

Nonacademic and Extracurricular Activities: Where Does FAPE End and Access Begin?

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IDEA 2004 and Extracurricular Activities

Under the IDEA 2004, an IEP must include, among other things, a statement of the special education and related services and supplementary aids and services to be provided to the child and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved in and make progress in the general education curriculum and *to participate in extracurricular and other nonacademic activities*. 20 USC § 1414(d)(1)(A)(i)(IV)(bb); and 34 CFR § 300.320(a)(4)(ii) (emphasis added).

34 CFR § 300.107

Section 300.107, defines free appropriate public education as it relates to state eligibility for federal funding:

(a) Each public agency must take steps, *including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities* in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

34 CFR § 300.107

Section 300.107, defines free appropriate public education as it relates to state eligibility for federal funding:

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

34 CFR § 300.117

Section 300.117, deals with the LRE environment requirement and provides the following:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. *The public agency must 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.*

SELECT CASES

Indep. Sch. Dist. No. 12, Centennial v. Minnesota Dep't of Educ., 55 IDELR 140 (Minn. 2010), *cert. denied*, 111 LRP 12740 (2011).

The Minnesota Supreme Court upheld a decision finding that the school district violated the IDEA when the IEP team refused to consider the supplementary aids and services necessary to support a fifth-grader with autism and Tourette syndrome in extracurricular activities. School district's outright refusal to provide accommodations was a violation of the IDEA because the school failed to convene an IEP team meeting to consider supplementary aids and services to support the student in volleyball, afterschool clubs, and an offsite graduation party.

North West Hendricks Schs., 114 LRP 25135
(SEA IA 2014)

Finding that district violated a disabled student's IEP that required access to all nonacademic and extracurricular activities available to nondisabled students when the student's teachers unilaterally decided to exclude him from singing in the curricular afterschool choir recitals that counted as a grade, and never invited the student to attend a field trip to the zoo with the rest of the choir class. The school had a policy to not include life skills students in choir performances.

Tahquamenon Area Schs., 115 LRP 23747 (SEA MI 2015)

Finding that a district's failure to address a student's behavioral issues impeded his ability to participate in extracurricular activities as required by his IEP and therefore, denied him FAPE. Even though the student received at least eight disciplinary referrals per month, the district never developed a BIP for him or included positive behavioral interventions in his IEP. As a result, the child continued to act out in class and was ultimately disqualified from attending a "good behavior" field trip with his nondisabled peers.

*New Mexico Pub. Educ. Dep't, 65 IDELR 159
(SEA NM 2015)*

A 16 year-old student with an intellectual disability, cerebral palsy, mood disorder, and reactive attachment disorder with history of aggressive behavior was denied FAPE when the district developed a new IEP that placed the teen in a special education classroom for a three-hour school day but barred the student from general school activities, and neglected to include or even consider extracurricular activities with appropriate supports the student's IEP. The IEP failed to provide equal opportunities for students with disabilities

Oakstone Community Schs., 114 LRP 53009
(SEA OH 2014).

Finding that charter school did not violate a disabled student's IEP that required access to nonacademic and extracurricular activities when the school offered various extracurricular opportunities to all students, including field trips, holiday celebrations, and other activities—but no sports. The school activities focused more on appropriate social interaction in a community setting.

Wyoming City Schs., 57 IDELR 85
(SEA OH 2011).

Finding that school district violated the IDEA when the decision of what supplementary aids and services were necessary for the student was decided by the swim coach instead of the student's IEP team.

Steines by Steines v. Ohio High Sch. Athletic Ass'n
114 LRP 48977 (S.D. OH 2014).

9th grade student with a learning disability and ADHD whose parents lived in Kentucky but who attended school in Ohio because of his disabilities must be reasonably accommodated under the ADA. Student could not be precluded from playing soccer on his high school team because of certain Ohio High School Athletic Association in-state residency criteria preventing participation. Court noted that waiver would not impose undue financial and administrative burdens, or require a fundamental alteration in the nature of the program.

Alcorn County Sch. Dist., 53 IDELR 136 (SEA MS 2009).

Hearing officer found that the school district violated the IDEA when it removed a student from the high school marching band as a result of behaviors cause by his disabilities of both ADHD and Asperger syndrome when District had failed to provide required counseling in his IEP.

Santa Fe R-X Sch. Dist., 113 LRP 35630 (SEA MS 2013).

School district did not violate the IDEA when District personnel refused to make e-mail notice to the parent of all extracurricular activities in which the student was eligible to participate a component of the student's IEP. Hearing officer agreed with the District that such action was not necessary or required. Hearing noted that the District took a variety of steps to ensure that parents and students were aware of extracurricular activities, including through its online calendar, a "text-cast" that described a variety of upcoming activities, daily announcements, in-class sign-up sheets, parent-teacher conferences, and the student's own planner.

Section 504 and Extracurricular Activities

34 CFR § 104.37

Nonacademic services. (a) *General.* (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an *equal opportunity for participation in such services and activities.* (emphasis added)

34 CFR § 104.37(c)(1)

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies ***may not discriminate on the basis of handicap.*** A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics ***shall provide to qualified handicapped students an equal opportunity for participation.*** (emphasis added)

34 CFR § 104.37(c)(2)

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to non-handicapped students *only if* separation or differentiation is consistent with the requirements of § 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different. (emphasis added)

Government Accountability Office Report

In June 2010, the GAO published a report that expressed concerns regarding the amount of athletic opportunities provided to students with disabilities.

- *Students with Disabilities: More Info. and Guidance Could Improve Opportunities in PE and Athletics*, GAO-10-519 (June 2010).

GAO Report

- The percentage of IDEA students who participated in “traditional” school-based extracurricular athletics (that is, athletics not specially designed for students with disabilities) ranged from 6 to 25 percent while other students participated at a much higher rate.
- But, GAO Staff spoke with officials at only 15 schools. Found no national data for comparison purposes.
- Among other things, GAO report recommended that the ED clarify and communicate schools’ responsibilities under Section 504 regarding provision of extracurricular athletics.

Office of Civil Rights' Response

Dear Colleague Letter - January 2013

The GAO report underscored that access to, and participation in, extracurricular athletic opportunities provide important health and social benefits to all students, particularly those with disabilities . . . 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.

- *Dear Colleague Letter*, 60 IDELR 167 (OCR 2013).

DCL Issue #1

District may not operate its program or activity on the basis of

- Generalizations, prejudices, or stereotypes about
 - Disabilities generally; or
 - Specific disabilities in particular.
- Exclusion from extracurricular athletics should be based on an individualized assessment.
- Consistent with previous Section 504 interpretations

DCL Issue #2

Ensure equal opportunity for participation by students with disabilities.

DCL - Excerpts

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. 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 programs.

DCL - Excerpts

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.

Example 1

What would you do?

Hearing impaired student wants to try out for basketball team. He has sign language interpreter in class.

- Should the sign language interpreter be provided at team tryouts?
- If he makes the team, should the interpreter be provided at practices?
- At games?
- Would other modifications have to be provided?

Limitations to the Accommodations

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. (emphasis added).

Dear Colleague Letter, 60 IDELR 167 (OCR 2013). See also *In re: Dear Colleague Letter of Jan. 25, 2013*, 62 IDELR 185 (OCR 2013).

Example 2

What would you do?

Hearing impaired high school student tried out for and made track team.

- At tryouts, coach gave visual cue to start race.
- During practice, coach gave visual cue to start race.
- Before scheduled district meet, he asks for a visual cue when starter gun is fired.
- Reasonable accommodation?

OCR Response – Example 2

- Yes.
- School district is entitled to set its requirements as to skill, ability, and other benchmarks.
- School district must provide a reasonable modification if necessary unless doing so would fundamentally alter the nature of the activity.
- Student met the benchmark requirements as to speed and skill.
- School district was obligated to provide necessary accommodation unless it determined that providing it would constitute a fundamental alteration of the activity.

See Dear Colleague Letter, 60 IDELR 167 (OCR 2013); and In re: Dear Colleague Letter of Jan. 25, 2013, 62 IDELR 185 (OCR 2013).

Example 3

What would you do?

Diabetic Section 504 student requires assistance from trained personnel with glucose testing and insulin administration.

- Student wants to join school-sponsored gymnastics club.
- Club meets after school.
- Student is eligible to be a member.
- Parent wants glucose testing and insulin administration after school while student participates.
- Reasonable accommodation?

OCR Response – Example 3

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 program.

See Dear Colleague Letter, 60 IDELR 167 (OCR 2013); and In re: Dear Colleague Letter of Jan. 25, 2013, 62 IDELR 185 (OCR 2013).

The Overall Conclusion from OCR Guidance

Unless the accommodation would alter the sport or athletic program, or the accommodation would create an unfair advantage for the student with disabilities, the school district should seriously consider making the accommodation for the student's disabilities.

Is the student with a disability guaranteed a spot on the team?

- Student unable to wear hearing aids during athletic activity.
- Student tried out for the high school basketball team.
- Coach used dry erase boards, used hand signals, and spoke directly to her, so she could read his lips.
- After the three-day tryouts, the student was cut from the team because of
 - Poor ball handling
 - Inability to make good passes
 - Difficulty handling defensive pressure; and,
 - Poor physical condition.

Was the school district required to include the student as an athlete on the basketball team?

OCR's Response

Because other students were cut from tryouts for the same reason, and because these are nondiscriminatory reasons for cutting a player from playing on a competitive basketball team, these nondiscriminatory reasons were based on certain requisite skills needed to make the team. “OCR will not substitute its judgment for that of the coaching staff on the relative abilities of the students who tried out for the team.” - *Abington (PA) Sch. Dist.*, 108 LRP 53229 (OCR 2008).

Some additional clarification from DCL

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 the school district. . . . [S]chool 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 nondiscriminatory.

Duval County (FL) Schs., 66 IDELR 230 (OCR 2015)

A Florida district's receipt of updated medical information regarding the physical abilities of a teen with asthma and ADD justified its delay of the teen's football tryouts. However, OCR found that upon its receipt of information which called into question the teen's ability to fully participate in sports, the district should have convened the teen's 504 team. Its failure to do so deemed the District out of compliance with Section 504 and Title II, OCR determined.

Blissfield (MI) Cmty. Schs., 62 IDELR 95 (OCR 2013)

Provision of equal opportunity to participate does not mean that a student with a disability must be categorically 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. School districts are required to make reasonable modifications and provide 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. Examples, Parent signed the Student up for track, but the Student would not voluntarily stay with the rest of the team during track practices and was not participating as a member of the team. Her attendance at required practices was sporadic and eventually she stopped attending practices at all

Blissfield (MI) Cmty. Schs., 62 IDELR 95 (OCR 2013)

Track: Parent signed the Student up for track, but the Student would not voluntarily stay with the rest of the team during track practices and was not participating as a member of the team. Her attendance at required practices was sporadic and eventually she stopped attending practices at all;

Musical: Student did not audition for the spring 2012 middle school musical, nor did she or the Complainant indicate any interest to the school in the Student participating in the play in an onstage role;

Camp/Dance: the evidence showed that the Student accumulated too many disqualifying points under the written camp eligibility policy for misconduct to be allowed to attend, and that she was in out-of-school suspension during the March school dance and, therefore, not permitted to attend any school function that day.

Cobb County Sch. Dist., 114 LRP 32419 (OCR 2014)

High school cheerleader who failed to make the varsity cheerleading squad was not discriminated against because of her diabetes. The student received a low score on her tryout performance before a panel of judges. She received a low performance score because she executed low tumbling tucks, her dance motions were off count and not precise, and she had a slow running speed. Student was not selected for the varsity team because of her low score not because the "cheerleading coaches did not want to deal with her diabetes" as claimed by her mother.

Midlothian Sch. Dist., 115 LRP 2166 (OCR 2014)

6th grade cheerleader who failed to make the middle school cheerleading squad because of losing points related to absences and two slightly negative teacher recommendations was discriminated against because of her disabilities that included migraines, anxiety and food allergies. OCR found that based on the student's 504 plan that disability-related absences and resultant missed work were inappropriately counted in the teacher evaluations and attendance record for the student. By agreement with OCR, the student was placed on the cheerleading team.

Practice Pointers

1. Be Proactive!

The cases show that nobody wins when the IEP avoids discussing or considering this issue. The IEP team should ask in what extracurricular or nonacademic activities the student is interested in participating. Once that question is answered, the discussion should turn to what services or supports the student needs to have an equal opportunity for participation.

Practice Pointers

2. Be Clear!

There is a difference between access and FAPE. It is important for the IEP to specify whether the student's involvement is required in order for the student to receive FAPE. If the student's participation is essential to FAPE, the IEP should explain why. In addition, the IEP team should discuss how and when the student will be involved.

Practice Pointers

3. And Be Reasonable!

When the team is considering involving a student in a sport, club, or other afterschool program, the relevant staff members who supervise those programs should be involved in the decision-making. But remember, the decision is the purview of the IEP team — it is not up to the coach or supervisor alone!

Practice Pointers

4. Equal Access is Not a Guarantee!

A special education student does not have an absolute right to participate in extracurricular or nonacademic activities merely by virtue of his or her disability. Instead, he or she is entitled only to the same opportunity as his or her nondisabled peers. This means that they have the right to try out, but not necessarily to participate if they do not meet the essential requirements for the team or activity.

THANK YOU!

For allowing me to make this presentation

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