SECTION 504 UPDATE

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A note about these materials: These materials are not intended as a comprehensive review of all new case law, rules and regulations on Section 504, but as an overview of some of the more complex current issues and trends confronted by schools as they seek to comply with Section 504 after the ADAAA. 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."

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), is available on the OCR website at *www.ed.gov/about/offices/list/ocr/504faq.html* and is referenced herein as "Revised Q&A."

In January, OCR released a long-awaited guidance document on the ADAAA and its impact on Section 504. The "Dear Colleague Letter" consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter,* 112 LRP 3621 (OCR 2012)(hereinafter "2012 DCL").

I. The Emerging Trend of §504 Cases Seeking Money Damages

Given the resources that IDEA makes available to students with a qualifying disability, it's easy to forget that the law has its limitations. For example, when seeking relief for violations of IDEA, parents can recover reimbursement for the costs of a unilateral private placement, can seek independent educational evaluations at public school expense, receive awards of compensatory services where FAPE has been denied, but, as a general rule, cannot recover money damage under IDEA. *See, for example, C.O v. Portland Public Schools,* 58 IDELR 272 (9th Cir. 2012), where a district court award of $1 in nominal damages to the parent of a former student with a disability was rejected. "We have repeatedly held that the IDEA creates a 'comprehensive enforcement scheme' in which compensatory damages play no part." "Instead, where Congress provides funds to a State to pursue certain functions, 'the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance, but rather action by the Federal Government to terminate funds to the state.'" *Id.* Consequently, parents of IDEA-eligible students (and parents of Section 504 eligible students as well) have increasingly turned to Section 504 claims for which monetary relief can be awarded in the right circumstances.

As the federal circuit courts have consistently ruled when the issue has presented itself, more has to be proven than a mere violation of §504—**conduct must rise to the level of intentional discrimination, bad faith, or gross misjudgment, or at least deliberate indifference, in order to go to trial to seek an award of money damages under §504.** *See, for example, Meagley v. City of Little Rock*, 639 F.3d 384 (8th Cir. 2011); *Nieves–Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Delano-Pyle v. Victoria County*, 302 F.3d (5th Cir. 2002); *Duvall v. City of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Powers v. MJB Acquisition Corp*., 184 F.3d 1147 (10th Cir. 1999); *Bartlett v. Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Pandiazides v. Virginia Bd. of Educ*., 13 F.3d 823 (4th Cir. 1994); *Wood v. President & Trs. of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*,

486 F.3d 267 (7th Cir. 2007). These materials will focus on two such theories: deliberate indifference (with its common application in harassment claims) and gross misjudgment (with a 5th Circuit decision that raises some new concerns).

A. Deliberate Indifference.

Although it is not a new liability theory, the number of cases alleging deliberate indifference has grown due to disability harassment claims. Of special concern are claims where the harassing conduct includes sexual assault or precipitates a suicide attempt by the student targeted. A modern movement in public education calls for more aggressive responses to bullying and harassment, as well as training on strategies to prevent the problem. Most states have passed laws to help address the problem. In light of the depth and severity of the problem, half-hearted attempts to address the issue on campuses simply will not be enough, as districts must explore comprehensive approaches to deal with this difficult problem and avoid liability.

The federal court approach to harassment liability under civil rights laws was crafted by the U.S. Supreme Court in response to litigation under Title IX. The anti-discrimination provision of Title IX is remarkably similar to that of §504. Title IX states, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. §1681(a). Note that in their enforcement of disability harassment rules, the federal courts and U.S. Department of Education (ED) frequently look to Title IX cases and guidance. The author will do so as well.

In *Davis v. Monroe County Board of Education*, 103 LRP 20059, 526 U.S. 629 (U.S. 1999), the Supreme Court applied what we know as the "Doe v. Taylor rule" on sexual assaults by school employees on students to suits brought under Title IX for student-on-student sexual harassment. The plaintiff was the mother of a fifth grade girl who over five months was subjected to numerous acts of "objectively offensive touching" as well as offensive comments by a classmate. The boy eventually pled guilty to criminal sexual misconduct. The parent sued alleging that the District did nothing despite the student's repeated complaints to teachers and other employees, and the complaints of other girls as well. The Supreme Court concluded that **districts may be held liable where the school is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.** *Davis v. Monroe County Bd. of Educ.*, 103 LRP 20059, 526 U.S. 629 (U.S. 1999).

What conduct constitutes sexual harassment actionable under Title IX? The Court provided an example of the obvious, and some analysis to assist in identifying less-obvious harassment.

> "The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles[.]" *Id., at* 1675.

A plaintiff cannot simply allege that he/she has been teased and recover damages. "Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling** among school children, however, even where these comments target differences in gender." *Id., at* 1675. Instead, for district liability to arise, **the plaintiff must show "sexual harassment so severe, pervasive, and objectively offensive, and that so**

undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* Single events or incidents of harassment are not likely to create liability for money damages. "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." *Id., at* 1676. **Finally, districts are not required to "remedy" peer harassment. "On the contrary, the recipient [school district receiving federal funds] must merely respond to known peer harassment in a manner that is not clearly unreasonable."** *Id., at* 1674. This standard has been applied by analogy in the federal courts to claims of disability harassment as well.

1. How does the school respond in a manner that is clearly not unreasonable?

A variety of common-sense steps. *G.M. v. Drycreek Joint Elem. Sch. Dist.*, 59 IDELR 223 (E.D. Cal. 2012), a student with learning disabilities was allegedly subjected to harassment over a period of six months. The parents claimed that the District's failure to stop the behavior from taking place indicated that staff acted with deliberately indifference, thus making a claim for money damages possible. The court noted, however, that school officials took action following each incident of harassment. **There were five incidents over a 6-month period, and each was followed by increasingly intensive measures.** After the first incident, the teacher committed to monitoring the interactions. After the second, the teacher and a counselor met with the two harassers and prohibited them from working in any group with the target. After the parent claimed that the original harassers were enlisting other students to target their son, the assistant principal met with the latest harassers to warn them to stop or face consequences. In the last incident, where the student was punched, the harasser received a 5-day suspension. **The court pointed out that the fact that the measures were not fully effective did not mean staff was deliberately indifferent.** Deliberate indifference, said the court, means that District staff knew of the harm, yet failed to act upon it, and that was not the case here. Because the District took affirmative steps to address the harassment incidents, it could not be found to have acted with deliberate indifference.

A different outcome when reports don't trigger school action. *Preston v. Hilton Cent. Sch. Dist*., 59 IDELR 99 (W.D.N.Y. 2012). A high-schooler with Asperger's Syndrome was taunted with profanities that included references to Autism and intellectual disabilities, and his grades dropped by 40% in two classes. The parents alleged that their reports to staff led to neither investigations nor any attempts to stop the harassment. The court held that these allegations were sufficient to raise an issue as to whether the school acted with deliberate indifference, and thus, sufficient to maintain an action for disability harassment in violation of §504.

Can the school simply respond the same way each time the harasser commits an offense? No. The answer lies in the standard of deliberate indifference. To show that the school is not indifferent, it is required to take action reasonably calculated to stop the harassment from recurring. If after Student A has harassed Student B, Student A meets with the principal and is reminded of the rules and consequences, the district has taken action reasonably calculated to stop the problem. If Student A commits another harassing act, is the same response sufficient? No. Once a response has failed to have the desired effect, it would be difficult to argue that doing it again is reasonably calculated to solve the problem. Something else must be tried. *See, for example, Vance v. Spencer County Pub. Sch. Dist.*, 110 LRP 22284, 231 F.3d 253 (6th Cir. 2000) ("Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.").

Steps may be necessary beyond the harasser and target. Be careful that you don't ignore school-wide harassment (the forest) while punishing individual perpetrators (the trees). A case from the Sixth Circuit provides an interesting lesson to schools that fail to look at the overall climate on the campus

by treating incidents of harassment as discrete, unconnected events. *Patterson v. Hudson Area Schs.,* 109 LRP 351, 551 F.3d 438 (6th Cir. 2009). A student with an emotional disturbance alleged disability and sexual harassment over a series of incidents occurring from sixth grade through ninth grade. The district argued that since it responded to each individual incident and that each harasser never again harassed the student after the district's action, there could be no district liability for harassment. Said the court:

> "The thrust of Hudson's argument is that Hudson dealt successfully with each identified perpetrator; therefore, it asserts that it cannot be liable under Title IX as a matter of law. The argument misses the point. As explained above, Hudson's success with individual students did not prevent the overall and continuing harassment of DP, a fact of which Hudson was fully aware, and thus Hudson's isolated success with individual perpetrators cannot shield Hudson from liability as a matter of law."

The granting of the school's motion for summary judgment by the District Court was reversed. *See also, Theno v. Tonganoxie Unified Sch. Dist. No. 464,* 105 LRP 51835, 377 F. Supp. 2d 952 (D. Kan. 2005) ("this is not a case that involved a few discrete incidents of harassment. It involved severe and pervasive harassment that lasted for years, with other students engaging in the same form of harassment after those who were counseled had stopped, and the school rarely took disciplinary measures above and beyond talking to and warning harassers.").

A more complete approach. For an example of a campus addressing both the current problem (two students who waved peanut butter sandwiches in the face of an allergic student) and preventing future repetition, *see Kearney (MO) R-I Sch. Dist.,* 111 LRP 24625 (OCR 08/25/10) (The principal not only punished or counseled with the two harassers, but also "met with complainant's daughter's second-grade class and talked with all of the students in class about how serious a peanut allergy is and how cold lunch students must sit with other cold lunch students.").

A little commentary: **Focus on creating an environment where harassment is not tolerated. This requires a variety of interconnected policies, practices, and mindsets.** The process begins when the school creates policies and procedures to notify students of inappropriate conduct, together with a mechanism to receive complaints or reports and a process for promptly and appropriately investigating and resolving those complaints. Once the infrastructure is established, the school must create an awareness of what constitutes harassment by teaching students, staff, and parents both why and how they should report harassment when they become aware of it. Students, staff, and parents should be familiarized with the school's policy and process. As the school promptly responds to reports (by conducting appropriate investigations and taking action reasonably calculated to stop the harassment and remedy its effects), students, staff, and parents will gain confidence that reports are addressed and reporting will become easier. The result is a strong network of eyes and ears that can help the school discover incidents quickly and respond with greater precision. A series of OCR letters of finding demonstrate the comprehensive nature of the change required. *See, for example, Blanchard (OK) Pub. Schs.,* 35 IDELR 12 (OCR 2000) (In this mixed Title IX/disability harassment case, the district agreed to take corrective action with OCR. The district agreed to continue to publish and disseminate the grievance procedure to all students and staff, to identify the person responsible for taking and investigating complaints, time lines for each step of the process, and provisions for prompt, thorough, and impartial investigations and hearings); *See also, Hamilton (MO) R-II Sch. Dist.,* 37 IDELR 76 (OCR 2002) (District agrees to develop and disseminate a harassment policy to students, faculty, and staff, review the policy with those groups, explain the range of consequences to students for harassment and take other appropriate steps to prevent recurrence of harassment.); *Greenport (NY) Union Free Sch. Dist.,* 50 IDELR 290 (OCR 2008) (School agrees to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints.).

And a quick note on OCR's approach vs. federal courts: OCR requires more from schools to avoid violations of Section 504 than do the federal courts. *See, for example, Willamina (OR) Sch. Dist. 30-J,* 27 IDELR 221 (OCR 1997) ("Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act the district has the obligation to take all necessary steps to address and eliminate such harassment."). The legal duty "to end the harassment" is not recognized by the federal courts. Instead, the courts find liability for harassment when the school is aware of the harassment and is deliberately indifferent. Why the difference? OCR explains that the difference rests on monetary damages. "As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency." *In re: Dear Colleague Letter of October 26, 2010,* 111 LRP 32298 (OCR 2011).

2. The confluence of sexual assault and disability. A few cases, divided widely by time, illustrate the types of extreme facts that are likely to generate a damages claim.

For some students, sexual harassment will be more likely because of disability. While not a disability harassment case, *Murrell* provides a sobering lesson with respect to the vulnerability of some students with disabilities to sexual assault—especially at the hands of other students with disability-enhanced sexual aggression. A female high school student with spastic cerebral palsy was unable to use/control the right side of her body, deaf in one ear, and functioning at the first-grade level intellectually and developmentally when she was sexually assaulted numerous times by a male disabled student with a history of sexually inappropriate conduct. The assaults were made possible by inappropriate supervision despite school knowledge of the need to at least watch the male student, and demands by the mother of the female student that she be supervised *because of sexual assaults on her at a previous campus*. Things were made worse by staff instructing the female student to not report the assaults to her parents or to the police, and a pattern of deceptive communications from the school to the parent. The district's response looks pretty indifferent. Other than trying to hide the assaults, little was done to prevent further attacks. The male student was never punished by the school nor reported to law enforcement. *The female student, however, was suspended* for "behavior which is detrimental to the welfare of other pupils or school personnel." The 10th Circuit found that a Title IX claim due to the school's "response" to the assaults should survive summary judgment. *Murrell v. Denver Sch. Dist. No. 1,* 110 LRP 22280, 186 F.3d 1238 (10th Cir. 1999).

A more recent disability harassment claim on similar facts. In *Braden v. Mountain Home Sch. Dist*., 112 LRP 52094 (W.D.Ark. 2012), the court decided that a claim for money damages should proceed against a District in which a 4th-grader with ADHD and reactive attachment disorder was sexually assaulted in an alternative learning class. The school placed the student in the alternative class with significantly older students although the parents objected, believing he would be a target for harassment because of his emotional issues and history of being sexual abused. After another student allegedly sexually assaulted him, the school placed him on homebound services. Since the parent asserted that the student was subjected to multiple incidents of sexual abuse and assault in the classroom and in the presence of teachers with school officials' knowledge, the parent raised a genuine issue of fact as to whether school staff acted in bad faith or with gross misjudgment. The parents reported all incidents to the teacher and school resource officer but alleged they received no response. A police report completed after the parent reported a particularly disturbing incident described facts that, if proven true, indicate that various staffpersons had knowledge of the dangers to the student in his educational setting. Thus, the matter is proceeding to trial.

Deliberate indifference due to failure to make timely changes to the IEP? *Stewart v. Waco ISD,* 60 IDELR 241 (5th Cir. 2013)(now vacated, see discussion below at page 11). When disability harassment is manifested as sexual assault, a claim for money damages is increasingly likely. The student at issue (Stewart) has an intellectual disability, together with speech and hearing impairments. After "an incident involving sexual contact between Stewart and another student" the school made changes to her IEP "to provide that she be separated from male students and remain under close supervision at school." Despite these efforts, Stewart was involved in three more instances of sexual

contact (characterized by the parents as sexual abuse) over the next two years. The three instances alleged are described as follows.

> "In February 2006, a male student sexually abused Stewart in a school restroom. The District concluded that Stewart 'was at least somewhat complicit' in the incident and suspended her for three days. In August 2006, school personnel allowed Stewart to go to the restroom unattended, and she was again sexually abused by a male classmate. Finally, in October 2007, a male student 'exposed himself' to Stewart. The District suspended her again. In none of these instances, according to Stewart, did the District take any steps to further modify her IEP or to prevent future abuse.

The first theory in the litigation is the familiar disability harassment analysis that borrows from Title IX and looks to see whether the school was deliberately indifferent to known acts of peer-to-peer harassment. On this theory, the 5th Circuit affirms the dismissal of the claim by the district court, finding that Stewart has failed to plead sufficient facts to support the claim. Noting that deliberate indifference is an "exceedingly high standard," the court finds her allegations insufficient to meet the test.

> "The complaint's largely cursory allegations, however, provide little information on the 'constellation of surrounding circumstances, expectations, and relationships' necessary to determine whether the District's responses were 'clearly unreasonable' under the circumstances. The complaint fails to address the harassers' identities and relationship to Stewart, the punishments meted out to the harassers, the nature of the abuse, the names and responsibilities of District personnel with knowledge of the harassment, the time-delay between the abuse and the District's response, the extent of Stewart's harm and exclusion from educational opportunities, the specific reasons why the District's responses were obviously inadequate, or the manner in which such responses likely made Stewart susceptible to further discrimination. Courts have found these factors, among others, relevant in the context of student-on-student harassment under Title IX."

Please note: A second theory alleging gross misjudgment survived district court analysis, but the 5th Circuit's *Stewart* decision has important subsequent history addressed on page 11.

3. The confluence of suicide and disability harassment. A review of recent case law reveals the growing relationship between bullying in public schools and cases involving suicidal students. When bullying is severe enough that victimized students begin making suicidal statements, parents can become concerned enough to pull students out of school, place them in private school, or otherwise take legal action against the public school.

Equal opportunity apathy to bullying? In an unpublished case from Texas, the parents of a deceased special education student argued that his suicide by hanging in the nurse's office restroom in the school created a claim under Section 504. The parents alleged that the student was bullied, the school was aware of the bullying, but the school did not appropriately respond. Instead, the parents allege that the school labeled their son a "bad child" and a "troublemaker" for reporting the bullying, and that the school ignored the student's threats to kill himself while placed in the alternative school. A federal District Court dismissed the Section 504 claims because there was no evidence of intentional discrimination solely on the basis of disability. Wrote the court: **"If Plaintiffs'—often uncontested—facts are to be believed, the Defendants' approach to what seems to be fairly wide-spread bullying based on Plaintiffs' summary judgment evidence is to bury their collective heads in the sand."** While the death is tragic, and perhaps could have been preventable, the court nevertheless finds no claim for disability discrimination. **"Nowhere in Plaintiffs' voluminous record is there any evidence that [Student] was bullied or treated differently by school administration because of his disability, or his membership in any other federally protected class. To the contrary, what Plaintiffs' record reveals is that the Defendants had a consistent policy of ignoring bullying against all students. That is not an issue within the limited**

jurisdiction of this court." *Estate of Lance v. Kyer,* 59 IDELR 226 (E.D. Tex. 2012)(Unpublished). The court notes, in a footnote, that the state legislature could provide a mechanism for the parents to recover in tort, but has not done so.

See also, El Paso County Sch. Dist. 3, Widefield, 60 IDELR 117 (SEA Col. 2012). The parents of a student with traumatic brain impairment (TBI) reported that he was being harassed in one particular class, and that the school failed to adequately address those allegations to the point that he was not receiving the services set forth in his IEP. After initial attempts to resolve the problem with campus administrators, the parents again met with the assistant principal about their continuing concerns, which led him to investigate the matter more closely. **After his investigation, the assistant principal concluded that both the student and the alleged harassers were acting out in class and trying to get each other in trouble, and that the matter was more a case of mutual antagonism than unilateral bullying.** After a subsequent spitball incident, the parents again met with the principal, who proposed three options: (1) the student could remain in the class and administration would monitor the classroom more closely, (2) the student could stay in the 78-minute class for half the time and spend the other half in a supervised study hall to receive instruction personally from the principal (a former math teacher), or (3) the student could spend the entire class period in an improvised study hall in the room normally designated for in-school suspension receiving instruction from the principal. The parent, however, wanted the alleged harassers removed from the class and for the principal to monitor the class the entire period. The principal indicated this option was not feasible, but that he would agree to excuse the student's absence from this class when the parents stated they preferred to take him out of school during that period. After the student told his parents that he was contemplating suicide due to the harassment, which he alleged was continuing in other settings, his parents hospitalized him and withdrew him from school, and did not respond to offers to have him finish out the year in a new school. The State Agency determined that the reason the IEP services were not implemented was the student's withdrawal from school before the school could address their escalating concerns. Moreover, the school was not deliberately indifferent to the student's allegations, but the parents refused to consider the options proposed by the school administrators.

A little commentary: The state agency correctly states the legal proposition that harassment can amount to a denial of FAPE by negatively impacting the ability of a student to receive special education services, citing *M.L. v. Federal Way Sch. Dist*., 105 LRP 13966 (9th Cir. 2005). That case also cites the majority caselaw analysis of "deliberate indifference," whereby a school can be liable for student-to-student bullying if it fails to act in response to conduct of which it is aware. **But, the case also holds that the school cannot be held liable until the parent gives the school a reasonable opportunity to respond to the allegations and take action.** Here, the parents could not legitimately claim that the school administrators were deliberately indifferent to the student's problems when they met with the parents on several occasions and offered a number of proposals and options to address the bullying allegations. See, e.g. *G. M. v. Drycreek Joint Elem. Sch. Dist*., 112 LRP 45306 (E.D. Cal. 2012) and *Dunfee v. Oberlin City Sch. Dist*., 47 IDELR 217 (N.D. Ohio 2007)(deliberate indifference requires more than proof of school negligence).

Child Find implications. *In re: Student with a Disability*, 112 LRP 5256 (SEA New Mexico 2012). The 8th-grade student, who was previously identified and later dismissed from special education, again started having problems in the 6th grade, including refusing tasks and problems with peers. In the 7th grade, the student made a suicidal threat and expressed suicidal ideations, which led to the school conducting a suicide intervention. The student stated that everyone hated him, that he was upset over his parents' divorce, and that he wanted to kill himself. He also scratched himself, although not to the point of drawing blood. A month later, he again threatened suicide, for which police and emergency service providers responded. The school's suicide interventionist found that the student had pressure at school from bullies, teachers, and his parent, that he was concerned with his parents' divorce, that he neglected his school work, and that he self-mutilated by scratching. Private evaluators had diagnosed the student with emotional and behavioral disorders, including ADHD and oppositional defiant disorder. The student, moreover, was missing classroom instruction by frequently

going to the nurse's office. The school district, however, had not evaluated the student for potential ED. **The hearing officer found that the school had failed in its child-find obligation with regard to the potential for ED in the student, as there were ample behaviors and symptoms raising a suspicion of ED.** Moreover, the hearing officer held that the failure to identify ED served to deny the student a FAPE, as an appropriate IEP that would have addressed his emotional conditions was not put in place. He ordered the student qualified as ED and provided an appropriate IEP. The hearing officer denied compensatory education services, however, as the parent failed to offer evidence to prove what services the student should have received under an appropriate IEP that recognized his ED, finding that "subsequent placement may remedy the prior violation."

A little commentary: While the case makes clear that the district's suicide prevention/intervention protocol was both in place and implemented, its activities took place without apparent coordination with the special education program. The persistent and recurring nature of the suicidal threats, together with the obvious impact the student's stressors were having on his functioning at school should have led the school's suicide intervention team and the special education personnel to put two and two together. Thus, the lesson for schools is to link their suicide prevention protocols to the special education child-find system, so that special education personnel could make cogent child-find decisions in a timely fashion with the information gleaned from the suicide intervention process.

To avoid liability, the school need not take every step available to address the harassment. *Long v. Murray Sch. Dist.,* 59 IDELR 76 (N.D. Ga. 2012). A student with Asperger's Syndrome committed suicide after he and his parents reported harassment based on his disability. The parent sued, claiming that the school was deliberately indifferent to the harassment. The court found, however, that after the harassment was reported, the school disciplined the perpetrators and developed a safety plan for the student, which allowed the student to avoid crowds in the halls, be walked to the bus, and sit near the bus driver. Numerous cameras and teachers monitored the hallways during the school day. **Although the parent alleged that the school's decision to convene a meeting with the student and the perpetrators together was inappropriate, the court did not find it unreasonable.** Moreover, although the parents claimed the harassment continued after these efforts, there was no evidence that any single harasser repeated his conduct once the school addressed it through its efforts. The parent's argument was that there was a "culture of harassment," as evidenced by offensive bathroom messages (e.g., "we won't miss you") and students wearing nooses to school after the student's suicide. **While the court noted that the school never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate, including requiring staff to review its anti-bullying policies, and conducting a program where teachers met with small groups of students to discuss peer relationships and review the local code of conduct. In addition, the school held a tolerance program and implemented a district-wide behavior improvement program.** The court noted that the deliberate indifference standard is a difficult standard—it requires that the school's response be clearly unreasonable in light of the known circumstances, and neither negligence nor mere unreasonableness is enough. "This is an emotionally charged case with very difficult facts. There is little question that Tyler was the victim of severe disability harassment, and that Defendants should have done more to stop the harassment and prevent future incidents. To establish a claim under §504 and the ADA, however, Plaintiffs must demonstrate that Defendants' response to disability harassment constitutes deliberate indifference. **Deliberate indifference is a difficult, exacting standard, and there is simply no evidence of an existence of a clear pattern of inaction or abuse by any school employees."** [Emphasis added.] Thus, the court granted summary judgment to the district.

A little commentary: Notice that while the conduct of the offending students is outrageous and even shocking, the legal focus is on the actions of the school. Moreover, the issue is not whether the actions of the school in attempting to address bullying or harassment are in fact fully effective, but whether they indicate that the school was not deliberately indifferent to the victim's plight.

Despite the tragic facts, the road to monetary recovery in these cases is definitely a difficult one. *Brown v. Ogletree*, 58 IDELR 128 (S.D. Tex. 2012). The parents of a middle schooler with Asperger's who committed suicide claimed the district engaged in disability discrimination by ignoring her complaints of harassment against her son at school. The student was socially awkward, short, talked with a lisp, and was pigeon-toed. Other male students allegedly called him "queer," simulated sex acts with him, and pushed him down stairs on one occasion. The court noted that the parent's complaint failed to "connect the dots" between the harassment and her son's disabilities, and crucially, failed to allege that the district knew about the student's Asperger's. Thus, a disability discrimination claim could not proceed. But, the court initially held that the parent had stated a plausible constitutional claim based on deprivation of bodily integrity. On reconsideration, however, the court changed its mind after further briefing and dismissed the constitutional claims as well, based on 5th Circuit precedent regarding constitutional claims for the acts of private individuals, rather than state actors. *Brown v. Cypress Fairbanks Independent Sch. Dist*., 59 IDELR 293 (S.D. Tex. 2012)

A little commentary: It should come as no surprise that it is rare for a federal court to reverse course and change its opinion on second thought. The fact that it happens on a case like this shows the complexity of the interplay of the various legal theories and remedies at play.

B. Bad Faith, Intentional Discrimination, or Gross Misjudgment.

To state a claim under Section 504 or ADA Title II, "a plaintiff must show that: (1) that he is a qualified individual within the meaning of the ADA; (2) that he was excluded from participation in or denied the benefits of services, programs, or activities for which a public entity is responsible, or was otherwise subjected to discrimination by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." *Melton v. Dallas Area Rapid Transit,* 391 F.3d 669, 671-72 (5th Cir. 2004). In addition, for monetary damages, the various circuits will require intentional discrimination, bad faith or gross misjudgment.

Sufficient facts to support claim of intentional discrimination. *Patrick B. v. Paradise Protectory and Agricultural Sch., Inc*., 59 IDELR 162 (M.D. Pa. 2012). The court held that the parent's allegations of intentional discrimination in support of a money damages claim could not be dismissed outright. In the complaint, the parent alleged that the educators knew of at least 12 incidents of escalating behavioral incidents, including some with a potential to cause severe injury to self or others that led to physical restraints by staff. Nevertheless, the parent alleged that the school failed to conduct an FBA or develop a BIP. The court held that the allegations were sufficient to raise a claim of intentional discrimination, bad faith, or gross misjudgment at the pleading stage of the case (although the standard to survive a motion to dismiss on the pleadings is low).

Similarly, in *M.S. v. Marple Newtown Sch. Dist*., 59 IDELR 186 (E.D. Pa. 2012), allegations that a teenage girl was made to attend class with the brother of an individual convicted of molesting her sister was sufficient to survive a motion to dismiss on the pleadings. The teen, who suffered from anxiety and PTSD, claimed that the brother of the convicted molester stared and leered at her, while the school refused requests, over three years' time, to separate the students. Ultimately, the parent alleged, the teen became too distraught to attend school, and she eventually required homebound services. *See also, Swanger v. Warrior Run Sch. Dist*., 59 IDELR 70 (M.D. Pa. 2012)(claim that female student with cognitive deficits was seated near a male with history of sexually harassing peers could proceed to trial, since it raised issue of fact that staff had "conscious disregard" for student's disability).

Frustration with the school's response, but no intentional discrimination or bad faith. *Rhodabeck v. Seguin Independent Sch. Dist*., 59 IDELR 133 (W.D. Tex. 2012), a student with paraplegia confined to a wheelchair declined to participate in a band concert after arriving at the site to discover that the stage was not accessible. On another occasion, he missed a swimming class that was part of PE because the bus used to transport students to the pool was not equipped with a wheelchair lift. In addition, there

were other instances of problems providing accessible facilities to the student, including taking him on a field trip to natural bridge caverns that were not accessible by wheelchair. After a §504 hearing officer ruled that the conduct did not rise to the level of intentional discrimination or bad faith, the parents filed an action in federal court. **The court ruled, however, that the incidents revealed "a negligent lack of prior planning,"** but not an intentional effort to exclude the student. **"Evaluating these incidents in context, there is no evidence that these occurrences were gross departures from acceptable standards among education professionals. Although mistakes may have been made, they do not rise to the level of bad faith or gross misjudgment."** As a result, the student was unable to raise a material issue of fact to go forward to trial, and the court granted summary judgment to the District.

See, also David G. v. Council Rock Sch. Dist., 58 IDELR 254 (E.D. Pa. 2012). The high school graduate's claims that he was denied a FAPE in the area of reading his freshman and sophomore years were insufficient to raise a material issue of fact that the District intentionally discriminated against him. The court determined, as a matter of law, that he had to claim and prove intentional discrimination to proceed on his money damages claim. Interestingly, the plaintiff did not object to the magistrate judge's conclusion that the student cited no facts giving rise to a finding of intentional discrimination.

Gross misjudgment & reasonable accommodation. *Stewart v. Waco ISD,* 60 IDELR 241 (5th Cir. 2013)(now vacated, see discussion below). While the Plaintiff failed to allege sufficient facts to survive on a claim of deliberate indifference (see previous discussion), a second theory survives. Recall that the student alleged a series of sexual contact incidents with male students at school, but no changes to the student's IEP to address the issue. The court notes that a successful Section 504 claim is not limited to claims that a school literally refuses to make a reasonable accommodation. **Although "such cases are clear violations of Section 504, situations may arise where a district's course of action goes strongly against the grain of accepted standards of educational practice in ways that have nothing to do with affirmatively refusing a reasonable accommodation."** Such would be the case were the school to stop providing an effective accommodation and replace it with a practice that is not effective and "persists in the latter approach without adequate justification."

> "Notably, a plaintiff also may plead gross misjudgment by alleging that a school district knew of his disabilities but failed to investigate disability-based discrimination and harassment complaints or to 'take appropriate and effective remedial measures once notice of [the] harassment was provided to school authorities.' **In sum, a school district refuses reasonable accommodations under § 504 when it fails to exercise professional judgment in response to changing circumstances or new information, even if the district has already provided an accommodation based on an initial exercise of such judgment."** [Emphasis added.]

The court emphasizes that while similar, the theories of difference indifference and gross misjudgment are distinct. "Deliberate indifference applies here only with respect to the District's alleged liability for student-on-student harassment under a Title IX-like theory of disability discrimination. On the other hand, 'gross misjudgment'—a species of heightened negligence—applies to the District's refusal to make reasonable accommodations by further modifying Stewart's IEP, a claim traditionally cognizable in some fashion via the IDEA, the ADA, and the Rehabilitation Act." [Internal citations omitted].

In short, the school cannot simply implement an IEP and rest on its labors. The plan must adapt to changing circumstances and address new problems (or create new solutions to old problems not solved by the previous IEP). The court finds that she states a valid claim for relief on the gross misjudgment theory. **"At this early stage, we conclude that even if the District provided Stewart with reasonable accommodations when it initially modified her IEP, the three subsequent instances of alleged sexual abuse could plausibly support a finding that the modifications were actionably ineffective."** Finally, the court steps back to look at the big picture, and reassure schools as to future liability.

> **"We caution that this opinion should not be read to make school districts insurers of the safety of special-needs students.** We emphasize that courts generally should give deference to the judgments of educational professionals in the operation of their schools. This opinion neither alters that default rule nor lowers the high standards plaintiffs must satisfy to impose liability against school districts. **Isolated mistakes made by harried teachers and random bad acts committed by students and other third-parties generally will not support gross-misjudgment claims. At this stage in the case, we cannot say definitively that this case involves only the latter."** [Internal citations omitted, emphasis added.]

A little commentary: The court addresses the school's allegation that to some degree, Stewart was complicit in the sexual contact, but finds such complicity a problem to be solved through behavior management. "Regardless of what role Stewart allegedly played in facilitating this misconduct, her IEP was designed to prevent such encounters, and Stewart can plausibly argue at this stage that its effective implementation would have obviated any need for discipline." The dissent to this opinion is heated, arguing that the court has created a tort-like duty not to mismanage the student's IEP.

The 5th Circuit's *Stewart* decision has been vacated. A Motion for Rehearing and Motion for Rehearing En Banc, were both filed in this matter. On June 3, 2013 the 5th Circuit vacated this decision and remanded the case to the District Court to determine whether the student's failure to exhaust her IDEA remedies precluded her from suing under Section 504. *Stewart v. Waco Indep. Sch. Dist.*, 113 LRP 23555 (5th Cir. 06/03/13, *unpublished*). While this decision now has no precedential value, it remains an excellent example of the types of theories that may be pursued as demands for money damages continue.

See, also Brown v. School District of Philadelphia, 59 IDELR 130 (E.D. PA. 2012). In this money damages claim under Section 504, the court refused to dismiss the parents' claims alleging a series of refusals to evaluate. The complaint alleges that "the district ignored the student's ADHD diagnosis from 2003-2005, failed to classify him as having a disability in 2005, failed to respond to medical practitioners' requests that he be provided an IEP in 2007, and 'conditioned receipt of an IEP on the parents' signature of a settlement of potential past claims.'"

Is it gross misjudgment if the school is simply wrong? *MC & RC v. Arlington Central School District Bd. of Educ.,* 59 IDELR 134 (S.D.N.Y. 2012). Parents of student with Asperger's seek monetary damages following the school's incorrect belief that the student was suicidal, and the school's subsequent actions consistent with that belief, including sending him to the hospital. Concerned that the student "looked sad" a counselor and a school psychologist took the student into an office and questioned him for fifteen minutes. "One of the questions they asked C.C. was, 'What if both of your parents were killed tomorrow, would you be suicidal then?' C.C. responded by saying that he would be 'very sad, but not suicidal.'" In footnote 5 to the opinion, the court provides additional statements by the student that seem to support the school's concerns. The statements include "I have no motivation," "I have no reason to live," and "nobody takes me seriously." He also told the counselor and psychologist that same day that he "had thought of killing himself," if "I don't have a good life, have a good job, have friends or my parents died." Wrote the court:

> "even if Defendants were wrong about CC's suicidal tendencies and questioned him in an inappropriate manner, there is no indication that they acted in bad faith or with gross misjudgment or because of hostility based on disability. Plaintiffs do not argue that Defendants did not actually believe CC to be suicidal; rather, they state only that Defendants were incorrect in their judgment. Nor have they provided any facts from which one might infer that that allegedly incorrect judgment by six different professionals was grossly negligent or the result of animus toward disabled people. Accordingly, Defendants' decision to question CC and send him to the hospital does not evidence intentional discrimination. In fact, if Defendants truly believed CC to be suicidal, it is hard to see how their conduct does not amount to prudent behavior."

Some final thoughts: The lessons to be drawn from the modern cases seeking money damages under §504 is that parents may not be content to seek traditional educational remedies (e.g., compensatory services, additional or different services, orders of evaluation, etc…) in situations of egregious violations of §504 or IDEA. Although there has not been a successful case where money damages have been awarded in this context yet, such a case is likely in the works in some court. The best protection against claims of bad faith, gross misjudgment, intentional discrimination, or deliberate indifference is for schools to act in good faith and with the best interests of students in mind. This involves understanding legal requirements under §504 and IDEA, conducting child find in a timely way, taking prompt remedial action when student needs change or problems develop with the IEP/504 Plan, and generally, using common sense in dealing with the challenges of educating students with disabilities in public schools.

With respect to disability harassment-driven claims, the lessons are equally straightforward—**schools must take *proportionate* action to investigate and address reports of disability harassment and bullying.** Continued reports must be met with more aggressive strategies, particularly if the target's educational performance or participation is suffering. Schools should study the nature of the harassing incidents to help identify those that may be motivated by disability, as they require specific attention. Moreover, the measures to address instances of bullying and harassment must be wedded to more comprehensive district-wide preventive measures, which include development of written policies and procedures, training of staff, students, and parents on the policy and reporting procedures, counselor-driven intervention plans, anti-retaliation safeguards, and marshalling of resources to remedy the harmful effects.

II. New Child Find Issues After the Americans with Disabilities Act Amendments Act (ADAAA): Health Plans & RtI

From time to time, Congress revisits legislation to ensure that it has achieved the intended result. Upon review of the Americans with Disabilities Act (ADA), Congress determined that rather than providing a mechanism to make the workplace more accessible one lawsuit at a time, the ADA had become bogged down in disputes over eligibility. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA's protection. Congress amended the ADA to change this unhealthy litigation dynamic by expanding ADA and Section 504 eligibility.

A. Background on the ADAAA

1. What prompted Congress to make the changes? Eligibility rather than accommodation had become the focus. The findings and purposes section of the ADAAA clearly articulates Congress' rejection of the reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines Inc.,* 30 IDELR 681, 527 U.S. 471 (1999) (and its companion cases addressing the effect of mitigating measures on ADA eligibility) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* 102 LRP 6137, 534 U.S. 184 (2002) (denying ADA eligibility when the activity substantially limited is a narrow one, as opposed to one normally required in the daily life of most people). From the preamble statements included in the ADAAA, it is clear that Congress believed that the Supreme Court's recent interpretations of the eligibility provisions of the ADA had been overly stringent. Indeed, the Court's position that ADA eligibility provisions set up a "demanding" standard for eligibility meant that employees with a variety of impairments would be unable to access the federal courts to raise claims that an employer failed to provide reasonable accommodations that would enable them to perform the essential functions of their jobs.

Disagreement with the *Sutton* rationale. The problem, as outlined in the ADAAA, arises from two types of cases. In one, a person has a bona fide physical or mental impairment, but takes appropriate

and effective measures to treat, or mitigate, the impact of the impairment on his daily life. In the *Sutton* line of cases, the Court held that when determining eligibility, one must take into account the effect of these mitigating measures. Thus, if the mitigating measures are effectively addressing the impairment to the point that it does not pose a substantial limitation on a major life activity, then there is no eligibility under the ADA, and the person cannot maintain a legal action claiming an employer's failure to make reasonable accommodations or otherwise asserting discrimination on the basis of disability. *Sutton* addressed the problem of mitigating measures in the context of eyeglasses and contact lenses. *Murphy v. United Parcel Service Inc.*, 30 IDELR 694, 527 U.S. 516 (1999), applied the *Sutton* mitigation rule to medication, requiring that side effects of currently used medication be considered as well. The third case in the trilogy, *Albertsons, Inc. v. Kirkingburg*, 30 IDELR 697, 527 U.S. 555 (1999), applied the *Sutton* mitigation rule to compensatory skills.

Disagreement with the *Toyota* limitation. In the second type of case, a person has a physical or mental impairment, and it does substantially limit a certain activity required in the workplace, but the activity limited is a narrow one not normally required in the daily life of most people. Thus, in the *Toyota* case, the Supreme Court held that since the plaintiff's impairment affected only her ability to perform certain manual tasks required only for unique aspects of automotive manufacturing jobs, she was not substantially limited in a "major life activity." The Court noted, by example, that the plaintiff was able to perform manual tasks normally required in daily life, such as cleaning, doing laundry, going shopping, etc.

With those concerns guiding the effort, Congress amended the ADA making a variety of changes to impact eligibility and restore the necessary dynamic to improve workplace accessibility. The various changes are discussed below in more detail.

2. Was there a problem with K-12 Section 504 eligibility for FAPE? Congress made no findings with respect to the public schools' duties to students under Section 504 or the ADA. Instead, Congress was focused on changes to the ADA in the context of employment relationships, specifically with respect to eligibility for reasonable accommodations and access to federal courts. Congress did not directly address or reference the ED's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct ED to change the Section 504 regulations. *(Introductory paragraph of the Revised Q&A.)* **Regardless, the ADAAA changes apply to Section 504.** The conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised. Consequently, the ADAAA changes made by Congress to address problems encountered by employees attempting to secure reasonable accommodation through the courts also apply to FAPE eligibility for students in the public schools. ED indicates that its regulations "as currently written are valid and OCR is enforcing them consistent with the Amendments Act." *(Introductory paragraph of the Revised Q&A).*

Problems arise from the differences between the employment world for which the changes were drafted and the K-12 Section 504 world where the changes are also applied. In the employment world, employers do not hire every applicant, do not exist for the benefit of the employees (but instead for the benefit of shareholders or owners) and seek to turn a profit. Consequently, for the ADA to be successful, it must somehow address the profit motive behind an employer's reluctance to hire an employee with a disability or to effect accommodations for an employee with a disability. The ADA accomplishes that goal by providing a mechanism for employees to sue reluctant employers to make reasonable accommodations and, by means of the ADAAA, greatly reducing the employee's task in proving ADA eligibility.

The K-12 public education world is quite different. No public school runs at a profit, nor are public schools generally allowed to pick and choose whom they educate. Public schools exist for the sole purpose of educating students. Built into the public school-student dynamic (and spurred by concerns

for AYP) is a growing emphasis on individualized instruction and personalized attention when, due to disability or other factors, a student is not successful. Further different is that in the K-12 Section 504 world, the public school has a duty to identify and evaluate potentially eligible students and provide those eligible students with a free appropriate public education. Unlike the workplace, where employees request accommodation, K-12 public schools have an affirmative duty to look, find and accommodate or serve. Consequently, when Congress made it easier for employees to demonstrate their eligibility for reasonable accommodation, it also made it easier for K-12 students to qualify for FAPE (a higher level of services than reasonable accommodation) despite the absence of a finding that public schools were denying services to students believed by Congress to be eligible. Arising from these incongruities are questions and concerns about long-standing Section 504 doctrines and practices that arise from the ED's regulations and FAPE requirement.

3. The language of §504 eligibility remains the same, but the interpretation is different. To be eligible under Section 504, a student must be both "qualified" (the student is within the age range in which services are provided to disabled and nondisabled students under state law*, See 34 CFR §104.3(l)(2))*, and "handicapped." Pursuant to 34 CFR §104.3(j)(1), "Handicapped persons means any person who

(i) has a physical or mental impairment which substantially limits one or more major life activities;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment."

While the ADAAA changed eligibility, it did not change the language of the three prongs. Instead, Congress added new meaning to various pieces of the existing language and some new approaches when applying the language of eligibility. "The Amendments Act does not alter these three elements of the definition of disability in the ADA and Section 504. But it significantly changes how the term 'disability' is to be interpreted." 2012 DCL, p. 4.

B. A Summary of the Five Major Changes to Section 504 eligibility resulting from the ADAAA

Change #1: Construe Eligibility Language in Favor of Broad Coverage. Following its criticism of the Supreme Court cases and the federal Equal Employment Opportunity Commission's (EEOC's) definition of substantial limitation (discussed below), Congress writes, "It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress appears to want courts looking less at eligibility and focusing more intently on whether reasonable accommodations are provided by covered entities. To that end, Congress provides as part of its rules of construction that, **"The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."** OCR provided this additional explanation. "The Amendments Act does not alter the school district's substantive obligations under Section 504 and Title II. Rather… it amends the ADA and Section 504 to broaden the potential class of persons with disabilities protected by the statutes." 2012 DCL, p. 4.

A little commentary: In light of this provision, it seems that in cases where the eligibility question could go either way, Congress would have the Section 504 committee determine the student eligible.

Change #2: Expansion of Major Life Activities (Including Major Bodily Functions). Prior to the ADAAA, schools were accustomed to looking at a rather short list of major life activities during the Section 504 evaluation. **The Section 504 regulations initially listed major life activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing,**

learning, and working." 34 CFR §104.3(j)(2)(ii). The list of major life activities was not exhaustive; that is, there was an understanding that other major life activities could be added to the list. As part of its effort to reduce the time spent on proving eligibility prior to proceeding to the accommodation question, Congress expanded the list of major life activities in the ADAAA and included major bodily functions as well.

Pursuant to the ADAAA, **major life activities now also include eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.** 42 U.S.C. §12102(2)(A). The list is not exhaustive, and other major life activities are possible such as "interacting with others" (a major life activity adopted by the EEOC, but curiously, not recognized by Congress).

And major bodily functions… In the definition section of the ADAAA, Congress provided that "a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. §12102(2)(B). One of the problems encountered in eligibility is pinning down the major life activity impacted by the impairment. To ease the burden and make the analysis more eligibility-friendly, major bodily functions are helpful. Note that for some impairments, like diabetes, the addition of major bodily functions (specifically here, the endocrine function) makes tying the impairment to a life activity very simple.

Change #3: Impairments that Are Episodic or in Remission. The ADAAA declares: **"An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."** While the language covers two different types of impairments with similar treatment, the author will analyze these impairments separately as there are significant differences between the two.

Episodic impairments. Schools have experience with students whose physical or mental impairments ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraines and cystic fibrosis are good examples of impairments that may be substantially limiting at times (in hot weather, when the student is stressed, when irritants or trigger factors are present), and have little impact at other times. Schools commonly qualify students under Section 504 if their condition while not constant, episodically rises to the level of substantial limitation on a major life activity. Congress' concern seems to be that accommodations are not denied simply because the disability, at the moment of evaluation, is not substantially limiting, when we know from experience that substantial limitation will recur. Section 504 committees should look carefully at data over a range of time (as opposed to a snapshot). For example, the student whose heat-induced asthma is not affecting him at the time of Section 504 evaluation in January may have experienced significant troubles as the school year started in August and September, and when the previous school year ended in April and May. The timing of the evaluation should not function to preclude eligibility for students whose impairments are episodic and are not conveniently substantially limited at the time of evaluation.

Episodic Section 504 plans? An interesting result of the realization in law that a qualifying impairment need not rise to the level of substantial limitation every day is the corresponding logical conclusion that perhaps §504 plans need not provide constant services. If the impairment can be episodic, could the plan be episodic as well? As a practical matter, the nature of the impairment likely will dictate whether such a plan is possible. After all, the Section 504 committee would need to be able to articulate what factors trigger the plan's provisions, and likewise, what factors (or the absence of factors) trigger the plan to turn off. The triggers would need to be fairly simple and as subject to objective verification as possible. For example, a student with heat-induced asthma who needs assistance when the temperature rises above 90 degrees could have a plan triggered by temperature. When the thermometer hits 90 degrees, the plan is implemented, otherwise, the student does not

require services. Most students likely will not have such simple and objective triggers, making episodic plans difficult to implement. In those cases where the committee cannot articulate a simple objective trigger for the plan to turn on and off, the plan would simply be left in place all the time. Schools should talk with the school attorney about the idea before attempting to implement it. *See also Traverse City,* discussed below in the section on homebound.

Impairments "in remission." Under the ADAAA, an impairment "in remission is a disability if it would substantially limit a major life activity when active." Note that instead of the episodic situation (where an impairment may from time to time reach substantial limitation), this provision applies to an impairment that was once active, and could return (such as cancer, hepatitis, etc). This rule grants to some inactive impairments the same status that applies to active ones—assuming that the impairment in remission was substantially limiting when it was active.

Change #4: Determining Substantial Limitation under a New Mitigating Measures Rule. Congress rejected the mitigating measures rule imposed by the Supreme Court in the *Sutton* trilogy. In the ADAAA, Congress replaces *Sutton, et. al.,* with a rule prohibiting the consideration of the effects of remediation efforts when determining whether a disability substantially limits a major life activity (with the exception of ordinary eyeglasses and contact lenses).

> The ADA Amendments provide at 42 USC §12102(4)(E): "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —
>
> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
> (II) use of assistive technology;
> (III) reasonable accommodations or auxiliary aids or services; or
> (IV) learned behavioral or adaptive neurological modifications."

This part of the amendments clearly means to reverse the reasoning of the *Sutton* line of cases, where the Supreme Court held that eligibility determinations must take into account the effect of treatment or other mitigating measures utilized by the person with an impairment. Thus, under the Supreme Court's reasoning in *Murphy*, the fact that the truck driver with high blood pressure was being effectively treated with medication had to be taken into account in determining whether he was a person with a disability under Section 504. The Court found that, with treatment, the truck driver was not substantially limited in a major life activity and thus could not maintain a Section 504 lawsuit against his employer. In the third case of the *Sutton* trilogy, *Kirkingburg,* the Supreme Court determined that a compensatory skill developed and used by an individual with monocular vision was to be treated no differently for eligibility purposes than other mitigating measures. Congress here means to restore the employee's ability to press his claim for accommodation, rather than be dismissed at the "door" of the courthouse because of the use of mitigating measures. Note finally that the new mitigating measures rule has limited application. By its own terms, the rule only applies to the determination of whether the student is substantially limited. It does not apply to the question of whether the student with a disability needs services.

Change #5: A Lower Standard for "Substantial Limitation." In the ADAAA, Congress expresses its "expectation" that the EEOC will change its current regulation defining substantial limitation as "significantly restricted" to something more consistent with the ADA Amendments' efforts to expand the protection of the ADA. *See,* Pub. L. No. 110-325, §2(a)(8) & 2(b)(6). This change impacts many schools that looked to the EEOC definition in the absence of one from the U.S. Department of Education. ED never created a definition of substantial limitation in the Section 504 regulations.

Instead, the Commentary to ED's regulations provided this note "Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." Appendix A, p. 419. In later guidance, ED concluded that each LEA makes its own determination of substantial limitation. *Letter to McKethan,* 23 IDELR 504 (OCR 1995). While LEAs were not required to follow the EEOC definition, many did, as this was the definition most-frequently used and interpreted by the federal courts. EEOC's definition of substantial limitation, rejected by Congress in the ADAAA, was as follows:

> "(i) Unable to perform a major life activity that the average person in the general population can perform; or
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 CFR §1630.2(j)(1)(i)&(ii).

Congress' concern was not with the comparison of the person evaluated to the average person in the general population, but the *amount of difference required between the two* for substantial limitation to be found. For those school districts following EEOC, a change in the substantial limitation definition is required, that reflects something less than "significant restriction."

C. The Section 504 Duty to Refer.

The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. As the 2012 OCR guidance makes clear, "A school district must conduct an evaluation of any individual who because of disability "needs or is believed to need" special education or related services. 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)). Given that the Congress and OCR expect higher levels of eligibility under the new rules, where will those additional students be found? OCR guidance and letters of finding are increasingly focusing on students who are known by the district to have impairments and are also receiving services from the district because of those impairments. The two groups demanding the greatest immediate attention are (1) students with impairments who have health plans, and (2) students with impairments served through early intervention or RtI. Both groups are examined below.

D. Section 504 & the student with an impairment served in early intervention/RtI.

1. IDEA & Early Intervention/RtI. Special education has clearly embraced RtI and early intervention in an effort to solve a variety of problems with respect to eligibility and to restore an appropriate, cooperative, relationship between special education and regular education. At the risk of over-simplification, consider the following elements in the successful relationship between IDEA and RtI/early intervention. First, the relationship arises from a desire to reduce IDEA eligibility caused by over-identification and improper identification by emphasizing the importance of regular education first, and beefing-up the resources and interventions available to struggling students through regular education. Second, IDEA reserves specially designed instruction for IDEA-eligible students who cannot benefit from education unless they have specially designed instruction. If the student's needs can be met without special education, the student is not eligible for special education.

2. Section 504 & RtI. Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADAAA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating

measures to be "filtered out" during the Section 504 Committee's evaluation is "reasonable accommodation." OCR has determined that the phrase "reasonable accommodations" includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District,* 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools,* 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well.

How does this impact the line between RtI and Section 504 eligibility for students who need support due to impairments? Consider these two portions of the Revised Q&A.

> **"31. What is a reasonable justification for referring a student for evaluation for services under Section 504?** School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A, Question 31.

> **"40. What is the difference between a regular education intervention plan and a Section 504 plan?** A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school." Revised Q&A, Question 40.

A little commentary: Interestingly, those two questions and answers are at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

> "Under Section 504, prior to evaluating a student's need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student's overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services."

Karnes City (TX) Independent School District, 31 IDELR 64 (OCR 1999). A more recent (and post-ADAAA) letter from Missouri comes to a similar result with a mysterious absence of discussion of mitigating measures. In *Fergusson-Florissant R-II (MO) School District,* 56 IDELR 56 (OCR 2010), OCR upheld a school's determination that a student diagnosed with Asperger's was not eligible under Section 504 because he was not substantially limited. Interestingly, the letter references a lengthy list of parent demands for accommodations (including an extra set of textbooks at home, daily checking of his planner, extra time on assignments), together with the school's response that many of the requested items were already provided. The parent complained that the school focused too heavily on the student's academic success in determining eligibility (the student had a 3.875 average in 7th grade, and carried a 4.0 on a 4-point scale in 8th grade). OCR rejected that allegation due to evidence that the student's social interactions, standardized test scores, and adaptive behavior were also considered. Missing from the analysis was any mention of the positive impact of the mitigating measures (accommodations already provided the student) on the major life activity. In essence, most of what the parent wanted was already provided informally through regular education. The school does not appear to have done any mitigating measures analysis as part of the Section 504 evaluation (there is no reference to such analysis in the letter) and OCR says nothing of the failure, despite the fact that the student is determined ineligible because of a lack of substantial limitation. It's a strange letter, but

does hearken back to a Karnes City-like approach (but does so without any analysis, and perhaps, without intending to do so).

Does early intervention/RtI = special ed services for purposes of the Section 504 duty to evaluate? It appears that some wiggle room exists between the two. Note the following finding in a Mississippi case. A student with ADHD referred by the parent for Section 504 evaluation was served under the school's RtI program in Tier II. Because of the success of the interventions, the school believed that a Section 504 evaluation was not required as the student did not appear to need special education services. The interventions were significant. **The student was in Tier II and received, in both math and reading, five fifty-three minute computer lab sessions per week for remediation, together with one-to-one tutoring, and interventions to address his behaviors including an FBA, meetings with a behavioral specialist, behavioral timeouts, teaching of alternate behaviors, refocusing on work, and verbal praise.** Said OCR "The evidence was sufficient to give the district a reasonable belief that the complainant's son did not need special education at the time of the request." Consequently, there was no violation of the Section 504 duty to evaluate. OCR did find a violation due to the school's failure to provide the parent with the notice of rights when the school determined that it would not be conducting an evaluation. *Stone County (MS) School District,* 52 IDELR 51 (OCR 2008). *Fergusson* and *Stone County* offer quite a different approach than the *more recently issued* Revised Q&A.

Bottom line on the Section 504-RtI relationship: We're getting a mixed message, so caution is the order of the day. Due to changes from the ADA Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to RtI or early intervention need not be *considered* for possible Section 504 referral. **Schools should consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through RtI or early intervention.** When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

E. Section 504 and the student with a physical impairment served through a health plan.

1. Some districts ignored major life activities other than "learning." Some of the first Letters of Finding issued by OCR following the implementation of the ADAAA exposed the problem of schools hyper-focusing on the major life activity of learning and ignoring the possibility of Section 504 eligibility due to substantial limitation in any of the other major life activities. A few examples…

Asthma and the major life activity of "learning." In *Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009), the school had taken the position that a student could *only* qualify for Section 504 if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue was asthmatic, and his disability did not impact his learning or education. The student received a medical management plan. The "District advised OCR that, prior to December 2008, it generally had been using medical management plans instead of Section 504 plans for students with disabilities who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the disability was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a Section 504 plan and would instead provide a medical management plan for medical needs."

However, after training on the ADA Amendments… "The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally,

under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the school's previous understanding) as required in the Section 504 regulations and the ADA Amendments Act.

Bone cancer and "learning." In *Union City (MI) Community Schools,* 54 IDELR 131 (OCR 2009), the District refused to provide accommodations for a student with bone cancer in a Section 504 plan because the child's impairment did not impact the major life activity of learning. OCR noted, however, that the impairment periodically affected the student's ability to walk, climb steps, participate in PE, attend field trips, and obtain transportation services. OCR held that the district's use of an unduly restrictive definition of major life activities (excluding consideration of those other than learning) and its failure to evaluate the student in a timely manner denied the student FAPE.

Other physical impairments and "learning." In *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009), a Section 504 committee responded to a parent referral and addressed the potential Section 504 eligibility of a student with irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades on advanced classes with the help of accommodations provided under a campus student services team (SST) process. Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of digestive function. In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA, when it determined that his condition did not substantially limit his learning. *See also North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

A little commentary: While these misconceptions of eligibility were uncovered following the ADAAA, OCR had warned as early as 1995 that schools should look at other major life activities as well.

> "Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school." *Letter to McKethan,* 23 IDELR 504 (OCR 1995).

OCR provided some additional examples of impairment impacting other major life activities in the 2012 guidance.

> "(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing;
> (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and
> (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system." 2012 DCL, p. 6, Question 7.

2. A history of health plans for physical impairments rather than Section 504 Plans. In addition to districts that simply failed to consider the impact of physical impairments on major life activities other than learning, other districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. For example, in an Indiana case, OCR found that the District's practice of not serving all students with diabetes under

Section §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read "Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services." *Hamilton Heights (IN) School Corp.,* 37 IDELR 130 (OCR 2002). This "regular ed health plan makes §504 unnecessary" approach is of course complicated by the ADAAA's mitigating measures rule.

OCR has determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District,* 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed).

With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **"In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students' disability status."**

A little commentary: "The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009." **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: "The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child's medical impairment substantially limits one or more major life activities." ***But see also, Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504);** *Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). Note that in both of these cases, the concern was not that students were on health plans but that school policy looked for eligibility only if the impairment impacted education. Note further the absence of language indicating that all students on health plans are Section 504 eligible.

OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. Note that the question is directed at students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility after the ADAAA.

> "Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. **For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an 'individual health plan' or 'individualized health care plan' to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures.** Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. **If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards.** In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation." 2012 DCL, Question 13, p. 9-10 (emphasis added).

A little commentary: If, on the other hand, there is *no* belief that the student needs special education or related services due to her peanut allergy, she has no right to evaluation, placement and the procedural safeguards. Her health plan would be sufficient. *See, for example, Cleveland (MT) Elementary School District No. 14,* 111 LRP 34458 (OCR 2011)(As part of a resolution agreement, the District agrees to draft policies and procedures that "provide each student with the diabetes management services the student needs, consistent with the student's Section 504 plan, individualized education program, or individual health plan.").

So what to do? The OCR guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. "As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement." 2012 DCL, Question 11, p. 8-9.

The question then is which kids on health plans to refer**? The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be the result of school-school attorney discussion prior to proceeding.**

Should the school desire a more targeted response, the schools should contemplate with the school attorney developing an approach that includes the following considerations.

(1) A review of OCR Letters of Finding where health plans are at issue reveals the following:

- Not all students with a health plan will need to be referred for Section 504 evaluation. *(See, for example, North Royalton, Isle of Wight County).*

- Students on health plans cannot be categorically excluded from consideration for Section 504 evaluation, even if their health plans appear to allow these students equal participation and benefit in the school's programs and activities (see *Tyler,* below).

- Each student on a health plan should be considered individually to determine whether a referral for Section 504 evaluation is appropriate. Put simply, significant differences exist among health plans, even for students with the same impairment (see factors below).

- The health plan provides evidence of the student's need for services from the school, as well as insight into the impact of disability, giving the school information that can contribute to its thinking on whether the student might be substantially limited by his impairment, and thus needs to be referred.

(2) Where the student needs the school to administer medication to meet a student's educational needs as adequately as the needs of nondisabled students are met, whether as part of a health plan or as a stand-alone service, OCR believes the student is receiving a related service triggering the duty to evaluate under Section 504. 2012 DCL, Question 8, p. 7.

(3) Where the student, in addition to a health plan, receives accommodations or services from the school to address academic, social, emotional, physical or behavioral needs, the student should be evaluated under Section 504 and no additional analysis is necessary.

(4) If the student is only receiving a health plan from the school (and no other services or accommodations), the school should consider the following factors as part of the decision to refer and evaluate the student, together with other factors as determined appropriate by the school:

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)

- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)

- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)

- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)

- In analyzing the student's needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

(5) Where the student is Section 504-eligible (a student with a disability under Section 504) a health plan should be governed by the Section 504 procedural safeguards even if the health plan is separate from the Section 504 Plan and even if no Section 504 Plan of academic accommodations or services is provided (see discussion of *Tyler* case below).

A little commentary: As was the case with early intervention and RtI, the school needs to change its thinking about referral to Section 504 for students on health plans. Due to changes from the ADA

Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to a health plan need not be *considered* for possible Section 504 referral. **Consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through health plans.** When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

F. An important shift: To OCR, Section 504 rights matter as much as (or more) than services.

OCR's concern with respect to serving potentially Section 504-eligible students through RTI/early intervention or health plans rather than under Section 504 is the lack of procedural compliance and safeguards. *See, for example, Tyler (TX) ISD,* 56 IDELR 24 (OCR 2010)("In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504."); *Dracut (MA) Public Schools,* 110 LRP 48748 (OCR 2010)("A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504."). A 2011 letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

> "The Division states there is no reference to a Health Treatment Plan in any part of the June 2009 IEP. There is only a reference of 'cool temps' on the testing accommodations sheet and documentation of the ice pack use in a daily log. Because the Division did provide some evidence that it was complying with the Health Treatment Plan in assisting the Student with body temperature regulation, OCR finds there is insufficient evidence of a violation of Section 504. **However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan.** Thus, the student's health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504's procedural safeguards with regard to the health plan." *Prince William County (VA) Public Schools,* 111 LRP 49536 (OCR 2011)(emphasis added).

See also, Bradley County (TN) Schools, 43 IDELR 143 (OCR 2004). OCR did not overlook the school's serious and continued efforts to assist a student recovering from a motorcycle accident, but found the school's response noncompliant. Unfortunately for the school, it never conducted a Section 504 evaluation and the student did not graduate on time. The school argued that despite the failure to provide the evaluation, it *had* provided appropriate services to the student. OCR disagreed.

> "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."

III. Section 504 Plans & IEPs 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 students with disabilities 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").*

A. 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.

B. 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 with the coordinator's thinking, 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.

A view from a federal court: A gifted program and reasonable accommodation. *G.B.L. v. Bellevue School District #405,* 60 IDELR 186 (W.D. Wash. 2013). A special education eligible student with ADHD and sensoneural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace" despite "an entrance score one point below the requirement." During the summer prior to PRISM, a new IEP was developed that included 48 accommodations and modifications and 9 special education services. While the year started well, "both his grades and mood quickly declined over the course of the school year." When things got rough, the parents requested additional accommodation that was refused, and the district suggested that the student leave the program. Before the district took action to move the student, the parents unilaterally placed him in a private school, and filed this action seeking reimbursement. The court explains the reasonable accommodation analysis that it will apply to resolve the dispute.

> "Under the ADA and Section 504, 'an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.' *Zukle v. Regents of the Univ. of Cal.,* 166 F.3d 1041, 1046 (9th Cir. Cal. 1999) *(citing Alexander v. Choate,* 469 U.S. 287, 300 (1985)). If the Plaintiffs meet 'the burden of producing evidence of the existence of a reasonable accommodation that would enable [the Student] to meet the educational institution's essential eligibility requirements,' the burden shifts to the District 'to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards.' *Id.* at 1047. The District 'may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards.'"

At issue here is the school's refusal to provide two accommodations requested by the parents. Both requests arise from the student's difficulty keeping pace with the required out-of-class work. Homework was a significant problem for the student**. In his regular education classes the previous year, "which has much less homework than the PRISM program, the Student spent four hours each night doing homework."**

> "The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. **The homework is also more difficult than in the regular education program.** The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problem." [Emphasis added].

Faced with the more difficult curriculum and sheer volume of material in the PRISM program, the student was unable to keep up. His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned." The therapist also argued that the homework burden was the student's "greatest source of stress." The District denied the request **"finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."** The ALJ believed that the student, even with the proposed limitation would not be successful since "the Student was already doing partial homework and was not mastering the course material." Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material." Both ALJ and district court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

The second request by the parents was to allow extended time on assignments. Parents argue that the school failed to provide extended time as required in the IEP ("if extended time is need for assignment [Student] or his parent will indicate a suggested new date on the daily progress report.") since the student was failing. "The ALJ found that the Student's 'teachers uniformly gave full credit for the Student's homework regardless of when it was turned in.'" The court finds that the school provided reasonable accommodation, and that the additional request for homework limitation was not reasonable. Parent's action and demand for reimbursement of private school placement is denied.

A little commentary: Was the student "otherwise qualified for the program" if his entrance scores were below the established eligibility criteria? The court notes this fact in a single sentence, without any commentary. Assuming that eligibility criteria for the program are educationally-based, and are appropriate and nondiscrminiatroy, did the school accomplish anything by ignoring the criteria for this student?

The court notes that the District did not discuss the requested two-hour homework limitation with teachers prior to rejecting the request. During the hearing, the teachers testified that *had they been told* to limit homework, they would have complied, despite their belief that homework is a necessary part of the PRISM program. "The teachers also testified that setting a time limit would not be a good option for helping the Student be successful in the program because of the educational value in each assignment

and the specific processing difficulties faced by the Student in completing homework." The author would be concerned if the natural inclination of educators here to meet student needs overrode the school's obligation to provide educational benefit. A student who due to services and accommodations is denied opportunity for equal access and benefit in the school's programs and activities is not, by definition, receiving FAPE. In other words, excessive or inappropriate accommodation can deny FAPE if it takes away learning opportunities from the child. Here, without the necessary homework component, the student would simply not be able to keep up. Hence, this requested accommodation, if provided, would deprive the student of opportunity to benefit in the PRISM program.

Note finally that this is a case where the school's good faith efforts were critical. Consider this language from the court's opinion.

> "This case presents the unfortunate story of a bright Student who qualified for special education services and was given an IEP allowing the Student to participate in the accelerated PRISM program for highly gifted students; Parents who worked every day to ensure the Student's academic success by monitoring daily reports, communicating with the Student's special education teacher, and enlisting professional support and services whenever needed; and a School District that took many extra steps to facilitate the Student's learning. Despite the interventions of the Parents and the District, the Student was unable to achieve success in the PRISM program and the Parents ultimately removed the Student from the District."

That's a "high ground" position from which a defense of this type of litigation is much easier.

IV. Homebound, but not all the time? Two interesting issues.

Can a student be too impaired to come to school, but *not* too impaired to participate in a school dance? *Logan County (WV) Schools,* 55 IDELR 297 (OCR 2010). The problem at issue here was a policy with no exceptions. "The Policy categorically denies students who are placed on homebound instruction, including students with a disability who are placed on homebound instruction because of their disability, the opportunity to participate in extracurricular activities." Strangely, the policy prevented attendance at dances and parties, but did not prevent students on homebound from attending basketball and football games "since they are paid events and open to the public." Due to his homebound placement because of Fabry disease (a hereditary metabolic disorder), the student at issue in this complaint was denied the opportunity to participate in the senior party. OCR found this exclusion from participation in extracurricular activities on the basis of disability a §504 and ADA violation. The claims continue in federal district court, where the court refused to dismiss the student's Section 1983 claims. *Mowery v. Logan County Board of Education,* 58 IDELR 192 (S.D. W.V. 2012).

A little commentary: The case raises a common refrain: if the student is too impaired to come to school, is he not too impaired to go to a school party? Apparently OCR's take is "not necessarily." The main concern here was the categorical exclusion without any individualized analysis of the student's unique situation. Could the school require that, where a medical professional has opined that the student cannot attend school, that same professional provide a release indicating that attending the party is medically appropriate? And could the school then argue that perhaps some attendance at school is also now appropriate as the student is no longer confined to the home?

A final note, OCR also determined that the school's placement of the student on homebound was a significant change in placement ("as it changed the type, nature, length and duration of the education program he received when not on homebound instruction") and should have been preceded by a Section 504 evaluation.

Episodic Homebound? *Traverse City (MI) Public Schools,* 59 IDELR 144 (OCR 2012). Despite the fact that the student is multiply disabled and has frequent, recurring absences, the school refused to provide a

"just in case plan" for homebound services during ragweed season, instead relying on policy which created a fifteen-day delay between verification by a physician and start of services. **"OCR concludes that the District's failure to modify its practices and procedures to provide for educational services for foreseeable absences related to recurring or episodic conditions related to students' disabilities, without requiring an IEP meeting in every instance or waiting fifteen days to provide home instruction, violates the Section 504 regulation [on Free Appropriate Public Education] at 34 C.F.R. §104.33[.]"** (Bracketed material added). Note that if episodic plans are appropriate for IDEA-eligible students (where the procedural protections and higher) the concept should apply with equal if not more force to Section 504 students, especially in light of the Congress' special treatment of episodic impairments discussed previously.

V. 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 FAPE 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 Section 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 couple of federal courts weigh in…. and still no consensus.

Case I: *Lamkin v. Lone Jack C-6 School District,* 58 IDELR 197 (W.D. Mo. 2012). The first reported case in this area comes from a federal district court in Missouri. The analysis, like the opinion itself, is fairly brief. 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." A complicating factor in the case is that the court dismissed the litigation due to the parents' failure to exhaust administrative remedies under the IDEA, making this analysis less forceful (as the case was resolved on the more basic jurisdictional issue).

Case II: *Kimble v. Douglas County School District,* 60 IDELR 221 (D.C. Col. 2013). Unfortunately, the second reported case, from Colorado, not only takes the opposite view, but seems to confuse the issue in new and interesting ways. As is explained in the summary, the complexity of the overlapping IDEA-Section 504 relationship and the fact that Section 504 has both a FAPE component and a nondiscrimination component make for very difficult analysis.

Plaintiff's daughter was IDEA-eligible and was served under an IEP. The decision does not identify the student's impairment nor does it list the services she received from her IEP (other than to say the IEP included "various educational accommodations and modifications."). At the end of the 2010 school year, the school proposed a new IEP that differed from the existing IEP. Apparently in response to the unspecified change or changes, the parents withdrew consent for continued special education services. In response, the school informed the parent that she would receive services available to nondisabled students, but any 504 plan would be her IEP. The school viewed the revocation of consent for the IEP as a refusal of a 504 Plan as well (per the *Letter to McKethan* approach).

But the school did not rely entirely on the *McKethan* approach. When the parents requested a Section 504 meeting, a meeting was held, the student was determined 504-eligible, and a Section 504 plan was offered *that was identical to the rejected IEP*. "Plaintiffs did not accept the Section 504 plan because it contained the same special education and related services that Plaintiffs had rejected as part of the IEP under the IDEA." This litigation ensued, and the decision is in response to the Plaintiff's motion for summary judgment.

In its decision, the court highlights language from the 2008 IDEA regulations on IDEA revocation of consent stating that nothing in the IDEA is meant to limit the rights, procedures, and remedies available under Section 504 and other laws. The court recognizes that "both statutes require the state to provide students with FAPE" but that the procedures under IDEA for development of that FAPE provide a "precisely outlined IEP process" as opposed to the "far more vague" 504 approach. The court also recognized the 504 regulation at the heart of the *McKethan* approach.

> "The Department of Education's regulations provide that implementing an IEP that provides a FAPE under the IDEA is sufficient, but not necessary, to satisfy the FAPE requirements of Section 504 (citing 34 C.F.R. §104.33(b)(2))… 'Implementation of an IEP developed in accordance with the [IDEA] is one means of meeting' the substantive portion of the Section 504 FAPE requirement."

The court also seems to understand that providing a 504 plan where an IEP is required will not suffice, and that "a FAPE under Section 504 is a less stringent standard than that under IDEA."

The court then reviewed existing authority on the subject.

> "In *Letter to McKethan,* the OCR explained that a parent rejecting services under the IDEA 'could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed the IDEA requirements.' *Letter to McKethan.* The *Lamkin* court found *Letter to McKethan* persuasive, and [found] that the Plaintiffs' revocation of services under IDEA was tantamount to revocation under [Section] 504 and the ADA.'"

Looking to both the *McKethan* Letter and to *Lamkin,* the Colorado court was not persuaded, but distinguished the letter and case.

> **"The Court finds the *Lamkin* decision unhelpful, as its primary focus was on the plaintiffs' failure to exhaust administrative remedies, and its reliance on *Letter to McKethan* was an alternative basis for its holding and did not consider the larger statutory and regulatory context.** *See Lamkin,* No. 11-CV-1072-DW-W at 6-8. Even without resort to *Letter to McKethan,* the IDEA's implementing regulations are clear that a school district has no obligation to develop an IEP once parental consent is revoked. See 34 C.F.R. § 300.300(b)(4)(iv). However, *Letter to McKethan* has no direct applicability to this case, as Plaintiffs do not seek to 'compel the district to develop an IEP under Section 504,' but rather request a Section 504 plan." [Emphasis added].

In short, the analysis of *McKethan* misses the point. In *McKethan*, the question is whether a parent can reject the IEP that is on the table under IDEA and instead demand the same IEP services under Section 504 (hence the "develop an IEP under 504" language.) The *McKethan* decision existed well-before the

2008 regulations on revocation of consent, but rather clearly envisions a similar dynamic. The logic of the letter is unchanged by the 2008 regulations. Having offered an IEP (which is one way to meet the 504 FAPE requirement) and having that offer rejected, there is no remaining 504 FAPE duty.

The Colorado court seems to think that many offers of FAPE are necessary under 504.

> "Despite Defendant's arguments to the contrary, the Court is not persuaded that a parent's rejection of an IEP, developed under the IDEA, automatically rejects any plan that could be developed under the less-restrictive Section 504 requirements. **The IDEA's specified process for developing an IEP, which requires a stricter definition of a FAPE, is only 'one way' of meeting Section 504's broader FAPE requirement.** See 34 C.F.R. §§ 104.33(b)(2), 104.36. **The language of the regulations suggests that permitting a school district to meet its Section 504 obligations through implementing an IEP is merely an expediency to avoid a duplicative process that would have the same result, rather than establishing a legal equivalency."** [Emphasis added].

What the court seems to envision is that the regulation does not mean what it says, while offering an IEP is one way of meeting the 504 FAPE obligation, it is not sufficient. That is, since the school can make other offers, it must do so. The parents can reject the IEP, but look for something different or perhaps better though 504. While a 504 Plan could be developed that is different, the court does not seem to understand that the IEP Team considered significant evaluation data on student need in order to develop the special education and related services that would be offered in the IEP. Why a school would think a student could get FAPE with less than the IEP or something different from the IEP services is a mystery.

Further interesting is the legal equivalency language. The IEP is not a legal equivalent to a 504 FAPE. The Colorado court appears to have missed its explanation of the procedural complexities that attend an IEP that do not apply to a 504 Plan. That's why an IEP satisfies the 504 FAPE, but a 504 Plan does not satisfy IDEA. The argument made by the school is not that the IEP and 504 Plan are equivalent, but instead, that the IEP is far more valuable and procedurally complex. Since the IEP is "worth more" than the 504 FAPE, it is one way of satisfying the 504 FAPE obligation.

Finally, the court's language on avoiding a duplicative process is equally perplexing given the court's earlier statements about the precisely outlined IEP process and the far more vague process of 504. If, as here, the offer of services is no different, what is the substantive point of offering the same plan on a piece of paper with a different title, pursuant to a more vague process?

At this point, the court begins to confuse the FAPE and nondiscrimination duties.

> "Both the statutory language of the IDEA and the comments on its implementing regulations make clear that it may not 'be construed to restrict or limit the rights, procedures, and remedies available' under Section 504 and the ADA. See 20 U.S.C. § 1415(l). **Thus, the Court holds that parental revocation of consent for special education and related services under the IDEA does not eliminate the broader protection of Section 504 and the ADA.** For a student with a qualifying disability under Section 504 and the ADA, the student's right to be free from discrimination under those statutes exists without regard to her eligibility, or her parents' consent for, services under the IDEA. See 29 U.S.C. § 706(8)(B); 20 U.S.C. § 1401(a)(1)(A). **Accordingly, even after Plaintiffs revoked their consent for IDEA services, B.K. remained protected from discrimination on the basis of her disability under Section 504 and the ADA. Insofar as Defendant relies on Plaintiffs' waiver of their rights under one statute (IDEA) to insulate itself from liability under another (Section 504 or the ADA), Defendant misapprehends the law."** [Emphasis added.]

The notion that FAPE and nondiscrimination protection are different, and that a student without services still receives nondiscrimination protection under 504 is not new. That recognition came with the ADAAA. But that's not the issue. The school's argument is with respect to the FAPE requirement, not the residual nondiscrimination protections. The school does not appear to argue that the waiver of FAPE

through rejection of the IEP means that the school can now discriminate against the student on the basis of disability.

Of course, this argument appears to be for not, as the school held a 504 meeting anyway, and offered a plan.

> "However, in this case, Defendant held a Section 504 meeting subsequent to Plaintiffs' revocation of consent under the IDEA.… At that meeting, a Section 504 plan was proposed, whose substance was equivalent to that in the previously proposed IEP, and Plaintiffs refused to accept that plan. *(Id.)* Because the statutory language of Section 504 permits a school district to meet its obligations under that statute by implementing an IEP, the Court cannot find that Defendant's attempt to implement the IEP it developed violated its obligations to provide B.K. with a FAPE under Section 504 and the ADA. Because Defendant convened a Section 504 meeting and its committee proposed a 504 plan, once Plaintiffs refused to accept it, Plaintiffs cannot hold Defendant liable for failing to provide accommodations that they rejected as part of the 504 plan."

So, says the court, the offer of an IEP does not satisfy the Section 504 FAPE (plain language of the 504 regulation notwithstanding). But, if the parent is offered exactly the same services under a 504 Plan as were offered under an IEP (and rejected), and the parent rejects the 504 plan also, there is no FAPE violation. What substantively is added by this step? Isn't the court requiring exactly the procedure that it thinks the regulatory language was designed to prevent? ("The language of the regulations suggests that permitting a school district to meet its Section 504 obligations through implementing an IEP is merely an expediency to avoid a duplicative process that would have the same result, rather than establishing a legal equivalency.")

Finally, the court talks of a 504 FAPE obligation *after the rejection of the 504 plan.*

> "Nevertheless, just as Defendant was required to convene a Section 504 meeting and develop a 504 plan after Plaintiffs revoked consent for IDEA services, Defendant retains a continuing obligation under Section 504 and the ADA to protect B.K. from discrimination while she remains a qualifying student with a disability, and therefore must continue to offer any accommodations or services required to ensure that B.K. is provided an opportunity for a FAPE under Section 504. 34 C.F.R. § 104.33(b)(1)."

This language appears to result from the confusion between the school's FAPE duty and nondiscrimination duty. The offer and rejection of a 504 Plan satisfies the FAPE obligation. The nondiscrimination duty remains, but does not generate yet another requirement to offer a FAPE.

A little commentary: In short, the reasoning of the Colorado court is confusing, and the district's offer of a 504 plan means that the analysis of *McKethan* and *Lamkin* is dicta. What we are left with are a series of ideas, but no real authority from a court with jurisdiction over much of the country. 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. **Schools should talk with the 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. If the parent refuses, there is no 504 FAPE obligation. If the parent accepts, then the student will be 504 eligible (given his IDEA-eligibility) and will need to be offered a 504 Plan to meet the FAPE requirement.

VI. Other New Cases of Interest

Under pre-ADAAA, student with bipolar disorder was not substantially limited. *Weidow v. Scranton School District,* 58 IDELR 93 (3rd Cir. 2012). In this unpublished decision, the court found that a student

with bipolar disorder could not maintain a claim for disability harassment as she was not substantially limited by her impairment. Note that the decision relies on the more demanding standard of "substantial limitation" that existed prior to passage of the ADAAA. Further, OCR has taken the position that students with bipolar disorder are "virtually always" eligible following the ADAAA, see *Dear Colleague Letter,* 112 LRP 3621 (OCR 2012)).

I consent to the evaluation, with the following conditions…. *G.J. v. Muscogee School District,* 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Can the parent agree to evaluation, but do so with strings attached? Despite being provided the IDEA-required notices and opportunity to consent, the parents provided a lengthy addendum of conditions rather than consent. "Appellants' conditions vitiated any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against Appellants, and whether the parents received the information prior to the school district. We find, therefore, no error in the district court's conclusion that **due to the extensive nature of the conditions demanded by the parents, the parents had refused to provide consent to the school district for the reevaluation."** [Emphasis added.]

You can't ignore data and expect to achieve appropriate evaluation. *Lauren G. v. West Chester Area School District,* 60 IDELR 4 (E.D. PA. 2012). It sounds like a bit of political intrigue: what did the district know and when did they know it? In this Section 504 & IDEA eligibility case, they knew enough to have evaluated all areas of suspected disability, but for some reason chose not to do so. The student was determined ineligible under both laws, prompting this litigation.

> "When the District's Child Study Team met to determine if Lauren was eligible for a §504 Plan, the team only reviewed academic records, student meetings, and written feedback provided by Lauren's teachers. **The District ignored Lauren's psychiatric diagnoses, her inpatient and outpatient psychiatric hospitalization, and the fact that she was cutting classes to see the guidance or crisis counselor once or twice a week.** Despite all of this available information, the District did not conduct its own evaluation of Lauren to lean more. **Even worse, the District emailed Lauren's mother on the afternoon of April 15, 2008 to get additional information on Parents' request for § 504 Plan, but then issued a Denial of Eligibility Letter on April 16, 2008 without waiting for her response.** Ample evidence supports the Hearing Officer's conclusion that the District should be reasonably expected to have known about Lauren's disability." [Emphasis added.]

The district similarly failed when determining special education eligibility. "The District's psychologist concluded that Lauren did not have an emotional disturbance because it was unclear how long she exhibited the characteristics of emotional disturbance and even if she was emotionally disturbed, it did not negatively impact on her educational performance." The Hearing Officer disagreed, and the court rejected the school's position as well.

> "The District psychologist notes in her ER that as early as January 2008, Lauren was diagnosed with mood disorder, depression, anxiety, OCD, ODD, and major depression, severe. The District's psychologist was aware of Lauren's multiple inpatient and outpatient hospitalizations in 2008 for psychiatric reasons. Additionally, the District psychologist was aware of Lauren's diagnosis of Dysthymic Disorder, a disorder described in the DSM-IV as a chronic state of depression for a duration of at least two years within which no more than two months are free of mood symptoms. Moreover, the District's psychologist was aware that beginning in the spring of 2008, Lauren was seeking help from the guidance counselor or crisis counselor at least once a week. Furthermore, the District psychologist knew that Lauren's poor attendance was in part due to her hospitalizations and her frequent visits to the counselors' offices. Lastly, the District psychologist knew that, by the fall of 2008, Lauren was failing several of her classes. The above evidence amply supports the Hearing Officer's conclusion that Lauren suffered from an emotional disturbance that effected her educational performance."

No health-based need for homebound. *Stamps v. Gwinnett County School District,* 59 IDELR 1 (11th

Cir. 2012), *cert. den'd,* 112 LRP 54652 (2012). The school's refusal to educate three siblings at home, and creation of school placements for them was upheld by the court based on good data with respect to the impact of the students' impairments.

> "The administrative law judge did not clearly err in finding that the programs devised by the district are reasonably calculated to provide the children an adequate education in the least restrictive environment and that the children are capable of attending public school. Dr. Batlle's testimony did not establish that H.S., S.S., and J.S. had to be educated at home because they had a nonspecific immune deficiency. Batlle testified that the children's immune deficiency did not require preventative treatment, they did not have a 'bonafide primary immune deficiency,' their immune systems '[would] improve just like anybody' with age, and the children had not been sick in several years. Batlle's testimony was consistent with the opinion of an expert in pediatric infectious diseases who, after reviewing the children's medical records and speaking briefly with Batlle, found that the children 'would have the same probability of getting sick' as other children and that, because 'they did not have any severe or unusual infections,' they should not have 'any restrictions on their socialization activities, be it school or going to community functions.'"

Health risks in public school, but not a private school? *S.D. v. Starr,* 60 IDELR 70 (D. MD. 2012). Parents of a student eligible as OHI due to a variety of conditions including ADHD, and a chronic lung disease sought placement in a private school. During his partial year in public school, the parent withdrew the student from school in November due to a respiratory flare-up, fearing it would result in pneumonia. It did not. He was absent for 13.5 days during the fall, and staff indicated that he was able to complete his assigned work independently, without the assistance of the aide assigned him. The parents argue that the public school was not appropriate due to the student's medical issues. The ALJ and court had some trouble with the claims. **Specifically, "the ALJ found the testimony of S.D.'s mother logically inconsistent because she claimed the LB setting was unsafe for S.D.'s health but allowed him to travel in standard public transportation and stay in public accommodations where the health environment is less controlled than at LB. She also allowed S.D. to interact with his two sisters who attended LB and could spread germs from the very environment she found unsafe for S.D."** The parent's doctor who had provided written opinions was subject to the same criticism as his medical recommendation drew "a seemingly arbitrary distinction" between the student's safety in a 22-student class at the public school versus the 15-student class at the private school. In a word, the court found the testimony "unconvincing."

But see, New Jersey Dept. of Educ. Complaint Investigation C2012-4341, 59 IDELR 294 (N.J. Sup. Ct 2012). The student "has a neo-natal encephalopathy with severely compromised post-natal growth and neurological development. Because of his brain defect, T.S. has poor temperature regulation and must be in an environment that is 77 degrees Fahrenheit or higher so that his core body temperature remains about 96.5 degrees." The district argues that home placement is inappropriate because it is not the LRE, despite a finding by the State Office of Special Education that the home was the most controlled/controllable environment." "The district states that T.S. was initially placed at the Children's Therapy Center and removed from that program because of medical concerns, not because the program was deemed inappropriate. However, as the record indicates, the Children's Therapy Center program was deemed inappropriate because that program could not meet T.S.'s need for temperature stability." There being no evidence that the student's medical health can be maintained in a less-restrictive setting, the district is ordered to provide 10-hous per week of home instruction.

What's *your* school's protocol when a student forgets his lunch money? A kindergarten student with a severe peanut allergy was served the "credit lunch" provided to all similarly situated students—a peanut butter sandwich—when her funds on deposit in the cafeteria were insufficient to purchase regular lunch menu items. The child initially refused to eat the offered sandwich, but did so after being chastised by a lunchroom worker, and experienced an anaphylactic reaction. The Parents' attempt to sue the State of Maryland for negligence was rejected by the state courts on state law grounds. *Pace v. State of Maryland,* 58 IDELR 138 (MD Ct. App. 2012)

Data lessons from a demand for a "No Spray" Policy. *Zandi v. Fort Wayne Community Schools,* 112 LRP 48082 (N.D. IN. 2012). While a junior in high school, Josh began experiencing allergic reactions to "certain perfumes, fragrances, and lotions." His reactions ranged from mild rashes to facial swelling, tightness in the chest, and anaphylactic shock. An allergic reaction at school resulted in a five-day hospitalization. Josh finished his senior year in home-based education to avoid additional serious reactions. The litigation involves the school's refusal to implement a parent-requested "No Spray" policy. The policy would have prohibited, in writing, the spraying of fragrances in the building. While the school refused to adopt a written policy, it did take action to address the problem. The school, through emails to staff and morning announcements, encouraged students and staff to avoid the spraying of perfumes, and a school newspaper article was written to raise awareness of the student's predicament. Teachers and staff were on the look-out for individuals spraying perfumes, but none were ever found. The school also offered to allow the student access to the building through another entrance to avoid the crush of students (and exposure to scents), a different arrival time at school, the ability to stagger his passing periods to avoid the throng of students and suggested Josh consider the use of a mask.

Summary judgment was granted to the school on Josh's discrimination claim as the school provided reasonable accommodations (remember, this is a district court case, not an OCR letter) and there was no evidence that a written policy would have made any difference.

> "Although Josh suffered multiple reactions of varying degrees of severity, there is no evidence that anyone sprayed perfume inside the school. In fact, in some cases, Josh did not even smell perfume before a reaction. Without a medical or other expert opinion establishing that perfume sprayed in the building elicited a different reaction than perfume already sprayed on a person who enters the building, Josh cannot show that even an effective policy would have prevented his reactions from occurring."

Finally, the student does not remember seeing anyone spraying fragrances prior to any of his allergic reactions, and review of surveillance tapes by school personnel likewise do not evidence anyone at school spraying perfumes.

A Section 504 duty to serve students privately placed by their parents? No. *D.L. v. Baltimore City Board of Sch. Commissioners,* 60 IDELR 121 (4th Cir. 2013). The parent of a student privately placed in a religious school complained that the public school district refused to provide Section 504 services because the student was not enrolled in public school. Noting that state law did not allow for dual-enrollment, and the absence of a regulation on the topic, the court looked to OCR guidance in the *Letter to Veir.* In that letter, OCR indicated that once the school has "offered an appropriate education, a district is not responsible under Section 504, for the provision of educational services to students not enrolled in the public education program based on the personal choice of the parent or guardian." Implicit in that letter is recognition of an affirmative duty to child find which would include students like D.L., but no duty to serve them.

> "But, the affirmative obligation is to ensure universal access and awareness, not universal provision. Because of Section 504 and its child find provision, children like D.L. know they have the opportunity to enroll in public school to take advantage of services available to all eligible individuals. But, this child find obligation differs from a school district's obligations for service provision under Section 504, which are not affirmative. *See Burke Cnty. Bd. of Educ.,* 895 F.2d at 984. **Section 504 and its implementing regulations do not require that public schools provide access to eligible individuals that opt out of the program by enrolling in private schools." [Emphasis added.]**

A novel argument by the parents, rejected by the court, is that by denying access to public school Section 504 services because of the parents' choice of a private religious education for their student, constitutional rights are violated. Said the court: "The right to a religious education does not extend to a right to demand that public schools accommodate Appellants' educational preferences. BCBSC has legitimate financial, curricular, and administrative reasons to require that D.L. enroll exclusively in a public school in order to

take advantage of Section 504 services. The school board need not serve up its publicly funded services like a buffet from which Appellants can pick and choose."

Access to a microwave required for a student with diabetes? Nope. "The request to heat up J.M.'s homemade food represents the archetype of a preferential, as opposed to a necessary, accommodation. After his diagnosis, J.M.'s parent made the reasoned decision, in collaboration with J.M.'s hospital nutritionist, to send homemade lunches to school at least until he became more acclimated to his condition in order to more strictly monitor his diet. Although J.M.'s lunches were homemade, there is no evidence to suggest that he was excluded in any way from eating his homemade lunch with other non-disabled peers during the lunch period. Diabetics do not require hot food and no such claim is made here." *A.M. v. N.Y.C. Department of Education,* 112 LRP 3144 (E.D. NY 2012).

A "blanket" placement policy for all students with diabetes? *R.K v. Bd. of Educ. of Scott County Kentucky,* 59 IDELR 152 (6th Cir. 2012). Parents allege that the school district is enforcing a policy requiring all students with diabetes to be served at a non-neighborhood school where a nurse is assigned. The student at issues has Type 1 diabetes, but uses an insulin pump that negates the need for injections. The parents sought the student's return to his neighborhood school since he did not need a nurse to administer his insulin. Both school and parents agree that the student needs assistance with the pump and with counting his carbohydrate intake. The school argues that "that under Kentucky law, only a nurse or other qualified medical official can monitor R.K.'s insulin pump and assist with counting carbs" thus requiring him to attend a school where a nurse it present. Citing significant fact issues to be determined by the lower court, the 6th Circuit remands the case to determine, in part, whether an individualized assessment was done to determine the student's need for services and placement, or whether the student was moved, as alleged by the parents, pursuant to a policy that does not look to individual differences among students with disabilities, in contravention of Section 504.

