The Special Education Puzzle: 
Legal Fundamentals and the Provision of School Health/Nursing Services to Students with Disabilities

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School nurses can have a unique, important role in every aspect of the special education process: identification; evaluation; eligibility; development of the individualized education program; and the implementation of services for the student with a disability. For that reason, this session is designed, in part, to cover basic, core concepts of special education law, with tips to provide an understanding of fundamental concepts pertaining to educational programs for students with disabilities. In addition, the session will also highlight legal issues that are particularly pertinent to school nurses for the provision of school health/nursing services to these students. The objectives are to try to avoid common pitfalls that can interfere with a student receiving a free appropriate public education and to build strong relationships with parents.

I. PRIMARY APPLICABLE LAWS FOR TODAY’S DISCUSSION

A. Individuals with Disabilities Education Act (IDEA)

B. Section 504 of the Rehabilitation Act of 1973 (Section 504)

C. Americans with Disabilities Act (ADA)

D. Family Educational Rights and Privacy Act (FERPA)

E. Relevant State law requirements that differ from or supplement federal law, including relevant provisions of the Alabama Administrative Code (AAC), Chapter 290-8-9, Special Education Services.

II. GENERAL CONSIDERATIONS

A. Parents want to trust school staff.

As a general rule, most parents want to avoid conflict with school staff, and they often only contact an attorney/advocate as a last resort. Most parents want to believe that school staff are the experts when it comes to educating their child.

B. Parents may not know how to ask for what they really want.

Often, parents are not fully aware of their legal entitlements, no matter how often they receive their Parent Rights and have them explained by school personnel. Their terminology may not be the same terminology used by school staff and vice versa. Concerns about the appropriateness of their child’s education program may be raised by questions about progress or a staff person’s qualifications, which school staff may not understand to be special education issues.

C. Parents often feel overwhelmed at IEP meetings.

Parents are not always aware that the law requires the attendance of certain school district participants at IEP meetings. It is helpful if an explanation of the legal requirements for IEP Team participants is provided to parents. Also, parents should be
encouraged to provide input to the Team and voice their concerns, and then Team members should listen and respond to those.

D. Making the parent happy does not necessarily equate with legal compliance. Parents are happy … until they aren’t.

IDEA provides entitlements to the student, not the parent. The obligation to provide an eligible child with a free appropriate public education (“FAPE”) is the school district’s. No good deed goes unpunished. It can be dangerous to accede to parental demands, especially if what they are asking for is not appropriate for the student or, even worse, is actually illegal.

Goleta Union Elem. Sch. Dist. v. Ordway, 38 IDELR 64 (C.D. Cal. 2002). The district Director of Student Services is liable under Section 1983 for failing to investigate the appropriateness of a junior high school placement for a student with SLD before unilaterally deciding, at the request of the parent, to transfer him there.

Also, remember that a parent can agree … until they don’t.

E. Remember that issues involving a child’s education are private matters; maintain confidentiality.

More on confidentiality requirements below. But as a general consideration, parents do not want school staff discussing their child’s educational program and/or progress with others who do not have a legitimate reason to know, including other school district personnel. The same rule applies with respect to a child’s mental health treatment or prescription medications. Limit discussions about a child to those with an educational need to know.

F. Remember that you and other school staff are the professionals – act like it.

Be diligent in remaining professional during meetings, even if a parent becomes upset or argumentative. Be careful about your body language, as it can be misinterpreted (or correctly interpreted in some cases). For example, be careful not to roll your eyes or appear to become exasperated or frustrated. Also, limit side comments and discussions during Team meetings, as a parent might interpret a separate conversation having nothing to do with the child as something negative about him or her. Try not to take criticisms or questions personally, and don’t become defensive.

G. Documentation is important, but be careful of emails.

Assume any documentation you write or receive containing information about a student will be seen by the parent. In particular, be aware of information contained in the emails you send. Emails that relate to a student arguably may be education records under FERPA, and, in response to a request for records from parents, the school district may
have to produce emails relating to that student, if the emails are maintained by the district. In any event, emails would have to be produced in response to a subpoena.

H. The school district’s special education coordinator is a great resource to provide guidance and training to all school staff on special education matters.

Special education law is a highly specialized and highly litigious area. Consequences for noncompliance can be costly in terms of the quality of education provided to students with disabilities, as well as attorney fees paid to school board attorneys and parent attorneys, if parents prevail.

III. PRINCIPAL IDEA CONCEPTS AND DEFINITIONS

The IDEA is an amended version of a federal law originally known as the Education for All Handicapped Children Act (Public Law 94-142), passed in 1975. It was most recently reauthorized in 2004 (Public Law 108-446) with amendments. The IDEA has four sections, Parts A-D. Part B is the section that sets forth the educational guidelines for school children with disabilities ages 3-21 years of age. Key concepts and definitions of Part B pertinent to this discussion are as follows:

A. Child with a Disability. The IDEA’s obligations protect children with disabilities, as defined by the Act. The IDEA’s definition of a “child with a disability” means a child:

- with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), developmental delay, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments or specific learning disabilities; AND

- who, by reason thereof, needs special education and related services.

***Note that “special education” and “related services” are defined terms with precise meanings under the IDEA, as explained herein.


B. Child Find Obligation. School districts must develop and implement procedures that ensure that all children with disabilities within their jurisdiction, regardless of the severity of the disability, who need special education and related services are identified, located and evaluated. 20 U.S.C. § 1412(a)(3).

C. Evaluations. “Evaluation” means procedures to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34. C.F.R. § 300.15. Children suspected of having a disability that adversely affects their educational performance and who may need special education (specially designed instruction) and related services must be evaluated. Once eligible, a
child must be reevaluated at least once every three years, or more often if conditions warrant. 42. U.S.C. § 1414(a)(2).

D. **Free Appropriate Public Education ("FAPE")**. Every child with a disability – as defined by the IDEA – is entitled to a free and appropriate public education ("FAPE"). The term FAPE means special education and related services that:

- Are provided at public expense, under public supervision and direction and without charge to the parents – but does not preclude incidental fees that are normally charged to nondisabled students or their parents as part of the regular education program;

- Meet State standards, as determined by the State Department of Education;

- Include an appropriate preschool, elementary school, or secondary school education in the State, meaning that the State must have an appropriate program at all school levels, age-appropriate for the student; and

- Are provided in conformity with the student’s IEP.

20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.

E. **Individualized Education Program ("IEP")**. An IEP is a written statement for a child with a disability that is developed, reviewed, and revised in accordance with pertinent provision of the IDEA and its implementing regulations. 20 U.S.C. § 1401(14); 34 C.F.R. § 300.22. The IEP is the “centerpiece,” “primary vehicle” and “modus operandi” of the IDEA’s education delivery system for children with disabilities. Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982). Key components of the IEP include:

- Present levels of academic achievement and functional performance;

- Measurable goals;

- Special education, related services and supplementary aids and services; and

- Participation in general education and activities.

34 C.F.R. § 300.320.

F. **Least Restrictive Environment ("LRE")**. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, must be educated with children who are nondisabled, and special classes, separate schooling or other removal of students with disabilities from the regular
education environment is allowed only if the nature or severity of the disability is such that education in regular education classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2). The IEP Team determines the LRE.

G. **Procedural Safeguards.** Procedures required by the IDEA include:

- The opportunity for parents to examine all records relating to a child with a disability and to participate in meetings with respect to the identification, evaluation and educational placement of the child and the provision of a free appropriate public education to the child;

- Procedures to protect the rights of the child whenever the parents are not known or cannot be located or when the child is a ward of the State, including for the assignment of a surrogate for the parents;

- Prior written notice to the parents when a school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

- Procedures designed to ensure that the prior written notice is in the native language of the parents, unless it clearly is not feasible to do so; and

- Procedures for dispute resolution, including mediation and due process.


H. **Related Services.** The term “related services” means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. It does not include a medical device that is surgically implanted, or the replacement of such device. 20 U.S.C. § 1401(26). 34 C.F.R. § 300.34.

1. **Medical Services.** The term “medical services” means services provided by a licensed physician to determine a child’s medically related disability that results in the child’s need for special education and related services. 34 C.F.R. § 300.34(c)(5).

2. **School Health Services and School Nurse Services.** Encompassed in one definition, the term “school health services and school nurse services” means health
services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. 34 C.F.R. § 300.34(c)(13). The determination of whether a service can permissibly be provided by a qualified person or must be provided by a qualified school nurse is based on the delegation rules set forth in Alabama’s Nurse Practice Act, Ala. Code § 34-21-1, et seq., and AAC Chapter 610-X-6, Standards of Nursing Practice.

I. **Special Education.** “Special education” is defined generally as “specially designed instruction,” at no cost to parents, to meet the unique needs of a child with a disability and includes instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, as well as instruction in physical education. 34 C.F.R. § 300.38(a)(1).

J. **Specially Designed Instruction.** “Specially designed instruction” means adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction in order to:

- Address the unique needs of the child that result from the child’s disability; and
- Ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.38(a)(3).

K. **No federal definition of Individual Health Plan (“IHP”).**

Federal law does not include a requirement of a written plan for students with disabilities who have health concerns, nor is there a federal definition for an Individual Health Plan (IHP). There is a definition in Alabama’s Safe at School Act, Ala. Code § 16-30A-2(2):

A document that outlines health care to be provided to a student in the school setting, developed by the school nurse in conjunction with the student’s parent(s) or guardian(s) and may contain the orders from the physician, certified registered nurse practitioner operating under a valid collaborative agreement, or physician assistant operating with a valid supervisory agreement.

In general, an IHP focuses exclusively on addressing a student’s medical or health needs and is not developed in accordance with formal procedures, such as those required for the development of a 504 Plan. See Springer (NM) Mum. Schs., 111 LRP 65450 (OCR
IV. CHILD FIND TIPS

A. The child-find requirements under IDEA and Section 504 are affirmative in nature.

The duty to identify, locate and evaluate students with disabilities within the school district’s jurisdiction is the school district’s, not the parent’s. Referral for an evaluation is required when there is “reason to suspect” or “reason to believe” that the student may be a child with a disability in need of special education.

C.C. Jr. v. Beaumont Indep. Sch. Dist., 65 IDELR 109 (E.D. Tex. 2015). School district had reason to suspect a 3-year-old boy had a disability, triggering the duty to evaluate, when the mother, who worked for the school district as a diagnostician, played an audio recording of her son’s speech for the district’s speech language pathologist. The mother’s conversation with the SLP gave notice to the district of the child’s disability by his third birthday. The court held that the district’s delay in evaluating the child, coupled with its conditioning of the evaluation on the child’s enrollment, entitled the child to compensatory education.

Demarcus L. v. Board of Educ. of the City of Chicago, 63 IDELR 13 (N.D. Ill. 2014). Hearing Officer did not err in finding that there was no child find violation. A parent seeking relief for a child find violation must show that the district 1) overlooked clear signs of disability and negligently failed to order an evaluation; and 2) had no rational justification for its decision not to evaluate. Here, the parent failed to meet either standard. While the child was rude and discourteous, had disrupted classroom activities and engaged in behaviors such as fighting and yelling when he did not get his way, there was no fault in the district’s belief that it could manage the child’s behaviors using classroom-level interventions. District personnel managed and de-escalated the child’s behavior through the first semester of 2011 while he was in second grade and the district conducted an IDEA evaluation in late 2011, after it suspended him twice for disrupting classroom activities and learned of his subsequent psychiatric hospitalization.

Jana K. v. Annville Cleona Sch. Dist., 63 IDELR 278 (M.D. Pa. 2014). The parent’s failure to notify the district that a physician had diagnosed his daughter with depression did not excuse the district’s failure to conduct an IDEA evaluation. The duty to conduct an evaluation exists regardless of whether a parent requests an evaluation or shares information about a private assessment. Here, the district had sufficient information to suspect that the student had an emotional disturbance and might be in need of special education services. The student had poor relationships with peers and a tendency to report inoffensive conduct as “bullying;” she visited the school nurse on at least 54 occasions for injuries, hunger; anxiety or a need for “moral support;” the student’s grades, which has been poor to average in previous school years, plummeted when she began 7th grade; and the district was aware of at least one on-campus act of self-harm.
where she swallowed a metal instrument after using it to cut herself. This “mosaic of evidence” clearly portrayed a student who was in need of a special education evaluation.

B. **There are no magic words needed from a parent to trigger the duty to evaluate, and a parent’s request for help can take many forms. “When there’s debate, evaluate!”**

Hicks v. Purchase Line School District, 251 F. Supp.2d. 1250, 39 IDELR 92 (D. PA 2003). A parent did not have a duty to identify, locate or evaluate the student pursuant to IDEA. This obligation falls squarely upon the district. The Court of Appeals has clearly held that [a] child’s entitlement to special education should not depend upon the vigilance of parents (who may not be sufficiently sophisticated to comprehend the problem).

Robertson Co. School System v. King, 24 IDELR 1036 (6th Cir. 1996). A parent who is a neophyte to special education cannot be expected to appear and say “My child is eligible for special education services under IDEA and I am here to refer my child for an individual assessment.” A request for a special education evaluation and services is implied when a parent informs a district that the child may have special needs. Since the district failed to evaluate a student with disabilities within its jurisdiction, it was responsible for private school tuition reimbursement.

C. **There are “referral red flags” to look out for that trigger the child find duty, but not one, two or three such “flags,” in combination and in and of themselves, will necessarily constitute “reason to suspect” sufficient to trigger the duty to evaluate.**

Referral red flags are factors that courts/agencies have found, in combination, to be sufficient to constitute a “reason to suspect a disability” and a need for special education services that would trigger the IDEA’s or 504’s child-find duty. There is not a magic number of factors needed to trigger the duty to evaluate, but the more of them that exist in a particular situation, the more likely it is that the duty would be triggered.

Training is imperative to teach all school staff to look out for indicators in these areas and **“when there’s debate, evaluate (and re-evaluate too)!”**

1. **Academic Concerns in School**

   - Failing or noticeably declining grades
   - Retention
   - Poor or noticeably declining progress on standardized assessments
   - Student negatively “stands out” academically from his/her same-age peers
   - Student has been in the Problem Solving/RtI process and progress monitoring data indicate little academic progress or positive response to interventions
   - Student already has a 504 Plan and accommodations have provided little academic benefit
2. **Behavioral Concerns in School**

- Numerous or increasing disciplinary referrals for violations of the code of conduct
- Signs of depression, withdrawal, inattention/distraction, anxiety
- Truancy problems, chronic absences or a noticeable increase in absences, skipping class
- Student negatively “stands out” behaviorally from his/her same-age peers
- Student has been in the Problem Solving/RtI process and a behavior intervention plan (BIP) and progress monitoring data indicate little behavioral progress or positive response to interventions
- Student already has a 504 Plan or a BIP and accommodations have provided little behavioral benefit

3. **Outside Information Provided**

- Information that the child has been hospitalized (particularly for mental health reasons, chronic health issues, etc.)
- Information that the child has received a DSM-5 diagnosis (ADHD, ODD, OCD, etc.)
- Information that the child is taking medication
- Information that the child is seeing an outside counselor, therapist, physician, etc.
- Private evaluator/therapist/service provider/physician suggests the need for an evaluation or services

4. **Information from School Personnel**

- Teacher/other school service provider suggests a need for an evaluation under 504 or IDEA or suggests counseling, other services, etc.

5. **Parent Request for an Evaluation**

- Parent requests an evaluation and other checklist item(s) above are present

V. **EVALUATIONS TIPS**

In short, the purposes of an evaluation under the IDEA are to determine whether a child is eligible to receive special education services and to identify all of the student’s unique educational needs. The evaluation must be comprehensive, use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child, be selected and administered in a non-discriminatory manner and be conducted by trained and knowledgeable personnel. 20 U.S.C. § 1414(b); 34 C.F.R. § 300.304.

A. **School districts must conduct comprehensive evaluations and evaluate in all suspected areas of need, not just disability.**

The IDEA regulations require, among other things that “[i]n evaluating each child with a disability, the district must ensure that the evaluation is sufficiently comprehensive to
identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified. 34 C.F.R. § 300.304(c)(6). The domains to consider in a comprehensive, individual evaluation under IDEA include health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). As best practice, school nurses, the professional health expert, should be consulted in the evaluation process when information is needed in the areas of health, hearing and vision. The school nurse can also be an important liaison between the medical community and school staff. As a practical matter, however, school nurses are often under-utilized (or not utilized at all) in the special education evaluation process.

Timothy O. v. Paso Robles Unif. Sch. Dist., 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). When a district has reason to suspect that a child has a disability, it must conduct a full and individual initial evaluation that ensures the child is assessed in all areas of suspected disability using a variety of reliable and technically sound instruments. Here, the district was aware that the student displayed signs of autistic behavior at the time of the initial evaluation. However, the district chose not to formally assess him for autism because a psychologist, who observed the student for 30 to 40 minutes, concluded that the student merely had an expressive language delay and that he could not diagnose the student with autism “off the top of my head.” As a result, the district was unable to design an IEP that addressed the student’s needs and, therefore, denied FAPE to the student. The district’s fundamental procedural violations in this regard deprived the IEP team of critical evaluative information about the student’s developmental disabilities as a child with autism and it was impossible for the team to consider and recommend appropriate services necessary to address his individual needs. Thus, the district deprived the student of critical educational opportunities and substantially impaired his parents’ ability to fully participate in the IEP process.

A.W. v. Middletown Area Sch. Dist., 65 IDELR 16 (M.D. Pa. 2015). District’s delay in comprehensively evaluating teenager with an anxiety disorder is a denial of FAPE and entitles the student to compensatory education. The IDEA requires districts to conduct a “full and individual” initial evaluation of a student who is suspected of having a disability and districts must use a variety of assessment tools and strategies to gather relevant information about the student’s functional, developmental and academic needs. Here, the district sought parental consent only to conduct a psychiatric evaluation of the student. The evaluation information did not include information from which the district could develop a positive behavior plan or IEP goals or to rule out SLD. From the outset, the district knew that the psychiatric evaluation would not address educational matters and should have known that it would need to conduct additional assessments to determine the full scope of the student’s needs. In addition, the district did not convene the IEP team until 13 months after it first had reason to suspect that the student had a qualifying disability and the student went without appropriate services in the interim.

D.B. v. Bedford Co. Sch. Bd., 54 IDELR 190, 708 F. Supp.2d 564 (W.D. Va. 2010). Student with ADHD and found eligible for services as OHI was denied FAPE where district did not properly consider and evaluate for possible SLD. Despite the fact that
the evidence strongly suggested the student was SLD, the IEP team failed to assess for SLD or even discuss SLD. In addition and contrary to the hearing officer’s finding, the student’s services might well have changed had he been fully evaluated in all areas of suspected disability. “Although the [hearing officer] observed that [student] was promoted a grade every year…this token advancement documents, at best, a sad case of social promotion” where, after four years, the student is unable to read near grade level. Thus, the parents are entitled to reimbursement for private schooling.

Compton Unified Sch. Dist. v. A.F., 54 IDELR 225 (C.D. Cal. 2010). Where student displayed violent and disruptive behaviors and his grandparents requested a functional analysis assessment (FAA), FAPE was denied when the district failed to assess the 6 year old in all areas of suspected disability. While the school psychologist completed an initial psychoeducational assessment, the district’s failure to conduct an FAA prevented the IEP team from developing an appropriate IEP and making an offer of placement that provided FAPE. An FAA would have enabled the Team to consider strategies to address the behavioral issues that impeded the student’s learning.

B. Parents are not responsible for obtaining educationally-relevant evaluations, including medical evaluations for diagnostic/evaluative purposes.

Related services under the IDEA include medical services for diagnostic or evaluation purposes only. Put another way, the school district is responsible for medical services if necessary for diagnostic or evaluative purposes.

N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had once been privately diagnosed with autism, but school district staff suggested that the parents arrange for an autism evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.

Dear Colleague Letter, 68 IDELR 52 (OCR 2016). If a 504 Team decides that it needs a formal medical diagnosis of a condition, such as ADHD, in order to make disability-related decisions for a particular student, the school district is required to conduct and pay for the evaluation. The Dear Colleague Letter was accompanied by an extensive Resource Guide regarding educational services for students with ADHD. In the Resource Guide, OCR suggested that school districts should consider the need for a medical assessment in evaluating students with ADHD. While noting that a specific diagnosis is not necessary for a school to determine that a student has a mental or physical impairment that substantially limits a major life activity, a parent might request the school district conduct a 504 evaluation without having a prior diagnosis of any disorder. If a school district determines, based on the facts and circumstances of an individual case, that a medical assessment is necessary to conduct an initial 504 evaluation in order to determine whether a child suspected of having ADHD has a disability and needs special education or related services, the school district must ensure that this assessment is at no costs to the parents. OCR noted further that, if the district believes a medical assessment is necessary but the parents volunteer to pay for a private
assessment, the “district must make it clear that the parent has a choice and can choose to accept a school-furnished assessment.” Resource Guide, p. 23.

C. **School personnel should avoid making diagnoses or recommending medication.**

Unfortunately, there have been cases where teachers or other school personnel have made their own diagnoses of a particular medical condition without being qualified to do so. A proper referral for an evaluation must be made rather than statements to parents as to what school personnel believe to be a disability. The IDEA prohibits school personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation or receiving special education services. However, the law notes further that nothing in this paragraph “shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student’s academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services....”

W.B. v. Matula, 23 IDELR 411, 67 F.3d 484 (3d Cir. 1995). An action for damages can be brought under IDEA, Section 504 or Section 1983 for failure to timely identify a student as disabled.

Letter to Hoekstra, 34 IDELR 204 (OSERS 2000). It is not the role of educators to diagnose ADD or ADHD or to make recommendations for treatment. That responsibility belongs to physicians and family. School officials may provide input at parents’ request and with their consent about a student’s behavior that may aid medical professionals in making diagnosis.

VI. **ELIGIBILITY TIPS**

A. **Eligibility under the IDEA generally requires the presence of three components.**

In our view, eligibility under the IDEA generally requires three components:

1. A condition (as defined by the AAC Special Education Rules); 2. that adversely affects educational performance; 3. to the degree that the student needs special education and related services.

B. **Just because a doctor says a student is eligible or has a DSM-5 diagnosis doesn’t mean the child is eligible!**

A medical diagnosis from a physician or a “prescription” for special education services, an IEP or 504 Plan does not make a student eligible under the IDEA or Section 504. Similarly, just because a student has a healthcare need does not mean that the student is eligible under the IDEA. In order to find a child eligible under the IDEA, a properly-constituted eligibility team must review all relevant evaluative and other data and determine whether the child has one of the 13 conditions that adversely affects educational performance, which results in the need for special education services.
Where a child is found to be covered under the IDEA/AAC, an Individualized Education Program (IEP) will be developed for the child. If the child also has health care needs to be managed at school or during school activities, an Individual Health Plan (IHP) will also be developed that is typically referenced in or otherwise incorporated into the child’s IEP.

Marshall Joint Sch. Dist. No. 2 v. Brian and Traci D., 54 IDELR 307 (7th Cir. 2010). Where the ALJ’s decision that the student continued to be eligible for special education under the IDEA focused solely on the student’s need for adapted PE, the district court’s decision affirming it is reversed. The ALJ’s finding that the student’s educational performance could be affected if he experienced pain or fatigue at school is “an incorrect formulation of the [eligibility] test.” “It is not whether something, when considered in the abstract, can adversely affect a student’s educational performance, but whether in reality it does.” The evidence showed that the student’s physician based her opinion that he needed adapted PE on information entirely from his mother and upon an evaluation that lasted only 15 minutes with no testing or observation of the student’s actual performance. In contrast, the student’s PE teacher testified that he successfully participated in PE with modifications. “A physician cannot simply prescribe special education; rather, the [IDEA] dictates a full review by an IEP team” and while the team was required to consider the physician’s opinion, it was not required to defer to her view as to whether the student needed special education. Further, the student’s need for PT and OT did not make him eligible for special education under the IDEA, as those services do not amount to specialized instruction.

Nguyen v. District of Columbia, 54 IDELR 18 (D. D.C. 2010). Student does not have an emotional disturbance where his truancy and drug use were at least partially responsible for his educational difficulties. Although student was diagnosed with depression, parent failed to establish a direct link between that and his poor academic performance. In addition, small differences between student’s ability and achievement were insufficient to support SLD eligibility and such discrepancy might stem from the student’s poor attendance.

S. v. Wissahickon Sch. Dist., 50 IDELR 216 (E.D. Pa. 2008). Although the student was diagnosed with ADHD in the second grade, he earned As and Bs throughout elementary school. Though his grades slipped when he entered middle school, his teachers testified that he was attentive in class and performed well on quizzes and tests and that his poor performance stemmed from a lack of motivation rather than ADHD. Importantly, the court observed that the district devised strategies to help the student, which included the use of progress reports, an agenda book, and parent conferences.

Strock v. Indep. Sch. Dist. No. 281, 49 IDELR 273, 2008 WL 782346 (D. Minn. 2008). The mere existence of ADHD does not demand special education services. When the student actually completed required work, he received average or above-average grades. “Children having ADHD who graduate with no special education or any §504 accommodation are commonplace.” The fact that the student was required to take remedial courses when beginning at the community college is “neither unusual or evidence of ‘unsuccessful transition,’ an entirely undefined term.”
P.R. v. Woodmore Local Sch. Dist., 46 IDELR 134 (N.D. Ohio 2006). Student diagnosed with ADHD is not eligible as a student with a disability or OHI under IDEA. Student’s doctor based her conclusions that student was OHI on the student’s mother’s observations and never interviewed any of the student’s teachers, the student’s guidance counselor, or any of the school’s special education personnel. District personnel’s determination that his difficulties in school were no different than those of many boys in their junior year of high school is upheld.

C. Actual “disability labels” do not matter—it’s eligibility for services and the provision of FAPE that matter.

Once a student is determined eligible under IDEA, his/her needs determine the services the student receives. Students identified as eligible under any of the 13 disability categories in the IDEA may qualify for school health or school nurse services if such services are necessary in order to provide the student with FAPE. For example, a student with a specific learning disability may also have a diagnosis of asthma that affects the student’s attendance at school; in that circumstance, the issue may need to be addressed in the IEP.

D.B. v. Ithaca City Sch. Dist., 70 IDELR 1(2d Cir. 2017). Parent’s contention that the district’s proposed IEP was not appropriate because it did not recognize the student’s disability specifically as a “nonverbal learning disorder” is rejected. NVLD is not formally recognized as a psychiatric diagnosis by medical literature or by the state of New York. Accordingly the district’s failure to specifically identify the disability in the IEP does not compel a finding that the district does not understand the nature of the student’s disability or the extent of her needs. Thus, the lower court’s dismissal of the parent’s private residential school reimbursement claim is affirmed.

Lauren C. v. Lewisville Indep. Sch. Dist., 70 IDELR 63 (E.D. Tex. 2017). District’s refusal to add autism eligibility to the student’s IEP is upheld where the student does not meet the criteria for autism eligibility. Reportedly, the parents wanted autism added to the IEP because it would help them obtain services from outside agencies. While the district knew in 2002 that the student’s physician diagnosed her with autism, the district evaluated the student within a reasonable time after learning of that diagnosis and found her not eligible as a child with autism. The fact that the district did not classify her with autism did not mean that it violated its child find duty. To the contrary, the multiple evaluations that it conducted demonstrate compliance with child find requirements. Further, the IDEA does not require districts to affix a student with a particular label. Rather, the question is whether the district offered an IEP that is sufficiently individualized to address the student’s needs and to provide meaningful educational benefit to the student. The district has met that standard by providing the student with ABA and other services that have resulted in academic, social and behavioral progress.

W.W. v. New York City Dept. of Educ., 63 IDELR 66 (S.D.N.Y. 2014). The failure to explicitly mention a diagnosis of dyslexia in the IEP goals for an LD student is not fatal to the IEP because the IEP goals were adequately designed to address the student’s
learning challenges, which include not only dyslexia, but also dyscalculia and dysgraphia.

Torda v. Fairfax Co. Sch. Bd., 61 IDELR 4, 517 F. Appx. 162 (4th Cir. 2013), cert. denied, 134 S. Ct. 1538 (U.S. 2014) (unpublished). The district did not deny FAPE to a teenager with Down syndrome based on its failure to list auditory processing disorder as his secondary disability in his IEP. This is so because the IEP addressed all of the student’s needs, regardless of his classifications. Teachers gave detailed testimony on how they simplified lessons, paired visual material with oral instruction and checked for comprehension. Thus, there is no reason to disturb the district court’s decision that the student received FAPE.

D. Educational performance is broader than academics alone.

The AAC defines “educational performance” to mean “academics, social/emotional, and/or communication skills.” AAC Rule 290-8-9.00(4).

A.A. v. District of Columbia, 70 IDELR 21 (D. D.C. 2017). District’s argument that the fifth-grader’s good grades disqualified her from IDEA eligibility is rejected. Clearly, this child’s anxiety, mood disorder and inability to regulate her emotions that resulted in her removal to the kindergarten classroom for approximately 20 days during the school year, caused her to fall behind in classroom instruction. As such, her parents demonstrated that her disability impeded her educational performance. Based upon the fact that the child tried to jump out of her second-floor bedroom at least two times while saying she wanted to kill herself surely meets the criteria of “a general pervasive mood of unhappiness or depression” or “inappropriate types of behavior or feelings under normal circumstances” sufficient to meet eligibility for ED.

H.M. v. Weakley Co. Bd. of Educ., 65 IDELR 68 (W.D. Tenn. 2015). An ALJ’s ruling that the frequently truant high schooler was “socially maladjusted” did not mean that the student was not IDEA-eligible. The student’s lengthy history of severe major depression coexists with her bad conduct and qualifies her as an ED child. Social maladjustment does not in itself make a student ineligible under the IDEA. Rather, the IDEA regulations provide that the term “emotional disturbance” does not apply to children with social maladjustment unless they also meet one of the five criteria for ED. Since age 9, this student has been diagnosed with severe major depression and later medical and educational evaluations stated that she had post-traumatic stress disorder in addition to a recurrent pattern of disruptive and negative attention-seeking behaviors. Further, the depression was marked, had lasted a long time and affected her performance at school. Thus, it is “more likely than not” that her major depression, not just misconduct and manipulation, underlie her difficulties at school. Thus, the hearing officer’s decision finding her ineligible under the IDEA is reversed.

M.M. v. New York City Dept. of Educ., 63 IDELR 156 (S.D.N.Y. 2014). Student with anxiety and depression but good grades is a “child with a disability,” as her emotional disturbance impacted her grades because she could not come to school as evidenced by
the district’s agreement to provide two months of home instruction to her. Not only did the student miss several weeks of classes during the fall semester, but she did not attend at all from November 2007 to January 2008. She also did not earn the minimum number of credits required to move on to the next grade. Because district erred in finding student ineligible for IDEA services, parents may recover the cost of her residential placement.

G.D. v. Wissahickon Sch. Dist., 56 IDELR 294, 832 F. Supp.2d 455 (E.D. Pa. 2011). School district’s evaluation process was flawed when it found the child ineligible for IDEA services because IDEA eligibility does not turn on academic ability alone. Rather, the Third Circuit has held that a child’s progress must be measured in light of his potential. The school psychologist’s evaluation report focused solely on the child’s superior academic performance and did not discuss the results of two private ADHD diagnoses, parent and teacher rating scales, and input from the kindergarten teacher. In addition, the evaluation report did not include the psychologist’s own classroom observations of the student and the psychologist’s statement to the parents that she “didn’t do IEPs for students who have good skills” highlighted the flaws in the evaluation process. The district has an obligation to look beyond a child’s cognitive potential or academic progress and address attentional issues and behaviors that a teacher has identified as impeding the student’s progress. Thus, the district’s evaluation was flawed and an award of compensatory education is warranted.

Mr. I v. Maine Sch. Admin. Dist. No. 55, 47 IDELR 121, 480 F.3d 1 (1st Cir. 2007). In Maine, “educational performance” is more than just academics and there is nothing in IDEA or its legislative history that supports the conclusion that “educational performance” is limited only to performance that is graded. In addition, “adversely affects” does not have any qualifier such as “substantial,” “significant,” or “marked.” Thus, district court’s holding that any negative impact on educational performance is sufficient is upheld. Student with Asperger’s Syndrome who generally had strong grades but difficulty in “communication,” which is an area of educational performance listed in Maine’s law. That makes her eligible for special education services.

E. Teams must consider the need for specially designed instruction when determining eligibility.

G.D. v. West Chester Sch. Dist., 70 IDELR 180 (E.D. Pa. 2017). Intellectually gifted third-grader with an anxiety disorder is not eligible under the IDEA for services and the district’s determination that there is no need for services is upheld. The school psychologist’s evaluation report was not deficient, when the psychologist spoke with the student’s therapist two weeks before issuing an evaluation report. The psychologist testified that the therapist did not tell her that the student could not return to school but, instead, told her that the student was able to hold it together at school and that the behaviors at issue were displayed in the home. Further, the therapist’s characterization of the school as “an unhealthy environment” for the student was based on the student’s mistrust of her assigned school counselor. The school psychologist recognized, however, that the student needed a trusted adult on campus and indicated that the district could put that support in place. Thus, the school psychologist properly considered the
private therapist’s input, and the district adequately addressed the student’s anxiety by
developing a Section 504 plan.

was diagnosed privately with ADHD and a mood disorder, an impairment alone will not
qualify a student for special education. A parent must also show that the student needs
special education services to receive educational benefit. Prior services provided
pursuant to a 504 Plan and diagnosis of Asperger’s appeared to be roughly the same as
the efforts made for the general student population and the student was abundantly
successful. Without evidence that the student needs specialized instruction, the student
is not eligible under the IDEA.

district did not err in finding that the student was not eligible for services under the
IDEA. High schooler’s Asperger syndrome does not have an adverse effect on his
educational performance (which in Idaho includes academic areas such as reading, math
and communication, as well as nonacademic areas such as daily living skills, mobility
and social skills). Although the parents allege that the district focused too much on
academic performance, the hearing officer and district court noted that the student had
done well in classes that emphasized pre-vocational and life skills.

Q.W. v. Board of Educ. of Fayette Co., 64 IDELR 308 (E.D. Ky. 2015), aff’d, 66
finding that the student no longer requires IDEA services is upheld. The student’s
alleged difficulties at home do not require the district to continue providing special
education services. Under the IDEA, a student with autism is not eligible for special
education and related services, unless his disability adversely affects his educational
performance. The ordinary meaning of “educational performance” requires courts and
hearing officers to focus on school-based evaluation. Here, the student did not appear to
exhibit any academic, behavioral or social difficulties at school. Rather, his teachers
testified that he earned good grades, participated in class, exhibited the same level of
emotion as his peers and was “a joy” to have in class. While “educational performance”
may extend beyond grades to the classroom experience as a whole, it does not include
behaviors exhibited solely in the home. “Social and behavioral deficits will be
considered only insofar as they interfere with a student’s education.”

there was evidence of a severe discrepancy between ability and achievement in math
reasoning, the district did not violate IDEA in finding the 9th-grader ineligible for special
education. Where the student had no need for specialized instruction, she was not a
“child with a disability” under the IDEA. In addition to having one of the disabilities set
forth in IDEA, the student must show that she needs specialized instruction because of
that disability. Although the student had earned a D in math in eighth grade, those
grades stemmed from her failure to complete homework. Her grades improved after she
began receiving accommodations for her ADHD and, in 9th grade, she earned a final
grade of B- in the general education math curriculum. Further, her scores on a statewide
math assessment showed her overall math ability to be at the base-to-proficient level. Where she made solid progress in math without any modifications to the content, methodology, or delivery of instruction, the hearing officer’s decision that she did not need specialized instruction for an SLD is upheld.

C.M. v. Department of Educ., 58 IDELR 151 (9th Cir. 2012) (unpublished). District court’s decision that the student with CAPD and ADHD is not a child with a disability and eligible for services under the IDEA is upheld. Based upon the student’s performance in her regular education classes, with accommodations and modifications, she was able to benefit from her general education classes without special education services. The parent’s argument that the Read 180 program, pre-algebra course and math lab amounted to “specialized instruction” is rejected. Students who can benefit from general education classes with accommodations and modifications do not have a need for special education. The court agrees with the district court that substantial evidence supported the hearings officer’s conclusion that the reading and math classes were not “special education” classes, but were regular education classes with small enrollments designed to provide additional support and were open to many types of students who needed additional help. In addition, the department evaluated the student in all areas of suspected disability and the student did not qualify for services under the category of SLD or OHI, since the department could meet the student’s needs with a Section 504 plan.

Mowery v. Board of Educ. of the Sch. Dist. of Springfield R-12, 56 IDELR 126 (W.D. Mo. 2011). District’s determination that student is not eligible because he is not in need of special education and related services to receive an educational benefit is upheld. Although a private psychiatrist diagnosed student with a pervasive developmental disorder, Asperger syndrome, generalized anxiety disorder, obsessive compulsive disorder, oppositional defiant disorder, these impairments did not adversely affect his education, as the student performed reasonably well in his classes despite having missed 43 days of school in 4th grade. In addition to earning A’s, B’s and C’s, he participated in a gifted program and scored at the 5th grade level on standardized tests. The student’s behavior also improved when he changed medication and, while his teachers expressed some concern about personal and social development, the teachers still graded his performance as “satisfactory.”

VII. FAPE/IEP TIPS

A. The IEP is the “centerpiece” of the IDEA’s education delivery system for children with disabilities; in other words, it is the modus operandi for getting the FAPE job done.

To provide an eligible child with FAPE, school districts must develop an appropriate IEP for the child and implement the IEP in a consistent manner. The term “appropriate” is not defined in the IDEA or its implementing regulations, nor is it defined in the AAC. The first United States Supreme Court decision to address the standard required for FAPE under the IDEA, Board of Education of the Hendrick Hudson Central School
District v. Rowley, 458 U.S. 176 (1982), established a two-pronged test for determining appropriateness:

- Has the school district complied with the IDEA’s procedural requirements?
- Is the IEP reasonably calculated to enable the child to receive educational benefits?

On March 22, 2017, the Supreme Court clarified the FAPE standard from Rowley and unanimously rejected the Tenth Circuit Court of Appeal’s standard of “merely more than de minimis benefit” as one that set the bar too low. Rather, the Court noted that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than de minimis’ progress from year to year can hardly be said to have been offered an education at all.” Endrew F. v. Douglas Co. Sch. Dist., 69 IDELR 174, 137 S. Ct. 988 (2017). As a result, the Court set forth the following clarification of the FAPE standard:

“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress in light of the child’s circumstances.”

The Court concluded that it would “not attempt to elaborate on what ‘appropriate’ progress will look like from case to case. It is the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances for whom it was created.” Importantly, the Court also noted that “any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.”

The U.S. Department of Education issued a Q&A document on December 7, 2017 regarding the impact of the Supreme Court’s Endrew F. decision, which can be found at the following link: www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-endrewcase-12-07-2017.pdf.

B. The burden of proof in cases challenging the IEP and provision of FAPE is on the parents.

In Schaffer v. Weast, 44 IDELR 150, 126 S. Ct. 528 (2005), the Supreme Court held that the parents of a seventh-grader with learning and speech-language disabilities bore the burden of proving that his IEP was inadequate. Although the lower district court had awarded the parents reimbursement for their unilateral placement of the child in private school, the Fourth Circuit had reversed the decision, deciding that there was no reason to depart from the general rule of allocating the burden of proof to the party seeking relief. The Supreme Court agreed with the Fourth Circuit, stating that the IDEA’s purpose was to provide a “cooperative process” between parents and schools and that the IEP process was “the central vehicle for this collaboration.” Since parents are informed about and must consent to evaluations and be included as members of IEP teams, they play an
important part in the process. Because the IDEA is silent on the allocation of the burden of persuasion, the Court relied on the “default rule” that the party bringing the legal challenge bears such burden.

C. **Not every procedural violation is a denial of FAPE.**

The IDEA specifically addresses the issue of the effect of procedural violations on the FAPE determination as follows:

> A decision made by a hearing officer “shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies: 1) impeded the child’s right to a FAPE; 2) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or 3) caused a deprivation of educational benefits. However, nothing shall be construed to preclude a hearing officer from ordering an LEA to comply with the procedural requirements.

34 C.F.R. § 300.513.

**R.L. v. Miami-Dade Co. Sch. Bd.,** 63 IDELR 182, 757 F.3d 1173 (11th Cir. 2014). To avoid a finding of predetermination of placement, a school district must show that it came to the IEP meeting with an open mind and that it was “receptive and responsive” to the parents’ position at all stages. While some district team members seemed ready to discuss a small setting within the public high school as requested by the parents, the LEA Representative running the meeting “cut this conversation short” and told the parents that they would have to pursue mediation if they disagreed with the district’s placement offer at the Senior High School. “This absolute dismissal of the parents’ views falls short of what the IDEA demands from states charged with educating children with special needs.”

**B.P. v. New York City Dept. of Educ.,** 58 IDELR 74 (E.D. N.Y. 2012). Allegations that the school district failed to include an appropriate general education teacher on the student’s IEP team or to provide access to evaluative data to the student’s private school teacher were not enough to find that the district denied the student FAPE. The parents’ contention that the general education teacher on the student’s IEP team was not appropriate because there was no evidence that she was teaching fourth or fifth grade at the time of the meeting is rejected, because the IDEA does not require the general education teacher on an IEP team to be teaching at a particular grade level. In response to the parents’ claim that the student’s private school teacher, who participated in the meeting by phone, did not have access to adequate evaluative data, the parents’ own testimony showed that the teacher reviewed evaluation and progress reports before the meeting. In addition, the IEP included appropriate measurable goals and other children in the proposed SDC placement functioned at substantially similar levels despite their varying disabilities. Where the proposed IEP is substantively and procedurally appropriate, the parents’ request for private school tuition reimbursement is denied.
The district did not deny the parents meaningful participation in the development of the IEP. Although the parents missed one of three IEP meetings due to the district’s failure to provide notice, they actively participated in follow up meetings to the meeting where a decision was made regarding the extent to which a dedicated aide’s support would be reduced. The parents and their experts took part in discussions regarding this at the meetings and, as a result, the district agreed to increase the aide’s hours beyond what it had originally proposed. In addition, the district agreed to the parents’ request for additional data collection. The fact that the IEP team changed its course after the initial meeting showed that the reduction it considered was not set in stone.

D. Predetermination and denying meaningful parental participation are generally considered fatal procedural violations.

A predetermination of placement or making placement decisions without parental input or outside of the IEP/placement process will not only cause a parent to lose trust in school staff, it may very well lead to a finding of a denial of a free appropriate public education (FAPE). Districts must ensure that the parents of a child with a disability are members of any group that makes decisions about their child’s educational placement. 34 C.F.R. §§ 300.327, 300.501(c)(1). Likewise, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to:

- The identification, evaluation and educational placement of the child; and
- The provision of FAPE to the child.

34 C.F.R. § 300.501(b). Predetermination occurs when the school district makes placement or other IEP team decisions without parental input or outside of the IEP Team/placement process.

Shafer v. Whitehall Dist. Schs., 61 IDELR 20 (W.D. Mich. 2013). District staff committed a procedural error by deciding, prior to the eligibility meeting, that the student’s IEP would classify him primarily as SLD and secondarily as OHI and speech-language impaired and that he would not be classified as autistic. However, a procedural error constitutes a denial of FAPE only if it impedes the child’s right to FAPE, significantly impedes the parents’ opportunity to participate in the decision making process regarding the provision of FAPE, or causes a deprivation of educational benefits. The ALJ was correct in distinguishing between predetermination of a student’s classification and predetermination of an IEP and correctly concluded that the procedural misstep was not fatal because the IEP nevertheless put the student in other eligibility categories and provided him with appropriate services. In addition, the evidence reflected that the parent fully participated in the development of the IEP and the team considered the relevant data, creating an IEP that addressed the student’s unique needs. Thus, the failure to classify the student as autistic did not amount to a denial of FAPE.
E. The IDEA mandates proper attendance of required school personnel at IEP meetings.

Under the IDEA, the public agency shall ensure that the IEP team for each child with a disability includes (1) the parents of the child; (2) not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) not less than one special education teacher of the child, or if appropriate, at least one special education provider of the child; (4) a representative of the public agency who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general curriculum; and (iii) is knowledgeable about the availability of resources of the public agency; (5) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team already described; (6) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (7) if appropriate, the child.

The role of the school nurse as part of the IEP Team in terms of significance, participation and practice should parallel that of other related service providers. That means, at a minimum, if a student receives school health or school nurse services as a related service in the IEP, the school nurse needs to keep documentation of the implementation of the services and give input to the IEP Team with the IEP is developed or amended. If there are specific issues or questions about the services, the school nurse should be in attendance at the IEP meeting.

The IDEA provides that a member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the LEA agree that the attendance of such member is not necessary “because the member’s area of the curriculum or related services is not being modified or discussed in the meeting.” When the meeting involves a modification to or discussion of the member’s area of the curriculum or related services, the member may be excused if the parent and LEA consent to the excusal and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Parental consent to any excusal must be in writing.

M.L. v. Federal Way Sch. Dist., 42 IDELR 57, 387 F.3d 1101 (9th Cir. 2004), cert. denied, 545 U.S. 1128 (2005). The failure of the school district to have a regular education teacher at the IEP meeting for an autistic and intellectually impaired student was sufficient to find a denial of FAPE. The District’s omission was a “critical structural defect” because there was a possibility of placement in an integrated classroom and the IEP recommended might have been different had the general education teacher been involved. When the general education teacher was unable to attend, District should have cancelled the meeting and not proceeded without the benefit of input from the general education teacher regarding curriculum and environment there.

Arlington Cent. Sch. Dist. v. D.K. and K.K., 37 IDELR 277 (S.D.N.Y. 2002). The absence of a general education teacher at an IEP meeting for LD student denied him FAPE and supported award of tuition reimbursement for private placement. The
presence of the teacher at the meeting might have illuminated the extent to which visual instruction was offered as a part of the district’s mainstream curriculum and the likelihood that he could ever be integrated successfully into it general education program.

Pitchford v. Salem-Keizer Sch. Dist. No. 24J, 35 IDELR 126, 155 F. Supp.2d 1213 (D. Ore. 2001). IEPs for the 1996-97, 1998-99 and 1999-2000 school years were reasonably calculated to confer educational benefit to child with autism. However, 1997-98 IEP was sufficiently flawed to find a denial of FAPE because no district representative attended the meeting who was “qualified to provide or supervise the provision of special education” services. The absence of the district representative forced the student’s parents to accept whatever information was given to them by the student’s teacher. In addition, the parents had no other individual there who could address any concerns they might have had involving their child’s program, including the teacher’s style of teaching and his areas of emphasis or lack thereof, or the availability of other resources or programs within the district. In addition, the student “was likely denied educational opportunity that could have resulted from a full consideration of available resources in relation to M.’s skills in the development of her second grade IEP.”

F. IEP recommendations/decisions must be based upon the individual needs and circumstances of the child and nothing else.

L.M.P. v. School Bd. of Broward Co., 64 IDELR 66 (S.D. Fla. 2014). A school district employee’s statement at a meeting over 10 years ago that the school district did not provide ABA therapy as an intervention service suggests that the district predetermined IEPs that were proposed for 3-year-old triplets with autism. Thus, the parents’ action seeking money damages under Section 504 may proceed where an inference could be made that it was aware of its obligations but acted with “deliberate indifference to the appropriateness of the education a child will receive as a result of the IEP process when no consideration is given to the options other than predetermined ones.” In addition, the parents’ IDEA claims may proceed, as the court needs more information about the nature of ABA therapy.

A.M v. Fairbanks North Star Borough Sch. Dist., 46 IDELR 191 (D. Alaska 2006). Where district coordinator for intensive preschool services told parents that a full day intensive program “was not developmentally appropriate” for preschoolers, with or without autism, this was not considered a “blanket policy” because there was testimony that if a full-day program had been deemed necessary by the IEP team, it could have been implemented. The parents withdrew the autistic student from the public school program before IEP discussions could be completed.

Deal v. Hamilton Co. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because District had, at that point, pre-decided the student’s program and services. Thus, District’s predetermination violation caused student substantive
harm and therefore denied him FAPE. It appeared that District had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant “school system personnel thus did not have open minds and were not willing to consider the provision of such a program,” despite the student’s demonstrated success under it.

T.H. v. Board of Educ. of Palantine Community Consolidated Sch. Dist., 30 IDELR 764 (N.D. Ill. 1999). School district required to fund an ABA/DTT in-home program after ALJ determined that district recommended placement based upon availability of services, not the child’s needs.

Letter to Anonymous, 30 IDELR 705 (OSEP 1998). Lack of sufficient resources and personnel is not a proper justification for the failure to provide FAPE.

LeConte, 211 EHLR 146 (OSEP 1979). The availability of programs and services within the school district is not a valid consideration in the drafting of an IEP.

G. Just because a doctor says homebound or a parent wants it doesn’t mean it is appropriate!

A recurring mantra – just because a doctor says it or a parent wants it does not make it so! It frequently arises when a doctor “prescribes” or a parent wants homebound services for a student.

Courts and hearing officers have held that home placements based solely on parent preference are not appropriate. Moreover, the fact that a parent submits a letter from a physician stating that a student requires home instruction does not preclude a school Team from considering a less restrictive setting based on the LRE where the child can receive FAPE.

A.K. v. Gwinnett Co. Sch. Dist., 62 IDELR 253 (11th Cir.), cert. denied, 114 LRP 43723, 135 S. Ct. 78 (2014). Parents’ wish to administer nonprescription nutritional supplements to an 11 year-old girl with multiple, severe disabilities during the school day did not outweigh the student’s need to interact with same-age peers.

Stamps v. Gwinnett Co. Sch. Dist., 59 IDELR 1 (11th Cir.) (unpublished), cert. denied, 112 LRP 54652, 133 S. Ct. 576 (2012). Parent’s fear that three siblings with an immune disorder would become sick at school did not relieve the district of its responsibility to offer FAPE in the LRE.

Doctor’s generalized impression that public schools were “full of sick kids” did not demonstrate that a student who took immunosuppressive drugs for a liver transplant required home instruction.

Parents’ concerns that a student might have a seizure during the 2.4 mile trip to school in a small school bus did not demonstrate that homebound placement was necessary.

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school costs based on the district’s denial of FAPE and the student’s progress in the unilateral private placement.

Board of Educ. of Albuquerque Pub. Sch. v. Maez, 70 IDELR 157, 2017 WL 3278945 (D. N.M. 2017 (unpublished). Administrative hearing officer’s decision that a school district denied FAPE to a nonverbal sixth grader with autism and global developmental delays is reversed. The student’s IEP was appropriately ambitious in light of evidence that the student required a significant amount of time to acquire new skills, and the IEP, which included goals such as sorting objects by color and size and using pictures to answer questions, would enable the student to make progress that was appropriate in light of his circumstances. The evidence showed that the combined effect of the student’s autism and developmental delays significantly impeded his learning. “The record is brimming with evidence that [the student] takes a tremendous amount of time to make progress toward even the smallest goals.” Moreover, the student made progress. Not only was he able to sit and work in the classroom for up to 45 minutes at a time -- something he could not do at the beginning of the school year -- but he was also learning to use a visual schedule. His teacher testified that he was able to pay attention and sort objects into their correct boxes with minimal prompting. The student also was learning how to choose between two pictures in the picture exchange communication system in order to express his wants and needs. Although the parents argued that the district had low expectations for the student, the court held that the IEP was appropriate in light of the student’s unique circumstances.

C.M. v. Warren Indep. Sch. Dist., 69 IDELR 282 (E.D. Tex. 2017) (unpublished). Student’s severe behavioral problems, including noncompliance, eloping and physical aggression toward staff and other students, prevented him from receiving instruction in the general education classroom. Thus, the court will not focus upon the student’s academic abilities and instead look to whether the student’s IEP was reasonably calculated to enable him to make progress in light of his circumstances. Here, the student’s IEP was designed appropriately and, although staff had to restrain the student 5 times when he was aggressive or violent, the teacher testified that his behavior improved significantly after the district developed and implemented a BIP. Further, the teacher testified that the student made some progress in English, reading, math and social studies. This progress is appropriate in light of the student’s circumstances where his own behavior so significantly impedes his access to general education and placement in the self-contained classroom where he received one-to-one instruction was his LRE. Not only is the placement necessary to address the student’s severe behavioral problems, the BIP provided him the opportunity to earn time with general education peers when he behaved appropriately.

E.G. v. Great Valley Sch. Dist., 70 IDELR 3 (E.D. Pa. 2017). Part of the hearing officer’s order is upheld in favor of the district, even though the reading progress of a fifth grade student with a severe learning disability is “maddeningly slow.” While the parents allege that the IEP for the 2015-16 school year failed to address their child’s reading deficits and that he had achieved little progress in reading, the IHO correctly found that the reading programs outlined in the IEP was individualized for the student’s
intensive needs. The evidence showed that the reading program taught the student new reading skills and techniques that he regularly applied in the classroom. Although the parents argued that the student was still reading at a second-grade level, this did not render the IEP inappropriate. In Endrew F., improvement of the student’s reading accuracy was appropriate given the severity of his learning disability. In addition, several recent evaluation reports indicated that the student was making progress toward all of the annual academic goals listed in his IEP. The significance of the student’s ability to generalize Wilson reading skills across all setting strongly indicates that the instruction is working.

K.K. v. Alta Loma Sch. Dist., 60 IDELR 159 (C.D. Cal. 2013). While the parents of an SLD grade schooler may have been dissatisfied with the progress their daughter had made, they are not entitled to reimbursement for the cost of a private Lindamood-Bell program. An IEP offers meaningful educational benefit if it is tailored to the student’s unique needs and is reasonably calculated to produce more than de minimis benefits when gauged against the student’s abilities. Testimony for district employees showed that the IEP team considered detailed evaluations of the student’s skills and limitations and used the information from those evaluations to determine her goals and services. With respect to progress, the student made advancements in the third grade in writing paragraphs on her own and made progress in fluency and reading comprehension, while meeting many third grade standards. Although not progressing as quickly as her nondisabled peers, the student’s slow-but-steady progress showed that her IEPs offered meaningful benefit to her.

Houston Indep. Sch. Dist. v. Bobby R., 31 IDELR 185, 200 F.3d 341 (5th Cir.), cert. denied, 111 LRP 30885, 531 U.S. 817 (2000). While an IEP must be “likely to produce progress, not regression or trivial educational advancement,” the progress and development of a child with a disability should be measured not in relation to the rest of the regular education class, but with respect to the individual student. Declining percentile scores on standardized testing does not represent a lack of educational benefit. Rather, declining scores show only that the student’s disability prevents the student from maintaining the same level of academic progress achieved by his nondisabled peers. The district court was correct to focus on the fact that the student’s test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years with the district.

1. IEPs should not be overly specific or include unnecessary details or “promises.”

The IDEA does not give parents the right to dictate methodologies or staff used to implement a student’s IEP or 504 Plan. That includes the parents’ preference for a particular nurse or other care provider for a student. As long as the district’s chosen program and service provider can meet the student’s unique needs, the district selects the program or provider for a student. Since those are not IEP Team decisions, they are details that should not be specified in the IEP.
Specific information pertaining to school health or school nurse services may be more involved than can or should be specified in the IEP. In those circumstances, the IEP should reference current doctor’s orders and the student’s IHP on file in the school health office as a general description of the school health or school nurse services needed. The student’s IHP should detail the scope of school health or school nurse services to be provided.

Swanson v. Yuba City Sch. Dist., 68 IDELR 215 (E.D. Cal. 2016). The district’s failure to use the parent’s preferred nurse was not an IDEA violation. Clearly, the record shows that the district’s chosen nurse has the experience, training and credentialing required to provide the student’s diabetic care. In addition to having 23 years of experience, the school’s registered nurse had extensive experience in assessing and providing treatment to students with diabetes, including nonverbal students, students with autism and students with more serious forms of diabetes. In addition, the school’s nurse was directly familiar with the student, his means of communication, his complex diabetic requirements, and how to care for his rapidly changing diabetic needs.

Paoella v. District of Columbia, 46 IDELR 271 (D.C. Cir. 2006). There is no requirement that the student’s precise daily schedule be developed when determining an appropriate placement.

Kling v. Mentor Pub. Sch. Dist., 136 F.Supp.2d 744 (N.D. Ohio 2001). Interscholastic sports or other extracurricular activities may be related services under the IDEA, even though not expressly included within the definition of “recreation.” District ordered to revise student’s IEP to contain an interscholastic sports component and to place him on the high school track and cross country teams, even though district contended it would risk sanctions from the state athletic association because the 19-year old hearing impaired student with CP was too old. The local and state hearing officers had ruled that it was necessary for the student to participate for the development of his communication skills and to address his social and psychological needs.

Lachman v. Illinois St. Bd. of Educ., 852 F.2d 290 (7th Cir. 1988). Parents, no matter how well-motivated, do not have the right to choose a particular methodology to be used.

Letter to Hall, 21 IDELR 58 (OSERS 1994). Part B does not expressly mandate a particular teacher, materials to be used, or instructional methods to be used in the student’s IEP.

Virginia Dept. of Educ., 257 EHLR 658 (OCR 1985). IEPs are not expected to be so detailed as to be substitutes for lesson plans.
J. **BUT … the IEP must set forth a specific offer of placement and set out services and amount of services with sufficient clarity.**

IEP Teams must be sure to finalize placement recommendations, particularly by the beginning of the school year. Also, services and the amount of services offered should be set forth in the IEP in a fashion that is specific enough for parents to have a clear understanding of the level of commitment of services on the part of the school system. This will help to avoid misunderstandings.

**N.S. v. District of Columbia**, 54 IDELR 188 (D. D.C. 2010). Where the district’s proposed IEP did not contain present levels of performance or supplementary aids and services that would be provided in the regular setting and failed to provide for pull-out instruction, the student was denied FAPE and funding for private schooling is warranted. Although district witnesses testified that pull-out services would have been provided if needed, neither the IEP nor the IEP team meeting notes reflected that this was discussed and no clear offer of services was made. Thus, the parents are entitled to reimbursement for the cost of a unilateral private placement.

**Knable v. Bexley City Sch. Dist.,** 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the “equivalent of providing the parents a meaningful role in the process of formulating an IEP.” Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents’ refusal to agree with the district’s placement recommendations did not excuse the district’s failure to conduct an IEP conference.

**Glendale Unified Sch. Dist. v. Almasi,** 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents’ expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.

**Letter to Gregory,** 17 EHLR 1180 (OSEP 1991). The amount of time for related services must be stated with sufficient clarity to be understood by all persons involved in the development and implementation of the IEP.

**Letter to Akron,** 17 EHLR 287 (OSEP 1990). While the regulation does not explicitly require an IEP to state the amount of services with respect to the specific number of hours or minutes, the IEP must indicate the amount of services in a manner appropriate to the types of services and in a manner sufficiently clear to all persons involved in developing and implementing the IEP. The use of a range of times would not be sufficient to indicate the school’s commitment of resources.
K. Whether a student who requires school health or school nurse services can be removed from the classroom when those are provided is an IEP Team decision relating to the student’s LRE, taking into account a number of factors.

LRE issues primarily focus on where the student receives special education services during the course of the school day: in a general education classroom or in some type of special education classroom, such as a resource room or self-contained classroom. Still, it is important for the IEP Team to consider the appropriate setting for the provision of school health and school nurse services in IEP development, balancing considerations such as student privacy, potential disruption to the class, maximization of social engagement with typical peers and minimization of loss of instruction time. Deciding whether a student may remain in his classroom while undergoing a health-related procedure may be difficult, but it must be made by an appropriate team based upon individualized considerations and circumstances.

Bloomfield Township Bd. of Educ., 109 LRP 35236 (SEA NJ 2008). Hearing officer found that school district denied student FAPE in the LRE by requiring him to leave the classroom in order to complete blood sugar testing, when the testing could have been conducted in the classroom with assistance of a trained adult aide or the student’s one-on-one aide.

Wyomissing Area Sch. Dist., 109 LRP 21661 (SEA PA 2007). Hearing officer found that removal of student from regular classroom for tracheal suctioning violated the LRE requirement, reasoning that there had been no complaints about the student’s suctioning in the classroom and other students’ academic performance had not been affected by it.

Special Sch. Dist. No. 6, South Saint Paul, 23 IDELR 119 (SEA MN 1994). School district’s decision to removal student with severe multiple disabilities from classroom for tracheal suctioning was upheld. Removal to health services office with suctioning performed by school nurse was justified based on several factors: the susceptibility to infection in the classroom; the loud sound of the suctioning machine causing distraction to students who had other health conditions; and the health services office was the safest and most effective place for performing the procedures. The extent of the student’s medical condition supported his need for a registered nurse to perform the procedure.

L. If a parent requests a particular service or placement and there is disagreement about what is necessary, the IEP Team can seek an independent medical evaluation to try to resolve the conflict or to get additional information.

In order to meet the needs of medically fragile students and to determine the related services that are necessary, the IEP Team may seek an independent medical evaluation of the student to resolve any conflicting or incomplete information about a student’s condition. See, e.g., Shelby S. v. Conroe Indep. Sch. Dist., 45 IDELR 269 (5th Cir. 2006), cert. denied, 549 U.S. 1111 (2007).
M. **School districts must develop a plan for the provision of services in the IEP.**

The failure to implement a student’s IEP is the most serious substantive disaster that can occur. Frequently, failure to implement the IEP results from the IEP Team’s failure to appropriately prepare an “action plan” for ensuring that services are provided in a timely and appropriate fashion. The IDEA regulations at 34 C.F.R. § 300.323(d) require public agencies to ensure that each regular teacher, special education teacher, related services provider, and any other service provider who is responsible for the implementation of a child’s IEP, is informed of his or her specific responsibilities related to implementing the child’s IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the child’s IEP. In addition, services are to be provided as soon as possible after the development of the IEP.

VIII. **SECTION 504/ADA TIPS**

A. **School districts must have Section 504 procedures in place and train school personnel on them.**

Section 504 is misunderstood in terms of its application, its scope and its requirements. School districts must have Section 504 procedures that are compliant with the ADA and its most current amendments (the ADAAA), and all school personnel require training to ensure everyone understands the legal requirements of Section 504 as they relate to the education of children with disabilities.

B. **The definition of a “handicapped” person under the Section 504 regulations and of a person with a “disability” under the ADA is very broad.**

The definition of a “handicapped” person under the Section 504 regulations and of a person with a disability under the ADA is broader than the definition of a “student with a disability” under the IDEA. Therefore, there may be students with disabilities that are protected under Section 504/the ADA against discrimination and found to be in need of some special services that do not qualify for “special education” under the IDEA.

1. **Definition of “handicapped person”**

   A person is “handicapped” under Section 504 if he or she:

   a. Has a physical or mental impairment which substantially limits one or more major life activities;
   
   b. Has a record of such an impairment; or
   
   c. Is regarded as having such an impairment.

   34 C.F.R. § 104.3(j)(1).
2. Definition of “physical or mental impairment”

   a. Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

   b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

34 C.F.R. § 104.3(j)(2).

3. Definition of “major life activities”

   Under the 504 regulations, “major life activities” include functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. The ADAAA expanded the list of functions that are major life activities to include eating, standing, lifting, bending, reading, concentrating, thinking and sleeping. Although these “major life activities” are specifically listed, the list is clearly not exhaustive.

Virtually anything could be considered a “major life activity” under Section 504. See, e.g., T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997) [The “ability to control one’s behavior” is a major life activity].

4. Definition of “substantially limits:

   There is no definition of “substantially limits” in the 504 regulations. While OCR has attempted to informally define “substantially limits” on several occasions, such attempts have not been of much help to schools. See e.g., Letter to McKethan, 23 IDELR 504 (OCR 1995) [neither the regulations nor OCR have defined the word “substantially” and the decision as to whether a particular impairment “substantially limits” a major life activity for a child is a determination to be made by a school district, and not OCR]; Pinellas Co. Sch. Dist., 20 IDELR 561 (OCR 1993) [the term “substantially limits” has been interpreted to require an “important and material” limitation. One of the purposes of Section 504 and Title II of the ADA is to improve opportunities for individuals with disabilities, who because of a generally acknowledged disabling condition, have been excluded from or experienced significant difficulty in obtaining the necessary education to be self-sufficient. The term “substantially limits” must be interpreted within that context].

   In some “rules of construction” provided by the ADA regulations, it is noted by the Department of Justice (DOJ) that the primary object of attention in cases brought under Title II of the ADA should be upon whether public entities have complied with their obligations and whether discrimination has occurred, not
upon the extent to which an individual’s impairment substantially limits a major life activity. Accordingly, the “threshold issue” of whether an impairment substantially limits a major life activity should not demand “extensive analysis.

C. “Learning” is not the only “major life activity” to consider when determining whether a student is disabled under Section 504.

The ADA regulations provide that an impairment that substantially limits one major life activity does not need to limit other major life activities in order to be considered a substantially limiting impairment. 28 C.F.R. § 35.108(d)(1)(i)-(iii). In applying this principle, the DOJ in its commentary to the regulations provides the specific example of an individual seeking to establish coverage under the ADA who does not need to show a substantial limitation in the ability to learn if that individual is substantially limited in another major life activity, such as walking. 81 FR 53229 (2016). Therefore, a student with diabetes would not have to demonstrate a substantial limitation in the ability to learn to be considered an individual with a disability under ADA/504, if that student is substantially limited in, for example, the ability to eat or digest food.

Oxnard (CA) Union High Sch. Dist., 55 IDELR 21 (OCR 2009). School district denied Section 504 eligibility to a student with a gastrointestinal disorder due to student earning passing grades. The student had missed 35 school days during the previous school year as a result of the gastrointestinal disorder. The evaluation data indicated that as a result of the medical condition the student required accommodations such as excusal of tardiness and a reasonable period to make up missed assignments. OCR concluded that the district had erred by failing to consider other “major life impairments” other than learning in making its eligibility determination. OCR noted that major life activities for purposes of Section 504 include major bodily functions such as digestive and bowel functions.

See also, Memphis (MI) Community Sch., 54 IDELR 61 (OCR 2009).

See also, North Royalton (OH) City Sch. Dist., 52 IDELR 203 (OCR 2009).

D. School teams cannot consider the ameliorative effects of mitigating measures when determining whether a student has a disability under Section 504.

When determining whether a student with health care needs is an individual with a disability under Section 504, the 504 Team cannot consider the ameliorative effects of any mitigating measures that the student may be using or receiving. FAQs about Section 504 and the Education of Children with Disabilities (2009), Question 21. Thus, when deciding whether a student with health care issues is disabled under Section 504, the Team must determine whether there is a physical or mental impairment that substantially limits a major life activity without consideration of or regard to the ameliorative effects of any mitigating measures.
For example, where a student is taking medication to address ADHD, the determination of “substantial limitation” and whether the student is disabled must be made based upon evidence (if it exists) of how the student performs major life activities when not on medication. Thus, the Team cannot take the position that the student is not an individual with a disability under Section 504 because the student has a “correctable” condition or one that can be resolved through the use of mitigating measures, such as medication.

The ADA regulations also set forth examples of “mitigating measures.” The list includes, but is not limited to: medication; medical supplies; equipment; appliances; low-vision devices that magnify, enhance, or otherwise augment a visual image, but not ordinary eyeglasses or contact lenses; prosthetics, including limbs and devices; hearing aids; cochlear implants or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable modifications or auxiliary aids or services; learned behavioral or adaptive neurological modifications; psychotherapy, behavioral therapy or physical therapy. 28 C.F.R. § 35.108(d)(4).

Obviously, mitigating measures would include school health or nursing services. Thus, in determining whether a student has a disability under Section 504, the determination would be made based upon how the student would perform major life activities without the assistance of school health or nursing services.

According to OCR, an IHP is clearly a “mitigating measure.” North Royalton (OH) City Sch. Dist., 52 IDELR 203 (OCR 2009).

E. **Even health conditions that are seasonal or episodic in nature can be considered a disability under Section 504’s definition.**

A student may be one with a disability under Section 504 based upon a condition that is seasonal or episodic, such as an allergy. The ADA Amendments specifically provide that an individual with such a condition would be considered disabled if the condition would substantially limit a major life activity when active. 42 U.S.C. 12102(4)(D). The same goes for conditions that are in remission, such as cancer.

F. **Every student with a health care need is not automatically covered by Section 504, but most probably will fall under the definition of an individual with a disability.**

While not all students with some type of health need would automatically be considered as having a disability for Section 504 purposes, most students who have a health care need, particularly those that require formal and ongoing management at school, will more than likely fit the definition of “individual with a disability” under Section 504. This is because the definition of “disability” is much broader under Section 504 (and its sister statute, the ADA) than it is under the IDEA. The Office for Civil Rights (OCR), the federal agency that enforces Section 504, interprets the definition of “individual with a disability” very broadly.
All this means, however, is that the child cannot be discriminated against solely on the basis of the disability. It does not mean that the child needs a Section 504 Plan. That is a separate determination.

G. Not every student with an IHP is required to also have a Section 504 Plan.

After making a disability determination that finds that a student has a disability under Section 504’s definition, the 504 Team must then make a determination as to whether the student needs any special educational or related services under Section 504 in order to receive “504 FAPE.” That means, according to the Section 504 FAPE regulations, that a 504 Team must determine whether additional educational services are necessary in order to meet the student’s educational needs “as adequately as the educational needs of non-disabled students are met.” 34 C.F.R. §104.33(b). Having a disability under Section 504 and needing a Section 504 Plan are separate issues. Also, in deciding whether a student with an IHP needs other services documented in a 504 Plan, the ameliorative effects of the services in the student’s IHP can be considered.

For example, a student with an IHP to address a peanut allergy who makes excellent grades, performs very well on standardized assessments and has no behavioral problems may not be in need of a 504 Plan, but still is an “individual with a disability” who would be protected against discrimination on the basis of his peanut allergy. Still, another student with a severe peanut allergy may need special accommodations during testing or otherwise in the classroom environment and need a 504 Plan that sets out those educational/instructional accommodations. If so, then a 504 Team will document those services in a Section 504 Plan in addition to the services contained in an IHP.

H. According to OCR, the development of an IHP is not enough to satisfy all of Section 504’s requirements.

It used to be the general thinking that the development of an IHP for a child with a health condition would satisfy all of the requirements of Section 504. However, OCR currently expects that a “504 evaluation” will be done by a “504 Team” that will formally determine whether the child with an IHP has a disability—in other words, does this student have a physical or mental impairment that substantially limits a major life activity?

If a Team finds that a student has a disability under Section 504, the Team is to ensure that the school recognizes that the child has a disability and cannot be discriminated against on the basis of that disability. For instance, a Principal could not declare a school policy that barred students with IHPs from attending overnight field trips because that would be prohibited disability discrimination under Section 504.

In a 2012 Dear Colleague Letter, OCR clarified this, noting that, while a health condition may not be enough, in itself, to constitute a disability under Section 504, the critical question is whether, in developing a Health Plan, the district met the evaluation, placement and procedural safeguards requirements of Section 504. For example, before the 2008
ADA Amendments, a student with a peanut allergy may not have been officially considered a person with a disability because of the use of mitigating measures to minimize the risk of exposure to peanut products at school. The student’s school may have created and implemented a Health Plan that included things like hand washing procedures and the use of an EpiPen without necessarily going through the formal 504 disability determination process. Now, OCR expects that this formal process will be followed and that 504 Teams will evaluate whether a disability exists without considering amelioration by the measures in the Health Plan. 58 IDELR 79 (OCR 2012), Question 13.

So, according to OCR, schools cannot take the position that “the IHP is enough.” Rather, OCR expects a 504 Team to formally make a disability determination (“evaluation”) for students with an IHP and ensure that the parents of students with IHPs are provided with their Procedural Safeguards under Section 504 (the “504 Rights”) so that they are aware of the right to file a grievance regarding discrimination or even to file for an impartial due process hearing, where applicable.

Oran (MO) R-III Dist., 114 LRP 41265 (OCR 2014). District ordered to resolve OCR complaint by “evaluating” each student who has an IHP for Section 504 disability.

Opelika City (AL) Sch. Dist., 111 LRP 47376 (OCR 2011). The existence of an IHP from a transfer student’s prior school did not justify a 19-month delay in the student’s 504 evaluation.

Tyler (TX) Indep. Sch. Dist., 56 IDELR 24 (OCR 2010). District failed to “evaluate” an elementary school student with diabetes in a timely manner.

In light of this, some school districts – particularly those with a great number of students with IHPs – treat all students with IHPs as students with disabilities for Section 504 purposes, rather than convening many Team meetings to formally decide this. In these situations, the formal recognition of the existence of a disability and 504 Rights are provided during the development and review of the IHP for the child. However, if it is expected that the child needs more than an IHP in order to meet the child’s educational needs as adequately as those of nondisabled children are met, the child would be referred for a formal 504 or IDEA evaluation, as applicable.

I. Students with disabilities generally cannot be excluded from participation in school field trips.

As a general matter, school districts must provide students with disabilities the related aids or services they need in order to participate in all school programs, including field trips and other school activities. See, e.g., South Lyon (MI) Comm. Schs., 54 IDELR 204 (OCR 2009); Prince George’s Co. (MD) Pub. Schs., 64 IDELR 24 (OCR 2014). On an individualized basis, however, a district may prohibit a student from attending a field trip or other function if the student’s participation would present an unreasonable health risk to himself or others. See, e.g., North Hunterdon/Voorhees Reg’l (NJ) High Sch. Dist., 25 IDELR 165 (OCR 1996) [student with CP and epilepsy had experienced
seizures on the day of the field trip and staff was concerned about his safety]. Exclusion will only be appropriate if there are no accommodations that could ensure the student’s safety or equal participation. See Donegal (PA) Sch. Dist., 66 IDELR 231 (OCR 2015) [district violated 504/ADA when it conditioned student’s participation in class field trips upon his parent’s availability to “monitor his safety” instead of providing him with accommodations that would reduce his exposure to nut allergens, including providing him with nut-free food options and assigning him an aide who could administer the EpiPen].

According to OCR, decisions about a student’s ability to participate in a field trip must be made by a group of people who are knowledgeable about the child and the child’s condition. See, e.g., Mattuck-Cutchogue (NY) Union Free Sch. Dist., 113 LRP 27884 (OCR 2013) [principal who believed field trip to D.C. was too much for middle schooler with anxiety to handle is not entitled to make that decision on his own, and district should have convened 504 Team meeting to address the issue]. School nurses and other school personnel must collaborate in making decisions and good professional judgments with respect to these kinds of questions.

J. Schools cannot require parents to attend field trips in order to accompany their children with health conditions.

OCR has repeatedly concluded that a school district cannot require the parent of a student with a disability to accompany the student on a field trip when the same obligation is not imposed upon the parents of nondisabled students.

Anderson Co. (TN) Sch. Dist., 66 IDELR 52 (OCR 2015). District ordered to conduct annual training for all staff members regarding obligation to fully implement 504 plans and not require parents or guardians to come to schools or participate in field trips to provide services.

Clovis (CA) Unif. Sch. Dist., 52 IDELR 167 (OCR 2009). District denied equal participation in a multi-day Sierra Outdoor School Program by conditioning students’ participation on the parents’ provision of medical services during the trip or authorizing other parents to provide the services.

See also, Fairfax Co. (VA) Pub. Schs., 112 LRP 41258 (OCR 2012).

See also, South Lyon (MI) Comm. Schs., 54 IDELR 204 (OCR 2009).

Although a district may not require a parent to attend, it could allow a parent to accompany a student with a disability on a field trip, if a parent asked to do so. The parent should be informed, however, that his/her attendance is not required for the student to participate.
K. “Otherwise qualified” students with disabilities cannot be excluded from athletics.

School districts must take steps necessary to ensure that “otherwise qualified” students with disabilities are provided with opportunities to participate in athletics, as well as other nonacademic or extracurricular activities, that are equal to those of nondisabled students. 34 CFR 104.37(a)(1). As a general rule, however, these students must still comply with the behavioral, academic and performance standards of nondisabled students.

School districts must provide reasonable modifications/accommodations to provide an equal opportunity for participation to otherwise qualified students. School districts may deny participation in an athletic program, however, if the district can show that the modification that is necessary would be a “fundamental alteration” to the athletic program, which is likely if it changes an essential aspect of the activity or game that would be unacceptable (such as adding an extra base in a baseball game).

S.S. v. Whitesboro Cent. Sch. Dist., 58 IDELR 99 (N.D.N.Y. 2012). Parents’ ADA and 504 damages claims on behalf of their daughter are dismissed, as the parents’ request that the student be allowed to leave the pool during swim practices and competitions to calm her nerves whenever she suffered a panic attack is unreasonable. The parents’ allegation that the district should have allowed their daughter to leave the pool for intermediate periods of time, and on unannounced occasions, without being dismissed from the team is rejected. “There is no reasonable accommodation that a swim team coach could make for an athlete who is suddenly and sporadically afraid of the water and thus has to exit the pool during practices and competitions.” The ability to enter and stay in the pool is an essential requirement of being a swim team member and allowing the student to do otherwise would have fundamentally altered the nature of the swim team program.

Dear Colleague Letter, 60 IDELR 167 (OCR 2013). Because extracurricular athletics offer benefits such as socialization, fitness, and teamwork and leadership skills, districts must make more of an effort to ensure that students with disabilities have an equal opportunity to participate in athletic programs. Districts should not act on the basis of generalizations and stereotypes about a particular disability. While students with disabilities do not have a right to join a particular team or play in every game, decisions about participation must be based on the same nondiscriminatory criteria applied to all prospective players. In addition, districts have the obligation to offer reasonable modifications so that students with disabilities may participate. If a particular modification is necessary, the district must offer it unless doing so would fundamentally alter the nature of the activity or give the student with a disability an unfair advantage. For example, using a visual cue to signal the start of the 200-meter dash would not fundamentally alter a track meet or give a student with a hearing impairment an unfair advantage over other runners. If a district does determine that a requested modification is unreasonable, it must consider whether the student could participate with a different modification or accommodation. While some students might be unable to participate in traditional athletic activities, even with modifications and supports, districts should offer
athletic opportunities that are separate or different from those offered to nondisabled students in these instances. Such opportunities might include disability-specific team sports, such as wheelchair basketball, or teams that allow students with disabilities to play alongside nondisabled peers. Districts should be flexible and creative when developing alternative programs for students with disabilities.

L. A student cannot be excluded from participation in nonacademic and extracurricular activities just because he is on homebound placement.

OCR has consistently found that students with disabilities receiving home instruction or homebound services have the right to participate in district-sponsored activities to the extent they are able to do so. See, e.g., Kanawha Co. (WV) Pub. Schs., 112 LRP 7430 (OCR 2011); Hernando C. (FL) Sch. Dist., 56 IDELR 142 (OCR 2010); and Logan Co. (WV) Schs., 55 IDELR 297 (OCR 2010). In addition, a few court rulings and administrative decisions have supported the right of a homebound student to participate in extracurricular activities.

Mowery v. Logan Co. Bd. of Educ., 58 IDELR 192 (S.D. W.Va. 2012). Homebound high school student with a hereditary metabolic disorder stated valid claims for disability discrimination and disparate treatment under Section 1983, 504 and ADA based upon the district’s refusal to allow him to attend a senior class dance and other events because he was “too sick” to attend school. Based upon the allegation that he was often told, “if you’re too sick to come to school, you’re too sick to attend these events,” it appeared that the district treated him differently than other high schoolers on the basis of disability. In addition, student’s claims dating back to his freshman year may proceed, because the student’s alleged exclusion from senior class events could be viewed as part of a pattern of exclusion for discrimination and Section 1983 purposes.

Sch. Dist. of Philadelphia, 111 LRP 51028 (SEA PA 2011). District violated Section 504 by excluding homebound student with depression, anxiety and PTSD from graduation ceremony.

M. Access to snacks is considered a reasonable accommodation for students with diabetes.

When a student with diabetes must have a snack during the day, the school district must allow the student time to obtain the needed food. OCR has found that school districts must permit a student with diabetes who needs snacks to access them whenever and wherever necessary, including on the school bus. In some circumstances, a district could be required to assign an aide to monitor the provision of snacks as a reasonable accommodation.

Pleasant Hill R-III (MO) Sch. Dist., 116 LRP 5620 (OCR 2015). District entered into resolution agreement with OCR in response to complaint that it required diabetic student to eat his snack in the nurse’s office, rather than in his classroom.
Cobb Co. (GA) Sch. Dist., 63 IDELR 297 (OCR 2014). Finding insufficient evidence of district’s noncompliance with Section 504, where evidence showed that snacks were available and the student was allowed to have snacks when necessary.

Lowell (MA) Pub. Schs., 63 IDELR 171 (OCR 2014). District resolved allegation of 504 violation by agreeing to provide snacks to the student’s classroom and stock a “fanny pack” with snacks in the classroom in order to address the student’s need for ready access to food and drink in the event of school lockdown procedures.

Colorado Springs (CO) Sch. Dist., 65 IDELR 112 (OCR 2014). District resolved discrimination claim by developing a 504 plan with a provision that allowed the student to eat snacks at school when needed.

Davenport (IA) Comm. Sch. Dist., 59 IDELR 112 (OCR 2012). No Section 504 violation where the district’s records documented the student’s requests for, and receipt of, access to her juice and snacks.

Eastmont (WA) Sch. Dist. No. 206, 44 IDELR 258 (OCR 2005). District complied with Section 504 with respect to implementation of the snack provision of the 504 plan.

Springboro (OH) Comm. City Sch. Dist., 39 IDELR 41 (OCR 2003). District acknowledged that relaxation of snack policies is a “related aid and service” under Section 504, and, as such, the team would consider it when determining the student’s plan.

Jamestown Area (PA) Sch. Dist., 37 IDELR 260 (OCR 2002). District agreed, as part of resolution of OCR complaint, to send a memorandum to its bus company, advising its bus drivers that diabetic student must be permitted snacks on the bus.

Eureka (CA) City Sch., 23 IDELR 238 (OCR 1995). District achieved compliance with Section 504 by, in part, sending a memo to the student’s teachers advising them that the student needs to be excused during the day to obtain snacks.

Renton (WA) Sch. Dist., 21 IDELR 859 (OCR 1994). Insufficient evidence of 504 violation where district hired an aide to assist a student with Down Syndrome and diabetes with his snack schedule and diabetes monitoring.

N. **Students with allergies are entitled to reasonable accommodations to be safe at school.**

There are all kinds of allergies that schools may need to accommodate, from environmental and food allergies to chemical sensitivities. Generally, “reasonable accommodations” must be made, including things like the following:
• using latex-free equipment and requiring classmates to wash their hands after coming into contact with latex (Middleton Sch. Dist., 46 IDELR 298 (SEA NH 2006);
• allowing a student to carry an EpiPen (Franklin Co. (TN) Pub. Schs., 52 IDELR 143 (OCR 2009);
• banning peanuts and peanut products from a student’s classroom (South Windsor (CT) Pub. Schs., 49 IDELR 108 (OCR 2007);
• agreeing not to use latex balloons in class (Fayette Co. (WV) Schs., 62 IDELR 64 (OCR 2013);
• installing air purifiers, removing plants and conducting air-quality sample tests for mold (North Penn (PA) Sch. Dist., 53 IDELR 336 (OCR 2009);
• cleaning of surfaces at school (Upper Dublin Sch. Dist., 8 ECLPR 37 (SEA PA 2010); and
• placing hand-washing stations outside the student’s classroom (Encinitas (CA) Union Sch. Dist., 114 LRP 23545 (OCR 2014).

OCR generally interprets “reasonable accommodations/modifications” to mean, among other things, that schools must take steps to make school environments as safe for students with disabilities as they are for nondisabled students. See Virginia Beach (VA) City Pub. Schs., 59 IDELR 54 (OCR 2012); and Washington (NC) Montessori Pub. Charter Sch., 60 IDELR 79 (OCR 2012).

Courts and hearing officers generally focus the inquiry on whether a requested accommodation is actually reasonable. If a requested accommodation is unreasonable or unnecessary, a school district is not required to provide it. See, e.g., Smith v. Tangipahoa Parish Sch. Dist., 46 IDELR 282 (E.D. La. 2006). School district was not required to ban horses from the school’s campus, wipe down equipment or spray down an adjoining street with water or bleach to accommodate a student with an allergy to horses. Cases finding requested accommodations from schools unreasonable are scarce, however.

O. Other students without disabilities likely have no right to claim a violation or infringement of their rights as a result of accommodations for students with disabilities.

Given the expansiveness of the “reasonable accommodation” obligation, where almost anything needed to make the school environment safe for a student with allergies will be deemed “reasonable,” one can imagine, in the current environment, a parent of a nondisabled student asking, “What about the rights of my kid who loves peanut butter?”

It is unlikely that another student could claim a violation or infringement of his rights based on a school’s ban of certain foods as an accommodation for a student with allergies to such foods (unless perhaps the other student also had a disability or condition that required some kind of counter accommodation). Although such claims are rare, there has been at least one unsuccessful attempt to make such an argument.
The parent of a nondisabled student was not able to convince the court that the district’s schoolwide ban on peanut and tree nut products violated her daughter’s equal protection rights because it was arbitrary or irrational. Rather, the court ruled that the district properly enacted the ban to protect the health and safety of a schoolmate with a life-threatening peanut and tree nut allergy. Therefore, the ban passed constitutional muster because it was rationally related to a legitimate governmental interest and was necessary to accommodate the schoolmate’s allergy, which was so severe that it was triggered by airborne exposure to nut products.

P. Retaliation is prohibited by Section 504 and the ADA.

Section 504 and the ADA expressly prohibit anyone from attempting to thwart the exercise of rights granted by the law to individuals with disabilities. Also, encompassed in this prohibition are retaliatory acts against persons (with or without disabilities) who complain of unlawful discrimination on behalf of an individual with a disability or who otherwise advocates for such rights.

Hicks v. Benton Co. Bd. of Educ., 69 IDELR 32 (W.D. Tenn. 2016). A principal’s statement that he might have kept a special education aide on his staff if she had not informed parents of deficiencies in the services being provided to their children could signal retaliation in violation of Section 504 and the ADA. Thus, the district’s motion for judgment is denied. Not only could the aide’s conversations with parents about implementation failure constitute advocacy on their behalf, the district’s decision not to renew her for the following school year could be adverse action. The district conceded its knowledge or the aide’s discussions with parents and the principal’s deposition testimony included statements about the aide “stirring up” trouble, all of which could support a finding that the district did not renew her based upon her advocacy on behalf of her students.

Pollack v. Regional Sch. Unit 75, 67 IDELR 40 (D. Me. 2016). Superintendent’s motion for qualified immunity on the First Amendment claim and district’s motion for judgment on 504 and ADA claims are denied where the district allegedly provided the parents with copies of hundreds of staff emails about their student before they filed for due process. After they filed for due process, the Superintendent requested $2,600 for the production of certain emails, which could have been considered retaliatory. The question of the Superintendent’s intent is a matter for a jury to decide.

Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir.), cert. denied, 125 S. Ct. 478 (2004). Verdict of jury is upheld, where it found that the school district had violated Section 504 and the state’s whistleblower statute and held for itinerant special education teacher on all claims. The jury’s award of $500,000 in non-economic damages, $402,000 in economic damages and $50,000 in punitive damages against both the special education director and school principal under Section 1983 is upheld. The jury was more than reasonable in finding that the interests served by allowing the teacher to express herself outweighed any minor workplace disruption that resulted from her
speech. Furthermore, it is well-settled that a teacher’s public employment cannot be conditioned on her refraining from speaking out on school matters.

IX. OTHER SCHOOL HEALTH/NURSING SERVICES TIPS

A. FERPA prohibits school personnel from disclosing personally identifiable information from a student’s education records without written parental consent, except in a health and safety emergency.

FERPA, 20 U.S.C. §1232g and its implementing regulations, limits disclosure of personally identifiable information about a student contained in education records without the prior written consent of the parent, unless disclosure is permitted by one of the FERPA exceptions. One exception allows school districts to disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, “in connection with an emergency if knowledge of the information is necessary to protect the health and safety of the student or other individuals.” 34 C.F.R. §99.36 (a). See also, Letter to Anonymous, 53 IDELR 235 (EDU 2008) [an emergency exists if there is a significant and articulable threat to an individual’s health or safety, considering the totality of the circumstances].

According to the U.S. Department of Education, when determining whether to release personally identifiable information, a district:

… may take into account the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals. If the educational agency or institution determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the determination, the Department will not substitute its judgment for that of the educational agency or institution in evaluating the circumstances and making its determination.

34 C.F.R. Sec. 99.36 (c). To be “an ‘articulable and significant threat’ does not mean that the threat must be verbal. It simply means that the institution must be able to articulate what the threat is under Sec. 99.36 when it makes and records the disclosure.” 73 Fed. Reg. 74,838 (2008).

The Family Policy Compliance Office (FPCO) that enforces FERPA has found that school officials’ disclosure of a student’s contact information to medical personnel during an apparent diabetic emergency did not violate FERPA. See, e.g., Letter re: Pioneer Sch., 108 LRP 12926 (FPCO 2007). Such disclosure appeared to satisfy the requirements for disclosure in the context of a health or safety emergency.
B. Medical services, unless for diagnostic or evaluative purposes only, are not the responsibility of school districts.

Essentially, the “medical services” that are not required under the IDEA are medical services that are required to be provided by a physician. In 1984, the U.S. Supreme Court addressed the provision of Clean Intermittent Catheterization (CIC) to a child with spina bifida and whether those were medical services or school health/related services. In Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 55 IDELR 511 (1984), the Court ruled that CIC was clearly a related or school health service rather than a medical service under the law. The Court noted that CIC was not medical in nature, was relatively simple and could be performed throughout the day in a manner not different from other procedures that were already being provided by school nurses. The Court enunciated what is known as a “bright-line test,” noting that “medical services,” which are not the responsibility of schools, include only those that must be performed by a physician. Anything short of that is a related service or a school health service that the school is responsible for providing.

C. But services needed to maintain the health and safety of a child with a disability while at school, no matter how extensive (or costly), are not excluded medical services if a physician is not necessary.

In 1999, the Supreme Court decided a second case involving a medically fragile student – Cedar Rapids Comm. Sch. Dist. v. Garrett F., 29 IDELR 966, 526 U.S. 66 (1999)—where the student’s medical needs required continuous one-on-one nursing services during the school day. Specifically, the student needed assistance with urinary bladder catheterization once a day; the suctioning of his tracheotomy tube as needed, but at least once every six hours; with food and drink at lunchtime; in getting into a reclining position for five minutes of each hour; and ambu bagging occasionally as needed when his ventilator was checked for proper functioning. He also needed assistance from someone familiar with his ventilator in the event there was a malfunction or electrical problem, and someone who could perform emergency procedures in the event he experienced autonomic hyperreflexia (an uncontrolled visceral reaction to anxiety or a full bladder, wherein blood pressure increases, heart rate increases, and flushing and sweating may occur).

In Garrett F., the Court reiterated the Court’s “bright-line test” from Tatro and found that, while school districts are not required to provide treatment or other medical services by a physician to a student with a disability, they are “responsible for providing services necessary to maintain the health and safety of a child while the child is in school.” Since the extensive services needed by the student at issue were being performed by a full-time nurse and a physician was not necessary, the Court deemed the nursing services to be related services (or school health services) under the law to be funded by the school district.
D. **School health services and school nurse services, if required as related services, must be provided during transportation, if needed.**

In *Garrett F.*, the Supreme Court noted that school districts have the same obligations to students during transportation to and from school as they do in the school building. If a student needs school health services or school nurse services during transport, the school district is required to provide those services to the student and denies FAPE if it does not do so.

*Oconee Co. Sch. Dist. v. A.B.*, 65 IDELR 297 (M.D. Ga. 2015). Court affirmed hearing officer decision, concluding that the school district denied FAPE to a student with a disability when it refused to provide the student with an aide trained to administer Diastat, if needed, on the bus to and from school. The Parent was awarded an amended IEP providing for an aide trained to administer the medication on the school bus and reimbursement for the cost of transporting the student until the district provided the trained aide.

*Elizabeth Bd. of Educ.*, 66 IDELR 237 (SEA N.J. 2015). Because 13 year-old with autism and asthma would suffer irreparable harm if he had an asthma attack on the bus without a medical professional present, district was ordered to provide medical minivan transport services with an EMT on board or other staff member trained to provide medical assistance.

E. **Medications and medical equipment must be properly stored and secured on school buses, and drivers and aides must be trained on any emergency plans.**

Students with health conditions, including medically fragile students, may need to carry medication or medical equipment with them while riding the school bus. School districts must develop proper procedures for storing and securing any such medication or medical equipment on the bus and make sure that bus drivers and aides are fully informed of the requirements in a student’s applicable Plan. *Wake Co. (NC) Pub. Sch. Sys.*, 62 IDELR 215 (OCR 2013).

Bus drivers and aides must also be trained regarding the implementation of any bus emergency plan. This should obviously include conversations and collaboration with the school nurse or other medical personnel, as appropriate.

F. **In very rare circumstances, a student’s medical condition may be so severe that he is not transportable.**

Although atypical, it could happen that a student with extenuating medical issues cannot be moved without posing a serious risk to their personal health or safety. For instance, some of these students may reside at a hospital or other medical facility, while others may need to stay home. *See, e.g., Abney v. District of Columbia*, 559 IDELR 501 (D.C. Cir. 1988); and *Letter to Rowland*, 16 IDELR 501 (OSERS 1990). In these instances, the applicable Team must rely upon and defer to the sound judgments of medical
professionals who can advise as to whether these students should be transported to a school program or receive services where they reside as their LRE.

**G. Administration of medication can be a related service, but there is no obligation to supply or pay for medication. School districts cannot require a student to take medication as a condition for an evaluation or the receipt of services.**

While not specifically stated in the law, administration of medication is considered a related service under the IDEA, if a student must take medication during the school day to effectively participate in his or her educational program. See Collier Co. Sch. Dist., 110 LRP 7471 (SEA FL 2009); and Birmingham City Bd. of Educ., 33 IDELR 236 (SEA AL 2000). Administration of medication and other health-related services are also considered by OCR to be related services under Section 504 if necessary to enable a student with a disability to benefit from his educational program. Prince William Co. (VA) Pub. Schs., 64 IDELR 153 (OCR 2014) [student may have needed related services for his allergies under Section 504].

Clearly, supplying or paying for a student’s medication is not required by the IDEA. Somerville Pub. Schs., 23 IDELR 932 (SEA MA 1996) [medication is neither special education nor a related service and the district is not required to pay for medication]. Similarly under Section 504, OCR declared in Letter to Veir, 20 IDELR 864 (OCR 1993), that because schools are not required to provide medicine for nondisabled students, they are not required to supply medication prescribed for students in connection with their disabilities. See also, Choctaw County (AL) Sch. Dist., 57 IDELR 21 (OCR 2011).

Obviously, medication should never be written into the IEP as a related service or serve as a pre-condition for receipt of educational services or an evaluation. Valerie J. v. Derry Cooperative Sch. Dist., 771 F. Supp. 483 (D. N.H. 1991) [district acted unreasonably in insisting that student’s IEP include requirement that student take Ritalin or similar drug as condition to receipt of services]. The IDEA specifically prohibits this. 34 C.F.R. § 300.174.

Having a backup plan in place when a regular school nurse or other qualified professional is absent or unavailable to administer needed medication is prudent. See, e.g., Montgomery Co. Pub. Schs., 114 LRP 23039 (SEA MD 2014). However, this backup plan should not be one that requires the parent to administer any needed procedure or medication. See Sarasota Co. (FL) Sch. Dist., 60 IDELR 261 (OCR 2012) [fact that a child’s neighborhood elementary school did not have a full-time registered nurse on staff did not justify district’s practice of having the parent come to school each day to administer the child’s insulin. By failing to administer insulin, district improperly shifted its burden to provide related services]. See also, Copan (OK) Pub. Sch. Dist., 110 LRP 57387 (OCR 2010); and San Ramon Valley (CA) Unif. Sch. Dist., 18 IDELR 465 (OCR 1991).
In one Letter of Findings, OCR set out four items that a student’s Team should discuss in a meeting to address medication administration:

1. The purpose of the medication (as indicated in documentation provided by the student’s doctor);
2. The individuals at the student’s school who have responsibility for administering the medicine;
3. Whether any staff training for administration of the medication is needed; and
4. The protocol to be followed in the event of an emergency involving the student and his medicine.


In terms of who may administer medication and whether non-medical staff members may do so or conduct certain procedures depends on state law provisions. Some states require that registered or licensed nurses administer certain medications or procedures. If state law does not require administration by a nurse, then the district may utilize other school personnel capable of safely administering medication or performing a procedure. Of course, Alabama’s applicable nursing laws apply here.

H. Follow prescribed and recommended dosing instructions for medications given at school.

Courts have recognized that a school district may refuse to administer medication to a student with a disability on the basis of a district policy prohibiting administration of medication in excess of the physicians’ recommended daily dosage. See, e.g., DeBord v. Board of Educ. of the Ferguson-Florissant Sch. Dist., 26 IDELR 1133 (8th Cir. 1997), cert. denied, 112 LRP 31062, 523 U.S. 1073 (1998); and Davis v. Francis Howell Sch. Dist., 25 IDELR 212, 104 F.3d 204 (8th Cir. 1997) [injunction to require school nurse to administer physician’s prescribed dosage that exceeded recommended daily dosage is denied]; and Davis v. Francis Howell Sch. Dist., 27 IDELR 811 (8th Cir. 1998) [district court decision granting summary judgment in favor of the school district is affirmed where elementary school student with ADHD was not subjected to differential treatment because of his disability when the school district refused to administer the student’s medication. The school nurse’s refusal to administer the student’s medication was based on the district’s policy of administering medications in compliance with the recommended daily dosage and safety and liability concerns, not the student’s disability. The disputed district policy was neutral, as it applied to all students. In addition, the district offered to reasonably accommodate the student by allowing the parents or a designee to come to the student’s school and administer his medication. Accordingly, the parents failed to demonstrate the school district violated the ADA or Section 504].
I. If a student with a communicable/contagious disease poses an actual and realistic safety risk to other students, a more restrictive placement may be appropriate.

The right to attend school and the right to be served in the least restrictive environment is limited only when the student’s presence poses a safety risk. In this context, the focus is usually upon whether the general school population is in jeopardy of contracting the disease. Thus, if the student’s presence in the regular classroom would pose an actual and realistic health risk to others in the classroom, inclusion in the regular classroom may not be appropriate. Importantly, school districts must have objective evidence of a direct threat to the health and safety of others, not unfounded beliefs or stereotypes, as the basis for excluding a student.

Chadam v. Palo Alto Unif. Sch. Dist., 114 LRP 48383 (N.D. Cal. 2014). District’s genuine belief that a middle schooler with genetic markers for cystic fibrosis posed a significant health risk to two siblings diagnosed with the disorder justified its decision to temporarily remove the student from school for two weeks.

Martinez v. School Bd. of Hillsborough Co., 441 IDELR 257 (11th Cir 1988). In order to allow a district to segregate a child with AIDS from other children in the classroom, a court must find that there is more than a “remote theoretical risk” of transmission of the disease and must make findings concerning overall risk of transmission from the child’s bodily fluids. In this case, it was found that the student could not be segregated, because there was only a theoretically remote risk of transmission of the disease in the classroom environment.

J. Alabama law now narrowly incorporates Do Not Resuscitate (“DNR/DNAR”) orders for minors in school settings.

The constitutional right to refuse medical treatment is becoming widely recognized, both in the school setting and in society at large. Generally, the legality of a “Do Not Resuscitate” orders has been upheld in the school setting. See ABC School v. Mr. and Mrs. M., 26 IDELR 1103 (Mass. Super. Ct. 1997) [rejecting school’s argument that honoring DNR order would violate its “preservation of life” policy].

In May of 2018, Governor Ivey signed The Alex Hoover Palliative and End of Life Care Act (HB202), which will be codified in the Alabama Code at Ala Code 16-30B-1, et seq. In short, the law provides for school nurses to write, in collaboration with the parent, palliative and end of life individual health plans for terminally ill students. It effectively allows for the incorporation of a proper DNR into the plan, although the only person in the school setting subject to the requirements or restrictions is a school nurse. The law provides liability immunity to school employees who follow – or fail to follow – the plan directives. The State Department of Education is required to convene a task force that will make recommendations to the Department on rules implementing the law, to include how to set up the individual health plans, what should be included and how to execute or terminate a plan. The task force is required to meet no later than August 1st, and the rules must be adopted by June 1, 2019.