

2016 Year in Review Administrative

OSEP Issues Policy Letter on Rights of Students with Disabilities Enrolled in Private Schools by Their Parents

As you are most undoubtedly aware, the issue of students attending private schools is a hot right now. On December 27, 2016, the U.S. Education Department' Office for Special Education Programs (OSEP) issued a policy letter spelling out some of the key rights under the IDEA for students with disabilities when they are enrolled by their parents in private schools, as opposed to when they have been placed by the school district. *Letter to Chambers*, 117 LRP 2508 (Dec. 27, 2016, OSEP). The IDEA refers to these students as "parentally-placed private school students." These rules would apply any time a parent enrolls a student with a disability in a private school, including when using vouchers, tax credits and other school-choice options. Note, however, that an individual State may grant full IDEA rights to these students, and some States have done so.

First, these students lose a number of their IDEA rights, including the rights to a FAPE, an IEP, and a due process hearing. Instead, school districts must meet with representatives of the parentally-placed private school students to determine which services will be provided to these students. Although the parents must be consulted in this process, the school district makes the final decision about which students will receive services, the services to be provided and where those services will be provided.

OSEP went on to note that if transportation is necessary for a student to benefit from the services, the school district must provide transportation to and from the service site. This is so even if the site is outside of the school district's boundaries or even outside the State. School districts are not required to transport students between their home and the private school itself, however.

OSEP went on to note that services may be provided on the site of the private school, even a private religious school, "to the extent consistent with law." In fact, OSEP stated that providing services on site may be preferred "so as not to unduly interrupt the child's educational experience, unless there is a compelling reason for these services to be provided off-site." If services are provided at another site, transportation may be required to get the student to and from the site. Finally, OSEP stated districts should coordinate with representatives of private school students to ensure services are provided at sites, including at the private school, so the district can avoid significant transportation costs.

Department of Education Issues Dear Colleague Letter Regarding Education of Children with Disabilities Attending Public Virtual Schools

U.S. Department of Education's August 11 release of an important and much needed "Dear Colleague" letter that will have a significant impact on children with disabilities and their families. The letter clarifies the obligation to ensure that students with disabilities attending

public virtual schools receive all of the protections that they are entitled to under the Individuals with Disabilities Education Act (IDEA). “Dear Colleague” contains a number of key points:

- The IDEA applies to all public virtual schools, regardless of structure
- The State Education Department is ultimately responsible for ensuring compliance with the IDEA, as well as participation in State and district-wide assessments under the Every Student Succeeds Act (ESSA) and establishing and maintaining qualifications for personnel, including training and content knowledge.
- Virtual schools are responsible for identifying students that not have been identified as a student with a disability but may need to be evaluated to determine eligibility—what is called “child find”
- Virtual schools are responsible for providing a free appropriate public education (FAPE) to their students
- The IDEA requirements for providing services in the least restrictive environment (LRE) also apply

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl--virtual-schools--08-05-2016.pdf>

Department of Education Issues Important “Dear Colleague” Letter re: The Role of Behavior Supports in FAPE and LRE: Provides Three Factor Test for Informal Removals

On August 1, 2016, the USDOE’s Office of Special Education and Rehabilitative Services (OSERS) issued a “*Dear Colleague*” letter that clarifies the responsibility under the Individuals with Disabilities Education Act (IDEA) for school districts to provide IDEA eligible students the behavioral interventions and supports they need to have meaningful access to their education.

The letter is at: <http://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps-08-01-2016.pdf> or though LRP at: *Dear Colleague Letter*, [116 LRP 33108](#) (OSERS/OSEP 08/01/16).

The Department of Education’s “Rethink Discipline” webpage also includes the letter and some additional resources: <http://www2.ed.gov/policy/gen/guid/school-discipline/index.html>

Highlights of the August 1 “Dear Colleague” Letter:

The letter makes clear that evidence-based positive behavioral interventions and supports (hereafter “behavior supports”) are not optional when a child’s behavior impedes their learning or that of others, and are not dependent upon a child being eligible in any particular IDEA eligibility category. In addition, behavior supports may be required even when a student is doing well academically, if the students’ behavior otherwise meets the threshold above.

The failure to consider and provide for appropriate behavior supports can result in a denial of Free Appropriate Public Education (FAPE) and/or a violation of the Least Restrictive Environment (LRE) requirement of the IDEA. Behavior supports are required throughout a continuum of placements; a child may not be placed in a segregated program simply to receive behavior support. Similarly, the requirement to provide behavior supports extends to charter schools and educational programs in juvenile justice facilities.

The requirement to provide behavior supports exists separate and apart from the authority of school personnel to discipline a student with a disability. In fact, incidents of misbehavior and classroom disruption may indicate a need for behavior supports. Shorter removals (under 10 days) can give rise to a need to revise the IEP and consider their addition.

As part of the development of IEPs, IEP teams should consider whether behavior supports should be provided in these areas: 1) special education and related services, 2) supplementary aides and services, and 3) program modifications and support for school personnel.

On Page 8 of the letter, OSERS provides a list of examples of circumstances that may indicate potential denials of FAPE or placement in the LRE. Some of these include a failure to list behavior supports in the student's IEP even when the IEP team determines they are needed; and when the supports listed in the IEP are appropriate but are not being implemented.

OSERS uses the term "exclusionary disciplinary measures" (EDM) to refer to both formal and informal removals/exclusions from the classroom. The letter addresses both types of removals and provides examples of EDM which include such events as shortened school days, and a pattern of office referrals that results in an extended removal from instruction, among others.

On Page 13 and in footnote 29, OSERS provides a three factor test that may be used to determine whether an informal removal rises to the level at which it may be "tantamount to a suspension" requiring the district to comply with the procedures set out in 34 CFR 300.530 (e.g. provision of a manifestation determination review). Informal removals should be evaluated to see if the student: 1) continues to be involved in and make progress in the general curriculum, 2) receive the instruction and services specified on their IEP and, 3) participate with nondisabled children to the extent they would have in their current placement.

Department of Education Office for Civil Rights Issues Guidance on Students with Attention Deficit Hyperactivity Disorder (ADHD)

On July 26, 2016, the Department of Education's Office for Civil Rights (OCR) issued a "*Dear Colleague*" letter and resource guide on addressing the needs of students with attention-deficit/hyperactivity disorder (ADHD) under Section 504 of the Rehabilitation Act of 1973. *Dear Colleague Letter*; U.S. Department of Education, Office for Civil Rights; *Students with ADHD and*

Section 504: A Resource Guide (Resource Guide), 68 IDELR 52 (July 2016);
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201607-504-adhd.pdf>.

Highlights of the July 26 “Dear Colleague” Letter:

In the cover letter accompanying the guidance document, Assistant Secretary for Civil Rights, Catherine Lhamon, noted that of the 16,000 complaints involving elementary and secondary schools alleging discrimination based on disability between 2011 and 2015, about 2,000, or one in nine, involved students with ADHD. The Assistant Secretary noted some common themes in these complaints:

- Problems related to identifying and evaluating students for ADHD, including:
 - Not referring students for evaluations
 - Not evaluating students in a timely manner
 - Conducting inadequate evaluations
- Problems related to meeting the needs of students with ADHD under Section 504:
 - Making inappropriate decisions based on a misunderstanding of ADHD or Section 504 requirements
 - Failing to distribute documentation to appropriate staff
 - Inappropriately considering administrative or financial burdens when making decisions

The Secretary emphasized that services must be “based on specific needs, not cost, and not based on stereotypes or generalized misunderstandings of a disability.” *Dear Colleague Letter* at 3.

Highlights of the Resource Guide:

The Resource Guide began with a brief overview of the major federal statutes governing the rights of students with ADHD in school—Section 504, the Americans with Disabilities Act Amendments Act (ADAAA), and the Individuals with Disabilities Education Act (IDEA).

Section 504 Overview

- An impairment that substantially limits any major life activity, not just learning or school, would be considered a disability under Section 504. *Resource Guide* at 3.
- Although not explicitly required, a written plan, often called a Section 504 Plan, is a useful way to document the district’s process to identify, address and communicate to staff the information needed to meet the student’s needs. *Id.* at 4.
- A team, often called a Section 504 Team, of individuals knowledgeable about the student must meet to make decisions about the student, and parents can be an important source of information about the student. *Id.*, fn.14.

ADA Overview

- ADA44 requires definition of disability be considered broadly and eligibility determinations should not require extensive analysis. *Id.* at 5
- ADA44 expanded list of examples of major life activities to include: concentrating, reading, thinking, functions of the brain, and others. *Id.*
- Eligibility should be considered without regard to mitigating measures, such as medication, assistive technology, reasonable accommodations, or learned behaviors or neurological adaptations. *Id.*, fn. 18.

IDEA Overview

- IDEA regulations were specifically amended in 1999 to include ADHD as an example in the definition of other health impaired. *Id.* at 7.
- Finding a student ineligible under IDEA does not relieve district of its obligations under Section 504. “The school district must still consider if the student could be covered by Section 504.” *Id.* at 8.

Section 504 Analysis

- **Child Find Requirements**
 - District must conduct free evaluation for any student with a disability who needs or is believed to need special education or related services. *Id.* at 9.
 - OCR will presume that any child with ADHD has an impairment that substantially limits a major life activity
 - Examples of when a student may need to be evaluated (*Id.* at 11)
 - Signs of restlessness or inattention inappropriate for age
 - Trouble organizing tasks or activities
 - Communication or social skills deficits
 - Behavioral challenges, whether or not accompanied by academic challenges, such as a high number of disciplinary referrals
 - Many other examples given (*Id.*, fn. 43)
 - Students may be performing well academically, but still be eligible under Section 504. *Id.* at 12.
 - Students with inattentive-type of ADHD may not engage in impulsive or disruptive behavior but may nevertheless have significant limitations to learning. *Id.* at 13.
 - Parents may request an evaluation, in which case the district must either conduct the evaluation or notify the parents of their due process rights. *Id.* at 14.
 - If the district suspects the student’s needs have changed, or it is not otherwise meeting the student’s needs, the district must “promptly” make any needed changes. *Id.*
 - Intervention strategies are supported by the Department, but they cannot be used to delay an evaluation. District’s run afoul of Section 504 when they:

- “Rigidly insist on first implementing interventions, or that each tier of a multi-tiered model of intervention must be implemented first ...; or
 - Categorically require that data from an intervention strategy must be collected and incorporated as a necessary element of an evaluation.” *Id.* at 17.
- **Evaluation and Placement Requirements**
 - Evaluations must include information from a variety of sources, including the student, parents, caregivers, teachers and other professionals. *Id.* at 19.
 - If district determines a medical assessment is necessary to determine eligibility, it must arrange it at no cost to the parents. *Id.* at 23.
 - Services must be based on the individual needs of the student and some students may not need any services at all. *Id.* at 25.
 - School districts cannot limit services to those “that are free or low cost.” Students are entitled to services that meet their needs “regardless of cost or administrative burden.” *Id.* at 27.
 - Students are entitled to receive the services identified in their Section 504 Plan or IEP. “It is not the responsibility of the student with a disability to request a FAPE.” *Id.* at 28.
- **Due Process Rights**
 - Parents are entitled to notice
 - Parents are entitled to an impartial due process hearing
 - The hearing officer cannot be an employee of the district. *Id.* at 31.

U.S. Department of Education, Office for Civil Rights, Concludes School District Discriminated against Student through Repeated Use of Inappropriate Prone Restraints

In response to a complaint brought by Disability Rights California (P&A), the U.S. Department of Education Office for Civil Rights (OCR) concluded that the Oakland Unified School District discriminated against a student with a disability by placing the student in a non-public school (NPS) where staff “repeatedly subjected the Student to inappropriate prone restraint over an 11-month period.” *Letter of Finding, Oakland (CA) Unified School District*, No. 09-14-1465 (OCR June 24, 2016) at

<http://www.disabilityrightsca.org/Documents/OCRFindingsReportReOUSDANOVAComplaint.pdf>.

OCR investigated:

1. Whether the District failed to provide the student with a free appropriate public education (FAPE) by: (a) failing to implement the student's Individualized Education Program (IEP); and (b) failing to appropriately evaluate/re-evaluate the Student's individual educational needs; and
2. Whether the District discriminated against the student on the basis of disability by allowing the NPS to: (a) deny the student an opportunity to participate in, or benefit from an aid, benefit

or service when the student was excessively restrained and secluded from class; (b) subject the student to different discipline than non-disabled students; and (c) subject the student to a hostile environment. *Id.* at 1-2.

OCR concluded that the district discriminated against the student in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act with respect to both issues. *Id.* at 30.

Regarding the FAPE violation, OCR determined that the preponderance of the evidence supported a conclusion that the district violated the student's right to a FAPE. First, the district failed to ensure that the student's IEP was implemented in the non-public school. The school disregarded the student's behavioral plan and used its own plan for the student. In addition, while the student was in restraint and during the periods when the student was in recovery the student "did not receive the instructional services, speech and language services, and occupational therapy required under the student's IEP." *Id.* at 23-24.

Turning to the failure to evaluate the student, OCR noted the non-public school used prone restraint," so frequently and for such long durations [it] should have prompted the District to evaluate the Student's behavior under its own policy." *Id.* Additionally, the Education Department's May 2012 Resource Document on restraint and seclusion "provides that repeated restraint use for an individual child, multiple uses within the same classroom, or multiple uses by the same individual should trigger a review and, if appropriate, a revision of behavioral strategies currently in place to address dangerous behavior." *Id.* Additionally, the time in which the student was placed in restraint and in time "recovering" outside of his classroom "exceeded ten instructional days and, thus constituted a change in placement," thereby requiring an evaluation. *Id.* at 24-25. Finally, the district recognized the need to conduct further evaluations in May 2013, but "nearly a year passed, during which the student was continually subjected to prone restraint, before the assessment was completed." *Id.* at 25.

Regarding the discrimination claims, OCR noted that because the district provided substantial assistance to the non-public school the district was responsible for the non-public school's discrimination against the student when it failed to take appropriate steps to obtain compliance from the program or terminate its relationship with the program. *Id.* at 25-26.

OCR determined that the student was discriminated against because he was denied an equal opportunity to benefit from his educational program when he was being restrained and then made to stay away from the classroom while he was "recovering." *Id.* at 26. OCR noted that the student spent most of his time at the non-public school outside of his instructional setting and that he made no academic progress and that his academic and functional performance declined while there. *Id.*

Regarding a hostile environment, OCR noted:

A school district may violate Section 504, Title II, and the regulations if: (1) the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or

benefit from the educational program; (2) the district knew or reasonably should have known about the harassment; and (3) the district fails to take appropriate responsive action that is within its authority

In determining whether a hostile environment based on disability has been created, OCR evaluates whether or not the conduct was sufficiently serious to deny or limit the student's ability to participate in or benefit from the district's program. OCR examines all the circumstances, including: the type of harassment (e.g., whether it was verbal or physical); the frequency and severity of the conduct; the nature of the student's disability; the age and relationship of the parties; the setting and context in which the harassment occurred; whether other incidents have occurred at the district; and other relevant factors. *Id.* at 4-5.

Applying these factors, OCR noted that the inappropriate use of restraint may constitute disability-based harassment. The Department's Resource Document "unambiguously states that the reason prone restraints should never be used is because they can cause the student to either suffer serious injury or death." *Id.* at 27. OCR concluded that the non-public school's "inappropriate use of prone restraints against the Student constituted disability-based harassment since [it] restrained the student in response to disability-related behaviors." *Id.*

Additionally, this use was severe and a potentially lethal act that: caused the Student to scream and cry with physical pain, suffer physical injury, fear and anxiety about going to school, and become depressed to the point of being suicidal. The Student struggled against the restraint use; it was not welcome; he did not consent to its use. The Student was subjected to this dangerous type of restraint when he was nine years old, small for his age and experiencing weak muscle tone by adults who were more than twice his size. He was denied food and water and was denied the right to use the restroom during periods of restraint. The restraint subjected the Student to public humiliation as its use was preceded by a physical escort to the resource room which was visible to his peers who saw him with his arms being held behind him by the adult escort(s) as they took him away. *Id.*

It was also persistent and pervasive - he placed in a prone restraint "over 90 times in 11 months, an average of twice a week ... for an average of 29 minutes each time." *Id.* He also "heard the cries of other students being restrained on a nearly daily basis." *Id.*

OCR concluded that the use of prone restraints "was sufficiently serious to deny or limit the Student's ability to participate in or benefit from the educational program and created a hostile environment" based on disability. *Id.* The district had both constructive and actual knowledge of the situation yet failed to "promptly stop the harassment, eliminate the hostile environment, and remedy the effects of the harassment." *Id.* at 28. The district was in violation of Section 504 and Title II as a result. *Id.* at 29.

OCR then turned to whether the district discriminated against the student for different treatment for defiant or disruptive behavior. It noted the district had implemented a system of school-wide positive behaviors and supports (SWPBIS) to address primarily defiant and

disruptive student misconduct through positive interventions. Yet, “prone restraint is not a positive intervention.” *Id.* At his non-public school he was routinely placed in prone restraint in response to behavior that was defiant or disruptive, not dangerous. This would not have been the case at a school within the district:

According to the District, prone restraint use against its students is only permissible for those it places at an NPS. Only students with disabilities are placed in NPSes. Thus, the only students the District allows to be prone restrained for non-dangerous defiant and disruptive behavior are students with disabilities. OCR determined that the District allowed the Student to be treated differently for non-dangerous, defiant and disruptive behavior on the basis of disability and that for the reasons stated above, this was adverse treatment that denied and/or limited his educational benefits and opportunities. *Id.* at 30. Accordingly, the district discriminated against the student in violation of Section 504 and Title II on this claim. *Id.*

U.S. Department of Education’s (ED) Office for Civil Rights (OCR) Issues Guidance on Restraint and Seclusion in School

On December 28, 2016, the U.S. Department of Education’s Office for Civil Rights (OCR) issued a [Dear Colleague Letter](#) (DCL), and a [Q&A/Fact Sheet](#), on restraint and seclusion in schools. The purpose of this guidance was to inform “school districts how the use of restraint and seclusion may result in discrimination against students with disabilities, thereby violating Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II) (both as amended).” Dear Colleague Letter at 1-2.

U.S. ED’s OCR Issues a Resource Guide for Parents and Educators on Section 504

On December 28, 2016, OCR also issued a [Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools](#) which generally addresses the rights of students under Section 504. The stated purpose of this guide:

The attached resource guide reminds all educational institutions receiving Federal financial assistance from the Department that they must vigilantly work to ensure compliance with Section 504 and other Federal laws that protect students with disabilities. We intend this resource guide to also help parents of students with disabilities understand the obligations imposed under Section 504. In particular, the resource guide summarizes key requirements of Section 504, and aims to increase understanding of these requirements for both parents and members of the school community alike.

Resource Guide, at 1. The guide is a 52 page comprehensive overview of Section 504 obligations for students with disabilities and has 10 hypothetical fact patterns to help explain these obligations.

Department of Education Final Every Student Succeeds Act (ESSA) Regulations on Assessments

On December 8, 2016, the U.S. Department of Education (ED) published final regulations regarding the assessment requirements of the Every Student Succeeds Act (ESSA). 81 Fed. Reg. 88886. <https://www.gpo.gov/fdsys/pkg/FR-2016-12-08/pdf/2016-29128.pdf>. The effective date of the regulations is January 9, 2017. Below is a basic summary of the key provisions of these regulations. A draft of a more detailed analysis is available at:

http://www.ndrn.org/images/Documents/Issues/Education/ESSA_Section_by_Section_FINAL.pdf and will be updated in the near future.

- State Responsibilities for Assessment
 - assessments should be developed to the greatest extent possible using principles of universal design for learning
 - general assessments must be aligned with challenging state academic standards that are aligned with entrance requirements for credit bearing coursework in systems of public higher education in the State and relevant career and technical education standards
 - alternate assessments based on alternate academic achievement standards(AA-AAAS) be developed in a way that reflects professional judgement to the highest possible standards achievable by a student with the most significant cognitive disabilities to ensure that the student is on track to pursue postsecondary education or competitive integrated employment
- Inclusion of Students with Disabilities
 - all students, except those with the most significant cognitive disabilities, must be assessed using the general academic assessment
 - students with the most significant cognitive disabilities may be assessed using either the general assessment or the alternate assessment for the grade in which the student is enrolled
- Appropriate Accommodations
 - state's assessment system must provide accommodations for each student with a disability who needs them
 - interoperability with, and ability to use, "assistive technology devices" included
 - use of assistive technology devices must be consistent with nationally recognized accessibility standards
 - determination of which accommodations would be appropriate must be made individually by the IEP team, placement team, or other team the LEA designates to make those decisions
 - states must ensure that educators, including paraprofessionals, specialized instructional support personnel, and other appropriate staff receive training and know how to make use of accommodations

- states must ensure that a student with a disability who uses accommodations on assessments has the same opportunity to participate in and is not denied the benefits of the assessment as compared with a student who does not have a disability, including such benefits as valid college reporting scores
- Alternate Assessments
 - incorporates new statutory requirement regarding alternate assessments aligned with alternate academic achievement standards (AA-AAAS) for students with the most significant cognitive disabilities, including the 1% cap
 - LEAS which exceed 1 percent in a subject in a school must submit a justification to the state
 - States must submit a request a waiver from the Secretary to exceed the state level 1 percent cap
 - states must report on number and percentages of children with disabilities who take general assessments, general assessments with accommodations and AA-AAAS
- State Guidelines
 - states must adopt guidelines for IEP teams to use when determining which students should take the AA-AAS
 - guidelines would include a state definition of students with the most significant cognitive disabilities
 - the definition would address factors related to both cognitive functioning and adaptive behavior
 - the definition must consider that such students are those requiring extensive, direct individualized instruction and substantial supports to achieve measurable gains on challenging State academic content standards for the grade in which the student is enrolled
 - the state guidelines must also provide IEP teams a clear explanation of the implications of taking the AA-AAS including the effect on a student's opportunity to complete the requirements (including completing requirements on time) for a regular HS diploma
 - a state may not establish guidelines in such a manner that preclude a student who is taking the AA-AAAS from obtaining a regular HS diploma
 - state guidelines for IEP teams must emphasize that students with significant cognitive disabilities who do not meet the criteria for the state's definition of students with the most significant cognitive disability must receive instruction for the grade in which they are enrolled and be assessed against the challenging state academic standards

Department of Education Final Regulations Regarding Disproportionality

On December 19, 2016, the U.S. Department of Education (ED) published final regulations establishing a standard methodology states must use to determine whether significant

disproportionality based on race and ethnicity is occurring in the state and its LEAs. 81 Fed. Reg. 92376 <https://www.gpo.gov/fdsys/pkg/FR-2016-12-19/pdf/2016-30190.pdf>.

The purpose of the final regulations is to ensure that states meaningfully identify LEAs with significant disproportionality and that states assist LEAs in ensuring that students are properly served. The regulations are effective January 18, 2017 and the compliance date for these regulations is July 1, 2018, with an exception for children ages 3-5.

The regulations clarify that states must address significant disproportionality in the incidence, duration, and type of disciplinary actions, including suspensions and expulsions, using the same statutory remedies required to address significant disproportionality in the identification and placement of children with disabilities. The regulations describe the procedures that must be used when significant disproportionality is found. They require that LEAs identify and address the factors contributing to significant disproportionality as part of comprehensive coordinated early intervening services (comprehensive CEIS) and allow these services for children from age 3 through grade 12, with and without disabilities.

Key points relevant to P&A work include the following provisions:

- Requires states to report all risk ratio thresholds, minimum cell sizes, minimum n-sizes, standards for measuring reasonable progress, and the rationales for each, to the Department. States must consult with their stakeholders and State Advisory Panels to develop these, as well as any of the available flexibilities they will adopt.
- Sets a rebuttable presumption that a minimum cell size of no greater than 10 and a minimum n-size of no greater than 30 are reasonable.
- Clarifies that the remedies are triggered if a state makes a determination of significant disproportionality with respect to disciplinary removals from placement, clarifying a prior area of confusion.
- States may choose to identify an LEA as having significant disproportionality after it exceeds a risk ratio threshold for up to three prior consecutive years. A state also has the flexibility not to identify an LEA with significant disproportionality if the LEA is making “reasonable progress” in lowering the risk ratios, even if they exceed the State’s risk ratio thresholds.