SECTION 504 AND INDIVIDUAL HEALTH PLANS*

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This overview synthesizes recent published[1] letters of findings (LOFs)[2] issued by the Office for Civil Rights (OCR) specific to K-12 students who are on individual health plans (IHPs).[3] The emphasis is the effect of the Americans with Disabilities Amendments Act (ADAAA) in terms of eligibility,[4] although it also covers interrelated issues in these LOFs.[5] It does not cover LOFs that are specific to related but separate issues, such as health-related accommodations prior to the ADAAA[6] and the ADAAA's effect on the eligibility/FAPE process

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[1] Although "published" has various meanings with regard to court decisions or other primary legal sources, here it refers to OCR LOFs published in the INDIVIDUALS WITH DISABILITIES EDUCATION LAW REPORT (IDELR). It does not extend to other relevant LOFs in LRP's electronic database. *E.g.,* Springer (NM) Mun. Pub. Sch., 111 LRP 65460 (OCR 2011) (concluding that IHP did not suffice for student eligible under Section 504).

[2] Although LOFs show OCR's compliance posture in enforcing Section 504, the following caveat merits attention: "Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public." Catoosa Cnty. (GA) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011). Moreover, as this same LOF illustrates, the resulting "voluntary" resolution agreement is not equivalent to an officially imposed remedy. Id.

[3] "IHP" is used generically herein to cover what some districts call various other terms, such as "individual healthcare plan," "medical/health plan" or "medical management plan."

[4] *E.g.*, Perry A. Zirkel, *History and Expansion of Section 504 Student Eligibility: Implications for School Nurses*, 25 I. SCH. NURSING 256 (2009); Perry A. Zirkel, *Legal Perspectives: New Section 504 Student Eligibility Standards*, 41 TEACHING EXCEPTIONAL CHILD. 68 (June 2009).

[5] In some cases, the interrelationship is blurry. For example, in a covered case of a student with food allergies, the summary *infra* does not extend to the harassment issue. Catoosa Cnty. (GA) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011).

[6] *E.g.*, Westport (CT) Pub. Sch., 54 IDELR ¶ 329 (OCR 2009) (concerning § 504 eligibility of student with asthma and mold allergy); Buncomb (NC) Sch., 54 IDELR ¶ 235 (OCR 2009) (concerning blood sugar checks for students with diabetes); N. Penn. (PA) Sch. Dist., 53 IDELR ¶ 336 (OCR 2009) (concerning implementation of IEP provision for air-purifying measures for student with airborne allergies); Pine-Richland (PA) Sch. Dist., 53 IDELR ¶ 200 (OCR 2009) (concerning disclosure of child's food allergy to her classmates as part of efforts to maintain safe environment); Henry Cty. (MO) R-1 Sch. Dist., 52 IDELR ¶ 233 (OCR 2009) (concerning implementation of 504 plan provision for gluten-free diet); Bethlehem (NY) Cent. Sch. Dist., 52 IDELR ¶ 169 (OCR 2009) (concerning exclusion of student with 504 plan for food allergy from culinary arts class, contrary to medical information).

more generally.[7] It also does not extend to case law concerning related but separable issues, such as administration of medication,[8] implementation of health–related provisions of 504 Plans,[9] or IHPs incorporated in IEPs.[10] The accompanying chart provides for each LOF the citation, a summary of the facts as a result of OCR's investigation, OCR's rulings (or conclusions), and a sample of the provisions in the resulting voluntary resolution agreement. The primary lesson, in terms of compliance with OCR's view,[11] appears to be that school districts should promptly arrange to screen all students on IHPs to determine which ones are covered by the § 504 "child find" obligation[12] and, for those children, to obtain parental consent, conduct a timely eligibility evaluation, and provide the procedural safeguards notice. The corollary lesson is to provide a

[7] *E.g.*, Va. Beach (VA) City Pub. Sch., 54 IDELR ¶ 202 (OCR 2009) (found that district failed to consider whether the student's ADHD substantially limited additional major life activities, such as concentrating, thinking, and/or communicating); Union City (MI) Cmty. Sch., 54 IDELR ¶ 131 (OCR 2009) (ruling that the district failed to provide a timely and appropriate evaluation under § 504 for a student with bone cancer by 1. not conducting the evaluation until several months after notification of her medical condition, 2. using unduly restrictive, learning-based definition for eligibility, 3. not considering all relevant information, particularly of a medical nature; and 4. not providing individualized FAPE via a knowledgeable team); Aurora (CO) Sch. Dist., 52 IDELR ¶ 171 (OCR 2009) (ruling that district violated by refusing evaluation of "smart" student with peanut allergy and asthma plus not providing procedural safeguards notice. For a discussion of the FAPE consequences of the ADAAA, see Perry A. Zirkel, *For Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).

[8] *E.g.*, *Davis v. Francis Howell Sch. Dist*., 138 F.3d 75 (8th Cir. 1997); *DeBord v. Bd. of Educ*., 126 F.3d 1102 (8th Cir. 1997) (ruling that § 504 and the ADA do not require administration, to an eligible student, of medication that is beyond the recommended dosage); *R.K. v Bd. of Educ*., 755 F. Supp. 2d 800 (E.D. Ky. 2010) (ruling that offer to provide insulin pump monitoring in another district school sufficed under § 504/ADA rather than hiring nurse in neighborhood school for kgn. child with Type I diabetes); *Am. Nurses Ass'n v. O'Con*nell, 110 Cal. Rptr. 3d 305 (Ct. App. 2010), *review granted*, 116 Cal. Rptr. 3d 194 (2010) (ruling that state nurse practice act did not allow school personnel who were not licensed nurses to administer insulin to children with diabetes per the child's IEP or 504 plan); *cf. P.K. v. Middleton Area Sch. Dist*., 56 IDELR ¶ 105 (D.N.H. 2011) (ruling, under IDEA, that district did not violate the IEP provision for monitoring and maintaining latex-free environment).

[9] *E.g.*, Oxford Hills (ME) Sch. Dist., 57 IDELR ¶ 83 (OCR 2011) (finding that district complied with field trips provision in 504 Plan for student with diabetes).

[10] *E.g.*, Prince William Cnty. (VA) Pub. Sch., 57 IDELR ¶ 172 (OCR 2011) (clarifying that such IHPs are concurrently within OCR's § 504 jurisdiction).

[11] The courts do not necessarily share the procedural rigor of OCR's position. For a discussion of the difference with a focus on 504 Plans, see Zirkel, *supra* note 7.

[12] This obligation is to conduct an evaluation in accordance with the § 504 regulations for students whom the district reasonably believes may have a physical or mental impairment that substantially limits a major life activity under the applicable standards of the ADAAA. As the summarized cases reveal, limiting the scope of the Child Find screening or subsequent evaluation to the major life activity of learning clearly violates the Section 504 definition for eligibility, not only after but also before the effective date of the ADAAA.

504 Plan, which conforms to the § 504 definition of free appropriate public education (FAPE),[13] for those students duly determined to meet these eligibility standards.[14] The choices to meet this final requirement appear to range from identifying the IHP as the 504 Plan to developing a 504 Plan that incorporates the contents the IHP and adds, if any, the necessary accommodations and/or services to meet the individual needs of the eligible student "as adequately as the needs of non-disabled students are met."[15]

[13] 34 C.F.R. § 104.33(b) ("regular or special education and related aids and services").

[14] In determining whether the student meets the three criteria for eligibility (i.e., 1. mental or physical impairment that limits 2. a major life activity 3. substantially), the third criterion is without mitigating measures, arguably including the IHP.

[15] 34 C.F.R. § 104.33(a).

	Facts (in Chronological Order)	Rulings	Voluntary Resolution Agreement (examples)
N. Royalton (OH) City Sch. Dist., 52 IDELR ¶ 203 (OCR 2009)	a) student attended private school and, next, home education program in grade 2 b) prior to enrolling the student in the district for grade 3, the parent informed school personnel of his severe, purportedly life-threatening, peanut allergy and related anxiety disorder c) district policy prior to the ADAAA limited § 504 eligibility to impairments substantially limiting learning, instead serving students such as this child with emergency allergy plans (EAPs) d) upon the child's enrollment, the school nurse provided him with an EAP, including a detailed addendum not provided to other students with EAPs and subsequent revisions in response to parental input, and – though not the standard practice – conducted a § 504 evaluation at the parent's request e) the team determined that the child was not eligible at that time (Nov. 2008) but would be after the effective date of the ADAAA (Jan. 2009) g) on Jan. 1, 2009, the child's EAP became his 504 Plan – the parent signed it and received notice of § 504 procedural safeguards h) the district did not evaluate any of the other 40 students on EAPs for § 504 eligibility after the effective date of the ADAAA	1) no denial of FAPE (or district disability harassment) 2) "Although the District knew about your son's impairments and had received what was in effect a request for related services, the District acknowledged that it initially developed only an EAP for your son, in accordance with its policy and procedures, and did not conduct Section 504 evaluation of your son until you specifically requested a Section 504 plan." 3) the district's policy and practice of limiting § 504 eligibility to learning and using reasonableness as the standard for FAPE are inconsistent with § 504 and the ADA[16]	1) revise policies for eligibility evaluation and FAPE standard

Memphis (MI) Cmty. Sch., 54 IDELR ¶ 61 (OCR 2009)	a) midway in grade 1, the district placed the student, who has asthma, on a 504 Plan b) early in grade 2, the district reviewed and renewed the 504 Plan c) early in grade 3, after attending a regional training session on § 504, the building 504 coordinator reported to the parent that eligibility is limited to impairments with educational impacts d) the team reevaluated the student, concluding that his asthma substantially limited breathing but did not learning, thereby proposing to discontinue his 504 Plan and substitute an IHP e) the parent disagreed, saying she would obtain supporting information from the physician, whereupon the district continued the 504 Plan on an interim basis f) two months later, district personnel attended another training, where they learned about the ADAAA g) the district promptly convened another team meeting, including the parent, agreeing that the student was eligible regardless of the effect on learning; however, because the parent did not agree as to the proposed contents of the new 504 Plan, again seeking more time for input from the child's physician, the district continued to implement the previous year's Plan h) three months later, the team reconvened and agreed on the new 504 Plan	1) "Because at no time were the Student's 504 plan and services actually terminated, OCR considers the allegation as it pertains to the Student to be resolved." 2) OCR's investigation incidentally revealed "procedural compliance issues."[17]	1) revise policies and forms to correct the exclusive reliance on learning and to comply with the ADAAA 2) re-evaluate any student who was on an IEP or was denied eligibility during 2008-09 based on either of these compliance issues 3) "clarify that parents/ guardians either will be invited to participate in Section 504 meetings or otherwise will be given a meaningful opportunity to provide input into § 504 team decisions regarding the identification, evaluation, and placement of students with disabilities"

[17] OCR also found various compliance problems with the forms for its 504 Plans, including: 1) defining "substantially limits" too narrowly in terms of "unable to perform" or "'significantly restricted"; 2) listing only accommodations, not related services; and 3) listing date of expiration rather than date of review or reevaluation.

Oxnard (CA) Union High Sch. Dist., 55 IDELR ¶ 21 (OCR 2009)	a) under the district's policy, the student study team (SST) determines whether a § 504 evaluation is appropriate and, if so, conducts it in terms of whether the child's impairment significantly affects education/learning b) the district's procedural safeguards form state that if parents disagree with the evaluation or 504 Plan, they have the right to file a complaint with the grievance process (but no mention of the right to an impartial hearing) c) during grade 9, the student was absent for 28 days due to illness d) at the start of grade 10, the student's physician sent the district a letter indicating that the student had intestinal bowl syndrome, which caused recurrent vomiting, nausea and intestinal pain and that would result in attendance problems e) during grade 10, the student was absent for 35 days due to illness, including a period of 27 consecutive days f) one month after the start of grade 10, the SST met to discuss the student's repeated first-period tardiness and physician's recommendation for absolute bathroom privileges g) two months later, the parent request a 504 Plan for difficulties with homework completion, making up work, and catching up on tests, and the physician promptly followed up with an additional diagnosis of post-infectious gastro paresis h) the SST notified the parent that the student did not qualify under 504 based on his high academic performance with SST accommodations, recommending changing some of his courses from honors level and offering not only counseling due to the emotional stress but also various other additional SST accommodations (e.g., bathroom privileges and excused tardiness) i) a week later, the student was placed on homebound; the teachers refused modified assignments because they would negate the honors curriculum j) two weeks later, the parent withdrew the student and enrolled him in an on-line charter school k) subsequent e-mails between district administrators directed that students on homebound were not eligible for a 504 Plan or participation in the international baccalaureate (IB) program	1) the district's sole focus on learning as the only major life activity was not consistent with § 504 and its failure to consider the impact on bowel functions was inconsistent with the ADAAA 2) the district's determination of learning was inconsistent with § 504 by relying solely on grades and inconsistent with the ADAAA by conflating the SST accommodations 3) treating homebound, IB, and honors courses as mutually exclusive with § 504 was also a procedural denial of FAPE 4) the district failed to provide the parent with the requisite procedural safeguards notice (in terms of the right to an impartial hearing and subsequent review)	1) reconvene 504 team to reconsider the student's eligibility under corrected standards, with the parent and the student invited to participate 2) revise policies, procedures, and forms – including homebound, honors, and IB

Isle of Wight County (VA) Pub. Sch., 56 IDELR ¶ 111 (OCR 2010)	a) student enrolled in the district in grade 8 b) soon thereafter student received diagnosis of Type I ("brittle") diabetes c) parent informed district of the diagnosis either early in grade 8 or grade 11 d) neither the parent, who was a physician, nor the hospital requested a 504 Plan for the student e) the district followed his "medical plan" but did not consider the student for § 504 eligibility (even after the 1/1/09 effective date of the ADAAA, which was midway in the student's junior year) g) during the first month of the student's senior year, the district suspended the student for 10 days, pending expulsion proceedings, for threatening an administrator by stating: "I'm going to slit her throat"; the district did not consider the impact of his high blood sugar level h) the district reassigned him to an alternative school for four months, after which he returned to complete his senior year i) in the interim, two months after the incident, in response to parental request, the district conducted a § 504 evaluation, determined he was eligible, and provided a 504 Plan	1) the district had reason to believe that the student may have been eligible under § 504 and had not provided procedural safeguards at the time of the incident (based on conclusion that district had requisite suspicion either as early as the beginning of grade 11 or based on lack of change in the two months before determining he was eligible)[18] – "OCR's policies require a determination of whether the behavior is a manifestation of a disability[19] and, if so, an evaluation to determine if the current placement is appropriate"	1) arrange for training in ADAAA and MDRs 2) review all students on IHPs – and all students found ineligible after 1/1/09 – to determine which need to be referred for a § 504 evaluation

[18] In "dicta," OCR questioned the district's "heavy reliance" on parental requests, emphasizing that the obligation for evaluating students reasonably believed to be eligible under § 504 is the district's, not the parent's.

[19] Similarly, in its discussion, OCR recited the IDEA causation standard, without attribution to the IDEA, as the applicable criterion of manifestation determination reviews (MDRs) under § 504.

Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010)	a) parent informed school personnel upon enrolling her child in grade 4 of child's diabetes b) nurse promptly arranged for IHP c) two months later parent requested 504 Plan d) one month later parent provided consent for evaluation e) two weeks later district conducted 504 evaluation, which included the parent and nurse, determining that the student was eligible and recommending set of instructional accommodations f) parent disagreed with the proposed accommodations g) district informed parent that if she did not sign the plan as approved, it would be placed in inactive folder	1) there was insufficient information of violation for issue of the complaint, which was whether the district had failed to provide a "timely evaluation" of the child's eligibility under § 504 (using, by analogy, IDEA and Texas 60-day period from date of consent to the completion of the evaluation 2) the district's eligibility determination triggered its obligation to provide FAPE; § 504 does not require signing for the 504 plan to be valid 3) similarly, based on evidence of the district practice that failed to provide § 504 evaluation for children on IHPs "circumvents the procedural safeguards set forth in Section 504"	1) determine child's educational loss and, if any, proposed compensatory education 2) review all students on IHPs to determine if any of them may be eligible and providing those individuals with an evaluation and, if eligible, 504 Plan

Lourdes (OR) Pub. Charter Sch., 57 IDELR ¶ 53 (OCR 2011)	a) during 2009-10 the school provided—per the state education agency's procedures (which included licensed nurse and annual assessments)—an IHP for the student, who had a diagnosis of Type I diabetes b) at the end of the year, the licensed nurses who developed and implemented the IHP left c) during the summer, the school's director contacted more than 10 health organizations and individuals w/o success in obtaining licensed health care providers conduct the required assessment and training d) in early September 2010, the state education agency informed that director that w/o the required procedure, the only option was to provide in-home tutoring e) from the start of the school year until November 3, 2010, when the school had completed the requisite procedures for the annual IHP, the school provided the student with the customary 5 hours per week of in-home tutoring f) the school did not provide the parent with a procedural safeguards notice an did not have written procedures for 504 evaluations of children with or believed to have disabilities	1) the change to in-home tutoring was a significant change in placement, thus causing violation of the § 504 regulation for evaluation 2) the in-home placement also violated the § 504 regulation for least restrictive environment 3) the school also violated the § 504 regulation for procedural safeguards notice 4) these violations amounted to a denial of FAPE	1) determine whether the child requires compensatory education for the period on in-home placement and, if so, provide it 2) provide training and development of proper procedures