

Extracurricular Athletics for Students with Disabilities

On January 25, 2013, the U.S. Department of Education's Office for Civil Rights (OCR) issued a *Dear Colleague* letter (the "Letter") which addresses "extracurricular athletics" for students with disabilities. An OCR *Dear Colleague* letter gives public entities (like public school systems) and the public generally a "heads up" on how OCR interprets and will investigate and enforce the laws and regulations for which it is responsible. Here, in the absence of specific statutory or regulatory mandates, OCR is telling all public school systems that they have an affirmative duty to expand, develop, and support extracurricular athletic opportunities for student with disabilities—all without additional funding.

"Students with disabilities" (SWDs) include those students who are eligible for special education and related services under the Individuals with Disabilities Education Act (IDEA) (as determined through a Louisiana Bulletin 1508 evaluation) and those children who are determined to be "qualified" SWDs under Section 504 of the Rehabilitation Act of 1973 (Section 504). Note that all students who are IDEA eligible are also considered covered by Section 504. OCR states that Section 504 requires school systems to provide SWDs "an opportunity to benefit from the school district's [athletic] program equal to that of students without disabilities." (Letter at p. 3).

While the *Dear Colleague* letter prompts the expansion of athletic opportunities for students with disabilities, it states,

Of course, simply because a student is a "qualified" student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory. (Letter at p. 3) (emphasis added).

Nevertheless, the Letter makes clear that "a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity" (Letter at p. 7). OCR notes that a school system MAY deny such modifications, IF through an "individualized inquiry" those modifications would "fundamentally alter" the athletic activity. OCR states that fundamental alteration can occur when a modification would either (1) alter an essential aspect of activity/game; OR (2) provide the player an unfair advantage. Although one modification may meet either of these criteria, OCR directs that the school would need to explore other possible modifications.

Significantly, OCR tells school systems it would be basically fruitless to attempt another traditionally available defense (i.e., "undue burden") to a needed modification. An "undue burden" defense asserts that the needed modification would cause too great of a burden on the system's resources (e.g., money). Moreover, OCR plainly states that fundamental alteration and undue burden defenses are NOT applicable regarding the school system's obligation to provide a free appropriate public education (FAPE) under IDEA or Section 504 to a particular student. In other words, if an IEP or Section 504 Plan required a modification for participation in an extracurricular activity, the

system *must* make that modification available regardless of cost, etc.

Background

The Letter is the more recent of two USDOE responses to a U.S. General Accountability Office (GAO) report from 2010 which recommended the USDOE provide more information and guidance to states and districts on physical education opportunities for students with disabilities. The GAO report concluded that students with disabilities participate in athletic programs in public schools at a lower rate than non-disabled peers. In the GAO's review, it noted that many districts and schools reported a "lack of information on ways to expand athletic opportunities" and a "lack of clarity regarding schools' responsibilities" to provide such opportunities to students with disabilities. This information, coupled with data on the negative health outcomes of sedentary lifestyles of youth, especially youth with disabilities, the GAO recommended that the USDOE: (1) "facilitate information sharing among states and schools on ways to provide opportunities in PE and extracurricular athletics to students with disabilities"; and (2) "clarify and communicate schools' responsibilities under Section 504 of the Rehabilitation Act regarding the provision of extracurricular athletics". (GAO Report at p. 32). The GAO report may be accessed at <http://www.gao.gov/assets/310/305770.pdf>.

The Letter was also preceded in August of 2011 by the USDOE's response to the GAO's first recommendation (see above). This document, *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, provides "suggestions to increase opportunities for children and youth to access PE and athletics" (p. 2). The suggestions briefly address the disability related areas of accessibility, equipment, personnel preparation, teaching style, management of behavior, program options, curriculum, and assessment/progress/achievement/grading. This document may be accessed at <http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>.

Conclusion

OCR's *Dear Colleague* letter clearly expands the responsibilities of school systems to develop and support athletic programs for student with disabilities. Because OCR has enforcement authority over Section 504 and Title II of the American with Disabilities Act (ADA), school systems should heed OCR's warning that "[t]his letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether [public schools] are complying with their legal obligations." (Letter at p. 2 n.4).

If you have concerns or questions about what this *Dear Colleague* letter means to your school system, please feel free to contact us at 225-923-3462 (Baton Rouge) or 318-324-0101 (Monroe).

The full text of the January 25, 2013 *Dear Colleague* letter is attached or may be accessed at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>.