IASB Special Report
Commentary on Education Issues

A School District's Responsibilities to Students With Disabilities in Extra-Curricular Activities

Recently, the United States Department of Education, Office for Civil Rights ("OCR"), issued a "Dear Colleague" Letter designed to serve as guidance in answering the question of when and how a student with disabilities protected by Section 504 of the Rehabilitation Act of 1973 has the right to participate in extra-curricular activities.

The Letter itself has no force of law; it is merely designed to give school districts a 'heads-up' as to how to approach these situations. In that respect, it is quite helpful. From a legal perspective, it appears the OCR continues to hold a very broad view of the law, judging by their rules and their interpretations of the statute. The Office of Civil Rights apparently does not see or value the distinction between Section 504 and the Individuals with Disabilities Act (aka "IDEA" or "special education"). The IDEA is a *proactive law* requiring school districts to find and service students with disabilities and offer each one FAPE: a Free Appropriate Public Education. It's a "Thou Shalt" law, if you will. In contrast, Section 504 is a *prohibition*; recipients of federal funds may not discriminate against individuals solely on the basis of their disability. It is a "Thou Shalt Not" law. Nevertheless, OCR applies FAPE and its obligations in its regulations under Section 504.

Procedurally, OCR, an office within the U.S. Department of Education, has the power to 'cite' a school district for what OCR believes is a violation of any law it administers. There is an appeal process, of course, but it's still within the U.S.D.E. An appealing entity has to exhaust the internal appeals processes before it can go to court to get a judge's view of whether or not the district has violated the law. It is not unusual for a court to disagree with O.C.R./U.S.E.D.'s determination.

What is "Section 504"?

Veteran school board members are probably familiar with Section 504, but a brief synopsis for those who are not is in order.

Section 504 is a federal law that applies to any entity that receives federal funds, prohibiting that entity from discriminating against a person with a disability as defined by the law. It was conceived and enacted as a post-war era effort to assure that war veterans were not discriminated against in public education or employment with governmental entities. However, Section 504's applicability has grown much broader over time.

The prohibition in the law itself is only one sentence long:

> *No otherwise qualified individual with a disability in the United States, ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

This Special Report will focus on the ins and outs of the rights of a student with a disability to participate in extra-curricular activities, as well as the process for determining that, because the focus of the "Dear Colleague" Letter is on extra-curricular activities.

Despite its simplicity, two phrases in Section 504 initially require both a legal and practical analysis: "person with a disability" and "otherwise qualified." With respect to the first phrase, most students wishing to engage in extra-curricular activities will most likely have already been assessed for disabilities. In a nutshell, a qualifying disability is any condition that is not short-term and "substantially impairs" any of the student's major life functions -- from breathing to learning. With respect to the other phrase at issue early in the analysis, the U.S. Supreme Court wrote in its first opportunity to examine Section 504, "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." The lower court in that case had put it even more clearly: "[o]therwise qualified, can only be read to mean otherwise able to function sufficiently in the position sought in spite of the handicap, if proper training and facilities are suitable and available." In short, a district or school receiving federal funds cannot exclude a student who can play a sport, play an instrument, sing or act (for example) from the activity just because s/he has a disability.

The essential questions to be asked, after determining that the student has a disability as defined in the law and regulations, is this: *Can s/he perform the activity desired despite her/his handicap?* If not, the district must ask, C*ould the student perform the activity if s/he is given specific supports, aid, or services*? If no, the answer is that the student does not have a *right to participate*. If yes, the question then becomes whether those supports, aids, and/or services are "reasonable." See the flow chart at the end of this Special Report.

The "Dear Colleague" Letter:
Guidance from the U.S. Dept. of Education, Office of Civil Rights
The Letter, issued this past January, reminds school districts of their obligations to students with disabilities, including having in place a grievance procedure or due process avenue for resolving complaints of possible violations of Section 504. *Note: It would be wise for districts to have their school attorney review any decision denying a grievance (finding no violation by the district) even -- or especially -- if that attorney was not involved in an advisory capacity during the due process grievance procedure.*

After giving an overview of the OCR's view of the law's applicability to any and all school activities, the "Dear Colleague" Letter then moves to the first of its three main precepts:

(1) DO NOT ACT ON GENERALIZATIONS OR STEREOTYPES
An example was given of a coach who didn't play a member of the lacrosse team, one whom he knew had a certain learning disability. He wrongfully held the view that all students with that type of disability were unable to play well under the time and pressure of a real game. He also thought that allowing the student to be on the team and to participate fully in practices was sufficient to fulfill the district's obligation under Section 504. He was wrong. His decision not to play her in competition lacked a factual basis and data; it was made purely on a stereotype.

The second precept as laid out in the Guidance is:

(2) ENSURE EQUAL OPPORTUNITY FOR PARTICIPATION
This is where school districts may have to think creatively, as often a student with a physical disability can be included with only a few small modifications, or when aids and/or services are provided. The example given in the Letter was of a track athlete with a severe hearing impairment who asked the district's athletic staff to use a visual cue either in place of or in addition to the usual starter gun. School personnel agreed to do so at practices, but balked at using them (and requiring other schools to use them) at meets, reasoning -- without any evidence to prove it -- that the visual cue could distract other runners and the whole issue could generate complaints.

The modifications recommended in that example were minimal and free. No additional personnel were needed; no expensive gadgets and gizmos were required. Thus, they were "reasonable." Moreover, as mentioned above, there was no data supporting the mere supposition that using the visual cues at away meets would be objectionable to the other schools or a problem for their athletes. In short the student's request should have been granted in this example.

But what if the modifications requested as necessary are unreasonable due to cost? Or, if they would violate real safety standards? Or would "fundamentally alter the activity or sport"? Or if using them would give the student with

a disability an unfair advantage? These are all acceptable reasons to deny a ***particular*** modification, service, or form of assistance. But effort should be made to think of other ways to enable a student to participate fully before a school district rejects the student's request to participate.

Two examples of the above-mentioned factors were included, one of which is very similar to a situation in Iowa. In the Dear Colleague Letter's example, a student who was born without a hand on one arm was a competitive swimmer who qualified for the school's team. However, one of the rules for a certain stroke/race required that the swimmer touch the pool wall with both hands at the end of the race. The swimmer in this example, of course, asked that the rule be waived for her. She didn't have two hands and could not physically comply.

The issue in this scenario raises the "reasonableness" factor in a Section 504 analysis: whether the requested modification (waiving the two-handed touch) is reasonable depends, in part, on whether or not it "fundamentally alters an essential aspect of the activity," or whether it "gives an unfair advantage to" the student with a disability. (Safety was not an issue.) OCR's response was informative:

*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 would not be required.*

In such circumstances, the school district would still be required to determine if other modifications were available... for example (there would be no unfair advantage if the swim judge would consider) the student to have finished (the race) 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 ... and allowed the student to compete.

A situation in Iowa involved a swimmer with an ankle that was deformed, either at birth or due to injury. Two standard requirements got in his way in terms of competing. The first involved a requirement of the motion and placement of the swimmer's feet, with which he could not physically comply. The second was his inability to enter a race from the starting block, due to the same disability. The state athletic association agreed to waive the requirement for this swimmer on both counts. He would begin the race in the water, and there would be no deduction or elimination for his feet not being in compliance with the rule. It appears the parties correctly concluded that the feet movement was not an "essential aspect of the activity," and that his starting the race in the water was not going to give him an "unfair advantage" over other swimmers.

The Iowa High School Athletic Association ("IHSAA") and Iowa Girls High School Athletic Union ("IGHSAU") have both dealt with requests over the years for accommodations for student athletes with disabilities and have a history of cooperation. In addition to the example above, the IHSAA granted a request that a student golfer with a deformed ankle be permitted to use a cart. Another student with a disability, one that prevented him from writing small letters and numbers, was allowed to have another golfer record his score for him. A wrestler missing a limb was allowed to begin a match or period in an altered starting position.

What would you respond to a blind student who wants to run cross-country? Too dangerous? True, but what about reasonable modifications? One of the Iowa athletic associations permitted a blind runner to participate in cross country being tethered to a sighted non-participant who led the way. Problem solved.

The IGHSAU has given permission to a wrestling cheerleader with cerebral palsy to use a scooter to move from one mat to another, limited only by situations and locations where the use of the scooter would create a safety hazard. This accommodation was acceptable to the cheerleader and the wrestling tournament officials.

Another school district came to the conclusion that a young lady with cerebral palsy could try out for cheerleading, as they realized that the function of a cheerleader was to excite the crowd, infusing enthusiasm and support for the team, not to turn cartwheels and perform gymnastic stunts. The young lady was permitted to try out and she made the team, wheelchair and all.

Another example provided in the Dear Colleague Letter involved a diabetic elementary student who received, as the essence of his 504 plan, assistance with glucose testing and insulin administration from trained school personnel during the school day. When he decided to go out for gymnastics, an after-school extra-curricular activity sponsored by his school and involving a cooperative arrangement with a local gymnastics club, the school declined to continue the services provided because the gymnastics club was an extra-curricular activity. The answer to this one is easy: the law covers all "programs and activities" of the school. The student's request should have been granted; personnel needed to be supplied to test his glucose levels and administer insulin as needed in the after-school activity, just as it was during the school day. (Note: The fact that the program was a co-op with a non-school entity did not absolve the district of its responsibilities to the student under Section 504.)

The final precept of the 2013 Dear Colleague Letter relates to:

(3) OFFERING SEPARATE OR DIFFERENT ATHLETIC OPPORTUNITIES
The OCR begins by encouraging all schools to work with their communities and athletic associations to include all students with disabilities in a wide variety of athletic and non-athletic extra-curricular activities.

The Letter's stickiest wicket, if you will, arises when discussing the rights of a student who cannot participate in one or more activities, even with reasonable modifications. *Is the school r**equired to create a program** for students with disabilities?* The OCR's answer was, in short, the school "should" create additional opportunities for those students. It is noteworthy that OCR's "should" was not accompanied by a citation to authority; this indicates there is probably no cases or regulations that support the premise that creating a program is required.

It's hard to disagree with the proposition that "students 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." But is "should have" the same thing as "have a right to"? In saying they "should," the OCR is out on a narrow and unstable legal limb on this issue.

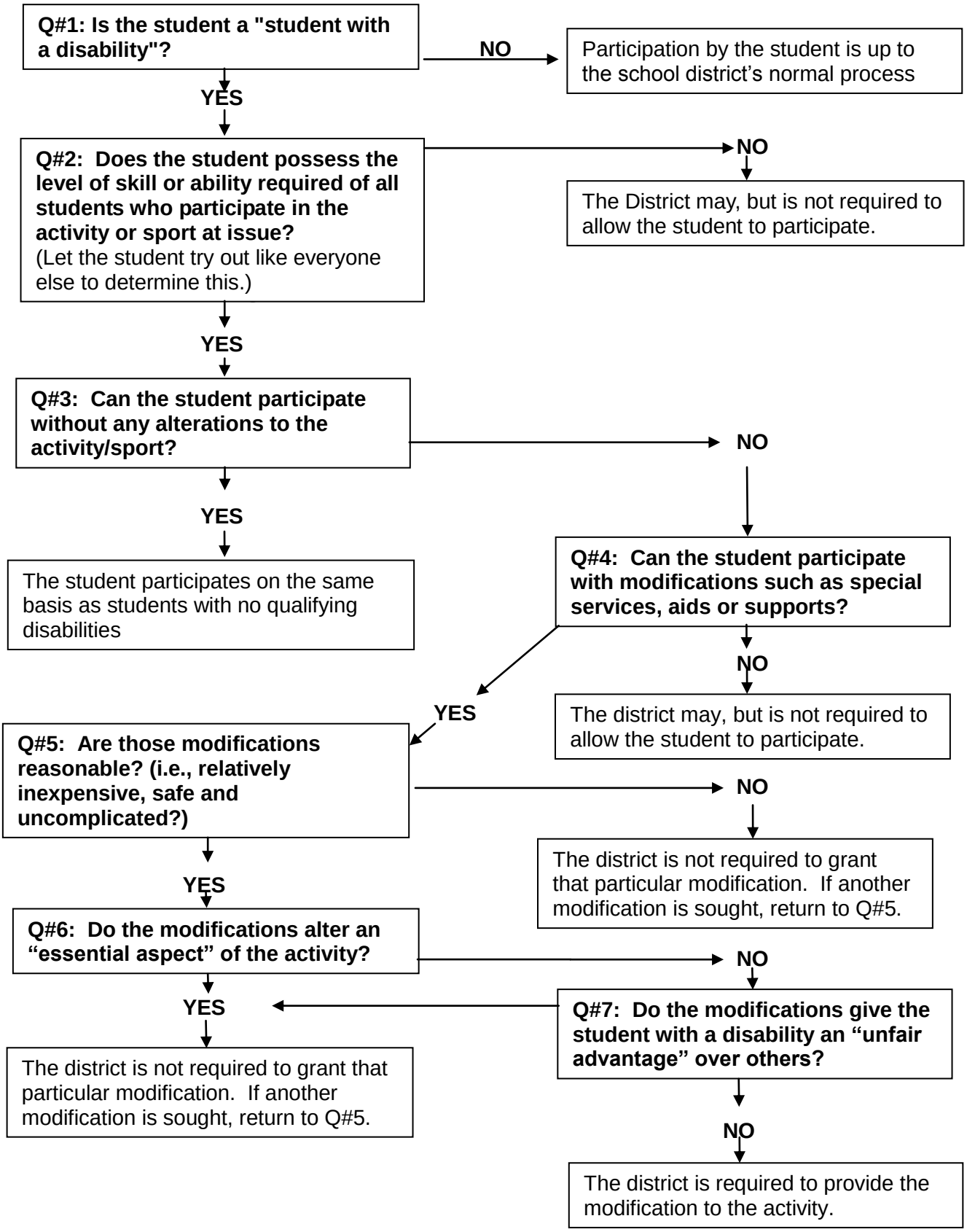
Fortunately, state athletic associations, including Iowa's, have created many opportunities willingly. Wheelchair basketball contests, wheelchair opportunities in track and field events and wheelchair tennis and table tennis tournaments exist in many states. The Special Olympics is a wonderful opportunity for children and teens with disabilities to experience "the thrill of victory and the agony of defeat." In terms of creating events and activities for kids with disabilities, our nation has come a long way in a relatively short time. The IHSAA and IGHSAU are excellent resources for school officials to turn to if they have a student who wants to participate in extra-curricular activities but the district has no opportunities, or because of legitimate safety concerns, or other legitimate reasons.

Conclusion

The state associations are also an excellent resource for guidance and ideas, as they would be aware of similar requests and responses (modifications granted) elsewhere. And of course, the internet is a boundless source of information. If you have a student with a prosthetic leg, for example, who wants to compete in track, you can Google "sports program alterations + track + prosthetic leg" and that would give you a good start in finding out what other schools -- everywhere -- have done in terms of program modifications, if any, for such a student. In other words, resources abound, so there is no excuse for making uninformed decisions about students' requests for accommodations to allow them to participate in extra-curricular activities despite their disabilities.

It is not enough that school board members are aware of and able to respond intelligently to inquiries regarding extra-curricular activities for students with disabilities. It is equally, if not more important, that a school's athletic director, its coaches, and its activity sponsors are also aware of the law. It is in everyone's best interest that the right decision be made, regardless of whether the student/parent approaches the coach or activity sponsor, the principal or superintendent, or the school board.

FLOW CHART
FOR ADDRESSING REQUESTS FROM
STUDENTS WITH DISABILITIES



Cites
IASB Section 504 Manual
IASB Equal Educational Opportunity Policy and Regulations, including the mandatory Grievance Procedure Regulation
Special Olympics - http://www.soiowa.org/
Para Olympics - http://www.paralympic.org/
Iowa High School Athletic Association - http://www.iahsaa.org/
Iowa Girls High School Athletic Union - http://www.ighsau.org/

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