

IDEA FAQ: EXTRACURRICULAR & NONACADEMIC ACTIVITIES

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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 extracurricular and nonacademic activities and the student with a disability, but as an overview of the rules and some of the most frequently asked (or interesting) questions. These materials are not intended as legal advice, and should not be so construed. State law, local policy and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

I. An Overview of Relevant Disability Law Requirements

A. IDEA Requirements

In the 2004 reauthorization of IDEA, a provision was added to the section setting forth the required contents of an IEP. The language specifically addressed extracurricular activities. The language states that the IEP must include

“a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child... to participate in extracurricular and other nonacademic activities.” 20 U.S.C. §1414(d)(1)(A)(i)(IV)(bb).

The relevant 2006 federal regulation likewise includes the same requirement. *See* 34 C.F.R. §300.320(a)(4)(ii). Thus, IEP teams are required, as part of the IEP development process to consider whether a student needs supplementary aids and services, program modifications, or personnel supports, in order for them to participate in extracurricular and/or nonacademic activities. Another regulation adds that states must ensure that the IEP team addresses participation in nonacademic services:

“Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child’s IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.” 34 C.F.R. §300.107(a).

Yet another regulation states:

“In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 300.107, each public agency must ensure that *each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child.* The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child’s IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.” 34 C.F.R. §300.117 (emphasis added).

FAPE need not be implicated for these provisions to apply. The plain language of the rules does not require FAPE to be implicated. Instead, the need to address supplementary aids and services necessary for a student with a disability to participate in extracurricular or nonacademic services arises whether or not the participation is tied to, or required in order to meet, the student’s educational goals. For example, in *Independent Sch. Dist. No. 12, Centennial v. Minnesota Dept. of Educ.*, 110 LRP 58331 (Minn. 2010), the Minnesota Supreme Court ruled that the IEP of a child with autism and Tourette Syndrome had to address her need for supplementary aids and services to afford her participation in volleyball and school clubs regardless of whether participation in such activities was necessary in order to receive a FAPE. The court noted that none of the above-cited regulations required such a linkage to educational needs or FAPE in order for the student to receive supports required merely to participate in the extracurricular or nonacademic service. To the court, if participation in the student’s selected activity requires the provision of supports, the IEP team must address that need.

A little commentary: A significant question is whether the IDEA requirement exceeds that imposed under §504, or whether it merely is intended to reiterate the requirement and ensure its compliance by means of the IEP team process. Certainly, if the IEP team has to address the provision of supplementary aids and services for participation in nonacademic/extracurricular activities, even if they bear no relation to the student’s educational goals or receipt of FAPE, it would appear that the requirement applies as it is intended under §504—as a matter of non-discrimination and equal opportunity to access.

B. §504 Requirements

In addition to the IDEA provisions cited above, student eligible under the IDEA also receive the nondiscrimination protection of 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 can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

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

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

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

II. The nondiscrimination rules at work.

A. Equal notice is part of nondiscrimination.

For example, OCR found a school in violation of §504 for failing to notify a student who was receiving home instruction of a senior career interview day. The school improperly placed the burden on the student to find out about extracurricular opportunities, while OCR held that the school had a duty to notify the student in order to afford him an equal opportunity to access the activity. *Hernando Co. (FL) Sch. Dist.*, 56 IDELR 42 (OCR 2010); *See also, Metro Nashville (TN) School District*, 53 IDELR 337 (OCR 2009). Indeed, in another case, OCR held that such a notice had to be designed so that parents of students with severe disabilities would receive notice of upcoming extracurricular activities or

nonacademic services. *Polk Co. (FL) Schs.*, 54 IDELR 331 (OCR 2009). Thus, OCR found that notices in the form of a marquee and scrolling type on closed-circuit TV was insufficient to alert severely disabled students or their parents of an upcoming activity, and they were therefore unable to participate.

B. Prerequisites to participation.

Students with disabilities may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. **OCR generally approves of uniform application of eligibility requirements of school extracurricular activities.** See Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504, A Report of the United States Commission on Civil Rights (September 1997), at p. 343 (hereafter cited as “CCR Report”). Although some accommodations may be required of schools in this area, it appears that students must submit to the general behavioral, academic, and performance standards applied to non-disabled students. Clearly, disability does not offer a “free ride” to competitive sports. These rules are illustrated by letters of finding from a variety of extracurricular and nonacademic activities below.

C. The “Reasonable” Accommodation Standard

Question #1: Does a reasonable accommodation limitation apply to extracurricular and nonacademic services? Yes. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that **accommodations to allow for participation in extracurricular and nonacademic activities are subject to the “reasonable” limitation.** See, for example, *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996)(analyzed below). Thus, there is a reasonableness limit to the type and scope of accommodations that districts will be obligated to provide students to assure their equal opportunity to participate in extracurricular/nonacademic activities.

Note however, that 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.”)

“Unreasonable” Accommodations or “Fundamental Alteration. When does an accommodation in the field of extracurricular or nonacademic activities become an unreasonable accommodation? When it would require a “fundamental alteration in the nature of a program,” which in turn means “undue financial and administrative burdens.” See OCR Senior Staff Memoranda, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” 17 IDELR 1233, (OCR 1990).

For example, a 17-year-old student with Down’s Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was demoted from manager to co-manager of the varsity basketball team, was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change,

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

Question #2: What can we learn about fundamental alteration from Casey Martin's golf cart? *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (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 Ninth Circuit, on appeal by the PGA, agreed, prompting the appeal to the Supreme Court.

The Supremes, 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 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 head wind 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.” PGA loses.

A little commentary: Districts would be wise to recognize that **the Supreme Court went a bit out of its way to find jurisdiction to address Casey Martin’s problem.** The semantic gymnastics required were substantial. The Court had to conclude that a professional golfer is a “customer” of the golf course and that the course itself remains a public accommodation during competition [Right–try wandering out to the green while Tiger is putting]. Justice Scalia begins his dissent by calling the majority decision an exercise of “benevolent compassion that the law does not place within our power to impose.” An additional lesson is the PGA’s emphasis in argument that use of golf carts would fundamentally alter the competition. **The PGA incorrectly assumed that by proving how important the rule was to the game, they would never have to deal with the particulars of Casey Martin.** In essence, the argument is that “here is the rule, here is the rationale, there can be no exceptions.” Beginning in the district court, the PGA should have gotten the message that Martin’s disability and his circumstances were the issue. As the court of appeals wrote, the issue was not over use of carts in general, but whether use of a cart by Martin would fundamentally alter the game. **By refusing to look at Martin, and by not rebutting the evidence that he was more fatigued using the cart than his competitors who walked, the PGA made a serious blunder.** Even if fatigue was an essential factor or part of the game, the only evidence that mattered was that Martin, with the cart, was more fatigued than those who walked. The main reason for the rule is unharmed by the exception, and the defendant never seriously considered the exception. The PGA loses.

III. Examples from Select Extracurricular and Nonacademic Services

A. Athletics

The Section 504 regulations provide additional language addressing the nondiscrimination duty as it applies to P.E. and athletics. 34 C.F.R. §014.37(c) provides

“Physical education and athletics.

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

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

1. GAO Report on Physical Education and Athletics

In June of 2010, in response to a Congressional inquiry on the subject, the General Accounting Office (GAO) released a report entitled *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, GAO, (June 23, 2010)(hereinafter, “GAO”). Specifically, GAO was asked to examine PE and extracurricular athletic opportunities for students with disabilities and how the Department of Education assists the states and schools in these areas. **Utilizing a variety of data sources including on site interviews in school districts, the GAO report holds few surprises, finding that lack of training and budget concerns remain serious barriers to participation by students with disabilities in both PE and extracurricular athletic activities.** Further, the U.S. Department of Education needs to provide additional help to schools not

only to understand schools' duties with respect to PE and athletics for students with disabilities, but also to identify promising practices in the field. *GAO*, p. 31-32. A few highlights from the report:

•**Benefits flow to students with disabilities from participation in PE and athletics.** “The health and social benefits of physical activity and athletic participation for children are well established. **These benefits may be even more important for children with disabilities**, including those with cognitive and physical disabilities who have a greater risk of being sedentary and having associated health conditions such as obesity and reduced cardiovascular fitness. Studies have shown that for students with disabilities, regular physical activity may help control or slow the progress of chronic disease, improve muscular health, control body weight, and enhance students' psychological well-being through additional social ties and improved self-confidence and self-esteem.” *GAO*, p. 1 (*emphasis added*).

•**Easier access in elementary than middle or high school.** “Various factors may affect students' experience in PE, such as their school level (e.g., elementary or middle) or their type of disability. For instance, some parents and school officials said that PE teachers in elementary school may be able to more easily integrate students with disabilities in their classes than those in secondary schools because peers in elementary school are more accepting, the equipment is more varied, and there is less focus on competitive games than in secondary school, which may be harder for students with disabilities to participate. Some district and school officials also said that middle school can be particularly difficult for some students with disabilities who may have more difficulty changing into PE uniforms or opening combination locks on their PE lockers.” *GAO*, p. 12.

A little commentary: The problem of student acceptance of disability can be even more severe when a culture of harassment is allowed to exist, especially in unsupervised and unstructured settings like a locker room. It is not uncommon for parents of students with disability to seek exemptions from PE due to harassment or bullying experienced as students are dressing out for PE. Efforts by school staff to provide structure or supervision to the locker room would seem a sensible place to start a school's efforts to make PE and athletic activities more accessible.

•**Extracurricular Athletics.** A number of other barriers appear to complicate access to athletics, including the competitiveness of athletic teams (a Texas school official noted that “extracurricular athletics in his district were very competitive and that it was unlikely that many students with disabilities would make these teams”). *GAO*, p. 21-22. The type of disability may also impact participation. *GAO* reports that “students with hearing impairments, speech impairments, learning disabilities, or other health impairments reported participating on sports teams as a higher rate compared to students with orthopedic impairments, mental retardation, visual impairments, autism or multiple disabilities.” *GAO*, p. 22. The latter group of students would require far more modifications and assistance in order to participate. “Officials from several schools and disability groups also noted that Special Olympics has had a strong influence nationally in providing opportunities for students with intellectual disabilities but that there is not a similar organization for students with physical disabilities.” *GAO*, p. 22-23. Special Olympics limits participation to athletes with an intellectual disability, a cognitive delay, or a developmental disability (athletes may also have a physical disability). No qualifying scores are required to participate. In contrast, Paralympic athletes “are generally those with amputations, cerebral palsy, intellectual disabilities, visual impairments, and spinal injuries. Unlike Special Olympics, the Paralympics is focused on elite performance sport and athletes must go through stringent qualification processes to compete.” *GAO*, p. 23, *fn.* 31. Schools reported greater success in access by students with disabilities when these students were specifically invited or recruited to play, or where special education teachers also worked as coaches and “this dual role enabled them to encourage students with disabilities to participate.” *GAO*, p. 21.

•**What are schools required to do under Section 504?** With respect to participation by students with disabilities in extracurricular athletics, schools reported confusion with respect to their legal obligations under Section 504. “Officials in two districts and several disability associations told us that Education’s Section 504 regulations regarding schools’ responsibilities to provide extracurricular opportunities are ambiguous. For example, a few disability associations noted that there is lack of clarity regarding how “equal opportunity” should be defined. Officials from another district questioned whether their responsibilities included providing specifically designed programs for students with disabilities, such as separate adapted athletics, particularly within a school environment focused on greater inclusion for students with disabilities.” *GAO, p. 26.* Following a review of OCR guidance, GAO “found several documents that state that students with disabilities may not be excluded on the basis of a disability from an extracurricular activity, which may include athletics, and that students must be provided opportunities to participate in these activities equal to those of other students. However, with regard to PE and extracurricular athletics, these documents do not provide information beyond what is stated in the Section 504 regulations. In contrast, OCR has provided more detailed guidance in other civil rights areas, such as letters, pamphlets, and question and answer sheets.” *GAO, p. 28.*

Any response from ED? In response to the GAO’s findings, ED indicated by letter that it will provide additional assistance to schools in addressing the needs of students with disabilities in this area. Specifically, “The Department agrees that it is important for schools to be aware of their responsibilities and that students with disabilities have opportunities to participate in extracurricular athletics equal to those of other students. In fiscal year 2011, the Department’s Office for Civil Rights intends to issue additional guidance on Section 504 of the Rehabilitation Act and recipients obligations to provide students with disabilities equal access in extracurricular activities.” *GAO, p. 50.* Further, “To help states and schools access existing knowledge and resources, we recommend that the Secretary of Education facilitate information sharing among states and schools on ways to provide opportunities in Physical Education (PE) and extracurricular athletics to students with disabilities.” *GAO, p. 49.* As of the date of these materials, ED had released *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, U.S. Department of Education (August 2011), providing suggestions to increase opportunities, but the promised legal guidance had not been released.

2. Assorted Athletic Questions Addressed in OCR Letters of Finding

Question #3: Might a school be required to provide accommodations during try-outs? Yes. *See, for example, Marion County (FL) Sch. Dist., 37 IDELR 13 (OCR 2001)*(School was required to provide accommodations to a girl with unspecified disabilities who wanted to try out for cheerleading. The school was required to allow her to videotape the sponsor’s instructions and demonstrations.)

Question #4: Is enrollment in the public school an essential requirement? It can be. *Paul v. Henrico County Public Schools, 32 IDELR 173 (E.D.VA. 2000).* The student, a fourteen-year-old with dyslexia and ADHD was a member of the school baseball team prior to his parents’ enrolling him in a private school. The parents sought a preliminary injunction allowing him to play despite his attendance at a private school, arguing that the student was excluded from the baseball team due to disability. The court rejected the request for waiver of the enrollment requirement.

“Requiring HCSB to waive the enrollment requirement for Phillip is not a reasonable accommodation, but fundamentally alters the baseball program. Were HCSB to change the enrollment policy, what was once a school activity where Short Pump students could gather and improve upon a skill while fostering school spirit, would become a program where students from perhaps far reaching areas, having no relationship with the school other than one existing on paper,

would be allowed to play in the program, taking places from students at Short Pump. This accommodation could so drastically alter the baseball program as to render it unreasonable.”

Question #5: Are independent walking and dressing essential to swim team eligibility? No. A student with an intellectual disability and a neuro-degenerative disorder wished to participate in the swimming team. OCR found that the district was required under §504 to provide accommodations to the student, in the form of an aide to assist with walking and dressing. Since those functions were not essential eligibility standards for participation in swimming, requiring the accommodations would not constitute a fundamental alteration of the swimming program. *Quaker Valley (PA) School District*, 352 EHLR 235 (OCR 1986).

Question #6: Can a student with disability be excluded from the team due to lack of the required baseball skills? Yes. Students with disabilities may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. For example, a student with Tourette Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The parent was concerned that having supervised the in-school-suspension room, the baseball coach had knowledge of the student’s behaviors, and had excluded him from the team because of that knowledge. OCR found otherwise. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation since the “student was given an equal opportunity to compete for a position.” *Maryville City (TN) School District*, 25 IDELR 154 (OCR 1996).

Note that the same rule applies to cheerleading (and every other activity requiring a try-out). *McDowell County (W.V.) Schools*, 55 IDELR 82 (OCR 2010). Twenty-four girls tried out for the 12 available cheerleader positions. Complainant argued that Student was not selected due to her small stature, the result of a growth hormone deficiency. The cheerleading coach explained the selection criteria to OCR.

“There were five judges, including the coach, for the cheerleading tryouts and each judge was given a rubric to fill out... [T]he students were rated on the following: set, smile, loudness, clap, coordination and attitude. Students were also rated on two types of jumps, as well as a jump of their choice.... In addition to the judge’s rubrics, the cheerleading coach said that she has each girl’s classroom teacher fill out a rubric rating the girls on classroom performance in the following areas: behavior, attendance, attitude, responsibility and grades.”

OCR notes that while the parent and student “were of the opinion that the Student was better at cheerleading and gymnastics than at least three of the other students who made the team” the judges disagreed. The scores were tallied and the girls with the highest scores received the positions. OCR concluded that while the tally sheets had been destroyed and could not be reviewed as part of the investigation, OCR’s investigation did not reveal any evidence (other than the parent and student’s opinions) to suggest that the Student did or should have scored in the top 12. Additionally, none of the judges were aware that the student was disabled nor did the judges suspect any disability.

Question #7: Can the school apply attendance requirements to continued eligibility (miss a practice, miss a game)? *Houghton Lake (MI) Community Schools*, 45 IDELR 199 (OCR 2005). Pursuant to district policy, the student must attend school at least for a half-day (three hours, excluding lunch) to participate in any extracurricular activity, including athletics, that day. The policy applies to all students, disabled and nondisabled alike, and there are no exceptions. Parents of a student with diabetes requested an exception when a previously scheduled doctor’s appointment caused a student to miss the entire school day of a basketball game. The appointment had been scheduled months in advance, and the parents had been unaware of the game at the time the

appointment was made. The district refused to grant an exception. The student was not allowed to participate in that particular basketball game (although he could attend).

The parent complained to OCR, arguing that the district's policy and its refusal to grant an exception was disability discrimination. OCR determined that the policy was contained in the student handbook that was provided to all students. A parent and the student acknowledged by their signatures that they had received and read the handbook. Further, coaches remind students of the policy at the first practice of each year. OCR also determined that a nondisabled student sought an exception to the policy and was also denied. The District planned to provide schedules to parents for the 2005-2006 school year by June 2005 to allow for scheduling of potentially conflicting appointments. OCR found the policy facially neutral and applied equally to all students. No violation found.

See also, Shelby County (AL) Sch. Dist., 37 IDELR 41 (OCR 2002)(A student was suspended for three days, which caused her to miss three days of volleyball practice, which resulted in her dismissal from the team under the school's rules. OCR found that the school applied the rule uniformly, and that thus, there was no disability discrimination.); *Maine Sch. Administrative Dist. #1*, 37 IDELR 160 (OCR 2002)(Student was removed from the hockey team for missing three practices, and not allowed to travel with the team for an overnight trip due to his absence from school on that day. The student's actions violated the rules for the hockey team. OCR found that the absences were not due to disability-related reasons, and thus, there was no discrimination.); *Salem (NH) Sch. Dist.*, 35 IDELR 260 (OCR 2001)(Student was excluded from hockey team partly due to not meeting state attendance requirements, and partly due to behavior and grades at school. OCR found no discrimination. Moreover, he was denied a waiver of the state age eligibility requirement, discussed below).

Question #8: Can a student with disability be removed from a team for violating a coach's instructions, team rules, or laws that apply to all students? Yes. *See, for example, Carmel (NY) Central School District*, 23 IDELR 1195 (OCR 1995)(District did not violate §504 when it removed a disabled student from the wrestling team for failing to follow instructions during practice, since non-disabled students were also removed for the same offense.); *Cabarrus County (NC) School District*, 22 IDELR 506 (OCR 1995)(District was not in violation of §504 when it suspended a student from participation in sports for four months due to his criminal conviction. The suspension was required by district policy and there was no evidence of discriminatory application.); *Kaneland (IL) Community Unit Sch. Dist. #302*, 37 IDELR 287 (OCR 2002)(Student was cut from baseball team although parent alleged he was one of the best players. The coach, however, indicated that the student did not meet the attitude and teamwork criteria set forth in the Baseball Team Guidelines. For example, the student had twice quit the team the year before. OCR found no discrimination.); *Alief ISD*, 26 IDELR 202 (SEA TX. 1997)(Student was removed from the football team after drinking alcohol from a soft drink bottle at school, in violation of the school's rules on extracurricular participation.).

Question #9: There's no "I" in "Team" but there has to be chemistry in volleyball? *Festus (MO) R-VI School District*, 47 IDELR 17 (OCR 2006). Explaining to OCR that the Student at issue in a discrimination complaint did not have the required skills, the varsity volleyball coach discussed the importance of on-court chemistry.

"Ms. Eggemeyer explained 'chemistry' between the players on the court is extremely important in volleyball. Ms. Eggemeyer explained how she used the term chemistry to describe how well the team members interacted or worked together, including their communication and confidence in each other on the court. According to Ms. Eggemeyer, Student A's chemistry on the court with the other players was just decent because she was really quiet, not out-going, lacked confidence and was not vocal enough or consistent enough. Ms. Eggemeyer explained being vocal is crucial because players have to talk to each other on the court to prevent dropped balls and collision with other players."

The coach explained to OCR the efforts she had undertaken to help the student identify the skills that needed improvement. The Student needed “to be more consistent, more vocal, quicker, and not walk through drills.” OCR found no discrimination in the amount of playing time the student received. While the evidence suggests that “Student A is a very capable athlete, she was not considered one of the top six volleyball players by at least three coaches who were familiar with her play.”

A little commentary: One of the allegations made in this complaint is quite common in the reported cases. “The complainant stated Student A was one of the top six players on the varsity volleyball team.” Interestingly, when OCR opened the investigation, it “accepted as true the complainant’s allegation that Student A was at least among one of the top six players on the team.” After investigation, and hearing the opinions of several coaches, it concluded otherwise. One of the reasons proffered by the complainant for the high opinion of the student’s skills was the amount of playing time she received on the junior varsity team. OCR learned from the junior varsity coach that “Student A received more playing time at the junior varsity level because the goal was to give the girls the experience they needed to move up to the varsity level. At the varsity level, the goal is different.” It is all about winning, and she ranked 9th, 10th or 11th in skills rather than in the top 6.

Question #10: Does the school have to provide a disability-related exception to a minimum GPA requirement for cheerleaders? Yes, this time. *Northshore (WA) School District No. 417*, 48 IDELR 199 (OCR 2006). A special education-eligible high school student with a learning disability was denied the opportunity to try out for the cheerleading squad because she did not maintain the required 2.8 GPA. The student was enrolled in all regular education classes and provided with unspecified academic supports. In response to the parents’ request for an exemption to the GPA requirement, the co-principal stated that the high school does not make exceptions and “would not consider doing so in any case.” According to the co-principal, the decision was final and no appeal was available. The parent complained to OCR. As the challenge alleged discrimination in an extracurricular activity, OCR’s analysis focused on two issues with respect to the GPA requirement. First, was the 2.8 GPA requirement necessary for the cheerleading program? A second, related issue, was whether modifying the requirement would fundamentally alter the program. The analysis focused on the reasonable accommodation standard applicable to extracurricular and nonacademic activities.

On the necessity issue, OCR found that neither the co-principal nor the cheerleading sponsor knew why 2.8 was chosen as the standard. Further interesting was the fact that among all of the high schools in the district, the minimum cheerleading GPA requirement ranged from 2.6 to 2.8. Athletes, on the other hand, were only required to maintain a 2.0 GPA pursuant to state rules. The explanation that cheerleaders are more visible representatives of the school than athletes was rejected by OCR. A further explanation that cheerleaders have a year-long commitment (the longer season justifying greater need for good academic performance) failed as athletes can also compete all year in a variety of sports.

The requirement fared no better on the question of fundamental alteration. For students in special education classes (with different curriculum and different standards), the school simply imported the student’s GPA using the special education class grades. The complainant here was in special education, but enrolled in all regular education classes (see commentary below) that were arguably more difficult due to higher standards. The student’s special education case manager testified that the student’s disability impacted her grades—a fact noted in her IEP. Further enlightening was the flexibility offered by the other two high schools: one considered exceptions to the GPA requirement on a case-by-case basis; the other allowed tryouts for students not meeting the GPA requirement if the student was willing to enter into a contract to work on improving grades. OCR determined that the GPA requirement was neither necessary nor would the program be fundamentally altered by its modification. OCR further chastised the school for ignoring the need for a grievance policy for 504 issues (and the co-principal’s comment on lack of an appeal process).

A little commentary: An unaddressed issue in this case is the unintentional impact of the GPA policy—what motivation is there for a special education student to take more challenging classes (move from resource to mainstream, for example) where the impact is lower grades and the possibility of not being a cheerleader? Were no exception to the GPA requirement possible, a parent in the same position might not complain to OCR but push the IEP Team for a more restrictive placement in less-challenging, grade-friendlier resource classes to improve the student’s chances of meeting the GPA requirement for cheerleading, instead of moving toward grade level curriculum which the student could learn. That’s a result contrary to both IDEA and NCLB.

Question #11: Doesn’t football (or baseball, or whatever your state obsession happens to be) change the minimum grade rules? It depends.

No Pass/No Play, California Style. A special education student with visual, auditory, and learning disabilities was placed on academic probation when his grades fell below a 2.0 average. According to school policy, a student had to maintain an average of at least 2.0 in order to participate in extracurricular activities. When the parent inquired as to whether the district had considered the impact of the student’s disabilities when applying the probationary sanction, the district did not respond. OCR, however, did respond. OCR reminds the district that

“the implementing regulation of Section 504 provides that recipients will provide non-academic and extra-curricular services and activities in a manner which affords disabled students an equal opportunity for participation. **Applying an academic standard to all students without providing for appropriate consideration of whether the standard may discriminate against students with disabilities could constitute discrimination on the basis of disability.**”

To correct its errant ways, the district entered into a Voluntary Resolution Plan. As a part of the academic probation process, the district agreed to verify that the student’s Section 504 plan or IEP is fully implemented, ensure that parents are notified of academic probation situations and given an opportunity to participate in a Section 504 or IEP team meeting to discuss the appropriateness of applying academic probation to the student. *Mt. Diablo (Ca) Unified Sch. Dist.*, 30 IDELR 994, 995 (OCR 1999).

Question #12: What if the student’s failure and ineligibility wasn’t his fault? A student with a learning disability received a failing grade when the school failed to properly implement his IEP. During the second semester of the student’s junior year, he failed to turn in substantial amounts of work (9 of 25 English assignments) including an essay that was critical to his passing for the semester. On the final exam, he was not provided the accommodations required in his IEP (take test with tutor, extended time, restated directions, access to dictionary), completed only 52 of 85 objective questions correctly, and did not complete the essay portion of the exam. Due to failure to pay fees owed to the school, the school never sent a report card, and he did not get notice of the failure until early August. In early September, the school allowed him to re-take the exam with IEP accommodations in place. He studied with his tutor beforehand and passed the test with a B-, resulting in a passing grade for the semester. The student filed for due process, alleging that the school failed to implement his IEP and challenging the ineligibility to play football based on the failing grade. The Hearing Officer found a mix of troubles.

“Essentially, the IHO found that while David Ingram bore significant responsibility for his failure to turn in assignments in English, the school and the professionals charged with ensuring Ingram received a FAPE were more culpable for failing to properly implement Ingram’s IEP. The IHO therefore ordered Start to convene an IEP meeting; to permit Ingram to make up the missed fourth quarter English assignments ‘with assistance from his tutor according to the modifications that are in place within the student’s current IEP’; and to reevaluate Ingram’s football eligibility once he had submitted the assignments and passed the fourth quarter.”

The problem was the OHSAA's (Ohio's governing body for interscholastic athletic competition) rule on make-up work and eligibility. He was ruled ineligible to play football since he completed makeup work *outside the grading period*. The District court disagreed, finding flexibility in a no-fault rule.

“Where a student completes make-up work because an independent, final, and binding order has been issued stating that the student's school failed to implement properly the student's IEP, and the student is deemed by the school, on the basis of the make-up work, to have passed the quarter the student had previously failed, OHSAA Bylaw 4-4-6 prohibiting the use of ‘[s]ummer school or other educational options’ as substitute fourth quarter grades should not be interpreted to render the student ineligible. Rather, the exceptions to the ‘no make-up work’ rule for circumstances beyond the student's control such as illness or accident should include situations in which an independent, final, and binding finding declares the student's initial failure of a class was caused by the failure of the student's school to implement properly the student's IEP, and the student has made up work, leading to a passing grade for the quarter at issue.”

The kid gets to play. *Ingram v. Toledo City School District Board of Education*, 42 IDELR 33 (N.D. OH. 2004).

Question #13: Are students with disabilities subject to physical punishment for failure to perform athletically? Yep. *See for example, Little Axe (OK) Pub. Schs.*, 37 IDELR 103 (OCR 2002)(The school applied its policy of making softball players run laps for missing practice in a uniform fashion. All players, disabled or not, were required to run laps if they missed a practice. No discrimination found.); *Adlai Stevenson Dist. #125 (IL)*, 38 IDELR 157 (OCR 2002)(running around the gym as punishment not discriminatory to disabled basketball player).

Question #14: Could the school be required to provide a sign language interpreter for basketball games and practices? Yes. A district in West Virginia violated §504 by failing to provide a deaf student with a sign language interpreter for use in basketball games and practices. *Lambert v. West Virginia State Bd. of Education*, 21 IDELR 647 (W. Va. Supreme Court of Appeals 1994). The school apparently argued that since the parent's request was not made directly to the director of special education (but to the school principal and to the basketball coach), the request did not trigger any legal duty. Said the court “we hold that when a student has a disability requiring special assistance or services to enable participation in school-sanctioned extracurricular activities, a request for assistance or services can be made on the student's behalf to any school official familiar with the student's needs. That school official then has the responsibility to inform the county board of education's director of special education of the request so that appropriate action can be taken.”

B. Field Trips

As with extracurricular activities, districts must provide non-academic services or benefits in a non-discriminatory manner that allows disabled students an equal opportunity to participate. 34 C.F.R. §104.37(a)(1). In the student context, this issue arises primarily with respect to after-school programs, summer programs, field trips and recreational activities, all of which must be provided in a manner that allows for disabled students' participation. Schools may not condition the provision of the non-academic service on the parent's attendance or provision of a babysitter, exclude disabled students, or charge a higher cost than that charged non-disabled students' parents. *See* OCR Senior Staff Memoranda, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” January 3, 1990.

Question #15: Might the school be required to provide a trained aide & transportation? Yes. *Williamstown (MA) Pub. Schs.*, 39 IDELR 43 (OCR 2003). OCR found a violation of §504 when a wheelchair-bound student with spastic cerebral palsy missed several chorus practice sessions due to the reassignment of a teaching assistant who had not yet been fully trained regarding the Student's needs.

Around the same time, the Student was excluded from a class field trip because the District failed to plan for her transportation.” Said OCR “Adequately trained aides and arrangements for transporting students with mobility impairments are two examples of ways of making nonacademic and extracurricular services and activities accessible to a student with a disability.” *See also, Fayette County (TN) Sch. Dist.*, 38 IDELR 219 (OCR 2002)(Student was excluded from field trip due to missing the deadline for special transportation arrangements to be made. Since the rule was applied uniformly, there was no discrimination.).

Question #16: Can a student’s behavior result in exclusion from a field trip? *St. Johns County (FL) Sch. Dist.*, 35 IDELR 257 (OCR 2001). A student eligible under the IDEA with a specific learning disability was excluded from attending a field trip to a play. OCR determined that the exclusion was not discriminatory. “Evidence shows that the Student had experienced behavior problems throughout the day of the field trip and he did not respond to the corrective measures; therefore, he was not permitted to attend the field trip. Evidence also shows that there was a non-disabled student who was not permitted to go on the February 5th field trip because of his inappropriate behavior on a previous field trip. Thus, there is no evidence that disability played a part in the Student not going on the February 5th field trip.” OCR further noted that the school had offered counseling services (presumably to help address the behaviors), but the offer was refused by the parent.

Question #17: Can absences impact a student’s opportunity to perform in a school play? Yes. *Rutherford County (TN) Sch. Dist.*, 34 IDELR 44 (OCR 2000). OCR determined that a student absent from November 8, 1999 to March 23, 2000 was not denied equal participation in a school play because of disability. OCR determined that the student was given a part in the school play that would be presented once during the daytime and once in the evening of December 10, 1999. The Student attended most of the after-school practices, but was not attending school at that time.

“On December 6, 1999, the Complainant told the Principal that she was not pleased that the Student was not going to participate in the play. He said he would look into the situation, and the Complainant should check back with him. On December 7, the Principal and the drama teacher agreed that, with no indication that the Student would be present during the daytime performance, another student would be assigned the part for the daytime and the Student would perform during the evening. The Complainant never contacted the Principal again regarding this matter. The Student’s name was included on the play’s program. The Complainant did not inform the school that the Student would not participate in the evening play, but neither the Student nor the Complainant reported to the drama teacher, and the Student did not perform.”

The student’s exclusion was due to absences, not disability. “Student’s physician informed the District that the Student should not miss an excessive amount of school if the asthma is controlled with medication. Further, the physician stated that the only educational modifications needed would relate to the taking of medication and to having the inhaler ready in case of an attack. The District also has been informed that the Student is able to administer the medicine herself.”

Question #18: Can a parent be required to attend a field trip in order for his/her student to attend? No. *Oxford Hills (ME) School District*, 57 IDELR 83 (OCR 2011). The student’s attendance cannot be contingent on the parent’s willingness to go on a field trip, as that would be a discriminatory prerequisite to field trip attendance *unless* every student was required to have a parent attend. Here, despite the parent’ allegation, OCR finds that the school provided a properly trained employee to attend field trips with the student in case of need for assistance with the student’s diabetes. No discrimination was found. *See also, Conejo Valley (CA) Unified School District*, 109 LRP 54727 (SEA CA 2009)(discussed below).

Question #19: Can the school exclude students with disabilities from field trips for budgetary reasons? No. *Thompson (CO) School District*, 57 IDELR 81 (OCR 2011)(“The CHOICES teacher’s

email identified the fundraising restriction as the reason that the CHOICES program did not participate in a field trip. Because the other sixth grade classes faced the same fundraising restrictions yet still participated in a field trip, we find that the funding restriction was not a legitimate, nondiscriminatory reason for denying CHOICES students the opportunity to participate in a field trip.”).

Question #20: No ESPN Zone, No Six Flags, No Violation? *Howard County (MD) Public School System*, 41 IDELR 215 (OCR 2003). Parents of twin students with intellectual disabilities argued that the school discriminated against the twins by denying them the opportunity to participate in two field trips during summer extended school year (ESY). The IEP Team had determined that both students were eligible for ESY, and upon the parents’ urging, agreed to provide the ESY in the SOAR program. SOAR provides interaction with nondisabled peers enabling students with disabilities to participate in social activities, attend field trips and practice social skills in different real life settings to promote generalization of skills. “Neither the amount nor nature of the socialization opportunities” were specified in the IEP Team minutes, although the team made clear to the parent that the special education office would determine which of the field trips would be available to special education students, and that the twins would not attend every field trip. As ESY began, the district notified the parent by letter that the twins would not attend the field trip to the ESPN Zone nor to Six Flags due to health and safety reasons. Based on prior experiences, the district had determined that providing adequate supervision for special education students was difficult especially at large crowded facilities. OCR determined that as the IEP Team did not determine that a particular number or kind of inclusion activities were necessary to ensure a FAPE, and the district had legitimate nondiscriminatory reasons for its decisions (health and safety concerns at large crowded facilities). No violation was found. “Field trips were just one of many settings where Student A and B could socialize with nondisabled peers. The fact that socialization opportunities took place in a summer camp setting did not create an obligation on the part of the District to provide Student A and B with the full summer camp experience an approximation of it or an equal opportunity to attend all trips.”

C. After-School & Summer Programs

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

Question #21: Is the after-school bowling program a “school” program? *Snohomish (WA) School District No. 201*, 23 IDELR 97 (OCR 1995). An after-school bowling program was subject to §504, and thus, had to be provided in non-discriminatory manner, because district provided substantial assistance to the program (staff, facilities, transportation, and promotion). “Although Sno-Wheels is operated primarily by volunteers, OCR found that the district significantly assisted in carrying out the Sno-Wheels program by providing the use of district staff, facilities, and transportation and by promoting participation in Sno-Wheels among district students. As such, the district is required to ensure that the Sno-Wheels program is conducted in a nondiscriminatory manner.

Question #22: What if the student’s behavioral needs couldn’t be met in summer program? *Saint Paul Public Schools*, 41 IDELR 37 (OCR 2003). The school provided a two-week summer camp as a voluntary enrichment program designed to bring together students of various races and cultures. The parents of a student with an emotional/behavioral disorder enrolled him in the program, telling the district that he has ADHD, and would need “redirection.” He was asked to leave a summer camp early after it became clear that his needs could not be met there. Among his behaviors, he refused to

participate in group activities, engaged in name-calling, foul language, and fought with another student. In a letter to the parent, the director stated that despite the efforts of staff to intervene and redirect the student, the student's behavior continued. He required too much attention from staff, and made it difficult for other students to achieve the goals of the program. The school's position was that it could not accommodate the student without fundamentally altering the nature of the summer program. The parents were not happy campers, and complained to OCR. OCR determined that the student's IEP did not require participation in this non-academic program, and that his behaviors were inconsistent with the program's conduct policy. The teachers took actions which they reasonably believed would redirect the student, but behavior did not improve by the end of the first week. OCR finds that the student was not denied equal opportunity for participation in the program. Parent loses.

A little commentary: OCR included in its analysis that another student with ADHD was enrolled in the program, and was not dismissed from the program. The fact that another similarly situated student with a disability was able to participate clearly helped the school demonstrate that it was not discriminating on the basis of disability.

Question #23: What if the school has a discipline policy, and the student violates it? *Douglas (MA) Public Schools*, 42 IDELR 209 (OCR 2004). The District ran an after-school day care program, governed by a conduct policy. The policy focused on "The Big Rule: No hitting, Kicking, Pushing, Biting or Hurting Anyone!" Parents of a student with Tourette Syndrome enrolled their child, dutifully informing the program of the student's disability, providing information about the disability and suggesting that Program staff attend a district in-service on the disability. Staff did not accept the invitation. Over the course of about a month, the student was involved in a variety of incidents including threatening to kill other students, punching and kicking other kids, and inappropriate touching of other students, in violation of program rules. The parents requested that the program provide an aide to work with the student. Rather than respond to the request, the program terminated his attendance. At no time did the program consider whether he could safely participate in the program with the assistance of an aide or other reasonable accommodation. The District failed to respond to the request for accommodation, and was found in violation of §504.

Question #24: What if the school just doesn't mention the summer program to the special education students? *Mundelein (IL) Elementary School District #75*, 41 IDELR 96 (OCR 2003). The district created a four-week "Summer Scholars Program" to assist student who were falling behind in reading, writing or math, but who were not being considered for retention. The voluntary program carried a tuition of \$75, and was accessible by application. District teachers were directed to make recommendations to parents of students who would benefit from the program. However, an elementary principal emailed his classroom teachers, advising them not to recommend special education students to the program, due to fears that the school would have to pay for tuition and transportation. If parents of special ed students asked teachers about whether their student should attend the program, teachers could say yes. The directive was not to make recommendations. As a result of the email, teachers at the elementary school recommended regular ed students, but did not recommend any special education students to the program. OCR found the process "flawed." While the principal argued that the program could be discussed in annual IEP Team reviews, those reviews typically made no mention of the optional program. As a result, a mechanism existed for teachers to recommend regular education students to the program, but no recommendations were possible for special education students. OCR found that special education students were denied the opportunity to participate in the Summer Scholars program in violation of §504.

A little commentary: The principal's email was unwise as it was unnecessary. The school's duty to provide FAPE does not necessarily extend to a summer program for each special education student. Where a summer program is not necessary to the provision of a free appropriate public education, the school is not necessarily on the hook for either tuition or transportation.

Question #25: Is that what the “Free” in FAPE means? *Conejo Valley (CA) Unified School District*, 109 LRP 54727 (SEA CA 2009). 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.

C. School Clubs and Organizations

Question #26: Can off-level classes preclude National Honor Society eligibility? Yes. *Humble (TX) ISD*, 44 IDELR 218 (OCR 2005). A high school’s chapter of the National Honor Society refused to induct a special education student because she had received a modified curriculum in five classes. According to its acceptance criteria, students must demonstrate a 4.0 grade point average in level or above-level courses, together with service, leadership and character requirements. OCR determined that the NHS requirements were presented to both parents and students during an orientation meeting in the fall. As the five classes were not on level or above-level classes, but were reduced or modified curriculum (thus below level) the scholarship requirement was not met. No discrimination found.

Another Honor Society exclusion, based on lack of participation in other activities. *Perry (OH) Public School District*, 41 IDELR 72 (OCR 2003). The parent of a student with juvenile diabetes argued that her exclusion from the National Junior Honor Society was due to absences related to disability, or was otherwise because of disability in violation of Section 504. In reviewing NHS requirements, OCR determined that while 95% school attendance was required for membership, the requirement is automatically waived upon receipt of a doctor’s note indicating absences arising from disability. OCR determined that attendance requirements were not used in a discriminatory manner against this student, as the waiver was applied to her as well.

Rather than attendance troubles, the student’s membership in NHS was rejected under the requirement that the student actively participate in two co-curricular activities. The student listed Spanish Club as one of her activities, despite the fact that her participation was less than “active.” One of the members of the faculty council that oversaw the applications was familiar with the Spanish Club and stated that Student was not an active member. The Spanish Club advisor indicated that there were 8-10 active participants in the club, but Student was not one of them. In facts, when the NHS advisor inquired as to the Student’s participation, *the Spanish Club advisor did not know who the student was*. In her own behalf, the student argued a high level of activity in the club, but she admitted that she had only attended the club a few times last year, and could not confirm how many meetings she had attended recently. OCR rejected the allegation of discrimination on the basis of disability, finding that the evidence of her activity (especially the testimony of the student) supported the conclusion that she was not an active participant, and was excluded for that reason.

Question #27: Can music skills be required for membership in the Select Band? Of course. *Hawaii State Department of Education*, 41 IDELR 16 (OCR 2003). Because of disability, an 8th grade student required the help of an aide together with a modified rehearsal and performance schedule (allowing for breaks) in order to participate in band. The student sought a position in a select Big Island Middle School Band, but was not selected by her band director to participate. The parent alleged that the student was denied a position because the director did not want to accommodate the student's disability and in retaliation for a previous complaint filed by the parent. The parent also argued that the parent's child was a better percussionist than one of the students selected to play in the band. In response to the allegation of discrimination, the band director argued that he selected the participants based on (1) the students' technical skills with the instruments; (2) their ability to perform the selected pieces with limited rehearsal time; and (3) the instrumentation required in the select band. Based on these nondiscriminatory criteria, the director determined that the student did not have the ability to learn *any of the pieces selected* within the time and rehearsal constraints that existed and that two other students were more capable. No discrimination was found. *See also, Grosse Pointe (MI) Public Schools*, 35 IDELR 225 (OCR 2001)(A student with visual impairments was excluded from choir and dance activities. The school argued the exclusion was due to her limited skill level and the complexity of the choreography, which raised health and safety concerns. OCR found that the school raised legitimate nondiscriminatory reasons for the exclusion).

A little commentary: Was this band a "program or activity of the district?" The district argued (unsuccessfully) that it was not, despite the fact that the school provided significant assistance to the band in the form of instrument usage, rehearsal space, equipment, music stands and sheet music, and publicity. The lesson: the more ties between the school and the activity, the harder it is to argue "not our program."

D. Counseling & Other Nonacademic Services

The Section 504 regulations provide additional language addressing the nondiscrimination duty as it applies to counseling services. 34 C.F.R. §014.37(b) provides

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

Question #28: What happens when the counselor's lack of reading comprehension scuttles student's AP English exam? *Clover Park (WA) School District No. 400*, 41 IDELR 274 (OCR 2004). A high school senior with a disability received modified exams in the classroom and her English books on tape. She was determined by ETS to be eligible for modified administration of an AP exam. The College Board's eligibility form (completed by the school's counselor who served as the Students with Disabilities Coordinator) asked for the student's preferred format for auditory assistance on a school based test, and provided choices of cassette test or reader. While College Board allows the student to receive the preferred method of accommodation, when a cassette test is not available a reader becomes the only choice. In this instance, the Disabilities Brochure indicated that a cassette version was not available for the AP English test, and a reader will be used. The counselor did not notice the test was not available on cassette, and did not make arrangements for a reader to be present at the test site. Upon arrival at the test site, and finding that no cassette version was available, the student requested a reader, and was told that the district had not arranged for one. The student took the exam without accommodation and did not score the needed "3" to get college credit. OCR found that the school failed to arrange a reader for the student, and thus denied the student a disability-related service to which she was entitled for the test, in violation of Section 504.

Question #29: Is it a violation to fail to provide notice about accommodations for which the school is not responsible? Yep. *Cambridge (MA) Public Schools*, 17 IDELR 996 (OCR 1991). OCR found the district in violation of §504 for failing to adequately inform students with disabilities of the possibility for accommodations or modifications to the ACT or SAT college board tests (despite the fact that ETS, not the schools, would be responsible for such accommodations).

Question #30: Did the school provide equal access to the school library? *Crenshaw County (AL) Sch. Dist.*, 34 IDELR 72 (OCR 2000). “District policy states that all students are allowed to use and check out books from the library. Additionally, all students, regardless of having a disability, are notified about delinquent or damaged books in the same manner. Generally, students are given a specific number of days for checking a book out. If the book is not returned by the due date, the librarian sends students a delinquent notice. The librarian sends several notices until the book is returned or replaced. A record is kept on all students not returning books and restitution must be made prior to graduation.” OCR determined that it had insufficient evidence to support an allegation that students with disabilities and their parents were not provided sufficient notice of delinquent or damaged books checked out from the school library.

E. Graduation

As with all other non-academic services or benefits available to non-disabled students, graduation and graduation ceremonies must allow for equal opportunity for participation by disabled students. *See, generally, Letter to Runkel*, 25 IDELR 387 (OCR 1996); *Crenshaw County (AL) Sch. Dist.*, 34 IDELR 72 (OCR 2000).

Question #31: What can schools do to ensure participation in graduation events by students with disabilities? *Crenshaw County (AL) Sch. Dist.*, 34 IDELR 72 (OCR 2000). In response to a complaint that special education students were not given equal opportunity to participate in senior activities including senior class pictures, yearbook purchases, class rings and senior invitations, the school detailed a handful of measures it employs to ensure equal participation. First, the assistant principal and an English teacher serve as senior sponsors who are responsible for students with disabilities as well as those without. These sponsors ensured that all students, regardless of disability, were included in all facets of senior activities. Additionally, intercom announcements, posters displayed in each building, and staff visits to classes and homerooms notified students of senior events. Additional methods were used to notify students of yearbook sales and senior portraits. In interviews with OCR, a parent of a student with a disability stated that she was notified of all senior activities for her student. No discrimination was found.

Question #32: Can the school provide the student with a disability a different diploma? *Moffat County (CO) School District RE-1*, 26 IDELR 28 (OCR 1996). The award of a different diploma to students who receive all necessary credits for graduation, but do not pass the statewide exit assessment, is appropriate.

Question #33: Can the school provide a separate graduation for students with disabilities? *Aldine (TX) Independent School District*, 16 EHLR 1411 (OCR 1990). The district failed to show an educational justification for its separate graduation ceremony for disabled students. Said OCR “Although the district does consider and document interaction of Lane Center students with nonhandicapped peers, the district has not demonstrated why the students at Lane Center should graduate on a different date and location than their handicapped and nonhandicapped peers at Eisenhower, Nimitz, McArthur and Aldine High Schools.” A corrective action plan provided that “The district will ensure that Lane Center students graduate with nonhandicapped peers when the [IEP Team] determines it is appropriate to the individual needs of the handicapped students. The district will ensure that a group of knowledgeable persons, the [IEP Team], addresses whether Lane Center students will participate in the graduation ceremony along with their home campus peers at Nimitz, McArthur,

Eisenhower and Aldine High Schools or in a separate ceremony. The district will document these decisions.”

Question #34: Can different treatment of students with disabilities provide equal participation at graduation? Yes, it’s possible. *Modesto (CA) City Elementary School District*, 43 IDELR 43 (OCR–2004). One of three students classified as deaf and hard of hearing alleged that she was subjected to discrimination at graduation exercises when she was seated with other deaf students who were called up as a group to receive their diplomas rather than in alphabetical order as her non-disabled peers. In response, the school argued that it had a legitimate nondiscriminatory reason for the differing treatment. The school had determined that the location in which the deaf students were seated offered a good view of the sign language interpreter located at the front of the assembly, *where other participants who needed sign language interpretation to access the event could also see the interpreter*. OCR agreed. “The Title II regulation allows for different treatment of persons with disabilities if the action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others. It was logical and nondiscriminatory to call them up together and preserve the integrity of the row. In this case, providing special seating was deemed necessary to achieve effective communication, the students were able to participate in the graduation ceremony along with their non-disabled peers, and the difference in treatment was minimal.” No violation.

Question #35: Who makes the decision to exclude a student from graduation? *Capistrano (CA) Unified Sch. Dist.*, 38 IDELR 136 (OCR 2002). The school’s decision to exclude a student with a disability from graduation due to his posing a “threat to himself and others” was improper as it was made outside of the required procedures. “OCR made no conclusion about whether or not it was appropriate for the Student to participate in the Aliso Niguel graduation ceremony. OCR did conclude that the process used to make the decision to exclude the Student did not comply with the requirements of the Section 504 regulation. The Student was excluded from a District graduation ceremony, an extracurricular activity. The District’s reason was that it would not be appropriate for the Student to participate because of dangers arising from disability-related conduct. However, this decision was not based on current information about the Student and was not made by the IEP team or other appropriate group of individuals.”

Question #36: Doesn’t the student have to be disabled to attack on exclusion from graduation due to disability? Yep. *Soirez v. Vermillion Parish School Board*, 44 IDELR 254 (W.D. LA. 2005). In preparation for the high school’s graduation exercises, students were required to attend one of two mandatory practice sessions. Failure to attend one of the sessions would result in being denied the opportunity to walk across the stage and receive a diploma at the ceremony. The policy was “announced, printed and distributed to all of the graduating seniors,” including the Plaintiff. Plaintiff took pain medication associated with her spinal condition (spondylolisthesis) and overslept her alarm and the second practice. The school, recognizing that she was not present, made several attempts to contact her by phone (calling both the home number and parent number) to no avail. The parent requested an exception to the policy on medical grounds, and included a doctor’s excuse from the student’s treating physician. The school refused to grant the exception. The student did not walk at graduation, but received her diploma a week after the ceremony. This lawsuit alleged that the student was denied access to graduation exercises due to disability.

The Court never reached the alleged discrimination issue, since the student was not ADA or 504-eligible. While the spinal condition was a physical or mental impairment, the Court concluded the student was not “substantially limited.” “At the time leading up to, during, and after the missed graduation practice, Soirez was able to participate in many activities that a healthy teenager would be involved. She regularly attended class during her senior year, volunteered as the statistician for the basketball team, held a job that required long hours on her feet, and attended private graduation parties. Soirez’ treating physician documented that Soirez had ‘returned to normal activities of daily living’ shortly after her second corrective surgery.” That physician’s letter was dated at the start of her senior

year. The Student testified “the pain associated with her condition sporadically flared up approximately once every couple of weeks. At most, she felt discomfort once a week.” She’s not eligible, and loses.

A little commentary: The student at issue here was not receiving §504 services at the time of graduation, nor apparently during her senior year. In order for her to argue disability discrimination to fight her exclusion from graduation, she had to convince the Court of her 504/ADA eligibility. She was unsuccessful because she was not substantially limited by the impairment. Based on the facts, even if she had been eligible, she probably would still lose, as the attendance requirement was facially neutral, and there was no evidence that exceptions were made for any student, disabled or nondisabled. (*See the athletic participation version of this case in Houghton Lake*) The case is instructive on the eligibility issue, and also on the types of decisions that anger parents sufficiently to file suit.

F. Food Services Issues

The nondiscrimination duty does not stop at the door to the school cafeteria. Just as students have to breathe and move and perform other major life activities to access and benefit from public education, they also have to eat. For students with food allergies, food intolerances or other impairments impacted by the food they consume, a campus’ cafeteria may have nondiscrimination duties to fulfill. The following is a summary of cases and rules with respect to a school district’s duty to comply with Section 504 with respect to cafeteria food service. *It is not a summary of cases on the broader duty to protect students with food allergies or sensitivities from exposure to those foods or ingredients elsewhere in the school, on the bus or at school-related events or programs.*

Question #37: Can you give me some examples of impairments impacted by school food service?

The following background is provided to briefly describe some of the impairments at issue. These are not exhaustive descriptions, but starting points for understanding. In the author’s opinion, the best medical information (for §504 purposes) is current data with respect to the unique impact of the impairment on the student being evaluated or served.

Food allergies are a reaction of the body’s immune system to a reaction-provoking substance, or allergen, in the food. The body sees the substance as “foreign” and fights it with antibodies. Eight foods—milk, eggs, peanuts, tree nuts (almonds, walnuts), soy, wheat, fish and shellfish—are responsible for over 90 percent of all food allergic reactions. *International Food Information Council Foundation, pamphlet: Understanding Food Allergy*, September 1998. According to the National Institutes of Health, approximately 5 million Americans, including **5-8% of American children have a true food allergy**. *Id.* **If exposed to the allergen, the following symptoms may occur.** The lips may swell, there may be stomach cramps, vomiting, diarrhea, skin problems (such as hives, rashes, and eczema), wheezing or other breathing problems. U.S. Food and Drug Administration, FDA CONSUMER, *Food Allergies Rare but Risky*, May, 1994 [hereinafter, “FDA”.] The reaction can also be more severe. Anaphylaxis, a violent allergic reaction is also possible. Severe symptoms can appear in as little as 5-15 minutes, or can progress to the life-threatening stage over 3-4 hours. A severe reaction may be indicated by “difficulty breathing, feeling of impending doom, swelling of the mouth and throat, a drop in blood pressure, and loss of consciousness.” *FDA, supra.* Ominously, as “little as one-fifth to one-five-thousandth of a teaspoon of the offending food has caused death.” *Id.* A study published in the *NEW ENGLAND JOURNAL OF MEDICINE* in 1992 pointed to an interesting **correlation between food allergies and asthma**. According to that study of thirteen children who had suffered severe allergic reactions to food (from which six died, and the other seven nearly died), “Asthma, a disease with allergic underpinnings, was common to all children in the study.” *FDA, supra.* Indeed, the FDA reports that patients who have true food allergies will likely have other types of allergies, such as dust or pollen. **Importantly, “children with both food allergies and asthma are at increased risk for more severe reactions.”** *FDA, supra.*

Food intolerance. The United States Departments of Agriculture (USDA) provided this definition. “An adverse food-induced reaction that does not involve the body’s immune system. Lactose intolerance is one example of a food intolerance. A person with lactose intolerance lacks an enzyme that is needed to digest milk sugar. When milk products are consumed symptoms such as gas, bloating and abdominal pain may occur.” “Accommodating Children with Special Dietary Needs in School Nutrition Programs: Guidance for School Food Service Staff,” USDA, Fall 2001 [*hereinafter* “*Accommodating Children*”], http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf. See also, *Yuba City Unified School District*, 103 LRP 20254 (SEA CA. 2002)(For this student with lactose intolerance, “failure to adhere to a strict diet may result in brain damage, damage to eyes, liver, or kidneys, or death”).

Celiac disease. In a New York case, a federal district court provided the following description of Celiac disease. Celiac disease “is a lifelong, digestive disorder affecting children and adults. When people with [Celiac disease] eat foods that contain gluten, it creates an immune-mediated toxic reaction that causes damage to the small intestine and does not allow food to be properly absorbed.” *Paladino v. DHL Express*, 110 LRP 19572 (ED NY 2010); See also, *Brevard County School Board*, 109 LRP 56512 (SEA FL 2009)(Complications from gluten exposure for student with Celiac disease included triggering seizures).

Diabetes. In addition to food allergies, students with other types of impairments, including diabetes, for example, may need to exercise care in the types and amounts of foods and beverages they consume, as well as the timing of their consumption. “Diabetes is a group of diseases characterized by high levels of blood glucose resulting from defects in insulin production, insulin action, or both. Diabetes can be associated with serious complications and premature death, but people with diabetes can take steps to control the disease and lower the risk of complications.” American Diabetes Association, *National Diabetes Fact Sheet*, (no date). According to data compiled by the American Diabetes Association for 2002, 18.2 million people or roughly 6.3% of the population of the United States has diabetes. Of that number, some 5.2 million people are undiagnosed. With respect to youth, approximately 206,000 people under the age of 20 have diabetes, representing about .25% of the age group. *Id.* Managing carbohydrates and hydration are two important elements of good diabetes management.

2. U.S. Department of Education (ED) Section 504 Regulations & Decisions

While ED has enforced Section 504 regulations since the late 1970’s, food services issues have received little attention. Consequently, questions on these issues are difficult to answer relying solely on existing OCR guidance. Here’s what we know.

Question #38: Does the school have a duty to provide different foods to accommodate disability-related dietary restrictions? The analysis of the school’s duty begins with a 1993 OCR letter. When asked if schools are required to provide food to meet a student’s disability-related dietary restrictions, OCR provided the following answer.

“It depends. A recipient, in providing any aid, benefit, or service, may not deny or afford a person with a disability an opportunity to participate in, or benefit from, an aid, benefit, or service, such as the provision of food services, that is not equal to, or as effective as, that provided to persons without disability. The recipient also is required to provide free appropriate public education to each qualified person with a disability. The provision of an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of persons with disabilities as adequately as the needs of persons without disabilities are met. 34 C.F.R. § 104.33(a) and (b). **Unlike medicine, which the school is not required to provide for any student, if the school provides food to students generally, it would also have to provide an appropriate lunch to the student with**

disabilities who has special dietary needs on the same basis that food is provided to students without disabilities. Depending on the circumstances, the school may have to provide special foods to meet the individual needs of the student with disabilities. This responsibility is determined on a case-by-case basis.” *Letter to Veir*, 20 IDELR 864 (OCR 1993)(emphasis added).

See also, Board of Education of City School District of the City of New York, 106 LRP 23625 (SEA NY 1999)(“child’s need for special food had been addressed by the hearing officer in proceeding 1, and that respondent had acknowledged its responsibility to reimburse petitioner for the cost of the meals which she provided for the child at the Westchester School.” The previous hearing officer gave the public school the option of either providing the special meals at the private school or reimbursing the parent for same. No details were provided as to the nature of the student’s special diet or the disability reason for the diet).

Question #39: Does an equivalent snack have to be equal in quantity? That is, do two Jolly Ranchers equal a bag of popcorn? A parent complained to OCR that the school violated Section 504 by only providing the child with two pieces of hard candy during a movie screening when the other children each received a full bag of popcorn. The parent argued that a comparable amount of snack was required. As the student’s health plan specifically approved of the snack the school provided, and did not contain requirements “regarding the amount or comparability” of the snacks, OCR found no violation. *Porta (IL) Community Unit School District*, 50 IDELR 170 (OCR 2007).

Question #40: Does the school have a duty to provide dietary information on cafeteria lunches? **Yes.** In an effort to allow the student to participate in school lunches, the §504 Plan required the school to provide to the parent a carbohydrate count on all food items that would be served in the cafeteria for the school year. To meet the requirement, the cafeteria manager relied on information received in the form of a software program from food service vendors. Unfortunately, serving sizes and counts of items required to be mixed with ingredients other than water (like cakes and brownie mixes) were confusing. No designation was made for the carbohydrate count of those items when prepared, only when purchased dry and not mixed. The school discovered the problem and resolved it during the fourth week of school by re-visiting the issue with food vendors, and use of a manual provided by the vendor that produced more accurate counts. OCR found no §504 violation for the error. *Hamilton Heights (IN) School Corporation*, 37 IDELR 130 (OCR 2002). Similarly, in a California case, the parent of two high school students with food allergies complained to OCR that her students were unable to eat school lunches due to concerns over “unknown ingredients.” The case was resolved by the school providing a food lists (identifying component ingredients) “so that the students could be knowledgeable about what food they could eat at school.” *Sonoma Valley (CA) Unified School District*, 49 IDELR 76 (CR 2007). *See also, Tolland (CT) School District*, 107 LRP 2140 (OCR 2006)(Groups using school facilities required to make available gluten free foods upon notice that student with allergy would be attending an event).

Another twist on carbohydrate counts. In response to the parents’ request for the lunch menu with the carbohydrate counts of meals served each day of the school year, the school responded by providing the menu for a single month, upon which was written calculations of the carbohydrate count for the meals served each day of the month. The District indicated that since the same meals are provided each month (apparently on different days or in different patterns) the single month menu provided the data for the entire year. OCR was did not find a violation. *Springboro (OH) Community City School District*, 39 IDELR 41 (OCR 2003).

Question #41: Could the school be required to ban certain foods, like peanuts or tree-nuts? At least one hearing officer has ordered a complete peanut ban in the student’s classroom. In the case of a first-grader with a life threatening peanut allergy, the school had previously implemented a voluntary peanut ban. The school asked parents to refrain from sending peanut-containing products to

school, required staff and students to wash their hands before and after eating, provided staff training on anaphylactic reactions, stopped supplying peanut butter lunches, created a peanut-free lunch table for the student and washed all tables and desks after meals. Despite the fact that the voluntary efforts had been successful (one exposure during the school year), the hearing officer found the accommodations inadequate and ordered the school to institute a firm ban on any peanut products. He did not believe such a ban would fundamentally alter the nature of the school's educational program. The ban would, however, allow the student to interact with all students during lunch, and participate in all food-related activities, such as "Asian food night," which the student was unable to participate in due to the use of peanut products. The hearing officer also found that the inconvenience the ban would impose on other students was justified in light of the life-threatening nature of the student's peanut allergies. *Mystic Valley Regional Charter School*, 40 IDELR 275 (SEA Mass. 2004). Similarly, schools have agreed not to serve peanuts or peanut products in the school cafeteria, *Cascade School District*, 37 IDELR 300 (SEA OR 2002), *Upper Dublin School District*, 110 LRP 37073 (SEA PA. 2010); and have taken action to prevent exposure from lunches brought to school by others, *Summit County (CO) School District*, 110 LRP 20111 (OCR 2009).

Preventing exposure to gluten. To address casein and gluten sensitivities, a variety of approaches have been used. Schools have agreed through an IEP to provide food prepared without gluten and casein (*Lowell Joint School District*, 106 LRP 49430 (SEA CA. 2006)); and sometimes parents have simply chosen to provide all the food the student needs to consume at school. *In Re: Student with a Disability*, 103 LRP 9817 (SEA VA. 2002). In a Maryland case, the student's school health plan (but not his IEP) required the school to provide "snack alternatives to accommodate his need for a gluten-free, casein-free diet." *Wicomico County (MD) Board of Education*, 107 LRP 40174 (OCR 2006). To prevent accidental exposure, a Missouri school purchased a separate freezer for gluten-free foods, kept refrigerated gluten-free foods on the top shelf of a refrigerator (sealed and labeled), and kept gluten-free dry goods in their own cabinet and in labeled containers. *Henry County (MO) R-I School District*, 52 IDELR 233 (OCR 2009)(Unfortunately, the school had previously served the student food products containing gluten on two occasions, resulting in serious illness and a violation of FAPE).

Question #42: Does the school need to worry about anything other than the food it serves? Yes. Schools address food allergies and food intolerance in the cafeteria in some very basic ways. They typically designate a peanut-free table (or other allergen free-zone) where the prohibited food item is not to be consumed. The table is typically washed carefully at appropriate intervals, and the sharing of food is prohibited. For younger students, staff may inspect meals brought from home prior before allowing students to sit in the allergen free zone. Note that at least one federal court has indicated that while the zone itself is acceptable, forcing other students to sit there is not. *See Molly L. v. Lower Merion School District*, 36 IDELR 182 (D.C. PA. 2002)(No §504 duty to provide alternative lunch room with forced attendance by nondisabled students for student sensitive to environmental noise and odors). Students returning to the classroom of the student with food allergies may also be asked to wash their hands or use wipes before resuming their work. *See also, South Windsor (CT) Public Schools*, 49 IDELR 108 (OCR 2007)(One or two instances of children at the same table as a student with a milk allergy drinking milk from open plastic containers rather than the cardboard containers required in the student's §504 plan were quickly rectified. These isolated implementation problems were not sufficient to deny FAPE to either student.).

A little commentary on the U.S. Department of Education letters of finding on food service issues: While the *Letter to Veir* is fairly straightforward, and there is clearly a nondiscrimination duty arising from the school's provision of food to students generally, recorded cases on food substitution are rare. Further, not all of the decisions seem to recognize a duty to accommodate by providing different foods—even the *Letter to Veir* says the analysis is case-by-case, but doesn't provide much to help schools determine *when* food must be substituted. Finally, to the author's knowledge, no published decision by the ED seems to have considered the impact of the USDA's Section 504 regulations,

discussed below, which directly govern food services in public schools. That seems odd, as it's the USDA that provides federal funds for food services, and would seem to have the bigger stake (compared to ED) to ensure that recipients of those funds comply with the Section 504 duty.

3. U.S. Department of Agriculture (USDA) Regulations & Guidance on Section 504

While most public school employees are aware of the existence of ED's Section 504 regulations, food service is an area where the jurisdiction of another federal agency has regulatory authority. Less well-known (at least to folks outside of food service) are the USDA's regulations and guidance on accommodating students' disabilities in the provision of meals at school. While your cafeteria folks will likely be aware of these rules, a summary is provided here to keep everyone on the same page.

In 1994, the USDA issued a guidance document entitled "Meal Substitutions for Medical or Other Special Dietary Reasons" FNS Instruction 783-2, Rev. 2 (USDA October 14, 1994) [*hereinafter* "*Meal Substitutions*"], to provide guidance on the USDA's Section 504 regulations, 7 C.F.R. Part 15b, and their impact on Child Nutrition Programs. **While the 1994 guidance is obviously quite old, it is still in force.** "Q&A Milk Substitution for Children with Medical or Special Dietary Needs (Non-Disability)", USDA Memo Code SP 07-2010 (November 12, 2009)(Question 23: Is FNS Instruction 783-2, Rev. 2 still valid? "Yes, this instruction, issued on October 14, 1994, is still current and applies to meal variations for children with and without disabilities." The milk substitution rule at issue in the 2009 letter "establishes additional requirements that apply only to fluid milk substitution for children without disabilities."). *Meal Substitutions* was supported in 2001 by a larger document, *Accommodating Children* cited previously.

With respect to food service, USDA recognizes the impact of Section 504.

"The U.S. Department of Agriculture's (USDA) nondiscrimination regulation (7 CFR 15b), as well as the regulations governing the National School Lunch Program and School Breakfast Program, make it clear that substitutions to the regular meal must be made for children who are unable to eat school meals because of their disabilities, when that need is certified by a licensed physician. In most cases, children with disabilities can be accommodated with little extra expense or involvement. The nature of the child's disability, the reason the disability prevents the child from eating the regular school meal, and the specific substitutions needed must be specified in a statement signed by a licensed physician. Often, the substitutions can be made relatively easily. There are situations, however, which may require additional equipment or specific technical training and expertise. When these instances occur, it is important that school food service managers and parent(s) be involved at the outset in preparations for the child's entrance into the school." *Accommodating Children*, p. 1-2.

The Guidance issued by USDA in 1994 provides some basic rules for School Nutrition Programs faced with requests for meal substitutions due to disability or other special dietary reasons. The term "Child Nutrition Programs," as used by USDA, appears to include the following: National School Lunch Program, School Breakfast Program, Child and Adult Care Food Program, Summer Food Service Program, the Fresh Fruit and Vegetable Program, and, sometimes, the Special Milk Program (for schools not participating in the other Nutrition Programs). The *Meal Substitutions* guidance on Section 504 as applied to these programs is summarized in the following paragraphs.

a. The USDA's Non-Discrimination Rule in Food Service. "Child Nutrition Program regulations require participating school food authorities, institutions, and sponsors to offer all participants breakfasts, lunches, suppers, supplements and milk which meet the meal patterns identified in the program regulations.... [schools] are required to offer Program meals to participants with handicaps whenever meals are offered to the general populations served by the Programs." *Meal Substitutions*, p. 1. IDEA may add requirements to Program duties. Schools "should be aware

that the Individuals with Disabilities Education Act (IDEA) imposes requirements on States which may affect them, including the service of meals even when such service is not required by the Child Nutrition Programs.” *Id.*, p. 1-2 (*emphasis added*).

b. Meal Substitutions or modifications. Schools participating in the Child Nutrition Programs “are required to make substitutions or modifications to the meal patterns for those participants with handicaps who are unable to consume the meals offered to nonhandicapped participants.” *Id.*, p. 2. The substitution or modification, as discussed below, may be required or could be discretionary. “**Meal substitution**” typically refers to replacement of a food with another food or foods. “**Modification**” tends to indicate a difference in preparation, such as changing the texture of the food (such as chopped, ground or pureed foods). *Accommodating Children*, p. 9.

Question #43: Does that mean the school could be required to provide extra meals outside of a school’s regular meal service? It’s possible. “The school food service is not required to provide meal services to children with disabilities when the meal service is not normally available to the general student body, unless a meal service is required under the child’s IEP.” *Id.*, p. 8.

c. Licensed physicians make the meal substitution or modification decision. “Determinations of whether or not a participant has a handicap which restricts his or her diet are to be made on an individual basis by a licensed physician. (Licensed physicians include Doctors of Osteopathy in many states.) The physician’s medical statement of the participant’s handicap must be based on the regulatory criteria for “handicapped person” defined in 7 CFR Part 15b.3(i) and contain a finding that the handicap restricts the participant’s diet. In those cases in which the school food authority, institution or sponsor has consulted with the physician issuing the statement and is still unclear whether the medical statement meets the regulatory criteria, the school food authority, institution or sponsor may consult the State agency.” *Meal Substitutions*, p. 3.

Question #44: What should the physician’s medical statement include? “A participant whose handicap restricts his or her diet shall be provided substitutions in foods only when supported by a statement signed by a licensed physician. The medical statement shall identify:

- A. The participant’s handicap and an explanation of why the handicap restricts the participant’s diet;
- B. The major life activity affected by the handicap; and
- C. The food or foods to be omitted from the participant’s diet, and the food or choice of foods that must be substituted.” *Meal Substitutions*, p. 3.

Question #45: Why does a physician have to provide the statement? “Children with disabilities who require changes to the basic meal (such as special supplements or substitutions) are required to provide documentation with accompanying instructions from a licensed physician. This is required to ensure that the modified meal is reimbursable, and to ensure that any meal modifications meet nutrition standards which are medically appropriate for the child.” *Accommodating Children*, p. 8-9.

Question #46: When is the substitution or modification required? “[W]hen in the physician’s assessment *food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or the obesity is severe enough to substantially limit a major life activity*, the participant then meets the definition of “handicapped person”, and the food service personnel must make the substitutions prescribed by the physician.” *Meal Substitutions*, at 4, (*emphasis added*). This is the language and mechanism utilized by USDA to determine a student with a disability under USDA’s Section 504 regulations.

Question #47: When is the substitution or modification discretionary? “Generally, participants with food allergies or intolerances, or obese participants are not “handicapped persons”, as defined

in 7 CFR 15b.3(i), and school food authorities, institutions and sponsors are not required to make substitutions for them.... [schools] may, at their discretion, make substitutions for individual participants who are not ‘handicapped persons’, as defined in 7 CFR Part 15b.3(i), but who are unable to consume a food item because of medical or other special dietary needs. **Such substitutions may only be made on a case-by-case basis when supported by a statement signed by a recognized medical authority.** In these cases, recognized medical authorities may include physicians, physician assistants, nurse practitioners or other professionals specified by the State agency. For these nonhandicapped participants, the supporting statement shall include:

- A. An identification of the medical or other special dietary need which restricts the participant’s diet; and
- B. The food or foods to be omitted from the participant’s diet, and the food or choice of foods that may be substituted.” *Id.*, p. 4 (*emphasis added*).

Accommodating Children describes the distinction between those children for whom mandatory substitutions are required (children with disabilities) versus those for whom substitutions are discretionary (children with other special dietary needs) as a matter of severity of impact. “The school food service may make food substitutions, at their discretion, for individual children who do not have a disability, but who are medically certified as having a special medical or dietary need. Such determinations are only made on a case-by-case basis. This provision covers those children who have food intolerances or allergies but do not have life-threatening reactions (anaphylactic reactions) when exposed to the food(s) to which they have problems.” *Accommodating Children*, p. 6. Children in this category do not have a disability, per USDA regulations, but have “special dietary needs.”

Question #48: How about an example of a discretionary situation? “[I]ndividuals who are overweight or have elevated blood cholesterol generally do not meet the definition of handicapped person, and thus school food authorities, institutions, and sponsors are not required to make meal substitutions for them. In fact, in most cases, the special dietary needs of nonhandicapped participants may be managed within the normal Program meal service when a well- planned variety of nutritious foods is available to children, and/or ‘offer versus serve’ is available and implemented.” *Id.*, at 4-5.

Question #49: Is there any legal distinction between “medically required” and “parentally desired” food substitutions? Yes. At times, parent preference may favor diets or foods outside the mainstream, and requests may be made for the school to provide food choices respectful of those preferences. Under Section 504 and the ADA, parent preference is considered but does require accommodation. Should a particular diet be required by an impairment and the required level of risk is identified by a physician, the duty to accommodate is created with respect to school food service. When the diet is a preference or life choice, but not required by impairment, Section 504 and the ADA appear to create no duty to provide food choice consistent with the preference. Unfortunately, these preferences may arise from nonmainstream treatments for impairments, further complicating the analysis. *See for example, Atkins School District*, 4 ECLPR 180, 4 LRP 9860 (SEA ARK. 1999)(Parents of a student with autism adopted an “all white diet” (everything has been eliminated from diet “except white food such as turnips, potatoes, cauliflower, breast of chicken, but not including dairy products, wheat products and rice”) to address the student’s behaviors. In response to evidence from school staff on the child’s lethargy and the child looking in the hearing officer’s pockets and hands for food, the Hearing Officer questioned the dietary choice. “There is no way of knowing how well this child would have done this past year had the parents given the child an adequate diet....”).

And finally, this bit of USDA language on parent preferences. “While school food authorities are encouraged to consult with recognized medical authorities, where appropriate, **schools are not**

required to make modifications to meals based on food choices of a family or child regarding a healthful diet.” *Id.*, at 9 (*emphasis added*). This thinking is emphasized in a hypothetical provided later in the *Accommodating Children* guidance.

“Situation 6: A child’s parents have requested that the school prepare a strict vegetarian diet for their child based on a statement from a health food store ‘nutrition advisor’ who is not a licensed physician. Must the school comply with this request?

Response: No. The school is responsible only for accommodating those conditions meeting the definition of disability as described in 7 CFR Part 15b. Schools are not required to make food substitutions based on food choices of a family or child regarding a healthful diet.” *Id.*, at 26.

Question #50: Can schools charge more for substituted or modified meals? No. “Furthermore, there shall not be a supplementary charge for the substituted food item(s) to either a handicapped participant or to a participant with other special dietary needs. 7 CFR 15b.26(d)(1) specifies that, in providing food services, recipients of Federal financial assistance ‘may not discriminate on the basis of handicap’ and ‘shall serve special meals, at no extra charge, to students whose handicap restricts their diet.’ While any additional costs for substituted foods are considered allowable Program costs, no additional Child Nutrition Program reimbursement is available. Sources of supplemental funding may include special education funds (if the substituted food is specified in the child’s individualized education program); the general account of the school food authority, institution or sponsor; or, for school food authorities, the nonprofit school food service account.” *Id.*, at 5. Note that *Accommodating Children* provides an interesting list of potential funding sources that might be available for meal substitution and modification. See *Accommodating Children*, p. 11-14.

Question #51: Can schools change or revise a physician’s diet prescription or medical order? No. “Substitutions or modifications for children with disabilities must be based on a prescription written by a licensed physician.... Under no circumstances are school food service staff to revise or change a diet prescription or medical order.” *Accommodating Children*, p. 7. “School food service staff cannot decide what substitutions are appropriate for a given child. **Food service staff should not choose the substitutions themselves because a child may be on a specific medication, which could interact in a negative way with a particular food item.** Ideally, a list of appropriate substitutions should accompany the menus and the foods should be on hand on a regular basis. If such a list is not available, school food service staff must ask parents to obtain from the child’s physician (or the individual who planned the child’s menus) a list of those foods that may be substituted.” *Id.*, p. 30 (*emphasis added*).

Question #52: What if the school does not understand the order, or the physician did not provide all of the required information? The school needs to ask some questions and get the necessary information. “If school food service staff have questions about the diet order, the prescribed meal substitutions, or any other modifications that are required, the child’s physician and/or a registered dietitian should be consulted. If the school food service director cannot obtain local level assistance, the State agency should be consulted for technical assistance. Under no circumstances should school food service staff diagnose health conditions, perform a nutritional assessment, prescribe nutritional requirements, or *interpret, revise or change* a diet order.” *Id.*, p. 20-21 (*emphasis in original*). Note the cautionary tone used in Situation 15.

“Situation 15: The physician’s statement only specifies the medical disability, not the required food substitutions. What should the food service director do?

Response: An appropriate school official (such as the food service director, food service manager or school nurse) must ask parents to obtain more written information from the physician

concerning the substitutions or modifications the child requires. If difficulties arise in obtaining the needed information, the parent(s) should be advised of the problem and asked to work with the school to obtain a complete medical statement for the child. *It is important that the family understand that the school is unable to provide food substitutions or modifications without an adequate diet order or diet prescription.*

In some cases, it may be appropriate and helpful for the physician to provide a written referral to a registered dietitian or other qualified professional for diet substitutions. For further guidance or referral to a registered dietitian, school food service directors may contact their State agency.” *Id.*, at 32 (*emphasis added*).

Question #53: Do these meal substitutions or modifications have to be documented? Of course. “It is important that all recommendations for accommodations or changes to existing diet orders be documented in writing to protect the school and minimize misunderstandings. Schools should retain copies of special, non-meal pattern diets on file for reviews.” *Id.*, p. 8. *See discussion below on merging the two sets of regulations.*

Question #54: How often should meal substitutions and modifications be reviewed? “The diet orders do not need to be renewed on a yearly basis; however schools are encouraged to ensure that the diet orders reflect the current dietary needs of the child.” *Id.* Of course, best practice is annual review of Section 504 students, discussed below.

Question #55: Which set of regulations (USDA or ED) should the schools follow? Ideally, both sets should be followed, as schools are subject to the jurisdiction of both federal agencies. *Accommodating Children* was prepared by USDA in consultation with the Department of Justice and the Department of Education. *Accommodating Children*, p. 2. Nevertheless, USDA neither references nor seems to acknowledge the Department of Education’s Section 504 regulations, the Section 504 Committee or the Section 504 Plan. With respect to food substitutions and modifications in school food services, the USDA regulations and guidance are far more clear and concise than the U.S. Department of Education’s regulations and guidance, but USDA guidance provides no process for getting the accommodations determined, implemented, and reviewed. Since USDA rules and guidance are more specific to eligibility in the school lunch, breakfast and milk programs, they would seem to have greater weight on these issues. Since Section 504 Committees (governed by ED regulations) do the work of Section 504 in the public schools, the §504 Committee process should be followed in implementing the USDA rules on food service substitution and modification. With those thoughts in mind, consider the following approach with your school attorneys:

1. As a general rule, medical diagnoses are not required for Section 504 eligibility unless the Section 504 Committee believes that it needs a diagnosis [*Williamson County (TN) School District*, 32 IDELR 261 (OCR 2000); *Letter to Parker*, 18 IDELR 965 (OCR 1992)]. Food substitution due to disability requires medical data beyond that typically necessary for eligibility. The school must know not only what specific foods or ingredients are problematic, but also what specific foods should be substituted to ensure that USDA nutrition standards are met. **Consequently, a medical doctor’s findings are critical to the USDA approach to required substitutions and modifications in School Nutrition Programs over which USDA has jurisdiction.** Substitutions or modifications to school breakfast, lunch, or other meals governed by USDA rules should be made consistently with those USDA rules as outlined above. **Further, the rules with respect to discretionary substitutions and modifications require written determinations by “recognized medical authorities” as opposed to physicians only.**
2. The physician’s or recognized medical authority’s information (as appropriate for required or discretionary substitutions or modifications) should list the foods to be substituted or the changes

to be made in food texture. Those instructions should be followed. If the instructions are unclear, appropriate staff should work with the parent and doctor to clarify the orders.

3. Decisions with respect to meal substitution or modification for students eligible under §504 should be documented in the §504 Plan. For IDEA-eligible students, meal substitutions or modifications should be part of the student's IEP. Section 504 Committees and ARD Committees/IEP Teams must understand that student need may not be limited to food service issues. For example, Celiac disease and the requirement of gluten-free foods may also require, on a case-by-case-basis, use of gluten-free school supplies, manipulatives, and toys. *See, for example, Brevard County School Board, supra (where student with autism and Celiac disease frequently put objects into his mouth, including non-food objects).*

4. While USDA does not require an annual update of the physician's or recognized medical authority's findings, USDA recognizes the need for the data to be current for student safety purposes. Consequently, part of the school's Section 504 annual review for the student should address whether the current doctor orders and findings with respect to food substitutions or modifications are up-to-date. While Section 504 only requires periodic re-evaluation (every three years), the author believes annual review is best practice.

III. Some final thoughts...

A. These are decisions to be made by the appropriate IEP Team or Section 504 committee.

See, for example, Marana (AZ) Unified School District, 53 IDELR 201 (OCR 2009), where a school staff person's unilateral decision-making regarding which activities a student with Down syndrome could participate in during his marching band's trip to Disneyland violated Section 504 and Title II of the ADA. The staff person unilaterally determined that the student was to be excluded from the band's recording session, a parade, and the band's group picture. The fact that the decision was made outside either the IEP team or §504 committee process meant that neither appropriate team nor the parent were able to participate. See also, Wyoming City Schools, 57 IDELR 85 (SEA OH. 2011)(In response to parent's request for an interpreter on a school bus to assist the student should he become ill, school held IEP Team meeting, but did not include persons with knowledge of the student's medical needs and communication, instead relying on opinion of swim coach.).

B. Transportation may be required for access.

See, for example, Carmel Central School District, 20 IDELR 1177 (OCR 1993) where the District violated §504 by denying late transportation to disabled student, who needed such transportation in order to access extracurricular activity. District policy requiring students to furnish their own transportation did not relieve the District of its obligation under §504.

C. School can require students and parents to notify school of need for accommodation.

See, for example, Rockdale County (GA) School District, 22 IDELR 1047 (OCR 1995) where a District policy requiring students who need accommodations in order to participate in extracurricular activities to notify school was determined appropriate. No formal policy on disabled students' participation in extracurricular activities is required. See also, Lambert v. West Virginia State Bd. of Education, 21 IDELR 647 (W. Va. Supreme Court of Appeals 1994)(Court rejects the school argument that since the parent's request was not made directly to the director of special education, the request did not trigger any legal duty).