

2016 GUIDANCE ROUND-UP

IAASE 2017 WINTER CONFERENCE

February 16, 2017

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WHAT EXACTLY IS A GUIDANCE DOCUMENT?

Guidance documents represent a federal or state department's current thinking on a topic.

Generally speaking, guidance documents do not create or confer any rights for or on a person and do not impose any requirements beyond those required under applicable law or regulations.

TYPES OF GUIDANCE DOCUMENTS

Guidance documents can take many forms, e.g.:

- "Guidance" publications
- "Dear Colleague" letters
- Policy letters
- "Memorandum to..." publications
- FAQ publications
- "Technical Assistance" circulars



TYPES OF GUIDANCE DOCUMENTS

Per the OMB, there are three categories of **federal** guidance documents:

- Guidance documents
- Significant guidance documents
- Economically-significant guidance documents

TYPES OF GUIDANCE DOCUMENTS

In the context of special education, watch for guidance from ED and its internal divisions:

- OSEP (*IDEA* issues)
- OSERS (*IDEA* issues)
- OCR (Section 504/*ADA* issues)
- FPCO (education records issues)

2016 GUIDANCE ROUND-UP

KEY SPECIAL EDUCATION-RELATED
FEDERAL GUIDANCE FROM 2016



RECORDING IEP MEETINGS

1. Letter to Savit, 67 IDELR 216 (OSEP 01/19/16):

School districts have the option to require, prohibit, limit or otherwise regulate the use of recording devices at IEP meetings.

If the policy prohibits or limits use of recording devices, the policy must provide for exceptions if necessary to ensure the parent understands the IEP/IEP process or to implement other parental rights under the IDEA.

RECORDING IEP MEETINGS

The district must ensure that the policy is applied uniformly.



If the policy requires a parent to give prior notice before recording an IEP meeting, then the district must give the parent sufficient notice of this requirement to allow him/her to comply with it.

SCHOOL ATTORNEYS AT IEP MEETINGS

2. Letter to Andel, 116 LRP 8548 (OSEP 2/17/16):

OSEP reiterated its longstanding position that attendance of attorneys at IEP conferences is strongly discouraged (but not prohibited).

SCHOOL ATTORNEYS AT IEP MEETINGS

Section 300.321 of the *IDEA* regulations provides that at the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the child may attend the IEP conference.

OSEP notes that, even if an attorney possesses the knowledge or special expertise regarding the child, an attorney's presence could have the potential for creating an adversarial atmosphere that would not necessarily be in the best interest of the child.

SCHOOL ATTORNEYS AT IEP MEETINGS

If a parent brings an attorney to an IEP meeting without prior notification to the school district, the district may reschedule the meeting to another date/time if (a) the parent agrees, and (b) the postponement does not result in a delay or denial of FAPE.

A school district may not tell a parent that it will proceed with the IEP meeting only if the parent's attorney does not participate, because that would interfere with the parent's rights under the *IDEA*.

DYSLEXIA

3. *Letter to Unnerstall*, 116 LRP 21355 (OSEP 4/25/16):

In furtherance of its October 2015 *DCL* on dyslexia, OSEP explains that that nothing in the *IDEA* gives a parent the right to dictate the specific areas that the school district must assess as part of a comprehensive evaluation. The school district is only required to assess the child in particular areas related to the child's suspected disability, as it determines appropriate.

DYSLEXIA

However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and his/her educational needs, then the district must conduct the necessary assessment(s).



PRESCHOOL CHILDREN AND RtI

4. *Memorandum to State Directors of Special Education, Preschool/619 State Coordinators, Head Start Directors, 67 IDELR 272 (OSEP 4/29/16):*

The RtI process may not be used to delay or deny an evaluation for preschool special education services under the IDEA. A district may not decline a child find referral from a preschool program until it monitors the child's developmental progress using RtI procedures.

TRANSLATION OF SPECIAL EDUCATION DOCUMENTS

5. *Letter to State Directors of Special Education and Others, 116 LRP 44552 (OSERS 6/14/16):*

Under Title VI of the Civil Rights Act of 1964, all "vital documents," including a student's IEP, must be accessible to IEP parents, but that does not necessarily mean that all vital documents must be translated for every language in the district.

TRANSLATION OF SPECIAL EDUCATION DOCUMENTS

A timely and complete interpretation or translated summary of a vital document may be sufficient in some cases. Districts must, however, be prepared to provide timely and complete translated IEPs if needed to provide parents with meaningful access to the IEP and the procedural rights attached to it.

TRANSLATION OF SPECIAL EDUCATION DOCUMENTS

Rationale: Parents need meaningful access to their child’s IEP not just during the IEP meeting, but also across school years in order to monitor the child’s progress and ensure that IEP services are provided.

CHILDREN IN FOSTER CARE GUIDANCE

6. *Ensuring Educational Stability for Children in Foster Care* (ED/HHS 6/23/16):

This guidance document starts with a reminder that the *ESSA* highlights the need to provide educational stability for children in foster care, with emphasis on collaboration between the state, school districts, and child welfare agencies, to ensure that those students have the opportunity to achieve at the same high levels as their peers.

CHILDREN IN FOSTER CARE GUIDANCE

The guidance emphasizes that school districts should:

- Limit educational disruptions by keeping foster children in their schools of origin unless it is determined not to be in their best interest;
- Immediately enroll foster children if it is not in their best interest to stay in their schools of origin, even if the children are unable to produce records normally required for enrollment;

CHILDREN IN FOSTER CARE GUIDANCE

- Contact the school of origin immediately to obtain relevant academic and other records; and
- Collaborate with child welfare agencies, yet ensure compliance with all applicable laws governing student data and privacy.

CHILDREN IN FOSTER CARE GUIDANCE

When making best interest determinations related to school stability, school districts and child welfare agencies should:

- Consider a variety of student-centered factors in determining whether remaining in the school of origin is in the child's best interest;
- Develop a clear policy or protocol on how to make best-interest determinations; and
- Make an effort to gather meaningful input from relevant parties (e.g., school of origin staff who are knowledgeable about the child, foster parents, biological parents when appropriate, staff on the child's IEP or Section 504 team).

CHILDREN IN FOSTER CARE GUIDANCE

For foster children eligible under the IDEA or Section 504 ~

- Provide timely and expedited evaluations and eligibility determinations;
- Provide access to comparable services (including summer or other ESY services); and
- Ensure that all required special education and related services and supports are provided in the least restrictive environment where the child’s unique needs, as described in the child’s IEP or Section 504 plan, can be met.

CHILDREN IN FOSTER CARE GUIDANCE

Transportation of children in foster care ~

If a school district receives Title I funds, the district must collaborate with state or local child welfare agencies to ensure that transportation for children in foster care is provided, arranged, and funded for the duration of the child’s time in foster care.

CHILDREN IN FOSTER CARE GUIDANCE

The ESSA requires school districts to collaborate with their state or local child welfare agency by December 10, 2016 to develop and implement clear written procedures governing how transportation to maintain foster children in their schools of origin will be provided, arranged, and funded for the duration of the child’s time in foster care.

(Note: ISBE subsequently extended this deadline and issued Bulletin 01-16, *Guidelines for Determination of Best Interests and Transportation and Procedures for Dispute Resolution.*)

CHILDREN IN FOSTER CARE GUIDANCE

Transportation procedures for foster children must ensure that:

- Children needing transportation to their schools of origin will promptly receive transportation in a cost effective manner and in accordance with the *Social Security Act*; and
- If there are additional costs in providing such transportation, the district will provide the transportation if (i) the child welfare agency agrees to reimburse the district; (ii) the district agrees to cover the cost; or (iii) the district and child welfare agency agree to share the cost.

ADHD GUIDANCE

7. Dear Colleague Letter and Resource Guide on Students with ADHD (OCR 7/26/16):

OCR has issued guidance on identifying, evaluating, determining eligibility, and determining appropriate services and placements for students with ADHD.

ADHD GUIDANCE

OCR reminds school districts that the *ADAAA of 2008* (and its parallel changes to Section 504) broadened the definition of an individual with a disability by:

- Expanding the list of major life activities that a physical or mental impairment may substantially limit to include, among other things, concentrating, reading, thinking, and functions of the brain; and
- Providing that mitigating measures (such as ADHD medication, etc.) cannot be considered in determining whether a student's eligibility under Section 504.

ADHD GUIDANCE

OCR also reminds school districts that they are responsible for providing a medical assessment of a student, at no cost to the parents, if such assessment is necessary to determine whether a child suspected of having ADHD has a disability and needs special education or related aids and services.

ADHD GUIDANCE

OCR advises that, in deciding whether or not to evaluate a student for possible Section 504 eligibility, schools should consider how difficult it is or how much time it takes for a student with ADHD, in comparison to another student without ADHD, to plan, begin, complete, and turn in an essay, term paper, homework assignment or exam.

OCR encourages the use of evidence-based regular education interventions, but reminds schools that the use of such interventions should not be used as a basis to deny or delay evaluations of students suspected of having ADHD or any other disability.

ADHD GUIDANCE

OCR states that a determination that a student has any of the types of ADHD (*i.e.*, predominantly inattentive type, predominantly hyperactive-impulsive type, or combined type) constitutes a determination that the student has an impairment for purposes of Section 504's definition of disability.

Unless there is evidence to the contrary, OCR will presume that a student who has been diagnosed with ADHD is substantially limited in one or more major life activities.

ADHD GUIDANCE

OCR reminds districts that even if a student is academically successful, he or she may still have an impairment that substantially limits a major life activity.

Also, the major life activity that is substantially limited does not have to be *learning* in order for a student to be found eligible under Section 504. For example, a student with ADHD whose concentration is substantially limited could be eligible under Section 504.

ADHD GUIDANCE

OCR cautions school districts to avoid acting on stereotypes and generalizations regarding students with ADHD.

A determination of appropriate supports and services and placement must be made by a group of persons, including persons knowledgeable about the child, and must be individualized based upon the specific needs of that child.

School districts must not provide the same services/supports or placement to all students with ADHD.

ADHD GUIDANCE

OCR notes that students with ADHD may also be eligible for special education and related services under the *IDEA*.

IDEA-eligibility for students with ADHD is not limited to the OHI classification. For example, students with ADHD may be eligible under the SLD or ED classifications if they meet those applicable criteria.

BEHAVIORAL INTERVENTIONS GUIDANCE

8. *Dear Colleague Letter: Behavioral Interventions and Supports for Children with Disabilities (OSERS/OSEP 8/01/16):*

According to OSERS and OSEP, recent data on short-term disciplinary removals strongly suggest that many students with disabilities may not be receiving appropriate behavioral interventions in their IEPs.

Also, the rate of disciplinary removals of students with disabilities, particularly SWDs of color, is disproportionately high.

BEHAVIORAL INTERVENTIONS GUIDANCE

In light of research about the detrimental impact of disciplinary removals, including short-term removals, OSERS/OSEP issued this guidance to remind school personnel that the authority to implement disciplinary removals does not negate the obligation to consider and address the behavioral needs of students with disabilities and effects of such removals on the provision of FAPE.

BEHAVIORAL INTERVENTIONS GUIDANCE

Per OSERS/OSEP, “the failure to consider and provide for needed behavioral supports in the IEP process is likely to result in a child not receiving a meaningful educational benefit of FAPE.”

Failure to provide appropriate behavioral supports throughout a continuum of placements could also result in a denial of placement in the LRE.

BEHAVIORAL INTERVENTIONS GUIDANCE

Circumstances that may indicate a failure in a district's IEP development or revision include (but are not limited to):

- Team did not consider use of positive behavioral interventions;
- District did not convene IEP meeting to address problem behavior after a reasonable parent request;
- Team failed to discuss parent concerns about the student's behavior;

BEHAVIORAL INTERVENTIONS GUIDANCE

- Team agrees behavioral supports are needed but does not include them in the IEP;
- Behavioral supports included in the IEP are not appropriate or effective; and/or
- Behavioral supports included in the IEP are appropriate but not implemented properly.

VIRTUAL SCHOOLS GUIDANCE

9. *Dear Colleague Letter on Virtual Schools* (OSERS 8/5/16):

This *DCL* highlights issues that OSEP believes are likely to occur when certain key *IDEA* requirements are implemented in a virtual school context.

VIRTUAL SCHOOLS GUIDANCE

EDFacts defines “virtual school” as a public school that offers only virtual courses: instruction in which children and teachers are separated by time and/or location. Interaction occurs via computers and/or telecommunications technologies, and the school generally does not have a physical facility that allows children to attend on-site classes.

For purposes of this *DCL*, the term “virtual schools” refers to programs, as defined by EDFacts, that are public schools of a traditional LEA or are public schools that operate as a LEA under state law.

VIRTUAL SCHOOLS GUIDANCE

Key issues and reminders in the *DCL*:

- *IDEA* requirements apply to children who attend virtual schools operated by a district.
- Districts should review their *IDEA*-related policies and procedures to ensure that they encompass the virtual schools of the district.

VIRTUAL SCHOOLS GUIDANCE

OSERS recognizes that children who attend virtual schools may not have the same degree of fact-to-face interactions and in-person contacts with a teacher or other school personnel as children who attend brick-and-mortar schools, which will present unique child find challenges. However, reliance on referrals by parents should not be the primary means of meeting a district’s child find obligations.

VIRTUAL SCHOOLS GUIDANCE

District responsibilities for ensuring the provision of FAPE to students with disabilities who are enrolled in virtual schools include:

- Implementing all evaluation and eligibility determination requirements;
- Meeting all IEP meeting requirements (*e.g.*, notice of conference, meeting participants, parent participation, full IEP development, *etc.*);
- Implementing the LRE requirements, including ensuring the availability of a continuum of placement options to provide special education services; and
- Providing all IEP services.

BEHAVIORAL INTERVENTIONS GUIDANCE

10. *Letter to Carroll, 68 IDELR 279 (OSEP 10/22/16):*

It is inconsistent with a parent's right to request an IEE at public expense to allow a district to conduct an assessment in an area that was not part of the initial evaluation or reevaluation before either granting the parent's IEE request or filing a due process request to show its evaluation was appropriate.

RESTRAINT AND SECLUSION

11. *Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities, 116 LRP 53792 (OCR 12/28/16):*

OCR cautions that a school district may discriminate on the basis of disability in its use of restraint or seclusion by:

- Unnecessarily treating SWDs differently than students without disabilities;
- Implementing policies, procedures, practices, or criteria that have an effect of discriminating; or
- Denying the right to FAPE.

RESTRAINT AND SECLUSION

The use of restraint or seclusion may trigger a district's obligation to conduct an evaluation or reevaluation of a student to determine:

- The possible existence of a new or additional disability;
- A possible change in the student's needs; and/or
- The effects of restraint or seclusion on a student's receipt of FAPE

QUESTIONS



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