The Intersection of Student Health Plans and Modern Section 504 Requirements

by

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Addressing Misconceptions About Modern §504 Eligibility and Physical Impairments

Key Points:

- **Schools may over-focus on academic performance and the major life activity of "learning" in determining §504 eligibility**
- **The ADAAA's expansion of the list of major life activities increases the possibility of §504 eligibility for students with acute or chronic health impairments**

Some of the first Letters of Finding issued by OCR following the effective date of the ADAAA addressed schools' over-focus on the major life activity of learning while ignoring the possibility of §504 eligibility based on substantial limitation to any of the other major life activities in the expanded listing. Some such cases include the following:

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

> After the OCR investigation and training on the ADAAA, however, "[t]he District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the District sent a letter to parents of students on health plans indicating that it would be

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

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

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

> *Note*—While these misconceptions of eligibility came onto contrast following the ADAAA, OCR had in fact warned, as early as 1995, that schools should look at major life activities other than "learning" in making eligibility determinations. In 1995, for example, OCR wrote that "[s]tudents may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school." ***Letter to McKethan*, 23 IDELR 504 (OCR 1995)**.

In its 2012 guidance, OCR provided some additional examples of impairments impacting other major life activities in the 2012 guidance. "(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing; (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system." *2012 Dear Colleague Letter*, p. 6, Question 7.

OCR's Position on Health Plans vs. §504 Plans

Key Points:

- **Many schools use individual health plans (IHPs) or similar documents to address the health-related needs of students with health impairments, without considering a §504 referral**
- **OCR's position is that IHPs are a form of mitigating measure under the ADAAA, and its beneficial effects must not be considered in determining §504 eligibility**
- **OCR also takes the position that implementation of IHPs created outside of the §504 process may not suffice to meet the school's §504 child-find and FAPE obligations**
- **IHPs developed outside §504 procedures can deprive parents and students of §504 status, with its nondiscrimination protections, and procedural safeguards**

By way of reference, "health plans" or "individual health plans (IHPs)" is used in these materials as a catch-all term to describe protocols or processes put in place for an individual student to maintain the student's health at school or to respond to a health emergency at school. In everyday school usage, a "health plan" is limited to health issues and rarely addresses the educational supports or services that a student might need due to an impairment. Some schools use phrases like "individualized health care plan," "emergency plan," or a name that directly references the impairment like "allergy plan" to convey the same idea.

In addition to districts that simply failed to consider the impact of physical impairments on major life activities other than learning, other districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. For example, in a pre-ADAAA Indiana case, OCR found that the District's practice of not serving all students with diabetes under Section §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read "Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services." *Hamilton Heights (IN) School Corp.*, 37 IDELR 130 (OCR 2002). This approach is complicated

by the ADAAA's mitigating measures rule.

OCR has determined that health plans and emergency plans are mitigating measures under the ADAAA—In *North Royalton (OH) City School District,* 52 IDELR 203 (OCR 2009), the school initially found a student with an anxiety disorder and tree nut allergy ineligible for §504 due to the effectiveness of his emergency allergy plan (EAP). Prior to the effective date of the ADAAA, OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA's effective date, the school reconsidered the eligibility question, and found the student §504-eligible under the new rules, and his EAP was made his §504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services, but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning. With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations, stating that "[i]n doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students' disability status."

> *Note*—A fact revealed during OCR's investigation leads to an interesting question. "The district also stated, however, that no other student with a food allergy being served under an EAP—approximately 40 students—has been identified as a student with a disability and provided a §504 plan since the ADAAA took effect on January 1, 2009." Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made. Instead, OCR was satisfied with the District's agreement to "issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child's medical impairment substantially limits one or more major life activities."
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> In other situations, OCR has required a broader process to resolve the complaints. See, e.g., *Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010)(as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools,* 54 IDELR 61 (OCR 2009)(as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year).

Given the history described above, OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 *Dear*

Colleague Letter Q&A guidance. The question focuses on students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility *after* the ADAAA, as follows:

> "**Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?**
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> A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district's actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an 'individual health plan' or 'individualized health care plan' to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures. Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards. In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation." 2012 *Dear Colleague Letter*, Question 13, p. 9-10.

In this question and answer, OCR addresses the trend in schools to implement health plans (sometimes called by other names) to address chronic or acute health conditions, when those plans are not developed under §504 procedures or requirements. As in a variety of complaint investigations and letters of findings, OCR states that continuing a health plan may not be enough if the student needs services because of the physical impairment. In a situation where a student has a disability in the form of an acute or chronic health condition, and needs services as a result, OCR indicates that the student has a right to an evaluation, placement, and procedural safeguards. The student, moreover, is entitled to the legal non-discrimination protections of §504. Thus, providing the student with needed health-related accommodations and/or

services under the auspices of the §504 program is also required to ensure that the student and parents have access to the procedural safeguards of §504, as well as the passive—yet potentially crucial—nondiscrimination protections of the law.

Practical Guidance on Making §504 Referral Decisions

Key Point:

- **Schools should undertake a multi-factor process to determine whether students on IHPs should be offered a §504 evaluation**

Students with acute or chronic medical conditions may need a health plan, usually developed by school nurses in consultation with the student's doctor, in order to participate in school. The question, however, is whether the development of such health plans should take place under the §504 process, through action of a §504 committee, and as part of development of a §504 plan. OCR decisions appear to indicate that the practice of maintaining and implementing health plans without following §504 procedures can violate §504. At the same time, however, no OCR letter has taken the position that every student that has a health plan must be referred to §504, or that every health plan must be developed under the §504 procedures.

So, how can schools make sensible determinations regarding when a student that needs a health plan also needs to be referred for a §504 evaluation so that potentially the health plan becomes part of a §504 plan developed in accordance with §504 procedures? As you review the files of all students on health plans, the following set of factors can help identify the students that should be offered a §504 evaluation:

- Degree of severity of health condition
- Degree of complexity of health plan
- Risk of a medical emergency at school
- Severity of potential consequences of a medical event at school
- Frequency of implementation of health plan action items
- Need for accommodations/services in classroom due to health condition
- Need for health plan implementation in order to function in and attend school
- Student's classroom performance, including in PE

Schools could use the above set of questions as a metric to consider the relative need for referral of students currently on IHPs, but who have not been evaluated through §504. If analysis of the above factors still leaves you in doubt about the need for a §504 referral, err on the side of offering a §504 evaluation to the parent. The use of a multi-factor tool to assist in consideration of whether an IHP student should be offered a §504 evaluation can assist a school in showing OCR that careful consideration has been made of the students on IHPs and which of those students should be referred to §504.

Combating anti-eligibility attitudes—§504 coordinators have to work to resist any potential tendencies on the part of campuses to avoid evaluating and qualifying students with health impairments under §504 when they have IHPs. These tendencies likely result from a preference to avoid the §504 evaluation process, with its notice and consent requirements, need to schedule and hold a §504 committee meeting, documentation of the meeting and potential §504 plan, and need for periodic reevaluations. Aside from the fact that IHPs may not meet the full range of student needs, such a course exposes the schools to adverse OCR complaint investigations. More menacing is the potential that a long-term failure to identify a student under §504 could lead to a money damages claim in federal court if the student has a serious health-related event at school or there is a blatant long-term failure to address FAPE needs under §504.

> An example this type of case, although not in the context of IHPs, is ***T.H. v. Montgomery Cnty. Bd. of Educ.*, 56 IDELR 268 (M.D.Ala. 2011)**, where a school failed to make any changes to a student's §504 plan over a span of years, despite knowledge of her frequent tardies, failure to complete work, and refusal to participate in class. In refusing to dismiss the money damages case, the court noted that the district had conducted no evaluations in a span of 8 years to attempt to address the problems. And, "the [student's] plans were barely altered from the beginning of ninth grade through the end of eleventh grade, despite the fact that [the student] had failed classes and graduation examinations during that period,…" Thus, the court held that the facts could suggest deliberate indifference on the part of the school, and he allowed the claim to proceed.

OCR Investigations Involving IHPs

Key Point:

- **A number of OCR decisions after the ADAAA have found schools in violation of §504 for failing to consider §504 evaluations for students on IHPs, in various fact situations**

In its investigation of ***Prince William Cnty. (VA) Pub. Sch.*, 57 IDELR 172 (OCR 2011)**, OCR looked at the health plan from a different angle, finding that if a student with a disability has a health plan, OCR will deem implementation of such a health plan to be a §504 service, even if the plan is not formally incorporated into the student's §504 plan. In that case, OCR stated that it "cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan. Thus, the student's health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504's procedural safeguards with regard to the health plan."

OCR ruled similarly in ***Springer (NM) Mun. Schs.*, 111 LRP 65,450 (OCR**

2011). There, the "individualized health management plan" a district created to address the pancreatitis-related dietary needs of a student who had frequent medically related absences was found to not be equivalent to a 504 plan. Even if the student did not need academic modifications, the health plan was neither developed by an appropriately constituted Section 504 team, nor subject to Section 504's procedural protections.

In ***Roselle Park (NJ) Sch. Dist.*, 112 LRP 17,599 (OCR 2012)**, although the district developed an IHP to address a student's limited mobility, the process for developing the IHP did not comply with the procedural requirements of §504. The District convened a group of knowledgeable people in developing the plan, but it did not notify the parent of her right to request a due process hearing if she disagreed with its contents, or otherwise notify the parent of her other procedural safeguards under §504.

Diabetes Cases

In the matter of ***Opelika (AL) City Sch. Dist.*, 11 LRP 47376 (OCR 2011)**, when the parent asked for a §504 plan for a student with diabetes, the school instead implemented his Diabetes Management Plan from his prior school district, and failed to provide the parent notice of her §504 rights or review the plan through a §504 committee. The school was apparently under the impression it had no reason to convene a §504 meeting, since the student did well academically. "In an interview with OCR, the Section 504 Coordinator explained that the Student had good grades and was extremely capable. He also opined that students with Section 504 Plans are usually students who need academic accommodations or special furniture or equipment." Ultimately, the school provided a §504 plan, but only seven months after the parent's request. OCR thus found the District in violation of §504. OCR added that "because the IHP was unilaterally developed by the regular school nurse, instead of a group of persons knowledgeable about the Student and the meaning of the evaluation data and placement options, the IHP did not constitute a properly developed Section 504 Plan."

> *Note*—As can be seen, the misconception that §504 plans are only for students with impairments that directly impact classroom academic performance is well-entrenched and commonly leads to adverse results for schools in OCR complaints. Schools that hear that type of thinking from staff should consider §504 training on child-find and application of §504 eligibility interpretations after the ADAAA.

In ***Tyler (TX) Ind. Sch. Dist.*, 56 IDELR 24 (OCR 2010)**, the District had a practice of providing health plans to students with diabetes instead of considering their eligibility under §504. OCR found that with the parent who filed the complaint, the District conducted a §504 evaluation of the student, but only after the parent requested, not as part of its normal practice. The student was missing instruction when he was pulled from class for insulin shots, but the health plan did not address classroom issues, only diabetes maintenance issues, as is usually the case. The §504 plan developed after the §504 evaluation,

however, contained a variety of classroom accommodations, in addition to the health plan items. OCR found that the District's practice to not initiate 6504 evaluations for students with diabetes, but rather to rely on health plans created outside of §504, violated the student's rights under the law. "In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD circumvents the procedural safeguards set forth in Section 504."

> *Note*—For a very similar finding, see *Forest Hills (OH) Local Sch. Dist.*, 58 IDELR 114 (OCR 2011)(practice of addressing the needs of students with diabetes only through health plans, and conducting §504 evaluations only when parents specifically requested them, violated §504).

Expanded OCR Investigations on IHPs

OCR has the authority to expand a single-student investigation to a broader focus, as it did in ***Clarksville-Montgomery Cnty. (TN) Sch. Dist.*, 60 IDELR 203 (OCR 2012)**. There, OCR obtained records on all students on health plans in comparison to those on §504 plans. It found that while 1,206 students had individual health plans (IHPs), only 194 students had been identified as eligible under either §504 or special education. Indeed, §504 coordinators conceded that they were reluctant to qualify students under §504, and they stated that a student's condition had to impact learning in the classroom before they would make a referral for a §504 evaluation. Normally, school nurses developed the IHPs in collaboration with the student's doctor, and without consideration of a referral to §504. "The development and implementation of the IHCP for a student does not include consideration of possible referral for an evaluation as set forth in the Section 504 regulation using a variety of sources and in consultation with a group of knowledgeable persons or notice of procedural safeguards. OCR thus required the District to make changes in its procedures and policies with respect to §504 referral and eligibility." OCR thus held that many of the students on IHPs should have been referred to §504, or their IHPs had to be created in compliance with §504. OCR stated that "[i]t is important to note that an IHCP may also comply with the provisions of Section 504, provided that where appropriate, students with IHCPs, who are students with disabilities who may need related services, are provided evaluation, and, where appropriate, placement, and the procedural safeguards required by the Section 504 regulation."

Similarly, OCR examined the District overall numbers and statistics in the case of ***Memphis (TN) City Sch. Dist.*, 112 LRP 26130 (OCR 2012)**. In that large school system, OCR found that 9,824 students from its 191 schools had health plans, but very few received §504 evaluations. In schools with 100% minority enrollment, moreover, zero students on health plans received §504 evaluations. Apparently, §504 evaluations were only conducted when parents actively made referrals based on their children's health conditions. Guidance counselors, who were responsible for coordinating §504 activities, were not proactive in making referrals for students on health plans that may have needed referral. OCR thus negotiated for the school to revise its §504 child-find policies and procedures by

adding additional steps to the counselor's processes.

> *Note*—The two cases above raise two significant implications: (1) OCR may decide to expand a single-student investigation to assess districtwide compliance on a particular §504 issue, and (2) data indicating that only a small fraction of students on IHPs are carried under §504 tend to lead to OCR findings of violation of §504.

Students with Allergies

The health plan concern under §504 can arise in situations of students with allergies, as in the case of ***Torrington (CT) Bd. of Educ.*, 60 IDELR 295 (OCR 2012)**. That District was under the impression that it was properly addressing the needs of a student with life-threatening shellfish allergy by placing her on a health plan. The school's practice was to not consider whether a student was §504-eligible if the condition in question was an allergy. OCR noted that "the District admits that had the Complainant not requested that the Student be evaluated under the 504 process, the Student likely would have remained on a health plan given the District's practice of placing students with allergies on health plans without consideration to their possible qualification and eligibility for services under Section 504." Although the District finally evaluated the student under §504 after the parent requested, the parent filed a complaint alleging the District should have done it sooner. OCR agreed, finding that "[i]t is essential that eligibility determinations for students suspected of having disabilities are made within the context of Section 504 so that districts are required to adhere to the procedural requirements of the statute's regulations, including making parents or guardians aware of their due process rights at required junctures."

> *Note*—To OCR, the §504 legal status, procedural rights, and non-discrimination protections are as important as the accommodations and services the student will receive from the school. While schools tend to focus on addressing the students' immediate health-related needs, they may at times underemphasize the importance of the §504 process, students' legal rights, and parent rights in complying with their obligations.

Another similar case involving a student with food allergies led to an OCR finding of violation in ***Union Cnty. (NC) Pub. Schs.*, 64 IDELR 25 (OCR 2014)**. Although OCR found that the District provided services to the child under an IHP, it failed to evaluate her for eligibility and services under §504. In fact, OCR found that although dozens of students were on health plans at the school, none had been evaluated under §504 based on their underlying health conditions. Again, OCR focused on the lack of §504 rights and safeguards for these students. "The District's IHP provisions don't provide Section 504 protections, e.g., they include no provisions requiring that IHP-related decisions be made by a group of people who are knowledgeable about the student and the data being considered, a commitment by the District that it will provide all (or any) of the aids or services contained in the IHP (which are prepared by the

School nurse), and no hearing, appeal, or other due process procedures or rights." The school thus agreed to evaluate all students with food allergies under §504.

Special Education Students and IHPs

Sometimes, similar problems can arise even when the student is in fact an identified special education student, as in the OCR investigation in ***Grenada (MS) Sch. Dist.*, 61 IDELR 54 (OCR 2012)**. There, a student with Diabetes was also eligible under IDEA as a student with an Intellectual Disability (ID) and Speech Impairment (SI). Other than noting that the student had Diabetes, and needed breaks for water and snacks, the IEP team had neither collected any information nor conducted any type of evaluation or assessment to understand the impact of Diabetes on his educational program or determine if the student also qualified as a student with an Other Health Impairment (OHI). Moreover, the student was on a "School Care Plan" that was not part of his IEP or developed by his IEP team. OCR held that the school had failed in its §504 obligations to evaluate the student's Diabetes and its impact on his functioning in the school setting as part of the IEP team process.

> *Note*—Why is OCR, an office authorized only to monitor compliance with §504/ADA, able to investigate the case of an IDEA-eligible student? Because all IDEA-eligible students meet §504 eligibility criteria and have residual §504 nondiscrimination protections. These students §504 rights, however, are usually amply addressed through the IEP team process. But, their residual §504 status enables OCR to investigate allegations of §504 violations in their cases.

Asthma

The health plan vs. §504 plan issue can arise when a student begins struggling at school, as in the OCR investigation in ***Campbell (CA) Union Elem. Sch. Dist.*, 58 IDELR 200 (OCR 2011)**. There, a first-grader with asthma was attending a campus under an intra-district transfer agreement. While she had a health plan, she was not identified as a §504 student. When she began to have attendance problems, apparently due to the asthma, the District revoked her transfer and moved her to a regularly assigned campus. The parent complained to OCR, alleging a failure to identify her daughter as a §504 student. OCR agreed, finding that the school's knowledge of her asthma, together with the substantial absences, should have led the school to refer the student for a §504 evaluation, at which the team could have examined the cause of the absences and other available data. As in other cases, school staff were misled by the student's academic performance. "According to District witnesses, they never discussed the possibility of evaluating the Student for a Section 504 plan. This was attributed by some witnesses to the fact that the Student was testing at or above grade level." OCR found that the change in placement without prior §504 evaluation, under the circumstances, violated §504.

> *Note*—If school staff had looked at the overall information when

considering a transfer revocation, they may have determined that a §504 referral should have taken place before revoking the transfer. As it was, the revocation of the transfer was the step that caused the parent to file the OCR complaint that led to a finding of violation. When a student with a health impairment has attendance problems, which in turn can affect classroom performance, a §504 referral may certainly be warranted prior to truancy filings, transfer revocations, or application of other school policies.

In ***Travis (CA) Unified Sch. Dist.*, 58 IDELR 262 (OCR 2011)**, the parent of a girl with asthma complained that the district failed to provide her a §504 plan even after she made a request for a plan. The district, aware that the girl had asthma, developed an "Asthma Action Plan," but had not conducted a §504 evaluation of the student or provided notice of rights and procedural safeguards under the law. The girl, moreover, was struggling in PE, with her grade dropping from an A to a D because she was unable to run a required mile due to her shortness of breath. The PE progress reports, however, chalked the problems up to lack of effort on the part of the student. OCR found a violation of §504, as the Asthma Action Plan was "generic" and "not based upon an evaluation of the individual school health or educational needs of the Student and did not provide Section 504 procedural safeguards." The district was made to provide a §504 evaluation and consider health services and classroom accommodations, including a plan for making up work missed due to asthma-related absences, visits to the nurses office, and medication administration.

Pre-ADAAA OCR Analysis of Health Issues

In a pre-ADAAA investigation, OCR ruled not much differently than in modern cases with respect to a school's informal handling of a student's diabetes. In ***Fayette County (KY) Schs.*, 45 IDELR 67 (OCR 2005)**, a student who transferred from Pennsylvania to Kentucky was not identified as a §504 student by the District despite its knowledge of his medical condition and needs. At first, the District failed to monitor the student's glucose or administer insulin, and the parents complained that he was testing his glucose in an unsanitary bathroom. After the student attempted suicide by insulin overdose and spent a week in a psychiatric hospital, the District developed informal procedures for monitoring the student's glucose and administering insulin, but it did not evaluate the student pursuant to §504 or develop a §504 plan, despite the parent's request. Thus, the school was found in violation of the child-find mandate of the §504 regulations and denied the student a FAPE under §504.

Health Plans and Extracurricular Activities

Under §504, students must be afforded an equal opportunity to participate in extracurricular activities and nonacademic services associated with a public school. 34 C.F.R. §104.37. In situations where implementation of health-related accommodations or services are necessary in order for a student to participate at school, they will generally also be necessary in order for them to participate in extracurricular activities or nonacademic services. Schools must ensure that

arrangements are made so such accommodations and services are provided to students during those activities. The case below shows how miscommunication and misunderstandings about those services can derail a student's participation.

In the OCR investigation of ***Yakima (WA) Sch. Dist. No. 7*, 114 LRP 35083 (OCR 2014)**, a band member with epilepsy was scheduled to attend an overnight summer band camp. The student's health plan required that a nurse be in attendance whenever outside a 15-minute 911 response area, and that the student be otherwise supervised by a trained staffperson. Although the school had in fact planned for three trained adults to attend the camp, and the camp was within a 15-minute 911 response area, the school failed to communicate these arrangements to the parent, telling the parents only that a nurse would not be attending. The parent responded by not sending the student to the camp. The District thus agreed to revise its policies and procedures, and provide staff training, to ensure such miscommunications did not recur.

HIPAA, Health Plans, and Other School Nurse Records

HIPAA (Health Insurance Portability and Accountability Act) regulations at 45 C.F.R. Parts 160 and 164 confirm that schools' education records that are subject to FERPA are not subject to HIPAA. The regulations provide that the privacy rule "expressly excluded from the definition of 'protected health information' only educational and other records that are covered by the Family Education Rights and Privacy Act of 1974, as amended, 20 USC Sec. 1232g."

> Under the FERPA regulation at 34 C.F.R. §99.3, "education records" are records that "directly related to a student; and maintained by an educational agency or institution or by a party acting for the agency or institution" (that are not otherwise within the five exceptions set forth in the regulations). 34 C.F.R. §300.611 of the IDEA regulations in turn adopts the definition set forth in 34 C.F.R. Part 99.
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> Therefore, student medical records and related education records maintained by public schools under FERPA are not subject to HIPAA. When a school provides health care to students, such as through its school nurses or health clinic, it may be a "health care provider" as defined by HIPAA. But, many schools, even those that are potentially HIPAA-covered entities, are not required to comply with the HIPAA Privacy Rule because the only health records maintained by the schools are "education records" or "treatment records" of eligible students under FERPA, both of which are excluded from coverage under the HIPAA Privacy Rule. See *Joint Guidance on the Application of FERPA and HIPPA to Student Health Records* (November 2008—Department of Health and Human Services and Department of Education).