When Do We Need a Nurse?
Legal Obligations for Schools Regarding Nursing Services on Field Trips and During Extracurriculars

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FIELD TRIP NURSING SERVICES CHART

Are Nursing Services Required by Law?

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Does state law mandate nursing services on school grounds during the school day?

YES

Does the student need any other services, including administration of medications or other treatment?

NO

Does the trip, activity or event take place during the time when medication/treatment is to be given?

YES

Can the medication/treatment be scheduled for a time that is not during the trip/activity/event?

YES

No nursing services necessary. Provide maximum amount of advance notice possible and, where possible, include note in 504 Plan.

NO

No nursing services necessary. The Section 504 Plan should provide information regarding the student’s medical needs, including identification of any signs/symptoms that may be necessary for a coach, advisor, or chaperone to recognize, along with an action plan, if necessary.

Nursing services required.

NO

Can this be scheduled for a regular time during the day (either at home or at school)?

YES

No nursing services necessary. A 504 Plan should be developed that sets forth a well-developed plan for carefully-monitored self-medication.

NO

Does he/she require medication/treatment/services that ONLY a nurse can provide (emergency or otherwise)?

YES

Nursing services required.

NO

Does he/she require medication/treatment/services that qualifies him/her for accommodations under the ADA/Section 504?

YES

Student not legally entitled to nursing services. Careful! Should this student be Section 504-eligible?

NO

Is the nurse attendance being considered for emergency situations/care?

YES

Nursing services required.

NO

Is “call 911” sufficient in the event of an emergency (only choose “yes” if there are no nursing services that need to be provided prior to EMS arrival.)

NO

Does the student need any other services, including administration of medications or other treatment?

NO

No nursing services necessary. The Section 504 Plan should explain, in detail, what signs to look for, who is responsible for calling 911, etc.

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STATE LAW AND NURSING SERVICES

When determining whether nursing services are legally required to be provided, one of the key questions that must be asked is whether state law requires nursing services to be provided to students during the school day. State laws vary dramatically with regards to requiring the staffing of schools with school nurses, but one thing is certain: there are far too few nurses. A brief internet search regarding school nurse staffing will bring up a large number of articles addressing the current nursing shortage in today’s schools. This nursing shortage not only affects the school’s ability to provide basic nursing services to students, but it also may result in potential liability for schools under such laws as the IDEA and Section 504, under which students may be entitled to nursing services as a related service (more on that issue in the sections that follow).

The National Association of School Nurses recommends a minimum nurse-to-student ratio of 1:750 for “well” students, and the American Academy of Pediatrics recommends a full-time nurse in every school. Regardless of these recommendations, however, most states do not even have a law establishing a minimum nurse-to-student ratio, much less a requirement that all school buildings be staffed by nurses. Some states provide only a suggested ratio, such as Indiana’s 1:750 “recommended” school nurse-to-student staffing ratio (511 IAC 4-1.5-2) and Alabama’s 1:500 ratio that is contingent upon funding.

Other states, such as Delaware, use a highly-complex formula for determining school nurse-to-student ratios. In that state, staffing is determined by “units” of students, with the school nurse staffing ratio being 1:40 “units.” The number of students in a “unit” is established in the regulations (14 Del. Admin. C. § 1703) as follows:

- Preschool — 12.8
- K-3 — 16.2
- 4-12 Regular Education — 20
• 4-12 Basic Special Education (Basic) — 8.4
• Pre K-12 Intensive Special Education (Intensive) — 6
• Pre K-12 Complex Special Education (Complex) — 2.6.

Thus, pursuant to the Delaware code, the nurse-to-student ratio differs, depending upon the student population:

- Preschool – 1:512
- K-3 – 1:648
- 4-12 Regular Education – 1:800
- 4-12 “Basic” Special Education – 1:336
- Pre K – 12 “Intensive” Special Education – 1:240
- Pre K-12 “Complex” Special Education – 1:104

Not all school nurse staffing laws are as complex as the Delaware statute, though. Pennsylvania has established a simple but unwieldy nurse staffing requirement. In that state, the maximum nurse-to-student ratio is set at 1:1500 (24 P.S. §§14-1402 and 14-1410), which is simple to calculate but far above the NASN and AAP recommendations. In Pennsylvania, however, public school nurses are also obligated to provide basic school nurse services to private and parochial

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1 Defined as a special education student that does not fall under the defined categories of “intensive” or “complex” under the law, as set forth, below. 14 Del. Admin. C. § 1703(d)(4).
2 Defined as: “In need of a moderate level of instructional, behavioral, personal support, or health support characterized individually or in combination by the following: A. Need for adult-student ratio of 1:3 to 1:8 for a substantial portion of educational program; B. Need for staff support for mid-range or moderate-use assistive technology; C. Need for some extended school year or relatively frequent but intermittent out-of-school (e.g., hospital; homebound) services; D. Need for moderate level of related services, including interpreter, therapy, and school nurse and health services; E. Need for nonroutine or frequent accommodations or adaptations to curriculum or educational environment; and F. Such additional criteria as may be adopted by the Department with the approval of the State Board of Education through regulation.” 14 Del. Admin. C. § 1703(d)(5).
3 Defined as: “In need of a high level of instructional, behavioral, personal, or health support characterized individually or in combination by the following: A. Need for adult-student ratio of 1:1 to 1:2 for a substantial portion of educational program; B. Need for staff support for high-tech or extensive-use assistive technology which may include both high and low technology items; C. Need for extensive extended school year or relatively frequent but intermittent out-of-school (e.g., hospital; homebound) services; D. Need for extensive level of related services, including interpreter, therapy, and school nurse and health services; E. Need for extraordinary or extensive accommodations or adaptations to curriculum or educational environment; and F. Such additional criteria as may be adopted by the Department with the approval of the State Board of Education through regulation.” 14 Del. Admin. C. § 1703(d)(6).
students as well as public school students. (028 PA Code 23.51-.53B). This adds travel time to a school nurse’s already hefty caseloads and takes nurses away from school buildings, requiring schools to address nursing gap issues in buildings where a student’s disability might require nurse presence.

The map on the following page sets forth current student-to-nurse ratio averages in each state. Only a handful of states (Vermont, New Hampshire, Maine, Rhode Island, Connecticut, New Jersey, Delaware, Washington D.C., Missouri, Kansas, Wyoming, and Alaska) meet or exceed the NASN recommended staffing ratio of 1:750 or smaller.
In some states, local hospital systems are assisting by providing nursing services in states where the nurse-to-student ratio is high and/or where legally-established maximums do not exist. In Texas, there is no legally-required ratio; however, in Austin, a private healthcare corporation provides school nursing services at a 1:1200 ratio at no cost to the school.⁴

A closer look at whether schools are staffing full-time, part-time, or any nurses at all reveals some significant geographic trends. As indicated on the chart, below, schools in the western states (indicated in red on the chart) are far less likely to have full-time nurses and far more likely to not have any nursing staff than schools in the eastern U.S. The map, below, outlines the differences in types of school nurse staffing across the U.S.:  

**Federal Law Requirements – The IDEA and Section 504**

Regardless of state mandates and minimum nurse staffing requirements, a child must be provided with nursing services if the IEP or Section 504 Team determine that such services are needed for FAPE. *See 71 Fed. Reg. 46,574 (2006)(Comments to 34 CFR 300.34).* Under both laws, failure to provide necessary nursing services required for a student to participate in a public education program could result in substantial liability. Thus, it is the responsibility of the IEP and/or Section 504 Team to determine whether nursing services are required or whether other accommodations, such as assistance by non-nursing personnel, might be appropriate.

Although schools are obligated to provide nursing services, where necessary, the specific nurse assigned is left to the discretion of the school, and parents are not free to dictate or demand specific staff members. *See Swanson v. Yuba City Sch. Dist.*, 2016 WL 6039024, 68 IDELR 215 (E.D. Cal. 2016) and *North Bend Sch. Dist.*, 117 LRP 23752 (SEA OR 04/06/17).

**Students Not Protected Under the IDEA or Section 504**

Where a student does, in fact, qualify under the IDEA or Section 504, the District must consider whether nursing services are necessary. When a student does not qualify under either law, but does require nursing services, schools must look to state law to determine what accommodations, if any, are legally required to be provided. This is commonly an issue in cases where the condition for which a student may need nursing services is temporary in nature. In many cases, schools may be able to accommodate the student with the already-available nursing staff. However, in some cases, particularly with regards to off-campus and after-school activities for which there are no IDEA or Section 504-eligible students, a nurse may not be present to provide necessary services. In such cases, the district must determine whether to provide the necessary nursing services. If a student does require nursing services but does not qualify as a student with
a disability, schools must look to state law to determine whether there are any prohibitions against postponing the student’s participation in the activity or event until he/she is medically cleared to be able to participate without the need for nursing services. If state law requires participation, then the nursing services must be provided. If state law does not mandate participation, then the school may wish, for liability purposes, to prohibit the student’s attendance unless/until cleared by a physician to attend without nursing services. It is important to note that, while a non-disabled student may not have a right to accommodations, such as nursing services, pursuant to law under Section 504 or the IDEA, schools should not permit the participation of a student for whom nursing services are medically required, when a nurse cannot be present. Depending upon the state’s tort claims protections, this may lead to liability, particularly if the school was aware of the need for the services and expressly denied them. In such cases, preclusion from the activity would likely be favorable to permitting a student to attend and then failing to provide the necessary nursing services; however, state law should be consulted.

The IDEA

School nursing services are a type of related service that may be required for a student pursuant to the IDEA, depending upon the student’s individual needs. 34 CFR §300.34(c)(13). The IDEA contains a specifically-enumerated list of “chronic and acute health problems” that may qualify a student for IDEA services if the health problem 1) adversely affects the child’s educational performance and 2) results in a need for specifically-designed instruction. 34 CFR § 300.8(a)(9)(i). The “health problems” included in that list are:

- Asthma;
- ADD/ADHD;
- Diabetes;
- Epilepsy;
- A heart condition;
• Hemophilia;
• Lead poisoning;
• Leukemia;
• Nephritis;
• Rheumatic fever;
• Sickle cell anemia; and/or
• Tourette syndrome.

34 CFR § 300.8(a)(9)(i). In addition to these conditions, other IDEA-eligible disabilities may also require nursing services. For instance, students with Autism, Down Syndrome, and other disabilities that qualify for specially-designed instruction under the IDEA may have nursing needs.

It is important for IEP teams to remember, however, that accommodations provided in an IEP are not limited to only those conditions for which the student was deemed eligible under the IDEA. IEP teams must be aware that IDEA students may also have other disabilities that would qualify for accommodations under Section 504. While the development of a separate Section 504 plan for those non-IDEA disabilities is possible and not prohibited under the law, in most cases, a separate Section 504 team is not developed, and the IEP team must identify other disability-related needs and establish appropriate accommodations for such students.

SECTION 504

For students with qualifying disabilities under Section 504, nursing services may be a required component of FAPE if the student needs the nursing services in order to access or benefit from his/her education. See Walpole Pub. Schs., 26 IDELR 976 (SEA MA 1997).

SECTION 504 / ADA ELIGIBILITY:

While Section 504 contains a number of technical requirements that do not affect a school’s decision as to whether or not a nurse will be provided, such as whether the student has a history of being “regarded as” having an impairment, the analysis as to whether a student is an eligible student with a disability for the purposes of determining legally-required accommodations on
school trips and at school functions is much more straightforward and practical. There are 3 basic questions that must be asked to determine Section 504 eligibility for the purposes of determining whether a student is legally entitled, under Federal law, to accommodations, which may include nursing services. The questions are:

1. Does the student have a physical or mental impairment?
2. If so, does the physical or mental impairment affect one or more of the student’s “major life activities”?
3. If so, is it a “substantial limitation” of the “major life activity”?

Note that each of these items builds upon the answer to the previous. Thus, if the answer to any of these questions is “no,” the next question need not be asked. It is important to note that these 3 questions actually determine eligibility under Section 504 and the ADA, since the two laws share definitions and eligibility requirements. Under Section 504, if all three of these questions are answered in the affirmative, then the school is required to answer a resulting question: 4. What accommodations, if any, are needed?

- **QUESTION 1: DOES THE STUDENT HAVE A PHYSICAL OR MENTAL IMPAIRMENT?**

The Section 504 Regulations define a “physical or mental impairment” as 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, speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic/lymphatic, skin/endocrine, or any mental/psychological disorder such as mental retardation, organic brain syndrome, diagnosed
mental illness, learning disability not requiring specially designed instruction under the IDEA, or OTHER. 34 CFR §104.3(j)(2)(i).

Note: The 2008 ADA and Section 504 Amendments require that “[t]he definition of ‘disability’ in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.” In other words, when making a determination regarding “physical or mental impairment,” “major life activity,” or “substantially limits,” err on the side of caution by finding that an impairment exists.

- **Vision Impairments:**

  Vision impairments that are correctible with regular prescription eyeglasses are not deemed a disability under Section 504.

- **Transitory/Temporary Disabilities:**

  If the physical or mental impairment is transitory and minor, the student does not have a qualifying physical impairment. According to the guidance issued by the Office of Civil Rights in May of 2011, entitled *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, a transitory and minor impairment with an actual or expected duration of six months or less would not be "regarded as" a disability under Section 504 of the Rehabilitation Act of 1973 or the ADA. The six-month guideline is challenging, however, for a number of reasons. First, despite the language of the FAQ, the “6-month-rule” is found in a section of the ADA that relates to individuals who are “regarded as” being individuals with disabilities, not directly in the 504-applicable provisions, themselves. Thus, it is merely a guide and should not be a fixed determination.
Note that these temporary conditions CAN require nursing services. For instance, if a student temporarily requires a particular medication or nursing service that only a nurse can provide under the state’s nursing laws, the school should provide that service. However, since such student is not protected under either Section 504 or the ADA, he/she would be limited with regards to the causes of action that can be brought against the school if the school simply did not permit him/her to attend a particular extracurricular activity or trip due to the fact that no nursing services were available. As discussed in greater detail later in this document, nursing services should not be withheld if they are necessary for the student’s wellbeing, however, the student likely does not have any specific legal recourse where the school refuses to permit him to attend the activity or event due to lack of nursing services.

- **Question 2: Does the Physical or Mental Impairment Affect a Major Life Activity?**

  Under the law, “major life activity” is an open-ended category. It does provide, however, examples of what would be considered a “major life activity.” Those examples are:

  - [ ] Caring for oneself
  - [ ] Performing manual tasks
  - [ ] Walking
  - [ ] Seeing
  - [ ] Hearing
  - [ ] Speaking
  - [ ] Breathing
  - [ ] Learning
  - [ ] Reading
  - [ ] Eating
  - [ ] Standing
  - [ ] Sleeping
  - [ ] Lifting
  - [ ] Concentrating
  - [ ] Thinking
  - [ ] Working
  - [ ] Bending
  - [ ] Communicating
  - [ ] Major Bodily Function, which includes functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions
It is important to note that this is not a finite list. These are merely examples of what could be considered a “major life activity.”

- **QUESTION 3: IS THE LIMITATION ON THE MAJOR LIFE ACTIVITY A SUBSTANTIAL LIMITATION?**

  Here is the entire question, as it needs to be considered by the Team:

  As a result of the physical or mental impairment, is the student substantially limited as to the condition, manner, or duration under which the student can perform a particular major life activity as compared to the condition, manner, or duration under which the student of the same age/grade level in the general population can perform that same major life activity? U.S. Department of Education Federal Policy and Guidance – “Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008” (March 2011) - 03/25/2011.

  o **Mitigating Aids/Devices/Medications Should NOT be Considered:**

    It must be determined whether the disability would substantially limit a major life activity without the use of aids/devices/medications. Examples of mitigating measures are medication; low vision devices (except eyeglasses or contact lenses); hearing aids and cochlear implants; mobility devices, prosthetics, assistive technology; learned behavioral or adaptive neurological modifications; and reasonable accommodations or auxiliary aids/services. 28 CFR § 35.108(d)(1)(viii)

    It is particularly important to remember this consideration for field trip and extracurricular activity Section 504 planning for a student whose disability does not appear to be affecting him and whose only mitigating measure occurs in the evening or outside of the school day. Many Section 504 Teams mistakenly believe that, since this student does not need any accommodations
during the school day, he does not need a Section 504 plan, which is incorrect if there is any possibility that the student would wish to become involved in extracurricular activities or go on trips that may extend past the traditional school day.

- **Episodic Disabilities / Diseases in Remission**

  If it is an episodic disability (such as epilepsy/allergies/asthma) or a disease in remission (such as cancer), it must be determined whether there was a substantial limitation during times where the disability or disease was present. (Ex., for a student with epilepsy, consider the limitation imposed *during* a seizure.)

- **Determining a Need for Accommodations:**

  If all three of the above questions answered affirmatively, then the Team must determine whether the student requires any modifications (medical, physical, or educational) in order to receive a free appropriate public education (FAPE) and have equal access to the school’s programs. Students may be eligible for Section 504 protection and due process rights if they meet the requirements of questions 1, 2 and 3, above, however, a Section 504 Plan is only necessary where the answer to question #4 is also yes. It is possible that a student’s disability does not affect him/her during the school day, and, therefore, accommodations/modifications in school are not necessary. However, consider this issue very carefully. Is there something that occurs outside of the school day that affects his/her performance during the school day, such as a sleep disorder? If so, what accommodations would be necessary to ensure that the student is able to receive FAPE in school? How would this affect field trips and extracurricular activities?

- **The “Otherwise Qualified” Standard:**
It is important to note that a student must be otherwise qualified for a program or activity to be entitled to participate. A student, apart from his/her disability, must be able to meet the requirements of the program. For instance, in a school with a Spanish Club that requires students to have taken at least Spanish I, a student who has not taken Spanish I would not qualify for that club regardless of his/her disability. He/she has not met the requisite qualifications for participation.

- **Medical Accommodations:**

  All necessary nursing services provided because of a student’s disability are necessary accommodations under Section 504 and should be included in the Student’s 504 Plan. If a student is receiving medical services or accommodations, even if they are as simple as going to the nurse’s office before or after lunch to check glucose levels, that service/accommodation should be written into the Section 504 Plan. The presence of the medical accommodations within an Individualized Health Plan (IHP), where that IHP has not been considered by the Section 504 Team and incorporated into the Section 504 plan, will likely not be sufficient to meet the requirements of Section 504. That law affords parents due process rights as well as guaranteeing the students appropriate accommodations. It is rare that an IHP development process would satisfy the procedural requirements of Section 504. Therefore, all IHPs should at least be considered for Section 504 eligibility. We recommend that all students with IHPs be evaluated for Section 504 eligibility – this process affords the parents and students with their procedural safeguards while allowing the Section 504 team to make the legal determination.

**Examples of Commonly-Overlooked Nursing Accommodations**

In many cases, Section 504 teams may determine that the presence of a nurse in the building or within a specified distance is necessary. In such cases, then, the 504 team must also discuss and
address the issue of whether a nurse presence would also be required on the bus to and from school.


Additionally, Section 504 teams should consider whether a nurse needs to be within the same distance during field trips and extracurricular activities. If the 504 team determines that a nurse is necessary during the school day but not on the bus or during trips or extracurricular activities, the reasoning behind the discrepancy should be clearly and carefully documented.

**INCLUSION OF NON-NECESSARY NURSING SERVICES IN SECTION 504 PLAN OR IEP**

In some cases, Section 504 teams are tempted to include a nursing services provision in the 504 plan simply because the parents requested it and the school does, in fact, have a nurse on staff during the day. This can seem like the path of least resistance for the school employee, who may be pressured by the family to include the nursing services accommodation or who may be attempting to ingratiate themselves with the parents. However, for liability purposes, the 504 team should only include those accommodations that are necessary for the student to receive FAPE. Placing an accommodation into a Section 504 plan or IEP will likely be construed by the courts as agreement or declaration that the accommodation is necessary for FAPE. If this is the case, then, the school will be required to provide those services across all settings, including at school events/activities and on school transportation.

**ADMINISTRATION OF MEDICATION**

If a student with a qualifying disability under the IDEA and/or Section 504 requires the administration of medication during the school day, such administration is typically deemed to be
a related service to which the student is entitled. See Collier County Sch. Dist., 110 LRP 7471 (SEA FL 09/15/09); and Birmingham City Bd. of Educ., 33 IDELR 236 (SEA AL 2000).

As discussed above, the administration of certain medications, such as those that are required to be given intravenously or subcutaneously or those that need to be specifically measured or for which the dosage must be based upon the symptoms in question, may be specifically designated by law as a “nursing function” that may not be delegated to an unlicensed assistive personnel, although most states now expressly permit non-medical personnel to administer some emergency injectable medications, such as epi-pens for allergies and Glucagon for diabetes. Other medications, such as those that must be rectally-administered in emergency situations, like the commonly-prescribed emergency medication for epilepsy called Diastat, vary more widely state-by-state (see the “Epilepsy” section of the “Disability-Specific Issues” section, below, for more information on state rules regarding rectally-administered drugs).

For example, Section 10-22.21b of the Illinois School Code states:

It shall be the policy of the State of Illinois that the administration of medication to students during regular school hours and during school-related activities should be discouraged unless absolutely necessary for the critical health and well-being of the student. Under no circumstances shall teachers or other non-administrative school employees, except certified school nurses and non-certificated registered professional nurses, be required to administer medication to students. This Section shall not prohibit a school district from adopting guidelines for self-administration of medication by students. This Section shall not prohibit any school employee from providing emergency assistance to students.

Note that this law, while stating that non-medical school employees may not be required to administer non-emergency medications to students, does not specifically prohibit them from doing so, either. Still, a guidance document entitled “Recommended Guidelines for Medication
Administration in Schools,” which was jointly published by the Illinois Department of Human Services and the Illinois State Board of Education, suggests that the administration of medication by non-nursing staff be limited to administrators, not teachers.\(^5\)

In Pennsylvania, there is a direct conflict between the law and the non-regulatory guidance issued by the state Department of Health. In Pennsylvania, the administration of over-the-counter and regular oral prescription medication is not specifically reserved for nurses or other medically-licensed personnel by statute, such as the Nurse Practice Act. Thus, under the law, non-licensed personnel, such as building administrators or Section 504 teams, may delegate such administration to unlicensed personnel. (The legal defensibility of such delegation shall be discussed later in this paper.) The Pennsylvania Department of Health, however, has issued formal non-regulatory guidance on the matter and has staunchly indicated that even clearly-marked oral medications must be administered by a properly-licensed nurse. The PA Department of Health’s website clearly states that “[s]chool administrators do not have the authority to delegate nursing functions, such as medication administration.” That position is not supported by law, though, and, if followed, could have a significant impact on educational programs.

Utah’s *Nurse Practice Act* has a very specific requirement regarding the delegation of nursing functions within the school setting:


In addition to the delegation rule found in Section R156-31b-701, the delegation of tasks in a school setting is further defined, clarified, or established as follows:

\(^5\) The full text of this document is available at: http://www.dhs.state.il.us/onenetlibrary/27897/documents/schoolhealth/medguide2000.pdf
(1) Before a registered nurse may delegate a task that is required to be performed within a school setting, the registered nurse shall:

(a) develop, in conjunction with the applicable student, parent(s) or parent surrogate(s), educator(s), and healthcare provider(s) an IHP; and

(b) ensure that the IHP is available to school personnel.

(2) Any task being delegated by a registered nurse shall be identified within the patient's current IHP.

(3)(a) A registered nurse shall personally train any unlicensed person who will be delegated the task of administering routine medication(s), as defined in Subsection 58-31b-102(17), to a student.

(b) The training required under this Subsection (3)(a) shall be performed at least annually.

(c) A registered nurse may not delegate to an unlicensed person the administration of any medication:

(i) with known, frequent side effects that can be life threatening;

(ii) that requires the student's vital signs or oxygen saturation to be monitored before, during or after administration of the drug;

(iii) that is being administered as a first dose:

(A) of a new medication; or

(B) after a dosage change; or

(iv) that requires nursing assessment or judgment prior to or immediately after administration.

(d) In addition to delegating other tasks pursuant to this rule, a registered nurse may delegate to an unlicensed person who has been properly trained regarding a diabetic student's IHP:

(i) the administration of a scheduled dose of insulin; and

(ii) the administration of glucagon in an emergency situation, as prescribed by the practitioner's order or specified in the IHP.
**STATE NURSE PRACTICE ACTS, UNLICENSED ASSISTIVE PERSONNEL, AND THE DELEGATION ISSUE:**

Almost all states, within their *Nurse Practice Acts* (or similar state nursing laws), have rules regarding what nursing functions can and cannot be delegated to “Unlicensed Assistive Personnel.” (UAP is a frequent acronym in professional nursing literature and may appear in some state legislation and/or regulatory language.) Non-delegation rules can be tricky, however, in states where specific nursing functions are ambiguous or too broad. The National Association of School Nurses (NASN) has defined the term “delegation” in the school setting as follows:

*Nursing delegation* in the school setting is the assignment by the school nurse – not a school administrator – to a competent unlicensed individual (also called unlicensed assistive personnel [UAP]) the performance of a selected nursing task in a selected situation for an individual student. The school nurse facilitates the UAP training, evaluation of UAP competence, and provides for ongoing supervision of the UAP and the student’s health outcomes. The nursing process can never be delegated. 6

In their “Joint Statement on Delegation,” the American Nursing Association (ANA) and the National Council of State Boards of Nursing (NCSBN) provide this summary of the concept of nurse delegation:

ANA and NCSBN both defined delegation as the process for a nurse to direct another person to perform nursing tasks and activities. NCSBN describes this as the nurse transferring authority while ANA calls this a transfer of responsibility. Both mean that a registered nurse (RN) can direct another individual to do something that that person would not normally be allowed to do. Both papers stress that the nurse retains accountability for the delegation. 1

6 This definition can be found on the NASN’s website at: https://www.nasn.org/nasn-resources/professional-topics/delegation.
The issue of delegation has presented a significant amount of difficulty in some states. For instance, Pennsylvania’s Nurse Practice Act but it states that nurses may not delegate “nursing functions” to non-nurses. 63 P.S. §§ 212.1(k) and 216.1. However, the law does not designate administration of medication as a “nursing function.” Thus, there is no legal prohibition on either the delegation of administration of medication by nurses or the actual administration of medication by non-medical personnel. Indeed, there are a number of PA regulations that require certain lay staff members, such as employees in child care settings and nursing homes to administer medication. See, for example, 55 Pa Code §2800.182 and 55 Pa Code §3270.133.

**Policy Prohibitions on the Use of UAPs**

While schools are free to establish specific policies and protocols regarding the administration of medication, schools must consider Section 504 medication issues on a case-by-case basis and cannot simply refuse to allow non-nurses to administer medication when it may be safe, appropriate, and lawful to do so. In *School Bd. of Pinellas County*, 58 IDELR 59 (SEA FL 2011), the district had a specific policy that required a school nurse to administer insulin to diabetic students, not unlicensed personnel, regardless of training. In that case, there was no full-time nurse present at the student’s school. The school offered to have the student relocate to another school in the district that was staffed by a full-time nurse or allow the parents to provide the services when the part-time nurse was not available. Despite the testimony by two district witnesses, the district’s physician and an official from the Florida Department of Health, both of whom testified that the delegation of insulin administration is a nursing task, the IHO ruled that the provision of services by a UAP would constitute FAPE in this case. The student’s treating physician agreed that the services could be provided by a properly-trained UAP when the school nurse was not in the
building. The IHO in that case held that district policy cannot supersede what is individually appropriate for a student with disabilities.

**THE USE OF PARENTS IN LIEU OF TRAINED NURSING STAFF**

Requiring parents to provide accommodations/services that would otherwise be the responsibility of the school under Section 504 will likely constitute a denial of FAPE. *See Sarasota County (FL) Sch. Dist.*, 60 IDELR 261 (OCR 2012). However, some parents who are accustomed to providing medication and other services to their children may *volunteer* to provide accommodations to their own children on field trips and at school events (some may even insist on it). While there is nothing in the law that prohibits this practice, schools need to be extremely cautious in ensuring that the parents are aware that while the school they *may* provide such services to their students, they are not *required* to do so. Without proper documentation of the fact that the parents have requested to provide these services, it may appear as if the school is unwilling to provide them or ill-equipped to do so.

To ensure proper documentation of the school’s willingness and ability to administer medication and/or provide other accommodations in situations where a parent is volunteering to do so, such facts should be expressly set forth in the Section 504 plan, itself. The plan should set forth the procedure for when the parent chooses to provide the accommodations and should specifically acknowledge the fact that, should the parents be unwilling, unable, or simply just choose not to provide the accommodations, the school will provide them. In many cases, it is helpful (and in some cases necessary) to set forth protocols for parents who voluntarily choose to provide services for their child on a regular basis to notify the school in the event that they will not be able to do so for a particular event. Again, it is essential that the school make clear, in writing,
that the school is willing and able to provide the necessary accommodations and that the parents have requested to provide them voluntarily. The documentation should also indicate that the school is able to provide the necessary services, should the parents decide that they are no longer able/willing to do so.

THE USE OF PARENT VOLUNTEERS WITH NURSING QUALIFICATIONS IN LIEU OF PAID NURSING STAFF

In some cases, there may be a parent who has nursing qualifications who volunteers to serve in his/her nursing capacity on school trips or at school events. Schools should be extremely cautious about how they handle these arrangements, since the volunteer nurses would be providing professional services, not just general volunteer services. Schools should review their insurance policies and contact their carriers, where necessary, to determine whether a volunteer nurse would be covered under the school’s liability coverage. In the event that there is no coverage for a volunteer providing professional services, it may be in the school’s best interests to hire the volunteer on a per diem basis. While schools should check with their carriers to be sure, it is likely that this will effectively extend coverage to the volunteering parent. In the event that the school does determine that it is necessary or beneficial to hire the individual on a per diem basis, the school should also make sure that such action is not in violation of any bidding requirements or other legal obligations.

It is also important to ensure that the individual has the proper and necessary training, licensure, credentials, and certifications to provide the services. The school should obtain and maintain a copy of the individual’s licensure and any other necessary documentation, including any necessary child abuse clearances and background checks. It is recommended that the school perform a preliminary background check, if such is standard hiring practice, to ensure the validity
of the individual’s credentials and to ensure that there is nothing in the individual’s background or employment history that would preclude him or her from being a viable candidate for employment, even in a limited capacity.

**INDIVIDUALIZED HEALTH PLANS (IHPS) AND THEIR ROLE IN THE PROCESS**

Individualized Health Plans are plans that nurses develop to address the specific medical needs of a student during the school day. In most states, these are not legally-required documents, although they are best-practice tools used by nurses. They simply aid the nurse in establishing and documenting the services that are medically-necessary to be provided by the nurse for the student. Notably, however, despite the fact that they are written plans to address a student’s medical needs, IHPS are not fully-compliant with the mandates of Section 504. Under Section 504, in addition to the development of a plan, parents and the student are entitled to an evaluation and meetings using a team process that involves the parents to determine what accommodations are necessary and/or appropriate for the student. See 34 CFR §§300.34, 300.35, and 300.36 The IHP process simply does not satisfy all of these procedural elements, and the failure to include the parents in the process may also result in substantive deficiencies in the accommodations, as well, that the parents may have pointed out had they been involved in the process. See Springer (NM) Mun. Schs. 111 LRP 65450 (OCR 06/17/11); Roselle Park (NJ) Sch. Dist. 59 IDELR 17 (OCR 2012); and Anaheim City (CA) Sch. Dist., 115 LRP 19319 (OCR 12/02/14).

**IHPS AND CHILD FIND**

The presence of IHPS for a student who qualifies as a student with a disability under Section 504 and who has not been identified under Section 504 can lead to a child find violation. IHPs establish, definitively, that the district “knew or should have known” of a particular student’s disability and need for accommodations. Indeed, in one Missouri district, the Office for Civil
Rights (OCR) approved a settlement that required the district to revise all of its child find and Section 504 eligibility policies and procedures and establish a plan to review all of the IHPs in the district for Section 504 eligibility and to determine whether the IHP accommodations are appropriate, necessary, and/or sufficient. *Oran (MO) R-III Sch. Dist.*, 114 LRP 41265 (OCR 03/10/14).

A review of the eligibility requirements under Section 504 will reveal that most students for whom a nurse deems an IHP to be necessary will qualify as students with disabilities under Section 504, and the presence of an IHP will not justify a delay in Section 504 eligibility. *See Opelika City (AL) Sch. Dist.* 111 LRP 47376 (OCR 03/18/11); and *Tyler (TX) Indep. Sch. Dist.* 56 IDELR 24 (OCR 2010).

**DISABILITY-SPECIFIC ISSUES:**

- **DIABETES**

A recent amendment to the Pennsylvania School Code now permits UAPs to administer both insulin and glucagon to students with diabetes as well as

A school employee [*sic*] who is not a licensed health care practitioner and who has successfully completed the education modules under subsection (A) or annual education offered by a licensed health care practitioner with expertise in the care and treatment of diabetes that includes substantially the same information as outlined in subsection (A) may be designated in a student's service agreement or IEP to administer diabetes medications, use monitoring equipment and provide other diabetes care. H.B. 1606, Gen. Assemb., Reg. Sess., Section 6.2 (Pa. 2015-2016).

Many states have specific laws regarding the right to carry diabetic medications and equipment, the right of students to self-test, and the right to self-administer insulin. Attorneys should also review their state laws to determine whether there are any restrictions on or prohibitions regarding
the use of unlicensed assistive personnel (UAPs) and, where permitted, whether there are any specific training requirements, such as those set forth in the Pennsylvania statute, above.

- **EPILEPSY AND DIASTAT ADMINISTRATION**

In 2009, the California Board of Registered Nursing issued a directive to California public schools stating that the state’s Nurse Practice Act prohibited non-licensed personnel to administer Diastat to students, a (typically) rectally-administered form of valium designed to be used in seizure-related emergencies. Although the state’s School Code, at the time, permitted non-licensed personnel to administer other emergency medications, such as epinephrine and Glucagon, there was no similar law on the books with regards to Diastat. This non-regulatory guidance from the state Board of Nursing raised a great deal of concern and outrage, since, in instances where a nurse was not available, a student may be required to wait sometimes more than 10 or 15 minutes until emergency responders arrived, which is far too long in many cases. It is possible for a seizure that is left untreated to cause permanent brain injury or even death in a matter of minutes. In 2007, the California Department of Education issued a non-regulatory guidance statement indicating:

“When federal and state laws are reconciled, it is clear that it is unlawful for [a local education agency] to have a general practice or policy that asserts it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.”