SECTION 504 UPDATE

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A note about these materials: These materials are not intended as a comprehensive review of all new case law, rules and OCR guidance on Section 504, but as an overview of some of the more complex current issues and trends confronted by schools as they seek to comply with Section 504. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read "ED."

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

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

Finally, on January 25, 2013, OCR released a Dear Colleague Letter explaining schools' obligations to students with disabilities in the area of extracurricular athletics. The letter can be found at *Dear Colleague Letter,* 60 IDELR 167 (OCR 2013)(hereinafter "Athletics DCL").

I. ED's 2013 Guidance on Students with Disabilities & Extracurricular Athletics

A. Overview & Background

The 2010 GAO Report. In June of 2010, in response to a Congressional inquiry on the subject, the General Accounting Office (GAO) released a report entitled *Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics,* GAO, (June 23, 2010)(hereinafter, "GAO"). Specifically, GAO was asked to examine PE and extracurricular athletic opportunities for students with disabilities and how the Department of Education assists the states and schools in these areas. **Utilizing a variety of data sources including on site interviews in school districts, the GAO report found, not surprisingly, that lack of training and budget concerns remain serious barriers to participation by students with disabilities in both PE and extracurricular athletic activities.** Further, GAO found that the U.S. Department of Education needs to provide additional help to schools not only to understand schools' duties with respect to PE and athletics for students with disabilities, but also to identify promising practices in the field. *GAO, p. 31-32.* A few highlights from the report:

•**Benefits flow to students with disabilities from participation in PE and athletics.** "The health and social benefits of physical activity and athletic participation for children are well established. **These benefits may be even more important for children with disabilities,** including those with cognitive and physical disabilities who have a greater risk of being sedentary and having associated

health conditions such as obesity and reduced cardiovascular fitness. Studies have shown that for students with disabilities, regular physical activity may help control or slow the progress of chronic disease, improve muscular health, control body weight, and enhance students' psychological well-being through additional social ties and improved self-confidence and self-esteem." *GAO, p. 1 (emphasis added).*

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

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

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

•What are schools required to do under Section 504? With respect to participation by students with disabilities in extracurricular athletics, schools reported confusion with respect to their legal obligations under Section 504. "Officials in two districts and several disability associations told us that Education's Section 504 regulations regarding schools' responsibilities to provide extracurricular opportunities are ambiguous. For example, a few disability associations noted that there is lack of clarity regarding how "equal opportunity" should be defined. Officials from another district questioned whether their responsibilities included providing specifically designed programs for students with disabilities, such as separate adapted athletics, particularly within a school environment focused on greater inclusion for students with disabilities." *GAO, p. 26.* Following a review of OCR

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> guidance, GAO "found several documents that state that students with disabilities may not be excluded on the basis of a disability from an extracurricular activity, which may include athletics, and that students must be provided opportunities to participate in these activities equal to those of other students. However, with regard to PE and extracurricular athletics, these documents do not provide information beyond what is stated in the Section 504 regulations. In contrast, OCR has provided more detailed guidance in other civil rights areas, such as letters, pamphlets, and question and answer sheets." *GAO, p. 28.*

The Department of Education's Two-Prong Response. In response to the GAO's findings, ED indicated by letter that it would provide additional assistance to schools in addressing the needs of students with disabilities in this area. Specifically, "The Department agrees that it is important for schools to be aware of their responsibilities and that students with disabilities have opportunities to participate in extracurricular athletics equal to those of other students. In fiscal year 2011, the Department's Office for Civil Rights intends to issue additional guidance on Section 504 of the Rehabilitation Act and recipients obligations to provide students with disabilities equal access in extracurricular activities." *GAO, p. 50.* Further, "To help states and schools access existing knowledge and resources, we recommend that the Secretary of Education facilitate information sharing among states and schools on ways to provide opportunities in Physical Education (PE) and extracurricular athletics to students with disabilities." *GAO, p. 49.* In 2011, ED released *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics,* U.S. Department of Education (August 2011), providing suggestions to help school increase opportunities for students with disabilities to participate, but the promised legal guidance was not released until January 2013.

B. January 2013 Dear Colleague Letter

The letter is broken up into four main areas: an overview of schools' obligations under Section 504 and ADA Title II; cautions against making decisions on the basis of presumption and stereotype; the Section 504 requirements to ensure equal opportunity for participation; and discussion of the provision of separate or different athletic opportunities for students with disabilities. **The intent of the letter was to explain existing rules, not create new requirements.** "This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." *Athletics DCL, p. 2, footnote 4.* As this is the first major guidance letter on the topic from OCR, extensive quotations from the letter are reproduced here.

Some limitations on the discussion of special education-eligible students… Since the letter was written by OCR, and OCR does not enforce IDEA, the letter does not address IDEA's requirements with respect to extracurricular athletics.

> "Because the IDEA is not enforced by OCR, this document is not intended as an explanation of IDEA requirements or implementing regulations, which include the requirement that a student's IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities. In general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation." *Athletics DCL, p. 4, fn 8.*

IDEA rules in this area, while unaddressed in the guidance, are important to consider. In the 2004 reauthorization of IDEA, a provision was added to the section setting forth the required contents of an IEP. The language specifically addressed extracurricular activities. The language states that the IEP must include

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

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

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

And a final regulation references the LRE requirement:

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

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

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

UIL or similar sports leagues or associations. While the letter addresses the relationship between schools and sports leagues or associations (like UIL), these sections are not addressed in the materials. *See, for example, Athletics DCL, p. 5, ¶2.*

What follows is a summary of the letter's other contents, together with references to OCR letters of

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finding to illustrate the concepts.

1. Overview of Section 504 Requirements. OCR begins the guidance letter with a reminder of the schools' Section 504 obligations.

> "To better understand the obligations of school districts with respect to extracurricular athletics for students with disabilities, it is helpful to review Section 504's requirements.
>
> Under the Department's Section 504 regulations, a school district is required to provide a qualified student with a disability an opportunity to benefit from the school district's program equal to that of students without disabilities. For purposes of Section 504, a person with a disability is one who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. With respect to public elementary and secondary educational services, 'qualified' means a person (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).
>
> **Of course, simply because a student is a 'qualified' student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district;** school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory." *Athletics DCL, p. 3 (emphasis added).*

Discrimination can occur in a variety of way, each prohibited by the regulations.

- denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;
- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;
- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;
- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service. 34 C.F.R. §104.4(b)(1)(i)-(iv), (vii), (2),(3).

Finally, Section 504 also requires that a free appropriate public education be provided to qualifying students with disabilities. 34 C.F.R. §104.33(a).

2. Section 504 Prohibits Acting on Generalizations & Stereotypes. Like IDEA, Section 504 requires an individualized approach to serving students with disabilities.

> "A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular. A school district also may not rely on generalizations about what students with a type of disability are capable of —one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport."

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Athletics DCL, p. 5.

Avoiding generalization and stereotypes requires schools to make decisions based on data with respect to an individual student. OCR provides the following example.

The Lacrosse Example. "A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club. As she enters the ninth grade in high school, she tries out and is selected as a member of the high school's lacrosse team. **The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides never to play this student during games.** In his opinion, participating fully in all the team practice sessions is good enough.

Analysis. OCR would find that the coach's decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability. A school district, including its athletic staff, must not operate on generalizations or assumptions about disability or how a particular disability limits any particular student. Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices. **The student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions)."** *Athletics DCL, p. 5-6 (emphasis added).*

A little commentary: The coach's thinking may actually have been correct with respect to the student—that time pressure negatively impacts the student's athletic performance. What makes the decision discriminatory is that the coach did not look for evidence that with respect to *this* student, time pressure was problematic. Had the coach utilized timed scrimmages or otherwise simulated game-time pressure, and then observed the student's performance, evidence of *actual* poor performance under time pressure would support the student not participating in games, and the decision would not be discriminatory.

3. Ensure Equal Opportunity for Participation. "A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation. This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program." *Athletics DCL, p. 6.*

a. To have a right to participate, the student must first make the team.

"Schools may require a level of skill or ability for participation in a competitive program or activity; **equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out.** A school district must, however, afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student. This means that a **school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity,** unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity." *Athletics DCL, p. 7 (emphasis added).*

Students with disabilities may try out for any extracurricular activity they desire, but they must

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generally meet the regular performance standards applied to all students. **OCR generally approves of uniform application of eligibility requirements of school extracurricular activities**. *See* Equal Educational Opportunity and Nondiscrimination for Students with Disabilities: Federal Enforcement of Section 504, A Report of the United States Commission on Civil Rights (September 1997), p. 343. Although some accommodations may be required of schools in this area, it appears that students must submit to the general behavioral, academic, and performance standards applied to nondisabled students. A few OCR letters of finding illustrate the requirement.

Must the student be enrolled in the public schools? In Virginia, the answer is yes. *Paul v. Henrico County Public Schools,* 32 IDELR 173 (E.D.VA. 2000). The student, a fourteen-year-old with dyslexia and ADHD was a member of the school baseball team prior to his parents' enrolling him in a private school. The parents sought a preliminary injunction allowing him to play despite his attendance at a private school, arguing that the student was excluded from the baseball team due to disability. The court rejected the request for waiver of the enrollment requirement.

> "Requiring HCSB to waive the enrollment requirement for Phillip is not a reasonable accommodation, but fundamentally alters the baseball program. Were HCSB to change the enrollment policy, what was once a school activity where Short Pump students could gather and improve upon a skill while fostering school spirit, would become a program where students from perhaps far reaching areas, having no relationship with the school other than one existing on paper, would be allowed to play in the program, taking places from students at Short Pump. This accommodation could so drastically alter the baseball program as to render it unreasonable."

Note that state law may not require enrollment to participate in extracurricular athletics. Consult your school attorney for state law requirements.

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

Note that the same rule applies to cheerleading (and every other activity requiring a try-out). *McDowell County (W.V.) Schools,* 55 IDELR 82 (OCR 2010). Twenty-four girls tried out for the 12 available cheerleader positions. Complainant argued that Student was not selected due to her small stature, the result of a growth hormone deficiency. The cheerleading coach explained the selection criteria to OCR. "There were five judges, including the coach, for the cheerleading tryouts and each judge was given a rubric to fill out… [T]he students were rated on the following: set, smile, loudness, clap, coordination and attitude. Students were also rated on two types of jumps, as well as a jump of their choice…. In addition to the judge's rubrics, the cheerleading coach said that she has each girl's classroom teacher fill out a rubric rating the girls on classroom performance in the following areas: behavior, attendance, attitude, responsibility and grades." OCR notes that while the parent and student "were of the opinion that the Student was better at cheerleading and gymnastics than at least three of the other students who made the team" the judges disagreed. The scores were tallied and the girls with the highest scores received the positions. OCR concluded that while the tally sheets had been destroyed and could not be reviewed as part of the investigation, OCR's investigation did not reveal any evidence (other than the parent and student's opinions) to suggest

that the Student did or should have scored in the top 12. Additionally, none of the judges were aware that the student was disabled nor did the judges suspect any disability.

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

What about communication skills? There has to be chemistry in volleyball? *Festus (MO) R-VI School District,* 47 IDELR 17 (OCR 2006). Explaining to OCR that the Student at issue in a discrimination complaint did not have the required skills, the varsity volleyball coach discussed the importance of on-court chemistry.

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

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

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

Can the school apply attendance requirements to team eligibility (miss a practice, miss a game)? *Houghton Lake (MI) Community Schools,* 45 IDELR 199 (OCR 2005). Pursuant to district policy, the student must attend school at least for a half-day (three hours, excluding lunch) to participate in any extracurricular activity, including athletics, that day. The policy applies to all students, disabled and nondisabled alike, and there are no exceptions. Parents of a student with diabetes requested an exception when a previously scheduled doctor's appointment caused a student to miss the entire school day of a basketball game. The appointment had been scheduled months in advance, and the parents had been unaware of the game at the time the appointment was made. The district refused to grant an exception. The student was not allowed to participate in that particular basketball game (although he could attend).

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

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

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

Bona fide safety standards. "[A] school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity. A school district, however, must consider whether safe participation by any particular student with a disability can be assured through reasonable modifications or the provision of aids and services." *Athletics DCL, p.6.* In essence, if the student's participation creates safety concerns, the district cannot deny participation if, with the provision of reasonable aids and services, the student can safely participate. No athletic example of safety standard analysis is provided by OCR in the guidance, but a footnote references a U.S. Supreme Court case an example that illustrates the point by analogy. *See, Southeastern Community College v. Davis,* 442 U.S. 397 (1979)(Student with a serious hearing impairment who relied on lip reading was determined not qualified to enter college nursing program because of her inability to safely perform in operating room or other sterile room environments where masks are used that cover the mouth.).

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b. Modifications that result in fundamental alterations of the program are not required.

> "In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the school district must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. **A modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball).** Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition. **Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student's participation."** *Athletics DCL, p. 7 (emphasis added).*

OCR provides three examples in the guidance letter to illustrate this point. Only one is reproduced here.

> **The Swimmer with One Hand. "**A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school's swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the 'two-hand touch' finish it requires of all swimmers in swim meets, and to permit her to finish with a 'one-hand touch.' The school district refuses the request because it determines that permitting the student to finish with a 'one-hand touch' would give the student an unfair advantage over the other swimmers.
>
> **Analysis.** A school district must conduct an individualized assessment to determine whether the requested modification is necessary for the student's participation, and must determine whether permitting it would fundamentally alter the nature of the activity. Here, modification of the two-hand touch is necessary for the student to participate. In determining whether making the necessary modification—eliminating the two-hand touch rule—would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.
>
> OCR would find a one-hand touch does not alter an essential aspect of the activity. **If, however, the evidence demonstrated that the school district's judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.**
>
> **In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation.** In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete." *Athletics DCL, p. 9-10 (emphasis added).*

A little commentary: The fact that a proffered modification will not work (here, one-hand touch results in an unfair competition) does not end the school's obligation. OCR insists that it remains the school's obligation to look for alternatives that would not fundamentally alter the activity and would not provide unfair advantage. There is no clear indication at what point the inquiry can be stopped without the district being subjected to a discrimination claim. An additional concern raised

by school attorneys (including the National School Boards Association in a letter to OCR) is the mechanism for making determinations of need and reasonable modifications. For example, NSBA, assuming that a Section 504 Committee or other similar group would be tasked with evaluating need and making these decisions, expressed concern over the additional Section 504 meetings and evaluations required to perform these tasks in addition to existing 504 meeting requirements. NSBA has sought clarification on this issue. The NSBA letter to OCR addresses a large number of concerns with the guidance, and is available on the NSBA website at http://www.nsba.org/SchoolLaw/Issues/Equity/NSBA-Response-to-OCRs-January-25-2013-Dear-Colleague-Letter.pdf.

A variety of letters of finding illustrate the fundamental alteration exception. For example, consider these two letters on swim team modifications, one is required, one is a fundamental alteration.

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

What about staying in the pool during competition? That's different. *S.S. v. Whitesboro Central School District,* 112 LRP 5880 (N.D.N.Y. 2012)("There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions…. [O]ne of the essential requirements of swim team members is the ability to enter, and remain in, the pool when required by the coach during practices and competitions. To require otherwise would fundamentally change the nature of the swim team and thus be unreasonable."

Fundamental alteration & essential standards. *Crete-Monee (IL) School District 201-U*, 25 IDELR 986 (OCR 1996). In this OCR letter of finding, a 17-year-old student with Down Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was demoted from manager to co-manager of the varsity basketball team, was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, was not alert enough to get out of the way of an incoming play on the bench, and could not perform most of the duties of a manager, resulting in the need to replace him with someone who could perform the required duties. Despite accommodations, the student was unable to perform the essential functions of the position. OCR found no violation of §504. In short, he could not perform the essential duties for which the position existed, and the district had no obligation to dramatically change the position to fit the student's abilities. Instead, the district created a position more suited to the student's ability level. OCR agreed that the varsity basketball manager had to be able to do manager activities.

Some final thoughts on fundamental alteration. It's important to understand that fundamental alteration with respect to Section 504 and students is very different from the same concept in the adult Section 504/ADA world. For example, "neither the fundamental alteration nor undue burden defense is available in the context of a school district's obligation to provide a FAPE under the IDEA or Section 504." *Athletics DCL, p. 8, fn 17.* Further, the undue burden defense (the argument that the modification is too expensive or inconvenient) is generally disfavored by OCR as well, even for nondiscrimination purposes (when FAPE is not an issue). "Although a school district may also raise the defense that a needed modification or aid or service would constitute an undue burden to its program, based on OCR experience, such a defense would rarely, if ever, prevail in the context of extracurricular athletics…" *Id.* This position is supported by OCR's application of IDEA

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requirements to Section 504 students. "Moreover, whenever the IDEA would impose a duty to provide aids and services needed for participation in extracurricular athletics…OCR would likewise rarely, if ever, find that providing the same related aids and services for extracurricular athletics constitutes a fundamental alteration under Section 504 for students not eligible under the IDEA."

4. Offering Separate or Different Athletic Opportunities. This section of the guidance begins with reference to traditional notions of LRE. "[I]n providing or arranging for the provision of extracurricular athletics, a school district must ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of that student with a disability. The provision of *unnecessarily separate or different services is discriminatory." Athletics DCL, p. 11.* Of course, some students with disabilities will be unable to participate in regular extracurricular athletics with nondisabled peers—even with reasonable modifications or aids and services. It's here that the guidance has raised the most controversy.

> "Students with disabilities who cannot participate in the school district's existing extracurricular athletics program—even with reasonable modifications or aids and services—should still have an equal opportunity to receive the benefits of extracurricular athletics. **When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district *should* create additional opportunities for those students with disabilities.**
>
> In those circumstances, a school district *should* offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities. **These athletic opportunities provided by school districts *should* be supported equally, as with a school district's other athletic activities.** School districts must be flexible as they develop programs that consider the unmet interests of students with disabilities. For example, an ever-increasing number of school districts across the country are creating disability-specific teams for sports such as wheelchair tennis or wheelchair basketball. When the number of students with disabilities at an individual school is insufficient to field a team, school districts *can* also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer 'allied' or 'unified' sports teams on which students with disabilities participate with students without disabilities. OCR *urges* school districts, in coordination with students, families, community and advocacy organizations, athletic associations, and other interested parties, to support these and other creative ways to expand such opportunities for students with disabilities." *Athletics DCL, p. 11 (emphasis added).*

A little commentary: The language raises some interesting questions, including whether the law requires the creation of wheel-chair basketball teams, whether these teams get equal funding and access to facilities (even though they may serve far fewer students), etc. To some degree, the angst generated by this section may be unnecessary. The paragraph is dominated by the use of "should" and "can" (see italics in quote) rather than the mandatory or compulsive "shall" and "must." The language is hopeful rather than regulatory. Further, public explanations by an ED spokesperson, cited in the NSBA response letter, indicates that OCR is urging, but not requiring separate sports programs. *Michele McNeil, "Did the ED. Dept. Really Create a Right to Wheelchair Basketball?" Education Week blog, Jan. 25, 2013, as quoted in NSBA letter, p. 7, fn. 22.* Talk with your school attorney to determine an appropriate response to this and other portions of the OCR guidance letter.

II. Students with Disabilities in RtI & Section 504 Referral after the ADAAA

From time to time, Congress revisits legislation to ensure that it has achieved the intended result. Upon review of the Americans with Disabilities Act (ADA), Congress determined that rather than providing a

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mechanism to make the workplace more accessible one lawsuit at a time, the ADA had become bogged down in disputes over eligibility. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA's protection. Congress amended the ADA to change this unhealthy litigation dynamic by expanding ADA and Section 504 eligibility.

A. Background on the ADAAA

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

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

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

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

2. Was there a problem with K-12 Section 504 eligibility for FAPE? Congress made no findings with respect to the public schools' duties to students under Section 504 or the ADA. Instead, Congress was focused on changes to the ADA in the context of employment relationships,

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specifically with respect to eligibility for reasonable accommodations and access to federal courts. Congress did not directly address or reference the ED's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct ED to change the Section 504 regulations. *(Introductory paragraph of the Revised Q&A.)* **Regardless, the ADAAA changes apply to Section 504.** The conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised. Consequently, the ADAAA changes made by Congress to address problems encountered by employees attempting to secure reasonable accommodation through the courts also apply to FAPE eligibility for students in the public schools. ED indicates that its regulations "as currently written are valid and OCR is enforcing them consistent with the Amendments Act." *(Introductory paragraph of the Revised Q&A).*

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

The K-12 public education world is quite different. No public school runs at a profit, nor are public schools generally allowed to pick and choose whom they educate. Public schools exist for the sole purpose of educating students. Built into the public school-student dynamic (and spurred by concerns for AYP) is a growing emphasis on individualized instruction and personalized attention when, due to disability or other factors, a student is not successful. Further different is that in the K-12 Section 504 world, the public school has a duty to identify and evaluate potentially eligible students and provide those eligible students with a free appropriate public education. Unlike the workplace, where employees request accommodation, K-12 public schools have an affirmative duty to look, find and accommodate or serve. Consequently, when Congress made it easier for employees to demonstrate their eligibility for reasonable accommodation, it also made it easier for K-12 students to qualify for FAPE (a higher level of services than reasonable accommodation) despite the absence of a finding that public schools were denying services to students believed by Congress to be eligible. Arising from these incongruities are questions and concerns about long-standing Section 504 doctrines and practices that arise from the ED's regulations and FAPE requirement.

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

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

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

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

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

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

Change #2: Expansion of Major Life Activities (Including Major Bodily Functions). Prior to the ADAAA, schools were accustomed to looking at a rather short list of major life activities during the Section 504 evaluation. **The Section 504 regulations initially listed major life activities such as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."** 34 CFR §104.3(j)(2)(ii). The list of major life activities was not exhaustive; that is, there was an understanding that other major life activities could be added to the list. As part of its effort to reduce the time spent on proving eligibility prior to proceeding to the accommodation question, Congress expanded the list of major life activities in the ADAAA and included major bodily functions as well.

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

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

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

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

Episodic Section 504 plans? An interesting result of the realization in law that a qualifying impairment need not rise to the level of substantial limitation every day is the corresponding logical conclusion that perhaps §504 plans need not provide constant services. If the impairment can be episodic, could the plan be episodic as well? As a practical matter, the nature of the impairment likely will dictate whether such a plan is possible. After all, the Section 504 committee would need to be able to articulate what factors trigger the plan's provisions, and likewise, what factors (or the absence of factors) trigger the plan to turn off. The triggers would need to be fairly simple and as subject to objective verification as possible. For example, a student with heat-induced asthma who needs assistance when the temperature rises above 90 degrees could have a plan triggered by temperature. When the thermometer hits 90 degrees, the plan is implemented, otherwise, the student does not require services. Most students likely will not have such simple and objective triggers, making episodic plans difficult to implement. In those cases where the committee cannot articulate a simple objective trigger for the plan to turn on and off, the plan would simply be left in place all the time. Schools should talk with the school attorney about the idea before attempting to implement it. *See also Traverse City,* discussed below in the section on homebound.

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

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

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

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(III) reasonable accommodations or auxiliary aids or services; or
(IV) learned behavioral or adaptive neurological modifications."

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

Change #5: A Lower Standard for "Substantial Limitation." In the ADAAA, Congress expresses its "expectation" that the EEOC will change its current regulation defining substantial limitation as "significantly restricted" to something more consistent with the ADA Amendments' efforts to expand the protection of the ADA. *See,* Pub. L. No. 110-325, §2(a)(8) & 2(b)(6). This change impacts many schools that looked to the EEOC definition in the absence of one from the U.S. Department of Education. ED never created a definition of substantial limitation in the Section 504 regulations. Instead, the Commentary to ED's regulations provided this note "Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." Appendix A, p. 419. In later guidance, ED concluded that each LEA makes its own determination of substantial limitation. *Letter to McKethan,* 23 IDELR 504 (OCR 1995). While LEAs were not required to follow the EEOC definition, many did, as this was the definition most-frequently used and interpreted by the federal courts. EEOC's definition of substantial limitation, rejected by Congress in the ADAAA, was as follows:

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

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

C. The Section 504 Duty to Refer.

The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. As the 2012 OCR guidance makes clear, "A school district must conduct an evaluation of any individual who because of disability "needs or is believed to need" special education or related services. 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)). Given that the

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Congress and OCR expect higher levels of eligibility under the new rules, where will those additional students be found? OCR guidance and letters of finding are increasingly focusing on students who are known by the district to have impairments and are also receiving services from the district because of those impairments. The two groups demanding the greatest immediate attention are (1) students with impairments served through early intervention or RtI and (2) students with impairments who have health plans. We'll focus on the kids in RtI, understanding that the referral concerns apply by analogy to the health plan students as well.

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

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

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

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

> **"31. What is a reasonable justification for referring a student for evaluation for services under Section 504?** School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A, Question 31.
>
> **"40. What is the difference between a regular education intervention plan and a Section 504 plan?** A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school." Revised Q&A, Question 40.

A little commentary: Interestingly, those two questions and answers are at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For

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example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

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

Karnes City (TX) Independent School District, 31 IDELR 64 (OCR 1999). A more recent (and post-ADAAA) letter from Missouri comes to a similar result with a mysterious absence of discussion of mitigating measures. In *Fergusson-Florissant R-II (MO) School District,* 56 IDELR 56 (OCR 2010), OCR upheld a school's determination that a student diagnosed with Asperger's was not eligible under Section 504 because he was not substantially limited. Interestingly, the letter references a lengthy list of parent demands for accommodations (including an extra set of textbooks at home, daily checking of his planner, extra time on assignments), together with the school's response that many of the requested items were already provided. The parent complained that the school focused too heavily on the student's academic success in determining eligibility (the student had a 3.875 average in 7th grade, and carried a 4.0 on a 4-point scale in 8th grade). OCR rejected that allegation due to evidence that the student's social interactions, standardized test scores, and adaptive behavior were also considered. Missing from the analysis was any mention of the positive impact of the mitigating measures (accommodations already provided the student) on the major life activity. In essence, most of what the parent wanted was already provided informally through regular education. The school does not appear to have done any mitigating measures analysis as part of the Section 504 evaluation (there is no reference to such analysis in the letter) and OCR says nothing of the failure, despite the fact that the student is determined ineligible because of a lack of substantial limitation. It's a strange letter, but does hearken back to a Karnes City-like approach (but does so without any analysis, and perhaps, without intending to do so).

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

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

or mental impairments whose disability-related needs are successfully met through RtI or early intervention. When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

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

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

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

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

> "The District had numerous meetings with the complainant and the Student in efforts to help him complete course requirements for English 12. But the fact remains that these evaluation and placement decisions were not made by a Section 504 review committee in accordance with the evaluation and placement procedures required by OCR's regulations. The purpose of these requirements is to assure that an informed decision is made as to a student's eligibility and need for services. As the District did not follow these procedures, there is no way to know if the services that were provided to the Student actually were appropriate."

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

Given the resources that IDEA makes available to students with a qualifying disability, it's easy to forget that the law has its limitations. For example, when seeking relief for violations of IDEA, parents can recover reimbursement for the costs of a unilateral private placement, can seek independent educational evaluations at public school expense, receive awards of compensatory services where FAPE has been denied, but, as a general rule, cannot recover money damage under IDEA. *See, for example, C.O v. Portland Public Schools,* 58 IDELR 272 (9th Cir. 2012), where a district court award of $1 in nominal damages to the parent of a former student with a disability was rejected. "We have repeatedly held that

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the IDEA creates a 'comprehensive enforcement scheme' in which compensatory damages play no part." "Instead, where Congress provides funds to a State to pursue certain functions, 'the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance, but rather action by the Federal Government to terminate funds to the state.'" *Id.* Consequently, parents of IDEA-eligible students (and parents of Section 504 eligible students as well) have increasingly turned to Section 504 claims for which monetary relief can be awarded in the right circumstances.

As the federal circuit courts have consistently ruled when the issue has presented itself, more has to be proven than a mere violation of §504—**conduct must rise to the level of intentional discrimination, bad faith, or gross misjudgment, or at least deliberate indifference, in order to go to trial to seek an award of money damages under §504.** *See, for example, Meagley v. City of Little Rock*, 639 F.3d 384 (8th Cir. 2011); *Nieves–Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003); *Delano-Pyle v. Victoria County*, 302 F.3d (5th Cir. 2002); *Duvall v. City of Kitsap*, 260 F.3d 1124 (9th Cir. 2001); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147 (10th Cir. 1999); *Bartlett v. Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Pandiazides v. Virginia Bd. of Educ.*, 13 F.3d 823 (4th Cir. 1994); *Wood v. President & Trs. of Spring Hill College*, 978 F.2d 1214 (11th Cir. 1992); *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267 (7th Cir. 2007). These materials will focus on two such theories: deliberate indifference (with its common application in harassment claims) and gross misjudgment (with a 5th Circuit decision that raises some new concerns).

A. Deliberate Indifference.

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

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

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

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

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

A plaintiff cannot simply allege that he/she has been teased and recover damages. "Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. **Damages are not available for simple acts of teasing and name-calling** among school children, however, even where these comments target differences in gender." *Id., at* 1675. Instead, for district liability to arise, **the plaintiff must show "sexual harassment so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim's educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."** *Id.* Single events or incidents of harassment are not likely to create liability for money damages. "Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." *Id., at* 1676. **Finally, districts are not required to "remedy" peer harassment. "On the contrary, the recipient [school district receiving federal funds] must merely respond to known peer harassment in a manner that is not clearly unreasonable."** *Id., at* 1674. This standard has been applied by analogy in the federal courts to claims of disability harassment as well.

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

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

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

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

Steps may be necessary beyond the harasser and target. Be careful that you don't ignore school-wide harassment (the forest) while punishing individual perpetrators (the trees). A case from the Sixth Circuit provides an interesting lesson to schools that fail to look at the overall climate on the campus by treating incidents of harassment as discrete, unconnected events. *Patterson v. Hudson Area Schs.,* 109 LRP 351, 551 F.3d 438 (6th Cir. 2009). A student with an emotional disturbance alleged disability and sexual harassment over a series of incidents occurring from sixth grade through ninth grade. The district argued that since it responded to each individual incident and that each harasser never again harassed the student after the district's action, there could be no district liability for harassment. Said the court:

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

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

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

A little commentary: **Focus on creating an environment where harassment is not tolerated. This requires a variety of interconnected policies, practices, and mindsets.** The process begins when the school creates policies and procedures to notify students of inappropriate conduct, together with a mechanism to receive complaints or reports and a process for promptly and appropriately investigating and resolving those complaints. Once the infrastructure is established, the school must create an awareness of what constitutes harassment by teaching students, staff, and parents both why and how they should report harassment when they become aware of it. Students, staff, and parents should be familiarized with the school's policy and process. As the school promptly responds to reports (by conducting appropriate investigations and taking action reasonably calculated to stop the harassment and remedy its effects), students, staff, and parents will gain confidence that reports are

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addressed and reporting will become easier. The result is a strong network of eyes and ears that can help the school discover incidents quickly and respond with greater precision. A series of OCR letters of finding demonstrate the comprehensive nature of the change required. *See, for example, Blanchard (OK) Pub. Schs.,* 35 IDELR 12 (OCR 2000) (In this mixed Title IX/disability harassment case, the district agreed to take corrective action with OCR. The district agreed to continue to publish and disseminate the grievance procedure to all students and staff, to identify the person responsible for taking and investigating complaints, time lines for each step of the process, and provisions for prompt, thorough, and impartial investigations and hearings); *See also, Hamilton (MO) R-II Sch. Dist.,* 37 IDELR 76 (OCR 2002) (District agrees to develop and disseminate a harassment policy to students, faculty, and staff, review the policy with those groups, explain the range of consequences to students for harassment and take other appropriate steps to prevent recurrence of harassment.); *Greenport (NY) Union Free Sch. Dist.,* 50 IDELR 290 (OCR 2008) (School agrees to adopt and publish a grievance procedure to ensure the prompt and equitable resolution of disability discrimination complaints.).

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

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

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

A more recent disability harassment claim on similar facts. In *Braden v. Mountain Home Sch. Dist*., 112 LRP 52094 (W.D.Ark. 2012), the court decided that a claim for money damages should proceed against a District in which a 4th-grader with ADHD and reactive attachment disorder was sexually assaulted in an alternative learning class. The school placed the student in the alternative class with significantly older students although the parents objected, believing he would be a target for harassment because of his emotional issues and history of being sexual abused. After another student allegedly sexually assaulted him, the school placed him on homebound services. Since the

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parent asserted that the student was subjected to multiple incidents of sexual abuse and assault in the classroom and in the presence of teachers with school officials' knowledge, the parent raised a genuine issue of fact as to whether school staff acted in bad faith or with gross misjudgment. The parents reported all incidents to the teacher and school resource officer but alleged they received no response. A police report completed after the parent reported a particularly disturbing incident described facts that, if proven true, indicate that various staffpersons had knowledge of the dangers to the student in his educational setting. Thus, the matter is proceeding to trial.

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

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

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

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

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

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

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Equal opportunity apathy to bullying? In an unpublished case from Texas, the parents of a deceased special education student argued that his suicide by hanging in the nurse's office restroom in the school created a claim under Section 504. The parents alleged that the student was bullied, the school was aware of the bullying, but the school did not appropriately respond. Instead, the parents allege that the school labeled their son a "bad child" and a "troublemaker" for reporting the bullying, and that the school ignored the student's threats to kill himself while placed in the alternative school. A federal District Court dismissed the Section 504 claims because there was no evidence of intentional discrimination solely on the basis of disability. Wrote the court: **"If Plaintiffs'—often uncontested—facts are to be believed, the Defendants' approach to what seems to be fairly wide-spread bullying based on Plaintiffs' summary judgment evidence is to bury their collective heads in the sand."** While the death is tragic, and perhaps could have been preventable, the court nevertheless finds no claim for disability discrimination. **"Nowhere in Plaintiffs' voluminous record is there any evidence that [Student] was bullied or treated differently by school administration because of his disability, or his membership in any other federally protected class. To the contrary, what Plaintiffs' record reveals is that the Defendants had a consistent policy of ignoring bullying against all students. That is not an issue within the limited jurisdiction of this court."** *Estate of Lance v. Kyer,* 59 IDELR 226 (E.D. Tex. 2012)(Unpublished). The court notes, in a footnote, that the state legislature could provide a mechanism for the parents to recover in tort, but has not done so.

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

A little commentary: The state agency correctly states the legal proposition that harassment can amount to a denial of FAPE by negatively impacting the ability of a student to receive special education services, citing *M.L. v. Federal Way Sch. Dist.*, 105 LRP 13966 (9th Cir. 2005). That case also cites the majority caselaw analysis of "deliberate indifference," whereby a school can be liable for student-to-student bullying if it fails to act in response to conduct of which it is aware. **But, the case also holds that the school cannot be held liable until the parent gives the school a reasonable opportunity to respond to the allegations and take action.** Here, the parents could not legitimately claim that the school administrators were deliberately indifferent to the student's problems when they met with the parents on several occasions and offered a number of proposals and

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options to address the bullying allegations. See, e.g. *G. M. v. Drycreek Joint Elem. Sch. Dist*., 112 LRP 45306 (E.D. Cal. 2012) and *Dunfee v. Oberlin City Sch. Dist*., 47 IDELR 217 (N.D. Ohio 2007)(deliberate indifference requires more than proof of school negligence).

Child Find implications. *In re: Student with a Disability*, 112 LRP 5256 (SEA New Mexico 2012). The 8th-grade student, who was previously identified and later dismissed from special education, again started having problems in the 6th grade, including refusing tasks and problems with peers. In the 7th grade, the student made a suicidal threat and expressed suicidal ideations, which led to the school conducting a suicide intervention. The student stated that everyone hated him, that he was upset over his parents' divorce, and that he wanted to kill himself. He also scratched himself, although not to the point of drawing blood. A month later, he again threatened suicide, for which police and emergency service providers responded. The school's suicide interventionist found that the student had pressure at school from bullies, teachers, and his parent, that he was concerned with his parents' divorce, that he neglected his school work, and that he self-mutilated by scratching. Private evaluators had diagnosed the student with emotional and behavioral disorders, including ADHD and oppositional defiant disorder. The student, moreover, was missing classroom instruction by frequently going to the nurse's office. The school district, however, had not evaluated the student for potential ED. **The hearing officer found that the school had failed in its child-find obligation with regard to the potential for ED in the student, as there were ample behaviors and symptoms raising a suspicion of ED.** Moreover, the hearing officer held that the failure to identify ED served to deny the student a FAPE, as an appropriate IEP that would have addressed his emotional conditions was not put in place. He ordered the student qualified as ED and provided an appropriate IEP. The hearing officer denied compensatory education services, however, as the parent failed to offer evidence to prove what services the student should have received under an appropriate IEP that recognized his ED, finding that "subsequent placement may remedy the prior violation."

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

To avoid liability, the school need not take every step available to address the harassment. *Long v. Murray Sch. Dist.,* 59 IDELR 76 (N.D. Ga. 2012). A student with Asperger's Syndrome committed suicide after he and his parents reported harassment based on his disability. The parent sued, claiming that the school was deliberately indifferent to the harassment. The court found, however, that after the harassment was reported, the school disciplined the perpetrators and developed a safety plan for the student, which allowed the student to avoid crowds in the halls, be walked to the bus, and sit near the bus driver. Numerous cameras and teachers monitored the hallways during the school day. **Although the parent alleged that the school's decision to convene a meeting with the student and the perpetrators together was inappropriate, the court did not find it unreasonable.** Moreover, although the parents claimed the harassment continued after these efforts, there was no evidence that any single harasser repeated his conduct once the school addressed it through its efforts. The parent's argument was that there was a "culture of harassment," as evidenced by offensive bathroom messages (e.g., "we won't miss you") and students wearing nooses to school after the student's suicide. **While the court noted that the school never held any assemblies to discuss bullying and harassment, it took several steps to address the school climate, including requiring staff to review its anti-bullying policies, and conducting a program where teachers met with small groups of students to discuss peer relationships and review the local code of conduct. In addition, the school held a tolerance program and implemented a district-wide behavior improvement program.** The court noted that the deliberate indifference standard is a difficult standard—it requires that the school's

response be clearly unreasonable in light of the known circumstances, and neither negligence nor mere unreasonableness is enough. "This is an emotionally charged case with very difficult facts. There is little question that Tyler was the victim of severe disability harassment, and that Defendants should have done more to stop the harassment and prevent future incidents. To establish a claim under §504 and the ADA, however, Plaintiffs must demonstrate that Defendants' response to disability harassment constitutes deliberate indifference. **Deliberate indifference is a difficult, exacting standard, and there is simply no evidence of an existence of a clear pattern of inaction or abuse by any school employees."** [Emphasis added.] Thus, the court granted summary judgment to the district.

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

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

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

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

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

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

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

Frustration with the school's response, but no intentional discrimination or bad faith. *Rhodabeck v. Seguin Independent Sch. Dist*., 59 IDELR 133 (W.D. Tex. 2012), a student with paraplegia confined to a wheelchair declined to participate in a band concert after arriving at the site to discover that the stage was not accessible. On another occasion, he missed a swimming class that was part of PE because the bus used to transport students to the pool was not equipped with a wheelchair lift. In addition, there were other instances of problems providing accessible facilities to the student, including taking him on a field trip to natural bridge caverns that were not accessible by wheelchair. After a §504 hearing officer ruled that the conduct did not rise to the level of intentional discrimination or bad faith, the parents filed an action in federal court. **The court ruled, however, that the incidents revealed "a negligent lack of prior planning,"** but not an intentional effort to exclude the student. **"Evaluating these incidents in context, there is no evidence that these occurrences were gross departures from acceptable standards among education professionals. Although mistakes may have been made, they do not rise to the level of bad faith or gross misjudgment."** As a result, the student was unable to raise a material issue of fact to go forward to trial, and the court granted summary judgment to the District.

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

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

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

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

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

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

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

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

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

Is it gross misjudgment if the school is simply wrong? *MC & RC v. Arlington Central School District Bd. of Educ.,* 59 IDELR 134 (S.D.N.Y. 2012). Parents of student with Asperger's seek monetary damages following the school's incorrect belief that the student was suicidal, and the school's subsequent actions consistent with that belief, including sending him to the hospital. Concerned that the student "looked sad" a counselor and a school psychologist took the student into an office and questioned him for fifteen minutes. "One of the questions they asked C.C. was, 'What if both of your parents were killed tomorrow, would you be suicidal then?' C.C. responded by saying that he would be

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'very sad, but not suicidal.'" In footnote 5 to the opinion, the court provides additional statements by the student that seem to support the school's concerns. The statements include "I have no motivation," "I have no reason to live," and "nobody takes me seriously." He also told the counselor and psychologist that same day that he "had thought of killing himself," if "I don't have a good life, have a good job, have friends or my parents died." Wrote the court:

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

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

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

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

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

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

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

Episodic Homebound? *Traverse City (MI) Public Schools,* 59 IDELR 144 (OCR 2012). Despite the fact that the student is multiply disabled and has frequent, recurring absences, the school refused to provide a "just in case plan" for homebound services during ragweed season, instead relying on policy which created a fifteen-day delay between verification by a physician and start of services. **"OCR concludes that the District's failure to modify its practices and procedures to provide for educational services for foreseeable absences related to recurring or episodic conditions related to students' disabilities, without requiring an IEP meeting in every instance or waiting fifteen days to provide home instruction, violates the Section 504 regulation [on Free Appropriate Public Education] at 34 C.F.R. §104.33[.]"** (Bracketed material added). Note that if episodic plans are appropriate for IDEA-eligible students (where the procedural protections and higher) the concept should apply with equal if not more force to Section 504 students, especially in light of the Congress' special treatment of episodic impairments discussed previously.

V. Other New Cases of Interest

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

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

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

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> Ample evidence supports the Hearing Officer's conclusion that the District should be reasonably expected to have known about Lauren's disability." [Emphasis added.]

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

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

No health-based need for homebound. *Stamps v. Gwinnett County School District,* 59 IDELR 1 (11th Cir. 2012), *cert. den'd,* 112 LRP 54652 (2012). The school's refusal to educate three siblings at home, and creation of school placements for them was upheld by the court based on good data with respect to the impact of the students' impairments.

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

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

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class at the public school versus the 15-student class at the private school. In a word, the court found the testimony “unconvincing.”

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

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

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

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

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

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

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

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

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

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

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

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