EMERGING SECTION 504 ISSUES:

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A note about these materials: These materials are not intended as a comprehensive review of all case law or rules on these assorted Section 504 topics, but as a response to some of the most frequently asked (or interesting) questions in each area. 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.

With respect to the ADA Amendments, we continue to anticipate comprehensive guidance from the U.S. Department of Education to assist schools as they adapt their Section 504 procedures to the new ADAAA demands. However, as of the date of this writing, no comprehensive guidance has been issued. A Revised Q&A Document has been posted on the OCR Web site since the ADA Amendment changes went into effect, addressing some of the changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities,* revised March 27, 2009 FAQ from OCR-Chicago, is available on the OCR Web site at *http://www.ed.gov/about/offices/list/ocr/504faq.html* and is referenced herein as "Revised Q&A." The Revised Q&A is not intended as the final USDE guidance on these issues, as noted in its opening paragraph. "OCR is currently evaluating the impact of the Amendments Act on OCR's enforcement responsibilities under Section 504 and Title II of the ADA, including whether any changes in regulations, guidance or other publications are appropriate." As OCR has begun to enforce the changes, without comprehensive guidance to the field, these materials will provide some thoughts to schools on how to respond. Of course, these thoughts and strategies are subject to change should guidance be issued. Take these thoughts and strategies as talking points to discuss with your attorney prior to making any significant changes on the basis of these materials.

I. The ADA Amendments Act of 2008 or ADAAA (effective Jan. 1, 2009).

A. What prompted Congress to make the changes? Eligibility rather than accommodation has 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 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 have 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.

1. 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 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* applied the *Sutton* mitigation rule to medication, requiring that side effects of currently used medication be considered as well. *Murphy v. United Parcel Service Inc.*, 30 IDELR 694, 527 U.S. 516 (1999). The third case in the trilogy, *Albertsons, Inc. v. Kirkingburg* applied the *Sutton* mitigation rule to compensatory skills. *Albertsons, Inc. v. Kirkingburg*, 30 IDELR 697, 527 U.S. 555 (1999).

2. 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.

3. Bottom Line? Employees aren't getting their day in court to argue for reasonable accommodation. Following its criticism of the Supreme Court cases and EEOC's definition of substantial limitation (discussed below), Congress writes that, "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."

4. 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 USDE's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct USDE 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 USDE'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. USDE 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).*

The following is provided as a summary of the major changes created by the ADA Amendments Act of 2008, and the potential impact of some of those changes on the K-12 public schools' efforts to provide

a free appropriate public education to students eligible under Section 504 of the Rehabilitation Act of 1973.

B. The 5 Significant Changes to K-12 Section 504 flowing from the ADAAA

In addition to the overriding admonition to view eligibility more broadly, four significant changes arise from Congress' concerns. A fifth significant change could possibly arise from the Equal Employment Opportunity Commission's proposed regulations, depending on their final form.

1. Expansion of Major Life Activities

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."** §104.3(j)(2)(ii) (emphasis added). 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. In the ADAAA, Congress added to the list. **Major life activities now include major bodily functions (such as the immune system and normal cell growth), as well as sleeping, standing, lifting, bending, reading, concentrating, thinking and communicating.** Commonly, we understand the term "major life activity" to encompass all activities humans must engage in to fully function. Viewed in this manner, it is hardly surprising that Congress added examples as central to human life as sleeping, thinking and communicating. In fact, a major life activity covering relationships with others is a possible major life activity that Congress could have added. The EEOC has already recognized "interacting with others" as a MLA.

Congress' disagreement with the Supreme Court's narrow interpretation of major life activity in the *Toyota* case tells us that the term should not be "over-interpreted" in the school context. Further, the addition of new MLAs has an immediate impact on eligibility, especially as it creates MLAs that are smaller in scope than their predecessors. For example, a student with dyslexia may not be substantially limited in "learning" due to her ability to learn through methods that do not involve the printed word. But when the major life activity evaluated is "reading" rather than "learning," the same impairment is more likely to have greater impact, as we are no longer looking at other methods by which a student can learn. Thus, an impairment can substantially limit reading, although perhaps not "learning." The same result is possible with concentrating and thinking (which are also, arguably, smaller subsets of learning). The result of additional (and narrower) MLAs seems to be increased eligibility under Section 504.

Some recent decisions involving major life activities

What if the impairment doesn't substantially limit the major life activity of learning?
Memphis (MI) Community Schools, 110 LRP 7395 (OCR 2009).

In this decision, the school had taken the position that a student could *only* qualify for Section 504 protections if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue here 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) slated in the Section 504 regulations and the ADA Amendments Act." (parenthetical added by the author).

A little commentary: As OCR recognized, an impairment substantially limiting a major life activity other than "learning" could trigger Section 504 eligibility was not "new" because of the ADA Amendments. Instead, this thinking represents long-standing guidance from OCR. *See, for example, Letter to McKethan,* 23 IDELR 504 (OCR 1995)("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."). Also interesting is the finding that the school's Section 504 forms do not comply with the Section 504 regulations because they do not "ensure that parent/guardians are provided with a meaningful opportunity to provide input into Section 504 decisions for their child." While meaningful participation is required under IDEA, and parental participation is certainly best practice, there is no such requirement under Section 504.

Without *Toyota,* new hope for eligibility
Jenkins v. National Board of Medical Examiners, 109 LRP 7480 (6th Cir. 2009)(Unpublished).

The 6th Circuit remanded to the District Court the determination of whether the plaintiff was entitled to accommodations on the U.S. Medical Licensing Exam. The District Court initially denied his request for injunction, due to his failure "to demonstrate how his reading difficulties limited his ability to perform tasks central to the lives of most people." Since he could read the kinds of things that matter to most people (menus and newspapers, for example) although he did so slowly, he was not ADA-eligible. The 6th Circuit found that the District Court was clearly led by *Toyota* in its analysis, and the intervening ADA Amendments undermine the court's holding. Consequently, "The resolution of this case will require the District Court to make a fresh application of the law to the facts in light of the amendments to the ADA."

Changes in major life activities can change eligibility
Michael M. v. Bd. of Educ. of Evanston Township District #202, 53 IDELR 21 (N.D. Ill. 2009).

Having previously been denied Section 504 eligibility in 2008 despite the student's ADHD, the parents appealed the hearing officer's decision to federal court. The parents argue a continuing failure to identify on the basis of the relaxed eligibility resulting from the ADAAA. The school argues that it plans to consider the student's eligibility in light of the change, but no such meeting has been held or even scheduled. The court refused, very elegantly, to dismiss the parents' claim of an ongoing Section 504 failure to evaluate. Wrote the court, "Until such a meeting occurs, Plaintiff's claim for relief is not moot."

A little commentary: As an interesting side-note, **claims against individual school employees were dismissed by the district court.** "Because the Section 504 and ADA obligations of the individual defendants in this case are derivative of the board's obligations, and any relief would come from the board itself, the claims against defendants Tauman, Madden, Canchola and Dr. Witherspoon are redundant and unnecessary, and are dismissed."

2. Treatment of Impairments that Are Episodic or in Remission

The ADAAA declares that, "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active." Schools certainly have experience with students with episodic conditions that ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraine 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.

The "in remission" portion of this provision is problematic. The proposition that a student fully in remission from a condition that once substantially limited a major life activity should be provided an accommodation plan based on speculation over the degree of impact the condition would have were it presently active raises serious questions.

How would such a student be identified as in need of evaluation? The school's duty to evaluate under Section 504 is triggered by the school's suspicion of the student's need. Section 104.35(a) on evaluation provides: "A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement." 34 CFR §104.35(a). **No right to Section 504 evaluation on demand.** "[T]here is no absolute right to an evaluation on demand — not for ADD or any other suspected disability. However, a school district is obligated to evaluate any child it suspects of having a disability that substantially limits a major life activity, such as learning." *Letter to Mentink,* 19 IDELR 1127 (OCR 1993). **Where the disability is in remission, there will likely be no outward evidence of impairment or student need to trigger the school's evaluation. Nevertheless, as the impairment could well be substantially limiting when active, the school would seem to have a duty to evaluate under the ADAAA.** Note that employers have no child find duty and no duty to evaluate. Consequently, rules crafted for employment would not address this concern.

How would the student be evaluated? With what data? Does it matter that the student is functioning well now, or matter more that when the disability was active there were serious problems? Doesn't this provision value older data as more important than current data? (For example, "Don't tell me how he's currently doing in high school. I'm concerned about his performance in first grade.")

Even if eligible because of the disability now in remission, why would an accommodation plan be developed or implemented for such a student? A quick reminder of the eligibility criteria and the duties that arise from the various eligibility prongs is required. To be eligible under Section 504, a student must be both "qualified" (basically the student is of an age during which services are provided to disabled and nondisabled students under state law*, See 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 activity;
(ii) has a record of such an impairment; or
(iii) is regarded as having such an impairment.

In a 1992 Senior Staff Memorandum, OCR clarified the FAPE duty and its application to students eligible under prong one, but not prongs two and three.

"The reason for the inclusion of the second and third prongs of the definition is explained in the regulation at Section 104.3(j)(2)(iii) and (iv), and is further clarified in Appendix A at #3. **Those two prongs of the definition are legal fictions. They are meant to reach situations where individuals either never were or are not currently handicapped, but are treated by others as if they were.** For instance, a person with severe facial scarring may be denied a job because she is 'regarded as' handicapped. A person with a history of mental illness may be denied admission to college because of that 'record' of a handicap. The persons are not, in fact, handicapped, but have been treated by others as if they were. It is the negative action taken based on the perception or the record that entitles a person to protection against discrimination on the basis of the assumptions of others."

The use of these prongs of the definition of handicapped person arises most often in the area of employment, and sometimes in the area of postsecondary education. **It is rare for these prongs to be used in elementary and secondary student cases. They *cannot* be the basis upon which the requirement for FAPE is triggered.** Logically, since the student is not, in fact, mentally or physically handicapped, there can be no need for special education or related aids and services. *OCR Senior Staff Memorandum,* 19 IDELR 894 (OCR 1992).

Finally, recall what the Section 504 Plan is supposed to accomplish. **The Section 504 FAPE (the Section 504 Plan) is focused on leveling the playing field.** "For the purpose of this subpart, the provision of an appropriate education is *the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met* and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36." 34 CFR §104.33(b)(emphasis added). The long-standing guidance from USDE with respect to students who "have a record of such impairment" (discussed above) provides a logical response to the student with an impairment in remission—since this is not a student with a current impairment, he is not entitled to FAPE (the Section 504 Plan). Should this student be provided with protection from discrimination? Absolutely — this student receives Section 504's nondiscrimination protection as this is a student with a record of impairment. But this student doesn't require a Section 504 Plan because there is no current need or accommodations or services. If the disability returns and is substantially limiting, then the school would then be required to conduct an evaluation.

Unfortunately, in the Revised Q&A, the long-standing position on who gets a Section 504 Plan is reinforced but not reconciled with the "in remission" change in the ADAAA. Two separate entries address the issue, with apparently different results.

"35. Is an impairment that is episodic or in remission a disability under Section 504? Yes, under certain circumstances. In the Amendments Act (see FAQ 1), Congress clarified that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. *A student with such an impairment is entitled to a free appropriate public education under Section 504."(emphasis added).*

"37. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"? *No.* In public elementary and secondary schools, unless a student actually has an impairment that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free appropriate public education (FAPE)…." *(emphasis added).*

In the K-12 Section 504 world, the ADAAA's "in remission" requirement is confusing as written, creates possible exposure for failure to evaluate unseen impairments with no current impact, and arguably requires schools to create Section 504 plans based on old impairments no longer present. As the employment world does not have the duty to child find and evaluate (those requirements arise from USDE's regulations requiring FAPE), this was not a concern to Congress. USDE guidance on this provision is essential.

3. 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.

No help for the *Sutton* pilot candidates — As a curiosity, the ADAAA would not have apparently helped the prospective airline pilots in the *Sutton* case, since the act states that the effect of eyeglasses can be considered in determining Section 504 eligibility. In the *Sutton* case, the Supreme Court held that with eyeglasses, the pilot candidates were not impaired in the major life activity of "seeing," and thus were not eligible and could not maintain their action claiming discrimination on the basis of a visual impairment. Under the act, United Airlines would still have been able to assert

that the mitigating effect of eyeglasses meant that the pilot candidates in question were not disabled within the meaning of Section 504.

The duty to evaluate is virtually impossible to meet under the new mitigating measures rule as written. How can the school see what's not happening due to the positive effects of mitigation? For example, consider this Texas case involving the impact of an asthma inhaler.

Medication can make a huge difference in substantial limitation. The parent "testified that although Alexander had to carry his inhaler at all times, he still participated in karate, bicycle riding, skateboarding, motorcycle riding, swimming, playing outdoors and traveling — including out-of-country trips. [The parent] explained that Alexander experienced periodic asthmatic flare-ups, but Alexander's breathing difficulties were controlled using a nebulizer and an inhaler … This evidence supports the defendants' position that no evidence exists to demonstrate that Alexander was disabled under Section 504 because it shows that Alexander's asthma was corrected by a mitigating measure — the use of his inhaler — and that in its mitigated state, Alexander's asthma did not substantially limit his breathing. The evidence shows that in its mitigated state, Alexander's breathing was regulated to such a degree that he succeeded in school, played with friends like a normal child, and participated in a wide range of physical activities." *Garcia v. Northside ISD,* 47 IDELR 6 (W.D. Tex 2007).

Are regular education interventions and RTI "reasonable accommodations" that must be filtered out in determining whether the student is substantially limited? If so, is Section 504 required for any student with an impairment who receives interventions? Contrast the following divergent opinions on regular education intervention from OCR.

If the student has a disability and needs help, refer to Section 504. "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 #31. *See also Revised Q&A #40* (**"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….").

OR, in an older case, the school has the option of trying regular ed interventions first. "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) ISD,* 31 IDELR 64 (OCR 1999).

Similarly, what if a health plan meets the student's needs? In an Indiana case, for example, OCR found that the district's practice of not serving all students with diabetes under Section 504 or IDEA is appropriate, so long as such students have protocols in place to address their medical conditions, and the district includes language in future student/parent handbooks that "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). *But see, North Royalton (OH) City School District,* 52 IDELR 203 (OCR 2009)(discussed below).

A little commentary: Is Section 504 really a nondiscrimination statute if every student with an impairment who needs interventions must go through Section 504 to get the intervention, even if the help is available through a regular education process outside Section 504? Isn't there a flavor of discrimination in the notion that regular education interventions are not available outside of Section 504 for a student who has a disability? Doesn't this thinking conflict with the IDEA push for regular education to do more and to get the right students into IDEA? USDE can help school efforts to improve regular education interventions by providing guidance here.

Some recent decisions involving mitigating measures

Update your forms!
Fox (MO) C-6 School District, 109 LRP 54751 (OCR 2009).

The complaint arises from the school's alleged failure to properly evaluate a student with a peanut allergy for Section 504 eligibility. While not clear from the published decision, it appears that the district may have previously evaluated the student and denied eligibility due to the impact of a mitigating measure, such as an EpiPen. Part of the resolution agreement requires the school to evaluate the student for possible Section 504 eligibility. Included in the resolution language is the following: "Documentation considered by the multidisciplinary team in making its determinations will include, but not limited to, new and existing information regarding the Student and a copy of the complete text of the ADAAA."

"While mitigating measures were addressed in the school's procedures manual, the references apparently were incorrect. OCR provides, as technical assistance, encouragement to either remove references to mitigating measures in the Section 504 eligibility form, or include language that addresses the ADAAA treatment of mitigating measures for eligibility purposes. Additionally, the school agrees to revise its Section 504 Procedures Manual "in the section under the heading 'Which students are covered,' to incorporate a definition of a person with a disability that is consistent with the ADAAA. Revisions will include, but may not be limited to, defining 'major life activities' as they are defined in the ADAAA and removing references to any court decisions that were specifically rejected by the ADAAA."

A little commentary: In a related case, *St. Clair County (MI) Regional Educational Service Agency,* 53 IDELR 238 (OCR 2009), OCR made similar findings with respect to the service agency providing the manuals. *See also, Rim of the World (CA) Unified School District,* 109 LRP 27323 (OCR 2009)("The District's Section 504 plan form contains a definition of 'substantially limits a major life activity,' which is inconsistent with current law because it instructs staff to consider mitigating circumstances in determining whether a student has a disability under Section 504.).

Health plans are mitigating measures
North Royalton (OH) City School District, 52 IDELR 203 (OCR 2009).

Prior to the effective date of the ADAAA, the school 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."

4. A New Definition of Substantial Limitation

In the ADAAA, Congress expresses its "expectation" that 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. Given that Congress appears intent on broadening access to the courts for employees with impairments claiming their employers have failed to provide reasonable accommodations in the workplace, it is not surprising that they would want the EEOC to relax its regulation defining "substantial limitation." Congress wants to move the focus from the threshold eligibility determination to employers' provision of reasonable accommodations to persons with impairments. EEOC's now-defunct definition is 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).

It is interesting to note, however, that the ADAAA makes no mention of the U.S. Department of Education's Section 504 regulations, or of any need to effect change to its substantive requirements. The USDE did not create a definition of substantial limitation in the regulations. Instead, the commentary to the USDE's regulations provides 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, the USDE 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. **For those school districts utilizing the EEOC's definition, a change in the substantial limitation definition is required.** The more interesting question, of course, is what definition to use?

A mere limitation is insufficient (as the word "substantial" would be rendered meaningless) and a significant restriction (per the ADAAA) is too high a requirement. The answer lies somewhere between these two points.

EEOC has proposed changes to its regulations in light of the ADAAA. Included in those changes is a discussion of "substantial limitation" which no longer resembles a definition of the term, but an explanation of what is and is not "substantial limitation." The following are direct quotes from the proposed regulations, numbered for convenience.

1. "In general. An impairment is a disability within the meaning of this section if it 'substantially limits' the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability." *Proposed 29 CFR 1630.2(j)(1).*

2. "[T]he term 'substantially limits,' including the application of that term to the major life activity of working, shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of the ADA and should not require extensive analysis." *Proposed 29 CFR 1630.2(j)(2)(i).*

3. "An individual whose impairment substantially limits a major life activity need not also demonstrate a limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability." *Proposed 29 CFR. 1630.2(j)(2)(ii).*

4. "An impairment that 'substantially limits' one major life activity need not limit other major life activities in order to be considered a disability." *Proposed 29 CFR. 1630.2(j)(2)(iii).*

5. "The comparison of an individual's limitation to the ability of most people in the general population often may be made using a commonsense standard, without resorting to scientific or medical evidence." *Proposed 29 CFR 1630.2(j)(2)(iv).*

6. "The 'transitory and minor' exception in §1630.2(l) of this part (the 'regarded as' prong of the definition of 'disability') does not establish a durational minimum for the definition of 'disability' under §1630.2(g)(1) (actual disability) or §1630.2(g)(2) (record of a disability). An impairment may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months." *Proposed 29 CFR. 1630.2(j)(2)(v).*

7. "In determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment." *Proposed 29 CFR. 1630.2(j)(2)(vi).*

Note that these are proposed regulations and are not yet final, and frankly, may confuse Section 504 Teams rather than inform their decisions. Note further that even if finalized, these regulations will not have legal authority with respect to K-12 Section 504 students, as the USDE retains jurisdiction to issue K-12 rules. However, these proposals by EEOC are certainly informative and one would assume that they would likely be analyzed by the USDE as part of its own rulemaking, should the USDE determine that new Section 504 regulations are necessary.

An update on temporary impairments and the ADAAA's Six-Month Rule
Garfield (OH) Local School District, 52 IDELR 142 (OCR 2009).

Addressing a complaint based on a student's ability to participate at school following a broken foot

and injured knee, OCR determined he was not Section 504 eligible as the disability did not last 6 months. Citing ADA's Title II regulations, OCR wrote:

> "At the time of the alleged discrimination, the Title II implementing regulation, at 28 CFR § 35.104, stated that the question of whether a temporary impairment rises to the level of a disability must be addressed on a case-by-case basis and noted that: 'temporary impairments, such as a broken leg, are not commonly regarded as disabilities, and only in rare circumstances would the degree of the limitation and its expected duration be substantial.' OCR typically has found that temporary impairments affecting mobility for a few months or less are not considered significant enough to qualify as a disability pursuant to Section 504 or Title II. It should be noted that OCR applied the standards in effect at the time of the alleged discrimination and not the amendments to the Americans with Disabilities Act that became effective in January 2009. Under those amended standards, any impairment, the duration of which is less than six months, would not constitute a disability."

A little commentary: This decision seems strange as it not only misstates the ADAAA change (it applies the six-month rule only to the "regarded as disabled" prong of eligibility) but it also seems at odds with historical and current OCR policy. In various policy letters over the years, the OCR has reiterated that a temporary disability can constitute a physical impairment that substantially limits a major life activity such that Section 504 services might be required. *See, for example, Ventura (CA) Unified School District*, 17 IDELR 854 (OCR 1991); *Temple (TX) ISD,* 25 IDELR 232 (OCR 1996). That position seemed completely entrenched in March of 2009 when OCR posted the "Revised Q&A." Question 34 of the document includes no bright-line rule.

> **"34. How should a recipient school district view a temporary impairment?** A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. **The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.** In the Amendments Act (see FAQ 1), Congress clarified that an individual is not "regarded as" an individual with a disability if the impairment is transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less." (emphasis added).

This result is a perfect illustration of why schools are confused and in need of substantial, comprehensive guidance to square the ADA Amendments with the Section 504 FAPE and long-standing OCR policy positions. Presumably, as this complaint (dated Feb. 19, 2009) was resolved prior to the Revised Q&A (March 27, 2009), it is no longer OCR's position.

5. EEOC's List of Impairments that Will Consistently Meet the Definition of Disability

Perhaps the biggest shift in thinking arising from the ADAAA is manifest in a new position taken in the EEOC's proposed regulations with respect to near-automatic eligibility for certain types of impairments.

> "Interpreting the definition of disability broadly and without extensive analysis as required under the ADA Amendments Act, some types of impairments will consistently meet the definition of disability. Because of certain characteristics associated with these impairments, the individualized assessment of the limitations on a person can be conducted quickly and easily, and will consistently result in a determination that the person is substantially limited in a major life activity. In addition to examples such as deafness, blindness, intellectual disability (formerly termed mental

retardation), partially or completely missing limbs, and mobility impairments requiring the use of a wheelchair, other examples of impairments that will consistently meet the definition include, but are not limited to —

(A) Autism, which substantially limits major life activities such as communicating, interacting with others, or learning;
(B) Cancer, which substantially limits major life activities such as normal cell growth;
(C) Cerebral palsy, which substantially limits major life activities such as walking, performing manual tasks, speaking, or functions of the brain;
(D) Diabetes, which substantially limits major life activities such as functions of the endocrine system (e.g., the production of insulin) (*see 2008 House Judiciary Committee Report at 17*);
(E) Epilepsy, which substantially limits major life activities such as functions of the brain or, during a seizure, seeing, hearing, speaking, walking or thinking;
(F) HIV or AIDS, which substantially limit functions of the immune system;
(G) Multiple sclerosis and muscular dystrophy, which substantially limit major life activities including neurological functions, walking, performing manual tasks, seeing, speaking or thinking;
(H) Major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, or schizophrenia, which substantially limit major life activities including functions of the brain, thinking, concentrating, interacting with others, sleeping, or caring for oneself." *Proposed 29 CFR 1630.2(j)(5)(i)(A)-(H).*

"No Negative Implication From Omission of Particular Impairments. The list of examples in paragraph (j)(5)(i) of this section is merely intended to illustrate some of the types of impairments that are consistently substantially limiting. Other types of impairments not specifically identified in the examples included in paragraph (j)(5)(i) of this section may also consistently be substantially limiting, such as some forms of depression other than major depression and seizure disorders other than epilepsy." *Proposed 29 CFR. 1630.2(j)(5)(iii).*

Again, these are proposed regulations and are not yet final. Note further that even if finalized, these regulations will not have legal authority with respect to K-12 Section 504 students, as the USDE retains jurisdiction to issue K-12 rules. **Further, in the Revised Q&A, the USDE has already taken a position on ADAAA contrary to that in the EEOC proposed rules** (s*ee, for example, Revised Q&A Question 23):*

"23. Are there any impairments that automatically mean that a student has a disability under Section 504? No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504."

Of course, the USDE took this position prior to the EEOC releasing proposed regulations, and can always reconsider. For now, however, Section 504 eligibility is determined individually and not merely because the student has a particular impairment.

C. Some thoughts on how to meld the Section 504 FAPE with the ADAAA

Under Section 504, schools must identify potentially disabled students in order to ascertain whether they are in fact disabled, determine the educational needs resulting from the disability, and develop accommodation plans appropriate to meet those needs. If the language of the ADAAA is applied to the public schools technically, as written, the amendments would appear to require the development and implementation of accommodation plans without a basis of actual and present need, and upon purely speculative analysis. This would work a sea change in disability law, since the entire system of disability laws with respect to education has been based on a child's actual and present educational

need. **It simply seems unlikely that in addressing its disagreement with a few employment opinions handed down by the modern Supreme Court, Congress meant to cause a fundamental shift in the way disability laws are applied in the context of students in public school settings.** A more sensible explanation looks to the highly specific sections explaining the purpose of the ADAAA, down to the exact Supreme Court opinions that are overturned by legislative action. Viewed in this manner, it appears that the concern of Congress was amplifying employees' access to the courts to press discrimination and reasonable accommodation claims, rather than upsetting the long-standing applecart of disability laws' application to public education. Important differences between K-12 education and employment must be considered. Employers choose who to employ, fire those who fail to perform, and are generally not accountable legally for employees who fail to progress in their job skills. Public schools do not have these luxuries. Further, accommodation in the public school context is part of a broader effort to meet the need of struggling students. Congress did not consider the impact of growing early intervention activities on the need to expand eligibility since the employment world has no similar dynamic. Nevertheless, schools need to take action to comply.

1. Some actions that schools *must* take pending guidance

• Watch for clarifying guidance from the USDE on the impact of the ADA amendments to the functions and duties of public schools under Section 504. In October 2008, OCR issued a letter response indicating that "OCR is evaluating the impact of the ADA Amendments on OCR's enforcement responsibilities made under Section 504 and Title II, including whether any changes in regulations, guidance, or other publications are appropriate." 51 IDELR 80 (OCR 2008). In light of the fact that the purpose of the amendments seems limited to the employment context, and that a strict technical application of the changes would lead to clearly absurd and unworkable results in the educational context, it is our belief that the U.S. Department of Education will at some point provide written guidance on the amendments in order to clarify the act's implications on public schools' K-12 duty to provide FAPE**. The Section 504 FAPE, child find and the duty to evaluate are creatures of the regulations, and are the key differences between the employment world where Congress was focused in the ADAAA and the K-12 world where the changes simply don't work as written.** That the USDE guidance, in the context of Congress' focus on nondiscrimination in employment, as opposed to FAPE, could allow the USDE to distinguish the changes as applicable only to the K-12 Section 504 nondiscrimination duty, but not applicable to the K-12 Section 504 duty to provide a free appropriate public education.

• Add language to Section 504 Eligibility forms, manuals and procedures to show your school's understanding of the ADAAA's emphasis on broad eligibility.

• Change Section 504 Eligibility forms, manuals and procedures to reflect the newly recognized major life activities, including reading, and the inclusion of major bodily functions. Pay special attention to the recent cases *(North Royalton & Memphis,* discussed previously) where schools were found in violation for only looking at impact on the major life activity of learning. While the ADAAA did not change the rule, it seems to have exposed an inappropriate practice in some schools.

• **Remove references to the EEOC's definition of substantial limitation from Section 504 Eligibility forms, manuals and procedures.** Keep an eye on the federal courts and EEOC for emerging definitions. *See, for example, Rim of the World (CA) Unified School District,* 109 LRP 27323 (OCR 2009)(While investigating a variety of parent complaints, OCR identified problems with the district Section 504 paperwork, including the district's use of a definition of "substantial limitation" rejected by the ADAAA.).

• Be careful denying eligibility to students whose conditions, although episodic, can reach the point of substantial limitation when active. Understand that the plain language of the changes may

create a duty to evaluate based on an impairment that is in remission and gives rise to no current need for services. Make appropriate changes in Section 504 Eligibility forms, manuals and procedures to reflect the new requirement.

• Recognize the limited options available to the school when a parent requests a Section 504 evaluation. *See, for example, Bryan County (GA) School District,* 53 IDELR 131 (OCR 2009)("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights.").

• Understand that the plain language of the changes requires Section 504 eligibility to be determined without regard to the ameliorative or beneficial impact of mitigating measures. Those measures likely include regular education interventions, accommodations (like differentiated instruction) and other assistance (like health plans and emergency response plans). Understand that OCR could conclude that regular education intervention provided outside of a Section 504 process or plan is not appropriate for students who have a physical or mental impairment and are in need of interventions or accommodation (the Q&A #31 approach discussed above), even though such a conclusion is inconsistent with IDEA's emphasis on regular education as a first tier for all students.

• Continue to develop strong systems of early intervention for all struggling students, with the knowledge that the need for services arising from disability may be considered a trigger of the duty to evaluate under Section 504.

• Train your employees so that they understand the changes you are making to your forms and procedures and the new approach to Section 504 eligibility.

2. Some actions that schools *should consider together with the school attorney,* pending USDE guidance. The following positions were crafted in an effort to comply with both Section 504 and the changes sought by the ADAAA (despite the inconsistencies and differences between the employment environment and its reasonable accommodation standard and the K-12 environment with its FAPE requirement). In the absence of guidance from USDE, these positions allow for practical use of limited district resources while meeting the needs of struggling students with disabilities.

• Recognize the possibility of "Technical Section 504 Eligibility" but no need for a Section 504 Plan. While the ADAAA requires that the ameliorative effects of mitigating measures are not to be considered in determining substantial limitation (that is, during the process of evaluating to determine Section 504 eligibility) the ADAAA is silent on the consideration of mitigating measures when determining whether and what to provide in a Section 504 Plan. These two decisions, determining eligibility and determining services, are distinct. *See, e.g., Memphis (MI) Community Schools,* 110 LRP 7395 (OCR 2009)("The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student's educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate."). This bit of language seems to support the position that a student can be technically eligible for Section 504 under prong one (currently disabled), but not be eligible for services, for example, because of the positive effect of mitigating measures that make additional services unnecessary for the student to receive FAPE. Note further that in commentary to the EEOC's proposed regulations, there is recognition that accommodation requests may already be met through "existing employer policies and procedures (e.g., use of accrued annual or sick leave or

employer unpaid leave policy, employer short- or long-term disability benefits, employer flexible schedule options guaranteed by a CBA, voluntary transfer programs, 'early return to work' programs, etc.), or under another statute (e.g., FMLA, workers' compensation, etc.)." 74 Fed. Reg. 48,422 (2009). Those existing policies and procedures, in the K-12 school environment, would include regular education interventions, differentiated instruction, makeup work policies, after-school tutoring, and the myriad other resources available to all struggling learners.

The fact that a student has a physical or mental impairment that substantially limits him in one or more major life activities (prong one eligibility) does not mean that he is currently subjected to discrimination nor does it necessarily mean that his disability-related needs are not currently met as adequately as the needs of his nondisabled peers. While technically under the ADAAA, there may be more students who meet the prong one current disability requirements. That does not mean that those students will have a need for a Section 504 plan. The ameliorative effect of mitigating measures that cannot be considered at the eligibility stage (Section 504 teams are to screen out the positive effects of medication, accommodations, health plans, compensatory skills, etc.) are likely, if the student is appropriately participating and benefitting from education, the same accommodations and services that would form his Section 504 Plan. Of what necessity, then, is the Section 504 Plan? If the student's needs are already met as adequately as his nondisabled peers, Section 504 as a civil rights law has been satisfied. As an eligible student, he will receive the nondiscrimination protections of Section 504, but is not in need of a Section 504 Plan because, having had his needs met, there is no required accommodation. This is the "technically eligible" student who does not need a Section 504 Plan. Since he is now Section 504 eligible, he has nondiscrimination protection, and should he be denied participation or benefit, he has the Section 504 procedural safeguards available to him. Further, should he need accommodations or services at a later time, the Section 504 Team can address those needs as they arise.

Finally, note that requiring the student with disability to receive a Section 504 Plan to access regular education programs, activities and services in which he currently participates and benefits is something akin to a "separate but equal" system of education. He is then required, because of disability, to access regular education assistance already available to him through the Section 504 process.

• **Child find and evaluate under Section 504 only students suspected of having a *current* disability-related need for services.** The ADAAA would require schools to "child find" students with impairments that are no longer present or significant (such as students who had cancer that is now in remission or students for whom medication or other mitigating measures reduce the impact of disability below that of substantial limitation), and provide them with a Section 504 evaluation. If regular education students with impairments that are successfully addressed by mitigating measures or are in remission must be treated as if they were presently disabled, without taking into account their remission or effective treatment, child find would be rendered nearly impossible. Identification of potentially eligible students has always hinged on whether there are *reasonable grounds to suspect* an impairment that substantially limits a major life activity. How then, does a school child find for students that show no outward signs of impairment due to effective treatment or the fact the impairment is in remission?

Consequently, focus the limited time, personnel and intervention resources of the school on students who are struggling. If the student's needs are already met as adequately as his peers, there is no need to trigger a Section 504 evaluation (even though, if mitigating measures were ignored, the student might be eligible). As he has no current need, the school does not have to evaluate him. *See, the previous discussion of 34 CFR. §104.35(a) & Letter to Mentink.* Of course, if the parents of a student choose to refer to Section 504, the school must either follow through with referral, applying the eligibility standard as required by the ADAAA, followed by a determination of whether a Section 504

Plan is required, or refuse to evaluate and provide the parents their notice of rights. *See previous discussion of Bryan County.*

II. Using Evaluation Data to Determine Appropriate Accommodations

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

The need must arise from the impairment. "It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation." The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1½-mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student "has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity." No transportation was required as a related service. *Lincoln Elementary School District 156,* 47 IDELR 57 (SEA IL 2006).

Evaluation data requires an aide on the bus. The student's doctor reported that an EpiPen had to be administered "expeditiously" following the student's exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, "there is absolutely no way" he would survive. The administrative law judge ordered an aide be placed on the bus, further finding that:

> "Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves, and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B. Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen and thereby allow the student to avoid the above-described problems. J.B. Jr. is too young to be responsible to monitor himself and to administer his own EpiPen. Therefore, a nurse, aide or other trained adult is required for those purposes." *Manalapan-Englishtown Regional Board of Education,* 107 LRP 27925 (SEA NJ 2007).

An important distinction: "Parentally-desired" vs. "Doctor-required." In a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to understand the student's medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter, opining that, "He was not aware of any acute medical indication for keeping the student home from school, and that it is

reasonable to provide *nonmedical* personnel with appropriate training in the administration of her medications." *Murfreesboro (TN) City School District,* 34 IDELR 299 (OCR 2000).

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

Is unlimited water fountain access the only solution?
North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002).

A common problem encountered by schools is a disability related need and a parent's strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student's ability to stay on task. To provide proper hydration while maintaining the student's presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified "hygiene" reasons and logistical concerns about refilling it, the parent agreed to the accommodation and OCR determined the matter closed.

When accommodation goes too far … You can use a calculator, just not THAT calculator. A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. "The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. **If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires."** The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. *Sherman v. Mamaroneck Union Free School District,* 39 IDELR 181, 340 F.3d 87 (2d Cir. 2003).

When the demands are complex and data incomplete. Does the child who must be shielded from a wide variety of allergens at school (according to the doctor's letter) live a life at home that seems unconcerned with exposure? That is, what does the child do when she is not in school? Does she go to the mall, play outside or at neighbors' houses, go to church? Does the child play at the park, go to the zoo? If the child's home life is very different in terms of reaction to allergens, another issue may be present. A hearing officer's decision from Oregon is instructive. A.E., was a female student with, according to the parents, severe chemical sensitivities and allergies. Throughout the school's relationship with the student, the parents and student's physician were vague in identifying "what if

anything within the school buildings was adversely affecting A.E." In (over)response to the vague concerns, the school made considerable changes to the school building, installed fans, air filters, changed the types of chemicals, paints and cleaning supplies it used, and the schedule under which it used them, and even built a "clean room" where A.E. could go to recover from exposure to whatever it was that bothered her. The school became suspicious when it noted the variety of activities A.E. was involved in outside of school, with no resulting physical reaction. "Apparently, she was not able to go just anywhere, but she was very capable of being around other people in settings which were seemingly much more polluted than various parts of the school buildings." The hearing officer summarized the suspicions.

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

The hearing officer agreed that the inconsistencies were evidence that the disability was not what the parents would have the school believe. Further problematic was her rejection of tutors sent by the school to her home during periods when she did not attend school. The hearing officer believed that A.E. simply did not want to be subjected to the structure of school. "Keeping in mind that this is a very intelligent young woman, she also is very assertive, and she sometimes informed her tutors that they did not pass the 'sniff test' and therefore they could not come into her home, that she did not want to take tests or respond to questions or be required to do certain assignments, or take certain subjects in the prescribed order, or for that matter take some classes that are required for graduation of all." *Id., at 511.* In essence, A.E., with the help of her mother who also suffered from multiple chemical sensitivity, used an amorphous, confusing set of allergies or sensitivities as a school avoidance technique. *Salem-Keizer School District,* 26 IDELR 508 (SEA OR 1997).

III. Section 504 Accommodations in Accelerated Classes

Any discussion of accommodations in accelerated classes (here, shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated Dec. 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the other assumption, commonly articulated by some parents, that disabled students are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the "accelerated" nature of the class. The letter does seem to recognize limits to accommodations, but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (12/26/07)*(Hereinafter, "Dear Colleague" or "2007 Letter").*

IDEA and Section 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 in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur." *Dear Colleague, p. 1*, *(emphasis added)*. 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., (emphasis added)*. 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.").

What if the parents don't like the school's decision? Will OSEP or OCR get involved? These two offices of the U.S. Department of Education have very limited jurisdiction over accelerated programs. "The Office of Special Education Programs has no responsibility for 'gifted' and 'talented' students with the exception of any student who, consistent with IDEA, has a disability and requires special education and related services." *Letter to Anonymous,* 22 IDELR 454 (OSEP 1994). Similarly, OCR's jurisdiction over accelerated programs would be limited to ensuring that federal civil rights laws are not violated in admission or benefit from these programs.

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. OCR wrote:

> "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 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 Section 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 Section 504 plan cannot be denied access to an accelerated class or program because he has an IEP or Section 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 Section 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 Section 504 violation when the school refused to apply a student's existing Section 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.")

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 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).

IV. Complications to Accommodation: 'Unfair Advantage' Claims and Hostility to Accommodation

On July 25, 2000 the U.S. Department of Education, through the joint efforts of the Office for Civil Rights and the Office of Special Education and Rehabilitative Services issued a letter warning schools about the need to address harassment based on disability. The letter is the result of concerns

communicated to the department by parents and advocates, substantiated by focus groups conducted by OCR & OSERS on the "often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats and bullying, to sexual and physical assault by teachers and other students." The USDE reminds districts that disability-based harassment is a form of discrimination under both Section 504 and Title II of the ADA. With reference specifically to Section 504, the USDE is concerned that disability harassment may result in denial of FAPE to a student or may deny him an equal opportunity to education.

In the past, school efforts to accommodate disability seemed complicated primarily by logistics and the need to convince the occasional reluctant school employee to comply. Unfortunately, an increasingly difficult problem arises when a student's accommodation plan requires the cooperation and support of his nondisabled peers and their parents. While the required cooperation is often (thankfully) given freely, a growing body of case law reflects a backlash: anger and advocacy by the parents of nondisabled students objecting to accommodations for others. At times, the backlash is in response to accommodations that seem overly intrusive in the lives of the nondisabled population (limits on what foods can be brought to school, requests that certain scents or perfumes not be used) or seem excessive (hosing down a road in front of a school after a horse passes by) or because the accommodation is seen as creating an unfair advantage. A few cases provide a feel for this problem.

A. Accommodation and Unfair Advantage

While the time and place for the "unfair advantage" argument certainly exists, the "fairness" piece is typically the argument's downfall. **Pretty consistently in the case law, unfairness is alleged in a way that conveniently ignores the negative impact of disability and the evaluation data demonstrating that the accommodation is appropriate. That, of course, is exactly the problem.** If the accommodation is not in fact required due to the impact of disability, the accommodation is, to the extent it makes the competitive task easier or provides an advantage, fundamentally unfair. The most high-profile analysis of the argument was conducted by the U.S. Supreme Court.

Casey Martin's golf cart
PGA Tour, Inc. v. Martin, 532 U.S. 661, 103 LRP 26208 (2001).

Casey Martin was a professional golfer. Because of a degenerative circulatory disorder, Martin experienced severe pain and atrophy in his right leg and was unable to walk the 18-hole course. Walking caused him pain, fatigue and anxiety (since he was at significant risk of hemorrhaging, developing blood clots, and "fracturing his tibia so badly that an amputation might be required"). PGA rules generally require competitors to walk the course during tournament play. Martin's request to use a golf cart was denied, based on the PGA's position that "walking is a substantive rule of competition, and that waiving it as to any individual for any reason would fundamentally alter the nature of the competition." As a result, **the PGA denied Martin's request without making any attempt to review the medical evidence provided by Martin in conjunction with his request, and without any attempt to consider Martin's personal circumstances and the impact of the walking rule as applied to him.** Martin sought an injunction in federal District Court under the ADA, and prevailed. The District Court determined that the walking rule existed to inject fatigue into the skill of shot-making. It also found that the rule generally had little effect, as the fatigue caused by walking the course, under normal circumstances, was not significant. The particulars of Martin's situation, however, evidence the short-sightedness of the PGA's position. **"Martin presented evidence, and the judge found, that even with the use of a cart, Martin must walk over a mile during an 18-hole round, and that the fatigue he suffers from coping with his disability is 'undeniably greater' than the fatigue his able-bodied competitors endure from walking the course."** Allowing Martin to ride would not then fundamentally alter the game, since he would still experience more fatigue than those

who walked. The 9th Circuit, on appeal by the PGA, agreed, prompting the appeal to the Supreme Court.

The Supreme Court, after a bit of fancy footwork to establish that the PGA was subject to the ADA, fell in line with the previous court rulings. Despite the PGA's argument to the contrary, the Supreme Court determined that the walking rule or "no cart rule" is not an essential attribute of the game of golf. Nor did it matter that the rules exist, according to the PGA, to guarantee that each competitor will play under exactly the same conditions so that only an individual's ability will determine the winner. The Supreme Court didn't buy it, concluding, "Changes in the weather may produce harder greens and more headwind for the tournament leader than for his closest pursuers. A lucky bounce may save a shot or two." **In short, pure chance may have a greater impact on the game than the walking rule.** The walking rule does not significantly impact the outcome of golf.

Even if the walking rule had impact, the District Court's finding that Martin was more fatigued due to disability than those who walked would mean that, **as applied to Martin, the walking rule was unnecessary and that an accommodation could be made without unfairly impacting the game.** "A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires." In short, faced with the medical evidence and a request for an accommodation by Martin, the PGA should have made an individualized inquiry into the request. **"Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or a waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable."** The PGA loses.

A little commentary: This unfairness analysis has been applied directly to accommodations in the educational arena, where a school very similarly appears to make the claim of unfairness without much factual support. *Hornstine v. Township of Moorestown,* 39 IDELR 64 (D.N.J. 2003)(The facts and additional analysis are provided later in these materials.)

> "As in a professional game of golf, it is impossible to guarantee that a student's educational abilities will be the sole determinant of academic success in a highly regarded and competitive high school. Teachers employ different grading standards, even those who teach the same course. Indeed, grading itself is often subjective and, thus, the same teacher may grade differently two students in the same class who are performing substantially at the same level. This is particularly true when the students are gifted and the distinction between performances is slight. Students have different technological support available to them in their homes, or may enjoy the benefit of an older sibling or parent to assist them. The permutations are endless; the playing field for students rarely is the same. Furthermore, as described above, the specific allegations of unfair competitive advantage alleged by defendants have been substantially refuted by plaintiff. Just as the disabled golfer in *Martin* did not receive an unfair competitive advantage from his accommodation, neither did plaintiff receive an unfair competitive advantage from her accommodation."

Doesn't an academic accommodation change the rules in accelerated classes? Not here …
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 Section 504 accommodations in honors classes. During the 2005-06 school year, the student was determined eligible for Section 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 ninth-grader) enrolled in honors English and algebra, but in a Section 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 Section 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 Section 504 coordinator was that:

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

A little commentary: An important fact here is that honors English and regular English classes cover the same material — there is no difference in the underlying curriculum between the two classes. The difference seems to be that the honors class requires "a more intensive study of composition (especially persuasive essays) and literature." Consequently, extended time would not seem to have much impact, as highlighted by the honors classroom teacher asking how much extra time the student should receive (presumably asked with the intention of providing the amount required). The case could be much more complex were the honors class to require significantly more reading and more written work, as opposed to "more intensive study" or intensive analysis. When the extra curriculum required by an accelerated class is impacted by the accommodation, the extent or scale of the accommodation (even if appropriate) can impact whether the accelerated class really is accelerated following the application of the accommodation. Note finally that both the Section 504 coordinator and superintendent of schools (who rejected the student's grievance on the accommodation issue) were required to take additional Section 504 training.

Unfairness in a private school case under the ADA's 'reasonable accommodation' standard
Doe v. The Haverford School, 39 IDELR 266 (E.D. Pa. 2003).

The student at issue is an 11th-grader with sleep apnea and "phase-delayed syndrome" (a sleep cycle from 3:00 a.m. or 4:00 a.m. to noon) seeking substantial accommodations at his private school under the ADA. Specifically, he argues that he should be promoted to 12th grade despite his failure to meet the school's promotion criteria. The private school granted a variety of requests for extensions of time to complete course requirements and granted him incompletes rather than failing grades. Nevertheless, the student failed to complete the required coursework and demanded the additional accommodations at issue here. The school refused to further accommodate, arguing that to do so would result in a lowering of its academic standards, a result not required under the ADA's reasonable accommodation standard.

> "The plaintiff requests in excess of five additional months to complete schoolwork from the third quarter and in excess of two additional months to complete schoolwork from the fourth quarter for four courses. Allowing the plaintiff this much extra time to complete his work can rationally be viewed as lowering Haverford's academic standards. …

> Allowing the plaintiff to make up quizzes, tests and exams months after his classmates completed these tasks gives the plaintiff months of preparation that his classmates did not have. Although tests are designed to test what a student knows, part of taking the tests and part of the educational process is to prepare to take quizzes, tests and exams in a timely fashion. Haverford's conclusion that avoiding those parts of its educational requirements lowers its academic standards is a decision for the school to make. …
>
> Ordering the modifications the plaintiff requests would place the court in the untenable position of telling Haverford what courses can be required, how much time students have to complete their work, and when the school teachers are required to work. The court will not substitute its judgment on these matters for that of Haverford. …"

A lot of commentary: While the analysis is intriguing, the case is decided under reasonable accommodation analysis (which includes analysis of whether the accommodation fundamentally alters the nature of the school's program) rather than the FAPE standard that applies to the public schools. It is the author's belief that where there is a difference between the regular curriculum and the curriculum of an accelerated class, the impact of the accommodation on the student's responsibility for the additional curriculum (beyond that in a regular class) must be considered or the student with a disability may receive an unfair advantage in a weighted class (accommodation might allow him to perform less than the above-grade level curriculum). Note that the 2007 OCR letter (discussed previously) uses the word "generally" to precede the rule on accommodation, perhaps saving for another time analysis of situations where the accelerated curriculum is not, in fact, the same as the regular curriculum. In that situation, the accommodation would seem to transform to a modification (a reduction in expectation or curriculum standards).

Another key element in the decision is the court's reluctance to second-guess the educational judgments of the private school. "Courts are reluctant to disturb academic decisions of educational institutions. *Regents of the Univ. of Michigan v. Ewing,* 474 U.S. 214, 226, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985). The plaintiff is correct that the rule of deferring to academic judgments was developed in the context of a student's due process challenge. Courts of Appeals, however, have extended this rule to cases where a student brings an ADA or a Rehabilitation Act challenge. *See, e.g., Zukle,* 166 F.3d at 1047-48 (9th Cir. 1999); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141, 153 (1st Cir. 1998); *McGregor v. Louisiana State Univ. Bd. of Supervisors,* 3 F.3d 850, 858-59 (5th Cir. 1993); *Wynne v. Tufts Univ. Sch. of Med.,* 932 F.2d 19, 24-26 (1st Cir. 1991)." Consequently, should the school determine, on the basis of educational criteria, that an accommodation in an accelerated class would lower the academic standards (from an accelerated class to that of a regular education, grade level curriculum class), OCR's position on accommodation would then seem to reduce expectations (something that IDEA can accomplish by replacing grade level curriculum with goals and objectives) rather than level the playing field. While the argument has been made in the FAPE context *(see Wilson County* and *Hornstine, supra*), the facts have yet to support the claim.

Beware the 'unfair to the other kids defense'
Livingston Township Bd of Educ, 40 IDELR 111 (SEA NJ 2003).

The student had a physical disability substantially limiting his use of his arms and upper body. He had received a variety of accommodations for purposes of accessibility (physical facilities changes in doors, water fountains, restrooms, extra time on tests, and ability to keep a set of textbooks in class so as not to carry them from class to class). For the year in question, he was also to receive textbooks on CD and teacher assistance for securing classroom notes. The student earned all A's in ninth grade, and B+ grades in 10th grade, where these issues arose. Because of his physical impairment, notetaking was a challenge for the student. During the 10th grade year, various somewhat halfhearted efforts to secure either student notes or teacher notes/outlines failed. **Finding that notetaking skills are "very valuable**

and important for all students to master in the higher grades as well as to prepare for college," the ALJ determined that despite the passing grades, the student was denied adequate notetaking assistance. In her order the ALJ required that notetaking must be provided in every substantive class. If a student is unavailable or unwilling to serve, an adult scribe must be used for that class.

A little commentary: The result seems curious on its face, as requiring a notetaker will not help this student learn how to take notes. Isn't that the valuable skill he was being denied? Isn't that why his good grades don't influence the decision of whether his program was appropriate? In fact, the argument could be made that outside notes will undermine the student's ability/need to develop compensatory skills such as shorthand or some other method of quick notation. So why this result? Bad facts make bad law. The ALJ seemed bothered that the district focused its defense on the difficulty of providing what the parents requested (students won't share notes), and on the fairness to other students of the additional help for this student. It also appears that the Section 504 plan was not well-supervised between meetings. Further complicating this decision is a serious dysfunctional relationship between parent and school. That relationship, the ALJ's misplaced reliance on IDEA doctrine and analysis, and the school's tactical errors explain the decision. Of further interest is that the student's twin sister is in the same classes as her brother, but the parents refused to allow her to be a source of notes for her brother. The fact appears in the decision without elaboration by the ALJ, except to say that the brother didn't like her notes because they were "too detailed."

B. Hostility to Accommodation

When other parents are angry that a student with disability becomes valedictorian
Hornstine v. Township of Moorestown, 39 IDELR 64 (D.N.J. 2003).

The student, a senior at the time of the dispute, suffered "substantial fatigue" from an unspecified physical impairment. She was unable to attend school for a full day, and was provided, by IEP, "a hybrid program that allows her to attend morning classes and receive the remainder of her instruction at home." Under this hybrid approach, she took many honors classes with weighted grades, and was poised to be the class valedictorian until community unrest about her "unfair advantage" together with a new superintendent resulted in a proposed policy change (which would apply retroactively) under which the school board would have discretion to name multiple valedictorians or could award the honor to someone other than the student with a disability. Before dismantling the unfairness argument, the court gives us an idea about how the decision is going to go.

> "Given that this case has generated a firestorm of controversy, it is important to emphasize at the outset what this case is not about. First, it is not about whether plaintiff is disabled; that is undisputed by defendants. Second, it is not about the appropriateness of the accommodations plaintiff received through her IEP; she was afforded these accommodations by the board to level the academic playing field for her, and in fact, her achievements are a model example of a successful IDEA program. This case is about an outstanding student who overcame the hardships of her disability to achieve the best grades in her class, and who is now in danger of having her accomplishments tarnished by her own school's administrators in the name of rectifying an imagined injustice."

The main push for the policy change seems to have been made by the new superintendent, apparently in response to "'parents, students and other community members' expressing concern that 'students were not provided equal opportunities to earn awards because plaintiff was granted accommodations in a disparate manner.'" In response to the pressure, the superintendent appears to have embarked on an investigation into the student's disability, accommodations and academic record in order to document the unfairness. Complaints included allegations that she had access to more AP courses due to home instruction, was able to get higher grades in classes than students attending the high school, and that home instructors did not grade as harshly as the faculty at school. Each example raised by the school

was addressed head-on by the District Court, giving the impression that the allegations were an after-thought invented once the outrage was already burning. For example,

> "Plaintiff's IEP specifically states that 'standard grading practices will apply' and 'grading in home instruction classes will be determined by the home instructor in conjunction with the regular class teachers.' In fact, in one of plaintiff's home instruction courses, AP calculus, she was required to take chapter tests graded by her home instructor as well as the same midterm exam as her nondisabled classmates, graded by the in-school instructor. Plaintiff received an A+ on the in-school exam, and an A average on her home instructor's tests. Her home instructor stated in a certification that, '[i]n retrospect, perhaps my grading is actually more rigorous than the school's own' grading." *(internal citations omitted)."*

Similarly, the hybrid program resulted in plaintiff not being able to take AP biology at home (as she could not complete the lab component) nor honors national government (no suitable home instructor was available) resulting in her taking unweighted courses instead. The student wins, and the new valedictorian policy is rejected by the court.

A little commentary: Note that the school's argument that the parent manipulated the IEP process in order to inflate the student's grades was easily ignored by the court, since the school was responsible for the IEP. "Thus, whether or not Mr. Hornstine intended to manipulate the system is immaterial: the board approved every aspect of plaintiff's curriculum through her IEP." In essence, the school can hardly complain, after the fact, that the accommodations and services were excessive and resulted in inflated grades for the plaintiff. Further, the school never disputed the student's impairment (in fact, its own doctor agreed that full-time attendance was inappropriate based on her condition). Instead, administration and the board seem to have been swept in the controversy rather than standing up to it. Says the court:

> "In summary, it appears that Superintendent Kadri and the board initially attempted to appease the interests of some parents and students in the school community by reviewing plaintiff's academic history to confirm that she had fairly earned the valedictorian award. In so doing, however, defendants adopted the assumption that somehow plaintiff's disability and accommodations have given her an academic advantage over other students. **They have lost sight of the fact that plaintiff, unlike her peers, suffers from a debilitating medical condition, which has never been disputed by the board, and that her accommodations were aimed at putting her on a level playing field with her healthy classmates.** Defendants should revel in the success of their IDEA program and the academic star it has produced; instead they seek to diminish the honor that she has rightly earned. Regrettably, this issue has polarized the graduating class and the community — most of whom are uninformed about the facts and the law. In light of that, I want to make clear that the evidence in this case has shown that Ms. Hornstine earned her distinction as the top student in her class in spite of, not because of, her disability."

When other parents protest accommodations and refuse to cooperate
Smith v. Tangipahoa Parish School Board, 46 IDELR 282 (E.D. La. 2006).

The principal of a Louisiana school found enforcement of a ban on horses (due to a student's allergy to horse hair) difficult to enforce. In an effort to enforce the campuswide ban on horses, the principal "called a deputy in to help and personally stood in the roadway to attempt to stop the horses from proceeding," but that "[t]he parents refused to stop and proceeded down the road, and the deputy had to pull [the principal] out of the way." Further, in response to the campus administration's decision to cancel their reward to the students for good attendance during test week (both the principal and assistant principal promised to ride their horses to school), a campus parent passed out fliers urging them to reconsider. "In the flier, she urged all parents to contact Browning and

members of the school board and voice their support for Browning and the vice principal's decision to ride horses to school on March 24. Although the flier did not identify plaintiffs or any of their children by name, the flier stated that there was a child allergic to horse hair who threatened cancelation of the event and noted that '[t]his same parent caused our students to miss out on a beautifully decorated library during the Book Fair about two years ago, when the theme was western, and saddles, etc. had to be removed for ONE child.'" That flier, together with vandalism of the student's home, and group of citizens in a car yelling "horse hater" to the child's parent, were characterized as retaliation by the school, despite the fact that there was no evidence that the school in anyway encouraged or promoted these activities.

When other parents ask a lot of questions, is it disability harassment?
Pacific Grove (CA) Unified School District, 47 IDELR 138 (OCR 2006).

Parents of students in a third-grade class complained and questioned the efforts of the school to accommodate a classmate with a life-threatening allergy to nuts. The student qualified for special education as Other Health Impaired. On a daily basis, the school vacuumed classroom carpet, washed all classroom desks, required hand-washing by anyone entering the room, and maintained the classroom food-free. Parents and students asked a lot of questions about the accommodations and why things were occurring. Generally, the tone was not hostile, although the parent of the student with allergies reported hostile looks, and "third-grade parents unnecessarily calling her and being rude."

> "In order for the classroom program to work effectively and result in a reasonably safe environment for the student, the voluntary cooperation of other students and their parents was essential. Part of this process was an ongoing dialogue and informational process. The other participants were being asked to alter their customary behavior in ways that were novel and restrictive of their personal preferences. It is reasonable that, without animus or a discriminatory purpose, they might question the necessity of the procedures they were being asked to follow.
>
> Much of the behavior identified by the complainants represents reasonable inquiries on the part of parents and their children who were participants in the classroom to which the student was assigned. In many cases, the questioning by parents and students were made to student's mother and her aide. It appears that this was done to avoid questioning the student directly, in most cases.
>
> The evidence shows that the district took reasonable steps to inform the affected students and their families as to the nature of the modifications to their educational environment and to explain the necessity for the changes. When it appeared that additional information was required, the district provided forums to supply information, in a manner consistent with the voluntary nature of public education and the district's legal obligations under Title II and Section 504."

These inquiries and communications from parents were not harassment.

School liability for disability harassment depends on the school's response
Greenport (NY) Union Free School District, 50 IDELR 290 (OCR 2008).

When harassing conduct victimizing a student because of disability occurs, **OCR will determine "whether the school took prompt and effective action that was reasonably calculated to stop the harassment, prevent its recurrence and, as appropriate, remedy its effects."** On these facts, each alleged act of disability harassment was addressed appropriately by the school. The case addressed harassment targeting two siblings with severe peanut allergies. The first occurrence (a student called one of the siblings "peanut butter boy" and offered him peanut butter) was addressed by a verbal reprimand from the school counselor and a call to the harasser's parents. A second incident (a student said she would go to the store, get peanut butter, and smear it all over one of the siblings, and assaulted

one of the siblings) was addressed by parent conference, detention, and removal from chorus. Other students involved in the incident received detention and parent conferences. Campus administration also met with the fifth- and sixth-grade classes about threats and teasing related to the peanut butter allergies. A third incident was alleged but could not be substantiated following the principal's investigation. No violation was found for harassment by the district (although the school was required to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints).

Note that the objections are not without some support in the case law. "The purpose of the Rehabilitation Act of 1973 is to prevent discrimination against disabled persons and, if necessary, to add things to the environment to permit greater participation by the disabled — elevators, bathrooms, signs, more time on examinations for the learning disabled, flexible work schedules for the mentally ill, etc. **There is nothing in the act to suggest that the nondisabled population was expected to give up or substantially alter their lifestyle.** There is nothing in the act to suggest that Congress intended the nondisabled population at St. Peter to stop wearing scented products so that one child could avoid the possibility of an allergic reaction. If Congress did so intend, it will have to say so with greater clarity given the revolutionary quality of such a policy." *Hunt v. St. Peter School,* 26 IDELR 6, 11 (W.D. Mo. 1997)*(emphasis added). See also Cascade School District,* 37 IDLER 300 (SEA OR 2002)(Hearing officer rejects a blanket prohibition on parents sending homemade treats to school to protect a student with a severe allergy to nuts. "Moreover, sending a note home to classmates' parents twice a year informing them of 'the policy of no peanut or tree nut products allowed for parties, activities, etc.,' and that 'No food will be accepted without a label' creates a de facto policy prohibiting entrance in the classroom, and by extension the entire school, of any product of any type, food or otherwise. Such a blanket prohibition on other parents sending homemade treats is unacceptable interference in the individual rights of parents to raise their children as is appropriate for their culture, beliefs, languages and finances, even if a list of ingredients (label) for homemade treats is included with the treats, and goes beyond the standard applicable here.")

A little commentary: While the position taken in the *Hunt* and *Cascade* cases is perhaps a bit harsh, it does point to a major problem of controlling the behavior of other students or parents in a child's IAP or IEP. *See, also Brannick v. State of New Jersey,* 106 LRP 65531 (D.N.J. 2006)(Faced with a request from a litigant that "on the days when she was to appear in court, that no one would be permitted to wear scented products or carry tobacco or smoke fumes on their person or clothing," the court agreed in part and refused in part. "As a facility whose courtrooms are open to the public, the court could not 'dictate the habits' of people in attendance; however, the court was able to accommodate Brannick's request for a controlled environment by enabling her to participate in the proceedings via video conference.") The court's language shows the same reluctance to control the general public that schools sometimes feel when faced with demands for bans on scents or certain foods at school. A critical difference, of course, is that schools are far less open to the public than courthouses (although principals have substantially less authority than judges). Schools already impose dress codes, limit the things that students can bring to school, and increasingly screen visitors routinely before allowing them into classrooms.

Bottom line: For some Section 504 accommodations to work, a base level of cooperation by nondisabled students and their parents is required. Schools must seek to achieve this cooperation through FERPA-appropriate communications with the school community. Where opposition is vocal, schools should be especially wary so as not to support efforts to frustrate required accommodations. For the school to avoid responsibility for acts hostile to accommodation, school employees and policy cannot be seen as supporting or encouraging the hostility. Further, disability harassment rules require the school to take action reasonably calculated to stop actions by students or parents that jeopardize the delivery of FAPE under Section 504 or IDEA.

V. Revocation of IDEA Consent and 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, the USDE 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 (2008).

In the absence of a direct answer from USDE, 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 Section 504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under Section 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 cannot 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 Section 504, and thus, schools would have no obligations under Section 504 to children whose parents revoked consent to IDEA services. *See, e.g., 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 (2008) (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 USDE warn of the loss of manifestation protection if every student for whom consent were revoked is entitled to manifestation determination due to 504 FAPE eligibility?

Further, USDE 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 (2008).

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 these "epiphany" moments where the parent realizes the impact of revoking consent for special education. A long, slow, painful educational journey (with Section 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, the USDE makes this 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 nondisabled children **under relevant state standards."** 73 Fed. Reg. 73,012 (2008) (emphasis added).

Bottom line: While there is difference of opinion on the issue, the "no residual FAPE in Section 504" position makes the most overall sense, but the USDE must resolve the issue, having declined the opportunity to do so in December 2008. Talk with your school attorney to determine how your school will respond to this issue. A good, safe position is to adopt a policy of reviewing these situations on a case-by-case basis.

VI. Miscellaneous Cases

This isn't IDEA: The district of residence has the Section 504 duty to evaluate
West Seneca (NY) School District, 53 IDELR 237 (OCR 2009).

The parent of a private school student with migraines complained to OCR that the school district where her daughter's private school was located had the duty to conduct a Section 504 evaluation. OCR disagreed, recognizing that while special education has such a rule, in the Section 504 world, the district of residence has the duty to evaluate.

You have to implement the Section 504 Plan
Ewing (NJ) Public Schools, 53 IDELR 166 (OCR 2009).

The parent alleges three types of failure by school staff to implement the student's Section 504 Plan, and OCR found the school in violation on two of the three allegations. Several teachers had failed to check or otherwise assist the student in maintaining his agenda, and another teacher failed to properly contact the student's parent by phone or e-mail with progress reports as required by the plan. To resolve the complaint, the district agreed to monitor plan implementation.

A little commentary: What makes this case truly interesting is that the parent had filed an OCR complaint against the school in the fall of 2003. His fourth allegation in this filing is that the teachers were refusing to comply with the plan in retaliation for his previous filing six years earlier. *If only they had*

remembered, thinks the school attorney, perhaps they would have made more of an effort knowing that the parent would be watching. Compliance is a school duty, not the duty of the parent. It does no good to identify, evaluate, and create a plan for the student if the plan will not be implemented. OCR found no retaliation.

The confusing relationship between Section 504 and IDEA
Ellenberg v. New Mexico Military Institute, 52 IDELR 181, 572 F.3d 815 (10th Cir. 2009).

According to the 10th Circuit, a student's IDEA eligibility does not also automatically include eligibility under the lower eligibility standard of Section 504. "Thus, eligibility for special education and having an individualized education program under the IDEA demonstrate a child's disability, but that disability is not necessarily one that 'substantially limits' the major life activity of learning. As a matter of law, therefore, Ellenberg cannot rely on the IDEA alone to make her prima facie discrimination claim under Section 504. Instead, she must offer evidence and arguments from that evidence showing her disability is substantial in the context of the major life activity as a whole. She failed to do so here and the district court correctly granted summary judgment."

A little commentary: Oddly, the opinion fails to reference the expanded eligibility under Section 504 arising from the ADAAA, and in fact does not appear to recognize the ADAAA at all. The U.S. Department of Education's position on the matter is quite plain. "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 cannot 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)(emphasis added).

Denial of FAPE for failure to identify? But the student wasn't failing …
Cleveland County (NC) Schools, 110 LRP 4643 (OCR 2009).

During a parent-teacher meeting early in the student's third-grade year, the parent informed the teacher that the student had been diagnosed with ADHD, and that the doctor had advised the parent to seek placement in Section 504 so that the student could receive accommodations for end-of-year tests. The teacher indicated that she had not observed any signs of ADHD. The parent provided no documentation of the diagnosis. Within a few days, the teacher passed on the evaluation request to the guidance counselor who reviewed the student's grades thus far, but looked at no other data and was unaware of the medical diagnosis that triggered the requested evaluation. The review of grades revealed "Reading — C, Spelling — A, Mathematics — A, and Science/Health — B. For his writing grade, the student was rated as 'Progressing' and he received a 'Satisfactory' grade in personal development, with a notation that he 'pays attention and follows directions, follows all rules and procedures.'"

The guidance counselor informed OCR that: "She decided that the student was ineligible to receive 504 services based on her review of his grades, which she considered to be good. She made the decision alone. The teacher then reported by letter to the parent that the student did not qualify for a Section 504 plan because he does not have 'a major deficit problem in *most* or *all areas.*'" *(emphasis in original).* Further, the teacher wrote that the student would have to receive Ds and Fs in his classes "in order to prove his ADD [sic] was affecting his classroom learning."

OCR found that the district did not follow proper procedure in determining Section 504 eligibility. The decision was made by one person (not the required group of knowledgeable people), only grades were utilized as data (the doctor's diagnosis and other data were not considered), and the parent was not provided procedural safeguards. Note OCR's commentary on the guidance counselor's reliance on grades:

"OCR is concerned that the school's apparent reliance on the student's grades/educational performance alone in making its evaluation decision is inconsistent with the definition of 'disability' set forth in the Section 504 regulation, and with recent amendments to the ADA and Section 504 (which, notably, were not in effect at the time of the school's evaluation decision). It appears that the school did not consider whether the student was substantially limited in a major life activity in determining whether the Student could be eligible to receive services under Section 504. Rather, the school decided that the student was ineligible to receive services under Section 504 simply because he did not earn failing grades (Ds and Fs) in his classes."

A little commentary: The guidance counselor here articulated what many public school employees are thinking as they approach Section 504 eligibility. OCR has been faced with this issue many times before, as parents have complained about unwritten school policies that restrict Section 504 plans to students who are failing, but rarely has OCR found a school willing to admit such a policy or practice. To resolve the complaint, the district agreed to evaluate the student, and if found eligible, determine whether compensatory services are necessary. The school also agreed to train administrators on the campus, including guidance counselors on relevant Section 504 rules and procedures including the ADAAA.

The use of IDEA's in-school suspension rule for Section 504 students
Fox (MO) C-6 School District, 109 LRP 54751 (OCR 2009).

IDEA provides that under certain circumstances, in-school suspension days do not count toward the 10 cumulative removal days after which a pattern of exclusion may be found. Note the interesting language here:

"The District's 504 Procedures Manual, at the beginning of the second sentence under the heading Discipline of Section 504 Disabled Students, states, 'When a student is suspended, out of school, for more than 10 consecutive days. ...' The District should remove the phrase 'out of school' because, if serving an in-school suspension has the effect of denying a student the regular or special education and related aids and services the student is required to receive, pursuant to a 504 plan, in order to be provided a FAPE, the in-school suspension constitutes a removal of the student from his or her placement."

The language seems to suggest that the in-school suspension of a Section 504 student may not count toward the 10 cumulative days if the same conditions are met allowing an IDEA student's time in in-school suspension not to count.

Reasonable Accommodation or FAPE (it depends on who you ask)
Rim of the World (CA) Unified School District, 109 LRP 27323 (OCR 2009).

While the federal courts tend to apply the reasonable accommodation standard in K-12 Section 504 cases *(See, for example, J.D. v. Pawlet School District,* 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000), OCR has consistently maintained that **"reasonable" is not the standard for K-12 FAPE.** "OCR reviewed the district's Section 504 FAPE policies, procedures and forms. OCR found two documents that indicate that the district utilizes legal standards that are inconsistent with Section 504 and Title II. The district's Section 504 handbook at Page 14, limits FAPE to 'reasonable accommodations. … The 'reasonable accommodations' legal standard is not applicable to FAPE under Section 504." *See, also Response to Zirkel,* 20 IDELR 134 (OCR 1993)(In response to a question on the subject, OCR concluded that reasonableness is not a factor in Section 504 FAPE on elementary and secondary campuses. "The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education a 'reasonable accommodation' standard, or other similar limitation. The clear and unequivocal answer to that is no.")

What is the statute of limitations for a Section 504 claim?
Peters v. Bd. of Trustees, Vista Unified School District, 109 LRP 76647 (S.D. Cal. 2009).

"Neither the ADA nor the Rehabilitation Act, the only remaining federal claims, includes its own statute of limitations. When a federal statute does not contain a statute of limitations, federal courts routinely borrow analogous statutes of limitations of the forum state. *Hardin v. Straub,* 490 U.S. 536, 538 (1989)." Plaintiff instead argues that the federal catch-all limitation period applies. The generic limitation period, found at 28 USC § 1658(a), provides, "Except as otherwise provided by law, a civil action arising under an act of Congress enacted after the date of the enactment of this section may not be commenced later than four years after the cause of action accrues." The statute applies if the claims arose under an act of Congress enacted after Dec. 1, 1990. Since the plaintiff maintains that his claims arise under the ADA Amendments Act of 2008, but are based on events occurring prior to 2003 — years before the enactment of the ADA Amendments Act of 2008, plaintiff's ADA and Rehabilitation Act claims do not arise under the ADA Amendments Act of 2008, and California's three-year statute of limitations applies.

Eligibility and student transfers, parents as necessary team members?
Sequoia (CA) Union High School District, 110 LRP 4676 (OCR 2009).

A student with ADHD transferred to the district already Section 504-eligible. While the new district had the right to conduct its own evaluation and make its own eligibility decision, it "with limited exception, failed to implement the student's Section 504 Plan from the sending district while its own evaluation process was pending." OCR likewise found the group of knowledgeable persons incomplete.

> "The district convened a team of persons knowledgeable about the student, but it did not include the student's parents, as is the routine practice, even though the parents were necessary in this case for the evaluation process. By excluding the parents, the district was limited to in-class performance without knowledge of things such as how long the student took to complete homework assignments at night, his adaptive behavior at home as it related to his experiences at school, or the degree of parental intervention in homework assignments."

The statement is interesting for it focuses on "the routine practice" but does not identify it as routine for the new school (in which case it would seem to have more impact) as opposed to routine throughout some geographical area. It also seems clear that when a student is new, and there has not been a great deal of interaction with the parent, and parent input is not otherwise provided, important knowledge may be missing from the group. OCR determined, in essence, that based on the same data available to the sending school (where the student was determined eligible) the new school found the student ineligible. That should not be much of a surprise to most educators, as the subjective eligibility standard of Section 504 has generated a number of similar results. The problem, however, was the lack of interim services.

> "It is of course, reasonable for two sets of professional educators to reach contrary opinions looking at the same student. But the district was not entitled to cease services in the meantime, limit parental input to a questionnaire, or confine itself to one major life activity, learning. Nor could it fail to take into account the positive impact of its own interventions."

As part of the resolution agreement, the district will provide training on transfer situations, academic success and eligibility, and the need for parents to be members of the Section 504 team as the child's needs demand. A final note, in April of the same school year, the parent informed the school that the student's medication dosage had changed and that it affected his performance — teachers were now finding him distracted and he was having difficulty in class. Two weeks later, he was determined Section 504 eligible.

A little commentary: **Again, the issue of eligibility and grades.** This time, however, the context was

mitigating measures. Note that OCR was interested in data from the parent on time spent on homework and the level of parental support provided to the student. That interest seems to mesh with this requirement for staff training agreed to as part of the resolution.

> "When considering the condition, manner or duration in which an individual with a specific disability performs a major life activity, the evaluation should not assume that an individual who has performed well academically cannot be substantially limited in activities such as teaming, reading, writing, thinking or speaking. While grades may be a legitimate factor in the range of sources for an evaluation process, grades may not be used as the only source or sole determinative source of a decision that a student is not eligible under Section 504. Achievement based on informal services provided by teachers, such as extra time on exams, extensions of homework deadlines, for example, may be pertinent to evaluation of some types of impairments."

Nondiscrimination in District 'Summer Camp'
Conejo Valley (CA) Unified School District, 109 LRP 54727 (SEA CA 2009).

This decision addresses the Section 504 duty applicable to preschool programs, found at §104.38 of the Section 504 regulations. The regulation, titled "Preschool and adult education," applies to recipients that provide preschool education or day care or adult education. Such a recipient "may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits or services to be provided." The parents of a 10-year-old student with diabetes complained about inadequate services from the district to allow the child to participate in the district's summer day care program called Summer Camp. Specifically, district employees were not to "assist the student in refitting her insulin pump after swimming, readjusting the settings of the pump, or injecting the student with insulin if her blood glucose levels called for these actions, as specified by the student's physician."

The student was able to attend on-site, but was prohibited from field trips to Universal Studios, Knott's Berry Farm and Disneyland unless accompanied by a parent or someone sent by the parent to address the medical concerns beyond the services that district personnel would provide (servicing the insulin pump or administering insulin injections in case of emergency). During field trips where a parent or designee could not attend, she went to a different Summer School site and was given "substitute activities." OCR found a violation. "OCR concludes that, **although the student was not completely precluded from participating in Summer Camp, she was provided an opportunity that was not equal to that provided to other participants and, to the extent that she was allowed to go on field trips, she was subject to conditions that imposed costs on the student's family that were in excess of those incurred by nondisabled students.** Had the district fulfilled its responsibilities to make its program accessible to the Student, these limitations would not have been imposed." (emphasis added). A Section 504 violation was found and the school agreed to reimburse the parents $1,100 for expenses incurred in accompanying the student on field trips.

Elements of a Section 504 Grievance Procedure
Confluence Academy (MO), 110 LRP 4701 (OCR 2009).

While among the procedural protections provided by Section 504, the grievance procedure has historically received scant attention. In response to a complaint, the academy entered into a resolution agreement that outlines the grievance procedure the academy has promised to create. While the procedures here may exceed that required by Section 504 (as it was part of an agreement), the elements provide a nice framework for districts as they create or modify their own grievance procedure. Note also that the procedures apply to other laws enforced by OCR. The agreement provides that the grievance procedures must include the following elements and be published in such a manner that they are readily accessible to the participants, beneficiaries, applicants and employees of the academy and its programs:

a) information regarding where and how complaints may be filed;
b) provisions for adequate, reliable and impartial investigations, including notice to the accused and an opportunity for the parties to present witnesses and evidence;
c) written notice to the parties of the outcome of the investigation/complaint, including notice of remedial action taken;
d) a mechanism to appeal the outcome of the investigation and/or the action taken;
e) assurances that the academy will take steps to prevent further harassment and correct its effects, as appropriate;
f) reasonably prompt time frames for major stages of the grievance process; and
g) identification, by name and/or title, and the address and telephone number for the individual(s) designated by the academy to coordinate the academy's efforts to comply with Section 504, Title II, Title IX, and the Age Act."

The academy also agreed to provide training with respect to the term "disability" under the ADAAA.

OCR addresses the reasonableness of grievance deadlines
Rim of the World (CA) Unified School District, 109 LRP 27323 (OCR 2009).

OCR concluded that, according to district policy, a Section 504 grievance had to be filed within ten days of the incident giving rise to the complaint. OCR determined that, given the 60-day timeline of the state's education code for education complaints, and OCR's 180-day timeline, the district's 10-day timeline was "unreasonably short." By agreement, the school would replace the 10-day limitation period with a 30-day deadline. Further, the district allowed only 30 days to file with OCR — inconsistent with OCR's 180-day rule.