

TO: Directors of Special Education and Pupil Services
Directors of Private Approved Special Education Facilities
Directors of Charter Schools

FROM: George P. Dowaliby, Chief
Bureau of Special Education and Pupil Services

DATE: November 8, 2002

SUBJECT: Update #31

The purpose of this update is to provide clarifying information on two subjects, which have recently been reviewed by the Bureau. First, policy and procedure regarding the identification of pregnant students as disabled under Connecticut regulations and the services for such children is included as a result of a recent complaint investigation which identified an inconsistency in the treatment of such children. Second, an extensive review of the standard under which districts are required to provide educational services to children who are qualified disabled individuals as defined in Section 504 of the Rehabilitation Act and the use of certified special education staff for the provision of instruction to non-IDEA eligible children is included.

In addition to the above, this update contains copies of the following:

- The settlement agreement for the class action lawsuit, PJ et al v. State of Connecticut, Board of Education, et al. A copy of this agreement was previously sent to all Superintendents and LEA Board members;
- Legislation related to special education adopted in special session; and
- Information regarding the December ConnCase Leadership Forum – Current Legal Issues in Education

IDENTIFICATION OF PREGNANT STUDENTS AS ELIGIBLE FOR SPECIAL EDUCATION UNDER CONNECTICUT REGULATIONS

As many of you are aware, the State Department of Education ceased collecting ISSIS data on pregnant students. As a result, districts stopped identifying such students as eligible for special education solely based on pregnancy, as is required by the state regulations. This is to advise districts that pregnant students must be identified as eligible for special education. Pregnancy is a category of disability that confers eligibility for special education services and is found only in the Connecticut regulations; it is not a category of disability under either the IDEA or Connecticut state statutes. The determination of eligibility for special education is specifically described in Section 10-76d-15 of the state regulations, Homebound and Hospitalized Instruction. A pregnant student is eligible for services if the child is pregnant or has given birth and a physician has certified in writing that homebound or hospitalized instruction is in the child's best interest and should continue for a specified period of time, see Section 10-76d-15(b)(4). A planning and placement team meeting may be required, but only in the event that it is

appropriate for a pregnant student to receive specially designed instruction. Parents, or the student if the student is over 18 or an emancipated minor, have the option of rejecting special education and related services. The student may remain in regular education as the means of acquiring an education. In addition, should the student otherwise be eligible for special education under either an IDEA or Connecticut state statute category of disability, the student will continue to receive services as specified in the IEP.

Continue to omit reporting these students in your ISSIS submission.

**PROVISION OF EDUCATIONAL SERVICES TO CHILDREN WHO ARE QUALIFIED
DISABLED INDIVIDUALS AS DEFINED IN SECTION 504 OF THE
REHABILITATION ACT**

The proper standard for determining what level of services is to be provided to children identified as qualified disabled for purposes of Section 504 in public elementary and secondary schools is whether or not the child has been provided with a free appropriate public education. 34 CFR 104.33(b) defines an appropriate education as the provision of regular or special education and related aids and services that: are designed to meet the individual educational needs of children with disabilities as adequately as the needs of persons without disabilities are met and that are based upon adherence to procedures that satisfy the requirements of 34 CFR 104.34 to 104.36, inclusive (procedural safeguards). In addition, in order to meet the requirements for appropriateness under Section 504, the provision of services to a child must include adherence to the least restrictive environment requirement so that each child with a disability is educated with children without disabilities, to the maximum extent appropriate to the needs of the child with a disability; a periodic reevaluation of children who have been provided special education and related services must occur; nondiscriminatory evaluation and placement procedures need to be established to guard against misclassification or inappropriate placement of children; and, due process procedures are available which enable parents or guardians to review identification, evaluation and placement decisions which provide for notice, an opportunity for the parents and guardians to examine relevant records, an impartial hearing with opportunity for participation by parents or guardians and representation by counsel, and a review procedure.¹

It is important that school staff understand that a FAPE standard exists for the provision of services to children identified as disabled in accordance with Section 504 and that services which may have traditionally been thought of as available only to children identified as eligible for special education in accordance with IDEA may also be required for the provision of a FAPE to children who are identified under Section 504. Such services include extended school year and extended school day services; an equal opportunity to participate in nonacademic services and extracurricular activities and before or after school day care and summer recreation programs run by a public school district, which may require related aids or services for the child; counseling services; and, transportation for extracurricular events. Because the concept of FAPE is based on

¹ Technical Assistance Presentation on the Application of Section 504 to Elementary and Secondary School Children, US Department of Education, Memo to Regional Civil Rights Directors dated April 21, 1992. Copy enclosed.

the individual needs of each child with a disability, it precludes a school district from categorically excluding consideration of any appropriate nonmedical service.²

Following below is a discussion on the availability of instruction from certified special education staff for children who are identified as disabled as per Section 504. Please review this information with your staff as soon as possible.

USE OF CERTIFIED SPECIAL EDUCATION STAFF FOR THE PROVISION OF INSTRUCTION TO NON-IDEA ELIGIBLE CHILDREN

How may districts use certified special education staff for the provision of instruction to children who are not eligible for special education and related services under either the IDEA or state statutes? Specifically, districts have questioned whether or not it is permissible to provide children who are identified as disabled under Section 504 of the Rehabilitation Act of 1973 (Sec. 504 hereafter) with instruction from certified special education staff, whether in the regular education classroom or in the resource room.

Question #1

Who may be covered for purposes of Sec. 504?

Sec. 504 is a basic civil rights statute that prohibits discrimination on the basis of disability by recipients of Federal funds. Local and regional boards of education are recipients of Federal funds in various forms such as education funds, environmental funds, transportation funds, etc. Therefore, the Sec. 504 protections for individuals with disabilities must be provided by local or regional boards of education to children, parents and employees who may be qualified disabled for purposes of Sec. 504.

A child is qualified for purposes of Sec. 504 if the child has: (1) a physical or mental impairment which substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. See 34 CFR 104.3(j).

The second and third prong of the definition are legal fictions created to reach situations where individuals either never were or are not currently disabled, but are treated by others as if they were. It is rare for these prongs to be used in the elementary and secondary setting and they cannot be the basis upon which the requirement for a free appropriate public education is triggered. Since the child is not, in fact, mentally or physically disabled, there can be no need for special education or related aids and services. See OCR Memorandum to Section Staff from Richard D. Komer, Deputy Assistant Secretary on Clarification to "Record of" and "Regarded as" in the Definition of Disability under Section 504, August 3, 1992.

² Extended School Year/Extended Day Services for Disabled Children, US Department of Education, Memo to Regional Civil Rights Directors dated 5/24/83.

Question #2

What responsibilities do local or regional boards of education have under Sec. 504 of the Rehabilitation Act to identify and evaluate children who may be disabled for purposes of Sec. 504 only?

In a memo sent to Directors of Special Education and Pupil Personnel Services on January 4, 1993, the procedures for identifying and evaluating a child for purposes of Sec. 504 were delineated. Included with the SDE memo was a memorandum distributed jointly by the Office of Special Education and Rehabilitative Services and the Office for Civil Rights that compared the processes available under both IDEA and Sec. 504. Both these memos, while written initially for the AD(H)D population, contain information that is equally applicable for any child suspected of being qualified disabled.

Question #3

May a board of education utilize a certified special education teacher to provide instructional services to children when such children are not eligible for special education under either IDEA or state special education statutes, but are disabled solely for purposes of Sec. 504?

Sec. 504 requires the provision of a free appropriate public education (FAPE) to children. A FAPE for purposes of Sec. 504 is described as “the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met...”, See 34 CFR 104.33 (b). In the Appendix to the Final Sec. 504 regulations, an analysis of the regulations states that a “disabled child’s teachers must be trained in the instruction of persons with the disability in question and appropriate materials and equipment must be available”.

Under the state certification requirements, academic areas are taught by certified teachers whose certificates are subject area or grade level endorsed. Both the Elementary and Secondary Academic endorsements are prefaced by the following; “This certificate, *or another certificate appropriate to the subject and grade level to be taught*, shall be required for anyone employed by a board of education...”, Sections 10-145d-434 and 10-145d-449 of the Regulations of Connecticut State Agencies. A teacher who holds a comprehensive special education endorsement for either the elementary or secondary level can teach a child who is not eligible for special education under either IDEA or the state statutes because of the language “*or another certificate appropriate to the subject and grade level to be taught*.” The Bureau of Certification and Professional Development has agreed that the comprehensive special education certificate is “*another certificate appropriate to the subject and grade level to be taught*” which would allow a Sec. 504 child to receive direct instruction from a certified special education teacher.

Question #4

Are there other considerations when a child is provided services as a Sec. 504 child?

Merely being classified under Sec. 504 does not mean that the child should be taught by other than the regular subject area endorsed classroom teacher. There are several conditions that must be met:

- (1) The child's written plan must describe the circumstances that prevent the child from receiving instruction from certified subject matter or grade level certificate teachers and require that instruction be delivered by a teacher in the "another appropriate certificate" category.
- (2) If the child is to be provided such services from the certified special education teacher in a setting other than a regular education classroom, the written plan must "demonstrate...that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily," see 34 CFR 104.34(a).
- (3) A child who is qualified disabled for purposes of Sec. 504 solely may not be counted as part of the district's IDEA-B child count. As you are aware, only those children who meet the eligibility criteria of IDEA may be counted for IDEA purposes.
- (4) Each board must have in place, at the local level, due process procedures which allows parents or guardians to challenge any decision made by the board with respect to the identification, evaluation, or educational placement of the child. 34 CFR 104.36 states as follows:

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Disabled Act (now known as IDEA) is one means of meeting this requirement.

An LEA may adopt the IDEA procedural safeguards as its method of meeting the procedural safeguards requirement of Sec. 504. If an LEA decides to follow the Sec. 504 requirements only, a separate set of procedural safeguards for Sec. 504 should be adopted. Do not amend your IDEA procedural safeguards document for the purpose of adding Sec. 504 requirements.

The due process hearing procedure maintained by the SDE for IDEA/state special education is **not** available for cases involving children who are receiving services from a district because they

are Sec. 504 qualified.³ In other words, the hearing officers do not have jurisdiction to hear “504 only” cases. This means that each district needs to have, at the local level, a hearing procedure through which parents or guardians may challenge the identification, evaluation or educational placement of a child either found qualified or not qualified under Sec. 504. The local procedure to advise parents or guardians of what steps they must take to challenge decisions related to identification, evaluation or placement should be included as part of the annual notification of the board’s duty under Sec. 504 to parents or guardians.

To summarize:

- A child who is not eligible for special education and related services under the IDEA but who is a child with a disability for purposes of Sec. 504 of the Rehabilitation Act may be instructed by a certified special education teacher.
- There are several conditions which must be met before a child is provided with such services, including written justification for the child receiving instruction from a teacher other than the certified subject matter or grade level certificate teacher and discussion of the placement options considered and why the child could not be accommodated in the regular classroom.
- The child may not be counted for purposes of the district’s IDEA Part-B Child Count.
- The district must have in place due process procedures which allow parents or guardians to challenge any decision made by the board with respect to the identification, evaluation, or educational placement of the child.
- Procedural safeguards must also be provided, however, do not amend the district’s IDEA procedural safeguards document for the purpose of adding Sec. 504 requirements.

For further information on this topic, please contact Theresa C. DeFrancis at (860) 807-2018.

GPD:g
Enclosures

cc: Theodore S. Sergi, Commissioner of Education
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³ See Circular Letter C-9, 2000-2001 Series for a more detailed description of appropriate Section 504 hearing requirements.