



STATE OF DELAWARE
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December 21, 2015

Ms. Tina Shockley, Education Associate
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

RE: 19 DE Reg. 462 [DOE Proposed High School Interscholastic Athletics Regulation]

Dear Ms. Shockley:

The State Council for Persons with Disabilities (SCPD) has reviewed the Department of Education's (DOE's) proposal to adopt revisions to the Delaware Interscholastic Athletic Association (DIAA) regulation covering school-sponsored sport and athletic activities at the high school level. SCPD commented on an earlier version of this proposed regulation in August. The DOE is now publishing a revised proposed regulation which attempts to address some of the concerns raised by the Council. The proposed regulation was published as 19 DE Reg. 462 in the December 1, 2015 issue of the Register of Regulations. SCPD has the following observations on the latest version of the regulation.

First, one section which remains unchanged is §2.1.1. Therefore, SCPD is reiterating the following comment:

§2.1.1 is difficult to interpret. It recites that a student turning 19 on or after June 15 immediately preceding the student's year of participation shall be eligible for all sports provided all other eligibility requirements are met. There is no definition of "student's year of participation". Moreover, there is no comparable guidance for a student who becomes age 20 or 21 on or after June 15. Students are generally eligible to attend school at least through age 20. See 14 Del.C. §202(a). An IDEA-classified student is often eligible for education past his/her 21st birthday. See 14 Del.C. §3101(1). The implication of §2.1.1 is that 19 year olds can play all sports but 20 year olds are barred from all sports. If this is accurate, it reflects a rather "brittle" approach to eligibility which deters participation in athletics.

Second, the Council noted in its August commentary that an attempt to create an age waiver protocol for students with disabilities was well intentioned but problematic in several respects. The

age waiver protocol (former proposed §2.1.1.2) has been stricken from the revised proposed regulation to allow further analysis. The DOE provided the following rationale:

There were also comments regarding the age waiver protocol for students with disabilities being limited to students with an IEP and not covering students with 504 Plans, and the involvement of the IEP team. After considering these public comments, the DIAA Board voted to remove this proposed change for further consideration and analysis at this time. Due to the fact that this is a substantive change, the regulation is being republished for comment.

SCPD would be happy to offer technical assistance to the DOE in this context.

Third, in the August commentary the Council noted that use of a definition of “student with a disability” which covered only IDEA-identified students to the exclusion of §504-identified students was ill-conceived. The DOE has attempted to address this observation by adopting the following revised definition of “student with a disability” in §1.1:

“Student with a Disability” means a “child with a disability” as that term is defined in 14 DE Admin Code 922 or Section 504 of the Rehabilitation Act of 1973.

SCPD believes there are two problems with the new definition:

A. Section 2.3.3.1 contains a definition of “Student with a Disability” which is limited to IDEA-identified students. Since the definition in §1.1 covers the entire regulation, the inconsistent definition in §2.3.3.1 should be stricken.

B. Section 504 of the Rehabilitation Act does not define “student with a disability”. Consider the following revision:

“Student with a Disability” means a “child with a disability” as defined in 14 DE Admin Code 922 or a qualified person with a disability under Section 504 of the Rehabilitation Act.

Compare 14 DE Admin Code 930.1.3.

Fourth, §2.3.3.2.1 remains unchanged from the August version of the regulation. Therefore, SCPD is reiterating the following italicized comment:

§2.3.3.2 provides as follows:

2.3.3.2. A student with a disability who is placed in a special school or program shall be eligible to participate in interscholastic athletics as follows:

2.3.3.2.1. If the special school or program sponsors the interscholastic sport in question, the student shall be eligible to participate only at the school or program.

This violates federal and State law since it categorically bars a student with a disability from any opportunity to participate in a non-segregated team. It rigidly limits a student with a disability to participate in a team exclusively comprised of students with disabilities of the special school (e.g. Delaware School for the Deaf). The DOE has an affirmative obligation to promote opportunities for participation in integrated extracurricular activities. See 14 DE Admin Code 923.17.0; 34 C.F.R. §§104.34(b) and 104.37(c)(2); and 34 C.F.R. §300.117.

For example, 14 DE Admin Code 923.17.0 recites as follows:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, ...each public agency shall ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child”.

The sponsors of the “unified sports” bill (H.B. 175) recently stressed that public policy and federal law support integrated athletics:

The General Assembly recognizes that unified sports offer benefits to all students and serve as a potential tool for schools that are required to meet Section 504 of the federal Rehabilitation Act of 1973, 29 U.S.C. §794, regarding providing extracurricular activities, and 14 Del. Admin. C. §923-7.1 and 7.2.

Fifth, §2.6.1.1 remains unchanged from the August version of the regulation. Therefore, SCPD is reiterating the following comment:

Section 2.6.1.1 authorizes an accommodation for a student with a disability with an IEP but not a student with a disability with a Section 504 Plan. The section should be modified to also cover students with a Section 504 Plan. Consistent with the attached 2013 federal guidance, footnote 8, Section 504-identified students are entitled to similar protections and accommodations. The DOE has provided assurances that it does not discriminate based on “disability”, not simply IDEA-identified disability. See 14 DE Admin Code 225.1.0.

Sixth, §2.7 remains substantively unchanged from the August version of the regulation. Therefore, SCPD is reiterating the following comment:

§2.7 bars a student from participating in athletics after 4 consecutive years from the date of the student’s first entrance into the 9th grade. It also bars a student who had more than 4 “opportunities” to participate in sports. The regulation authorizes the DIAA to issue a “hardship” waiver. The standards place the “burden of proof” on the student and the DIAA considers disability-related factors such as extended illness, debilitating injury, and emotional stress. For a student with a disability, the decision of whether a student should participate in extracurricular activities such as athletics is the province of the IEP or Section

504 team. Such decision-making does not involve a “burden of proof”. The team would decide if such participation is appropriate as part of a FAPE.

Seventh, based on the Council’s August “Special Olympics” commentary, the DOE added the following section:

6.6.2.6 Nothing in this regulation shall be construed as prohibiting schools from providing transportation or school supplied assistive technology and equipment to or for non-school activities for students with disabilities.

This represents an improvement from the August version.

Eighth, the new regulation is rife with a common grammatical error which did not appear in the August version. The DOE has substituted a plural pronoun (“their” or “they”) with a singular antecedent (“student”) throughout the regulation. The following sections are illustrative: §§2.2.1; 2.2.1.1; 2.2.1.2; 2.2.1.3; 2.2.1.7; 2.3.1; 2.3.2; 2.6.1.1; 2.6.2.2; 2.7.1.2; and 2.7.1.2.3. To correct the error, the DOE could substitute “student” or “student’s” as done in §§2.2.1. and 2.2.1.8. Alternatively, consistent with the Delaware Administrative Code Style Manual, §7.2 and Title 1 Del.C. §304, the masculine version of the pronoun could be used.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

Sincerely,



Daniese McMullin-Powell, Chairperson
State Council for Persons with Disabilities

cc: The Honorable Steven Godowsky, Ed.D, Secretary of Education
Mr. Chris Kenton, Professional Standards Board
Dr. Teri Quinn Gray, State Board of Education
Ms. Mary Ann Mieczkowski, Department of Education
Ms. Kathleen Geiszler, Esq., Department of Justice
Ms. Terry Hickey, Esq., Department of Justice
Ms. Ilona Kirshon, Esq., Department of Justice
Mr. Kevin Charles, DIAA
Mr. Brian Hartman, Esq.
Developmental Disabilities Council
Governor’s Advisory Council for Exceptional Citizens

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

January 25, 2013

Dear Colleague:

Extracurricular athletics—which include club, intramural, or interscholastic (e.g., freshman, junior varsity, varsity) athletics at all education levels—are an important component of an overall education program. The United States Government Accountability Office (GAO) published a report that underscored that access to, and participation in, extracurricular athletic opportunities provide important health and social benefits to all students, particularly those with disabilities.¹ These benefits can include socialization, improved teamwork and leadership skills, and fitness. Unfortunately, the GAO found that students with disabilities are not being afforded an equal opportunity to participate in extracurricular athletics in public elementary and secondary schools.²

To ensure that students with disabilities consistently have opportunities to participate in extracurricular athletics equal to those of other students, the GAO recommended that the United States Department of Education (Department) clarify and communicate schools' responsibilities under Section 504 of the Rehabilitation Act of 1973 (Section 504) regarding the provision of extracurricular athletics. The Department's Office for Civil Rights (OCR) is responsible for enforcing Section 504, which is a Federal law

¹ United States 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>.

² *Id.* at 20-22, 25-26.

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

designed to protect the rights of individuals with disabilities in programs and activities (including traditional public schools and charter schools) that receive Federal financial assistance.³

In response to the GAO's recommendation, this 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. The specific details of the illustrative examples offered in this guidance are focused on the elementary and secondary school context. Nonetheless, students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club, and intramural athletics.⁴

³ 29 U.S.C. § 794(a), (b). Pursuant to a delegation by the Attorney General of the United States, OCR shares in the enforcement of Title II of the Americans with Disabilities Act of 1990, which is a Federal law prohibiting disability discrimination in the services, programs, and activities of state and local governments (including public school districts), regardless of whether they receive Federal financial assistance. 42 U.S.C. § 12132. Violations of Section 504 that result from school districts' failure to meet the obligations identified in this letter also constitute violations of Title II. 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II's substantive requirements.

OCR also enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs that receive Federal financial assistance. 20 U.S.C. § 1681. For more information about the application of Title IX in athletics, see OCR's "Reading Room," "Documents – Title IX," at <http://www.ed.gov/ocr/publications.html#TitleIX-Docs>.

⁴ 34 C.F.R. §§ 104.4, 104.47. 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, and to provide members of the public with information about their rights under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter 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. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202.

I. Overview of Section 504 Requirements

To better understand the obligations of school districts with respect to extracurricular athletics for students with disabilities, it is helpful to review Section 504's requirements.

Under the Department's Section 504 regulations, a school district is required to provide a qualified student with a disability an opportunity to benefit from the school district's program equal to that of students without disabilities. For purposes of Section 504, 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.⁵ With respect to public elementary and secondary educational services, "qualified" means a person (i) of an age during which persons without disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).⁶

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.

Among other things, the Department's Section 504 regulations prohibit school districts from:

- denying a qualified student with a disability the opportunity to participate in or benefit from an aid, benefit, or service;
- affording a qualified student with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded others;

⁵ 29 U.S.C. § 705(9)(B), (20)(B) (as amended by the Americans with Disabilities Act Amendments Act of 2008); 34 C.F.R. § 104.3(j). For additional information on the broadened meaning of disability after the effective date of the 2008 Amendments Act, see OCR's 2012 Dear Colleague Letter and Frequently Asked Questions document, available at <http://www.ed.gov/ocr/letters/colleague-201109.html>, and <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>.

⁶ 34 C.F.R. § 104.3(j)(2).

- providing a qualified student with a disability with an aid, benefit, or service that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;
- providing different or separate aid, benefits, or services to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with aid, benefits, or services that are as effective as those provided to others; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.⁷

The Department's Section 504 regulations also require school districts to provide a free appropriate public education (Section 504 FAPE) to each qualified person with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the person's disability.⁸

⁷ 34 C.F.R. § 104.4(b)(1)(i)-(iv), (vi), (2), (3). Among the many specific applications of these general requirements, Section 504 prohibits harassment on the basis of disability, including harassment that occurs during extracurricular athletic activities. OCR issued a Dear Colleague letter dated October 26, 2010, that addresses harassment, including disability harassment, in educational settings. See Dear Colleague Letter: Harassment and Bullying, available at <http://www.ed.gov/ocr/letters/colleague-201010.html>. For additional information on disability-based harassment, see OCR's Dear Colleague Letter: Prohibited Disability Harassment (July 25, 2000), available at <http://www.ed.gov/ocr/docs/disabharassltr.html>.

⁸ 34 C.F.R. § 104.33(a). Section 504 FAPE may include services a student requires in order to ensure that he or she has an equal opportunity to participate in extracurricular and other nonacademic activities. One way to meet the Section 504 FAPE obligation is to implement an individualized education program (IEP) developed in accordance with the IDEA. 34 C.F.R. § 104.33(b)(2). Because the IDEA is not enforced by OCR, this document is not intended as an explanation of IDEA requirements or implementing regulations, which include the requirement that a student's IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities. 34 C.F.R. § 300.320(a)(4)(ii). In general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation.

A school district must also adopt grievance procedures that incorporate appropriate due process standards and that provide for prompt and equitable resolution of complaints alleging violations of the Section 504 regulations.⁹

A school district's legal obligation to comply with Section 504 and the Department's regulations supersedes any rule of any association, organization, club, or league that would render a student ineligible to participate, or limit the eligibility of a student to participate, in any aid, benefit, or service on the basis of disability.¹⁰ Indeed, it would violate a school district's obligations under Section 504 to provide significant assistance to any association, organization, club, league, or other third party that discriminates on the basis of disability in providing any aid, benefit, or service to the school district's students.¹¹ To avoid violating their Section 504 obligations in the context of extracurricular athletics, school districts should work with their athletic associations to ensure that students with disabilities are not denied an equal opportunity to participate in interscholastic athletics.¹²

II. Do Not Act On Generalizations and Stereotypes

A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular. A school district also may not rely on generalizations about what students with a type of disability are capable of—one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport.

Example 1: A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club. As she enters the ninth grade in high school, she tries out and is

⁹ 34 C.F.R. § 104.7(b).

¹⁰ 34 C.F.R. § 104.10(a), 34 C.F.R. § 104.4(b)(1).

¹¹ 34 C.F.R. § 104.4(b)(1)(v); 34 C.F.R. pt. 104, App. A § 104.4 at 367 (2012).

¹² OCR would find that an interscholastic athletic association is subject to Section 504 if it receives Federal financial assistance or its members are recipients of Federal financial assistance who have ceded to the association controlling authority over portions of their athletic program. Cf. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, Inc.*, 80 F.Supp.2d 729, 733-35 (W.D. Mich. 2000) (at urging of the United States, court finding that an entity with controlling authority over a program or activity receiving Federal financial assistance is subject to Title IX's anti-discrimination rule). Where an athletic association is covered by Section 504, OCR would find that the school district's obligations set out in this letter would apply with equal force to the covered athletic association.

selected as a member of the high school's lacrosse team. The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides never to play this student during games. In his opinion, participating fully in all the team practice sessions is good enough.

Analysis: OCR would find that the coach's decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability. A school district, including its athletic staff, must not operate on generalizations or assumptions about disability or how a particular disability limits any particular student. Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices. The student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions).

III. Ensure Equal Opportunity for Participation

A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation.¹³ This means making reasonable modifications and providing 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.¹⁴ Of course, a school district may adopt bona fide safety standards needed to implement its extracurricular athletic program or activity. A school district, however, must consider whether safe participation by any particular student with a disability can be assured through reasonable modifications or the provision of aids and services.¹⁵

¹³ 34 C.F.R. § 104.37(a), (c).

¹⁴ See *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985) (Section 504 may require reasonable modifications to a program or benefit to assure meaningful access to qualified persons with disabilities); *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (Section 504 does not prohibit a college from excluding a person with a serious hearing impairment as not qualified where accommodating the impairment would require a fundamental alteration in the college's program).

¹⁵ 34 C.F.R. § 104.4(b)(1).

Schools may require a level of skill or ability for participation in a competitive program or activity; 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. A school district must, however, afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student.¹⁶ This means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity.

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.

¹⁶ 34 C.F.R. § 104.37(a), (c); 34 C.F.R. § 104.34(b); 34 C.F.R. § 104.4(b)(1)(II).

To comply with its obligations under Section 504, a school district must also provide a qualified student with a disability with needed aids and services, if the failure to do so would deny that student an equal opportunity for participation in extracurricular activities in an integrated manner to the maximum extent appropriate to the needs of the student.¹⁷

Example 2: A high school student has a disability as defined by Section 504 due to a hearing impairment. The student is interested in running track for the school team. He is especially interested in the sprinting events such as the 100 and 200 meter dashes. At the tryouts for the track team, the start of each race was signaled by the coach's assistant using a visual cue, and the student's speed was fast enough to qualify him for the team in those events. After the student makes the team, the coach also signals the start of races during practice with the same visual cue. Before the first scheduled meet, the student asks the district that a visual cue be used at the meet simultaneously when the starter pistol sounds to alert him to the start of the race. Two neighboring districts use a visual cue as an alternative start in their track and field meets. Those districts report that their runners easily adjusted to the visual cue and did not complain about being distracted by the use of the visual cue.

After conducting an individualized inquiry and determining that the modification is necessary for the student to compete at meets, the district nevertheless refuses the student's request because the district is concerned that the use of a visual cue may distract other runners and trigger complaints once the track season begins. The coach tells the student that although he may practice with the team, he will not be allowed to participate in meets.

¹⁷ 34 C.F.R. § 104.37(a), (c); 34 C.F.R. § 104.34(b); 34 C.F.R. § 104.4(b)(1)(ii). Although a school district may also raise the defense that a needed modification or aid or service would constitute an undue burden to its program, based on OCR's experience, such a defense would rarely, if ever, prevail in the context of extracurricular athletics; for this reason, to the extent the examples in this letter touch on applicable defenses, the discussion focuses on the fundamental alteration defense. 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. See 20 U.S.C. § 1414(d)(1); 34 C.F.R. § 104.33. Moreover, whenever the IDEA would impose a duty to provide aids and services needed for participation in extracurricular athletics (as discussed in footnote 8 above), OCR would likewise rarely, if ever, find that providing the same needed aids and services for extracurricular athletics constitutes a fundamental alteration under Section 504 for students not eligible under the IDEA.

Analysis: OCR would find that the school district's decision violates Section 504.

While a school district is entitled to set its requirements as to skill, ability, and other benchmarks, it must provide a reasonable modification if necessary, unless doing so would fundamentally alter the nature of the activity. Here, the student met the benchmark requirements as to speed and skill in the 100 and 200 meter dashes to make the team. Once the school district determined that the requested modification was necessary, the school district was then obligated to provide the visual cue unless it determined that providing it would constitute a fundamental alteration of the activity.

In this example, OCR would find that the evidence demonstrated that the use of a visual cue does not alter an essential aspect of the activity or give this student an unfair advantage over others. The school district should have permitted the use of a visual cue and allowed the student to compete.

Example 3: A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school's swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the "two-hand touch" finish it requires of all swimmers in swim meets, and to permit her to finish with a "one-hand touch." The school district refuses the request because it determines that permitting the student to finish with a "one-hand touch" would give the student an unfair advantage over the other swimmers.

Analysis: A school district must conduct an individualized assessment to determine whether the requested modification is necessary for the student's participation, and must determine whether permitting it would fundamentally alter the nature of the activity. Here, modification of the two-hand touch is necessary for the student to participate. In determining whether making the necessary modification – eliminating the two-hand touch rule – would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.

OCR would find a one-hand touch does not alter an essential aspect of the activity. If, however, the evidence demonstrated that the school district's judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.

In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation. In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete.

Example 4: An elementary school student with diabetes is determined not eligible for services under the IDEA. Under the school district's Section 504 procedures, however, he is determined to have a disability. In order to participate in the regular classroom setting, the student is provided services under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel. Later in the year, this student wants to join the school-sponsored gymnastics club that meets after school. The only eligibility requirement is that all gymnastics club members must attend that school. When the parent asks the school to provide the glucose testing and insulin administration that the student needs to participate in the gymnastics club, school personnel agree that it is necessary but respond that they are not required to provide him with such assistance because gymnastics club is an extracurricular activity.

Analysis: OCR would find that the school's decision violates Section 504. The student needs assistance in glucose testing and insulin administration in order to participate in activities during and after school. To meet the requirements of Section 504 FAPE, the school district must provide this needed assistance during the school day.

In addition, the school district must provide this assistance after school under Section 504 so that the student can participate in the gymnastics club, unless doing so would be a fundamental alteration of the district's education program. Because the school district always has a legal obligation under IDEA to provide aids or services in its education program to enable any IDEA-eligible students to participate in extracurricular

activities,¹⁸ providing these aids or services after school to a student with a disability not eligible under the IDEA would rarely, if ever, be a fundamental alteration of its education program. This remains true even if there are currently no IDEA-eligible students in the district who need these aids or services.

In this example, OCR would find that the school district must provide glucose testing and insulin administration for this student during the gymnastics club in order to comply with its Section 504 obligations. The student needs this assistance in order to participate in the gymnastics club, and because this assistance is available under the IDEA for extracurricular activities, providing this assistance to this student would not constitute a fundamental alteration of the district's education program.¹⁹

IV. Offering Separate or Different Athletic Opportunities

As stated above, in providing or arranging for the provision of extracurricular athletics, a school district must ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of that student with a disability.²⁰ The provision of *unnecessarily* separate or different services is discriminatory.²¹ OCR thus encourages school districts to work with their community and athletic associations to develop broad opportunities to include students with disabilities in all extracurricular athletic activities.

Students with disabilities who cannot participate in the school district's existing extracurricular athletics program – even with reasonable modifications or aids and services – should still have an equal opportunity to receive the benefits of extracurricular athletics. 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 20 U.S.C. §§ 1412(a)(1), 1414(d)(1)(A)(i)(IV)(bb); 34 CFR §§ 300.320(a)(4)(ii), 300.107, 300.117; *see also* footnotes 8 & 17, above.

¹⁹ 34 C.F.R. § 104.37.

²⁰ 34 C.F.R. § 104.34(b).

²¹ 34 C.F.R. pt. 104, App. A § 104.4 at 367 (2012); 34 C.F.R. pt. 104, App. A § 104.37 at 376 (2012).

In those circumstances, a school district should offer students with disabilities opportunities for athletic activities that are separate or different from those offered to students without disabilities. These athletic opportunities provided by school districts should be supported equally, as with a school district's other athletic activities. School districts must be flexible as they develop programs that consider the unmet interests of students with disabilities. For example, an ever-increasing number of school districts across the country are creating disability-specific teams for sports such as wheelchair tennis or wheelchair basketball. When the number of students with disabilities at an individual school is insufficient to field a team, school districts can also: (1) develop district-wide or regional teams for students with disabilities as opposed to a school-based team in order to provide competitive experiences; (2) mix male and female students with disabilities on teams together; or (3) offer "allied" or "unified" sports teams on which students with disabilities participate with students without disabilities.²² OCR urges school districts, in coordination with students, families, community and advocacy organizations, athletic associations, and other interested parties, to support these and other creative ways to expand such opportunities for students with disabilities.²³

V. Conclusion

OCR is committed to working with schools, students, families, community and advocacy organizations, athletic associations, and other interested parties to ensure that students with disabilities are provided an equal opportunity to participate in extracurricular athletics. Individuals who believe they have been subjected to discrimination may also file a complaint with OCR or in court.²⁴

²² The Department's Office of Special Education and Rehabilitative Services issued a guidance document that, among other things, includes suggestions on ways to increase opportunities for children with disabilities to participate in physical education and athletic activities. That guidance, *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, dated August 2011, is available at <http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>.

²³ It bears repeating, however, that a qualified student with a disability who would be able to participate in the school district's existing extracurricular athletics program, with or without reasonable modifications or the provision of aids and services that would not fundamentally alter the program, may neither be denied that opportunity nor be limited to opportunities to participate in athletic activities that are separate or different. 34 C.F.R. § 104.37(c)(2).

²⁴ 34 C.F.R. § 104.61 (incorporating 34 C.F.R. § 100.7(b)); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

For the OCR regional office serving your area, please visit:

<http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>, or call OCR's Customer Service Team at 1-800-421-3481 (TDD 1-877-521-2172).

Please do not hesitate to contact us if we can provide assistance in your efforts to address this issue or if you have other civil rights concerns. I look forward to continuing our work together to ensure that students with disabilities receive an equal opportunity to participate in a school district's education program.

Sincerely,

/s/

Seth M. Galanter
Acting Assistant Secretary for Civil Rights