

SURVIVING SECTION 504 COMPLAINTS AND COMPLIANCE REVIEWS

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A note about these materials: These materials are not intended as a comprehensive review of all OCR procedures or all areas of Section 504/ADA Title II giving rise to OCR complaints or compliance reviews. Instead, these materials attempt to inform the reader of the basic framework used by OCR for complaint investigation and resolution, and provide some insight into areas where schools may be experiencing difficulty adapting to new approaches following the Americans with Disabilities Act Amendments Act (ADAAA) and other areas of disability law compliance OCR is currently emphasizing. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from three important OCR documents. First, OCR’s Case Processing Manual or “CRM,” found on OCR’s website at <http://www2.ed.gov/print/about/offices/list/ocr/docs/ocrcpm.html>. Second, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as “Revised Q&A.” And finally, in January of 2012, OCR released a long-awaited guidance document on the ADAAA and its impact on Section 504. The “Dear Colleague Letter” consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012)(hereinafter “2012 DCL”).

I. OCR Complaints and Compliance Reviews

A. The Basics on OCR—Jurisdiction and Enforcement Duties

OCR is an office of the Department of Education (DOE) that is responsible for enforcing school districts’ compliance with the following statutes:

1. §504 of the Rehabilitation Act of 1973 (29 U.S.C. §794),
2. Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§2000d-2000d-7),
3. Title IX of the Education Amendments of 1972 (20 U.S.C. §§1681, et seq.),
4. Title II of the Americans with Disabilities Act (42 U.S.C. §§12,132, et seq.).

Although OCR assists in enforcement of the Age Discrimination Act of 1975 and Title V, Part A of the Elementary and Secondary Education Act, the statutes set forth above represent OCR’s primary enforcement focus.

Based on figures available in 2012, OCR had received more than 11,700 disability-related complaints in the previous three fiscal years—more than in any other three-year period, and more than half of the total complaints received by the agency during this period, according to a report. *Disability Rights: Enforcement Highlights* (OCR 2012) at <http://www2.ed.gov/documents/news/section-504.pdf>. Nearly 10% of complaints dealt with disability harassment claims, while 40% dealt with claims of denial of

FAPE. In its Fiscal Year 2015 Budget Request (hereinafter “2015 Budget”), OCR provided some additional insight into complaint numbers. From 2012 to 2013, OCR saw the number of complaints grow to 9,950 from 7,833. OCR expects that number to continue to increase at about 1% per year for 2014 and 2015. 43% of the complaints filed from October 2012 through September 2013 were disability discrimination complaints. It is also possible that disability issues were present in some of the 13% of complaints where multiple discrimination issues were alleged. OCR’s 2015 Budget Request can be viewed at <http://www2.ed.gov/about/overview/budget/budget15/justifications/bb-ocr.pdf>.

Because Title II of the ADA has been interpreted consistently with §504, except where the ADA expressly adopts a different standard, OCR treats all §504 complaints against school districts as dual §504/ADA complaints.

With respect to §504, OCR enforces the law in two ways: (1) individual parent-initiated complaint investigations, and (2) district-wide compliance reviews, although it also provides technical assistance, outreach efforts, and compliance seminars.

A parent or any person may file complaints against districts alleging violations of §504/ADA. Unless a complaint is completely and patently frivolous, OCR will initiate its complaint investigation process. Compliance reviews, however, are opened in a supposed random process of selection, and are designed to uncover and address district-wide compliance issues, usually in areas of particular enforcement priority, which may change from year to year.

In addition to enforcement duties, OCR has improved its technical assistance functions, and now conducts periodic seminars and presentations designed to assist school districts in their efforts to comply with §504/ADA, as well as informing them of OCR’s enforcement role and perspectives.

B. OCR’s Complaint Resolution and Enforcement Mechanisms

OCR’s enforcement mechanism, which can potentially culminate with termination of a district’s federal funding, is set forth in its Case Processing Manual (CPM). The vast majority of investigations are closed either informally, at the Early Complaint Resolution (ECR) stage, or by means of districts’ agreeing to implement negotiated “Resolution Agreements.” OCR’s CPM sets forth the procedures and guidelines that OCR must follow throughout the complaint investigation process. Whenever a district receives notice of a complaint, it should print the CPR (or obtain a copy from the regional OCR office at the earliest opportunity after the complaint is received) and consult the Manual throughout the process. It is advisable for schools to review the relevant portions of the CPM in order to understand the steps of the investigation process, the terminology used by the complaint investigator, and the avenues available for resolving the complaint.

Complaint Evaluation. Initially, OCR determines whether the complaint meets its criteria. The complaint must not be anonymous, it must not be oral, and it must not simply represent an inquiry or request for information, and must not be a courtesy copy of a complaint or correspondence filed with another agency. OCR acknowledges the complaint, assigns it a case or reference number, and establishes a file. If necessary, OCR will contact the complainant to request additional information to complete the complaint. The complainant will be asked to sign a consent form assuring cooperation with OCR's complaint resolution process.

OCR must also determine whether the complaint is timely. Generally, OCR will take action only with respect to complaints filed within 180 calendar days of the last act of alleged discrimination. A waiver of the limitations period can be granted under criteria specified in the Manual. *See* CPM at Sections 106-7. OCR also determines whether the allegations raised in the complaint come within its jurisdiction. The Manual states that OCR should not proceed to complaint resolution under a variety of circumstances:

1. The Complaint fails to allege discrimination or retaliation under one of the laws OCR has jurisdiction to enforce or the allegation is against an institution that OCR does not cover.
2. The Complainant withdraws the complaint.
3. Continuation of a pattern of previously filed complaints that have been found factually or legally insubstantial
4. Allegations dealt with in a previous complaint
5. Caselaw or ED decisions/policy foreclose such complaints
6. Litigation has been filed regarding the same allegations
7. Same complaint is being investigated by another agency
8. Mootness
9. Complainant's failure to cooperate
10. Case is being transferred to another agency
11. Death of complainant or injured party
12. The same issues involving the same recipient have been addressed in a recent OCR compliance review
13. "The Office Director, with the approval of the Deputy Assistant Secretary of Enforcement, may treat a complaint as a Compliance Review when: (a) the complaint because of its scope, involves systemic issues; (b) a compliance review would be the most effective means of addressing multiple individual complaints against the same recipient; or (c) the complainant decides to with a complaint that includes class allegations." *See CPM, at Section 502.*

School districts should consult the Manual to work with OCR in determining if the complaint falls into one of the above categories. *See CPM, at Section 110.* The difficulty for schools in this context is that OCR has the actual complaint, but the school might not get a copy (at least not at this stage). If the district is litigating an IDEA due process hearing on the same or similar issues, OCR will generally defer to the decision of the hearing officer, although they may inquire to determine whether the issues dealt with in the hearing are truly the same or similar as those raised in the OCR complaint. OCR may ask for hearing documents or transcripts to make their determination. If these hurdles are passed, OCR then notifies the parties and proceeds to complaint resolution.

Early Complaint Resolution (ECR). ECR essentially involves reaching an agreement with the complainant, with OCR as the broker or mediator. In the ECR mode, the district does not have to submit to a monitoring or follow-up schedule with OCR. Essentially, ECR is a mediation process that OCR proposes at the earliest stages of a complaint. OCR does not sign, approve, or endorse any agreements reached through ECR, although it will require a copy of any such agreement. *See CPM, at Sections 201-5 (Excerpts from the CRM are printed in all italics).*

“Article II EARLY COMPLAINT RESOLUTION (ECR)

The Early Complaint Resolution (ECR) process facilitates the voluntary resolution of complaints by providing an early opportunity for the parties involved to resolve the allegations.

Section 201 Early Complaint Resolution

(a) OCR’s Role

- *To serve as facilitator, upon request of both parties;*
- *To inform the parties of the procedures, establish a constructive tone, and encourage the parties to work in good faith toward a mutually acceptable resolution;*
- *To maintain an impartial approach and inform the parties that OCR will not insist on particular terms or any specific resolution;*
- *To review the allegations and make sure the parties understand the issues that OCR has accepted for investigation, and, as appropriate, facilitating an understanding of pertinent legal standards and possible remedies;*
- *To facilitate a discussion between the parties regarding possible actions that the parties may consider in working toward a resolution; and*

- To offer assistance, as appropriate, with regard to reducing any resolution to writing. If an agreement is reached, the parties are informed that OCR will issue a closure letter reflecting the voluntary resolution of the complaint by agreement of the parties.

(b) Role of the Participants

- To participate in the discussions in good faith;
- To consider offers or suggestions with an open mind and to work constructively toward a mutually acceptable resolution; and
- To implement any agreement in good faith.

Although encouraged early, ECR may take place at any time during the investigative process. OCR does not sign, approve, or endorse any agreement reached between the parties. However, OCR will assist both parties in understanding pertinent legal standards and possible remedies.

Section 202 Initiation and Termination of the ECR Process

If the Office Director or designee determines that ECR is appropriate and the complainant and the recipient are willing to proceed, the Office Director or designee will designate staff to facilitate an agreement between the recipient and complainant. To the extent possible, staff assigned to conduct ECR of a complaint shall not be staff assigned to the investigation of that complaint.

An Agreement to Participate in ECR must be reviewed and either signed or verbally agreed to by the complainant and recipient. In circumstances where ECR occurs by telephone and verbal acknowledgement is obtained, the ECR facilitator shall send a letter to the parties confirming this agreement.

The period of time that a complaint is in the ECR process (i.e., from the date of approval for ECR by the Office Director or designee to the date of the termination of ECR) shall not count in the 180-day GPRA standard period of time for completion of the investigation of the complaint. However, the Office Director or designee is responsible for ensuring that ECR proceeds without undue delay and that ECR is terminated as soon as it is clear that the parties will not succeed in resolving the complaint.

Section 203 Confidentiality of the ECR Process

A Confidentiality Agreement must be reviewed and either signed or acknowledged by the ECR facilitator and the parties to the ECR (the complainant or complainant's representative and the recipient or recipient's representative). In circumstances where ECR occurs by telephone and verbal or electronic (email) acknowledgement of the Confidentiality Agreement is obtained, the ECR facilitator shall send a letter to the parties confirming this agreement.

In order to maintain confidentiality of the ECR process, any notes taken during ECR by the facilitator and/or any records or other documents offered by either party to the facilitator during ECR will be kept in a separate file and will not be shared with the staff member(s) assigned to investigate the complaint.

Section 204 Successful Conclusion of ECR

At the conclusion of ECR, OCR will obtain a copy of a statement that the allegation has been resolved, signed by the complainant, or a copy of any settlement agreement that has been signed by the complainant. Once resolution of any allegation has been obtained, OCR will notify the parties in writing that the allegation(s) has or have been resolved; other outstanding issues, if any, are to be resolved through the investigation and resolution process. (See Article III.) A copy of any ECR agreement between the parties will be attached to the closure letter.

(a) Breach of Agreements

OCR will not monitor the agreement but will inform the parties that if a breach occurs, the complainant has the right to file another complaint. If a new complaint is filed, OCR will not address the alleged breach of the agreement. Instead, the Office Director, in consultation with the Enforcement Director, will determine whether to investigate the original allegation. When making this determination, the Office Director will consider the nature of the alleged breach, its relation to any alleged discrimination and any other factors as appropriate. To be considered timely, the new complaint must be filed either within 180 days of the date of the original discrimination or within 60 days of the date the complainant obtains information that a breach occurred, whichever date is later.

Section 205 Investigative Determination When ECR is not Achieved

The office will monitor the process of ECR to ensure adequate time for completion of the investigation in the event that ECR is unsuccessful. Where appropriate, investigation should proceed to ensure completion in accordance with normal case processing standards and timelines.” (Excerpt from OCR Case Resolution Manual, revised 2010 and 2012).

Voluntary Agreements for Corrective Action/Resolution Agreements. OCR can also close the case if the district agrees to a corrective action plan to OCR’s satisfaction (even if the parent is not completely satisfied). See CPM, at Section 302. These plans are called Voluntary Resolution Agreements. The Resolution Agreement must address all the issues in the complaint, but it may contain liability disclaimer language to the effect that the district denies any violation. In some cases, an on-site visit can be avoided, and the case can be closed on the basis of the commitment plan alone.

“Section 302 Resolution Agreement Reached During an Investigation

A complaint may be resolved at any time when, before the conclusion of an investigation, the recipient expresses an interest in resolving the complaint. OCR should inform the recipient that this process is voluntary. OCR’s determination that it is appropriate to resolve the complaint during the course of an investigation must be approved by the Office Director or designee. If approved, OCR will immediately notify the complainant of the recipient’s interest in resolving the complaint and will keep the complainant informed throughout all stages of this resolution process. The provisions of the resolution agreement will be aligned with the complaint allegations or the information obtained during the investigation, and will be consistent with applicable regulations. A copy of the resolution agreement will be included with the resolution letter. Resolution letters and agreements must be approved by the Chief Attorney or designee and the Office Director or designee, in consultation with the Enforcement Director. (See Section 304 regarding resolution agreements and Section 307 regarding monitoring.)

From the date that the proposed terms of the resolution agreement are shared with the recipient, OCR and the recipient will have a period of up to 30 calendar days within which to reach final agreement. During the negotiations period (which may be less than 30 days, at the discretion of the enforcement office), OCR may suspend its investigation of the case. If a final agreement is not reached within the 30-day period, the investigation will resume no later than on the 31st day after negotiations were initiated. The 30-day negotiations period (during which OCR has the option of suspending the investigation) cannot be restarted. (Section 302 last modified April 9, 2014).”

The plans must include a monitoring schedule whereby OCR oversees and confirms implementation of the plan. See CPM, at Section 304. Agreements must always be in writing, signed by a person with authority to bind the district, and must be approved by the Chief Regional Attorney or designee, and the Regional Director or designee. They must include specific steps or actions that will be taken by the

district to address the allegations, a timetable for these steps, and a specific timetable for submission of monitoring documentation.

If a district fails to comply with an Agreement, OCR may (1) modify the Agreement, (2) issue a letter detailing the deficiencies in implementation, (3) investigate further, or (4) immediately refer the case for enforcement. It is within the context of discussing, negotiating, and drafting a Resolution Agreement that most OCR complaints are resolved. This process also presents the best opportunities for expeditious, inexpensive, and least burdensome resolution of complaints, especially if the district is able to draft the Agreement in a way that best meets OCR's needs and requirements in accordance with the Manual.

On-Site Investigation Process. If the informal processes fail to resolve the dispute, OCR will conduct an on-site investigation, which may consist of file reviews, staff interviews, and parent and student interviews. The time spent on-site will vary depending on the number and seriousness of the allegations. If, during the on-site visit, OCR Investigators determine that there may be potential violations in addition to those raised in the complaint, it may expand the scope of the complaint to address systemic violations or violations with respect to other students. On-site visits generally consume much staff time, since Investigators will ask for various records, ask for explanations regarding records, and conduct staff interviews, sometimes extensively.

The Manual also contains OCR's procedures and guidelines for data collection and information gathering. *See* CPM, at Section 301. These guidelines address access to records, the interview process with respect to school staff and students, and OCR's responses to denials of access or refusals to provide data.

Letters of Findings (LOFs). A written decision called a Letter of Findings (LOF) is issued in the following circumstances: (1) "the investigation establishes insufficient evidence to support a conclusion of noncompliance;" or (2) "there is sufficient evidence to support a conclusion of noncompliance." *See* CPM at Section 303. After the violation LOF is issued, OCR will still make attempts to secure voluntary compliance from the district through a proposed Resolution Agreement. *See* CPM at Section 303(b). If these efforts fail, OCR will proceed to its more extreme, but rarely-used, enforcement mechanisms, including a potential ED hearing and other steps leading to fund termination.

Enforcement Actions. The regulations setting forth the precise steps of the actual enforcement process are at 34 C.F.R. Part 100. After the violation LOF is issued, OCR may proceed to initiate administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance from DOE. *See* CPM at Article IV. It may also refer the case to the Department of Justice. *See* CPM at Section 402. If the district persists, a regional/headquarters team will be assembled to prosecute the case in the administrative proceeding. *See* CPM at Section 401. The results of the administrative hearing may be appealed to the appropriate federal district court. Enforcement actions are burdensome, expensive, highly adversarial, and thus, exceedingly rare. Generally, OCR regional offices will make every effort to avoid accessing the enforcement process, but they will, as a matter of last resort, initiate such actions if a district refuses to take action to remedy the non-compliance findings.

Compliance Reviews. Compliance reviews are district-wide investigations generally employed to determine whether there are systemic or widespread violations, usually in an area of priority, or where a Compliance Review would be the most effective means of addressing multiple individual complaints. *See* CPM at Section 502. Because of the extensive staff hours these reviews consume, they are much less frequent than complaint investigations. In fact, OCR initiated only 35 new compliance reviews during fiscal years 2011-2013. OCR explained that "the reduced number of initiated compliance reviews was a result of their complexity; the need to resolve open compliance reviews before initiating new ones; and the need to shift staff resources to investigate the increased number of complaints received." (2015 Budget, p. BB-11.)

In its 2015 Budget Request, OCR highlighted areas where it will be acting in concert with the ED Strategic Action Plan on issues of concern. Those issues include teacher and resources equity (targeting inequality experienced by “low-income and racial and linguistic minority students”); discriminatory discipline under its Title VI mandate; and reducing racial isolation and increasing diversity. **For students with disabilities, OCR is targeting (1) “ensuring that school’s properly evaluate students with food allergies and other health impairments”; (2) “determining technology needs”; (3) “giving student with disabilities equitable access to athletic programs and activities;” and (4) “reduction of discriminatory bullying, harassment and violence.”** 2015 Budget, pp. BB-20-BB-23).

Investigation Staff Hierarchy. Districts involved in investigations or compliance reviews will normally deal with an Investigator. The Investigator will also consult the staff attorney throughout the complaint resolution process. A district may also attempt to deal directly with the staff attorney, which in some cases may be advisable if the district encounters problems communicating and working with a particular Investigator. The staff attorney is in turn supervised by a larger hierarchy of assistant division directors and division directors, who rarely get involved firsthand in dealing with districts on particular investigations.

OCR’s Enforcement and Analytical Approaches

Process Orientation. Except in extraordinary circumstances, OCR refrains from reviewing the educational service and placement decisions reached by school districts, as long as they comply with the procedural requirements of the §504 regulations. *See* 34 C.F.R. Part 104, Appendix A, Subpart D. Thus, in investigations, the focus will be on whether the school understands and complies with the procedural requirements of the regulations, not on whether the pedagogical decisions reached are educationally appropriate. *See* CPM at Section 110(d). The forum to challenge educational decisions made by §504 committees is the due process hearing procedure, which must be made available to parents under the regulation addressing procedural safeguards. 34 C.F.R. §104.36.

Analytical Framework. Although OCR’s analytical framework is not much discussed, the Commission on Civil Rights (CCR) has reported that it appears to fall in line with the following outline:

- I. Is the student disabled within the meaning of §504?
- II. Is the student “otherwise qualified”?
- III. Has the student been discriminated against on the basis of disability?
 - A. Has there been a failure to provide a FAPE under §504?
 - 1) Have the student’s individual educational needs been met as adequately as the needs of non-disabled students?
 - 2) Has the student been educated in an environment that affords maximum opportunity for interaction with non-disabled students?
 - 3) Are the services, facilities, and activities provided to the disabled student comparable to others provided at the school?
 - 4) Has the student’s evaluation followed required procedures?
 - 5) Has the student’s placement been determined in accordance with required procedures?
 - 6) Has the school established and implemented required procedural safeguards?
 - B. Has there been unjustified disparate treatment on the basis of disability?
 - C. Has application of a school policy, practice, or test resulted in a disparate impact on a disabled student?
 - D. Has there been equal educational opportunity? (Note—It is with respect to the FAPE and equal educational opportunity compliance components that OCR primarily employs its process-oriented approach).

Some Thoughts and Strategies (to Consider with Your school Attorney) for Dealing with Complaint Investigations

1. When informed of a complaint, determine who filed the complaint and what student is the subject of the complaint. Although investigators may resist providing you the name of the complainant, you can argue that you cannot effectively respond to the allegations without knowing whom you are talking about. Alternatively, you can seek a copy of the actual complaint from ED by means of a Freedom of Information Act (FOIA) request. *See* 5 U.S.C. §552, implementing regulations at 34 C.F.R. Part 5. OCR Regional offices have staff specifically designated to deal with FOIA requests.

2. Research the subject matter of the complaint and all its allegations thoroughly and quickly. Your chances of resolving the case without an on-site investigation are substantially reduced if you delay in learning about the complaint and its allegations. Within a few days receiving notice of a complaint, you should be ready to talk to the OCR investigator about Early Complaint Resolution or another pre-on-site investigation resolution avenue.

3. If you do not have OCR's Case Processing Manual (CPM), get one and review it. As stated above, reviewing the CPM is useful reading for a district or district representative dealing with an OCR complaint. The document is only a total of about 25 pages, but there is information that can prove useful to formulating questions for the Investigator and understanding the complaint process. Make sure the OCR Investigator is observant of the Manual and its requirements.

4. Contact the assigned investigator immediately, and let them know that you are quickly researching the case and will be contacting them within a few days. If you are interested in resolving the investigation quickly and without an on-site visit, tell the investigator that you will want to explore ECR or a negotiated Resolution Agreement. Use the OCR Manual's terminology. This will let the Investigator know you have reviewed the Case Processing Manual and you are interested in resolving the case in a cooperative and expeditious fashion.

5. Once you have ascertained the general nature of the allegations, ask the Investigator whether OCR or ED has issued any guidance on the areas in question. If so, get a copy of the guidance and review it. It may prove useful. On issues that commonly recur, or which are of priority interest to OCR, ED or OCR may have issued guidance to assist recipients in complying with §504. Use the guidance materials to help analyze your case, formulate arguments that the district in fact complied with the requirements of §504, despite the complainant's arguments to the contrary, or to help you in developing and negotiating a Resolution Agreement.

6. Raising legal and factual arguments, however, may reduce your chances of accomplishing a resolution without an on-site visit. Usually, OCR investigators will cooperate with district efforts to resolve the case by agreement, but will insist on an on-site visit if the district raises legal or factual arguments disputing the parent's allegations. While this does not necessarily mean that OCR will find you in violation, it increases the possibility of an on-site visit, and all the inconveniences it poses. In addition, the Investigator may not be familiar enough with §504, the regulations, and their requirements, to deal effectively with your questions or arguments. Unfortunately, raising factual and legal arguments inevitably lengthens the complaint resolution process and may place the regional office on the defensive. If the district is committed to their legal and factual arguments, however, it need not agree to a negotiated Resolution Agreement, as is discussed below.

7. If you are committed to defending the complaint, diplomatically inform the investigator that you are not interested in an agreed resolution, and instead want an on-site investigation. If you feel the complaint is defensible or without merit, and are willing to deal with the inconvenience and expense of an on-site visit, simply tell the investigator that you are confident that their investigation will yield no findings of violation, and work with him or her to schedule their on-site visit. It is generally advisable for

a district to retain experienced counsel to assist with the on-site visit, because an on-site visit may result in an expansion of the scope of the investigation.

8. Cooperate fully with the investigator in providing OCR relevant records (parent consent is not required) as quickly as possible. The Investigator will let the district know what records it will need. Provide all the records requested, but not more than those requested, unless they clearly will support the district's position. The more records provided, the higher the possibility of the Investigator determining that other potential violations may exist that need to be investigated themselves.

9. If your relationship with the investigator sours, ask to deal with another investigator, or ask to speak to the staff attorney assigned to the case. If the Investigator is not working cooperatively with district staff (which is not commonly the case), report the behavior to the staff attorney or another supervisor. Ask for the complaint to be assigned to another investigator.

10. Work to ensure that the investigation issues do not change or multiply in the investigation process. Insist that the issues and allegations be identified with clarity at the initial stage and remain the same. Ask for a letter describing the precise issues and allegations. Refer back at all times to that letter, and the issues it describes, to deal with the allegations. Always offer resistance to any tendency to expand or multiply the issues involved in the complaint. At times, when a complainant begins to fear that their complaint is not going well, they may attempt to add or change allegations. Resist this dynamic. Insist on the Investigator sticking to the issues as originally identified. If the Investigator indicates that the issues will in fact change or expand, ask for a revised complaint notice letter setting forth a new statement of issues. The Manual requires OCR to notify recipients of "the complaint allegations." CPM, Section 109. New issues should require new notice.

11. At all times maintain an atmosphere of cooperation, assistance, and willingness to compromise. The more adamant and defensive the district acts, the more assertive the OCR Investigator will generally become, and the more difficult it will be to resolve the matter agreeably, and the more the Investigator may sympathize with the complainant.

12. If the district is interested in a negotiated Resolution Agreement to resolve the complaint issues without further investigation, tell the Investigator that you would like to draft a proposed Agreement for his or her review that will address all the allegations and establish a monitoring schedule. If you review the CPM closely, you can ascertain the components OCR wants to see in a Resolution Agreement and include those in your proposal. The district can include disclaimers of liability, and it may be able to formulate a plan that is formatted in a manner that addresses all the allegations without great effort or expense on the part of the District, and which commits to continued compliance with §504/ADA. Moreover, OCR tends to be flexible in monitoring and documentation schedules.

If the Agreement looks good to the Investigator, very likely the complaint will be closed on the basis of the Agreement with little revisions from OCR. Experience counts in knowing the format and style that your particular regional office prefers to see in these agreements. Remember to make the most of your existing policies and practices in the agreements, and to cite to the §504 regulations and any OCR guidance extensively.

13. If an on-site investigation has occurred, and the Investigator informally tells you that there may be violations, reconsider negotiating a Resolution Agreement. Obviously, at this point, the investigator is telling you that OCR may either force you into a corrective action plan or issue a "violation LOF." You may want to avoid a formal finding from OCR to the effect that the district has violated the law. Reconsider a voluntary agreement at this time. The terms may not be as agreeable to the district as they might have been prior to the on-site visit, but they will be better than if the process continues to run its course closer to enforcement actions.

14. If OCR informs you that the district is in violation, and you are adamant about defending the case, simply wait until OCR takes you to the administrative hearing required by their procedures. You can, however, reopen negotiations toward a Resolution Agreement at any later time in the enforcement process. In our firm’s experience, OCR tends to avoid situations where it is forced to issue a “violation LOF” where the district refuses to negotiate a Resolution Agreement. This scenario means that OCR must follow tedious hearing and fund termination procedures. They would much rather resolve the case by means of negotiated Resolution Agreements. If the issue is of crucial policy importance to the District, it can, however, let the process run toward administrative proceedings.

15. Retain counsel if the case cannot be quickly negotiated, or if an on-site visit is imminent. Many districts can handle OCR investigations without attorneys, but sometimes the investigation can get complicated. Make sure your attorney understands the district’s position, so that he or she may act accordingly (i.e., does the district want to defend the complaint at all costs? Does the district wish to resolve the case informally and quickly?). Make sure your attorney obtains a copy of the CPM and any ED or OCR guidance on the issues that are the subject of the complaint.

16. Be aware of the 180-day limitation period for complaints. Operative regulations indicate that OCR cannot investigate complaints arising more than 180 days before the filing of the complaint, unless some significant mitigating circumstances exist warranting departure from the timeline. See CPM, Sections 106-7.

17. Refrain from contacting the parent or engaging in any action that maybe construed as intimidation, threats, retaliation against, or harassment of the complainant. A regulation prohibits the district from engaging in such actions against a complainant. 34 C.F.R. §100.7(e). Such actions may seriously escalate the investigation, or lead to the opening of a new investigation. Make sure campus staff understand and comply with this requirement. Sometimes, a campus principal may think that a face-to-face conversation with the parent will make the complaint go away, but the parent may report back to OCR and characterize the conversation as intimidating, threatening, retaliatory, or harassing.

18. In line with OCR’s process-oriented enforcement approach, focus your efforts on showing compliance with the procedural requirements of §504. As stated above, OCR rarely second-guesses educational decisions, as long as the district has complied with the basic procedural requirements of §504. Thus, instead of arguing the appropriateness of the child’s placement and services, or the child’s progress, the defense focus must be on showing compliance with the procedural requirements of §504, hopefully as reflected in district §504 policies. Likewise, Resolution Agreements should be process-focused rather than outcome-determinative. Do not let the investigation meander into areas of basic educational decision-making.

The remainder of the materials are focused on OCR guidance in the areas previously identified as areas of OCR interest to assist schools in their understanding of OCR expectations.

II. Child Find Issues After the Americans with Disabilities Act Amendments Act (ADAAA): Students with impairments served by Health Plans or RtI

From time to time, Congress revisits legislation to ensure that it has achieved the intended result. Upon review of the Americans with Disabilities Act (ADA), Congress determined that rather than providing a mechanism to make the workplace more accessible one lawsuit at a time, the ADA had become bogged down in disputes over eligibility. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA’s protection. Congress amended the ADA to change this unhealthy litigation dynamic by expanding ADA and Section 504 eligibility.

A. Background on the ADAAA

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

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

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

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

2. Was there a problem with K-12 Section 504 eligibility for FAPE? Congress made no findings with respect to the public schools' duties to students under Section 504 or the ADA. Instead, Congress was focused on changes to the ADA in the context of employment relationships, specifically with respect to eligibility for reasonable accommodations and access to federal courts. Congress did not directly address or reference the ED's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct ED to change the Section 504 regulations. (*Introductory paragraph of the Revised Q&A.*) **Regardless, the ADAAA changes apply to Section 504.** The conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised. Consequently,

the ADAAA changes made by Congress to address problems encountered by employees attempting to secure reasonable accommodation through the courts also apply to FAPE eligibility for students in the public schools. ED indicates that its regulations “as currently written are valid and OCR is enforcing them consistent with the Amendments Act.” (*Introductory paragraph of the Revised Q&A*).

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

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

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

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

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

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

Change #1: Construe Eligibility Language in Favor of Broad Coverage. Following its criticism of the Supreme Court cases and the federal Equal Employment Opportunity Commission’s (EEOC’s) definition of substantial limitation (discussed below), Congress writes, “It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities

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

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

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

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

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

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

Episodic impairments. Schools have experience with students whose physical or mental impairments ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraines and cystic fibrosis are good examples of impairments that may be substantially limiting at times (in hot weather, when the student is stressed, when irritants or trigger factors are present), and have little impact at other times. Schools commonly qualify students under Section 504 if their condition while not constant, episodically rises to the level of substantial limitation on a major life activity. Congress' concern seems to be that accommodations are not denied simply because the

disability, at the moment of evaluation, is not substantially limiting, when we know from experience that substantial limitation will recur. Section 504 committees should look carefully at data over a range of time (as opposed to a snapshot). For example, the student whose heat-induced asthma is not affecting him at the time of Section 504 evaluation in January may have experienced significant troubles as the school year started in August and September, and when the previous school year ended in April and May. The timing of the evaluation should not function to preclude eligibility for students whose impairments are episodic and are not conveniently substantially limited at the time of evaluation.

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

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

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

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

The ADA Amendments provide at 42 USC §12102(4)(E): “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.”

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

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

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

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

C. The Section 504 Duty to Refer.

The school's duty to evaluate under Section 504 is triggered by the school's suspicion that the student is disabled and in need of services. As the 2012 OCR guidance makes clear, "A school district must conduct an evaluation of any individual who because of disability "needs or is believed to need" special education or related services. 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)). Given that the Congress and OCR expect higher levels of eligibility under the new rules, where will those additional students be found? OCR guidance and letters of finding are increasingly focusing on students who are known by the district to have impairments and are also receiving services from the district because of those impairments. The two groups demanding the greatest immediate attention are (1) students with impairments who have health plans, and (2) students with impairments served through early intervention or RtI. Both groups are examined below.

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

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

2. Section 504 & RtI. Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADAAA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of mitigating measures when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating measures to be "filtered out" during the Section 504 Committee's evaluation is "reasonable accommodation." OCR has determined that the phrase "reasonable accommodations" includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools*, 54 IDELR 202 (OCR 2009). The inclusion of those two activities logically include RTI as well. *Tuscaloosa City (AL) Sch. Dist.*, 111 LRP 65062 (OCR 2011)(Section 504 violation found where district delayed evaluation at parent request in order to provide regular education interventions first).

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

"31. What is a reasonable justification for referring a student for evaluation for services under Section 504? School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A, Question 31.

"40. What is the difference between a regular education intervention plan and a Section 504 plan? A regular education intervention plan is appropriate for a student who does not have a

disability or is not suspected of having a disability but may be facing challenges in school.”
Revised Q&A, Question 40.

A little commentary: Interestingly, those two questions and answers are at odds with both the current RtI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

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

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

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

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

E. Section 504 and the student with a physical impairment served through a health plan.

1. Some districts ignored major life activities other than “learning.” Some of the first Letters of Finding issued by OCR following the implementation of the ADAAA exposed the problem of schools hyper-focusing on the major life activity of learning and ignoring the possibility of Section 504 eligibility due to substantial limitation in any of the other major life activities. A few examples...

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

However, after training on the ADA Amendments... “The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment.” To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally, under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the school's previous understanding) as required in the Section 504 regulations and the ADA Amendments Act.

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

Other physical impairments and “learning.” In *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009), a Section 504 committee responded to a parent referral and addressed the potential Section 504 eligibility of a student with irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades on advanced classes with the help of accommodations provided under a campus student services team (SST) process.

Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of digestive function. In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA, when it determined that his condition did not substantially limit his learning. *See also North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

A little commentary: While these misconceptions of eligibility were uncovered following the ADAAA, OCR had warned as early as 1995 that schools should look at other major life activities as well.

“Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school.” *Letter to McKethan*, 23 IDELR 504 (OCR 1995).

OCR provided some additional examples of impairment impacting other major life activities in the 2012 guidance.

- “(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing;
- (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and
- (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system.” 2012 DCL, p. 6, Question 7.

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

OCR has determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school's claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. As the student's needs had been met throughout, OCR found no violation with respect to the child's services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only

considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed).

With respect to health plans (or the EAPs here), OCR required the school to apply the ADA/AA to future evaluations. **“In doing so, the district will also apply the new ADA/AA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students’ disability status.”**

A little commentary: “The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADA/AA took effect on January 1, 2009.” **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: “The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child’s medical impairment substantially limits one or more major life activities.” ***But see also, Isle of Wight County (VA) Public Schools, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); Memphis (MI) Community Schools, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year).*** Note that in both of these cases, the concern was not that students were on health plans but that school policy looked for eligibility only if the impairment impacted education. Note further the absence of language indicating that all students on health plans are Section 504 eligible.

OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. Note that the question is directed at students served on health plans prior to the ADA/AA and whether that status can continue without Section 504 eligibility after the ADA/AA.

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

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

this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation.” 2012 DCL, Question 13, p. 9-10 (emphasis added).

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

So what to do? The OCR guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. “As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement.” 2012 DCL, Question 11, p. 8-9.

The question then is which kids on health plans to refer? **The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be the result of school-school attorney discussion prior to proceeding.**

Should the school desire a more targeted response, the schools should contemplate with the school attorney developing an approach that includes the following considerations.

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

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

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

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

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

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)
- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)
- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)
- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)
- In analyzing the student's needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

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

A little commentary: As was the case with early intervention and RTI, the school needs to change its thinking about referral to Section 504 for students on health plans. Due to changes from the ADA Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to a health plan need not be *considered* for possible Section 504 referral. **Consider with the school attorney an approach that does not categorically remove from consideration for Section 504 referral students with physical or mental impairments whose disability-related needs are successfully met through health plans.** When a parent request for Section 504 evaluation is refused, the parent must be provided with notice of Section 504 rights.

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

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

letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

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

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

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

III. OCR Guidance on Disability Harassment

A. U.S. Department of Education (ED) enforcement of Section 504 & ADA Title II.

1. July 2000 “Dear Colleague” letter from OCR & OSERS on Disability Harassment. On July 25, 2000 the U.S. Department of Education (ED), through the joint efforts of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) issued a letter warning schools about the need to address harassment based on disability. *Dear Colleague Letter*, 111 LRP 45106 (OCR/OSERS 2000)[hereinafter, “*DCL 2000*”]. The letter is the result of concerns communicated to the department by parents and advocates, substantiated by focus groups conducted by OCR & OSERS on the **“often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.”** (Emphasis added). ED reminds districts that disability-based harassment is a form of discrimination under both Section 504 and Title II of the Americans with Disabilities Act (ADA). With reference specifically to §504, ED is concerned that disability harassment may result in denial of FAPE to a student or may deny him/her an equal opportunity to participate or benefit in a school’s educational programs. Disability harassment of a student eligible under the IDEA could also deny FAPE. A quick reminder: **students eligible under the IDEA are also entitled to the nondiscrimination protections of Section 504 and the ADA.** “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

“Disability Harassment” defined. “Disability harassment under Section 504 and Title II is [1] intimidation or abusive behavior [2] toward a student based on disability [3] that creates a hostile environment by interfering with or denying a student’s participation in or receipt of benefits, services, or opportunities in the institution’s program. 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.” *DCL 2000, p.2 (bracketed material added by author).*

Under federal law, bullying & harassment are related, but different. Throughout the disability harassment cases, misconduct is often referred to by the courts as “bullying,” to the point that the terms are used somewhat interchangeably. Likewise, society at large and the schools in particular often make no distinction between “bullying” and “harassment.” OCR (the Office for Civil Rights) sees the terms as different.

“The complaint alleged that the actions taken against the Student constituted ‘bullying.’ The laws enforced by OCR, however, do not utilize the term ‘bullying’ and instead prohibit unlawful harassment. Although the possible bases for actions constituting ‘bullying’ are much broader than the bases constituting harassment under the federal laws enforced by OCR, because the complaint stated actions alleged to have been taken against the Student because of disability, the distinction between ‘bullying’ and harassment in this matter is immaterial and the complaint was investigated as one alleging harassment.” *Santa Monica-Malibu (CA) Unified School District, 55 IDELR 208 (OCR 2010).*

While bullying can arise from any number of motivations (including one’s attire, diminutive stature, or inability to throw a baseball), harassment focuses on actions arising from legally protected status—race, color, national origin, sex or disability. Consequently, a student “bullied” due to disability is a student protected not only by the school’s policies and procedures on bullying, but also by the requirements of federal law enforced by OCR and outlined below.

Hostile Environment: When harassment can violate rights under Section 504, ADA Title II. “When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student’s rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student’s ability to participate in or benefit from the educational program.” *Id.* It is also possible for the harassment to violate an eligible-student’s right to FAPE under either Section 504 or IDEA. “Harassment of a student based on disability may decrease the student’s ability to benefit from his or her education and amount to a violation of FAPE.” *Id.*

OCR: The school’s duty to end disability harassment and prevent recurrence.

“Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.

A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. **The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring** and, where appropriate, remedying the effects on the student who was harassed.” *DCL 2000, p. 3 [emphasis added].*

See also, Willamina (Or) Sch. Dist., 30-J 27, IDELR 221 (OCR 1997)(“Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act the district has the

obligation to take all necessary steps to address and eliminate such harassment.”). The legal duty “to end the harassment” is not recognized by the federal courts. Instead, the courts find liability for harassment when the school is aware of the harassment and is deliberately indifferent.

2. A Second Dear Colleague Letter in 2010. On October 26, 2010, OCR issued a second Dear Colleague letter to SEAs (state education agencies) and LEAs (school districts) on the subject. *Dear Colleague Letter*, 55 IDELR 174 (OCR 2010)[*Hereinafter*, “DCL 2010”]. The 2010 letter recognized the growing efforts of schools to address bullying, and emphasized that while these efforts were important, the civil rights implications of harassment could not be neglected.

“In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools’ appreciation of their important responsibility to maintain a safe learning environment for all students. **I am writing to remind you, however, that some student misconduct that falls under a school’s anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by the Department’s Office for Civil Rights (OCR).** As discussed in more detail below, by limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment.” *DCL 2010*, p. 1 [*emphasis added*].

Treatment of disability harassment as mere “bullying” is a major concern for OCR, as it strips eligible students of legal protection provided by federal law. *See, for example, Williamston (MI) Community Schools*, 56 IDELR 22 (OCR 2010)(“OCR also found that District staff did not address incidents of disability-based name-calling and related physical conduct as disability-based harassment. Instead, name-calling such as ‘go to your rubber room’ ‘go back to your sped class,’ ‘retard’ or ‘stupid’ were treated as minor infractions of ‘rude inconsiderate or disrespectful behavior’ under the School’s Code rather than the more serious ‘harassment’....”).

3. A Third Dear Colleague Letter in 2013.

In the third letter, OCR fine-tunes the message. OCR again recognizes the policies and practices in place to address both bullying and harassment, and then makes a couple of important points not raised in previous letters. *Dear Colleague Letter*, 113 LRP 33753 (OCR 2013)[*Hereinafter*, “DCL 2013”].

Prior letters had focused schools’ attention on what motivated a particular student with a disability to be harassed (was it disability or some other reason?). Consequently, OCR distinguished between bullying and harassment (see 1st and 2nd Dear Colleague Letters above). **OCR’s current letter focuses on the impact of the bullying, whether motivated by the targeted student’s disability or not.**

“Whether or not the bullying is related to the student’s disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of FAPE under the IDEA that must be remedied. States and school districts have a responsibility under the IDEA, 20 U.S.C. § 1400, et seq., to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student’s individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit.” *DCL 2013*, p. 2.

The language is especially interesting as allegations of bullying and disability harassment are legion, but published cases of bullying and harassment giving rise to a violation of FAPE are scarce. Schools

need to recognize that *impact* of the bullying behavior on the student with disability is an OCR focus in addition to the motivation for the behavior that transforms bullying into a harassment.

In light of the concern over the impact of bullying on a targeted student's education, OCR cautions schools that in their response to bullying of a student with a disability, there should be **review by the IEP Team (and presumably the Section 504 Committee where applicable) to determine whether FAPE has been negatively impacted.**

“Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. **The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit.** If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying.” *Id.*, p 2-3 (*emphasis added*).

Where FAPE has been negatively impacted, **OCR warns of two concerns as schools respond: impact on LRE and changing services without required IEP Meetings.**

“The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (e.g., placement in a more restrictive ‘protected’ setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. **Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services.** These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation.” *Id.*, p. 3 (*emphasis added*).

OCR also speaks to the now-common problem of the student with disability as harasser. In fact, it is not uncommon for a disability harassment allegation to consist of two students with a disability, each accusing the other of harassment. IEP Teams should respond appropriately.

“If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted.” *Id.*, at p. 3.

A little commentary: Put simply, when the student with a disability is both the harasser and the target of harassment, schools must address both sides of the problem by remedying harmful effects, restoring lost FAPE and addressing the behavioral implications of the student's own harassing behavior as well.

B. Federal court enforcement of Section 504 & ADA Title II.

The federal court approach to harassment liability under civil rights laws was crafted by the U.S. Supreme Court in response to litigation under Title IX. The anti-discrimination provision of Title IX is remarkably similar to that of §504. Title IX states “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. §1681(a).

In *Davis v. Monroe County Board of Education*, the Supreme Court applied what we know as the “*Doe v. Taylor* rule” on sexual assaults by school employees on students to suits brought under Title IX for student-on-student sexual harassment. The plaintiff was the mother of a fifth grade girl who over five months was subjected to numerous acts of “objectively offensive touching” as well as offensive comments by a classmate. The boy eventually pled guilty to criminal sexual misconduct. The parent sued alleging that the District did nothing despite the student’s repeated complaints to teachers and other employees, and the complaints of other girls as well. The Supreme Court concluded that **districts may be held liable where the school is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school’s disciplinary authority.** *Davis v. Monroe County Board of Education*, 119 S.Ct. 1661 (1999).

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

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

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

Applying the Court’s Title IX analysis to disability harassment, simple name-calling and teasing based on disability is not enough to invoke district liability for money damages. Interestingly, according to the Supreme Court, a plaintiff must show something more than a “mere decline in grades” in order to prevail on a harassment claim. *Id.*, at 1676. In addition, the student would also have to demonstrate difficulty accomplishing school assignments or tasks, a reluctance to attend school or a school activity,

or some other sort of barrier (physical or otherwise) to the student receiving equal access to school programs and activities. In the Title IX context, ED painted district liability for student-to-student sexual harassment very broadly when it warned districts of the potential problems. For example, in an early pamphlet on sexual harassment issued by OCR, districts were told “If a school finds out that there has been sexual harassment, it has the obligation to stop it and make sure that it does not happen again.” *Sexual Harassment: It’s Not Academic* (OCR Pamphlet, 1997). Later, the courts reined in the standards as demonstrated in the Supreme Court’s decision in *Davis*. The difference in approach and liability standards still remains between the courts and OCR. OCR explains that the difference rests on monetary damages. “As you know, *Davis* was a case involving a claim for monetary damages; it was not a case involving federal administrative enforcement by a federal agency.” *In re: Dear Colleague Letter of October 26, 2010*, 111 LRP 32298 (OCR 2011).

C. So what should my school do?

ED and the federal courts apply different standards to school district liability for disability harassment under Section 504 and ADA Title II. ED’s standards require more of schools (schools must stop the harassment, and the knowledge standard is more stringent). For federal compliance purposes, the conservative position is to comply with the ED standard that will also satisfy the school’s obligations should the school have to defend its practices in federal court. With respect to the interplay between state bullying/harassment rules and federal disability harassment rules, talk with your school attorney.

IV. A Guidance Letter update from OCR on Extracurricular Athletics

OCR’s January 2013 Dear Colleague letter on extracurricular athletics generated a great deal of discussion and debate. *Dear Colleague Letter*, 60 IDELR 167 (OCR 2013). Some of that debate arose from the NSBA Council of School Attorneys’ letter to OCR. In response to that NSBA letter, OCR provided some valuable clarification, especially with respect to (1) the process for determining modifications, aides and services, and (2) the issue of separate teams for students with disability. A brief summary of OCR’s response is provided below. OCR’s letter to NSBA can be found at *Dear Colleague Letter*, 113 LRP 51638 (OCR 2013).

The right to equal participation. OCR makes clear that the regulations only require equality of access to extracurricular athletic opportunities, “It does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities.”

For some students, equal participation may only be possible when the school provides reasonable modifications or aids and services.

“Examples of such modifications and aids and services include using a light along with a starter pistol so that a deaf runner can compete and assisting with the administration of needed medicine like insulin so a student with diabetes can take part in an after-school gymnastics club.

As we have said before, providing this equal opportunity does not mean:

- Compromising student safety;
- Changing the nature of selective teams—students with disabilities have to compete with everyone else and legitimately earn their place on the team;
- Giving a student with a disability an unfair advantage over other competitors; or
- Changing essential elements that affect the fundamental nature of the game.”

The individualized inquiry: the mechanism for determining modifications, aids and services for extra-curricular athletics. One of the NSBA’s concerns was the possibility of additional Section 504 meetings to address services for athletics. OCR notes that to make such decisions, the district should

conduct and individualized inquiry. “What is called for is a reasonable, timely, good-faith effort by the individuals with the appropriate knowledge and expertise to determine whether there are reasonable modifications or aids and services that would provide that student with equal access to the particular activity.”

Interestingly, the inquiry can occur outside of a Section 504 committee meeting. “This does not necessarily mean, however, that the Section 504 team—the group of persons most knowledgeable about the student that determines the scope of the student's free, appropriate public education, or FAPE—must convene when a student with a disability wishes to take part in extracurricular athletics.” OCR then provides some helpful discussion and options.

“In some circumstances, the inquiry could amount to something as straightforward as a coach or athletic staff member consulting with the student and student’s parents to determine what reasonable modifications could be provided to give the student an equal opportunity to participate in the activity. In other circumstances, a district athletics official might be brought into the conversation to address adaptations to standard rules or practices in district competitions (like allowing the use of the light along with the starter pistol); or a student’s teacher might advise on a coaching modification that could support a student with a developmental disability to participate on a team for which she had the requisite athletic ability.”

Since these are not issues of FAPE, a less formal individualized inquiry is possible.

FAPE and participation in athletics. On the issue of FAPE, OCR reminds schools that the guidance does not suggest that Section 504’s FAPE provision requires a student’s participation in extracurricular athletics. “OCR is not stating that Section 504’s FAPE provisions require that a student's participation in nonacademic services, e.g., extracurricular athletics, be addressed by the Section 504 team as part of delivering FAPE.”

What about a duty to create new athletic teams for students with disabilities? OCR confirms that the language of the January 2013 letter on the topic is not a regulation or statement of law, but an expression of OCR’s desire for schools to consider such action.

“For students with disabilities who cannot participate in the school district’s existing extracurricular athletics program, even with reasonable modifications or aids and services, **the guidance urges school districts to create additional opportunities for such students, which could include separate or different activities from those already provided. However, it is not OCR’s view that a school district is required to do so.**”

If a school district voluntarily wishes to provide such separate activities, those must be supported equally as compared with the school district’s other athletic activities. This determination of equal support will invariably depend upon the specific allegations of the case, including the activity at issue. Among the issues that would be considered would be how similar activities are supported. For example, if a school district created a varsity wheelchair lacrosse activity, OCR would look to the supports provided to other varsity teams as a benchmark for what might be appropriate for the adapted varsity activity.” (Emphasis added).