DISABILITIES LAW PROGRAM

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MEMORANDUM

To: SCPD Policy & Law Committee

From: Brian J. Hartman

Re: Recent Regulatory Initiatives

Date: August 7, 2015

Consistent with the requests of the SCPD and GACEC, I am providing an analysis of nine (9) regulatory initiatives in anticipation of the August 13 Committee meeting. Given time constraints, the analysis should be considered preliminary and non-exhaustive.

1. DOE Proposed School Transportation Regulation [19 DE Reg. 112 (8/1/15)]

The current Department of Education school transportation regulation requires bus drivers and aides to complete annual district-provided training. The current regulation also requires bus aides to complete an annual physical exam.

The attached Section 337 of the FY16 budget bill directs the suspension of these aspects of the regulation pending an appropriation:

> (b) Notwithstanding any provision to the contrary, the additional in-service training requirements for school bus drivers and aides and annual physical examinations for aides imposed pursuant to Regulation 1150 (formerly 1105) School Transportation (14 Del.C. Section 122(d)) shall not be implemented until such time as the costs of implementing those additional requirements have been fully funded by the General Assembly.

The DOE is now implementing Section 337 by amending the pertinent sections of the school transportation regulation.

I have the following observations.

First, the approach adopted in §7.5 is "odd". It strikes some of the annual bus driver training standards and then recites the standards are only "effective pursuant to funding by the General Assembly". Logically, the standard should be retained in its entirety followed by the disclaimer about it is not effective until funded. The reference to "pursuant to funding by the General Assembly" could also be improved. Consider the following substitute: "Consistent with the annual budget epilog, the requirements in this subsection are suspended until fully funded by the General Assembly." This is more "informative" than an oblique reference to funding.

Second, the approach adopted in §8.2 is similarly "odd". It strikes some of the annual bus aide training standards and then recites the standards are only "effective pursuant to funding by the General Assembly". Logically, the standard should be retained in its entirety followed by the disclaimer that it is not effective until funded. The reference to "pursuant to funding by the General Assembly" could also be improved. Consider the following substitute: "Consistent with the annual budget epilog, the requirements in this subsection are suspended until fully funded by the General Assembly."

Third, in §8.1.5, the following substitute for the final sentence should be considered: "Consistent with the annual budget epilog, the requirements in this subsection are suspended until fully funded by the General Assembly."

The Councils may wish to consider sharing the above observations with the DOE and SBE.

2. DOE Prop. K-12 School Counseling Program Regulation [19 DE Reg. 102 (8/1/15)]

The Department of Education proposes to revise its standards covering school counseling programs.

As background, the revisions are intended to achieve alignment with national standards adopted by the American School Counselor Association (ASCA) in 2012. The DOE notes that a group of counselors has been meeting for the past three months to develop user-friendly templates which conform to the national model. Consistent with the attached ASCA position statement, "The School Counselor and Students with Disabilities" (rev. 2013), the ASCA standards address special needs of all students.

The proposed standards are straightforward. Each school is required to implement a comprehensive school counseling program aligned with the ASCA model (§2.1). Each school is required to have a written plan with enumerated content (§2.2) which is submitted to the DOE annually (§3.1).

The Councils may wish to consider endorsement of the initiative subject to one inquiry. The standards literally apply only to district schools (§§2.1, 2.2, and 3.1. The DOE may wish to consider whether the standards should also apply to charter schools.

3. DOE Prop. High School Graduation & Diploma Reg. [19 DE Reg. 100 (8/1/15)]

The Department of Education proposes to adopt a few discrete amendments to its standards covering graduation requirements and diplomas.

First, districts and charter schools are authorized to award credits based on "demonstration of mastery of the competencies of the particular course" (§8.1.11).

Second, the definition of "Student in DSCYF Custody" is amended to cover students covered by Title 10 Del.C. §1009. This includes post-adjudication juveniles determined delinquent, dependent, or neglected.

I have the following observations.

First, the references to "pursuant to 10 Del.C. Chapter 9, §1009" in §§10.1 and 10.2 are redundant since incorporated into the definition of a "Student in DSCYF Custody." The references could be deleted as superfluous.

Second, recently enacted H.B. No. 116 authorizes the DSCYF to award credits to students completing courses in its education system (e.g. Ferris) or outside placements (e.g. Devereux). There is some "tension" between that authorization and §8.1 which limits awards of credits to district and charter schools. The DOE may wish to incorporate this aspect of H.B. No. 116 into the regulation.

Third, the multiple references to §1009 are "underinclusive". For example, §1009 only covers "post adjudication" youth. Pre-adjudication youth are covered by Title 10 Del.C. §921. A minor could also be in DSCYF custody based on other statutes, including Title 10 Del.C. §921(3)(12), Title 10 Del.C. §1007, Title 13 Del.C. Ch. 25, Title 16 Del.C. §§2210-2214, and Title 16 Del.C. §5025. The "bottom line" is that there are many statutory "routes" to DSCYF custody and/or placement. Sole reference to §1009 is clearly underinclusive. I recommend deletion of the following from the definition of "Student in DSCYF Custody": ,pursuant to 10 Del.C. Chapter 9, §1009,". There's no need to include a statutory reference.

The Councils may wish to consider sharing the above observations with the DOE, SBE, and DSCY&F. A courtesy copy could be shared with Chris MacIntyre and Janice Tigani (DAG).

4. DPH Medical Marijuana Regulation [19 DE Reg. 91 (Emergency) and 116 (Proposed) (8/1/15)]

The Division of Public Health proposes to adopt some discrete amendments to the State of Delaware Medical Marijuana Code. The new standards appear in the Register of Regulations as both an emergency regulation and proposed regulation. A public hearing is scheduled on August 27 to receive comments which can otherwise be submitted by September 8.

The primary impetus for the revisions is the recent enactment of S.B. No. 90. Background on that legislation is contained in the attached May 14, 2015 News Journal article and summary published in the Delaware Senate Republican Caucus newsletter. As these sources indicate, the primary focus of the legislation was to amend the medical marijuana law to allow children under age 18 to use medical marijuana-based oils to treat seizures.

I have the following observations.

First, it would be preferable to permit an adult with a qualifying condition to receive marijuana oil as juxtaposed to traditional dried-plant-based marijuana. The regulation ostensibly disallows adults from acquiring marijuana oil. See §7.2.8.3.1.4. Indeed, it is defined as "Pediatric Medical Marijuana Oil". Consider the following:

A. Ingesting an oil would not have the adverse lung effects of smoking marijuana.

B. A minor turning 18 for whom the oil is effective must categorically stop using the oil. See §5.3.8. It is difficult to imagine that the efficacy of the oil would change on someone's birthday.

C. The May 14, 2015 article suggests that other states allow adults access to the oil-based marijuana:

> Fourteen states have approved cannabis oil for the treatment of epilepsy and other serious conditions. The list includes Virginia, where lawmakers earlier this year passed legislation allowing residents, including children, to use marijuana oils to treat seizures.

D. The synopsis to S.B. No. 90 posits that age of the user should be immaterial:

> These oils don't have enough "active ingredient" to get someone high. Therefore, there is no reason whatsoever not to allow its use for treatment of these conditions, no matter what the age of the person needing its help.

E. The text of S.B. No. 90 does not limit access marijuana oils to minors. The definition of "usable marijuana" is amended to include "marijuana oil" and adults are eligible to receive "usable marijuana".

Second, it's unclear how much marijuana oil can be dispensed (to a child or adult). Section 7.2.8.3.1.2 limits dispensing to no more than 3 ounces of usable marijuana during a 14 day period. Three ounces of a liquid oil may be quite different than three ounces of a dried plant product. The Division may wish to assess whether the 3-oz. cap should apply to oils.

Third, the definition of "Responsible Party", second sentence, merits correction for grammar. There is a plural pronoun ("their") with a singular antecedent ("Party"). Consider substituting "Responsible Party's" for "their".

Fourth, an adult with a qualifying condition for whom a guardian has been appointed could participate in the program with the guardian serving as the "Responsible Party". However, §3.3.3 categorically presumes that anyone with a guardian will be a minor. Thus, only pediatric physicians are authorized to certify eligibility. The requirement that a pediatric physician certify the eligibility of an adult with a guardian should be corrected. Note that the reference to pediatric physicians in §3.3.3 may be redundant anyway given the definition of "Physician".

Fifth, §3.3.3.2 should be reviewed. Since there is a plural pronoun ("they") with a singular antecedent ("patient"), consider substituting "the patient has" for "they have". Moreover, the term "seizures" should be inserted after "nausea;". Compare S.B. No. 90, §4902A(3)b. There could be seizures without "painful and persistent muscle spasms".

Sixth, the grammar in §3.3.5 should be corrected. Substitute "Parties" for "Party's".

Seventh, the grammar in §5.3.8, first sentence, should be corrected. Consider the following substitute: "When a registered qualifying pediatric patient ~~passes their 18th birthday~~ attains 18 years of age, ~~they~~ the patient may...."

Eighth, §7.2.6 adopts more flexible standards for the maximum inventory of marijuana that can be maintained by a compassion center. This change is consistent with a recommendation in the attached article, M. Lally, "What's in Store for Delaware's First Medical Cannabis Dispensary" at p. 23:

> In addition, Delaware law prohibits a registered compassion center from having more than 150 marijuana plants, irrespective of the stage of grow, or from possessing more than 1,500 ounces of usable marijuana, regardless of formulation. These restrictions may adversely impact the ability of registered dispensaries to produce enough medicine.

Adopting a more flexible standard is ostensibly a prudent amendment.

The Councils may wish to consider sharing the above observations with the Division. In the Councils' discretion, a courtesy copy could be shared with the prime sponsor of S. B. No. 90, Sen. Ernie Lozez.

5. DOE DIAA Prop. High School Interscholastic Athletics Reg [19 DE Reg. 111 (8/1/15)]

The Department of Education proposes to adopt many revisions to the Delaware Interscholastic Athletic Association regulation covering school-sponsored sport and athletic activities at the high school level. I have the following observations.

First, §§7.1.2.2 and 7.2.1.2 are amended to require certified and emergency coaches to complete an approved concussion course. This furthers the concussion and return-to-play initiatives of the SCPD and AIDI. It also implements 14 Del.C. §303(d) adopted in 2011.

Second, §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.

Third, §2.1.1.2 is an attempt to create an age waiver protocol for students with disabilities. While well-intentioned, it merits reconsideration in several contexts.

A. Section 2.1.1.2.2.3 limits the waiver to IDEA-classified students with an IEP. At a minimum, §504-identified students with disabilities are eligible for policy modifications and accommodations under federal law. See attached U.S. Department of Education guidance documents. See also the discussion under "Fourth" below.

B. An IDEA-identified student is entitled to have extracurricular and nonacademic activities (including athletics) included in the student's IEP. See attached 2011 guidance at p. 10 and 34 C.F.R. §§300.107 and §300.320(a)(4). Cf. 19 DE Reg. 107, §1.2.1.5.4.3 ["Remember the field, court, pool or mat is a classroom."] The athletic activity is therefore subject to IEP team jurisdiction. The IEP team would determine whether an accommodation or policy modification is appropriate to enable a student to participate in a DIAA-sponsored activity. The proposed DIAA regulation incorporates standards which would be considered "foreign" to IEP team deliberation, including placing the burden of proof to qualify for an accommodation on the student and reciting that DOE staff and representatives have no duty to produce or collect information (§2.1.1.2.1) .

C. Section 2.1.1.2.1 categorically bars an age waiver "for any season or sport in any subsequent school year". This rigid approach is "at odds" with individualized decision-making required by the IDEA and Section 504. It is reminiscent of a past attempt to limit IDEA-student driver education eligibility to the standard 1-time enrollment. Title 14 Del.C. §4125 was amended in 2012 to permit subsequent enrollment in deference to federal law. If an IEP team determines that a student should participate in an athletic activity for 2 years in a row, the team's decision-making cannot be hamstrung by a no-exceptions DOE regulation.

D. Section 2.1.1.2.2.1 limits the disability determination to a "treating physician or psychiatrist." This is unduly narrow. Compare §3.1.1, §3.1.6.2, and 14 DE Admin Code 930.2.2..

E. The combination of §2.1.1.2.2.2 and §2.1.1.2.2.4 indicates that an age waiver would only be granted if a student with a disability has weak or depressed skills. Query why having weak skills is material? If a student with autism or Downs Syndrome is a fast runner, why should his/her speed be a factor in denying a waiver? The DIAA "Sportsmanship" regulation stresses that developing character is the focus of interscholastic sports, not "winning". See 19 DE Reg 106, §1.2.1.5.2.2.

Fourth, several sections (e.g. §§2.1.1.2, 2.3.3.2) use the term "student with a disability" which is limited to IDEA-classified students to the exclusion of students identified under Section 504. See §2.3.3.1, definition of "student with a disability". 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.

Fifth, §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. Sterck). 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.

Sixth, §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. See discussion in "Fourth" above.

Seventh, §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.

Eighth, §6.6 discourages participation of students with disabilities in programs such as Special Olympics. The regulation bans a school (e.g. Ennis; Leach) from transporting students to Special Olympics, bans PTAs and support groups from providing or paying for transportation to Special Olympics, and limits school-supplied assistive technology/equipment to that used to prevent physical injury. Thus, if a student has a school-supplied AAC device for communication in the community, the student cannot use it to communicate at a Special Olympics event. These limits are "overbroad" and ill-conceived since the DOE should be encouraging, not discouraging, participation in such extracurricular activities.

The Councils may wish to consider sharing the above observations with the DOE (including Tina Shockley, Mary Ann Mieczkowski and the DIAA); the SBE; Ann Grunert; State PTA; and the DFRC.

6. DOE DIAA Prop. Jr. H.S. & Middle School Intersch. Athletics Reg [19 DE Reg. 111 (8/1/15)]

The Department of Education proposes to adopt many revisions to the Delaware Interscholastic Athletic Association regulation covering school-sponsored sport and athletic activities at the junior high and middle school levels. I have the following observations.

First, §§7.1.2.2 and 7.2.2.2 are amended to require certified and emergency coaches to complete an approved concussion course. This furthers the concussion and return-to-play initiatives of the SCPD and AIDI. It also implements 14 Del.C. §303(d) adopted in 2011.

Second, §2.1.1.2 is an attempt to create an age waiver protocol for students with disabilities. While well-intentioned, it merits reconsideration in several contexts.

A. Section 2.1.3.2.3 limits the waiver to IDEA-classified students with an IEP. At a minimum, §504-identified students with disabilities are eligible for policy accommodations under federal law. See attached U.S. Department of Education guidance documents. See also the discussion under "Third" below.

B. An IDEA-identified student is entitled to have extracurricular and nonacademic activities (including athletics) included in the student's IEP. See attached 2011 guidance at p. 10 and 34 C.F.R. §§300.107 and §300.320(a)(4). Cf. 19 DE Reg. 107, §1.2.1.5.4.3 ["Remember the field, court, pool or mat is a classroom."] The athletic activity is therefore subject to IEP team jurisdiction. The IEP team would determine whether an accommodation or policy modification is appropriate to enable a student to participate in a DIAA-sponsored activity. The proposed DIAA regulation incorporates standards which would be considered "foreign" to IEP team deliberation, including placing the burden of proof to qualify for an accommodation on the student and reciting that DOE staff and representatives have no duty to produce or collect information (§2.1.3.1) .

C. Section 2.1.3.1 categorically bars an age waiver "for any season or sport in any subsequent school year". This rigid approach is "at odds" with individualized decision-making required by the IDEA and Section 504. It is reminiscent of a past attempt to limit IDEA-student driver education eligibility to the standard 1-time enrollment. Title 14 Del.C. §4125 was amended in 2012 to permit subsequent enrollment in deference to federal law. If an IEP team determines that a student should participate in an athletic activity for 2 years in a row, the team's decision-making cannot be hamstrung by a no-exceptions DOE regulation.

D. Section 2.1.3.2.1 limits the disability determination to a "treating physician or psychiatrist." This is unduly narrow. Compare §3.1.1, §3.1.6.2, and 14 DE Admin Code 930.2.2..

E. The combination of §2.1.3.2.2 and §2.1.3.2.4 indicates that an age waiver would only be granted if a student with a disability has weak or depressed skills. Query why having weak skills is material? If a student with autism or Downs Syndrome is a fast runner, why should his/her speed be a factor in denying a waiver? The DIAA "Sportsmanship" regulation stresses that developing character is the focus of interscholastic sports, not "winning". See 19 DE Reg 106, §1.2.1.5.2.2.

Third, several sections (e.g. §§2.1.3, 2.3.2.2) use the term "student with a disability" which is limited to IDEA-classified students to the exclusion of students identified under Section 504. See §2.3.2.1, definition of "student with a disability". 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.

Fourth, §2.3.2.2 provides as follows:

> 2.3.2.2. A student with a disability who is placed in a special school or program administered by a school district or charter school which sponsors junior high or middle school interscholastic athletics shall be eligible to participate in interscholastic athletics as follows:
>
> > 2.3.2.2.1. 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. Sterck). 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.

Fifth, §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. See discussion in "Third" above.

Sixth, §2.7 bars a student from participating in athletics after 4 consecutive semesters from the date of the student's first entrance into the 7th grade. It also bars a student who has had more than 2 "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 illness, injury, and accidents. 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, §6.6 discourages participation of students with disabilities in programs such as Special Olympics. The regulation bans a school (e.g. Ennis; Leach) from transporting students to Special Olympics, bans PTAs and support groups from providing or paying for transportation to Special Olympics, and limits school-supplied assistive technology/equipment to that used to prevent physical injury. Thus, if a student has a school-supplied AAC device for communication in the community, the student cannot use it to communicate at a Special Olympics event. These limits are "overbroad" and ill-conceived since the DOE should be encouraging, not discouraging, participation in such extracurricular activities.

The Councils may wish to consider sharing the above observations with the DOE (including Tina Shockley, Mary Ann Mieczkowski and the DIAA); the SBE; Ann Grunert; and the State PTA.

7. DOE Proposed DIAA Sportmanship Regulation [19 DE Reg. 105 (8/1/15)]

The Department of Education proposes to adopt some discrete amendments to its "sportsmanship" standards applicable to DIAA-regulated athletics.

I have the following observations.

First, §1.2.1.5.2.8 requires coaches to "forbid the use of tobacco, alcohol, and non-prescribed drugs...". This is "overbroad" in multiple contexts.

A. Students who have reached the age of 18 can legally use tobacco and students who have reached age 21 can consume alcohol. There is no legal basis for a coach to forbid adult athletes from using tobacco or alcohol when not involved in school functions. Compare 14 DE Admin Code 877. Section 1.2.1.5.2.8 is not limited to school functions and sites.

B. An across-the-board ban on use of "non-prescribed drugs" would penalize an athlete from using even benign over-the-counter drugs (e.g. Neosporin for a cut; Aspirin or Advil for a headache or inflammation reduction). Trainers at athletic contests would be barred from even suggesting use of benign over-the-counter drugs (e.g. Neosporin).

Second, the grammar in §1.2.1.5.4.1 should be corrected. In the second sentence, delete "shall".

The Councils may wish to consider sharing the above observations with the DOE (Tina Shockley and DIAA) and SBE.

8. DPR Board. Of Nursing Regulation [19 DE Reg. 125 (8/1/15)]

The Division of Professional Regulation proposes to adopt some discrete amendments to the Board of Nursing regulation. In general, the changes are straightforward and clear. However, I have the following observations.

First, as an alternative to a refresher course, an inactive nurse may be permitted to work in a facility under an alternative supervised practice plan. Qualifying facilities are limited to "an acute care or long term care skilled nursing healthcare facility". There may be other facilities in which ample opportunities to engage in frequent, high-level nursing services are available. For example, the Stockley Center is an ICF/MR with 30 nurses and approximately 60-70 residents. See http://intermediate-care.healthgrove.com/l/783/Stockley-Center. The following sentence could be added to §4.2.1: "The Board may authorize other healthcare facilities to serve as a participating facility if it determines that the facility would provide comparable opportunity to complete the SPP clinical skills checklist for a nurse applicant."

Second, §5.0 implements the recently enacted H.B. No. 111. However, H.B. No. 111 addressed LLAM trained UAPs giving both prescribed and nonprescription drugs. See §§1902(h) and 1932(a). In contrast, the regulation only limits giving a prescribed medication prior to completing LLAM coursework (§5.2.1). The Board may wish to consider whether to expand the limit to nonprescription drugs.

Third, the consequences of some medication errors are not clear. Under§5.5.2, an LLAM Trained UAP who commits 2 medication errors within a 6-month period must repeat the entire training program. That's easily understood. However, §5.4.2 literally suggests that an LLAM Trained UAP can only renew "by successfully demonstrating competency in the LLAM process with no errors. It's unclear what this means. It could be interpreted that the person has had 0 medication errors in the past year. It could be interpreted that the person must have 0 medication errors in an annual assessment. What are consequences if the person has 1 error under §5.4.2? The Board may wish to consider clarifying the standards in this context.

Fourth, since this is a new process, annual retesting (§5.4.2) may be appropriate. However, in the future the Board may wish to exempt individuals with favorable multi-year results from an annual assessment.

The Councils may wish to consider sharing the above observations with the Board.

9. DHSS HCBS Transition Plan Update [19 DE Reg. 144 (8/1/15)]

I prepared extensive comments on earlier drafts of the Department of Heath & Social Services HCBS Transition Plan. The Department has now published an updated July 27, 2015 version which it plans to submit to CMS by September 17, 2015. The new version is not earmarked with changes (strikeouts; underlining) consistent with the protocol for regulations adopted by the Register of Regulations. That would have facilitated review. Given the length (139 pages) of the document, I lack the time to review it. Public hearings are scheduled on August 24 and 28. Comments are due by August 31.

Attachments

8g:legis/815bils
F:pub/bjh/p&l/815

HS NO 1
FOR HB 225
FY 16 Budget Bill

(5) For Fiscal Year ~~2015~~ 2016, the fixed cost allowance for district and contractor buses shall include ~~an additional $48.00 per bus per year to account~~ funding for the provision of emergency communication devices. The Department of Education is authorized to bring school districts or private contractors operating school buses equipped with cellular phone technology under a state negotiated cellular phone contract.

(c) Except as specified in this section, or for changes in the price of fuel, or for the adjustments of those items changed by state or federal laws, the Department of Education shall not change the transportation formula unless the change has been authorized by the General Assembly and an appropriation therefore has been made by the General Assembly.

(d) The Department of Education shall calculate the formula amounts for each district as provided herein but shall only provide 90 percent of such calculation to each school district.

(e) Of the appropriation allocated for public school districts, $125.0 is allocated to purchase a maximum of 12 air conditioned buses to transport special need students. The Department of Education is authorized to amend its formula to allow the purchase of air conditioned buses which may be required to transport special education students that have a medical need for air conditioning (specified by a physician).

Section 337. (a) It is the intent of the General Assembly to make progress toward implementing the recommendation of the Public School Transportation Working Group to address school bus operating cost factors not reflected in the school transportation formula, which has been in existence since 1977. These factors include, but are not limited to, environmental compliance requirements for school bus maintenance, maintenance costs of advanced technology on school buses and school bus driver training requirements.

(b) Notwithstanding any provision to the contrary, the additional annual in-service training requirements for school bus drivers and aides and annual physical examinations for aides imposed pursuant to Regulation 1150 (formerly 1105) School Transportation (14 Del. C. Section 122(d)) shall not be implemented until such time as the costs of implementing those additional requirements have been fully funded by the General Assembly.

Section 338. (a) All school districts shall be required to utilize Trapeze, a computerized routing system for school bus transportation, provided by the Department of Education to create school bus routes. Schools are encouraged to maximize the capabilities of this system to derive transportation efficiencies to contain increasing costs.

AMERICAN SCHOOL COUNSELOR ASSOCIATION

The School Counselor and Students with Disabilities

(Adopted 1999; revised 2004, 2010, 2013)

American School Counselor Association (ASCA) Position

School counselors encourage and support the academic, career and social/emotional development for all students through comprehensive school counseling programs. School counselors are committed to helping all students realize their potential and meet or exceed academic standards regardless of challenges resulting from disabilities and other special needs.

Rationale

The Individuals with Disabilities Education Act (IDEA) requires public schools to provide a free, appropriate public education in the least restrictive environment for all students. However, research suggests "students with disabilities have not always received adequate educational services and supports" (Rock & Leff, 2007, p. 314). In addition, Section 504 of the Rehabilitation Act of 1973 protects qualified individuals with disabilities defined as persons with a physical or mental impairment that substantially limits one or more major life activities (caring for one's self, walking, seeing, hearing, speaking, breathing, working, performing manual tasks and learning). School counselors strive to assist all students in achieving their full potential, including students with disabilities, within the scope of the comprehensive school counseling program.

School counselors recognize their strengths and limitations in working with students with disabilities. School counselors also are aware of current research and seek to implement best practices in working with students presenting any disability category. IDEA defines "child with a disability" as a child with:

- autism
- deaf-blindness
- developmental delay
- emotional disturbance
- hearing impairments (including deafness)
- intellectual disability (formerly mental retardation)
- multiple disabilities
- orthopedic impairments
- other health impairments
- specific learning disabilities
- speech or language impairments
- traumatic brain injury
- visual impairments (including blindness)

and

who, by reason thereof, needs special education and related services.

The School Counselor's Role

School counselors work with students individually, in group settings, in special education class settings and in the regular classroom. School counselor responsibilities may include but are not limited to:

- providing school counseling curriculum lessons, individual and/or group counseling to students with special needs within the scope of the comprehensive school counseling program
- providing short-term, goal-focused counseling in instances where it is appropriate to include these strategies in the individual educational program (IEP)
- encouraging family involvement in the educational process
- consulting and collaborating with staff and families to understand the special needs of a student and understanding the adaptations and modifications needed to assist the student
- advocating for students with special needs in the school and in the community

- contributing to the school's multidisciplinary team within the scope and practice of the comprehensive school counseling program to identify students who may need to be assessed to determine special education eligibility
- collaborating with related student support professionals (e.g., school psychologists, physical therapists, occupational therapists, special education staff, speech and language pathologists, teachers of deaf and hearing impaired) in the delivery of services
- providing assistance with developing academic and transition plans for students in the IEP as appropriate

Inappropriate administrative or supervisory responsibilities for the school counselor include, but are not limited to:

- making singular decisions regarding placement or retention
- serving in any supervisory capacity related to the implementation of the IDEA
- serving as the school district representative for the team writing the IEP
- coordinating, writing or supervising a specific plan under Section 504 of Public Law 93-112
- coordinating, writing or supervising the implementation of the IEP
- providing long-term therapy

Summary

The school counselor takes an active role in student achievement by providing a comprehensive school counseling program for all students. As a part of this program, school counselors advocate for students with special needs, encourage family involvement in their child's education and collaborate with other educational professionals to promote academic achievement for all.

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Bill would allow marijuana oils for kids with seizures

JONATHAN STARKEY
THE NEWS JOURNAL

Rylie Maedler's seizures started after a 2013 surgery to remove a benign but aggressive tumor that spread from her jaw to the palate of her mouth.

Now Maedler's seizures come and go, but can have a devastating impact.

They leave the Rehoboth Beach 9-year-old dizzy, her legs numb and immobile, and with headaches that can last for days.

But drugs used to treat the seizures have had their own troubling effects. One of the medicines doctors prescribed made her lethargic and unwilling to participate in normal activities.

"Like a zombie," says Janie Maedler, Rylie's mother.

Another drug's symptoms were even more concerning.

The medicine caused her to become extremely agitated, and fight bouts of depression that caused changes in her personality.

"With all of the health issues that she has, the pharmaceuticals actually work against her health issues," Maedler says, adding the drugs also worsened Rylie's jaw pain and caused degeneration in her teeth.

Now the Maedlers are helping to change the law in Delaware to allow children to legally access marijuana-extracted oils for the treatment of seizures.

Maedler said allowing legal access to marijuana oils "means a chance at a normal life" for Rylie.

Across the country, some parents have turned to marijuana oils to help treat seizures, even though there is little scientific evidence to back up its anecdotal therapeutic benefits.

Delaware Sen. Ernie Lopez, a Lewes Republican, is sponsoring the legislation that would narrowly open Delaware's medical marijuana program to minors by allowing access to the oils.

Lopez's bill would specifically allow doctors to certify minor patients to use marijuana for the treatment of intractable epilepsy or "involuntary muscle contractions that cause slow, repetitive movements or abnormal postures."

The proposal would allow Delaware children to use two oils extracted from marijuana to help treat seizures – cannabidiol oil and THC-A oil. Children would not become intoxicated from using the oils, advocates say.

CHUCK SNYDER/SPECIAL TO THE NEWS JOURNAL
Rylie Maedler, 9, of Rehoboth Beach, plays with brother Korban, 3. Rylie suffers from epileptic seizures.

Delawareans younger than 18 are blocked from using marijuana under the state's current medical marijuana program.

If lawmakers pass the measure, which also would allow adults with epilepsy to obtain medical marijuana, parents could seek certification from a Delaware doctor and obtain the oils from medical marijuana dispensaries licensed by the state.

The first dispensary is scheduled to open next month outside of Wilmington.

Two dozen lawmakers, including Democrats and Republicans and members of leadership, are backing Lopez's measure.

Fourteen states have approved cannabis oil for the treatment of epilepsy and other serious conditions.

The list includes Virginia, where lawmakers earlier this year passed legislation allowing residents, including children, to use marijuana oils to treat seizures.

Lopez's bill was modeled after the Virginia legislation.

Lawmakers on the Senate Health and Social Services Committee approved Lopez's bill Wednesday, moving it to the full Senate for consideration. Lopez expects it will go before the full Senate in early June.

The Medical Society of Delaware also is remaining neutral, saying they are awaiting scientific evidence that marijuana oils can be beneficial.

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Delaware Plummets In Ranking

Delaware's economic outlook ranks in the bottom third of the country, according to a national study released recently.

Delaware was rated 38th, based on taxing, spending and regulatory practices tracked by the non-partisan policy center American Legislative Exchange Council (ALEC).

Delaware fell 11 spots in the rankings from a year ago, the second largest drop of any state in the country.

The Economic Outlook Ranking is a measure of how each state can expect to perform economically based on 15 policy

With bill sponsor Sen. Ernie Lopez by her side, Rylie Maedler, left, testifies this week at a Senate hearing.

Cannabis Oil Bill Passes First Test

'Rylie's Law' Seen As Relief For Children Suffering From Epileptic Seizures

DOVER - A bill that would make it legal for Delaware children under the age of 18 to use medical marijuana-based oils to treat debilitating medical conditions is headed to a vote of the full Senate after being approved this week in the Senate Health and Social Services Committee.

The bipartisan measure, sponsored by Sen. Ernie Lopez (R-Lewes) and co-sponsored by more than 20 others, would expand the state's medical marijuana laws to allow physicians to certify the use of cannabis oil to treat children who suffer from intractable epilepsy and dystonia. Currently no form of medical marijuana is legally available for those under the age of 18.

Said Sen. Lopez during Wednesday's committee hearing: "My fellow Senators the time has come for Delaware to join our sister states in allowing our children - children who suffer from unconscionable pain, children who suffer by no fault of their own, children who suffer because our laws here at home do not allow helpful medicine that other states have long since adopted . . . to ease that pain, ease the suffering that's consumed them and held them back from the joys that you and I take for granted."

Intractable epilepsy is defined as epilepsy that does not respond to traditional drugs. Disorders such as dystonia are characterized by involuntary muscle contractions. The medical marijuana oil, also known as cannabidiol oil, has been proven to help people with intractable epilepsy and dystonia.

The legislation is named after Rylie Maedler, a 9-year-old from Rehoboth Beach who is recovering from surgery to remove a bone tumor in her face. After the surgery she started suffering seizures.

Rylie's mother testified that the medicine prescribed to treat the

areas that have proven, over time, to be the best determinants of economic success.

Generally speaking, according to the study, states that spend less and tax less experience higher growth rates than states that tax and spend more.

"Bottom line, the biggest deficiency in Delaware, as we see it, are that there are too many taxes and those taxes are too high," said ALEC Research Analyst William Freeland. "Across the board the taxes are ugly. In addition, not embracing right to work, a pretty important metric as we measure it, is also hurting Delaware."

Adding to the state's shaky financial standing is a string of projections by the Delaware Economic and Financial Advisory Council of falling state revenues. After last month's DEFAC report, revenue estimates are down about $67 million since Gov. Jack Markell proposed his budget in January. The panel is scheduled to meet again on Monday.

"This independent report is further proof that our state's legislative policies of higher taxes and increased spending, as determined by the majority party, have failed to turn our economy around," said Senate Republican Leader Gary Simpson (R-Milford). "We have continued to present new ideas to stimulate the economy and reduce the cost of government. We have introduced legislation to reform our state's prevailing wage and right-to-work laws. It's time the governor and majority party realize what they're doing isn't working."

seizures and other symptoms is not working. She said medical professionals and families in similar situations across the country have advised her of the benefits of cannabis oil.

"Rylie's days are a struggle for her," said Janie Maedler. "She has dizziness, severe headaches, pain, inflammation and debilitating seizures. To not allow her a natural medicine that would address these issues without side effects feels like a life sentence that she does not deserve. Cannabis can bring her quality of life back to almost what it was before her health issues. We can only imagine how many children there are that it could benefit and give them their childhood back."

Rylie also addressed the Senate committee.

"I am scared that one day I will have a seizure and it would never stop," she said. "I hope you pass this law because I just want a chance to be normal."

Sen. Lopez emphasized the oil does not contain enough THC - the active chemical in marijuana - to get someone high. The bill could be placed on the Senate agenda as early as Tuesday.

A proposal by Democratic lawmakers to increase motor vehicle fees to pay for road improvements has cleared the House.

State House Approves DMV Fee Increases

Republicans Push For Alternatives

DOVER - As House Democrats pushed through a bill hiking 14 vehicle-related fees, General Assembly Republicans are advocating for a bipartisan, holistic approach to solving the state's transportation funding challenges.

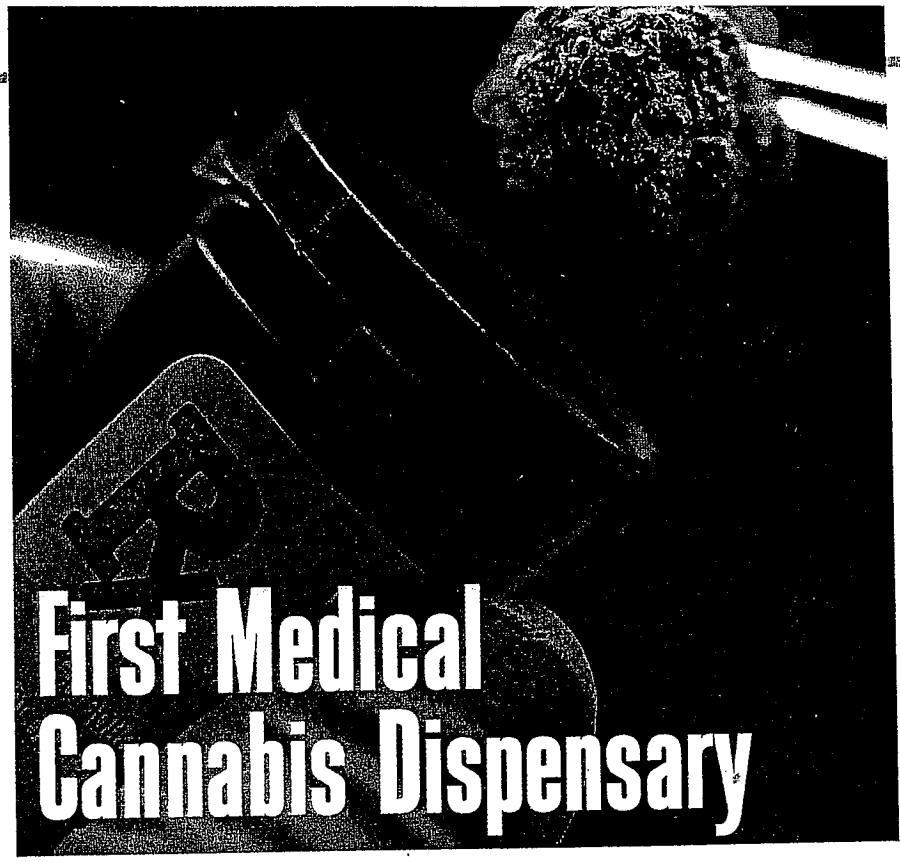
House Bill 140, which would impose $24 million in additional annual costs on Delaware residents and businesses, passed along party lines late Thursday, 25 to 16. It now heads to the Senate for consideration.

General Assembly Democrats abruptly filed the measure unilaterally last Friday, despite negotiations Republican and Democratic lawmakers have been engaged in since early this year to find a long-term answer to the transportation dilemma.

The state's ailing Transportation Trust Fund (TTF) - financed by

FEATURE

Mark S. Lally
CEO, First State Compassion Center



What's in Store for Delaware's First Medical Cannabis Dispensary

Though authorized in Delaware, dispensing cannabis for medical purposes is adversely affected by restrictive federal laws.

The First State Compassion Center ("FSCC") will open its doors in Wilmington this Spring. For the first time in modern history, Delawareans with serious medical conditions that may benefit from administration of medical cannabis will have a sanctioned resource within their home state.

Delaware law now authorizes the use of medical cannabis to treat or alleviate symptoms of several qualifying conditions including amyotrophic lateral sclerosis (ALS or Lou Gehrig's disease), cancer, AIDS/HIV, chronic pain and post-traumatic stress disorder.

The FSCC holds the first of three medical cannabis licenses awarded as part of the Delaware Division of Public Health's ("DDPH") implementation of the Delaware Medical Marijuana Act ("DMMA"), which became effective July 1, 2012.[1] FSCC is committed to creating a facility that provides safe access to high-quality, affordable medical cannabis to licensed patients who are Delaware residents. The FSCC will include industry-leading protocols for security, patient access, compassionate care and regulatory compliance.

DDPH Director Dr. Karyl Rattay has stated: "FSCC has assembled an experienced team with a high level of competency in the field of medical marijuana." FSCC selected its team and undertook the other steps necessary to opening a medical cannabis dispensary with guidance from MariMed Advisors, a national consulting firm specializing in assisting state-licensed companies in the designing and building of state-of-the-art, regulatory compliant dispensaries and cultivation centers. The MariMed consultants developed the Thomas C. Slater Compassion Center in Rhode Island, which serves as a model of excellence for the industry.

Federal Prohibition Against Marijuana Remains

FSCC shares the challenges faced by all state-licensed cannabis facilities around the country. It must navigate past many obstacles in its path to be able to open and operate, not the least of which is that medical cannabis remains classified by the United States federal government as a Schedule I drug, the most restrictive of five groups established by the Controlled Substances Act of 1970 ("CSA").[2] Other drugs in this category include heroin, LSD and ecstasy.

The Schedule 1 classification means such drugs are deemed to have no accepted medical use in the United States, have a high potential for abuse and are subject to tight restrictions on scientific study. In short, they remain flatly prohibited and subject to criminal punishment under federal law.

This federal law is in direct conflict with statutes legalizing medical cannabis passed by 23 states and the District of Columbia (as well as statutes in four states – Delaware is not among them – legalizing recreational marijuana). Nevertheless, following the scaling back by the United States Department of Justice ("DOJ") of its enforcement efforts over several years, on December 16, 2014, the federal prohibition on medical cannabis was further eroded when President Obama signed legislation that prohibits the DOJ from using federal funds to prevent such states from implementing their own medical cannabis programs.[3]

Even with the advent of this more favorable enforcement environment, existing federal law discourages many qualified individuals from applying for licenses or working in the cannabis industry as an employee or consultant. Many professionals and healthcare providers have been reluctant to participate in aspects of working with companies such as FSCC. These deterrents impede efforts to establish and grow this type of business. The opposition and difficulties to being in the industry have been described as horrific.

Financial Challenges Abound

Imagine the challenge of opening up a company and not being able to have a bank account? How do you pay your bills? How do you deposit your retail receipts? How do you get the use of credit cards? How do you secure bank loans or lines of credit?

Most banks are registered and licensed through the federal banking system. That allows them to process transactions through the funds transfer system operated by the United States Federal Reserve Banks. This system enables financial institutions to electronically move funds between its participants. Further, banks are insured by an independent agency of the federal government. Accordingly, most banks are particularly sensitive to the need to remain in compliance with federal law.

Historically, banks that did business with marijuana distributors were at risk of civil and criminal penalties for money laundering and other violations of federal law. Many cannabis businesses do not always disclose that they are in this business. Indeed, one Colorado state bank known for allowing dispensary clients terminated more than 300 accounts after the DOJ warned in 2011 that it would pursue money-laundering charges.[4] Without a bank account, dispensaries have no traditional means of paying employees or banking. They must operate exclusively in cash.

Marijuana businesses have had to find back doors into the banking system. Some dispensary owners have set up holding companies with names that obscure the nature of their businesses, while others have opened personal accounts to be able to bank. However, once the bank learns the account is connected to a medical marijuana business, they close it. Some dispensaries are trying to form their own banking cooperative to skirt these restrictions.

Medical cannabis businesses without a banking relationship are further challenged by their inability to secure traditional bank loans. They may also have difficulty borrowing funds from nontraditional lenders, and are forced to self-finance from family, friends and private investors or through creative financing.

In addition, medical marijuana entrepreneurs have not been able to open credit card accounts and some may have been blacklisted from any credit card use. Historically, most major credit card companies have kept away from the medical marijuana industry, refusing to process transactions at dispensaries and even closing merchant accounts for medical marijuana centers. Many dispensaries set up credit and debit processing in affiliated companies to meet this challenge and navigate around another roadblock.

Existing federal law also creates unique tax challenges for a medical cannabis business. The IRS will not allow deductions for ordinary and necessary business expenses for sale of drugs deemed illegal by federal law.[5] Therefore, marijuana businesses have not been able to deduct any of their business-related expenses even though they pay taxes. This has made medical marijuana businesses very expensive to operate.

The FSCC and others entering or operating in the medical marijuana field now have reason for cautious optimism in view of recent steps by the federal government to eliminate interference in states' efforts to implement their own laws legalizing and regulating medical marijuana. It will take some time, however, for the changing legal environment to have a concrete impact on how medical cannabis dispensaries are operated.

Medical Research Has Been Stunted

Another frustrating issue created by the classification of marijuana as a Schedule 1 drug is that it has made independent medical research next to impossible. Research is critical for precise dosing, strain selection and delivery methods. Such research also is critical in determining the effectiveness of it on specific symptoms and disease states.

To obtain cannabis legally, according to a recent *New York Times* article, researchers must apply to the Food and Drug Administration, the Drug Enforcement Administration ("DEA") and the National Institute on Drug Abuse ("NIDA").[6] NIDA, citing a 1961 treaty obligation, administers the only legal source of the drug for federally sanctioned research, at the University of Mississippi.

Since 1968, the United States has had a federally funded medical marijuana farm and production facility at the University. The resulting cannabis cigarettes and other purified elements from this site are used for NIDA-approved research. NIDA also manages the distribution of cannabis to the seven surviving medical patients grandfathered into the U.S. government's medical marijuana research program, Compassionate Investigational New Drug program (established in 1978 and cancelled in 1992). The program offered relief to AIDS patients, as well as those suffering with other diseases like glaucoma and bone tumors.

It is evident that the patient population would benefit from further independent research concerning medical cannabis. For example, Mahmoud ElSohly, Ph.D., the head of the marijuana research program at the University of Mississippi since 1981, is working on a new method of administering delta-9-tetrahydrocannabinol ("THC"), the main therapeutic component in marijuana. A small transmucosal patch will be put inside the mouth above the gum line. It is believed that this means of delivering THC will promote better absorption with less variability, thereby overcoming problems some patients experience with taking the drug other forms.

Ironically, even though the CSA deems marijuana not to have any legitimate medical use, the U.S government owns one of the only patents on marijuana as a medicine. The patent, commonly known as "the 507 Patent," claims exclusive rights on the use of cannabidiol ("CBD"), one of the cannabinoids identified in cannabis, for treating neurological diseases conditions, such as Alzheimer's disease, Parkinson's disease and strokes, as well as diseases caused by oxidative stress, such as heart attacks, Crohn's disease, diabetes and arthritis.[7]

KannaLife Sciences currently holds an exclusive license agreement with the National Institutes of Health – Office of Technology Transfer for the commercialization of this patent. The existence of this patent – issued more than a decade ago – and its licensing for commercial purposes mean that the federal government is at least nominally aware of the potential health benefits of CBD.

The contradiction of the federal government holding a patent that touts the therapeutic applications of a cannabis-derived compound while simultaneously classifying cannabis as a Schedule 1 controlled substance has not escaped the notice of the popular press. For example, CNN's Chief Medical Correspondent, Dr. Sanjay Gupta, recently questioned: "How can the government deny the benefits of medical marijuana even as it holds a patent for those very same benefits?"[8]

The Continuing National Trend Toward Legalization Of Medical Cannabis

Recent legislative activity strongly suggests that there is now a broadening awareness in Congress of the federal government's incompatible positions on medical marijuana and, perhaps, the political will to address them. On February 20, 2015, the *Huffington Post* reported that two congressmen have filed separate House bills that together would legalize, regulate and tax marijuana at the federal level, effectively ending the U.S. government's decades-long prohibition against the plant.[9]

One of these bills, the Regulate Marijuana Like Alcohol Act,[10] introduced by Rep. Jared Polis (D-Colo.), would remove marijuana from the CSA's schedules, transfer oversight of the substance from the DEA to the Bureau of Alcohol, Tobacco, Firearms and Explosives, and regulate marijuana in a manner similar to the regulation of alcohol in the United States.

If this bill passes, it will enable scientists to begin intensive research on this promising medicine that could help millions of citizens who suffer from disabling diseases. In addition, it will remove the fear many physicians have that the federal government will take away their ability to prescribe narcotics if they recommend medical marijuana.

At a local level, with the passage of the DMMA and the DDPH's implementation of its Medical Marijuana Program, Delaware has taken an important step forward by providing its citizens with another treatment choice for serious illnesses and conditions. Yet, as currently written and applied, the Delaware law is not perfect. For instance, it prohibits individuals under the age of 21 from working in a dispensary. This eliminates the opportunity for most college students to have internships and learn about this emerging field.

In addition, Delaware law prohibits a registered compassion center from having more than 150 marijuana plants, irrespective of the stage of grow, or from possessing more than 1,500 ounces of usable marijuana, regardless of formulation. These restrictions may adversely impact the ability of registered dispensaries to produce enough medicine.

Despite these obstacles and challenges, the FSCC anxiously looks forward to opening this spring to serve the citizens of Delaware. It will bring the highest level of professionalism, the tightest security, the most knowledgeable staff, the highest quality medicine and a state-of-the-art facility that will be a replicable model of best practices for the rest of the country.

The State of Delaware has committed itself to support the FSCC in the implementation of this pilot program as it deems necessary to support the legislation and to provide the best medical cannabis products to qualified patients in a safe, secure and professional manner. ◆

FOOTNOTES

1. *See* Del. Code tit. 16, ch. 49A.
2. 28 U.S.C. § 801 *et seq.*
3. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pubic Law No. 113-235, § 538 (2014).
4. *See* John Ingold, *Last Bank Shuts Doors on Colorado Pot Dispensaries*, Denverpost.com (Oct. 1, 2011, at 1:00 a.m. MDT, updated Oct. 19, 2013, at 11:11 a.m. MST), http://www.denverpost.com/news/marijuana/ci_19016660.
5. *See* 28 U.S.C. § 280E ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business ... consists of trafficking in controlled substances ... which is prohibited by Federal law ....").
6. *See* Serge F. Kovaleski, *Medical Marijuana Research Hits Wall of U.S. Law*, N.Y. Times, Aug. 9, 2014.
7. Cannabinoids As Antioxidants And Neuroprotectants, U.S. Patent No. 6,630,507 B1 (issued Oct. 7, 2003).
8. Dr. Sanjay Gupta, *Medical Marijuana*, CNN.com (March 6, 2014, at 8:40 a.m. ET), http://www.cnn.com/2014/03/05/health/gupta-medical-marijuana.
9. *See* Matt Ferner, *Two House Bills Would End Federal Prohibition Of Marijuana*, The Huffington Post.com, Inc. (Feb. 20, 2015, at 4:27 p.m. ET, updated Feb. 20, 2015, at 4:59 p.m. ET), http://www.huffingtonpost.com/2015/02/20/marijuana-legalization-congress_n_6722686.html.
10. H.R. 1013, 114th Cong. (2015).

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.

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;

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[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(*l*)(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]

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[7] 34 C.F.R. § 104.4(b)(1)(i)-(iv), (vii), (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

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[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]

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[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.

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[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]

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[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).

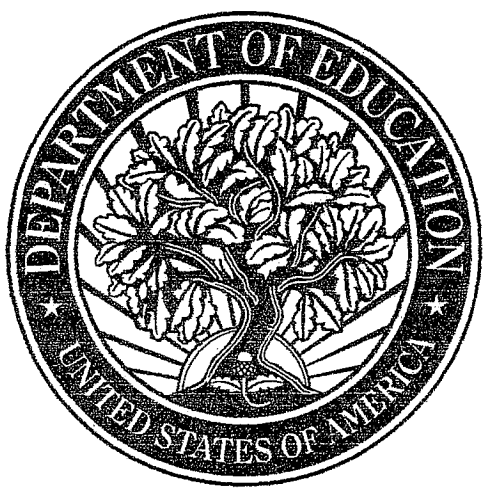
Please do not hesitate to contact us if we can provide assistance in your efforts to address this issue or if you have other civil rights concerns. I look forward to continuing our work together to ensure that students with disabilities receive an equal opportunity to participate in a school district's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

Sincerely,

/s/

Seth M. Galanter
Acting Assistant Secretary for Civil Rights

CREATING EQUAL OPPORTUNITIES FOR CHILDREN AND YOUTH WITH DISABILITIES TO PARTICIPATE IN PHYSICAL EDUCATION AND EXTRACURRICULAR ATHLETICS



AUGUST, 2011

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U.S, Department of Education
Arne Duncan
Secretary

Office of Special Education and Rehabilitative Services (OSERS)
Alexa Posny
Assistant Secretary

Office of Special Education Programs
Melody Musgrove
Director

August 2011

CONTENTS

OVERVIEW

Physical inactivity is high among many children. In 2009, less than 25% of youth participated in at least 60 minutes of physical activity on any of the previous seven days according to the national Youth Risk Behavior Survey (U. S. Department of Health and Human Services, 2010). The President's Council on Physical Fitness and Sports Research Digest reported that physical activity is 4.5 times lower for children and youth with disabilities than their peers without disabilities (Rimmer, 2008). The patterns of inactivity in childhood and adolescence track to higher rates of inactivity, obesity, and other health problems in adulthood. Among some young people with disabilities, the lower rates of physical activity may be related to the lack of physical capacity to perform certain activities and the lack of appropriate opportunities for physical activity and athletics.

Adults with disabilities report the barriers to health and fitness "include cost of memberships, lack of transportation to fitness centers, lack of information on available and accessible facilities and programs, lack of accessible exercise equipment that can be purchased for home use, and the perception that fitness facilities are unfriendly environments for those with a disability" (Rimmer, 2008, p. 3). The feelings related to lack of access and being unwelcomed reflect a continuation of behavioral and emotional patterns begun in childhood. Typically, children and youth with disabilities engage in very little school-based physical activity, less healthy after-school activity, and more sedentary amusements (Rimmer & Rowland, 2007).

A report by the United States Government Accountability Office (GAO-10-519) revealed that, despite legislation obligating states and schools to provide equal access, opportunities for physical activity are limited for children and youth with disabilities (GAO, 2010). This

document is the initial response to the GAO recommendation that "the Secretary of Education facilitate information sharing among states and schools on ways to provide opportunities in [physical education] PE and extracurricular athletics to students with disabilities" (p. 32). The purposes of this document are to disseminate information on improving opportunities for children and youth to access PE and athletics and to refer the reader to sources of additional information regarding the inclusion of children and youth with disabilities in PE and athletic extracurricular activities. The Office for Civil Rights (OCR) in the U.S. Department of Education (Department) is providing separate and additional guidance on the legal aspects of the provision of extracurricular athletic opportunities to students with disabilities to comply with the second recommendation by the GAO to the Department in its report.

This document includes an overview of the problem, suggestions to increase opportunities for children and youth to access PE and athletics, and three appendices. Appendix A includes references from the field, Appendix B includes an example of a State law that addresses equal opportunity to access PE and athletics, and Appendix C lists projects and collaborative efforts that address physical activity among people with disabilities and includes links to Department-funded projects preparing adapted physical education personnel.

Federal Laws

States and schools are required to provide equal opportunity to participate in physical education and extracurricular athletics by children and youth with and without disabilities. The Individuals with Disabilities Education Act (IDEA) requires schools to provide a "free appropriate public education" in the "least restrictive environment." The definition of "special education" in section 602(29) of the IDEA includes instruction in physical education. Therefore, for some students with disabilities instruction in physical education may be a part of the special

education services prescribed in their individualized education program (IEP). Section 504 of the Rehabilitation Act (Section 504) and Title II of the Americans with Disabilities Act (Title II) are federal civil rights laws that prohibit disability discrimination, including in public schools. Under Section 504, schools that receive Federal financial assistance must ensure that children and youth with disabilities have an equal opportunity to participate in the program or activity of the school, including extracurricular activities. Under Title II, public entities, including public schools, may not discriminate on the basis of disability in providing their services, programs, and activities.

OCR enforces Section 504 and Title II in the context of education. OCR investigates complaints of discrimination on the basis of race, color, national origin, sex, disability, or age pursuant to these and other laws. OCR collaborates with the Office of Special Education and Rehabilitative Services in supporting improved educational opportunities for children and youth with disabilities through policy guidance, technical assistance, and information dissemination.

IDEA defines a child with a disability as a child having one of the disabilities specified in section 602(3) of the IDEA who, by reason of the disability, needs special education and related services. The following categories of disability are included in the section 602(3) of the IDEA: developmental delay (only for children under the age of 9); intellectual disability (formerly known as mental retardation); hearing impairments including deafness; speech or language impairments; visual impairments including blindness; emotional disturbance; orthopedic impairments; autism; traumatic brain injury; other health impairments; and specific learning disabilities. Identification criteria are typically developed in state regulations based on the statutory definitions of the specified disability terms in 34 CFR §300.8(c). Some children meet the identification criteria for more than one disability, (e.g. deaf-blindness or multiple

disabilities). In this document, the term "disabilities" refers to all categories of disability unless specifically noted. This inclusive meaning must inform the readers' understanding and interpretation of the document's suggestions, which are necessarily broad.[1]

Guidelines for Physical Activity

The *2008 Physical Activity Guidelines for Americans* (U. S. Department of Health and Human Services, 2008) recommend that children and youth have 60 minutes of physical activity of moderate and vigorous intensity daily in three types of activity—aerobic activities, muscle-strengthening activities, and bone-strengthening activities. The *Guidelines* include a brief mention of children and youth with disabilities (p. 19):

> Children and adolescents with disabilities are more likely to be inactive than those without disabilities. Youth with disabilities should work with their healthcare provider to understand the types and amounts of physical activity appropriate for them. When possible, children and adolescents with disabilities should meet the Guidelines. When young people are not able to participate in appropriate physical activities to meet the Guidelines, they should be as active as possible and avoid being inactive.

In order to reduce the risk of injury, children and youth are advised to increase their physical activity gradually and to engage in a variety of exercise, sport, and recreation activities.[2]

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[1] Section 504 and the Americans with Disabilities Act use a different definition of disability. For purposes of this document, unless otherwise noted, the term, "disability," means the IDEA definition of disability. Although the authors of the cited works may apply different definitions of the term, "disability," the contents of these works are broadly applicable to children and youth with disabilities receiving services under IDEA.

[2] A variety of exercise, sport, and recreation activities promote balanced aerobic conditioning, muscle strengthening, and bone strengthening. Joints, muscle groups, and other body parts are used differently, thereby reducing the risk of injury due to repetitive motion or overuse (Foley, 2010).

Increased physical activity increases motor skills, which in turn facilitate increased physical activity (Foley, 2010).

The trend of childhood obesity and inactivity is increasing the focus on physical activity among children (e.g. The First Lady's *Let's Move*! campaign--information available at http://www.letsmove.gov/). Not only are inactivity and obesity even more prevalent among children with disabilities (Rimmer, 2008), inactivity and obesity can be more problematic for children and youth with disabilities because they can lead to and exacerbate secondary conditions associated with certain disabilities (Rimmer, Wang, Yamaki, & Davis, 2010).

Limitations in Our Current Knowledge

There is limited understanding of how the research on children without disabilities can be translated into guidance for physical activity programs for children with disabilities (Fleming, 2010). In spite of the public's awareness of the risks of inactivity and obesity, there is limited research providing evidence of effective practices and approaches to increase physical activity, to reduce obesity, and to maintain health among children and youth with disabilities. The few findings of the research done in clinical settings have not been adequately translated for application to PE and athletic activities in school and community settings. As a result of the limited research in this area, states, schools, and educators are faced with the challenge of developing and implementing practices to increase the participation of children and youth with disabilities in PE and athletics without a strong base of research evidence.

Even with the limited research on effective practices, there is growing consensus in the research literature regarding several common barriers to physical activity for children and youth with disabilities. The barriers include inaccessible facilities and equipment (Auxter, Pyfer,

Zittel, & Roth, 2010; Block, 2007; Rimmer, 2008; Rimmer & Rowland, 2007; Simeonsson, Carlson, Huntington, McMillen, & Brent, 2001; and Stanish, 2010); personnel without adequate training (Auxter, et al., 2010; Block, 2007; Rimmer & Rowland, 2007; and Stanish, 2010); and inadequate, non-compliant, or otherwise inaccessible programs and curricula (Auxter, et al., 2010; Block, 2007; Porretta, 2010; Rimmer, 2008; Rimmer & Rowland, 2007; Simeonsson, et al., 2001; and Stanish, 2010). The research base and professional opinion support the following suggestions for improving opportunities for children and youth with disabilities to participate in PE and athletic activity.

SUGGESTIONS TO INCREASE OPPORTUNITIES

States and school districts can increase opportunities for participation by reducing or eliminating common barriers to participation. In this section, we address common barriers and provide suggestions for increasing access.

ACCESSIBILITY

Accessibility includes the considerations of the area or environment in which physical activity takes place, the safety and security within the space, and specifications suggested for particular disabilities. Access is facilitated through adapted PE practices[3] and universal design principles[4] (U. S. Access Board, n.d.). For example, concrete play areas are being replaced by soft surfaces to reduce child injury. Because wood chips and sand interfere with mobility of children and youth in wheelchairs, solid soft surfaces are recommended to allow safe use of play areas by more children and youth (U. S. Access Board, n.d.).

The Title II regulations, which apply to public schools and their facilities, provide requirements for accessibility to persons with disabilities.[5] For example, Title II applies to public schools' play areas and provides requirements for their accessibility by persons with

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[3] "Adapted Physical Education is physical education which has been adapted or modified, so that it is as appropriate for the person with a disability as it is for a person without a disability." (Adapted Physical Education National Standards at http://www.apens.org/whatisape.html)

[4] "The term, 'universal design,' means a concept or philosophy for designing and delivering products and services that are usable by people with the widest possible range of functional capabilities, which include products and services that are directly accessible (without requiring assistive technologies) and products and services that are interoperable with assistive technologies." (See Assistive Technology Act of 1998, as amended, 29 U. S. C. § 3002. IDEA uses the same definition. See 20 U.S.C. § 1401(35).)

[5] Among other things, the Title II regulations provide that new construction of a facility be done so that the facility is readily accessible to and usable by persons with disabilities. New construction and alterations commencing on or after March 15, 2012, are subject to new design standards under the Title II regulations, and these standards include specific requirements for play areas. See 28 C.F.R. §35.151. The Title II regulations also impose a requirement that each service, program or activity of a public entity, when viewed in its entirety, is readily accessible to and usable by persons with disabilities, and they establish program accessibility requirements that include requirements applicable to play areas. See 28 C.F.R. §35.150.

disabilities. Accessibility also refers to the opportunity to use facilities and equipment. Communities that provide accessible transportation to accessible facilities increase the opportunity for physical activity by children and youth with disabilities and their families.

Equipment

Appropriate equipment can help children and youth with disabilities participate in appropriate physical activity. Athletic equipment might need to be modified for safe use by some children and youth with disabilities. For other students with disabilities, specialized equipment may be needed. Activities involving the use of modified or specialized equipment can replace other less safe activities. Treadmills, for example, are effective in providing predictable walking and running conditions, which can be necessary and appropriate for some individuals with disabilities (Stanish, 2010). As another example, gaming systems that support movement detection technologies (e.g., Wii, Xbox 360, and PlayStation 3) can be used by some children and youth with disabilities to participate in sport simulations (Foley, 2010). Physical growth and development and changes in ability require continuous reevaluation and, as needed, modification of the fit and functionality of equipment for children and youth with disabilities.

Personnel Preparation

Knowledgeable adults create the possibility of participation among children and youth both with and without disabilities. Physical activities may be guided by a wide range of support personnel with various levels of training including other students, general and special education teachers, paraprofessionals, adaptive physical education specialists, and related service providers (e.g., occupational therapist or speech language pathologist). Appropriate personnel preparation and professional development to adapt games and activities to various ability and fitness levels are needed in order to increase opportunities for children and youth with disabilities.

Teaching style

Inclusive teaching styles create a climate and culture of participation for children and youth with and without disabilities. The educational philosophy and beliefs of the individual teacher and the school system influence opportunity. Patterns of teaching must be informed by the need to safeguard the civil rights of all students, including those with disabilities, both by providing equal athletic opportunity and protecting students from reasonably foreseeable risks to their health and safety. In PE and athletic programs, the focus has traditionally been on competition rather than instruction, but has recently shifted to "new PE," which focuses on improvements by the individual student. Children and youth with disabilities and those without athletic prowess require adaptive opportunities and precise instruction for concerns such as poor motor coordination (Stanish, 2010).

Management of behavior

Athletics in the school setting involve complex interactions in settings less controlled than the typical academic classroom. Team play and sportsmanship cannot be taught except through participation. Effective PE and athletics require a teacher or coach with strong behavior management skills. Certain disabilities are associated with characteristics that may interfere with the student's ability to act consistently like a good team player or otherwise conform to the social expectations of particular athletic activities. A few of these characteristics include poor impulse control, limited social awareness, and emotional lability.[6] School personnel should have the knowledge, skills, and abilities to address the interactional components of disabilities within the context of competition. Children and youth with and without disabilities can participate in PE

[6] "Emotional lability is a condition of excessive emotional reactions and frequent mood changes." (Mosby's Medical Dictionary, 8th edition, 2009)

and athletics more fully when social, emotional, and behavioral interactions are directly instructed, monitored, and remediated.

PROGRAM OPTIONS

PE and athletics can be offered in various degrees of inclusion in programs and activities with children and youth without disabilities. IDEA requires that each child with a disability participates with nondisabled children in these programs and activities to the maximum extent appropriate to the needs of that child.[7] Physical education services, specially designed if necessary, must be made available to every child with a disability receiving a free appropriate public education, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.[8] Each public agency must take steps to provide nonacademic and extracurricular services and activities, including athletics, in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.[9] For students served under IDEA, the student's IEP must include, among other things, a statement of the special education and related services, and supplementary aids, services, and other supports that are needed to meet each child's unique needs in order for the child to: (1) advance appropriately towards attaining the annual goals; (2) be involved in and make progress in the general education curriculum and to participate in extracurricular and other nonacademic activities; and (3) be educated and

[7] The IDEA Part B regulations in 34 CFR §300.117 require that the public agency ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in nonacademic settings.

[8] The IDEA Part B regulations in 34 CFR §300.108(b) require that each child with a disability must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled full time in a separate facility; or the child needs specially designed physical education, as prescribed in the child's IEP. The regulations in 34 CFR §300.108(d) require the public agency responsible for the education of a child with a disability who is enrolled in a separate facility to ensure that the child receives appropriate physical education services.

[9] The IDEA Part B regulations in 34 CFR §300.107 address nonacademic and extracurricular services and activities.

participate in such activities with other children with disabilities and nondisabled children.[10] The IEP team, which includes both general and special education teachers, might benefit from participation by a general or adaptive physical education teacher in order to develop the IEP for certain students. Section 504 and Title II also reflect the principle of inclusion in their mandate of equal access and require that students with disabilities are served in the most integrated setting appropriate to their needs.

CURRICULUM

Curriculum encompasses more than the age or grade lists of content standards, benchmarks, objectives, strategies, and assessments. Curriculum includes day-to-day implementation, which requires flexibility with the content in context. An accessible PE curriculum provides for that flexibility. Applying the universal design for learning (UDL)[11] framework to the PE curriculum increases opportunities for participation by providing multiple means for student engagement. The variety of options allows children with disabilities to choose activities of interest which increases their participation (Porretta, 2010). UDL also provides multiple means of presentation. Information technology shows promise in providing a new means of presentation. For example, "bug-in-the-ear" communicators allow sideline coaches and instructors to personalize the "real-time" explanation of game rules and procedures based on the needs of individual players with disabilities (Rimmer & Rowland, 2008).

[10] The IDEA Part B regulations in 34 CFR §300.320 (a) address the content required in a child's IEP and §300.320(a)(4) requires a statement of the special education and related services and supplementary aids and services and other supports to be provided to the child.

[11] "The term "universal design for learning" means a scientifically valid framework for guiding educational practice that— (A) provides flexibility in the ways information is presented, in the ways students respond or demonstrate knowledge and skills, and in the ways students are engaged; and (B) reduces barriers in instruction, provides appropriate accommodations, supports, and challenges, and maintains high achievement expectations for all students, including students with disabilities and students who are limited English proficient." (Higher Education Resources and Student Assistance, 20 U.S. C. § 1003)

PE curricula based on physical growth and the development of fitness and socialization can support the inclusion of children and youth with disabilities. The curricular focus on lifelong fitness and health can facilitate forming habits that will follow through to adulthood (Foley, 2010). Teachers and coaches increase successful inclusion by focusing on the camaraderie and fun of activity rather than on competition and winning.

An individual student's IEP must include goals and accommodations for PE and athletics, as needed (IDEA, 20 U. S. C. §1414(d)). The development of IEPs requires collaboration among professionals as well as parent participation. Parents might be reluctant to have their children participate in physical activity due to uncertainty about its effects and the possibility of teasing and ridicule from peers. The IEP team can better support the students' successful access to, and participation in, PE and athletics when these concerns are effectively addressed in the IEP.

Assessment, Progress, Achievement, and Grading

Assessment in PE and athletics should be planned and implemented so that progress and achievement can be rated accurately and fairly. Assessment instruments that compare the individual against herself or himself are able to measure both attainment and growth. These comparisons show the trajectory toward health and fitness, while avoiding the inappropriate application of some standardized benchmarks of health and fitness to children and youth with disabilities. For example, Body Mass Index has been shown to be inappropriate for people with certain disabilities who tend to have a different proportion of lean mass (Rimmer, et al., 2010). Some equipment and technologies may allow for more accurate assessments of the incremental improvements made by children and youth with disabilities. For instance, wheelchair scales increase the accurate measurement of a student's weight and a spreadsheet can track the changes.

Better assessment can lead to better instruction, feedback, grading practices, and ultimately better outcomes for children and youth with disabilities.

When competitive performance is the sole or primary criterion for grades in PE classes, some children and youth with and without disabilities might earn failing grades. The methods used to grade progress and achievement can be used to encourage participation among children and youth with disabilities. For an individual child whose IEP includes annual goals for PE and athletics, the IEP must include a description of how a child's progress towards meeting the annual goals will be measured.

CONCLUSION

The purpose of this document is to disseminate information on improving opportunities for children and youth to access PE and athletics. This document is the Department's initial response to GAO's recommendation, referring the reader to sources of additional information regarding the inclusion of children and youth with disabilities in PE and athletic extracurricular activities. Research and professional opinion support the suggestions for improving opportunities for children and youth with disabilities to participate in PE and athletic activity by addressing common barriers to increase access and participation.

States and school districts can increase opportunities for participation by reducing or eliminating common barriers to participation. The Appendices that follow provide references, examples and resources for increasing equal opportunities for children and youth with disabilities to participate in PE and athletics. The example from Maryland in Appendix B describes the only current state legislation addressing equal opportunity to access PE and athletics. The resources in Appendix C include projects and collaborative efforts that address physical activity among people with disabilities. Links to Department-funded projects preparing adapted physical education personnel are also provided in Appendix C.

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APPENDIX B:
AN EXAMPLE FROM STATE LEGISLATION AND POLICY: MARYLAND

2008 Maryland Fitness and Athletic Equity Act for Students with Disabilities

The Maryland law, unique in the nation and in full effect July 2011, requires local boards of education to develop policies to include students with disabilities in all curricular and extracurricular physical education and athletic programs. Specifically, the schools must provide students with reasonable accommodations to participate, the opportunity to try out for school teams, and access to alternative sports programs.

A Guide for Serving Students with Disabilities in Physical Education

www.marylandpublicschools.org/NR/rdonlyres/84C4C717-B8FF-486B-8659-79F297DF5B38/19715/Servingstudents2.pdf

The Maryland State Department of Education published this guide for schools to comply with the 2008 Maryland Fitness and Athletic Equity Act for Students with Disabilities.[12]

[12] As previously stated on page ii, the resources, information, and links cited in this document are for the readers' convenience and their inclusion herein does not constitute an endorsement by the U.S. Department of Education of any products or services.

APPENDIX C: RESOURCES

National Center on Accessibility

www.ncaonline.org

This center is supported through a cooperative agreement with the National Parks Service. It promotes access and inclusion for people with disabilities to parks, recreation, and tourism. The center promotes personal wellness and community health.

National Center on Physical Activity and Disability

www.ncpad.org

NCPAD is supported by the Centers for Disease Control and Prevention (CDC). It is an information center concerned with physical activity and disability. The center provides an online source for information about people of all ages with disabilities, including Web pages that list resources by categories.

National Consortium for Physical Education and Recreation for Individuals with Disabilities

www.ncperid.org

NCPERID promotes research, professional preparation, service delivery, and advocacy of physical education and recreation for individuals with disabilities.

The President's Challenge

www.presidentschallenge.org/participate/ed-disabilities.shtml

The President's Challenge to increase physical fitness is made to all children, youth, and adults of all ages and abilities. Detailed information about the challenge and resources to support individuals and school or community groups in meeting the challenge are made available through the President's Council on Fitness, Sports & Nutrition.

Project UNIFY

www.specialolympics.org/projectunify.aspx

The Special Olympics' Project UNIFY is supported by the Office of Special Education Programs (OSEP). It is a K-12 intervention that strategically activates youth, engages educators and promotes communities of acceptance and inclusion where all young people are agents of change—fostering respect and dignity for people with Intellectual Disabilities (ID), utilizing the sports and education initiatives of Special Olympics.

ADAPTED PHYSICAL EDUCATION PERSONNEL PREPARATION PROJECTS FUNDED BY THE U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS

Adapted Physical Education Training of U. S. Pacific Islanders Using a Teacher-Consultant Model (Project APERT), University of Hawaii

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Personnel Preparation of Highly Qualified Adapted Physical Education Teachers in Pennsylvania, Slippery Rock University of Pennsylvania

Robert Arnhold, Ph.D.

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Preparation of Fully Credentialed, Highly Qualified Adapted Physical Educators at the Masters Level for Students with Low Incidence Disabilities, Texas Women's University

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Preparation of Leadership Personnel in Adapted Physical Education, Oregon State University

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Project for Preparing Adapted Physical Education, Western Michigan University

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Project P. P. A. P. E.: Professional Preparation of Adapted Physical Education, North Carolina Agricultural and Technical State University

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Using a Hybrid Online Master's Degree Program to Train Qualified Adapted Physical Education Teachers, Western Michigan University

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