

Americans with Disabilities Act Amendments Act of 2008 (ADAAA)

Effective January 1, 2009

Meeting Purpose

Provide information on ADAAA

At the conclusion the School Nurse will:

- Understand ADAAA intent and protections
- Describe the ADAAA law
- Discuss OCR education interpretations
- Apply to School Nurse Practice

Review District vision, mission, goals: Iowa Department of Education

Vision: Iowa students will become productive citizens in a democratic society and successful participants in a global community.

Mission: Champion excellence for all Iowa students through leadership and service.

Goals

- All children will enter school ready to learn.
- All K-12 students will achieve at a high level.
- Individuals will pursue postsecondary education in order to drive economic success.
- About us--<http://www.iowa/educate>

I. Americans with Disabilities Act Amendments Act of 2008 (ADAAA) Purposes

- Provide a clear and comprehensive national mandate for the elimination of discrimination and clear, strong, consistent, enforceable standards addressing discrimination by reinstating a broad scope of ADA protections
- To reject previous rulings

42 USC 126

- 42 United States Code, Public Health and Welfare, Chapter 126, Equal Opportunity for Individuals with Disabilities 12101 et seq.
- Restore intent and protections of Americans with Disabilities Act of 1990
- Retains Section 504 and ADA disability definition emphasizing broad interpretation
- **NOT** consider-mitigating measures to determine if individual has a disability (excludes ordinary eyeglasses/contact lenses)
- Expands "major life activities" (non-exhaustive general activities and major bodily functions lists)
- Clarifies impairment, episodic or in remission, is a disability if substantially limits a major life activity when active
- Clarifies "regarded as" having a disability, does **NOT** entitle reasonable accommodations, or modifications

Disability Definition

Broad coverage of individuals to maximum extent permitted and generally does not require extensive analysis: (Conforming amendment to Rehabilitation Act of 1973 affects meaning of disability in Section 504-concepts viewed interchangeable Rehabilitation Act-Section 504)

DEFINITION OF DISABILITY of an individual

(A) physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Major Life Activities

Major Bodily Functions including but not limited to: functions of immune system, normal cell growth, digestive, bowel, bladder, brain, respiratory, circulatory, endocrine, and reproductive functions

General Life Activities include, but are not limited to: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working

U.S. Department of Education, Office of Civil Rights (OCR)

- Continues evaluation of Amendments Act impact on OCR's enforcement responsibilities under Section 504 and Title II of ADA, including whether any changes in regulations, guidance, or other publications are appropriate
- <http://www2.ed.gov/about/offices/list/ocr/disabilityoverview.html>
- Title II, ADA prohibits public entity disability discrimination.
- OCR, designated U.S. Department of Justice, enforces regulation under Title II with public educational entities-federal code of regulations-28 CFR 35
- Examples of discrimination prohibited:
 - access to educational programs and facilities,
 - denial of a free appropriate public education for elementary and secondary students, and
 - academic adjustments in higher education
- Section 504 & Title II prohibit retaliation for filing a complaint for advocating for a right protected by the laws, & harassment of students of others because of a disability

OCR Iowa Office

U.S. Department of Education, Citigroup Center
500 W. Madison Street, Suite 1475, Chicago, IL 60661

Sample Notice of Non-discrimination

(Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities and provides equal access designated youth groups. The following person has been designated to handle inquiries regarding the non-discrimination policies: Name and/or Title, Address, Telephone No.

Prevention Overview

- OCR handles numerous complaints and has many resources/tools to assist parents, students, schools, and colleges to prevent civil rights problems and to address civil rights concerns at the local level.
- OCR encourages resolutions at the Local Level with effective implementation of complaint procedures. Resources:
 - Developing policies of nondiscrimination
 - Developing effective grievance procedure requirements
 - Partnerships and Parental Empowerment
 - Self-evaluation materials on education civil rights issues
 - Racial/Sexual Harassment Resources
 - Athletic Equity Resources
 - English Language Learner Resources

Questions and Answers on Disability Discrimination under Section 504 & Title II

- **How Section 504 & Title II differ?**
The main difference is Section 504 applies to recipients of grants from the federal government and Title II applies only to public entities. If a school is a recipient of both Federal funds from the US Department of Education and also a public entity-the institution is covered by both laws.
- **Are all schools covered by these laws?**
Virtually all public school districts are covered by Section 504 because they receive some federal financial assistance.
- **Do these laws cover just students?**
No. The laws protect all participants in the program from discrimination, including parents, students, and employees.
- **Do laws cover just education programs?**
No. They cover all programs of a school, including academics, extracurricular, and athletics. Also, the laws apply to activities of a school that occur off campus.
- **Do all buildings have to be physically accessible?**
No, not necessarily. Buildings constructed after Section 504 regulation was issued (those built since 1977) must be fully accessible, older buildings do not have to be made fully accessible. For

older buildings, law requires the program or activity be made accessible. A common way this is done is to relocate the program to another accessible building.

- **What types of services are required for students with disabilities in elementary & secondary schools?**
- Schools are required to provide-free appropriate education to students with disabilities based on individualized educational needs. Services may include special education, related aids, services such as physical therapy, and modifications to regular education program, adjustments in test taking procedures, adjustments to rules regarding absences when a student's absences due to disability.
- **Does OCR enforce laws prohibiting student harassment (or others) because of disability?**
Yes. Both Section 504 and Title II of the Americans with Disabilities Act make it unlawful to harass people in covered entities because of their disabilities.

Protecting Students With Disabilities FAQ 3/09 <http://www2.ed.gov/about/offices/list/ocr/504faq.html>

21. May school districts consider "mitigating measures" used by a student in determining whether student has a disability under Section 504?
 - No. As of January 1, 2009, schools, in determining if a student has a physical or mental impairment that substantially limits that student in a major life activity, must *not* consider the ameliorating effects of any mitigating measures that student is using.
 - Congress did not define the term "mitigating measures" but rather provided a non-exhaustive list: 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; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or auxiliary aids or services; and learned behavioral or adaptive neurological modifications.
22. Does OCR endorse a single formula or scale that measures substantial limitation?
 - No. Determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.
23. Are there any impairments which automatically mean a student has a disability under Section 504?
 - No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.
24. Can a medical diagnosis suffice as evaluation for purpose of providing FAPE?
 - No. A physician's medical diagnosis may be considered among other sources in evaluating a student with an impairment or believed to have an impairment which substantially limits a major life activity. Other sources to consider, along with medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. Section 504 regulations require school districts to draw upon a variety of sources in interpreting evaluation data and making placement decisions.
25. Does medical diagnosis of an illness automatically mean student can receive services under Section 504?
 - No. A medical diagnosis of an illness does not automatically mean student can receive services under Section 504. The illness must cause substantial limitation on student's ability to learn or another major life activity. For example, student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if impairment does not in any way limit student's ability to learn or other major life activity, or only results in some minor limitation in that regard.

II. Examples

Union City (MI) Community Schools, 54 IDELR 131 (OCR 7/24/2009). **Student's disability need not affect learning for 504-eligibility.** Parent of a student with bone cancer requested accommodations for her child. District agreed to provide accommodations but refused to put them in a 504 plan because child's impairment did not impact major life activity of learning. OCR noted the impairment periodically affected student's ability to walk, climb steps, participate in PE, attend field trips, and obtain transportation services. District used an unduly restrictive definition of major life activities and failed to evaluate student in a timely manner denied student FAPE.

Wake County (NC) Public School System, 53 IDELR 129 (OCR 4/1/2009). Lack of school staff consensus on who was responsible for student's diabetes care. 1) Failed implement HP-did not assign person/location test blood sugar causing missed time from class negatively affecting health/class work. 2) Failed develop Section 504 plan even with requests. District agreed to take remedial action comply Section 504;

- Hold meeting,
- Determine eligibility,
- Section 504 plan include HP modifications, specify who responsible, how inform teachers, education, communication, if use HP as 504 plan-modify and note serves as such,
- Document mandatory retraining, and
- District will notify parents, in writing revisions, provide copies, and inform those trained.

Michael M. v. Board of Education of Evanston Township High School District #202, 53 IDELR 21 (N.D. Ill. 7/29/09). Court refused to dismiss the parent's claim of student with ADHD until ADAAA eligibility changes made.

Memphis (MI) Community Schools, 54 IDELR 61 (OCR 5/11/2009). District defended Section 504 complaint-used outdated forms/incorrect eligibility standards.

North Penn (PA) Sch. Dist., 53 IDELR 336 (OCR 2/23/2009). Student's parent claimed district discriminated against son failing to regularly maintain classroom air purifiers/ minimize exposure to environmental allergens. District presented records-staff changed purifier filters 1 X month and removed ceiling tiles from classroom to reduce exposure to allergens... District's approach helped it avoid a Section 504 violation.

Reasonableness: Districts must take reasonable steps to ensure that a student with a disability is provided an equal opportunity to participate in and benefit from an educational program as effective as that provided to nondisabled students.

"The district in *North Penn* went above and beyond to reduce the student's exposure to allergens. That's probably why they avoided a violation," said a Section 504, ADA and homebound supervisor in Shreveport, La. Even so, districts can, and should, consider the reasonableness of parents' accommodation requests.

To start, teams should base their decisions on more than a single piece of data, such as a medical diagnosis, said a school attorney in Arlington Heights, Ill. "OCR states in its guidance and regulations that [districts] can't rely on one piece of evidence." Therefore, districts should obtain parental permission to contact the student's doctor. Ask the doctor to explain the medical and scientific basis for the recommendations. In cases where the issue is very complicated, seek your own medical information by consulting with an allergist or other specialist.

Jeffries v. Albert, 53 IDELR 217 (D. Hawaii 11/24/2009). Hawaii Dept Ed may have discriminated against 14-year-old girl with Wolf-Hirschhorn syndrome-denied parents' homebound placement request. ED decided against restrictive placement despite information student had a decreased life expectancy/would develop fewer illnesses if educated at home.

Student later died receiving services in out-of-state residential school. The court affirmed Parents allegation ED failed accommodate daughter's medical condition and had viable claims under Section 504 and Title II. Denial of a placement request on basis it would be overly restrictive could expose district to discrimination claims. To minimize liability-ensure students are educated in most appropriate setting by these steps: Know how handle requests for homebound placement. Homebound placement doctor Rx is considered by team. If team determines homebound isn't appropriate, team should document why (child's participation data/current placement progress). Don't delay addressing student's evolving needs. Needs can change suddenly (student-brittle bones-more injuries, student -seizure activity increases). Team reconsiders placement/changes. Attend to parents' fears about inclusion. Parents often are very nervous about child at school, with someone else administer medication/perform health procedures (send nurses/staff performing procedure to home to demonstrate how carry out task, invite parents to observe child's care in classroom). Also, explain staff training and system of monitoring/tracking health procedures.

North Royalton (OH) City School District, 52 IDELR 203 (OCR 3/30/2009). Don't use health plan as legal replacement for accommodations

Health plans should not take place of 504 plans. ADA's broader definition of disability means more students on IHPs now should be served under 504. OCR, in one case, health plans are mitigating measures, under ADA, districts cannot consider in eligibility determinations.

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St. Clair County (MI) Regional Educational Service Agency, 53 IDELR 238 (OCR June 3, 2009). Principal terminated 504 plan of student with asthma saying student's condition did not impact education-based training regional educational agency materials (2008). OCR determined materials were outdated with ADA passage. Even though agency was aligning training manual with ADA, continued use of old manuals misguided districts' decision on student's disability. Agency signed a resolution agreement to achieve compliance.

54 IDELR 174, 110 LRP 20355, *Fairborn (OH) City Schools*, OCR, Midwestern Division, Cleveland (Ohio), 15-07-1118 (September 3, 2009). Ohio district failed to include a kindergartener with Down syndrome and behavioral issues in extracurricular and nonacademic activities. District violated 504's inclusion mandate because half school year passed before district allowed child to join nondisabled peers for music, physical education, lunch, and recess, and continued to exclude from field trips. The student attended a self-contained resource room class for children with various disabilities. However, his IEP called for him to join the regular kindergarten class whenever appropriate. District resolved the case by agreeing to implement staff training. School staff tools to field parent food allergy reports:

Defining food allergies. "adverse immune response that occurs reproducibly on exposure to given food/is distinct from other adverse food responses (food intolerance)."

Screening diagnoses. Lack of uniform criteria in diagnosing food allergies could lead over-diagnosis/over-identification of students for Section 504 services.

Processing special diet requests. Document food allergy nature/severity, medical statement, & specific diet requirements. If student's impairment would substantially limit a major life activity when active, then it is a disability under Section 504. If food allergy would result in anaphylactic shock, student would be limited in major life activity of breathing when impairment is active thus, 504-eligible.

Base team placement decisions on multiple assessments/ reports/expert opinions.

Seek permission to speak directly with student's physician. Obtain health information release and maintain open communication with a child's doctor.

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Justice Department-Arkansas

U.S. Justice Department filed lawsuit May 6, 2010 against Arkansas for allegedly violating ADA by placing people with severe mental or physical disabilities in state institutions that are inappropriately restrictive

U.S. Justice Department also sued Texas/Georgia for violating ADA

Reminders

- Use ADA/OCR guidance documents
- Ensure 504 training materials account for ADA, proper eligibility procedures
- Verify accuracy of materials before using
- Consider variety of data in making eligibility determinations
- Give parents copy of their 504 procedural safeguards
- Team process when deciding to evaluate
- Remember "learning" is only one of a number of major life activities-look beyond
- Always use the team decision-making process and
- Investigate. Determine why a student doesn't want a particular accommodation. Example: teacher might implement an accommodation in a way that is embarrassing for student
- Get student input. When appropriate, include student in creating Section 504 plan (an agreement between teachers, parents, and student)
- Institute progress monitoring. If a parent asks school to discontinue a service, first, document in writing parent's request. Then, monitor student's progress without the accommodation for a certain period of time-four weeks, for example. If there are changes, reconvene the team
- Review the plan. Go through plans at least annually

Distribute to all staff needing to know

- **Schools sometimes are so concerned about confidentiality they don't share** 504 plans with need-to-know staff members, such as substitutes or bus drivers. In some cases, it is essential these personnel have copies of student's 504 plans, especially for students with health conditions.
- **Focus on clarity in writing accommodations.** Write specific 504 action plans. Anyone should be able to pick up a 504 plan and understand exactly what to do. Emergency plan might state: "If difficulty breathing, Student is to self administer inhaler carries with him." Call 911 if continues to experience breathing difficulty and report to nurse for further instructions and recording. Copyright 2010© LRP Publications June 3, 2010

Emerging issues

- **Medical policies/health plans 504 consistent**
- Don't use HP as legal replacement
- **Recognize possibility-504 technical eligibility**
- Serve students impairments in remission
- **Create episodic plans-episodic impairments**
- Rely on research-based methods
- **Objective standards to track, review progress**
- Involve student in process
- Collect data-addressing all suspected disability areas
- **Follow up with parents-health documentation**
- Prepare to conduct your own health assessment
- **Obtain evaluation data to assess student's unique needs**

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Sample School Board Policy On the Basis of Disability

No otherwise qualified individual with disabilities shall, solely by reason of disability, be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination under any program or activity. For purposes of this policy, qualified individual with disabilities shall be one who satisfies the definition set forth in Section 504 of the Rehabilitation Act 1973 and its implementing regulations. The _____ School District will identify, evaluate and provide a free and appropriate public education to each individual with disabilities within its district boundaries. The 504 Coordinator will ensure that due process rights will be offered to all students eligible for services.

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Alexandra Public Schools: CHECKLIST: REFERRAL/ELIGIBILITY/PLAN MEETING 504/ADAAA PRIOR TO MEETING CHAIRPERSON WILL:

- At least 14 days prior to the projected meeting date contact the parent to secure a mutually agreed upon date and time for the meeting.
- Seven to ten calendar days prior to meeting, send written notification to the parent confirming the agreed upon date. Document attempts to secure parental participation.
- Notify all team members of time and place of meeting well in advance of the meeting date.

AT THE MEETING THE PRINCIPAL/DESIGNEE WILL:

- Welcome participants, make introductions, and review purpose of meeting.
- If necessary, complete the *Disclosure of Records* form and have the parent sign for any individual attending the meeting the parent has invited. Maintain the form in the student's record.
- Review Procedural Safeguards Notice pertaining to 504; provide a copy to the parent(s) if requested.
- Review the present level of functioning in the educational setting such as grades, attendance, discipline record, most recent evaluations, local and state assessments, and other.
- In consideration of all information shared at the eligibility meeting, discuss and answer the following:
 - Does the impairment substantially limit the major life activity?
 - What major life activity is substantially limited (reading, hearing, seeing, thinking, concentrating, sleeping, walking, eating, speaking, working, breathing, learning and digestive functions, other?)
- If the answer to any of eligibility questions is "no," the student is not eligible under 504.
- Complete eligibility documentation.
- Provide copies of documents to parents.

- If student is found eligible under Section 504, a 504 plan shall be developed within 30 calendar days. In development of plan, consider reasonable accommodations necessary to provide an equal opportunity for student to participate in general curriculum.
- Identify case manager; share Section 504 accommodation plan with all necessary staff members directly involved with the student.

Checklist -- March 2009

III. Questions

Does nurse's intermittent presence render school unsafe for diabetic? Sixth-grader with Type I diabetes depended on insulin and faced life-threatening emergencies if blood sugar dropped-504 plan provided-two employees trained to administer insulin and respond to health needs-nurse and principal-would be present at school during school day. Nurse was not at school every moment, but never more than 15 minutes' driving distance away. Although principal resigned halfway through school year, other staff members were "designated diabetic assistants," trained solely to administer glucagon. OCR complaint, student's mother argued district violated Section 504 by not implementing a 504 plan and failed to provide healthy, safe environment required to receive FAPE.

You Judge: Is constant, immediate availability of care needed for student to receive FAPE?

- A. No. The 504 plan did not state that a health care provider would be physically present at all times.
- B. No. There were other staff members available to provide the care.
- C. Yes. Only the continual presence of someone trained to give insulin shots would meet the student's health needs.
- D. Yes. Districts must always have someone present qualified to inject insulin if a student has diabetes.

How OCR ruled: C

Because district did not adequately address student's needs, OCR found sufficient evidence district failed to comply with Section 504. *Kiski (PA) Area Sch. Dist.*, No. 03-07-1258, 109 LRP 32695 (OCR 2008). OCR stated, "Regardless of language in [plan], District was required to have at least one trained individual, capable of monitoring Student's condition and administering necessary treatment, scheduled to be physically present in Student's school building at all times throughout school day." Because there were periods when no one qualified to treat student was present, district failed to implement his plan and provide FAPE.

A district is required to provide each student with FAPE, regular and/or special education and related aids and services designed to meet needs as adequately as it meets needs of students without disabilities.

Editor's note: This feature is not intended as instructional material or to replace legal advice.

Joseph L. Pfrommer, Esq., covers special education legal issues for LRP Publications. 10/5/2009

Do district's eligibility standards pass under 504?

Parent of student with ADHD complained to school her son required changes to his 504 plan because he was staying up until midnight to complete homework. Parent filed OCR complaint, alleging district denied son FAPE by failing to revise plan. OCR investigation, examined district's 504 plan form for sufficiency. Form Stated "Substantially limits major life activity means student, with their mitigating circumstances . . . still unable to perform major life activity average person in general population can perform. Thus, student takes medication, works hard, has strong parental support, or otherwise compensates for effect of disability to point student is no longer 'substantially limited,' then student not labeled disabled under Section 504 "substantially limited" means "unable to perform major life activity.

You Judge: Does form's language violate Section 504?

- A. No. Districts may consider mitigating measures, such as medication.
- B. No. The "unable to perform" language stated the appropriate standard.
- C. Yes. Although ADA utilized "unable to perform" standard, ADAAA eliminated that language.
- D. Yes. It articulated wrong eligibility standards.

How OCR found D correct. D. Yes. It articulated wrong eligibility standards.

Form included incorrect standards to determine whether a child meets definition of student with a disability under Section 504. Form incorrectly described when impairment substantially limits a major life activity by permitting officials to consider mitigating measures. ADAAA bars districts from doing so. Form erroneously stated an eligible student is one "unable to perform" an activity. OCR instructed district to revise its forms.

Joseph L. Pfrommer, Esq., LRP Publications. May 4, 2010. Copyright 2010© LRP Publications

Must district assess student based on deteriorating grades, behavior?

High school student-failing many classes/having behavioral problems. District disciplined for defying teachers/refusing to pay attention. Student study team summary noted student had ADHD/was concerned about grades, motivation, and anger. Student's parent asked evaluate student for special education, citing an ADHD diagnosis. District declined. Assistant principal said he attempted to meet with parent, but offer refused. Parent filed OCR complaint alleging district violated Section 504 by failing to evaluate son. District explained to OCR it believed environmental issues, including student's home life instability, and were larger factors in student's behavior problems than ADHD.

You Judge: Does failure to evaluate student violate 504?

- A. Yes. The district knew the parent requested an evaluation.
- B. No. The district believed the student's behavioral and academic difficulties arose from environmental factors, not ADHD.
- C. No. The parent failed to attend the meeting.
- D. Yes. The district knew about the student's diagnosis, behavior, and low grades.

How OCR found: D

OCR concluded the District had information indicating student may have disability/violated 504 failing act on information. OCR pointed out district knew student's ADHD diagnosis, behavioral problems/academic difficulties, yet it never assessed student's psychoemotional educational needs. Section 504 implementing regulation requires districts, before making an initial placement, evaluate any student who needs or is believed to need special education or related aids/services because of disability. OCR noted District had good reason to suspect the high school student may be student with disability in need of special education or related aids/services. Parent informed district of student's ADHD/district made note of condition at meeting/district knew student was having significant behavioral challenges/failing grades.

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IV. Summary: DEFINITION OF DISABILITY

(A) physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; Broad coverage of individuals to maximum extent permitted and generally not require extensive analysis: Conforming amendment to Rehabilitation Act of 1973 affects meaning of disability in Section 504

District/School Updates

- Schools need to update their manuals, materials, and forms in light of the changes enacted by the ADAAA
- Schools need to make sure the ADAAA changes filter down to all school staff
- In a case OCR required a school to revisit their Section 504 eligibility and reevaluate students who were denied eligibility after the law's January 1, 2009 effective date.

Resources

- U.S. Department of Education, Office of Civil Rights
- <http://www2.ed.gov/about/offices/list/ocr/index.html>
- Overview, Laws, Programs, Contacts, Reports, Resources, Rights, Prevention, Reading Room, Q & A

Americans with Disabilities Act Amendments Act of 2008 (ADAAA), Effective January 1, 2009

Compiled by Charlotte Burt, Consultant, Iowa Department of Education, March 16, 2011

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