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 4.9 for a more detailed discussion of the federal funding requirement. Because the ADA generally provides no greater rights to students with diabetes than 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 21 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 meet the requirements for providing 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 or “IEP.”

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 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 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. Most 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 school do to comply with its non-discrimination requirement?

Under Section 504 and the Americans with Disabilities Act (ADA) 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.

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).

Title III of the ADA applies to most private schools (see Question 4.9) and contains similar provisions: “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 establishes the same requirements by providing that at a school receiving federal financial assistance, “no 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 does not impose all of these obligations on private, as opposed to 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 Boston (MA) Public 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.
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 Section 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. Students with diabetes have been found to fit this definition, but whether a particular student is covered must be determined on a case-by-case basis. Whether diabetes is a disability depends primarily on whether the effects of diabetes and its treatment are substantially limiting in the life of the individual, an issue which is discussed in the next question.

Notes

The discussion in the next two sections applies to claims under the Americans with Disabilities Act and Section 504. The Individuals with Disabilities Education Act adopts a different definition of disability (see Question 4.7).

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. U.S. Dept. of Educ., Office for Civil Rights, Chicago Office, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 24.

The Americans with Disabilities Act 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. This creates two requirements, first, that there be a physical or mental impairment, and second, that this impairment substantially limit a major life activity.

Even if an individual cannot meet this definition, and therefore does not have an actual disability, that person is considered to have a disability if he or she has a record of an impairment that substantially limits one or more major life activities, or is regarded as having such an impairment. See Nyack (NY) Unified School Dist., Complaint No. 02-04-1065, 43 IDELR 169, (OCR 2004) (finding that a school regarded a student with diabetes as disabled even though the student had not formally been identified as having a disability under Section 504, based on evidence that the school excluded the student from a field trip because of concerns about her diabetes). ADA regulations expressly provide that diabetes is a “physical impairment.” 28 C.F.R. §§ 35.104 (Title II), 36.104 (Title III). Major life activities recognized by regulations and the courts include eating, caring for one’s self, walking, seeing, learning, reading, and thinking. 28 C.F.R. § 35.104 (walking, seeing); Lawson v. CSX Transportation, 245 F. 3d 916, 923 (7th Cir. 2001) (eating, caring for one’s self); Bartlett v. New York State Bd. of Law Examiners, 2000 U.S. App. LEXIS 22212 (2d Cir. 2000) (reading); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999) (thinking). Section 504 has a similar definition of “disability” which extends protection to those with a physical impairment,
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including the endocrine system (which is affected by diabetes) that “substantially limits one or more major life activities.” 34 C.F.R. § 104.3(j).

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. Measures needed by students in the school setting to treat and control diabetes (such as insulin injections, snacks or other forms of treatment) are not considered in determining whether a student has a disability. The Supreme Court has held that certain “mitigating measures” used by people with disabilities must be considered in determining whether an individual’s impairment is substantially limiting and therefore covered by the ADA and Section 504. However, because schools usually exercise ultimate control over whether and when students can treat their diabetes, such mitigating measures should not be considered in the school setting. Only those mitigating measures that students may use without any action or assistance by the school are to be considered.

Notes

Whether an impairment “substantially limit[s]” a major life activity has been much debated in the employment context. The Supreme Court has held that the effect of “mitigating measures,” must be taken into account when deciding whether a person’s limitation is substantial. Where these mitigating measures correct an impairment so that it does not affect a person (for example, when glasses are worn to correct myopia), that impairment would not be a disability because, when corrected, it is not substantially limiting. Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed. 2d 450 (1999). Whether a person has a disability requires an evaluation of an individual’s actual condition. Thus, those with diabetes must be individually evaluated. In Sutton, the Supreme Court observed that without consideration of an individual’s actual condition, including corrective measures, “courts would almost certainly find all diabetics to be disabled, because if they failed to monitor their blood sugar levels and administer insulin, they would almost certainly be substantially limited in one or more major life activities,” and therefore a “diabetic whose illness does not impair his or her daily activities would therefore be considered disabled simply because he or she has diabetes.” 527 U.S. at 483.

Although people with diabetes are not automatically covered under Section 504 and the ADA simply because of their diagnosis, diabetes will often meet the definition of a disability because of the way it affects individuals. In determining whether a person with diabetes is covered, both that individual’s medical condition and the extent of his or her treatment program must be considered. Not only is a person with diabetes subject to risks of hypoglycemia, hyperglycemia, and their consequences, but the regimen of treatment itself is significant (e.g., monitoring blood glucose levels, snacks to avoid hypoglycemia, injecting insulin). In the employment context, type 1 diabetes has been considered a disability when the interaction of the disease and its management are considered. See, e.g., Branham v. Snow, 392 F.3d 896 (7th Cir. 2004) (taking into account “any negative side effects” that person with insulin treated diabetes has “from the use of mitigating measures” such as significant restrictions “as to the manner in which he can eat as compared to the average person in the general population” and necessity to “adjust his diet to compensate for any greater exertion, stress, or illness that he experiences” summary judgment precluded on question whether illness substantially limits the major life activity of eating); Lawson v. CSX Transportation, Inc., 245 F.3d 916 (7th Cir. 2001) (reversing grant of summary judgment; noting that the plaintiff
“must endure the discomfort of multiple blood tests to monitor his blood glucose levels,” “must adjust his food intake and level of exertion to take into account fluctuations in blood sugar,” and “[w]hen his blood sugar drops, he must stop all other activities and find the kinds of food that will bring his levels back to normal or he will experience disabling episodes of dizziness, weakness, loss of mentation and concentration, and a deterioration of bodily functions ….”); Fraser v. Goodale, 342 F. 3d 1032 (9th Cir. 2003) (bank employee whose diabetes was difficult to control due to frequent, rapid, and unpredictable blood sugar fluctuations, considered disabled).

The argument that a student with diabetes is protected despite mitigating measures is often even stronger than that for an employee. This is because school personnel have a great deal of control over the behavior and activities of students while they attend school; thus, a student is not free to manage or mitigate diabetes as he or she sees fit. Rather, the student must abide by whatever rules the school has in place about insulin or medicine administration or other treatment issues. Similarly, students who are not able to self-manage the disease will receive appropriate care only if provided for by the school.

The Office for Civil Rights issued a Guidance to its staff following Sutton, in which it explained the critical distinction between circumstances faced by employees and students. This Guidance is important to advocates because Sutton is sometimes erroneously used as a justification for denying accommodations to students with diabetes. The Guidance makes clear that Sutton actually has rather limited application in the usual school setting.

In the Guidance, OCR noted the difference between mitigating measures which the student may use without any action or assistance by the school, on the one hand, and those reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services that schools are required to provide, on the other. See Sutton Investigative Guidance: Consideration of “Mitigating Measures” in OCR Disability Cases, U.S. Department of Education Office for Civil Rights (September 29, 2000). OCR finds that “permission to monitor diabetes or inject insulin” belongs to the latter category. The distinction is significant.

OCR explains:

Mitigating measures should not be confused with reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services, all of which are provided by, or are under the control of, the educational institution. Examples of these are computers adapted for use by blind students, sign language interpreters, and permission to monitor diabetes or inject insulin. When some action or permission on the part of the school would be required before a student could use a measure, the effects of the measure will not be considered as “mitigating” because the measure is effectively unavailable to the student unless the school takes some action. Therefore, OCR will not consider the impact of reasonable modifications, academic adjustments, auxiliary aids and services, or related aids and services when evaluating whether a student’s impairment substantially limits a major life activity.

OCR further explains:

If there is a mitigating measure involved, determine if the student can use the mitigating measure independently in the school setting. Does the student need the school to take some action (such as provide a related aid or service, or modify a policy, including giving permission to use the mitigating measure during school hours, on school grounds) in order to use the mitigating
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measure? If the student needs the school to take some action, do not consider the effect of the measure (positive or negative) in determining if the student has an impairment that substantially limits him or her in any major life activity.

OCR notes other pertinent considerations to be evaluated. For example, there may be side effects to mitigating measures a student uses. Also, mitigating measures may not fully correct the effects of the disability. Both affect the determination of whether a disability for purposes of Section 504 or ADA is involved.

OCR’s Guidance specifically recognizes the need to consider the possible side effects of the use of insulin. The Guidance states:

Determine if the mitigating measure is effective all of the time for this student. If there is a risk of failure of the mitigating measure(s), or a risk that the effect of the mitigating measure(s) may not be consistent, then the student may still be substantially limited in a major life activity, despite the use of the measure(s). If that is the case, the school should be prepared to deal with emergency situations that might arise if the mitigating measure fails. For instance, a student with diabetes who injects insulin at home may still need an insulin injection, on an emergency basis, at school.

Decisions from OCR have also found students with diabetes to be disabled, based on an analysis of their condition. See, e.g., 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); 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).

Despite the clear intent of the OCR Sutton guidance, one district court considered a student to be “using” a mitigating measure, and thus potentially not disabled, even when the measure is not available to that student at a particular time. For example, in Garcia v. Northside Indep. Sch. Dist., 2007 U.S. Dist. LEXIS 103 (W. D. Tex. 2007), a student with severe asthma died when he had difficulty breathing during physical education class and did not have access to his inhaler (because it was locked in the gym with his other belongings). Although the court cited the Sutton guidance for the proposition that mitigating measures should not be considered if they were not used, it held that the student was “using” his inhaler at the time of his death, even though it was not available to him at that time. Since the plaintiffs admitted that the child’s asthma did not affect him when using his inhaler, the court found that he was not disabled. There were no allegations in that case that the school actively prevented the student from having access to his inhaler. It should be noted that even if a child with diabetes were considered to be “using” insulin under these circumstances, the insulin would not mitigate the effects of diabetes.

Schools often do not question that students with diabetes are covered under Section 504 and the ADA. See, e.g., Lisbon School Dist., 33 IDELR 172 (Maine State Educational Agency 2000) (observing there was no dispute that student with type 1 diabetes was a child with a disability).
Diabetes, even when treated, can affect a number of major life activities, such as caring for oneself and eating. As pointed out in one decision, “all individuals who take insulin are subject to insulin reactions” including “insulin shock which, when it happens, substantially limits a major life activity by impairing a person’s ability to walk, see, hear, speak, breathe, learn, and/or work.” Gasconade County (MO) R-I Sch. Dist., Complaint No. 07-91-1061, 18 IDELR 313 (OCR 1991). Diabetes can also substantially limit the ability to learn because, when glucose levels are high or low, the ability of a student to concentrate, to pay attention, to study can be seriously affected.

Children with type 1 diabetes have been covered under the ADA and Section 504. Indeed, the American Diabetes Association is aware of no situation in which a child with type 1 diabetes has been found not to be covered by these laws. Some students with type 2 diabetes face similar limitations, while others do not use insulin or oral medications. 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). A person who experiences no substantial limitation in any major life activity when using a mitigating measure, such as medication, does not meet the definition of a person with a disability. U.S. Dept. of Educ., Office for Civil Rights, Chicago Office, Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Question 21. However, a case-by-case evaluation of a child must be made to determine whether there is a substantial limitation of a major life activity as a result of the disability. Id., Question 22. Accordingly, those with type 2 diabetes also may be considered disabled.

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 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 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 (see Question 4.7).

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). 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 (Maine 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. Letter to McKethan, 23 IDFELR 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 while at school, 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. 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); *Garfield Heights City Schls.*, Complaint No. 15-04-1045, 42 IDELR 42 (OCR 2004) (by limiting its focus during a Section 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 Sch. Dist.*, Complaint No. 04-98-1089, 30 IDELR 549 OCR 1998 (district’s Section 504 plan improperly excluded students whose disabilities impact major life activities other than ability to learn).

In *Rock Hill Local Schools*, the Office for Civil Rights 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, so long as a student with diabetes has a substantial limitation in a single major life activity (which can include many activities besides learning), that student is qualified under Section 504 and entitled to receive the health related services needed, without the student needing to show any existing impairment regarding learning.

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

Unlike Section 504 and the ADA, IDEA’s 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 causes that student to need special education services. As a result, some students who are covered under Section 504 and the Americans with Disabilities Act (ADA) will not be covered under IDEA.

Advocates should be sensitive to the possibility that 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.
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. § 1410(d); 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 School Dept., 33 IDELR 172 (Maine 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. According to the California Department of Education:

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.


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 School Dept., 33 IDELR 172 (Maine State Educational Agency 2000). See also 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. SE-1180-2002 (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 School Corp., 39 IDELR 202 (Indiana 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] Act.” 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. The child would be a “child with a disability” under IDEA. 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 school subject to these statutes 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 recipients program or activity.” 34 C.F.R. § 104.4(b)(1); 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) Public 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. 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.

The Office for Civil Rights has held that a parent-teacher organization (or PTA) received significant assistance. Irvine (CA) Unified Sch. Dist., Complaint No. 09-93-1043, 19 IDELR 883 (OCR 1993). 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.

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. *Irvine (CA) Unified Sch. Dist.*, Complaint No. 09-93-1043, 19 IDELR 883 (OCR 1993) (finding violation and imposing requirement). 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).

**4.9 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 Question 4.3, 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.
What Legal Protections are Available for Students?

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). 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. 1999). But see *Boston (MA) Public 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).
4.10 Does coverage under Section 504 and the Americans with Disabilities Act differ for those students in elementary or secondary as compared with those in postsecondary education?

Yes. At the elementary or secondary education level, all students with a disability may be protected while in higher education they must meet the prerequisites for admission or participation in the program or activity.

Notes

This notebook considers the rights of children with diabetes in elementary and secondary education. Some, though not all, of these rights also apply in postsecondary and vocational education programs. Any elementary or secondary student of school age with a disability is entitled to protection. 34 C.F.R. § 104.3(l)(2). With respect to postsecondary and vocational education services, a person with a disability must meet the academic and technical standards requisite to admission or participation in the education program or activity involved. 34 C.F.R. § 104.3(l)(3). Diabetes will seldom preclude admission or participation in postsecondary programs, and many issues (e.g., self-care or possession of supplies) are unlikely to arise in these settings.

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 www.diabetes.org/advocacy-and-legalresources/discrimination/school/legislation.jsp States with school diabetes care laws are: CA, CT, HI, MA, MT, NC, OR, SC, TN, TX, VA, WA, and WI.