



## SCHOOL SERVICES FOR STUDENTS WITH DIABETES UNDER IDEA AND 504: CHOOSING THE RIGHT STATUTE FOR COVERAGE

Victoria Thomas, JD

### INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 (504), and the Individuals with Disabilities in Education Act (IDEA) are the two primary laws that offer protection from discrimination as well as accommodations to students with disabilities, including diabetes. When school officials (such as the principal, the 504 coordinator, or others) become aware that a student may need disability services at a public school, the school is obligated to determine whether the student has a disability that qualifies for services under either 504 or IDEA, and, if so, must determine what related aids and services will be provided.<sup>1</sup> To qualify for 504 services, a student must have a mental or physical impairment that substantially limits a major life activity.<sup>2</sup> To qualify for IDEA services, a student must need "special education and related services."<sup>3</sup> Students with diabetes have varying needs, and any individual student with diabetes may be better qualified and better served under one law than the other. Part I of this memo explains how students with diabetes can qualify for services under Section 504 and IDEA. Part II discusses the relevant differences in Section 504 and IDEA for a student with diabetes in order to highlight the various benefits and burdens of qualifying a student under one statute as opposed to the other.

#### I. Students with Diabetes Usually Covered by Section 504

To determine whether a student with diabetes is qualified for services under Section 504, a school evaluates whether the student's diabetes substantially limits a major life activity. Although this evaluation must be made based on the way diabetes affects each individual, the disease will by its very nature substantially limit a student with diabetes in several major life activities, including eating, caring for oneself and the functioning of the endocrine system.<sup>4</sup> During hypoglycemia or hyperglycemia, students may also be limited in major life activities such as thinking, walking, concentrating and learning. The effects of medication such as insulin and other measures used to treat

---

<sup>1</sup> Section 504 only applies to schools that receive federal funding, and IDEA only applies to public schools. The Americans with Disabilities Act (ADA) also protects individuals with disabilities, and covers some private non-religious schools not covered by Section 504. However, since in the education setting it provides nearly identical substantive rights to Section 504, and because most schools are more familiar with 504, it is not further addressed in this paper.

<sup>2</sup> 34 C.F.R. 104.3(j)(1)(2008).

<sup>3</sup> 20 U.S.C. § 1401(3)(A).

<sup>4</sup> 42 U.S.C. § 12102(2)(A), (B).

diabetes (called “mitigating measures”) cannot be considered in determining the impact of diabetes on major life activities.<sup>5</sup>

Various school officials may be involved in the 504 evaluation process to determine whether a student qualifies for services, but generally the determination will be made by the student’s Section 504 “team,” which will often include the principal, school nurse, and a 504 coordinator or special education coordinator. Medical documentation explaining that the student has diabetes and briefly describing both the complications the student experiences (such as hypoglycemia and hyperglycemia) and outlining the services the student will need helps establish 504 coverage.

Parents should be prepared to address several misconceptions about 504 eligibility that sometimes are held by school districts. The first is that diabetes must substantially limit the major life activity of learning, or must negatively impact the student’s academic performance. In fact, there is no requirement that learning be the major life activity at issue.<sup>6</sup> Also, recent changes to Section 504 (made by the Americans with Disabilities Act Amendments Act of 2008) make it easier for students with diabetes to establish eligibility. School districts may still be evaluating students under the old legal standards. For more information on these changes, see <http://www.diabetes.org/advocacy-and-legalresources/discrimination/employment/americans-with-disabilities-act-amendments-act.jsp>

## II. Students with Diabetes May Be Covered by IDEA

The IDEA eligibility determination focuses on the services the student requires, rather than the effects of diabetes on daily activities. IDEA applies to students who need “special education and related services” because of an impairment.<sup>7</sup> There are several categories of impairments covered by IDEA, including “other health impairment,” which is defined as “chronic or acute health problems” that causes “limited strength, vitality or alertness” and “adversely affects a child’s educational performance.”<sup>8</sup> Diabetes is expressly included as an “other health impairment.”<sup>9</sup> The Office of Special Education Programs has stated that IDEA can cover students with diabetes.<sup>10</sup> However, IDEA coverage also requires that the child need both special education and related services. While almost all students with diabetes will require related services, such as assistance

---

<sup>5</sup> 42 U.S.C. § 12102 (4)(E)(i).

<sup>6</sup> See *Weixel v. Board of Education*, 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); *San Diego (CA) City Unified School Dist.*, Complaint No. 09-04-1150, 44 IDELR 135 (OCR 2005) (district failed to initiate Section 504 evaluation process because it believed that only students limited in learning were eligible under Section 504);

<sup>7</sup> 20 U.S.C. § 1401(3)(A).

<sup>8</sup> 34 C.F.R. § 300.7(c)(9).

<sup>9</sup> 34 C.F.R. § 300.8(b)(9)(i).

<sup>10</sup> *Letter to Anonymous*, 24 IDELR 853 (OSEP April 5, 1996).

with medication administration or provision of emergency care for severe hypoglycemia, it is not clear that all students also require special education.<sup>11</sup>

Special education is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability.”<sup>12</sup> The focus is on what changes must be made to the academic environment or the way the child is taught in order to counter the effects of the disability on academic performance. For example, tutoring, extra time on tests and assignments and changes in assignment format relate directly to academic performance and could qualify as special education, while services such as permitting self-care at school or providing school personnel to administer insulin to a student are more properly considered related services, which do not by themselves give rise to IDEA eligibility.

There are generally three categories of students with diabetes who may be IDEA eligible. First, students who have another disability in addition to diabetes which requires special education will often qualify for IDEA based on that other disability. For example, a student with both diabetes and autism may have difficulty learning and communicating, rendering her unable to self-manage her diabetes or communicate symptoms of high or low blood glucose, necessitating special education and related services. While diabetes-related services may be included in the IEPs of such students, diabetes is generally not the main basis for IDEA eligibility for these students.

Second, younger children and children who experience frequent hyperglycemia or hypoglycemia may also qualify under IDEA. The amount of care and individual attention required by students who cannot perform self-care may mean that the student spends a significant amount of class time in the nurse’s office; students who experience severe hyperglycemia or hypoglycemia may miss days or weeks of school; and even while in class, these students’ ability to concentrate and learn may be impaired by erratic blood glucose levels. Most schools will want to see evidence of the student’s difficulty learning, such as poor grades. In the absence of poor grades, parents and advocates can also focus on evidence of the student’s difficulty managing diabetes to establish a need for special education and related services.

Third, a child may qualify for IDEA if he or she requires an adapted curriculum or other modifications to the academic environment due to diabetes. For example, some children with diabetes require changes in physical education instruction; modifications to the regular school day schedule (such as various breaks required by abnormal blood

---

<sup>11</sup> *B.M. v. Bd. of Educ.*, No. 5:07-153-JMH, 2008 U.S. Dist. LEXIS 66645, at \*16-17 (E.D. Ky. 2008) (“B.M.’s allegations arise from concerns about how blood sugar monitoring would be conducted and insulin administered while she was at school. Plaintiff does not allege that diabetes impacts her educational performance and that she, thus, requires specialized educational services. In other words, Plaintiff’s claims are not related to the way that Defendants provided an education to B.M. Rather, she complains of constitutional and statutory violations independent of the IDEA”); *A.P. ex rel. Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11*, 538 F.Supp.2d 1125, 1147 (D. Minn. 2008) (plaintiff’s claims for failure to administer insulin and test blood glucose were only loosely related to education and thus, did not seek a form of relief offered under IDEA).

<sup>12</sup> 20 U.S.C. § 1401(29) (2009).

glucose levels); modified or additional time for taking tests; a regular schedule for eating, drinking and toileting; changes to assignment due dates; and various other academic adaptations. While there is little case law evaluating this kind of claim for eligibility, it should be possible to demonstrate that these changes to schedules and classroom administration can qualify as special education.

The evaluation process for IDEA is often similar to that under 504, although IDEA includes more specific requirements that districts must follow. A “team” of school administrators and others evaluate whether the student needs special education and related services. Under both IDEA and 504, the school may request that the student be interviewed by a specialist, take tests, and other forms of evaluation. The parents have the right to actively participate in the evaluation process, for example by presenting their reasoning and documentation in favor of eligibility to the rest of the “team.”

In order to convince a school district that a student is IDEA eligible, advocates should request an IDEA evaluation and support their claim that the student needs special education and related services. First, they should provide a letter from the child’s treating endocrinologist outlining the types of diabetes services the student needs and documenting particular areas of concern. This letter should highlight the challenges the student faces, such as multiple disabilities or frequent hypoglycemia or hyperglycemia. The parents should also write a letter requesting an IDEA evaluation and further outlining any necessary services, such as extra make-up time for tests and assignments missed due to diabetes. In order to help the IDEA evaluation team understand diabetes and the particular needs of the student, a diabetes professional, such as a Certified Diabetes Educator (CDE), can take part in the IDEA evaluation. The CDE can explain, for example, how the individual child’s diabetes impacts him or her, for example that because the child experiences frequent hypoglycemia and/or hyperglycemia, he or she has special challenges in learning. The parents, doctor, and CDE can all emphasize the need for services to prevent diabetes from disrupting the child’s education. For example they can explain that the child cannot self-care, needs frequent blood glucose tests, and that therefore diabetes care assistance in the classroom will be necessary. By including in the request the need for services that are available under IDEA, parents and advocates can demonstrate that the student is IDEA eligible.

### III. Qualifying Students with Diabetes for Services at School: Choosing between 504 and IDEA

While IDEA and 504 have overlapping coverage and can entitle students to many of the same related services, they are not identical, and an advocate should consider whether a student will be better served under one law or the other. There is no “right” or “wrong” answer to this question for all students; adequate services can be provided under either law. The choice will often depend on individual district attitudes and policies. This section discusses the relevant differences between the two laws in order to help advocates determine whether a particular student should be covered by 504 or IDEA.

A. The Benefits and Burdens of Qualifying Students with Diabetes under Section 504

A primary benefit of requesting services under Section 504, rather than IDEA, is that it is easier to show that a student with diabetes is eligible, particularly following recent changes to eligibility under 504. All students with diabetes should qualify for services under 504, while, as discussed above, the same is not true under IDEA.<sup>13</sup> For example, a student who self-manages is still limited in endocrine function and eating, and may need assistance in an emergency, but may not be able to show a need for special education. While many school districts readily accept that diabetes renders a student eligible under 504, a substantial number question IDEA eligibility. Although the argument can be made that diabetes requires significant changes to the student's academic environment, thus opening the door to IDEA eligibility, this argument may not be as readily accepted by school districts.

In general, Section 504 and IDEA provide the same basic right to a free, appropriate public education (FAPE).<sup>14</sup> While at least one court has suggested that FAPE may have a different meaning under the two laws,<sup>15</sup> no court has clearly articulated those differences. Generally, students with qualifying disabilities are entitled to necessary services under either law. For example, basic academic accommodations can be provided under 504.<sup>16</sup> However, as will be discussed, because 504 is not commonly used to get students academic services, one-to-one aides, and other services, school districts may deny these more intensive services under 504.

The more salient differences between the two laws relate to procedural rights. IDEA requires that students exhaust their administrative remedies through a due process hearing before filing suit, while Section 504 contains no such exhaustion requirement. Therefore, students who are eligible under Section 504 but not IDEA may file suit without going through any administrative process.<sup>17</sup> The IDEA exhaustion requirement, however, would apply whenever the lawsuit seeks relief available under IDEA, such as where the student has been found eligible under IDEA or has an IEP.<sup>18</sup> While 504 has no exhaustion requirement, administrative remedies may be pursued through complaints to the Office for Civil Rights (OCR) within the U.S. Department of Education, which enforces Section 504, or through district and state grievance procedures.<sup>19</sup> Because the

---

<sup>13</sup> *Brendan K. v. Easton Area Sch. Dist.*, No. 05-4179, 2007 U.S. Dist. LEXIS 27846 at \*36 (E.D. Pa. Apr. 16, 2007) ("Although the two laws overlap significantly, it is well recognized that Section 504 covers more students than does IDEA").

<sup>14</sup> 34 CFR 300.17 (FAPE is required under IDEA); 34 CFR 104.33 (FAPE is required under Section 504).

<sup>15</sup> *Mark H. v. Lemahieu*, 513 F. 3d 922, 933 (9<sup>th</sup> Cir. 2008).

<sup>16</sup> *Phillipsburg (NJ) School District*, Complaint No. 02-04-1194, 43 IDELR 253 (OCR 2005) (student's 504 Plan included time extensions for assignments, class work, and testing as well as homebound instruction); *Belle Plain (MN) School District*, No. 05-02-1174, 38 IDELR 71, (OCR 2002) (school district determined that student did not have a disability under IDEA, but developed a 504 Plan that included one-on-one assistance during class from the teacher, an aide, or a peer tutor).

<sup>17</sup> *B.M. v. Bd. of Educ.*, No. 5:07-153-JMH, 2008 U.S. Dist. Lexis 66645, at \*12 (E.D. Ky. 2008).

<sup>18</sup> 20 U.S.C. § 1415(l).

<sup>19</sup> After investigating the parent's complaint, OCR issues a Letter of Findings (LOF) that explains OCR's interpretation of the facts and law and determines whether there has been a violation of Section 504. If

OCR process is relatively informal and does not require parents to hire an attorney, parents of students with diabetes may prefer this process over going to court or a due process hearing.

The remedies available under 504 and IDEA also differ. 504 does allow families to seek monetary damages in court, while IDEA does not.<sup>20</sup> However, OCR will not award damages, requiring individuals to go to court to access this remedy.

B. The Benefits and Burdens of Qualifying Students with Diabetes under IDEA

One benefit of IDEA is that school districts may be more willing to provide the types of services a particular student needs under IDEA than 504. If a student needs services that can be viewed as burdensome, such as hiring a nurse or one-on-one aide, the district may view these services as more like services provided to IDEA-eligible students. Thus, advocates may meet less resistance to having these services provided by pursuing IDEA eligibility and analogizing the child's situation to that faced by children with more severe disabilities who receive IDEA services. Advocates should try to understand the district's attitude toward IDEA in deciding how to proceed. Similarly, when a student's diabetes clearly impacts learning, IDEA coverage is easier to establish and the types of accommodations the student may need, such as tutoring, remedial classes, and modified assignments, are commonly provided under IDEA. A school administration may be more accustomed to providing academic accommodations and intensive services such as a one-to-one aide under IDEA.<sup>21</sup>

The IDEA statute is also much more detailed than Section 504 regarding its requirements. For example, IDEA requires a written individualized education plan (IEP) which must include:

[A] statement of the child's present levels of educational performance; . . . 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; . . . [and] the projected date for the beginning of the services and

---

there has been a violation, OCR will usually include in the letter a list of actions the district must take to address the violation.

<sup>20</sup> 29 U.S.C. § 794a(a)(2) (2009) (“The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.”); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72-73 (U.S. 1992) (discussing the right to monetary damages under Title VI and 504).

<sup>21</sup> School districts receive federal dollars based on how many students in the district qualify for IDEA. As a result, some school districts prefer to provide expensive accommodations under IDEA. Although 504 does not provide a cost defense to denying accommodations and modifications, school administrations may nevertheless be more accommodating under IDEA because of financial concerns.

modifications . . . and the anticipated frequency, location, and duration of those services and modifications.<sup>22</sup>

These guidelines require districts to provide significant detail in the IEP about the student's needs and how services will be provided. Diabetes education and awareness is best achieved through a detailed, written plan that is shared with not only the personnel who assist with diabetes care but also with teachers, substitutes, coaches, and others. Section 504 does not require a written plan, and although many school districts willingly create "Section 504 Plans," there are no guidelines in the statute or the regulations regarding what sort of information districts must include- meaning that a Section 504 Plan can be very short and basic.<sup>23</sup> Some school districts attempt to serve students who qualify under 504 with health plans, which focus largely on medication administration and are often shared only with the staff who assist with medication, leading to breakdowns in communication and services for students with diabetes. Thus, IDEA provides greater assurance than 504 that a student will have a written plan that educates appropriate personnel and clearly establishes what services will be provided. The statute also provides detailed instructions to districts regarding how to properly evaluate students under IDEA and provide services.<sup>24</sup> 504, on the other hand, provides very little clear guidance to schools regarding evaluations and written plans.

If a school fails to comply with its responsibilities under IDEA, IDEA also offers procedural safeguards that are not available under Section 504.<sup>25</sup> The IDEA administrative complaint process is implemented by the state, and so will vary somewhat, but must include a due process hearing with the state department of education.<sup>26</sup> Unlike the OCR complaint process, families will generally need representation by an attorney or skilled advocate in order to navigate the IDEA administrative process. Students who qualify under IDEA also have the option of filing a complaint with OCR under 504, because all students who are covered by IDEA are also covered by 504, but filing with OCR does not meet the administrative exhaustion requirement. Thus, IDEA provides the opportunity to resolve disputes through due process, a procedure that resembles a court hearing but can be resolved more rapidly. Section 504, on the other hand, gives the right to proceed directly to court if that option is desired.

Unlike 504, monetary damages are not available under IDEA, although families are entitled to tuition reimbursement if the school district fails to provide FAPE and the family then enrolls the student in a private school that meets the child's needs.<sup>27</sup> The

---

<sup>22</sup> 20 U.S.C. § 1414(d)(1)(A).

<sup>23</sup> In practice, most districts create a "504 Plan" for students with diabetes who qualify for services under Section 504. Several states have state laws requiring schools to create detailed plans for students with diabetes, regardless of whether they have been evaluated under IDEA or 504. *See, e.g.*, Tex. Health & Safety Code § 168.003 (2007); N.C. Gen. Stat. § 115C-12 (2008).

<sup>24</sup> 20 USCS § 1414.

<sup>25</sup> 20 U.S.C. § 1415, et. seq.

<sup>26</sup> 20 U.S.C. §1415(6). *See also* Gardner v. Uniondale Public School District, No. 08-CV-847, 2008 U.S. Dist. Lexis 84496 at \*17-18 (E.D.N.Y. 2008).

<sup>27</sup> 20 U.S.C. §1412(a)(10)(C)(ii); *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 370 (1985).

courts have reasoned that in circumstances in which review of an inappropriate IEP takes months or years, parents should be entitled to enroll a child in an appropriate private school and seek reimbursement through a due process hearing or, after exhausting administrative remedies, in court.<sup>28</sup> A recent Supreme Court decision found that parents can seek tuition reimbursement even where the student did not previously receive special education services at the public school.<sup>29</sup>

### Conclusion

Both IDEA and Section 504 offer similar rights to services to students with diabetes. However, differences in the statutes can cause one to be preferable for a particular student with diabetes. Students with diabetes have historically had no trouble qualifying for 504's protections, but some students with diabetes will have difficulty qualifying for IDEA. However, IDEA can be a better fit for students with difficulty to manage diabetes or multiple disabilities because these children are more likely to need the types of services, such as academic adjustments and one-to-one aides, that are more typically provided under IDEA. The procedural considerations under each statute may make a difference as well. IDEA requires a detailed written plan and offers greater procedural safeguards with the additional option of a due process hearing, but requires administrative exhaustion before filing in court. Section 504 lacks clearly outlined evaluation procedures, does not require a written plan, and has fewer procedural safeguards, but also allows the choice of filing an administrative complaint or going straight to court. Finally, while tuition reimbursement is available both through the IDEA administrative process and in court, monetary damages are only available under 504. The individual situation of a particular student with diabetes will help define which statute is the best fit.

---

<sup>28</sup> *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359, 370-71 (1985).

<sup>29</sup> *Forest Grove Sch. Dist. v. T. A.*, 2009 U.S. LEXIS 4645 at \*5 (June 22, 2009).