



Recent Developments at OCR: The Same, But Different?

October 5, 2017

Jason T. Clagg
(260) 425-4646
jclagg@btlaw.com

Who is this guy?

- **Jason**
 - Partner at Barnes & Thornburg
 - Went to IU and Purdue
 - Represents schools in student/employment matters
 - Dad of three monsters



Our School Law Team



What is this all about?

- Providing you up-to-date information on recent developments, new cases, and hot topics at the federal level
 - A/K/A → Showing you the trouble other schools got into and how we can stay out of it
- Covering lots of subjects –Section 504, Title IX, Bullying, Transgender Issues, Sexual Misconduct

Our Talk Today is Interactive



- Please feel free to ask questions
- If I don't have your answer today, I will track it down ASAP

Just so we are all speaking the same language . . .

- IDEA = Individuals with Disabilities Education Act
- Article 7 = 511 IAC 7-32 through -47
- 504 = Section 504 of the Rehabilitation Act
- FAPE = Free Appropriate Public Education
- IEP = Individualized Education Program
- LRE = Least Restrictive Environment



- FBA = Functional Behavior Assessment
- BIP = Behavior Intervention Plan
- ESY = Extended School Year
- IEE = Independent Educational Evaluation
- RtI = Response to Intervention
- CCC = Case Conference Committee
- ToR = Teacher of Record

Significant Cases of Note



Fry v. Napoleon Comm. Sch. Dist.

- Decided by the Supreme Court in late February 2017
- When can an IDEA-eligible student sue you in court under Section 504 without pursuing a due process hearing?
 - Answer: When the student is seeking relief other than FAPE
- Must ask two questions—
 - Could the student have brought the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public library or theater?
 - Could an *adult* at the school—say, an employee or visitor—have pressed essentially the same complaint?
- If yes, student can go straight to court under 504!

Andrew F. v. Douglas County School District

- Decided by the Supreme Court in late March 2017
- Rejected lower court decisions that FAPE only requires an IEP that is calculated to convey more than a *de minimis* benefit
- Instead, IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.”
- Presumably this will trickle down to Section 504



AGENCY GUIDANCE: DEAR COLLEAGUE . . .

The Law vs. Agency Guidance

- Statutes control → passed by lawmakers
- Regulations usually control → implemented by an agency after a rigorous, public process
- What about agency guidance?
 - Very few procedures
 - Explains how an agency will apply the law
 - Not binding, but may receive some amount of deference from courts/IHOs

Dear Colleague . . .

- Sure sounds friendly, right?
- Usually, announces a change in interpretation or demands more rigorous enforcement / compliance
- Bottom line: Look out!



WHO ISSUES THESE THINGS?: THE USUAL SUSPECTS

Office of Civil Rights (“OCR”)

- Part of the U.S. Department of Education
- Enforces anti-discrimination statutes—Section 504 & Title IX
- Individuals can file complaints with OCR and the agency will conduct an investigation
 - Asks for a written response (position statement)
 - Asks for documents
 - Often conducts interviews (sometimes telephonic)



Office of Special Education Programs ("OSEP")

- Part of the U.S. Department of Education
- Operates under the Office of Special Education and Rehabilitative Services ("OSERS")
- Responsible to:
 - Create and disseminate federal policy;
 - Monitor and report on implementation of federal policy; and
 - Promote the training of educational professionals

What will the Trump Administration Mean for OCR?



Looking Back on the Obama Years

- Significant Dear Colleague Letters
 - The need for educational technology to be accessible
 - Effective communication for students with hearing, vision, or speech disabilities
 - FAQs regarding the ADA and the broadened definition of “disability”
 - Access to extracurricular activities and sports
 - Disability based bullying and harassment

Looking Back on the Obama Years II

- Past administration created expansive guidelines for investigations, stating that certain complaints could automatically trigger a broad investigation looking into more than just the particular issue raised.

Trump Pushes Back on Enforcement

- *The Washington Post*, May 29, 2017
 - Under President Trump’s proposed budget, [OCR] — which has investigated thousands of complaints of discrimination in school districts across the country . . . — would also see significant staffing cuts.
 - Administration officials acknowledge . . . the civil rights office will have to scale back the number of investigations it conducts and limit travel to school districts to carry out its work.

Scaled Back Approach

- Internal OCR memo issued new guidelines in June 2017
 - Regional offices subject to less oversight from D.C.
 - Will look into broader patterns of noncompliance *only* when a complaint explicitly mentions as much.
 - Ends the Obama era guideline recommending investigators look at school records going back three years looking for a pattern of violations.
 - Investigators can now decide for themselves the scope of information they need.

Broader Context of Policy

- Most notable change → Investigations will no longer routinely go beyond the original complaint
 - If not alleged, usually not investigated
- Drops the requirement that regional offices automatically confer with OCR headquarters in Washington
 - No longer required to discuss “highly sensitive complaints,” *i.e.*, disproportionate discipline for minority students and mishandling of sexual assaults

Broader Context of Policy

- Aimed to resolve cases quickly
 - Close cases within the 180 day goal
 - Encourage settlement
 - Keep complaints narrow

Title IX: Sexual Assault Investigations

- What's changed?

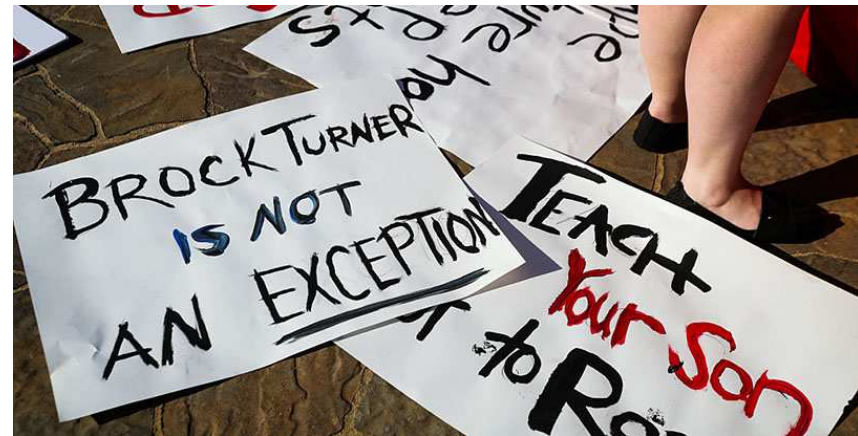


Look Back: 2011 Dear Colleague Letter

- **2011** | OCR issues “Dear Colleague” letter that told schools they have a legal responsibility under Title IX to respond promptly and fairly to allegations of sexual assault, and sets forth guidelines for how to handle these allegations.
 - Urged schools to better investigate reports of sexual violence, specifying that educators “must use a preponderance of the evidence standard” in investigations, rather than the more rigorous “clear and convincing” standard
 - Accelerated adjudications, with a recommended 60-day limit
 - Discouraged cross-examination of accusers

DOE Rolls Back Title IX Guidance

- **2017** | DOE formally withdraws the prior “Dear Colleague Letter”
- Secretary DeVos announces changes to OCR’s guidelines for school disciplinary procedures in sex assault cases.
- New procedures will put a greater emphasis on the rights of the accused.



What are the schools obligations under the new administration?

- A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct.
- OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable.

What are the schools obligations under the new administration?

- Are the Procedures Prompt and Equitable?
 - (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents, and employees;
 - (ii) applies the grievance procedures to complaints filed by students alleging sexual misconduct carried out by employees, other students, or third parties;
 - (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and evidence;
 - (iv) designates and follows a reasonably prompt timeframe;
 - (v) notifies the parties of the outcome of the complaint; and
 - (vi) provides assurance the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects.

Transgender Issues

- What's New?



Looking Back: Dear Colleague Letter of May 13, 2016

- Obama administration issued “Dear Colleague” letter interpreting Title IX, the law prohibiting sex discrimination, to include transgender students.
- The letter stated that in order to be in compliance with the law, every school "must not treat a transgender student differently from the way it treats other students of the same gender identity."
- Letter contained implicit threat: noncompliance would result in lawsuit or a loss of federal dollars.



DOE Narrows Transgender Investigations

- Trump DOE Rescinds the Dear Colleague Letter on 2/22/17
 - Why—It did not “contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did [the Obama Administration] undergo any formal public process.”
- Maintains “protections from discrimination, bullying, or harassment.”
- Trump says rollback gives the states and districts more flexibility in their interpretation of Title IX and how they choose to accommodate transgender students.

Scaled Back Approach: New Guidelines

- Does identify specific instances where OCR could have jurisdiction
 - Failure to use a student's preferred pronoun
 - Failure to fix an environment that is hostile toward transgendered students
 - Retaliation
 - Different treatment based on a student failure to conform to stereotyped notion of masculinity/femininity
- Investigations into transgender students being denied the right to use the bathrooms of their choice is **not** on that list

Focus Shifts to the Courts



Whitaker v. Kenosha Unified Sch. Dist.

- Decided by the Seventh Circuit on May 30, 2017
- Upheld a preliminary injunction in favor of a transgender student
- At the initial stage, court concluded that discrimination against a transgender individual is sex discrimination under Title IX
- The District has filed an appeal on August 25, 2017, asking the Supreme Court to overturn the decision
- **Bottom Line (for Now):** A transgender individual can use the restroom with which they identify and cannot be made to use a single person restroom.



BUT WAIT, THERE IS MORE!

Dear Colleague: Section 504 in Charter Schools (12/28/2016)

- “Charter school students with disabilities have the same Section 504 rights as other public schools students with disabilities.”
- All the guidance on Section 504 regarding public schools also applies to charter schools, even if charter schools are not specifically mentioned.

Parent and Educator Resource Guide to Section 504 (12/28/2016)

- <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>
- 52-page document that is a helpful summary
 - Seems like a primer for parents

Resource Guide, cont'd

- One of the largest sections is devoted to bullying and harassment.
- “This section includes language that is undeniably offensive and may be painful to many readers. OCR hopes the benefit of including examples to reflect the harsh reality of harassment at school helps school personnel, parents, and student understand the rights of students with disabilities who are harassed and how schools must respond, and that it outweighs the cost of offending some readers of this content.”

Dear Colleague: Restraint and Seclusion (12/28/2016)

- Emphasizes that restraint and seclusion can constitute disability discrimination.
- Reinforces an earlier document published by the DOE in 2012, *Restraint and Seclusion: Resource document*.

DOE's Key Recommendations

- Never use mechanical restraint
- Never use physical restraint or seclusion for disciplinary purposes
- Trained school officials should use physical restraint or seclusion only if the student's behavior poses imminent danger of serious physical harm to self or others

Restraint and Seclusion, cont'd

- If a student is being restrained/secluded due to behavioral challenges, this is likely to trigger the school's obligation to evaluate for a disability
- Question: Would the school restrain/seclude a student without a disability for this behavior?
 - Example: Student has a panic disorder. The Student and a friend run around the classroom carrying sharp scissors and waving their arms. The students put the scissors away and sit down. The teacher then has the SRO restrain only the student with the panic disorder.

Dear Colleague: Race Discrimination n Special Ed (12/12/2016)

- Title VI: Prohibits race discrimination
- Key issues:
 - Over-identification of students of color as having disabilities
 - Under-identification of students of color as having disabilities
 - Unlawful delays in evaluating and providing special ed services to students of color

Race Discrimination, cont'd

- Example 1—Over-identification referrals:
 - Class has 11 black students and 14 white students.
 - 5 black students referred for evaluation based on “aggressive behavior” or “violent theme in writing.”
 - No white students referred, although four received general education interventions for numerous behavioral infractions and poor academic progress.

Race Discrimination, cont'd

- Example 2—Under-identification:
 - A black student and white student have trouble turning in homework
 - Teacher suspects the white student has ADHD and refers him for an evaluation
 - Teacher suspects the black student lacks motivation because his family does not value education
 - Teacher meets with the black students family to suggest ways they can provide additional support for him at home

Dear Colleague: ADHD (7/26/2016)

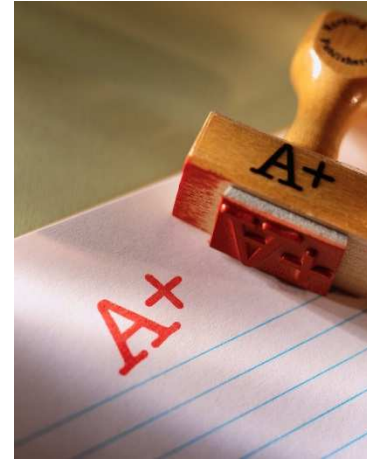
- Because of the broadening of the ADA, “more students with ADHD are now clearly entitled to the protections under Section 504”
- Essentially, said many schools are not meeting legal obligations to students with ADHD in various ways
 - And they are coming after those schools!

Dear Colleague: ADHD (con't)

- How so?
 - School must identify and evaluate potentially disabled students
 - RtI cannot delay evaluation
 - Substantially limited in a major life activity
 - This is not the same as “has a big impact at school”
 - All “As” does not mean “not disabled”

Dear Colleague: ADHD (con't)

- And there is more
 - No limitations on placement of 504 eligible students
 - Entitled to FAPE – even if outside of gen ed
 - Includes transportation
 - Cost is not controlling
 - Need to provide 504 safeguards, much like Article 7 safeguards
 - Good 504 plans are not distributed and followed
 - “on the shelf”



Scenarios from Recent Cases

(A/K/A WHAT SCHOOLS DID TO GET INTO OR OUT OF BIG TROUBLE)

Scenarios: Glucose Test Kits

- Facts:
 - District rejected parent's request that a glucose monitoring kit be kept in class
 - District denied request based on policy that prohibited testing equipment in classrooms as a safety hazard

- Legal or illegal?

- North East (TX) Indep. Sch. Dist. (2016).

Scenarios: Diagnosis

- Facts
 - Sixth grader with diagnosed ADHD and a mood disorder
 - Academically and behaviorally successful in the classroom
 - School refuses to find the student eligible under IDEA
- Legal or illegal?
 - Under 504?
- *M.P. by K.S. v. Aransas Pass Indep. Sch. Dist.* (S.D. Texas 2016)

Scenarios: Evaluations

- Facts:
 - Child has an existing 504 plan
 - Parents request special ed evaluation
 - District denies, says student receives above average grades and test scores, participates in extracurriculars, no disciplinary referrals, and was attentive and respectful

- Legal or illegal?

- *In re Student with a disability, (SEA MN 2017)*

Scenarios: Bilingual Student

- Facts
 - Student spoke English and Spanish, student was proficient in both languages as demonstrated by his performance in the classroom and one-on-one conversations
 - District evaluated student in English and did not assess his Spanish-language needs
 - Legal or illegal?
- B.G. by J.A.G. v. City of Chicago Sch. Dist. (N.D. Ill. 2017)

Scenarios: School Websites

- Facts
 - Low vision student could not access some parts of the school's website (e.g., non-adjustable font size, no descriptors for images)
 - Parent filed an OCR charge alleging the school website was not accessible under ADA/504
- Result?
- *Silsbee (TX) Indep. Sch. Dist. (OCR 03/10/15)*

Scenarios: Placement

- Facts:
 - Mom believes child needed a shortened school day due to violent behaviors
 - Principal agrees.
 - They make they change in placement without convening an IEP meeting.
 - Legal or illegal?
 - Alleghany County (NC) Schs. (2016)

Scenarios: Doctors

- Facts:
 - Doctors recommends consistency in aides
 - Parents request 1 full-time aide rather than 2 part-time
 - School denies request
 - Legal or illegal?
 - *Oneida Sch. Dist. No. 351 (2017)*

Scenarios: Dogs & Allergies

- Facts
 - Student A begins bringing a service dog to school
 - Student B begins to experience allergies
 - School modified the students schedules, installed air filters, and increased cleaning
 - But no meeting was convened and no follow up occurred
 - Student B filed with OCR
- Thoughts?
- *West Gilbert (AZ) Charter Elem. Sch., Inc. (06/30/15)*

Scenarios: Service Dogs

- Facts
 - Diabetic student had a service dog who would alert staff when the student's glucose levels were low.
 - The School allowed the Student to take the dog into most of the school except for certain restrooms and the library.
 - The School limited access to these areas because parent concerns regarding allergies and fear of dogs.
 - Student complains to OCR.
- Result?
- *Ida (MI) Pub. Schs. (2015)*

Scenarios: 504 for Diabetes?

- Facts
 - School develops a 504 plan for a student with diabetes by offering the standard 504 plan given to all diabetic students
- Result?
- *Harney County (OR) Sch. Dist. 3 (OCR 2014)*



Thank you!

Jason T. Clagg
(260) 425-4646
jclagg@btlaw.com