

Individual Health Care Plans versus Section 504 Plans: School Districts' Obligation to Determine Eligibility for Students with Health Related Conditions

Outline

I. School districts' obligation to students with disabilities under Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794 and Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12101 et seq.

A. School districts' general obligations under Section 504/Title II

1. Section 504 is a federal law which protects the rights of individuals with disabilities in programs and activities that receive Federal financial assistance from the U.S. Department of Education (ED).
2. Title II prohibits discrimination against individuals with disabilities in state and local government services, programs and activities.
3. Section 504 requires school districts to evaluate students to determine whether a student has a disability and whether, because of the disability, the student needs special education or related services.
4. If a student with a disability under Section 504 and Title II does not require any special education or related services and does not require any modifications to the school district's policies, practices and procedures, the student is nevertheless a student with a disability and is protected by the general nondiscrimination prohibitions included in Section 504 and Title II. *See* 28 C.F.R. § 35.130(b); 34 C.F.R. §§ 104.4(b), 104.21-23, 104.37, 104.61 (incorporating 34 C.F.R. § 100.7(e)).

B. How these obligations are different from districts' obligations under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq.

1. A student with a disabling condition must require special education, i.e., generally, a student's educational performance must be adversely affected by his or her disability, in order to receive special services under the IDEA. Under the IDEA's definition, a student is not considered to be a child with a disability *unless* that child requires special education services. The IDEA defines special education as "specially designed instruction, at no cost to the parents or guardians, to meet the unique needs of a child with a disability." 20 U.S.C. § 1401 (29).
2. The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulatory provision at 34 C.F.R. § 104.3(j)(2)(i) defines 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, including speech organs; cardiovascular; reproductive;

digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulatory provision does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

C. Summary of the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), Pub. L. No. 110-325, 122 Stat. 3553 (2008).

1. The Amendments Act was signed into law in September 2008 and became effective on January 1, 2009.
2. The Amendments Act reversed restrictive judicial interpretation of what is considered a substantial limitation of a major life activity.
3. Section 504 and Title II define disability as: (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment.
4. The Amendments Act does not change the three elements of the definition of disability, but changes how the elements are to be interpreted. An impairment does not have to prevent or severely or significantly restrict a major life activity to be considered substantially limiting. However, the Amendments Act significantly changes how the term "disability" is to be interpreted. Specifically, Congress directed that the definition of disability shall be construed broadly and that the determination of whether an individual has a disability should not demand extensive analysis. Additionally, the ameliorative effects of mitigating measures may not be considered. 154 Cong. Rec. S8342, S8345 (daily ed. Sept. 11, 2008) (statement of the Managers).
5. The Amendments Act also added to the non-exhaustive list of "major life activities" referenced in the definition of a disability under Section 504 and Title II.

II. Evaluating students with health impairments to determine if the students are qualified students with a disability as defined by Section 504 and Title II.

A. Process for eligibility determinations (34 C.F.R. §§104.34, 104.35, 104.36)

1. A school district must conduct an evaluation of any individual who because of a disability "needs or is believed to need" special education or related services. If a school district determines that a student does not need special education or related services, it must still consider whether the student is entitled to a reasonable modification of policies, practices or procedures.

2. An individual evaluation must be conducted before any action is taken with respect to the student's initial placement, or before a significant change in placement.
3. This provision requires a school district to establish a system of procedural safeguards for the identification, evaluation, and educational placement of persons who, because of disability, need or are believed to need special education or related services. Parents and guardians must be told about this system, notified of any evaluation or placement actions, allowed to examine their child's records, afforded an impartial hearing with opportunity for representation by counsel, and provided a review procedure. Compliance with the procedural safeguards of the IDEA is one means of meeting this requirement. 34 C.F.R. § 104.36.

B. Impact Amendments Act may have on eligibility determinations, particularly for students with health related conditions.

1. Students with health problems may or may not be considered students with a disability under Section 504 and Title II. Whether a student with a health problem qualifies for a Section 504 plan depends on whether the health problem substantially limits a major life activity and whether, because of the disability, the student needs, or is believed to need, special education or related services.
2. Students who may not have previously been considered a student with a disability may be found to have a condition that substantially limits a major life activity under the broader definition of disability resulting from the Amendments Act.

III. Individual Health Care Plans (IHCPs)

A. Function of IHCPs and the differences between IHCPs and Section 504 plans

1. An IHCP is a written document that outlines the provision of student healthcare services intended to achieve specific student outcomes.
2. A student with an IHCP who has not been determined to be a student with a disability will not be entitled to a free appropriate public education or afforded the protections provided by the general nondiscrimination prohibitions included in Section 504 and Title II. Additionally, unlike a Section 504 plan, an IHCP is not subject to a requirement that it be developed by an appropriately constituted team.

B. Findings regarding IHCPs vs. Section 504 plans

1. *Opelika City (AL) Sch. Dist.*, 111 LRP 47376 (OCR 2011).
2. *Tyler (TX) Indep. Sch. Dist.*, 56 IDELR 24 (OCR 2010).
3. *Springer (NM) Mun. Schs.*, 111 LRP 65450 (OCR 2011)

4. *Roselle Park (NJ) Sch. Dist.*, 112 LRP 17599 (OCR 2012).
5. *Forest Hills (OH) Local Sch. Dist.*, 58 IDELR 114 (OCR 2011).

IV. Recent compliance review conducted by the ED's Office for Civil Rights (OCR)

A. Overview of OCR

1. OCR, with its 12 regional offices, enforces Section 504 in programs and activities that receive Federal financial assistance from ED. Recipients of this Federal financial assistance include public school districts, institutions of higher education, and other state and local educational agencies. (OCR's Document entitled *Protecting Students with Disabilities* available at www2.ed.gov/print/about/offices/list/ocr/504faq.html)
 2. Tasks include complaint investigation, technical assistance and compliance reviews
- B. OCR reviewed a District's use of IHCPs for students with health-related conditions such as food allergies, diabetes and asthma.
1. The District entered into a voluntary resolution agreement with OCR.
 2. The Agreement required the District to revise its policies and procedures to ensure the proper identification, evaluation and placement of students with disabilities and to determine whether students with IHCPs were eligible for services under Section 504.