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SECTION 504: AN UPDATE

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I. SECTION 504 OF THE REHABILITATION ACT OF 1973

*No otherwise qualified individual with a disability in the United States...shall, **solely** by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program receiving Federal financial assistance...*

A. General Overview

1. Unlike the Individuals with Disabilities Education Improvement Act (“IDEIA”), which is a federal law that governs and affirmatively mandates the provision of special education services, Section 504 of the Rehabilitation Act (“Section 504”) is a civil rights statute that prohibits any program, both public and private, who receive federal financial assistance, from discriminating against persons with disabilities. This would include schools. Section 504 provides that no person with a disability can be excluded from or denied the benefits of any school program receiving federal funds.
 - a. The IDEIA provides (limited) federal funding to both state and local education agencies in order to guarantee the provision of special education and related services for those students who meet the specific criteria for eligibility. The purpose of the IDEIA is the formulation of a procedurally sound individualized education program (“specialized instruction”) reasonably calculated to confer educational benefit to students with recognized disabilities.
 - b. In contrast, Section 504 is not a funded programmatic statute and the government does not provide additional federal dollars for students who are eligible for services under Section 504. The focus of Section 504 is the provision of equal educational opportunity to students with disabilities by accommodating their disabilities in such a way that they have an equal opportunity at success in the classroom.
 - c. Under Section 504, the definition of an individual with a disability includes, any person who:
 - (1) Has a mental or physical impairment which substantially limits one or more major life activities;
 - (2) Has a record of such impairment; or

- (3) Is regarded as having such impairment. 29 U.S.C. 705(20)(B).

Practice Pointer: Only those persons who have a mental or physical impairment are entitled to “accommodation” under 504. The other two groups are entitled to “nondiscrimination,” nothing more. This is logical. If a person is “regarded as” having a disability, but does not actually have one, there would be nothing for a school to accommodate.

- d. One way to conceptualize the difference between IDEIA and 504, is that IDEIA eligibility is limited to those students with a learning problem due to a disability that is specifically defined in the law. 504 covers students with any mental and physical impairments, regardless of whether that impairment results in any educational need.
2. Harassment on the basis of a disability is also considered discriminatory under Section 504. A failure by the district to address harassing conduct by a coach or other employee can constitute a violation of 504. Also, harassment by other students, if condoned by the district, can lead to a finding that the district has discriminated against a student with a disability. OCR defines harassment as:

*[I]ntimidation or abusive behavior towards a student based on disability that creates a hostile environment by interfering with or denying a student’s participation in a school district’s program or a student’s receipt of program benefits, services or opportunities. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements or conduct that is physically threatening, harmful, or humiliating. Given the totality of the circumstances involved, including the age and level of maturity of the students and the nature, frequency, scope, and duration of the allegedly discriminatory acts, the conduct may constitute a violation of Section 504 when such conduct is severe, pervasive, and/or persistent enough to create a hostile environment on the basis of disability. See: **Rochester (MI) Community Schs.**, 41 IDELR 246 (2004)*

3. Under Section 504, schools must provide students with “**reasonable accommodations**” in order to provide equal educational opportunity comparable with that provided to their non-disabled peers. As such, 504 eligible students are entitled to aids, benefits and/or services to afford them an equal opportunity to obtain the same results as students without

disabilities. In the years following the passage of Section 504, schools focused on providing physical access to school buildings by installing ramps, elevators, and larger restroom stalls. Now the focus of 504 is not just physical access, but educational access as well.

- a. Entitlement to these aids and services is not meant to produce the equivalent outcome. Equal treatment does not mean the same treatment; it simply means a standard is set for educational success, which may be different based on student needs and individualized by procedural safeguards.
 - b. Thus, unlike the IDEA, Section 504 does not mandate that districts act affirmatively to overcome a child's disability.
4. In the instructional program, the standard is provision of a free appropriate public education (FAPE), although the meaning of FAPE in the 504 context differs somewhat from the IDEA version.
 5. Within the non-instructional program, such as athletics, field trips and other extracurricular activities (discussed below), the standard is reasonable accommodation without undue hardship, unless the IEP (for special education student) or 504 team has determined that participation in activities that are within the non-instructional program are necessary for the student to attain FAPE. (*Be careful!*).

B. Free Appropriate Public Education (FAPE)

1. Under Section 504, “[a] recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient’s jurisdiction, regardless of the nature or the severity of the person’s handicap.” 34 C.F.R. 104.33(a). The substantive standard applied to school regarding accommodations and services, according to the Office for Civil Rights, bears similarities to the FAPE standard under the IDEA (although the procedural requirements for FAPE under the IDEA are significantly more detailed). While the IDEA confines the definition of FAPE to the provision of special education, related services and aids implemented on the basis of an IEP document, Section 504 defines FAPE to include regular and special education and related aids and services, as implemented by any appropriate means (including but not limited to an IEP) that are:

- a. Designed to meet individual education needs of students with disabilities *as adequately as the needs of non-disabled persons are met*; and
 - b. Based on adherence to procedures that satisfy the requirements of 34 C.F.R. 104.34 (educational setting); 34 C.F.R. 104.35 (evaluation and placement), and 34 C.F.R. 104.36 (procedural safeguards).
2. “Appropriate education” means provision of regular or special education and related aids and services that are designed to meet individual educational needs of handicapped students as adequately as the needs on non-handicapped students are met. This generally means the provision of individual accommodations necessary to provide an equal playing field.
 3. “Free education” means the provision of education and related services without cost to the handicapped student or his/her parents, except for those fees that are imposed upon non-handicapped students and their parents.
 4. Opposing views on 504 and FAPE:

- a. **Majority View:** “In order to succeed on a claim that a school district has violated Section 504, a Plaintiff is not only required to prove that the student is disabled, but is required to demonstrate that the school district acted in a discriminatory manner when it failed to reasonably accommodate the student. *In other words, something more than a mere failure to provide, as required by the IDEA, a “free appropriate education” must be shown in order to establish a violation of the Rehabilitation Act.*” *Campbell v. Board of Educ. of the Centerline School Dist.*, 38 IDELR 154 (6th Cir. 2003).

– versus –

- b. **Minority View:** “[T]here appear to be few differences, if any, between IDEA’s affirmative duty and Section 504’s negative prohibition against discrimination by schools receiving federal financial assistance. Indeed, the regulations implementing Section 504 adopt the IDEA’s language, requiring that schools which receive or benefit from federal financial assistance ‘shall provide a free appropriate public education to each qualified disabled person who is in the recipient’s jurisdiction.’” *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995) (case settled with payment to parents of \$245,000 prior to going to the jury).

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5. Unlike the IDEA, which includes an express requirement that the services provided meet the standards of the state education agency (as part of its definition of FAPE), the FAPE requirements under Section 504 state that the quality of special education services provided to students with or without disabilities must be equal.
6. Under Section 504, a school may not require parents of disabled students to pay the costs associated with necessary accommodations and services. Thus, there are no cost considerations that limit a district's responsibility to provide reasonable accommodations for students with Section 504 plans and the Office of Civil Rights does not support a reasonable accommodation limitation. *Modoc County (CA) Office of Education*, 24 IDELR 580 (OCR, 1996), (practice of determining which services to offer to students with disabilities based on cost and staff availability, without consideration of whether least costly or available services were appropriate for particular characteristics of a student, violated Section 504 and Title II of the ADA).

C. Evaluation Process/Components

1. Under Section 504, a student must be identified through evaluation procedures that gather information from a variety of sources. All decisions made regarding the student, evaluation data, and placement options must only be made by knowledgeable individuals. Determinations should be based on appropriate test data and information from a variety of sources such as teacher recommendations, physical conditions, social or cultural background, and adaptive behavior. Although a multidisciplinary, multifactored approach utilized for IDEA eligibility can be used to satisfy the requirement, it is not required.
2. A school district must conduct an initial evaluation of a student before it takes any action with respect to the initial placement of a student with a disability.
3. The initial evaluation is used to determine whether the student is a student with a disability for purposes of Section 504 and assembles the data used to determine the necessary special education or related services, as well as the educational setting in the least restrictive environment. Similar to the evaluation procedures under the IDEA, Section 504's procedures must ensure that:
 - a. Tests and other evaluation materials have been validated;
 - b. Evaluations are administered by trained personnel;

- c. Evaluations are tailored to assess specific areas of educational need;
 - d. Tests are selected and administered that accurately reflect the factors the test purports to measure. 34 C.F.R. 104.35
4. Upon completion of an evaluation and eligibility determination, placement decisions must be made by a group that includes persons knowledgeable about:
- a. The child;
 - b. The meaning of the evaluation data; and
 - c. Placement options. 34 CFR 104.35(c).
5. Re-evaluation: Schools must establish procedures for “periodic re-evaluation of students who have been provided special education and related services. 104.35(d) A re-evaluation procedure consistent with the IDEA is one means of meeting this requirement.” 34 C.F.R. 104.35 (d).

Practice Pointer: Certainly a re-evaluation should occur when there is a significant change in the student’s disabling condition, or a change in the educational environment. It would be wise to review plans upon transition to middle school or high school, or to another program in the student’s current grade level.

6. Independent Educational Evaluations: Section 504, unlike IDEA, does not provide parents with the right to obtain an independent educational evaluation at public expense. Nevertheless, if a district fails to conduct an appropriate evaluation, a court may award damages to cover the cost of such an evaluation.

D. Eligibility Determinations: the “Crux” of the Matter

1. The definition for Section 504 eligibility is significantly broader (more inclusive) than eligibility criteria under the IDEA. As such, students who are eligible for services under the IDEA will always meet the definition for eligibility for Section 504, although the converse is not true. Also, if a student is not found eligible for services under the IDEA, s/he may still be eligible for special education services under Section 504.

2. However, while many special educators believe that Section 504 eligibility is more “liberal” than the IDEIA, the converse is probably true given the need for a “substantial” limitation – a very strict standard.
 - a. By contrast, IDEIA placement teams have considerable latitude regarding eligibility;
 - b. As such, students with impairments who are performing on par with average non-disabled students are not likely to be 504 eligible; and
 - c. Therefore, Section 504 placements should be the exception and not the rule.

3. In order to be eligible for services and protection against discrimination on the basis of a disability under Section 504, a student must be determined as a result of an evaluation to:
 - a. Have; or have a record of having; or be regarded as having, a physical or mental impairment that;
 - b. **Significantly interferes** with one of life’s major activities. 34 C.F.R. 104.3(j).
 - (1) **Physical or Mental Impairment** – A physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:
 - (a) Neurological, musculoskeletal, special sense organs;
 - (b) Cardiovascular, reproductive, digestive, genitourinary;
 - (c) Hemic and lymphatic;
 - (d) Skin and endocrine;
 - (e) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. 34 C.F.R. 104.3(j)(2)

Note: Alcoholism and drug addiction are both considered to be physical and/or mental impairments under Section 504 (but are **not** disabilities under IDEA). As such, students with alcoholism or drug-addiction are therefore students with disabilities for purposes of Section 504 if the alcoholism or drug addiction substantially limits a major life activity. In particular, a student who is participating in or has completed a supervised drug rehabilitation program may be eligible for protection and services under Section 504. However, students who are currently engaged in the illegal use of alcohol or drugs are not covered even if the student is otherwise disabled.

- (2) **Major Life Activity** – A major life activity includes, but is not limited to functions such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”
- (a) It is helpful to first consider the major life activity in its totality. For example, deficits in the major life activity of learning do not include simple deficits in one component of learning. If a child is disorganized or has problems with math reasoning, it does not necessarily mean that he/she is a child with a disability.
- (b) If a doctor determines a child has ADD or depression, it remains within the province of the 504 team to address, through the evaluation process, whether this problem imposes a substantial limitation on the global activity of learning. 34 C.F.R.104.3(j)(2)
- (3) **Substantial Limitation** – A substantial limitation has been described as “an important and material limitation.” The Office for Civil Rights has never defined this and communicated only that each district must decide whether an impairment “substantially limits” a major life activity on an individual basis (for each student).

- (a) In order for a student to be covered under the “regarded as” prong, a school district must believe that the student’s supposed impairment substantially limits a major life activity and must take a discriminatory action against the student on that basis (a mistaken belief alone is not enough to establish coverage). A school district regards a student as having an impairment when:
 - (i) The student has a physical or mental impairment that does not substantially limit major life activities, but the district treats him on the basis of the impairment being so limiting.
 - (ii) The student’s physical or mental impairment would not substantially limit major life activities but for the attitudes of others toward the impairment.
 - (iii) The student does not have an impairment at all, but is treated as if he has an impairment that substantially limits a major life activity.
- (b) Courts and the OCR have generally interpreted a substantial limitation in reference to average students and expectations.
- (c) If “mitigating” measures (i.e., medication, eyeglasses, etc) eliminate or significantly reduce the negative impact of an impairment, then a person is not considered to have a disability – even if there would be a substantial limitation if the corrective measures were eliminated. (See recent US Supreme Court Cases on the ADA, discussed below).
- (d) While the OCR has never promulgated a definition of “substantially limits,” courts that have addressed the issue often apply the Equal Employment Opportunity Commission’s definition of that term under the Americans with Disabilities Act.

- (i) The person is unable to perform a major life activity that the *average person in the general population* can perform; or
- (ii) Is significantly restricted as to the condition, manner or duration under which the individual can perform a major life activity as compared to the condition, manner or duration under which the *average person in the general population* can perform the activity. 29 CFR 1630.2(j)(1). See *Bercovitch v. Baldwin School*, 27 IDELR 357 (1st Cir. 1998)

Practice Pointer: The comparison to the “average person” is significant. It means the student must be compared to the state or national average, not his/her siblings, high-achieving students, or even his/her own potential.

- (iii) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
 - The nature and severity of the impairment;
 - The duration or expected duration of the impairment; and
 - The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment (29 CFR §1630.3(j)(2)).
- (e) **Congressional Response** – H.R. 3195 – the proposed “ADA Restoration Act of 2007”

Certain U.S. House members are trying to broaden the U.S. Supreme Court's interpretation of the Americans with Disabilities Act with “restoration” legislation.

They argue the Court has narrowed the definition of "disability" since the passage of the landmark legislation 17 years ago by excluding people who have mitigated the effects of their impairments through assistive devices and medication. Specifically, the legislation would change the definition of disability by reversing the Supreme Court's "substantially limited in a major life activity" analysis now used to determine whether a person has a disability. It also would require the courts to **ignore** mitigating measures when determining a condition is explicitly a disability.

The bill has extensive, bipartisan support, with 222 cosponsors. Section 504 coordinators should keep an eye on the bill because, if passed, it could open up new considerations for "major life activities" and change how districts must accommodate individuals with disabilities.

4. **Addressing ADD/ADHD**

- a. IDEA: In the appropriate cases, eligibility for children with ADD/ADHD may occur under Other Health Impaired (OHI), Emotionally Disturbed (ED) or Specific Learning Disability (SLD).
- b. **504 eligibility:** The fundamental inquiry becomes whether there exists a "substantial impairment" under circumstances where a child does not qualify under IDEA?
 - (1) Physician's diagnosis of ADD/ADHD not necessary; and
 - (2) Conversely, a physician's diagnosis may not be helpful in determining substantial impairment.
- c. Interventions without IDEA or 504 qualifying disability.

5. **Recent 504 Eligibility Cases – The Changing Trend**

- a. *Scottsdale Unified School District*, 38 IDELR 137 (AEA AZ 2002). A "classic" scenario wherein parents of a child with ADHD and bipolar disorder sought special education services

through the IDEA as “other health impaired” and/or “emotionally disturbed.” At due process, the evidence showed that the student clearly had disabilities; however, the IHO determined that he was making satisfactory educational progress through 504 accommodations and did not need specialized instruction to overcome the consequences of his disabilities. The parents argued that when a student is suspected of having a disability, the school district must first determine IDEA eligibility before moving to a discussion of any applicable 504 accommodations. The court disagreed:

IDEA-based special education and Section 504 accommodations are not mutually exclusive and eligibility for one law is not the counterpoint of the other. Pre-supposition of eligibility under either law is not permitted and a broad evaluation process is required to appraise the student’s needs. Therefore, a special education evaluation need not precede a Section 504 evaluation, and, indeed, considerations of least restrictive environment militate in favor of determining accommodations before deciding that special education services are necessary.

- b. ***New Bedford Public Schools***, 35 IDELR 266 (SEA MA 2001). This case demonstrates a growing trend of decisions wherein the determination that a child is not IDEA eligible results in a similar lack of eligibility under Section 504. Here, a 15 year-old student with poor grades and a documented reading deficit did not meet the SLD eligibility standard of a severe discrepancy between achievement and academic ability. Neither did the student’s stress and anxiety over poor performance rise to the level of an emotional disturbance under the IDEA. Even though the student had a qualifying emotional impairment for 504 purposes, the IHO ruled that nothing in the record indicated that those difficulties negatively impacted his learning or other life activities as required by Section 504.
- c. ***N.L. by Ms. C. V. Knox County Schools***, 315 F.3d 688 (6th Cir. 2003). A significant, if not curious, recent decision out of the 6th Circuit involving a 7th grade student who had originally been placed on an IEP in the 2nd grade for ADHD with a behavior intervention plan. In the 5th grade, the student was removed from special education after a re-evaluation and her performance indicated she did not meet eligibility standards. After being accused of slapping a teacher, and while she was in danger of

being expelled, the district determined that an evaluation was warranted. The multidisciplinary team concluded that although the student had ADHD, her behavioral problems were volitional and not attributable to her ADHD and, therefore, that she did not qualify for special education services under IDEA. Though the parent disagreed with that conclusion, the same team met immediately after the IEP meeting and determined that the student was not eligible under Section 504 either. The trial court ruled that the school district had not properly applied the 504 standards when it merely referenced the IDEA multidisciplinary team report in denying eligibility. The 6th Circuit reversed based upon its reading of prevailing cases concluding that a failure to establish IDEA eligibility also resolves the 504 eligibility issue:

In sum, precedent has firmly established that Section 504 claims are dismissed when IDEA claims brought on the theory of a denial of free appropriate public education are also dismissed. These holdings make sense in light of Section 504's general applicability and its status as an anti-discrimination statute.

[Ed. Note: Recall, while students who are eligible for IDEA services will always meet the definition for eligibility for Section 504 or ADA, the converse is not always true. The non-categorical criteria for determining eligibility under Section 504 and the ADA are generally broader and more inclusive than the IDEA categories. Nevertheless, despite the 6th Circuit's holding, it is important to be aware that there are students eligible for educational accommodations and services under Section 504 and the ADA who are ineligible under the IDEA]

- d. *West Chester Area School District*, 35 IDELR 235 (SEA PA, 2001). Another attempt by the parents of a student with ADD to assert eligibility under IDEA as “Other Health Impaired” or “Specific Learning Disability.” Here, the evidence demonstrated that the eligibility requirements for those disabilities were not significant to the resolution of the case, since the facts showed no corresponding need for special education services. The student was successful and was receiving in-class accommodations from regular education teachers who were providing the same strategies to all regular education students who requested it. In addition to finding that the student did not qualify under IDEA, the appellate panel determined that he was also not eligible under Section 504:

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Although the Section 504 definition of “disability” is, in some respects, broader than that under the IDEA, the added breadth is largely in terms of alternative major life activities other than learning, such as walking, breathing, and working. More specifically, in addition to requiring a mental or physical impairment, the Section 504 definition requires that such impairment substantially limit a major life activity. For the major life activity of “learning,” which has written expression, math reasoning, reading decoding, and many other academic areas as components, the courts have clarified that in order to determine substantial limitation 1) the frame of reference – in contrast with the IDEA definition of SLD – is the achievement in the national population, typically as measured by standardized tests and grades, and 2) the measurement is with, not without, the mitigating effects of medication. Chad’s grades and test scores, with the mitigating effect of medication, reveal quite clearly that his ADD does not substantially impair the major life activity of learning.

- e. ***Wong v. Regents of the University of California***, 410 F.3d 1052 (9th Cir. 2005). In this case, the 9th Circuit declared that a medical student was not eligible for accommodations under 504. The Court based its decision on the fact that student had been accepted to medical school without any disability-related accommodations. This showed that the student was achieving beyond the level of the “average person in the general population” and thus could not be considered “substantially limited” in the major life activity of learning. While Mr. Wong may have had a learning disability, his need for accommodations was contradicted by his ability to achieve academic success without special accommodations. In making its ruling, the Court admonished that the decision should not be read to exclude any successful student from 504 eligibility. According to the Court:

A blind student is properly considered to be disabled, because of her limitation on the major life activity of seeing, even if she graduates at the top of her class. Nor do we say that a successful student cannot prove ‘disability’ based on a learning impairment. A learning-impaired student may properly be considered to be disabled if she could not have achieved success without special accommodation.

6. **Supreme Court ADA Decisions Impacting Section 504 Eligibility.**

- a. *Sutton v. United Airlines*, 527 U.S. 471 (1999). Petitioners with uncorrected vision of 20/200 applied for jobs as airline pilots but the airline required minimum uncorrected vision of 20/100. In rejecting their claims of disability discrimination the Supreme Court held that mitigating and/or corrective measures (such as eyeglasses in this case) must be taken into account when judging whether or not an individual has a “disability” under the ADA. This conclusion is derived from the language of the act which requires that an impairment “substantially limit” a “major life activity.” The Court found that the plaintiffs did not properly allege that they have an impairment that substantially limits a major life activity because they are only limited for the position of global airline pilot and could still use their skills for other jobs, such as regional pilot or instructor. **See also *Murphy v. United Parcel Service*, 527 U.S. 516 (1999)** (mechanic with hypertension not a qualified individual where medication mitigated against a substantial limitation); ***Albertsons, Inc. v. Kirkingburg*, 527 U.S. 555 (1999)** (truck driver with poor vision determined unqualified for commercial driving but not protected by ADA where “adjustments” prevented a substantial limitation).

[Note: the ADA Restoration Act of 2007, H.R. 3195, discussed above, is intended to reverse the effects of these Court decisions regarding mitigating circumstances in eligibility determinations]

- b. *PGA Tour Inc. v. Martin*, 121 S. Ct 1879 (2001) Casey Martin, a professional golfer who suffers from a circulatory disorder with a resulting malformation in his right leg, sued the PGA, alleging that the PGA’s rule banning the use of golf carts in certain tournaments violated 42 U.S.C. § 12101 *et seq.* – the Americans With Disabilities Act (ADA). The United States Supreme Court focused on whether a disabled contestant could be denied the use of a golf cart because it would “fundamentally alter the nature” of the tournaments to allow him to ride when all the other contestants must walk. The court determined that permitting Martin the use of a cart would not “fundamentally alter the nature” of golf. An example of what might “fundamentally alter the nature” of golf, the court proffered, would be enlarging the hole from a three-inch diameter to one with a six-inch diameter. Before concluding, the court admonished:

“The ADA admittedly imposes some administrative burdens on the operators of places of public accommodation that could be avoided by strictly adhering to general rules and policies that are entirely fair with respect to the able-bodied but that may indiscriminately preclude access by qualified persons with disabilities. But surely, in a case of this kind, Congress intended that an entity like the PGA not only give individualized attention to the handful of requests that it might receive from talented but disabled athletes for a modification or waiver of a rule to allow them access to the competition, but also carefully weigh the purpose, as well as the letter, of the rule before determining that no accommodation would be tolerable.”

7. **Why Do We Care? – The Problems of Over-Identification**

Although “over-identification” of 504 students is not being monitored by the federal government like their IDEIA counterparts, there are a number of problems associated with labeling a child as having a “disability” where one does not exist under law:

- a. Are we really advocating for the child by providing a 504 plan as a “consolation” prize or to avoid confrontation with demanding parents? Life in the post-secondary education and employment world will not be as accommodating.
- b. Recall, that with each 504-identified student, districts do not receive any federal funding but nevertheless must:
 - (1) Evaluate periodically;
 - (2) Meet procedural safeguards;
 - (3) Generate and maintain appropriate documentation of compliance;
 - (4) Provide significant procedural protections for identified students who are engaged in misconduct, including “manifestation” determinations; and
 - (5) Engage in periodic meetings prior to any significant change in placement.

E. **Section 504 Accommodation Plans**

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1. Although school districts may follow IDEA procedures (develop an IEP) for students who are eligible for services covered only under Section 504, most generally produce a document entitled “Section 504 Accommodation Plan” or a “Section 504 Plan” to memorialize the agreed services and accommodations. Also, unlike the IDEA, Section 504 allows school districts to determine the range of information that should be included in a Section 504 Plan.

Practice pointer: Keep it simple and focused. Using the same IEP methods for 504 and IDEIA students could confuse district personnel as to which students are 504-eligible and which are IDEIA-eligible. Developing a 504 plan is less complicated than developing a formal IEP, and it seems wise to avoid entangling your district in the latter especially when it is not required.

However, in order to clearly demonstrate compliance with Section 504, the Plan should address the following:

- a. *The nature of the student’s disability* – and the major life activity that it limits;
 - b. *The basis for determining the disability* – the evaluation procedures utilized (different than an MFE under IDEA) should be documented in the plan;
 - c. *The educational impact of the disability* – describe how the disability affects the child’s educational performance so that proper accommodations can be crafted;
 - d. *The necessary accommodations* – services designed to meet the needs of students with disabilities as adequately as the needs of non-handicapped students are met; and
 - e. *Placement in the least restrictive environment.*
2. **Accommodations**-Accommodations are adjustments made by the classroom teacher and school staff to help the student effectively access his/her educational program. Accommodations should take into account both the functional limitations of the individual and the alternative methods of performing tasks or activities so the student can participate without jeopardizing outcomes.

Common types of accommodations include:

- a. Modifying assignments or tests (i.e. allowing student to dictate answers or allowing extra time for completion);
 - b. Providing an extra set of textbooks for home;
 - c. Adjusting student seating;
 - d. Providing a peer tutor;
 - e. Providing school counseling services;
 - f. Modifying recess/PE/transportation; and
 - g. Using necessary health care procedures.
3. **Least Restrictive Environment** – Under Section 504, a district is required to place a student with a disability in the regular education environment unless it can demonstrate that the education of that student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 104.34(a).
- a. Also, pursuant to Sections 504's “comparability” requirement, school districts are required to “ensure that the facility and the services and the activities provided therein, are comparable to the other facilities, services and activities of the district.” 34 C.F.R. 104.34(c).
 - b. As such, a school district is required to provide students with disabilities services and classrooms comparable to the services and classrooms provided to non-disabled students.

F. Procedural Safeguards

- 1. A school system must establish and implement, with respect to actions regarding the identification, evaluation or educational placement of persons who, because of a handicap, need or are believed to need special instruction or related services, a system of procedural safeguards. However, the regulations addressing procedural safeguards under Section 504 is one sentence long and specifies only four safeguards a district must provide parents with:
 - a. Notice;

- b. An opportunity for the parents or guardian of the student to examine relevant records;
 - c. An impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel; and
 - d. A review procedure. 34 C.F.R. 104.36
- 2. Compliance with the procedural safeguards of the IDEIA is one of the means for meeting this requirement. 34 C.F.R. 104.36.
 - 3. ***Parental involvement*** in developing 504 plans: not required by Section 504 but highly recommended!
 - 4. In contrast to the complexities of the IDEIA procedural safeguards (46 separate regulations addressing consent requirements, confidentiality, independent evaluations, due process hearing procedures, and procedures for LD evaluations), Section 504 requires only the maintenance of a simple system that provides the basic, bare bones procedural safeguards necessary for parents who know what is happening and how to contest school decisions in an impartial forum.

II. DISCIPLINING STUDENTS COVERED UNDER SECTION 504: THE BASICS

- A. Since Section 504 prohibits school districts, as recipients of federal funds, from excluding otherwise qualified students from their programs solely on the basis of disability, courts and federal agencies have generally treated suspension and expulsion matters consistently, regardless of whether an IDEA or Section 504 student is involved.
 - 1. Although the Office of Civil Rights has never incorporated the 2004 IDEIA Amendments directly into the language of Section 504, the same basic protections that are afforded to students classified as disabled under the IDEIA are available to those under Section 504, with some limited exceptions, including students who are classified as disabled solely by virtue of alcoholism or drug addiction.
 - a. Alcoholism and Drug Addiction:
 - (1) Section 504 allows a school district to discipline all students with disabilities who are current alcohol or drug users for use or possession of alcohol or drugs in violation of the school district's student code of conduct/disciplinary code even if the student is disabled on the basis of

alcoholism or drug addiction. Since arguably a student who is currently engaged in the illegal use of drugs is not considered disabled under Section 504, the student can be disciplined even if s/he has an alcohol or drug addiction.

- (2) Caveat: This has been interpreted to mean only students disabled under Section 504 alone, not students who enjoy dual protection under IDEA and Section 504.
- (3) Also, the possession of illegal drugs or alcohol – in and of itself – does not result in a loss of protection under Section 504, unless the student is also currently engaged in the illegal use of drugs or alcohol.

b. The following are generally the only requirements in the 2004 IDEIA dealing with discipline that districts may be reluctant to apply to Section 504 students (in the absence of guidance from the Office of Civil Rights to the contrary):

- (1) Mandatory reporting of disciplinary records (FERPA issues).
- (2) Mandatory functional behavior assessments and behavior assessment plans.
- (3) Interim alternative placements.

c. Stay Put: Unlike the IDEA, *Section 504 does not have a specific “stay put” requirement that parents can invoke to stay a disciplinary action.* However, the Office for Civil Rights has said that Section 504 has an *implicit* stay-put component, at least to the extent that the school district should wait until the completion of the required evaluation process before making a change in placement. If you suspend or expel a Section 504 student and the parents file for due process, you may wish to consider complying with the OCR’s view on stay put and offer or mutually develop an alternative placement pending completion of due process.

d. Cessation of services: Under the IDEA, educational services to an eligible student never terminate, even if the student is properly expelled for conduct unrelated to the disability. Under Section 504, however, educational services to a properly expelled student

may cease – but only if the same policy applies to non-disabled students.

III. EXTRACURRICULAR ACTIVITIES: PROMOTING EQUAL OPPORTUNITY AND AVOIDING DISCRIMINATION

A. Statutory and Regulatory Considerations

1. Section 504

a. Under Section 504, participation in extracurricular activities is primarily an issue of accessibility and equal opportunity. Since school districts are required to provide services and athletics in a manner necessary to provide students with disabilities an equal opportunity for participation, limitations that are placed on such participation may be discrimination under Section 504.

b. 34 C.F.R. §104.37 Non-academic Services and Programs

(1) School districts shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an *equal opportunity for participation* in such services and activities.

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

(3) In providing physical education courses, athletics and similar programs and activities, a school district may not discriminate on the basis of a student's handicap. A school district which provides physical education courses or that operates or sponsors interscholastic, club or intramural athletics, shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(4) A school district may offer handicapped students physical education and athletic activities that are separate or

different from those offered to non-handicapped students only if separation or differentiation is consistent with educational setting requirements and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

- c. Generally, a student must be included in the program if he/she meets all the criteria for entry into the program, even if the student only qualifies with the provision of reasonable accommodation. However, where participation of the disabled student would fundamentally alter the program, or require unreasonable accommodation that would place an undue burden on the district, the student may be excluded from the program.
- (1) In determining whether the accommodations would pose an undue burden, a district should consider:
 - (a) The nature of the student's disability;
 - (b) The type and cost of modification(s) that would be required;
 - (c) The size of the program with respect to the number of staff;
 - (d) The type of facility required;
 - (e) The size of the budget; and
 - (f) The nature of the program including the number and types of students served
 - (2) In determining whether the accommodation would fundamentally alter the program, a district should consider:
 - (a) Whether the child is capable of participating with the accommodation;
 - (b) The cost of the accommodation; and
 - (c) Whether the student will so disrupt the activities of the program that other students cannot participate.

- (3) If a student poses a *direct threat* to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures, or by the provision of auxiliary aids or services, a public accommodation is not required to permit the child to remain in the program (Letter of Finding to Douglas County School District, Office for Civil Rights, Case No.: 08041037-D, May, 20, 2004).

2. Ohio Revised Code 3313.535(D)

Boards of Education are authorized to adopt rules which allow for a student's IEP to exempt a student with a disability from the school district's minimum grade point average requirement for participation in interscholastic extracurricular activities when such an exemption would be advisable.

B. Other Important Rules Pertaining to Extracurricular Activities

1. Ohio High School Athletic Association By-laws

a. **Age eligibility by-laws**

- (1) If a student enrolled in high school attains the age of 19 before August 1, the student shall be ineligible to participate in high school athletics for the school year commencing that calendar year. Bylaw 4-2-1.
- (2) If a student in grade 7 or 8 attains the age of 15 before August 1, the student shall be ineligible to participate in 7th and 8th grade interscholastic athletics for the school year commencing that calendar year. Bylaw 4-2-2.

b. **Eight semester eligibility by-law**

After a student completes the 8th grade or is otherwise eligible for high school athletics pursuant to bylaw 4-2-3, the student shall be ineligible for a period not to exceed eight semesters, taken in order of attendance, whether the student participates or not. A student in grade 7 or 8 who attains the age of 15 before August 1 shall only be eligible at the high school level for a period not to exceed eight semesters, whether the student participates or not.

c. **Exception to age and semester by-laws:** If the student is a “child with a disability” as that term is defined at 42 U.S.C. Section 12102 (ADA) and the Regulations promulgated thereunder, **that student may be declared eligible by the Commissioner** if, in the Commissioner’s sole discretion, the Commissioner determines that:

- (1) The student does not pose a safety risk to himself/herself or others; and
- (2) The student does not enjoy any advantages in terms of physical maturity, mental maturity or athletic maturity over other student athletes; and
- (3) The student’s participation does not affect the principles of competitive equity; and
- (4) The student’s participation does not displace another student-athlete; and
- (5) There is no evidence of “red-shirting” or other indicia of academic dishonesty.

d. **Academic eligibility by-law**

- (1) In order to be eligible in grades 9-12, a student must be currently enrolled and must have been enrolled in school the immediately preceding grading period. During the preceding grading period, the student must have received passing grades in a minimum of five one-credit courses or the equivalent which count toward graduation.

2. School district policies and standard practices
3. Ohio Model Procedures for the Education of Children with Disabilities
4. Operating Standards for Ohio’s Schools Serving Children with Disabilities

C. **Summarizing Relevant Caselaw and Legal Authority Addressing Extracurricular Activities**

1. **Students with a disability can be denied participation on a sports team based on Ohio High School Athletic Association By-Laws.**

Generally, athletic association by-laws which limit a student's interscholastic athletic eligibility based on a neutral criteria (age, number of semesters in attendance) and not based on a student's disability have been upheld in Ohio as not being discriminatory.

- a. **Until recently, age eligibility by-laws have been upheld as neutral and non-discriminatory in this jurisdiction.**

McPherson v. Michigan High School Athletic Association,
119 F.3d 453 (6th Cir 1997)

Due to academic performance, the plaintiff repeated the eleventh grade, therefore, the student's 12th grade year marked his ninth and tenth high school semesters. Interestingly, the plaintiff was not diagnosed with ADHD and as having a seizure disorder until his twelfth grade year. The plaintiff attempted to play basketball during his senior year, but had exhausted his eligibility under the eight-semester rule. He then filed a request with the MHSAA for a waiver. After considering information about the plaintiff that it had requested from the school district, the MHSAA rejected the plaintiff's request. The plaintiff then brought suit in federal district court requesting that the MHSAA be enjoined from prohibiting his participation. The court issued a preliminary injunction and the MHSAA appealed.

On appeal, the Sixth Circuit reversed the decision of the district court and upheld the enforcement of the eight semester rule, stating:

*We find no principled distinction between the nature and purpose of the age-limit rule and the eight-semester rule that could lead us to conclude that the former is necessary while the latter is not. The purposes served by the two rules are largely the same: both are intended to limit the level of athletic experience and range of skills of the players in order to create a more even playing field for the competitors, to limit the size and physical maturity of high school athletes for the safety of all participants, and to afford the [other] players * * * a fair opportunity to compete for playing time.*

The court concluded by recognizing that requiring a waiver of the eight-semester rule would result in a fundamental alteration in high school sports programs.

[Note: Although the court found that the MHSAA may not be covered by the Rehabilitation Act because it received no federal or state funds, the OHSAA is in fact covered by the Act. See *Rhodes v. Ohio High School Athletic Assoc.*, 939 F.Supp. 584 (N.D. Ohio 1996).]

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Sandison v. Michigan High School Athletic Association,
64 F.3d 1026 (6th Cir. 1995)

Two former high school students filed this action after they were prohibited from participating on their high school football team based on a rule of the Michigan High School Athletic Association (MHSAA) which forbid students over age 19 from playing interscholastic sports. Both students had learning disabilities which caused them to repeat certain elementary school grades. By the time of their senior years both students were over age 19 and were consequently not eligible to play on their high school sports teams. The students filed suit claiming that their exclusion from football was unlawful discrimination based on their disability in violation of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act, the U.S. Constitution and other state anti-discrimination laws. The case was dismissed by the federal court which found that the age eligibility by-law was neutral and was applied without regard to whether a student did or did not have a disability. The students had been permitted to participate in athletics in all previous years, despite their disabilities. It was not until the students reached the age of 19 that the rule prohibited their participation. According to the court, it was the passage of time that prevented the students from meeting the age eligibility requirement, not their disabilities. The court also found that no reasonable accommodation could be provided to enable the 19- year old students to participate in interscholastic athletics because the waiver of the age limitation would inject older, more mature students into competition and would fundamentally alter the athletic program.

b. **OHSAA’s eight semester eligibility rule has been upheld as neutral and non-discriminatory**

Dixon v. Hamilton City Schools,
1999 U.S. District LEXIS 21488 (S.D. Ohio Nov. 4, 1999)

The parents of a student who suffered from Attention Deficit Hyperactivity Disorder (“ADHD”) filed this action claiming their son’s IEP required his participation on the high school football team. Specifically, the student’s 12th grade IEP stated “[I]f eligible as determined by the Ohio High School Athletic Association (‘OHSAA’), [student] will participate in practice and competitive events for individuals or team-sports for which he has successfully made the team through the regular student process.” The student was declared ineligible to participate on the high school football team in his senior year based on the by-laws of OHSAA which limit a high school student’s period of eligibility to eight semesters. The student had repeated ninth grade and therefore his eight semesters of academic eligibility expired at the conclusion of the 11th grade.

The court found that the student's IEP was replete with statements that conditioned participation on OHSAA eligibility and making the team through the normal "try-out" process. Accordingly, the court concluded that participation on the football team was not written into the student's IEP as a mandatory part of his educational program.

The court also concluded that interscholastic athletics is not a related service as defined in the IDEA. According to the court, athletics may be considered a motivational tool with "spill over" educational benefits, but participation is not necessary for the child to attend school and benefit from public education. Finally, the court found that the parents failed to demonstrate that the student's IEP would not afford him FAPE without the ability to participate in sports. The court found that many elements of the IEP (other than athletics) contributed to the student's academic and behavioral progress. No witness was able to testify that the IEP would not deliver educational benefit in the absence of participation in athletics.

Rhodes v. Ohio High School Athletic Association,
939 F.Supp. 684 (N.D. Ohio 1996)

Due to academic performance, the plaintiff in this case repeated the ninth grade, therefore, the student's 12th grade year marked his ninth and tenth high school semesters. As in *Dixon*, the student was declared ineligible to participate on the football team during his senior year based on the eight semester eligibility requirement.

The student's request to waive the eligibility limit was denied by OHSAA. As in *Dixon*, the court determined that the eight semester eligibility rule could be applied to students regardless of their disability. The decision to prohibit this student's participation on the football team was not based solely on his disability, but was based on the number of semesters of high school attendance. As in *Sandison*, that court also found that accommodation of the student's disability through waiver of the eligibility requirement would materially alter the essential elements of the program. The court found it unnecessary to reach this issue, however, based on a previous finding that the student was prohibited from participation in football because he could not satisfy the eight consecutive semester rule, not because he was disabled.

c. **However, the trend is changing direction on age eligibility waivers:**

Ingram v. Toledo City School District Board of Education,
339 F. Supp. 2d 998 (N.D. Ohio 2004)

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This case involved an eighteen-year-old senior at Toledo Start High School who was seeking a college football scholarship. The student had been diagnosed with a specific learning disability that affected his reading, reading comprehension, and math abilities and received educational programming in conformance with an IEP. Under Ohio High School Athletic Association (“OHSAA”) bylaws, a student athlete must achieve passing grades in at least five core courses in the quarter immediately preceding the period of eligibility in order to participate in interscholastic athletics. In addition, the OHSAA prohibits the use of summer school or other educational options as a substitute for a failed grade during the last grading period of the year. There is an exception, however, for tutoring or completion of examinations if a student was unable to complete the work due to illness or accident verified by a physician.

Due to incomplete homework and classroom assignments, the student received a failing fourth quarter grade in English [during the second semester of his junior year]. Because the student only enrolled in five classes, the failing grade resulted in his ineligibility to play football his senior year (under OHSAA Bylaw 4-4-1). The student filed for a due process hearing to contest the school’s failure to implement his IEP. The hearing officer found that the school’s failure to properly implement the student’s IEP resulted in the student receiving an “F” for fourth quarter English. The IHO ordered that the student be permitted to make up missed assignments with the assistance of his tutor and that the school then reevaluate the student’s football eligibility. After completing the missed work, the student received a “D” as his fourth quarter English grade and therefore met the eligibility requirements to play football. Nonetheless, the OHSAA still ruled him ineligible under the “no make-up work” Bylaw (4-4-6). The student filed an action with the court seeking to enjoin the OHSAA from keeping him off the field and from sanctioning the school for any games that played.

The court granted the student’s motion for a preliminary injunction and allowed him to play football, finding that he had a strong likelihood of success on the merits. The court equated this situation to the exception permitted by OHSAA when a student is able to complete make-up work in the case of an illness or accident (Bylaw 4-4-7). Here, the court found that this exception should also include a situation where a student completes make-up work based on an independent, final, and binding decision which declares that the student failed the class because of an improperly implemented IEP. The court found it unreasonable for the OHSAA to prohibit the school from complying with the IHO’s order and by not granting the student a waiver to play football. The court found that the student was likely to suffer irreparable injury by losing a chance at a college scholarship, and that by allowing the student to play in this circumstance, there would be no likelihood of substantial harm to the OHSAA or

member schools. The potential for abuse was also unlikely, as an independent verification of the school's failure to serve the student was made by an IHO.

Cruz v. Pennsylvania Interscholastic Athletic Association,
34 IDELR 290 (E.D. Pa. 2001)

The IEP for a student, diagnosed as Learning Disabled, indicated a need to take part in extracurricular activities, including athletic activities. During the student's first three years in high school, he participated in football, wrestling, and track. Prior to his fourth year of high school, the student turned nineteen (19) years of age. Although the student was permitted to play in two football games during that year, the school district recognized the conflict with the Age Rule set forth in the Pennsylvania Interscholastic Athletic Association's ("Athletic Association") By-Laws and reported the conflict to the Athletic Association. Additionally, the school district and parent requested that the Athletic Association grant a waiver/exemption of the Age Rule and/or amend the rules so that the student could participate in athletic activities during his fourth year. However, the Athletic Association refused. In response, the parent and district filed suit against the Athletic Association under Section 504, the IDEA, and the ADA claiming that the Athletic Association discriminated against the student on the basis of his disability by excluding him from participation.

Although the IDEA claim was dismissed for failure to exhaust administrative remedies, the Court ruled that the student required an opportunity to present his case to the Athletic Association, which was obligated to evaluate any requested waiver of its age-based athletic participation rule for individuals with disabilities on a case-by-case basis. The Court further enjoined the Athletic Association from enforcing its age ineligibility rule until the Athletic Association entertained the student's application for a waiver under the ADA guidelines established in *PGA Tour Inc. v. Casey Martin*, in which the Supreme Court made it clear that a basic requirement of the ADA is the evaluation of a disabled person on an individual basis. In particular, under *Martin*, three (3) inquiries must be conducted as contemplated by the ADA: 1) whether the requested modification is reasonable; 2) whether it is necessary for the disabled individual; and 3) whether it would fundamentally alter the nature of the competition.

The Court found that the student could be eligible to return to the school district's teams upon a showing that the requested modification to the age rule was reasonable, necessary, and did not fundamentally alter the nature of the competition. Despite the fact that the Athletic Association argued that it would be nearly impossible for it to determine in each individual case whether allowing participation of an over-age student would alter the nature of the competition, the Court noted that the Athletic Association had a waiver process for other rules, including student transfers. In granting the injunction, the Court determined that

the establishment of an age-waiver rule, as requested by Plaintiff's, would not place an undue burden on the Athletic Association. Specifically, the Court noted that the balancing test weighed in favor of the student, who was clearly entitled to the benefits of the ADA.

Kling v. Mentor Public School District Board of Education,
Case Nos. 1:01-CV204, 1:01 - CV3130 (N. Dist. Ohio, 2001)

The parents of an 11th grade student with a hearing impairment, motor delays and cerebral palsy challenged the school district's unwillingness to include participation on the high school cross-country team on the student's IEP. The school district informed the student that he would be ineligible to participate on the cross-country team during his junior year based upon the Ohio High School Athletic Association By-Law which prohibits participation in interscholastic athletics once the student attains the age of 19. Also, central to the case was whether or not the student's participation on the cross-country team was necessary in order for the school district to provide FAPE.

The parents filed a request for due process in accordance with the IDEA challenging the student's proposed IEP which did not include participation on the cross-country team. The parents further challenged what they perceived to be the unwillingness on the part of the school district to discuss the student's participation on the cross-country team based on the OHSSA age eligibility by-law. The school district moved to dismiss the due process request on the grounds that the parents could not receive the relief they sought (participation on the cross-country team) through the administrative proceeding since the impediment to the student's participation was the OHSSA age eligibility by-law and not the policy of the school district. The school district argued that relief could only be available through an administrative or civil action filed against OHSSA to waive the age eligibility requirement. The Hearing Officer denied the school district's motion and the due process hearing proceeded.

Following a lengthy hearing, the Impartial Hearing Officer ordered the school district to reconvene the IEP team to establish appropriate goals and objectives which included the student's participation on the high school track and cross-country teams. The basis for the Hearing Officer's decision was two-fold. In response to the school district's position that the age eligibility by-law of OHSSA prevented the school district from placing the student on the athletic teams, the Hearing Officer found that the school district was not obligated to follow the more restrictive by-laws of OHSSA which prevented their compliance with the IDEA. According to the Hearing Officer:

Under applicable federal statutes and regulations, the IEP team, and not OHSSA, is charged with the responsibility to determine the need for a disabled student to

participate in interscholastic athletics. Where OHSSA rules conflict with, or are more restrictive than IDEA, and thereby operate to prevent compliance with IDEA, such conflicts shall be resolved in favor of IDEA.

Upon finding that the by-law of OHSSA did not prevent the school district from including participation in athletics on the student's IEP, the Hearing Officer further concluded, based on the testimony of experts and the student's parents, that participation in track and cross-country was a necessary component of the student's IEP as the student could not attain educational benefit or FAPE in the absence of such participation.

The SLRO affirmed the decision of the hearing officer.

On April 3, 2001, the District Court granted a requested preliminary injunction. The effect of the injunction is that the student was permitted to run on the cross-country and track teams and OHSAA was enjoined from sanctioning the school district for allowing this otherwise ineligible student to participate.

Effective November 1, 2001, OHSAA amended by-law 4-2-1, providing an exception to the 19 year-old rule (**discussed above**).

[*See also Dennin v. Connecticut Interscholastic Conference*, 913 F.Supp. 663 (Dist. Conn. 1996) finding that a waiver of the age 19 rule was required where the student would be immediately and irreparably harmed if he was not able to swim competitively. The court found that the student's self-esteem and IEP goals would be negatively affected by a refusal to grant the waiver.]

2. **School districts have a responsibility to facilitate participation by students with disabilities in athletics:**

a. Sign language interpreter

Wichita Falls (TX) Independent School Dist., 33 IDLER 167 (OCR, 1999) (the school district agreed to provide a sign language interpreter to enable the student's participation on the basketball team).

b. Transportation

San Diego (CA.) Unified School District, 30 IDLER 628 (OCR 1998) (where only non-disabled students were provided a "late activity" bus to transport them home after late activities, the district voluntarily agreed to include access to transportation to all students with disabilities who choose to participate in after school programs).

3. **Field trips: to what extent are the school districts required to accommodate students with disabilities on field trips?**

- a. Once again, students with handicaps must be provided equal opportunities for participation.

Elk Grove (CA) Unified School District, 21 IDELR 941 (OCR 1994). The parent alleged that the school district discriminated against her daughter, a wheel chair user with a disease which severely limited her ability to walk, by denying her the right to ride on a school bus for a field trip. The parent had been directed to take the student by car to the field trip because placing the student's wheelchair on the bus could result in a safety hazard and the teacher did not want the student on the bus. OCR found that denying the student the right to ride the school bus by failing to arrange transportation denied the student equal opportunity to participate in the field trip.

b. **Practical pointers for addressing field trips under Section 504:**

- (1) Decisions about participation of students with disabilities must be made on a case-by-case basis – avoid a “one size fits all” solution. In order to deny participation, the district has the burden of proving why the student should not be allowed to participate.
- (2) A lack of funds is typically not an acceptable reason to deny field trip participation for special education students when money is made available for regular education students.
- (3) If a student with a disability needs related aids and/or services to participate in a school program, including a field trip, the district must provide the services.
- (4) Students with disabilities may be prohibited from attending field trips if the district can demonstrate that participation presents an unacceptable risk to the health and safety of the student.
- (5) Parents cannot be required to attend field trips with their disabled children, unless a similar obligation is imposed upon parents of regular education students. Parents may be invited, but, again, if related aids and/or services are

necessary for the student to participate, the district – not the parent – must provide them.

- (6) Don't forget to provide equal notice to parents of students with disabilities about field trips. Failure to provide written materials to parents of students in a self-contained class resulted in an illegal denial of participation in *Mt. Gilead Exempted Village School District*, 20 IDELR 765 (OCR 1993).

IV. JUDICIAL PRONOUNCEMENTS ON SECTION 504: A SELECTED CASE LAW UPDATE

Ability to control asthma denies 504 protection

Garcia v. Northside Independent School Dist and Wilson

47 IDELR 6 (January 3, 2007)

The decision in this matter arose out of the school district's motion for summary judgment on the plaintiffs' claims that the district discriminated against their son on the basis of his disability in violation of Section 504. Parents of a student with asthma filed suit against the district and certain school personnel after their son collapsed and died during a physical education class on the school's outdoor track. Upon enrolling their son in school, the parents provided the school with documents instructing that the student carry his inhaler at all times. During the gym class at issue, the student left the inhaler in his locker because the gym uniform did not have pockets. The district argued it was entitled to summary judgment because the student did not qualify as disabled for purposes of 504. The magistrate assigned to all prehearing issues agreed.

The magistrate found that neither party disputed that the student suffered from a "physical impairment" or that the 504 regulations specify "breathing" as a major life activity. Rather, the determination turned on the Supreme Court's decision in *Sutton v. United Air Lines* which held that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment." The Court explained that "a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not 'substantially limit' a major life activity." The magistrate found that the deposition testimony of the student's parents indicated he controlled his breathing through use of a nebulizer and inhaler, and that the student was able to participate in a wide-range of physical and outdoor activities. The magistrate also found that neither the EEOC nor the OCR carve out an exception for a particular point in time when a person does not use a mitigating measure, however, they both recognize that a person would not

be required to use a mitigating measure to be considered disabled. The evidence showed the inhaler was available to the student and that the district never prevented him from using the inhaler or carrying it to gym class. Thus the magistrate concluded that “where no evidence suggests [the district] prevented [the student] from carrying his inhaler, the fact that the inhaler was not available to him at the specific time he died does not make use of the inhaler irrelevant to a disability determination under 504.

The magistrate recommended that the District Court grant the school district’s motion for summary judgment on the 504 claim as the student was not considered disabled under this statute.

**This case has not been dismissed in its entirety. The District Court could decide not to adopt the decision of the magistrate with respect to the parents 504 claim against the district. Also, even if the District Court adopts the decision, the parents’ state-law claims of negligence and gross negligence against the school nurse remain.*

When is a valedictorian not a valedictorian?

***Hornstine v. Township of Moorestown,
Moorestown Board of Education, et al.***
26 NDLR 58 (Dist. NJ 2003)

A high school student filed suit seeking injunctive relief and money damages against the school district for failing to name her as valedictorian of her class at the completion of the 2002-2003 school year. Due to an unspecified physical disability which caused her to suffer from substantial fatigue and prevented her from attending a full-day of school, the student was provided with an IEP that specified at-home instruction. However, despite her disability, the student took several advanced placement (AP) and honors courses and earned the highest weighted grade-point average in her senior class. Although the student and her parents expected her to be named as valedictorian, some other parents of students in the graduating class complained to the school district’s superintendent that the student earned the highest grade point average merely because she enjoyed an unfair advantage due to her IEP and reasonable accommodations (i.e., she only attended class a few hours a day and spent the rest of time with private tutors and was exempt from taking classes that were not weighted heavily, like physical education). In response, the superintendent investigated the student’s educational performance and proposed and implemented a retroactive amendment to the valedictorian policy, permitting the school district to name more than one valedictorian.

In response, the student filed an application for emergency relief with the state board of education and filed a temporary restraining order to prevent the school district from naming the three (3) proposed co-valedictorians, claiming that she would suffer irreparable harm and sought money damages. Despite the school district's claims that the student failed to exhaust her administrative remedies, the Court granted the temporary restraining order and found that the school district "clearly intended to discriminate against the student on the basis of her disability with the retroactive application of the valedictorian policy." In particular, the Court noted that the discriminatory intent was evident based on the fact that the superintendent investigated the student's educational experience and performance and calculated her scores, but did not investigate and calculate the accuracy of other student's scores. As such, the Court ordered the school district to name her as the senior class valedictorian and permitted her to proceed with her claim for damages.

Denial of Services

Campbell v. Board of Education of the Centerline School District,
38 IDELR 154 (6th Cir. 2003)

The parents of a student with dyslexia sued the school district claiming that it violated Section 504 by refusing to provide their son with an appropriate reading program. Although the student was determined to be eligible for services under Section 504, the parents asserted that the school district discriminated against the student by assigning him to the school district standard remedial reading program ("Project Read"), instead of enrolling him in a private tutorial course (the "Orton-Gillingham Program") at the district's expense. The trial court found that the parents failed to demonstrate that the Project Read program would not have reasonably accommodated the student's individual education needs under Section 504. In particular, the court noted that based on expert testimony presented at the trial, it was evident that the Orton-Gillingham Program was not a comparatively superior instructional program (versus Project Read).

The Sixth Circuit upheld the decision of the trial court, reasoning that in order to succeed on a claim that the school district violated Section 504, the parents were not only required to prove that the student was disabled, but were required to demonstrate that the school district acted in a discriminatory manner when it failed to reasonably accommodate the student. In particular, the parents needed to demonstrate that the Orton-Gillingham Program was a reasonable accommodation that was superior to that offered by the school district and that, in turn, the school district intentionally discriminated against the student by refusing to pay for the program. Since the parents failed to show that the Project Read program was inappropriate/inadequate, they could not prove that the school district acted with discriminatory intent.

Section 504 does not provide for a “procedural inadequacy” cause of action

Power v. School Bd. of the City of Virginia,
2003 WL 21939476 (E.D. Va. 2003)

Parents, on behalf of their child who had attention deficit hyperactivity disorder (ADHD), brought suit under section 504 of the Rehabilitation Act against the school board, challenging its procedures for disciplining disabled students. In essence, Plaintiff alleged that the procedures enacted by the district were inadequate and therefore violated Section 504. In October 2002, Plaintiff brought a pellet gun onto the property of his high school. The school’s administrative guidelines provided that a section 504 student be given a “manifestation hearing” before he or she is punished. Plaintiff was accordingly given such a hearing two days after bringing the gun onto school property. The manifestation committee unanimously determined that the incident was not a manifestation of Plaintiff’s disability and approved the proposed mandatory expulsion of one year. Plaintiff’s parents appealed, and the decision was upheld by the school board. Plaintiff then continued the appeal process, ultimately bringing the issue to the United States District Court for the Eastern District of Virginia.

In upholding the earlier administrative decisions, the court initially noted that section 504 “contains no procedural rights, nor guarantees them” and recognized that while section 504 provides a private cause of action to enforce a claim of discrimination, it does not provide for a cause of action to assert a claim of procedural inadequacy, separate and apart from a claim of discrimination. Citing a case from a sister district, the court stated that “because the due process provision [appears] only in the federal regulations, and not in the statute itself, no evidence existed ‘that Congress intended to give private parties the right to a private remedy against institutions that failed to provide adequate grievance procedures.’” As such, the court held that “a procedural error, *by itself*, is insufficient to warrant the protections of the Rehabilitation Act.”

Even if never identified, 504 students must still assert rights under IDEIA

Cudjoe v. Independent School District No. 12,
297 F.3d 1058 (10th Cir. 2002)

In fifth grade, Scottie was placed on homebound instruction due to a diagnosis of Epstein-Barr syndrome, a condition that causes extreme fatigue. The district developed an accommodation plan under 504 which provided for a teacher coming to his home to teach him the normal curriculum for his grade level. From Scottie’s seventh through tenth grade years, the district allowed the parent to choose Scottie’s teachers. However, the parent and the district did not agree on a choice for Scottie’s eleventh grade year. This disagreement, as well as the

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district's delayed provision of teaching materials, and attendance of additional personnel at Scotties' IAT meetings, provided the basis for the parents' 504 discrimination lawsuit.

The 10th Circuit upheld the lower court's dismissal of the parent's 504 claim for failure to exhaust administrative remedies under the IDEA. Even though Scottie was never identified under that statute, the Court held that IDEA's language suggests that students who bring claims for educational injuries must show: exhaustion of remedies under the IDEA, and that the relief sought is not available under that statute. Lack of identification did not mean relief for Scottie's claims was not available under IDEA. The Court reasoned that Scottie appears to meet the IDEA eligibility criteria for "other health impaired," and that his parent could have filed a complaint under IDEA for failure to identify and then used IDEA procedural mechanisms to address concerns regarding FAPE.

Cooperation is the key word

***Schwartz v. The Learning Center Academy,* 2001 U.S. Dist. LEXIS 563.**

In *Schwartz*, plaintiffs, parent and child, brought suit against defendant under the Rehabilitation Act alleging that defendant failed to provide a suitable education to plaintiff child. Because of plaintiff child's social phobia, defendant provided home instruction to plaintiff. Plaintiffs alleged that the education provided by defendant was inadequate because defendant failed to provide sufficient instruction, a substitute teacher, and educational materials. Plaintiff parent refused to allow defendant to evaluate her child, and also refused to allow the child's educational record to be released in its entirety from his prior school. In dismissing plaintiffs' complaint, the Court found that the Rehabilitation Act did not apply since plaintiff parent refused to permit evaluation of her child as required by the implementing regulations. Despite plaintiff's fears that the evaluation would be mentally harmful to plaintiff child, the evaluation was necessary to determine the existence and extent of the handicap as well as to formulate an appropriate educational plan. In the absence of such an evaluation, there could be no claim that the child was subjected to discrimination on the basis of his disability. The Court defined the elements of a charge under the Rehabilitation Act as: (1) The plaintiff is a "handicapped person" under the Act; (2) The plaintiff is "otherwise qualified" for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and (4) the relevant program is receiving Federal financial assistance.

In discussing the policy reasons for requiring evaluation of children before suit may be brought under the Rehabilitation Act, the Court stated:

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Schools are not required to design an individual education program for individuals simply because they allege they are handicapped. Otherwise, resources would be diverted from other children, including those determined to genuinely possess a handicap, to design educational programs of questionable effect (but potentially substantial expense) for allegedly handicapped individuals.

Punitive damages are not available in suits arising under §504

Barnes v. Gorman,
122 S. Ct. 2097 (2002).

A paraplegic was left unable to work full time when, after his arrest, he was injured while being transported to a police station in a van that was not equipped to accommodate the disabled. The man subsequently brought suit against the police officials for discriminating against him on the basis of his disability in violation of §202 of the Americans with Disabilities Act and §504 of the Rehabilitation Act of 1973 by failing to maintain appropriate policies for the arrest and transportation of persons with spinal cord injuries. A jury awarded him compensatory and punitive damages, but the district court vacated as to punitive damages holding that they were unavailable in private suits brought under §202 and §504. The Eighth Circuit Court of Appeals reversed, finding that federal courts have the power to award “any appropriate relief” for violation of a federal right. The defendants appealed this decision to the Supreme Court.

In reversing the Eighth Circuit, the Supreme Court first found that §202 and §504 are enforceable through private causes of action and that remedies for violations of these sections are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964. The Court also noted that Spending Clause legislation, like that at issue, is contractual in nature, i.e. in return for federal funds, the recipients agree to comply with federally imposed conditions, and that punitive damages are not generally available for breach of contract. Ultimately, the Court held that punitive damages may not be awarded in private suits brought under §202 and §504, saying that Title VI recipients have not implicitly consented to liability for punitive damages merely by accepting funds.

Compensatory damages alone might well exceed a recipients level of federal funding, punitive damages on top of that could well be disastrous. Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and

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indeterminate liability; it is doubtful whether they would even have accepted the funding if punitive damages liability was a required condition.

[NOTE: See also *Trevorrow v. Necedah Area School Dist.*, 2002 U.S. App. LEXIS 12727 (7th Cir. 2002), holding that when relief is available under IDEA, parties must exhaust administrative remedies unless they can demonstrate that pursuit of such remedies would be futile or inadequate. Furthermore, parties cannot avoid exhaustion merely by seeking money damages or by asserting that they are not interested in statutory remedies.]

V. HOT TOPICS IN SECTION 504: ALLERGIES, OBESITY AND OTHER CHALLENGES

A. **Peanut/Tree Nut (“PTA”) and Other Allergies**

Generally, when a student’s allergies impact upon the ability to attend school or otherwise jeopardize his/her health, they may be covered under Section 504. Again, the focus will be on whether or not a substantial impairment exists that affects learning of some other major life activity. If that is the case, a district may be required, in conjunction with a 504 accommodation plan, to remove the substance from the student’s environment or otherwise adjust the student’s placement so as to minimize or eliminate exposure during school.

1. An estimated 6 to 8 percent of U.S. students have some form of food allergy and the number appears to be increasing.
2. Schools can keep these children safe, but there is no guarantee that the school environment will be free from allergens.
3. Districts should engage in staff training on an annual basis and more intensive in-servicing for those teachers and others who have a child with a severe food allergy.
4. At a minimum, school nurses should review student health information, assist in the development of a “individualized health plan” which addresses the daily and emergency needs of the student.
5. Individualized health plans must be distributed to all appropriate staff members, including food service, transportation and custodial personnel. Training should focus on (a) recognizing an allergic reaction and (b) emergency treatment, including the use of an “epi-pen” typically prescribed to moderate the effects of an anaphylactic reaction. [Note:

House Bill 164, the “Epi-Pen” bill was enacted last year that permits certain students to carry and administer this medication and provides important immunities for school personnel relative to the use of epi-pens.]

6. After complying with HIPAA laws, consider direct communication to parents of other students in the school concerning, for example, the request not to provide their children with foods containing peanut or tree nuts.
7. Consider the development of an “Emergency Action Plan” or “EAP” to address those circumstances where a severe allergic reaction has occurred.
8. Many districts have altered the practice of having in-class parties or celebrations that include “treats” to further eliminate the risk of an allergic reaction for at-risk students.
9. Ask the student’s parents to provide updates on changes in the child’s health and/or the use of new medications.
10. Closely regulate field trips and enforce an overall “no eating” policy for school bus transportation.

B. Obesity

Obese students may qualify for Section 504 coverage if the obesity results from a physiological disorder and substantially limits a major life activity or if the student is regarded as having an impairment. However, obese students may have a difficult time meeting the eligibility requirements in the absence of a related condition such as Type II diabetes or other gastrointestinal ailments.

V. **THE IDEA AND SECTION 504: A COMPARISON CHART OF COVERAGE AREAS, STANDARDS, AND COMPLIANCE REQUIREMENTS**

Area of Comparison	IDEIA	Section 504
<i>Who or what is included?</i>	Students evaluated and deemed eligible because their disability, such as speech/language impairment, autism, traumatic brain injury, orthopedic impairment, visual and/or hearing impairment, multiple disabilities, mental retardation, traumatic brain injury, specific learning disabilities, emotional disturbance, adversely impacts education (requires that child’s disability adversely affect educational performance) and requires specially designed instruction to access the general education curriculum.	<p>Qualified individuals who have</p> <ul style="list-style-type: none"> • a substantial mental or physical impairment of a major life activity (walking, talking, caring for self, learning, breathing, seeing, hearing...)¹; • a record of an impairment, but not substantially limiting but for the attitude of others, or • may not be currently or ever disabled, but are regarded as having an impairment and negative action taken against them (does not require that the child needs special education to qualify) <p>This includes:</p> <ul style="list-style-type: none"> • students who have been evaluated and deemed eligible as having a substantial impairment in a major life activity • all IDEA eligible students • employees • the public-- including parents • extracurricular activities • facilities • programs

Area of Comparison	IDEIA	Section 504
<i>Standard for compliance</i>	Free appropriate public education (FAPE) – discussed below	<ul style="list-style-type: none"> • FAPE applied to students in instructional programs, which may include athletics if deemed a necessary component of FAPE • Reasonable accommodation without undue hardship for employees and noninstructional components of school programs • Accessibility to facilities and programs per law and regulations • Comparability of facilities and programs per law and regulations
<i>Definition of FAPE</i>	<ul style="list-style-type: none"> • “Appropriate” refers to a program designed to provide “educational benefit” for a person with disabilities. • Provision of special education and related services provided at no cost to the parents, and • The education and services must meet the standards of the education agency for educational programs • Are provided in conformity with the student’s IEP which was developed in compliance with the procedural safeguards of the IDEA and provides meaningful educational benefit 	<ul style="list-style-type: none"> • “Appropriate” refers to an education comparable to the education provided to those students who are not disabled • Provision of regular or special education and related aids and services that are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled, and • Are based upon adherence to the procedural safeguards of Section 504 • Commensurate opportunity rather than IDEA’s “meaningful benefit”²
<i>Procedural safeguards</i>	<ul style="list-style-type: none"> • Extensive written informed consent for identification, evaluation, placement and prior written notice of 	<ul style="list-style-type: none"> • Prior notice of actions re: identification, evaluation or placement/change of placement

Area of Comparison	IDEIA	Section 504
<i>Procedural safeguards (Continued)</i>	<p>disagreement</p> <ul style="list-style-type: none"> • Full comprehensive evaluation required by multidisciplinary team • Team specifically identified by statute and regulation • Access to and opportunity to review relevant records • IEP developed in compliance with IDEA offering meaningful educational benefit (cost is secondary) • At least triennial evaluation and annual review. Independent evaluation (at district expense) if parents disagree with first evaluation • No re-evaluation required before change in placement • Detailed due process hearing procedures (SEA is responsible) but no required grievance procedure and access to State Complaint/dispute resolution). • Appeal of hearing officer decision 	<ul style="list-style-type: none"> • Evaluation draws on information from a variety of sources and is documented • Team knowledgeable about child and disability³ • Access to and opportunity to review relevant records • Plan developed in compliance with 504 offering commensurate opportunity with nondisabled (cost may be a consideration if unduly burdensome) • Periodic evaluation and periodic review. No provision for independent evaluation at district's expense • Re-evaluation required before significant change in placement • Complaint/grievance procedures and/or impartial due process hearing (district as LEA is responsible, IHO not employee of district)⁴ • Review/appeal of hearing/grievance officer decision
<i>District Personnel responsible for oversight</i>	Director/Coordinator of Special Education or Pupil Services	Board policy designated 504/ADA Coordinator

Area of Comparison	IDEIA	Section 504
<i>Agency responsible for enforcement/oversight</i>	U.S. Department of Education’s Office of Special Education Programs (OSEP) and Ohio Department of Education’s Division of Exceptional Children	U.S. Department of Education’s Office for Civil Rights (OCR) for students Equal Employment Opportunity Commission (EEOC) and Ohio Civil Rights Commission (OCRC) for employees United States Department of Justice for ADA Title II for accessibility issues
<i>Funding for implementation</i>	Partial federal funding for individual IDEA-eligible students (\$624)	No federal funding specifically designated for implementation of any component of 504
<i>Loss of funding for (egregious?) noncompliance</i>	Loss of IDEA funds only	Loss of all federal funding
<i>Due Process Procedures</i>	<p>Must provide impartial hearing for parents who disagree with identification, evaluation, or placement of the student</p> <p>Requires written consent</p> <p>Detailed due process procedures</p> <p>Hearing Officer is appointed by an impartial appointee, or selected by parents and district</p> <p>Provides “stay-put” provision until all proceedings are resolved</p> <p>Parents must receive ten (10) days notice prior to any change in placement</p>	<p>Must provide impartial hearings for parents who disagree with the identification, evaluation, or placement of the student</p> <p>Does not require consent</p> <p>Requires that parent have an opportunity to participate and be represented by counsel</p> <p>Hearing Officer is generally appointed by the school</p> <p>No “stay-put” provisions</p> <p>No requirement of days notice prior to change of placement</p>
<i>Litigation/Remedies</i>	<ul style="list-style-type: none"> • Exhaustion of administrative remedies is required • District pays IHO and verbatim transcript costs 	<ul style="list-style-type: none"> • Exhaustion of administrative remedies only if IDEA issue • District pays IHO if required, but no mandated verbatim

Area of Comparison	IDEIA	Section 504
	Remedies may include: <ul style="list-style-type: none"> • compensatory education • tuition reimbursement • implementation of ordered program/modifications Court-ordered remedies may include: <ul style="list-style-type: none"> • Attorney’s fees and costs to parent if prevailing party which includes expert fees • compensatory damages (!) 	transcript; may tape record Remedies may include: <ul style="list-style-type: none"> • compensatory education • tuition reimbursement • implementation of ordered program/modifications Court-ordered remedies may include: <ul style="list-style-type: none"> • Attorney’s fees and costs to prevailing party (but usually awarded only to prevailing parents, not prevailing districts) • compensatory damages • punitive damages (!)

1. Current drug users (unless IDEIA eligible) do not have 504 protection; pregnancy does not qualify unless there are serious medical complications arising from the pregnancy that substantially limit a major life activity or if negative action is taken because the person is considered to have an impairment; obesity arising from a medical disorder may fall under Section 504; HIV and other contagious diseases may qualify under 504 if substantially limiting or if negative action is taken against the person due to a history of or perception of an impairment; disorders manifesting in social maladjustment (e.g., ODD), unlike the IDEIA, may qualify if it is a true disorder and not simply volitional or criminal acts underlying the social maladjustment or due to problems at home; temporary disabilities may fall within 504 if the impairment is for a period of time likely to substantially disrupt the student’s educational program.
2. In contrast with the IDEIA that imposes an affirmative duty upon districts to provide services that mitigate (or eliminate?!) the adverse impact of the student’s disability on his/her educational performance, 504 prohibits discrimination based on disability. If a student is deemed eligible under 504, the goal is to provide the student commensurate opportunity/equal access, not to guarantee that s/he will “do better” on tests, get better grades, to reassure parents that a student who needs some help gets it, to access social security income benefits (SSI), or to provide protection to a student who merely misbehaves for reasons unrelated to any disability. Also, 504 plans are not to be used to guarantee achievement commensurate with the “average” peer within the district (“average” student performs above national population). When evaluation results show the student is learning at a rate commensurate with his/her individually determined and/or expected levels, the child is not “disabled.”
3. A team, not a doctor, makes the eligibility determination and develops the plan. Just because a student is diagnosed with ADD/ADHD or some other problem does not mean automatic coverage under 504.
4. There must be a Board policy regarding implementation of 504/ADA with defined procedures and provision of notice to covered persons. For students, the Board may adopt a policy that offers all the procedural safeguards under the IDEIA. However, such a policy provides greater protection to the student, especially when a dispute arises, than either 504 or ADA require. **Review your board policy.**