Office for Civil Rights issues additional Section 504 guidance for school staff

Clarifies that more students will be covered but services may not change

By Robyn Kaplan-Cho, CEA • Excerpted from the Spring 2012 HCR Reporter

In response to the many unanswered questions following the Americans with Disabilities Act Amendments Act (ADAAA) of 2008 that also made significant changes to Section 504 of the Rehabilitation Act of 1973 (Section 504), the U.S. Department of Education’s Office for Civil Rights (OCR) has published a new Q&A document that is intended to clarify some outstanding issues related to how the new law impacts public schools.

In its guidance document, OCR reiterates that in passing the new law, Congress absolutely intended to be more inclusive and to allow for broad coverage of students under Section 504. Specifically, OCR states that “[s]tudents who, in the past, may not have been determined to have a disability under Section 504 … may now in fact be found to have a disability…. The school district would have to evaluate the student … to determine if he or she has a disability…. While not going so far as to state that all disabilities are covered, the guidance does provide that “the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504….”

As reported in the Spring 2009 and Spring 2011 issues of CEA’s Human & Civil Rights Reporter, the new law made several key changes:

- A student’s use of mitigating measures cannot be considered when determining 504 eligibility.
- The list of “major life activities” was expanded, and the law clarifies that the term “substantially limits” should not require extensive analysis.
- Impairments that are episodic or in remission are considered disabilities if, when in an active phase, they would substantially limit a major life activity.

The new guidance gives several examples related to these changes. First, in terms of mitigating measures, it states that a student who has an allergy but takes allergy shots would be covered under Section 504 if, without the allergy shots, the allergy would substantially limit a major life activity. Second, for episodic impairments, it explains that in a case where a student has bipolar disorder, the student would be 504-eligible if, during manic or depressive episodes, the student is substantially limited in a major life activity such as thinking, concentrating, or neurological function.

Perhaps the most helpful discussion concerns what services should be provided to those students who are now clearly Section 504-eligible under the more liberal standard. OCR clarifies that if a Section 504 team determines that a student is covered but does not require any services or accommodations, that district is not required to provide any. It states, “[n]either the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need.” As an example, OCR cites a student with severe asthma whose major life activity of breathing is substantially limited. However, the Section 504 team determines that because the student is fully participating in school, does not need any assistance administering the medication and does not require any modifications to school policies, the district is not required to provide the student with any additional services. Yet this student does remain a student with a disability who is protected by the general non-discrimination provisions of Section 504.

Another area of helpful clarification concerns the use of health plans developed prior to the ADAAA of 2008. OCR concludes that “continuing with a health plan may not be sufficient if the student needs or is believed to need … services because of his or her disability.” OCR includes the following peanut allergy case as an example:
For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student’s use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student’s school may have created and implemented what is often called an “individual health plan” or “individualized health care plan” to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures. Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards. In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation. The nature of the regular or special education and related services provided under Section 504 must be based on the student’s individual needs.

A recent case highlights the importance of not relying on individual health plans in place of a Section 504 evaluation. In Batavia (Ohio), 117 LRP 70127 (OCR 2011), OCR decided that the school district violated the rights of a student with diabetes when it failed to evaluate the student to determine whether she was eligible for services under Section 504. Although the district had unilaterally created a “diabetic care plan” for the student, OCR explained that because officials had reason to suspect that the student had a disability, they were required to evaluate her and provide her with a Section 504 plan. In addition, OCR explained that under Section 504, parents are not required to put their request for an evaluation in writing or use particular “magic words” to request 504 services as long as they provide school officials with a reasonable indication that they are seeking assistance in school to address their child’s physical or mental impairments.

In short, OCR’s recent guidance document appears to add little new information but is useful in its emphasis on liberalizing Section 504’s eligibility requirements and anti-discrimination protections. However, nothing has changed relative to the requirements for the provision of accommodations and services to Section 504 students. Consequently, when drafting Section 504 plans, Section 504 teams are still advised to focus on what is necessary and appropriate for the student.

To read the full Q&A, go to www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html