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Special Education in 2021 and Beyond: The Growing Role of Technology in IDEA Compliance

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I. TECHNOLOGY.

A. Technology Generally.

1. Importance of Technology. “Technology is the hallmark of the future, and technological competency is essential to preparing all students for future success. Emerging technologies are an educational resource that enhances learning for everyone, and perhaps especially for students with disabilities.” *Dear Colleague Letter: Electronic Book Readers*, 110 LRP 37424 (OCR/DOJ 2010).
 - a. Before COVID-19. Even before COVID-19, educational models involving online instruction were becoming more common,

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including the ability to attend virtual school. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

- b. After COVID-19. To state the obvious, COVID-19 has exponentially increased the use of educational models involving online instruction. So, it is arguably more important than it has ever been in the past to ensure that the technology that students are using at home is accessible.

B. Relevant Laws.

1. Individuals with Disabilities Education Act. IDEA is the federal statute which funds special education programs. In order to receive federal funding, states must take steps to ensure that local school districts are meeting IDEA's many requirements. IDEA is implemented by an extensive and complex body of federal regulations. *See* 34 C.F.R. Part 300. IDEA ensures students with a disability are provided with a Free Appropriate Public Education ("FAPE"). 34 C.F.R. § 300.1. Additionally, IDEA ensures that "the rights of children with disabilities and their parents are protected." *Id.*
2. Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act of 1990 ("ADA"). Section 504 is a federal anti-discrimination statute. It prohibits disability discrimination in any program or activity that receives federal financial assistance, including public schools. The ADA is a federal law prohibiting discrimination against individuals with disabilities. 42 U.S.C. § 12101, *et seq.* The ADA and Section 504 are similar with regard to the manner in which they relate to education.

II. TECHNOLOGY AND INSTRUCTION FOR ALL STUDENTS.

A. Accessible Technology under Section 504 and the ADA.

1. Accessibility: The concept of accessibility "involves the design of materials (e.g., curricula and resources), devices (e.g., smart phones and tablets), digital tools (e.g., computers, apps, and games), and platforms (e.g., online learning and websites) that support access to educational content and activities. Further, accessibility refers to accommodating individual cognitive and physical needs to remove unnecessary obstacles so that students can demonstrate their knowledge and skills in formative and summative assessments." Alise Crossland et al., Center on

Technology and Disability, *Digital Accessibility Toolkit: What Education Leaders Need to Know* (2016).

2. Examples: Tools to develop or enhance accessibility include:
 - a. Captions for videos;
 - b. Alt-text (inserted word or phrase to describe an image) on websites and in e-books);
 - c. Standard headers in websites, forms, e-books, and documents;
 - d. Adjustment of text colors and background contrasts; and
 - e. Text-to-speech, speech-to-text, dictionaries, and glossaries.

Alise Crossland et al., Center on Technology and Disability, *Digital Accessibility Toolkit: What Education Leaders Need to Know* (2016).

B. Incorporating Technology into Instruction for All Students.

1. Equal Opportunity. Pursuant to the ADA and Section 504, a school district “in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability ... [a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others.” 28 C.F.R. § 35.130 (ADA); 34 .C.F.R. § 104.4(b)(1)(ii) (Section 504).
2. Accessible Technology. “In its provision of benefits, services, and opportunities, a school must ensure that ... students [with disabilities, including students with low vision and a specific learning disabilities,] are not discriminated against as a result of inaccessible technology.” *Dear Colleague Letter*, 111 LRP 36986 (OCR 2011).
3. Types of Technology that must be accessible. As noted above, “all school programs and activities are subject to the nondiscrimination requirements of Section 504 and the ADA.” *Dear Colleague Letter*, 111 LRP 36986 (OCR 2011). For instance, the principles apply to:
 - a. Online programs;

- b. Pilot programs and programs of a short duration; and
- c. when planning to use an emerging technology in a class or school where no students with impairments are currently enrolled.

Dear Colleague Letter, 111 LRP 36986 (OCR 2011).

- 4. Selecting New Technology. When selecting technology for the classroom, schools should ask:
 - a. What educational opportunities and benefits does the school provide through the use of the technology?
 - b. How will the technology provide these opportunities and benefits?
 - c. Does the technology exist in a format that is accessible to individuals with disabilities?
 - d. If the technology is not accessible, can it be modified or is there a different technological device available, so that students with disabilities can obtain the educational opportunities and benefits in a timely, equally effective, and equally integrated manner?

Dear Colleague Letter, 111 LRP 36986 (OCR 2011).

- 5. Determining Accessibility. When determining whether technology is accessible, schools should ask:
 - a. Has the technology been tested with students with that disability?
 - b. Is there research or literature that supports the technology's use.
- 6. Accommodations and Modifications. “[W]here accessible technology is not available, a school can comply with Section 504 and the ADA if it provides students with disabilities ‘accommodations or modifications that permit them to receive all the educational benefits provided by the technology in an equally effective and equally integrated manner.’” *Dear Colleague Letter*, 111 LRP 36986 (OCR 2011).
 - a. Availability. “[A]n accommodation or modification that is available only at certain times (such as an aide to read to the student) will not be considered ‘equally effective and equally integrated where other students have access to the same

information at any time and any location, as is the case with a website or other on-line content.” *Virtual Cmty. Sch. of Ohio*, 62 IDELR 124 (OCR 2013).

- b. Traditional alternative media. “Traditional alternative media can still be used as an accommodation under appropriate circumstances.” In other words, a school can use the traditional alternative media if it provides access to the benefits of technology in an equally effective and equally integrated manner. “For example, if a school provides printed books to students in a class, books on tape may be an appropriate accommodation for a blind student.” *Dear Colleague Letter*, 111 LRP 36986 (OCR 2011).
- c. Note: Pursuant to the ADA and Section 504, a school district “in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability ... [p]rovide different or separate aid, benefits, or services to [] persons [with disabilities] or to any class of [] persons [with disabilities] unless such action is necessary to provide qualified [] persons [with disabilities] with aid, benefits, or services that are as effective as those provided to others.” 34 .C.F.R. § 104.4(b)(1)(iv) (Section 504).

III. DISTANCE LEARNING AND ONLINE CLASSES.

A. Accessibility.

1. Specific Methodologies Not Mandated. The OCR and OSERS noted that while “federal law requires distance instruction to be accessible to students with disabilities, it does not mandate specific methodologies.” For example, if a teacher who has a blind student in her class is working from home and cannot distribute a document accessible to that student, she can distribute to the rest of the class an inaccessible document and, if appropriate for the student, read the document over the phone to the blind student or provide the blind student with an audio recording of a reading of the document aloud.” *Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary, and Secondary School While Service Students with Disabilities*, 120 LRP 10623 (OSERS/OCR 2020).

B. Monitor Attendance and Progress in Online Courses.

1. Monitoring Progress. Students’ progress should be monitored in online courses and the IEP team should re-convene if necessary.

2. Communication Is Key. Proactive and ongoing communication with families to find out what is and is not working is paramount. School districts may be able to avoid discrimination claims under Section 504 by identifying, and reidentifying, barriers to accessibility as they come up (as opposed to down the road). Identifying problems is the first essential step to identifying solutions. If school staff are noting that a student is not participating in online learning, steps should be taken to follow up with the student and the family at the earliest possibility in order to assess whether there is an issue with access or engagement. In either case, schools should provide accommodations or modifications that would mitigate these issues. This might look like additional technology support to the student and/or parents. Alternatively, schools may need to modify the technology that the student is being asked to utilize to accommodate the student's needs. For instance, a student may need to have all of her materials centrally located in one document or file as opposed to using a number of different programs, formats, and/or links.
 - a. Pitfall – Assuming Everything is Working: Avoid assuming that everything is working. This is especially true if the school is not hearing from the family. This is a situation where an ounce of prevention can be worth a pound of cure. Instead of assuming parents and students can access the technology, reach out and find out. For instance, if school staff are noting that a student is not participating, follow up. Questions that staff could ask the family include:
 - Is this an access issue;
 - Is this an engagement issue;
 - Are accommodations or modifications that would mitigate any issues; and
 - Does this family need support to access the technology, whether that's coaching of the parents or a paraprofessional walking the student through accessing the technology over the phone one time or on a repeated basis?
3. *Cincinnati Learning Sch.*, 116 LRP 39184 (SEA OH 2016).
 - a. Facts: Student was in tenth grade and was enrolled in all on-line classes. The Student's IEP required him to receive small group or individual support several times per week. The Student had to request time to attend the resource room to receive his services and the Student's daily schedule did not indicate that any specific time

was assigned to the Student to enable him to receive the services written in his IEP. The School provided no documentation that demonstrated that the Student received the required amount of services in his IEP. The Student had a GPA below a 2.0 and was barely attending his online classes.

- b. Holding: The School violated the IDEA by not implementing the Student's IEP.
 - i. The School is required to provide services stated in the IEP at a minimum, whether the Student signs-up to receive services or not.
 - ii. The Student was not completing the required amount of work on-line, and there is no indication that the Student's IEP team was reconvened to address the situation or to ensure that the Student was receiving the services required by his IEP.

C. Data Privacy Considerations During Distance Learning. Schools still have an obligation to comply with the state and federal laws that govern data privacy with respect to student data during distance learning. This is true for general education and special education students alike. Under FERPA, schools cannot disclose student records or personally identifiable information from a student's education record without the consent of the student's parent or the application of an eligible exception. Just as a reminder, education records are all records that are directly related to an individual student and that are maintained by a school or someone acting for the school. Likewise, the MGDPA generally classifies educational data as private data.

- 1. Provision of Educational Services to a Group of Students.
 - a. Data Privacy Considerations. "Providing education services to a group of students in an online setting is similar to providing services in the school setting. If [a school] would provide instruction or other services to a group of students at school, [the school] can take the same [data privacy] factors into consideration in the online setting." MDE, *Student Privacy in the Online Setting*, <https://education.mn.gov/MDE/dse/health/covid19/MDE032171> (last visited May 12, 2021).
 - b. Best Practices:

- i. Workspace. If and when staff are video conferencing with one or more students or parents, extra care should be taken that there is no private student data visible in the background. Encourage staff to do a quick sweep of the area that will be in frame before they even log on to ensure that student data is protected and that the area around them and behind them is a professional workspace. This is especially true if staff are working from home. Nonetheless, everyone needs to be conscientious about their surroundings when they are appearing on video. A neutral background is ideal.
 - ii. Disclosure of Private Data. If staff are video conferencing with multiple students at the same time, the potential is there for parents who are home with their students to view other students. Accordingly, it is possible that private data, including personally identifiable information, on students could be disclosed. To address these concerns, consider asking parents to (1) consent to the possible disclosure of private data on their student in the context of distance learning; and (2) refrain from sharing or disseminating any private data on other students that they may observe while virtual learning is taking place. See MDE, *Student Privacy in the Online Setting*, <https://education.mn.gov/MDE/dse/health/covid19/MDE032171> (last visited May 12, 2021).
2. Parent Presence in the Virtual Classroom. “The U.S. Department of Education has long stated that FERPA neither requires schools to nor prohibits them from allowing a parent access to the classroom to observe their child. The reasoning is that FERPA’s requirement to protect private data applies to information either in or derived from a student’s education record; an educator may not disclose that information to other students, parents, or professionals in the classroom. But information about students that is based on what is happening more generally in the classroom is not necessarily subject to FERPA because it does not come from the student’s education record.” MDE, *Student Privacy in the Online Setting*, <https://education.mn.gov/MDE/dse/health/covid19/MDE032171> (last visited May 12, 2021).
3. Selecting an Online Platform. FERPA and the Minnesota Government Data Practices Act require that school districts protect private data. “If a school has concerns that providing services via an online platform could

contain and thus could reveal private data about students, then the school should use a platform which incorporates security measures to ensure that private data is encrypted and that it cannot be accessed by individuals who do not have the authority to access the data.” MDE, *Student Privacy in the Online Setting*, <https://education.mn.gov/MDE/dse/health/covid19/MDE032171> (last visited May 12, 2021).

4. Security Measures. Anytime a school is using an online platform like Google or Zoom or Skype, there are data privacy considerations. Preventative measures, like encrypting private data and ensuring that the data can only be accessed by those who are supposed to have access, are important. Staff also need to make sure they are taking steps to maintain that security.

D. Practical Tips

1. As Always, Be Professional. Keep written communications professional. Of course, staff are always expected to communicate in a professional manner, but distance learning may have the unintended consequence of making email and chatting seem casual and informal. The lawyer’s golden rule still applies: If you wouldn’t want it read in a courtroom, don’t type it into a chat box, text message, or email.

IV. INCORPORATING TECHNOLOGY INTO THE INSTRUCTION OF SPECIAL EDUCATION STUDENTS.

A. Assistive Technology.

1. Definitions.
 - a. Assistive technology device. In general, any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability. The term “assistive technology device” does not include a medical device that is surgically implanted, or the replacement of such device. 20 U.S.C. § 1401(1); 34 C.F.R. § 300.5.
 - b. Assistive technology service. In general, any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

- i. The evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
 - ii. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
 - iii. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
 - iv. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
 - v. Training or technical assistance for a child with a disability or, if appropriate, that child's family; and
 - vi. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

2. Team Decision. In developing an IEP, the IEP team is required to consider whether the child needs assistive technology devices and services. 34 CFR § 300.324(a)(2)(v).
 - a. Cost as a consideration. State law allows for the cost of assistive technology devices to be considered, along with the cost of related and special education services generally, “in choosing how to provide the appropriate services, instruction, or devices that are to be made part of the student’s individual education plan.” Minn. Stat. § 125A.08(b)(1).

3. FAPE. A school district’s “obligation to provide assistive technology is limited to assistive technology which is necessary to provide a FAPE.” *Zigich v. ISD No. 623 (Roseville)*, Civ. No. 99-1212 (D. Minn. 2000) (unpublished opinion) (emphasis added); *see also Grant v. Indep. Sch. Dist. No. 11*, No. CIV. 02-795 ADM/AJB, 2005 WL 1539805 (D. Minn. June 30, 2005) (school district was not required to conduct an assessment

of the student's assistive technology needs or provide the student with additional assistive technology where school district was providing the student FAPE).

- a. Whether AT is required to provide a FAPE is a determination that is commonly made by examining whether a device is necessary for a student to make progress on IEP goals and objectives.
 - b. The standard is not whether a student can benefit from the use of a particular assistive technology device the district must provide the device.
 - i. Virtually every student, whether qualified to receive services under IDEA or not, could benefit, to some degree, from some form of assistive technology, such as a laptop computer or IPAD.
 - c. On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE. 34 C.F.R. § 300.105(b).
4. Funding. The IDEA provides that grant funds must be used only in accordance with the applicable provisions of the IDEA and to pay the excess costs of providing special education and related services to children with disabilities. 34 C.F.R. § 300.202(a).
- a. In using IDEA funds for these purposes, a school district must comply with the excess costs requirement in 34 C.F.R. § 300.202(b). Therefore, IDEA funds may be used only to pay for auxiliary aids and services under Title II that also are required to be provided under the IDEA, such as assistive technology or interpreter services that are included in the student's IEP. *See* DOJ, OSERS, OCR, *Frequently Asked Questions on Effective Communication for Student with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, 64 IDELR 180 (November 12, 2014).
 - b. Public schools cannot charge students and parents for the special education, related services, and supplementary aids and services, including assistive technology devices and services, that are part of a student's IEP and provided under the IDEA. *Id.*

5. When to Conduct an Assistive Technology Assessment.

- a. Overview. There are no hard and fast rules for when, specifically, to conduct an AT assessment. However, an IEP team, in the course of developing each student's IEP, *must* consider whether the student needs assistive technology. 20 U.S.C. § 1414(d)(3)(B)(v) (emphasis added).
- i. Consideration does not require a formal annual evaluation or assessment.
 - ii. Team minutes and records should demonstrate that a discussion and determination of whether the need exists and, if so, whether it is being adequately met, as each annual IEP is drafted.
 - iii. The assessment of the need for assistive technology must be determined in relation to IEP goals. The use of assistive technology is not an end; it is a means to an end.
 - iv. As discussed above, an essential element of a discussion as to whether an assistive technology evaluation should be conducted is a discussion and conclusion as to whether the student is currently receiving FAPE.
 - v. Overall, the evaluation “should provide sufficient information to permit the IEP team to determine whether the student requires [AT] services to receive FAPE.” *Letter to Fisher*, 23 IDELR 565 (OSEP 1995).
- b. Initial Evaluation. AT should be considered during an initial evaluation. School districts are required to conduct a full and individual initial evaluation before the initial provision of special education and related services to a pupil. Minn. R. 3525.2710, Subp. 2; 34 C.F.R. § 104.35(a).
- c. Reevaluations. AT needs can and should be addressed during reevaluations as well. School districts are required to ensure that a reevaluation of each pupil is conducted if conditions warrant a reevaluation or if the pupil's parent or teacher requests a reevaluation. In any event, reevaluations must be conducted at least once every three years. Minn. R. 3525.2710, Subp. 2.

- d. Upon Parent Request. When parents request an AT assessment, school districts must provide them prior written notice of its decision to grant or deny the request.
6. Weight of Parent Input and Outside Individuals. The decision as to what constitutes an appropriate program, including assistive technology. During an AT evaluation, the schools must consider the disability-related information provided by parents, but they are not required to adopt the AT requests specified by parents. *See K.E. v. Independent School District No. 15*, 647 F.3d 795, 805-06 (8th Cir. 2011); *see also Evans v. Dist. No. 17*, 841 F.2d 824, 830 (8th Cir. 1988); *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 947 (1st Cir. 1991). Likewise, the decision as to what constitutes an appropriate assistive technology is not made by an individual or individuals advising school staff independent of an IEP team such as advisors, consultants, and/or independent assessors. 34 C.F.R. §§ 300.343, 344; MDCFL Complaint No. 1009 (1999).
7. Failure to Conduct an Assistive Technology Evaluation. Failure to conduct an assistive technology evaluation can amount to a denial of FAPE.
 - a. *North Hills Sch. Dist. v. M.B.*, 65 IDELR 150 (Pa. Commw. Ct. 2015). An 8-year-old nonverbal student with autism utilized an iPod app with pictures to communicate his needs outside of school. In school, he saw limited progress using this same device and resorted to moaning and crying when he could not express his needs. The court held the school district should have tried to determine why the student's device was not affording him success during school through an AT evaluation and that the failure to conduct this evaluation entitled the student to one hour daily compensatory education.

B. Virtual Service Minutes.

1. What Counts as Direct Service Minutes? The conservative approach is to provide direct minutes of service via face-to-face video conferencing to the greatest extent possible. That said, pre-recorded videos, teacher feedback, and guided independent work will likely count toward direct minutes of service (as they would in a resource room setting).
2. Provision of Services. The School is required to provide services stated in the IEP at a minimum, whether the Student signs-up to receive services or not. *Cincinnati Learning Sch.*, 116 LRP 39184 (SEA OH 2016)

- a. Practical Tip. Districts should identify specific times when students will receive their specialized instruction and track the student's attendance.

C. Section 504 and the ADA: Effective Communication.

1. Effective Communication. "A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a) (ADA). To comply with this requirement, districts must "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." .” 28 C.F.R. § 35.160(b)(1).
2. Compliance with IDEA May Not Be Sufficient Alone. It should be noted that regarding students with hearing, visual, or speech impairment, the U.S. Department of Education, the Department of Justice (“DOJ”), the Office for Civil Rights (“OCR”), and the Office of Special Education and Rehabilitative Services (“OSERS”) have stated that merely meeting FAPE under IDEA does not necessarily fulfill a school’s obligation under the ADA and Section 504. The ADA and Section 504 require schools to, without charge, ensure that communications with students with disabilities is as effective as communication with students without disabilities, giving primary consideration to students and parents in determining which auxiliary aids and services are necessary to provide such effective communication. In other words, for students with hearing, visual, or speech impairments, a school may have to go above and beyond what is necessary for FAPE to meet the requirements of the ADA. U.S. Department of Education and U.S. Department of Justice, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools* (2014); *Letter to Negrón*, 65 IDELR 304 (DOJ, OCR, OSERS 2015). Nonetheless, the DOJ, OCR, and OSERS did note that, “in many instances, the services a school provides under the IDEA to ensure a [FAPE] will also satisfy the school's obligation under Title II of the ADA to ensure equally effective communication.”

V. VIRTUAL SCHOOLS.

A. Overview.

1. **Virtual Schools.** Educational models involving online instruction are becoming more common, including the ability to attend virtual school. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

B. Applicable Laws.

1. **IDEA.** “The educational rights and protections afforded to children with disabilities and their parents under IDEA must not be diminished or compromised when children with disabilities attend virtual schools.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

- a. **FAPE.** Virtual schools are required by IDEA to provide FAPE, including by:
 - i. Identifying and evaluating children with disabilities;
 - ii. Developing IEPs;
 - iii. Providing special education and related services in the least restrictive environment; and
 - iv. the provision of procedural safeguards.

Letter to Barnes, 41 IDELR 35 (OSEP 2003).

- b. **Child Find.** “LEAs, including virtual schools that operate as LEAs, should review the State's child find policies and procedures as well as their own implementing policies, procedures, and practices to ensure that children with disabilities who attend virtual schools are identified, located, and evaluated.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

- i. **Child Find Strategies:** “Where the practices of the virtual school, whether it is an LEA or operated by an LEA, limit or prevent the teacher's interaction and contacts with a child, the SEA's child find policies should suggest additional ways that LEAs can meet this IDEA responsibility for children attending virtual schools (e.g., screenings to identify children who might need to be referred for an evaluation and questionnaires filled out by virtual school teachers and staff and children's parents). In general, reliance on referrals by

parents should not be the primary vehicle for meeting IDEA's child find requirements.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

- ii. Reevaluations: “For children who have IEPs and have been determined eligible for special education and related services prior to their enrollment in the virtual school, child find responsibilities also include ensuring that periodic reevaluations are conducted.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).
2. **Section 504**. “The same nondiscrimination principles that apply to all schools under [Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990] also apply to virtual schools.” *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).

B. Contracting with Virtual Schools.

1. Contracting. LEAs retain the responsibility for making FAPE available to an eligible child with a disability even if they choose to contract with virtual schools to provide educational services to children with disabilities. *Dear Colleague Letter*, 68 IDELR 108 (OSERS/OSEP 2016).
2. Quillayute Valley (WA) Sch. Dist. No 402, 49 IDELR 293 (OCR 2007): The OCR found that the online high school “is part of [the school district’s] public education program, and is operating under a management services agreement with [the school district], and that [the school district] did not ensure that [the school] is complying with Section 504 and Title II. Because [the school district] did not ensure that [the online school] is complying with Section 504 and Title II, [the OCR] conclude[d] that [the school district] is using methods of administration that have the effect of subjecting disabled students to discrimination on the basis of disability. As a result, OCR concludes that [the school district] did not comply with Section 504 and Title II.”

VI. VIRTUAL MEETINGS, E-MAILING, AND E-SIGNATURES.

A. Virtual IEP Team Meetings and Section 504 Team Meetings.

1. Accommodating Parents. Under the IDEA, parents have a right to provide input and participate in the decision-making process with respect to their student’s education. From underlying health conditions to work schedules parents, should be accommodated to the greatest extent

possible. Schools should offer virtual meetings whenever beneficial to facilitate safe and convenient meetings with parents.

2. Virtual IEP Team Meetings. IEP team meeting requirements, including requirements on the participants, still apply to virtual meetings. 34 U.S.C. § 300.321(a).
3. Virtual 504 Team Meeting. 504 team meeting requirements, including requirements on the participants, still apply to virtual meetings. 34 C.F.R. § 104.35(c).

B. E-mailing PWNs, Procedural Safeguard Notices, and Due Process Complaints.

1. PWNs, procedural safeguards notice, and due process complaints may be sent by e-mail. If the public agency makes that option available, parents may elect to receive PWNs, procedural safeguards notice, and due process complaints by e-mail. 34 C.F.R. 300.505.

C. Consent and Electronic Signatures.

1. Federal Guidance. “States may use electronic or digital signatures for consent, provided they take the necessary steps to ensure that there are appropriate safeguards to protect the integrity of the process. That is, consistent with § 300.9(b), a parent must understand and agree to the carrying out of the activity for which the parent's consent is sought.” *Letter to Breton*, 63 IDELR 111 (OSEP 2014).
 - a. Safeguards. “These safeguards include that the electronic signature: (1) is dated; (2) identifies and authenticates a particular person as the source of the electronic consent; [and] (3) indicates such person’s approval of the information contained in the electronic consent.” *Letter to Greer*, 113 LRP 30847 (OSERS 2013) (providing guidance on IDEA Part C and stating that the safeguards are “consistent” with the requirements in IDEA Part B).
2. Minnesota Guidance. There is not a concrete answer. Nonetheless, the Minnesota Department of Education (“MDE”) has shown a willingness to allow the utilization of electronic signatures for consent in at least some circumstances. Based upon the foregoing, until MDE provides guidance to the contrary, schools likely may rely on electronic signatures for consent provided that the charter school or school district “set a policy with data practices provisions to allow for electronic signatures for parents

when written consent is required” and “parents ... agree to use that format.” The school or district would also need “to ensure that the signature is tied to a particular person. This can be accomplished through a third-party digital software that authenticates electronic signatures, such as Adobe Sign, when it includes the date and time of the signature, an authentication code and is attributable to the person intending to sign the document.” MDE, *Special Education and COVID-19 Questions and Answers: Due Process*, at Question 42 (June 1, 2020), <https://education.mn.gov/MDE/dse/sped/MDE032087>.

- a. Distance Learning Period (2019-20 School Year). During the school closure period during the 2019-20 school year, MDE explicitly authorized school districts to “accept an electronic signature or an email from a parent confirming consent to the amendments in the PWN and the amended IEP.” MDE, *Special Education and COVID-19 Questions and Answers: Due Process*, at Question 5 (June 1, 2020), <https://education.mn.gov/MDE/dse/sped/MDE032087>.
- b. Distance Learning Period Beginning March 30, 2020. During the distance learning period necessitated by COVID-19, MDE stated “[t]he use of an electronic signature for parental consent is an area in which flexibility may be needed due to COVID-19. It would be up to a charter school or school district to set a policy with data practices provisions to allow for electronic signatures for parents when written consent is required, and parents would need to agree to use that format.” MDE, *Special Education and COVID-19 Questions and Answers: Due Process*, at Question 42 (June 1, 2020), <https://education.mn.gov/MDE/dse/sped/MDE032087>.
3. Best Practice. While electronic signatures like can be an option for receiving consent, it should not be the only option. For some families, it may be difficult to provide electronic signatures.
4. Note. This is an evolving area of law and it is important to continue to review Minnesota specific guidance.

V. CYBERBULLYING.

A. Overview.

1. Pew Research Center Survey: Social media is popular amongst U.S. teens, with 72% using Instagram and 69% using Snapchat. YouTube,

Instagram and Snapchat are the most popular online platforms among teens, Pew Research Center: Teens, Social Media & Technology (2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-media-technology-2018/pi_2018-05-31_teenstech_0-01/.

2. Pew Research Center Survey: 59% of U.S. teens have been bullied or harassed online, and a similar share says it's a major problem for people their age. Monica Anderson, *A Majority of Teens Have Experienced Some Form of Cyberbullying*, Pew Research Center: Internet & Technology (2018), <https://www.pewresearch.org/internet/2018/09/27/a-majority-of-teens-have-experienced-some-form-of-cyberbullying/>

B. Safe and Supportive Schools Act.

1. Cyber Bullying. The Safe and Supportive Schools Act defines cyberbullying as “bullying using technology or other electronic communication, including but not limited to a transfer of a sign, signal, writing, image, sound, or data, including a post on a social network Internet website or forum, transmitted through a computer, cell phone, or other electronic device.” Minn. Stat. § 121A.031, Subd. 2(f).
 - a. Because cyberbullying is a form of “bullying,” the conduct still must meet the definition of “bullying.” In order to qualify as “bullying” the conduct must: (1) be student-to-student; (2) occur in a location/forum identified by the statute; (3) consist of “intimidating, threatening, abusive, or harming” conduct; (4) be “objectively offensive;” and (5) meet either the “imbalance of power” and pattern standard or the “material disruption” standard. Minn. Stat. § 121A.031, Subd. 1(a), Subd. 2(e), Subd. 3(a).
 - b. The Safe and Supportive Schools Act applies to student conduct occurring:
 - i. on the school premises, at the school functions or activities, or on the school transportation;
 - ii. by use of electronic technology and communications on the school premises, during the school functions or activities, on the school transportation, or on the school computers, networks, forums, and mailing lists; and

- iii. by use of electronic technology and communications off the school premises, if such use substantially and materially disrupts student learning or the school environment.

Minn. Stat. § 121A.031, Subd. 1(a).

C. Individualized Education Programs and Section 504 Plans

- 1. The Safe and Supportive Schools Act requires school districts and charter schools to adopt a policy to address bullying, cyberbullying, and retaliation. One of the required components of the policy is to , if “appropriate for a child with a disability to prevent or respond to prohibited conduct, allow the child's individualized education program or section 504 plan to address the skills and proficiencies the child needs to respond to or not engage in prohibited conduct.” Minn. Stat. § 121A.031, subd. 4(a)(8).