

4. What Legal Protections are Available for Students?

Federal laws and many state laws require a school district to provide access to educational opportunities in a medically safe environment without discrimination. Schools covered under these laws are required to provide certain services, related aids, and special education as needed to qualifying children.

4.1 What disability laws may apply to students with diabetes?

There are three important federal laws relating to children with disabilities. They are:

- Americans with Disabilities Act (ADA).
- Section 504 of the Rehabilitation Act (Section 504).
- Individuals with Disabilities Education Act (IDEA).

The ADA applies broadly to public and private schools except those operated by or as religious institutions. Section 504 applies to any schools that receive federal funds. IDEA applies to public education agencies that provide services to students who need special education.

Anti-discrimination laws provide the most extensive protections for children with diabetes. Students may also have rights under various sections of the Constitution, such as the Equal Protection and Due Process Clauses of the Fourteenth Amendment that may be violated by the actions of school officials. Constitutional claims are generally brought under 42 U.S.C. § 1983, the federal statute which authorizes lawsuits to redress constitutional violations. Constitutional claims are not frequently raised with respect to diabetes care because of the protections available by statute and because courts that have ruled on similar claims have applied extremely difficult standards for demonstrating constitutional violations. Accordingly, constitutional claims are beyond the scope of this notebook.

Notes

The ADA is codified at 42 U.S.C. §§ 12101-12213. It provides protections in employment (Title I), in state and local government programs (Title II), and in places of public accommodation operated by private entities (Title III). Title II applies to public schools. 42 U.S.C. § 12131(1). Title III applies to private schools except those run by religious entities. 42 U.S.C. § 12181(7)(f).

Section 504 is codified at 29 U.S.C. § 794. This statute served as the model for many of the provisions of the ADA and, so, the requirements imposed by the two statutes are similar. What is different is that Section 504 applies only to schools that receive federal financial assistance. Public schools receive federal assistance through various federal education programs. Some private schools also receive federal funds; see Question 4.10 for a more detailed discussion of the federal funding requirement. Because the ADA generally provides similar rights to students with diabetes as Section 504, the more specific Section 504 implementing regulations are ordinarily followed by the Office for Civil Rights when determining compliance.

The IDEA is codified at 20 U.S.C. §§ 1400-1487. It has gone through a variety of name changes, including the Education for Handicapped Children Act (EHA) and the Education for All Handicapped Children Act (EAHCA), and is even sometimes referred to by its original statutory number (Public Law 94-142). This statute establishes a federal program (implemented in all states) in which the federal government provides funds for special education services and requires, in return, that states provide special education contained in the law. The law requires the states to have a plan in place to provide special education services and to make sure that local school districts are actually providing these services. This program requires that students with disabilities be provided a free appropriate public education in accordance with an Individualized Education Program.

4.2 What are the differences among the Americans with Disabilities Act, the Rehabilitation Act, and the Individuals with Disabilities Education Act?

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act are anti-discrimination laws. They prohibit discrimination against those with disabilities. This prohibition requires that otherwise qualified students be provided accommodations to allow participation in programs or activities. The idea is to “level the playing field” and to give students with disabilities the same kinds of opportunities as non-disabled students.

The Individuals with Disabilities Education Act (IDEA) is not an anti-discrimination statute. It affirmatively requires states and school districts to provide certain specific benefits (special education and related services) to certain categories of students with disabilities as a condition for receiving some federal funding used to provide these services.

Advocates should understand that these three laws cover different (although often overlapping) groups of students (as is discussed in Questions 4.4-4.7). The laws also impose different legal requirements in some circumstances. Virtually all students with diabetes will be covered by Section 504 and the ADA; some may also be covered by the IDEA, particularly if the child has other disabilities.

4.3 What generally must a public school do to comply with its non-discrimination requirement?

Under Section 504 and the Americans with Disabilities Act (ADA) public schools may not discriminate against students with disabilities. Broadly stated, this means that schools may not deny a person who has a disability, as defined by federal law, the opportunity to participate in or benefit from an aid, benefit or service that is afforded to non-disabled students. A student with a disability must be given equal opportunity to participate in school programs or activities, and must be provided reasonable modifications or accommodations as necessary to allow participation. Private schools have similar nondiscrimination obligations (see Question 4.9).

Notes

The cornerstone right of students with diabetes is the right to receive related aids and services needed to provide equal educational opportunity, as well as reasonable modifications to policies and procedures. What is required is determined on a case by case basis.

Title II of the ADA (covering public schools) states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. A “qualified individual with a disability” under the ADA is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices ... or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).

Section 504 establishes the same requirements by providing that at a school receiving federal financial assistance, “[n]o otherwise qualified individual with a disability” may be discriminated against. 29 U.S.C. § 794(a). Many provisions of the ADA are modeled on those of Section 504, and the two laws are construed to establish “nearly identical” rights. *Rothman v. Emory Univ.*, 123 F.3d 446, 451 (7th Cir. 1997). Section 504 implementing regulations provide that no qualified handicapped person may, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity. 34 C.F.R. § 104.4(a). These regulations also specifically prohibit a recipient of federal financial assistance from, on the basis of handicap, denying a qualified handicapped person the opportunity to participate in any aid, benefit, or service. 34 C.F.R. § 104.4(b)(1)(i). The Department of Education’s regulations require that a recipient of financial assistance operating a public elementary or secondary program must provide a free appropriate public education to each qualified handicapped person in its jurisdiction. 34 C.F.R. § 104.33(a). An “appropriate education” is the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and are based upon adherence to a variety of specified procedures. 34 C.F.R. §§ 104.33(b)(1), 104.34, 104.35, 104.36.

Section 504 and the ADA impose a number of more specific requirements designed to ensure that students with disabilities receive an adequate education, many of which are discussed elsewhere in this notebook. Schools must designate an employee to coordinate compliance with Section 504 and the ADA (see Question 5.4), provide notice to students and parents/guardians that the school does not discriminate (see Question 5.2), attempt to identify and locate all 504-qualified children in its boundaries (see Question 5.1), and provide procedures to resolve complaints of discrimination (see Questions 14.4, 14.8).

4.4 Are students with diabetes covered by the Americans with Disabilities Act and Section 504?

Students are covered by the ADA and Section 504 if they have a physical or mental impairment that substantially limits one or more major life activities. Virtually all, if not all, students with diabetes will meet this definition. In amendments made in 2008 to the ADA and Section 504, Congress expressed its intent that diabetes and other chronic diseases should be covered, and broadened coverage by, among other things, prohibiting the consideration of mitigating measures such as medication in the determination of whether one has a covered disability, and defining major life activities to include the functioning of major bodily systems such as the endocrine system. Diabetes, by its very definition, limits the functioning of the endocrine system, and therefore demonstrating that students with diabetes have a disability should not be difficult, although the determination remains an individualized inquiry and may require specific medical documentation of the student’s

diabetes and its effects. The Individuals with Disabilities Education Act adopts a different definition of disability (see Question 4.7).

Notes

Section 504 and the ADA protect only individuals who meet the legal definition of having a disability. Whether someone has a disability focuses on the effect of a physical impairment. A medical diagnosis does not itself result in a finding of a disability. This information must be considered along with other relevant information to determine whether the disability substantially limits a major life activity. However, proving that a student's diabetes is a disability is hardly a difficult or arduous task, as the result of changes to the coverage of the ADA and Section 504 made by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325. The Office for Civil Rights noted that the standards laid out in this law "should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504) and toward the school district's actions and obligations to ensure equal educational opportunities." U.S. Department of Education Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools* (January 2012), at Question 4, available at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.pdf>.

The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(1). This creates two requirements, first, that there be a physical or mental impairment, and second, that this impairment substantially limit a major life activity.

ADA regulations expressly provide that diabetes is a "physical impairment." 28 C.F.R. §§ 35.104 (Title II), 36.104 (Title III); *see also Gonzales v. City of New Braunfels*, 176 F.3d 834, 837 (5th Cir. 1999) (employment case describing diabetes as a "serious impairment");. The operation of a major bodily function, such as the endocrine system, is considered a major life activity. 42 U.S.C. § 12102(2)(B). Therefore, disability can be demonstrated by showing that diabetes has caused a substantial limitation in the operation of the individual's endocrine system (instead of or in addition to proving disability using other major life activities). The purpose of the endocrine system is to produce and secrete needed hormones so they can be distributed throughout the body. Diabetes renders the body unable to produce adequate supplies of insulin, a critical hormone produced by the endocrine system, and can also cause cells to be resistant to recognizing and properly using insulin. Because diabetes, by definition, impairs the functioning of the endocrine system in significant ways, there can be little dispute that the disease causes substantial limitation in endocrine function.

Indeed, the Department of Justice proposed regulations implementing the ADAAA take the position that diabetes will consistently meet the definition of disability. 79 Fed. Reg. 4839 (2014). Sections 35.108(d)(2) (Title II) and 36.105(d)(2) (Title III) of the proposed regulations states that certain impairments "will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward. The proposal here (at sections 35.108(d)(3)(H) and 36.105(d)(3)(H)) cites diabetes as an example of such condition, noting that it "substantially limits endocrine function." The regulations implementing the employment provisions of the ADAAA by the Equal Employment Opportunity Commission contain a similar provision. 29 C.F.R. § 1630.2(j)(3)(iii).

Other major life activities that can be substantially limited by diabetes include eating, caring for oneself, walking and seeing. *See Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-

1207, 109 LRP 32473 (OCR 2009) (district had enough information, based on student's diagnosis of type 1 diabetes and his need for diabetes care at school, to suspect that the child had an impairment that substantially limited his ability to eat and care for himself). While school districts sometimes believe that an impairment must substantially limit the major life activity of learning to qualify as a disability, this is not true. *See* Question 4.6.

When evaluating whether diabetes is substantially limiting, the effects of any mitigating measures, such as insulin and other medications, must be disregarded. *See* Question 4.5. Also, the effect of conditions which are episodic or intermittent must be evaluated based on when those conditions are active. 42 U.S.C. § 12102(4)(D). Thus, for example, the effects of diabetes and its complications, such as severe hypoglycemia, must be taken into account in making the determination of disability even if the person does not always experience these complications.

The Office for Civil Rights has found students with diabetes to be disabled on a number of occasions. *See Maine Sch. Admin. Dist. #25*, Complaint No. 01-93-1170, 20 IDELR 1354 (OCR 1993) ("OCR established that the Student is a person with a disability because he has a health impairment, diabetes, the management and control of which affects a major life activity, learning"); *New York City (NY) Bd. of Educ.*, Complaint No. 02-89-1128, 16 EHLR 455 (OCR 1989) (student had type 1 diabetes and, therefore, "OCR determined that the student is a qualified handicapped person"); *Bement (IL) Community Unit Sch. Dist. #5*, Complaint No. 05-89-1087, EHLR 353:383 (OCR 1989) (insulin-dependent diabetes was a handicapping condition because impairment necessitated restrictions in diet and close monitoring of diet, behavior and activities at all times and illness posed the immediate possibility of severe consequences if such monitoring was not carried out and/or emergency medical treatment was not available).

The ADA also provides for coverage of individuals who have a record of a disability or who are regarded as having a disability. However, these provisions are not very relevant in the context of students with diabetes. It is difficult to imagine a situation where an individual would have a record of diabetes but would not have an actual disability because of the disease. And while proving that an individual was regarded as disabled does not require proof of any substantial limitation, and only requires that the individual have an impairment, this provision does not entitle a student to any accommodations or modifications to policies, so is of limited use to children with diabetes.

4.5 Doesn't the availability of mitigating measures, such as insulin, prevent a student with diabetes from being considered "disabled" under the ADA and Section 504?

No. The Americans with Disabilities Act (ADA) definition of disability forbids the consideration of the ameliorative effects of mitigating measures such as insulin. Conditions must be considered in their unmitigated state. This is an easy way to demonstrate coverage under the ADA or Section 504 for most, if not all, students with diabetes. For example, a student with type 1 diabetes will become very sick and die within days or weeks without the administration of insulin. While the helpful effects of insulin and other mitigating measures may not be considered, the burdensome and harmful effects of these steps (for example, the need to constantly monitor blood glucose levels and the risk of hypoglycemia caused by taking insulin) should be considered where necessary.

Notes

Under the ADA (as amended by the Americans with Disabilities Act Amendments Act (ADAAA)), in determining whether an individual is covered, schools, agencies and courts may not consider that individual's use of "mitigating measures" such as medication to control the condition. The statute, at 42 U.S.C. § 12102(4)(E)(i), states:

The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.

For students with diabetes, this means that the beneficial effects of insulin and oral medications in treating the disease may not be considered in determining the existence of a disability. Instead, the focus must be on the condition as it exists in its unmedicated state. *See Robr v. Salt River Project Joint Agric. Improvement and Power Dist.*, 550 F. 3d 850, 862 (9th Cir. 2009) ("Impairments are to be evaluated in their *unmitigated* state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavioral adaptations such as a strict diet") (emphasis in original).

The diagnosis of type 1 diabetes, by definition, means that the body is unable to produce insulin because the cells that produce it naturally have been destroyed. Insulin is necessary for survival as it is the only means for transport of glucose into the cells to be used as a source of energy.. Within a few hours a person who receives no insulin will experience moderate to severe hyperglycemia, followed soon after by diabetic ketoacidosis (DKA). *See* Question 2.8. Thus, type 1 diabetes in its unmitigated state causes death, which substantially limits all major life activities. Even before death occurs, untreated type 1 diabetes will cause substantial limitations in thinking, concentrating, eating and caring for oneself (due to hunger, fatigue, and then shock and coma), seeing (due to blurred vision), and breathing (due to pneumonia).

Although children with type 2 diabetes will not face the same rapid onset of severe illness and death as do those with type 1, they nonetheless would face serious health consequences were they denied access to diabetes medication and other treatment. For those children who use insulin and/or oral medications to lower blood glucose levels, the constant hyperglycemia that would result if they did not receive medication when needed would cause substantial limitations in thinking, concentrating, breathing, seeing, eating and caring for oneself, as described above for type 1. Also, prolonged hyperglycemia over time causes severe complications that are substantially limiting. Even those children who can control their diabetes with only diet and exercise may be substantially limited because of the complications that would result if they failed to take the needed actions to keep their blood glucose levels under control. *But see Northeastern Junior College*, Complaint No. 08-97-2073

(OCR 1997) (student who controlled his type 2 diabetes through diet and exercise was not disabled for purposes of Section 504 or ADA).

While there can be little argument that diabetes qualifies as a disability after the amendments contained in the ADAAA, the situation was much different before that law became effective on January 1, 2009. Before the passage of the ADAAA, when mitigating measures were always considered, the harmful effects of the diabetes treatment regimen were often the focus of the disability inquiry for people with diabetes. Cases and administrative decisions that began before 2009 may be based on these more restrictive legal rules, and should be carefully scrutinized by advocates.

4.6 Must a student with diabetes perform unsatisfactorily in school to receive modifications or accommodations?

No. Modifications and accommodations under the Americans with Disabilities Act (ADA) and Section 504 are provided because of a student's disability to assure equal educational opportunity. It is not necessary that the student be performing unsatisfactorily in school or have any need for special education. On the other hand, the Individuals with Disabilities Education Act (IDEA) does require that a child's performance in school be affected by his or her disability and that there be a need for special education, but does not require that the student be failing or doing poorly in school, as discussed in the next question.

Notes

A student with diabetes is entitled to be evaluated and provided with the accommodations and school health services the student requires even if the student attends the regular school program and does not require special education. *Elizabeth S. v. Gilbool*, EHLR 558:461 (M.D. Pa. 1987); *Papillion-La Vista (NE) Pub. Schs.*, Complaint No. 07-07-1124, 51 IDELR 195 (OCR 2008) (school district's policy that only students who could not access the general education curriculum with accommodations would be considered for 504 eligibility was incorrect and defined coverage under Section 504 too narrowly). A child with diabetes is entitled to accommodations even if the child's disability does not affect his or her ability to learn and the student cannot meet the higher standard of eligibility under IDEA. *Vipperman v. Hanover County Sch. Bd.*, 22 IDELR 796 (E.D. Va. 1995) (school agreed to monitor student's blood glucose levels although student was not eligible for services under IDEA). A student with diabetes is entitled to modifications or accommodations even if one of the top students in school. *Lisbon School Dept.*, 33 IDELR 172 (Me. State Educational Agency 2000). This is because disability protections are also designed to provide extra help to those students who may need it to access learning due to a disability. See *Bloomfield Township Bd. of Educ.*, Complaint No. EDS 10165-06 2007-11586, 109 LRP 35236 (N.J. State Educational Agency 2008) (rejecting school district's argument that student was progressing academically and missing little class time due to diabetes care and therefore was not entitled to any additional services); *Letter to McKethan*, 23 IDELR 504 (OCR 1994) (child with asthma was entitled to accommodations even though the disability did not itself affect child's ability to learn because without regular administration of medication and use of inhaler, child could not remain in school).

School districts sometimes argue that students must be substantially limited in learning to be eligible under Section 504. However, there is no requirement that the major life activity at issue be learning in order to qualify a student as disabled in the educational setting. See *Weixel v. Bd. of Educ.*, 283 F. 3d 138 (2d Cir. 2002) (district court erred in requiring student to

show that her impairment limited her learning or school performance in order to establish disability under Section 504).

OCR has repeatedly held that districts may not limit the 504 eligibility inquiry to effects on learning. In *Clarksville-Montgomery County (TN) Sch. Dist.*, Complaint No. 04-10-5003, 60 IDELR 203 (OCR 2012), a district believed that only limitations in learning qualified a student as having a disability for Section 504 purposes, and had a practice of failing to evaluate students with diabetes and other medical conditions like asthma and food allergies for eligibility and refusing to find them eligible. OCR noted that these students had a right to be evaluated for Section 504 eligibility and required the district to revise its evaluation policies to fully consider these conditions. *See also Harrah (OK) Pub. Schs.*, Complaint No. 07-13-1092, 62 IDELR 216 (OCR 2013) (district was required to revise its 504 evaluation policies to ensure that the full range of major life activities, not just learning, would be considered); *Grenada (MS) Sch. Dist.*, Complaint No. 06-12-1005, 61 IDELR 54 (OCR 2012) (district policies stated that substantial limitations in learning could qualify a student for 504 services but failed to make clear that limitations in other major life activities would also qualify); *Sarasota County (FL) Sch. Dist.*, Complaint No. 04-09-1571, 60 IDELR 261 (OCR 2012) (district had a policy of not providing 504 plans to students with medical conditions that did not impact their ability to learn); *San Jacinto (CA) Unified Sch. Dist.*, Complaint No. 09-13-1049, 113 LRP 12681 (OCR 2012) (district incorrectly believed it did not have to provide 504 services for students with medical conditions who did not require special education); *Middletown (OH) City Sch. Dist.*, Complaint No. 15-10-1005, 110 LRP 59013 (OCR 2010) (resolution agreement required district to revise its evaluation policies, which stated that students would only be found eligible if they demonstrated a limitation in learning); *Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-1207, 109 LRP 32473 (OCR 2009) (district's 504 evaluation was inadequate where it only considered the effect of the student's diabetes on learning); *San Diego (CA) City Unified Sch. Dist.*, Complaint No. 09-04-1150, 44 IDELR 135 (OCR 2005) (district failed to initiate 504 evaluation process because it believed that only students limited in learning were eligible under Section 504); *Garfield Heights (OH) City Schs.*, Complaint No. 15-04-1045, 42 IDELR 42 (OCR 2004) (by limiting its focus during a 504 evaluation to the major life activity of learning, district failed to consider other major life activities that might be substantially limited by a student's disabilities); *Bibb County (GA) Sch. Dist.*, Complaint No. 04-98-1089, 30 IDELR 549 (OCR 1998) (district's 504 plan improperly excluded students whose disabilities impact major life activities other than ability to learn).

In *Rock Hill (OH) Local Schs.*, OCR made clear that a Section 504 plan for a student with diabetes need not include academic services or accommodations and may only need to include health care assistance:

In cases of students whose disabling condition is diabetes and where the major life activity that is substantially limited is breathing or something else other than learning, the plan may consist solely of a medical plan that addresses the related services, such as insulin, humalog, or glucagon, that must be administered to the student during the course of the school day to ensure the student has an equal opportunity to participate in the school's programs and activities.

37 IDELR 222 (OCR 2002) (evaluating complaint by parents of a student with diabetes).

In summary, a student with diabetes will be substantially limited in major life activities (including endocrine system functioning and others, as discussed in Question 4.4), and will not need to show any limitation in or effect on learning.

4.7 Are students with diabetes covered by the Individuals with Disabilities Education Act?

Unlike Section 504 and the Americans with Disabilities Act (ADA), the Individuals with Disabilities Education Act's (IDEA) protections only apply to students who require special education and related services. The student's diabetes (or another condition) must affect his or her ability to learn and cause that student to need special education services. As a result, some students who are covered under Section 504 and the ADA will not be covered under IDEA.

Advocates should consider whether IDEA applies to a child with diabetes. The procedures and protections under IDEA are more elaborate and extensive than those that exist under Section 504 or the ADA. Although this publication focuses on the requirements of Section 504 and the ADA, it also makes note of the requirements of IDEA in order to assist advocates for students who may be eligible under IDEA.

Notes

IDEA requires both that a student have a physical or mental impairment and that this impairment negatively impacts the student's ability to learn. Diabetes clearly qualifies as an impairment, to satisfy the first part of this test. The IDEA regulations define an impairment to include "having limited strength, vitality or alertness" that "[i]s due to chronic or acute health problems such as ... diabetes." 34 C.F.R. § 300.8(c)(9). Nonetheless, under IDEA it is also necessary that the child, "by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8(a)(1). IDEA eligibility requires that a "condition must cause an adverse effect on [a] student's educational performance and [the] student must be in need of special education services in order to progress educationally." *Lisbon Sch. Dept.*, 33 IDELR 172 (Me. State Educational Agency 2000). A number of effects of diabetes and its treatment regimen may have an adverse impact on a student's educational performance and necessitate changes to the educational environment that would lead to IDEA eligibility.

IDEA eligibility should be found where it can be shown that diabetes or its treatment contributes to a student's academic difficulties. In *Irvine Unified Sch. Dist.*, Complaint No. 2009050088, 53 IDELR 204 (Cal. State Educational Agency 2009), a state hearing officer ruled that a district should have found a student eligible under IDEA where he experienced failing grades and frequent absences despite various academic interventions attempted by the school. The student's doctor presented uncontradicted testimony that, while diabetes might not be the sole cause of his poor grades and absences, it could have been a contributing factor, and the student's difficulties controlling diabetes caused him to drop out of sports activities and otherwise affected him outside of school. While the school believed that his academic problems were the result of lack of interest and effort, medical evidence contradicted this.

Other students with diabetes require modifications or accommodations (such as those to which they are entitled under the ADA or Section 504), but do not need special education services. "In the absence of evidence of an adverse effect on [the] student's educational performance, which cannot be addressed through modifications and accommodations under Section 504 [or the ADA], [a] student has not demonstrated a need for special educational services [under IDEA]." *Lisbon Sch. Dept.*, 33 IDELR 172 (Me. State Educational Agency 2000). For example, concerns expressed about diabetes care provided at school did not suggest that a student was eligible under IDEA, where there was no evidence that his

diabetes affected his academic performance. According to his teacher, the kindergarten student was doing well academically, was not affected by his diabetes in the classroom and was not missing significant class time for diabetes care. *Clark County Sch. Dist.*, 114 LRP 45477 (Nev. State Educational Agency 2014). Similarly, a New York state hearing officer held that a student with diabetes did not qualify under IDEA, despite the need to self-monitor blood glucose levels 8-10 times per day and his endocrinologist's opinion that fluctuations in blood glucose levels could cause difficulty concentrating and learning. The student was in fact controlling his blood glucose well and not experiencing any academic difficulties, and the endocrinologist's opinion was based on what might happen to children with diabetes generally, not on the individual child's situation. *In re Student with a Disability*, Complaint No. 11-084, 111 LRP 67262 (N.Y. State Educational Agency 2011). See also *Loeb v. Bd. of Educ. of Edwardsville Community Sch. Dist.*, 327 Fed. Appx. 647, 651 (7th Cir. 2009) (affirming hearing officer decision that student with diabetes and an emotional disturbance was not eligible under IDEA because of a lack of evidence that diabetes impacted student's educational performance or that her frequent absences were related to diabetes); *Santa Ana (CA) Unified Sch. Dist.*, Complaint No. 09-92-1185, 19 IDELR 501 (OCR 1992) ("a student with a physical disability, such as diabetes ... may be handicapped under Section 504 but, if the student needs no special education or related services, that student might not meet the definition of a disabled student under IDEA"); *Perry Local Sch. Dist.*, Case No. SEA 1180-2002, 104 LRP 13231 (Ohio State Educational Agency 2003) (student with diabetes no longer had "other health impairment" for purposes of IDEA where student's condition became more stable; eligibility under Section 504 or ADA not considered).

A student with diabetes may have other disabilities, however, that entitled the student to services under IDEA. See, e.g., *Jay Sch. Corp.*, 39 IDELR 202 (Ind. State Educational Agency 2003) (autism and a communication disorder contributed to student's escalating aggressiveness and difficulties in school, not diabetes). Where diabetes is only one of several impairments that affect the student, IDEA eligibility may be even more likely.

The definition of a "child with a disability" for purposes of IDEA is subject to some variation and expansion under state law. A state, for example, may provide that a related service is itself special education. "[I]f a State considers a particular service that could be encompassed by the definition of *related services* also to be special education, then the child would be determined to be a child with a disability under the [IDEA]." 71 Fed. Reg. 46549 (2006). Where a state adopts this approach, a child needing only what would generally be considered a related service could be considered to also need special education (and thus be IDEA-eligible). See also 34 C.F.R. §§ 300.34 (defining related services, among them school health services and school nurse services), 300.39 (defining special education).

4.8 May a school subject to Section 504 or the Americans with Disabilities Act assist organizations that discriminate against those with diabetes?

A school subject to Section 504 and the American with Disabilities Act (ADA) may not provide significant assistance to any agency, organization, or individual that discriminates on the basis of disability.

Notes

Section 504 and Title II of the ADA prohibit a covered school from providing significant assistance to any agency, organization, or person that discriminates on the basis of disability. This is the case even where the assisted organization is not itself a recipient of

federal financial assistance and is not a public entity. Also, where services are provided to the public, the assisted organization might itself be subject to Title III of the ADA.

Section 504 regulations prohibit schools from aiding or perpetuating discrimination against a qualified disabled person “by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient’s program or activity.” 34 C.F.R. § 104.4(b)(1)(v); *see also Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-93-1043, 19 IDELR 883 (OCR 1993) (describing factors to be considered in determining whether assistance provided is significant).

Where a private school receives significant assistance from a public school district, the district must ensure that the private school does not discriminate against students with disabilities, even though the private school is not itself subject to Section 504. In *Boston (MA) Pub. Schs.*, Complaint No. 01-06-1177, 48 IDELR 167 (OCR 2006), computer-based instruction was provided to some students at a parochial school using computers purchased by the public school district with federal financial assistance. The Office for Civil Rights (OCR) found that if the private school discriminated against students with diabetes, the district was required to take steps to remedy the discrimination or to terminate the assistance provided to the private school. *See also Akron (OH) Pub. Schs.*, Complaint No. 15-10-1175, 111 LRP 28345 (OCR 2010) (where private school that allegedly denied enrollment to a student with diabetes did not receive federal funding directly but did receive federally funded services from the public school district, public school was required to ensure that the private school did not discriminate); *Lynnfield (MA) Pub. Schs.*, Complaint No. 01-07-1123, 108 LRP 21716 (OCR 2007).

In *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-93-1043, 19 IDELR 883 (OCR 1993), OCR held that a parent-teacher association (PTA) received significant assistance from a district. The PTA sponsored an after-school program of enrichment classes, including recreational classes, arts and crafts classes, computer classes, and English as a Second Language classes. OCR found evidence of significant indirect assistance, including allowing the program in public school buildings on a permanent and long-term basis without charge or even reimbursement for utility and maintenance costs. The PTA also advertised its program by furnishing leaflets to students at school. The program was also closely identified with the school district and benefited from that identification. *See also Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011) (school district could not provide significant assistance to an overnight camp program attended by students that refused to allow a student with diabetes to attend unless he was completely independent in managing the disease).

Where significant assistance is provided, schools must insist that the assisted agency, organization, or individual provide qualified individuals with disabilities an equal opportunity to participate, and reasonably modify programs to provide supplementary services and aids as necessary for individuals with disabilities to effectively participate without increased cost to the individuals with disabilities. A school, for example, must require that a PTA provide reasonable modification and services to a child with diabetes that are necessary for the child to participate in a PTA-sponsored after-school enrichment program. If the PTA refuses to provide the services, the school district must cease providing assistance to the program unless the organization can demonstrate that providing the services would result in a fundamental change in the program or an undue burden. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-93-1043, 19 IDELR 883 (OCR 1993). OCR has required that a public school district notify all private entities receiving assistance or funding from the district of their obligations to comply with federal anti-discrimination laws, that funding could be denied for failing to comply with these laws, and that the private entity should contact the

district when any situation arose potentially implicating the anti-discrimination provisions of federal law. *Chelsea (MA) Pub. Schs.*, Complaint No. 01-12-1015, 112 LRP 28743 (OCR 2012).

4.9 Do private schools have obligations under Section 504 and the Americans with Disabilities Act?

Private schools are covered by federal anti-discrimination law unless they are run by a religious organization and do not receive federal funding or assistance. The Americans with Disabilities Act will cover all private schools unless they are run by a religious organization, and even those run by such an organization are covered if they receive federal funds, as discussed in the next question. Private schools may not discriminate or exclude children with diabetes and other disabilities, and must make minor adjustments to their programs and policies to ensure that these children have access. However, private schools may not be required to ensure access at any cost or take all of the steps that public schools must, such as hiring additional staff to care for a student with diabetes.

Notes

Title III of the ADA applies to most private schools and provides that: “No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation ...” 42 U.S.C. § 12182(a). The ADA states that discrimination by a place of public accommodation includes “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless ... such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12182(b)(2)(A)(ii). Title III also provides that discrimination includes “a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated, or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless ... taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation or would result in an undue burden.” 42 U.S.C. § 12182(b)(2)(A)(iii).

Section 504 provides that at a school receiving federal financial assistance, “[n]o otherwise qualified individual with a disability” may be discriminated against. 29 U.S.C. § 794(a). Its implementing regulations provide that no qualified handicapped person may, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity. 34 C.F.R. § 104.4(a). These regulations also specifically prohibit a recipient of federal financial assistance from, on the basis of handicap, denying a qualified handicapped person the opportunity to participate in any aid, benefit, or service. 34 C.F.R. § 104.4(b)(1)(i). Private schools covered by Section 504 may not exclude students with diabetes from their programs. In *Kbalsa (AZ) Montessori Sch.*, Complaint No. 08-10-1261, 111 LRP 47585 (OCR 2011), a school was required to remove from its enrollment application questions about whether students had received disability-related supports or services, after an allegation that the school rejected the application of a student because that student could not yet self-manage diabetes.

But Section 504 may not require private schools to do everything it requires of public schools. A private school is required to provide an appropriate education only if this can be done “with minor adjustments.” 34 C.F.R. § 104.39(a). See *Lynnfield (MA) Pub. Schs.*, Complaint No. 01-07-1123, 108 LRP 21716 (OCR 2007) (private school provided adequate

care to a student with diabetes even though it did not have a full time nurse, since another staff member was able to monitor the student’s blood glucose levels on the two days per week the nurse was not at the school); *Boston (MA) Pub. Schs.*, Complaint No. 01-06-1177, 48 IDELR 167 (OCR 2006) (private school was not required to hire a full-time nurse to administer emergency medication to a student with asthma, and did not violate Section 504 by denying the student admission when it reasonably believed that the student required a nurse to perform this service). However, most of the adjustments typically required by a student with diabetes will be “minor” by Section 504 standards. In addition, where a public school district places a student in a private school, that district remains responsible for ensuring that the student receives FAPE in the private school, and can be held to have violated Section 504 if the private school does not provide FAPE. *See Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008) (district was responsible for ensuring that student received FAPE at private school for the deaf where student had been placed).

4.10 Are students with diabetes who attend private schools operated by religious organizations entitled to any legal protection?

The Americans with Disabilities Act (ADA) does not apply to private schools operated by religious organizations. Such a school is subject to Section 504 only if it receives federal funding. Therefore, schools operated by religious organizations that do not receive federal funding are not covered by either law. However, in these circumstances contract or tort law may impose similar obligations on a private school operated by a religious organization.

Notes

Title III of the ADA does not apply to “religious organizations or entities controlled by religious organizations, including places of worship.” 42 U.S.C. § 12187. Where such a school is a recipient of federal funding, however, Section 504 applies even if the school is operated by a religious organization (although, as noted in the previous question, private schools do not have the same obligation to accommodate students with disabilities under Section 504 as do public schools).

Because nearly all public schools and private non-religious schools are subject to the ADA, determining whether a school receives federal funding is primarily important where that school is religious, since if Section 504 does not apply there may be no protection against discrimination at such a school. For purposes of Section 504:

Recipient [of federal financial assistance] means ... any private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

34 C.F.R. § 104.3(f). Section 504 regulations also provide:

Federal financial assistance means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department [of Education] provides or otherwise makes available assistance in the form of: (1) Funds; (2) Services of Federal

personnel; or (3) Real and personal property or any interest in or use of such property

34 C.F.R. § 104.3(h). Where some specific program within a school receives federal funding Section 504 applies not only to that program but to the entire school. See generally Annot., 160 A.L.R. Fed. 297 (who is recipient of, and what constitutes program or activity receiving federal financial assistance for purposes of Section 504).

Federal funding may be received directly or indirectly. Examples of direct funding include school food and nutrition programs, assistance for at-risk students, and grants for technology, school improvement, or other purposes. These programs usually require participants to comply with civil rights laws including Section 504. See, e.g., 7 C.F.R. § 210.23(b) (providing for compliance with Section 504 in the National School Lunch program); *Silva v. St. Anne Catholic Sch.*, 595 F. Supp. 2d 1171, 1181-82 (D. Kan. 2009) (parochial school was subject to requirements of Title VI, which has a similar federal funding requirement, based on its receipt of funds through the school lunch program). States that administer such programs are required to obtain assurances of civil rights compliance by participating schools. Indirect funding occurs, for example, where a federal grant is made to the state which, in turn, allocates funds to local agencies that then provide funds to individual schools. A parochial school within a Roman Catholic diocese was found to be a recipient of federal funds although the funds were disbursed by the state through a local public school. See *Dupre v. The Roman Catholic Church of the Diocese of Houma-Thibodaux*, 1999 U.S. Dist. Lexis 13799, 31 IDELR 129 (E.D. La. Sept. 2, 1999). But see *Boston (MA) Pub. Schs.*, Complaint No. 01-06-1177, 48 IDELR 167 (OCR 2006) (parochial school was not subject to Section 504 merely because computers purchased by the local school district with federal financial assistance were used to provide instruction to some students at the parochial school).

There is some authority that federal financial assistance may be so *de minimis* or too little to subject a school to Section 504. See, e.g., *Marshall v. Sisters of the Holy Family of Nazareth*, 399 F. Supp. 2d 597 (E.D. Pa. 2005) (Section 504 inapplicable where only one student received a free lunch and the school received no proceeds from the sale). But the scope of such an exception, even if it exists, is quite narrow. *K.H. v. Vincent Smith Sch.*, 2006 U.S. Dist. Lexis 22412 (E.D. N.Y. 2006) (rejecting application of a *de minimis* exception).

Section 504 obligations are enforced by the government agency that administers the federal funding the school receives. For programs administered by the U.S. Department of Education, these obligations are enforced by the Office for Civil Rights. If a program is administered by another federal agency, that agency will be responsible for enforcement. The U.S. Department of Agriculture would enforce Section 504 where the only federal funds a school receives are for the school lunch program.

Even if Section 504 does not apply, it is important to examine a private school's policies and handbooks. They often include statements that the school will not discriminate that may be enforced as a matter of contract. Another basis to seek proper treatment is tort law. Schools may have a common law duty to assure care to its students in some situations. See Part 15.

Another basis for providing assistance to a child attending a private school would be state law provisions or services. See Question 4.11. Some states, for example, require that public schools provide nursing services to private school children that are the equivalent of those that would have been available had they attended public school. See *In re. Richard K.*, 31 A.D.3d 181, 815 N.Y.S.2d 270 (2006) (holding that under statute public schools must provide equivalent health and welfare services to private school children, but allowing school officials to determine where and how such services would be provided).

4.11 Do state laws protect the rights of students with diabetes?

Many states have laws that protect the rights of students with disabilities from discrimination, but these laws vary from state to state. A number of these laws essentially follow the requirements of the Americans with Disabilities Act or Section 504. Others go beyond the general prohibition against discrimination. Some of these specifically address responsibilities for diabetes care tasks in the school setting. State law also may include broad requirements that organizations open to the public be prepared to deal with health emergencies. Advocates need to be aware of rights that may be guaranteed by state anti-discrimination or other laws, which are not discussed in detail in this publication.

Notes

A growing number of states have adopted statutes that specifically relate to diabetes care. Current versions of these statutes and recently adopted legislation in other states should be consulted.

It is important to recognize as well that other pertinent statutes or regulations may be adopted regarding such issues as the administration of medications in schools, the delegation of health care responsibilities, immunity, and other matters relevant to diabetes care. The American Diabetes Association maintains information regarding other statutes and may be contacted for further information.

In addition, links to school diabetes care specific state laws may be accessed from <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/legal-protections/state-laws-and-policies.html>. States with school diabetes care laws include: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Indiana, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, and Wisconsin.