ASBA Legal Webinar
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When OCR Comes Calling: How Your District Can Avoid (and Handle) an Investigation from the Office for Civil Rights

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I. INFORMATION ABOUT OCR & THE INVESTIGATION PROCESS

The Office for Civil Rights for the U.S. Department of Education (“OCR”) is tasked, according to its mission statement, with “ensuring equal access to education and promoting excellence throughout the nation through vigorous enforcement of civil rights.”

OCR is the federal enforcement agency that is empowered to investigate complaints of discrimination by educational institutions against individuals on the basis of race, color, national origin, sex, disability and age. OCR accepts and investigates complaints through its enforcement offices. Arizona schools are covered by an enforcement office located in Denver, Colorado.

When OCR receives a complaint of discrimination, it initially determines whether it has authority to investigate the complaint. OCR only has authority to investigate a complaint that alleges a violation of one of the following laws:

• Title VI of the Civil Rights Act of 1964 (race, color, national origin discrimination)
• Title IX of the Civil Rights Act of 1964 (sex discrimination)
• Section 504 of the Rehabilitation Act of 1973 (disability discrimination)
• Age Discrimination Act of 1975 (age discrimination)
• Title II of the Americans with Disabilities Act (disability discrimination)
• Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001

OCR will generally dismiss a complaint without investigation if any of the following are true:

• The complaint does not state a violation of one of these laws;
• the complaint was filed more than 180 days after the complainant first knew about the alleged discrimination;
• the complaint has been or is being investigated by another Federal or state civil rights agency or through a state’s internal grievance procedure (for example, a due process complaint has been filed or an ADE complaint filed);
• the same allegations have already been investigated and resolved.

OCR may also dismiss a complaint where there is a pattern of complaints previously filed by the complainant involving the same or similar allegations, OCR has recently addressed the same issues in the district through another complaint or a compliance review, or the complainant withdraws the complaint (OCR might keep the case open regardless of a request to withdraw by the complainant if OCR believes the complaint addresses systemic issues within the district).

OCR’s Case Processing Manual is available online and provides detailed information about the process OCR follows when it receives a complaint.

Tips:

Your legal counsel will argue that the complaint should be dismissed without investigation if any of the above reasons exist to do so. Therefore, if, for example, you received an ADE complaint on the same issue by the same complainant a week before you received notice of an OCR investigation, or multiple OCR complaints in the past with the same allegations from the same complainant, be sure to advise your counsel.

II. INVESTIGATIONS

A. Receipt of the Complaint/Data Request

OCR initiates its investigation by sending a letter to the Superintendent informing a school district that it has received a complaint alleging discrimination by the district. The letter is generally relatively vague about what the actual complaint is, though it does identify the complainant. Along with the letter, OCR generally sends a Data Request asking for specific information and documentation from the district.

OCR findings are generally admissible evidence in civil legal actions. Therefore, an OCR investigation is a legal proceeding that your insurance carrier will want reported immediately.

Tips:

• The deadline for responding to a Data Request from OCR is often very short—sometimes no more than two weeks. Therefore, it is essential that the Superintendent’s office immediately forward the complaint and the Data Request to counsel for the district and to the department that will have the relevant records. Data responses often require gathering hundreds of pages of documents and talking to several individuals about the student involved and this process should start as quickly as possible after receipt of the complaint.
• Place a litigation hold on records, including emails, relevant to the complaint immediately. A directive ordering administrative staff, school sites, and departments to preserve records related to this student and the incident should be sent in writing to all relevant individuals.
• Identify a person, often the special education director, school counselor, or site-level administrator, who will coordinate gathering documents and identifying individuals who have important information. The designated staff member should start gathering those documents immediately. However, instruct the designated staff member NOT to obtain witness statements. Legal counsel will want to interview witnesses and may choose not to draft statements.
• Instruct staff to avoid any actions that are or appear to be retaliatory against the complainant or the student because of the OCR complaint.
• Do not allow a complaint to stop you from providing a free appropriate public education and meeting all of the district’s obligations. For example, do not postpone a necessary IEP meeting because you have received an OCR complaint.

B. Responding to the Data Request

OCR has broad authority to obtain documents and information. Therefore, though you may be tempted to redact identifying student information, or withhold documents that seem irrelevant even though they are responsive to the Data Request, you should not do so. First, OCR has the investigatory authority to obtain this information. Second, the documents provided will often support the district’s position. Finally, the district has no way to know what documents the complainant has provided to OCR, and so you should assume that if there is a less than helpful email or other document that complainant had access to, it is already in the hands of OCR.

A district may request an extension of the deadline for responding to a Data Request, which is often necessary due to the volume of information sought. The notification letter identifies the complaint investigator assigned to the case and your legal counsel may contact that investigator to request a reasonable extension.

The response to the Data Request is the district’s opportunity to set out the facts related to the student and the complaint. When OCR drafts its data request, the only information it has is information provided by the complainant (usually, though not always, the parent). At times, this information is outright incorrect. More often, it is simply incomplete. In the Data Request response, the district will provide context for OCR so that the investigator has a complete picture of the student, the steps taken by the district to ensure that the student is treated fairly or receives a free appropriate education, and the roadblocks that parents may have created.

C. Interviews of District Personnel

In some cases the OCR investigator will request interviews with specific district employees. These interviews are typically not long, but the interviewee should review relevant documents so as to refresh his/her recollections about the student and incidents related to the complaint. Often the events that are relevant to the complaint occurred months prior to the interview; therefore, a review of documents that involve the specific person being interviewed can help ensure that the testimony will be consistent with the written response to the Data Request.

D. Possible Outcomes of an OCR Complaint

1. Early Complaint Resolution Process
OCR can offer the parties the opportunity to participate in the Early Complaint Resolution process (ECR). OCR utilizes this process to attempt to resolve a complaint without a full investigation. If OCR determines that a complaint is appropriate for the ECR process, it will provide a mediator who will serve as an impartial facilitator. The parties will agree upon a mediation date and OCR will send the mediator (who is NOT the investigator) to the district or another location for the day. The district should only agree to participate in ECR if it is prepared to “give” something to achieve settlement. ECR mediations do not always involve monetary compensation to the complainant, though money can be a component of an agreement.

The mediation process is confidential. All participants in the mediation process, including the mediator, must sign a confidentiality agreement. If the mediation session does not result in a resolution agreement, the mediator will not share his/her notes or information with the investigator.

OCR does not sign, approve, or enforce agreements signed during the ECR process. If a mediation agreement is signed, the complaint investigation closes.

Tip: Districts should seek to include a release and waiver of claims as a component of a mediation agreement. Where an agreement includes a release and waiver of claims clause, the complainant has expressly agreed that s/he will not file a lawsuit or another administrative claim against the district or district personnel related to the allegations raised in the complaint.

2. 302 Agreements.

A 302 Agreement is OCR’s name for an agreement entered into between OCR and the district to resolve the complaint during the investigation. Typically, the OCR investigator will ask the district if it is interested in attempting to resolve the complaint via a 302 Agreement. Alternatively, if the district recognizes that the facts lend themselves to a possibility that OCR will find a violation, the district can approach the investigator to inquire as to whether OCR is willing to consider a settlement. The process is voluntary.

In negotiating a 302 Agreement, OCR will identify the allegations and areas of concern that it has uncovered during investigation, and will present a draft of an agreement to the district for review. Once signed, OCR will monitor the agreement until all of the district’s obligations have been met.

3. Letter of Findings

At the conclusion of an investigation in which no agreement has been reached (either via ECR or a 302 Agreement), OCR will determine whether, based on a preponderance of the evidence, there is sufficient evidence to support a conclusion that the district failed to comply with one of the statutes that OCR enforces, or whether there is insufficient evidence for such a conclusion. OCR will issue a letter of findings explaining its conclusion.

Where OCR concludes that there is insufficient evidence to support a finding of noncompliance, it will issue a letter of findings to that effect and the case is at an end.
Where OCR determines that the district is not in compliance, it will draft a resolution agreement that will require the district to take steps designed to remedy the individual discrimination and any systemic issues. The district is not required to enter into the agreement, but if it does, OCR will monitor the agreement until the district has complied with all elements and then the case will close.

If the district will not enter into a voluntary resolution agreement at this point, OCR will issue a Letter of Impending Enforcement Act, which sets out the allegations and issues investigated, the findings of fact for each allegation and issue, a description of OCR’s efforts to obtain voluntary compliance, notice of possible deferral of the district’s application for additional federal financial assistance, and a notice of the complainant’s right to sue the district.

**Tip:** If your district receives a Letter of Findings that concludes that the district is out of compliance, the district will likely enter into an agreement to voluntarily comply. These agreements, and compliance with the terms of the agreement, will often prevent OCR from investigating the same issue if another complaint is filed. The agreements often require the district to revise or draft policies related to the issue(s) identified in the finding and to provide training to district staff related to the policies.

II. A BRIEF LOOK AT ISSUES ON WHICH OCR HAS FOCUSED RECENTLY & TIPS FOR AVOIDING COMPLAINTS ON THESE ISSUES

A. PLAYGROUND ACCESS

The Americans with Disabilities Act (ADA) has complex requirements for playground accessibility and OCR will investigate allegations that students with disabilities are not offered the opportunity to access playground equipment.

The ADA prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation. Public school districts and charter schools are public entities subject to Title II of the ADA.

The ADA includes standards for accessible design, which must be followed when constructing or renovating facilities, to ensure they are readily accessible to and useable by individuals with disabilities. The most recent revision of the ADA Standards for Accessible Design was released in 2010. See [http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm](http://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.htm). The 2010 Standards apply to fixed or built-in elements of buildings, structures, site improvements, and pedestrian routes or vehicular ways located on a site.

For any construction or alterations completed prior to September 15, 2010, the 1991 version of the ADA Standards will apply. For any new construction or alterations that were started on or after March 15, 2012, then the new construction and/or alteration shall comply with the 2010 Standards.

For playground equipment, some examples of the requirements under the 2010 ADA standards are as follows:
• If elevated play components are provided, ground level components shall also be provided (i.e., if 2 to 4 components are elevated, must have 1 ground level component).

• Ground level play components accessed by children with disabilities must be integrated into all play areas (i.e., grouping all ground level play components into one location for children with disabilities is not considered integrated).

• Where sand is provided, an accessible route must connect to the border of the sand box. One example of this would be to have a surface such as hard rubber between the sidewalk adjacent to the playground and the ground level component where students would enter the playground equipment.

• If a stand-alone slide is provided, an accessible route must connect the base of the stairs at the entry point to the exit point of the slide.

The 2010 ADA Standards for Accessible Design are very complex and contain many requirements for all types of buildings and structures that may be constructed on a school site. Therefore, if a school or district has concerns about the accessibility of the buildings and/or structures located on campus, they should contact the district facilities manager to discuss whether alterations may be necessary.

Tips:

• Contact your facilities manager and have a conversation about whether playgrounds at all school sites have been altered and if so, whether the ADA standards were considered and implemented in during the alterations.

• Visually inspect your playgrounds to determine whether there is an accessible route to the playground equipment for a person with mobility impairments and whether there are elements on the playground that a student with physical disability could utilize.

• If you receive a complaint about playground access, consider a) whether the playground is required to meet the ADA Standards for Accessible Design; b) if so, whether it does; and c) if it does not, whether there are ways to remove barriers that inhibit the ability of a student with a disability to utilize the playground.

• Consider participating in ECR to determine whether you and complainant can find a way to accommodate the needs of the student.

B. SERVICE ANIMALS

The ADA states that refusing to allow a service animal in public entity can be discrimination on the basis of disability. Increasingly, schools are facing situations in which a student with a disability utilizes a service animal. A service animal is defined as:

A service animal is any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or
domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the handler's disability.

(emphasis added) 28 CFR § 35.104.

While the federal regulations limit service animals to dogs, 29 CFR § 35.136(i) requires that public entities make accommodations for miniature horses. Arizona law is parallel to the federal law. See A.R.S. § 11-1024.

Under federal law, a school is only permitted to ask two questions about a service animal: 1) is the service animal required because of a disability; and 2) what work or task has the service animal been trained to perform.” The school is not permitted to ask about the nature of the individual’s disability. Further, the school cannot require that the individual with a disability show proof that the animal has been certified, licensed, or trained as a service animal. Additionally, if it is “readily apparent” that the animal is trained to perform tasks for its owner; the school cannot make inquiries regarding the service animal. 34 C.F.R. § 35.136(f).

What Tasks Do Service Animals Perform?

Service animals can perform many tasks. These can include:

• Assisting individuals who are blind or have low vision with navigation and other tasks,
• Alerting individuals who are deaf or hard of hearing to the presence of people or sounds,
• Providing non-violent protection or rescue work,
• Pulling a wheelchair,
• Assisting an individual during a seizure,
• Alerting individuals to the presence of allergens,
• Retrieving items such as medicine or the telephone,
• Providing physical support and assistance with balance and stability to individuals with mobility disabilities, and
• Helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.

28 CFR § 35.104.

Refusing to allow a student who needs a service animal to have the animal on campus may lead to an OCR complaint. However, a service animal can be excluded from a public facility if one or more of the following apply:

• The animal poses a direct threat to the health or safety of others;
• The animal fundamentally alters the nature of the public place or goods, services or activities provided; or
• The animal poses an undue burden.

Further, a public entity to ask a person with a disability to remove a service animal “if the animal is out of control and the handler does not take effective action to control it; or the animal is not housebroken.” 28 CFR 35.136(b).

The care or supervision of a service animal is solely the responsibility of its owner. A school is not required to provide care or food for the animal. Nevertheless, a federal court found that teaching the staff the few commands required to assist the student with his service animal was a reasonable accommodation. C.C. v. Cypress School District, Case No. 8:11CV352-AG (C.D. Cal. June 2011).

Tips:

• School personnel are not permitted to ask about the nature of the individual’s disability.

• The care or supervision of a service animal is solely the responsibility of its owner. A school is not required to provide care or food for the animal. However, training personnel to assist with the handling of the service animal has been found by OCR to be a reasonable accommodation, and therefore, districts should consider whether such training is necessary on a case by case basis.

• If there is a student with allergies in the same class, do not simply deny the student the ability to have the service animal:
  o Contact parents to determine severity of allergy, possibly permission to speak with student’s physician;
  o Determine if there are ways to alleviate the allergy exposure, such as air filters.

C. OPEN ENROLLMENT

Because of severe budget cuts experienced by k-12 education in recent years, open enrollment becomes an increasing difficult issue and districts may find that they must deny open enrollment applications to ensure they can serve resident students. However, denying an open enrollment application, particularly where the student is in a protected category as described above, can lead to an OCR complaint.

Open enrollment policies must include admission criteria, application procedures, and transportation provisions. School districts may give enrollment preference to students who are the children of district employees. A.R.S. § 15-816.01(A). Though Arizona law does not prescribe or proscribe the admission criteria that a district can adopt, constitutional principles and various federal and state civil rights laws are implicated. For instance, the policies and procedures enacted by district must also ensure that no students who apply for open enrollment are treated differently because of their race, sex, age, national origin, religion, pregnancy, marital status, or disability because district policies are subject to Section 504 of the Rehabilitation Act (“Section 504”) and the ADA.
Section 504 and the ADA both mandate that students with disabilities have equal opportunity to access the benefits of the programs, services, and activities that a public entity (including a public school) provides. 29 U.S.C. § 794; 42 U.S.C. § 12132. Open enrollment for both district residents and non-district residents is a “benefit” offered to the public and, therefore, subject to the non-discrimination mandate of these laws. Specifically, the regulations that interpret Title II of the ADA tell us that a public entity, including a school district, may not provide a qualified individual with a disability with a benefit that is “not as effective in affording equal opportunity to obtain the same result [or] gain the same benefit” as a non-disabled person. 28 C.F.R. § 35.130(b)(1)(iii). In other words, districts must ensure that in the application of an open enrollment policy, students with disabilities are not excluded more often than non-disabled students.

Capacity
Arizona and federal law DO NOT require school districts to add physical facilities or hire additional faculty or staff to create extra or additional capacity for non-resident students. Therefore, the primary criterion for open enrollment admissions used by Arizona school districts is capacity. School districts consider a variety of relevant factors in determining whether a particular school has capacity to accept resident or non-resident open enrollment students, including class size, student/teacher ratios, plant capacity, programmatic capacity, and related service provider capacity.

Though there are no statutory rules regarding capacity in general, A.R.S. § 15-764(A)(5) does require that the governing board of each school district or county establish policy regarding pupil-teacher ratios and pupil-staff ratios for the provision of special education services. OCR has examined district capacity policies in relation to complaints against discrimination against students with disabilities. For instance, in Tanque Verde (AZ), OCR determined that the district’s website and letter to parents regarding open enrollment was discriminatory. In that case, the District has posted on its website and stated in a letter that there were approximately 100 open enrollment spaces available to students living outside of the District boundaries; however, the website and letter also stated that students with disabilities were not eligible for open enrollment because the special education programs were at capacity. 51 IDELR 111 (OCR 2008). OCR found that the website and letter were discriminatory on their face because they “had the effect of imposing eligibility criteria that screened out or tended to screen out students with disabilities from fully and equally enjoying the District’s educational services.” Id.

The District’s error in the Tanque Verde case was, in part, that it did not allow capacity available for each application to be considered on an individual basis. As OCR noted, “many students with disabilities are placed in mainstream educational environments with disability related supportive services.” Therefore, even if the self-contained programs were at capacity, the District’s statements improperly and unnecessarily screened out applications from students who could have been accepted into general education classrooms. Id.

In Winslow (AZ Unified School District), OCR found that the District discriminated against four non-resident students who applied for open enrollment where they were denied admission because the District had capped the enrollment of special education students at 10% of the total
population of each grade level. 57 IDELR 110 (OCR 2011). Again, OCR found that the District had violated Section 504 because it failed to individually consider whether it had the resources or capacity to provide the services required by the individual students’ IEPs. Id.

As long as districts establish capacity for self-contained special education classes, the districts are permitted to limit enrollment on the basis of capacity. Capacity should be reviewed for the following year and published prior to making open enrollment decisions. Furthermore, districts should be able to establish that prior to denying admission to a student with a disability, it did an individualized inquiry into whether it could serve the student without exceeding capacity.

Tips:

- Annually set student: staff ratios for general and special education classrooms. (Required per A.R.S. 15-764(A)(5)).
- Decisions must be based upon student’s individualized needs per their IEP.
- Do not place “caps” on enrollment for students with disabilities.
- Decisions may be based upon program capacity.
- Ensure that the person(s) processing open enrollment applications/revocation decisions is aware of the IEP/504 status of each student.
- If student has an IEP or 504 plan, consult the appropriate administrator and provide information about why revocation or denial of application is being considered.
- Centralize process at district level. If there is no centralized system, carefully assess district and school resources.

D. **WEBSITE ACCESSIBILITY**

School districts are public entities under Section 504 and Title II of the ADA, and therefore, districts are required to make their websites accessible to individuals with disabilities by removing all barriers that may prevent access.

Section 504 and the ADA require that students, parents and members of the public are able to independently acquire the same information, engage in the same interactions, and enjoy the same benefits and services within the same timeframe as their non-disabled peers, with substantially equivalent ease of use; and that they are not excluded from participation in, denied the benefits of, or otherwise subjected to discrimination in any school or district programs, services, and activities delivered online.

Because individuals with disabilities may utilize assistive technology, such as screen reading software (which allows a person to “hear” what the webpage is displaying) or keyboard, when accessing a district’s website, districts must ensure that the content and functionality of their websites (and all intranet pages such as classroom webpages) are developed in such a manner
that the information is properly conveyed when accessed by a screen reading software, or other assistive device.

With a little knowledge, it is fairly easy to ensure all content that is uploaded accessible to all users. Although there are more technical aspects of ensuring a school or district website is free of barriers to accessibility that may require a specialist to address; the following are just a few simple tips and tricks to remember when uploading content:

- **ALT Tags.** ALT tags are attributes that are assigned to HTML documents or images uploaded to a website that specify alternative text (alt text) for what is being displayed. ALT tags help individuals using "screen reader" software to interact with the document or element that is on the webpage. For example, Ms. Jones posts a picture of herself on her class webpage for parents to see. Unless she assigns an ALT tag to the picture that says, “Picture of Ms. Jones” the person using assistive technology would not know the picture was on the website, because it would not be picked up by the screen reader and read aloud.

- **Links on webpages.** When navigating through a page, screen reading software will read the blue underlined words in a link to the user. For example, the following link: http://husd.com/homework/lib/Jones would be read by the screen reader as follows: “h, t, t, p, colon, slash, slash, w, w, w, dot, h, u, s, d, dot, com, slash, homework, slash, l, i, b, slash, jones.” (Try having someone else read this to you with your eyes closed in a fast, robotic voice and you will likely see how unhelpful the information is). Therefore, when uploading links to a page, be sure to think carefully about the name given to a link. Perhaps naming a link something like “click here for Ms. Jones’ class homework” would be easier than spelling out or copying and pasting a link with technical information.

- **Contrast Ratio.** When building websites, or teacher pages within a website, it is important to remember that some people cannot read text if there is not sufficient contrast between the text and the background. For example, light gray text on a light background may be hard for a low-vision user to discern. Ensure that a good contrast ratio is maintained when choosing colors.

OCR is currently investigating numerous complaints on this issue in Arizona. Therefore, districts are encouraged to discuss with the school or district webmaster tips and tools to ensure any content that is uploaded to a school or district website is accessible to all users. More information about the standards for accessibility can be found by visiting the Web Accessibility Initiative at [http://www.w3.org/WAI/](http://www.w3.org/WAI/).

**Practical Tips:**

- Work with the district/school webmaster to train all staff responsible for uploading content to the website on how to make content accessible.
• Complete an audit of the school/district website periodically to identify the barriers that may be present to those individuals with disabilities who may use alternative methods of viewing the website.

E. BULLYING

Bullying has become a hot topic issue for OCR and it receives a lot of attention in the press. However, there are varying definitions of bullying that can lead to confusion among school staff and parents. The United States Department of Education’s Office of Special Education and Rehabilitative Services (OSERS) issued a Dear Colleague Letter (“DCL”) on bullying and particularly bullying of students with disabilities, in 2013. In the OSERS Dear Colleague Letter, bullying is defined as:

Bullying is characterized by aggression used within a relationship where the aggressor has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.

OCR issued a Dear Colleague Letter in October 2014, in which it took the position that bullying does not have to involve repeated incidents, but must be “sufficiently severe, pervasive, or persistent so as to interfere with or limit a student’s ability to participate in or benefit from services, activities, or opportunities offered by a school.”

The Dear Colleague Letters offer the following guidance to schools:

• Schools have an obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his/her IEP or Section 504 Plan.

• Convene an IEP meeting to determine if, as a result of the effects of the bullying, the student’s needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. For example, does the student require counseling?

• Use caution in changing a special education student’s placement in a bullying situation. The student should be kept in the original placement unless the student can no longer receive FAPE in the current LRE placement.

The enclosure with the OSERS DCL provides a substantive outline of preventative measures to prevent bullying at schools.

Section 504 and Title II require a school with notice of possible disability-based harassment to take prompt and effective steps to determine what occurred and to end any harassment, eliminate a hostile environment, and prevent recurrence.

Most recent legal guidance on bullying and students with disabilities from OCR:
http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

Bullying is also addressed in Arizona statute A.R.S. §15-341 (A).

Tips:
• It is imperative to have district and/or school anti-bullying guidelines and positive behavior intervention plans; this is the first line of defense. Make them both strong and clear!

• Teach anti-bullying tactics to both students and staff.

• Set up a bullying report system that students are not afraid to use.

• If any staff person becomes aware of bullying of a student with a disability, the IEP team should be convened promptly to evaluate the issue and determine if student’s IEP or 504 Plan require modifications for student to continue to receive a FAPE.

F. EXTRACURRICULAR ACTIVITIES

Districts must ensure that students with disabilities have equal opportunity to participate in extracurricular activities, which may include certain reasonable modifications. Both the Individuals with Disabilities Act (IDEA) (which OCR does not have jurisdiction to investigate) and Section 504 require school districts to provide a qualified student with a disability appropriate aids and services to allow the student to participate in extracurricular activities. Specifically:

• The IDEA requires school districts to take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. 34 C.F.R. § 300.107; and

• Section 504 requires that: “No otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”

On January 25, 2013, OCR issued a Dear Colleague Letter that specifically addresses the accommodation of students with disabilities in extracurricular activities. OCR concluded that school districts must ensure that students with disabilities have equal opportunity to participate in extracurricular activities. This does not preclude a district from establishing a level of skill or ability for participation in competitive activities; however, districts must make reasonable modifications to programs and policies to ensure students with disabilities have the opportunity to participate in extracurricular activities, unless districts are able to demonstrate that a modification would fundamentally alter the nature of the activity. Dear Colleague Letter, 113 LRP 3326 (OCR 2013).

When making a determination regarding a requested modification, school districts must conduct an individualized review to ascertain if the requested modification would constitute a fundamental alteration to the program at issue. A fundamental alteration to a program might exist if:

• The modification “alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally”; or
• The modification would provide the disabled student an unfair advantage over the other participants.

If students with disabilities are unable to participate in programs offered by the district, even with reasonable accommodations and modifications, then the district should (but is not required to) offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities.

Practical Tips:

• Ensure coaching staff are trained on the obligation to accommodate students with disabilities in extracurricular activities.

• Establish connections within the community to provide alternative activities for students with disabilities, i.e., Special Olympics.

G. ENGLISH LANGUAGE LEARNERS

In January, 2015, OCR and the Department of Justice issued a joint Dear Colleague Letter (“DCL”) on the issue of avoiding discrimination against English Learner (“EL”) students and limited English proficient parents. The DCL states that in determining whether a district’s EL programs comply with civil rights laws, OCR will consider the following:

• Whether the educational theory underlying the language assistance program is recognized as sound by some experts in the field or is considered a legitimate experimental strategy;

• Whether the program and practices used by the school system are reasonably calculated to implement effectively the educational theory adopted by the school; and

• Whether the program succeeds, after a legitimate trial, in producing results indicating that the students’ language barriers are actually being overcome within a reasonable period of time.

In the DCL, OCR identified several areas, listed below, in which it has seen noncompliance by school districts. These, therefore, are areas the district should review and consider in the effort to avoid OCR complaints:

Identification. Districts have an obligation to identify and assess EL students in need of language assistance in a timely, valid, and reliable manner. Schools must provide notices to all parents of EL students regarding the students’ identification as a student in need of language assistance services within 30 days of the beginning of the school year. This notice must be provided in a language that the parents can understand, and therefore, particularly with less common languages, the identification of the student must occur well before the 30 day deadline so that the notice can be translated into the parents’ primary language. Schools should refer suspected EL learners (generally identified by on a home language survey) for an English language proficiency assessment to determine proficiency in all four language domains: speaking, listening, reading, and writing.

OCR has found districts noncompliant in the following situations: a) a district does not have a process for identifying EL students, b) uses a process that fails to identify large numbers of students, c) fails to adequately assess English language proficiency for those students referred for
assessment, d) fails to timely assess EL students’ English proficiency, or e) fails to assess all four language domains.

**Provision of services:** Districts will violate civil rights laws where they do not provide EL students a language assistance program that is educationally sound and proven successful. There is no requirement that schools use a particular program, but the program chosen must enable EL students to attain English proficiency and parity of participation in the standard curriculum within a reasonable amount of time. Programs must not be implemented in a “one size fits all” manner. Students’ individual needs and language levels must be considered in determining the amount of time a student receives services, including core instruction in the primary language and English language instruction, in a day.

**Sufficient resources for program.** Districts must “sufficiently staff and support” the language assistance program they have implemented for EL students. This includes providing teachers who are highly qualified to provide language assistance services and trained administrators who can evaluate these teachers. Just as with provision of special education services, the needs of students must drive staffing, not the other way around. Therefore, a district cannot limit the amount of time students spend in EL programs based on the availability of staff.

**Equal access to programs:** EL students cannot be excluded from curricular or extracurricular programs, including the core curriculum, graduation requirements, specialized and advanced courses and programs, sports, and clubs, based on their EL status. EL students must have the opportunity to make the same core content progress as their non-EL peers. Therefore, districts may not provide specialized programing for EL students, including bilingual or sheltered content classes, that teach a “watered-down” version of the standard curriculum.

**Integration:** EL students may not be unnecessarily segregated from non-EL students. OCR recognizes that EL students might have to receive separate instruction from their non-EL peers for a period of time, but districts should ensure that EL students are educated with their peers whenever possible, such as during PE, art, and music, and during non-instructional time.

**Provision of special education:** EL students with disabilities who qualify for services under the IDEA or Section 504 must be evaluated and served as any non-EL student would be, and their language needs must be considered in evaluations and in the delivery of services. OCR has determined that formal or informal policies that prohibit dual services in the areas of EL language assistance and special education (or accommodations under a 504 Plan) are impermissible.

**Students who opt out:** students have the right to opt out of EL programs. Despite that decision, a district has an obligation to meet the needs of an EL student who has opted out of the language assistance program. OCR will investigate whether a parent’s decision to opt a student out of EL programing was “knowing and voluntary” so it is important that district staff avoid recommending opt out and that information regarding EL be provided in the parent’s primary language. Though a student may have opted out of language assistance programing, the student remains an EL student. Therefore, the district must monitor his/her progress and if the student is not demonstrating appropriate growth in English proficiency or is struggling academically due to language barriers, the district should notify the parent of the problem and offer EL programing once again. If parent again declines EL programs, the district must continue to take “affirmative
and appropriate steps” to meet its civil rights obligations, including providing training for the student’s general education teacher on second-language acquisition. A district must continue to assess an EL student’s English language proficiency at least annually to determine progress and to determine whether the student is still legally entitled to EL services.

Evaluation: districts must monitor and evaluate EL students who are in language assistance programs to ensure that they are making progress in acquiring English language proficiency and grade level core content. Monitoring must consider all four language domains—speaking, listening, reading, and writing. Districts must exit students from the language assistance programs once they are proficient in English, but also have an obligation to continue to monitor exited students to ensure that they were not existed prematurely. To exit a student from EL programing, a district must conduct a English language proficiency assessment that includes either separate proficiency scores in each language domain or a composite score. In either case, the proficiency score standard must be set at a level that will enable students to effectively participate in grade-level content instruction in English. Districts should maintain the records of these assessments because OCR can require that information in the event a complaint was filed.

Evaluate effectiveness of program: a district must periodically evaluate the effectiveness of the language assistance program if implements to ensure that EL students are acquiring English proficiency and that each program is reasonably calculated to allow EL students to “attain parity of participation in the standard instructional program within a reasonable period of time.”

Communication with parents of EL students: school districts have an obligation to ensure that parents of EL students can meaningfully communicate with the school. A home language survey can be a valuable tool to alert districts to parents who have limited English proficiency.

In addition to these requirements, school districts must ensure that students do not experience discrimination, including harassment, exclusion, retaliation, or different treatment, because they are EL students. For instance, a district may not implement a policy prohibiting students of non-majority national origin from speaking their primary language during the school day unless there is an educational justification for doing so. Students, therefore, cannot be prohibited or punished for speaking their primary language during unstructured, non-instructional time, such as during recess or at lunch.

Tips:

- Do not rely on aides who tutor EL students to supplement regular education instruction in lieu of providing EL programing through adequately trained, highly qualified teachers.
- Develop an individualized programming schedule to ensure each student is gaining English language proficiency and making progress in the general curriculum.
- Do not exclude EL students from gifted or other specialized programming (such as AP or honors courses) where they qualify for the programing. Lack of English proficiency should not disqualify them unless it can be demonstrated that English proficiency is necessary for meaningful participation.
- Conduct special education evaluations for EL students in the language that is appropriate for adequately assessing the student and determining the student’s disability related needs.
• Do not forget the EL students whose parents have opted them out of programming—the district still has affirmative obligations related to those students.

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