



VIA EMAIL AND USPS

May 20, 2013

The Honorable Seth M. Galanter
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Dear Colleague Letter Issued January 25, 2013

Dear Mr. Galanter:

The National School Boards Association (NSBA) shares the Department of Education's (US Ed) deep concern for protecting students, disabled and non-disabled, from all forms of discrimination in our nation's schools, including those students with disabilities who may wish to participate in their public school district's extracurricular athletics program. NSBA is committed to helping school districts across the country develop and implement policies to address discrimination against all students,¹ to create a school climate of inclusion in all educational programs offered by public schools,²

opportunities to participate in their school district's extracurricular athletics program.

NSBA's concerns with the DCL fall into three main areas of inquiry:

- I. Expansion of OCR's View of Its Authority Under Section 504
- II. Confusing Blend of OCR Enforcement Standards
- III. Need for Clarity in Ultimate Conclusions in DCL

I.

In the DCL, OCR appears to be taking a more expansive view of its authority under Section 504 to regulate the conduct of school districts with respect to the issues listed below.

A. Individual Assessments.

OCR's regulation⁶ on evaluations of students with disabilities focuses on individual assessments of a student's *educational* abilities and possible need for modifications, services, and/or aides in the classroom, basing those decisions on educational data, testing, academic performance, and input from a student's *educators*. However, in the DCL, it now seems that OCR is suggesting, possibly requiring, that an individual assessment of a disabled student's ability to participate in athletics needs to take place, as well.⁷

will create confusion that detracts from an understanding of the requirements of the law. This lack of clarification will also invite courts to sanction what amounts to un-promulgated, untested rules under the guise of deference to US Ed, which would deny both OCR and school districts the opportunity respectively to consider and provide valuable input that could facilitate the implementation and development of effective guidance.

C. Need for Clarity as to Availability of Other Modifications.

The DCL appears to expand a school district's obligations under Section 504 by requiring districts to do more than demonstrate that a specific requested modification would constitute a fundamental alteration to limit a student's participation in extracurricular athletics. Instead, the DCL appears to create and impose on the school district an affirmative obligation by which the district **–is required** to determine whether other modifications might be available that would permit the student's participation. While some alternative modifications may be readily apparent to the district, this may not always be the case. In such situations, it is unclear to what extent and at what point a school district may cease its inquiry into the availability of other modifications, and not be found out of compliance. In essence, how much searching is enough and how great should the scope of the inquiry be?

II. Confusing Blend of OCR Enforcement Standards.

A. FAPE vs. –Equal Opportunity to Participate.

OCR also should clarify its position on the application of OCR's statutorily

render most of the hundreds of thousands of current IEPs in public school districts across the country insufficient under the IDEA as to this particular issue.

But, the confusion does not stop there. Because the Section 504 regulations could be read to mean literally a –free appropriate public *education*, participation in a public school’s *extracurricular athletics* program could be understood to be purely *elective* and not related to the student’s *required* educational component. This appears to be supported by the DCL’s treatment of the Section 504 regulations, which discuss a disabled student’s evaluation and placement in terms of *educational*, rather than *athletic*, needs. Similarly, much of the DCL speaks to this –equal opportunity in looking at disabled students’ requests to participate. Thus, it would seem that a FAPE standard would have no applicability to extracurricular athletics activities, particularly when looking at Section 104.37(a)(1), which focuses on an –equal opportunity for participation. This confusion will create a new litigious path for those plaintiffs seeking to capitalize on a school district’s uncertainty as to how to identify and meet its obligations to accommodate a disabled student’s request for an opportunity to

C. No Mandates to Create New Teams.

In its discussion about a school district's consideration of creating –separate and different teams for students with disabilities, through any of the avenues identified, OCR may be overstepping its federal statutory bounds by inserting itself into a local school district's ability to guide its own programs.²⁴ Moreover, when the DCL states that –support for such teams should be provided equally to that of the school district's other athletic activities, OCR may be creating another unfunded mandate.²⁵ At a time when school districts struggle to meet the fiscal demands brought about by the recent national economic down turn, the federal government should be partnering with school districts to address these challenges, rather than burdening local communities with federal, one-size-fits-all overregulation.

Fiscal realities notwithstanding, NSBA agrees that expanded athletic opportunities for students with disabilities may provide a worthwhile benefit to many students, both disabled and nondisabled. Many school districts in the nation are actively developing and implementing these types of opportunities, with allied and unified sports programs being among the most popular and beneficial. School districts implement these programs because they believe in their value, and

IV. Conclusion.

It is our hope that through NSBA's comments here, OCR recognizes and addresses some unintended legal and practical challenges arising from the DCL. First, the DCL puts forward an expansive view of the requirements of Section 504 for school districts regarding equal opportunities for participation by students with disabilities in extracurricular athletics, and increases the potential for exposure of school districts to liability. Second, the DCL may encourage litigation by plaintiffs' attorneys relying on similarly expansive views of the law and confusion on the appropriate enforcement standards to be used in investigating Section 504 cases related to the provision of equal opportunities for participation of students with disabilities in extracurricular athletics. Lastly, OCR, through its DCL, seems to overstep its federal statutory bounds regarding US Ed's ability to insert itself into a school district's authority to direct its own educational programs, particularly interscholastic athletics. To this final point, NSBA cautions OCR against the use of informal guidance such as a DCL in a way that expands the substance and applicability of federal law and rules administered by US Ed. Because the informal guidance practice utilized by OCR lacks the formal input of important stakeholders that is part and parcel of the formal rule-making process, US Ed is denying itself the opportunity to understand the needs of school districts in a way that can help the agency develop truly useful guidance to meet and implement the objectives of the law. NSBA urges OCR to reach out to school boards, school attorneys, administrators, educators and other school officials in addition to parents and students, in a collaborative spirit to identify realistic, workable solutions to implementation across the spectrum of laws and rules enforced by US Ed and OCR.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose to keep schools free from discrimination and the exclusion of any student, not just those with disabilities, who want the opportunity to participate in extracurricular athletics. We look forward to working with OCR to develop guidance and resources to help schools understand the requirements of the law in supporting such an environment, and, specifically, in responding effectively to the requests of students with disabilities in this area. We continue to be available to OCR and US Ed for consultation to provide the perspective of school boards and their counsel *before* issuance of guidance such as the latest DCL. NSBA stands ready to work in partnership with OCR on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

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Francisco M. Negrón, Jr.
General Counsel
National School Boards Association