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Leveling the Playing Field: Providing Equitable Athletic Opportunities for Disabled Students

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When Congress enacted Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 et seq. ["Title IX"], it forever changed the landscape of interscholastic and intercollegiate sports. Although as the recent Biediger v. Quinnipiac federal lawsuit makes clear, disputes pertaining to gender-based athletic equity still arise, what some originally feared would rend the fabric of school athletics is now recognized as one of its most integral strands. Public school districts, however, are now facing demands for a different form of equitable athletic opportunity, a challenge that could usher in the most dramatic change to school athletics since Title IX's passage 41 years ago.

On January 25, 2013, the United States Department of Education's Office for Civil Rights ["OCR"] issued a "Dear Colleague" letter, or "DCL," regarding the obligation of public schools to provide equitable athletic opportunities to disabled students. As the salutation suggests, OCR characterizes DCLs as a form of collegial "guidance," a friendly conversation between equals. This "guidance" consists of OCR – which has broad investigatory powers and the power to sanction public school districts, including the possible termination of federal funding -- warning academic institutions how it interprets and intends to enforce those laws it has been charged to implement.

The thrust of the January 25 DCL was that students with disabilities have the right under Section 504 of the Rehabilitation Act of 1975 to an equal opportunity to participate in their extracurricular activities, particularly sports. Like Title IX, Section 504 applies to any entity that receives any form of federal funding, and it served as both the forerunner and template for the Americans with Disabilities Act. In the context of education, it covers students who have a physical or mental impairment that substantially limits a major life activity, have a record of such impairment, or are regarded – correctly or incorrectly -- as having such an impairment.

OCR correctly noted that Section 504 had addressed student rights with respect to extracurricular activities since at least the Rehabilitation Act's regulations were implemented in 1977. 34 C.F.R. §104.37. Nonetheless, courts had previously taken the position that "a student has no constitutional right to participate in interscholastic sports; it is a privilege which may be withdrawn by the school or by a voluntary association whose rules the school has agreed to follow." T.H. v. Montana High School Association, 1992 WL 672982 at *4 (D. Mont. Sep. 24, 1992). The only exception to this general rule was "[w]hen participation in interscholastic sports is included as a component of an IEP as a 'related service.'" Id. An "IEP," or

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Individualized Education Plan, is mandated under the Individuals with Disabilities Education Improvement Act of 2004 for students who as a result of his disability requires specialized instruction. The late Judge Dorsey reached the same conclusion in Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (D. Conn. 1996), holding that "[a]lthough there generally is no constitutional right to participate in interscholastic sports . . . inclusion of such activity in an IEP transforms it into a federally protected right." Id., at 671.

In its January 25 DCL, however, OCR made it abundantly clear that it considered the opportunity for disabled students to participate in interscholastic sports to be a federally protected right. It essentially predicated this upon its assertion that Section 504 requires school districts to provide disabled students with a free appropriate public education, that extracurricular activities are a part of that educational mandate, and thus, school districts must provide disabled students with the opportunity to participate in its athletic programs, regardless of whether or not the student has an IEP.

OCR also seeks to differentiate its position from prior court holdings by taking pains to stress that "simply because a student is [disabled] does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district." 1/25/2013 DCL, p. 2. Students must still demonstrate a certain level of skill or ability in order to make a team and districts are only required to provide disabled students with an equitable opportunity to demonstrate that ability. This opportunity, however, applies not only to tryouts but also to actual participation should the student qualify for a particular team.

For example, a hearing-impaired student may be entitled to a sign-language interpreter to relay instructions during tryouts or, upon making the team, during practices and competitions. Similarly, a student who requires assistance with glucose testing or insulin injections would likely be entitled to the provision of someone who can assist him or her with injections during either tryouts or actual events. A student whose grades have been adversely affected by an intellectual or learning disability may still be entitled to participate in athletics despite the fact that his grades would otherwise disqualify him from participation. Likewise, the continued viability of age limitations is in question if someone, due to a cognitive disability, has remained in school past the age of 18.

All of these determinations must be made on an individual basis. Students cannot be precluded from participation because of generalized perceptions or stereotypes. For example, it is illegal for a coach to deny participation to a student because he believes all children with attentional disorders lack the requisite focus or concentration to succeed in a particular sport. Part of this individualized determination is weighing what accommodations or supports would be required to provide the disabled student with opportunity equivalent to his or her non-disabled peers. At the same time, OCR notes that school districts are not required to provide accommodations that would provide the disabled student with a competitive advantage, would pose a safety risk to the student or to other participants, or would fundamentally alter the nature of the sport. There is,

however, a caveat, that being OCR's right to determine, in response to a complaint, what constitutes a fundamental alteration.

Although a school district might seek to rely upon a state athletic conference's requirements, OCR clearly stated that a school district cannot avoid its obligation under Section 504 by relying upon an athletic conference's strictures. To the contrary, OCR expressly states that to do so would violate Section 504, which suggests that school districts have an affirmative duty to contest a conference requirement that did not comport with the law. In any event, because the constituent school districts receive federal funding, if they, in turn, fund the athletic conference, OCR considers the conference to be under its jurisdiction.

OCR provides some relatively common-sense examples of accommodation, such as providing a signal light for hearing-impaired students who cannot hear a starter's pistol in track, yet it neglects to address more problematic situations. For example, disabled students who violate school rules cannot be expelled if their misconduct is a manifestation of their disabilities. Consequently, would a student who violated team rules be permitted to remain on the team if his behavior was linked to his disability? Similarly, what if his oppositional behavior was deemed the cause of his missing practices? Would OCR require the waiver of compliance with team rules or attendance at practices because such a waiver would not fundamentally alter the sport? If a student has social pragmatic deficits and as such is resistant to interacting with others and has difficulty reading non-verbal cues would OCR require individual tryouts, changing areas or even personal coaching?

The answer to these questions could very likely be "yes," for the DCL expressly provides: "OCR would . . . rarely, if ever, find that providing . . . needed aids and service for extracurricular athletics constitutes a fundamental alteration under Section 504." 1/25/2013 DCL, pp. 7-8, n. 17. Additionally, OCR unambiguously advises: "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 . . . such a defense would rarely, if ever, prevail in the context of extracurricular activities." Id. Thus, despite espousing a reasonable application of these requirements, it makes very clear that school districts have an extremely high burden when attempting to establish that its individualized determinations were appropriate.

Although OCR stresses that school districts must ensure that disabled students participate with non-disabled students in extracurricular activities to the maximum extent possible, the DCL further provides that if such participation opportunities are not available to disabled children, school districts should create additional opportunities for these students. Borrowing from Title IX, which it also enforces, OCR requires schools to assess possible interest in such teams, and if there is insufficient inter-district interest, then districts should consider developing district-wide or regional teams, co-educational teams, or "unified" sports teams in which both disabled and non-disabled students participate. OCR further advises that districts should provide equivalent financial support to these teams as to its more traditional teams, keeping in mind that, again, claims that such expenditures constitute an undue financial burden are essentially not permitted.

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Obviously, no one can argue with the underlying desire to ensure that disabled students have similar opportunities as their non-disabled peers. At the same time, it is evident from the tone and substance of the January 25 DCL that OCR is staking a new frontier in equitable athletic opportunities. As a civil rights statute, Section 504 provides not only recourse through OCR but also the right to initiate civil actions, and unlike Title IX, individual liability is available in Section 504 cases. Consequently, school districts are facing the possibility of closer governmental scrutiny and increased litigation as OCR seeks to further level the athletic playing field.

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