I. THE PURPOSE AND PROCESS OF §504

A. It’s all about leveling the playing field.

In 1973 when the Rehabilitation Act was passed, little was being done on a federal level to encourage participation and equal access to federally funded programs by the disabled. While largely geared toward providing job opportunities and training to disabled adults, the Act also addressed, though very discreetly, the failure of the public schools to educate disabled students. The single paragraph we now refer to as §504 of the Rehabilitation Act provided that

“No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service....” —29 U.S.C. § 794(a) (1973).

In §504, the focus is on non-discrimination. As applied to the schools, the language broadly prohibits the denial of public education participation, or enjoyment of the benefits offered by public school programs because of a child’s disability. The law recognizes that disability can mean that equal treatment and equal services may not be sufficient to convey equal benefit. For nondiscrimination to happen (that is, for eligible §504 students to have equal participation and opportunity for benefit) they must receive services that level the playing field. Services, then, have a direct relationship to evaluation data demonstrating disability-related need. These materials are designed to address that relationship, focusing on the need for appropriate data to understand student need, and restraint when providing services so as not to over or under-accommodate. After all, the goal is a level playing field.

B. §504 Evaluation basics

The §504 Committee knowledge requirement emphasizes the data-services link. The school must ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. §104.35(c)(3). Do not be confused by the word “placement.” In the §504 context, “placement” simply means the regular education classroom with individually planned accommodations. It does not literally mean taking the child out of the regular classroom and putting him someplace else. The knowledge required of the folks that identify the student as eligible and determine placement (or services) for the student demonstrates the importance placed on understanding student need and data as a prerequisite for providing services under §504.

Evaluation precedes eligibility, and precedes the delivery of services. The 504 regulations require that the school evaluate the student “before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.” 104.35(a). In other words, there are no initial services without an evaluation, nor changes in the services provided under §504 without a re-evaluation. The rational is quite simple: without data we do not know whether the student would be subjected to discrimination in the school’s programs.
and activities (is he eligible?) nor would we know how to serve him (how does the disability impact his ability to access the school’s programs and activities?). The §504 procedural safeguard provision at 104.36 further reminds us of the purpose of §504 (and the procedural protections created to further that purpose). “A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services[.]” The law looks to need arising from disability, and focuses services and accommodations on meeting that disability-generated need.

“Evaluation” does not necessarily mean “test.” In the §504 context, “evaluation” refers to a gathering of data or information from a variety of sources so that the committee can make the required determinations. §104.35(c)(1). Since specific or highly technical eligibility criteria are not part of the §504 regulations, formal testing is not required to determine eligibility. Letter to Williams, 21 IDELR 73 (OCR 1994). Common sources of evaluation data for §504 eligibility are the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, teacher comments, etc. If formal testing is pursued, the regulations require that the tests are properly selected and performed by trained personnel in the manner prescribed by the test’s creator. §104.35(b)(2). When interpreting evaluation data and making placement decisions, the District is required to “draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior.” Information obtained from all such sources is to be documented and carefully considered. §104.35(c)(1)&(2). “[This] paragraph requires a recipient to draw upon a variety of sources in the evaluation process so that the possibility of error in classification is minimized.” Appendix A, p. 430.

A comprehensive reevaluation is required periodically for each eligible student. Districts are considered to be in compliance if they complete reevaluations every three years (as they do with IDEA students). As a practical matter, and to ensure some continuity in the child’s program, Districts should consider an annual review of the child to determine whether changes are necessary due to differences in the child’s schedule in the coming year or changes in the child’s abilities and disabilities. Once the information has been gathered by the §504 Committee, it will determine eligibility based on the criteria previously addressed. If the child is found to be eligible, the Committee will create an accommodation plan for the child that describes the child’s “placement.”

C. The Concept of FAPE: Free Appropriate Public Education

Each District has the duty to provide a free appropriate public education (FAPE) to each qualified disabled person within the district’s boundaries regardless of the severity of the student’s disability. §104.33(a). A FAPE has several distinct parts: (1) it is education provided at no cost to the parents, (2) it is designed to provide educational benefit despite the child’s disabilities, [it is “appropriate”] and (3) it is provided in the environment that affords the greatest exposure to non-disabled peers.

1. No cost to the Parents. Simply put, this provision of FAPE mandates that the educational costs to be paid by parents of a disabled child attending public school are no different than those paid by parents of nondisabled students. So, while the school cannot charge the disabled child or her parents for highlighted textbooks or special manipulatives required by her disability for her to receive educational benefit, it may charge her for items for which all students are charged (costs of field trips, tickets to football or basketball games, purchase price of school uniforms, yearbooks, class pictures, etc.). §104.33(c)(1).

2. Appropriate Education. Under the regulations, an appropriate education is a blend of regular or special education and related aids and services created specifically for this student which is designed to meet his needs as adequately as the needs of nonhandicapped persons are met, and

Does the §504 Plan Need to Include THAT? Evaluation Data & Accommodation
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which satisfies the requirements for least restrictive environment, proper evaluation and placement, and procedural safeguards. §104.33(b)(1). More succinctly, it is a program created and maintained pursuant to the procedural requirements of the regulations that gives the disabled child an equal chance to succeed in the classroom.

**An accommodation plan is created for the §504 student.** This plan can have many names, including the simplest—504 plan. The plan modifies the regular classroom so that the student has equal access to the educational benefits of the school’s program. **The District cannot delegate away its responsibility to provide a FAPE.** Even if it chooses to place the §504 child outside the District, (which should rarely, if ever, occur) the District and not the entity where the child was placed, bears ultimate responsibility for providing the FAPE. §104.33(b)(3). While curricular modifications may be available to special education students (i.e., reduced mastery of the grade level curriculum), **there is no modification of the curriculum itself for §504 students.** 504 is not about reducing expectations for disabled students, but providing the types of accommodations that will compensate for their disabilities so that §504 students have an equal chance to compete in class. As a practical matter, modifying the curriculum is potentially disastrous for 504 students in states where graduation is conditioned on passing a competency test based on the state-mandated curriculum and no exemption exists for 504 students. The failure to expose 504 students to the required curriculum hardly gives them an equal opportunity to earn a diploma.

**Behavior Management Plans.** Should the student exhibit behaviors that are recurring or significantly impact upon education and do not seem to be diminishing under the regular discipline management plan, they need to be addressed in a Behavior Management Plan (BMP). Once in place, the BMP and the 504 plan must be followed to avoid violation of federal law. Failure to have a BMP in place where one is required is not only a violation of federal law, it may also prevent the school from moving the student to a more restrictive setting because the District will be unable to demonstrate that the student could not be served in the regular education classroom with modifications because behavioral modification (the BMP) was never properly attempted.

3. **Least Restrictive Environment.** The least restrictive environment is the setting that allows the disabled student the maximum exposure to nondisabled peers while still allowing him to receive an appropriate education. §104.34(a)(1). The presumption is that the disabled child will be educated with regular education children. §104.34(b). **§504 presumes a regular classroom placement for the child (or education in the mainstream).** This presumption also exists in IDEA, but is even stronger in §504 since the disabilities encountered in §504 students are typically less severe. A placement other than the regular classroom is only appropriate if the disabled child cannot be educated satisfactorily in the regular classroom with supplementary aids and services such as a behavior management plan, classroom modifications, assistive devices, counseling, etc. §104.34(a).

**II. Some lessons on gathering and reviewing evaluation data**

*We know what’s really going on here…. Ignoring evaluation data does not help.*

*Oak Harbor (WA) School District No. 201, 46 IDELR 24 (OCR–Seattle 2005).*

When the student was in third grade, the school completed the Attention Deficit Evaluation Scale (ADDES), and determined that the student was at risk for ADHD. The student had difficulty following directions, sustaining attention, being organized, finishing assignments and following rules. The school retained her in third grade, but provided no additional disability evaluation until 8th grade. Nevertheless, the student’s struggles persisted during the interim, including poor to failing academic performance. During her seventh grade year, the students’ parents made two requests that the student’s disability related...
needs be evaluated. The first request outlined the continued troubles mentioned above. The second request noted a medical diagnosis of ADD.

Staffings by the school resulted in the rejection of both evaluation requests. The student’s teachers took the position that her poor performance was volitional. The school psychologist involved in the rejections (1) relied on the teachers’ opinions, (2) did not know the student’s current grades, was unaware of the student’s educational record and the seven-year history of academic performance problems, and had no knowledge of the school’s identification of the student as at-risk in third grade. Said OCR in dramatic understatement: “We found that the Oak Harbor Middle School staff have not been trained in how to identify a student with ADD.” The student was eventually (Fall of 2004) referred to special education, but did not qualify as LD (adequate academic achievement and no educational need for special education services.)

In June of 2004 (beginning of the 8th grade year), the school decided to provide a 504 plan, but did not conduct an evaluation until November of 2004, when the special ed evaluation process was completed. A 504 plan was then drafted and implemented in December of 2004. OCR finds that the school did not seem to realize that 504 evaluation must precede a plan, and that the staff was inadequately trained in identifying students with disability, and consequently, did not base their determinations on the appropriate data.

A little commentary: As campuses are focusing on improving the performance of all students as a result of NCLB, this type of train wreck should be easily avoided. When faced with this struggling student, a review of the folder should have revealed an obvious cause for the student’s struggles. Unfortunately, years went by before someone connected the dots. An early intervention process where properly trained folks screens struggling students could have given this student help in a much more timely manner.

A neurologist’s report cannot, by itself, constitute a 504 evaluation.
*Cle Elum-Roslyn (WA) School District No. 404, 41 IDELR 271 (OCR–Seattle 2004).*

Rather than conducting its own evaluation, the school relied on an outside neurologist’s report obtained by the parents to determine that the student was 504-eligible due to Tourette syndrome and ADD, and created a 504 plan. The school did not attempt to evaluate areas of educational need nor did it apparently review any data other than the outside report. OCR found a variety of intertwined violations relating to the absence of an evaluation of the student’s educational needs.

A little commentary: The criticism here is not directed at the school’s reliance on the neurological to identify the impairment, but on the school’s failure to add to that data from the wealth of information it had on the student’s educational needs. OCR was concerned that the impact of the student’s disabilities on education were not considered, thus undermining any 504 plan (how do we know what to provide if we don’t know how the disability impacts the student’s access to, or benefit from, the school’s programs or activities?).

Sudden Impairment: An accident can change everything.
*Bradley County (TN) Schools, 43 IDELR 143 (OCR–Atlanta 2004).*

In a case that reminds us how quickly things can change, a high school senior with high grades and no record of misconduct was involved in a motorcycle accident on July 31, 2003. He injured his spine, broke 11 ribs, and suffered collapsed lungs, a lacerated liver and a broken arm. The student’s doctor provided the school with a medical diagnosis and in the space requesting a date when the student could return to school, the doctor simply inserted a question mark. The doctor indicated that the student could not attend school, but could receive homebound instruction. Due to a variety of post surgery complications, regular homebound did not begin until late September of 2003 and ceased in November 2003. After experiencing
difficulty in reading comprehension, the student was provided with a tutor. When he failed to respond to the tutoring, he complained about the tutors, who in turn, complained that he was disrespectful and lacked intelligence. He returned to school on November 3, 2003. Due to continued medication for pain, the student was tired and easily frustrated. The district continued to provide tutoring, allowed for flexibility in attendance, work completion and extra time to complete tests.

Despite the extra assistance, the student did not complete the English 12 work from homebound, and failed the first semester of that class. Along with the obvious lingering physical problems, other residual effects were significant. OCR found that he experienced difficulty with comprehension and underwent an apparent change in personality, evidenced by his confrontation of a teacher (disrespect and bad language) in April, resulting in his placement in an alternative school. He refused to attend the alternative school, and failed both English 12 and Algebra I. He did not graduate. The student was never evaluated for Section 504.

OCR focused on the lack of §504 in the school’s response to the student’s sudden, and growing needs. “Based on the extent and duration of the Student’s injuries, the evidence suggests that the Student was a qualified individual with a disability at least through his return full-time to classes, and perhaps for an additional period of time during the remainder of his senior year.” The District failed to timely evaluate the student.

**A little commentary:** OCR did not overlook the school’s obvious continued efforts to assist the student. On the contrary, OCR recognized the efforts extended on the student’s behalf, but noted that the 504 regulations required something more.

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

**III. Some lessons on providing accommodations under Section 504.**

The school employee’s question: “how far does the school have to go to accommodate a student who....” begins many discussions on §504’s duty to provide FAPE. While the question seems reasonable, it points to a misunderstanding of how accommodations are determined. **The duty is not to provide every possible service and accommodation until §504 can do no more.** The duty to accommodate (or more precisely, the particular services/accommodations a student will receive) is a matter of individualized evaluation and decision-making. That is, the nature of the student’s disability and the student’s resulting need (to alleviate the impact of the disability on the student’s ability to access and benefit from the school’s programs and activities) determines what he gets. What the question really means, is do we have to do what the parent is asking? The obvious answer: it depends.

**The §504 FAPE duty, in the eyes of OCR, is not subject to a reasonable accommodation limitation.** Many educators mistakenly believe that the §504 Plan they create for students in elementary and secondary programs are limited to “reasonable” accommodations. In response to a question on the subject, OCR concludes that reasonableness is not a factor in determining 504 accommodations on elementary and secondary campuses. “The key question in your letter is whether the OCR reads into the Section 504 regulatory requirement for a free appropriate public education (FAPE) a ‘reasonable accommodation’ standard, or other similar limitation. The clear and unequivocal answer to that is no.” *Response to Zirkel*, 20 IDELR 134 (OCR 1993). For K-12 extracurricular activities and nonacademic
services (see below), employment situations and postsecondary students, the answer is different. In support of its conclusion, OCR notes that the §504 regulations on employment and postsecondary education include specific references to a reasonable accommodation standard while the elementary and secondary regulations do not. That omission was intentional because of the uniqueness of elementary and secondary education. A critical factor identified by OCR is the voluntary nature of postsecondary study as opposed to the compulsory attendance rules that require students, both disabled and nondisabled, to attend elementary and secondary schools.

Extracurricular activities & the “reasonable accommodation” limitation. Although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that accommodations to allow for participation in extracurricular or nonacademic activities are subject to the “reasonable” limitation. An accommodation in the field of extracurricular or nonacademic activities becomes an unreasonable accommodation when it would require a “fundamental alteration in the nature of a program,” which in turn means “undue financial and administrative burdens.” See OCR SENIOR STAFF MEMORANDA, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” January 3, 1990. For example, a 17-year-old student with Down’s Syndrome alleged that the district failed to allow him to participate in extracurricular activities to the maximum possible extent. The student was co-manager of the varsity basketball team, but was not allowed on away games, and was not allowed to sit with the team at home games. The school district showed that the student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, and could not perform most of the duties of a manager. In addition, the student was not alert enough to get out of the way of an incoming play on the bench. Despite accommodations the student was unable to perform the basic functions of the position of manager, and thus, was reassigned to co-manager. OCR found no violation of §504. Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996).

So, OCR does not consider cost and inconvenience as limits to the §504 FAPE. What, then, are the limits? The answer lies in the evaluation data. Since the data determines need (and the areas where the disability gives rise to discrimination, and the need for services/accommodations), the data also limits the required accommodations to those necessary to meet the determined disability-based need. A few cases are instructive.

Evaluation data forms the basis of the accommodation decision. Section 504 accommodation is designed to level the playing field, not to guarantee a particular result or maximize potential. The Second Circuit described the duty this way: “The heart of J.D.’s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” J.D. v. Pawlet School District, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000). Consequently, when creating 504 plans, Section 504 Committee should focus on those areas where, because of disability, the needs of the eligible student are not met as adequately as his nondisabled peers, and provide services/assistance to bridge the gap. A few cases illustrate the importance of the data in providing appropriate accommodation.

The need must arise from the impairment. “It is clear that it is inconvenient for the parent to bring the student to school. However, no testimony indicated that he had a medical or other disability which would require transportation.” The student lives within 6 blocks of the school, thus not qualifying for regular transportation available pursuant to school policy for students outside a 1.5 mile radius from the school. His IEP team at the March 21, 2006 meeting determined that transportation would not be needed as a related service. The parent did not bring any testimony indicating otherwise. While the student “has a nebulizer at school for asthma, however, he only used it at the request of the parent during a short period. He was never observed having difficulty breathing, even after strenuous activity.” No transportation was required as a related service. Lincoln Elementary School District 156, 47 IDELR 57 (SEA IL. 2006).
Evaluation data requires an aide on the bus. The student’s doctor reported that an EpiPen had to be administered “expeditiously” following the student’s exposure to peanut protein (whether ingested, touched or inhaled), and that should he have to wait for paramedics to be called and arrive to administer the EpiPen, “there is absolutely no way” he would survive. The Administrative Law Judge ordered an aide be placed on the bus, further finding that

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

An important distinction: “Parentally-desired” vs. “Doctor-required.” In a Tennessee case, the parent removed a student with asthma from the school and threatened not to return the student until a nurse was present on the campus. The district refused to provide a nurse, but did contact the doctor in an effort to understand the student’s medical needs. Specifically, the school wrote a letter to the doctor asking if a nurse was required to be present at school. The doctor responded by letter, opining that “he was not aware of any acute medical indication for keeping the Student home from school, and that it is reasonable to provide nonmedical personnel with appropriate training in the administration of her medications.” Murfreesboro (TN) City School District, 34 IDELR 299 (OCR 2000).

A little commentary: Evaluation data is the key to resolving these types of issues. A parent demand for an accommodation does not create a school duty to provide the accommodation under §504. The legal duty arises from the impairment, and the data (here, input from the doctor) helped the school to determine what the disability required as opposed to what the parent wanted (which was clearly much more than what the disability actually required).

Is unlimited water fountain access the only solution?
North Lawrence (IN) Community Schools, 38 IDELR 194 (OCR 2002).

A common problem encountered by schools is a disability related need, and a parent’s strong preference for a particular accommodation to address the need. In this case, the student was diabetic, and the parent was concerned that his needs for water were being disregarded during the school day as he had been denied access to the water fountain on a variety of occasions. The district was apparently concerned that too frequent water breaks were interrupting the educational process and interfering with the student’s ability to stay on task. To provide proper hydration while maintaining the student’s presence in the classroom, the district suggested allowing the student to keep a water bottle at his desk. After an initial objection for unspecified “hygiene” reasons and logistical concerns about refilling it, the parent agreed to the accommodation, and OCR determined the matter closed.

When accommodation goes too far... You can use a calculator, just not THAT calculator. A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student’s teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student’s parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the
student to work through the various steps (the factoring) necessary to get there. The student’s teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. “It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor.” The TI-92 is inappropriate because “it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts.” The court concluded that the student’s failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student’s lack of effort. “The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires.” The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. Sherman v. Mamaroneck Union Free School District, 340 F.3d 87 (2nd Cir. 2003).

Is it possible to accommodate-away sources of evaluation data? Yes, that can happen if the committee is not careful. Parents of a 14-year old student with Type 1 diabetes alleged that the school discriminated against their son by refusing to grant him automatic excused absences for his medical needs. Instead, the §504 plan stated that the Student would not be penalized for absences due to medical appointments or treatment. The parents sought the absence language in apparent reliance on draft 504 plan language from a national diabetes organization (see commentary below). The school rejected the automatic excused absence language, and instead, provided that, as was the case for all students, all absences would be evaluated and recorded as excused or unexcused in accordance with state law and local board policy. That meant that for purposes of absences for medical appointments, the student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts. Sherman v. Mamaroneck Union Free School District, 340 F.3d 87 (2nd Cir. 2003).

A little commentary: An important element in this controversy was the parents’ reliance on a sample §504 plan from the American Diabetes Association website. The American Diabetes Association provides a great deal of useful information and guidance to parents and schools about the impairment itself and possible school interventions to assist students with diabetes to access and benefit from public education. In those efforts, the Association provides a sample §504 plan. In its description of that plan, the Association clearly and carefully indicates that the plan lists a broad range of things that must be individualized for each child. Unfortunately, some parents miss this crucial language on the ADA website:

“It is important to keep in mind that the attached 504 Plan is only a sample plan listing a broad range of accommodations that might be needed by a child with diabetes in school. If you develop a plan for your child, it should be adapted to the individual needs, abilities, and medical condition of your child and should include only those items in the sample that are relevant to your child.”

[www.diabetes.org/advocacy-and-legalresources/discrimination/school/504plan.jsp] The §504 Team or Committee should be aware of this language and remind parents, where appropriate, that not all of the sample plan’s provisions are necessary for each student, and that excessive accommodation can deny the student the opportunity to acquire new.

Why is an automatic excused absence a problem? Because compulsory attendance can easily be avoided in the guise of absences that really are not medically related. For example, consider the case of a parent keeping the student at home claiming a medical rationale for the absences, but refusing to provide the documentation required by campus policy. When campus efforts to get doctor’s notes to
verify the nature of the absences were continually frustrated, and the student was close to missing the required number of days for truancy action, the campus contacted the student’s doctor. The doctor assured the school that there was no medical reason for the student to be absent so extensively. The school filed for truancy and the parent filed with OCR alleging retaliation. OCR rejected the parent’s complaint. Melrose (MA) Public Schools, 44 IDELR 223 (OCR–Boston 2005).

**When the demands are complex and data incomplete.** Does the child who must be shielded from a wide variety of allergens at school (according to the doctor’s letter) live a life at home that seems unconcerned with exposure? That is, what does the child do when he/she is not in school? Does he/she go to the mall, play outside or at neighbors’ houses, go to church? Does the child play at the park, go to the zoo? If the child’s home life is very different in terms of reaction to allergens, another issue may be present. A hearing officer’s decision from Oregon is instructive. A.E., was a female student with, according to the parents, severe chemical sensitivities and allergies. Throughout the school’s relationship with the student, the parents and student’s physician were vague in identifying “what if anything within the school buildings was adversely affecting A.E.” In (over)response to the vague concerns, the school made considerable changes to the school building, installed fans, air filters, changed the types of chemicals, paints and cleaning supplies it used and the schedule under which it used them, and even built a “clean room” where A.E. could go to recover from exposure to whatever it was that bothered her. The school became suspicious when it noted the variety of activities A.E. was involved in outside of school, with no resulting physical reaction. “Apparently, she was not able to go just anywhere, but she was very capable of being around other people in settings which were seemingly much more polluted than various parts of the school buildings.” The hearing officer summarized the suspicions.

“A.E. sometimes has symptoms, such as flushing, hives, headaches, fatigue and other allergic type reactions. She experiences or complains of these symptoms in some settings, and around some people some times, but not other times. She cannot cope with some physical surroundings such as the ‘clean room’ at SSHS but can be around friends and other students in social settings where smoking and fragrances are relatively uncontrolled. She has problems in some social settings but not others. She cannot go to some stores, but has little discomfort in others. She complains of being bothered in some new construction areas, but not others.... The impact that substances have on her varies to the extent that sometimes she will put up with them if it means she can do what she wants to do while on other occasions she wants to do something, but simply cannot. She is a very strong willed young woman, and pretty much determines her limitations and what she will and will not accept.” Id., at 513.

The hearing officer agreed that the inconsistencies were evidence that the disability was not what the parents would have the school believe. Further problematic was her rejection of tutors sent by the school to her home during periods when she did not attend school. The Hearing Officer believed that A.E. simply did not want to be subjected to the structure of school. “Keeping in mind that this is a very intelligent young woman, she also is very assertive, and, she sometimes informed her tutors that they did not pass the ‘sniff test’ and therefore they could not come into her home, that she did not want to take tests or respond to questions or be required to do certain assignments, or take certain subjects in the prescribed order, or for that matter take some classes which are required for graduation of all.” Id., at 511. In essence, A.E., with the help of her mother who also suffered from multiple chemical sensitivity, used an amorphous, confusing set of allergies or sensitivities as a school avoidance technique. Salem-Keizer School District, 26 IDELR 508 (SEA Ore. 1997).

**Student effort matters. There is no such thing as a free diploma.**


The parent of a twenty-year-old high school drop out alleged violations of the IDEA relating back to his entire school career. As relief, the court is asked to order the school to issue the student a diploma.
Noting that the purpose of IDEA is to provide appropriate education so that qualifying students with disabilities can have their unique educational needs met and be prepared “for further education, employment and independent living,” the court has some trouble with the requested relief. “He is not asking the court to order that he be allowed to return to school in order to earn a diploma under a revised IEP. In fact, the plaintiff’s testimony reveals that he voluntarily quit school mid way through his Senior year because he ‘just got sick of it. I didn't want to go. I hated it.’ He also stated that school was not ‘fun’ anymore. The records reveal that he had excessive absences even before he quit. The fact that he simply desires his grades changed and to be given a diploma is not a remedy available under the IDEA.” (emphasis added).

A little commentary: The IDEA is sometimes asked to do things it was not designed to do, like granting a diploma that was not earned. Even assuming that there were a violation of IDEA, note that the court was not inclined to simply order graduation, but to return the student to school to receive appropriate services and to do the work necessary to get the diploma. Put simply, even if IDEA were violated, that violation does not mean a free diploma. The student has to work to earn it. A related misconception is the false assumption that students receiving FAPE must receive passing grades, regardless of student effort. A couple of older decisions make the point.

Can a student receive a failing grade and be receiving FAPE? Yes. A problem sometimes encountered by special educators is concern over a child who even with appropriate services has failing grades. A question often asked is what do we do if we know the IEP is appropriate and is being implemented in the classroom and the child still fails?

Student fails because he didn’t turn in work, and didn’t try. The parent complained to OCR that the student’s IEP had not been implemented causing the student to fail in keyboarding and Spanish class. The student was learning disabled. Classroom accommodations included extra time for written work, the chance to redo work deemed unacceptable by the teacher, and verbal clarification of instructions and assignments. The student failed keyboarding when he failed to complete, print, or turn in work. In the Spanish class (where no accommodations were required) the student nose-dived after the third 9-week session when he failed to make up three tests, a vocabulary poster and a major composition. The student left his final exam blank. When given the opportunity to redo papers or make corrections on assignments for a new grade (something the teacher did for all students), the student chose not to participate. OCR found no violation. “Student B’s failure to pass keyboarding and Spanish was not related to the District not implementing his IEP. The District tired [sic] to implement his IEP, however, the student would not attend make up or tutoring sessions and did not retake exams when the opportunity was available.” Beaufort County (SC) School District, 29 IDELR 75 (OCR 1998).

You can lead a horse to water... The parent of a 15-year-old special education eligible student with a speech-language impairment alleged that the IEP was inappropriate because the student’s grades were poor. The parent argued that the student should be receiving individual tutoring in science and math. The Hearing Officer rejected the claim, finding that the student was extremely capable, but loathe to avail herself of existing opportunities to receive tutoring and re-take tests. Both parent and student were aware of existing opportunities for tutoring and retaking tests as a regular education service. According to the Hearing Officer, the low grades in geometry arose from the student’s lack of background in Algebra I. The parent had insisted that the student take geometry in 9th grade without taking Algebra I first. In science, the poor grades were the result of the student’s not turning in work. Interestingly, both science and math provided regular tutoring opportunities. The student attended science tutoring approximately five times during the school year, and geometry tutoring once or twice. “Tutoring did not substantially aid Student in science and math because she did not take significant advantage of the tutoring opportunities she knew she had.” Similarly, the Hearing Officer found that “at all relevant times, the District offered Student the opportunity to retake any test on which she received a D or an F, but Student rarely chose to do so.” If she had low grades on tests, said the
Hearing Officer, it was because she either didn’t re-take or she had low scores on the re-take. The student’s IEP was appropriate. Sequoia Union High School District, 47 IDELR 209 (SEA CA. 2007).

**A little commentary:** The Hearing Officer’s decision is nicely based on the philosophy of intervention. Why provide something through special education when there is no evidence that the special education version of tutoring or test re-takes will be any more effective for a student who has no interest in tutoring or re-taking tests as a general education opportunity available to all students? Additionally, there was no evidence presented that tutoring or test re-takes were required for the student to benefit. The hearing result is also influenced by the student’s interesting disruptive behaviors (she frequently sketched or read comic books in class, disrupted instruction and “used profanity at inappropriate moments.”) The school requested consent to interview the student as part of its efforts to create a behavior management plan (as was its practice with all students) but the parent refused to allow the student to participate. The parent likewise refused consent to conduct a functional behavioral assessment, and refused a mental health assessment of the student.

**An important factor in these two cases is the districts’ good faith and clean hands.** In these cases, there was no question that school officials were concerned for the child and his performance. There was also a level of extra attention and effort in each case, and procedural compliance. Since OCR will typically not second-guess educational decisions made following the proper procedures, and the good faith of the school officials deflected any other concerns, the districts were found in compliance. **On the other hand, where the failure arises from the absence of appropriate services for which the student is qualified, the results are markedly different.** In a Texas case, a disabled student’s microcomputer teacher accepted late assignments, gave the student special instructions and extended deadlines, but the teacher did not use all of the accommodations required in the accommodation plan. The student received a final grade of 68. OCR found a violation and the district agreed to resolve the allegation. *Arlington (TX) ISD, 31 IDELR 87 (OCR 1999).* It would have been nice to see what accommodations the teacher failed to implement, and to know specifically why the child failed, but OCR appears to be willing to overlook causation and lay the blame on the school based simply on the failing grade and the implementation problem.

**A quick note on maximizing potential:** Maximizing potential is not the goal of §504 or IDEA. “The IDEA ‘does not secure the best education money can buy; it calls upon government, more modestly, to provide an appropriate education for each disabled child.’ Lunceford v. District of Columbia Bd. Of Educ., 745 F.2d 1577, 1583 (D.C.Cir. 1984). There is ‘no requirement that services be sufficient to maximize each child’s potential commensurate with the opportunity provided other children.’ ....The IDEA guarantees an ‘appropriate’ education, ‘not one that provides everything that might be thought desirable by loving parents.’” Weixel v. Board of Education of the City of New York, 33 IDELR 31 (S.D.N.Y. 2000). On a Section 504 claim, the Second Circuit provided this great language. “The heart of J.D.’s opposition to the proposed accommodation is that it was not optimal. However, Section 504 does not require a public school district to provide students with disabilities with potential-maximizing education, only reasonable accommodations that give those students the same access to the benefits of a public education as all other students.” *J.D. v. Pawlet School District, 224 F.3d. 60, 33 IDELR 34 (2d Cir. 2000).*