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Nonacademic and Extracurricular Activities:

Where Does FAPE End and Access Begin?

Jan E. Tomsky, Esq.
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Nonacademic and Extracurricular Activities

- Historically, primarily an access/discrimination issue enforced by the Office for Civil Rights
- But FAPE under 504 still a potential issue

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Section 504: Nondiscrimination

- Section 504 of the Rehabilitation Act of 1973:

  "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"

  (29 U.S.C. § 794(a).)

Section 504: Nondiscrimination

- Implementing regulations afford equal opportunity in nonacademic/extracurricular activities:
  - Recipients of federal financial assistance "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."
- (34 C.F.R. § 104.37(a)(1).)

Section 504: Duty to Provide FAPE

- Required by USDE regulations
  - Recipients of public funds
  - Operating public elementary or secondary education programs
  - Shall provide a free appropriate public education
  - To each qualified handicapped person
  - Regarding of the nature/severity of the handicap

CASE EXAMPLES

Lewis Palmer (CO) School District #38
47 IDELR 111 (OCR 2006)

- Student with ADHD
- Behavioral problems included glaring at students, ripping paper
- Denied participation in out-of-town drama conference
- Per OCR: Denial was discriminatory

Half Hollow Hills (NY) Central School District
44 IDELR 220 (OCR 2005)

- Fifth grader with diabetes
- Missed one out of five field trips
- Was failure to provide a nurse a denial of FAPE?
- Per OCR: No

Winooski (VT) School District
46 IDELR 172 (OCR 2006)

- 15-year-old 8th-grader with a non-verbal learning disability and Asperger syndrome
- Student's IEP required some paraprofessional assistance (not 1:1) for art, language arts, and for emotional/behavioral support during lunch and upon arrival at school
- Student's IEP did not require a 1:1 aide to support his student council activities or extracurricular activities such as the skiing program

Winooski (VT) School District
(cont'd)

- Parents filed complaint with OCR
- Alleged a denial of FAPE based on failure to implement IEP
- Failure to provide 1:1 aide to support participation on student council
- Failure to provide 1:1 aide in after-school skiing program

Winooski (VT) School District (cont'd)

- OCR concluded that the district did not discriminate against the student by not providing a 1:1 aide, as the student's IEP did not state that he needed 1:1 assistance for extracurricular activities
- However, OCR affirmed that districts have an obligation to provide disabled students with an equal opportunity to participate in nonacademic/extracurricular activities, which can include providing them assistance to participate effectively, even if the extracurricular activities in question are not listed in the student's IEP or 504 plan

- Since 2004 reauthorization, access and FAPE have converged under the IDEA as well
- Now, the IDEA and its implementing regulations require IEP teams to consider both FAPE and access

WHAT ABOUT FAPE?

- *Letter to Anonymous*, 17 IDELR 180 (OSEP 1990)
- Participation in extracurricular activities must be delineated in the IEP if a necessary component of FAPE

CASELAW (PRIOR TO 2004)

Sayreville Board of Education
39 IDELR 233 (SEA NJ 2003)

- 8th grade student with behavioral issues
- Parent sought emergent relief, challenging the District's decision to bar her from an end-of-school year dinner dance and picnic

Sayreville Board of Education (cont'd)

- District's written policy stated that students would be excluded from "special end of the year activities" if they accumulated "20 total administrative/lunch detentions and/or 3 or more incidents of suspension for the year"
- Student was suspended 4 times and received 25 detentions during the school year

Sayreville Board of Education (cont'd)

- Student asserted her behavior improved during recent months and thus application of policy should be waived to reward her improved behavior and encourage her to continue her good behavior
- Student's IEP provided that she did not require any modifications in order to participate in extracurricular and nonacademic activities, and that she was able to participate in those activities with non-disabled peers

Sayreville Board of Education (cont'd)

- ALJ upheld District's decision to exclude Student from the end-of-year dinner dance and picnic, noting the lack of modifications for extracurricular/non-academic activities in her IEP:

  "The student will hopefully learn from this event that negative behaviors do have consequences"

Socorro Independent School District 36 IDELR 180 (SEA TX 2002)

- High school student with speech impairment, Fragile X syndrome, mild to moderate intellectual disability
- IEP provided for participation in extracurricular activities as manager of the women's softball team, which included traveling with the team and participating in games
- Student was able to fulfill the duties of manager of the team with minimal supervision and modification

Socorro Independent School District (cont'd)

- Coach did not want Student to travel with team or attend games as manager due to concerns that she could not supervise Student at the games
- A school official determined that Student would be permitted to act as manager of the softball team during practices, but not during games
- Parent requested a due process hearing

Socorro Independent School District (cont'd)

- IHO recognized that the IEP must address the student's inclusion in extracurricular/ nonacademic activities. "The [IEP team], and no one else, is charged with determining the need for a disabled student to participate in extracurricular activities."
- Student "will not derive substantial benefit from being permitted to participate in practice as manager of the softball team without being allowed to participate in the games as manager"

Socorro Independent School District (cont'd)

- IHO ordered that Student be allowed to participate in the softball games as manager as set forth in his IEP, and that his IEP team convene to discuss safety and supervision issues and determine appropriate modifications if necessary

Lauderdale County Board of Education
36 IDELR 178 (SEA AL 2002)

- 17-year-old student with visual impairment
- IEP stated he would have an opportunities for participation in extracurricular activities
- Parents argued that, consequently, he was entitled to a spot on the football team
- Hearing officer disagreed

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Federal Law Assigns New Duties to IEP Team

Requirement that IEPs include a statement of:

- Special education and related services and supplementary aids and services to be provided to the child
- Program modifications or supports for school personnel that will be provided for the child to participate in extracurricular and other nonacademic activities

(20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4).)

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Federal Law Assigns New Duties to IEP Team

"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 C.F.R. § 300.107(a), emphasis added.)

Nonacademic Settings

- "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."
- (34 C.F.R. § 300.117.)

Nonacademic/Extracurricular Activities

- 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
  - employment of students, including both employment by the public agency and assistance in making outside employment available.

  (34 C.F.R. 300.107(b).)

A BALANCING ACT FOR IEP TEAMS!

- Consideration of supports necessary to access extracurricular and nonacademic activities
- *AND/OR*
- Requiring such supports as a necessary component of FAPE

CASELAW (SINCE 2006)

- **CONSIDERATION OF SUPPORTS NECESSARY TO ACCESS EXTRACURRICULAR AND NONACADEMIC ACTIVITIES**

Independent School District No. 12, Centennial v. Minnesota Department of Education
55 IDELR 140 (Minn. 2010)

- 5th-grader with autism and Tourette syndrome
- Parents requested supplementary aids and services for student to participate in extracurricular/nonacademic activities:
  - adult supervision after the activity until Student could be picked up
  - access to cell phone during the activity
  - ability to miss some games/practices to manage health concerns/stress

Independent School District No. 12, Centennial (cont'd)

- Parents alleged that district refused to discuss supplementary aids/services at IEP meeting and that district offered 504 meeting instead (!)
- District alleged that Parents asked for 504 meeting
- Resulting 504 plan did not include requested supplementary aids/services
- Parents filed a complaint

Independent School District No. 12, Centennial (cont'd)

- ED held that district violated IDEA by failing to convene an IEP meeting to discuss supplementary aids/services
- Court of Appeals upheld ED's decision in part, but held that IEP need only include supplementary aids/services necessary for participation in activities required for the child's education

Independent School District No. 12, Centennial (cont'd)

- Minnesota Supreme Court reversed in part, holding that an IEP's contents are not restricted to extracurricular/nonacademic activities required to educate a student

Independent School District No. 12, Centennial (cont'd)

- Minnesota Supreme Court reasoned:

  "Requiring disabled students to prove an educational benefit, when nondisabled students need not, does not afford disabled students an equal opportunity to participate in extracurricular and nonacademic activities. Thus, the court of appeals' holding violates the 'equal opportunity' for participation in extracurricular and nonacademic activities required by the plain language of section 300.107."

Wyoming City Schools 57 IDELR 85 (SEA OHIO 2011)

- Middle school student with an auditory processing disorder, hearing loss, and a medical condition that could cause him to become ill while traveling to and from swim meets
- Student claimed that due to his severe communication difficulties, he required a sign language interpreter on the bus to assist him if he became ill

Wyoming City Schools (cont'd)

- District relied on swim coach's opinion that Student did not need an interpreter on bus rides
- Swim coach did not attend the IEP meeting
- PWN did not consider what reasonable accommodations and support services were necessary to provide access to extracurricular activities

Wyoming City Schools (cont'd)

- The ED found that this issue should have been determined at a properly convened IEP meeting
- ED ordered district to reconvene student's IEP meeting and to consider his need for an interpreter on the bus

- **REQUIRING NECESSARY SUPPORTS AS A COMPONENT OF FAPE**

Maple Lake School District, Independent School District 881

108 LRP 21568 (Minn. 2007)

- High school student with cerebral palsy, ADHD, ODD, other disabilities
- Student's IEP included transition goal of participating in extracurricular and community activities

Maple Lake School District, Independent School District 881 (cont'd)

- IEP team offered to introduce student to basketball coach and invited him to help out as team manager
- Coach offered to have student assist at home games by filling up water bottles and cups for players
- Student was provided with team T-shirt and included in team picture
- His name was added to game programs

Maple Lake School District, Independent School District 881 (cont'd)

- Student began to "blossom" and positive peer interactions increased
- However, student was not allowed to travel on the team bus to away games
- Per District policy, only competing athletes were allowed to ride bus to away games
- Policy was consistently enforced

Maple Lake School District, Independent School District 881 (cont'd)

- Student alleged District denied him a FAPE by not allowing him to travel to away games on the team bus

Maple Lake School District, Independent School District 881 (cont'd)

- ALJ found that District took appropriate steps to provide extracurricular services and activities to student as necessary to afford him an equal opportunity for participation in those services and activities
- District showed that "Student participated in extracurricular activities and significantly improved his interaction and communication with his peers, enhancing his self-esteem and broadening his ability to participate in community-based activities"

Alcorn County School District, 53 IDELR 136 (SEA MS 2009)

- High school student with ADHD and Asperger's Syndrome
- Behavioral issues affected classroom instruction, especially in band
- IEP included accommodations relating to band, including counseling as a related service

Alcorn County School District (cont'd)

- Counseling services were not provided during the first semester due to the counselor's resignation
- Student experienced difficulties participating in the marching band
- Student's behaviors bothered other students ("touching them, getting close to them, getting in their face")
- In response, other students mistreated Student

Alcorn County School District (cont'd)

- Student was removed from band because of inappropriate touching of other students without their permission
- Band teacher told Student he would have to stop doing that; Student said, "I can't stop."

Alcorn County School District (cont'd)

- The ALJ, reiterating school districts' IDEA obligations in the context of non-academic/extracurricular settings, found the District denied Student a FAPE
- Student may not be denied opportunity to participate in band if the failure to understand and master the "fundamental" of band is substantially related to the lack of appropriate services and supports

Alcorn County School District (cont'd)

- ALJ noted:

  "It is also true, however, that a student does not have a right to participate in band (including the marching band) solely because of his disability."

In Sum

- Be proactive!
- Don't avoid the conversation
  - Ask what extracurricular/nonacademic activities the student is participating in or is interested in participating in
  - Then turn the discussion to what services/supports the student needs to have an equal opportunity for participation

In Sum

- But be clear!
  - Does the IEP require participation in extracurricular activities to access FAPE?
  - And if so, why? When? How?
- And be reasonable!
  - Involve relevant district staff in decision-making

In Sum

- Equal Access ≠ Guarantee
  - A special education student does not have a right to participate in extracurricular/nonacademic activities solely by virtue of his/her disability
  - Equal access may be necessary to try-outs, but not participation
  - School districts are not required to lower performance standards/fundamental requirements of program to permit a disabled student to participate
  - Beware categorical exclusion

Thank you for your participation!

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