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OCR Provides New Guidance on Bullying of Students with Disabilities

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On October 21, 2014, the U.S. Education Department's Office for Civil Rights (OCR) released new guidance to assist schools in addressing bullying of students with disabilities. This guidance supplements a dear colleague letter from OCR that was published in 2013, which also addressed the bullying of student's with disabilities.

Under Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990, public school districts are prohibited from discriminating against individuals because they have a disability. Under Section 504, schools must provide students with disabilities equal access to educational opportunities, which includes a requirement to provide these students with a Free Appropriate Public Education (FAPE). FAPE services for students with disabilities are typically provided to students through a Section 504 plan, or for students who are eligible for special education, an Individualized Education Plan (IEP). OCR's new guidance clarifies that bullying of a student with a disability on any basis may result in a denial of FAPE.

As indicated in previous guidance, school districts have an obligation to address the bullying of stu-

dents with disabilities. OCR addresses complaints of bullying by investigating two possible violations: (1) whether there has been disability-based harassment, and (2) whether the bullying has resulted in a denial of FAPE.

OCR considers the following factors when investigating disability-based harassment violations:

- "Was a student with a disability bullied by one or more students based on the student's disability?"
- "Was the bullying conduct sufficiently serious to create a hostile environment?"
- "Did the school know or should it have known of the conduct?"
- "Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from reoccurring, and, as appropriate, remedy its effects?"

If the answer to each of these is "yes," there is a disability-based harassment violation. Additionally, even if only one of the above questions is answered "yes," OCR has a basis for investigating

whether the student with a disability was denied FAPE as a result of the bullying.

In considering whether a denial of FAPE occurred, OCR asks the following:

- "Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student's academic performance or behavior indicating that the student may not be receiving FAPE?"

If the answer is "no," there is no FAPE violation. If the answer is "yes," the following additional factor is addressed:

- "Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?"

If the answer is "no" and the student was not receiv-

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OCR Provides New Guidance on Bullying of Students with Disabilities, Cont.

ing FAPE, there would be a FAPE violation.

OCR's guidance also provided hypothetical situations in which a disability-based harassment violation and/or a FAPE violation would be found. Through these hypotheticals, OCR also provided examples of possible remedies that might result under a resolution agreement. To see these examples, as well as additional information on OCR's guidance, view the following link.

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

How this affects your district:

This guidance reinforces the obligations of school districts to address bullying for all students, including students with disabilities, to ensure

that disability-based harassment does not occur, and to ensure that students with disabilities are not denied FAPE as a result of bullying. In addition to this guidance from OCR, a recent 6th Circuit Court case from Ohio also addressed a school's obligations to address bullying behavior. Although this case involved race and gender-based discrimination, it reinforced the obligation of schools to address any bullying behavior, regardless of whether the student is a student with a disability. According to the allegations of the parents in this case, the school district administrators failed to address ongoing physical, verbal, and cyber-bullying of a high school student despite having knowledge of the bullying. The Court concluded that the parents' allegations, if found to be true, would amount to reck-

less behavior on the part of the administrators due to their failure to address the continued bullying and harassment. If upon further evidence, the administrators are found to have acted recklessly under O.R.C. § 2744.03(A)(6), the Court stated that they could be held individually liable and, therefore, would not be protected by qualified immunity. *Shively v. Green Local Sch. Dist.*, No. 13-3423 (6th Cir. Aug. 27, 2014).

Although school districts are not expected to be knowledgeable of every instance of bullying, they are expected to take action when they are knowledgeable or should have been knowledgeable. District administrators should also be familiar with and strictly follow the district's state

ODE Guidance Clarifies New Rules on Annualized FTE

As districts transition to the new minimum school year reporting system, the Ohio Department of Education ("ODE") recently released guidance about how it will allocate funding for students that attend school for less than a full day. In July of 2013, House Bill 59 became effective and mandated that the state funding formula for schools be based on annualized full-time enrollment ("FTE"). In order for a district to receive full per pupil funding, each student is expected to receive instruction for the entire day that the student's grade level is scheduled to attend.

However, school districts typically have a number of students that do not attend for a full day, including students who participate in alternative school programs or who receive home instruction. Currently, districts are required to report in EMIS the percent of time that these students attend school as compared to the full day. In its guidance, ODE states that schools may experience a decrease in funding for part-time students as follows.

Alternative School Programs

Many students who are enrolled in alternative school programs are given the option to complete online modules independently. Often these students do not attend school for the entire day. According to ODE's guidance, beginning this school year districts will be expected to provide an entire day of instruction for alternative school students unless they apply for and receive a waiver from ODE. ODE cites ORC §3313.533(B)(1), which states that an alternative school student must attend school or participate in another program named in the district's plan for a period equal to the minimum school day mandated by state law. ODE states that a district may obtain a waiver if it can demonstrate that "the minimum hourly requirements are not workable for a particular student population."

Districts that wish to apply for a waiver this school year are instructed to submit an email request to ODE at daystohours@education.ohio.gov.

Home Instruction

ORC §3323.12 requires a board of education to provide home instruction for children with disabilities who are unable to attend school. The statute further clarifies that for the purpose of determining formula ADM, five hours of home instruction is equivalent to five school days. Relying in part on this statute, school districts sometimes place students temporarily on home instruction, and provide five hours of instruction each week to ensure full funding. However, ODE notes that unless an IEP expressly requires home instruction, students who receive home instruction for less than a full day, including special education students, must be reported in EMIS as attending part-time. These students may trigger a percentage reduction in funding as a result.

Senior Late Arrival and Early Release

For years, school districts have rewarded seniors who have completed most of their graduation require-

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ODE Guidance Clarifies New Rules on Annualized FTE, Cont.

ments early with the option to arrive late or leave early from school each day. Beginning this summer, ODE indicated to districts that these students must be reported as attending school part-time. ODE recognized in the new guidance that districts may lose funding for the percentage of time the seniors are out of school because of late arrival or early release.

However, ODE also indicates that districts may apply for a waiver from the state superintendent that would allow them to count certain seniors who miss one period of class as fully enrolled, but only if those students take sufficiently rigorous courses. The guidance includes several examples of what would be considered “rigorous” for the waiver, such as when a student 1) takes two or more AP classes; 2) takes two courses through a dual enrollment program, or 3) completes a certain number of hours in an internship or apprenticeship program. A district that wishes to request this waiver/exemption should send the request along with a draft policy to daystohours@education.ohio.gov.

Work Release Programs

For work release, a district may count a student’s work time as instruction time if he/she participates in an official work study program or an approved educational option. However, if a student has been released for employment due to financial hardship, a district has two options:

- 1) The district may report the student as part-time and include only the hours the student actually attends class (this is required if the absence is for more than ten days); or
- 1) Under certain circumstances, the district can count the absence as an excused absence if in accordance with board policy and approved by the district’s superintendent as an emergency or some other circumstance considered “good and sufficient cause” for an absence from school. Under this option, the absence will not impact the school’s funding but will affect the attendance rate.

Zero Periods

The last exemption for FTE that was included in the guidance involves zero periods. A zero period occurs when a district offers an additional period of instruction that is optional for students. With regard to the zero period exception, ODE will permit a district to report a student as attending full-time if he/she attends a district-created optional instruction period/zero period but is released from a period later in the day.

If you would like to view ODE’s guidance on Annualized Full-Time Enrollment, view the following link:

<http://education.ohio.gov/getattachment/Topics/Finance-and-Funding/Finance-Related-Data/Guidance-on-Schedule-Change-from-Days-to-Hours/FTE-Enrollment-Reporting-Percent-of-Time.pdf.aspx>

LEGAL REFS: ORC 3313.533, 3317.03, 3321.04, 3323.12

Student’s Removal for Sensory Breaks did Not Deny Student of FAPE

The U.S. District Court for the Northern District of Ohio addressed the issue of whether an Ohio school district provided a student with a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE) when it provided sensory breaks and small group instruction outside the general education classroom. The case involved the education of a student with autism during his first through third grade years. After attending kindergarten mainstreamed in the public elementary school, the parent declined a first grade IEP because the student would not be completely mainstreamed. Instead, the parent accepted the Ohio Autism scholarship and unilaterally enrolled the

student in three different private schools during his first grade year. Due to the parent’s dissatisfaction with all of these private placements, the parent accepted the school district’s second grade IEP and moved the student back to the public elementary school. Again dissatisfied, the parent unilaterally enrolled the student in a fourth private school during his second grade school year.

Shortly after this fourth private school placement, the parent filled due process against the school district requesting tuition reimbursement, which was ultimately appealed to U.S. District Court. In addressing the parent’s claims against the school district, the Court con-

cluded that the public school district provided the student FAPE in his LRE. The following actions helped support this conclusion.

In addressing the parent’s argument that the district changed the student’s placement by providing sensory breaks and instruction outside of the general education classroom, the Court stated that, although the student used the “glass house,” which was a glass-enclosed vestibule between the school’s interior and exterior doors, for sensory breaks and as a quiet place to complete his work, the majority of the day (85-90%) was spent in the general education setting as indicated

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Student's Removal for Sensory Breaks did Not Deny Student of FAPE, Cont.

in the student's IEP. The Court ultimately concluded that the use of the "glass house" was not a change in placement because it did not fundamentally change or eliminate a basic element of the student's educational program.

The Court also found that the district was diligent in addressing the student's behavioral needs. The district completed two functional behavior assessments (FBAs) during the student's first grade year, which documented that the student's behaviors improved when provided sensory breaks, and amended the student's IEP after each FBA to address the student's behavioral and sensory needs. Then when the student returned to the public school in third grade, the school district consulted with a Board Certified Behavioral Analyst to provide an updated FBA. When addressing the parent's complaint about the district prioritizing the student's behavioral needs over any academic needs, a witness from ODE supported the district's

decision to prioritize a student's behavioral needs before addressing academic needs.

The district presented additional evidence to support its decision, including the following: (1) The student missed more general education instruction because of absences than sensory breaks; (2) The parent declined Extended School Year (ESY) services both times the district offered the services; (3) The student's behavior improved during the couple of months the public school provided more small group instruction (directly before the parent unilaterally removed the student to a private placement); and (4) The evidence supported the fact that the school district worked in collaboration with the parent. Because the school district established that it had offered the student FAPE in his LRE, it was not required to reimburse the parent for the unilateral private placement.

K.S. v. Stongsville City Sch. Dist., 63 IDELR 125 (N.D. Ohio 2014).

How this Affects Your District:

This case shows how documentation and continued efforts to address a student's behavioral needs can help a district defend its actions in a due process suit. In this case, the district's continued efforts to address the student's behavioral needs through the IEP, with support of FBA data, proved that the district had offered the student FAPE. Additionally, the IEP established the need for sensory breaks and small group instruction. Although in this case the amount of time spent in sensory breaks "was not frequent enough" to constitute a change of placement, districts should be mindful of the time that a student spends taking breaks outside of the general education classroom and make sure that the student's IEP accurately reflects the time needed for those breaks.

ODE Provides Several New OTES Guidance Documents

Teachers on a Less Frequent Evaluation Cycle:

ODE provided the following guidance for determining the appropriate evaluation cycle for an Accomplished or Skilled teacher from 2013-2014 who is on a less frequent evaluation cycle in 2014-2015 but scored below average (score of 1 or 2) on his or her fall 2014 individual Value-Added report or Vendor Assessment report.

- Teachers are not required to begin the full evaluation cycle for the 2014-2015 school year. However, districts may choose to do so.
- The full evaluation cycle must begin in the 2015-2016 school year.

- If the full evaluation cycle is not implemented the 2014-2015 school year, it is recommended that the teacher be placed on an improvement plan for the 2014-2015 school year none the less.

New Calculation Formula:

After HB 362 allowed school districts the option of evaluating teachers under an alternative framework, the previously used Evaluation Matrix (or "Look-up Table") was no longer feasible for calculating teachers' final summative ratings. Therefore, ODE has announced a new formula-based calculation that will be used with all OTES evaluations, even those subject to the original evaluation framework. This change will also apply to all OPES evaluations.

eTPES will convert the ratings entered for teacher performance (i.e., 1-4), student growth (i.e., 1-5), and, if used, alternative component (i.e., 1-4) into a 600-point scale. eTPES will then calculate the final summative rating by applying appropriate weights and percentages to the ratings. See the following equivalencies:

Teacher Performance:

- Accomplished rating of 4=600 points, Skilled rating of 3=400 points, Developing rating of 2=200 points, and Ineffective rating of 1=0 points.

Student Growth:

- Effective rating of 5=600 points, Above Average rating of 4=400 points, Average rating of 3=300 points, Approaching Average rating of 2=200 points, and a Below Average rating of 1=0 points.

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ODE Provides Several New OTES Guidance Documents, Cont.

Alternative Component:

- Effective Rating of 4=600 points, Rating of 3=400 points, Rating of 2=200 points, and Rating of 1=0 points.

The final summative rating will then be provided on a 600-point scale as follows:

- Accomplished: 500-600
- Skilled: 300-499
- Developing: 100-299
- Ineffective: 0-99

How this affects your district:

Although you will continue to enter the same rating scale for teacher performance and student growth, the final summative rating will now be based on the 600-point scale. This new formula allows the alternative framework more consistency with the original framework, but with this change comes additional training. Remember, this new point scale will apply to all OTES and OPES evaluations. If you have ques-

tions regarding the new point scale, please contact an ERF attorney.

For the full guidance document, view the following link:

http://education.ohio.gov/getattachment/Topics/Teaching/Educator-Evaluation-System/Ohio-s-Teacher-Evaluation-System/OTES_600-point-formula_09-17-14.pdf.aspx

What You Should Know About Guns In Schools

The Ohio State Bar Association and several media channels recently published an article written by Bill Deters & Pam Leist. If you have questions about who can carry guns on school property, whether a board of education has any authority to allow individuals to carry guns on school property, and what risks are involved in arming school staff, check out the article by accessing the link below.

<https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/What-You-Should-Know-about-Guns-in-Schools.aspx>

Upcoming Deadlines

As your school district prepares for the next couple of months, please keep in mind the following upcoming deadlines. For questions about these requirements, please contact an ERF attorney.

Nov. 1—Deadline for teacher to complete online classroom lessons (blizzard bags) for make up hours due to certain school closures (RC 3313.482)

Nov. 1—Deadline screen first time kindergarteners, or first graders, for hearing, vision, speech and communications, and health or medical problems and for any developmental disorders (RC 3313.673)

Nov. 4—General Election Day (RC 3501.01)

Nov. 5—Filing resolution of necessity, resolution to proceed, and auditor's certification for February bond levy with board of elections (RC 133.18)

Nov. 5—Submission of February continuing replacement, permanent improvement, or operating levy to board of elections (RC 5705.192, 5705.21)

Nov. 5—Certification of resolution for February income tax levy to board of elections (RC 5748.02)

Nov. 5—Submission of February emergency levy to board of elections (RC 5705.195)

Nov. 5—Submission of February phased-in levy or current operating expenses levy to board of elections (RC 5705.251) (90 days prior to election)

Dec. 31—Treasurer deadline to canvass members of new Board to determine annual organizational meeting date, which must occur by Jan. 15th (RC 3313.14)

Dec. 31—Expiration of Board member's 4-year term (RC 3313.09)

Dec. 31—Report to ODE the number of students with diabetes enrolled in the district during the previous school year & the number of errors due to administration of diabetes medication during the previous school year (RC 3313.7112)—**This is a new requirement established in recent diabetes legislation, HB 264. Although districts may not have systematically collected this data last year, this provision of law is currently in effect, and ODE will be requiring school districts to report last school year's data by this deadline. ODE has not yet released information regarding the reporting process, but school districts are advised to begin assembling this data.**

Education Law Speeches/Seminars

SAVE THE DATE! 2014-2015 Administrator's Academy Seminar Series

Seminars will take place at the Great Oaks Instructional Resource Center or via live webinar from 9:00 a.m. to 11:30 a.m. unless otherwise noted. Additional registration information will be provided in the near future!

January 22 – Managing Workplace Injuries and Leaves of Absence

April 23 – Special Education Legal Update

July 16 – 2014-2015 School Law Year in Review

Other Upcoming Presentations:

Nov. 10—Six keys to a better night's sleep, OSBA Capital Conference
Presented by: Gary Stedronsky

Nov. 11—OTES & OPES: Implementation Issues Arise, OSBA School Law Workshop/Capital Conference
Presented by: William Deters

Dec. 5—Special Education Laws Made Simple, National Business Institute (NBI), Toledo, OH
Presented by: William Deters & Jeremy Neff

Feb. 9 (Columbus) & Feb. 10 (Dayton)—Ohio Special Education Law, National Business Institute (NBI)
Presented by: Jeremy Neff & Erin Wessendorf-Wortman

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Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Advanced Topics in School Finance
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

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Special Education

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