

Questions submitted to Pete Wright

FIRST QUESTION: I recently read about the Office of Civil Rights April 23, 2012 resolution of a case involving an IHCP in the Memphis, TN schools.

Their press release stated that:

If a student currently has an IHCP, the district will provide parents or guardians with information regarding the student's possible rights to evaluation, placement, and procedural safeguards. An IHCP for a student who has a qualifying disability is insufficient if it does not incorporate these rights.

See <http://www.ed.gov/news/press-releases/us-education-department-reaches-agreement-memphis-city-schools-aids-services-stu>

Does this mean that if a student is considered disabled and needs aides, services or accommodations, that a 504 is the correct way to document what is needed to allow a food allergic child access to a FAPE?

WRIGHTSLAW ANSWER: If a child has a disability as defined by either the Individuals with Disabilities Education Act (IDEA 2004), Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, Amended Act of 2008 (ADA AA), and needs "aides, services, or accommodations" the child should have either an IEP or a Section 504 Plan, dependent upon the nature of the disability. Per the question, if the disability is solely limited to a food allergy, then an IEP would not be appropriate, but a Section 504 is appropriate.

It is important for parents to understand that an Individualized Health Care Plan (IHCP) is not an agreement that provides specific rights and procedural safeguards but instead is more akin to a nursing care plan. The Virginia Department of Education explains that one of the purposes of an IHCP is to "protect the school nurse in legal proceedings . . ."

http://www.doe.virginia.gov/support/health_medical/specialized_health_care_procedures/appendix_a.pdf

The concept of an IHCP is not recognized in or created by the Individuals with Disabilities Education Act (IDEA 2004), Section 504 of the Rehabilitation Act or the Americans with Disabilities Act, Amended Act of 2008 (ADA AA). Each of the three statutes do provide procedural safeguards for the student. An IHCP does not provide any procedural safeguards for the student. If an IHCP is created, to obtain the rights and protections of the preceding statutes, it should be attached to and incorporated by reference into either an IEP or a Section 504 Plan and considered as a part of the IEP or Section 504 Plan.

The ADA was revised in 2008 as the result of two U. S. Supreme Court cases that had narrowed the definition of those eligible for protections under the ADA. The 2008 “Amendments Act” has substantially broadened eligibility, thus gutting the impact of those two prior cases. That expansion applies to Section 504 of the Rehabilitation Act. Thus a child found ineligible for either an IEP or a Section 504 plan in 2007 may today, because of the change in the law, be eligible.

The Office of Civil Rights issued a FAQ monograph that addresses the ADA AA, Section 504 and IHCPs. It is titled “Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools” located at:

<http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

The critical questions are 4, 5, 11, 12 and 13.

Below I have copied and pasted those questions and portions of their answers. I provided the complete answers to Questions 12 and 13. The bold emphasis was added by me.

Q4. How does the Amendments Act alter coverage under Section 504 and Title II?

A: The Amendments Act emphasizes that the definition of "disability" in Section 504 and the ADA should be interpreted to allow for broad coverage. Students who, in the past, may not have been determined to have a disability under Section 504 and Title II may now in fact be found to have a disability under those laws. A student whom a school district did not believe had a disability, and therefore did not receive, as described in the Section 504 regulation, special education or related services before passage of the Amendments Act, must now be considered under these new legal standards . . .

Q5: Should a school district revise its policies and procedures regarding the determination of coverage and provision of services under Section 504 and Title II?

A: Yes, if those policies and procedures do not implement the Amendments Act's new legal standards. As noted above, the definition of disability is to be interpreted broadly, so determining whether one has a disability should not demand extensive analysis, and the determination shall be made without regard to the ameliorative effects of mitigating measures . . .

Q11: What must a school district do for a student who has a disability but does not need any special education or related services?

A: As described in the Section 504 regulation, 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, and must do so before taking any action with respect to the initial placement of the person in regular or special education or any significant change in placement. 34 C.F.R. § 104.35(a). If, as a result of a properly conducted evaluation, the school district determines that the student does not need special

education or related services, the district is not required to provide aids or services. Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need. **But the school district must still conduct an evaluation before making a determination. Further, the student is still a person with a disability, and so is protected by Section 504's general nondiscrimination prohibitions** and Title II's statutory and regulatory requirements. 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)).

For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school's regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school's policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. **The student is still a person with a disability, however, and therefore remains protected by the general nondiscrimination provisions of Section 504 and Title II.**

Q12: Should school districts conduct FAPE evaluations as described in the Section 504 regulation for students who, prior to the Amendments Act, had health problems but might not have been considered persons with a disability?

A: The answer depends upon whether, because of the health problem, that student has a disability and, because of that disability, needs, or is believed to need, special education or related services. A medical diagnosis alone does not necessarily trigger a school district's obligation to conduct an evaluation to determine the need for special education or related services or the proper educational placement of a student who does have such need. As explained in Q11, a student with a disability may not need any special education or related service as a result of the disability.

Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?

A: Not necessarily. **Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability.** The critical question is whether the school district's actions meet the evaluation, placement, **and procedural safeguard requirements of the FAPE provisions described in the Section 504 regulation.** 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. As noted in Q2 above, the student would also be protected from discrimination under Title II's statutory and regulatory requirements, as well as Section 504's general nondiscrimination provisions.

Parents should download and read the Memphis, TN press release and the above FAQ monograph from OCR. Afterwards, to get a better handle on this, parents should go to our www.wrightslaw.com website and read the following:

- <http://www.wrightslaw.com/blog/?p=58>
- <http://www.wrightslaw.com/blog/?p=2831>
- <http://www.wrightslaw.com/law/504/OCR.va.peanut.pdf>
- <http://www.wrightslaw.com/info/adaaa.elig.bruce.htm>
- <http://www.wrightslaw.com/info/sec504.index.htm>
- <http://www.wrightslaw.com/info/sec504.adaaa.htm>

SECOND QUESTION: My son's school principal told me that they handle food allergies with an IHCP. They said any accommodations could be written into the IHCP. My son has life-threatening food allergies and will need accommodations in the classroom, and a trained adult and EpiPens with him on field trips etc. In your experience, is it better to have a 504 plan or will an IHCP suffice?

WRIGHTSLAW ANSWER: Presumably you have now read the Memphis, TN press release, the FAQ monograph from OCR and the above articles on our website. Bottom line, you know that there are no protections under an IHCP and it will not suffice.

On another note, you write that the principal "told me . . ." Remember, if he did not put it in writing, it was not said. There must be a paper trail. More about this shortly.

THIRD QUESTION: If school administrators are going to sit down and write an IHCP why are they so reluctant to write a 504 plan? Our school says they are “the same” What is the difference between a IHCP and a 504? What do you recommend for life-threatening food allergies?

WRIGHTSLAW ANSWER: A Section 504 Plan provides the student with rights and remedies, i.e., it has procedural safeguards, if the school breaches the 504 Plan. There are no such procedural safeguards in an IHCP. It is not a legal concept recognized in any of the statutes discussed in the opening answer. Dependent upon the child and other possible issues, I recommend either an IEP or a Section 504 Plan. The IHCP can be incorporated into a Section 504 Plan.

FOURTH QUESTION: How would you proceed if you were told by a district that “We don’t do 504 plans for food allergies”?

WRIGHTSLAW ANSWER: Again, repeating the answer to the second question, if you were told something and it is not in writing, you are mistaken, it was never said! So what do you do?

First step is to become educated about IDEA 2004, Section 504 and the 2008 Amendments to ADA that impact the Section 504 eligibility. Read the OCR articles and websites listed above. IDEA 2004 and Section 504 are on our website and also included in our book, Wrightslaw: Special Education Law, 2nd Ed.

Second, once you have a handle on the law and the eligibility issues, then you have to take the same steps any parent has to take to obtain eligibility for their child for either a Section 504 Plan or an IEP. You must have an organized file. (See Chapter 9 in our book, Wrightslaw: From Emotions to Advocacy, 2nd Ed.) You must understand all of your child’s test data. (See Chapters 10 + 11.) Then you must understand how to create and maintain a paper trail (Chapter 22) and learn to write good evidence letters (Chapter 23) that do not blame or finger point, but instead create empathy and a desire to fix the issue. This is done using the “Letter to the Stranger” principles. (Chapter 24)

When that is accomplished, the parent is able to write a nice letter to the administrators in which they describe their child, the medical/allergy issues, provide the documentation, express some confusion about the law and the OCR documents, provide those documents and ask the school to help you understand why your child does not fit and why an IHCP is not a Section 504 document and what can be done.

As a part of the self-study, the parent will also need to learn effective negotiation skills which are in the subsequent chapters of that book.

Many of the other questions were related to “How can I get the school to . . .” The answer is to motivate them, not by a threat of litigation or letter complaint to OCR, but instead by a letter

seeking their help to educate you about the law (actually you already know it, but you have created your newly merged personality of Ms. Manners and Columbo) and to provide help regarding your child.

See the following links for more about developing an organized file, understanding the test data, creating the paper trail, and writing persuasive evidence letters using the “Letter to the Stranger” approach.

<http://www.wrightslaw.com/info/organize.file.htm>

<http://www.wrightslaw.com/blog/?p=877>

<http://www.wrightslaw.com/nltr/12/ss.organize.file.htm>

<http://www.youtube.com/watch?v=Spjccoj4Ow0>

http://www.wrightslaw.com/advoc/articles/tests_measurements.html

<http://www.wrightslaw.com/advoc/articles/advo.create.trails.htm>

http://www.wrightslaw.com/advoc/articles/12rules_letters.htm

<http://www.wrightslaw.com/nltr/11/ss.short.course.htm>

<http://www.wrightslaw.com/nltr/08/nl.0226.htm>

<http://www.wrightslaw.com/blog/?tag=paper-trails>

<http://www.wrightslaw.com/info/ltrs.index.htm>

http://www.wrightslaw.com/advoc/articles/Letter_to_Stranger.html

<http://www.wrightslaw.com/advoc/stranger/brody.html>

<http://www.wrightslaw.com/advoc/ltrs/strngr.joejames.htm>

<http://www.wrightslaw.com/advoc/articles/ltr.to.stranger.miata.pdf>

Wrightslaw Note: This article, with slight revisions, was originally published in a FARE “Ask the Expert” column.