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TEN TIPS FOR PROVIDING OCCUPATIONAL AND PHYSICAL THERAPY IN YOUR SCHOOL DISTRICT:

A LEGAL UPDATE

OCTOBER 17, 2013

Prepared by:
Mary L. Hubacher
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Ten Tips for Providing Occupational and Physical Therapy in Your School District: A Legal Update

Tip #1: Who gets OT and PT? Follow the IEP development process first, then determine whether OT or PT is necessary.

1. Referrals and Eligibility for OT/PT

Any teacher, social worker, nurse, or psychologist who reasonably believes that a child has a disability must refer the child for a special education evaluation. Any other person may make a referral. Wis. Stat. § 115.777(1). Before the IEP team decides whether or not the child is eligible for OT or PT, the team should determine if the child is a child with a disability.

The IEP team must include an OT if the child is suspected of needing occupational therapy, and a PT if the child is suspected of needing physical therapy. The OT/PT should take an active role in helping teachers and special education teachers determine whether the child needs an OT and/or PT evaluation.

2. Present Levels of Academic Achievement and Functional Performance

The present levels set the stage for a child's goals, services and placement. IEP teams can improve this section of a child's IEP by ensuring that the present levels are detailed, comprehensive, and easy for a non-educator (such as a parent or a judge) to understand. IEP teams should ensure that the present levels "match up" with each and every one of the child's goals. As a result, the present levels must include baseline data throughout.

"The OT and PT add to the discussion about the child's functional performance. Occupational therapy and physical therapy evaluations provide valuable information about functional activities and tasks the student can perform, as well as the student's current level of participation in classroom and school activities. This present level should contain measurable baseline data for goals. Information from occupational therapy and physical therapy evaluations helps establish a baseline from which the team develops goals and measures progress." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 31.

3. Special Factors: Behavior Impedes Learning

For children whose behavior impedes learning, the IEP team must consider "use of positive behavioral interventions and supports, and other strategies." IEP teams, however, should carefully consider this factor for all children, regardless of their identified disability or their disciplinary record. In some

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determine whether OT or PT is necessary.

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cases, for example, a child may have difficulty paying attention in class or have problems with attendance. Although these behaviors may not violate the code of conduct or cause disruption, they may impede the child's learning. If so, the IEP team must consider strategies and supports to improve attention or attendance.

Focus on behavior in the school setting. Strategies to address behavior, however, should be limited to those necessary for classroom behavior management that allows the child to benefit from education. They do not include a full range of services that are intended to resolve a child's mental health problems or medical issues. As a result, descriptions of present levels and behavioral supports should focus on behavioral concerns within the school setting.

(a) The team may **check "yes"** for behavior that impedes the student's learning or the learning of others.

(b) The team may **develop a new behavior plan**, or revise the existing behavior plan, to list the positive interventions and supports recommended to address behavioral problems (i.e. rewards, praise, verbal or physical cues, fidgets or sensory strategies, one-to-one assistance with work or behavioral issues, coping skill strategies, cool down periods). "Positive" means supportive – not punitive. IF the IEP team determines that a punitive measure will positively influence behavior, the team may include it, but only in addition to the positive strategies.

(c) For many children, a **two-part behavior plan** may be appropriate. The first part is a "menu" of helpful POSITIVE behavioral strategies to help the child improve behavior. The second part is a "crisis plan" that includes steps school staff may follow when the child engages in defined behavior (verbally aggressive, physically aggressive, etc.) The plan should clearly state that it remains flexible. The plan should specifically describe what typically occurs when the child is removed from class (i.e. allowed to "process" with staff member, redirected and returned to activity).

Note regarding functional behavioral assessments: FBAs are not just for disciplinary situations. They are required whenever the IEP team needs information to develop an effective behavior intervention plan, or when the current plan isn't working. A number of school staff should be involved in conducting the FBA – not just a school psychologist. Depending on the circumstances, special education teachers, regular education teachers, occupational therapists and others should be involved in the process.

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4. Educational Goals

Base Goals on Present Levels, Not on Anticipated Services.

"The IEP should not include a separate page of occupational therapy goals and a separate page of physical therapy goals. The IEP team as a whole writes the child's goals for academic and functional performance. The goals describe the activities and behaviors that the child will demonstrate in the classroom and other educational environments, and are not discipline-specific." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 29.

Additional considerations: Goals should be entirely based on the present levels, addressing issues raised in the present levels and using the baseline data in the present levels as a starting point. IEP teams should write clear, concise goals and objectives parents, advocates regular education teachers and hearing officers can understand. When a non-educator looks at a goal and accompanying objectives, he or she should be able to understand exactly what the IEP team wants the student to accomplish. Goals and objectives are more clear and concise when the team uses language that is not subject to multiple interpretations. For example, phrases like "to write," "to identify," and "to recite" are more effective than "to describe the significance of," "to clearly understand" or "to internalize."

5. Statement of Special Education

The IEP is a legally enforceable one-way contract, and staff failure to implement it denies FAPE. Parents have no obligations under the IDEA – it's entirely up to the school. As a result, school staff must be certain that they can actually provide the special education and services outlined in the IEP – with or without parent support.

Statements of special education must be clear and accurate enough that parents and staff will understand exactly what the child will receive. If the frequency or amount will fluctuate based on the child's needs, teams should be particularly careful. "As needed" is not enough. Who will determine whether the services are needed? Under what circumstances will it be needed? Team members must specifically outline who and under what circumstances with as much detail as possible.

Tip #2: Apply the legal standard for related services under the Individuals with Disabilities Education Act without changes or additions.

Step One: Consider the Legal Standard

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Apply the legal standard for related services under the Individuals with Disabilities Education Act without changes or additions.

Step One: Consider the Legal Standard

"Related services" means transportation and such developmental, corrective, and other supportive services ***as may be required to assist a child with a disability to benefit from special education*** . . . Wis. Stat. 115.76(14)(a)

"No one should assume that the therapist must address what he or she directly evaluated. Instead, occupational therapy and physical therapy evaluations contribute to the IEP team's understanding of the child's educational and functional needs. As team members, therapists participate in developing goals for the child and discussing strategies to help the child achieve the goals. The team decides if occupational therapy or physical therapy will be added to the IEP by applying the IDEA's definition of related services." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 29.

Step Two: Consider additional DPI-recommended questions.

1) What does the student need to learn?
2) Which strategies will facilitate the student's learning?
3) Whose expertise is needed to assist the student with achieving outcomes?

Step Three: Consider the purpose of school-based therapy.

"Therapy helps the child with a disability perform important functions that support or enable participation in academic and non-academic activities." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 3.

Step Four: Consider the least restrictive environment (LRE.)

We must ensure that, "to the maximum extent appropriate, a child with a disability . . . is educated with nondisabled children." Wis. Stat. 115.79(1)(c)

LRE means that we always begin by discussing OT and PT in the regular education classroom setting, with nondisabled peers. If the present levels suggest that we cannot satisfactorily provide the needed OT and PT in that setting, the team can consider more restrictive environments, such as pull-out sessions in a small group. If the child's needs (as articulated in the present levels) require an even more restrictive setting, the team considers individual pull-out services. The IEP team must always clearly and specifically justify the pull-out in both the present levels and the statement regarding participation with nondisabled peers.

"To support this process, OTs and PTs should assess how the child functions in the context of the classroom, the cafeteria, the halls, the playground, and anywhere else within the naturally occurring school environment." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 28.

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It is also appropriate to consider the nature of the services when determining whether OT and PT services can satisfactorily be provided in the regular education classroom setting. "The nature of the intervention, the space or equipment required in the therapy, or the potential distraction to other children, are acceptable reasons for the therapist to implement the child's IEP in a location other than a classroom full of other children." *OT and PT: A Resource and Planning Guide*, Wisconsin Department of Public Instruction, May 2011, p. 42.

Tip #3: Describe OT and PT specifically and accurately.

- The amount of therapy must be stated in the IEP so that the level of the agency's commitment of resources is clear to parents and all who are involved in the IEP development and implementation.
- The amount of time per episode/session/day/week must be appropriate to the service.
- The amount of therapy should be based upon the student's needs, not the availability of the staff.
- The duration of service is considered the length of the IEP unless otherwise stated. When the duration is different than the rest of the IEP, the IEP should show beginning and ending dates.

OT and PT: A Resource and Planning Guide, Wisconsin Department of Public Instruction, May 2011, p. 38.

Tip #4: Consult OTs and PTs to develop supplementary aids and services and program supports/modifications.

Supplementary aids and services is an ideal place for collaboration between OTs, PTs and other professionals on a child's IEP team. The OT and PT can suggest classroom-based aids and services that help classroom teachers make the required good faith effort to assist a child in reaching IEP goals. Appropriate aids and services may include assistive technology, adaptive devices and other accommodations that help a child to participate in school routines. The IEP should describe the circumstances under which the child will use the adaptive devices or require the accommodations. IEP teams must first consider supplementary aids and services before determining that a child requires additional pull-out, a more self-contained setting or an alternative placement. If the child can satisfactorily receive instruction in the classroom with aids and services, that's the least restrictive environment for the child.

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Program modifications and supports help regular education staff implement the IEP. If a classroom teacher needs additional training to perform IEP-related duties, the IEP team can include training or instruction in this section of the IEP.

Tip #5: **OT and PT is available to children with disabilities under Section 504 of the Rehabilitation Act - special education eligibility is not required.**

Section 504 Eligibility

1. Physical or mental impairment that
2. Substantially limits
3. One or more major life activities

A child is eligible for a Section 504 plan if the child has an impairment that substantially limits one or more major life activities. Major life activities include, but are not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Major Life Activities: The ADAAA includes the following major life activities: eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating. The ADAAA also includes "the operation of a major bodily function, including but not limited to, the function of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."

Broad Interpretation: The ADA Amendments Act of 2008 is clear that we must interpret Section 504 eligibility criteria broadly, and be inclusive - not exclusive - in eligibility determinations. The Act "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act." Congress specifically rejected stricter interpretations expressed in a number of U.S. Supreme Court cases, including Sutton v. United Air Lines and Toyota v. Williams.

Substantially Limits: Substantially limits does NOT mean "significantly restricted." According to the ADAAA, this standard is too high.

Episodic Impairments and Impairments in Remission: Section 504 includes impairments that are episodic or in remission if they would substantially limit a major life activity when active.

Transitory or Minor Impairments: Section 504 does not include impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

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Program modifications and supports help regular education staff implement the IEP. If a classroom teacher needs additional training to perform IEP-related duties, the IEP team can include training or instruction in this section of the IEP.

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Transitory or Minor Impairments: Section 504 does not include impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

Mitigating Measures: Mitigating measures **DO NOT PREVENT** a child from qualifying for a Section 504 plan, but may impact the accommodations the plan includes:

> "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as: medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies."

Tip #6: **Can't agree? Follow the IEP Team consensus rules.**

Appendix A to 34 C.F.R. §300, Question #9

Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs.

The IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE. **It is not appropriate to make IEP decisions based upon a majority "vote."** If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program, and the parents have the right to seek resolution of any disagreements by initiating an impartial due process hearing. Every effort should be made to resolve differences between parents and school staff through voluntary mediation or some other informal step, without resort to a due process hearing. However, mediation or other informal procedures may not be used to deny or delay a parent's right to a due process hearing, or to deny any other rights afforded under Part B."

Tip for IEP Team Leaders: If you are responsible for concluding a meeting, and the parents and staff members of the IEP team cannot reach consensus:

(a) Make sure each staff member expressed a consistent opinion regarding the controversial issue. This means that even teachers who are not expert in the area MUST voice and explain their opinion. If this did not already occur, call on specific staff members to do this.

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(b) Make sure the parents had an opportunity to voice their opinion. If they brought an attorney or advocate, make sure that person had the opportunity to speak. Make sure school staff responded directly to parent concerns and explained the difference of opinion.

(c) Announce to the group that the staff members of the IEP team have reached consensus, but the parents continue to disagree. Advise the parents that the District will note their objection in the IEP (either parent concerns, options considered and rejected, or both). Explain that, because it is the District's responsibility to provide FAPE, the District must move forward with the consensus of staff members. Explain that the parent has recourse, which is detailed in the parent rights brochure. Offer the parents another copy.

(d) In some cases, the team leader may opt to offer mediation right away. Discuss this option in advance with the team and appropriate District staff. If you do not offer mediation immediately, you can always contact the family later to propose it.

(e) Follow Up in Writing

If the IEP team says "no," it must document that response AND the reasons for it. This seems like extra paperwork – and it is – but there are significant benefits:

- It forces the team to think hard about its reasons – because they will appear in writing and the team members must all be prepared to support them.
- It clearly documents the team's reasoning, which helps later if the parents claim the decision was based on impermissible factors, such as cost or staff availability.
- It sets forth a rationale for the parents (and perhaps their advocate or attorney) to consider after the meeting, when emotions may have subsided. In some cases, the parents will remain angry, and may even get angrier after seeing the rationale in writing. Regardless, we are required to inform them in writing when we say no.

Ways to document our response:

- On the placement page, P-1 or P-2, in "options considered and rejected." It doesn't just relate to placement - it also relates to special education and related services, supplementary aids and services, and program modifications or supports.

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- On the M-1 form.
- In a letter to the family.

Tip #7: **OT and PT is for children with disabilities, but take advantage of opportunities to provide "incidental benefit" to all students.**

CFR §300.208 Permissive Use of funds. (a) Uses. Notwithstanding §§300.202, 300.203(a), and 300.162(b), funds provided to an LEA under Part B of the Act may bused for the following activities: (1) Services and aids that also benefit nondisabled children. For the costs of special education and related services, and supplementary aids and services, provided in a regular class or other education-related setting to a child with a disability in accordance with the IEP of the child, even if one or more nondisabled children benefit from these services.

DPI Guidance:

- Each teacher in a team teaching situation brings unique qualifications and skills to the situation, and there is a shared responsibility for developing and delivering instruction.
- The special education teacher's primary focus must be on ensuring special education services are implemented for students with disabilities in accordance with their IEPs.
- The special education teacher participating in the general education classroom instruction must primarily be doing so to meet the instructional needs of the students requiring special education services as defined by their IEPs. Students with disabilities must be provided a free, appropriate public education (FAPE) in the least restrictive environment (LRE) in conformance with an IEP that is based on individual need.
- Special education teachers may work with individual students with disabilities or with small groups within the general education class, which may include students with disabilities as well as students without disabilities. Within these groupings care must be taken to avoid long term situations that could result in de facto placement into special education, (e.g., without the proper referral, evaluation and placement processes). The implementation of IEPs must be the primary purpose for the special education teacher's presence in the general education classroom. Special education personnel may not provide ongoing, individualized supports to non-disabled students.
- Proper referral, evaluation and placement procedures must be followed prior to academic or behavioral instruction or intervention by a special education teacher that reaches beyond the limits of incidental benefit.

Tip #7:

On •

the M -I form.

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In a letter to the family.

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