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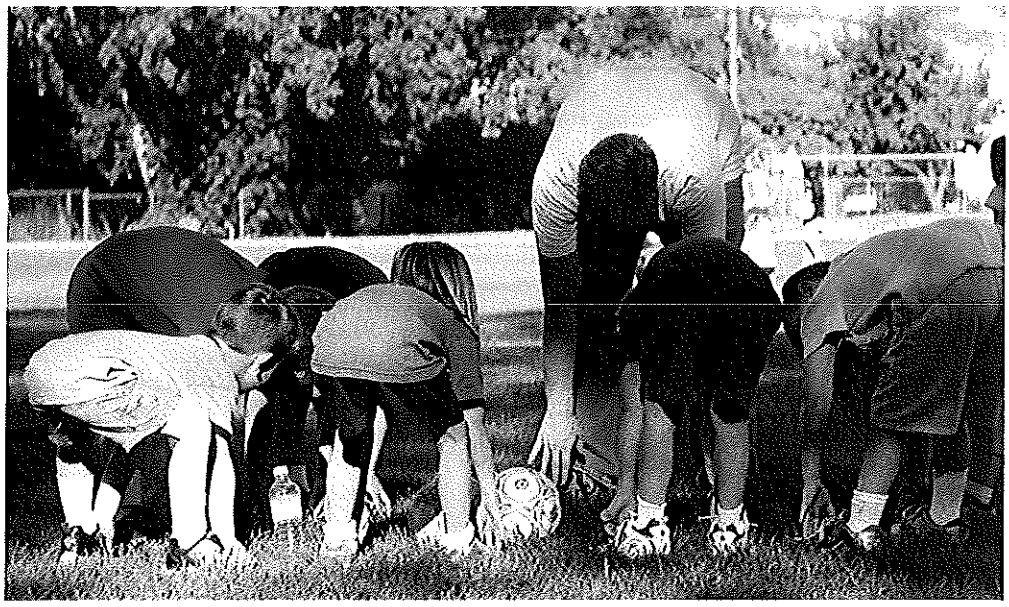

# SECTION 504, OCR AND EXTRACURRICULAR ATHLETIC ACTIVITIES: CONFUSION OVER THE RULES OF THE GAME

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On January 25, 2013, the United States Department of Education Office for Civil Rights (OCR) released a "guidance document."[1] The subject of the Guidance is the participation of students with disabilities in "extracurricular athletics." In this context, OCR has used the term "extracurricular athletics" to include: "club, intramural, or interscholastic (e.g., freshman, junior varsity, varsity) athletics at all education levels."[2]

The Guidance addresses three key areas related to the participation of students with disabilities in extracurricular athletics:

- Decisions to exclude that are based on "presumptions" or "stereotypes;"
- Measures required to be taken to ensure that students with disabilities have "an equal opportunity for participation;" and
- Offering "separate or different athletic opportunities" for students with disabilities who are unable to participate, even with "reasonable modifications or aids and services."

The Guidance, for the most part, breaks no new ground. OCR continues to rely on the Section 504 free appropriate public education (FAPE) standard that is included in the Section 504 regulations. Section 504 FAPE finds no support, however, in either the statutory provision itself or in

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case law. Similarly, in terms of separate or different athletic opportunities for students with disabilities who would otherwise be unable to participate, there would appear to be no legal basis for requiring a public school district to create such opportunities. Because of the significant burdens, financial costs and logistical difficulties potentially created by it, the Guidance is of major concern to all public school districts. The discussion below considers the three areas addressed by the Guidance and provides legal analysis that should assist school attorneys advising their school district clients.

**Background: The 2010 GAO Report**

The Guidance notes at the outset that it was occasioned by a June, 2010 report published by the United States Government Accountability Office (GAO).[3] An in-depth review of the GAO Report is well beyond the scope of this article. Several observations may, however, help the reader understand the genesis of the Guidance.

The GAO Report may be most accurately characterized as an informal survey. It is based entirely on reports previously prepared by others, together with limited anecdotal information collected by the GAO staff. In obtaining information for the Report, the GAO staff spoke with officials of only fifteen school districts.[4] In a most significant comment, the GAO Report says:

> [A]ccording to our interviews with Education officials and researchers, ***we found no national data that was reliable for our purpose of comparing the participation of students with disabilities to students without disabilities in extracurricular athletics.***[5]

The GAO Report concludes by recommending that the Secretary of Education: facilitate information sharing among states and schools on ways to provide opportunities in PE and extracurricular athletics to students with disabilities. . . .
and

> . . . clarify and communicate schools' responsibilities under Section 504 of the Rehabilitation Act regarding the provision of extracurricular athletics. . . .[6]

A draft of the Report was provided to the United States Department of Education for review and comment. The Department issued a letter dated June 4, 2010, in which it noted its agreement with the recommendations and the necessary follow up activities. The letter is appended to the Report.

In response to the first Report recommendation, information sharing, the Department of Education released a document in August, 2011. The document is entitled "Creating Equal Opportunities for Children and Youth With Disabilities To Participate in Physical Education and Extracurricular Activities."[7] The Department noted a "growing consensus" that there are several "common barriers" to physical activity for children and youth with disabilities:

- Inaccessible facilities and equipment;
- Personnel without adequate training; and
- "[I]nadequate, non-compliant, or otherwise inaccessible programs and curricula."[8]

The Department then offered suggestions regarding accessibility, equipment, personnel preparation, teaching style, management of behavior, program options, and curriculum. These suggestions were very general and likely of little assistance to educators.

The recent Guidance, issued January 25, 2013, is the Department of Education's response to the second GAO recommendation to "clarify and communicate schools' responsibilities under Section 504 . . ." The Guidance specifically references the GAO Report in its opening remarks.[9] OCR then observes that the Guidance:

> . . . provides an overview of the obligations of public elementary and secondary schools under Section 504 and the Department's Section 504 regulations, cautions against making decisions based on presumptions and stereotypes, details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities, and discusses the provision of separate or different athletic opportunities. . . .[10]

**Legal Analysis: Does the 2013 Guidance Accurately Reflect Existing Obligations for K-12 Public School Districts?**

In the short time since its release, the Guidance has generated a great deal of discussion in the school community, as well as public comment and media attention. Much of this attention has focused on a

possible obligation to create "separate or different athletic teams" for certain students with disabilities.[11] This has caused confusion and understandable consternation. Although perhaps less visible, the reemphasis by OCR of a Section 504 FAPE standard is also of great concern.

This article examines the legal bases underlying the Guidance. More particularly, it questions whether OCR has correctly identified existing obligations or is, in fact, creating new obligations for public schools. In order to answer these questions, the following issues must first be addressed:

- What is the legal standard that applies under Section 504?[12]
  - Is a free appropriate public education (FAPE) legally required?
  - If FAPE is required, is "Section 504 FAPE" identical to FAPE under the Individuals with Disabilities Education Act (IDEA), 20 USC Section 1401 *et seq.*?
  - If the applicable standard is "meaningful access," are there any limitations on the obligations of a public school district to provide such access?

- Does Section 504 require a public school district to create "separate or different athletic opportunities" for participation in extracurricular athletics for students with disabilities who are unable to participate in existing athletic activities, even with "reasonable modifications or aids and services?"

## Section 504—Statute and Regulations

Section 504 of the Rehabilitation Act of 1973, 29 USC § 794 provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

The statute is supported by implementing regulations.[13] Section 104.33 of the regulations[14] provides:

> Free appropriate public education. (a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. . . .

Very strong legal arguments exist that the inclusion of a "FAPE" standard in the Section 504 regulations was beyond agency authority.[15] This is a critical issue in analyzing the Guidance, and a review of the several apparently controlling United States Supreme Court cases is necessary.

## Judicial Construction of Section 504

In *Southeastern Community College v Davis*,[16] the United States Supreme Court was presented with its first opportunity to interpret Section 504.[17] In Davis, the plaintiff suffered from a serious hearing disability. She sought admission to a nursing program at a state institution that received federal funds and was within the purview of Section 504. The plaintiff was denied admission to the program based upon a determination that her "hearing limitations" could interfere with her ability to safely care for patients.

The student filed suit alleging, in part, that the denial of admission was a violation of Section 504. The federal district court entered judgment in favor of the college. On appeal, the Fourth Circuit Court of Appeals reversed. These lower court proceedings will not be discussed, other than to note that the Court of Appeals concluded that Section 504 requires "affirmative conduct" to accommodate disabilities.[18]

On appeal, the Supreme Court began its analysis by looking at the language of the statute, "[the] starting point in every case involving construction of a statute."[19] The Court continued:

> Section 504 by its terms does not compel educational institutions to disregard the disabilities of handicapped individuals or to make *substantial modifications* in their programs to allow disabled persons to participate. Instead, it requires only that an "otherwise qualified handicapped individual" not be excluded from participation in a federally funded program "solely by reason of his handicap," . . . . [Emphasis added.]

The plaintiff in *Davis* contended that certain "adjustments" could have been made to the nursing program to permit her safe participation. She offered that this could include the provision of individual supervision by faculty members whenever she attended patients. The Supreme Court rejected the notion that Section 504 would impose such an obligation: "Such a *fundamental alteration* in the nature of a program is far more than the "modification" the regulation requires [emphasis added]."[20] The "fundamental alteration" test has been frequently cited in subsequent cases testing Section 504 compliance. Particularly important, for purposes of this article, is the following comment from the *Davis* Court:

> [N]either the language, purpose, nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds. Accordingly, we hold that even if HEW has attempted to create such an obligation itself, it lacks the authority to do so.[21]

Six years later, in *Smith v Robinson*,[22] the United States Supreme Court briefly considered the interplay between Section 504 and the Education of the Handicapped Act (EHA).[23] The Court noted explicitly that only the EHA (today the IDEA) contained the substantive and procedural rights assumed to be guaranteed by both statutes: [A]lthough both statutes begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that *the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.* [Emphasis added.][24]

Referencing its Davis opinion, the *Robinson* Court said, "[Section] 504 does not require affirmative action on behalf of handicapped persons, but only the absence of discrimination against those persons."[25]

In *Alexander v Choate*,[26] the Supreme Court had a further opportunity to consider the breadth of Section 504. In that case, the State of Tennessee had proposed reducing the number of annual days of inpatient hospital care covered by its state Medicaid program. A class action was brought which alleged, in part, that the proposed 14-day limitation would have a discriminatory effect on "handicapped"

persons. This was claimed to be violative of Section 504.

The issues in *Choate* were quite different than those that surround the recent OCR Guidance; therefore, much of the discussion by the Court is inapposite. The comments by the Court concerning the import of its *Davis* decision, however, are directly applicable here. The Court explained that *Davis*:

> struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: *[W]hile a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.* [Emphasis added.][27]

In *Choate*, the Court also addressed criticism that had been raised about its use of the term "affirmative action" in the *Davis* decision. In a footnote, the Court explained:

> Regardless of the aptness of our choice of words in *Davis*, it is clear from the context of *Davis* that the term "affirmative action" referred to those "changes," "adjustments," or "modifications" to existing programs that would be "substantial," [cite omitted], or that would constitute "fundamental [alterations] in the nature of a program . . .," [cite omitted], rather than to those changes that would be reasonable accommodations.[28]

The recapitulation provided by the *Choate* Court is most instructive:

> The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. . . . *[T]o assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.* [Emphasis added.][29]

Based on the above, it is highly questionable whether the inclusion of a FAPE standard in the Section 504 regulations was within the authority of the Department of Health, Education and Welfare (HEW), the predecessor to the Department of Education. More importantly, apart from a generic reference to "FAPE," there is serious question about what a Section 504 FAPE could permissibly entail.

In a letter of inquiry submitted to OCR in 1993,[30] Professor Perry Zirkel asked:

> Does OCR recognize that the relevant regulation (34 C.F.R. § 104.33) implicitly incorporates a reasonable accommodation, reasonable modification, or other such cost-conscious limitation at least as applied to those students covered by Sec. 504 who do not meet the narrow definition of disability under the IDEA?

OCR responded, "[t]he clear and unequivocal answer to that [question] is no."[31] OCR has adamantly adhered to this position, citing no authority beyond the regulation itself.

The same principles, above, would control the application of a "meaningful access" standard. Based on the decision of the Supreme Court in *Choate*, the obligations of a school district are limited to *reasonable accommodations*; not those that would be substantial or would constitute a *fundamental alteration* in the nature of the program.

### The Guidance

With the above as background, the discussion will turn to the application of the legal principles to the OCR Guidance. Under the heading "Do Not Act On Generalizations and Stereotypes,"[32] the Guidance says:

> A school district may not operate its program or activity on the basis of generalizations, prejudices, or stereotypes about disability generally, or specific disabilities in particular.

This is certainly a correct statement of the law under Section 504. A student with a disability may be excluded from an extracurricular athletic team, program or activity on the basis of the disability only following an individualized assessment; not a generalization or stereotype. It should be emphasized that legitimate, individualized health or safety concerns are at all times paramount.[33] Moreover, the Guidance recognizes that a school district may require a certain level of skill or ability in order for a student to participate in a selective or competitive program or activity.[34]

The second aspect of the Guidance concerns the obligation of a public school district to "ensure [an] equal opportunity for participation" for students with disabilities.[35] The OCR discussion in this regard begins with a proper recitation of the controlling principles established by the Supreme Court:

- students with disabilities must be afforded an "equal opportunity to participate" in extracurricular athletics;
- a school district must make *reasonable modifications* and provide necessary aids and services unless doing so would require a *fundamental alteration* to its program;
- a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity; and
- a school district may require a level of skill or ability in order for any student, including a student with a disability, to participate in a competitive program or activity.[36]

However, having identified these principles, OCR then inexplicably diverges into a "results oriented" approach that is devoid of legal reasoning. The bottom line position of OCR is found in a footnote[37] which provides, in pertinent part:

> To be clear, however, neither the fundamental alteration nor undue burden defense is available in the context of a school district's obligation to provide a FAPE under the IDEA or Section 504.

This analytical framework is fundamentally flawed. A proper legal analysis requires identification of the controlling legal principle, followed by the application of that principle to the facts of the particular matter. The announced "results oriented" approach, where OCR would follow the *reasonable accommodation* and *fundamental alteration* standards unless they fail to produce the desired result, is devoid of any legal justification. Most importantly, again, the statement in the footnote is in direct conflict with the decisions of the United States Supreme Court in *Davis, Robinson* and *Choate*. These decisions do, indeed, establish *reasonable accommodation* and *fundamental alteration* as the controlling standards.

The final and most discussed portion of the Guidance appears under the heading "Offering Separate or Different Athletic Opportunities."[38] This concerns the creation of separate or different athletic programs for students with disabilities who are unable to

participate in existing programs, even with the provision of modifications, aids or supports.

If required, "separate or different athletic opportunities" portend significant financial commitments and logistical burdens for school districts. In terms of costs, the purchase of additional equipment and uniforms, hiring officials, coaches and support personnel, and providing transportation immediately come to mind. Scheduling the use of fields or facilities for practices and athletic contests, already difficult for many school districts, would be an extraordinary burden.

There is very considerable confusion over what OCR actually intended in this portion of the Guidance. The language is most peculiar, including repeated use of the word "should." A dictionary definition of "should" reveals it to be the past tense of "shall." However, in common parlance "should" typically connotes something less imperative than "shall" or "must." Of course, this academic exercise is not determinative of what OCR in fact intended.

At the time the Guidance was released, Seth M. Galanter, the Acting Assistant Secretary for Civil Rights, whose name appears at the end of the Guidance, was quoted as saying:

> The guidance does not say that there is a right to separate or parallel sports programs.[39]

Mr. Galanter explained that the Guidance "urges" but does *not* require that school districts find ways in which students with disabilities may be given the opportunity to take part in extracurricular athletics.

## Conclusion

The stated purpose of the Guidance is to advise public school districts of their *obligations* under Section 504. OCR continues to rely on a Section 504 FAPE standard that enjoys no judicial support, and would appear ripe for legal challenge.

In terms of offering separate or different athletic opportunities for students with disabilities who would otherwise be unable to participate, it is unclear why this discussion was made a part of the Guidance. If OCR intended the inclusion of this subject to be only for the purpose of "urging," or offering recommendations or suggestions to school districts (not the typical role of OCR), this should be immediately clarified. If intended, however, to identify a *legal obligation* for public school districts to create such opportunities, which is the stated overall purpose for issuing the Guidance, there would appear to be no legal basis upon which this could be sustained.

## End Notes

1. The document is available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf. It will be referred to throughout this Article as the "Guidance."
   Page 2, footnote 4 of the Guidance provides, in part:
   > . . . The U.S. Department of Education has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations . . .
   >
   > 2. Guidance at 1.
   >
   > 3. Guidance at 1. The GAO Report is available at http://www.gao.gov/assets/310/305770.pdf. The final page of the Report includes the following statement of the GAO "mission":
   >
   > The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. . . .
   >
   > 4. GAO Report at 30. It is ***not*** the intent of this author to criticize the approach that was followed by GAO or the scope of the undertaking. However, given the very limited data collection and the acknowledgment by GAO that it found *no national data that was reliable* for comparison purposes, any findings or recommendations are entitled to little weight.
2. GAO Report at 20.
3. GAO Report at 32.
4. The document is available at http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf and will be referenced here as "Creating Equal Opportunities."
5. *Id.* at 5-6.
6. Guidance at 1-2.
7. *Id.*
8. Various media reports have quoted an advocacy organization as saying: "This will do for students with disabilities what Title IX did for women and girls." *See* Sean Gregory, *Disabled Kids Get in the Game -- A new federal directive demands equal access*, TIME, Feb. 11, 2013, at 56; Philip Elliott (Associated Press), *Schools must provide sports for disabled, US says*, DENVER POST, Jan. 25, 2013, *available at* http://www.denverpost.com/education/ci_22448127/schools-must-provide-sports-disabled-us-says.
9. This article is limited to issues concerning a free appropriate public education (FAPE) requirement under Section 504. It does not attempt to address whether any of the matters at issue might be considered differently under the Individuals with Disabilities Education Act (IDEA), 20 USC Section 1401 *et seq.*
10. The Department of Health, Education and Welfare ("HEW") was the predecessor to the United States Department of Education. HEW promulgated regulations to implement Section 504 in 1977. Those regulations are now Department of Education regulations found at 34 CFR §§ 104.1-104.61.
11. 34 CFR 104.33(a) (2012).
12. See the January 2013 issue of INQUIRY & ANALYSIS which includes an article by COSA member Ronald D. Wenkart: *The OCR-Created 'Right' To a Free Appropriate Public Education Under Section 504: Time for a Challenge.*
13. 442 U.S. 397; 99 S. Ct. 2361; 60 L. Ed. 2d 980 (1979).
14. 442 U.S. at 405.
15. 574 F.2d 1158, 1162 (4th Cir. 1978).
16. 442 U.S. at 405.
17. 442 U.S. at 410.
18. 442 U.S. at 411-412.
19. 468 U.S. 992; 104 S. Ct. 3457; 82 L. Ed. 2d 746 (1984).
20. The Education of the Handicapped Act (EHA) was a statutory predecessor to the Individuals with Disabilities Education Act (IDEA). The applicable standards governing opportunities for participation in extracurricular athletics for a student eligible under the IDEA are not part of the discussion in this article.
21. 468 U.S. at 1018.
22. *Id.*
23. 469 U.S. 287; 105 S. Ct. 712; 83 L. Ed. 2d 661 (1985).
24. 469 U.S. at 300.
25. *Id.* n 20.
26. 469 U.S. at 301
27. *See* "Letter to Zirkel," 20 IDELR 134.
28. *Id.*
29. Guidance at 5.
30. In a post on NSBA Connect (2/5/2013), a Council of School Attorneys member reported on an Oregon case in which these considerations were at issue. There, due to safety concerns, the school district limited the participation of a student with autism and epilepsy to softball drills and practices; not actual games. The court rejected the argument that the student posed a danger to herself or others. A preliminary injunction was entered, permitting the student to also play in actual softball games.
31. Guidance at 3.
32. Guidance at 6.
33. Guidance at 6-7.
34. Guidance at 8, n 17.
35. Guidance at 11.
36. The author has been informed that an OCR official very recently confirmed this position to a member of the Council of School Attorneys in connection with an open investigation.

## Section 504, OCR and Extracurricular Athletic Activities: Confusion over the Rules of the Game

*By Richard E. Kroopnick, J.D., Lusk & Albertson, PLC (summary prepared by Paul DeAngelis, Deputy Supt., BPS in February 2014)*
*National School Boards Association's Council of School Attorneys (March/April 2013)*

In January 2013, the United States Department of Education Office for Civil Rights (OCR) released a "guidance document" regarding the participation of students with disabilities in "extracurricular athletics."

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The Guidance addresses three key areas related to the participation of students with disabilities in extracurricular athletics:

- Decisions to exclude that are based on "presumptions" or "stereotypes;"
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- Offering "separate or different athletic opportunities" for students with disabilities who are unable to participate, even with "reasonable modifications or aids and services."

> *"The Guidance, for the most part, breaks no new ground. OCR continues to rely on the Section 504 free appropriate public education (FAPE) standard that is included in the Section 504 regulations. Section 504 FAPE finds no support, however, in either the statutory provision itself or in case law. Similarly, in terms of separate or different athletic opportunities for students with disabilities who would otherwise be unable to participate, there would appear to be no legal basis for requiring a public school district to create such opportunities."*

For background, Mr. Kroopnick reviewed a 2010 United States Government Accountability Office (GAO) report:

- Characterized as an informal survey… but limited to only 15 school districts;
- *"…found no national data that was reliable for our purpose of comparing the participation of students with disabilities to students without disabilities in extracurricular athletics;"*
- Report was provided to the United States Department of Education who released a document in August 2011 titled "Creating Equal Opportunities for Children and Youth With Disabilities To Participate in Physical Education and Extracurricular Activities;"
- Department noted a "growing consensus" that there are several "common barriers" to physical activity for children and youth with disabilities:
  - Inaccessible facilities and equipment;
  - Personnel without adequate training; and
  - "Inadequate, non-compliant, or otherwise inaccessible programs and curricula."
- Thus, the Guidance is the Department of Education's response to the second GAO recommendation to "clarify and communicate schools' responsibilities under Section 504…"

> *"OCR then observes that the Guidance: '…provides an overview of the obligations of public elementary and secondary schools under Section 504 and the Department's Section 504 regulations, cautions against making decisions based on presumptions and stereotypes, details the specific Section 504 regulations that require students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities, and discusses the provision of separate or different athletic opportunities…'"*

Three key areas related to the participation of students with disabilities in extracurricular athletics:

- **Decisions to exclude that are based on "presumptions" or "stereotypes;"**
  - *A school district may not operate its program or activity on the basis of generalizations, prejudices, or stereotypes about disability generally, or specific disabilities in particular.*
  - *A student with a disability may be excluded from an extracurricular athletic team, program or activity on the basis of the disability only following an individualized assessment; not a generalization or stereotype.*
  - *Legitimate, individualized health or safety concerns are at all times paramount.*
  - *A school district may require a certain level of skill or ability in order for a student to participate in a selective or competitive program or activity.*
- **Measures required to be taken to ensure that students with disabilities have "an equal opportunity for participation;" and**
  - *Students with disabilities must be afforded an "equal opportunity to participate" in extracurricular athletics;*
  - *A school district must make reasonable modifications and provide necessary aids and services unless doing so would require a fundamental alteration to its program;*
  - *A school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity; and*
  - *A school district may require a level of skill or ability in order for any student, including a student with a disability, to participate in a competitive program or activity.*
- **Offering "separate or different athletic opportunities" for students with disabilities who are unable to participate, even with "reasonable modifications or aids and services."**
  - *"The Guidance does not say that there is a right to separate or parallel sports programs."*
  - *The Guidance "urges" but does not require that districts find ways in which students with disabilities may be given the opportunity to take part in extracurricular athletics.*