

FLORIDA DEPARTMENT OF EDUCATION



STATE BOARD OF EDUCATION

KATHLEEN SHANAHAN, Chair
ROBERTO MARTÍNEZ, Vice Chair

Members

SALLY BRADSHAW
GARY CHARTRAND
DR. AKSHAY DESAI
BARBARA S. FEINGOLD
JOHN R. PADGET

Gerard Robinson
Commissioner of Education



MEMORANDUM

TO: Exceptional Student Education Directors
Student Services Directors

FROM: Monica Verra-Tirado, Ed.D., Chief *MY T*

DATE: April 6, 2012

SUBJECT: Individual Health Care Plans and Section 504 White Paper

School districts and Section 504 teams continue to raise concerns related to the initiation of Individual Health Care Plans and their relevance to Section 504 Accommodation Plans. As a result of the need for technical assistance, we are pleased to provide the attached “White Paper” to guide your 504 school teams in problem solving to determine what is required for students with disabilities.

These guidelines, *Guiding Principles for Section 504 Committees for Students with Individual Health Care Plans (IHCPs)*, should assist Section 504 Committees in making decisions with respect to referral, disability determination/eligibility, and Section 504 Plans for students on IHCPs, as required by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA).

During our “White Paper” discussions with Office of Civil Rights (OCR) staff, they suggested we emphasize that students with a disability substantially limiting a life activity, but not requiring an accommodation plan, must remain protected from discrimination.

The General Counsel’s office, Julie Weatherly, attorney with Resolutions in Special Education, Inc., and David Richards, attorney with Richards, Lindsay & Martin, provided input for these guidelines. We offer our sincere gratitude to all of the contributors for their expertise and advice.

MONICA VERRA-TIRADO, ED.D., CHIEF
Bureau of Exceptional Education and Student Services

ESE Directors
April 6, 2012
Page Two

For questions regarding the attached document, please contact Ms. Bettye Hyle at bettye.hyle@fldoe.org. For specific guidance regarding a particular factual situation or district Section 504 procedures, please consult your school board attorney.

MVT/bh

Attachment

cc: Julie Weatherly
David Richards
Mary Jane Tappen
Lois Tepper
Section 504 Contacts
School Health Coordinators
Bettye Hyle

Guiding Principles for Section 504 Committees on Students with Individual Health Care Plans (IHCPs) Florida Department of Education

The following guidelines are provided to assist Section 504 Committee decision-making with respect to referral, disability determination/eligibility, and Section 504 Plans for students on Individual Health Care Plans (IHCPs), as required by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). For specific questions and guidance regarding a particular fact situation or student, please consult your school board attorney.

I. Introduction & Background

Section 504 of the Rehabilitation Act of 1973 is, at its core, an anti-discrimination law. It states, “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .”¹ The fact that Section 504 is a *civil rights* law supports the notion that students with disabilities who are 504 eligible, but do not have 504 accommodation *plans*, cannot be discriminated against and have protections.

Section 504 requires school districts to conduct an evaluation of any student who, because of a disability, needs or is believed to need special education or related services. 34 CFR §104.35(a). It is important to note that a student’s physical or mental condition or impairment does not have to substantially limit the major life activity of learning for the student to be considered disabled under Section 504. *See, for example, Letter to McKethan*, 23 IDELR 504 (OCR 1995) [“Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school.”] Thus, students with physical impairments including, but not limited to, diabetes, asthma, allergies and migraine headaches may meet the definition of being disabled under Section 504 if their impairments substantially limit them in one or more major life activities, which include major bodily functions, even if their impairments do not substantially limit learning. *See, for example, Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009); *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009). As a result, students with individual health care plans (IHCPs) that address physical or mental impairments must be considered for Section 504 evaluation and a determination of disability pursuant to the school’s 504 process. *Tyler (TX) ISD*, 56 IDELR 24 (OCR 2010). Merely continuing with the implementation of an IHCP may not be sufficient under Section 504 if the student needs or is believed to need special education and related services because of a disability.

II. Referral of Students on IHCPs for Section 504 Consideration

Students on IHCPs cannot be categorically excluded from consideration for Section 504 referral and disability determination. When determining whether to refer a student with an IHCP for a 504 disability determination, the school should consider whether the student, because of disability, needs or is believed to need special education and related services within the meaning

¹ 29 U.S.C. § 794(a) (1973).

of Section 504. When parents of students receiving mitigating measures, such as IHCPs, refer their child for Section 504 consideration, and the school has reason to suspect that the student has a disability under Section 504 and is in need of special education or related services, the school should evaluate the student and determine whether a disability exists under Section 504. As part of the consideration for evaluation, the school should look at several factors, including the following:

- The frequency of the required IHCP services.
- The intensity of the required IHCP services.
- The complexity of the required IHCP services.
- The health & safety risk to the student if IHCP services are not provided or are provided incorrectly.
- The student's need for other services and accommodations from the school.

The above factors are the same as those considered in determining the need for a 504 Plan (See Section IV).

If there is no reason to suspect that a disability exists or no reason to suspect that the student needs special education or related services, the school can refuse to evaluate and promptly provide the parent with a notice of refusal to evaluate and a copy of their Section 504 Rights.

III. Section 504 Evaluation of a Student with an IHCP

When evaluating a student with an IHCP and determining whether the student is disabled under Section 504, the Section 504 Committee must determine whether the student would be substantially limited by his or her impairment without the provision of services listed in the student's IHCP or any other mitigating measure utilized by or for the student. 42 U.S.C. §12102(4)(E); *North Royalton (OH) Sch. District*, 52 IDELR 203 (OCR 2009). This analysis must be conducted to satisfy the mitigating measures rule contained in the Amendments to the ADA.

As part of the 504 evaluation process, the Section 504 Committee should attempt to obtain and carefully review and consider all appropriate and available medical and/or nursing information, as well as other relevant data gathered from a variety of sources. 34 C.F.R. §104.35. Should the student be determined disabled under Section 504 because the student has a physical or mental impairment that substantially limits a major life activity, the Section 504 Committee must then determine whether the student needs a Section 504 Plan in order to have his/her educational needs met as adequately as the needs of nondisabled students are met. 34 C.F.R. §104.33(b). The extent of a school district's obligation to make reasonable modifications or to provide educational accommodations is fact dependent and requires a case-by-case analysis. Not every student determined to be disabled will be in need of a Section 504 Plan. *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009).

Clearly, an IHCP is considered a mitigating measure for a student with a health impairment. While the ameliorative effects of the IHCP cannot be considered in determining whether a student has a disability under Section 504, the IHCP and those effects can be considered in determining whether the student is in need of a Section 504 Plan. 42 U.S.C. §12102(4)(E); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009).

IV. Factors to Consider When Determining Whether a Student With a Disability Who Has an IHCP Requires a Section 504 Plan

In making the determination of whether a student with an IHCP and a disability under Section 504 requires a Section 504 Plan, the Section 504 Committee should consider all relevant educational factors for each student individually and discuss the following factors:

- The **frequency** of IHCP services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 Plan than when IHCP services are required on a daily or weekly basis and in many different environments, including the classroom.)
- The **intensity** of the required IHCP services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 Plan than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes and across different environments, including the classroom.)
- The **complexity** of the required IHCP services. (That is, whether the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs. For example, the more a student requires constant monitoring and exchange of information among school staff, parents and doctors and in different environments to meet his health needs, the more likely he requires a Section 504 Plan.)
- The **health and safety risk** to the student if IHCP services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services across all environments, the more likely the student requires a Section 504 Plan.)

If the Committee determines that the disabled student with an IHCP requires, in addition to an IHCP, educational accommodations or services to address academic, social, emotional, physical or behavioral needs in order to meet the student's educational needs as adequately as the school meets the educational needs of nondisabled students, the disabled student would be entitled to a Section 504 Plan.

If, as a result of a properly conducted evaluation process, the 504 Committee determines that a student does not need special education or related services because the student's educational needs are being met as adequately as the educational needs of nondisabled students, the Committee would not be required to develop a 504 Plan for providing additional aids or services. Neither the ADA Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need.

In analyzing the student's educational needs with respect to these factors, no one factor is necessarily dispositive in every evaluation. The weight to be given any factor is to be determined by the Section 504 Committee as appropriate in its case-by-case determination pursuant to the regulations. It is also important to note that an analysis that focuses solely on whether the need for IHCP services is "medical" rather than "educational" may be susceptible to legal challenge, due to the potential for arbitrary and inconsistent implementation.