

SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 14

Information on the Rights of Students with Significant Health Conditions

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Information on the Rights of Students with Significant Health Conditions

1. My child has a serious illness or condition, or is recovering from an accident or surgery, that will keep him from attending school for a short time. Can he receive any special services to help him stay current with his education?

Yes. Students with temporary disabilities — for whom it is impossible or inadvisable to attend regular classes — may receive individual instruction, even if they are not eligible under the special education or Section 504 laws. “Temporary disability” means a physical, mental, or emotional disability that occurs while the student is in regularly enrolled classes and after which he can be reasonably expected to return to school. “Individual instruction” means instruction provided to the student at home, in a hospital or most other residential facilities. [California Education Code Section (Cal. Ed. Code Sec.) 48206.3]

2. Who is responsible for providing individual instruction to my child while he is at home or is temporarily hospitalized?

While your child is at home, the school district in which you reside is responsible for providing individual instruction. If your child is hospitalized in a hospital within your district of residence, that same district will be responsible for

individual instruction. If your child is hospitalized in a hospital outside your district of residence, the district in which the hospital is located is responsible for instruction. [Cal. Ed. Code Secs. 48206.3(a) & 48207.]

3. How can I ensure that my child, who is hospitalized in another school district, receives his needed educational services during his hospitalization?

You must notify the district where the hospital is located of your child's presence in that hospital and of his need for educational services. Once the district receives that notification, it must, within five working days, determine if your child is able to receive individualized instruction. If he *can* receive individualized instruction in the hospital, instruction must begin within five working days. The district where the hospital is located has the option of providing instruction or contracting with your child's prior school district. [Cal. Ed. Code Sec. 48208(b).] If your child has short hospital stays, and is going back-and-forth between your home and a hospital located in another district, you should contact the responsible district(s) to clarify the process for arranging instruction.

4. If my child is not already eligible for special education or Section 504, how much individualized instruction will he receive?

California law provides that for purposes of computing average daily attendance for students with *temporary* disabilities, each "clock hour" of teaching time devoted to individual instruction counts as one day of attendance. In other words, in order to receive full state funding for a day of attendance, a district need only provide one hour of instruction to that student. The law also says that no student can be credited with more than five days of attendance per week. [Cal. Ed. Code Sec. 48206.3(c).] There is no law requiring districts to provide enough individual instruction to each temporarily disabled student to enable him to stay current with all his courses and maintain his grades.

5. If my child’s disability is not going to be temporary, but may affect his educational progress for a significant period of time or permanently, is there any advantage to having him made eligible for Section 504 or under special education?

Yes. If your child’s disability qualifies him for special education or Section 504, the IEP or 504 team will decide the number of hours of instruction and other educational services necessary to meet your child’s individual needs. It cannot be automatically assumed that five hours of instruction will meet his unique needs or be sufficient to include all the instructional and related services necessary for an appropriate education.

If your child qualifies for either special education or Section 504, your district must provide educational services based on these rights and principles:

- (1) A free, appropriate public education (FAPE);
- (2) An appropriate assessment before determining services;
- (3) Education in the least restrictive environment (LRE);
- (4) Participation in the development of your child’s individual education program (IEP);
- (5) Resolving disagreements about educational placement, services or accommodations through due process or compliance complaint procedures; and
- (6) Determining and documenting child’s educational goals, placement, services and accommodations based on your child’s individual needs.

See Chapter 1, *Information on Basic Rights and Responsibilities*.

6. Who qualifies for special education under the “other health impaired” category?

Students qualifying for special education under this category are those who have limited strength, vitality, or alertness (including a heightened alertness to

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environmental stimuli that results in limited alertness in the educational environment), that is due to chronic or acute health problems, including, but not limited to, a heart condition, cancer, leukemia, rheumatic fever, chronic kidney disease, cystic fibrosis, asthma, epilepsy, lead poisoning, diabetes, tuberculosis and other communicable infectious diseases, hematological disorders, such as sickle cell anemia and hemophilia, nephritis, attention deficit disorder, or attention deficit hyperactivity disorder, and which *adversely affects* a student's educational performance. [34 C.F.R. Sec. 300.8(c)(9); 5 California Code of Regulations (C.C.R.) Sec. 3030(f).] An "adverse effect" on educational performance may be measured by a student's grades, but may also include consideration of other ways in which a student's condition affects his school activities.

School districts tend to read "adversely affect" narrowly and limit it to academic performance. The courts take a broader view of educational performance and include consideration of a student's academic, social, health, emotional, communicative, physical and vocational needs. [*Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996).] Federal law also distinguishes between educational and academic performance and establishes that educational performance is a broad concept. For example, students must be assessed by schools in all areas of suspected disability. [20 U.S.C. Sec. 1414(b)(3)(B).] Those areas are defined by federal regulations to include: health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. [34 C.F.R. Sec. 300.304(c)(4).] Academic performance is only one of the areas in which students must be assessed. In addition to grades and standardized tests scores, schools must consider how the student's emotional health or other conditions adversely affect his non-academic performance in social, behavioral and other domains as well.

7. What if the district acknowledges my child’s health condition, but says that he does not really need specialized instruction or that he has above-average academic abilities and, therefore, is not eligible for special education?

In addition to having a qualifying disability, under federal law your child must also “need special education and related services.” [34 C.F.R. Sec. 300.8(a).] For example, if your child may otherwise regress educationally — and perhaps even fail because he needs extended and/or intermittent home or hospital-based instructional services — then he likely “needs” special education for eligibility purposes.

Under state law, your child qualifies if he has an impairment which “requires [specialized] instruction and services which cannot be provided with modification of the regular school program” in order to ensure FAPE. [Cal. Ed. Code Sec. 56026(b).]

Above-average intelligence or academic ability by itself does not disqualify a student for special education. [*Corchado v. Board of Education* 86 F. Supp. 2d 168 (W.D.N.Y. 2000); Letter to Ulissi 18 Individuals with Disabilities Education Law Reporter (IDELR) 683 (U.S. Department of Education, Office of Special Education Programs (OSEP) 1992).] These characteristics may, however, the “adverse effect on educational performance” required by the “other health impaired” eligibility category. See Chapter 3, *Information on Eligibility Criteria*.

8. What is a “home instruction” placement for a student who qualifies for special education?

Home instruction (sometimes called “home/hospital”) is an educational program option available to students with disabilities who cannot be educated in a public school setting. Typically, students in this placement have significant health needs or significant behavioral challenges.

Any home instruction program must be individually designed to assure that progress toward goals and objectives continues, even if the program is being provided at the student's home. The law also requires that students have access to — and make progress in — the general education curriculum. [20 U.S.C. Sec. 1414(d)(1)(A)(i).] All the same procedures must be followed by the IEP team in developing an IEP for a student to be instructed at home as are followed for any other special education student. [*Letter to Boney* 18 IDELR 537(OSEP 1991).]

For a student with an IEP, services are determined by the IEP team, including the type, length and amount of instructional services. This is different from the home- or hospital-based instruction a student with a *temporary* disability may receive, where one hour per day is permissible. For the special education student, an arbitrary limit of one hour per day of home instruction, without individualized assessment and a determination that such a limit will result in educational benefit, is *not* designed to meet that student's unique needs. Educational benefit means progress toward the central IEP goals and objectives. [*County of San Diego v. Special Education Hearing Office*, 93 F.3d 1458 (9th Cir. 1996).] If the district insists on a limit of one hour per day and you disagree, a parent may file a compliance complaint or file for due process. See Chapter 6, *Information on Due Process/Compliance Procedures*.

9. If my child will require modification of his school program once he returns to school after a long absence, must the district develop a plan in advance to provide support, services or accommodations?

If your child is eligible for Section 504 or special education, any services or accommodations needed to help with his transition back to school should be discussed at a team meeting and written into a Section 504 plan or IEP prior to his return to school. You may request a 504 or IEP meeting at any time. Once the district has received your written request for an IEP meeting, the meeting must be held within 30 days from the date of the receipt of your written request. [Cal. Ed. Code Sec. 56343.5.]

If your child is a *general* education student, the district does not have to provide support, services or accommodations. However, you should contact the district to discuss your child's needs and develop an informal, non-binding agreement to support him once he returns to school. In light of the illness or serious health condition, you should consider making a referral for Section 504 and special education eligibility.

10. If my child becomes eligible for special education student because of his health condition, will this affect his ability to go to college?

No. Under Section 504 and the Americans with Disabilities Act (ADA) colleges and universities cannot discriminate on the basis of disability by denying admission to a qualified individual. [42 U.S.C. Sec. 12182(b)(1)(A)(i); 34 C.F.R. Sec. 104.42(a).]

It is helpful to have an IEP or 504 plan to demonstrate your child's eligibility under Section 504 at the post-secondary level and to identify services and accommodations he may need. Make sure your child takes the necessary units in the required subject areas, and college preparatory courses as appropriate, in order to earn a high school diploma. Your child must also pass any required proficiency test or exit exam. See Chapter 11, *Information on District-Wide Assessments/ Graduation Requirements*. Be sure that your child's special education identification does not result in his being placed on a "track" leading to a certificate of completion rather than a diploma.

Beginning at age 16, or earlier, your child's IEP must include appropriate, measurable post-secondary goals based on age-appropriate transition assessments related to training, education, employment, and independent living skills where appropriate. The IEP must also contain a statement of needed transition services that focus on your child's courses of study (such as participation in advanced-placement courses or a vocational education program). [Cal. Ed. Code Sec. 56345(a)(8).] If your child's post-secondary educational goal is admission to a college or university, the IEP should specify the requirements necessary to earn a

diploma, as well as the transition services needed to assist him in reaching that goal. See Chapter 10, *Information on Transition and Vocational Education*.

11. Because of absences or learning problems associated with his condition or treatment, the district says my child should be enrolled in basic general education courses and that it has no duty to provide accommodations in his honors or advanced placement (AP) classes. Is this true?

No. Section 504 protects both special education students and those on 504 plans from discrimination in programs which receive federal financial assistance. These include honors and AP classes. Discrimination is prohibited in any aid, benefit, or service provided by the public school. [34 C.F.R. Sec. 104.4(b)(1).] For a given activity, the district must provide related aids and services to meet the disabled student's needs as adequately as the needs of students without disabilities. [34 C.F.R. Sec. 104.33(b)(1).]

While a district cannot refuse services or accommodations to students in honors or AP classes under Section 504, taking an AP or honors classes likely means that the student is ineligible for special education.

12. If my child receives instruction at home, can the district require that a parent be present during periods of instruction?

Although there is no California law or case requiring a parent to be at home during periods of instruction, such a policy would probably be upheld for a child under 18. The one federal court of appeals that addressed this question found that such a policy does not violate the Individuals with Disabilities Education Act (IDEA) or Section 504. [*Daniel O. v. Missouri State Board of Ed.*, 210 F.3d 378 (8th Cir. 2000).]

13. Will I have to purchase any necessary equipment, like a computer or other technology, if my child receives home instruction?

No. Any equipment or technology necessary to enable your child to benefit from home instruction, to access and make progress in the general curriculum, or to ensure progress on his IEP or 504 goals must be provided as part of his FAPE. [20 U.S.C. Sec. 1401(9); 34 C.F.R. Secs. 104.33(c)(1) and 300.105.] If a student with a temporary disability (who is not a 504 or special education student) needs the use of a device, you should argue that the device must be provided by the district in order to facilitate the required home instruction. [Cal. Ed. Code Sec. 48206.3.]

14. If my child has a communicable disease, can the district refuse to provide a home instructor or prohibit his from attending school on the basis of a risk to staff or other children?

Under state regulations, a student “while infected with any contagious or infectious disease may not remain in any public school.” [5 C.C.R. Sec. 202.] However, a district policy that denies home instruction or school attendance to a student with a communicable disease on the ground of risk to others will be closely examined by the courts. At least one court has held that these factors shall be considered: 1) how great the risk really is in terms of how the disease is transmitted; 2) the duration of the risk; 3) how great the risk is in terms of the consequences of infection; 4) the likelihood of transmission of the disease; and 5) the reasonable steps that could be taken to reduce any risks. [*Martinez v. School Board of Hillsboro County*, 861 F.2d 1502 (11th Cir. 1988).]

15. My child just needs to take his medication while at school. What assistance must the school provide to make sure this happens?

State law provides that school districts may use school nurses or others to assist students in taking their medications if the student's authorized health care provider specifies the method, amount and time of medication administration (and any other

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relevant information required by the school), and if the parent provides a written request for this assistance. An authorized health care provider is someone licensed in California to prescribe medication. [5 C.C.R. Secs. 600 & 601(a); Cal. Ed. Code Sec. 49423.]

Medications may include prescription or over-the-counter medications, supplements, and herbs. [5 C.C.R. Sec. 601(b).] The regulations do not prohibit any particular medication from being administered at school, such as Diastat for seizure control. Even if a student seeks staff assistance with taking a non-prescription medication, it is likely that a physician's authorization will be required.

For students in special education or with Section 504 plans, the regulations are not a limitation on their right to have medications administered to them by school personnel if their individualized plans require it. [5 C.C.R. Sec. 610(d).] The Office for Civil Rights (OCR) has found that a district's refusal to administer a student's medication as part of a 504 plan is discriminatory under Section 504. [*San Juan Unified School District*, 20 IDELR 549 (W.D. Cal. 1993).] The same reasoning should apply to a student with an IEP.

As part of your written request for staff assistance in the administration of medication, the district may require that you give permission for the district to communicate directly with your child's health care provider regarding the provider's written authorization. [5 C.C.R. Sec. 603(a)(2).] If you are concerned that school staff may attempt to discuss things other than details of your child's medication administration with the doctor, make sure that any authorization is specifically limited to matters related to medication administration. If the district provides a broad consent form, you should add a sentence or two above your signature, limiting the district's authorization to matters related to medication administration. You should also give a copy of the authorization to the doctor and clarify that it is limited to the details of medication administration.

16. Are there any medications my child may administer to himself without the involvement of district staff?

Yes. As long as the district receives certain written statements from your child's health provider and you, he can carry and self-administer *prescription auto-injectable epinephrine* or *inhaled asthma medication* for asthma. The student's physician or surgeon's statement shall include the medication's name, method, amount and administration time schedules. You will be required to give your written consent that your child may self-administer and that school staff may communicate directly with your child's health care providers. In addition, districts may provide epinephrine auto-injectors to trained personnel to provide emergency medical aid to persons experiencing an anaphylactic reaction. [Cal. Ed. Code Sec. 49414(a).]

You will also need to provide a liability release (waiver) in the event your child suffers an adverse reaction from self-administration. [Cal. Ed. Code Secs. 49423(b)(2) & 49423.1(b)(2).] A general release from civil liability would not protect a school district from liability for injuries resulting from a staff person's negligence. Any document describing a particular health care service involving school staff must be very clear as to how the service is to be performed.

In addition, if your child has diabetes and is able to *self-test and monitor his blood glucose level*, he will be allowed to test his level and provide diabetes *self-care* at school, upon your written request. This can occur in the classroom or any other area of the school, during any school-related activity and (upon your specific request) in a private location. You will also need to provide authorization from his health care provider [Cal. Ed. Code Sec. 49414.5(c).]

Districts *may* provide volunteer school personnel with training on emergency medical assistance for students with diabetes who experience severe hypoglycemia. [Cal. Ed. Code Sec. 49414.5(a).] There is no requirement that anyone volunteer for this training. A copy of the California Department of Education (CDE) *Legal Advisory*, Sample 504 Plan and Sample Diabetes Medical Management Plan are available at www.dre.df.org/diabetes.

For students in special education or with Section 504 plans, the regulations are not a limitation on their right to self-administer medications if their individualized plans require it. [5 C.C.R. Sec. 610(d).]

17. In addition to medication administration, is a special education student entitled to other health care services while at school and at district expense?

Yes. The Supreme Court has found, under special education law, that continuous, complex nursing care services are considered "related services" — not "medical services" — if necessary to ensure that students with significant health care needs have access to the public schools and are integrated with non-disabled students. These are the kinds of services that can be provided by a nurse, whereas medical services are those provided by a physician. [*Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66 (1999).] State law also affirms the right to attend school with health care services, at district expense. [Cal. Ed. Code Sec. 49423.5(f).] The school district cannot refuse to provide nursing services or to deny attendance based on cost.

Under federal regulations, "medical services" means "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." [34 C.F.R. Sec. 300.34(c)(5).] The regulations clarify that the only medical services a district must provide are for diagnostic and evaluation purposes. [34 C.F.R. Sec. 300.34(a).]

18. In addition to medication administration, what other health care services must be provided to a student who has a Section 504 plan?

A district may argue that the provision of health care services, such as suctioning, catheterization, etc., under Section 504, goes beyond "reasonable" in terms of its duty to provide "reasonable accommodations." OCR has rejected the "reasonable accommodation" standard when analyzing whether a district has provided FAPE

under Section 504. [*Letter to Zirkel*, 20 IDELR 134 (1993); *Madera (CA) Unified School District*, 22 IDELR 510 (E.D. Penn. 1995); *Bonita (CA) Unified School District*, 39 IDELR 8 (W.D. Cal. 2003).] The same analysis should apply to a student needing health care services in order to attend school — and attend in the least restrictive environment — under Section 504.

19. If my child is a special education student, when can “specialized physical health care services” be provided by someone other than a nurse?

Under state law, “specialized physical health care services” include catheterization, gastric tube feeding, suctioning, or other services that require medically related training. [Cal. Ed. Code Sec. 49423.5(d).] These services are typically provided by a school nurse, but also may be provided by other school staff if *all* of the following conditions are met:

- (1) The staff are trained in administering the service;
- (2) The staff must be competent in basic cardiopulmonary resuscitation and knowledgeable about the emergency medical resources available in the community;
- (3) The staff are supervised by a school nurse or doctor;
- (4) The service is determined by the school nurse or doctor, in consultation with the student's doctor, to be all of the following:
 - a. routine for the student,
 - b. pose little potential harm for the student,
 - c. performed with predictable outcomes, as defined by the student's IEP,
 - d. does not require a nursing assessment, interpretation, or decision-making by the school staff. [Cal. Ed. Code Secs. 49423.5(a)(2)(A)-(D).]

The staff supervision can be “immediate” (physically present), “direct” (school nurse or doctor is in the same building and available for consultation or assistance)

or "indirect" (nurse or doctor is available by electronic means to provide any necessary instruction, consultation, or referral). [5 C.C.R. Sec. 3051.12(b)(1)(D).] If appropriate supervision is critical to the service, be sure to discuss this with the student's doctor and provide documentation to the IEP team if necessary.

The District may insist that a service requires *some* degree of "nursing assessment, interpretation, or decision making" that cannot be provided by anyone other than a nurse. If you are concerned whether a nurse or other school staff is necessary to provide this service — or that your child may need to attend a different school with a nurse on site — these are issues to be discussed with your doctor and the IEP team. The determination about whether a service in fact requires nursing assessment, interpretation, or decision-making is to be made in consultation with your child's doctor. [Cal. Ed. Code Sec. 49423.5(a)(2).] If there is a disagreement, you can always file for due process. See Chapter 6, *Information on Due Process/Compliance Procedures*.

20. Can the school district require that I pay for my child's nursing services or use Medi-Cal in order for him to attend school?

Services that children need to attend school, and benefit from their education, must be at no cost to the parents. [20 U.S.C. Sec. 1401(29); 34 C.F.R. Sec. 104.33(c)(1).]

The district must look to other non-educational public agencies, like the Medi-Cal program, to pay for services before using its own funds. However, you must give your consent for the district to access public benefits or insurance, including Medi-Cal. *Your refusal to give consent does not relieve the district of its responsibility to insure that all required services are provided at no cost.* [34 C.F.R. Secs. 300.154(a)(1) & (d)(2)(iv).] The district may not require you to pay out-of-pocket expenses, such as deductibles or co-payments (but the *district* may pay these costs). In addition, the district cannot require you to sign up for Medi-Cal, or to use your child's Medi-Cal if that use would:

- (1) Decrease your available lifetime coverage or any other insured benefit;

- (2) Result in the family paying for services that would otherwise be covered by Medi-Cal and that are required for your child outside of the time he is in school;
- (3) Increase premiums or lead to discontinuation of benefits; or
- (4) Risk loss of his eligibility for “home and community-based waivers” based on “aggregate health-related expenditures.”

[34 C.F.R. Sec. 300.154(d)(2).]

Even if the district requests your consent to use public benefits, and meets the requirements listed above, you may still refuse to give your consent.

21. Can the district insist that I use our family's private insurance to pay for health care services which my child needs during the school day?

A school district may use private health insurance benefits for this purpose only if a parent consents and only if the district informs you that your refusal to consent does not mean the district is relieved of its responsibility to provide all the services your child needs and at no cost to the family. [34 C.F.R. Sec. 300.154(e).]

22. What must a school district tell you when it asks for consent to use your child's Medi-Cal benefits or private health insurance to pay for a special education related service?

Parental consent is only valid if you have been fully informed of all information relevant to the activity for which consent is being requested, and is in your native language or other mode of communication. You must “understand and agree” in writing. You should understand that the granting of consent is voluntary and can be revoked at any time. [34 C.F.R. Secs. 300.154(d)(2)(iv)(A), (e), & 300.9.]

For children with both Medi-Cal and private insurance coverage, parents must be told that use of a child's Medi-Cal can result in the Medi-Cal program initiating third-party recovery against the child's private insurance, thereby possibly

depleting the private insurance lifetime cap, or the lifetime cap on coverage for a particular service or treatment.

23. If I consent to the district using my child's Medi-Cal or private insurance to pay for a special education related service, can I revoke consent?

For services already provided, you *cannot* revoke your consent. For services *not yet* provided, you may revoke consent at any time. In addition, the law provides that *each time* a school district seeks to access your child's Medi-Cal or private insurance for this purpose, it must obtain your consent. [34 C.F.R. Secs. 300.154(d)(2)(iv)(A) & (e)(2).]

24. If the district's only nurse is stationed at a certain school site, must my child be bused to that school?

The district might attempt to reduce its cost of providing specialized physical health care services to students by concentrating the students on certain school sites where nursing services are already available. Therefore, state law provides that: "It is the intent of the Legislature that nothing in this section shall cause the placement of [special education students] at school sites other than those they would attend but for their needs for specialized physical health care services." [Cal. Ed. Code Sec. 49423.5(h).]

25. Can the school district agree to provide my child with a person to perform needed health care services only during school hours, but not for after-school activities or while being transported?

No. For students with IEPs and those with 504 plans, Section 504 prohibits discrimination against students with disabilities. Preventing students with disabilities from participating in extra-curricular and non-academic activities (such as counseling services, physical and recreational activities, transportation, special

interest groups or school-sponsored clubs, during of after school) is a form of discrimination. [34 C.F.R. Sec. 104.37.] In addition, if a student's IEP specifies any of these types of activities, the related services necessary to enable that student to participate, such as nursing services, must be provided in order to comply with the IEP. [34 C.F.R. Sec. 300.107.]

26. If the person who provides my child's health care services is absent, does my child have to miss a day of school?

Because the person who provides your child's health care services is so important to your child's ability to attend school, and benefit from the rest of his educational program, you should insist that some kind of back-up system be described included in the IEP or Section 504 plan for those times when the provider is absent. At a minimum, the back-up plan should specify the provider's obligation to timely notify the district of an absence, so that the district can arrange for a qualified substitute provider who has received previous training.