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**Ohio Association of Pupil
Services Administrators
Legal Update**

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**LEGISLATIVE AND ODE UPDATES
IMPACTING PUPIL SERVICES**

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Special Education Reminders

- Revisions to operating standards effective July 1, 2014
 - Procedures and Guidance are being updated
 - Updated Parent Notice of Procedural Safeguards (Whose IDEA is This?) will be released during the 2014-15 school year
 - Use current Whose IDEA is This? From April 2, 2012 with January 21, 2014 Addendum until it is released as required parent notice of procedural safeguards
 - Revised special education forms will be in effect for 2015-16 school year

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Operating Standards Key Changes

- Mental retardation/ cognitive disability replaced with "intellectual disability"
- Visual Impairment aligned with federal language – includes partial sight and blindness
- Language clarification for team composition
 - i.e. Initial Evaluation Team – eliminated "IEP team" language; Reevaluation team includes IEP team

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Operating Standards Key Changes

- Language additions and modifications for recent changes
 - When to use a prior written notice
 - Transition Services to begin by age 14 and include development of competitive employment
 - Jon Peterson Scholarship and notification of scholarships to parents
 - Notification to parents for comprehensive eye exam
 - Determination of workloads for service providers

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Operating Standards Key Changes

- Timeline language removed regarding functional behavior assessment and behavior intervention plan for behavior ("subject to disciplinary action" removed)
- Reevaluations for preschool to school age required for a child identified with a developmental delay
- Eliminated provision for discussions that occur during a resolution sessions as confidential

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Assessment Accommodations

- Allowable accommodations for PARCC assessments do not align with allowable accommodations for OAA/OGT
 - “Read aloud” is causing numerous problems
- ODE has provided guidance on which students are eligible for read aloud on the English Language Arts test
 - IEP/504 Decision Making Tool to be used by teams

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Assessment Accommodations

- Ultimate decision regarding accommodations lies with the IEP/504 team
 - No permission from ODE is required to allow the accommodation
 - If the number of students receiving the “read aloud” accommodation on the ELA test is statistically too high, ODE will contact district regarding the issue
- Teams will need to list allowable accommodations on all IEPs and Section 504 plans

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Assessment Accommodation Scenarios

- Scenario 1
 - Student’s IEP provides for “read aloud” for the reading portion of statewide assessments
 - District reviews the accommodations and determines student qualifies for read aloud on the ELA section of the PARCC
- What should the district do?
 - No action is required because there is no need to change the IEP.

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Assessment Accommodation Scenarios

- Scenario 2
 - Student’s IEP provides for “read aloud” for the reading portion of statewide assessments
 - District determines student may not qualify for read aloud on the ELA section
- What should the district do?
 - Convene the IEP team and determine eligibility in conformity with ODE guidance; no disagreement
 - Document the decision on the IEP
 - **Send prior written notice**

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Assessment Accommodation Scenarios

- Scenario 3
 - Student’s IEP provides for “read aloud” for the reading portion of statewide assessments
 - District determines student may not qualify for read aloud on the ELA section
- What should the district do?
 - Convene the IEP team and determine eligibility in conformity with ODE guidance; parent strongly disagrees
 - Document the decision on the IEP
 - **Send prior written notice**

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Goodbye OGT . . . New Graduation Paths

- Instead of the OGT, students must pass a prescribed number of standard courses to graduate, **AND**
- Satisfy one of three testing pathways
 - Path 1 – passing score on seven end-of-course exams
 - Path 2 – “Remediation free” score on nationally-recognized college admission exam
 - Path 3 – earn industry-recognized credential or state-issued license to work in a vocation and achieve passing score on a job-skills assessment

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Sub. HB 367 - Overview

- Signed into law December 19, 2014
 - Effective after 90 days
- Variety of school law changes in numerous areas including:
 - Curriculum
 - State assessments
 - End of course assessments
 - Attendance/enrollment
 - Care for diabetic students
 - OGT phase out

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Sub. HB 367 – OGT Phase Out

- ODE has discretion to set end date for OGT administration to students who have fulfilled curriculum graduation requirements to graduate but have not passed one or more parts of OGT
 - Previously, deadline was set for July 1, 2015

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Sub. HB 367 - Enrollment

- Foster children registration cannot be denied due to lack of birth certificate documentation (90 days to provide from entry)
- For student attendance reporting
 - Funding formula that student enrollment considered to cease at 105 continuous hours of unexcused absences removed
 - Student grades 9-12 considered full-time if enrolled in at least five instruction units

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Sub. HB 367 - Assessments

- Third Grade Reading
 - Administer Ohio Achievement Assessment in English language arts (regardless of student's previous test score of the OAA) to all third grade students in spring of 2014-15 school year
 - September 30th deadline for language and reading diagnostic assessment for K-3 removed
- Increases from one to multiple nationally standardized assessments for college and career readiness districts can choose from

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Sub. HB 367 - Health

- Opioid abuse prevention education requirement to health curriculum
 - ODE is required to publish recommendations from the Governor's Cabinet Opiate Action Team (no later than July 1, 2015)
- Districts can contract with ESC for a nurse who is providing diabetes care to students

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HB 264 – Diabetic Students

- Students with diabetes must be allowed to attend neighborhood schools
- Student may provide own diabetes care- schools cannot limit the areas for administration
- School with a student with diabetes must have a staff member trained regarding diabetes within 14 days
- Schools must provide an information to parents regarding their child's potential eligibility for a Section 504 plan no later than 14 days after receiving diagnosis from physician

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HB 264 – Diabetic Students

- ODE required to develop 504 plan informational sheet and nationally recognized training guidelines
- Schools are authorized to provide training for recognition of hypoglycemia and hyperglycemia and emergency actions to bus driver and all school employees who have primary responsibility for supervising the student

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Providing Care for Students with Diabetes and Other Conditions

- Increasing numbers of students need medical care in school setting
- Conditions include:
 - Diabetes
 - Asthma
 - Epilepsy (and other seizure conditions)
 - Life threatening allergies (bees, peanuts, etc.)
- Districts must have appropriate staffing to provide care

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Providing Care for Students with Diabetes and Other Conditions

- Take proactive steps to limit potential roadblocks to providing care
 - Work with district nurse to determine which tasks can be delegated to non-medical personnel
 - Review job descriptions to make sure they include providing care that students might need
 - Think about emergency situations **and** situations where continuous care is required
 - If possible, work with unions and employees before a situation arises

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PRIOR WRITTEN NOTICE – SOME FRIENDLY REMINDERS AND TIPS

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PR-01 Requirements

- An agreed upon IEP no longer serves as prior written notice to parents
 - Districts are required to send prior written notice even when there is agreement with the IEP
 - Also required to send PR-01 after any meeting where IEP is discussed/amended (even if there is agreement)
- Prior written notice is still required whenever there is disagreement
 - Also required when the district proposes or refuses any action that impacts the student's IEP or the provision of FAPE

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PR-01 Case Study

- Timing of special transportation for student with a disability was such that student missed the last 10 minutes of his last period class each day
- Parent complained and district worked internally to address issue
- During this time, principal sent email to parent with two options:
 - Student could take class for no credit
 - Student could forego special transportation

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PR-01 Case Study (cont'd)

- Parent filed a complaint with ODE
- Prior to the resolution of the complaint, the district changed the bus schedule to allow the student to receive special transportation and attend his entire last period class
- ODE Findings
 - District violated OAC 3301-51-09(F)(1) [length of school day]
 - District violated 34 C.F.R. 300.503 [prior written notice]

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PR-01 Case Study (cont'd)

- Length of school day violation
 - District violated OAC 3301-51-09(F)(1) because, even though the student's day was structured so that he received the same number of overall minutes of instruction, he originally was not going to receive credit for a course in order to access special transportation
 - District special transportation dropped student off early so his day started earlier than his peers

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PR-01 Case Study (cont'd)

- Prior written notice violation
 - ODE considered the principal's email which gave the options of (1) no credit for the course or (2) no special transportation to be a "proposal" which changed the "provision of FAPE" to the student
 - Changes to the provision of FAPE trigger the need for a PR-01
 - District argues that the email was not intended to be a "proposal" as it was sent by one person – not proposed by the team – ODE did not buy this argument

PR-01 Case Study Take Aways

- Think carefully when sending emails to parents that might propose changes to FAPE
- Counsel others who communicate with parents to think carefully about the impact of their emails on the provision of FAPE prior to sending
- When in doubt, communicate via a PR-01
 - Districts never get in trouble for sending a PR-01 when it's not technically required

Prior Written Notice Tips

- The prior written notice is the ultimate "CYA" form – use it often and write it well.
 - Send prior written notice **every time it is required** and in other situations where it would be helpful.
 - Tell the district's story with the prior written notice – don't skimp on the details.
 - There should not be any blanks or N/A notations on the PR-01 form – all questions must be answered.
 - Re-read the prior written notice to make sure all questions have been answered thoughtfully and completely.

More Prior Written Notice Tips

- When writing a PR-01, think about your **entire audience**
 - While PR-01s are intended for parents, they are also powerful evidence if there is a state complaint or due process complaint
 - Your audience includes an ODE investigator and/or an impartial hearing officer – make sure to include details that are important to a third party (e.g., titles, dates, etc.)

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Amending a PR-01?

- If a parent disagrees with a PR-01 and wants the district to make changes, what should you do?
- Two possible avenues..
 - Treat the request as a request to amend an educational record under FERPA and hold a “records hearing”
 - Advise the parent that he/she can document the disagreement and that it will be included in the student’s file

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Amending a PR-01?

- The “records hearing” option is the procedurally correct avenue if the parent specifically requests changes.
 - Depending on how the parent phrases the request, he/she may (or may not) be seeking to amend a record.
- If the parent simply disagrees, without requesting a change, placing the “disagreement” in the file is fine.

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CASE LAW UPDATE

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IEP Meeting Member Participation

- Florida State Educational Agency complaint
 - Teachers left IEP meeting early after they discussed student's progress, accommodations, and course needs
 - Had not discussed annual goals before the teachers left
 - Parents did not object to teachers leaving mid-meeting
 - As a required team member, teacher was required to participate in full unless parents consented to excusal in writing
 - Verbal consent is not sufficient to meet federal regulations [34 CFR 300.321(e)(2)]
 - *Charlotte County Sch. Dist.*, 114 LRP 22660 (SEA FL Oct. 18, 2013)

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Imposing Time Limits on Meetings?

- IDEA provides no specific length of time for an IEP meeting or limits the number of meetings
- Limits should be reasonable to the task at hand, e.g. initial IEP meeting generally takes longer than meetings for existing IEPs
 - If the district opts to impose a time limit, it should be written in the notice or, at the very least, communicated at the start of the meeting
- Practically speaking, marathon IEP meetings often lead to frayed nerves, verbal blow ups, and mistakes
 - It's generally better for all involved to have a difficult meeting over several sessions rather than trying to cram it all into one

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OCR Disability Discrimination

- Failure to include a student with a disability in a field trip lead by a parent-run association
- District promoted the field trip, thus responsible under Section 504 and Title II to provide equal opportunity for participation
- District voluntarily resolved the complaint
 - Pledged to either appoint an employee as a liaison to notify the association of antidiscrimination policies/obligations **OR**
 - sever ties with the association (which it chose)
 - *Fairview Park City (OH) Sch. Dist.*, 114 LRP 16833 (OCR Feb. 13, 2014)

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Open Enrollment Discrimination

- First grade student with Section 504 plan for ADHD was denied open enrollment
 - Parent stated superintendent told her that students on 504 plans usually were not accepted due to cost concerns
 - District denied automatic disqualifiers
 - District admitted that admission decisions could be impacted if district determined that it could not serve the student based on disability

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- District's open enrollment policy allowed acceptance of a limited number of students on a "first-come, first-served" basis
 - Facts showed that student's application was one of the first received; however, she was denied open enrollment
 - Evidence also showed that other students with disabilities were denied open enrollment although their applications were received before those of non-disabled students who were admitted

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- Individual Student Findings
 - OCR concluded district discriminated against individual student on the basis of her disability when it denied her open enrollment application
 - Nondisabled students whose applications were received later were admitted to 1st grade
 - District admitted student was denied admission because it believed she needed more services than it could provide
 - District could not identify what it could not provide
 - Did not have process in place

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- District Policy Findings
 - OCR also found that the district’s application process included an additional “hurdle” for students with disabilities
 - OCR found that additional criteria for enrollment for student with a disability was discriminatory and violated Section 504
 - Practice was for principal to evaluate whether student could be served in the building
 - No set criteria in place
 - Assessment was undocumented

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- Resolution Agreement
 - District must notify parents of all students with disabilities who were denied admission that it has changed its policies and invite them to apply for the 2014-15 school year
 - District must evaluate the needs of each SWD who applies for open enrollment and determine whether it can serve the student without considering cost
 - District is not required to create a new program for open enrollment student

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- District must make “meaningful determination” when deciding whether student can be served
- OCR will monitor district’s compliance with resolution agreement
 - *Tuslaw (OH) Local School Dist.*, 114 LRP 48993 (June 6, 2014)

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Open Enrollment Reminders

- The school district of residence retains the obligation to provide FAPE for open enrollment students
 - Any state or due process complaint will be filed against district of residence, not district where the student is attending via open enrollment
 - DO NOT lose track of these students!
- Districts are not required to create programs to serve SWD who apply for open enrollment

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School Prevails By Addressing Bullying

- Sixth grade student with dyslexia bullied in PE class 5 times in 6 months
 - Bullying included name calling, instigating harassment by others, punching
- In each incident, school took action:
 - Teacher kept watchful eye on situation
 - Students barred from working in groups together
 - Counselor met with students
 - AP met with harassers
 - Student suspended for punching incident

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- Parents thought school's efforts were insufficient and sued under Section 504
- Court held that school was not "deliberately indifferent"
 - Deliberate indifference requires that school knew of harm and failed to act on it
 - Court said no deliberate indifference based on efforts district took to end bullying
 - *G.M. v. Daycreek Joint Elem. Sch. Dist.*, 64 IDELR 231 (9th Cir. Dec. 24, 2014)

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Modification of Policies for Students with Disabilities

- Student with chronic medical condition applied for intra-district open enrollment
- Application was denied based on the student's absences
 - Policy allowed denial of application based on attendance record
- Facts revealed student's absences were disability related illnesses

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- OCR identified additional concern that district had not evaluated the student for Section 504 eligibility
 - School had provided "informal " accommodations such as restroom breaks and late arrival to class
 - Despite this, the need for accommodations, and the district's knowledge of the medical condition, the district did not evaluate the student
 - Lack of evaluation made OCR doubt that district had considered modifying the attendance requirement for open enrollment based on the student's disability

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- OCR concluded...
 - The student should have been evaluated for eligibility under Section 504
 - The district should have considered whether to make a modification to the open enrollment attendance requirement based on the student's disability

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- Resolution...
 - District to provide training regarding evaluations
 - District will evaluate the student
 - District will reconsider the student's open enrollment application
 - Craven County (NC) Schools, 114 LRP 36292 (March 28, 2014)

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504 Evaluation Reminders

- Districts must determine if students being served on "health plans" are eligible under Section 504
- Having a "health plan" in place is not a substitute for conducting an evaluation and making a decision regarding eligibility under Section 504
- The key to compliance is following Section 504's procedural requirements – not what the plan is called

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- Converting a health plan to a "Section 504 plan" requires:
 - Parental consent to evaluate
 - An evaluation that finds the student eligible under Section 504
 - Development of a Section 504 plan
 - Implementation of the Section 504 plan
 - Remember that all staff must be aware of the plan and implement the plan – not just the school nurse

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Additional Health Plan Cases

- OCR found two districts violated 504 with respect to evaluations of students with diabetes. In the first instance, the district failed to conduct an evaluation even though it was on notice of the student's condition based on documents received from his prior district. *Fayette Cty. (KY) Schs.* (OCR 2005). In the second, the district provided an IHP rather than conduct an evaluation under 504. *Tyler (TX) Indep. Sch. Dist.* (OCR 2010).

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OFFICE OF CIVIL RIGHTS DEAR COLLEAGUE LETTERS

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Discrimination Investigations

- Oct. 1, 2014 OCR Dear Colleague Letter
- Title VI of the Civil Rights Act of 1964 provides an obligation to prohibit discrimination
- Guidance outlines the legal framework used in OCR investigations of discrimination complaints (intentional discrimination & disparate impact)

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Discrimination Investigations

- OCR provides guidance to ensure equal access to student resources, including:
 - Academic programs, instruction, and support
 - Extracurricular activities
 - Qualified personnel
 - School Facilities
 - Technology and instructional materials
- OCR's guidance recommends that districts self-assess and monitor their compliance

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Effective Communication

- **November 2014 Dear Colleague Letter**
- Addresses public school obligations to meet communication needs of students with disabilities, but obligations vary under:
 - Individuals with Disabilities Education Act (IDEA)
 - Title II of the American with Disabilities Act of 1990 (Title II)
 - Section 504 of the Rehabilitation Act of 1973 (Section 504)

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- Free appropriate public education vs. "as effective as others" standard
 - IDEA vs. Title II
- In meeting communication needs for students with a hearing, vision, or speech disability schools must consider both legal standards
- In order to comply with Title II, a school may have to provide auxiliary aids or services that are not required under IDEA

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- Title II requires schools to give “primary consideration” to the auxiliary aid or service requested by the student with the disability when determining what is appropriate
 - School must provide an opportunity for the individual to request the aid or service he/she thinks is needed to provide effective communication
 - The school must honor the request unless it can prove that an alternative is “as effective and affords the person with a disability an equal opportunity to participate...”

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- A school does not have to provide the requested auxiliary aid or service if it results in a fundamental alteration or creates an undue financial and administrative burden.
 - The superintendent (or designee) must determine that the requested aid/service would fundamentally alter the program or create an undue burden “after considering all resources available for use by the school district in the funding and operation of the service, program or activity.”
 - The determination must be in writing.

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- OCR notes that “compliance with the effective communication requirement would, in most cases, not result in undue financial and administrative burdens.”
- If the district does not provide the requested aid/service, it still must provide an aid/service that would ensure effective communication that would not create a fundamental alteration or undue burden.

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Notes on Effective Communication

- Caution IEP teams to consider requirements of Title II when discussing parent requests regarding effective communication
 - The conventional wisdom that the district has the ultimate authority to determine how a student's need will be accommodated via an IEP team decision does not apply in these situations
 - This question moves beyond FAPE and must be evaluated using Title II standards

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OCR Addresses "Effective Communication" and Evaluation

- Background Facts
 - District informed that incoming kindergarten student had been diagnosed with hearing loss and had hearing aids
 - Parent requested FM system and IEP prior to the start of the school year
 - Parent provided reports from ENT and clinical audiologist recommending FM system

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- District referred the case to educational audiologist and instituted a 2 month FM system trial
 - No response to parent's request for IEP
- Data from FM system trial indicated that the FM system helped student's communication in class
 - FM system was discontinued after December 20, 2013
- January 15, 2014, parent renews request for the FM system and an IEP
- February 3, 2014, team determined student did not qualify under the IDEA
 - Does not appear evaluation was completed

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- February 22, 2014, meeting held to “fill out forms” regarding Section 504
- March 7, 2014, meeting held and student determined eligible under Section 504; however, team concluded that no 504 plan was needed because the student was making “strong educational progress:
- Team also concluded student did not need the FM system
 - Unclear what team did/did not consider when reaching this decision

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- OCR Conclusions Evaluation
 - District should have conducted a Section 504 evaluation at an earlier date
 - Had information on hearing loss
 - Had information suggesting need for accommodations
 - The decision that the student did not meet IDEA eligibility criteria did not relieve this obligation
 - The evaluation ultimately conducted was insufficient because it did not consider information from a variety of sources or suggestions from the audiologist’s report

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- OCR Conclusions Effective Communication
 - District violated Title II by not giving “primary consideration” to the parent’s request for an FM system to assist the student in communicating
 - District also violated Title II when it discontinued the FM system after the trial period
- OCR Resolution
 - Compensatory education and the provision of an FM system
 - *Elida (OH) Local School District*, 115 LRP 4578 (Sept. 12, 2014)

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Bullying

- **October 21, 2014 Dear Colleague Letter**
- Issued due to the increasing complaints received by OCR regarding bullying of students with disabilities
- OCR released expanded guidance for schools regarding responsibilities to prevent and address the bullying of students with disabilities
- Bullying may violate civil rights laws, including Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act, **even if the bullying was not based on the student's disability**

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- Districts must take steps to address both the bullying **and** the impact of bullying on the provision of FAPE
- When the school knows, or should know that a student with a disability was/is bullied, the school is obligated to:
 - Investigate and implement its established anti-bullying policies **AND**
 - Take additional steps to ensure FAPE is not denied and respond appropriately

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- OCR guidance outlines several steps when a student with a disability is bullied:
 - Promptly determine if the student's receipt of FAPE services may have been affected by the bullying (even if the bullying was not based on the student's disability)
 - Safeguard against the student having the burden to avoid or handle the bullying independently
 - Look for changes in academic performance or behavior, such as grades suddenly declining, emotional outbursts, increased frequency or intensity of behavior, or an increase in missed service sessions to signal an IEP or 504 meeting is needed

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- Promptly convene the Section 504 team or IEP team to determine if:
 - the student's needs have changed due to the bullying,
 - the student's receipt of FAPE services have been affected, and
 - if any additional services or changes are necessary to meet the student's needs
- Implement changes determined by the Section 504 team or IEP team promptly

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In response to this guidance, schools should:

- Ensure that the school's anti-bullying procedures are followed and that staff members are trained to implement strategies to support students and respond appropriately to allegations of bullying
- Conduct thorough and quick investigations when bullying, harassment, or intimidation is suspected for a student with a disability, **even if the bullying, harassment or intimidation is not based upon the student's disability.**

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- Take prompt and reasonable steps to address any behavior of bullying, harassment, or intimidation.
- Identify procedures and train staff to ensure that the impact on the provision of FAPE is assessed in situations involving students with disabilities (including the involvement of the Section 504 or IEP team).
- Ensure procedural safeguards for students with disabilities are followed in assessing the impact on the student's needs and making any necessary changes to the IEP or Section 504 plan (*i.e.*, services, placement, etc.).

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Notes on Bullying

- When OCR investigates bullying, the focus is generally on the district's response to the allegations – not whether bullying actually occurred.
- Cases are won/lost based on:
 - Promptness of district response;
 - Completeness of investigation;
 - Compliance with district policies; and
 - Reasonableness of district response (i.e., were the steps taken likely to resolve situation).

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When SWDs Engage in Bullying

- When a student with a disability engages in bullying, districts must carefully balance a number of issues:
 - Student's due process rights under R.C. 3313.66 (regular education discipline);
 - Student's rights under the IDEA or Section 504 (including whether the bullying was disability related); and
 - The impact (if any) on the student's IEP or Section 504 Plan.

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- Districts investigate the bullying concerns in compliance with Board policy
- If bullying allegations are confirmed:
 - Consider regular education discipline (but don't overlook IDEA procedural safeguards, if applicable)
 - Take steps to end the bullying by making necessary changes in the classroom, cafeteria, etc.
 - Implement positive behavioral interventions
 - Consider whether the bullying is (or may be) related to the child's disability

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- Consider convening the IEP team to:
 - Ensure any bullying “action items” are consistent with the IEP (e.g., no denial of access to services, unilateral changes of placement, etc.)
 - Look at services in place and determine if additional services are needed to address the bullying behavior
 - Consider the need for an FBA
 - Consider the need for changes to the student’s BIP (if applicable)

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Extracurricular Activities

- **January 25, 2013 Dear Colleague Letter**
- Issued in response to a report from the U.S. Government Accountability Office finding students with disabilities are not receiving an equal opportunity to participate in extracurricular athletics
- The letter does not create new obligations, but reiterates and clarifies the responsibilities of public school districts under Section 504 with respect to extracurricular activities

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- Public school district must ensure that qualified students with disabilities are given an opportunity to benefit from a district's extracurricular programs "equal to that of students without disabilities"
- As a practical matter, this means:
 - Extracurricular programs can still require students to demonstrate a level of skill or ability to participate through a tryout process – provided that all potential team members are required to try out
 - A qualified student with a disability must be given the opportunity to try out if he/she meets the criteria for doing so (e.g., has the required grade point average, etc.)
 - Failure to allow a qualified student with a disability the opportunity to try out is discrimination and violates Section 504

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- The Dear Colleague Letter urges (but does not require) that school districts create additional opportunities for students with disabilities to participate in separate or different extracurricular athletic activities when they cannot be included in an existing activity even with reasonable modifications or necessary aids or services.
 - *In re: Dear Colleague Letter of Jan. 25, 2013*, 62 IDELR 185 (OCR 2013).

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Notes on Extracurricular Activities

- Remember that students with disabilities are entitled to accommodations in extracurricular activities unless the accommodation would create a fundamental alteration.
- This includes:
 - Access to required services (e.g., services to support medical needs; services to ensure communication, etc.)
 - Possible alteration of activity (e.g., use of a light as a starting signal instead of a starter pistol, etc.)

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OCR Findings Regarding Extracurricular Activities

- Facts
 - Student with diabetes on JV cheerleading squad tried out for varsity, but did not make the squad
 - In tryouts, panel of coaches rated each individual's performance on the same skill sets
 - Student's scores were lower than those who made the squad
 - Parent's OCR complaint alleged student did not make the squad because coaches were "tired of dealing with her diabetes"

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- Student's Section 504 plan had specific accommodations for cheerleading such as:
 - Individuals trained to monitor blood glucose
 - Student to room with trained, female coach on overnight trips
 - Allowing student to check glucose and treat any issues prior to practice and/or delay starting practice if symptomatic
 - Staff trained in symptoms of high/low blood sugar
 - 504 contact person to distribute plan to teachers and coaches

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- OCR Findings Regarding Discrimination
 - There was no evidence of disability discrimination
 - There is evidence that some other students were given the opportunity to retry a skill if they had been inconsistent; however, student was not given this opportunity because her scores were consistently poor
 - The student was treated in the same manner as other who tried out
 - The student did not request (or receive) any accommodations for the tryouts

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- OCR Findings Regarding Unalleged Compliance Issue
 - OCR raised issue regarding compliance with 504 plan
 - OCR concluded that training should have been provided prior to tryouts
 - OCR concluded that coaches should have received a copy of the plan
 - District cited privacy concerns, but OCR was unconvinced noting coaches were no different than teachers who implement the plan
 - Cobb County (GA) Sch. Dist., 63 IDELR 297 (March 20, 2014)

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The Latchkey Conundrum

- Programs where the district serves as the fiscal agent (such as latchkey programs) are required to accommodate students with disabilities
- This may include hiring additional staff depending on the student's needs
- Students cannot be denied access based on disability or needs that result from the student's disability

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- The fact that a program is not funded by the district does not alleviate the obligation to accommodate students with disabilities
- Parents of students with disabilities cannot be charged more than parents of nondisabled students based on the child's needs
- An across the board increase in program fees is permissible

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LEGALLY DEFENSIBLE DISCIPLINE FOR STUDENTS WITH DISABILITIES

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Manifestation Determinations

- Conduct the manifestation determination review (MDR) within 10 school days of the discipline decision (change of placement) of a special education student or student with a 504
- Start counting the time to conduct the manifestation determination review from the date the discipline that takes the student over 10 days is issued
 - This is usually the first day of suspension

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MDR Pitfalls...

- Do not simply look at the student's "label" when determining if conduct is a manifestation of the student's disability, students may have more than one disability
- Consider all available information
 - ETRs, IEPs, support personnel input/observations
 - Parent input/observations
 - New data
 - Medical or mental health diagnoses

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MDR Pitfalls...

- Decisions must be based on facts and evidence discussed at the meeting
 - It is possible for a student to be ED and have an incident not be a manifestation of his disability
 - It is equally possible for an SLD student to engage in conduct that is a manifestation of his disability
- Teams must have a defensible basis for the decision – preferably based on the IEP, ETR and data
 - Parents can challenge MDR decision via a due process hearing

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MDR Pitfalls

- The administrator imposing discipline cannot unilaterally change a student's placement to an IAES as this is an IEP team decision
 - This decision must be made by the team and documented on the student's IEP
 - Prior written notice of the change in educational placement based on discipline must be sent

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MDR Pitfalls...

- Stick to timelines
 - Do not allow the parent to push the district into noncompliance by failing to attend the manifestation determination meeting; document attempts to gain participation and send a PR-01
 - Keep track of days student is suspended
 - Be careful with in-school suspensions (are services being provided?)

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Discipline and FAPE

- Examples of how to provide FAPE during expulsions:
 - Home instruction
 - Online instruction
 - Alternative settings (e.g., separate facility placement)
- Parental consent for placement in the IAES selected by the district is not required
 - If the parent files a due process complaint, the student remains in the IAES

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Documenting the IAES

- The IAES must be documented in the IEP and prior written notice must be sent regarding the change in placement
- Timing is tricky - think about when the team wants to make the IAES decision
 - The best solution often depends on the circumstances (e.g., how many days of removal at the time of the MDR, parent availability for meetings, likelihood of expulsion, etc.)

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COMMON COMPLIANCE ISSUES: DATA COLLECTION AND PROGRESS MONITORING

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Why it matters..

- Schools are required to provide a FAPE to students with disabilities
- One element of a FAPE is whether the student is receiving a meaningful educational benefit from the services being provided by the District
- Impossible to determine whether FAPE is being provided without solid data
 - Present levels of performance **and**
 - Progress data that aligns with goals

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Why it matters...

- If a parent files a due process complaint, there will be an allegation that the district has failed to provide FAPE
- The district can only demonstrate that it has provided FAPE if:
 - It can show procedural compliance with the IDEIA (e.g., annual reviews completed timely, PR-01s sent, IEP meeting invitations issued, etc.) **and**
 - That the student made progress on the IEP goals (i.e., received a meaningful educational benefit)

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What we are seeing...

- An increasing number of parent advocates (some of whom are former educators) are hyper-focused on progress data
 - Progress reports and raw data are analyzed and picked apart if the data is not adequate or if there are discrepancies
 - These issues are used to form the basis for the "denial of FAPE" component in the due process complaint
- Parents are also becoming more savvy regarding data and progress

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Common Mistakes: PLOPS

- Failing to provide quantifiable present levels of performance
 - Use of old ETR data
 - Use of ETR data that does not align with the goal
 - Use of classroom grades
 - Writing a paragraph (that says nothing) when a specific sentence (that includes data) would do

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Common Mistakes: Goals

- Including too much in one goal and/or including unrelated concepts
 - Example: When given a grade level text, Johnny will correctly define vocabulary words, state the main idea of the passage and answer literal and inferential questions with 80% accuracy in 4/5 trials by the end of the IEP cycle.
 - In order to meet the goal, the student has to achieve all of these skills at 80% in 4/5 trials.
 - Also, data must be collected on each component for the specified number of trials – you cannot collect one data point with literal questions, one with inferential questions, etc.

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- Using the same level of mastery for all goals/objectives
 - Rarely will it be appropriate to use 80% in 4/5 trials for each goal
 - Level for mastery of goal must be based on PLOPs
- Setting the level of mastery too high per parent request
 - Again, think about the student's PLOP and the rate at which he/she gains skills

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Common Mistakes: Data Collection

- Picking too many methods by which progress will be monitored/data collected
 - Pick the best one or two (at most) methods by which data will be collected
 - Data must be collected using all of the methods indicated on the IEP
- Picking the wrong method to collect data
 - Think about how the data collection will look when selecting
 - Think twice about using "observation"

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- Collecting data that does not align to the goal/objective
 - Example: data that reports how the student completes a task with prompts when the goal states that the task will be done independently (or does not specify prompting)
- Using classroom assessments as “data” even though they do not align with the goal
- Using grades as “data” for the goal
- Failing to collect enough data
 - IEP says 80% in 4/5 trials and only three data points

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Raw Data

- Documentation that shows raw data collected should be:
 - Organized/Neat (e.g., legible and maintained in a binder or other similar format)
 - Dated (with year)
 - Refer clearly to the goal it measures
 - Understandable by others
 - Easily accessible (e.g., can be produced promptly if requested – remember, parents have the right to receive copies of raw data)

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Know When to Reconvene the Team

- Do not wait for parents to raise concerns to reconvene the team if the student is having issues. Reconvene the team when:
 - The student is not making progress on IEP goals/objectives;
 - The student’s grades are slipping (don’t wait for Ds and Fs to go home in the report card);
 - The student is having behavioral or social issues; or
 - New information from parents or other professionals needs to be considered.

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**PRACTICAL TIPS FOR AVOIDING
PREDETERMINATION**

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Avoid Predetermination Claims

- Predetermination is currently “en vogue” and is a claim that is included in almost every due process complaint...but what does it mean?
- Predetermination occurs when the district decides, outside the IEP process, what will (or will not) be included in a student’s IEP
 - Parent claims of predetermination occur when parents do not feel “heard” at the IEP meeting and are not treated like equal participants

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What the courts say...

“The facts of this case strongly suggest that the School System had an unofficial policy of refusing to provide one-on-one ABA programs and that the School System personnel thus did not have open minds and were not willing to consider the provision of such a program. . . The clear implication is that no matter how strong the evidence presented by the Deals the School System would have refused to provide the services. This is predetermination.”

–Deal v. Hamilton Cty. BOE, 392 F.3d 840 (6th Cir. 2004)

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What the courts say...

- But “predetermination is not synonymous with preparation.”
– *Nack v. Orange Cty. Sch. Dist.*, 454 F.3d 604 (6th Cir. 2006)
- “School evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child so long as they are willing to listen to the parents and the parents have the opportunity to make objections and suggestions.”
– *N.L. ex rel. Mrs. C. v. Knox Cty. Schs.*, 315 F.3d 688 (6th Cir. 2003)

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Strategies to Avoid Predetermination

- There is no way to prevent a predetermination claim, but there are many ways to defeat a claim that has been made
- Strategies include:
 - Active solicitation of parent input;
 - **Documentation** of parent input (and why it was/was not incorporated into the IEP);
 - Incorporate parental observations into IEP present levels of performance where possible and appropriate

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- Consideration of all information provided by parents (even if the team discounts the source);
 - This does not mean you have to accept the information, you must give good faith consideration to it
 - Avoid situation where you take the parents' private evaluation report and proclaim “**You’ve got to be kidding me! This guy is a ‘quack’ and we’re not even going to consider his report.**”

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- Demonstrate a willingness to compromise with parents when appropriate, even when they are unwilling to do the same
 - Each time parents bring new suggestions to the table, have a discussion about each one individually
 - Unreasonable parents can still have a reasonable suggestion
 - Document your efforts
- Avoid any and all comments related to cost and/or whether the service requested is available in the district

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- Avoid comments that imply (or state) that you have to check with a higher authority prior to granting a parent's request
 - The district representative must have the authority to commit the financial resources of the district
 - If you need more time, find a way to "punt" – the need to gather additional information is always an acceptable reason to delay making a decision

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Recording the IEP Meeting

- IDEA provides little guidance on this issue and leaves it up to state and local laws or policy
- The regulations give SEAs and LEAs the option to require, prohibit, limit, or otherwise regulate use of recording devices at IEP meetings 34 C.F.R. § 300.222(e)
- That same section of the regulations also requires LEAs take whatever action is necessary to ensure parents understand the proceedings of the IEP meeting, which could include making an audio or video recording

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Recording the IEP Meeting

- A Connecticut court held the district violated the IDEA when it refused to let a parent who was a native Danish speaker, with limited English-proficiency, record the meeting. She asked permission to record the meeting so she could review it later with a dictionary. The district refused and the court held this refusal denied the parent meaningful participation in the IEP process.
 - *E.H. v. Tirozzi* (D.Conn. 1990)
- Recently, an Ohio court held that parents had no right to record their child's IEP meetings, as they could not prove they fell within any exceptions to the district's no-recording rule.
 - *Horen v. BOE of Toledo*, 655 F. Supp.2d 794 (N.D. Ohio 2009)

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When recording is helpful...

- In some cases, recording the IEP meeting is helpful in defeating predetermination claims
 - Provides an unimpeachable record of exactly what was said, what was considered and how the district and parent interacted
 - Helpful in cases where parents are very involved participants (or in cases where parents or advocates attempt to "derail" the process and - make team decision-making very difficult)

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QUESTIONS


