

62 IDELR 185
113 LRP 51638

In re: Dear Colleague Letter of January 25, 2013

Office for Civil Rights

N/A

December 16, 2013

Related Index Numbers

10.015 Athletics/Extracurricular Activities
325.005 Athletics/Physical Education
405.015 Athletics/Extracurricular Activities

Case Summary

OCR's statement in a January 2013 *Dear Colleague* letter that districts "should offer" separate and different athletic opportunities for students with disabilities who are unable to participate in traditional school sport programs did not reflect a legal mandate. In a letter to the NSBA's general counsel, OCR clarified that Section 504 does not require districts to develop activities such as wheelchair basketball to create additional opportunities for students with disabilities. OCR explained that the earlier letter, reported at 60 IDELR 167, did not impose any new obligations on districts. Rather, the *Dear Colleague* letter clarified how OCR interprets the Section 504 regulations addressing participation in extracurricular activities. OCR noted that the regulation at 34 CFR 104.37 requires districts to provide an equal opportunity to participate. "It does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities," wrote John K. DiPaolo, OCR's assistant secretary for policy. OCR nonetheless encouraged districts to develop additional opportunities for students with disabilities, which could include separate or different activities. If a district chooses to create different or separate programs, OCR observed, it must ensure that it provides the same level of support that it provides to comparable activities for nondisabled students. "For example, if a school district created a varsity wheelchair lacrosse activity, OCR would look to the supports provided to other varsity teams as a benchmark for what might be appropriate for the adapted varsity activity," DiPaolo wrote. In addition, OCR noted that districts must make a reasonable, timely, and good-faith effort to determine whether students with disabilities can participate in existing activities with modifications, aids, or supports. OCR explained that such determinations may be made outside of the Section 504 team process.

Judge / Administrative Officer

John K. DiPaolo, Deputy Assistant Secretary for Policy

Full Text

Dear Mr. Negrón:

I am writing to reply to your May 21, 2013, letter concerning the Office for Civil Rights' (OCR) January 25, 2013, Dear Colleague Letter on students with disabilities in extracurricular athletics (the DCL). I

appreciate the National School Boards Association's commitment, as you say in that letter, to "protecting students, disabled and non-disabled, from all forms of discrimination in our nation's schools, including those students with disabilities who may wish to participate in the public school district's extracurricular athletics program." I also appreciate the thoughtful questions you raised in that letter and in our meeting by teleconference on August 7, 2013. It is valuable for OCR to have a dialogue with interested stakeholders on important issues such as this.

I address below a number of questions you have raised about the DCL. You may also find helpful information in our "Background and Fast Facts" document on this topic, which can be found at <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.html>.

Equal Opportunity

The provisions of the Department of Education's regulations under Section 504 of the Rehabilitation Act of 1973 that deal with this topic have been in force since the regulations were first promulgated in 1977. The DCL does not announce new obligations or rules, but rather clarifies how OCR applies these long-standing provisions. The provision at 34 C.F.R. § 104.37 requires that school districts provide students with disabilities an equal opportunity to participate in and benefit from the districts' nonacademic services, including their existing extracurricular athletic activities. This means that students with disabilities must be provided with equal access to those existing extracurricular athletic activities. It does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities.

To meet its obligations under this provision, a school district must not exclude a student with a disability based on stereotypes and assumptions about the student or about students with disabilities; rather, the school district must consider each student, individually. Some students with disabilities may be able to participate in an athletic activity without the need for any action by the school district. For other students with disabilities, in order to ensure equal access, the school district must make an individualized inquiry to determine if reasonable modifications could be made, or aids and services provided, that would allow those students an equal opportunity for participation. (The individualized inquiry is discussed below.)

Examples of such modifications and aids and services include using a light along with a starter pistol so that a deaf runner can compete and assisting with the administration of needed medicine like insulin so a student with diabetes can take part in an after-school gymnastics club.

As we have said before, providing this equal opportunity does not mean:

- Compromising student safety;
- Changing the nature of selective teams -- students with disabilities have to compete with everyone else and legitimately earn their place on the team;
- Giving a student with a disability an unfair advantage over other competitors; or
- Changing essential elements that affect the fundamental nature of the game.

Individualized Inquiry

As stated above, a school district must conduct an individualized inquiry to determine whether reasonable modifications or necessary aids and services would provide a student with a disability with

an equal opportunity to participate in an extracurricular activity. This does not necessarily mean, however, that the Section 504 team -- the group of persons most knowledgeable about the student that determines the scope of the student's free, appropriate public education, or FAPE -- must convene when a student with a disability wishes to take part in extracurricular athletics. In some circumstances, the inquiry could amount to something as straightforward as a coach or athletic staff member consulting with the student and student's parents to determine what reasonable modifications could be provided to give the student an equal opportunity to participate in the activity. In other circumstances, a district athletics official might be brought into the conversation to address adaptations to standard rules or practices in district competitions (like allowing the use of the light along with the starter pistol); or a student's teacher might advise on a coaching modification that could support a student with a developmental disability to participate on a team for which she had the requisite athletic ability. What is called for is a reasonable, timely, good-faith effort by the individuals with the appropriate knowledge and expertise to determine whether there are reasonable modifications or aids and services that would provide that student with equal access to the particular activity.

FAPE and Equal Opportunity to Participate

I want to reiterate our explanation of footnote 8 of the DCL. This note explains that the Individualized Education Program (IEP) of a student covered by the individuals with Disabilities Education Act, 20 U.S.C. § 1400, may include provisions that relate to a student's participation in extracurricular activities. 34 C.F.R. § 300.320(a)(4)(ii). Where this is the case, a failure to provide the services set forth in an IEP could constitute noncompliance with Section 504, as proper implementation of an IEP under the IDEA is one means of complying with the Department's Section 504 regulatory provisions concerning FAPE (see 34 CFR §§ 104.33-36). OCR is not, however, articulating a legal requirement under Section 504 that such IEPs must address participation extracurricular athletics. (OCR does not enforce the IDEA and does not offer advice or views regarding the requirements of that statute. For additional information about the IDEA and its requirements, please visit the Department's Office of Special Education Programs website, at <http://www2.ed.gov/about/offices/list/osers/osep/index.html>.) Furthermore, OCR is not stating that Section 504's FAPE provisions require that a student's participation in nonacademic services, e.g., extracurricular athletics, be addressed by the Section 504 team as part of delivering FAPE.

Creation of New Athletic Opportunities

For students with disabilities who cannot participate in the school district's existing extracurricular athletics program, even with reasonable modifications or aids and services, the guidance urges school districts to create additional opportunities for such students, which could include separate or different activities from those already provided. However, it is not OCR's view that a school district is required to do so.

If a school district voluntarily wishes to provide such separate activities, those must be supported equally as compared with the school district's other athletic activities. This determination of equal support will invariably depend upon the specific allegations of the case, including the activity at issue. Among the issues that would be considered would be how similar activities are supported. For example, if a school district created a varsity wheelchair lacrosse activity, OCR would look to the supports provided to other varsity teams as a benchmark for what might be appropriate for the adapted varsity activity.

Conclusion

Again, thank you for taking the time to speak with us. We look forward to participating in your webinar this month, and hope we can continue to be a resource to you and other stakeholders in the continued

enforcement of civil rights.

Regulations Cited

34 CFR 104.37

34 CFR 300.320(a)(4)(iii)

Cases Cited

60 IDELR 167

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