

OCR Issues Guidance on Nondiscrimination in the Age of Distance Learning

Education Law Notes

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The U.S. Department of Education Office of Civil Rights (“OCR”) issued a fact sheet today entitled “Addressing the Risk of COVID-19 in Schools While Protecting the Civil Rights of Students.” The fact sheet addresses various types of discrimination that must be avoided while providing education to students in these uncertain times. The information accompanying the fact sheet makes it clear that the guidance is “not legally binding” and much of it is stated in vague generalities. Nonetheless, it provides some guidance for districts as to what to expect if complaints are filed with OCR regarding the provision of education while

schools are closed due to the pandemic.

Denial of Access on the Basis of Race, Color or National Origin

While not as applicable during distance learning, at some point schools will return to regular session, and at that point districts must be mindful to prevent race, color and national origin discrimination while ensuring that students and staff are assessed and treated appropriately based on their actual risks. For example, school officials must be careful not to rely on stereotypes such as assuming that people of certain national origins are more at risk for being infected rather than screening based on recent travel or actual exposure to the virus.

Students with Disabilities at Elementary and Secondary Schools

OCR made clear that if schools are closed completely for a period of time with no education provided, then the schools are not required to provide special education services during that time. Once schools reopen or turn to distance learning, schools must provide special education and related services to students according to their IEP and/or Section 504 plan. OCR apparently recognizes that this may be impossible in some situations but indicates that if a student does not receive services for an extended period of time, the student’s PPT or 504 team must determine “to what extent compensatory services are needed consistent

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with the respective applicable requirements, including to make up for any skills that may have been lost.” OCR, however, does not provide any guidance as to what this might look like. While not entirely clear, an ESY-type inquiry might be effective – i.e. a look to determine what services the child would have been entitled to during the break in order to prevent regression.

OCR notes that PPT meetings do not need to be held in person while schools are closed. It does not, however, specify what steps to take if a parent refuses a telephone or other type of meeting rather than an in-person meeting. OCR also recognizes that face-to-face evaluations must be delayed until school reopens. It provides less clarity, however, on evaluations that do not need face-to-face interaction to occur. When in doubt, it is suggested that reevaluations, and evaluations for which the time lines are already running take place via a review of records and information when possible.

Be aware that in the past, OSEP has taken the position that it does not have the authority to alter IDEA timelines in the event of a crisis. OSEP issued a "Dear Colleague" letter in response to school districts in New York requesting flexibility in meeting timelines for "evaluation, placements, annual review meetings, due process hearings and resolution sessions" in light of the damage to several schools done by Hurricane Sandy. OSEP indicated that that the Department "does not have authority to waive the requirements in Part B of the IDEA" and that the Department, therefore, "cannot extend timelines for the above requirements."

There is, however, flexibility built in for some time lines. For example, for initial evaluations, the IDEA regulations permit states to establish their own timeframes, meaning the State could provide relief. 34 C.F.R. §300.3019c)(1)(ii). For implementing IEPs after a student has been determined to need special education, the IDEA regulations require that it be implemented "as soon as possible." 34 C.F.R. §300.323(c).

Effective Communication and Language Assistance

As with other non-binding guidance, at the end of the day, districts must do their best to meet the needs of their students while recognizing that it will not be possible to provide every service for every student in these trying times. For questions on specific situations, please reach out to any of the attorneys in our School Law practice group.

Be mindful that information provided to students and parents during the coronavirus crisis should be provided in ways that persons with limited English proficiency can also access. Additionally, schools must ensure that persons with disabilities (such as those that are blind or deaf) receive equal access to communications and information.

Posted in COVID-19, Discrimination, Special Education

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Tags: Individualized Education Program (IEP), Office for Civil Rights (OCR), Section 504, U.S. Department of Education, Virtual Learning