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EDUCATION**CIVIL RIGHTS**

Department of Education's Office for Civil Rights Issues Controversial Guidance On Rights of Disabled Students to Participate in Extracurricular Activities



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On Jan. 25, 2013, the U.S. Department of Education's Office for Civil Rights ("OCR") released a Dear Colleague Letter ("DCL") providing guidance on the obligations under Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act related to ensuring that disabled students receive fair and equal opportunities to participate in sports and other extracurricular activities.

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This guidance applies to recipients of federal education funds—elementary and secondary schools, as well as institutions of higher education (collectively, "schools")—and is expected to have wide-reaching effects. The DCL comes after a 2010 Government Accountability Office report finding that public elementary and secondary students with disabilities do not have equal opportunities to participate in extracurricular athletics and recommending that the department clarify schools' obligations under Section 504.¹ While advocates for the disabled cheered the guidance,² critics have suggested that the requirements will impose a number of additional costs on schools—amounting to an unfunded mandate for "wheelchair basketball."³

Seth Galanter, acting assistant secretary for OCR explained⁴ that the DCL centers around five principles:

¹ See U.S. Government Accountability Office, "Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics," No. GAO-10-519, at 1, 31 (June 2010), available at <http://www.gao.gov/assets/310/305770.pdf> (last visited March 4, 2013).

² See, e.g., Greg Roppo, "White House: Schools must open sports to disabled" USA Today (Jan. 25, 2013) ("We think it's huge,' said Kirk Bauer, executive director of Disabled Sports USA."); "'It's really affording them access to terrific social situations that will hopefully break down some of the barriers and discrimination we've seen in the past,' said Lindsay Jones of the Council for Exceptional Children, a national advocacy group."), available at <http://www.usatoday.com/story/news/nation/2013/01/24/disabilities-high-school-sports/1862105/> (last visited March 4, 2013).

³ Michael J. Petrilli, "The Obama Administration Invents a Right to Wheelchair Basketball" (Jan. 25, 2013), available at <http://www.edexcellence.net/commentary/education-gadfly-daily/flypaper/2013/the-obama-administration-invents-a-right-to-wheelchair-basketball.html> (last visited March 4, 2013).

⁴ See Council for Exceptional Children Policy Insider "We are all on the same team"; Feds Issue Guidance on Including Students with Disabilities in School Athletic Programs" (Jan.

- (1) treating every child as an individual;
- (2) ensuring equal opportunity for participation;
- (3) providing children and youth with disabilities⁵ with needed aids and services to ensure access to equal opportunity;
- (4) offering separate or different athletic opportunities; and
- (5) expanding opportunities and inclusion.

In furtherance of these five principles, the DCL reminds schools that they must adopt grievance procedures to achieve resolution of complaints alleging Section 504 violations, and that the obligation to comply with Section 504 “supersedes any rule of any association, organization, club, or league” to the contrary. The DCL also addresses three areas of confusion concerning schools’ obligations to ensure disabled students receive fair and equal opportunities to participate in sports and other extracurricular activities. First, schools may “not act on generalizations or stereotypes” about a disability in determining whether any particular student may play a sport (or engage in an extracurricular activity). Schools must also offer extracurricular activities to “ensure equal opportunity for participation” for all students in an integrated manner. Finally, to the extent that students with disabilities cannot participate in a school’s existing extracurricular athletics program, the school “should create additional opportunities for those students with disabilities.” These “clarifications” have generated much controversy, as their implementation creates additional costs and uncertainty for schools.

Disability Stereotypes Not Permitted

The first clarification⁶ appears fairly uncontroversial. OCR explains that a school may not utilize generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular in administering an athletic or extracurricular program. Thus, if a student can qualify to participate on a team—based on the criteria applied to all students—a school cannot exclude this student from participation simply because the student is disabled, or because of a belief that disabled students are more likely to have difficulty keeping up with sports practice and homework requirements. If a student can qualify to participate on a team, the student must be permitted to participate, absent specific concerns about the student in question.

31, 2013), located at <http://www.policyinsider.org/2013/01/we-are-all-on-the-same-team-feds-issue-guidance-on-including-students-with-disabilities-in-school-at.html> (last visited March 4, 2013).

⁵ A person with a disability is one who “(1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.” 34 C.F.R. § 104.3(j).

⁶ OCR states that the DCL “does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”

Do ‘Reasonable Modifications’ Constitute ‘Fundamental Alterations’?

The next clarification, however, appears much more problematic for schools. In requiring schools to afford equal opportunity for participation, OCR provides that schools must make “reasonable modifications and provid[e] those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program.” Thus, while a school may (1) impose requirements based on skill level and ability (“equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out”), and (2) consider safety concerns⁷ (“a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity”), a school must make “reasonable modifications” to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the modification would constitute a “fundamental alteration” of the nature of the extracurricular athletic activity. The test for whether something is a fundamental alteration, however, appears largely subjective.

In considering whether a reasonable modification is legally required, the school district must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the school district must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. A modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball). Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the character of the competition. Even if a specific modification would constitute a fundamental alteration, the school district would still be required to determine if other modifications might be available that would permit the student’s participation.⁸

In focusing on a “fundamental alteration,” it appears that OCR is relying on *PGA Tour v. Martin*⁹ where the U.S. Supreme Court held that golfer Casey Martin’s use of a golf cart in a professional golfing match did not fundamentally alter the game and required that accommodation.¹⁰ The court suggested that a fundamental alteration could occur in two different ways: either through changing an “essential aspect of the game” even if it affected all competitors equally (such as

⁷ DCL, at 6 (“Of course, a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity.”) See generally *Chevron v. Echazabal*, 536 U.S. 73 (2002). This, would presumably address a concern raised by some critics of the guidance related to “blind archers.” See Frederick Hess, “OCR’s Bizarre Disabilities & Sports Ruling: When Good Intentions Run Amok” (Jan. 28, 2013), located at <http://www.frederickhess.org/2013/01/ocr-bizarre-disabilities-sports-ruling-when-good> (last visited March 4, 2013).

⁸ DCL at 7.

⁹ 532 U.S. 661 (2001).

¹⁰ *Id.* at 672.

changing the size of the hole),¹¹ or a less significant change having only a peripheral impact on the game itself that might nevertheless give the disabled player an advantage over the others.¹²

Now, as OCR suggests in the DCL, adding another base to a baseball diamond would, in fact, fundamentally alter the game. This is akin to changing the size of the hole in golf and is pretty clear. Determining whether a disabled player receives an advantage from a less significant change, however, is a far more complicated inquiry. For example, OCR suggests that schools would be required to use, alongside an aural cue (like a starting pistol), a visual cue to signal the start of a 100 meter dash to accommodate a runner with a hearing impairment.¹³ Such an alteration would not be fundamental, despite complaints from the other runners that the visual cue is distracting. One might rightfully question whether that split second of distraction places other runners in the event at a disadvantage.

Another example¹⁴ in the DCL suggests that OCR would find that altering a “two-hand touch”¹⁵ rule in an interscholastic¹⁶ swimming meet (to allow a “one hand” touch) would not be a fundamental alteration to the competition if done to accommodate a one handed swimmer. Interestingly, despite declaring OCR’s position on this issue, OCR did leave open the possibility that evidence could demonstrate that such a change could offer an unfair advantage to the disabled swimmer. It is unclear just what level of evidence would be required, however, or whether OCR is equipped to judge (1) the sufficiency of the evidence or (2) whether the disabled student has gained an advantage. In any event, the school would have to determine if other modifications that did not fundamentally alter the sport could be made to accommodate the disabled student’s participation.¹⁷

Do ‘Additional Opportunities’ Require Disability-Specific Teams?

The third “clarification” is the most controversial. Under Section 504, schools are said to have an obliga-

¹¹ *Id.* at 682. See also *Kuketz v. Petronelli*, 443 Mass. 355, 364 (2005) (requested change to permit a wheelchair-bound player to hit a racquetball on the second bounce when playing with non-disabled players that were required to hit the ball on only one bounce held to be a fundamental alteration, as “[t]he modifications sought . . . create a new game, with new strategies and new rules.”). See generally William D. Goren, *Understanding the Americans with Disabilities Act*, (3d ed.), 114-115 (ABA 2010).

¹² *Id.* at 683.

¹³ See DCL at 8-9.

¹⁴ See DCL at 9-10.

¹⁵ This rule requires a swimmer to touch the wall of the pool with two hands to complete the race.

¹⁶ As the DCL notes, Schools would be in violation of their obligations under Section 504 to provide significant assistance to any association, league, or other third party that discriminates on the basis of disability in providing any aid, benefit, or service to a student. DCL, at 5 (citing 34 C.F.R. § 104.4(b)(1)(v); 34 C.F.R. pt. 104, App. A § 104.4 at 367 (2012)).

¹⁷ A third example clarifies that where a school provides health services during the school-day to a student such as student requires assistance with glucose testing and insulin administration, such services must be provided by the school during extracurricular activities as well. See, DCL at 10.

tion to “create additional opportunities for those students with disabilities” where integrated opportunities are not possible. The DCL requires that “when the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district’s existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities.”¹⁸ OCR goes on to suggest that “these athletic opportunities provided by school districts should be supported equally, as with a school district’s other athletic activities.” OCR also suggests that in addition to “creating disability-specific teams, such as wheelchair tennis or wheelchair basketball,” schools are also directed to be flexible in meeting the unmet interest of disabled students. To that end, when there are insufficient numbers of students to field such a team, schools should develop district or region-wide teams, mixed male and female teams, or teams that include students both with and without disabilities.

Many have criticized this third clarification. Indeed, as formulated, it looks suspiciously like Title IX for disabled students. In response to strong criticisms about this DCL, OCR has since attempted to clarify that “the guidance does not say that there is a right to separate or parallel sports programs.”¹⁹ In addition, OCR has clarified that the section of the DCL concerning the provision of parallel teams “does not prescribe any penalties.”²⁰ Despite such statements—which do not constitute agency guidance—the plain language of the guidance says that schools “should” provide these additional teams.

Further Clarification Required

There are a number of questions left unanswered by the guidance. For example:

(1) What does “supported equally” require? Is the requirement similar to the “equal opportunity” requirement under Title IX?²¹ Does this requirement apply to college scholarship opportunities as well?

(2) At what level must students be permitted to compete to meet the obligations under Section 504? Could a college provide a “club” wheelchair basketball team and meet its obligations?

(3) How should any conflicts related to the support obligations mandated by Title IX and Section 504 be resolved?

(4) What are the limits to the requirement to provide accommodations? If an accommodation could be had only at a great cost—through the purchase of equipment, for example, must a school make the accommodation?

(5) Are geographic factors relevant to whether a school has complied with its obligation to create a disability-specific team?

¹⁸ DCL at 12.

¹⁹ EdWeek, Cristina A. Samules, “Guidance on Athletics and Spec. Ed. Students Draws Sharply Split Response” (Feb. 5, 2013) (quoting Seth Galanter), located at http://www.edweek.org/ew/articles/2013/02/06/20sports_ep.h32.html?tkn=RVZFNKqlr%2BN0Nun0eU1quo7R6QTrYIGO07VU&cmp=ENL-EU-NEWS1 (last visited March 5, 2013).

²⁰ *Id.*

²¹ See 34 CFR 106.41(c).

These questions notwithstanding, schools must address the concerns raised in the DCL. Indeed, a failure to take action may lead to the filing of a civil rights complaint with the OCR or an action in court. To that end, schools would be wise to undertake steps to assess their compliance and remediate any deficiencies. Initially, a school should:

- Review its student population to assess the number of disabled students that are currently participating in extracurricular activities.
- Update its Section 504 and disabled student policies and procedures to incorporate the participation and accommodation issues raised by OCR.
- Provide training for coaches, faculty and staff on the requirements of the DCL, the concerns of disabled students, and the prohibition on using generalizations or assumptions about disabilities to dictate the treatment of any particular disabled student.
- Work with athletic associations to ensure that students with disabilities are not denied an equal opportunity to participate in interscholastic athletics and to develop broad opportunities to include students with disabilities in all extracurricular athletic activities.
- Ensure that students who require medical services during the school day receive such services during after school activities—even if an Individualized Education

Program (“IEP”) does not specifically require such services after school.

■ Create a welcoming atmosphere that will encourage participation by being proactive in finding integrated opportunities for all students—disabled or not—to compete. Schools should not simply wait until issues are raised by individual students before addressing them.

■ Remember to handle accommodation requests with respect. While a school need not make every requested accommodation, it must make reasonable modifications and provide aids and services that are necessary to ensure an equal opportunity for disabled students unless doing so would cause a fundamental alteration to its program (or, presumably, cause a direct threat to the disabled student or others).

This area of the law is evolving and likely to change. We anticipate that the OCR guidance will be clarified in the future, whether through litigation or issuing additional guidance. Schools should review their policies, train staff and work to ensure students with disabilities are not being excluded from participation in extracurricular athletics. Schools should, however, carefully consider the costs incurred in setting up separate athletic teams or leagues for students with disabilities. While the benefits of inclusion will likely outweigh the costs, schools must be careful not to start such a large undertaking without providing sufficient resources to ensure its success.