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U.S. Department of Education's "Dear Colleague Letter" Highlights Schools' Responsibility for Accommodating Disabled Students in Extracurricular Activities

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Introduction

On Friday, January 25, 2013, the United States Department of Education Office for Civil Rights ("OCR") issued a "Dear Colleague Letter" ("DCL") focusing on the importance of access to and participation in extracurricular activities for students with disabilities. Many pundits have described this event as the most significant development since the passage of Title IX. This Special Report highlights the requirements clarified by the DCL and outlines specific steps to take in advance of possible OCR action or private litigation.

To ensure equal opportunity to disabled students, the Office of Civil Rights, through the DCL, clarifies and communicates educational institutions' responsibilities under Section 504 of the Rehabilitation Act of 1973 ("Section 504"). The DCL focuses on four main principles:

- An overview of educational institutions' obligations under Section 504;
- The need to conduct individualized assessments rather than acting on presumptions and stereotypes;
- The obligation to provide disabled students with an equal opportunity for participation in nonacademic and extracurricular activities; and
- Situations in which separate or different athletic opportunities are permissible or required.

The DCL primarily addresses the rights, particularly in the area of athletics, of disabled students at public primary and secondary educational institutions that receive federal funds. It is important to note, however, that the same Section 504 obligations apply to postsecondary educational institutions with respect to their extracurricular activities, including intercollegiate, club, and intramural athletics. The Office of Civil Rights recognizes that postsecondary institutions deal with the NCAA and NAIA and provide athletic scholarships to student-athletes to participate on athletic teams. As detailed below, the guidance in the DCL supersedes the applicable rules and bylaws of any other member organizations, presumably including the NCAA. Thus, postsecondary institutions must comply with the mandate of providing equal opportunities to disabled students even when awarding athletic scholarships.

Although the requirements detailed in the DCL are not necessarily new, the DCL provides significant clarification of the heavy burden educational institutions must meet in connection with the accessibility of extracurricular activities to students with disabilities. When implementing policies and procedures to comply with Section 504, educational institutions may look for guidance from their employment practices regarding employing qualified individuals with a disability because of the similarities between Section 504 and the Americans with Disabilities Act, as amended ("ADA").

I. Overview of Section 504 Requirements

The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. Section 504 of the Rehabilitation Act prohibits educational institutions from engaging in the following types of behavior with respect to a *qualified student with a disability*:

- denying the opportunity to participate in or benefit from an aid, benefit, or service;
- affording the opportunity to participate in or benefit from an aid, benefit, or service that is not equal to that afforded to other students without a disability;
- affording an aid, benefit, or service that is not as effective as aids, benefits, or services provided to others and that does not provide an equal opportunity to achieve the same result, gain the same benefit, or reach the same level of achievement as others;
- providing different or separate aid, benefits, or services unless necessary to provide an aid, benefit, or service that is as effective as those provided to others; and
- limiting the enjoyment of any right, privilege, advantage, or opportunity enjoyed by other students without a disability.

These obligations apply with respect to "qualified students with a disability." To be "qualified" under Section 504, the student must be a person of an age at which persons without disabilities are provided such services or during which it is mandatory under state law to provide such services to persons with disabilities or a person to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act.

The Rehabilitation Act's definition of an "individual with a disability" is identical to the ADA's definition. Specifically, for purposes of Section 504, an individual with a disability is someone who:

- has a physical or mental impairment that substantially limits one or more major life activities;
- has a record of such an impairment; or
- is regarded as having such an impairment.

The DCL makes clear that the obligations set forth above supersede legal obligations and rules of associations, organizations, conferences, and leagues in which educational institutions participate. Therefore, educational institutions could violate Section 504 by complying with rules of associations, organizations, conferences, and/or leagues that are inconsistent with their obligations under Section 504. Educational institutions are encouraged to work with their athletic associations, organizations, conferences, and/or leagues to ensure that qualified students with a disability are being provided equal opportunities. It will not be a defense to a claim to rely on the activities of such associations.

II. Conducting Individualized Assessments

Perhaps the greatest challenge in complying with the OCR's DCL stems from the concept of individualized assessment. Educational institutions are not permitted to rely on general presumptions and stereotypes when determining the capabilities of a qualified student with a disability. Rather, educational institutions must make an individualized assessment of each qualified student with a disability to determine the abilities of that particular student. This places a tremendous burden on coaches, athletic directors, and club sponsors to individually evaluate each student with a disability in order to determine whether the particular student possesses the requisite skill set to participate in an extracurricular activity or athletic team.

A. Do Not Act On Generalizations and Stereotypes

In an attempt to clarify an educational institution's obligations regarding individualized assessments, the DCL provided several illustrative factual scenarios. In the first example, the DCL describes a coach who made a decision not to allow a student with a learning disability to participate in any games, after allowing her to practice with the team, without ever considering the student's individual abilities and/or limitations. The coach made this decision because he felt the "time restraints and pressures of an actual game" would prevent the student from successfully participating. The DCL states the coach's actions would constitute a violation of Section 504 because the coach operated on general assumptions about the disability, rather than conducting an individualized inquiry with the student regarding her abilities. It is important to note that the DCL specified that the student did not necessarily have a right to participate in the games. However, the decision on whether the student could participate in games must be based on the same criteria the coach used for all other players, rather than the student's disability.

This factual scenario makes it clear that the OCR expects all decision-makers involved with a student's participation in athletics to be adequately informed and capable of making such evaluations. The OCR also expects an individualized inquiry to take place with regard to each student. Enacting broad rules without examining the specific facts will be considered a violation of Section 504.

B. Engage In the Interactive Process

The DCL's "individualized assessment" requirement is akin to the requirement under the ADA that an employer engage in the interactive process with an employee to ascertain whether a reasonable accommodation is available. The Senate Report on the ADA explained that "[a] problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations . . . [E]mployers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation." S. Rep. No. 101-116, at 34 (1989); *see also* H.R. Rep. No. 101-485, pt. 2, at 65 (1990). In the context of Section 504 and athletics, the educational institution must address the specific limitations of each student. In the example above, the coach relied on his

generalizations or assumptions about the student's disabilities. The DCL makes it clear that this would be a violation of Section 504.

From a practical standpoint, in the case of a student who qualifies for protection under Section 504, in general, "...placement decisions are to be made by a group of persons who are knowledgeable about the child, the meaning of the evaluation data, placement options, least restrictive environment requirements, and comparable facilities." 34 C.F.R. §104.35(c)(3). Thus, it is more than likely that the student's limitations have already been assessed prior to his or her participation in athletics. However, this evaluation was likely done without consideration of a specific sport or activity. While the student's coach or athletic director can use this information as a contributing factor in determining an appropriate accommodation, the educational institution must be careful to take into account physical abilities and/or limitations since the prior evaluation may have only addressed academic limitations.

III. Providing Equal Opportunities

Educational institutions must offer all qualified students with a disability equal opportunities to participate in extracurricular activities. In short, this means educational institutions must provide reasonable accommodations to qualified students with a disability to ensure equal opportunities to participate in extracurricular activities, unless doing so would "fundamentally alter" the extracurricular activity. The concept of "fundamentally alter" is not simple and must be evaluated on a case-by-case basis.

As explained in detail below, this provision is similar to what is required from employers when hiring and employing individuals with a disability under the ADA. Similar to employers, educational institutions may require a certain level of skill to participate in the extracurricular activity and are not required to automatically provide qualified students with a disability with a spot on a team or in an organization. Rather, educational institutions must provide a qualified student with a disability the opportunity to try out or audition for a team or organization.

A. Assessing a Reasonable Modification

When determining whether a reasonable modification is necessary, the educational institution must undertake an individual assessment of the qualified student with a disability. If the accommodation is necessary, the educational institution must allow it unless doing so would fundamentally alter the extracurricular activity.

Under the Rehabilitation Act regulations, educational institutions are required to provide a disabled student with reasonable accommodations to ensure that the institution's requirements do not discriminate on the basis of the student's disability. See 34 C.F.R. § 104.44(a). Similarly, the ADA's implementing regulations require a public entity to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on

the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 35.130(b)(7). The Supreme Court has made clear that an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones. See *Alexander v. Choate,* 469 U.S. 287, 300 (1985).

The DCL provided the following factual scenario regarding an elementary student with diabetes. In order for the student to participate in a regular classroom setting, the school provided the following accommodation: the student is provided assistance with glucose testing and insulin administration from trained school personnel. When the student wished to join the school-sponsored gymnastics club (which required the student to continue to receive the diabetes treatment after school), the school administration refused to provide the assistance because the gymnastics club was an extracurricular activity. According to the DCL, this constituted a violation of Section 504 because the school was required to provide the student the assistance she needed to participate in the gymnastic club and providing the assistance would not fundamentally alter the school's education program.

Whether or not a reasonable accommodation exists is a highly factually specific inquiry. "Because the issue of reasonableness depends on the individual circumstances of each case, this determination requires a fact-specific, individualized analysis of the disabled individual's circumstances and the accommodations that might allow him to meet the program's standards." *Wong v. Regents of Univ. of Cal.,* 192 F.3d 807, 818 (9th Cir. 1999), *citing Crowder v. Kitagawa,* 81 F.3d 1480, 1486 (9th Cir. 1996). It is imperative that each educational institution examine the student requesting an accommodation and whether an accommodation is feasible.

B. Modifications Must Not Fundamentally Alter an Essential Function of the Activity

After an individualized inquiry is conducted to determine whether a modification is necessary, the educational institution must also examine whether the modifications will fundamentally alter the extracurricular activity. This occurs when the modification alters an essential aspect of the activity that affects all participants equally or alters a peripheral aspect of the activity but otherwise gives the qualified student with a disability an unfair competitive advantage. However, that is only a portion of the inquiry. Once it is determined that the accommodation would fundamentally alter the activity, educational institutions are obligated to examine alternative accommodations to evaluate their level of reasonableness.

The DCL gives several examples of reasonable modifications to existing activities. The first example describes a student with a hearing impairment who wanted to participate on the track team. The student, who qualified for the team otherwise, needed a visual cue at the start of the race rather than an audible one. The district denied the student's request, citing a concern that the visual cue may distract other runners and trigger complaints. According to the DCL, this was a violation of Section 504. As part of the factual scenario, the DCL pointed out that "two neighboring districts use a visual cue as an alternative start to their track and field meets" and the athletes easily adjusted to the visual without complaints of distraction. The inclusion of this information indicates the OCR will consider any modifications made by other educational

institutions in determining the reasonableness of an accommodation. Of course, while it is recommended that modifications made by other educational institutions be considered, the fact that other educational institutions have not adopted a modification is not, in and of itself, a reason for another educational institution to pass on the option. As part of the individualized inquiry, the educational institution should examine accommodations made by other institutions and/or any studies conducted regarding the appropriateness of the accommodation because it is clear the OCR will consider this evidence in making its decision.

The second example described a student with one hand who requested the "two-hand" touch rule, requiring a swimmer to touch the wall with two hands at the finish of a race, be modified to a one-hand touch rule. In this example, the school district determined that permitting the student to finish with a one-hand touch would give the student an unfair advantage. Here, the DCL walked the reader through the OCR's potential analysis. Specifically, the DCL stated that if the evidence demonstrated an unfair advantage, then a complete waiver of the rule "would constitute a fundamental alteration and not be required." However, according to the OCR, the inquiry should not end there. The school district would still be required to determine if other modifications were available. If the school district failed to do so, it would be a violation of Section 504. The DCL speculated that a modification to the one-hand touch rule could be made requiring the disabled student to stretch both arms forward, but only one hand need touch the wall.

The DCL's examples provide important clues as to the requirements placed on the educational institutions. It is clear the OCR will require more than a superficial inquiry; rather, when faced with a request for an accommodation, the institution must examine all potential accommodations. It must be noted that most of the examples given by the DCL involve individual sports. However, these requirements will also affect team sports. The only example the DCL gives of an accommodation which would constitute a fundamental alteration is adding a fifth base in baseball, which would not be a change the institution is required to make. As with litigation involving Title IX, the OCR's requirements will likely evolve over time.

IV. Separate or Different Opportunities

Finally, the DCL provides situations in which separate or different opportunities are permissible or even required. Although the overall goal for educational institutions is to provide a qualified student with a disability the opportunity to participate in activities with students without a disability, with or without a reasonable accommodation, there are some situations in which separate or different opportunities should be utilized, such as when a reasonable accommodation would fundamentally alter the activity or give the qualified student with a disability an unfair advantage. In those situations, educational institutions must create additional opportunities for the qualified student with a disability.

Importantly, these separate or different activities should be supported equally by the educational institution. Furthermore, educational institutions tasked with creating separate or

different activities and teams are not permitted to neglect their obligations by stating that there is an insufficient number of qualified students with disabilities to successfully field a team or create an organization. In these situations, educational institutions are encouraged to "think outside the box" to develop district-wide or regional teams/organizations, create co-ed teams/organizations, or create teams/organizations on which qualified students with a disability participate with students without disabilities.

V. Potential Penalties

In the educational context, OCR has been given administrative authority to enforce Section 504. Section 504 is a Federal statute that may be enforced through the Department of Education's administrative process or through the Federal court system. The OCR may conduct an investigation if a complaint is made, or if it deems that an investigation is necessary to ensure compliance. The OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If the OCR is unable to achieve voluntary compliance, the OCR will initiate an enforcement action. To that end, the OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

In addition, a person may at any time file a private lawsuit against a school district. The Section 504 regulations do not contain a requirement that a person file a complaint with OCR and exhaust his or her administrative remedies before filing a private lawsuit.

VI. What Is An Educational Institution To Do?

Only time will tell how the OCR intends to enforce the provisions of the DCL. However, there are several proactive steps educational institutions can make to ensure they are making every effort to comply with the DCL. Practically speaking, most students who are considered "qualified students with a disability" under 504 will have been identified as such prior to participation in athletics. Thus, the name of each student who expresses an interest in a particular sport should be submitted to school administration to determine if the student is a "qualified student with a disability."

If in fact a student is subject to 504's requirements, the student should have a "504 plan" in place detailing any accommodations he or she needs. This plan will provide a framework for the coach and school administrators to follow in order to evaluate any reasonable accommodations to participate in athletics and may need to be modified annually. It is imperative for the athletic department to communicate with the school administrator or counselor who is responsible for the student's 504 plan to ensure compliance with any

accommodations contained in the plan, and to formulate the best strategy to accommodate the student in athletics.

In the event a student who has expressed an interest in athletics exhibits a noticeable disability, but has not required an accommodation in the classroom setting, the coach must involve the institution's resident-expert on 504 requirements. This noticeable disability will trigger the institution's responsibility to engage in an interactive process with the student to develop a reasonable accommodation.

Finally, when developing 504 plans for a qualified student with a disability, it is advisable to include participation in athletics as part of the plan. This will not only consolidate the process for the institution, it will demonstrate a proactive approach to accommodating all students with a disability.

VII. Conclusion

Similar to the April 2011 DCL reinforcing educational institutions' obligations under Title IX, the January 2013 DCL reinforces educational institutions' obligations under Section 504. Furthermore, similar to the activity surrounding Title IX, one may anticipate an active OCR in overseeing compliance and ensuring qualified students with a disability are being afforded equal opportunity to participate in extracurricular activities, including athletics. Moreover, the OCR's actions will undoubtedly bring these requirements to the forefront, which can increase the risk of private litigation. However, with the right preventive steps, educational institutions can reduce their risks and future liability.

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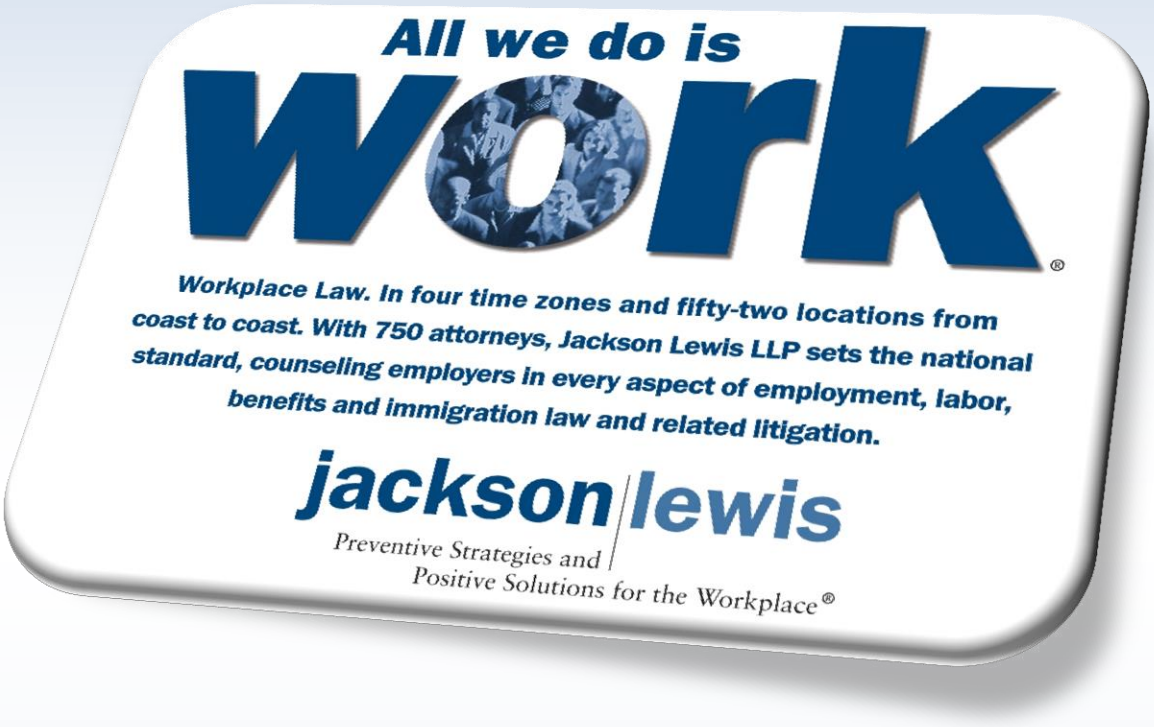
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