

Legal Rights of Students with Diabetes

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List of Abbreviations

ADA	Americans with Disabilities Act
ADAAA	ADA Amendments Act of 2008
ADCP	Authorized Diabetes Care Provider
Association	American Diabetes Association
CFR	Code of Federal Regulations
DKA	Diabetic ketoacidosis
DMMP	Diabetes Medical Management Plan
DOJ	U.S. Department of Justice
IDEA	Individuals with Disabilities Education Act
IDELR	Individuals with Disabilities Education Law Reporter
IEP	Individualized Education Program
NDEP	National Diabetes Education Program
OCR	U.S. Department of Education Office for Civil Rights
Section 504	Section 504 of the Rehabilitation Act

Introduction

The American Diabetes Association considers the protection of the rights of students with diabetes a vital part of its mission. This publication continues the effort of the Association to assist advocates who work to ensure that children with diabetes are educated in a medically safe environment and are provided with equal access to all school-related opportunities. Advocates are truly heroes. No work is more important than to ensure that those who are vulnerable receive equal educational opportunity in America's schools. We hope that *Legal Rights of Students with Diabetes* assists you in this important work.

Helping protect the rights of children can be a truly rewarding experience. Approximately one out of every 400 to 500 school children in the United States has type 1 diabetes and, although the exact number of children with type 2 diabetes is unclear, the numbers are increasing. Each of these children faces daily the challenge of managing and overcoming a chronic disease that impacts many aspects of their lives. Many of these children are treated with the dignity and accommodations they deserve. However, other children experience discrimination at school because of their diabetes; their rights are ignored and their health and safety are compromised.

Advocates have a valuable and necessary role to play in ensuring that these acts of discrimination are confronted and corrected. The Association is committed to helping advocates fulfill this role by providing information and resources needed to advocate effectively. This publication has been designed to give advocates information drawn from a variety of sources that will be helpful in advocating for children with diabetes.

1. What is this Notebook and How Should it Be Used?

This notebook is a tool designed to provide advocates with information and resources that will be helpful in working for the rights of students with diabetes. It contains sections discussing the legal rights of these students, strategies for securing these rights, and procedures to be followed when disputes cannot be resolved informally. The notebook also contains links to useful forms and resources that can be consulted for further information. This notebook is only one component of the extensive assistance that the American Diabetes Association provides to support advocates for those with diabetes.

1.1 What is this notebook?

Legal Rights of Students with Diabetes is an authoritative and comprehensive book designed to assist advocates throughout the process of working with schools to secure appropriate care for students with diabetes. More detailed information about the topics covered and the organization of this notebook can be found in Question 1.4. Although the purpose of the notebook is not to steer advocates immediately toward litigation as a means of resolving disputes, it does provide the information lawyers need should legal action become necessary. Finally, the notebook provides links to extensive resources that advocates can use during the process of working with school personnel.

1.2 Who should use this notebook?

This notebook is designed to assist advocates who need detailed information on the legal rights of students with diabetes and on how those rights can be enforced. It will be most useful to attorneys who are representing or assisting parents or guardians, since it contains many references to statutes, court opinions and administrative agency letters of finding. However, this notebook can still be useful to advocates without legal training, including parents or guardians, so long as they understand that this notebook is not legal advice and cannot substitute for the advice of a licensed attorney in situations where legal advice is needed. Advocates who are not attorneys may want to become familiar with some of the types of legal documents referenced in this notebook, which are discussed in the next question. The information in this notebook is quite detailed; advocates who need more general information about diabetes or about the legal rights of students with diabetes are encouraged to consult some of the other resources available from the Association (see Question 1.5). Schools, as well as their health care providers and attorneys, may also find this notebook useful to better understand the responsibilities they have to students with diabetes.

1.3 How should this notebook be used?

The notebook is meant to be a resource for answering specific questions during the process of advocating for the rights of a student with diabetes. Therefore, while this notebook can be read as a “textbook”, from cover to cover, individual parts can also be consulted as the need arises. The text is organized in a question and answer format; by consulting the detailed table of contents, advocates can quickly and easily find the topic they are seeking and turn directly to that part or question. For a more detailed description of the notebook’s organization, see the next question.

Many of the answers to the questions in the text are followed by a section of “Notes” which provides more detailed information on the topic. Many of these Notes contain references to statutes, regulations, court cases, or administrative decisions. While the notebook can be successfully used without consulting these references, some understanding of the differences between these sources is helpful. While the sources referenced (statutes, regulations, agency decisions, and cases) all are important parts of the legal framework governing the responsibilities of schools to students with diabetes, some types of legal sources are more persuasive and more binding on school districts than others. Recognizing the differences between these sources can be important:

- Statutes (or laws) are passed by federal and state governments and are binding on the schools, districts, or individuals they cover. The major federal laws relevant to students with diabetes are discussed in Question 4.1. Some relevant state statutes are also referenced, and more information on state laws is available on the Associations’ web site. Federal statutes are cited by the chapter and section in the U. S. Code (U.S.C.); for example, 42 U.S.C. § 12133.
- Regulations are developed by government agencies to clarify the law and give more detail about what it means. Most of the regulations discussed in this notebook are issued by the U. S. Department of Education to implement the federal civil rights laws that protect students with diabetes (discussed in Question 4.1), although many states also have regulations that may need to be considered. Regulations are also binding on those to whom they apply, unless they are clearly in conflict with the laws they were issued to implement (which happens infrequently). Federal regulations are cited by the chapter and section in the Code of Federal Regulations (C.F.R.); for example, 34 C.F.R. § 104.7(a).
- Court cases can affect the rights of students with diabetes if they result in published opinions. Courts are organized hierarchically, and decisions from higher courts are more likely to be persuasive than decisions from lower courts. For example, the federal court system has three levels: the U. S. Supreme Court, circuit courts of appeal (which are generally numbered and each of which covers a different geographic region of the country), and district courts (trial courts) in each state. Court opinions are legally binding on courts which are lower in the hierarchy than the deciding court. For example, a decision by the federal 9th Circuit Court of Appeals would be binding on federal district courts in the region covered by the 9th Circuit

(much of the western U.S.) but not on district courts in other regions. Even when not binding, however, often a court's interpretation of the law will be persuasive to another court. The way court cases are cited differs depending on which court the opinion is from, but all case citations in this notebook include the abbreviated name of the court and the year of the decision in parentheses.

- Administrative decisions are issued by government agencies which have responsibility for investigating individual cases of discrimination. These decisions are only legally binding on the parties involved in the case, and the same agency investigating similar facts in a different case may come to a different conclusion. Administrative decisions may be persuasive to a court, but generally hold less weight than the other types of legal documents discussed in this question. Most of the administrative decisions cited in this notebook are issued by the U. S. Department of Education's Office for Civil Rights (OCR), but some are issued by state agencies hearing appeals from due process hearings. (For more information on OCR procedures as well as due process hearings, see Part 14). OCR findings letters and agreements are only binding upon the subject school district. However, they might be used as a negotiation tool by the diabetes advocate. Many administrative decisions cited in this notebook are published in the *Individuals with Disabilities Education Law Reporter*[®] (IDELR), published by LRP Publications, and are cited by the volume and section number from that publication; for example 34 IDELR 102. These citations also include, in parentheses, the agency that issued the decision (typically OCR) and the year the decision was issued.

Although it is not necessary to read these documents in order to effectively use this notebook, the text of the statutes and regulations cited is generally available on the Internet. A helpful link to statutes and regulations is provided through Cornell University Law School's Legal Information Institute at: <http://www.law.cornell.edu>. Although some are available on the Internet or through the American Diabetes Association's web site, the usual source for copies of cases and administrative decisions is a local law library.

1.4 How is this notebook organized?

The notebook is divided into sections, each of which focuses on a particular topic of concern and contains specific questions and answers related to that topic. The notebook begins with general information on the medical aspects of diabetes, on the legal obligations of schools, and on the process by which needed services and accommodations are determined and documented. The middle sections address what schools are required to do in specific settings, including diabetes care at school, academics, extracurricular activities, and discipline. The final sections address the process for resolving disputes, alternative legal theories that may be available, and the rights of students in postsecondary institutions.

More specifically, the parts of this notebook are as follows:

- Part 1 (this section) describes the notebook and its organization, as well as the other services the American Diabetes Association provides to advocates.

- Part 2 provides background information on diabetes, including information about the symptoms and treatment of the condition and how it can affect students in school. This information can be useful as background for advocates or for educating school officials.
- Part 3 contains definitions of a number of terms which are important to an understanding of diabetes care or of the legal rights of students with diabetes.
- Part 4 introduces the three main federal laws that protect students with diabetes: the Rehabilitation Act, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act. The section discusses which individuals and which schools are covered by each law, and also briefly discusses state antidiscrimination laws.
- Part 5 addresses how the process for requesting accommodations and services should be initiated, including how requests should be made, what they should contain, and a school district's duty to evaluate students who may need services.
- Part 6 discusses the process by which the school district develops plans to accommodate the health and educational needs of students with diabetes. This section explains how parents or guardians participate in this process and issues surrounding the release of medical information.
- Part 7 addresses how accommodations and services should be documented, including what should be included in a written plan and when and how these plans should be revised.
- Part 8 discusses specific services and accommodations that may be needed to ensure that students get appropriate diabetes care. This section covers medication administration, emergency situations, and food in the school setting.
- Part 9 addresses the key question of who should provide diabetes care services to students. It discusses both permitting self-care and the need for trained personnel to provide care when needed.
- Part 10 addresses whether non-health care professionals can and should be trained to provide diabetes care, and emphasizes the Association's position that such personnel are a crucial part of effective diabetes care in schools.
- Part 11 discusses academic modifications that may be required for students because of their diabetes, including issues that arise on standardized and classroom tests and absences related to diabetes care.
- Part 12 discusses a school's obligation to provide services to students outside of the classroom, including coverage for field trips, extracurricular activities, athletic events and school bus rides.
- Part 13 addresses disciplinary issues that can arise when a student's conduct may be related to diabetes.
- Part 14 outlines the procedures to be followed when disputes cannot be resolved informally. The section covers procedures under the three federal laws that protect students with diabetes, including complaint procedures, deadlines, and prerequisites to litigation.

- Part 15 discusses state tort law remedies that may be available to students with diabetes for injuries suffered in the school setting.
- Part 16 explains the obligations of postsecondary institutions, including colleges, universities and vocational and trade schools, to serve students with diabetes, and how these obligations differ from those of elementary and secondary schools.

1.5 How does the American Diabetes Association assist advocates?

Founded in 1940, the American Diabetes Association is the nation's premier nonprofit voluntary health organization. The Association's mission is to prevent and cure diabetes and to improve the lives of all people affected by diabetes through diabetes research, information, education, and advocacy. While maintaining its leadership in research and education, it is also active in eliminating discrimination against people with diabetes through the use of education and negotiation, federal and state litigation, legislation and regulatory reform.

Protecting the rights of school children with diabetes is an area of special interest to the American Diabetes Association. As a result, the Association provides considerable assistance to advocates representing the interests of children, including:

- The Association maintains a web site providing advocacy and legal resources. The site is at: <http://www.diabetes.org/safeatschool>". The web site also contains extensive information about diabetes and diabetes care that can be useful to advocates and others who need to educate school personnel about diabetes. Go to the home page and click on the "Living With Diabetes" link. A school discrimination packet designed for those facing discrimination is also available by calling 1-800-DIABETES.
- The Association provides publications and written materials to assist advocates. Key materials in the area of diabetes care at school include:

A library of research materials for attorneys, including cases, court briefs, and administrative documents (available at <http://www.diabetes.org/living-with-diabetes/know-your-rights/for-lawyers/>).

Diabetes Care in the School and Day Care Setting, *Diabetes Care* Volume 37, Supplement 1, at S91-S96 (Jan. 2014), available at http://care.diabetesjournals.org/content/37/Supplement_1/S91.full.pdf+html. This peer-reviewed position statement published by the American Diabetes Association in its scholarly journal *Diabetes Care* explains the accepted standards in the medical community for the proper care of students with diabetes in the school setting.

Helping the Student with Diabetes Succeed: A Guide for School Personnel (November 2010), available at http://ndep.nih.gov/media/NDEP61_SchoolGuide_4c_508.pdf, a guide by the National Diabetes Education Program (NDEP), a federally sponsored partnership of the National Institutes of Health, the Centers for Disease Control and Prevention, and more than 200 partner organizations, including the American Diabetes Association. The purpose of the guide is to educate and inform school personnel about how diabetes is

managed and how each member of the school staff can help meet the needs of students with diabetes. It is highly recommended that all diabetes school advocates obtain a copy of this guide.

Diabetes Care Tasks at School: What Key Personnel Need to Know, available at <http://www.diabetes.org/schooltraining>, downloadable PowerPoint training modules developed by the Association that can be used by a school nurse or other health care professionals to train school staff members on performing diabetes care tasks.

For the latest resources available from the American Diabetes Association, advocates should check the Association's web site.

- The Association's legal advocacy staff includes attorneys and other legal professionals who are available to discuss issues important to protecting the rights of school children. Association staff regularly work with attorneys to help formulate strategy, review legal pleadings, and locate expert medical consultants.
- The Association participates in important litigation having a broad impact on the lives of people with diabetes. This participation often takes the form of submitting amicus (friend of the court) briefs. The Association's Legal Advocacy Subcommittee, whose membership includes attorneys and health care professionals, supervises these efforts.
- The Association maintains a network of attorneys interested in protecting the rights of people with diabetes. These attorneys are often willing to serve as advocates for students or assist parents in advocating for their children.

The Association has many resources available to help advocates succeed, and encourages advocates to take advantage of these resources by contacting the Association or consulting its web site.

2. What Should Advocates Know About Diabetes?

Often a school district's failure to properly address the needs of a student with diabetes is due not to bad faith, but to ignorance or a lack of accurate information about diabetes. Advocates therefore may need to educate district personnel about the disease and its treatment. This section can serve as a starting point for educating advocates or school personnel. It provides only basic information about diabetes; advocates who need more detailed information should consult the Association's web site.

2.1 What is diabetes?

Diabetes is a serious chronic disease that impairs the body's ability to use food for energy and results in high levels of glucose (or sugar) in the blood. Diabetes can lead to both short-term and long-term complications. Short-term problems can include high (hyperglycemia) or low (hypoglycemia) blood glucose levels that significantly affect the student's ability to concentrate and learn, and can cause serious immediate consequences such as brain damage or death if not treated. In addition, diabetes can cause serious complications that develop over time (such as vision problems and kidney disease), but people with diabetes can take steps to control the disease and lower the risk of complications.

More information about diabetes can be found on page 6 of *Helping the Student with Diabetes Succeed: A Guide for School Personnel*, published by the National Diabetes Education Program (NDEP) (see Question 1.5). Advocates can also consult the Association's web site or call 1-800-DIABETES for more information. However, it is very important for an advocate to be familiar with the child's own diabetes and treatment regimen. This information is best obtained from the child, the child's parents or guardians, and the child's health care provider. Because many aspects of advocacy require an individualized evaluation of the child and circumstances, a thorough familiarity with the child's specific situation is essential.

2.2 What are the types of diabetes?

There are two main types of diabetes that can affect children. Type 1 diabetes was previously called insulin-dependent diabetes mellitus or juvenile-onset diabetes. Type 1 develops when the body's immune system destroys pancreatic beta cells, the only cells in the body that make insulin. Insulin is the hormone that allows glucose in the bloodstream to enter the cells of the body, where it can be converted into energy. This form of diabetes usually strikes children and young adults, although the disease can develop at any age. In order to survive, people with type 1 diabetes must have insulin delivered by injections or a pump and this insulin must be carefully balanced with food intake and physical activity.

Type 2 diabetes was previously called non-insulin-dependent diabetes mellitus or adult-onset diabetes. It usually begins as insulin resistance, a disorder in which the cells do not use insulin properly. Type 2 diabetes is increasingly being diagnosed in children and adolescents. Some people with type 2 diabetes may control their blood glucose levels through diet and exercise. Others are required to take oral medications, insulin, or both.

Gestational diabetes is a form of glucose intolerance that is diagnosed in some women during pregnancy. During pregnancy, gestational diabetes requires treatment to normalize maternal blood glucose levels to avoid complications in the infant. After pregnancy, gestational diabetes generally disappears, although women who have had it are more likely to develop type 2 diabetes later in life.

The term “brittle” diabetes is sometimes used, although its use is no longer preferred. “Brittle” diabetes refers to unpredictable highs and lows, often within very short periods of time, as a result of even small changes in activity, nutrition, or insulin usage.

More information on the types of diabetes can be found on pages 11-14 of *Helping the Student with Diabetes Succeed* (see Question 2.1).

2.3 How does diabetes affect a student?

It is important to understand the effect diabetes has on a particular student and how that student’s diabetes is treated. Diabetes is a disability and can have substantial impacts on a student’s academic performance and safety at school, but it does not affect all students in the same ways. Diabetes can affect students in several ways:

First, diabetes must be managed 24 hours a day, 7 days a week. Diabetes care requires an ongoing treatment regimen, as discussed in the next two questions. The treatment regimen affects the child’s daily schedule and, if appropriate provisions are not made, may impact the ability of the child to have equal access to all school-related activities.

Second, blood glucose levels that are not kept in target range may result in hypoglycemia (see Question 2.7) or hyperglycemia (see Question 2.8). Hypoglycemia is the most common and immediate concern for school-aged children. Severe hypoglycemia can result in loss of consciousness and is life-threatening. Both hyperglycemia and hypoglycemia can affect a student’s cognitive functioning and, thus, school performance.

Finally, even where blood glucose levels are maintained within reasonably acceptable ranges fluctuations can affect a student’s ability to concentrate and learn. In addition, diabetes may have an adverse impact upon the ability of a student to provide self-care or to engage in daily living tasks such as eating, communicating, or even walking. Effective diabetes care is essential for a student’s immediate safety and ensures a student will be able to participate in all school activities.

2.4 What are the typical regimens for treating type 1 diabetes?

Type 1 diabetes requires the daily balancing of insulin, nutrition, and physical activity. Each impacts a child’s blood glucose levels.

Insulin comes in several types and can be administered in different ways (see Question 2.6). Some children take predetermined doses of insulin at specific times; these children often must maintain rather strict eating schedules and amounts, regularly eat snacks, monitor

What Should Advocates Know About Diabetes?

activities, and make adjustments when any of these change to avoid hyperglycemia or hypoglycemia. Other children are now treated with an insulin regimen which attempts to maintain a steady level of insulin throughout the day through a continuous delivery of basal insulin. These regimens may reduce the need for snacks and provide greater flexibility as to when meals must be consumed.

Where a student's diabetes is treated with insulin, it is extremely important to check blood glucose levels at set times and whenever hypoglycemia or hyperglycemia is suspected, and to respond to levels that are too high or too low as quickly as possible. More frequent checking of blood glucose levels may be needed for students using an insulin pump.

More information on diabetes treatment and management (type 1 and type 2) can be found on pages 33-49 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

2.5 Does the treatment for type 2 diabetes differ from type 1 diabetes?

Type 2 diabetes can have a wide variety of effects on different individuals, depending on the severity of insulin resistance and the length of time the person has had diabetes. Sometimes it can be treated with proper diet and exercise, without the need for medications. Other students may need to take oral medications to control their diabetes, and some require insulin injections. Children with type 2 diabetes, particularly those using insulin, need to closely monitor blood glucose levels and treat symptoms of high or low blood glucose, just as students with type 1 diabetes do. Some types of oral medications other than insulin used to treat type 2 diabetes (called insulin secretagogues) may cause hypoglycemia, while other oral medications generally do not. Knowing a type 2 child's medication regimen is important to understanding the impact of his or her diabetes.

More information on diabetes treatment and management (type 1 and type 2) can be found on pages 33-49 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

2.6 How is insulin administered?

Insulin must be injected into the body so that it reaches the bloodstream; it generally cannot be ingested or taken in pill form. There are different types of insulin, which vary in the speed with which they begin to lower blood glucose and the length of time they are effective. Individuals may take only one type of insulin, or a combination of several types, based on a doctor's instructions.

There are a number of ways that insulin can be administered, including injections with a lancet, insulin pens, and insulin pumps. The administration method used by a child may depend on that child's age, health needs, and preferences.

More information on insulin can be found on pages 44-49 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

2.7 What is hypoglycemia and how is it treated?

Hypoglycemia, also called "low blood glucose" or "low blood sugar," occurs when a student's blood glucose level falls too low. Hypoglycemia is typically caused by administering too much insulin, skipping or delaying meals or snacks, eating too little food,

exercising too long or too intensely. Hypoglycemia is the most common and immediate concern for school-aged children.

Hypoglycemia usually can be treated easily and effectively. If it is not treated promptly, however, hypoglycemia can become severe and lead to unconsciousness and convulsions and can be life-threatening. Symptoms of mild to moderate hypoglycemia include tremors, sweating, lightheadedness, irritability, confusion, and drowsiness. Symptoms of severe hypoglycemia include inability to swallow, convulsions or unconsciousness.

Mild to moderate hypoglycemia can be treated by promptly ingesting a quick-acting source of carbohydrates (such as hard candy, juice, or glucose tablets). After treatment, blood glucose levels should be rechecked in 10-15 minutes, and more carbohydrates administered until the student's blood glucose levels return to target levels.

When severe hypoglycemia occurs, the person cannot ingest or swallow anything and should never be given food or drink. Instead, glucagon should be administered and emergency personnel contacted. Glucagon is a hormone that raises blood glucose levels by causing the release of glycogen (a form of stored carbohydrate) from the liver. Although it may cause nausea and vomiting when the student regains consciousness, glucagon can be a lifesaving treatment that cannot harm a student.

More information on hypoglycemia and its treatment can be found on pages 36-41 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

2.8 What is hyperglycemia and how is it treated?

Hyperglycemia, also called “high blood glucose” or “high blood sugar,” occurs when the body gets too little insulin, food that is not covered by insulin, or too little exercise; it may also be caused by stress, menses, injury or an illness such as a cold. The most common symptoms of hyperglycemia are thirst, frequent urination, fatigue, and blurry vision. If left untreated, hyperglycemia can lead to a serious condition called diabetic ketoacidosis (DKA); characterized by nausea, vomiting, and a high level of ketones in the urine. DKA can be life-threatening and, thus, requires immediate medical attention.

Treatment of hyperglycemia may involve drinking extra water or diet drinks or administering supplemental insulin. The student's blood glucose level should be monitored closely until it returns to the target range.

More information on diabetes treatment and management (type 1 and type 2) can be found on pages 41-44 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

2.9 What are the dietary needs of children with diabetes?

The nutritional needs of a student with diabetes do not differ from the needs of a student without diabetes. Both should eat a variety of foods to maintain normal growth and development. The major difference for children who use insulin is that the timing, amount, and content of the food that the student with diabetes eats are carefully matched to the dosage and peak action of the insulin. The student's meal plan is designed to balance nutritional needs with the insulin regimen and physical activity level. There are usually no forbidden foods for people with diabetes.

What Should Advocates Know About Diabetes?

More information on nutrition and diet can be found on pages 50-54 of *Helping the Student with Diabetes Succeed* (see Question 1.5).

3. What Are Key Terms and Concepts for Diabetes Advocates?

This section lists a number of terms used in connection with diabetes care and the legal rights of students with diabetes with which advocates will want to be familiar.

3.1 What are some common terms related to diabetes care?

Blood glucose level: The amount of glucose in the blood. The recommended blood glucose levels for most people with diabetes are from about 80 to 120 before a meal, 180 or less after a meal, and between 100 and 140 at bedtime.

Blood glucose meter: A device that measures how much glucose is in the blood. A specially coated test strip containing a fresh sample of blood (obtained by pricking the skin, usually the finger, with a lancet) is inserted in the meter, which then measures the amount of glucose in the blood.

Blood glucose monitoring: The act of checking the amount of glucose in the blood. When done by the individual with diabetes, it is also called self-monitoring of blood glucose. For more information on the importance of blood glucose monitoring, see Question 2.3.

Carbohydrates: One of the three main classes of foods and a source of energy for the body. Carbohydrates are mainly sugars and starches that the body breaks down into glucose.

Glucagon: A hormone that raises blood glucose. Glucagon, given by injection, is used to treat severe hypoglycemia. For more information on glucagon and its use, see Question 2.7.

Glucose: A simple sugar found in the blood. It is the body's main source of energy.

Hyperglycemia: A high level of glucose in the blood. High blood glucose can be due to taking too little insulin, eating food not covered by insulin, or too little exercise. Symptoms include thirst, frequent urination, blurred vision, and fatigue. For more information on hyperglycemia, see Question 2.8.

Hypoglycemia: A low level of glucose in the blood. Low blood glucose is most likely to occur during or after exercise, if too much insulin is present, or not enough food is consumed. Symptoms include feeling shaky, having a headache, or being sweaty, pale, hungry, or tired. If not treated with a source of sugar, hypoglycemia can lead to a loss of consciousness, which can be life-threatening. For more information on hypoglycemia, see Question 2.7.

Insulin: A hormone produced by the pancreas that helps the body use glucose for growth and energy. When the body cannot make enough insulin, it is taken by injection using a syringe or pen, or through use of an insulin pump, and there are several different types of man-made insulin that can be injected. These types differ in how long they take to begin working and how long their effects last, and are used separately or in combination to treat people with diabetes. For more information on insulin administration, see Question 2.6.

Insulin injections: The process of administering insulin into the body with a syringe or pen.

Insulin pen: A pen-like device used to administer insulin into the body.

Insulin pump: A device that delivers a continuous supply of insulin. The pump is often programmed to deliver small, steady doses of insulin throughout the day. This steady dosage is known as the basal rate. Additional doses, called boluses, are given to cover food or high blood glucose levels. The pump holds a reservoir of insulin which is delivered through a system of plastic tubing (infusion set). Most infusion sets are started with a guide needle, then the plastic cannula (a tiny, flexible plastic tube) is left in place, taped with dressing, and the needle is removed.

Ketoacidosis: A serious condition that occurs due to insufficient insulin in the body because of illness, incorrect doses of insulin, or omitting insulin injections. The lack of insulin causes acids known as ketones to build up in the blood and to be discharged in the urine. The acidic state that follows causes fruity smelling breath, deep and rapid breathing, stomach pain, nausea, vomiting, and sleepiness, and can lead to diabetic coma or even death if not properly treated. Also known as diabetic ketoacidosis or DKA.

Lancet: A fine, sharp-pointed needle used to prick the skin of a person with diabetes to obtain a sample of blood for blood glucose monitoring.

Pancreas: The organ behind the lower part of the stomach that makes insulin.

Quick-acting glucose: Foods containing simple sugar that are used to raise blood glucose levels quickly during a hypoglycemic episode.

Target range: A selected level for blood glucose values that the person with diabetes tries to maintain. The target range is usually determined by the physician in consultation with the patient or parent/guardian.

3.2 What are some common terms related to the legal rights of students with diabetes?

Accommodations: The term “accommodations” is often used to refer to the related aids and services provided to elementary and secondary school children or to the academic adjustments and auxiliary services provided those in higher education pursuant to laws such as Section 504, the Americans with Disabilities Act or the Individuals with Disabilities Education Act. When so used, accommodations involve adjustments or modifications in programs or related services to ensure that a child can participate equally and fully in an educational program. The more appropriate term in this context is “related aids and services.” The term “accommodations” is more properly used only in the employment context, where “reasonable accommodations” refers to the modifications or adjustments employers make that enable an employee with a disability to enjoy equal benefits and privileges of employment. Using this phrase can incorrectly suggest that “accommodations” in the education context need not be provided if they would result in an “undue burden”. While the concept of “undue burden” limits the duty to provide accommodations in the employment context, it does not apply in education. Thus, while the term “accommodations” has become common in the elementary and secondary school setting,

and appears in this notebook, it should be seen as a shorthand for “related aids and services” and should not be understood as requiring the same showing as in the employment context.

Americans with Disabilities Act (or “ADA”): A federal law enacted in 1990 that prohibits discrimination against people with disabilities. As it relates to public schools, the requirements of the ADA are almost identical to those of Section 504 of the Rehabilitation Act. The ADA applies to all public schools and to all private schools except those controlled by religious organizations. The ADA is codified at 42 U.S.C. § 12101 *et seq.*

Diabetes Medical Management Plan: Describes the medical orders or diabetes treatment regimen developed by the student’s health care provider and family. The phrase Diabetes Medical Management Plan (or “DMMP”) is growing in use, but this document may also be referred to as physician’s orders or by other names.

Individualized Education Program (IEP): A plan describing the special education and related services that will be provided to a student with a disability under the Individuals with Disabilities Education Act. Some school districts also use IEPs to meet the requirements of Section 504.

Individuals with Disabilities Education Act (IDEA): A federal law that provides funds to states to support special education and related services for children with disabilities, administered by the Office of Special Education Programs in the U.S. Department of Education. Unlike the ADA or Section 504, to be eligible for services under IDEA, a student’s diabetes must impair his or her ability to learn so that he or she requires special education. The IDEA is codified at 20 U.S.C. § 1400 *et seq.*

Office of Civil Rights (OCR): Agency within the U.S. Department of Education responsible for enforcing Section 504 and, by agreement with the U.S. Department of Justice, Title II of the Americans with Disabilities Act as they apply to educational institutions. OCR’s duties include investigating complaints and conducting compliance reviews of states and local school districts.

Related Aids and Services: A phrase used in the elementary and secondary school context to describe the developmental, corrective, and other supportive services provided to give equal access to the educational curriculum for students with disabilities

Section 504: Section of the Rehabilitation Act (a federal law passed by Congress in 1973) that prohibits recipients of federal funds from discriminating against individuals on the basis of disability. Section 504 requires schools to provide students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met. Section 504 is codified at 29 U.S.C. § 794.

Section 504 Plan (or 504 Plan): A plan describing the special education and/or related services that a student with a disability will be provided in order to have equal access to education, as required by Section 504 of the Rehabilitation Act.

3.3 Is there a difference between “handicap” and “disability?”

No. The two terms are interchangeable, although the term “disability” is preferred today. Although early state and federal laws use the term “handicap”, and some of the regulations implementing Section 504 still use that term, more recent statutes like the Americans with Disabilities Act use the term “disability.”

3.4 What is the relationship between a Diabetes Medical Management Plan and a 504 Plan?

A Diabetes Medical Management Plan and a Section 504 Plan contain different information, even though they are sometimes confused. The DMMP, in effect, is a physician’s order. It outlines a child’s treatment regimen and is prepared by a child’s health care provider in consultation with the child’s family. School officials might well ask questions about or offer suggestions regarding the DMMP to a physician or family, but they do not prepare these directions. A Section 504 Plan is coordinated with and must be consistent with the DMMP. However, the Section 504 Plan specifies the who, what, where, and when to implement the DMMP in the school setting. The DMMP, for example, might say that the child should monitor his or her glucose each day at a specific time with supervision by school staff, and the Section 504 Plan will provide which school personnel will provide that supervision. The 504 Plan is prepared by the school but must ensure that decisions are made by a group of persons knowledgeable about the child and that the child’s parents or guardians are given an opportunity to participate in the process.

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)(J).

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. Gilhool*, 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 *Harrab (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 Loch 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 *Khalsa (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.

5. How Should Needed Services and Accommodations Be Requested?

The process of deciding what services and accommodations will be provided to a student with diabetes cannot begin until the school is aware that the student may have a disability and may need such services. This Part discusses what is required to begin this process. Typically this process begins when parents or guardians inform school officials that their child has diabetes and request (often informally) that services be provided. However, schools also have an obligation under certain circumstances to independently identify and evaluate students who may have a disability

5.1 What obligation does a school have to identify students who may need modifications or accommodations?

The process for developing an accommodation plan for a student cannot begin until that student has been identified by or to the school as potentially having a disability that requires accommodation. In many cases, the parents or guardians will bring the fact of the student's diabetes to the attention of school officials, but schools must take some steps to locate and evaluate children with disabilities. Public schools must attempt to identify and locate those students who are not receiving a public education but who may need modifications or accommodations (an obligation known as the "child find" requirement). Schools must also initiate the evaluation process for a student, even one already attending the school, where it has reason to believe, based on information or observation, that the student may have a disability requiring aids or services. Students with diabetes may come to the attention of school personnel based on the initial diagnosis and the accompanying absences from school, or through other means. When a student is identified, schools should promptly initiate the process to determine and provide appropriate modifications or accommodations to the child with diabetes.

Notes

Section 504 and the Individuals with Disabilities Education Act (IDEA) require that public elementary or secondary schools undertake to identify and locate children with disabilities who are not receiving a public education and inform parents or guardians of those children of the public schools' obligation toward those who have disabilities. 34 C.F.R. § 104.32 (Section 504); 20 U.S.C. § 1412(a)(3) (IDEA state requirements); 34 C.F.R. § 300.111 (IDEA child find regulations).

However, schools are not required to screen students for diabetes or undertake outreach efforts targeted at diabetes or other specific diseases. *Akers v. Bolton*, 531 F. Supp. 300 (D. Kan. 1981) (district had no obligation to make specific efforts to identify children with epilepsy). The Supreme Court in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 658 (1995), suggested (without deciding the question) that conducting random urine tests to identify which students had diabetes might violate a student's right to privacy. Nevertheless, every state requires that students undergo school health examinations and screening for

diabetes may be required as part of a school health examination. *See, e.g.*, 105 ILCS 5/27-8.1 (Illinois requirement).

Districts must also evaluate children to determine eligibility for special education or related services where the district knows or should know that the child may have a disability and may need such services. This amounts to a requirement that a district “find” particular children where there is reason to think they may be eligible for services. IDEA requires the district to ensure that all children with disabilities who need special education and related services are evaluated. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1). Section 504 requires that “[a] recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation . . . of any person who, because of handicap, needs or is believed to need special education or related services”. 34 C.F.R. § 104.35(a). OCR has held that the fact a student has been diagnosed with diabetes and requires services outlined in a diabetes care plan at school is sufficient information to put a district on notice that a student may be in need of services under Section 504 and therefore is entitled to an evaluation. *See Batavia (OH) Local Sch. Dist.*, Complaint No. 15-11-1110, 111 LRP 70127 (OCR 2011); *Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-1207, 109 LRP 32473 (OCR 2009); *Sandusky (OH) City Sch. Dist.*, Complaint No. 15-08-1062, 108 LRP 66797 (OCR 2008) (district knew student had diabetes and had a detailed treatment plan from the student’s doctor, and parents and school nurses had expressed concerns about the care the student was receiving); *Rock Hill (OH) Local Schs.*, Complaint No. 15-05-1181, 106 LRP 35138 (OCR 2005). Schools sometimes believe that a school-developed health plan is sufficient to avoid the need for a 504 evaluation, but this is incorrect. *See* Question 7.4. On the other hand, in *Clark County Sch. Dist.*, 114 LRP 45477 (Nev. State Educational Agency 2014), a state review officer found that a district did not violate its child find obligations under IDEA, where there was no evidence that the student’s diabetes affected his academic performance and therefore the district had no reason to suspect that the student required special education as well as related services. (This decision turns on the different legal standards for eligibility under IDEA, as discussed in Question 4.7).

In *Memphis (TN) City Sch. Dist.*, Complaint No. 04-10-5002, 112 LRP 26130 (OCR 2012), OCR found that a district violated Section 504 by having a practice of not referring students with diabetes and other conditions for 504 evaluations, based in part on evidence showing that only very small numbers of students with such medical conditions actually had 504 plans. *See also Sarasota County (FL) Sch. Dist.*, Complaint No. 04-09-1571, 60 IDELR 261 (OCR 2012) (district agreed to evaluate students with diabetes for 504 eligibility after OCR criticized its practice of refusing to evaluate students with diabetes unless they demonstrated limitations in learning); *San Jacinto (CA) Unified Sch. Dist.*, Complaint No. 09-13-1049, 113 LRP 12681 (OCR 2012) (district agreed to evaluate and develop 504 plans for students with diabetes in accordance with practices outlined in the NDEP guide (see Question 1.5)); *Forest Hills (OH) Local Sch. Dist.*, Complaint No. 15-09-1280, 58 IDELR 114 (OCR 2011) (district agreed to overhaul its 504 evaluation policies and practices, which provided for 504 evaluations only when parents requested them). *Cf. Hamilton (OH) Local Sch. Dist.*, Complaint No. 15-10-1123, 58 IDELR 82 (OCR 2011) (district had a practice of not evaluating students even when it had evidence that the students’ medical conditions were causing significant attendance problems).

School officials should seek out those students who may need accommodations, rather than waiting to be contacted by parents or guardians. *See Isle of Wight County (VA) Pub. Schs.*, Complaint No. 11-10-1044, 56 IDELR 111 (OCR 2011) (rejecting argument that district had no duty to evaluate for 504 eligibility where parent never requested an evaluation, and expressing concern over district’s over-reliance on parent requests for evaluations); *Opelika (AL) City Sch. Dist.*, Complaint No. 04-09-1182, 111 LRP 47376 (OCR 2011) (Section 504

coordinator's belief that a student was adequately served by a health plan and that the parent had never expressed any concerns despite being asked to do so did not excuse the district's failure to conduct a 504 evaluation). Teachers, nurses, and counselors must be prepared to make referrals for possible services based on personal observations of a student's behavior and performance or information received from parents or others. *Fayette County (KY) Sch. Dist.*, Complaint No. 03-05-1061, 45 IDELR 67 (OCR 2005) (district violated Section 504 by failing to evaluate student with diabetes who had recently transferred into the district because, even though student received some health care services under a school health care plan, he was experiencing depression and behavior problems and had attempted suicide); *Hamilton Heights (IN) Sch. Corp.*, Complaint No. 05-02-1048, 37 IDELR 130 (OCR 2002) (finding that Section 504 satisfied where referrals were made by teachers, nurses, and counselors, based on "those individuals' personal observations of the students' behaviors and requests from parents, and information from physicians").

5.2 Are schools required to notify parents of the availability of services under Section 504 and the Americans with Disabilities Act?

Yes. Schools must make efforts to inform parents/guardians and students of the school's obligation to provide services under Section 504 and the ADA. Notice must be given of the school's obligation to provide a free, appropriate public education to students with disabilities and to provide related aids and services needed by those students. However, schools need only make efforts to provide public notice of these rights and obligations; schools are not required to ensure that every parent/guardian and student actually is aware of them.

Notes

Schools are required to provide appropriate notice to parents or guardians of all students enrolled of the availability of services pursuant to Section 504 and the ADA. 34 C.F.R. § 104.32 (Section 504); 28 C.F.R. § 35.106 (ADA Title II). The notice must include information regarding the parents' or guardians' right to request an individual evaluation of their children to determine a student's eligibility for services. *See Elkhart (IN) Community Sch. Corp.*, Complaint No. 05-00-1026, 34 IDELR 13 (OCR 2000) (requiring that notices be given as part of voluntary resolution; specific notice required of all students with diabetes at time of resolution).

5.3 Must a parent or student make a formal request to trigger a school's obligation to provide accommodations?

No. As discussed earlier (see Question 5.1), Section 504 requires that an evaluation be initiated where a school knows or believes a child may need special education or related services. No formal request is required, and in fact a child may be evaluated and services provided even if the parent or guardian objects. However, it is a good idea for the parent/guardian or student to make a formal request for accommodations and services, rather than waiting for the school to act, especially for disabilities like diabetes which may not be readily observable by others.

5.4 To whom are requests for modifications or accommodations made?

As a practical matter, initial requests for modifications or accommodations are often directed to the school's principal or school nurse. However, school districts (except those which are very small) must designate individuals to coordinate efforts to comply with Section 504, the ADA and the IDEA. School districts frequently designate the same individual to coordinate compliance efforts under all three laws, although this is not always the case. Frequently these individuals are responsible for processing requests for modifications. While teachers, principals, or nurses should forward such requests to these individuals where appropriate, it can be helpful for parents or guardians to make the request directly to the person who is responsible for processing it. The school's student handbook should include contact information for individuals who are responsible for compliance with anti-discrimination laws.

Notes

Section 504's regulations require that a recipient that employs 15 or more persons must designate at least one person to coordinate its efforts to comply with the law's requirements. 34 C.F.R. § 104.7(a). The regulations also require that a recipient take appropriate initial and continuing steps to notify participants in school programs and activities and other interested persons of the identity of the recipient's 504 coordinator. 34 C.F.R. § 104.8. Sometimes the person who is designated as the 504 coordinator holds another primary job title.

Most school districts also have a special education coordinator who can be contacted about issues relating to students who are eligible for special education under IDEA.

5.5 How should an accommodation request be initiated?

Parents or guardians are not required to suggest modifications or accommodations to begin the process for determining what services will be provided. It is enough to bring to the attention of school officials that the child has diabetes; school officials then have the duty to find appropriate accommodations. However, it is strongly recommended that parents or guardians request specific modifications and accommodations. This can eliminate confusion about what the child needs and wants, and can speed the process of determining what should be provided. Indeed, without specific accommodation requests and documentation to support them, schools have no reliable information on which to base health-related accommodation decisions for students with diabetes. An accommodation request may be submitted orally, and need not mention "modifications," "Section 504," or any other specific legal terminology. However, it is best to submit the request in writing. The request should include:

- Purpose of the request.

For example: I am the parent of [name], whose date of birth is [date] and am submitting this request to obtain accommodations under Section 504 of the Rehabilitation Act and the American with Disabilities Act. My child attends [school] and has type 1 diabetes.

- The limitations caused by the disability.

For example: As a result of my child's diabetes, her endocrine system does not function properly and she is at risk of serious health problems and even death if her condition is not properly treated. She is required to monitor blood glucose levels, take insulin, eat snacks, and have access to the restroom.

- How the condition will affect the skills and abilities expected of the student – including both life and academic skills and abilities.

For example: My daughter may at times have high or low blood glucose levels that may affect her concentration or ability to do school work, to eat, to walk or to care for herself.

- The types of accommodations requested.

For example: I am seeking for my daughter appropriate accommodations. Among others, she should be permitted to carry and use blood glucose monitoring supplies, snacks, water, and insulin as per her Diabetes Medical Management Plan (DMMP).

- Provide medical documentation of the disability.

For example: Enclosed is a letter from my daughter's physician confirming her diagnosis of diabetes. Also provided is the Diabetes Medical Management Plan developed for my daughter.

- Offer to participate in any needed evaluation or meeting to discuss accommodations.

For example: Because of the immediate and chronic needs my daughter has, I ask that you promptly consider this request. My daughter is available for any further evaluation you may need. Also, I am prepared to meet at your earliest convenience to discuss her situation.

6. What is the Process for Deciding Which Services and Accommodations Will Be Provided?

Deciding which services and accommodations will be provided to a student with diabetes requires parents or guardians and school officials to exchange information about the child's health-related and academic needs and the resources available to the school, and can involve a "give and take" process between parents or guardians and school officials designed to determine what services will best meet the child's needs. While the school makes the ultimate decision about what will be provided, parents and their advocates can and should play an active role in this process. This Part discusses the process of deciding on services and accommodations, including issues such as who must be involved in the process and what medical information can be required. Part 7 discusses how accommodation decisions should be documented.

6.1 What is the process for deciding how a student's needs will be accommodated?

The process for evaluating the needs of a student with a disability and determining what accommodations and services will be provided involves contributions by both school officials and parents or guardians. Medical information about the student's diabetes and treatment regimen (typically in the form of a Diabetes Medical Management Plan (DMMP) developed by the student's physician, discussed further in Question 7.1) serves as a basis for determining what health care services will be provided. Once this information is presented, parents or guardians and school officials discuss (and perhaps negotiate) how to implement this plan. The student may also participate in the process if he or she has the desire and maturity. To help direct the process, parents or guardians should request specific, reasonable, necessary, and appropriate accommodations from school officials, making clear early on exactly what the parents or guardians feel is necessary for their child.

Although this process often takes place informally, Section 504 requires that people who are knowledgeable about diabetes and the student's particular health care needs be involved in the decision-making process, and also requires that decisions be based on accurate, current medical and educational information. The responsibility for evaluating the needs of students and making appropriate accommodations rests with the school. School officials should use an interactive approach beginning with a determination of the precise limitations imposed by the child's disability and how those limitations might be addressed. In consultation with the parents or guardians, the school should identify potential services and assess their effectiveness in enabling the child to fully participate in the school's programs. Of course, this process need not be elaborate in practice, and many schools will quickly put in place appropriate services upon receiving documentation specifying what is required.

As discussed in Question 6.9, school officials are ultimately responsible for deciding on and implementing accommodations, after considering the preference of the child's parents or guardians and documented health care needs.

Notes

Section 504 prescribes procedures for the evaluation and placement of students with disabilities. Specifically, schools must conduct an individual evaluation of a student with a disability before taking any action with respect to the initial placement of the student and any subsequent significant change in the student's placement. 34 C.F.R. § 104.35(a). Procedures apply to "ensure that children are not misclassified, unnecessarily labeled as handicapped, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials." *Cabell County (WV) Sch. Dist.*, Complaint No. 03-92-1062 (OCR 1992). In interpreting evaluation data and in making placement decisions, a school must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior; (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered; (3) 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; and (4) ensure that the placement is with persons who are not disabled to the maximum extent appropriate to the child's needs. 34 C.F.R. §§ 104.34, 104.35(c). See *Harney County (OR) Pub. Schs.*, Complaint No. 10-14-1327, 115 LRP 6273 (OCR 2014) (district agreed to revise policies in response to allegation that it failed to consider evaluation data about the student's diabetes prior to developing a 504 plan). Title II of the Americans with Disabilities Act (ADA) places similar requirements on schools. See 28 C.F.R. § 35.130. Schools have the option of attempting to address needs prior to conducting an evaluation. See *Karnes City (TX) Indep. Sch. Dist.*, Complaint No. 06-98-1180, 31 IDELR 64 (OCR 1999).

The evaluation process requires that the school district carefully review the student's condition and records and consult with appropriately knowledgeable individuals. Simply having the school nurse or another employee dictate what services will be provided or make a decision to deny eligibility based on a review of the file is not sufficient. *Papillion-La Vista (NE) Pub. Schs.*, Complaint No. 07-07-1124, 51 IDELR 195 (OCR 2008) (district violated Section 504 by failing to consult with appropriate knowledgeable individuals when only evidence of an evaluation process was the assertion that the school nurse reviewed the files of students with diabetes and determined whether they met eligibility criteria); *Schaffer (CA) Union Elementary Sch. Dist.*, Complaint No. 09-06-1412, 107 LRP 61308 (OCR 2007) (504 violated where school principal developed a 504 plan and presented it to the parents, without consulting a team of people knowledgeable about the student or evaluating data about the student's diabetes, and did not involve the parents in the process); *West Las Vegas Pub. Schs.*, Complaint No. DPH 0607-13, 107 LRP 33209 (N.M. State Educational Agency 2007) (school nurse developed a health plan based on a book of nursing guidelines without consulting the student's health care provider or other members of the IEP team).

The evaluation process may require a medical assessment. If a medical assessment is necessary to make an appropriate evaluation of a student with diabetes, the school district must ensure that the student is assessed at no cost to the child's parents or guardians. Failure to obtain a medical assessment where required, or to at least invite a parent or guardian to produce one, violates Section 504 and the ADA by not procuring a proper evaluation prior to placement. *Yuba City (CA) Unified Sch. Dist.*, Complaint No. 09-94-1170, 22 IDELR 1148 (OCR 1995) (finding violation in case involving child with diabetes). Because diabetes care is constantly improving, the medical assessment process (whether

conducted within or outside of the 504 or IEP team meeting) must use only the most current information available and not rely on outdated assumptions regarding care. See *Polk County (FL) Sch. Dist.*, Complaint No. 04-13-1245, 114 LRP 3197 (OCR 2013) (resolution agreement required school district to have the student’s treating physician present at the 504 team meeting or, if the physician could not be present, to have the school nurse consult with the physician about specific aspects of the student’s treatment regimen); *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995) (directing that current information be considered in determining whether in-class testing of blood glucose levels would be permitted); *In re Student with a Disability*, Complaint No. 0607-14, 48 IDELR 146 (N.M. State Educational Agency 2007) (district violated IDEA by failing to gather information on student’s diabetes and other medical conditions or to consult with an individual knowledgeable about these conditions); *In re Student with a Disability*, Complaint No. 45043, 107 LRP 37946 (N.Y. State Educational Agency 2002) (district decided to reduce a paraprofessional providing monitoring services to a child with diabetes from full time to part time based only on the passage of time from one school year to the next and despite evidence that the student’s safety would be compromised).

During the evaluation process, students with disabilities must “receive the kind of decent and thoughtful consideration and resolve which concerned adults—parents/guardians, teachers, principals, and other concerned personnel alike—can be expected to give them.” *Elizabeth S. v. Gilbool*, EHLR 558:461 (M.D. Pa. 1987). What the law “requires is simply that parents or guardians and teachers, principals, and others, whose advice and participation are valued because of their knowledge of the child, or the school, or of the disability or health condition, should sit down together, together [inform] themselves and think out loud together about the child’s circumstances ... and about the arrangements and undertakings which will support and assist the child to participate effectively in school”. *Elizabeth S. v. Gilbool*, EHLR 558:461 (M.D. Pa. 1987). Failure to hold meetings with parents or guardians at which school officials respond to parent concerns and requests denies the rights of students with diabetes. *Bement (IL) Community Unit Sch. Dist. #5*, Complaint No. 05-89-1087, EHLR 353:383 (OCR 1989) (record did not show meetings were held).

6.2 Are the procedures for determining modifications or accommodations different under the Individuals with Disabilities Education Act?

This notebook focuses mostly on Section 504 (and thereby the ADA). It is important to keep in mind that a particular child also may be covered by the IDEA, especially where a child has multiple disabilities. See Question 4.7. In general, the procedures under IDEA are similar to those under Section 504, although certain time limitations and other requirements are specified in more detail under IDEA than under 504.

Notes

The procedures followed under IDEA are usually more elaborate than those under Section 504, so while a school complies with Section 504 by meeting the IDEA requirements for providing a free appropriate public education, the reverse is not necessarily true. 34 C.F.R. § 104.33(b)(2). Section 504 and IDEA are similar in that each provides for evaluation, accommodation, related services, and dispute resolution procedures. However, certain procedural protections are found in IDEA but not in Section 504, including additional reporting requirements and additional protections for students facing discipline. Some specific differences between IDEA and Section 504 are noted in the sections that

follow, but advocates for a child covered by IDEA should consult that statute and its regulations for further details.

6.3 What medical or other information and authorizations should the student's family be prepared to provide to school officials?

Parents or guardians must be prepared to provide school districts any medical or other information and authorizations required to establish a child's need for services and how to meet those needs. Typical requirements include:

- Information establishing the child's diagnosis of diabetes.
- Description of the health care services required at school.
- Physician and parent/guardian confirmation as to the student's ability to self-monitor blood glucose or self-administer insulin, if appropriate.
- Parent/guardian medical authorization for administering medication and providing other diabetes care services to the child.
- Physician's order (sometimes called a Diabetes Medical Management Plan).
- Consent to disclose information, both medical and educational, to the student's physician.

Notes

Parents or guardians must be prepared to provide schools the necessary information required to develop a plan to accommodate a child. The student's physician is the person best suited to assess that student's health care needs. *Hawaii State Educational Agency*, Case No. 01-34 (Hawaii State Educational Agency 2001). If a parent or guardian fails to provide written instructions from the student's doctor on how and when to administer insulin or glucagon, for example, school officials do not violate Section 504 or the Americans with Disabilities Act when they do not provide the services. *Rock Hill (OH) Local Schs.*, Complaint No. 15-02-1034, 37 IDELR 222 (OCR 2002). Similarly, parents or guardians cannot legitimately complain about the school's selection of a back-up supply of fast acting sugar where they fail to respond to a questionnaire seeking that information. *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994) (parents failed to complete questionnaire although submitted twice). The best place to put this information is in orders signed by the treating health care professional, which is often called a Diabetes Medical Management Plan. See Question 7.1.

6.4 Are school officials entitled to confirm the appropriateness of a student's treatment routine?

A student's treatment routine should be determined by the student's physician and health care team. However, where there are questions about the student's treatment, school officials may confirm the treatment program. Neither Section 504 nor the Americans with Disabilities Act (ADA) are violated by confirming the correct treatment of a student with diabetes.

Notes

A school may legitimately confirm the appropriateness of medication dosages, and may refuse to administer a child's medication where the prescribed dosage is contrary to established protocols because of concerns about the student's health and the school's own liability. *See, e.g., Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754 (8th Cir. 1998) (ADA not violated where school refused to administer Ritalin to child whose dosages exceed the Physician's Desk Reference recommendation).

This situation should not arise regarding the administration of insulin, since there are no established limits on insulin dosages (although there may be such limits for some oral diabetes medication). Still, failing to take sufficient insulin or taking too much can result in hyperglycemia or hypoglycemia. Therefore, schools are entitled to confirm that proper dosage information has been furnished before providing insulin. Where dosage information provided by a physician or parent/guardian is not clear, school officials may contact parents or guardians for assistance in determining the correct dosage and may confirm with the school nurse that the parent-advised dosage is appropriate. *Union County (SC) Sch. Dist.*, Complaint No. 04-00-1420, 34 IDELR 210 (OCR 2000) (Section 504 not violated by 10 to 15 minute delay in insulin administration caused by school's efforts to confirm dosages with parent and physician; dosage information provided by physician did not contain specific information on what dosage should be given at very high blood glucose levels such as those experienced by the student in this incident). It is important for parents and guardians to ensure that physicians supply complete and clear dosage information to schools as part of the Diabetes Medical Management Plan.

School officials should not wait until a problem arises to determine whether physician or parent/guardian instructions are adequate. If the information received is inadequate, a school district should promptly contact the student's physician and parents or guardians, preferably in writing, to specify what additional information is necessary. *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000) (complaint resolved, in part, by establishing requirement).

6.5 Should parents of students with diabetes or students themselves be required to sign a medical authorization or a release?

Parents or guardians must provide an appropriate medical authorization to school officials, although the scope of that authorization might be limited in appropriate circumstances. A release of liability should not be required but is sometimes provided.

Notes

Schools may require necessary medical or physician authorizations or orders as a prerequisite to administering medications, such as insulin and/or glucagon. *See, e.g., Amarillo Indep. Sch. Dist.*, Complaint No. 06-02-1181 (OCR 2002) (school agreed to administer medications, including insulin and/or glucagon, to the student, providing necessary authorizations and physician's orders are received). This does not necessarily mean that the school is entitled to complete access to all medical information about the student; disclosure of information that is not related to the student's diabetes (such as information about psychological treatment a student received) may not need to be disclosed. On the other hand, a student who is entitled to accommodations should not be required to provide a release of liability as a prerequisite to receive what the law entitles the student to receive.

Parents or guardians are not required to sign a release to allow their children to attend school. *Berlin Brothersvalley (PA) Sch. Dist.*, EHLR 353:124 (OCR 1988) (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or Individuals with Disabilities Education Act on parents signing a waiver of liability is prohibited). Nevertheless, many parents will provide a release. A special release may be required of all students participating in selected activities (e.g., athletic programs or field trips).

6.6 What rules apply to the release or exchange of medical and educational information?

The confidentiality and privacy of student medical records should be protected during the evaluation process. Health care providers and schools may and should require appropriate consents to release or exchange medical and educational information not only during the process of developing an accommodations plan, but also during its implementation.

Notes

Health care providers and schools will require that appropriate consents to release or exchange information be provided. These consents are required by several different laws.

Physicians and other health care providers are subject to the Health Insurance Portability and Accountability Act or HIPAA. Pub. L. 104-191 (1996), 110 Stat. 1936 (codified at 42 U.S.C. § 1320d-2 (note)) (statute); 45 C.F.R. Parts 160 and 164 (regulations). Under HIPAA, physicians and other health care providers are expected to obtain consent from a parent/guardian or the student (if an adult) to release information.

Schools are also subject to privacy laws. Schools that receive federal funds are subject to the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g (statute); 34 C.F.R. Part 99 (regulations). Similar requirements are provided under the IDEA. 34 C.F.R. §§ 300.611-300.627. State statutes may be applicable as well.

While these laws provide some exceptions, FERPA requires that a school obtain written consent to the disclosure of education records even to a student's own physician. *Irvine (CA) Unified Sch. Dist.*, No. 0613, 23 IDELR 1077 (U.S. Dept. of Educ. Family Policy Compliance Office 1996) (FERPA required written consent to disclosure of education records regarding student with diabetes to student's physician). Education records covered by FERPA can include medical or treatment records if those records are created by the school or in its possession. Disclosure is prohibited to those in the school setting, such as other students, who do not need to know the information. In *L.S. v. Mount Olive Bd. of Educ.*, 765 F. Supp. 2d 648 (D. N.J. 2011), the court found that school employees had violated FERPA by failing to redact personally identifiable information from the records of a student with diabetes when they used those records as a teaching tool for other students, some of whom were able to identify the student.

HIPAA regulations exclude education records covered by FERPA or IDEA from those records subject to HIPAA's consent requirements. *See, e.g.*, 45 C.F.R. § 164.501 (providing that "protected health information" excludes individually identifiable health information in "[e]ducation records covered by" FERPA). Most records relating to a student will be subject to FERPA or IDEA privacy standards, but advocates should still be aware of HIPAA.

It should be recognized that some exceptions to the consent requirement may apply with respect to students with diabetes. Consent is not required under FERPA where

educational records are disclosed to other school officials, including teachers, “who have been determined by such agency or institution to have legitimate educational interests, including the educational interests of the child for whom consent would otherwise be required.” 20 U.S.C. § 1232g(b)(1)(A). Accordingly, a school may disclose information to a child’s teachers or others who are expected to provide accommodations. In some circumstances, disclosures may be made to other individuals who have custodial responsibility or an interest in the education of the child. In *Letter to Hay*, 110 LRP 45088 (U.S. Dept. of Educ. Family Policy Compliance Office 2010), a school district did not violate FERPA by disclosing details of the student’s treatment regimen to the student’s grandfather, where the grandfather had previously been closely involved with the student’s care, had participated in 504 team meetings and was authorized to accompany the student on field trips. Although parents objected to disclosure, the district had acted reasonably given a provision in the 504 plan that broadly authorized disclosure to any adult with custodial responsibilities who may need to know the information. The district was advised to work with the parent to determine what disclosures should be permitted in the future. Another exception to the consent requirement applies to health and safety emergencies. 20 U.S.C. § 1232g(b)(1)(I). Under this exception, information may be disclosed to meet a health emergency involving a student with diabetes. See *Letter re: Pioneer Sch.*, 108 LRP 12926 (U.S. Dept. of Educ. Family Policy Compliance Office 2007) (school did not violate FERPA by disclosing the names of adults authorized to make medical decisions for the child to emergency personnel who had been called to respond to an episode of severe hypoglycemia).

6.7 What disclosures should be made to teachers or others about the student's health?

Once modifications or accommodations are determined, teachers and other school personnel who have responsibility for a student need to be informed of the student’s diabetes and what responsibilities they may have. Without such knowledge, they will be unable to provide needed services. The school should obtain appropriate consent for the release of this information if required, although, as discussed previously, such consent may not be required when school personnel need the information as part of their educational duties. See Question 6.6. It is sometimes also helpful for students to be educated about diabetes where a student in their class has diabetes. See Question 9.12.

Notes

Enabling teachers and others who have responsibility for the student to provide adequate care will mean disclosing some details of the student’s treatment regimen to them. Failure to inform these individuals renders them unable to provide adequate care. See *Sandusky (OH) City Sch. Dist.*, Complaint No. 15-08-1062, 108 LRP 66797 (OCR 2008) (much of what was required for diabetes care at school in the physician’s orders was not communicated to school staff who supervised the student, who were therefore not able to implement the orders).

6.8 How is it decided whether a modification or accommodation is reasonable?

Under the Americans with Disabilities Act, modifications or accommodations are only required if they are reasonable. Whether a modification or accommodation is reasonable is

decided on a case-by-case basis. Modifications need not be made if they would fundamentally alter the nature of the school's program, but as the purpose of school is to safely educate its students it is hard to imagine fundamental alteration being an impediment to students with diabetes obtaining needed services. At private schools, modifications are also not required if providing the modification would be unduly burdensome. Section 504 (like the Individuals with Disabilities Education Act), on the other hand, does not specifically require modifications to be reasonable. Instead, modifications may be required as part of the school's duty to provide "related aids and services" needed to provide a student with a free appropriate public education.

Notes

In *Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-1207, 109 LRP 32473 (OCR 2009), OCR noted compliance concerns with a statement in the district's 504 policies that reasonable accommodations were not required if they would impose an undue burden or fundamental alteration of school programs. OCR observed that the FAPE requirement of section 504 contains no limitations based on undue burden or fundamental alteration. See also *Compliance With The Americans With Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools*, U.S. Dept. of Educ. Office for Civil Rights (1995), available at: <http://files.eric.ed.gov/fulltext/ED401688.pdf>.

6.9 Who makes the final decision about what services will be provided?

School officials are to consider information provided by and the preference of the child's parents or guardians during the process, and to select and implement an accommodation that is appropriate for the child. If there are several equally effective accommodations appropriate to the student's individual needs, the school has the authority to determine the accommodation that will be provided. Both Section 504 and the ADA, as well as the IDEA, provide procedures to have any disagreements resolved.

Notes

As discussed in Question 6.1, under Section 504, school officials are required to carefully consider information from a variety of sources, including the child's parents or guardians. The school is not required to follow parent/guardian recommendations, however. See *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D. N.Y. 2012) (school was not required to provide the specific service the parents requested, only to provide the student services needed for meaningful access to education). Indeed, unlike the IDEA, there is no requirement that parents or guardians be a part of the group. Cf. 20 U.S.C. § 1414(d)(1)(B)(i) (parents or guardians required to be included in Individualized Education Program team under IDEA). Where an agreement cannot be reached, the school must make a final determination. *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994).

While school officials may make a final determination if there is disagreement, the determination is always subject to the right of parents or guardians to seek a due process hearing or file a discrimination complaint. *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994). See Part 14 for information on the procedures available for resolving disputes.

6.10 How often must accommodation decisions be reviewed?

Accommodations must be periodically reviewed to ensure that they remain correct and appropriate, although Section 504 does not specify precisely how often. In addition, a review may be initiated by either school officials or the child's parents or guardians if the child's circumstances have changed.

Notes

Section 504 requires that schools provide for "periodic reevaluation of students" with disabilities who receive services. 34 C.F.R. § 104.35(d). Although not specifically required to follow the reevaluation procedures of the IDEA, following IDEA is one means of meeting this requirement. 34 C.F.R. § 104.35(d). IDEA requires that review occur "periodically, but not less frequently than annually." 20 U.S.C. § 1414(d)(4). IDEA, under some circumstances, allows long-term plans up to three years. 20 U.S.C. § 1414(d)(5).

Parents/guardians, teachers, or other school officials may request a review of accommodation decisions at any time if the child's circumstances have changed. If a student with accommodations performs poorly in school, for example, parents or teachers should suggest an evaluation to determine whether other accommodations or services may be required. *See, e.g., Hernando (FL) County Schs.*, Complaint No. 04-98-1412, 31 IDELR 89 (OCR 1999) (student with diabetes referred for evaluation because of poor school performance). A review may also be requested if the child's diabetes treatment regimen changes significantly.

7. How Should Needed Services and Accommodations Be Documented?

While accommodations for students with diabetes can be handled informally by schools with parent/guardian and physician authorizations and directions, written plans outlining each student's diabetes management and needed accommodations are highly recommended. As discussed further below, most students with diabetes should have two separate planning documents. One (often called the Diabetes Medical Management Plan) lays out the student's treatment regimen, while the other (often called a Section 504 Plan) outlines how the needed diabetes care will be provided at school. This Part discusses the development and contents of both types of plans.

7.1 What types of documents should be prepared regarding accommodations for students with diabetes?

Accommodating students with diabetes requires an assessment both of the health care needs of the student and of how those needs will be met in the school setting. It is helpful to develop two different types of documents to specify the services a student with diabetes will be provided. Typically, these documents are known as a Diabetes Medical Management Plan (DMMP) and a Section 504 Plan, although schools may use different names for one or both of them. Most students with diabetes should have both documents, and they are described below.

An individualized medical plan, developed by the student's personal health care team (including the treating physician) and family, contains the prescribed diabetes health care regimen tailored for that student. For example, this plan would include the times at which insulin should be given and the proper dose to be given for a specified blood glucose value. While this plan is often called a DMMP, it also may be called the physician's orders or other names. (Sometimes schools refer to this document as a diabetes care plan or health care plan, although care should be taken to distinguish this plan, which is developed by the student's own health care providers, from plans developed by the school which sometimes have similar names). See Question 7.7 for more information on the plan's contents.

An education plan explains what accommodations, education aids, and services are needed for each student with diabetes in order to ensure the child is safe at school and receives the proper treatment that is outlined in the DMMP or other health care plan. Depending on the law under which the student is covered and the preferences of the school, this plan can be known as a 504 plan, Individualized Education Program (IEP), or by another name. See Question 7.8 for more information on the plan's contents.

Together, these two plans provide the school and the parents or guardians with a comprehensive picture of the student's health care needs and how those needs will be met at school. While this information can be combined into one document, it is better to keep treatment information in a separate health care plan like a DMMP. Separate documents make clear that it is the responsibility of the treating physician and parents/guardians, rather

than the school, to decide on the treatment regimen appropriate for the child. This approach also ensures that the school has the most up-to-date and accurate information on the student's health care needs when making accommodation decisions.

Notes

The DMMP and the 504 plan are the most important documents setting out how diabetes care takes place at school, but other documents may be incorporated into them, including a health plan developed by the school (see Question 7.4). While it is acceptable and desirable to incorporate documents such as the DMMP or an ISHP into a 504 plan, districts should be careful not to incorporate or reference so many documents that the plan becomes difficult to understand or explain. For example, in *Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008), the student's plan comprised numerous documents, including an IEP (for her hearing impairment), a 504 plan, an ISHP, and multiple sets of medical orders. According to the Office For Civil Rights (OCR), no school staff person was familiar with all of these documents or could explain exactly what care the student required. Therefore, the resolution agreement required the district to reconvene the student's 504 team and develop one document containing all needed accommodations and services. See also *West Las Vegas Pub. Schs.*, Complaint No. DPH 0607-13, 107 LRP 33209 (N.M. State Educational Agency 2007) (different versions of plans with contradictory information circulated among school staff, resulting in inconsistent implementation of services).

7.2 Are there differences in documentation depending on whether a student is covered by Section 504, the Americans with Disabilities Act, or the Individuals with Disabilities Education Act?

Yes. The documentation required under Section 504 and the IDEA differs. Children covered by IDEA are required to have a written Individualized Education Program (IEP). On the other hand, a written plan is not necessary to comply with Section 504 (or the ADA), but schools can (and sometimes do) use IEPs developed using the IDEA process to comply with these laws. Even where an IEP is not developed, most schools will develop a written 504 plan describing the accommodations to be provided to students with diabetes and other disabilities covered by Section 504.

Notes

As discussed at Questions 4.4-4.7, all students with diabetes should be covered by Section 504 and the ADA while some, but not all, may be covered by IDEA. It is important to understand the documentation required by each of these laws.

The IDEA contains extensive requirements about what must be documented in a student's accommodation plan. Under IDEA, each child with a disability must have a written IEP. See 20 U.S.C. § 1414(d). Among other requirements, the IEP must provide: a statement of the child's present levels of academic achievement and functional performance; a statement of measurable annual goals, both academic and functional; a description of how the child's progress toward meeting the annual goals will be measured and reported; a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child; an explanation of the extent to which the child will not participate with non-disabled children in

the regular class and in school activities; and a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state or district-wide assessments. The IEP is developed after an evaluation by an IEP team following detailed procedures and requirements.

While Section 504 sets standards for how evaluations of a student's service and placement needs should be evaluated, it does not require that services be specified in a written plan. 34 C.F.R. § 104.35. If a school does develop a written accommodation plan, it can use the IDEA process of developing an IEP to comply with Section 504's evaluation requirements, but it is also free to adopt less detailed procedures. 34 C.F.R. § 104.33(b)(2). In fact, much of the information described above which must be in an IEP is not necessary in a plan for a student who needs only related services for diabetes care.

IEPs, unlike 504 plans, must be in writing. Where there is an IEP, it is often advisable to make reference to diabetes care in the written IEP even if diabetes is not the reason the child is considered to have a disability for IDEA purposes. In some circumstances, including diabetes care information is essential to ensure the provision of FAPE. *See In re: Student with a Disability*, Complaint No. 0607-14, 48 IDELR 146 (N. M. State Educational Agency 2007) (district violated IDEA where it did not create an individualized health plan or include in the IEP any information about diabetes or needed services).

7.3 Do students with diabetes always require a written Section 504 or accommodations plan?

No. School officials and teachers are permitted to make accommodations for students with disabilities such as diabetes without a written plan. However, a written plan is desirable, and it is recommended that one be developed for each student with diabetes. One benefit of a written plan is that it formally identifies the child as having a disability that entitles him or her to services under Section 504 or another anti-discrimination law. A written plan also assures parents/guardians and school personnel that everyone involved with diabetes care knows what his or her role is and what accommodations will be provided. Whether a written plan is critical, nonetheless, depends very much on how diabetes care is handled with respect to a child.

Notes

OCR has stressed the importance of developing a written 504 plan. "Although the Section 504 regulation does not explicitly require a written plan describing the specific services to be provided to the student because of the student's disability, school are strongly encouraged to develop written plans because it is difficult to imagine how school personnel and parents can be clear about their responsibilities without a written plan. Schools that avoid drafting a written plan may encounter compliance problems especially with ensuring full implementation of the plan and the provision of services necessary to provide covered students with a [free appropriate public education]." *Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011).

7.4 Is a health plan developed by the school an appropriate substitute for a Section 504 plan?

No. Schools often wish to develop a health plan (often called an Individualized Health Plan (IHP) or Individualized School Health Plan (ISHP)) as a means of implementing the

student's DMMP. This plan is typically developed by the school nurse and specifies which school personnel will provide needed services and how they will be provided. It is important that an IHP accurately reflect the treatment called for in a student's DMMP. While these plans can be helpful for school nurses and other personnel, they are not an adequate substitute for a Section 504 plan or IEP because they generally do not comply with the procedural requirements of those laws. Instead, the IHP itself can be incorporated by reference into the 504 plan or IEP, or the information from the IHP can also be included in these plans.

Notes

IHPs and ISHPs are typically developed by school nurses to describe how care will be provided, and are analogous to nursing care plans developed in other health care settings. See National Association of School Nurses, *Individualized Health Care Plans, The Role of the School Nurse* (June 2013), available at <http://www.nasn.org/PolicyAdvocacy/PositionPapersandReports/NASNPositionStatementsFullView/tabid/462/ArticleId/32/Individualized-Healthcare-Plans-IHP-Revised-2008>. Although they may be developed in collaboration with parents/guardians or treating physicians, often they are internal documents that are not shown to parents.

Where a student with diabetes is eligible for services under Section 504, an IHP is not in and of itself an adequate substitute for a properly developed 504 plan. In *Clarksville-Montgomery County (TN) Sch. Dist.*, Complaint No. 04-10-5003, 60 IDELR 203 (OCR 2012), OCR stated that an IHP could comply with the requirements of 504, but only if students with IHPs were evaluated for 504 eligibility in appropriate cases and given the law's other procedural protections. See also *Grenada (MS) Sch. Dist.*, Complaint No. 06-12-1005, 61 IDELR 54 (OCR 2012) (district developed an IEP that did not address the student's diabetes care needs, along with a diabetes care plan that was not a 504 plan and did not comply with 504 requirements); *Batavia (OH) Local Sch. Dist.*, Complaint No. 15-11-1110, 111 LRP 70127 (OCR 2011) (district agreed to revise its policy and practice of developing "diabetic care plans" instead of 504 plans for students with diabetes); *Forest Hills (OH) Local Sch. Dist.*, Complaint No. 15-09-1280, 58 IDELR 114 (OCR 2011) (district required to revise its policy of only serving students with diabetes through health plans); *Opelika (AL) City Sch. Dist.*, Complaint No. 04-09-1182, 111 LRP 47376 (OCR 2011) (district had an obligation to conduct a 504 evaluation of a student with diabetes even though the district's 504 coordinator believed that the IHP that had been developed was adequate to meet the student's needs); *Tyler (TX) Indep. Sch. Dist.*, Complaint No. 06-10-1043, 56 IDELR 24 (OCR 2010) (school's practice was to provide services through IHPs rather than conducting 504 evaluations); *Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-1207, 109 LRP 32473 (OCR 2009) (district provided services to a student through a diabetes care plan it developed but failed to evaluate the student for eligibility under 504); *Schaffer (CA) Union Elementary Sch. Dist.*, Complaint No. 09-06-1412, 107 LRP 61308 (OCR 2007) (student's health plan did not comply with Section 504 because it was not adopted in accordance with 504 requirements and procedural protections); *Fayette County (KY) Sch. Dist.*, Complaint No. 03-05-1061, 45 IDELR 67 (OCR 2005) (even though student was receiving some health care services under an IHP, district was required to evaluate him for eligibility under Section 504); *San Diego (CA) City Unified Sch. Dist.*, Complaint No. 09-04-1150, 44 IDELR 135 (OCR 2005) (student's ISHP was not an adequate substitute for a 504 plan adopted in accordance with proper procedures); *Rock Hill (OH) Local Schs.*, Complaint No. 15-05-1181, 106 LRP 35138 (OCR 2005) (district incorrectly believed that an IHP was an adequate substitute for a 504 evaluation for a student with diabetes).

7.5 Who prepares the Section 504 or accommodations plan?

It is the responsibility of school officials to prepare a written education plan. This plan should take into account the health care needs of the child and should be based on the Diabetes Medical Management Plan for the child, if one has been prepared, as well as other relevant information about the child's circumstances (see Question 6.1). Of course, the parents or guardians of the student may make whatever proposals for the plan they consider appropriate, and it is often helpful for them to prepare and present a proposed plan to the district. The district may adopt this plan or may use it as an aid in drafting the final plan.

7.6 Who should sign the Section 504 or accommodations plan?

Since there is no requirement that a 504 plan be in writing (see Question 7.3), there is no requirement that it be signed by any particular person. Ideally a school official authorized to bind the school (such as the 504 coordinator) and the parents or guardian will sign the education plan. However, parents need not sign the plan, and it can be implemented even if the parents object and refuse to sign it.

Notes

OCR has held that there is no requirement that parents or guardians sign a 504 plan. *See Bradley County (TN) Sch. Dist.*, Complaint No. 04-04-1247, 43 IDELR 44 (OCR 2004) (school did not violate Section 504 by implementing plan where a group of knowledgeable individuals developed and signed the plan, even though parent disagreed with the plan and refused to sign it). While such a plan can be implemented over a parent or guardian's objections, the parent or guardian has the right to challenge the adequacy of the plan through informal or formal procedures. See Part 14 for a discussion of how disputes about the content of plans can be resolved.

Some schools have all of a child's teachers sign the accommodations plan so that it is clear they are aware of the plan. Schools may also take other steps to ensure that all teachers are aware of their obligations under the plan. *Hamilton Heights (IN) Sch. Corp.*, Complaint No. 05-02-1048, 37 IDELR 130 (OCR 2002) (teachers ultimately signed plan or at least received instructions regarding diabetes). This is a good idea to ensure that a student's teachers are all well-informed as to their responsibilities under the plan.

An individualized education program (IEP) under the IDEA is required to be written and signed by the members of the IEP team. Parents or guardians also sign the IEP if they approve it.

7.7 What should be included in the Diabetes Medical Management Plan?

The American Diabetes Association suggests that a Diabetes Medical Management Plan or other medical plan address the specific health care needs of a child and provide specific instructions for each of the following:

- Blood glucose monitoring, including frequency and circumstances.
- Insulin administration, including doses/injection times prescribed for specific blood glucose values and the storage of insulin.

- Meals and snacks, including food content, amounts, and timing.
- Symptoms and treatment of hypoglycemia (low blood glucose), including the administration of glucagon, if authorized by the student's treating physician.
- Symptoms and treatment of hyperglycemia (high blood glucose).
- Testing for ketones and appropriate actions to take for abnormal ketone levels.

Of course, in any specific situation, other information may be appropriate. This listing is not exhaustive.

Notes

The suggested list is taken from a Position Statement of the American Diabetes Association, *Diabetes Care in the School and Day Care Setting* (see Question 1.5). Other suggestions can be found in the Association's sample DMMP and the OCR complaint resolution agreements available on its website (see Question 1.5).

It is important that the DMMP be clear about what care the student needs at school, since the school may not be required to provide what is not specifically called for by the physician as medically necessary. For example, in *Wayne Township Bd. Of Educ.*, 106 LRP 2442 (N.J. State Educational Agency 2001) the district was not required to provide a nurse to attend an overnight field trip because the information provided by the doctor did not clearly require any care that had to be provided by a nurse, and other adults were available to make sure the student tested her blood glucose. Even though the parent wanted a nurse to attend the trip and felt more comfortable with this arrangement, the school was not legally required to provide it.

7.8 What should be included in a Section 504 or other accommodation plan?

An accommodation plan should include information about how the student's diabetes will be managed at school, based on the treatment regimen outlined in the Diabetes Medical Management Plan. The plan should specify what accommodations and modifications to school policies will be made to provide diabetes care, who will perform diabetes care tasks, and who is responsible for supervising the provision of care. Some things that are fundamental to most plans are:

- When and where insulin will be administered.
- Who will administer insulin.
- Who is responsible for monitoring the student for possible signs of hypoglycemia or hyperglycemia.
- Who will administer glucagon in emergency situations.
- How care will be provided on field trips, during extracurricular activities, and on the school bus.
- Access to food, water and restrooms.
- How medications and syringes will be stored and disposed of at school.

- Who will provide diabetes care training and which staff members have been trained.
- The circumstances under which parents/guardians and the child's treating physician will be contacted regarding care issues.

As necessary the accommodation plan should also address other issues besides diabetes health care, such as the need for academic modifications:

- Alternate time to take academic exams if blood glucose levels are out of target range.
- No penalty for diabetes-related absences or tardiness.
- Reasonable time to make up missed assignments and exams.
- Opportunity to receive missed classroom instruction.
- Access to water, bathroom, supplies, health care upon request.
- Full participation in all school-sponsored activities such as field trips and extracurricular events.

Notes

Failure to include any information about the student's diabetes and the services or accommodations required can violate Section 504 and the IDEA. *See District of Columbia (DC) Pub. Charter Schs.*, Complaint No. 11-12-1419 et al., 60 IDELR 231 (OCR 2012) (OCR review of 504 plans of students with diabetes revealed that many did not specify needed aids and services for diabetes care); *Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011) (criticizing district for failing to specify in the student's 504 plan which school staff would provide diabetes care and under what circumstances); *Urbana (OH) City Sch. Dist.*, Complaint No. 15-11-1174, 112 LRP 4236 (OCR 2011) (because of confusion about care responsibilities of district staff created by the lack of detail in a student's 504 plan, district agreed to review the plans of all students with diabetes and incorporate all services related to diabetes, including all services provided or supervised by the school nurse, into these plans); *Alexandria Community Sch. Corp.*, Complaint No. CP-102-2009, 110 LRP 55138 (Ind. State Educational Agency 2009) (plan failed to provide sufficient detail on what teachers should do in situations where student asked to check his blood glucose); *In re: Student with a Disability*, Complaint No. 0607-14, 48 IDELR 146 (N. M. State Educational Agency 2007) (district violated IDEA where it did not create an individualized health plan or include in the IEP any information about diabetes or needed services). It is important that the 504 plan or other accommodation plan contain specific instructions about what diabetes care services will be provided and how and when they will be provided. Failure to specify these details may make it difficult for parents to enforce their rights to needed services. For example, in *Lee County (FL) Sch. Dist.*, Complaint No. 04-06-1178, 47 IDELR 18 (OCR 2006), the parents and the school nurse disagreed about how often the insulin cartridge in the student's insulin pen should be changed. OCR found that, since the issue was not addressed in the student's 504 plan, the district had not violated Section 504 by failing to change the insulin cartridge when requested. OCR suggested that the 504 team be reconvened to address this issue.

One example of things to include in an accommodation plan can be found in a complaint resolution which provides:

Each plan will provide those services required by Section 504 and Title II [of the ADA]. For example, each plan will, when appropriate, permit a student to: see school ADCPs [Authorized Diabetes Care Providers] or medical personnel upon

request; self-test, self-treat and self-monitor in the classroom and during all school sponsored activities, field trips and programs; eat snacks and drink beverages to prevent hypoglycemia; miss school without consequences for diabetes-related care, provided the absence is medically documented; and be excused to use a restroom, as necessary.

Buchanan County (VA) Pub. Schs., Case No. 11-03-1051, 103 LRP 56159 (OCR 2003). Other suggestions for can be found in the American Diabetes Association's sample Section 504 plan found on the Association's website (see Question 1.5).

7.9 Should school nurse services be specified?

Services to be provided by the school nurse or other trained personnel should be included in a child's accommodation plan. If the child has an individualized education program (IEP) it is particularly important to incorporate reference to school nurse services to be provided.

Notes

Where a child has an IEP detailed mention of school nurse services is important. School health services have always been considered a "related service" under regulations implementing the IDEA. 34 C.F.R. § 300.34(a) (term "related services" also includes "school health services and school nurse services"). The Individuals with Disabilities Education Improvement Act of 2004 amended the IDEA to specifically provide that such services are included. However, IDEA provides that "related services" includes "school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child." 20 U.S.C. § 1401(26)(A). Because the "as described" language does not modify other services included in the definition, the change suggests that it may be necessary to be more specific with respect to school nurse services to be furnished the child under the IEP.

7.10 What are the time limitations for developing a plan?

No specific time limits are prescribed under Section 504 or the ADA. Schools must, however, plan for and implement accommodations within a reasonable period of time. The IDEA, on the other hand, contains specific time limitations for the development of an Individualized Education Program (IEP), which can provide a helpful standard for determining a reasonable timetable even for students covered only by Section 504 or the ADA.

Notes

While written plans are not required to be developed within any given period of time under Section 504 and the ADA, schools must accommodate students with diabetes within a reasonable period of time. Just what is reasonable depends on the facts and circumstances, but delay in developing a plan is not a reason to deprive a child of an education. During the process, the child should not be denied meaningful access to school.

Significant delays in beginning the evaluation process will violate Section 504. *See Opelika (AL) City Sch. Dist.*, Complaint No. 04-09-1182, 111 LRP 47376 (OCR 2011) (district delayed evaluating student for eligibility for nearly 18 months after the initial parent request);

San Diego (CA) City Unified Sch. Dist., Complaint No. 09-04-1150, 44 IDELR 135 (OCR 2005) (delay of 3-4 months in initiating evaluation unreasonable where it resulted from erroneous beliefs about 504 eligibility and procedures and where evaluation did not begin until after expulsion proceedings had been initiated against student for conduct related to his disability); *Cabell County (WV) Sch. Dist.*, Complaint No. 03-92-1062 (OCR 1992) (six month delay in initiating evaluation, and delay in over a year in actually completing evaluation, found to violate section 504).

Where OCR reaches an agreement to resolve a complaint, 45 school days is often fixed as the time to evaluate the specific areas of the student's academic and nonacademic needs, obtain all necessary medical evaluations regarding the student's disability-related needs, carefully consider all medical evaluations, review academic accommodations, and develop an accommodation plan for the student. The plan is expected to be implemented within 60 school days. *See, e.g., Evergreen (WA) Sch. Dist. No. 114*, Complaint No. 10-00-1139, 36 IDELR 9 (OCR 2001) (setting schedule for claim submitted by student with diabetes).

Districts need to take all reasonable steps to ensure that appropriate care can begin at the start of the school year when they are aware of the student's condition and need for services. In *North Thurston (WA) Sch. Dist.*, Complaint No. 2012-SE-0084, 113 LRP 31234 (Wash. State Educational Agency 2013), the district knew that a child entering first grade had diabetes and would require services, yet despite parental requests during the summer made no attempt to develop a care plan prior to the start of the school year. Even after school began, the district refused to provide care for six weeks while demanding new medical orders and questioning the care called for by the student's physician, forcing the parents to come to school to provide care. A state hearing officer found that the school had denied the child a free, appropriate public education by failing to take steps to put a care plan in place prior to the school year, and any delays in providing care were caused by the actions of the district.

Every effort should be made to avoid delaying or interrupting a student's attendance at school. Where necessary to allow the evaluation of a student's needs and determination of appropriate accommodations, it has been held that a ten-day exclusion from school was not excessive. A change in a student's health care plan was considered after the student was treated in a hospital emergency room for a diabetes-related seizure. *Seattle (WA) Pub. Sch.*, Complaint No. 10-98-1264, 31 IDELR 193 (OCR 1999) (district found to have timely developed new health care plan upon notice that student's school health needs had changed). If a student is excluded from school, it may be appropriate not only to accelerate the evaluation process but also provide compensatory education if the student suffers any deficit relating to the lapse in attendance. *Addison Sch. Dist.*, Complaint No. 02-01-1110 (OCR 2001) (where student was excluded from school, process placed under stricter time lines and consideration of compensatory education required); *Ware Pub. Schs.*, Complaint No. 01-00-1046 (OCR 2000) (resolution agreement required provision for in-school tutoring to assist student in making up missed class work).

The IDEA requires that written IEPs be developed within specified time limits. While not strictly applicable under Section 504 and the ADA, these limitations provide some guidance. Where an initial evaluation is requested by a parent or guardian, the evaluation process and determination of whether a child has a disability is to be completed within 60 calendar days of receiving parental consent for the evaluation. 20 U.S.C. § 1414(a)(1)(C). An IEP meeting must be held within 30 calendar days of a determination that a child needs special education and related services. 34 C.F.R. § 300.323(c)(1). The IEP must then be implemented as soon as possible. 34 C.F.R. § 300.323(c)(2). These timelines are longer than would ordinarily be needed for students with diabetes; it is reasonable to expect that a

meeting would be held within 30 calendar days after parents or guardians provide school officials the child's Diabetes Medical Management Plan.

Some schools characterize accommodation plans as "drafts" when initially developed, and begin implementing the plans before they are finalized. There is nothing wrong with describing a plan as a draft, provided the student is receiving appropriate services and accommodations. *See Bradley County (TN) Sch. Dist.*, Complaint No. 04-04-1247, 43 IDELR 44 (OCR 2004) (no violation found where school had implemented a "draft" 504 plan at the beginning of the school year and had not finalized the plan until several weeks later).

7.11 What should be done if the Section 504 or accommodations plan is not being followed?

If an agreed-upon accommodations plan is not being followed, advocates should begin by presenting concerns to the appropriate school official. If the plan continues to be ignored, complaint procedures should be considered.

Notes

When a plan is not being followed, sometimes it is simply the result of lower-level staff failing to recognize the importance of implementing the plan. *See, e.g., Northwestern (OH) Local Schs.*, Case No. 15-03-1202 (OCR 2004) (OCR dismissed complaint where school had already addressed failure to implement Section 504 plan including, among other things, emphasizing to food service staff the importance of following the plan). Where this is the case, tactfully complaining to responsible school officials should lead to resolution of the problem. If problems persist, the formal and informal procedures discussed in Part 14 should be considered.

8. What Diabetes Care Services and Accommodations Should Be Provided?

Most students with diabetes will require some services and accommodations from the school in order to successfully manage the condition and participate fully in the educational program. Negotiations between advocates and schools will frequently focus on what diabetes care services the school is required to provide and how they will be provided. This Part begins with a discussion of the American Diabetes Association’s position on diabetes care in schools and of key points in its model state legislation, and then addresses the crucial need for accommodation decisions to be based on the needs of the individual child, not on blanket rules. It then addresses issues surrounding what care must be provided, including insulin administration, emergency care, and meals and snacks. The question of who should provide care is discussed in more detail in Part 9.

8.1 May a school be required to provide diabetes health care services to a student with diabetes?

Schools can be required to provide aids and services related to the health care needs of a student with a disability. Health services, such as those provided by a school nurse or other trained personnel, are services that the school can be required to provide under Section 504, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). Schools are not required to provide “medical services”, which are defined as services which must be provided by a physician (as opposed to a school nurse or other trained personnel). Since diabetes care tasks such as insulin and glucagon administration can be provided by nurses or other personnel, they are not “medical services” under this definition.

Notes

At a minimum, students with diabetes may not simply be excluded from school because they require diabetes-related health services. For example, in *District of Columbia (DC) Pub. Schs.*, Complaint No. 11-12-1133, 112 LRP 50236 (OCR 2012), the district had a policy of requiring that students with diabetes be sent home when school nurses were not available to provide care, but entered into a resolution agreement with OCR that required the district to provide these services at school. *See also Lourdes (OR) Pub. Charter Sch.*, Complaint No. 10-10-1249, 57 IDELR 53 (OCR 2011) (district’s difficulties in hiring a nurse could not justify its decision to transfer the student from the general education curriculum to homebound instruction); *Hasbrouck Heights (NJ) Sch. Dist.*, Complaint No. 02-01-1121 (OCR 2001) (assurances made to resolve complaint that school denied student a free appropriate public education by requiring parent to remove student with diabetes from school when nurse was not present). *Cf. Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014) (district agreed that it would not send or threaten to send the student home in order to

receive diabetes care if his blood glucose was at designated levels, but instead would provide such care at school, unless the parent requested that the child be sent home).

Section 504 provides that health services are included among those services that may be required to be provided to a student with a disability. 34 C.F.R. § 104.37(a)(2). The IDEA also states that school health services can be provided but does not require the provision of “medical services”. See 20 U.S.C. § 1401(26). The Supreme Court has narrowly defined the scope of “medical services” that schools need not provide under IDEA. The Court has held that services that may be provided by a qualified school nurse or other qualified person are related services, which must be provided, rather than a medical service, which is not required. *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999). Excluded medical services generally are those which must be provided by a licensed physician. Providing a supply of medication for a student is considered a medical service. See 34 C.F.R. Part 300, Attachment 1, Analysis of Comments and Changes, 64 Fed. Reg. 12540 (1999) (considering IDEA). However, while a district is therefore not required to provide medication, it may be required to provide the related service of administering the medication provided by the student or his or her parents or guardians. While Section 504 and the ADA do not provide for an explicit “medical services” exception, it is likely that medical services not required under IDEA would also not be required under these laws.

8.2 What is the position of the American Diabetes Association on the provision of diabetes care in the school setting?

The views of the American Diabetes Association on diabetes care in the school setting are embodied in the Association’s Position Statement on Diabetes Care in the School and Day Care Setting (see Question 1.5). This position statement emphasizes the need to assess the needs of each child individually and to provide appropriate care in the school based on the student’s Diabetes Medical Management Plan (DMMP) or other health care plan. The Association opposes blanket rules that would exclude students with diabetes from participating in school activities or would restrict the services school personnel provide. Diabetes care should be provided in a way that encourages self-management of diabetes by the student whenever appropriate and which ensures that adequate numbers of trained personnel are available to protect the student’s health and safety whenever the student is in school or participating in school-sponsored activities.

The position statement contains a number of specific recommendations regarding diabetes care services to be provided at school. Many of these recommendations are incorporated into model legislation that the Association has developed regarding diabetes care in schools. Legislation based on this model has been passed in a number of states. Key features of the Association’s model legislation are:

- Assuring that trained school personnel are available to provide routine and emergency diabetes care at school and school-related activities.
- Requiring development of diabetes care training guidelines by various government agencies and organizations and the training of school personnel.
- Permitting independent monitoring and treatment by students who are capable of doing so.
- Assuring that school choice is not restricted because of diabetes.

- Requiring development and implementation by the school of a DMMP approved by the child’s health care provider.

8.3 Should all students with diabetes be provided with the same modifications or accommodations?

No. Across-the-board, “one-size-fits-all” accommodation plans are not appropriate because they may not take into account each child’s individual needs. Accommodations for students with diabetes are often similar, but diabetes affects each individual differently and it is essential that individual needs be considered. Every child is entitled to an individualized assessment.

Notes

Section 504 requires the development of an individualized, appropriate educational program for each student with a disability. That program must be developed through a process that meets certain requirements. 34 C.F.R. §§ 104.34 (educational setting), 104.35 (evaluation and placement), and 104.36 (procedural safeguards). Title II of the ADA is similarly construed. 28 C.F.R. § 35.130(b). Because of this, under both Section 504 and the ADA, the individual needs of students must be considered. *See Sandusky (OH) City Sch. Dist.*, Complaint No. 15-08-1062, 108 LRP 66797 (OCR 2008) (“District staff’s denial of certain services and modifications, such as allowing blood sugar testing to be done in the classroom or administering emergency injections, were not determinations made based on evaluation data or on the student’s individual needs, but rather were based on administrative concerns or staff preference.”) *See also R.K. v. Bd. of Educ. of Scott County*, 494 Fed. Appx. 589, 597 (6th Cir. 2012) (factual issues existed as to whether district had made an individualized assessment of whether a student needed to attend a school with a full time nurse on staff); *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993) (homebound instruction for child with Down Syndrome and diabetes could not be limited to one hour per day without regard to student’s individual needs); *In re Student with a Disability*, Complaint No. 45043, 107 LRP 37946 (N.Y. State Educational Agency 2002) (district decided to reduce the services of a paraprofessional performing a student’s diabetes care from full time to half time based only on the fact that a few months had passed since the end of the prior school year, without considering any individualized information about the student’s condition or need for diabetes care from an adult).

General policies applicable to all students with diabetes violate these requirements. *See, e.g., Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995) (rejecting rule prohibiting in-class blood glucose testing); *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993) (Section 504 and ADA violated where school failed to consider individual needs of student with diabetes and, instead, proposed options that were based on the district’s refusal to allow non-licensed personnel to administer injections even in emergency situations); *Sch. Bd. of Pinellas County*, 58 IDELR 59 (Fla. State Educational Agency 2011) (student’s assignment to another school in order to receive diabetes care could happen only after an individualized determination of the student’s needs, not based on inflexible district policy).

8.4 Can schools apply blanket rules based on safety concerns?

Blanket rules that do not take into account individual circumstances are not appropriate, even when safety concerns are raised to justify them. These concerns must be considered as part of the assessment of a child's individual needs.

Notes

Students' needs must be assessed on an individual basis. See Question 8.3. Health and safety concerns may be considered, but only as part of the individualized determination. *Santa Maria-Bonita (CA) Sch. Dist.*, Complaint No. 09-97-1449, 30 IDELR 547 (OCR 1998) (school adopted agreement for individual assessment); *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995) (issues arising from guidelines under the federal Occupational Safety and Health Act, the disruptiveness to the overall class caused by blood glucose monitoring, and the safety of other students, must be considered as part of individualized evaluation).

8.5 May students with diabetes be assigned to a separate school other than the one they would attend if not disabled?

Some school districts may attempt to require students needing certain kinds of diabetes care to attend certain schools other than their zoned or assigned school. For example, the school may suggest that a student who needs assistance from school personnel with medication administration should attend a school with a full time school nurse (see Part 10). Parents may be given the option to assume responsibility for providing care for the child if they wish him or her to remain at the assigned school, but the district effectively refuses to provide the care the child needs at that school. It is the Association's position that this unnecessarily and improperly segregates students with diabetes from their non-disabled peers. If a student requires accommodations and services, they should be furnished at the student's regular school. The typical accommodations required for students with diabetes may easily be provided at all schools. In addition, if a school district were to require a student to attend another school because services are not available at the student's regular school, it would need to provide many of these same services during transportation to and from this school. See Question 12.8. Although parents may accept placement in a different school, parents should not be required to do so since other less disruptive options to provide diabetes care exist.

Notes

A policy prohibiting non-licensed individuals from giving students with diabetes injections may not be the exclusive controlling factor in making a placement, without consideration of the nature of the proposed placement in terms of curriculum, educational setting, opportunity to interact with non-disabled students, and other factors. *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993) (application of blanket policy in placement process violated Section 504 and ADA although several different options had been offered). The U. S. Departments of Justice and Education have determined that a policy requiring students to transfer to a different school because of their need for diabetes care can violate both laws. In 2013, DOJ issued a letter of findings addressing a complaint that Alabama school districts were forcing students to transfer to a school with a full time nurse if they needed school personnel to administer insulin or

glucagon. The state was supporting this practice through interpretations of state law that prohibited school nurses from delegating diabetes medication administration (see Question 10.5). In reviewing these practices, DOJ stated:

Attendance at a child's zoned school or school of choice is a benefit generally afforded to Alabama school children. Indeed, many parents, in selecting a home, place great importance on the school enrollment options for their home's location. And most parents expect that their children will have the opportunity to attend school alongside their siblings and neighbors. The ADA thus mandates that this same benefit be afforded equally to children with diabetes unless it is necessary to provide a different benefit to ensure that the aids, benefits or services of the education program are equally effective.

U.S. Department of Justice, Letter re: The United States' Investigation Under Title II of the Americans with Disabilities Act with respect to Public School Children with Diabetes in Alabama (Dec. 9, 2013), available at <http://www.ada.gov/alabama-LOF.htm>. DOJ found that this right was violated when decisions about student placement related to diabetes were made without considering the individual circumstances related to the child's medical condition. OCR has also indicated that such policies can violate Section 504 in recent letters of finding and agreements. In *Duval County (FL) Pub. Schs.*, Complaint No. 04-08-1278, 113 LRP 27887 (OCR 2013), the district signed a resolution agreement revising its policies to provide that insulin administration services would be provided at the school the child would attend if he or she did not have diabetes, unless the parent or guardian elected to send the child to a school with a full time nurse. *See also Sarasota County (FL) Sch. Dist.*, Complaint No. 04-09-1571, 60 IDELR 261 (OCR 2012) (school district violated Section 504 by refusing to provide school staff to administer insulin at the child's assigned school, and forcing the parent to agree to provide care in order to keep the student at that school); *District of Columbia (DC) Pub. Schs.*, Complaint No. 11-12-1133, 112 LRP 50236 (OCR 2012) (resolution agreement forbade district from requiring students to transfer to a different school or restricting school choice based on diabetes care needs).

State agencies have also found such policies or practices invalid under Section 504. In *Sch. Bd. of Pinellas County*, 58 IDELR 59 (Fla. State Educational Agency 2011), a hearing officer ruled that the district's policy of requiring students to transfer to a school with a full time nurse was not based on individualized assessment of the student's needs or current medical knowledge about diabetes. The hearing officer stated:

Respondent school district's over-arching policy relative to the administration of diabetes care, which fails to consider the individual and unique needs of the student Petitioner on a case-by-case basis, necessarily violates Petitioner's § 504 procedural rights. ... What Respondent cannot do is use its policy decision to use only nurse administration of insulin, as grounds to defend its position that students, desiring district diabetes services, must transfer to a school where nurses are stationed. This is because Respondent does have alternative options for the provision of these services, which options would not be near as burdensome to Respondent.

See also North Thurston (WA) Sch. Dist., Complaint No. 2012-SE-0084, 113 LRP 31234 (Wash. State Educational Agency 2013) (district violated Section 504 by abruptly deciding that a student would have to be transferred to a different school in order to receive diabetes care, without providing the student any time for transition or considering the impact on the child's medical condition).

Older OCR opinions, however, suggest that if a particular student's diabetes requires that a school nurse be available to provide services, it may be appropriate to assign a child to a school that has such services available rather than a school with only periodic coverage. See *Montgomery County (AL) Sch. Dist.*, Complaint No. 04-07-1022, 108 LRP 9480 (OCR 2007) (district did not violate Section 504 by requiring transfer of a student to a different school where state law did not permit anyone but a school nurse to administer insulin and where the academic programs in the new school were identical to those in the prior school); *Calcasieu Parish (LA) Sch. Bd.*, Complaint No. 06041354, 44 IDELR 49 (OCR 2005) (district's offer to transfer student to a school with a full time nurse was reasonable where state nursing regulations prohibited delegating insulin administration to unlicensed personnel and where the school the child attended had only a part-time nurse); *Seattle (WA) Pub. Schs.*, Complaint No. 10-98-1264, 31 IDELR 193 (OCR 1999) (assignment to school with a nurse on site daily approved for student with diabetes; unclear whether parent supported or opposed the requirement that care be provided by a nurse). These decisions appear to be inconsistent with the more recent positions taken by OCR and DOJ, as noted above.

Section 504 and the IDEA require that students be educated with persons who are not disabled and in the least restrictive environment. 34 C.F.R. § 104.34; 20 U.S.C. § 1412(5). However, in cases involving disabilities other than diabetes, several courts have stated that this does not automatically mean that all students with disabilities end up being assigned to their neighborhood school. *A.W. v. Fairfax County Bd. of Educ.*, 372 F. 3d 674, 681 (4th Cir. 2004) (under IDEA, "least restrictive environment" requirement means only that students should not unreasonably be segregated from non-disabled students and does not mandate any particular school placement or override school discretion in student assignment decisions); *Urban v. Jefferson County School Dist. R-1*, 89 F. 3d 720 (10th Cir. 1996) (reaching a similar conclusion under IDEA, and holding that 504 and the ADA confer no more rights than IDEA in this regard).

Two court cases (decided by the same judge) have used these principles to hold that Section 504 does not provide students with diabetes the right to attend any particular school. In *R.K. v. Bd. of Educ. of Scott County*, a federal district court held that a district did not violate Section 504 or the ADA in declining to assign a nurse to the school a student with diabetes would otherwise have attended and requiring the student to attend a different school if he wished district nurses to administer insulin. According to the court, the plaintiff failed to allege that the education at the school where a nurse was available was inadequate or, indeed, any different from that at the school he wished to attend, and the plaintiff had no claim so long as the district provided meaningful access to education at the school it chose. 2014 U.S. Dist. Lexis 121340 (E.D. Ky. Aug. 28, 2014). However, the U.S. Department of Justice, in an amicus brief to the Sixth Circuit on the same case, argued that the district court's analysis of the law and facts in a prior opinion was incorrect, and that the court had failed to properly consider whether a forced transfer to another school would deny a student FAPE or discriminate against the student on the basis of disability. See <http://www.justice.gov/crt/about/app/briefs/rkscottcountybrief.pdf>. See also *B. M. v. Bd. of Educ. of Scott County*, 2008 U.S. Dist. Lexis 66645 at *23-24 (E.D. Ky. 2008) (school acted reasonably in refusing to train unlicensed school personnel and transferring the student to a different school 5-7 minutes away where the school believed that state law did not permit the training of unlicensed personnel and was concerned about liability).

8.6 What are typical examples of health care modifications or accommodations for students with diabetes?

Examples of accommodations frequently requested include allowing blood glucose self-monitoring and medication administration by students who are capable of doing it themselves (see Question 9.1), administration of blood glucose checks and medications such as insulin and glucagon by school personnel when assistance is needed (see Questions 8.9, 8.11), and modification of food and bathroom usage policies (see Questions 8.15-8.17).

Notes

Numerous cases and OCR agreements have discussed these kinds of health care accommodations. Several rather comprehensive agreements to resolve discrimination complaints exist and can serve as guides to the kinds of accommodations that many children with diabetes will need. For example, one agreement requires that each plan for a student with diabetes permit a student to “see school ADCPs [Authorized Diabetes Care Providers] or medical personnel upon request; self-test, self-treat and self-monitor in the classroom and during all school sponsored activities, field trips and programs; eat snacks and drink beverages to prevent hypoglycemia; miss school without consequences for diabetes-related care, provided the absence is medically documented; and be excused to use a restroom, as necessary.” *Onslow County (NC) Pub. Schs.*, Complaint No. 11-02-1035, 37 IDELR 161 (OCR 2002); *see also Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999). *See also Springboro (OH) Community City Sch. Dist.*, Complaint No. 15-02-1194, 39 IDELR 41 (OCR 2003) (blood glucose monitoring, relaxation of snack policies, providing food serving size and carbohydrate information, and administration of medication).

8.7 Must schools monitor a student’s blood glucose levels?

Monitoring of a child’s blood glucose levels may be required if the child cannot monitor his or her levels independently. Younger students typically require assistance with taking blood glucose readings, reading and interpreting the results, and taking appropriate steps to respond to particular blood glucose values. Most older students, on the other hand, are capable of testing their blood glucose levels independently. Even for these students, monitoring may be required in emergency situations.

Notes

Since blood glucose monitoring is perceived as less complicated than administering insulin or other medications, it is often more readily provided by schools. One court held that the parents of a student with diabetes were likely to prevail at trial on their claim that a school district was required to test the student’s blood glucose levels during an after-school care program. *A. P. v. Anoka-Hennepin Indep. Sch. Dist.*, 538 F. Supp. 2d 1125, 1142 (D. Minn. 2008). (Because this case dealt with an after-school program, it did not involve the duty to provide a free, appropriate public education; the case for requiring school districts to monitor blood glucose levels would be even stronger in the educational setting). In *Charles A. Beard Memorial Sch. Corp. (IN)*, Complaint No. 05-14-1191, 115 LRP 10477 (OCR 2014), a district allegedly failed to check a middle school student’s blood glucose levels on multiple occasions, and on several other occasions performed the checks late or failed to treat issues related to blood glucose. OCR, as part of a resolution agreement, required the district to provide training specific to diabetes to school staff, including “the importance of conducting

all required blood sugar testing, timely testing of blood sugar, [and] the appropriate treatment of a student's blood sugar after testing.” See also *In re Student with a Disability*, Complaint No. 45043, 107 LRP 37946 (N.Y. State Educational Agency 2002) (school district was required to provide a paraprofessional in the classroom to monitor blood glucose levels of a first grader where the parent presented extensive evidence that he was not safe in the classroom without access to blood glucose monitoring). A school may also be responsible for ensuring that a student monitors blood glucose levels even when that student does so independently. For example, in *Lake Station Community Schs.*, Complaint No. CP 015-2012, 112 LRP 12094 (Ind. State Educational Agency 2011), the student’s IEP called for the school district to check the student’s blood glucose levels if she was unable to do so. The district violated IDEA in one instance where school personnel did not ensure that the student checked her blood glucose levels after she ate a snack. See also *Waterbury (CT) Bd. Of Educ.*, Complaint No. 01-07-1030, 108 LRP 60388 (OCR 2007) (despite parent’s complaint that school failed to monitor student’s blood glucose levels, OCR found no violation where medication logs showed that levels were monitored on a regular basis).

8.8 Are schools required to provide diabetes care supplies for students?

No. Schools need not provide diabetes supplies to a student. Parents or guardians are required to provide glucose testing equipment, insulin, glucagon, snacks, and other supplies necessary for students. However, it is a good idea for a school to have certain backup supplies available.

Notes

Diabetes care supplies such as blood glucose monitoring equipment and medications are considered medical supplies, which districts are not required to provide or pay for as an accommodation. While schools are required in appropriate circumstances to administer needed medications where those medications are provided by the child’s parents or guardians, schools are not required to provide medications or other items which are individually prescribed for the student, especially where those items are used by the student at home as well. See Question 8.1 (definition of medical services); see also *Ardmore (OK) Pub. Schs.*, Complaint No. 07-06-1016, 106 LRP 59000 (OCR 2006) (revised IEP required parents to provide diabetes supplies after school had difficulty getting parents to comply with requests to do so); *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994) (parents were to provide a supply of fast acting sugar as a medical supply). Schools should have a place for parent-provided supplies to be stored so that they are accessible when needed. See *Moore (OK) Pub. Schs.*, Complaint No. 07-11-1234, 112 LRP 37770 (OCR 2012) (school agreed to store diabetes care supplies in the student’s classroom).

Parents or guardians also may be expected to provide sodas or snacks if needed for diabetes care. *Maine Sch. Admin. Dist. #25*, Complaint No. 01-93-1170, 20 IDELR 1354 (OCR 1993) (school did not retaliate by expecting parents to buy or provide sodas to student with diabetes; school did provide storage and refrigerator space). Many schools wisely provide a backup source of some supplies, such as a glucose meter, snacks, and glucose tablets. The choice of backup supplies must meet the recommendations of the student’s diabetes medical providers, but the source does not need to be exactly what the student or parent/guardian might prefer. *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994) (school expected to provide a backup supply of fast acting sugar; complaint about the choice rejected where parent failed to respond to requests for student’s preferences).

8.9 May a school prohibit the administration of insulin during the school day?

No. Schools must provide for the administration of insulin to students with diabetes who need it. If a student needs insulin to be administered during the school day, such a policy would effectively exclude the student from school, by making it unsafe for him or her to attend.

Notes

Students who need insulin have a right to receive it in school. As the California Supreme Court stated in *American Nurses Association v. Torlakson*, 57 Cal. 4th 570, 576 (2013):

Public school students with diabetes who cannot self-administer insulin are normally entitled to have it administered to them at no cost. ... Public schools must offer to students covered by [Section 504, the ADA, and IDEA] a free and appropriate public education that includes related aids and services, such as medical services, designed to meet their individual educational needs. Under these laws, diabetic students pay for insulin, supplies and equipment but not the cost of administering insulin.

A policy that prohibits qualified staff from giving injectables to students with diabetes, even if needed and even in emergency situations, may have the effect of denying needed services to students with disabilities. *Sandusky (OH) City Sch. Dist.*, Complaint No. 15-08-1062, 108 LRP 66797 (OCR 2008) (district refused to allow any school staff to administer insulin because of policy forbidding medication administration); *see also Prince George's (MD) County Schs.*, Complaint No. 03-02-1258, 39 IDELR 103 (OCR 2003); *Amarillo Indep. Sch. Dist.*, Complaint No. 06-02-1181 (OCR 2002) (school agreed to administer medications, including insulin and/or glucagon); *cf. Moore (OK) Pub. Schs.*, Complaint No. 07-11-1234, 112 LRP 37770 (OCR 2012) (resolution agreement required district to remove statement from its policies that school staff would not be responsible for determining or calculating dosages of insulin); *Urbana (OH) City Sch. Dist.*, Complaint No. 15-11-1174, 112 LRP 4236 (OCR 2011) (district refused to administer insulin to a student when he did not want to self-administer).

If a student is able to self-administer insulin, no intervention or assistance from school personnel is necessary except in emergency situations. However, most younger children will not be capable of self-administering and will require assistance, and some older students may continue to need assistance (particularly where other disabilities are involved that make self-administration difficult). Insulin should be administered to a student until such time as the student is able to self-administer. *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000) (complaint resolution provided that school would administer insulin to student who was eight years old until she acquired the skill and comfort level to self-administer). Whether a student is able to self-administer insulin should be determined by the student's parents or guardians and physician in collaboration with school officials.

While in the past many people had treatment regimens that required only one or two insulin shots a day (and therefore would not necessarily require administration during school hours), since the 1990s advances in diabetes treatment have shown that a regimen including more frequent insulin dosages is much more effective at managing diabetes and avoiding long term complications. As a result, most students with diabetes require insulin administration during school hours. A student's need for insulin administration at school,

including timing and amount of doses, should be specified in detail in the student's Diabetes Medical Management Plan or other medical plan. Where the need for insulin is not documented, a school may not be required to administer insulin. See *Everett (WA) Sch. Dist. No. 2*, Complaint No. 10-06-1181, 108 LRP 42433 (OCR 2007) (where doctor's orders called for insulin administration only at lunch and during emergencies, and kindergarten student did not attend school during lunch, school had no obligation to provide for insulin administration); *Eastmont (WA) Sch. Dist. No. 206*, Complaint No. 10-05-1030, 44 IDELR 258 (OCR 2005) (where no medical documentation indicated that student needed insulin to be administered during the school day, district did not violate Section 504 by failing to administer it, even where parent claimed that she had been told by district officials not to request insulin because it would not be provided).

8.10 Do accommodation needs differ for students using an insulin pump?

Students using an insulin pump require accommodations just as do other children with diabetes. However, the accommodations might vary because of the pump. While independent students may be able to operate the pump without assistance, other students will need assistance as prescribed in the student's Diabetes Medical Management Plan (DMMP). All students may need assistance in the event of a diabetes emergency or pump malfunction. For students requiring assistance, the school nurse or other trained diabetes personnel need to be trained to assist with or perform essential pump functions such as bolusing, setting a temporary basal rate, changing batteries, and troubleshooting. The family and school should work together to develop a plan for providing insulin to the student in the event of a pump malfunction or infusion site dislodge. It may be necessary to administer insulin by syringe or pen until the infusion site can be changed as prescribed by the DMMP. A school nurse, if trained, possesses competency and agrees to do so, may also be able to change the infusion site. Schools may also need to make a plan for securing or storing a student's insulin pump if a student disconnects it for physical education or for some other reason.

Notes

One case involving an after-school program (and therefore not invoking the obligation to provide a free, appropriate public education) held that the parents of a student with diabetes were likely to prevail at trial on their claim that a school district was required to train staff to operate the student's insulin pump. *A. P. v. Anoka-Hennepin Indep. Sch. Dist.*, 538 F. Supp. 2d 1125, 1142 (D. Minn. 2008). For examples of Office for Civil Rights agreements addressing insulin pump issues, see *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-07-1271, 108 LRP 34606 (OCR 2007) (nurse would be trained and permitted to change the infusion site on a student's pump); *Henderson County (NC) Pub. Schs.*, Complaint No. 11-00-1008, 34 IDELR 43 (OCR 2000) (school agreed to train school personnel in the use of pump and also have an individual trained to operate the pump accompany the student to school-sponsored events off campus).

8.11 Must a school be prepared to administer glucagon to students?

Yes. Accommodation of students with diabetes requires that school personnel be prepared to administer glucagon to students if needed. Glucagon cannot be self-administered; it is administered by injection when a person is unconscious or semi-conscious

due to severe hypoglycemia and cannot take glucose orally. Therefore, even students who are independent in all other aspects of care will generally need someone at school available to administer glucagon in an emergency. Although a child may vomit, he or she is not injured from receiving glucagon when it is not actually required. For more information on glucagon, see Question 2.7.

Notes

A life threatening situation may result if glucagon is not administered promptly when circumstances warrant. In *American School for the Deaf (CT)*, Complaint No. 01-07-1268, 108 LRP 58193 (OCR 2008), OCR found that a district had violated Section 504 by failing to properly respond to an incident of hypoglycemia during a field trip; glucagon was not brought on the field trip because no staff were authorized to administer it. It has been held that a student with diabetes who is at risk of hypoglycemia must be placed where a nurse or other qualified individual is available on site to administer glucagon in case of any emergency. *Hawaii State Educational Agency*, Case No. 01-34 (Hawaii Dept. of Educ. 2001).

A specific written order of the student's physician may be required before school personnel will agree to administer glucagon. *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000). Where the student's physician orders do not clearly require glucagon, the district may not be required to provide school staff to administer it even if parents believe it is needed. *Everett (WA) Sch. Dist. No. 2*, Complaint No. 10-06-1181, 108 LRP 42433 (OCR 2007).

The administration of glucagon has been frequently addressed in resolutions of discrimination complaints. See, e.g., *Springdale (AR) Sch. Dist.*, Complaint No. 06-08-1349, 109 LRP 4346 (OCR 2008) (school agreed to train coaches, principal and teachers to recognize symptoms of hypoglycemia and to administer glucagon); *Jamestown Area (PA) Sch. Dist.*, Complaint No. 03-02-1117, 37 IDELR 260 (OCR 2002) (school district agreement to implement a procedure including a designated back-up person for the school nurse to administer glucagon to student as needed); *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000) (school agreed that glucagon would be administered to student by district nurse as needed in emergency situations); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999).

8.12 Is a 911 call a substitute for providing diabetes care to students?

No. It is the American Diabetes Association's position that failing to administer glucagon or provide other needed treatment while 911 is called unnecessarily delays needed health care and may result in death or serious brain damage. Normally, the proper response to an emergency situation is to call 911 and administer glucagon while waiting for emergency personnel to arrive.

Notes

The argument is sometimes made that there is no obligation to provide glucagon in cases of severe hypoglycemia because a call to 911 is sufficient. This argument is appealing for school districts because it would relieve them of the responsibility for planning for diabetes emergencies by shifting all of the responsibility onto local emergency services. However, the administration of glucagon is not an unanticipated situation, and districts need

to have a plan in place to respond to such emergencies. Delay in administering glucagon for the time it takes emergency personnel to arrive could result in serious harm. Given the unpredictability of emergency response times and the fact that school personnel can be successfully trained to administer glucagon immediately in an emergency situation, there is no justification for doing nothing while waiting for emergency personnel to arrive. In *Cape May County (NJ) Technical Sch. Dist.*, Complaint No. 02-09-1019, 110 LRP 19930 (OCR 2009), a district violated Section 504 when it did not have school staff available to provide diabetes care during before and after school activities and relied on calling the parents or 911 if the student experienced health problems. In the related context of emergency treatment for a seizure disorder, it was held that calling 911 was not an appropriate response because there was no guarantee an ambulance would arrive within any particular time frame, despite the fact that a hospital was nearby. *Silsbee Indep. Sch. Dist.*, 25 IDELR 1023 (Tex. State Educational Agency 1997). *But see Everett (WA) Sch. Dist. No. 2*, Complaint No. 10-06-1181, 108 LRP 42433 (OCR 2007) (appearing to endorse calling 911 as an alternative to school staff administering glucagon in a situation where the physician's orders did not clearly require glucagon). Calling 911 will, of course, be an appropriate part of an emergency protocol alongside glucagon administration. *See Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014) (district agreed that it would call 911 under emergency circumstances requiring more than the administration of insulin and glucagon)

8.13 How should emergency evacuation procedures be modified to accommodate students with diabetes?

Emergency procedures should consider the need for students to have medication, food, and diabetes supplies available to them wherever they happen to be within the school day. This may require school personnel to take steps to make sure that these items are available for a student. One way that this could be accomplished is to allow students who are mature enough to carry with them items needed for self-care (see Questions 8.14, 9.8-9.9), in addition to designating a school staff member who is responsible for securing and transporting supplies to an emergency evacuation site.

Notes

Several OCR agreements have required districts to address whether diabetes care and supplies are accessible in an emergency or lockdown situation. In *Lowell (MA) Pub. Schs.*, Complaint No. 01-13-123, 63 IDELR 171 (OCR 2014), the school permitted the student to carry food and drink in a fanny pack, and as part of a resolution agreement the district agreed to convene a 504 meeting to decide whether other diabetes supplies could be carried in the pack and thus be available to the student during a lockdown. And in *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-07-1271, 108 LRP 34606 (OCR 2007), the district agreed in a resolution agreement to keep diabetes supplies in its crisis management kit so that they would be accessible in an emergency or lockdown.

8.14 Should students carry glucagon with them while at school?

Students with diabetes should be allowed to carry glucagon. A student will not, of course, self-administer glucagon. However, carrying glucagon on the student's person will give trained personnel quick access should the need for it arise. In addition, it is preferable to store a back-up glucagon kit in the nurse's office, athletic trainer's kit, or some other

location where school personnel will have easy access. Whether to carry glucagon is an individual decision, and many students with diabetes choose not to carry it.

8.15 Should students with diabetes be given unrestricted access to water and restrooms?

Because of the increased need students with diabetes may have for water and for use of the restroom, a student's Section 504 plan or other education plan may need to provide unrestricted access to these facilities.

Notes

Children with diabetes have an increased need for drinking water when experiencing a high blood glucose level. For this reason, students with diabetes should have unrestricted access to water. This does not mean, however, that the student must be allowed to leave the classroom and go to a drinking fountain. To assure that the student stays on task and in order to minimize interruptions in the educational process, allowing the student to have bottled water in the classroom might be an equally appropriate accommodation. *North Lawrence (IN) Community Schs.*, Complaint No. 05-02-1235, 38 IDELR 194 (OCR 2002) (noting resolution of complaint).

Where greater amounts of water are consumed, a student with diabetes may also require frequent restroom breaks. See *Prince George's County (MD) Pub. Schs.*, Complaint No. 03-14-1025, 114 LRP 36274 (OCR 2014) (where parent complained that the student was not allowed unlimited access to the restroom, resolution agreement required district to convene a new 504 plan meeting and address the student's need for restroom access); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999) (where appropriate, accommodation plans must provide for students to be excused to use the restroom).

8.16 Is the school required to provide a student with carbohydrate counts or other nutritional information?

Nutrition management is essential for proper diabetes care. Carbohydrate information must be made available to individual students when needed. Where children are unable to properly calculate carbohydrates or portion sizes, the student may need assistance doing so.

Notes

Carbohydrate counting is very important for many students with diabetes. Therefore, providing information on carbohydrates and serving sizes can be essential. *Hamilton Heights (IN) Sch. Corp.*, Complaint No. 05-02-1048, 37 IDELR 130 (OCR 2002). In *Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014), a parent complained that the school had failed to follow the student's 504 plan by not providing nutritional information for school lunches. As part of a resolution agreement, the school agreed, that, if the student returned to the district, the district would address at a 504 team meeting "how and when nutritional information would be provided to the family.

Most schools participate in the National School Lunch Program administered by the U.S. Department of Agriculture. The Department prohibits discrimination in programs it administers. 7 C.F.R. § 15b. Discrimination is specifically prohibited in the National School

Lunch Program and those with disabilities must be accommodated. 7 C.F.R. § 10.10(d). Accommodations may require substitutions to regular meals where medically required. See U.S. Department of Agriculture Food and Nutrition Service, *Accommodating Children with Special Dietary Needs in the School Nutrition Programs: Guidance for School Food Service Staff*, available at: http://www.fns.usda.gov/cnd/Guidance/special_dietary_needs.pdf. In addition to providing carbohydrate count information, schools may choose to meet the needs of students with diabetes by preparing individual meals for the student. *In re: Student with a Disability*, Complaint No. 0607-14, 48 IDELR 146 (N. M. State Educational Agency 2007) (school prepared special meals for student with type 2 diabetes to meet her medical needs). However, not all modifications to school food policies will be required or medically necessary. In *A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660 (E.D. N.Y. 2012), a district court held that a school district did not violate Section 504 when it refused to allow the student's lunches to be heated in the school microwave. Even though the student was more likely to eat his food if it was heated and therefore more appealing, it was not medically necessary for the student's food to be hot. Therefore, the student did not require hot lunches in order to have meaningful access to lunch or to be safe, and the district did not discriminate when it failed to allow the use of its microwave to heat lunches.

The National School Lunch Program also requires that nutrition of meals be analyzed. 7 C.F.R. § 10.10. Therefore, schools are required to have nutrition information available.

Because of the need for carbohydrate information, food vendors often make this available to schools. It is important, however, for schools to make a clear distinction between "as prepared" and "as purchased" carbohydrate counts. Schools should provide students with diabetes information on the "as prepared" counts. *Hamilton Heights (IN) Sch. Corp.*, Complaint No. 05-02-1048, 37 IDELR 130 (OCR 2002) (school voluntarily corrected errors in mistakenly providing "as purchased" rather than "as prepared" carbohydrate information).

8.17 Should a student with diabetes be denied candy or "treats" given during school parties and activities or as part of a reward program?

Despite misconceptions to the contrary, there are no forbidden foods for most students with diabetes. These students may eat candy or other treats at school parties, activities, or programs provided they make appropriate adjustments in their diabetes care regimen. Such adjustments often require advance planning and notice to parents or guardians. While making such adjustments can be difficult in the school setting, it is inappropriate to exclude these students from having candy or treats unless there is a valid health-related reason.

Notes

Misinformation about the ability of students with diabetes, particularly type 1 diabetes, to eat candy or other sugary foods persists, despite the fact that sugar intake is readily managed with proper insulin dosages. One district even reported the parents of a young child with type 1 diabetes to child protection authorities based, in part, on allegations that the parents provided the child with sweets to eat at school. In a case alleging that the district discriminated against the child by making this report, the court found that the principal (who made the report) had received training on diabetes and therefore knew or should have known that children with diabetes are not forbidden from eating sugar. *A.C. v. Shelby County Bd. of Educ.*, 711 F. 3d 687, 700 (6th Cir. 2013).

Children on the insulin pump may conveniently inject insulin (a bolus) where additional food is consumed. If a student is unable to calculate the insulin required for candy or treats, the school must be prepared to assist the student to do so.

If a child receives insulin injections, less flexibility exists in food consumption unless there is pre-planning. For this reason, schools should provide parents or guardians advance notice when there will be candy or treats at school. Under one such procedure established for a child on daily injections, the teacher sent a letter home at the beginning of the school year, notifying the parents in the child's classroom that they are to inform the teacher at least two days in advance of bringing food treats to school. When this happened, the procedure also required the teacher to call the parent of the child with diabetes. If the teacher was unable to reach the parent, or if the parent stated that the child's food schedule could not be rearranged that day, the child's treat was placed in the refrigerator until he could have it, usually the following day. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995) (finding procedure adequate and finding that neither Section 504 nor the Americans with Disabilities Act (ADA) were violated where policy was not followed on one occasion where a parent brought treats without advance notice and, as a result, the child was denied the treat). *See also Danbury (CT) Bd. of Educ.*, Complaint No. 01-13-1115, 113 LRP 52424 (OCR 2013) (resolution agreement required district to hold a 504 team meeting to discuss with the parents what foods could be provided to the student at unanticipated classroom events, and that the district would continue to ask teachers and parents to provide advance notice of such events where possible); *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-07-1271, 108 LRP 34606 (OCR 2007) (resolution agreement required school to provide advance notice of classroom parties and to contact parents before denying the student a treat for medical reasons).

A school may be required to monitor the provision of snacks to a student with diabetes. *Renton (WA) Sch. Dist.*, Complaint No. 10-93-1079, 21 IDELR 859 (OCR 1994) (monitoring of snacks provided for 9-year-old student with diabetes and other impairments). If a student's blood glucose level is high, a teacher may withhold food that might aggravate the high. This does not violate Section 504 or the ADA because there would be "a legitimate, nondiscriminatory reason (i.e., the nature of the student's disability and concern for the student's health and safety) for treating the student differently on these occasions." At these times, the teacher may offer to give the candy or "treat" to the parent or guardian so that the child may enjoy it when glucose levels are within the proper range. *Rock Hill (OH) Local Schs.*, Complaint No. 15-02-1034, 37 IDELR 222 (OCR 2002).

Schools might consider making sugar-free candy available to students with diabetes. This may be appropriate, for example, where candy is given to students as part of a good-behavior reward system. *Southern Lyon County Unified Sch. Dist. #252*, Complaint No. 07-97-1022 (OCR 1997) (resolving complaint that student with diabetes was discriminated against by not allowing child to participate in teacher's reward system known as "Fun Friday Candy Party" by providing sugar-free candy to child).

8.18 Are schools required to have emergency response plans that address diabetes?

State law may require that schools adopt emergency response plans. These laws may be specific to schools or apply more broadly to other public facilities, such as those providing recreational opportunities. Although these plans are often prompted by concern about cardiac emergencies, state laws may require that other health emergencies be addressed as well, including those relating to diabetes. Advocates for students with diabetes should

consider whether these laws require emergency plans to address and make available emergency diabetes care.

Notes

The American Heart Association promotes legislation that requires automated external defibrillators in public facilities. These laws, however, may not be restricted to cardiac emergencies and may require that more general emergency plans be adopted. The AHA's Medical Emergency Response Plan for Schools (available at http://www.heart.org/idc/groups/heart-public/@wcm/@ecc/documents/downloadable/ucm_425826.pdf) is a broad public health initiative that supports state laws requiring schools (and often other public facilities) to be prepared to respond to life-threatening medical emergencies (such as diabetes and low blood glucose) in the first minutes before the arrival of emergency medical services. .

The AHA initiative urges that teachers, staff and even students be trained to deal with life-threatening emergencies, and that available first aid kits include a source of glucose.

9. Who Should Provide Diabetes Care to Students?

Deciding who will provide diabetes care in the school setting is an important part of the process of developing an accommodation plan. Often, the best care providers are the students themselves; by their teenage years most students with diabetes are quite self-reliant in providing for their own care. However, even the most self-reliant and independent student will need help in the event of a diabetes emergency. Other students, because of age, developmental level, or inexperience, will need help from school staff. This Part first discusses accommodations that may be needed to allow self-care, including when and where students may perform care tasks and whether students may carry diabetes supplies. Next, the need for school personnel to provide care is discussed, including how personnel should be trained.

9.1 Should students with diabetes be permitted to perform diabetes self-care tasks at school?

Where the student has the appropriate skills and maturity to perform self-care, the student should be permitted to do so. The parent should consent to self-care by the student, and the physician's orders should authorize the particular kinds of self-care the student can perform. Some students may be able to perform some care tasks independently but not others; this decision should be individualized and made by the parents and physician. In order to provide self-care, students will generally also need the ability to carry some diabetes supplies with them (see Question 9.9).

Notes

Common self-care tasks that students perform include monitoring blood glucose levels and treating high or low blood glucose levels using insulin or a fast-acting source of glucose. School districts should allow those students who are able to self-monitor blood glucose levels, rather than requiring all care to be provided by school staff. *See Bigborn (WY) Sch. Dist. #2*, Complaint No. 08-13-1165, 61 IDELR 236 (OCR 2013) (after complaint, district and parent agreed on new 504 plan that permitted student to self-monitor).

But where the treating physician's orders do not clearly permit the student to self-treat, the district may not violate 504 by refusing to allow this. *See C.T.L. v. Ashland Sch. Dist.*, 743 F. 3d 524, 531 (7th Cir. 2014) (where original treating orders had been ambiguous as to whether student was allowed to self-treat hypoglycemia with fast-acting glucose, and where school had permitted this once orders were revised, there was no 504 violation for an incident where student had not been allowed to self-treat prior to the revision of the orders).

9.2 Should diabetes self-care happen in the classroom or where activities take place?

Students must be allowed to perform diabetes self-care in the classroom (or at other locations where school activities occur) where the child's individual evaluation shows this is appropriate. It is inappropriate to require these students to go to another location, such as the school nurse's office, school clinic, or an administrator's office, when care can safely and quickly be performed in the classroom. Common self-care tasks that occur in the classroom are blood glucose monitoring, administering insulin, treating hypoglycemia, eating snacks, and drinking water. It is important that self-care be performed in the classroom when possible for the student's health and safety, and also to minimize the amount of instructional time that students must miss while traveling to another location to perform routine self-care.

Notes

School officials must consider whether concerns they may have about self-care can be accommodated in some way. If, for example, self-care is thought to create disruption to the classroom, school officials are "required to consider whether, through repetition, through education and training or by other adjustments, the disruption could be minimized." *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995). Any perceived disruption must be weighed against the right of students with disabilities to be educated with non-disabled students to the maximum extent appropriate. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995).

A frequent issue involving classroom self-care is blood glucose monitoring. A student's 504 plan or IEP should specify that care may be performed in the classroom or wherever the student is on campus. *See Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014) (district would be required to address at 504 team meeting "when and where the Student can test and treat his glucose and ketone levels, which should be accessible in terms of time and location so the Student's daily schedule will not be unduly disrupted"); *Ferndale (PA) Area Sch. Dist.*, Complaint No. 03-13-1053, 113 LRP 28080 (OCR 2013) (after parent complained student's 504 plan was revised to permit her to perform care anywhere at school); *Sandusky (OH) City Sch. Dist.*, Complaint No. 15-08-1062, 108 LRP 66797 (OCR 2008) (after parent complained that teacher would not allow third grade student to monitor his blood glucose in the classroom but instead required him to go to the school office multiple times per day, OCR required school to convene a 504 meeting to address this and other diabetes care issues and noted that the district had made decisions based on administrative convenience and preference rather than the needs of the student).

In *Shelby County (TN) Sch. Dist.*, Complaint No. 04-07-1412, 108 LRP 68122 (OCR 2008), a student with type 1 diabetes, missed significant class time because all blood glucose testing had to be done in the school nurse's office. After school district officials were shown materials from the American Diabetes Association demonstrating that blood glucose testing in the classroom was safe and recommended, they agreed that testing could be performed in the classroom while she was in class (and in the nurse's office when she visited there between classes or on the way to lunch). And in *Bloomfield Township Bd. of Educ.*, Complaint No. EDS 10165-06 2007-11586, 109 LRP 35236 (N.J. State Educational Agency 2008), a school district was required to permit a high school student with type 1 diabetes and Down's Syndrome to monitor his blood glucose levels in the classroom and to keep his testing supplies on his person during the school day. The district required the student to come to the nurse's office, and miss class time, several times per day for testing. The state hearing officer determined that on the spot testing was medically necessary for the student to

minimize any harmful consequences of hypoglycemia or hyperglycemia, and rejected the district's arguments that the testing would be unsafe or disruptive as unsupported by evidence. *See also Rock Hill (OH) Local Schs.*, Complaint No. 15-05-1181, 106 LRP 35138 (OCR 2005) (school required student to come to the nurse's office to monitor blood glucose and administer insulin until new medical information was received from the parent and treating physician).

According to OCR, once school officials become aware of a child's need to have blood glucose monitoring during school hours and the child's parents or guardians maintain that monitoring could and should take place in the classroom, the school must ensure that a decision is made by a group of knowledgeable persons, using current information, and fully and carefully considering the matter. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995). The individualized assessment required with respect to each student requesting to self-check in the classroom should take into consideration all relevant factors. These might include, for example, each student's age, capabilities, willingness to self-test, maturity level and experience with self-monitoring. *Buchanan County (VA) Pub. Schs.*, Case No. 11-03-1051, 103 LRP 56159 (OCR 2003) (resolution agreement).

9.3 Are blood glucose testing and the presence of sharps (e.g., lancets and syringes) in the classroom safe?

Yes. Medical professionals confirm that blood glucose monitoring, insulin administration, and sharps are safe in the classroom. There is no risk of transmitting disease or blood-borne pathogens through conducting diabetes care tasks in the classroom. It is the position of the American Diabetes Association that self-care, including blood glucose testing and insulin administration, can safely and effectively be performed by many students in the classroom, and that safety concerns do not justify prohibiting self-care in class.

Notes

In *Bloomfield Township Bd. Of Educ.*, Complaint No. EDS 10165-06 2007-11586, 109 LRP 35236 (NJ State Educational Agency 2008), a state hearing officer rejected a district's argument that blood glucose testing in the classroom was unsafe for a high school student with type 1 diabetes and Downs syndrome. The officer credited evidence that the American Diabetes Association supported blood glucose testing in the classroom as safe and effective.

While the Office for Civil Rights recognizes that health and safety concerns and disruption in the classroom are matters of importance and may be considered, decisions about whether to allow testing in the classroom must be based on an individualized assessment rather than blanket rules. A fixed rule based on such matters "expressed using generalized expectations rather than based on an assessment and evaluation of the needs of the specific disabled student and the requirement to ensure that services are administered in the most integrated setting appropriate to the needs of the individual with disabilities" is prohibited. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995).

9.4 Does the Occupational Safety and Health Act (OSHA) prohibit blood glucose monitoring and sharps (e.g., lancets and syringes) in the classroom?

No. The Occupational Safety and Health Act is sometimes raised as a reason for denying students the opportunity to perform diabetes self-care in the classroom or at other locations. However, no OSHA rule prohibits blood glucose monitoring, insulin administration, or the presence of sharps in the classroom.

Notes

OSHA actually applies only to private employees – not students. 29 U.S.C. §§ 652(5), 654. Even if OSHA guidelines did apply, they do not preclude self-care. The guidelines, along with any other relevant considerations, are to be considered as part of individualized evaluation and assessment of the child's needs. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995). The American Diabetes Association is unaware of any situation where such guidelines have been found to support a prohibition against self-care in the classroom or other school locations.

9.5 What measures should be taken to make certain syringes, lancets, or blood glucose monitoring materials are properly disposed of?

Most schools will have proper containers for students to dispose of sharps and other medical waste materials. Other schools may work out individual agreements for students to retain sharps and testing materials and take them home for disposal at the end of the day. The procedure to be used should be specified in the student's accommodation plan, and students should be made aware of the importance of proper disposal of sharps.

9.6 Should students with diabetes be permitted to leave class whenever necessary for diabetes care?

A student's Section 504 Plan or other written education plan should address the circumstances under which the student is allowed to leave class. A plan should allow students to leave class for diabetes care if they wish to do so. When allowing the child to leave is appropriate will depend on why the child is leaving, whether he or she is able to perform self-care tasks, and whether he or she needs to be accompanied when leaving. In no circumstances should a child be permitted to leave the classroom unaccompanied during an emergency situation (see Question 9.7).

Notes

In *Davenport (LA) Community Sch. Dist.*, Complaint No. 05-10-1132, 59 IDELR 112 (OCR 2012), the school convened an IEP meeting in which the student's plan was modified to permit her to leave class in order to perform diabetes care, even if no staff escort was available. OCR determined that this response was adequate, and that the parent could not identify any adverse consequences to the student after this plan was implemented. *See also Farmington (MN) Sch. Dist. #192*, Complaint No. 05-08-1235, 109 LRP 31151 (OCR 2009) (resolution agreement permitted student to go to the nurse's office at lunch to test her blood glucose levels, and at any other time when she felt it necessary).

9.7 Is it sometimes appropriate to require students to go to the school nurse's office or other location for diabetes care?

Some children (usually those who are younger or less mature) are unable or unwilling to perform self-care tasks independently or require supervision or assistance when doing so. In these cases, it may be appropriate to require that students go to the school nurse's office or clinic or another place in the school for diabetes care. However, this decision only may be made as part of the individualized evaluation and assessment of the child; schools may not have a blanket policy requiring all students to go to a certain location for diabetes care.

Notes

Any requirement that a student go to the nurse's office or another location for diabetes care should be clearly spelled out in the 504 plan or other accommodation plan and should be based on the needs of the child rather than the convenience of school staff. It is also important that students not be forced to miss unnecessary instruction time while waiting for care. In *Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008), a school violated Section 504 when it required a student to go to the office to test her blood glucose levels and receive diabetes care. The student's 504 plan stated that she could test and receive care in any location, and there were aides available in the classroom who could provide care. OCR found that the student was required to go to the office because the care providers were unfamiliar with the 504 plan and found it more convenient to send the student to the office, not because of any evaluation of the child's needs. The student was required to go to the office every time she needed to test blood glucose levels, and had to wait there while any levels that were out of range were treated. She missed an average of 45 minutes per day of class time, and OCR found that this violated 504. See also *American School for the Deaf (CT)*, Complaint No. 01-07-1268, 108 LRP 58193 (OCR 2008) (similar); *Moore (OK) Pub. Schs.*, Complaint No. 07-11-1234, 112 LRP 37770 (OCR 2012) (resolution agreement required blood glucose monitoring to take place in the classroom). *But see Lowell (MA) Pub. Schs.*, Complaint No. 01-13-123, 63 IDELR 171 (OCR 2014) (district policy requiring medications to be kept in a locked cabinet in the office, and thus preventing the administration of medication in the classroom, was neutral and nondiscriminatory on its face, and parent presented no evidence that any student had been denied access to any medication because of the policy).

A student should never be required to go alone to the school nurse's office or clinic when an emergency situation exists, such as hypoglycemia or other circumstances where a student's health might be at risk while in route. Where diabetes-related symptoms exist, a specific person should be responsible for getting the child to the nurse's office or clinic. *Casa Grande (AZ) Elementary Sch. Dist.*, Complaint No. 08-11-1082, 112 LRP 15697 (OCR 2011) (district violated 504 on at least one occasion by sending student unaccompanied to the nurse's office when experiencing low blood glucose symptoms, even though his IEP required that she be escorted in such situations); *Schaffer (CA) Union Elementary Sch. Dist.*, Complaint No. 09-06-1412, 107 LRP 61308 (OCR 2007) (district violated 504 by sending student to nurse's office accompanied by another student, where student's plan required him to be accompanied by an adult); *Lee County (FL) Sch. Dist.*, Complaint No. 04-06-1178, 47 IDELR 18 (OCR 2006) (student's 504 plan provided that she should not be permitted to walk alone to the school clinic when she was weak or not feeling well); *Abington Sch. Dist.*, Case No. 812, 28 IDELR 890 (Pa. State Educational Agency 1998) (noting importance of requirement that student be accompanied by another person).

But if the plan does not specifically require the student to be accompanied in these situations, there may be no violation. In *Ardmore (OK) Pub. Schs.*, Complaint No. 07-06-1016, 106 LRP 59000 (OCR 2006), the student on several occasions experienced symptoms of hypoglycemia but did not have snacks to treat the low; she was therefore sent to the nurse's office for care but sometimes did not go there. On one occasion the parents became upset when the student was allowed to go get her lunch unaccompanied while she was feeling low. After this incident, the school modified the student's IEP to require her to be accompanied whenever she left class. OCR found that the school had responded adequately to the situation by convening an IEP meeting and revising the plan after concerns were raised, but had not violated IDEA prior to the meeting because the plan did not require the child to be accompanied when leaving class. *See also Le Center Indep. Sch. Dist.*, Complaint No. 2236, 109 LRP 32528 (Minn. State Educational Agency 2006) (no violation where district failed to send someone to escort the student to the nurse's office for blood glucose monitoring, because the student's plan only required an escort when the student was experiencing low blood glucose levels).

If a child's Section 504 Plan provides that the student is to go to the nurse's office, school clinic, or other location, teachers need to ensure that the student goes to this location when necessary (even if the student forgets to go). *Sierra Vista (AZ) Unified Sch. Dist.*, Complaint No. 08-99-1039, 31 IDELR 169 (OCR 1999) (complaint resolution reached where staff failed to send child to nurse's office at specified times for a blood glucose check).

9.8 Should students be permitted to carry and eat food at any time and any place during school?

Students should be permitted to carry and eat snacks at any time and any place during school if it is determined that this accommodation is needed. See Question 9.2. Snacks are important in diabetes management for many students, and many students will benefit from having immediate access to them to more easily manage diabetes and more quickly treat hypoglycemia.

Notes

Snacks are important because diabetes care requires a continual balance of insulin, nutrition, and physical activity. Many forms of insulin do not work at a steady rate, and hypoglycemia can be frequent between meals. To avoid hypoglycemia, many students with diabetes regularly need a snack several times a day. A snack also may be needed at unexpected times. Therefore, students must have food readily available at all times. More information on snacks and nutrition is available in *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (June 2003) (see Question 1.5), at pp. 23-24. A student's accommodation plan can permit the student, where appropriate, to eat snacks and drink beverages to treat and prevent hypoglycemia. *See Davenport (LA) Community Sch. Dist.*, Complaint No. 05-10-1132, 59 IDELR 112 (OCR 2012) (district modified student's plan to allow juice and snacks to be kept in the classroom); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999) (resolution agreement required school to allow access to food and drink).

9.9 Should students be permitted to carry diabetes testing supplies and test at any time and any place during school?

With parent/guardian and health care team consent, students with diabetes should be allowed to carry testing supplies where they demonstrate sufficient maturity and responsibility. Although general rules may serve as a guide, an individual determination should be made as to whether a student will carry testing supplies.

Notes

The Diabetes Medical Management Plan for a student with diabetes may specify that the student be allowed to carry testing supplies, such as a glucose meter, test strips, and lancets, at all times where medically necessary. This is the case even where a school has a general policy requiring that all medications be housed in an administrative or nursing office. *Huntsville City (AL) Sch. Dist.*, Complaint No. 04-96-1096, 25 IDELR 70 (OCR 1996) (district made exception for student with diabetes after student’s physician verified that it was medically necessary for her to have her glucose meter with her at all times). See Question 13.3 (discussing the possibility that students may be disciplined for carrying medications or supplies based on laws or policies designed to prevent drug use in schools).

Schools should develop a policy to address the needs of students who must monitor their blood glucose levels during the school day. *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-02-1275, 38 IDELR 105 (OCR 2002) (school committed to develop and publish policy). Such a policy must take into consideration the student’s level of maturity, capabilities, and responsibility. School policies vary as to which students may carry supplies. See, e.g., *Sumner County (TN) Sch. Dist.*, Complaint No. 04-01-1122, 36 IDELR 136 (OCR 2001) (district did not permit middle school student to carry diabetes supplies but did allow high school students to do so; appropriateness of policy not questioned); *Santa Maria-Bonita (CA) Sch. Dist.*, Complaint No. 09-97-1449, 30 IDELR 547 (OCR 1998) (sixth grader and eighth grader permitted to possess testing kit, including sharps, in classroom and perform regular testing as needed and at designated times in classroom).

A student’s use of a glucose meter might be restricted where circumstances establish that the student is not capable of using the meter unsupervised or acting on the results. See, e.g., *Wells (ME) Pub. Schs.*, Complaint No. 01-01-1227, 36 IDELR 244 (OCR 2002) (supervised access to testing supplies appropriate in view of student’s “low average general cognitive skills with specific processing deficits in auditory concentration and memory.”)

9.10 May the student’s written education plan require that a child’s parent go to school to provide diabetes care?

Schools are obligated to provide services to students with diabetes, and may not require a student’s parent or guardian to assume this obligation. Parents or guardians may not be required to provide services at school, but a child’s parents or guardians and school officials may agree that the parent or guardian will do so.

Notes

According to the Office for Civil Rights, “under normal circumstances, it is not appropriate for a school district to require a student’s parent or guardian to come to school to provide medication that is a related service that the student needs during the school day in order to participate in the District’s programs and services.” *Rock Hill (OH) Local Schs.*,

Complaint No. 15-02-1034, 37 IDELR 222 (OCR 2002). As discussed in Question 8.1, administration of medication and other diabetes care tasks is generally a service that schools are required to provide. OCR also cautions that schools may not condition the provision of nonacademic services on a parent's attendance or provision of a surrogate. *OCR Senior Staff Memorandum*, 17 EHRLR 1233 (OCR 1990) (Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance). In *Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011), OCR found that a school violated 504 by requiring family members to give insulin to a student when school staff were not available. Only one paraprofessional was trained to administer insulin to the student, so the school asked the parent who should administer insulin when that individual was not available. The only choices the school offered the parent were to designate an adult family member to come to school and give insulin or to have the student's sister, who also attended the school, give insulin. The parent chose to have the sister give the insulin, but OCR found that requiring the parent to make this choice violated 504 because it was the school's responsibility to provide care. And in *North Thurston Sch. Dist.*, Complaint No. 2012-SE-0084, 113 LRP 31234 (Wash. State Educational Agency 2013), a state hearing officer found that a district had violated 504 by requiring the parents of a first grader with type 1 diabetes to come to school each day to administer insulin. When the parents informed the district during the summer that they wanted district staff to provide insulin to their child, the district took no steps to arrange training for staff until the beginning of school, and instead required parents to come to school for nearly two months while the school delayed in arranging for care.

Neither Section 504 nor the ADA precludes parents or guardians and schools from agreeing that parents or guardians will provide services. Schools, for example, may agree to this where a parent or guardian insists that he or she provide medication. *Rock Hill (OH) Local Schs.*, Complaint No. 15-02-1034, 37 IDELR 222 (OCR 2002). See also *Valle Lindo (CA) Elem. Sch. Dist.*, Complaint No. 09-06-1079, 47 IDELR 170 (OCR 2006) (parents and district agreed that parent would come to school to administer insulin temporarily until district staff were trained; even though a "miscommunication" subsequently led parent to believe she was still required to come to school long after staff were trained, no 504 violation because school did eventually assign staff to administer insulin to the student). Parents can, however, later decide they no longer wish to provide care. See *North Thurston Sch. Dist.*, Complaint No. 2012-SE-0084, 113 LRP 31234 (Wash. State Educational Agency 2013) (parent had agreed to provide care during student's kindergarten year, but then communicated to district that they were no longer willing to do so for child's first grade year; district violated 504 by making no arrangements for staff to be trained and instead continuing to require parents to provide care).

9.11 Must students with diabetes be provided a one-on-one aide?

Although each child's situation must be evaluated individually, providing a one-on-one aide for a child with diabetes is generally not necessary to provide routine diabetes care, unless the student has other disabilities that require a personal aide. It is usually sufficient for teachers and other school personnel to be familiar with the needs of a child with diabetes and able to provide or obtain prompt care when necessary.

Notes

Where a child with diabetes has appropriate accommodations that may be provided without the need of a personal health aide, a school is not obligated to provide one. See *Bradley County (TN) Sch. Dist.*, Complaint No. 04-04-1247, 43 IDELR 44 (OCR 2004)

(“Neither the ADA nor the Section 504 regulation requires that the District employ or assign a full-time nurse or aide to diabetic students, as long as the District maintains a sufficient number of trained staff persons to provide the related aids and services to students with diabetes.”) In *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-08-1368, 52 IDELR 109 (OCR 2009), OCR found that a district did not violate section 504 when it refused to allow a private aide to attend to the student’s care throughout the day. The school had trained six employees, including the school nurse, cafeteria manager and employees who would attend the student during extracurricular activities in diabetes care such as testing blood glucose levels, and OCR found this to be adequate. There are, however, circumstances where an aide has been found to be appropriate. See, e.g., *Monterey Peninsula Sch. Dist.*, Case No. SN02-02753, 38 IDELR 223 (Cal. State Educational Agency 2003) (noting that student with diabetes who used pump while in fifth grade had one-on-one health aide apparently because of the student’s inability to independently monitor blood glucose levels). This might not always be a full time aide, of course. *Northwestern (OH) Local Schs.*, Complaint No. 15-03-1202, 41 IDELR 273 (OCR 2004) (Section 504 team provided for a part-time but not full time aide).

Generalized apprehension over whether the school staff will provide proper monitoring or assistance in the absence of an aide does not warrant assignment of an aide. *Abington Sch. Dist.*, Case No. 812, 28 IDELR 890 (Pa. State Educational Agency 1998). However, if it is subsequently determined that the accommodations are not being provided, it may be appropriate to require a one-on-one aide to assure compliance. *Abington Sch. Dist.*, Case No. 812, 28 IDELR 890 (Pa. State Educational Agency 1998) (declining to order personal aide, but recommending that state compliance officer incorporate the requirement if required accommodations for child with diabetes and mental retardation were not provided).

A school which assigns an aide to accompany the student with diabetes must make certain that the aide is able to meet the individual needs of the student. Providing an aide who has no authority to provide emergency injections, for example, may not be an appropriate accommodation where emergency response needs exist. *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993).

9.12 Should the teachers of students with diabetes or staff who work with or supervise the student receive training or instruction regarding diabetes?

Yes. While the level of instruction may vary depending on the position or role of the teacher or staff, all school personnel having regular contact with a student with diabetes should be trained to recognize problems relating to diabetes and know who to contact when problems arise. A few school staff members should receive training in specific diabetes care tasks in order to assist students who cannot self-manage these tasks and to provide needed emergency care to any student with diabetes.

Notes

Teachers and staff who are in contact with a student with diabetes should be trained. Different levels of training may be appropriate depending on the level of responsibility the individual will have for the student’s care. Basic training for all staff that interact regularly with the student should include information about diabetes and instructions on the signs and symptoms of hypoglycemia and hyperglycemia and what should be done when these situations are encountered. If the individual will not be responsible for performing routine or emergency diabetes care tasks, he or she should be told who is responsible for providing

that care and how they can be contacted. See *Cobb County (GA) Sch. Dist.*, Complaint No. 04-13-1990, 114 LRP 32419 (OCR 2014) (expressing concern that district had failed to train student’s cheerleading coaches on her diabetes or provide copies of the 504 plan, even though the plan referenced her care needs during cheerleading; coaches, like teachers, needed to be trained).

Some schools provide basic training to all school staff. *Henderson County (NC) Pub. Schs.*, Complaint No. 11-00-1008, 34 IDELR 43 (OCR 2000); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999). Others may train only those with responsibility for the student during the school day. *District of Columbia (DC) Pub. Schs.*, Complaint No. 11-12-1133, 112 LRP 50236 (OCR 2012) (resolution agreement required training of all personnel with immediate custodial supervision of a child and to those responsible for student transportation); *Moore (OK) Pub. Schs.*, Complaint No. 07-11-1234, 112 LRP 37770 (OCR 2012) (resolution agreement required to ensure training was provided to teachers and other staff supervising the student at school or during school-sponsored activities); *Springdale (AR) Sch. Dist.*, Complaint No. 06-08-1349, 109 LRP 4346 (OCR 2008) (resolution agreement called for training of volleyball coaches, principal, assistant principal, and the student’s teachers in recognizing symptoms of hypoglycemia and in administering glucagon). The “staff needs to be trained to recognize problems relating to [a child’s] diabetes, as they are truly the first line of defense against problems.” Indeed, “[t]hey are the ones who can prevent problems or at least mitigate the extent of the severity of the problem” that might result if prompt action is not taken. *Gettysburg Area School District*, Case 1984/02-03, 103 LRP 9599 (Pa. State Educational Agency 2003). Basic diabetes education for other students may also be a good idea and is the practice at some schools. *Santa Maria-Bonita (CA) Sch. Dist.*, Complaint No. 09-97-1449, 30 IDELR 547 (OCR 1998) (providing for training of all students in classes with students with diabetes).

More detailed training is needed for those staff members who will directly perform diabetes care tasks and should include areas such as insulin administration, glucagon administration, blood glucose monitoring, and carbohydrate counting for meals and snacks. For example, where a child uses an insulin pump, it is important that some staff be trained on the use of the pump and be available to assist when needed. *Henderson County (NC) Pub. Schs.*, Complaint No. 11-00-1008, 34 IDELR 43 (OCR 2000) (school agreed to train school personnel in the use of an insulin pump and also have a trained individual to accompany the student to school-sponsored events off campus). Arrangements should also be made to instruct substitute teachers or care providers on the student’s care, although a full training program for substitute staff is not necessary. See *Stafford County (VA) Pub. Schs.*, Complaint No. 11-12-1071, 60 IDELR 51 (OCR 2012) (no evidence of 504 violation for failing to train substitute teachers in basic diabetes care; substitutes were notified of the identity of students with diabetes and were given information about symptoms of hypoglycemia and hyperglycemia); *Millington (MI) Community Schs.*, Complaint No. 15-07-1057, 49 IDELR 232 (OCR 2007) (finding no Section 504 violation in care provided by substitute paraprofessional where district had given substitute written instructions on the student’s care and parent could not refute district’s evidence that all needed care had been given). Parents should be made aware of which staff members will be providing care. See *Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014) (district would discuss at the 504 team meeting with parents “the names, contact information, and specific responsibilities of each District staff person responsible for providing adequate diabetes care to the Student.”)

Several OCR decisions have described in some detail a training program which OCR indicated was adequate and appropriate. In *Bradley County (TN) Sch. Dist.*, Complaint No. 04-

04-1247, 43 IDELR 44 (OCR 2004), the district designated school personnel as primary and secondary care providers, who were trained by the school nurse in collaboration with the student's parent. All providers were trained in diabetes care management and basic diabetes knowledge. In addition, primary care providers (the student's classroom teacher and teaching assistant) "received additional instruction in the signs and symptoms of hypoglycemia and hyperglycemia, the offsets of the highs and lows of blood sugar, glucose testing, monitoring glucose checks performed by the Student and recording the results and understanding the action(s) that needs to be taken for specific blood sugar readings." Ten school staff members were trained to assist the student with insulin pump administration and monitoring. *See also Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-08-1368, 52 IDELR 109 (OCR 2009) (district trained 16 staff members in diabetes care for a kindergartner, including monitoring blood glucose levels, recognizing symptoms of hypoglycemia and hyperglycemia, and treating hypoglycemia with glucose gel or glucagon, and district also trained backup personnel for times when the school nurse was not available to provide care).

In *Lee County (FL) Sch. Dist.*, Complaint No. 04-06-1178, 47 IDELR 18 (OCR 2006), OCR addressed allegations that a district had failed to adequately train teachers, classroom aides and clinic staff in how to properly manage a student's diabetes and in implementing the student's 504 plan. For example, the parent presented evidence that teachers and aides allowed the student to walk unaccompanied to the clinic when she felt weak and pressured her to complete tests when she did not feel well (both contradicting provisions of the student's 504 plan), and that the school nurse and clinic staff had difficulty in properly selecting injection sites for the student and made medication errors. Based on this evidence and the fact that the school nurse, who was responsible for training staff, lacked current diabetes training herself, OCR concluded that the district had failed to provide adequate training. The school resolved the complaint by hiring a new school nurse who was a certified diabetes instructor and agreeing to provide training to "all teachers, administrators, support staff and clinic personnel at the School regarding the care of students with diabetes." *See also Wake County (NC) Pub. Sch. Sys.*, Complaint No. 11-09-1001, 53 IDELR 129 (OCR 2009) (district agreed to provide additional training to classroom teacher and part time teaching assistant in diabetes care after parent raised concerns that the assistant was not fully knowledgeable about diabetes).

Trained personnel should also have access (through radio, telephone or other means) to medical personnel such as the school nurse, and to information on emergency procedures. *See, e.g., North Kitsap (WA) Sch. Dist. No. 400*, Complaint No. 10-99-1230, 33 IDELR 109 (OCR 1999) (student's PE teacher carried a 2-way radio so that the main office could be immediately contacted in the event of an emergency). Another helpful practice is providing a summary of the student's emergency plan on the back of radios or mobile phones. *See, e.g., East Allen (IN) County Schs.*, Complaint No. 05-02-1163, 38 IDELR 75 (OCR 2002) (abbreviated version used contained emergency telephone numbers, described symptoms of low and high blood glucose levels, and indicated what actions to take if levels were too high or too low).

There are many resources available to schools to provide training for teachers and staff. A good starting point is the publication *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (see Question 1.5). The Association has also developed *Diabetes Care Tasks at School: What Key Personnel Need to Know*, a series of training modules that can be used to train school personnel and which are available online (see Question 1.5). Schools frequently agree to provide training that meets the recommendations of the American Diabetes Association. *Henderson County (NC) Pub. Schs.*, Complaint No. 11-00-1008, 34 IDELR 43 (OCR 2000).

9.13 May the school nurse or other trained diabetes personnel be permitted to administer insulin upon the direction of a parent?

Insulin must be prescribed by a student’s physician, and directions on how to administer insulin should ordinarily come from the physician. Nevertheless, parents or guardians are usually well-versed in their child’s care and can provide input, guidance, and explanations of the physician’s directions. A physician can authorize a parent’s or guardian’s adjustment of insulin dosages in a student’s Diabetes Medical Management Plan, and this is often a good idea.

Notes

In *C.T.L. v. Ashland Sch. Dist.*, 743 F. 3d 524 (7th Cir. 2014), the parents of a child with diabetes claimed that the school district had violated Section 504 by refusing to permit them to give instructions to school personnel on the child’s insulin dosages. The court found that the physician’s orders were ambiguous as to whether parental adjustment was permitted. While the orders stated that the parents were authorized to adjust the dose at any time, they also stated that the child’s bolus calculator should be used for all dose calculations. The court held that the district’s refusal to permit the parents to give direction on dosage adjustments was not unreasonable, given the ambiguity in the physician’s orders and the school nurse’s belief that state law did not permit nurses or other school staff to take dosage directions from parents.

9.14 Are parents entitled to select a diabetes care provider or require a school to replace the school-selected provider?

No. Schools have the authority to select the individual who will provide care to a student with diabetes. Parents or guardians are not entitled to require that a specific provider be selected or that a designated provider be replaced or changed. However, parents or guardians are entitled to make such a request and detail their concerns.

Notes

It is well established that so long as a school provides a child with a disability with an appropriate education, the methodology (including the selection of personnel), is left to the school’s discretion. *Board of Educ. v. Rowley*, 458 U.S. 176, 200, 208 (1982). Accordingly, a parent or guardian of a student with diabetes generally has no “veto power” over the district’s personnel selection even where there are supposed communication problems or an “erosion of trust.” *Monterey Peninsula Sch. Dist.*, Case No. SN02-02753, 38 IDELR 223 (Cal. State Educational Agency 2003) (also observing that there was no evidence that the student failed to effectively communicate with or did not trust the assigned nurse). Stated otherwise, “a student and his parents simply do not have the right to dictate to a school who should provide services to the student” and, instead, “[t]hat decision is the prerogative of the school.” *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994). *Cf. Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-08-1368, 52 IDELR 109 (OCR 2009) (school was under no obligation to allow a private aide to accompany a student with diabetes to school to check blood glucose levels where the school had adequate trained personnel available to meet the child’s needs).

The diabetes care provider selected by the school must be qualified to provide the services to the child. *Monterey Peninsula Sch. Dist.*, Case No. SN02-02753, 38 IDELR 223 (Cal.

St. Educational Agency 2003); *Lee County (FL) School Dist.*, Complaint No. 04-06-1178, 47 IDELR 18 (OCR 2006) (district had violated Section 504 because school nurse lacked current training in diabetes and nurse and clinic staff had made numerous medication errors in caring for student). Further, in exercising its prerogative, the school “needs to make the best match possible” and “[i]f there is a high probability of failure with one service provider (even if that probability is based on an antipathy by the student or parent/guardian to a particular teacher), the School will want to make a selection which offers the best chance of success for the student.” *In re School Admin. Dist. #25*, Case No. 93.114, 20 IDELR 1316 (Me. State Educational Agency 1994).

Where there are concerns about the qualifications of personnel providing care or about the care being provided, it is often a good idea to institute procedures for increased monitoring of staff performance and communication with the parent. For example, in *Lee County (FL) School Dist.*, Complaint No. 04-06-1178, 47 IDELR 18 (OCR 2006), because of medication errors and lack of diabetes knowledge by clinic staff, the district agreed to contact the parent daily before giving the student insulin to verify dosage, and to maintain a log for the student and designate a person responsible for monitoring compliance.

9.15 Should school personnel be required to contact parents when a student’s blood glucose levels are out of range or for other routine diabetes care?

With the increasing availability of cell phones and other technology, it has become more feasible for school personnel to contact parents to report a child’s blood glucose level and other information about the child’s diabetes on a daily basis, and even to get parental approval or instructions before providing care. While school personnel should be able to implement a child’s DMMP without regular daily contact with the parents, and some parents may not want such routine contact, it is sometimes written into Section 504 plans. Where required by the plan, a district may violate section 504 if needed communication does not happen.

Notes

In *Casa Grande (AZ) Elementary Sch. Dist.*, Complaint No. 08-11-1082, 112 LRP 15697 (OCR 2011), OCR found that a district had violated Section 504 by failing to contact a parent whenever the student’s blood glucose levels were out of range. While the IEP clearly required this contact, review of the schools’ logs showed that in most cases the contact was not made. OCR found a 504 violation even though the student had received adequate care and had suffered no adverse consequences from the failure to contact the parents. *See also Middletown (OH) City Sch. Dist.*, Complaint No. 15-10-1005, 110 LRP 59013 (OCR 2010) (while 504 plan required parents to be contacted when blood glucose was out of range, OCR reviewed records and identified only one day when the parents should have been contacted but contact may not have occurred, and therefore found no violation); *Waterbury (CT) Bd. Of Educ.*, Complaint No. 01-10-1074, 111 LRP 1772 (OCR 2010) (resolution agreement required school to implement provision of 504 plan requiring parent contact when blood glucose levels were too low); *Farmington (MN) Sch. Dist. #192*, Complaint No. 05-08-1235, 109 LRP 31151 (OCR 2009) (resolution agreement required parents to be notified every time student’s blood glucose levels were out of range when tested in the nurse’s office);

10. May Diabetes Care Tasks Be Performed by Non-Medical or Non-Nursing Personnel?

Disputes sometimes arise about whether diabetes care can be provided to students by school personnel who are not nurses. Diabetes health care professionals agree that the diabetes care tasks needed at school can be performed by non-nurses who receive appropriate training. Personnel must be available to students with diabetes at all times. Because a school nurse will not always be available, this requires that trained non-nursing personnel provide care. The extent to which care may be provided by non-health care professionals varies based on state law.

10.1 What, if any, medical license is required to perform blood glucose checks upon students or to administer insulin or glucagon?

It is sometimes assumed that only a nurse may administer insulin or glucagon, or perform certain other diabetes care tasks. Although a school nurse is the most appropriate person to regularly provide diabetes care, many schools do not have a school nurse. Even if a full-time nurse is present, additional personnel should be trained to provide routine and emergency diabetes care including tasks such as checking blood glucose levels and insulin and glucagon administration during the school day and during extracurricular activities and field trips when the nurse is unavailable. School personnel, parents, guardians, and others are routinely trained to administer insulin or glucagon.

Diabetes health care professionals agree that non-medical personnel (sometimes referred to as “trained diabetes personnel”) can and should be trained to provide diabetes care to students. These non-medical school staff members should be trained and monitored by a school nurse or other health care professional. The provider of diabetes care must take relevant state laws into account (see Questions 10.4, 10.5). However, the absence of a licensed health care professional does not diminish a school’s obligation to accommodate a student (see Question 10.6).

Notes

Some school districts argue that only licensed health care professionals may provide diabetes care. This position may be based on state law; in some states, only school nurses can perform certain diabetes-related care tasks, such as glucagon injections, in the school setting. However, a growing number of states explicitly allow non-nurse school employees to administer insulin and glucagon and to provide other care. The Office for Civil Rights has recognized that, where staff can be trained to provide diabetes care, a nurse or other licensed staff person is not required. *Bradley County (TN) Sch. Dist.*, Complaint No. 04-04-1247, 43 IDELR 44 (OCR 2004) (“Neither the ADA nor the Section 504 regulation requires that the District employ or assign a full-time nurse or aide to diabetic students, as long as the District maintains a sufficient number of trained staff persons to provide the related aids and services to students with diabetes.”) See also *Lynnfield (MA) Pub. Schs.*, Complaint No. 01-07-

1123, 108 LRP 21716 (OCR 2007) (private school did not violate 504 by not having a full time nurse where the principal's assistant monitored the student's diabetes on days the nurse was not present; this was adequate even though the parent expressed concern for the student's safety at times when the nurse was not present).

Courts and administrative agencies have also recognized the unlicensed personnel can and routinely do provide diabetes care. The California Supreme Court, in interpreting state law to permit insulin administration by unlicensed personnel, noted that the law "reflects the practical reality that most insulin administered outside of hospitals and other clinical settings is in fact administered by laypersons." *American Nurses Assn. v. Torlakson*, 57 Cal. 4th 570, 575 (2013). The court later went on to say, "The routine administration of insulin outside of hospitals and clinical settings, the [American Diabetes] Association observes, does not require substantial scientific knowledge or technical skill and is, in fact, typically accomplished by the patients themselves, including some children, or by friends and family members." *Id.* at 582. OCR agrees that the medical profession has recognized that lay people are easily trained to perform this care. *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993).

A Florida administrative hearing officer evaluated the competing evidence presented by a family of a child with diabetes and a school district that refused to train unlicensed personnel to administer insulin, and found the evidence that insulin could be safely administered by such personnel to be persuasive. The hearing officer concluded:

The totality of the evidence leads to the conclusion that the administration of insulin requires a certain maturity and carefulness, as well as specific training in how to measure blood glucose levels, caloric intake, and the precise dosage to be administered. The science of this process has, however, been refined to the point where parents and other family members routinely administer insulin to children who are unable to self-administer, Children as young as eight and nine are allowed by schools to self-administer insulin albeit probably with supervision by a UAP.

Without doubt the administration of insulin requires serious attention, appropriate training, good medically established procedures, and close nursing supervision. I do not think that one could deny that it would be safer for insulin to be administered by a trained medical professional. That said, I do not think that Respondent has overcome Petitioner's evidence that insulin is routinely and safely administered to children with diabetes by individuals who are not licensed medical professionals.

Sch. Bd. of Pinellas County, 58 IDELR 59 (Fla. State Educational Agency 2011). *See also Hawaii State Educational Agency*, Case No. 01-34 (Hawaii State Educational Agency 2001) (although a nurse may be the preferable choice to administer medications, any individual properly trained could administer glucagon). One case to consider the issue (in the context of an after-school care program, rather than an educational program) found that the plaintiff had raised a triable issue of fact as to whether training unlicensed staff to administer glucagon was reasonable, although the court ultimately held that the parents could not meet the deliberate indifference standard required to recover damages under Section 504. *A. P. v. Anoka-Hennepin Indep. Sch. Dist.*, 538 F. Supp. 2d 1125, 1142-43 (D. Minn. 2008).

Many complaint resolutions approved by OCR also contemplate that other trained staff persons may be used. *See, e.g., Duval County (FL) Pub. Schs.*, Complaint No. 04-08-1278, 113 LRP 27887 (OCR 2013) (policies would be revised to provide that trained staff, in addition to nurses, could administer insulin); *Big Horn (WY) School District #2*, Complaint No. 08-13-

1165, 61 IDELR 236 (OCR 2013) (in resolving allegations that district refused to train any staff other than the school nurse to provide diabetes care, district agreed to train four staff members to provide care in the nurse's absence); *Cobville (WA) Sch. Dist. No. 115*, Complaint No. 10-09-1363, 110 LRP 49214 (OCR 2009) (adequate number of school staff to be trained); *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000) (nurse or "trained staff person" to be responsible for administering insulin and glucagon); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999).

School districts needing to find volunteers to be trained to provide diabetes care should consider communicating with all staff members to see if any of them have interest in helping; many staff will have experience with or connections to diabetes and will be willing to do so. Recruitment of staff should stress that training will be provided and that no one will be coerced into providing the care. See, e.g., Ohio Rev. Stat. § 3313.7112(c)(2) (describing content of notice that school may send to staff). But see *Everett (WA) Sch. Dist. No. 2*, Complaint No. 10-06-1181, 108 LRP 42433 (OCR 2007) (principal's efforts to find volunteers by asking several staff members were sufficient, even though he refused to allow the parent to distribute written notices to all staff).

10.2 What is the position of the American Diabetes Association regarding non-medical and non-nursing personnel providing diabetes care?

The position of the American Diabetes Association is that diabetes care tasks may be safely and appropriately delegated to non-medical and non-nursing personnel in the school setting. It would be ideal for all health care services required by children with diabetes to be performed by a health care professional, such as a school nurse. The reality, however, is that not every school has a school nurse and, even where a school has a school nurse assigned full time the nurse will not always be available (e.g., at field trips and extracurricular activities). Therefore, proper diabetes care in the school setting requires delegation.

Notes

The position taken by the Association on delegation of diabetes care tasks is based on a peer-reviewed position statement from specialists in the area of pediatric endocrinology. This statement is referenced in Question 8.2. This position is also set forth in a Statement of Principles adopted as part of the Association's Safe at Schools Campaign, which has been endorsed by key diabetes and other health care organizations (see Question 10.3). This position statement is available through the web page for the Safe at Schools campaign at <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/safe-at-school/safe-at-school-statement-of.html>.

10.3 What is the position of leading health organizations on diabetes care by unlicensed personnel?

The National Diabetes Education Program (a federally sponsored partnership of the National Institutes of Health, the Centers for Disease Control, and more than 200 partner organizations) has taken the view that delegation of diabetes care can be safe. The program's publication *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (see Question 1.5) states:

Nonmedical school personnel who receive ... training, called “trained diabetes personnel” in this guide, can be supervised by the school nurse to perform diabetes care tasks safely in the school setting. In your school, these individuals may be known as unlicensed assistive personnel, assistive personnel, paraprofessionals, or trained nonmedical personnel. Assignment of diabetes care tasks, however, must take into account State laws that may be relevant in determining which tasks may be performed by trained diabetes personnel.

This statement represents not simply the view of the American Diabetes Association, but that of a wide range of other organizations, including medical, research, professional, educational, and other groups.

Notes

In addition, a number of major diabetes health professional and patient organizations, as well as other health care organizations, have endorsed the Association’s statement of principles adopted as part of its Safe at School campaign, which states that non-medical personnel can provide diabetes care. These organizations include: American Association of Diabetes Educators, American Dietetic Association, Pediatric Endocrine Society, Pediatric Endocrinology Nursing Society, Children with Diabetes, and Juvenile Diabetes Research Foundation.

10.4 May diabetes care tasks be delegated to non-medical school personnel?

Delegation of care tasks involves allowing an unlicensed person to perform a task under the authority and supervision of a nurse or other health care professional, who generally retains responsibility and accountability for how the task is performed. Delegation of diabetes care tasks is one mechanism used in some states to permit unlicensed school personnel to perform diabetes care (see Question 10.5). General practice recognizes that delegation can be a safe and fiscally responsible way to meet the health needs of school children. It is important, of course, that non-medical school personnel to whom tasks are delegated are properly trained to provide those services (see Question 9.12).

Notes

“Delegation” in the health care context has been defined as the “transfer of responsibility for the performance of an activity from one individual to another while retaining accountability for the outcome.” American Nurses Association, Position Statement on *Assuring Safe, High Quality Health Care in Pre-K through 12 Educational Settings* (March 16, 2007). Schools and health care professionals should establish and follow an appropriate protocol in the delegation process. See generally National Council of State Boards of Nursing, *Delegation: Concepts and Decision-Making Process National Council Position Paper*, 1995, available at: <http://www.state.ia.us/nursing/images/pdf/delegation1.pdf>.

10.5 Do state laws provide for delegation of diabetes care tasks?

Since state laws restrict which individuals can perform health care tasks, particularly in a professional setting, some mechanism is generally needed in state law to permit school personnel other than nurses to administer medication and provide some other types of diabetes care. While most states now allow unlicensed school personnel to perform most or

all diabetes care tasks, the manner of authorizing such care varies widely, and advocates need to be aware of the law in their state.

Advocates should be aware of the law in their state, as this can have a significant effect on what arrangements can be made for care in school.

Notes

The Association has information on state school laws in all fifty states, including citations to statutes, regulations, and court decisions, available at <http://www.diabetes.org/living-with-diabetes/parents-and-kids/diabetes-care-at-school/legal-protections/state-laws-and-policies.html>. This information on state laws focuses on administration of insulin and glucagon, along with self-care; other tasks, such as blood glucose monitoring and carbohydrate counting, are generally not considered to be restricted to nurses in the schools.

Some states permit delegation of diabetes care tasks such as insulin administration, while others allow unlicensed personnel to perform these tasks without requiring explicit delegation by a nurse. The first question to be asked is whether the particular diabetes care task falls within the scope of practice of nurses and other health care professionals; those that do not may be performed by any school employee. Even for tasks that generally do fall within the scope of practice of nurses, such as administration of medications, exceptions to the statutes governing the practice of nursing often permit them to be performed in the schools by non-nurses. Diabetes medications may be covered by general exceptions, such as those permitting care in an emergency, or by specific provisions relating to diabetes care in schools.

Some states have adopted comprehensive statutory schemes tailored to the school setting. See, e.g., Ohio Rev. Code Ann. § 3313.712, Ga. Code Ann. § 20-2-779. Other states have a simpler statutory provision permitting schools to train unlicensed personnel to administer insulin and glucagon, without detailed provisions regarding training and other issues. See, e.g., Ariz. Rev. Stat. § 15-344.01(C). Still others can be read to permit unlicensed personnel to administer insulin and/or glucagon through general provisions not related to diabetes, either by permitting delegation of care or through an exception to nursing scope of practice. For example, some states provide that care in an emergency situation is not subject to nursing regulations; this should be read to permit administration of glucagon by school personnel. (On the other hand, some school districts or even state nursing authorities may not accept such general authorizations; they may believe, for example, that authorization for delegation of medication administration should not include subcutaneous injections such as insulin, even though this distinction has no basis in state law).

Courts may also step in to interpret state law to permit unlicensed personnel to administer medications where there is no explicit authorization in state law. For example, in *American Nurses Assn. v. Torlakson*, 57 Cal. 4th 570 (2013), the California Supreme Court interpreted the state Education Code and Nursing Practice Act to authorize insulin administration by such personnel with parent consent and physician authorization. The court held that the Education Code generally authorized medication administration by both nurses and unlicensed personnel with physician authorization and parent consent, and nothing in the statute or regulations excluded insulin from this provision. *Id.* at 580 (citing Cal. Educ. Code § 49423(a)). The court then held that an exception to the state's Nursing Practice Act exempted from the scope of nursing practice acts performed in carrying out the orders of a physician, and held that insulin administration in the schools pursuant to physician orders fell within this exception. *Id.* at 583-584 (citing Cal. Bus. & Prof. Code § 2727(e)).

10.6 Do state restrictions on delegation of diabetes care tasks, if any, limit a school's obligation to provide such services?

No. Where delegation is not permitted, the school must provide appropriately licensed personnel to provide services.

Notes

The lack of a school nurse is not an appropriate reason for failing to provide services required by a student with diabetes. *Prince George's (MD) County Schs.*, Complaint No. 03-02-1258, 39 IDELR 103 (OCR 2003). A student with diabetes may not be excluded from school when a nurse is not present. *Hasbrouck Heights Sch. Dist.*, Complaint No. 02-01-1121 (OCR 2001) (assurances made to resolve complaint that school denied student a free appropriate public education by requiring parent to remove student with diabetes from school when nurse was not present). In *District of Columbia (DC) Pub. Charter Schs.*, Complaint No. 11-12-1419 *et al.*, 60 IDELR 231 (OCR 2012), OCR found that many charter schools in the District of Columbia were violating Section 504 because they did not train staff other than nurses to provide care, and could not provide any care when a nurse was not available.

Where the school nurse or other trained person is absent or unavailable, a back-up is required. See *Rudyard (MI) Area Schs.*, Complaint No. 15-14-1177, 115 LRP 10469 (OCR 2014) (school would identify to parents an alternate diabetes care provider who would provide care when the school nurse was not present in the school); *Prince George's County (MD) Pub. Schs.*, Complaint No. 03-14-1025, 114 LRP 36274 (OCR 2014) (resolution agreement required district to convene a new 504 meeting to address how blood glucose monitoring and other care would be provided when the nurse was absent); *Bighorn (WY) Sch. Dist. #2*, Complaint No. 08-13-1165, 61 IDELR 236 (OCR 2013) (resolution agreement addressing complaint that school had no staff available to provide care when the nurse was absent and required parent to provide the care provided that school would train four staff members to provide care when the nurse was not available); *District of Columbia (DC) Pub. Schs.*, Complaint No. 11-12-1133, 112 LRP 50236 (OCR 2012) (resolution agreement required district to train at least two staff members in diabetes care at each school attended by a student with diabetes, rather than sending students home when no nurse was available); *Lee County (FL) Sch. Dist.*, Complaint No. 04-06-1300, 46 IDELR 228 (OCR 2006) (district had resolved allegation that there was no provision for care when nursing staff were not present by "develop[ing] a Clinic Back-up Plan to address provision of services to diabetic students in the absence of nursing personnel and/or in the event of an emergency"); *Puyallup (WA) Sch. Dist. No. 3*, Complaint No. 10-02-1104 (OCR 2002) (voluntary resolution agreement stipulated that school would adopt "procedures for the student's health and diabetes care needs during field trips, participation in any other extracurricular activities, or when a nurse is not present at school"); *Jamestown Area (PA) Sch. Dist.*, Complaint No. 03-02-1117, 37 IDELR 260 (OCR 2002) (school district agreed to designate a back-up person for the school nurse to administer glucagon to student as needed); *Wayne-Westland (MI) Community Schs.*, Complaint No. 15-00-1130, 35 IDELR 14 (OCR 2000) (complaint resolution required designation of a nurse or trained staff person as having primary responsibility for administration of insulin and glucagon, but also designation of a back-up); *Northeastern Clinton (NY) Central Sch. Dist.*, Complaint No. 02-01-1131 (OCR 2001) (complaint resolved, in part, by commitment that school would adopt "a protocol that provides for the Student's diabetes care needs during field trips or participation in any other extracurricular activities or when a nurse is not present at the School"); *West Las Vegas Pub. Schs.*, Complaint No. DPH 0607-13, 107 LRP 33209 (N.M. State Educational Agency 2007) (student's health plan was

inadequate because the school nurse was not always available on campus and backup staff did not know how to administer insulin or glucagon).

Where a school district chooses, either based on law or district policy, not to allow appropriately trained non-licensed school personnel to administer insulin and/or glucagon, the school must still provide the needed care, either by having a nurse or other licensed medical professional available to do so or through alternative response systems that do not have a negative impact on a student's otherwise appropriate placement. *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-93-1002, 20 IDELR 1276 (OCR 1993); *Gettysburg Area Sch. District*, Complaint No. 1984/02-03, 103 LRP 9599 (Pa. State Educational Agency 2003). *But see C.T.L. v. Ashland Sch. Dist.*, 743 F. 3d 524 (7th Cir. 2014) (no violation of section 504 even though district refused to permit unlicensed staff to provide care, because parents could identify only one instance when the nurse was not present to provide care); *Middletown (OH) City Sch. Dist.*, Complaint No. 15-10-1005, 110 LRP 59013 (OCR 2010) (district had an adequate back up plan to provide care using other nurses when the full time nurse was absent, even though parent had concerns about substitute nurses); *Lake Station Community Schs.*, Complaint No. CP 015-2012, 112 LRP 12094 (Ind. State Educational Agency 2011) (no violation where one staff member trained to provide care was on site at all times, even when most staff were at an off-site event). Moreover, a policy providing that only school nurses may administer injections cannot be the exclusive or controlling factor in determining a child's placement. See Question 8.5.

11. What Academic Modifications Should Be Provided?

Supplementary aids, services and modifications to the school's academic program may be required in order to allow students with diabetes to participate in the regular educational environment. For example, students may need to take additional breaks during standardized tests or may need to have diabetes-related absences excused. These accommodations should also be documented in a Section 504 Plan or other written education plan.

11.1 Under Section 504 and the Americans with Disabilities Act, what obligation does a school have to provide supplementary aids and services to students with diabetes in the academic program?

Schools may not discriminate against students with disabilities in academic programs and therefore must provide academic accommodations to students who need them because of diabetes.

Notes

Section 504 regulations require that the school "place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 34 C.F.R. § 104.34(a). This requires that supplementary aids and services be allowed to students with diabetes.

11.2 Should schools allow alternate times for academic tests and exams if blood glucose levels are significantly out of target range?

Yes. Students who experience high or low blood glucose levels at school should not be penalized academically because of the incident. These students should not be required to take tests when their academic performance would be significantly impaired because of diabetes-related problems. If it is clear that a student is significantly out of his or her target range, the student should be allowed an alternate time to take academic tests or exams just as a student would in case of illness.

Notes

It is important for educators to recognize that both hyperglycemia and hypoglycemia affect cognitive performance. Studies confirm this although the impact is often individualized and varied. *See, e.g.,* Cox DJ, Kovatchev BP, Gonder-Frederick LA, Summers KH, McCall A, Grimm KJ, Clarke WL: *Relationships Between Hyperglycemia and Cognitive Performance Among Adults With Type 1 and Type 2 Diabetes*, *Diabetes Care* 28: 71-77 (2005) (and articles cited therein). A student's deviation from a usual standard of work should alert teachers that performance may well be impacted. An academic test given to a student

experiencing severe hyperglycemia or hypoglycemia will not reflect the student's true knowledge level.

11.3 Should students have access to diabetes supplies, snacks, water, and the restroom, during the administration of standardized or other tests?

Yes. Students should have access to supplies, snacks, water, and the restroom if necessary to treat the student's diabetes throughout the school day, including during academic or standardized tests. See Questions 8.15, 9.8.

11.4 Are students with diabetes entitled to extra time to complete standardized or similar tests?

Students with disabilities may be entitled to certain accommodations in order to have an equal opportunity to complete standardized or similar tests. Students with diabetes generally need two types of accommodations: permission to keep diabetes care supplies with them and modifications to the testing schedule. While these accommodations are usually very basic, they must be requested far in advance to avoid any test-day problems.

Many standardized tests have very strict requirements concerning what may be brought into the testing room. Therefore, students must review test policies and request any modifications to these policies far in advance. Students must ensure that they will have access to their blood glucose testing supplies; snacks and drinks to treat hypoglycemia and hyperglycemia; and their insulin pump and continuous blood glucose meter, if applicable.

While most students with diabetes will not need additional time to take these tests, some students may need to take extra breaks to treat symptoms of hypoglycemia or perform other diabetes care tasks and will need to have their test times adjusted to cover these breaks.

Notes

Students are required to take a variety of standardized or similar tests. These include state standardized tests such as minimum competency tests, sometimes referred to as "high stakes" exams. Under Title II of the ADA, state and local agencies must not discriminate against otherwise qualified test takers. College-bound students also typically take standardized tests such as the SAT and ACT. Under Title III of the ADA, private testing agencies must not discriminate against otherwise qualified test takers.

Where accommodations are required on standardized or similar tests, they should be requested in advance. Information may be obtained about accommodations on the web sites for the SAT and AP (<https://www.collegeboard.org/>) and the ACT (<http://www.actstudent.org/regist/disab/>). School officials should be consulted regarding accommodations on state or school required tests.

Most students with diabetes will not require additional time to work on a test solely due to diabetes. However, one accommodation often requested by students is an adjustment in the time to take a test to compensate for breaks needed to manage diabetes. This adjustment does not increase the overall time a student has to work on the test, but provides additional breaks if needed to perform diabetes care tasks.

11.5 Are teachers required to provide students with instruction missed due to absence to care for diabetes or an illness that is exacerbated because of diabetes?

Students who miss school because of diabetes should not be penalized academically for these absences. These students should be provided assistance in making up assignments, including tutoring. Such accommodations, if needed, should be specified in the student's written accommodations plan. At a minimum, students with diabetes should be provided the same level of assistance as is provided as a matter of policy or practice to non-disabled students who are ill.

Notes

Arrangements should be made to provide the student with make-up work for time missed due to diabetes. In *Opelika (AL) City Sch. Dist.*, Complaint No. 04-09-1182, 111 LRP 47376 (OCR 2011), a district violated Section 504 when it failed to permit a student to make up work needed due to frequent diabetes-related absences. The district failed to send make up assignments to the student, as required by the 504 plan, and later told the student that he would be unable to make up missed work and would have to repeat a grade. See also *Stafford County (VA) Pub. Schs.*, Complaint No. 11-12-1071, 60 IDELR 51 (OCR 2012) (despite parent complaint that 504 plan should have specifically required make-up work to be sent home each day, OCR found plan adequate where it stated that student could make up work without penalty, and the district had an adequate system for getting make up work to the student).

Other services or modifications may also be needed to ensure the child has full educational opportunity. If a student is required to be out of class for diabetes care, even briefly, school officials must consider whether modifications or additional aids and services are necessary to accommodate the absence. This might include, for example, counseling to reduce the amount of time the student spends away from the instructional environment. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995).

11.6 May a student with diabetes be subject to academic or other penalties for an absence or tardiness related to diabetes care needs?

Students with diabetes may not be penalized educationally for absences required for medical appointments or because of illness. In some circumstances, students may be excluded from participation in extracurricular activities due to diabetes-related absences, pursuant to an attendance policy that applies to all students.

Notes

Diabetes may result in a student being absent or tardy. Where it is due to a student's diabetes, the absence or tardiness should be excused. A 504 plan should specify that the student will not suffer adverse consequences because of such absences or tardies. See *Mercer County (WV) Pub. Schs.*, Complaint No. 03-07-1199, 108 LRP 17698 (OCR 2007) (district violated 504 by not exempting a student from a policy allowing students to be exempted from final exams if they had fewer than a given number of absences; although 504 plan contained a provision that student would be excluded from this policy for absences related to diabetes, district subsequently required her to take the exams rather than implementing

the 504 plan as written); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999) (providing that accommodation plans would, where appropriate, permit a student to “miss school without consequences for appointments to monitor the student’s diabetes management.”) *Cf. Grenada (MS) Sch. Dist.*, Complaint No. 06-12-1005, 61 IDELR 54 (OCR 2012) (district violated 504 by marking student tardy on multiple occasions when his special education bus was late; district resolved the issue by removing the tardies).

The student or the student’s parent or guardian may be required to confirm that the reason for the absence or tardiness was diabetes. *Fayette County (GA) Sch. Dist.*, Complaint No. 04-05-1037, 44 IDELR 221 (OCR 2005) (district was not required to automatically excuse absences related to diabetes care; district agreed to evaluate each absence individually and to excuse those for which a doctor’s note was provided, and OCR found this policy to be reasonable); *Prince George’s County (MD) Schs.*, Complaint No. 03991098, 33 IDELR 70 (OCR 1999) (commitment to resolve complaint included obligation to mark student “tardy excused” if tardiness was result of diabetes and written note from parents stating the reason for the tardiness is provided to the school). *See also Loch v. Bd. of Educ. of Edwardsville Community Sch. Dist.*, 327 Fed. Appx. 647, 651 (7th Cir. 2009) (child was ineligible for IDEA services because parents could not show that student’s excessive absences were due to diabetes; student’s treating physician stated that where diabetes was under good control there was no reason for extensive absences, and court concluded that student simply “quit going to school.”)

Where absences are not properly documented or not due to diabetes, a student may still be penalized for failing to comply with attendance policies. In *Bismarck (ND) 1 Pub. Schs.*, Complaint No. 05-06-1285, 107 LRP 42139 (OCR 2006), a student enrolled in a district summer school program, but accumulated too many absences to receive credit for the course. Some absences were related to diabetes, but others were due to the flu (either set of absences would have been enough to exceed the absence limit). The parent requested that the district modify its attendance policy, but OCR found that the policy had been applied to the student just as it would have been to a nondisabled student. The fact that absences were diabetes-related did not affect this holding because the student did not have a 504 plan that might have provided for excused absences (he attended a private school during the school year) and because no medical documentation that the absences were diabetes-related was provided.

In extreme cases, school officials may initiate truancy proceedings against students who have experienced significant absences due to diabetes or other conditions. However, it is generally inappropriate (and unhelpful) to treat diabetes-related absences as truancy, and failing to evaluate whether these absences result from a disability could violate section 504. *See Hamilton (OH) Local Sch. Dist.*, Complaint No. 15-10-1123, 58 IDELR 82 (OCR 2011) (district violated 504 when it referred a student with absences related to chronic hypoglycemia and migraines for truancy proceedings, and reassigned her to an online program, rather than evaluate the student for 504 eligibility); *but see Le Center (MN) Pub. Sch. Dist.*, Complaint No. 05-06-1057, 107 LRP 2185 (OCR 2006) (district did not violate 504 by sending a letter indicating that a student had many unexcused absences and might have to be reported to child welfare authorities; the district was required by law to send the letter after a number of absences and had sent similar letters to students without disabilities).

While diabetes-related absences should be excused, OCR held in one case that students may be penalized based on facially neutral attendance policies governing participation in extracurricular activities. *Houghton Lake (MI) Community Schs.*, Complaint No. 15-05-1050, 45 IDELR 199 (OCR 2005) (student could be excluded from playing in basketball game because he missed school that day due to a doctor’s appointment).

11.7 Where a student with diabetes has received appropriate academic accommodations, may the school treat the student's academic deficiencies as it does those of other students?

Students with diabetes are entitled to academic accommodations. Where appropriate accommodations are provided, academic measures and sanctions may be imposed upon such students as would be applied to any other student. So long as accommodations are provided, students with diabetes can be required to meet the same academic standards and requirements as non-disabled students.

Notes

If a student with diabetes fails to satisfactorily perform in school the student may be denied promotion. In one example, *Hernando (FL) County Schs.*, Complaint No. 04-98-1412, 31 IDELR 89 (OCR 1999), a student who had diabetes was held back in sixth grade after failing five classes and receiving grades of "C" and "D" in two other classes. The student was intellectually within the average range, but had some processing weaknesses and exhibited behaviors that affected learning. The student also had 36 unexcused absences, apparently failed to turn in homework assignments, and did not have his student planner signed by a parent. Although school officials had considered holding the student back previously, they acceded to parental insistence that he be promoted. A Section 504 accommodation plan was not challenged as being inadequate. The plan included adjustments in the arrangement of the classroom, assignments, and responses to positively re-enforce student behavior, presentation of lessons, personal organization skills, and test-taking skills. The plan also allowed for make-up work after prolonged absences. A discrimination claim made after the school declined to promote him was rejected. According to OCR, the school properly declined to promote the student based on the failure of the student to master the subject matter. It concluded that the student was not hampered by a failure of the school to accommodate his needs.

11.8 Must the requirements for academic honors or other recognition programs be modified to take into account a student's diabetes?

Many schools recognize academic excellence through awards, honor societies or other means. While students may be excused from certain recognition requirements that are impacted by their diabetes (e.g., attendance requirements), these students must meet the other requirements of these programs that are not impacted by diabetes.

Notes

Schools may not discriminate against persons with disabilities in the application of criteria for honors or other recognition programs. See *Hornstine v. Moorestown Board of Educ.*, 263 F. Supp. 2d 887 (D. N.J. 2003) (restraining order granted against school district preventing it from changing policies on determining who would be valedictorian when policies were clearly designed to prevent student with chronic fatigue syndrome from becoming valedictorian because of unfounded concerns about the fairness of her grades). However, students with disabilities must meet the academic and other requirements of these programs unless prevented from doing so by their disability. For example, in one case a student with diabetes was denied admission to the National Honor Society and claimed that

her rejection was because of disability-related absences. The school waived the NHS's school attendance requirement because of the student's disability, but found that she had not met the requirement for participation in an extracurricular activity and that her lack of participation was not related to her disability. OCR therefore found no violation of Section 504. *Perry (OH) Public Sch. Dist.*, Complaint No. 15-03-1148, 41 IDELR 72 (OCR 2003).

12. What Accommodations Should Be Provided Outside the Classroom or the School?

Accommodations need to be provided not only in the academic setting, but in nonacademic settings that are part of the school environment as well. This includes extracurricular activities, field trips, or similar activities. These accommodations should also be documented in a Section 504 Plan or other written education plan.

12.1 Are students with diabetes entitled to participate in extracurricular activities, field trips, or similar activities?

Yes. All programs or activities of a school are subject to Section 504 and the ADA. The non-discrimination obligation under Section 504 and the Americans with Disabilities Act applies to all school programs and activities. A student with diabetes may not be excluded from extracurricular activities, field trips, or similar activities due to the student's disability. Students with disabilities are entitled to accommodations and services they need to participate in extracurricular activities, including athletics, as long as those accommodations will not fundamentally alter the activity or athletic program.

Notes

Section 504 regulation requires equal opportunity for students to participate in nonacademic and extracurricular services and activities. 34 C.F.R. § 104.37(a) Students with diabetes who are eligible for services pursuant to Section 504 or the ADA must "be allowed to participate in non-academic and extracurricular activities, including field trips and other activities, to the maximum extent appropriate to the needs of that student." *Elkhart (IN) Community Sch. Corp.*, Complaint No. 05-00-1026, 34 IDELR 13 (OCR 2000). Students must be equally and equitably treated. *Plymouth-Canton Community Schs.*, Complaint No. 15-99-1113 (OCR 1999) (complaint that student was not allowed to treat herself for low blood sugar during cheerleading practice resolved by requirement that cheerleaders be treated equally and equitably with respect to standards governing tryouts, practice attendance, and summer camp attendance). The key inquiry is whether the student has a full and equal opportunity to participate in the sport or activity. In *Schaffer (CA) Union Elementary Sch. Dist.*, Complaint No. 09-06-1412, 107 LRP 61308 (OCR 2007), a parent alleged that the student's volleyball coach discouraged the student from attending away volleyball games because the coach was uncomfortable providing diabetes care. However, the coach denied making these statements, and evidence showed that the student was able to fully participate in volleyball. OCR held that mere expressions of discomfort about providing care were not enough to prove a 504 violation where the student was ultimately able to participate.

Students are entitled to an individualized assessment of their ability to participate and need for accommodations. *New York City (NY) Bd. of Educ.*, Complaint No. 02-89-1128, 16 EHLR 455 (OCR 1989) (Section 504 violation found where school, without evaluation, excluded student with diabetes from participating in field trips). OCR has stated: "A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular. A school district also may not rely on generalizations about what students with a type of disability are capable of." U.S. Department of Education Office for Civil Rights, *Dear*

Colleague Letter (Jan. 25, 2013) at 5 (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>).

Where all students are eligible to participate in an activity (as, for example, with many school field trips), the student must be given accommodations needed to participate. Where the school imposes rules or standards for who can participate in an activity (such as with most athletic teams), a student with diabetes desiring to participate must be able, with or without accommodations, to meet these requirements.

While anti-discrimination laws forbid unequal treatment of people with disabilities, they do not guarantee the right to play a particular sport. Students trying out for athletic teams, for example, need not be selected if they do not possess sufficient athletic skill, as judged by the same standards applied to others. See *Cobb County (GA) Sch. Dist.*, Complaint No. 04-13-1990, 114 LRP 32419 (OCR 2014) (evidence showed that student was not selected for cheerleading team based on her performance at tryouts, not because the coaches did not want to accommodate her diabetes); *Kennewick (WA) Sch. Dist. No. 17*, Complaint No. 10-11-1027, 57 IDELR 262 (OCR 2011) (student with diabetes failed to make soccer team because she lacked the skill and ability shown by other players and did not work hard enough in practice; her tryout scores were lower than other students who made the team). Also, OCR found in one case where a district imposes attendance requirements that students must meet in order to participate in extracurricular activities, a student with diabetes must meet these requirements, even if attendance problems are caused by diabetes. *Houghton Lake (MI) Community Schs.*, Complaint No. 15-05-1050, 45 IDELR 199 (OCR 2005) (school did not violate Section 504 by enforcing facially neutral policy that students could not participate in extracurricular activities on days they were absent from school, even where student missed school due to a diabetes-related appointment).

12.2 Must a school provide coverage by trained diabetes personnel while students participate in extracurricular activities, field trips, or similar activities?

School districts must provide care to students attending all school activities, including extracurricular activities, afterschool events, field trips, and even overnight trips. These situations can be challenging because the school nurse or other staff person who regularly provides care during the school day may not be present during the activity, but the school is responsible for making alternate arrangements where necessary. Failure to provide coverage by trained diabetes personnel at extracurricular activities will exclude many students with diabetes from participating in these activities for safety reasons, just as failure to provide coverage during the school day would exclude these students from school.

Notes

A student may not be excluded from participation in a school activity because no one is available to provide care. See *Prince George's County (MD) Pub. Schs.*, Complaint No. 03-14-1025, 114 LRP 36274 (OCR 2014) (resolution agreement required district to review and revise its policies relating to field trips and extracurricular and nonacademic activities to ensure that students with diabetes were not excluded); *Huntsville (AL) City Sch. Dist.*, Complaint No. 04-14-1014, 114 LRP 36268 (OCR 2014) (student was effectively denied opportunity to participate in afterschool activities because district had no nurse to provide care; resolution agreement required that care be provided by nurses or trained staff); *Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011) (district violated

Section 504 by excluding student from an afterschool softball activity because no staff were available to provide care).

A district may be required to provide medication administration services by school personnel during a field trip. Parents may not be required to attend the trip to provide care. (See Question 12.4) OCR has stated that where a student receives accommodations during the regular school day that may be needed during extracurricular activities or athletic events, the school generally may not refuse to provide them at these events. In an example included as part of a “Dear Colleague” letter on participation of students with disabilities in athletic activities, OCR considered the example of a student who receives blood glucose monitoring and insulin administration services during the school day from school staff. The school, however, refuses to provide these services during an extracurricular gymnastics club in which the student participates. OCR stated that the school would violate Section 504 under these facts because the student needs these services to participate in the activity, and since the district must provide these service during the school day to comply with 504, providing them during an extracurricular activity would not represent a fundamental alteration. U.S. Department of Education Office for Civil Rights, *Dear Colleague Letter* (Jan. 25, 2013) at 10-11 (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>). See also *Calcasieu Parish (LA) Sch. Bd.*, Complaint No. 06041354, 44 IDELR 49 (OCR 2005) (school district agreed that insulin administration is a related service that must be provided during field trips if necessary); *Orange County (FL) Sch. Dist.*, Complaint No. 04-04-1239, 105 LRP 12227 (OCR 2004) (district was required to provide diabetes care during field trips, as they were part of the school’s educational program, even though there was no nurse assigned to the school). See also *Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008) (Section 504 violated where no licensed professional was available to administer glucagon and the adults attending the trip, who were responsible for providing diabetes care, were unaware of or confused by the provisions of the 504 plan and the child’s needs); *Westwood (NJ) Reg’l Sch. Dist.*, Complaint No. 02-06-1363, 49 IDELR 78 (OCR 2007) (district’s policy did not violate section 504 where district promised to ensure that an individual capable of administering glucagon, either the school nurse or the parent, would attend all field trips, and where neither could attend the trip would be rescheduled); *Bradley County (TN) Sch. Dist.*, Complaint No. 04-04-1247, 43 IDELR 44 (OCR 2004) (school had “committed to providing the Student with a diabetes care provider during lunchtime, outside activities and field trips.”)

This obligation can extend beyond traditional field trips and extracurriculars to child care and camp programs held outside of school hours. See *Conejo Valley (CA) Unified Sch. Dist.*, Complaint No. 09-08-1278, 109 LRP 54727 (OCR 2009) (district violated 504 by refusing to train any staff at a summer camp sponsored by the district on school grounds to administer insulin or operate the student’s insulin pump; staff would only observe the student for symptoms and contact the parents or 911); *Cape May County (NJ) Technical Sch. Dist.*, Complaint No. 02-09-1019, 110 LRP 19930 (OCR 2009) (district was required to provide medication administration services during school’s child development program, which was open before and after regular school hours and on school holidays, when school nurse was not on site; simply having staff call the parent or 911 when the student appeared to need medication was not sufficient). This does not necessarily mean that a nurse will have to attend a camp or overnight trip, however. *Wayne Township Bd. of Educ.*, 106 LRP 2442 (N.J. State Educational Agency 2001) (district did not have to provide a nurse to accompany a high school student on an overnight band trip; district agreed to provide a trained adult to supervise the student’s use of an insulin pump, and none of the parent’s medical documentation demonstrated that a nurse needed to attend).

Training should be provided to coaches and other staff who supervise extracurricular activities, just as to teachers and other staff. See *Cobb County (GA) Sch. Dist.*, Complaint No. 04-13-1990, 114 LRP 32419 (OCR 2014) (OCR criticized school district for not providing training in diabetes to cheerleading coaches, even though 504 plan required training of staff and mentioned the student's need for diabetes care during cheerleading); *Springdale (AR) Sch. Dist.*, Complaint No. 06-08-1349, 109 LRP 4346 (OCR 2008) (resolution agreement required volleyball coach to be trained to recognize hypoglycemia and administer glucagon); see also *Gettysburg Area Sch. Dist.*, Case 1984/02-03, 103 LRP 9599 (Pa. State Educational Agency 2003) (teachers and staff who were to be with the child when away from the school building had to be trained to recognize problems relating to diabetes "as they are truly the first line of defense against problems" and "are the ones who can prevent problems or at least mitigate the extent of the severity of the problem.")

While other parents will often be present during field trips as chaperones, OCR has held that a school may not escape its obligations under 504 by having the parent of a student with diabetes agree that the chaperone parent will provide care, especially where the chaperone does not volunteer to do so and is not trained in diabetes care. *Clovis (CA) Unified Sch. Dist.*, Complaint No. 09-08-1395, 52 IDELR 167 (OCR 2009). Where chaperones do volunteer to provide care, they should be provided with appropriate training. *Harney County (OR) Pub. Schs.*, Complaint No. 10-14-1327, 115 LRP 6273 (OCR 2014) (school district revised policies to require that chaperones on field trips receive training on a student's medical needs prior to the trip).

The inability to find a nurse or other trained person to attend a field trip or other activity on short notice will not absolve a district from liability where the district had notice of the need and should have been able to locate someone. In *Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008), the school failed to take any steps to find a trained person until one hour before the field trip, and the parent ultimately agreed to attend. OCR held that the district violated 504, and could not escape liability by pointing to a provision in the student's 504 plan which permitted the district to ask the parent to attend if it could not find coverage for an unplanned trip, since this trip had been planned in advance and steps should have been taken to find appropriate personnel. However, where the parent's actions put the school district in the position of having to find someone to provide care at the last minute, it may be reasonable to exclude the student from participating if an appropriate person is not available. See *Oxford Hills (ME) Sch. Dist.*, Complaint No. 01-11-1002, 57 IDELR 83 (OCR 2011) (no violation even though student was forced to miss a field trip, where parent had initially agreed to attend and provide care but backed out at the last minute, leaving the district unable to find a substitute provider); *Denton (TX) Indep. Sch. Dist.*, Complaint No. 06-07-1334, 50 IDELR 200 (OCR 2007) (district did not discriminate in barring student from field trip where parent initially agreed to attend to provide care but backed out the night before the trip; district was permitted to exclude the student because no appropriate person was available to attend and because the recently diagnosed student's fluctuating blood glucose levels posed a safety risk without appropriate care). Cf. *Half Hollow Hills (NY) Central Sch. Dist.*, Complaint No. 02-04-1136, 44 IDELR 131 (OCR 2005) (district's efforts were reasonable where student was able to attend four of five field trips with appropriate care present, and for the fifth trip where regular nurse was unavailable district attempted to find a substitute nurse and ultimately offered to send a trained paraprofessional with the student, an offer the parents refused).

See Question 9.12 for additional information about training for school personnel.

12.3 Is the school required to provide coverage by trained diabetes personnel if a student is a spectator rather than a participant?

No distinction is made under Section 504 or the ADA between whether a student is involved in an activity as a participant rather than as a spectator. Being a student spectator is an important and valuable activity. However, a settlement approved by OCR suggests that it may not consider the provision of trained diabetes personnel for student spectators to be required. Of course, it is still a good idea for schools to have such care available.

Notes

OCR has approved a complaint resolution where school officials agreed to provide an authorized diabetes care provider when a student with diabetes “is a direct participant, but not when that student is solely an observer or an audience member.” *Buchanan County (VA) Pub. Schs.*, Case No. 11-03-1051, 103 LRP 56159 (OCR 2003).

12.4 May schools require parents to attend an extracurricular activity, field trip, or similar activity in order for a child to participate?

No. Districts may not condition student participation on parent or guardian attendance, unless the parents or guardians of non-disabled children are also required to attend.

Notes

OCR cautions that schools may not condition the provision of nonacademic services on a parent’s attendance or provision of a surrogate. *OCR Senior Staff Memorandum*, 17 EHLR 1233 (OCR 1990) (Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance). In one case, OCR held that a district violated 504 by repeatedly failing to provide any trained staff to give diabetes care on field trips and relying on parents to attend the trips or to sign a release authorizing another parent to provide care. OCR stated:

The evidence established that in a significant number of cases, a student's participation in such activities was conditioned upon whether his or her medical services or support would be provided while attending the activity. Whether the medical services or support would be provided was dependent upon whether the student's parent was willing to undertake certain obligations that were additional to those of parents of non-disabled students (e.g., payment of a registration or other fee to attend the activity, required personal attendance at the activity, a willingness to permit another parent, notwithstanding any reluctance or adequate training, to provide necessary support or services; etc.) The imposition of additional expenses, time commitments, and health risks as a condition to District students with disabilities participating in the District's curriculum based field trips and non-classroom activities ... serves to unnecessarily burden, deny, or limit the equal education and participation opportunities of students with disabilities. The District cannot condition a disabled student's participation in such activities upon the student's parents' willingness to accept an additional obligation or burden that is not likewise imposed on the parent of a non-disabled student.

Clovis (CA) Unified Sch. Dist., Complaint No. 09-08-1395, 52 IDELR 167 (OCR 2009); *see also Prince George's County (MD) Pub. Schs.*, Complaint No. 03-14-1025, 114 LRP 36274 (OCR 2014) (resolution agreement required district to review and revise its policies to ensure that parents would not be required to attend field trips); *Bighorn (WY) Sch. Dist. #2*, Complaint No. 08-13-1165, 61 IDELR 236 (OCR 2013) (after allegations that parent was required to attend field trips to provide care in the nurse's absence, resolution agreement required that four staff members be trained to provide care during field trips and other school activities); *American School for the Deaf (CT)*, Complaint No. 01-07-1268, 108 LRP 58193 (OCR 2008) (school violated Section 504 by requiring parent to attend a field trip when the school nurse was unable to attend, rather than providing another trained medical professional); *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-07-1271, 108 LRP 34606 (OCR 2007) (resolution agreement provided that parents would not be required or pressured to attend field trips with the student); *Nyack (NY) Unified Sch. Dist.*, Complaint No. 02-04-1065, 43 IDELR 169 (OCR 2004) (agreement to resolve complaint where evidence, though disputed, suggested that district required parent to attend class trip with student to provide diabetes care); *Orange County (FL) Sch. Dist.*, Complaint No. 04-04-1239, 105 LRP 12227 (OCR 2004) (district violated 504 when it refused to provide diabetes care during field trips and required parents to attend by telling parents that it was their responsibility to provide all care). But where a district is willing to provide care during the field trip, the mere fact that a parent goes on the trip does not show that the school violated 504 in forcing the parent to attend. *See Oxford Hills (ME) Sch. Dist.*, Complaint No. 01-11-1002, 57 IDELR 83 (OCR 2011) (district did not condition student participation in a field trip on the parent attending; although the parent did agree to attend, the district had trained the assistant principal, who was on the trip, to provide diabetes care); *see also Waterbury (CT) Bd. Of Educ.*, Complaint No. 01-07-1030, 108 LRP 60388 (OCR 2007) (where student's IEP provided that a contract nurse would attend all field trips where the parent could not attend, OCR found no violation even though the parent expressed fears about being forced or pressured to attend).

12.5 Can additional charges be imposed with respect to students with diabetes to cover any additional costs associated with their participation in extracurricular activities, field trips, or similar activities?

No. Additional costs may not be imposed beyond those which are charged to non-disabled students.

Notes

Section 504 regulations make clear that services provided to students with disabilities must be without cost, except for those fees that are imposed on non-disabled persons or their parents or guardian. 34 C.F.R. § 104.33(c)(1). OCR has also advised that students with disabilities may not be charged a higher cost of participating in nonacademic activities than is charged to non-disabled students. *OCR Senior Staff Memorandum*, 17 EHLR 1233 (OCR 1990) (Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance).

Although an additional cost may not be imposed, this does not mean that children with disabilities may refuse to participate in fundraising or similar activities that are expected of all students. Some schools, for example, require participation in sales activities, car washes, and the like. Assuming there is no disability-related reason that a student cannot participate, they may be expected and required to participate just as any other student.

The general rule that no charges may be imposed is subject to an exception for private schools. Private schools may adopt an additional charge if “justified by a substantial increase in cost” to the school. 34 C.F.R. § 104.39(b).

12.6 Does providing extra supervision for a child with a disability warrant exclusion from extracurricular activities, field trips, or similar activities?

The need to provide extra supervision for a child with a disability generally will not warrant exclusion from extracurricular activities, field trips, or similar activities.

Notes

OCR has stated that “[p]roviding extra supervision to a handicapped child ordinarily will neither change the fundamental nature of the program or unduly burden a recipient.” *OCR Senior Staff Memorandum*, 17 EHLR 1233 (OCR 1990) (Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance). Therefore, the need for supervision or assistance simply is not justification to exclude a student from extracurricular activities, field trips, or similar activities. Nevertheless, a school has “considerable discretion ... in determining what supplemental services are necessary in a particular case, since the Section 504 regulation provides no specific guidance.” *OCR Senior Staff Memorandum*, 17 EHLR 1233 (OCR 1990) (Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance).

12.7 Are schools required to maintain direct communications between school personnel and a trained medical professional when away from the school grounds?

A student’s accommodation plan should include a means for direct communication between school personnel and qualified health care personnel, such as the school nurse, when the student leaves the school building or campus if the child’s condition warrants this accommodation.

Notes

In *Gettysburg Area Sch. Dist.*, Case 1984/02-03, 103 LRP 9599 (Pa. State Educational Agency 2003), an accommodation was approved involving use of walkie-talkies when a student with diabetes left the school building. The particular student had hypoglycemic unawareness and, as a result, it was “abundantly clear ... that he has very specific needs and that a school nurse needs to be available and in contact at all times.” Therefore, a hearing officer required that whenever the child left the school building, the teacher or staff member must have a direct connection with the school nurse. The hearing officer also held that direct communication with the nurse by itself was not enough to meet this student’s needs, and that trained personnel were also required to be present (see Question 12.2).

12.8 Are accommodations required on school buses?

The same right to accommodations exists while on school buses just as it does in school. It is particularly important that students who have a long bus ride to school each day have

access to diabetes care supplies and to emergency care while riding the bus. However, accommodations may be required even on short bus rides.

Notes

Accommodations are required in transportation services provided to students under both Section 504 and the ADA. Schools have an obligation to ensure that students receive adequate transportation to and from the aid, benefits, or services provided to them. 34 C.F.R. § 104.33(c)(2) (Section 504); 20 U.S.C. § 1401(26)(B) (IDEA). Permitting students with diabetes to have snacks while riding on the school bus may be a reasonable accommodation, depending on the circumstances. *Jamestown Area (PA) Sch. Dist.*, Complaint No. 03-02-1117, 37 IDELR 260 (OCR 2002) (school district agreed to require school bus company to inform its bus drivers that student with diabetes must be permitted snacks while ride on bus); *Loudoun County (VA) Pub. Schs.*, Complaint Nos. 11-99-1003, 11-99-1064, 11-99-1069, 102 LRP 3258 (OCR 1999). School bus drivers should also be trained in appropriate diabetes care (at minimum, to recognize signs and symptoms of high and low blood glucose levels, and to take appropriate action in emergencies). *Danbury (CT) Bd. of Educ.*, Complaint No. 01-13-1115, 113 LRP 52424 (OCR 2013) (resolution agreement required appropriate training in diabetes care for bus driver); *District of Columbia (DC) Pub. Schs.*, Complaint No. 11-12-1133, 112 LRP 50236 (OCR 2012) (resolution agreement required district to provide training to staff responsible for student transportation); *Waterbury (CT) Sch. Dist.*, Complaint No. 01-07-1280, 51 IDELR 198 (OCR 2008) (district violated Section 504 by failing to implement provision in student's 504 plan requiring it to meet with and train staff of transportation provider in diabetes care, and required such training as part of resolution agreement).

It will generally not be necessary to provide an aide to ride the bus with a student, so long as the driver has been appropriately trained. In *Stafford County (VA) Pub. Schs.*, Complaint No. 11-12-1071, 60 IDELR 51 (OCR 2012), OCR rejected the parent's request that an aide be provided to ride the bus with the student because of concern that the student would otherwise not be safe. OCR noted that the district had agreed to train the bus driver and to allow the student to have diabetes supplies and food and drink on the bus, and found these provisions to be adequate. And in *Menlo Park Elementary Sch. Dist.*, Complaint No. 2010020281, 110 LRP 44206 (Cal. State Educational Agency 2010), a hearing officer found that the school district's offer of bus transportation was adequate even though the parent believed the bus driver was not adequately trained for an emergency and wanted the student transported on the same bus as his sibling. The school nurse had trained the bus driver in all aspects of the student's diabetes, and several incidents where the student had experienced hypoglycemia while waiting for a late bus did not demonstrate that the student would be at risk during the actual bus ride.

13. How Does Diabetes Affect Student Discipline?

Students may not be disciplined or punished because of diabetes. However, diabetes normally will not cause poor behavior or discipline problems, and where diabetes does not directly cause the behavior students with diabetes are required to meet the same disciplinary standards as other students.

13.1 Are students with diabetes subject to the same disciplinary rules as other students?

Students with diabetes are generally subject to the same disciplinary rules as other students. If a student's misconduct is the result of diabetes, however, a student may not be disciplined. Discrimination includes punishing a student because of the student's identified disability. Nevertheless, the fact that a student happens to have a disability is not an excuse for misconduct that is unrelated to the student's disability. Where the issue arises, schools are to evaluate whether there is a connection between the disability and the misconduct.

Notes

Obviously, students should not be disciplined for carrying out their diabetes care regimen at school. See *Prince George's County (MD) Pub. Schs.*, Complaint No. 03-14-1025, 114 LRP 36274 (OCR 2014) (resolution agreement required district to expunge all discipline imposed for going to the nurse's office for blood glucose monitoring). And where a behavior is identified as a possible consequence or symptom of diabetes, a district may violate Section 504 if it disciplines that student for that conduct, especially where the conduct may have resulted from failure of the district staff to provide needed services. For example, in *Buncombe County (NC) Schs.*, Complaint No. 11-09-1131, 54 IDELR 235 (OCR 2009), the student's 504 plan identified sleepiness as a possible symptom of diabetes. Nevertheless, several of the student's teachers made disciplinary referrals for falling asleep in class. While several members of the student's 504 team believed that the student was not compliant with diabetes care, discipline was inappropriate because the teachers had failed to properly monitor the student's blood glucose levels. On the other hand, not all conduct surrounding diabetes care is insulated from discipline, as long as the student is not being disciplined merely for performing care. In *Davenport (LA) Community Sch. Dist.*, Complaint No. 05-10-1132, 59 IDELR 112 (OCR 2012), OCR found that a student had not been disciplined for accessing juice and snacks to treat her diabetes (as her 504 plan permitted her to do), but for inappropriate conduct related to obtaining juice and snacks (such as giving juice to another student, bringing her cellphone to class when she went to her locker to get juice, and leaving the class on her own even after being directed to wait for a staff escort).

There are a number of cases confirming that students may be disciplined where misconduct is unrelated to a disability. In *Brown v. Metropolitan Sch. Dist. of Lawrence Township*, 945 F. Supp. 1202 (S.D. Ind. 1996), a student with diabetes was expelled for "knowingly possessing, handling, or transmitting a knife" while on a field trip with her fourth grade class. The student had informed her teacher that she felt ill. After she ate a piece of fruit, the child's blood glucose reading rose from 28 mg/dL to 66 mg/dL. The student later threatened to use a small knife to harm two other students who had been harassing her. The expulsion was upheld because the student failed to present evidence that the behavior was likely to have been caused by her diabetes given her blood glucose level at the time. See also

Eureka (CA) City Sch. Dist., Complaint No. 09-95-1020, 23 IDELR 238 (OCR 1995) (student with diabetes could be disciplined where there was a reasonable belief that he intentionally caused a teacher to fall into a swimming pool).

Students must meet generally applicable conduct standards in extra-curricular activities as well. In *Community (IL) Unit Sch. Dist. #300*, Complaint No. 05-98-1039, 30 IDELR 148 (OCR 1998), a student with diabetes was suspended from the soccer team and removed from the National Honor Society after an incident in which he swore at the coach and said he “should get a gun and kill” him after the coach reduced his playing time. Although there was some evidence that the misconduct was due to hypoglycemia, OCR declined to find discrimination because this evidence was not conclusive and the incident was clearly a serious breach of conduct rules.

Where children with disabilities or suspected disabilities demonstrate patterns of behavior that may result in disciplinary action, school officials should consider whether the behavior is a manifestation of a disability, as discussed in the next question.

13.2 Are students entitled to present evidence of the possibility that misconduct was related to a disability before being disciplined or penalized?

Students may not be disciplined or penalized without being afforded the right to present evidence that misconduct was related to a disability. Although less formal procedures are permitted where a student’s exclusion is ten or fewer days, the right to provide an explanation for the misconduct exists as a matter of due process regardless of the length of the suspension.

Notes

Students may not be disciplined without due process being afforded. *Goss v. Lopez*, 410 U.S. 565 (1975). Where there is a possibility that misconduct was related to a disability, school officials are obligated to consider whether the disability was a mitigating factor. See, e.g., *Isle of Wight County (VA) Pub. Schs.*, Complaint No. 11-10-1044, 56 IDELR 111 (OCR 2011) (school was required to evaluate whether student’s verbal threat was related to complications of his diabetes before expelling him, even where the student had not been found eligible under Section 504 at the time of the expulsion); *Community (IL) Unit Sch. Dist. #300*, Complaint No. 05-98-1039, 30 IDELR 148 (OCR 1998) (school considered whether diabetes resulted in misconduct, but found disability was not related); *Gasconade County (MO) R-I Sch. Dist.*, Complaint No. 07-91-1061, 18 IDELR 313 (OCR 1991) (school considered issue but determined that student cursing at teacher was unrelated to diabetes before imposing three day suspension).

The IDEA provides specific and detailed requirements when children with disabilities are disciplined. See 20 U.S.C. § 1415(k). Although these requirements are not expressly a part of Section 504 and the Americans with Disabilities Act, OCR insists that the rights of students with disabilities who are being disciplined be similarly protected. Where a student with a disability is to be suspended for longer periods of time, ordinarily in excess of ten days, or is being expelled, schools must undertake an appropriate evaluation and afford due process in order to determine whether the misconduct is a manifestation of the student’s disability and whether the child’s placement remains appropriate. See *Santa Ana (CA) Unified Sch. Dist.*, Complaint No. 09-92-1185, 19 IDELR 501 (OCR 1992) (requiring IDEA-type protections under Section 504 and ADA); *Petaluma (CA) Unified Sch. Dist.*, Complaint No. 09-95-1158 (OCR 1996) (resolution provided that where a student with diabetes is disciplined

for greater than ten cumulative days during school year that manifestation determination must be made). Even where shorter suspensions or other discipline is contemplated, schools should have a procedure to determine whether disruptive behavior by a student is caused by the student's diabetes. *Gasconade County (MO) R-I Sch. Dist.*, Complaint No. 07-91-1061, 18 IDELR 313 (OCR 1991) (observing that school had established a procedure to determine whether any future disruptive behavior by student with diabetes was caused by his disability).

13.3 May students be disciplined or penalized for carrying diabetes care supplies at school?

Some state laws permit or require students to be disciplined or suspended if found to be carrying controlled substances on school grounds. While generally enacted to combat illegal drug use in schools, these laws are sometimes written broadly enough to cover diabetes supplies such as insulin and syringes. Some districts have adopted such rules as policies even in the absence of state law. Where such a law or policy is in place, its appropriateness should be challenged to prevent students with diabetes from being disciplined for violating the policy. Many state laws now explicitly require that students who are able to manage their own diabetes be permitted to carry their diabetes supplies on their person (see Question 9.8)..

Notes

In one case, *Sumner County (TN) Sch. Dist.*, Complaint No.04-01-1122, 36 IDELR 136 (OCR 2001), it was found that a middle school student could be suspended for violating school district policy prohibiting carrying prescription or nonprescription drugs, including diabetes supplies. The policy, whose appropriateness was not questioned, provided that younger students were to provide supplies to teachers, and such supplies were to be kept in a locker accessible to all the student's teachers. The policy did allow high school students to carry supplies. Similarly, although a school may not inflexibly apply a policy prohibiting student possession of an unauthorized communication device (such as a cell phone or beeper), a student with diabetes is not entitled to carry a beeper where no medical condition required that the student carry one. *Moreno Valley (CA) Unified Sch. Dist.*, Complaint No. 09-95-1032, 22 IDELR 902 (OCR 1995).

Insulin pumps can also present disciplinary issues. In one case a pump was mistaken for a beeper, which was prohibited at the school, by an assistant principal (who became upset but did not discipline the student). *Palm Beach County (FL) Sch. Dist.*, Complaint No. 04-02-1275, 38 IDELR 105 (OCR 2002). School personnel who enforce disciplinary rules should be aware of what an insulin pump is.

14. How are Disagreements Resolved?

Every reasonable effort should be made by school officials and parents or guardians to reach a consensus regarding the accommodations to be provided students with diabetes. If a consensus cannot be reached, a number of methods are available to resolve disagreements. The available options may differ depending on which law gives rise to the right being asserted; this part discusses the options available under each of the federal laws protecting students with diabetes.

14.1 How are anti-discrimination laws enforced?

A number of options are available to parents or guardians who believe a student may have been subjected to discrimination. Some of the options that may be available and should be considered include:

- Mediation (an informal process where the parties, often with the help of a neutral third party, attempt to negotiate a solution).
- Internal school or district grievance procedures (see Question 14.4).
- Impartial hearings (sometimes called due process hearings) (see Question 14.8).
- Complaints to federal or state enforcement agencies (Questions 14.10-14.13).
- Lawsuits in federal or state court (Question 14.14).

14.2 Do the procedures differ under Section 504, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act?

Yes. These laws require different procedural steps to be followed, so it is important to be aware of which laws apply to a child's individual situation. The procedures under each law are described in detail below. In general, IDEA provides for more elaborate administrative procedures for resolving disputes, and these procedures must be followed where a child is covered by that law. Section 504 and the ADA require less elaborate administrative procedures but permit lawsuits to be filed regardless of whether available administrative procedures have been used.

14.3 Which school officials are responsible for receiving complaints and resolving disputes?

Most schools are required to designate an employee to oversee compliance with disability discrimination laws. Complaints or disagreements should be directed to this individual in the first instance. The name and contact information for this individual will usually be provided in student handbooks or publications. If not known, the chief officer of the school or the school district (generally the principal or superintendent) should be contacted.

Notes

Section 504 regulations require that districts employing 15 or more persons designate at least one person to coordinate their efforts to comply with Section 504. 34 C.F.R. § 104.7(a). The ADA also requires any public entity that employs 50 or more persons to designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the act, including any investigation of any complaint communicated to it alleging its noncompliance with the act or alleging any actions that would be prohibited. 28 C.F.R. § 35.107(a).

14.4 Are school grievance procedures available?

Almost all schools have informal grievance procedures available to consider concerns regarding the accommodations provided students with diabetes. These procedures do not preclude filing a complaint with federal or state agencies. School district grievance procedures are different from the impartial hearings which must be provided to resolve disputes under Section 504 and IDEA, which are discussed in Question 14.8. Decisions on grievances filed using these procedures are often made by school district personnel, such as the superintendent or the board of education.

Notes

Section 504 regulations require that recipients of federal funding (including school districts) employing 15 or more persons adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging action prohibited by that statute. 34 C.F.R. § 104.7(b). The ADA also requires any public entity that employs 50 or more persons to adopt and publish grievance procedures. 28 C.F.R. § 35.107(b). Following grievance procedures is not required before requesting a hearing or pursuing other remedies. *Sycamore (OH) Community City Sch. Dist.*, Complaint No. 15-01-1188, 36 IDELR 245 (OCR 2002) (resolution required school to omit any language in notices that suggested that parents must first follow an internal grievance or complaint procedure or any other procedures established by the district before requesting a due process hearing).

OCR states in its case resolution manual that it may decline to process a complaint being addressed through a school's formal grievance procedure if OCR anticipates that the school will provide a resolution process comparable to OCR's. The affected individual has another 60 days after the grievance process is completed to file or refile a complaint with OCR. OCR will review the results of the grievance procedure and determine whether comparable process and legal standards were in fact applied. See U.S. Dept. of Educ., Office for Civil Rights, *OCR Case Processing Manual*, Section 110(a), available at: <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>.

14.5 What are the procedures for resolving complaints under Section 504?

A student's rights under Section 504 may be enforced through administrative complaints to the Department of Education's Office for Civil Rights, through an impartial hearing at the district or state level, or through a private lawsuit in federal or state court.

OCR accepts and investigates complaints of violations of Section 504 by schools which receive federal funding. OCR will only investigate complaints which are filed within 180 days of the discriminatory actions, unless certain conditions permit granting a waiver of this requirement. For more information on OCR complaints and procedures see Questions 14.10-14.13. Complaints alleging both a violation of the ADA and 504 may also be filed with the U.S. Department of Justice, which has discretion to investigate such complaints or to refer them to OCR. See Question 14.6.

Schools that receive federal funding must have in place a procedure for impartial hearings (sometimes called “due process” hearings) to address violations of Section 504, and complaints may also be addressed through this hearing process. As noted below, IDEA also requires due process hearings, and sometimes states or districts use the same process for IDEA due process hearings as for 504 impartial hearings. For more information on hearing procedures see Question 14.9.

Litigation also may be filed in federal or state court, whether or not other possible processes have been utilized. However, if the lawsuit seeks relief available through IDEA, the IDEA due process procedures must be used before suit can be filed (see Question 14.14).

14.6 What are the procedures for resolving complaints under the Americans with Disabilities Act?

Like Section 504, the ADA provides for administrative complaints and for the filing of lawsuits. The procedures used to address violations of the ADA are similar to those available under Section 504, although the Department of Justice, rather than OCR, has authority to investigate ADA violations.

Notes

For public schools, the procedures for resolving administrative complaints under the ADA are the same as those under Section 504. 42 U.S.C. § 12133. While the Department of Justice has general jurisdiction over ADA complaints, it has designated the Department of Education to be responsible for investigating complaints of ADA violations against public schools. 28 C.F.R. § 35.190(b)(2). However, DOJ can also retain and investigate complaints filed with it, even those that also allege violations of Section 504. 28 C.F.R. § 35.190(e). Thus, complaints filed with DOJ may ultimately be investigated either by DOJ or OCR.

Where a private school does not receive federal funding but is subject to the ADA, complaints of ADA violations may be made to the Department of Justice, which will investigate these complaints using a procedure similar to that used by OCR.

14.7 What are the procedures for resolving complaints under the Individuals with Disabilities Education Act?

The primary means for enforcing rights provided by IDEA are administrative due process hearings and lawsuits in federal or state court. OCR does not have jurisdiction to investigate violations of IDEA rights. States must establish an impartial due process hearing system. A request for a hearing may be made if there is a disagreement about whether a child qualifies under IDEA, the content of the IEP, or the child’s placement. Requests

should be made to the director of special education for the district or school; while many districts have a specific form for requesting a hearing, an informal request for a hearing is sufficient. Most states have helpful handbooks to guide advocates and parents or guardians in the process.

In some states, the initial due process hearing is administered by a first tier hearing office and a second tier (appellate) review is available. In other states, only one level of due process hearings is available. Regardless, the process is to be impartial. At the hearing, parents or guardians have the right to be represented by an attorney or by an advocate who is not an attorney but who is knowledgeable about special education issues. While hearing procedures vary and are governed by state laws or policies, the hearing officer must allow for the introduction of evidence by the parties and must issue a written decision.

After a due process hearing (and any available appeal or review), a parent or guardian who remains dissatisfied may file a lawsuit in federal or state court. Due process hearing procedures must be complied with before a lawsuit can be filed (see Question 14.14).

States are required to provide and encourage mediation as an alternative to formal hearings. Further, before hearings occur resolution sessions must take place as a means to encourage agreement among the parties.

The procedures discussed in the remainder of this Part focus on Section 504 or the ADA. Advocates must keep in mind, however, that IDEA procedures must be followed if the child is covered by IDEA.

14.8 Is an impartial hearing available at the state level?

Yes. Schools are required to have an impartial hearing procedure available under Section 504. The hearing process may be administered by the district or by the state, but in either case the individual presiding at the hearing and making the final decision must be impartial and cannot be employed by or have a significant business relationship with the school district or the state education agency.

Notes

Section 504 requires that an impartial hearing and review procedure be available to those who are dissatisfied with the school's decisions. 34 C.F.R. § 104.36. The same standards apply under the Americans with Disabilities Act. To assure the procedural safeguards, a school must issue a written decision. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995).

As with school grievance procedures, OCR may defer consideration of a complaint where a state due process hearing is pending. If a student or parent/guardian is dissatisfied, an OCR complaint may be filed within 60 days of completion of the separate action (see Question 14.4).

Schools must inform parents or guardians about their hearing rights. Failure to inform a parent or guardian of the right to request an impartial hearing can violate Section 504 and the Americans with Disabilities Act. *Yuba City (CA) Unified Sch. Dist.*, Complaint No. 09-94-1170, 22 IDELR 1148 (OCR 1995) (finding violation of requirement).

Impartial due process hearings must also be provided under IDEA, as described in the last question. IDEA imposes more specific requirements on the hearing process than does

Section 504. For example, the hearing officer must render a decision within 45 days after the hearing is requested. 34 C.F.R. § 300.515(a). However, in practice the hearing procedures are often very similar, and in some states the 504 hearing procedures are coordinated with or are identical to the IDEA due process hearing procedures.

14.9 Which federal agencies investigate disability law complaints involving schools?

Investigations of complaints under Section 504 and the Americans with Disabilities Act involving public schools are conducted by the U.S. Department of Education Office for Civil Rights (OCR). Complaints relating to private schools are within the jurisdiction of the U.S. Department of Justice (DOJ).

Notes

Complaints under Section 504 are investigated by OCR. OCR complaints may be filed at any time, and a parent need not pursue an internal grievance before filing a complaint. *Kettering (OH) City Sch. Dist.*, Complaint No. 15-07-1207, 109 LRP 32473 (OCR 2009) (district policies incorrectly stated that an OCR complaint was the final stage in its grievance process). Under a Memorandum of Understanding between OCR and the Department of Education's Office of Special Education and Rehabilitative Services, OCR additionally investigates complaints alleging treatment that violates both Section 504 and IDEA. OCR also may investigate complaints filed with the U.S. Department of Justice alleging violations of Section 504, although DOJ also has authority to retain such complaints and conduct its own investigation (see Question 14.6).

OCR and DOJ therefore have concurrent jurisdiction over any school subject to Section 504 (public schools and private schools, including religious schools, that receive federal funding). DOJ has jurisdiction of complaints under Title III of the ADA applicable to public accommodations, including private schools (whether or not they receive federal funding). *Canterbury (IN) School*, Complaint No. 05-03-1235, 104 LRP 1380 (OCR 2003). DOJ does not have jurisdiction over private religious schools, which, as discussed in Question 4.10, are exempt from Title III.

Some states also have procedures for filing complaints alleging violations of state anti-discrimination laws by students with disabilities. Advocates may want to be aware of these procedures.

14.10 How is a federal complaint filed?

An OCR complaint may be filed by mail, by fax, online, or in person at an OCR office. The complaint must be in writing and should state what the person is complaining about, who has been discriminated against, when the discrimination occurred, and be signed, dated, and provide contact information. OCR has an online complaint form that can be used. According to OCR, oral allegations, anonymous correspondence, courtesy copies of correspondence or complaints filed with other agencies, and inquiries that seek advice or information but do not seek action or intervention from OCR are not considered complaints and will not trigger an investigation.

Notes

Information on filing complaints with OCR is available at <http://www2.ed.gov/about/offices/list/ocr/complaintprocess.html>. OCR's online complaint form is available at <http://www2.ed.gov/about/offices/list/ocr/complaintintro.html>. The Department of Justice's web site on filing disability complaints is at: <http://www.usdoj.gov/crt/ada/t3compfm.htm>.

14.11 When can an OCR complaint be filed?

The usual time limit for filing complaints with OCR is 180 days after the discriminatory action. This same time limit applies where the complaint is filed with the U.S. Department of Justice and referred to OCR for consideration. Waivers of the 180 day filing requirement may be granted under limited circumstances, such as where the complainant is ill or incapacitated or where the complaint was being addressed through a grievance procedure or a complaint with another state or federal agency.

Notes

OCR will take action only with respect to those complaint allegations that have been filed within 180 calendar days of the date of the last act of alleged discrimination unless a waiver is granted. The filing date of a complaint is the date the complaint was submitted (the postmark or the date of the e-mail, fax, or electronic submission), or the date the complaint is received by the government agency, whichever is earlier. A complaint may address earlier matters where continuing discriminatory policies or practices are alleged. *See OCR Case Processing Manual*, Section 106 (see Question 14.4).

If a complaint is not filed in a timely manner, a waiver may be requested. A waiver of the 180-day filing requirement may be granted in specific circumstances such as incapacitating illness, lack of awareness that the act was discriminatory, and the pendency of complaints with other agencies or internal grievances. Specific waiver requirements can be found in OCR's *Case Processing Manual*, Section 107 (see Question 14.4).

14.12 What should be included in an OCR complaint?

In order for OCR to investigate a complaint, the complainant must provide OCR with sufficient information to support the factual basis for the complainant's belief that discrimination has occurred. If the person discriminated against is age 18 or older, that person must sign the complaint; if the person is a minor, the signature of a parent or guardian is required. What information should be contained in a particular complaint will vary based on the type of discrimination alleged, but the complaint should be clear as to what happened and what resolution is sought. Here are some key elements to consider including in any complaint:

- Who is filing the complaint?
Provide the complainant's name, contact information (address, day and evening telephone numbers, fax number, and email address, if available), and relationship to the child.
- Who is the complainant's attorney or advocate?

Provide the attorney or other advocate's name, contact information, and relationship to the complainant or child, if any.

- Who was discriminated against?

If the person discriminated against is not the complainant, provide that person's name, contact information and relationship to the complainant.

- Who engaged in the discrimination?

Provide the name of the person or institution (*e.g.*, the school and school district), the name of the specific school or program attended by the child, and school or program contact information.

- What is the basis of the claim that the child's rights were violated?

State the type of violation that occurred (for example, discrimination on the basis of diabetes or retaliation for filing a complaint).

- What are the facts supporting the claim of discrimination?

Provide for each discriminatory action separately: the date(s) the action occurred; name(s) of individual(s) who took that action; what happened; witnesses (if any); and why the complainant believes the actions were discriminatory or retaliatory. If the allegations concern a failure to provide diabetes care to a student, include medical information showing that the care requested is appropriate and necessary for the child to safely attend school. This can include statements by the child's treating physician and position statements of the American Diabetes Association and other organizations. Also, state any basis for believing that the refusal to provide care or other discriminatory action was the result of a district policy. This will help to ensure that OCR will investigate the complaint rather than dismissing it as a dispute over individual educational placement (see Question 14.13).

- What written information or documentation is available?

Provide a description of the information or documentation. OCR will separately request this information, but if the complaint is mailed to OCR this material may be attached.

- When did the last act of discrimination occur?

Provide dates of discriminatory actions. If the discrimination is continuing (for example, if the school continues to refuse to provide appropriate diabetes care), make that clear. If the most recent action occurred more than 180 days ago, explain why the complaint was not filed sooner (see Question 14.11).

- What other efforts have been made to try to resolve the complaint through the institution's grievance process, due process hearing, with another agency, or otherwise?

Provide information on any grievance procedure, due process hearing, or other efforts made to resolve the issues, including the name of the agency with which these efforts were pursued, when they were pursued, what position was taken by the agency, the current status of the grievance or complaint, and information on any procedural or legal deficiencies in the process. Be quite clear if the process was not comparable to OCR's or failed to follow proper legal standards. This is because OCR may decline to investigate a complaint if the same complaint allegations have been filed with another federal, state, or local agency, or through an internal

grievance procedure or due process proceeding. If other procedures are used, OCR will only review the results of the other entity's action to determine whether it provided a comparable process and met appropriate legal standards (*i.e.*, all allegations were investigated, appropriate legal standards were applied, and any remedies secured met OCR's standards).

- What specific remedy is being sought?
Provide for each action of discrimination the remedy being sought. Be as specific as possible and provide a statement of why the remedy sought is necessary, appropriate, and reasonable. The OCR agreements available on the Association's website can be used as examples of remedies that OCR has approved in the past.

See Question 14.10 for links to additional resources for filing OCR and DOJ complaints, including a link to an OCR online complaint form.

14.13 What will happen after an OCR complaint is filed?

After a complaint is filed, OCR will investigate the complaint by gathering information from the complaining party and the school district. If this investigation indicates that a violation may have occurred, OCR will attempt to work with the school district to achieve a voluntary resolution of the matter, generally by negotiating a resolution agreement. If an agreement cannot be reached, OCR may initiate proceedings to cut off federal funding or may refer the matter for litigation, although neither outcome is common. Also, there are a number of reasons why OCR may decide not to continue an investigation, including lack of cooperation by the complaining party and a determination that the matter is more appropriately addressed through some other forum.

Notes

According to OCR, once the agency receives a complaint it will generally begin its investigation by contacting the school district within 15 days, and will make a determination as to whether a violation may have occurred within 105 days. When a violation is found, it is OCR's policy to seek, to the fullest extent practicable, the cooperation of the district in resolving the violation. For this reason violations generally are addressed through resolution agreements between OCR and the district, which can include general provisions about district policies or procedures as well as specific relief to address the situation of the child on whose behalf the complaint was filed. OCR only rarely seeks to terminate a district's funding, although this is the ultimate penalty available for violations of Section 504.

OCR may decline to investigate a complaint for a number of reasons. For example, OCR may decline to investigate a complaint if the allegations in the complaint have been the subject of a recent OCR decision or court case, if a complaint has been filed or an investigation made by another state or federal agency, or if the complaining party fails to cooperate or fails to provide enough information to allow the complaint to be investigated. *OCR Case Processing Manual*, Section 110 (see Question 14.4).

OCR sometimes declines to review cases that it believes concern individualized educational placement decisions. According to OCR:

It is not the intention of the Department, except in extraordinary circumstances, to review the result of individual placement and other educational decisions, so long as the school district complies with the

"process" requirements of [the Section 504 regulations] (concerning identification and location, evaluation, and due process procedures). However, the Department will place a high priority on investigating cases which may involve exclusion of a child from the education system or a pattern or practice of discriminatory placements or education.

34 C.F.R. Part 104 App. Accordingly, OCR sometimes declines to evaluate the content of a Section 504 plan under the expectation that any disagreements should be resolved through a state or district due process hearing. *See Glendale (CA) Unified Sch. Dist.*, Complaint No. 09-00-1434, 35 IDELR 131 (OCR 2000); *Denver (CO) Pub. Schs.*, Complaint No. 08-01-1057, 36 IDELR 243 (OCR 2001).

In some cases OCR has used the regulatory language above to decline to investigate complaints alleging that a school had failed to provide adequate care and services to a student with diabetes. Advocates should therefore be prepared to address this issue should it arise during the OCR investigation process. Disputes about health care accommodations for a child with diabetes are very different from the disagreements over the proper academic and educational services to be provided to a child this policy was developed to address, and there are strong arguments that OCR should evaluate these cases on their merits:

- The regulations state that the policy should apply to “individual placement or other educational decisions.” While decisions about which related aids and services should be provided might fall under the policy in situations where those aids and services are directly part of the educational process, much of school diabetes care is about safety and medical management. The justification for the policy (that members of the local IEP/504 team may have more expertise in deciding what educational services are appropriate than OCR) does not apply where the decisions are primarily related to health and safety rather than educational. Diabetes care decisions are therefore not “educational” (even if negotiated during the 504 or IEP processes) and therefore should not be subject to the policy.
- Situations where a student’s safety would be compromised by insufficient or inappropriate medical care should constitute “extraordinary circumstances” where the regulatory language says OCR will investigate complaints.
- The policy also applies only to “individualized’ educational decisions. In many cases, a district’s refusal to provide appropriate care for a student with diabetes will be based on district policy (formal or informal). In these cases, OCR should examine the legality of the policy. The regulations explicitly state that OCR will investigate a policy or pattern of discriminatory placements. Advocates should take care to frame the issue as one of district policy when the facts support such an interpretation.
- The policy logically should only apply to complaints challenging the district’s failure to provide free, appropriate public education, rather than discrimination complaints alleging that the district has treated children with diabetes differently from children without disabilities. Claims that districts are denying adequate health care to students with diabetes and putting the students’ safety at risk are claims that the students are being excluded from participation in the school’s programs and activities. Therefore, they should be evaluated consistent with OCR’s duty to prevent discriminatory treatment against people with disabilities.

When OCR determines that the evidence supports a finding of a violation, OCR will seek to negotiate a voluntary agreement. The agreement will include the specific acts or steps that the school will take to resolve compliance issues, provide the dates for

implementing each act or step, and specify dates for submission of reports and documentation verifying implementation. *OCR Case Processing Manual*, Section 304 (see Question 14.4).

OCR provides an appeal process. Appeals generally must be submitted within 60 days of the date of the decision. *OCR Case Processing Manual*, Section 306 (see Question 14.4).

For additional information regarding OCR's procedures the *OCR Case Processing Manual* should be reviewed.

14.14 When should litigation be considered?

Litigation is usually viewed as a last resort for discrimination complaints involving students with diabetes, partly because of the time required for a lawsuit to be resolved. However, litigation may always be considered, whether or not administrative complaints and other processes have been fully pursued (unless the IDEA exhaustion requirements discussed in the notes applies).

Notes

Section 504 and both Title II and Title III of the ADA do not require that mediation, grievance procedures, state hearing, or even a complaint be filed with OCR, before filing litigation. Where, however, remedies are also sought under the IDEA the due process hearing procedures must be exhausted before filing litigation. *Gardner v. Uniondale Pub. Sch. Dist.*, 2008 U.S. Dist. Lexis 84496 (E.D.N.Y. Oct. 21, 2008) (complaint dismissed for failure to exhaust where complaint raised claims under IDEA and 504 based on the same set of facts, even though student was served only under a 504 plan); *Eads v. Unified Sch. Dist. No. 289*, 184 F. Supp. 2d 1122 (D. Kan. 2002) (claim brought by student with diabetes under IDEA and ADA rejected where IDEA procedures not followed). Moreover, before bringing claims under Section 504, ADA, or other statutes seeking relief which is also available under IDEA, the administrative procedures under IDEA must be exhausted to the same extent as would be required had the action been brought under IDEA. 20 U.S.C. § 1415(l). While it can be argued that denial of health care services such as insulin administration can impact a child's educational performance and thus render a student eligible for services under IDEA (see Question 4.7), at least one court has held that exhaustion under IDEA was not required in a case involving a district's failure to provide insulin administration at the school the child regularly attended and its demand that the student be transferred to a different school which employed a nurse. The court stated that:

The claims herein arise from concerns about how the Child's insulin pump would be monitored, how insulin would be administered while the Child was at school and who would assist the Child counting carbohydrates. Plaintiff does not allege that the Child's disability, diabetes, impacts his educational process or performance and that he, thus, requires specialized educational services. In other words, Plaintiff's claims are not related to the way that Defendants provide an education to the Child. Rather, he complains of constitutional and statutory violations independent of the IDEA.

R.K. v. Bd. of Educ. of Scott County, 755 F. Supp. 2d 800, 807 (E.D. Ky. 2010), *rev'd and remanded on other grounds*, 494 Fed. Appx. 589 (6th Cir. 2012); *B. M. v. Bd. of Educ. of Scott County*, 2008 U.S. Dist. Lexis 66645, *16-17 (E. D. Ky. Aug. 29, 2008) (similar).

The time within which a judicial claim must be filed can vary. This is because federal law frequently adopts the most analogous state statute of limitations and, therefore, the precise limitation applicable may differ from jurisdiction to jurisdiction. *See, e.g., Loch v. Bd. of Educ. of Edwardsville Community Sch. Dist.*, 573 F. Supp. 2d 1072, 1079 (S.D. Ill. 2008), *aff'd*, 327 Fed. Appx. 647 (7th Cir. 2009) (applying Illinois two year statute of limitations for personal injury actions to Section 504 claims). Some movement is being made to provide greater consistency. Federal law now provides a uniform limitations of four years for “civil actions arising under an Act of Congress enacted after” December 1, 1990, where a limitations is not otherwise prescribed. 28 U.S.C. § 1658. IDEA deviates from the uniform limitations by fixing a 90 day limitation for seeking judicial review of a hearing officer’s decision but, even then, allows states to provide a different explicit time limitations. 20 U.S.C. § 1415(i)(2)(B). It is very important to determine the time within which judicial review must be sought.

14.15 Are individuals who take action to protect their rights protected against retaliation?

Yes. Federal regulations prohibit schools from taking actions which intimidate, threaten, coerce, or discriminate against individuals who exercise their rights under anti-discrimination laws.

Notes

Section 504 regulations adopt and incorporate the procedural provisions of Title VI of the Civil Rights Act of 1964. 34 C.F.R. § 104.61. Title VI regulations prohibit a recipient of Federal funds from retaliating against persons for the purpose of interfering with any right or privilege secured by the regulations. 34 C.F.R. § 100.7(e). The ADA contains similar retaliation prohibitions in both Title II (28 C.F.R. § 35.134) and Title III (28 C.F.R. § 36.206).

In analyzing a complaint of retaliation under Section 504 or Title II of the ADA, OCR first examines the evidence to determine whether there is a *prima facie* showing of retaliation. A *prima facie* case of retaliation is made by showing that:

- 1) The complainant engaged in a protected activity (e.g., asserted or defended a right or privilege secured by Section 504 or the ADA);
- 2) The school was aware of the protected activity;
- 3.) The complainant was subjected to an adverse action contemporaneous with or subsequent to the adverse action; and,
- 4.) There is sufficient connection or causal relationship between the protected act and the adverse action to give rise to an inference of retaliation.

If these elements are established OCR asks school officials if there is a nonretaliatory reason for the adverse action. OCR then determines whether there is evidence that the stated reason is a pretext for retaliation. Courts hearing retaliation claims will generally take a similar analytical approach.

Retaliation may take a variety of forms. It may include, for example, actions to intimidate, threaten, coerce, or otherwise retaliate against anyone who asserts a right protected by the civil rights laws OCR enforces, or who cooperates in an investigation. Where there is a non-pretextual, non-retaliatory reason for the school’s action, a claim of retaliation will be rejected. *See, e.g., Grenada (MS) Sch. Dist.*, Complaint No. 06-12-1005, 61

IDELR 54 (OCR 2012) (discipline imposed on student was not retaliation for parent's advocacy because it was reasonable and consistent with that imposed on other students for behavior problems); *Academy of Waterford (MI)*, Complaint No. 15-11-1181, 112 LRP 15747 (OCR 2011) (parent was banned from school grounds not because of her advocacy but because she yelled at school staff during an argument, and staff perceived her behavior as threatening); *Casa Grande (AZ) Elementary Sch. Dist.*, Complaint No. 08-11-1082, 112 LRP 15697 (OCR 2011) (parent was banned from school grounds because she had been abusive and disruptive); *Le Center (MN) Pub. Sch. Dist.*, Complaint No. 05-06-1057, 107 LRP 2185 (OCR 2006) (district was required to send letter discussing possibility of referral to authorities after excessive absences, and did so for non-disabled students as well); *Hamilton Heights (IN) Sch. Corp.*, Complaint No. 05-02-1048, 37 IDELR 130 (OCR 2002) (rejecting retaliation claim based on termination of volunteer services where parent of child with diabetes made excessive visits to nurse's clinic at school where her children were not enrolled). Similarly, where school officials apply a non-discriminatory practice retaliation is not established. *See, e.g., Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-94-1251, 23 IDELR 1144 (OCR 1995) (rejecting retaliation complaint where child with diabetes was sent home with shingles under school nurse's practice of keeping students out of school until lesions cleared up consistent with the way other students were treated in similar circumstances).

Retaliation claims are sometimes made when school officials are alleged to have referred to a student to child welfare agencies or other government agencies. Such claims can succeed where there is evidence that school officials made the referral and either took actions that suggested a retaliatory motive, or knew or should have known that it was based on misconceptions about diabetes care. For example, in *A.C. v. Shelby County Bd. of Educ.*, 711 F. 3d 687 (6th Cir. 2013), the court reversed a grant of summary judgment on a claim that a principal made a referral to child protective services in retaliation for requests for diabetes care at school made by the child's parents. The principal expressed concern that the child was being sent to school with sweets, that the parents were not properly monitoring the child's diabetes, and that the parents wanted something bad to happen to the child so that they could file a lawsuit. However, the court held that:

A reasonable jury could conclude that neither of the core allegations made in the [report to authorities] was 'reasonably informed' and that both comprised errors 'too obvious to be unintentional.' In particular, a jury could find that, based on her training, [the principal] knew or should have known that sending A.C. to school with sweets was not per se child abuse. And a jury could find that because she had easy access to [the school nurse], who knew that A.C. was constantly monitored via the state-of-the-art sensor-and-pump arrangement and also knew how to access stored records in the pump revealing whether the monitoring continued when A.C. was at home, [the principal] could have 'reasonably informed' herself about whether there was any basis for alleging that A.C. was not monitored at home.

Id. at 705. The Sixth Circuit also permitted a First Amendment retaliation claim by a parent of a child with diabetes where there was no evidence of legitimate concern for the child's health and the principal had allegedly admitted that the call to the child welfare agency was in retaliation for the parent contacting OCR. *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F. 3d 580, 588-89 (6th Cir. 2008).

However, these claims will generally be rejected absent evidence that the district took the action, or evidence that the action was taken for a retaliatory purpose. The *Jenkins* court rejected a similar retaliation claim by the parent of another student, where evidence showed that school nurse had contacted the agency because the child lacked insulin or supplies on

several occasions and the nurse was unable to contact the parent. *Id.*; see also *Casa Grande (AZ) Elementary Sch. Dist.*, Complaint No. 08-11-1082, 112 LRP 15697 (OCR 2011) (no evidence school staff had made a truancy referral); *Valle Lindo (CA) Elem. Sch. Dist.*, Complaint No. 09-06-1079, 47 IDELR 170 (OCR 2006) (no evidence that district, as opposed to a third party, had contacted immigration officials after the filing of an OCR complaint, resulting in child's mother being detained for immigration violations); *Ardmore (OK) Pub. Schs.*, 46 IDELR 288 (OCR 2006) (complaint by father of student with diabetes that district reported him to child welfare agency in retaliation for prior OCR complaint rejected where school officials had no knowledge of prior complaint when report was filed).

15. Are State Tort Remedies Available in the School Setting?

Failure to provide aid to or protect children may be the basis for state tort claims. However, many states recognize immunity precluding claims.

15.1 What state tort claims are available against school districts?

State tort remedies may be available where school officials had a duty to act and breached that duty, provided school officials do not have immunity from tort suits and other requirements for bringing a claim are met. The law of torts varies from state to state, especially with respect to whether a public or private school or its employees are immune from liability. Negligence claims may be asserted where schools fail to provide care and treatment for students. Unlike anti-discrimination law, tort claims are only available after a student has suffered actual harm (such as physical injury).

15.2 What is the duty to aid or protect?

Where a special relationship exists a duty to provide aid and protection arises. Such a duty exists between schools and students for state tort law purposes.

Notes

Tort law generally holds that there is no duty to provide aid or protection to another person. *See* Restatement (Second) of Torts §314 (“The fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”). A duty to take some affirmative action to aid or protect may arise, however, where a special relationship exists between parties. Although the usual school-student relationship is not sufficient to give rise to a constitutional duty, this relationship ordinarily is sufficient to give rise to a duty to aid or protect under state tort law. *See Pirkle v. Oakdale Union Grammar Sch.*, 40 Cal. 2d 207, 253 P.2d 1 (1953); Prosser and Keeton on The Law of Torts 376-77 (5th ed. 1984) (noting that there “is now respectable authority” imposing an affirmative duty on a school to aid and protect its pupils).

The classic statement of the rule is provided by Restatement (Second) of Torts §314A. Under the Restatement, a duty to provide aid or protection is imposed on, among others: “One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection”

The duty imposed requires the person “to take reasonable action”:

- “(a) to protect them against unreasonable risk of physical harm, and”
- “(b) to give them first aid after it knows or has reason to know that they are ill or injured, and to care for them until they can be cared for by others.”

The status of a person on property of another is frequently classified based on whether a trespasser, licensee, or invitee, with an “invitee” having the most favored status. It is the “invitee” to whom the Restatement’s duty to aid and protect extends. Students attending school or participating in school activities are usually considered invitees. *See, e.g., Jesik v. Maricopa County Community College Dist.*, 125 Ariz. 543, 611 P.2d 547 (1980); *Vreeland v. State of Arizona Bd. of Regents*, 9 Ariz. App. 61, 449 P.2d 78 (1969); *Peterson v. San Francisco Community*

College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); *Rehyea v. State*, 385 So. 2d 1378 (Fla. Dist. Ct. App. 1980); *Walker v. Daniels*, 407 S.E.2d 70 (Ga. Ct. App. 1991); *Schultz v. Gould Academy*, 332 A.2d 368 (Me. 1975); *McIntosh v. Omaha Pub. Schs.*, 249 Neb. 529, 544 N.W.2d 502 (1996); *Waltz v. Wake County Bd. of Educ.*, 409 S.E.2d 106 (N.C. Ct. App. 1991); *Eberle v. Benedictine Sisters of Mt. Angel*, 235 Or. 496, 385 P.2d 765 (1963); *McDonald v. University of W. Va.*, 444 S.E.2d 57 (W. Va. 1994). The school-student relationship may itself establish the requisite special relationship for tort law purposes. As such, school officials have a duty to reasonably respond to a student's medical needs.

15.3 Must school officials know the need for aid or protection?

School officials must know or have reason to know the need for aid or protection. Therefore, school officials must be aware that a child has diabetes and the nature and extent of care that might be required.

Notes

The Restatement (Second) of Torts §314A provides these comments:

The defendant is not liable where he neither knows nor should know of the unreasonable risk, or of the illness or injury. (Comment e.)

The defendant is not required to take any action until he knows or has reason to know that the plaintiff is endangered, or is ill or injured. He is not required to take any action beyond that which is reasonable under the circumstances. (Comment f.)

15.4 What aid or protection must be provided?

There is no hard and fast rule as to what care is needed. What is required is that school officials exercise reasonable care under the circumstances. Of course, the nature of chronic illnesses is such that what aid or protection might be needed is quite predictable.

Notes

The Restatement (Second) of Torts §314A states:

In the case of an ill or injured person, [a person] will seldom be required to do more than give such first aid as he reasonably can, and take reasonable steps to turn the sick man over to a physician, or to those who will look after him and see that medical assistance is obtained. He is not required to give any aid to one who is in the hands of apparently competent persons who have taken charge of him, or whose friends are present and apparently in a position to give him all necessary assistance. (Comment f.)

The sorts of claims that may be alleged (and, thus, the duties violated) were summarized in *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 775 P.2d 640 (Idaho 1989) (factual issues precluded summary judgment on claim that district was negligent in treating otherwise healthy student who developed an airway obstruction and subsequently died; listing a number of specific duties the district was alleged to have violated in relation to providing emergency medical care).

At a minimum, “[a] school is required to do whatever a reasonably prudent school would do in safeguarding the health of its students, providing emergency assistance to them when required and arranging for appropriate medical care if necessary.” *Federico v. Order of St. Benedict in Rhode Island*, 64 F.3d 1, 4 (1st Cir. 1995). Under tort law, schools are not expected to guarantee the health of students or assume roles for which they are not qualified. “[A] school must act as a reasonable school in responding to medical needs of the students.” *Federico*, 64 F.3d at 4 (holding that duty was met although there was no standing order to permit nurse to administer epinephrine subcutaneously in the event of allergic reaction to nuts; parent rejected advice to allow child to have epinephrine in a self-administered form to be immediately available to him and state law prohibited a nurse from administering epinephrine in the absence of a prescription or order).

15.5 Can a school district be liable if it fails to take preventive aid or protective measures?

It is reasonable to expect schools to anticipate and take measures to prevent avoidable harm to children with diabetes. However, because a school is not a guarantor or insurer of health and safety, it is not required to undertake preventive measures to address any and all emergencies that could arise.

Notes

Where a duty exists, preparation to prevent avoidable harm is required. Under the Restatement (Second) of Torts § 300, “want of preparation” is considered in evaluating negligence. It is obvious, for example, that a school maintaining an athletic program fails in its duty of care where it does not provide competent personnel, give sufficient training and instruction to participants, and ensure that athletes are provided safe equipment. So too, if reasonable under the circumstances schools must prepare so as to prevent harm to a child with a disability. On the other hand, reasonableness does not require that a school or others provide any and all medical care that they could conceivably be required. *See, e.g., Salte v. YMCA of Metropolitan Chicago Foundation*, 351 Ill. App. 3d 524, 286 Ill. Dec. 622, 814 N.E.2d 610 (2004) (YMCA was not required to have a defibrillator on premises).

15.6 Can a school district be liable if it prohibits a student’s immediate access to medication or items required for care?

A school may be found negligent where it has a policy prohibiting students from carrying medication where that medication is necessary for the child’s care.

Notes

In *Gonzalez v. Hanford Elementary School District*, 2002 Cal. App. Unpub. Lexis 1341 (2002), a judgment for the plaintiff was upheld where a child died after a severe asthma attack. Under a written school policy, all student medication was required to be stored in a place inaccessible to other students. A fifth grader and his mother understood this to mean that the student could not carry his inhaler to treat his severe asthma. Pursuant to this policy, the student’s nebulizer (used to administer medication to treat asthma) was kept in the school office and when it was needed the student had to be assisted by school staff. On the day the student died, he had left his classroom to use the restroom. Minutes later he appeared in the school office exhibiting symptoms of a severe asthma attack. A school secretary, trained in the use of a nebulizer, attempted to assist him, but before effective help could be rendered

the student collapsed and died later that afternoon. Application of the policy was found negligent.

15.7 What tort immunities can protect schools from liability?

Traditionally, common law immunity for governmental and charitable institutions has been recognized by case law. Although these absolute immunities have been abrogated in many states, narrower immunities which apply in certain situations have been created in most states by statute or judicial decision. For example, immunity is often recognized for government officials performing discretionary functions (as opposed to functions mandated by state law). Immunity can be subject to a number of exceptions.

Notes

Immunity has been found to preclude claims that medical care was not timely or appropriately provided. *See, e.g., Lennon v. Petersen*, 624 So. 2d 171 (Ala. 1993) (discretionary function immunity barred claim following injury of athlete); *Teston v. Collins*, 217 Ga. App. 829, 459 S.E.2d 452 (1995) (decisions relating to medical care discretionary; immunity applied); *Montgomery v. City of Detroit*, 181 Mich. App. 298, 448 N.W.2d 822 (1989) (immunity and other considerations applied to reject claim where school and associated defendants failed to provide sufficiently prompt emergency care to student who died from heart attack while running during physical education class). However, there are exceptions to immunity that sometimes apply. *See, e.g., Trotter v. School District 218*, 315 Ill. App. 3d 1, 247 Ill. Dec. 899, 733 N.E.2d 363 (2000) (immunity did not apply to claim that district failed to train instructors to respond to emergency situations in swimming class); *Upton v. Clovis Municipal Sch. Dist.*, 141 P.3d 1259 (N.M. 2006) (immunity not applied where student died from asthma attack after being required to continue exercising in physical education class; district failed to follow through on its safety policies for students with special needs and students in acute medical distress and this constituted an act of negligence in the operation of the school district which resulted in waiver of immunity).

Many states expressly provide immunity with regard to the administration of medication in schools. This may include administration of medication by school personnel (*e.g.*, Mich. Code § 380.1178) or self-administration by a student (*e.g.*, Indiana Code § 34-30-14-6).

15.8 Do school personnel have immunity when providing emergency medical care to students?

Where emergency care is provided, states generally recognize immunity. This immunity is provided under what are known as “Good Samaritan” laws, as well as other school immunity or diabetes-specific laws.

Notes

A Good Samaritan law “exempts from liability a person (such as an off-duty physician) who voluntarily renders aid to another in imminent danger but negligently causes injury while rendering the aid.” Black’s Law Dictionary 702 (7th ed. 1999). Every state and the District of Columbia have adopted some form of Good Samaritan law. Black’s Law Dictionary at 702.

Good Samaritan statutes usually apply to teachers or other school personnel. Indeed, some statutes expressly reference school personnel. *See, e.g.*, Connecticut General Statutes §52-557(b) (“a teacher or other school personnel on the school grounds or in the school building or at a school function who renders emergency aid to a person in need thereof, shall not be liable to such person assisted for civil damages for any personal injury which results from acts or omissions by such person in rendering the emergency first aid, which may constitute ordinary negligence”).

A Good Samaritan law is in addition to general immunity applicable to schools. Therefore, other grounds for immunity might well exist.

15.9 Does refusing to provide health care services by school personnel constitute unprofessional conduct?

School personnel must perform competently and professionally. Where negligent or intentionally inconsistent with their expected duties and responsibilities, licensing, or certification boards may take disciplinary action.

Notes

Licensing and certification boards uniformly have standards which, if not followed, may warrant discipline. Proof of violation of these standards is less demanding than that required under tort law. A professional may be disciplined, for example, where he or she acts in a manner inconsistent with the health or safety of persons under the professional’s charge or care. *See, e.g., Mississippi Bd. of Nursing v. Hanson*, 703 So. 2d 239 (Miss. 1997) (nurse’s license revoked on various charges for unsafely caring for infants including carrying them around naked, washing them in sinks, flipping levers on their incubators to stimulate them, etc.).

16. What Legal Protections Are Available for Postsecondary Students?

Students in colleges, universities, and vocational and trade schools are also protected by federal disability discrimination laws. However, these laws do not impose the same requirements on postsecondary institutions as they do on elementary and secondary schools. Postsecondary institutions must ensure that students with disabilities have equal opportunities and are not treated less favorably, but do not have to provide every service that a student might need in order to benefit from an education. As a practical matter, many accommodations that are important earlier in a child's school career are not needed in college, and some types of accommodations will simply not be required in the college setting.

This Part provides a basic introduction to issues likely to arise in the postsecondary context. For convenience, the term "college" and "college student" is used for all postsecondary institutions and students. However, the information in this Part applies equally to vocational training programs, graduate programs, and professional programs.

16.1 What federal disability laws protect college students with diabetes?

The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504) provide protection to college students with disabilities. The ADA applies broadly to all state-run and private colleges, except that it does not apply to those operated by religious institutions. Section 504 applies to all colleges—including religious colleges—that receive federal funds. Most religious colleges receive federal funds, for example, in the form of research grants or student financial aid and work-study funds.

While some students with diabetes in K-12 education receive services and are protected under the Individuals with Disabilities Education Act (IDEA), as discussed in Question 4.7, this law does not apply at the college level.

Notes

For general information about the ADA and Section 504, see Question 4.1. Title III of the ADA does not apply to religious organizations or entities they control. However, Section 504 applies where such a college is a recipient of federal funding. Where some specific program within a college receives federal funding, courts have held that Section 504 applies not only to that program but to the entire school. See Question 4.10. Federal funding may be received directly or indirectly. Examples of direct funding include grants for research, technology, school improvement, or other purposes. Some examples of federal programs include the Federal Perkins Loan Program, the Federal Work-Study Program, and

the Federal Supplemental Educational Opportunity Grant. 34 C.F.R. § 673.7. Courts have found that colleges become subject to anti-discrimination laws by participating in federal student financial aid programs. The Fifth Circuit has held that a state college that participated in the Federal Work Study and Pell Grant programs was subject to Section 504. *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448 (5th Cir. 2005). The Supreme Court also held that, in the context of Title IX, which bans discrimination based on sex in education and is structurally similar to Section 504, a school was not exempt from its anti-discrimination obligations just because federal funds were granted only to students and not directly to the college. *Grove City College v. Bell*, 465 U.S. 555, 569-570 (1984). Where Section 504 applies, its application is institution wide. In *Grove City*, the Supreme Court also held that Title IX was program specific but Congress in 1988 reversed that view with the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 (1988), clearly establishing institution-wide application.

Postsecondary education is not included in the IDEA definition of a free appropriate public education that the state is required to provide. 20 U.S.C. § 1401(a)(9)(C) (FAPE obligation extends to providing an appropriate preschool, elementary and secondary education). States are under no obligation to provide IDEA services to children with disabilities who have graduated from high school with a regular diploma. 34 C.F.R. § 300.102(a)(3)(i).

16.2 How do the legal responsibilities of K-12 schools and colleges differ?

Elementary and secondary schools are responsible for the health and safety of the children under their care and therefore may be required to provide certain health services. For example, they monitor younger students' blood glucose levels, treat hypoglycemia, help them to calculate carbohydrate content in foods, and administer insulin. Colleges do not have the same legal obligation to care for the medical needs of their students, and most college students manage their diabetes independently.

Public elementary and secondary schools that receive federal funding have an affirmative obligation to provide a "free appropriate public education" or FAPE to each qualified person with a disability in their jurisdiction. Colleges have no such obligation to provide an education to any particular person. However, they must not discriminate against otherwise qualified students. In addition, colleges need not provide modifications or accommodations which would impose an undue burden or fundamentally alter a program. These defenses are not available in the public school context.

Public elementary and secondary schools must also identify children with disabilities. In contrast, college students have the burden of identifying themselves as individuals with disabilities. If students need any accommodations, they must proactively request them, typically by working through the college's disability services office.

Finally, while many elementary and secondary schools document agree upon accommodations in an Individualized Education Program (IEP) or Section 504 Plan for students with diabetes, colleges typically do not. While college students should request written documentation of any services the school agrees to provide, this documentation will not typically be called a "Section 504 Plan."

The goal of federal anti-discrimination laws is to level the playing field for students, not to give students with disabilities an advantage over their peers. *See Hamilton v. City College of City Univ.*, 173 F. Supp. 2d 181 (S.D.N.Y. 2001) (college’s manual provided that the objective of accommodations or modifications “is always to accommodate the student’s learning differences, not to water down scholastic requirements”).

The obligation of an educational institution to make academic adjustments does not require that “fundamental” or substantial modifications be made to accommodate students with disabilities, but only reasonable ones. *Southeastern Community College v. Davis*, 442 U.S. 397 410 (1979) (hearing-impaired nursing student denied admission because accommodation would “result in a substantial modification to the existing program”). Further, there is no duty to assume “undue financial and administrative burdens.” *Id.* Neither must a program be significantly refashioned, *Eva N. v. Brock*, 741 F. Supp. 626 (E.D. Ky. 1990). This is especially true if the modifications might cause the institution to lose its accreditation. *Hartnett v. Fielding Graduate Inst.*, 400 F. Supp 2d 570 (S.D.N.Y. 2005), *aff’d in part and rev’d in part*, *Hartnett v. Fielding Graduate Inst.*, 2006 U.S. App. Lexis 24128 (2d Cir. 2006).

At least one court has held that colleges need not provide written accommodations plans. *See Bevington v. Wright State Univ.*, 23 Fed. Appx. 444, 445 (6th Cir. 2001) (finding “neither the Rehabilitation Act nor the Americans with Disabilities Act require a written plan for postsecondary students”).

16.3 What protections do applicants with diabetes have during the admissions process?

Colleges are generally prohibited from inquiring about disabilities during the admissions process.

Despite the general prohibition on pre-admission inquiries, there are two circumstances when a college may make an inquiry that has the effect of revealing a disability. First, there is a narrow exception when colleges ask applicants to voluntarily disclose a disability as part of efforts to increase participation by people with disabilities in their programs. Second, a college may inquire as to whether applicants can meet the essential requirements of their programs as long as these inquiries are not intended to reveal disabilities. This most often occurs in schools or programs designed to prepare students for a particular career or certification. For example, a criminal justice program at a local community college could ask students if they can meet certain required physical fitness standards. It could not ask applicants to reveal their chronic health conditions and list the medications they take.

After an offer of admission has been extended, colleges may make confidential inquiries as to whether incoming students may need modifications or accommodations. They also may confirm that students in fact meet the physical fitness standards.

For a discussion of standardized testing, including the SAT and ACT, see Question 11.4.

Colleges clearly cannot ask direct questions such as “do you have a disability?” 34 C.F.R. § 104.42(b)(4). However, more subtle questions, such as asking what prescription medications an applicant takes or why such medications were prescribed, may also be prohibited because they can often reveal a disability. In the context of diabetes, a college

would violate both the ADA and Section 504 by asking whether an applicant has diabetes or if the applicant uses insulin.

There is a narrow exception to this general prohibition when a college seeks to increase participation by people with disabilities in its programs. 34 C.F.R. § 104.42(c). However, it must make clear to applicants that all information is being requested on a strictly voluntary basis and only for this purpose. 34 C.F.R. § 104.42(c)(1)-(2).

While a college may ask whether an individual can meet essential requirements of its programs, it must ensure that its questions are not designed to reveal disabilities. The US Department of Education's Office for Civil Rights provides helpful guidance in distinguishing types of questions that are permissible and impermissible:

Examples of impermissible preadmission inquiries include: *Are you in good health? Have you been hospitalized for a medical condition in the past five years?* Institutions of postsecondary education may inquire about an applicant's ability to meet essential program requirements provided that such inquiries are not designed to reveal disability status. For example, if physical lifting is an essential requirement for a degree program in physical therapy, an acceptable question that could be asked is, *With or without reasonable accommodation, can you lift 25 pounds?* After admission, in response to a student's request for academic adjustments, reasonable modifications or auxiliary aids and services, institutions of postsecondary education may ask for documentation regarding disability status.

Transition of Students With Disabilities To Postsecondary Education: A Guide for High School Educators, Question 2, available at <http://www.ed.gov/about/offices/list/ocr/transitionguide.html> (emphasis in original).

Colleges are expressly authorized to make confidential inquiries to help them provide accommodations for admitted students. 34 C.F.R. § 104(b)(4). However, they must ensure that they make an admissions decision before they ask for any other information that may tend to reveal a disability. *See* University of Tennessee at Martin, 14 NDLR 72 (OCR Region IV, 1998) (finding violation of Section 504 and ADA when college required students to complete an application for a program for students with learning disabilities concurrently with the regular application).

16.4 Who should students approach in order to get accommodations at college?

College students have no obligation to disclose their diabetes to their college. If they do not require any modifications or accommodations, they may choose not to disclose their condition. However, in order to receive any accommodations, they need to let their college know. Most schools have an office responsible for coordinating the provision of needed accommodations (often called the disability services office, though the name may vary), and students should generally register with this office to get accommodations.

While many accommodations can be easily provided by professors, e.g., permission to bring snacks into class, extensions on assignments, and excusal for absences, it is often best to work through the disability services office, even for these simple accommodations. This can prevent any later confusion regarding what accommodations were agreed upon and provide students with valuable protections if disputes arise with individual instructors. Students should ensure that they receive written documentation of their agreements with this

office. This provides a critical evidentiary record in case a formal complaint or litigation becomes necessary.

Students who choose not to disclose their diabetes typically cannot get retroactive accommodations. For example, a student who has not disclosed her diabetes but is unable to complete her course work on time because of her diabetes may not be entitled to receive an extension (unless there is a general policy allowing all students with medical illnesses to receive extensions). Therefore, if some accommodations might ever be required, students should inform college officials of this possibility in advance.

16.5 What documentation should students provide in order to receive accommodations?

Students are responsible for providing documentation establishing the need for accommodations. The documentation must come from an appropriate expert, be fairly recent, and sufficiently comprehensive. Many colleges require that students provide a recent letter from their health care professional that includes the following general elements:

1. A diagnosis of the disability along with its symptoms;
2. An explanation of how it qualifies as a disability, if this has been questioned; and
3. A request for specific accommodations along with a clear rationale for why these accommodations are appropriate.

Each college usually has its own forms and exact procedures for providing documentation. Often, there are separate requirements for learning disabilities, mobility disabilities, physical disabilities, and chronic health disabilities. Typically, diabetes is classified as a physical disability or chronic health disability.

16.6 What types of academic accommodations are typically granted or denied?

Some changes to an academic program may be required in order to permit college students with diabetes to participate. Many accommodations typically requested by students with diabetes should be granted as a matter of course, e.g., permission to eat and perform diabetes care in class or extended breaks between sections of exams to check blood glucose. However, in certain circumstances, students may need to seek more substantial accommodations, such as changes in attendance policies, extensions for completion of course work, and rescheduling of exams. These requested accommodations will likely be subject to more scrutiny by colleges because they may be concerned that they may amount to a fundamental alteration to their program, as discussed in Question 1.2.

Accommodations that may often be reasonable include:

- The ability to check blood glucose in classrooms and lecture halls
- Permission to reschedule an exam if experiencing high or low blood glucose levels
- Breaks between separate sections of long exams to check blood glucose levels
- Being excused for diabetes-related absences and the ability to make up work

- Permission to have more frequent and/or extended breaks to take care of diabetes during a clinic or internship
- Permission to schedule classes so that a regular meal schedule can be maintained

Accommodations that may be found to be unreasonable include:

- Training of college staff in diabetes care
- Extra time on exams (as opposed to extra breaks during an exam)
- Exemption from course requirements

Students should be aware that colleges are granted a high level of deference in their academic decisions, including their provision of academic accommodations. Once colleges have reached a final decision to deny accommodations, administrative agencies and courts are unlikely to disturb the determination unless students can present evidence of a flaw in the process used to evaluate the reasonableness of accommodations.

Thus, students should not rely on administrative agencies and courts to provide them with needed accommodations. Rather, from the very first conversations they have with their college, they should proactively demonstrate why they need each requested accommodation and ensure that they carefully document any and all requests and communications.

Notes

Courts generally defer to the academic determinations of postsecondary institutions. *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (“a majority of circuits have extended judicial deference to an educational institution’s academic decisions in ADA and Rehabilitation Act cases”). However, if institutions have failed to adequately consider the individual circumstances of each student, courts are more likely to second-guess the determination. For example, one court found that, “[b]ecause the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow him to meet the program’s standards.” *Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999) (finding the college failed in its duty to properly consider student’s disability and request for accommodation). For more discussion of the issue of academic deference in the context of the ADA and Section 504, see Lynn Daggett, *Doing the Right Thing: Disability Discrimination and Readmission of Academically Dismissed Law Students*, 32 J. COLL. & UNIV. L. (2006); Bonnie Tucker, *Application of the Americans with Disabilities Act (ADA) and Section 504 to Colleges and Universities: An Overview and Discussion of Special Issues Relating to Students*, 23 J. COLL. & UNIV. L. 1 (1996); Adam Milani, *Disabled Students in Higher Education: Administrative and Judicial Enforcement of Disability Law*, 22 J. COLL. & UNIV. L. 989 (1996).

16.7 What accommodations are available for non-academic programs and services?

Colleges may not discriminate against students with disabilities in any of their activities and programs (including housing, meal plans, athletics, etc.). Just as college students have a right to attend class without being discriminated against, they also have a right to participate in athletics and live in campus housing on an equal basis, so long as they are otherwise qualified.

Unlike elementary and secondary schools, colleges do not need to make staff members available to administer insulin or glucagon or to monitor blood glucose. Students are responsible for their diabetes while at college. If they require assistance from others, they must arrange for such assistance themselves.

Notes

Section 504 explicitly clarifies that colleges cannot discriminate in any part of their curriculum or program:

No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

34 C.F.R. § 104.43(a). While some colleges may be unfamiliar with or question the applicability of the ADA and Section 504 outside of the academic context, other colleges proactively seek to ensure that students with disabilities have full access to all college programs and activities. For example, the University of Connecticut has established a policy for students who need modifications in housing and dining services based on their disability. While colleges will vary widely in their policies, this provides an example of how a college can work to accommodate the non-academic needs of its students. Center for Students with Disabilities, University of Connecticut, *Student Handbook: Accommodations and Services for Students with Disabilities, Residential Accommodations and Information*, available at <http://stamfordstudentlife.uconn.edu/wp-content/uploads/sites/418/2013/12/handbook.pdf>. A college will violate Section 504 and the ADA where it excludes a student from housing, dining or other programs because of that student's disability. See *Coleman v. Zatechka*, 4 NDLR 52 (D. Neb. 1993) (violation of Section 504 and ADA when college refused to assign a roommate to a person with cerebral palsy).

Decisions to exclude a student from physical education or athletics because of safety concerns must not be based on subjective fears but on objective and justifiable medical evidence. Compare *Rancho Santiago Community College*, 3 NDLR 52 (OCR 1992) (student barred from enrolling in physical education course because instructor was "afraid she would get hurt"), with *Knapp v. Northwestern University*, 101 F.3d 473 (7th Cir. 1996) (basketball scholarship winner prevented from playing because of heart condition college perceived as dangerous).

16.8 Are college students protected from discrimination in internships and clinical training programs?

Yes. Colleges cannot discriminate against students who participate in practical training courses and programs. Students have the right to participate equally in these programs and must be provided with reasonable accommodations if necessary. However, colleges need not permit students to participate in these programs if they present an objective safety risk or if accommodations will result in an undue burden or fundamental alteration.

Examples of such programs include: an undergraduate placed with a local social service provider doing an internship for academic credit; a nursing student in a practical training class; and a law student representing low-income clients in a clinic run by the law school. Of

course, as already mentioned, the student with a disability must meet the minimum requirements of the program with reasonable accommodations.

Notes

Section 504 regulations provide that no qualified disabled person shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance. 34 C.F.R. § 104.4(4). Recipients, in providing any aid, benefit, or service, may not, directly or through contractual relationships, on the basis of disability, deny a qualified disabled person the opportunity to participate in or benefit from the aid, benefit or service. 34 C.F.R. § 104.4(b)(1)(i). Further, postsecondary institutions must assure that other educational programs or activities not wholly operated by the recipient, yet benefiting its students, provide an equal opportunity for participation of qualified individuals with a disability. 34 C.F.R. § 104.43(b). That is, postsecondary institutions must ensure nondiscriminatory treatment by organizations with which they have contractual relationships.

For example, in *San Jose State University (CA)*, the Office for Civil Rights found that the college had violated both Section 504 and the ADA when it failed to provide modifications to a student in an internship. 4 NDLR 358 (OCR 1993). In this case, a student with a learning disability was placed at a county social services agency and his supervisor assigned him to a workstation that was inaccessible to him. *Id.* at 1320. Although the student requested accommodations, his college was unresponsive, and, because of this failure to provide accommodations, he was unable to complete the internship and received “no credit.” *Id.* at 1321.

16.9 What protections exist for college students who work on or off campus?

Many college students also work while studying, whether on or off campus. These individuals should be aware that their employers, including colleges, are prohibited from discriminating against them because of their diabetes. Employers cannot discriminate in hiring, firing, discipline, pay, promotion, job training, fringe benefits, or in any other term or condition of employment. They also must provide reasonable accommodations if requested and are also prohibited from retaliating against employees for asserting their rights.

However, employees need not hire or retain employees who are unqualified to perform their jobs or who present an objective safety risk. Further, they do not need to provide accommodations that will result in undue hardship, defined as requiring significant difficulty or expense.

The American Diabetes Association provides extensive materials on employment discrimination for both employees and their attorneys. For more information, please contact the American Diabetes Association.

Notes

Student workers who have been hired by and are paid by their college should be considered employees. *See Cuddelback v. Florida Bd. of Educ.*, 381 F.3d 1230, 1234-35 (11th Cir. 2004) (paid researcher also completing course requirements was an employee under analogous Title VII standard). In *Cuddelback*, the Eleventh Circuit analyzed whether the

graduate student assistant was an employee using the “economic realities test,” finding that the student qualified as an employee under this balancing test. *See also Clackamas Gastroenterology Associates, P.C., v. Wells*, 538 U.S. 440 (2003) (stating factors for determining if an individual is an “employee”). *But see Pollack v. Rice Univ.*, 1982 U.S. Dist. Lexis 12633 (S.D. Tex.), *aff’d mem.* 690 F.2d 903 (5th Cir. 1982) (paid services incidental to scholastic program). *See* James Rapp, Education Law §6.05[8][c] (collecting cases on coverage of employees under Title VII). When a student is not financially compensated for his or her labor, courts generally hold that the student is not an “employee.” *Jacob-Mua v. Veneman*, 289 F.3d 517 (8th Cir. 2002) (student not employee because no compensation). However, even if individuals are not able to establish that they are employees, they may have a possible claim against their college if their college sponsors the work-type activity. *See* Question 16.8.

16.10 How are disagreements resolved at the postsecondary level?

Every reasonable effort should be made by college students and their college to come to a consensus regarding any disputes. If disputes cannot be resolved informally, consulting an attorney is critical. College students may consider the following options:

- Mediation (an informal process where the parties, often with the help of a neutral third party, attempt to negotiate a solution).
- Internal college grievance procedures
- Complaints to federal or state enforcement agencies
- Lawsuits in federal or state court

See Part 14 for more information on these procedures.

If the claim involves a complaint against the college for employment discrimination, administrative exhaustion through the EEOC or state or local fair employment agency is required, and a charge of discrimination must be filed within a short period of time (usually 300 days, but as little as 180 days in certain states). Resources on employment discrimination litigation from the American Diabetes Association or other sources should be consulted before bringing such a claim, as the procedural and substantive requirements are beyond the scope of this notebook. State law or institutional policies may provide additional remedies.