

SECTION 504 ADVANCED ISSUES: PUZZLING CHILD FIND AND ELIGIBILITY QUESTIONS

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A note about these materials: These materials are not intended as a comprehensive review of all new case law on Section 504 and the ADA in public schools but as an identification and summary of some of the more interesting trends and issues arising from the last few years. For ease of reading, quotations will typically not include citations to the record or to other supporting authority. 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,” to the Equal Employment Opportunity Commission will read “EEOC,” and to the U.S. Department of Justice will read “DOJ.”

In addition to the ADA and Section 504 regulations from ED, EEOC and the DOJ and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, 67 IDELR 189 (OCR March 27, 2009, last modified Oct. 16, 2015), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as “Revised Q&A.” In January 2012, OCR released a guidance document on the ADAAA and its impact on Section 504. The “Dear Colleague Letter” consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 01/19/12) (hereinafter “2012 DCL”). Finally, In July of 2016, OCR released a guidance document/resource letter on ADHD. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016)(hereinafter “ADHD Resource Guide.”) In addition to addressing issues related to students with ADHD, the Guide also addresses parent referral, parent-procured evaluation and other related topics.

I. A few Section 504 issues “tapas” style to get started...

A. Eligibility by the numbers is a bad IDEA (and bad under 504 as well).

You might have read or at perhaps heard of the HOUSTON CHRONICLE’S story on the Texas’ limiting eligibility in special education by means of a cap. Here’s a few relevant pieces of the story.

“More than a dozen teachers and administrators from across Texas say they **delayed or denied special education to disabled students in order to stay below the benchmark** state officials set for the number of students who should get such services.

A Houston Chronicle investigation found the **Texas Education Agency’s enrollment benchmark for special education services of 8.5 percent has led to the systematic denial of services by school districts.** In the years since Texas’ 2004 implementation of the benchmark, the rate of students getting special education dropped from near the national average of 13 percent to the lowest in the country. It fell to 8.5 percent in 2015....

The TEA acknowledged in its statement that there is no research establishing 8.5 percent as ideal. Kathy Clayton, among the agency employees who set the benchmark, said **the percentage wasn’t**

based on research. Instead, she said, it was driven by the statewide average special education enrollment. Reminded that the statewide average was nearly 12 percent at the time, Clayton said, ‘Well, it was set at a little bit of a reach. Any time you set a goal, you want to make it a bit of a reach because you’re trying to move the number.’

Teachers and administrators say many Texas school districts have interpreted the TEA monitoring protocol as a strict ban on serving more than 8.5 percent of students in special education.” *Report: Benchmark led to special education services denials*, HOUSTON CHRONICLE, Online edition, Sunday, September 11, 2016 (emphasis added).

A little commentary: While the issues involved are complex, one conclusion seems indisputable: when federal law requires eligibility decisions to be made individually for a student, **the imposition of an arbitrary statistical cap that has the power to deny eligibility to a student who is otherwise eligible, or the power to prevent the referral of a student who is suspected to be eligible raises serious compliance concerns.** Eligibility under both IDEA and Section 504 cannot be determined for a child on the basis of how many other students have been determined “disabled” in the school district. The eligibility of others, even many others, has no bearing on whether an evaluation of *this* child will meet the established eligibility criteria. As long as the school’s eligibility process is compliant, decisions will be made one student at a time as the law intended.

See also, U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, (July 2016). “While research has shown that boys are more likely than girls to have ever been diagnosed with ADHD (13.2 percent of boys were diagnosed with ADHD as opposed to 5.6 percent of girls), and that black and Hispanic children are less likely to be diagnosed with ADHD than white children, a school district could inappropriately ignore the incidence of ADHD in girls, or in students of color, if it makes assumptions about sex, race or ethnicity.... More importantly, in acting upon such assumptions, school districts put such students at risk of delayed referral for evaluation, which would violate Section 504.” p. 20.

B. Transfer students & Section 504.

OCR provides the following guidance in the Revised Q&A.

“38. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district? If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines that the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student. There is no Section 504 bar to the receiving school district honoring the previous IEP during the interim period. Information about IDEA requirements when a student transfers is available from the Office of Special Education and Rehabilitative Services at <http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C3%2C>

A little commentary: The receiving school should assume that upon the transferring student’s arrival, the sending school knows the school better than the receiving school and that the sending school’s actions with respect to eligibility and placement were appropriate. Consequently, the receiving school should honor those decisions by implementing the 504 Plan, to the extent possible, until such time as the receiving school has sufficient knowledge and data to perform its own re-evaluation.

C. Transition & Section 504

One of the more interesting areas of §504 involves students who are transitioning to post-secondary life, and thus face a different world of legal protections than what they experienced in the K-12 public schools. While Section 504 and the ADA protect students in colleges and universities and some employers, the rules are not as “friendly” as those for elementary and secondary students in public schools. The differences are important for K-12 school personnel to understand as they assist college- and career-bound §504 students. OCR noted the difference in Question 14 of the Revised Q&A.

“14. Does the nature of services to which a student is entitled under Section 504 differ by educational level? Yes. Public elementary and secondary recipients are required to provide a free appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school’s program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.”

Not only are the services themselves different, but the process of determining eligibility and accommodation changes as well.

1. Colleges and Universities operate in a different legal world from K-12 public schools. There are significant differences between the legal requirements applicable to K-12 schools and those of higher education. At the risk of over-simplification, here’s a quick summary of the key differences.

No Duty to Child Find. Elementary and secondary schools have an affirmative duty to conduct a “child-find” at least annually, during which the school must make efforts to notify disabled students and their parents of the school district’s obligations to provide a free appropriate public education. 34 C.F.R §104.32. The requirement places the burden of identifying potentially eligible students squarely on the shoulders of the school district. Postsecondary institutions have no child find requirement. Like employers, they have no duty to provide accommodations until a student presents evidence to the school of his eligibility and the need for services.

Eligibility is harder to establish. In addition to being “disabled,” an individual must show that he or she is “qualified” in order to receive §504 protections. While the term “disabled” is no different after graduation, being “qualified” is a whole new ball game. For purposes of elementary and secondary education, “qualified” means the child has a legal right to education from the district (typically arising from state compulsory attendance laws) and is within the age range of students (both disabled and nondisabled) whom the school is legally obligated to serve. 34 C.F.R §104.3(k)(2). “With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity” is qualified. 34 C.F.R §104.3(k)(3). Clear from this regulation is that institutions of higher education can screen out students (whether disabled or not) who do not meet other eligibility requirements.

For example, a college refused to admit an applicant with a severe hearing problem to its nursing program. The college claimed that modifying the program to allow her participation would essentially prevent her from realizing the benefits of the program. The Supreme Court agreed. In the postsecondary world, Section 504 “does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their program to allow disabled persons to participate.” *Southeastern Community College v. Davis*, 442 U.S. 397,

405 (1978). Even with a hearing aide, the student could not understand speech directed at her without lip-reading. Since in some cases, a nurse would have to instantly follow a doctor's directions for medication or instruments, and since masks in many settings would prevent lip-reading, her disability prevents her from safely performing the functions of a nurse in the both the training program and in the profession upon graduation. No accommodation solves that problem. She is simply not qualified.

No duty to evaluate. “A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” 34 C.F.R. §104.35(a). The burden is on the public school (at its expense) to investigate areas of suspected disability and determine whether the student is eligible. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993); *Letter to Parker*, 18 IDELR 965 (OCR 1992). No corresponding regulation exists for postsecondary education. Instead, students can be required to provide their own evidence of disability (at their own expense). *Halasz v. University of New England*, 816 F.Supp. 37 (D.Me. 1993). While the institution is allowed to determine the types of evaluation instruments it will accept as evidence of impairment (and the credentials of evaluators) the requirements cannot be so burdensome that they “preclude or unnecessarily discourage individuals with disabilities from establishing that they are entitled to reasonable accommodation.” *Guckenberger v. Boston University*, 957 F.Supp. 306, 26 IDELR 573, 587 (D.Me. 1997).

Reasonable Accommodation is the higher ed standard. Many educators mistakenly believe that the accommodations they create for students in elementary and secondary programs are limited to “reasonable” accommodations. In response to a question on the subject, OCR concluded that reasonableness is not a factor in §504 on elementary and secondary campuses. “The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.” *Response to Zirkel*, 20 IDELR 134 (OCR 1993).

For employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. **A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools.** As a result of the higher education reasonable accommodation standard, “Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.” 34 C.F.R. §104.44(a). The appendix to the regulation makes clear that this requirement “does not obligate an institution to waive course or other academic requirements.... It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.” Appendix A, part 31.

2. No formal transition process under §504.

Unlike the IDEA, §504 has no formalized transition process to mark the path between the K-12 world and the adult working or post-secondary world beyond. That is not to say that §504 students have no need for help and the Accommodation Plan has no role in that journey. On the contrary, as a nondiscrimination statute, §504's expectation is that the transition needs of §504-eligible students are

met as adequately as the transition needs of nondisabled peers. So, to the extent that the public school provides services to assist students in identifying career paths, finding and securing scholarships, applying for colleges and universities, etc., students eligible under §504 will have equal opportunity to access and benefit from those services. This requirement is highlighted by a regulation addressing career path counseling, prohibiting counselors from counseling disabled students to “more restrictive career objectives that nondisabled students with similar interests and abilities.” §104.37(b).

Some common sense thoughts on transition. In the absence of specific requirements, and assuming that the school has satisfied the nondiscrimination duty as briefly articulated above, what else should a school be considering? The §504 rules change dramatically as the student moves to college (summarized above). The student moves from a somewhat sheltered environment where the adults have the duty to identify, assess and serve him to a harsher adult world where he must demonstrate to the satisfaction of the institution that he is disabled (the child “finds” himself and provides his own assessment), and must negotiate the services he needs (with or without help from the institution as disability services and support vary dramatically). That said, the efforts of K-12 schools to teach self-advocacy skills through the §504 process can be extremely helpful. For example, the §504 Committee must include a person with knowledge of the child. This requirement can certainly be met, as appropriate, with the attendance of the child. Not only will the student have the opportunity to speak on his or her own behalf to explain the impact of the impairment or preferences for a particular accommodation to assist current FAPE efforts, the skills learned through participation in the meeting can assist the student’s self-advocacy efforts later. The Committee might also consider having the student talk with one of his or her teachers following a §504 meeting to explain the disability and any changes to the required accommodations. Of course, the school’s efforts to encourage and teach students self-advocacy cannot transfer the school’s responsibility to provide FAPE to the student. The school remains responsible for the creation of an appropriate §504 plan and for its implementation.

What about the students going on to the workplace rather than college? While the materials have focused on the college-bound student, the nondiscrimination rules described (and transition steps urged above) apply with equal force to the student with vocational aspirations as well. To the extent that the school offers school-work programs, vocational classes, and other assistance to students to help them enter the work force after high school, §504 students should receive equal access to those activities. Similarly, efforts at self-advocacy will be beneficial to the student who must explain his disability to a boss, just as the skill is helpful when addressing a professor.

II. Impairments, Medical Diagnoses and Section 504 Eligibility

A. Does OCR recognize a “disability per se” or an impairment that automatically results in eligibility under Section 504?

No, in the Revised Q&A ED took the position that there is no automatic eligibility. “Are there any impairments that automatically mean that a student has a disability under Section 504? No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.” Revised Q&A, Question #23. The 2012 OCR guidance letter took a step in the direction of “disability per se” recognizing that a handful of impairments will, in virtually every case, result in eligibility.

“In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district’s actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. **Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.**” 2012 DCL, p. 5, Question 4 (emphasis added).

A presumption of eligibility follows some ADHD diagnoses. In what appears to be an extension of the “disability per se” discussion above, OCR wrote “a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.” It appears that not every diagnosis will create that presumption. OCR provides this bit of clarifying detail. “Diagnosis of ADHD requires a comprehensive evaluation by a licensed clinician, such as a pediatrician, psychologist, or psychiatrist with expertise in ADHD.” National Institutes of Mental Health (NIMH publication), Attention Deficit Hyperactivity Disorder (Revised March 2016).” U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (OCR 2016), p. 10, fn. 37.

A little commentary: Unless the diagnosis is based on a “comprehensive evaluation” meeting NIMH standards and conducted by a licensed clinician with expertise in ADHD, the presumption does not apply. More on the issue of “evidence to the contrary” below in the discussion on substantial limitation.

Recall the main purpose of the ADAAA was to expand eligibility. Congress wrote, **“It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.”** ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress wants courts looking less at eligibility and focusing more intently on whether required accommodations are provided by covered entities. To that end, Congress provides as part of its rules of construction that, **“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”** OCR provided this additional explanation. “The Amendments Act does not alter the school district’s substantive obligations under Section 504 and Title II. Rather... it amends the ADA and Section 504 to broaden the potential class of persons with disabilities protected by the statutes.” 2012 DCL, p. 4.

Having addressed the presumption of eligibility created by a compliant expert evaluation and identification of ADHD, a logical question remains. **Is a medical diagnosis required for a 504 committee to determine a student’s 504 eligibility?** No. No medical diagnosis is required for §504 eligibility. “Section 504 does not require that a school district conduct a medical assessment of a student who has or is suspected of having ADHD unless the district determines it is necessary in order to determine if the student has a disability.” *Williamson County (TN) Sch. Dist.*, 32 IDELR 261 (OCR 2000). **In fact, the regulations do not require medical evaluations for any disability to qualify under §504.**

So what’s the rule? The §504 regulations require no medical diagnosis for eligibility. The school may conduct the §504 evaluation without a medical diagnosis if it believes it has other effective methods of determining the existence of a physical or mental impairment. On the other hand, should the school desire a medical diagnosis, it must secure one at no cost to parent. **What are “other effective methods”?** Remember that the §504 committee is not asked to “diagnose” impairments, but to identify impairments so that the Committee may meet the needs of the child arising from the impairment. Committees accomplish this by a combination of methods such as student observations, behavior checklists, screening instruments, test scores, grade reports, and review of other available data to (1) identify the impairment and (2) screen out nondisability causes for the student’s struggles. The Resource Guide reaffirms this position.

“Note, there is nothing in Section 504 that requires a medical assessment as a precondition to the school district’s *determination* that the student has a disability and requires special education or related aids and services due to his or her disability. (In fact, as mentioned earlier, the *determination* of whether an individual has a disability need not demand extensive analysis.)” (p. 23) (emphasis added).

A little commentary: A piece of very old 504 mythology is that the 504 committee cannot identify an impairment without a doctor's help — that to do so means that the committee is medically diagnosing the impairment. Note OCR's consistent use of the "determine/determination" to describe the 504 committee's decision on the impairment. OCR recognizes that the committee is authorized by federal law to make this decision, even in the absence of a medical diagnosis (if the committee believes it has appropriate grounds to do so). That committee decision is not a diagnosis. It is an educational determination.

B. What if the school thinks it needs medical data? Then it should get the medical data. *Bethlehem (NY) Central School District*, 52 IDELR 169 (OCR 2009). A student allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the school's culinary arts program. The student's allergist opined that the student could safely participate as long as he wore gloves while handling the peanuts and did not ingest any of the foods to which he is allergic. **Despite that information, the school was concerned about the student's safety in the class, and staff "concluded that they required additional information about the extent and nature of the student's allergies."** To that end, they requested that the parents obtain a letter from the allergist with respect to the student's participation in the culinary class. A letter was provided, but did not allay the school's concerns with respect to "airborne allergens, accidental ingestion, food fights, etc." **The parent signed a release to allow the school to talk with the allergist who was on vacation when the district attempted contact.** "School staff acknowledged that they made no subsequent efforts to obtain the additional information." The student was denied enrollment in the class. OCR found a violation as the school did not convene a Section 504 Committee to make these determinations and did not identify the student as a student with a disability. Further, the school denied him enrollment because the school believed it did not have adequate medical information to determine if the student could participate safely. **"District staff members acknowledged that they could have sought additional information from the Student's allergist prior to excluding the Student from the Course for school year 2008-2009, but they did not do so."**

A little commentary: It's fairly simple: if the Committee thinks that it needs medical data in order to make an eligibility or placement decision, it has to get the data to make the decision. The school, not the parent, has the duty to evaluate.

C. Does a dispute over a medical release mean that the school need not complete the §504 evaluation? No. In response to a parent's request for §504 services based on the student's depression and severe allergies, the school provided the parents with a medical release form. The parent argues that the form was never received. The school argues that since it never got a signed release and could not get access to medical records, it had no duty to complete an evaluation. OCR concluded that the delay was a §504 violation. **"Where as part of an evaluation of a student with disabilities, such as clinical depression and severe allergies, a school district determines, based on the facts and circumstances of the individual case, that a medical assessment is necessary, the district must ensure that the student receives this assessment at no cost to the parents."** The District agreed to corrective action including a §504 evaluation and a determination of whether compensatory services were owed for the delay. *Rose Hill (KS) Public Schools, USD #394*, 46 IDELR 290 (OCR 2006). *See also, Muscogee County (GA) School District*, 111 LRP 19301 (OCR 2010) ("OCR also learned that the District has a practice of requiring parents to obtain and submit medical documentation before initiating a Section 504 evaluation. Putting the onus on parents to obtain such documentation before evaluating a student is contrary to Section 504's requirement that District's provide students with FAPE. In addition to improperly shifting the financial burden to the parents, such a practice could dissuade parents who do not have the time or resources to obtain such documentation from seeking Section 504 services in the first place.").

D. If the school can't get the medical data it needs, what happens to the evaluation? The evaluation should still proceed to an eligibility determination on the basis of the data available to the Committee. OCR has found no violation where a district refused to base eligibility on the parents' assurances that a student suffered from multiple chemical sensitivity (MCS). *Montgomery County (MD) Pub. Schools*, 31 IDELR 84 (OCR 1999). The parent provided the district with medical documentation of the condition (we're not told what was provided), but the district was either skeptical or did not have enough information to make the eligibility determination. The district sought to get its own medical evaluation of the child, but the parent refused, arguing that the district's evaluation would not be administered by competent personnel. The district completed the evaluation by reviewing the data it had, but never formally identified the student as MCS. **OCR found no §504 violation** for the failure to identify the student as having MCS, since **"the student's parent refused to authorize the district to secure an independent evaluation** of the student concerning his suspected MCS" and the district "had insufficient evaluative materials to make an informed placement decision as required by Section 504." While not explicitly stated in the decision, at issue could be the requirement to not base eligibility upon a single source of evaluation data (here, the parent's assurances). §104.35(c)(1) & Appendix A, p. 430.

E. Does every piece of data have the same value? No. The Section 504 Committee determines the weight to be given to outside evaluations including medical diagnoses, and all data that it reviews.

"Question 26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight? The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. **The weight of the information is determined by the committee given the student's individual circumstances.**" Revised Q&A (emphasis added).

Some things doctors say have more weight than others. *Marshall Joint School District #2 v. C.D.*, 54 IDELR 307, 616 F.3d 632 (7th Cir. 2010). A student with Ehlers-Danlos Syndrome, a genetic disorder that causes hypermobility, suffered from "poor upper body strength and poor postural and trunk stability." He had previously required adaptive P.E. due to these physical issues, but now only requires slight modifications for his medical and safety needs. As adaptive P.E. was the only special education required by the student, the school sought to dismiss him from special education since he no longer needed special education. The Administrative Law Judge (ALJ) ruled that the student could not be dismissed, relying in large part on evidence from the student's doctor that "the EDS causes him pain and fatigue and when he experiences that 'it can affect his educational performance.'" The 7th Circuit rejected the ALJ's finding with some excellent analysis.

"Dr. Trapano was the main source of evidence cited for the proposition that the EDS adversely affects C.D.'s educational performance. And the sole basis of her information was C.D.'s mother. Dr. Trapano evaluated C.D. for 15 minutes; she did not do any testing or observation of C.D. and his educational performance. **In fact, 'Dr. Trapano admitted that she had no experience or training in special education and never observed C.D. in the classroom. Her only familiarity with the curriculum was with her own children.** Such a cursory and conclusory pronouncement does not constitute substantial evidence to support the ALJ's finding.... The cursory examination aside, Dr. Trapano is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the Act and warrant the designation of a child with a disability." (Emphasis added).

Further, the doctor's pronouncement indicated that the EDS *could* affect performance. Said the court, there was no substantial evidence that it actually *had* such an affect. **For evidence on the student's need for services, the court looked not to the doctor, but to the adaptive P.E. teacher who was "the one who could testify best concerning whether he needed special education to participate in the gym curriculum and meet the goal for children in his grade level."**

A little commentary: This case is best known for a couple of snippets of language you're likely to hear a lot at law conferences.

"It was the team's position throughout these proceedings that physicians cannot simply prescribe special education for a student. Rather, that designation lies within the team's discretion, governed by applicable rules and regulations. We agree.... This brings us to a key point in this case: a physician's diagnosis and input on a child's medical condition is important and bears on the team's informed decision on a student's needs.... **But a physician cannot simply prescribe special education;** rather, the Act dictates a full review by an IEP team composed of parents, regular education teachers, special education teachers, and a representative of the local education agency[.]" (emphasis added).

F. Does the student's doctor decide what the student gets from Section 504 or does the Section 504 Committee make the placement decision? While medical data can prove very helpful, the doctor does not order or prescribe educational placements. When the doctor makes a diagnosis or provides information to protect the student's health, the doctor is addressing issues within the doctor's knowledge and expertise. The school's obligation is to document and consider all sources of evaluation data. Absent medical data to the contrary, the school cannot disregard the doctor's opinion, but that does not mean that everything the doctor orders is medical. For example, even in special education it's the IEP Team that places the student on homebound. "It has long been the Department's position that when a child with a disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than 10 consecutive school days), an individualized education program (IEP) meeting is necessary to change the child's placement and the contents of the child's IEP, **if warranted.**" *Questions and Answers on Providing Services to Children with Disabilities During the H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009)(emphasis added). Even if the doctor opines that homebound is required, the IEP Team has to make the educational placement decision that can differ from the doctor's preferred placement of the child (note the "if warranted" language from OSERS). A couple of cases emphasize the educational vs. medical distinction.

Why doctors don't make the placement decision.... For example, not knowing the educational options and resources available to the school, the doctor may simply think that homebound is the only possible solution. A case from Texas provides insight into the analysis that goes into educational placement decisions, and why these decisions are made by an IEP team.

"Dr. [] is unfamiliar with the criteria for educational placements; educational programs, including special education; or state or federal criteria for determining the need for homebound placement. Dr. [] is unfamiliar with the term 'IEP' and does not know the difference between homeschooling and homebound placement. Dr. [] has never visited Student's home or school, or talked to anyone from Student's school. Dr. [] was unaware that Student's parent had refused to provide Student's school with her consent for the school to speak with Dr. [] about his treatment of Student. Dr. [] has provided no information to Student's school that could be confused as a medical and/or professional opinion in support of an eligibility determination of OHI, based on allergies or multi-chemical sensitivity.... The standards for homebound placement do not exist in a vacuum, nor is it left up to the generalized opinion of a physician who is unfamiliar with the written State standards." *Plano Indep. Sch. Dist.*, 62 IDELR 159 (SEA TX 2013).

See also, Brevard County Sch. Bd., 109 LRP 56512 (SEA FL 08/12/09)(With respect to a doctor’s opinion on the issue of returning a medically fragile student with autism from homebound to a small classroom in his neighborhood school, the hearing officer wrote, “Petitioner’s physicians are not experts on education generally or ESE in particular. Given the nature of their pediatric practices, their counsel on Petitioner’s physical capacity to attend public school should be taken into consideration, but only in light of their very limited understanding of what the public school was offering in this instance.”).

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

A little commentary: The criticism here is not directed at the school’s reliance on the neurological to identify the impairment, but on the school’s failure to add to that data from the wealth of information it had in the student’s educational needs. OCR was concerned that the impact of the student’s disabilities on education were not considered, thus undermining any §504 plan (how do we know what to provide if we don’t know how the disability impacts the student’s access to, or benefit from, the school’s programs or activities?). *See also, Summer County (TN) School District*, 52 IDELR 83 (OCR 2009)(Evaluation found in violation of Section 504 as school looked only at a general doctor’s statement); *Vineland (CA) Elementary School District*, 49 IDELR 20 (OCR 2007). (“A physician’s medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504.”).

H. Why not just ask the parents to pay for the medical evaluation? Because that’s a violation. *Santa Rosa County (FL) School District*, 110 LRP 48657 (OCR 2009). Despite evidence that the student had an impairment affecting his educational performance (teacher emails indicate that this student’s was “the worst case of ADD” they had seen) and a Connor’s rating scale showed the student’s inattention fell in the “very significant” range on all three scales, the school placed the burden on the student’s parents to follow-up with their physician. “OCR still finds that the School’s policy of requiring a parent to arrange and pay for a physician’s evaluation for children with ADD and ADHD is inconsistent with Section 504.” As part of the corrective action steps, the District agreed to revise its procedures “to ensure that any medical evaluation or other assessment deemed necessary by the District for purposes of determining eligibility under Section 504 will be provided at no cost to parents.” *See also, Rose Hill (KS) Public Schools, supra.*

In its 2016 ADHD Resource Guide, OCR highlighted its concern with respect to a parent offer to secure evaluation data for the school. When the “parent volunteers to pay for a private assessment, the district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment. Compliance problems could arise when school districts and parents do not communicate clearly on this requirement.” (p. 23).

A little commentary: Of course, where the relationship is already established and existing medical data exists that can be accessed at no cost, the school should pursue consent to get records or speak with the doctor as part of the evaluation. Review of existing data is very different from forcing the parent to secure, at parent expense, new data from the doctor.

III. Twice-exceptional students and substantial limitation.

A quick reminder of Section 504 eligibility rules. To be eligible under Section 504, a student must be both “qualified” (the student is within the age range in which services are provided to disabled and nondisabled students under state law, *See 34 CFR §104.3(l)(2)*), and “handicapped.” Pursuant to 34 CFR §104.3(j)(1), “Handicapped persons means any person who

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

One of the most interesting areas of evolution in the ADA (and thus §504) is recognition that identifying learning disabilities require some complex thinking. In the commentary to its ADA regulations implementing the ADA, the Equal Employment Opportunity Commission provides some excellent analysis on how to address eligibility for students with learning disabilities (for example, dyslexia) who despite the disability, experience educational success. Some of these students are likely twice-exceptional. Note that EEOC regulations and commentary are not binding on the K-12 public schools *with respect to their treatment of students* (the U.S. Department of Education has jurisdiction for rules for students) but the EEOC’s rules are instructive, especially in the absence of anything from ED. Note further that EEOC regulations are binding on K-12 schools *with respect to their employment relationships with district employees*. Cites are to the EEOC commentary to 2011 ADA regulations, 76 Federal Register, March 25, 2011 [hereinafter, “EEOC.”].

1. Successful performance does not rule out substantial limitation. “As Congress emphasized in passing the Amendments Act, “[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” *EEOC, p. 17012-13.*

“Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.” *EEOC, p. 17012.*

2. Reading is effortless for most people, but not for folks with dyslexia. “For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.” *EEOC, p. 17013.*

3. Time and effort must be considered. “Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.” *EEOC, p. 17012.*

4. Typical eligibility for individuals with dyslexia. “Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required

under the ADA Amendments Act.” *EEOC*, p. 17009.

OCR applied this analysis to academically successful ADHD students. “Someone with ADHD may achieve a high level of academic success but may nevertheless be substantially limited in a major life activity due to his or her impairment because of the additional time or effort he or she must spend to read, write, or learn compared to others. In OCR’s investigative experience, school districts sometimes rely on a student’s average, or better-than-average, grade point average (GPA) and make inappropriate decisions.” 2016 ADHD Resource Guide (p. 12). “Thus, for example, when making the determination as to whether to evaluate a student suspected of having a disability under Section 504 because of ADHD, or in conducting such an evaluation, school districts should ask how difficult it is or how much time it takes for a student with ADHD, in comparison to a student without ADHD, to plan, begin, complete, and turn in an essay, term paper, homework assignment, or exam.” (*Id.*).

IV. The 504 Duty to Refer: Health Plans & RtI

A. Section 504 Duty to Refer

The school’s duty to offer evaluation under Section 504 is triggered by the school’s suspicion that the student is disabled and in need of services. The Section 504 regulation on evaluation provides: “A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.” 34 CFR §104.35(a). In short, a student should be referred to §504 when the District believes that the student may be eligible, i.e., when the District believes that the student has a physical or mental impairment that substantially limits one or more major life activities, AND believes that the student is in need of either regular education with supplementary services or special education and related services. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). This trigger did not change with the ADA, as the 2012 OCR guidance makes clear, a school district must conduct an evaluation of any individual who because of disability “needs or is believed to need special education or related services.” 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)).

The duty does not depend on parent request for evaluation. *West Contra Costa (CA) Unified School District*, 42 IDELR 121 (OCR 2004)(“The District had this obligation under Section 504 whether or not the parent made a request for an assessment.”) What choices does the school have when parents request a Section 504 evaluation? There are two: evaluate the student OR refuse to evaluate and provide the parent with Section 504 notice of rights. *See, for example, Bryan County (GA) School District*, 53 IDELR 131 (OCR 2009)(“Under Section 504, upon receiving notice of a parent’s belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights.”).

Some examples where the required factors are present to trigger the duty to evaluate....

The school’s receipt of a psychological assessment triggers the duty to evaluate. The parents provided the school with a psychological evaluation which, based on a variety of formal assessments and batteries, identified significant deficits in writing and spelling, together with anxiety, depression and a few other impairments. The psychologist recommended a variety of services, as well as the assistance of an autism specialist to determine additional supports in socialization, language and behavior. OCR determined that the parent’s presentation of the assessment to the school provided sufficient notice of suspected disability and need for services to trigger the duty to evaluate. “Because the school had before it the evidence described above, it was required to promptly determine whether

the Student needed to be referred for further evaluation or considered for eligibility for services as a student with a disability.” *Chesterfield County (SC) Public Schools*, 54 IDELR 299 (OCR 2009).

School’s knowledge of the student’s need for medication, coupled with school troubles, triggers the duty to evaluate. “In this case, the School specifically had information relating to the Student’s asthma condition and his need for medication every four hours, as specified in the Medications Form and in a letter from the Student’s physician[;] his frequent absences from School and hospitalization due to his asthma; his academic failure; and his behavior. While the School convened two S-Team meetings and identified intervention strategies, a Section 504 eligibility evaluation was warranted to determine whether the Student had a disability that substantially limited one or more major life activities under Section 504.” *Metro Nashville (TN) Public Schools*, 110 LRP 49252 (OCR 2009).

Student’s need for homebound services because of disability triggers duty to evaluate. Lacking appropriate staff and a health plan to address the medical needs of a student with diabetes, the school placed the student on homebound instruction. OCR determined that this was a significant change of placement for a student because of a physical impairment, requiring a Section 504 evaluation first. In essence, the school knew of the impairment and the resulting need for services. Thus, the school had a duty to conduct a Section 504 evaluation before it could place the student in homebound. “Further, because LPCS placed the student in an in-home tutoring environment, which was a more restrictive environment than what the student had previously and subsequently been provided, LPSC failed to comply with [the Section 504 LRE requirement at] 34 C.F.R. §104.34(a).” *Lourdes (OR) Public Charter School*, 57 IDELR 53 (OCR 2011).

In short, students on health plans have always been good candidates for Section 504 referral, but prior to the ADA, OCR seemed content as long as the health plan worked. The ADA changed things, as Congress expressed a desire for expanded eligibility and created a new mitigating measures rule. In response, OCR began to focus its attention on schools that provided health plans to students who should be receiving Section 504 Plans instead. Here’s the long version...

B. Health Plans & Referral

1. What’s a health plan? By way of reference, the author uses the phrase “health plans” as a catch-all term to describe protocols or processes the school puts in place to maintain a 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.

2. Health Plans Before and After the ADA. Prior to the ADA, some 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. OCR seemed content with such an approach. For example, in a pre-ADA Indiana case, OCR found that the District’s practice of not serving all students with diabetes under §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read “Section 504 plans may be developed for those students with a disability whose parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services.” *Hamilton Heights (IN) School Corp.*, 37 IDELR 130 (OCR 2002). **This “regular ed health plan makes §504 unnecessary” approach is of course complicated by the ADA’s mitigating measures rule.**

Post-ADA, OCR determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADA, North Royalton initially found the student with an anxiety disorder and

tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan (EAP). Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. **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.** As the student’s needs had been met throughout, OCR found no violation with respect to the child’s services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning. With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **“In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students’ disability status.”**

A little commentary: 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 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009.” **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: “The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child’s medical impairment substantially limits one or more major life activities.” In subsequent OCR letters, it became apparent that OCR expects schools to review students with health plans and determine which students are in need of Section 504 referral. *See Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). **Note that OCR has neither said that (1) all students on health plans are Section 504 eligible nor that (2) all students on health plans should be referred for Section 504 evaluation.**

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

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

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district’s actions meet the evaluation, placement, and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation. **For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student’s use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student’s school may have created and implemented what is often called an ‘individual health plan’ or ‘individualized health care plan’ to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures.** Now, after the Amendments Act, the effect of the epipen or other

mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. **If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards.** In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation.” 2012 DCL, Question 13, p. 9-10 (emphasis added).

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

The Section 504 Right to an Equally Safe Environment—In response to a complaint by a student with a severe nut allergy, OCR reminded schools of the nondiscrimination duty in the context of student safety. *Washington (NC) Montessori Public Charter School*, 60 IDELR 78 (OCR 2012). On that point, OCR stated:

“OCR interprets the above provisions to require that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. **As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.** Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program. *See also, Saluda (SC) School District One*, 47 IDELR 22 (OCR 2006).

Thus, OCR interprets §504 as requiring schools to provide a school environment to §504-eligible students that is equally safe to that provided to nondisabled peers. The formulation is an extension of the §504 nondiscrimination duty. The requirement does not mean a guarantee that there will be no harmful incident, but it requires schools to take measures, through the §504 committees, to make the school environment as reasonably safe as it is for nondisabled peers.

3. So, which kids on health plans should be referred for Section 504 evaluation? While not all students on health plans have to be referred, schools must be aware of the impact a health plan has on the school’s duty to refer. After all, if the student is receiving services from the school because of an impairment and the impairment appears to be substantially limiting a major life activity, the student should be considered for referral even if the health plan is meeting the student’s needs. OCR’s January 2012 guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. “As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement.” 2012 DCL, Question 11, p. 8-9.

The question then is which kids on health plans to refer? **The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be discussed with your school attorney prior to proceeding.** Should your district desire a more targeted response, consider developing an approach with your school attorney that includes the following considerations.

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

- Not all students with a health plan will need to be referred for Section 504 evaluation. (*See, for example, North Royalton, Isle of Wight County*).
- Students on health plans cannot be categorically excluded from consideration for Section 504 evaluation, even if their health plans appear to allow these students equal participation and benefit in the school's programs and activities (*see Tyler*).
- Each student on a health plan should be considered individually to determine whether a referral for Section 504 evaluation is appropriate. Put simply, significant differences exist among health plans, even for students with the same impairment (see factors below).
- The health plan provides evidence of the student's need for services from the school, as well as insight into the impact of disability, giving the school information that can contribute to its thinking on whether the student might be substantially limited by his impairment, and thus needs to be referred.

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

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

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

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)
- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)
- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)

- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)
- In analyzing the student’s needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

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

What to do? The school needs to change its thinking about referral to Section 504 for students on health plans. Due to changes from the ADA Amendments and OCR’s concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to a health plan need not be *considered* for possible Section 504 referral. **Consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through health plans.**

C. RtI/Early Intervention for students with physical or mental impairments

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

2. Section 504 & RtI. Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADAAA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating measures to be “filtered out” during the Section 504 Committee’s evaluation is “reasonable accommodation.” OCR has determined that the phrase “reasonable accommodations” includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools*, 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well. **How does this impact the line between RtI and Section 504 eligibility for students who need support due to impairments?** Consider these two portions of the Revised Q&A.

“31. What is a reasonable justification for referring a student for evaluation for services under Section 504? School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the

student, because of disability, needs or is believed to need such services.” Revised Q&A, Question 31.

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

More recently, the **July 2016 ADHD Resource Guide** spends three pages on this issue, alerting schools that while RtI programs can be beneficial, they should not be applied in a way that unduly denies or delays evaluations when the suspicion of disability and need for services exists. U.S. Department of Education, Office for Civil Rights, *Students with ADHD and Section 504: A Resource Guide*, 68 IDELR 52 (July 2016). OCR states that **“school districts violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected.”** *Resource Guide* at p. 15. While OCR agrees that “interventions can be very effective and beneficial,” rigidity in implementing RtI can lead to problems with §504 child-find compliance. **“If the district suspects that a student has a disability and because of the disability needs special education or related aids and services, it would be a violation of Section 504 to delay the evaluation in order to first implement an intervention that is unrelated to the evaluation, or to determining the need for special education or related aids and services.”**

A little commentary: The key point is that RtI interventions should not be applied or viewed as a “prerequisite” to §504 evaluations, or as a required step prior to deciding to evaluate a student under §504. OCR thus states that districts tend to run afoul of §504 child-find and evaluation requirements when they “rigidly insist” on implementing RtI before conducting §504 evaluations, when they inflexibly apply tiered intervention strategies sequentially before considering evaluation, and when they “categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.” *Id.* at p. 17. Interestingly, this position seems at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

“Under Section 504, prior to evaluating a student’s need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student’s overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.” *Karnes City (TX) Independent School District*, 31 IDELR 64 (OCR 1999).

Does early intervention/RtI = special ed services for purposes of the Section 504 duty to evaluate? It appears that some wiggle room exists between the two. Note the following finding in a Mississippi case. A student with ADHD referred by the parent for Section 504 evaluation was served under the school’s RtI program in Tier II. Because of the success of the interventions, the school believed that a Section 504 evaluation was not required as the student did not appear to need special education services. The interventions were significant. **The student was in Tier II and received, in both math and reading, five fifty-three minute computer lab sessions per week for remediation, together with one-to-one tutoring, and interventions to address his behaviors including an FBA, meetings with a behavioral specialist, behavioral timeouts, teaching of alternate behaviors, refocusing on work, and verbal praise.** Said OCR “The evidence was sufficient to give the district a reasonable belief that the complainant’s son did not need special education at the time of the request.”

Consequently, there was no violation of the Section 504 duty to evaluate. OCR did find a violation due to the school's failure to provide the parent with the notice of rights when the school determined that it would not be conducting an evaluation. *Stone County (MS) School District*, 52 IDELR 51 (OCR 2008). *Stone County* offers quite a different approach than the *more recently issued* Revised Q&A and ADHD Resource Guide.

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