OCR Updates Relating to Students with Disabilities

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I. OCR’s December 2013 Clarifying Letter to the NSBA Addressing the Participation of Students with Disabilities in Extracurricular Activities

A. Equal Opportunity Does Not Mean:

- Every student with a disability has a right to be on an athletic team.
- Districts must create separate or different activities just for students with disabilities.
- Compromising student safety.
- Changing the nature of selective teams. Students with disabilities have to compete with everyone else and legitimately earn their place on the team.
- Giving a student with a disability an unfair advantage over other competitors.
- Changing essential elements that affect the fundamental nature of the game.

B. Individualized Inquiry:

The NSBA questioned whether the DCL required that the individualized inquiry be undertaken by the school’s 504 team and, if so, whether the team composition needed to change.

OCR set out examples of circumstances when a 504 team decision was not needed, and in so doing implied that there may be circumstances when a 504 team decision would be required. “[The individualized inquiry] does not necessarily mean, however, that the Section 504 team must convene when a student with a disability wishes to take part in extracurricular athletics.” (emphasis in original). In some circumstances, the inquiry could amount to something as straightforward as a coach or athletic staff member consulting with the student and student’s parents to determine what reasonable modifications could be provided to give the student an equal opportunity to participate in the activity. In other circumstances, a district athletics official might be brought into the conversation to address adaptations to standard rules or practices in district competitions; or a student’s teacher might advise on a coaching modification that could support a student with a developmental disability to participate on a team for which she had the requisite athletic ability.”
II. OCTOBER 20, 2014 DEAR COLLEAGUE LETTER: RESPONDING TO BULLYING OF STUDENTS WITH DISABILITIES

A. Harassment on Any Basis.

Within this letter, OCR re-emphasized that harassment of a student with a disability on any basis can result in denial of FAPE under Section 504 or the IDEA.

An administrator’s responsibility does not stop with the duty to be aware of and promptly investigate allegations of harassment of students with disabilities. When harassment is determined to have occurred, administrators must also ask whether the harassment was severe enough that it resulted in a denial of FAPE to a student with a disability.

B. Framework:

School administrators must consider the following when addressing harassment and/or bullying of students with disabilities:

(1) Has there been disability-based harassment?

OCR indicates in its guidance that it will find a disability-based harassment violation if:

(a) a student is bullied based upon their disability;

(b) the bullying is sufficiently serious to create a hostile environment;

(c) school officials knew or should have known about the bullying (e.g., a teacher or employee witnessed or was told about the bullying); and,

(d) the school fails to respond appropriately.

(2) Has the harassment (disability-based or otherwise) of this student resulted in a FAPE violation under IDEA or Section 504? OCR suggested that unless it is clear from a school’s investigation into any bullying or harassment that there was no effect on the student with a disability’s receipt of FAPE, “as a best practice, [the school should] convene the IEP team or the Section 504 team” to determine if the student’s educational needs have changed, whether additional or different services are needed, and the impact the harassment has had on the student’s receipt of services.”
III. **November 2014 Frequently Asked Questions from the DOJ and OCR: Effective Communication for Students with Hearing, Vision, or Speech Disabilities**

Issuance of FAQs appears to signal this will be an emerging areas of interest and enforcement by OCR and the Department of Justice.

A. **IDEA: FAPE has to provide meaningful educational benefit.**

B. **Title II of the ADA: Schools must ensure that the communication services for students with hearing, vision, or speech disabilities are as effective as communication for students without disabilities.**

C. **Section 504: Schools must ensure that the services for students with hearing, vision, or speech disabilities meet their needs as adequately as the needs of students without disabilities.**

D. **So, Is More than FAPE Required?**

Both Departments have adopted as policy a decision out of the Ninth Circuit Court of Appeals which held that, in addressing the communication needs of students with hearing, vision, or speech disabilities, compliance with the IDEA and IEP processes, even if found to offer a FAPE, may not meet the requirements of Title II and/or Section 504.


E. **Highlights:**

1. Communication with students with disabilities in these areas must be as effective as it is with students without disabilities.

2. Sometimes the aid or service offered as part of FAPE will also meet Title II requirements.

3. Districts must give “primary consideration” to the auxiliary aids and services requested by the student or their family to determine what is appropriate for the student.

4. The district must honor the aid or service chosen by student or family or prove that the aid or service requested “would result in a fundamental alteration in the nature of the service, program or activity or in undue financial and administrative burden.”
5. If the school determines that the service or aid would result in a fundamental alteration, that decision must be accompanied by the decision-maker’s written statement of the reasons for that conclusion.

6. In determining the aid or service to be provided, the district must consider the length and complexity of the communications involved.

7. The service or aid, including an interpreter, must be provided during both the school day and at all school-sponsored extra-curricular activities for which the student will need the service or aid in order to participate.

8. “As a best practice,” the district must review and revisit the aid or services provided on a regular basis.

9. The aids or services must allow the student to access the information needed and must be done in a timely manner.

10. The obligations apply not just to students, but to all who may access the district’s programing and activities (e.g., family members, the public).

IV. DECEMBER 5, 2014 DEAR COLLEAGUE LETTER FROM OSERS: THE NEEDS OF STUDENTS WITH DISABILITIES IN CORRECTIONAL FACILITIES

DECEMBER 8, 2014 DEAR COLLEAGUE LETTER FROM THE DOJ AND OCR: CIVIL RIGHTS IN JUVENILE JUSTICE RESIDENTIAL FACILITIES

The timing of these two letters seems to signal this will be an area of interest and enforcement by OCR and the Department of Justice.

A. Both letters serve as a reminder that:

1. All IDEA protections apply (e.g., LRE, Child Find, Due Process, Discipline) to students with disabilities in correctional facilities.

2. The Departments view the provision of special education and related services in such facilities as a shared responsibility of any governmental agency involved.

3. Reentry services to promote a student’s effective reintegration into the community are an area of focus.
V. **SERVICE ANIMAL UPDATE**

A. **Relevant Regulations**

1. In 2010, Title II of the ADA was amended to include a definition of a service animal.

2. 28 CFR §35.104 – “Service Animal” means 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. *** The work or tasks performed by a service animal must be directly related to the handler’s disability.

   Examples of work or tasks include, but are not limited to:

   - 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.

   The crime deterrent effects of an animal’s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.

B. **Service Animals & FAPE - What Have We Learned?**

1. "Service animals are a civil rights issue; not a FAPE issue." Kathy Gips, Director of ADA the New England ADA Center.
2. Is the school required to allow the animal in school if the child is making progress? The fact that the child is making progress or educational benefit is not the relevant inquiry based on *C.C. v. Cypress School District*, 56 IDELR 295 (C.D. Cal. 2011), and OCR's position in *Jackson County (MI) Intermediate School District*, 59 IDELR 172 (OCR 2012).

C. What Have we Learned About “Handlers”?  

1. 28 CFR § 35.136 provides:

   (d) **Animal under handler’s control.** A service animal shall be under the control of its handler. ***

   (e) **Care or supervision.** A public entity is not responsible for the care or supervision of a service animal.

   *School Admin. Unit #23 (NH)*, 113 LRP 32018 (OCR 05/22/13). In the context of a Resolution Agreement, and without deciding whether a New Hampshire district had actually violated Section 504 or Title II, OCR found the school district could resolve a complaint involving a child’s use of a seizure-alert dog on school grounds by training at least two aides on how to handle the service animal.

   **What it means:** While a district has no obligation to train a student’s service animal, under some circumstances it may be responsible for training school personnel who will handle the animal on school grounds.

D. Conflict Between Student With Service Animal & Rights of Others

2010 U.S. Department of Justice “Fact Sheet” on Service Animals provides: “[a]llergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals. When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.”

Consider whether permitting a service animal would fundamentally alter district’s program.
E. Miniature Horse Update

1. 28 CFR § 35.136 (i) provides with respect to miniature horses:
   (A) A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

Excellent Planning Makes Success More Likely: Principal, Elizabeth Hornbuckle at Russian Jack Elementary in Anchorage, Alaska was approached by a parent about a miniature horse for a student with Ataxia-telangiectasia, a degenerative disease. Student uses a harness on the horse that steadies him while he walks. As his disease progresses, the horse can be trained to pick things up for the student and, eventually, pull a wheelchair.

In preparing to welcome the horse to the school, the Principal did the following:

1. Checked with staff and student for horse hair allergies and developed a plan for addressing the same;
2. Worked with the family to acquaint the horse to the noise, bells, and chaos it would face in an elementary building by bringing the horse in on the weekends for several weeks;
3. Created a communication plan with parents and students to increase the awareness and comfort level for parents seeing a horse in the building;
4. Found the perfect set of non-slip shoes for the horse’s hooves – Build-a-Bear tennis shoes.
5. Provided classmates with education about how to approach the horse, ask for permission to pet, etc.
6. Worked with staff to make sure that the classrooms where the student would be had floor plans that were open enough to allow the student to move alongside his horse, and seated the student near the door so that the horse’s handler (his mom) could arrive and take the horse out to relieve itself.