

Legal Obligations in Child Nutrition for Students with Disabilities



**2021 Spring Conference
Alabama Child Nutrition Directors**

April 16, 2021

**Julie J. Weatherly, Esq.
Resolutions in Special Education, Inc.
Mobile, Alabama**

Applicable Special Education Laws

- Section 504 of the Rehabilitation Act of 1973 (“Section 504”)
 - Americans with Disabilities Act (“ADA” Title II)
 - Individuals with Disabilities Education Act (“IDEA”)
 - Alabama Administrative Code (“AAC”)
-

USDA Regulations and Guidance

- More specifically regulate National School Lunch and Breakfast Programs;
 - Set forth nondiscrimination regulations (7 CFR 15b) which govern the NSLP and NSBP and require accommodations, substitutions or modifications in school meals for students with disabilities (virtually identical to 504 regulations);
 - Informal Guidance: “Accommodating Disabilities in the School Meal Programs: Guidance and Q&As” (USDA SP 40-2017 and Guide, SP 26-2017) and “Modifications to Accommodate Disabilities in the School Meal Programs” (USDA SP 59-2016)
-

What is Section 504?

- Section 504 is an anti-disability discrimination statute that provides, in pertinent part:

No otherwise qualified individual with a disability in the United States ...shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance....

29 U.S.C. 794.

What is an “Individual with a Disability?”

Under 504’s implementing regulations, a person is “handicapped” if he or she:

- Has a **physical or mental impairment** which **substantially limits** one or more **major life activities**;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

What is a “Physical or Mental Impairment?”

Under Section 504/ADA, a “physical or mental impairment” includes:

- Any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or
 - Any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
-

What is a “Major Life Activity?”

504’s examples of MLAs include:

- Caring for one's self
 - Performing manual tasks
 - Walking
 - Seeing
 - Speaking
 - Hearing
 - Breathing
 - Learning
 - Working
 - Eating?
-

2008 ADA Amendment Act

The ADAAA expanded the examples of MLAs to include:

- Eating
 - Sleeping
 - Standing
 - Lifting
 - Bending
 - Reading
 - Concentrating
 - Thinking
 - Communicating
-

2008 ADA Amendment Act

The ADAAA further expanded the examples of MLAs to include:

- The operation of a major bodily function; and
 - Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions. 42 USC 12101(2)(B).
-

DOJ's Broad Interpretation of "Substantially Limits"

- An impairment is “substantially limiting” if it limits the ability of an individual to perform a major life activity as compared to most people in the general population;
- Making the determination as to whether a condition is substantially limiting requires an individualized assessment;
- The determination generally will not require scientific, medical or statistical evidence. It is not a demanding standard requiring extensive analysis!

Other 504/ADA Considerations for Determining Disability

- An impairment need not be life threatening to be a disability. It is enough that it limits an MLA. For instance, digestion is an MLA. If digestion is impaired by lactose intolerance, it could constitute a disability, regardless of whether consuming milk causes severe distress;
 - An impairment may be a disability even if medication or some other “mitigating measure” can reduce the impact of the impairment. For instance, while a child may be able to control an allergic reaction by taking medication, that is not to be considered in determining whether the allergy is a disability;
 - Whether a physical or mental impairment is a disability under 504/ADA must be determined on a “case-by-case” basis.
-

What is a Disability under IDEA & AAC?

A student must have one of the recognized conditions based upon a comprehensive individualized evaluation and eligibility team process; the condition must adversely affect educational performance; and the student must need special education and related services.

Autism (AUT)	Orthopedic Impairment (OI)
Deaf-Blindness	Other Health Impairment (OHI)
Developmental Delay (DD)	Specific Learning Disability (SLD)
Emotional Disability (ED)	Speech or Language Impairment (SLI)
Hearing Impairment (HI)	Traumatic Brain Injury (TBI)
Intellectual Disability (ID)	Visual Impairment (VI)
Multiple Disabilities (MD)	

A Quick Comparison of IDEA and 504

IDEA	SECTION 504
Provides additional federal funding to covered entities	No additional federal funding to covered entities
Limited specific categories of “students with disabilities”	Very broad definition of what is a “student with a disability”
Extensive Procedural Safeguards	Some Procedural Safeguards
Not all students with disabilities are covered under IDEA	All students with disabilities are covered by 504’s anti-discrimination provisions
An Individual Education Plan (IEP) is developed for all eligible students that contains special education and related services that are reasonably calculated to assist the student to make appropriate progress in light of the student’s circumstances.	A Section 504 Plan is developed to reflect needed accommodations that meet a student’s educational needs as adequately as educational needs of nondisabled students are met. However, not all eligible students with disabilities will require a 504 Plan.

The Duty to Provide Special Meal Services

While the Child Nutrition Program is not required to provide a special meal service to students with disabilities when meal services are not made available to the general student body, it *is* required if a disabled student's IEP or 504 Team determines that it is necessary to afford the student a free appropriate public education (FAPE).

The Duty to Provide Special Meal Services

Where meal services are made available to the general student body, schools must take steps to make meal services equally accessible—with or without accommodations—to students with disabilities and to ensure that school environments are as safe for students with disabilities as they are for nondisabled students. This includes providing special meals at no extra charge.

Who Makes Special Dietary Decisions?

If the student has a disability, it will be the student's 504 or IEP Team. In many cases, the "most effective team" will include school food service staff, school administrators, school medical personnel, parents/guardians, children (when appropriate), and other school officials with relevant experience, such as school nutritionists. "Using a 'team approach' ensures information is shared consistently throughout the school environment and will help to protect children in situations where food is served outside the cafeteria, such as during classroom parties."

USDA 2017 Guidance, SP 26-2017, page 6.

Conditions Often Related to Special Dietary Issues

- Diabetes
 - Cerebral Palsy
 - Autism
 - Food Allergies
 - Muscular Dystrophy
 - Phenylketonuria (PKU)
 - Intellectual Disabilities
 - Dysphagia
 - Down Syndrome
 - Celiac Disease/Other Food Intolerances
 - Epilepsy
 - Cystic Fibrosis
 - Traumatic Brain Injury
 - Obesity
 - Food Sensitivities
-

Legal Issues & Guidance

Plumas (CA) Unif. Sch. Dist. (OCR 2010). Where there was confusion about the 504 Plan's provision for a 6-year-old with a severe peanut allergy that there would be "no nuts in the lunchroom," the school did not violate 504 when it implemented the Plan as it understood its meaning. While the parents interpreted the provision to mean no nuts would be present anywhere, the district interpreted it to mean that no nuts would be used in activities or decorations in the lunchroom. According to 504 team meeting participants, the principal verbally made it clear to the parents that the lunchroom would continue to serve food containing nuts and that other students would be permitted to bring lunches containing nuts.

- Lesson learned: 504 Plans should be clear and specific in order to avoid disputes and miscommunication (and filing of OCR and other Complaints).
-

Legal Issues & Guidance

Henry Co. (MO) R-I Sch. Dist. (OCR 2009). Despite a 504 Plan, food service workers gave kindergartner with celiac disease gluten twice, resulting in the child becoming seriously ill and having to leave school for treatment. In addition, a substitute teacher allegedly gave the child candy without checking to ensure it was gluten-free. As a result, the parent began providing meals for the child, because the district did not inform her of what it was doing to prevent the incidents from recurring. While the principal told OCR that substitutes are aware of the child's condition, the child's teacher told OCR that she does not consistently inform substitutes of the 504 Plan's gluten provisions, because they appear in the child's file. In this case, the 504 Plan implementation failures resulted in serious physical harm and prevented the child from eating district meals. Thus, the failure to provide her a completely gluten-free diet and to inform substitutes of her dietary needs significantly impacted her ability to participate in or benefit from her program. The district agreed to sign a resolution agreement to achieve compliance.

- Lesson learned: Cafeteria workers and substitute teachers must be fully apprised of any food restrictions set forth in IEPs, 504 Plans and/or Health Care Plans.
-

Legal Issues & Guidance

Encinitas (CA) Union Sch. Dist. (OCR 2014). Parents of a kindergartener with a severe peanut allergy claim that they frequently found food with peanut ingredients at the student's "nut-free table" when they visited during lunchtime. Where 504 regulations provide that schools may not discriminate against students with disabilities, exclude them from participating in, or deny them the benefits of, school programs, this means that schools must take steps to ensure that school environments are made as safe for students with disabilities as they are for nondisabled students. OCR will close the matter, however, since the district has agreed to take adequate steps to address the parents' concerns, including training and educating staff members on foods that contain peanuts and assigning employees to monitor the nut-free table.

- Lesson learned: Merely designating a table as "allergen free" may not be sufficient to address the needs of a student with a serious food allergy.
-

Legal Issues & Guidance

General McLane Sch. Dist. (SEA Pa. 2019). While student is not eligible under IDEA, the student is 504-eligible and the district is ordered to provide the student with a 504 Plan. There is no dispute that the district accepted the diagnoses of the student's eating, swallowing, food hypersensitivity and dysphagia conditions. In addition, there is unrebutted testimony and documentation that describe how these medical conditions substantially limited and interfered with the student's major life functions. However, because the Superintendent directed that a modified lunch menu be provided to the student, the parent's request for compensatory education is denied, but a 504 Plan formalizing the arrangement is required. The Plan shall provide the student with a modified lunch menu and “a commensurate opportunity to purchase lunch in school” as had been directed by the Superintendent.

- Lesson learned: 504 “evaluations” must be conducted when there is reason to believe a student has a disability and needs special services. When a student is found to have a disability, 504 accommodations should be formally and clearly set forth in a 504 Plan. Verbal directives are generally not sufficient.
-

Legal Issues & Guidance

Wooster (OH) City Sch. Dist. (OCR 2013). The parent requested information about whether the ingredients used to make the food items sold in her daughter's middle school cafeteria were produced in facilities with peanuts or tree nuts. Although the parent claims the district refused to provide the requested information, the district explained that it needed time to look up item codes for the 200 food items sold in the cafeteria so that its food service provider could research the facilities that produced the ingredients. In the interim, the district advised the parent by letter that it had removed all peanut butter and nut products from the school lunch menu. The district's food service director also invited the parent to come to the school and review the ingredient labels for the foods sold in the cafeteria, but the parent did not express an interest in doing so. Because the district has since provided all of the cross-contamination information the parent requested, the complaint is resolved.

- Lesson learned: Respond to parent requests about potential allergens in school meals as quickly and thoroughly as is reasonably possible.
-

Legal Issues & Guidance

T.L. v. Sherwood Charter Sch., (D. Ore. 2014). The parent's claim that the school deliberately refused to accommodate her child's diabetes under Section 504 and ADA is rejected. Although lunchroom monitors failed to ensure that the student ate his entire lunch on the day in question, which caused a drop in his blood sugar, the principal promptly met with lunchroom monitors and reminded them of their supervisory duties under the student's 504 plan. In addition, the school nurse spoke to the student and learned that the incident resulted from a misunderstanding about his right to bring food into certain locations on campus. She encouraged the student to advocate for himself if he needed to finish his lunch and made sure he knew he was allowed to do that. She also reviewed the student's diabetes protocol with all relevant personnel. Because the student had no further issues with eating lunch and the incident did not have serious medical or educational consequences, the school is entitled to judgment on the parent's "failure to accommodate" claims.

- Lesson learned: If a 504 Plan is not implemented, take immediate action and put plans in place to ensure that that implementation failure does not recur.
-

Legal Issues & Guidance

Moody v. New York City Dept. of Educ. (2d Cir. 2013) (unpublished). While an 11-year-old diabetic student may have preferred eating hot food for lunch, his preference does not require the school district to heat up lunches prepared by his mother. The availability of diabetic-friendly lunch options in the school cafeteria satisfied the district's duty to accommodate the student's disability, and the district only is required to ensure that the student has meaningful access to school lunch and other district programs. Here, the school's cafeteria offered a selection of hot and cold foods that the student could eat. Thus, even if the student sometimes skipped lunch and did not like the food on the school menu, that did not warrant a further accommodation beyond what the district had already provided. In addition, the district monitored the student's blood glucose throughout the day to ensure it stayed within acceptable levels.

- Lesson learned: Not every dietary request is required to be granted. Accommodating preferences is not required. Accommodating a disability is.
-

Questions, Comments or Concerns?

