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Alike and Different: Non-Discrimination, FAPE, and IHPs Under Section 504

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Alike and Different

- 504 504 plans
- 504 take
- 504 many
- 504 different
- 504 forms
- 504 and are not
- *504* *always necessary (or could be an IHP)*

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Alike and Different

- What is Section 504?
 - Non-discrimination law
 - Part of the Rehabilitation Act of 1973
 - Passed in part due to military personnel returning from Vietnam and being unable to find employment
 - Military service was not regarded as positively in connection with Vietnam; and
 - Many veterans who would have died in earlier conflicts were returning home alive, but with serious impairments
 - Applies only to recipients of federal funds

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Alike and Different

■ What is the Americans with Disabilities Act (the ADA)?

- Non-discrimination law
- Modeled in part after Rehabilitation Act of 1973
- Holds private entities to same standards as federal funding recipients regarding disability discrimination
- Applies to most private companies and to governmental entities (including school districts)
- Generally, compliance with 504 is same as compliance with the ADA
- So, today's focus is on Section 504 – particularly as it applies to students

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■ What does Section 504 say?

- No otherwise qualified individual with a disability . . . 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.

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■ What does that mean – Step 1?

- No otherwise qualified individual with a disability . . .
 - Student meets the qualifications applied to all others who participate in the activity
 - Examples:
 - Is of an age for which public education is available
 - Can perform physical requirements with or without accommodations

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- What does that mean – Step 2?
 - Shall solely by reason of disability . . .
 - May not be excluded just because of disability
 - In theory, “mixed motive” discrimination might not be unlawful
 - In practice, it is dangerous and inconsistent with educational purposes
 - Additionally, state agencies and courts have determined that it is unlawful under the Missouri Human Rights Act
 - A minute to consider the MHRA!

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- What does that mean – Step 3?
 - Be excluded from participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance.
 - Applies to public education
 - Applies to the entire program
 - Not just discrete parts receiving assistance

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- Just to be clear, what does Section 504 cover?
 - Total program (summer school, pre K (whether tuition or not))
 - Academic (including field trips)
 - Non-academic
 - Extra-curricular
 - School sponsored camps

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■ Is Section 504 related to the IDEA?

- IDEA was passed after Section 504, in part to fulfill responsibilities to students under Section 504
- Students receiving special education and related services are also protected by 504 (because they have a disability)
- The scope of 504 protection is often broader than the scope of the IEP
- When health issues are the reason for the IEP, the school nurse is an important member of the IEP team, as well!!!

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■ What does this mean for school nurses?

- If a student with a disability is otherwise qualified to participate in any program or activity of the school, with or without accommodations, the student must be included
- Regardless whether the activity is academic or non-academic, the school nurse may have information that will inform decisions about whether the student can participate and whether and what type of accommodations are needed
- Depending upon the nature and severity of the disability, the school nurse may be the case manager and the plan developed by the school to accommodate the student may be an Individualized Healthcare Plan (IHP)

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■ Was Section 504 recently amended?

- Yes, amended by the Americans with Disabilities Act Amendments Act (ADAAA)
- Amendments have a direct effect on school health services and on 504 compliance
- But they do not change fundamental principles

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- What is a disability under Section 504?
 - Definition of “disability”
 - Mental or physical condition
 - ***Substantially limits***
 - Major life activity

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- Is a medical diagnosis or the observable presence of a mental or physical condition the same as a disability?
 - No, not always
 - The condition must substantially limit a major life activity

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- Key issue? – “Substantially limits”
 - As compared to other non-disabled students
 - OCR typically will not revisit decision
 - OCR will examine process by which decision was reached
 - Integrity of process and documentation are essential
 - Sometimes school personnel are so distressed about ultimate decision that they forget essential procedures and documentation that would protect that decision

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- What did the ADAAA clarify as to whether a condition “substantially limits”?
 - Temporary or transitory conditions (usually those lasting less than six months) are not typically considered to be disabilities
 - But this is an individualized, fact-based inquiry, and particularly appropriate for the assistance of school nurses

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- What did the ADAAA change regarding whether a condition “substantially limits”?
 - May not consider mitigating measures (except ordinary glasses or contacts) in deciding whether a person is disabled
 - Must consider what the student would be like without the mitigating measures (this is not easy!)

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- What are some examples of “mitigating measures” that should not be considered in the “substantially limits” determination?
 - Medication; medical supplies, equipment or appliances; low-vision devices (other than exceptions above); 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

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- What did the ADAAA change regarding the list of “major life activities”?
 - General activities – carried over from existing law
 - Major bodily functions – new list to remedy conflicting or inconsistent case law and/or court decisions perceived to be inconsistent with purpose of the ADA and Section 504

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- What are the specific changes to the list “major life activities”?
 - General activities – eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating
 - Major bodily functions – immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive

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- How do these changes to Section 504 affect school health services?
 - More students potentially eligible for 504 services
 - Especially for conditions that did not substantially limit a major life activity as formerly defined (e.g., diabetes, ADHD, clinical depression, or other conditions that were being managed successfully by medication or other therapies)
 - More students with IHPs potentially eligible for 504
 - Increased role for nurses and other healthcare providers

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- What kind of disability discrimination is most commonly and directly related to students?
 - Failure to provide services or accommodations that would permit the student to participate in programs and activities, especially the failure to provide a Free Appropriate Public Education (FAPE)
 - Excluding students from specific activities or programs because of disability (plain old-fashioned discrimination, e.g., "We don't want that girl with a peanut allergy in our school," or "Kids who can't hear can't go out for track!")

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- What are the school district's specific obligations to students under Section 504?
 - FAPE
 - Free Appropriate Public Education
 - Primarily academic (but not entirely)
 - Non-FAPE
 - Primarily non-academic
 - Equal opportunity to participate in non-academic programs and activities

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Alike and Different

- How are FAPE and non-FAPE obligations alike?
 - Both prevent disability discrimination in its various forms
 - Two prongs of the 504 compliance fork!
- How are FAPE and non-FAPE obligations different?
 - Plans (necessary v. may be optional)
 - Protections (educational services v. equal access)
 - Procedures (FAPE appeal v. discrimination grievance)

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- How can these Section 504 obligations to students be satisfied?
 - Non-discrimination policies, training, and grievance procedures
 - 504 plans, IHPs, FAAPs, or other plans that document compliance with the mandate to provide educational and non-educational accommodations

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- Section 504 accommodations
 - Non-academic (non-FAPE) – access to all school activities (athletics, clubs, dances, etc.); may or may not appear on 504 plan or an IHP (if on an IHP, may need 504 plan)
 - Academic (FAPE) – instructional (extra time, preferential seating, shortened assignments, extra copies of textbooks); typically appear on 504 plan

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- What is the school's obligation regarding non-academic (non-FAPE) activities?
 - Equal opportunity to participate in programs and activities
 - Examples: counseling and health services, recreational activities, transportation, school-sponsored special interest groups or clubs, referrals to outside agencies that assist persons with disabilities, employment of students within and outside the school district (e.g., outside placement in mentoring or work programs that "refuse" to accept students with disabilities)
- Take a minute to consider the pregnant student (disabled or not!)

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- Remember that any sentence that begins with “Students with disabilities never” (or “always”) is already illegal, unless it is followed by –
 - “never suffer discrimination”; or
 - “always have an equal opportunity”

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- What are academic or FAPE activities?
 - FAPE is defined by 504 regulations
 - Provision of regular or special education and related aids and services that:
 - Are designed to meet the individual educational needs of students with disabilities as adequately as non disabled students; and
 - Are based on procedures that comply with the requirements of Section 504 and its regulations

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- What are some important FAPE factoids?
 - Not all students with disabilities are eligible for FAPE
 - The student must require educational services to be eligible for FAPE
 - A disabled student who does not require services is still protected from discrimination, but is not subject to the FAPE requirement
 - School nurses often help determine eligibility for services and appropriate programming

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■ What about 504 Plans?

- Surprise!!! – Nothing in Section 504, whether statute or regulation, requires a 504 plan
- IEPs are actually one method of providing a 504 plan, by the way, but only for students who qualify under the IDEA!
- An IHP or a Food Allergy Action Plan (FAAP) can be other ways of providing a “504 plan”
- But 504 plans are wise, where appropriate

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■ Why are 504 plans wise (essentially, necessary) for FAPE?

- Establish standards and criteria for student performance and staff compliance
- Basis for assessing student progress
- Essential for articulating between classrooms, grades, buildings, and districts
- Document district's intent to comply and its actual compliance with requirements of 504

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■ Why are 504 plans sometimes useful for non-FAPE obligations?

- Promotes compliance by staff and others
- Promotes consistency from one setting to another
- Documents compliance with basic non-discrimination requirements of 504
- More commonly used for health issues that do not involve an educational services component
- May take the form of an IHP or a Food Allergy Action Plan

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■ What is the 504 FAPE process?

- Similar to identification, evaluation, and placement process under the IDEA
- Emphasis is on process
 - Information from variety of sources
 - Information received is considered and documented
 - Decisions made by group of persons (often including the school nurse) knowledgeable about child, disability, meaning of evaluation data, and placement options
 - Decisions conform to Least Restrictive Environment requirements

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■ How are 504 plan reviews, revisions, and reevaluations conducted?

- No specific timelines under law
- IDEA timelines are a guide
- "Periodic" reevaluation requirement applies only to students eligible for FAPE
- BUT non-FAPE 504 plans, IHPs, and FAAPs should be reviewed at least annually, and revised as needed, as well
- Mental and physical conditions are subject to flux, especially in children and adolescents

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■ Are procedural safeguards required under Section 504, in the same manner as for IDEA?

- Necessary for actions regarding the identification, evaluation, or educational placement of a student
- May be similar to IDEA procedural safeguards, but should NOT be identical
- Timelines may differ – and allow flexibility
- NOT required for non-FAPE compliance, but a separate grievance procedure should be available for non-FAPE complaints
- Nurse play important role in all this – be sure nothing is included that is contrary to sound healthcare procedures

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- How do appeals from decisions regarding identification, evaluations, and placement under Section 504 work?
 - Should be exclusive remedy for these categories
 - Should use independent hearing officer selected by the district from list of qualified persons
 - OCR rarely revisits decisions by independent hearing officer because the process is deemed to comply with law
 - School nurse may be an essential witness, together with documentation
 - Process must be included in the 504 Procedural Safeguards
 - Different grievance process should be used for disability discrimination that does not involve FAPE

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- How does a Section 504 grievance procedure for non-FAPE discrimination work?
 - Separate procedure for alleged discrimination that does not pertain to identification, evaluation, or placement
 - Existence of this separate procedure should be acknowledged in the 504 Procedural Safeguards
 - It is possible for a student who is entitled to FAPE, and who has a 504 plan to be required to file a complaint under the separate grievance procedure
 - For example, student with disability gets extra time to finish a test after class; other student asks why the "dummy" gets extra time and he doesn't get to finish his test; teacher laughs and does nothing to address the second student's behavior
 - School nurse could be a witness, especially in "exclusion" situations

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- What should a Section 504 grievance procedure include?
 - Be specific to 504
 - Clearly identify the compliance coordinator
 - Appropriate timelines
 - Clear and consistent definitions
 - Provide for flexibility with respect to timelines

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■ How is Section 504 enforced internally?

- Personnel training and responsibilities
 - Training (yes, this is a compliance mechanism)
 - Documenting compliance
 - Documenting failure to comply
- Responding to complaints
 - Appeal procedure – identification, evaluation, and placement with respect to FAPE (academic issues)
 - Grievance procedures – general discrimination
 - The two procedures should be clearly separated

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■ How is Section 504 enforced externally?

- OCR complaint
- MCHR complaint (technically not 504, but “same difference” with complications)
- Petition for immediate injunctive relief
- Lawsuit for damages, as well as injunctive relief
- Potential for individual liability, punitive damages, and effect on employment
- Statute of limitations for most purposes – 26

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■ What should school nurses know about student discipline under Section 504?

- Like the IDEA –
 - Students eligible under Section 504 may not be suspended for more than 10 school days if the conduct is a manifestation of the student's disability
 - Requires manifestation determination by the 504 team
 - If health condition is involved, school nurse may be a necessary participant in the manifestation conference
- Different from the IDEA –
 - School not required to provide educational services during long-term suspension, unless provided for non-disabled students
 - Students who are engaged in current use of drugs or alcohol may be disciplined in same manner as non-disabled students

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- Why does Section 504 seem so difficult to administer?
 - Fear of the protections and procedures under Section 504
 - Compliance takes many forms
 - It must be an individualized determination
 - Educators and school nurses are in the best position to make legitimate educational and healthcare decisions, but are subject to second-guessing by non-educators and non-healthcare personnel in enforcement agencies and the courts
 - The process used may determine compliance as much as or more than the specific outcome (at least with respect to FAPE and the OCR, and even in some non-FAPE situations)

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Alike and Different

- How can school nurses prevent liability under Section 504?
 - Know the law
 - Understand how the non-discrimination and FAPE requirements are alike and different
 - Remember: The law evolves rapidly with respect to disability issues
 - Comply with the law
 - Document all compliance carefully, accurately, and contemporaneously!
 - Educate other school personnel

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