

## I. Basics of 504/ Common Traps

- Disability is an impairment that substantially limits a major bodily function  
Food Allergies have been found to substantially limit the major life activities of breathing and respiratory function. See, e.g., OCR Q&A, Question 13, p. 9-10.  
<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>, Question 13, p. 9-10.
- Not based on ability to perform schoolwork. *North Royalton City Sch. Dist.*, 52 IDELR 203 (2009).
- Can no longer consider mitigating factors like use of Epipen in determining eligibility.
- Requires accommodations. An accommodation is  

“generally any change in the ... environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities.”  
*Thomas v. Davidson Academy*, 846 F.Supp. 611 (M.D. Tenn. 1994).
- Accommodation must provide “Meaningful access to programs and services” *A.M. ex rel J.M. v. NYC Dept. of Educ.*, 112 LRP 3144 (E.D.N.Y. 1/17/12)
- Accommodations must meet the individual needs of disabled students as adequately as the needs of nondisabled students are met. *In re Bryan County (GA) Sch. Dist.*, 53 IDELR 131 (OCR 2009).
- **School should err on the side of inclusion wherever possible.** Restricting participation in classes is disfavored.
  - In one case, requiring a student with a latex allergy to leave the room when a chemistry class conducted experiments with balloons was “directly contrary to the directives contained in the student’s section 504 plan.” *Robbinsdale Indep. Sch. Dist. No. 281*, 106 LRP 14303 (SEA Minn. 2004).
  - In another case, a school was reprimanded for refusing to allow a student in a culinary class because it contained allergens and the school refused to modify the food. *Bethlehem (NY) Central School District*, 109 LRP 30964 (OCR 2009).
- A peanut free (allergen free) classroom has been found to be a reasonable accommodation. See, e.g., *Mystic Valley Regional Charter School*, 40 IDELR 275 (Mass. SEA 2004).

- Child find: An affirmative duty on the school to find children who may be disabled and hold evaluation.
- If a parent requests a 504 evaluation, school must conduct evaluation.
- School must provide appropriate staff access to the 504- failure to do so is evidence of FAPE violation.
  - o In one case in Tennessee, all vendors, visitors, and substitutes at the school were required to sign a facilities use form acknowledging that they were aware of the school's latex-free environment. *Franklin County (TN) Pub. Schs.*, 109 LRP 26598 (OCR 2009)
- **Applies to after school activities**
  - o The issue of after-school events was also addressed in an OCR case from **Connecticut**. The school district established a procedure that allowed the parents of a student with a gluten allergy to notify school groups if their daughter was planning on attending an event. The school district agreed to ensure that the group hosting the event made gluten-free foods available for consumption or purchase. Groups that failed to comply would lose their building use privileges. *Tolland (CT) Sch. Dist.*, 46 IDELR 171 (OCR 2006).
  - o **OCR has developed a test for when a school's PTO must accommodate a disability:**
    - 1) Does the District provide free or reduced cost to the PTO to use District facilities?
    - 2) Does the District publically announce PTO events to the student body or parents?
    - 3) Does the District disseminate flyers or other written communications about PTO events?
    - 4) Does the District allow the PTO to identify itself with the school and use the school logo or name in or associated with its meetings and events? *Irvine Unified Sch. District* 19 IDELR 883 (OCR Apr 28, 1993).
  - o In Kansas City, Nebraska, School District, a parent filed an OCR the school to notify PTA's and other groups that balloons could not be used as decorations due to a student's latex allergy. *Omaha (NE) Pub. Schs.*, 107 LRP 36147, (OCR 2006).
- **Applies to buses**
  - o Might be necessary to appoint an aide for the school bus.

“ If an allergic reaction begins, expeditious administration of the EpiPen® can control it. Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that [an allergic student] whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen® and, thereby allow the student to avoid the above-described problems. [The student] is too young to be responsible to monitor himself and to administer his own EpiPen®. Therefore, a nurse, aide or other trained adult is required for those purposes. *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007)

- OCR enforces by making a referral to the Justice Department for judicial proceedings or suspend the school’s funding from the USDOE.

## II. **OCR trend is to require 504 plans instead of health care plans**

- Happened in the wake of the ADA Amendments Act of 2008 which expanded the definition of disability.
- **IHCP may not be enough. Rights just as important as accommodations.** IHPs developed outside §504 procedures can deprive parents and students of §504 status, with its nondiscrimination protections, and procedural safeguards

“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.”

<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>, Question 13, p. 9-10.

- Several cases where school district failed to give 504 for food allergies
- Important case **IN CONNECTICUT Torrington (CT) Board of Education**, 60 IDELR 295 (OCR Oct. 26, 2012).

During the 2011-2012 school year, the student was in the second grade. The student had been on a health plan for the 2010-2011 and the 2011-2012 school year because she had a shellfish allergy. Under the plan, arrangements were made to administer an EpiPen when the student was exposed to shellfish. Notice was sent to the other students' parents to make sure that shellfish was not brought to school, and the student sat at a shellfish free table. In December of 2011, the principal notified the student's parents that fish would be served on the school menu in an effort to make the school lunch menu healthier. The student was tested for fish allergies (up until this point the student had only been tested for a shellfish allergy). The student tested positive and as a result, in January 2012, the parents requested that the student be referred to the District's 504 process. The parents allege that had the request not been made, the student would still be on the health plan. The district violated §504 by failing to determine the student's eligibility for §504 even though they addressed the student's severe shellfish allergy by placing her on a health plan. *The district admitted that had the parent not requested a 504 plan in 2012, it never would have evaluated the student.* OCR noted parents were deprived of their rights under 504: "[i]t is essential that eligibility determinations for students suspected of having disabilities are made within the context of Section 504 so that districts are required to adhere to the procedural requirements of the statute's regulations, including making parents or guardians aware of their due process rights at required junctures."

- **Similar situation for diabetes.** OCR found that a District's practice to not initiate §504 evaluations for students with diabetes, but rather to rely on health plans created outside of §504, violated the student's rights under the law. *Tyler (TX) Ind. Sch. Dist.*, 56 IDELR 24 (OCR 2010); *Union Cnty. (NC) Pub. Schs.*, 64 IDELR 25 (OCR 2014); *Forest Hills (OH) Local Sch. Dist.*, 58 IDELR 114 (OCR 2011).
- **OCR has the authority to expand a single-student investigation to a broader focus.** Children in poorer schools in Memphis were given only IHP's and children in wealthier districts were given 504 plans. OCR made school re-evaluate all students with medical conditions (including allergies) for 504 plans. *Memphis (TN) City School. Dist.*, 112 LRP 26130 (OCR 2012).
- **Sometimes, an IHCP will be held to the standard of a 504 plan.** OCR in one case said that that "if a student with a disability has a health plan, OCR will deem implementation of such a health plan to be a §504 service, even if the plan is not formally incorporated into the student's §504 plan." *Prince William Cnty. (VA) Pub. Sch.*, 57 IDELR 172 (OCR 2011).
- **CT guidelines require AT LEAST an IHCP plan, but this may not be enough.** In light of the Torrington decision, guidelines should be amended to say that all students with LTFA be evaluated for 504 plans.

- **Connecticut guidelines suggest a district to review at least annually the effectiveness of its district plan.** Guidelines for Managing Life-threatening Food Allergies and Glycogen Storage Disease P. 29
- **USDA also requires public schools to provide safe school lunches of equivalent nutritional value with doctor's note.**

See Accommodating Students With Special Dietary Needs (USDA, 2001); 7 CFR Part 15b

### **III. BULLYING DUE TO DISABILITY**

- School must make a proactive response
- Stricter standard for OCR than in civil courts: courts require actual knowledge, OCR says "should have known" good enough
- Strong likelihood that student experiencing bullying is being denied FAPE

"Once a school knows or reasonably should know of possible student-on-student harassment, it must take immediate and appropriate action to investigate or otherwise determine what occurred. If harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment, and prevent its recurrence. These duties are a school's responsibility even if the misconduct also is covered by an anti-bullying policy and regardless of whether the student makes a complaint, asks the school to take action, or identifies the harassment as a form of discrimination."

"OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately." Dear Colleague Letter, Oct. 26, 2010

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>