

A School Board's Obligation to Provide Accommodations so Students with Disabilities Can Effectively Participate in Extracurricular Activities*

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The Individuals with Disabilities Education Act (IDEA)¹ requires school boards to provide related, or supportive, services to students with disabilities when children need such assistance to benefit from their special education programs.² In its definition of related services, the IDEA specifically lists developmental, supportive, and corrective services such as transportation, speech-language pathology, audiology, interpreting services, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, school nurse services, counseling services (including rehabilitation counseling), orientation and mobility services, and medical services (for diagnostic or evaluative purposes only).³ To the extent that this list is not exhaustive other services may be deemed to be related services if they help students with disabilities benefit from special education. Thus, services such as art, music, and dance therapy could be identified as related services. Further, under the appropriate circumstances, students' involvement in extracurricular activities, particularly when participation helps them benefit from their special education programs, could come under the umbrella of related services that need to be included as part of their individualized education programs (IEPs).

School boards must provide related services only to students who are receiving special education. Under the IDEA's terms, students with disabilities are covered by the statute only if they require special education and related services. Put another way, there is no requirement to provide related services to students who are not receiving special education.⁴ At the same time, many supportive services could qualify as accommodations under Section 504 of the Rehabilitation Act of 1973 (Section 504),⁵ which prohibits recipients of federal funds from discriminating against individuals with disabilities, or similar provisions in

the Americans with Disabilities Act (ADA).⁶ As such, it is not unusual for school boards to provide accommodations in the form of related services to students who are qualified to receive assistance under Section 504 and the ADA but do not qualify for special education under the IDEA. Section 504 and the ADA require school boards to provide reasonable accommodations to individuals with disabilities so that they may participate in the district-operated programs.

Questions have arisen regarding the obligations of school boards to provide either related services under the IDEA or accommodations under Section 504 and the ADA to allow students with disabilities to participate in extracurricular activities. As this article demonstrates, school board officials certainly have an obligation to provide reasonable accommodations under Section 504 and the ADA. Although it is not as common, participation in extracurricular activities may be written into the IEPs of children under the IDEA and may obligate school boards to provide support so that students can effectively participate in the activities.

This article begins by briefly reviewing the requirements of Section 504, the ADA, and the IDEA regarding students with disabilities' participation in extracurricular activities. In so doing, the article pays particular attention to the circumstances under which school boards may need to provide accommodations so that the students will have an equal opportunity to participate. The article ends with suggestions for school personnel to consider to facilitate the participation of students with disabilities in extracurricular activities on an equal footing with their peers who are not disabled.

Accommodations under Section 504 and the ADA

Most student requests for accommodations for extracurricular activities are brought pursuant to Section 504 and the ADA. In many situations students have requested waivers of normal participation requirements. In general, courts have ordered school boards and athletic associations to waive nonessential eligibility requirements

for participation in extracurricular activities, although the results vary depending on the unique facts of each situation.⁷

Age-limitation and eight-semester rules provide an example of how courts reach mixed outcomes on the issue. Courts have ordered athletic associations to waive age-limitation requirements to allow older students who repeated grades due to their learning disabilities to participate in sports when jurists did not view disputed regulations as being essential.⁸ In these instances courts noted that athletic associations often allowed waivers of other rules and viewed waivers of regulations prohibiting students over the age of nineteen from participating in sports as being reasonable. Conversely, other courts did not agree that age-limitation rules were nonessential and refused to grant requests for waivers.⁹ In these disputes courts interpreted the purpose of age-limitations rules as being designed to prevent teams with older students from having competitive advantages. These decisions are often fact-specific with the differences in the outcomes influenced by the skill levels of the athletes in question. In a recent case, the federal trial court in New Jersey ruled that an athletic association's safety concerns were unwarranted and that a waiver of its age-limitation and eight-semester rules would be a reasonable accommodation. Yet, the court denied the student's request for a preliminary injunction enjoining the association from enforcing its rules absent evidence that its denial of the waiver was based on his disabilities.¹⁰

In another case the Sixth Circuit was convinced that preventing a transfer student in Tennessee from participating in sports when he changed schools only to access needed special education services was a clear violation of Section 504.¹¹ On the other hand, in an unpublished opinion, the Fifth Circuit reversed an order of a federal trial court in Louisiana enjoining an athletic association from enforcing its rule barring a transfer student from participating in sports for one year.¹² The student allegedly transferred from one nonpublic school to another in order to access individualized instruction and accommodations. However, the court

found that the student's anxiety disorder failed to meet the legal test of a disability under the ADA.

As a dispute resolved by a federal trial court in Illinois shows, jurists have not been inclined to grant waivers of other essential requirements such as adherence to athletic codes of conduct.¹³ The court was convinced that allowing exceptions to disciplinary rules could inhibit the uniform and consistent enforcement of the code of conduct. As with all matters relating to Section 504 and the ADA, determinations regarding rule waivers must be made on an individual basis.

To date, there is not a substantial amount of case law on the topic of eligibility rules. Still, it is safe to say that courts will order school districts to provide accommodations similar to those provided during the school day so that students with disabilities can participate in extracurricular activities on an equal basis with their peers who are not disabled.

As an initial matter when seeking accommodations, students must be able to show that they can meet ability requirements for participation if they receive the requested accommodations. For example, a federal trial court in Indiana dismissed a discrimination suit when school officials were able to show that a student with disabilities was not selected for the basketball team because his skill level was below that of players who made the team.¹⁴ When students do have the requisite skills and are otherwise qualified for participation, accommodations must be provided. In such a case, the Supreme Court of Appeals of West Virginia held that a student with a hearing impairment who had the assistance of a signer for academic subjects was entitled to the same for extracurricular activities.¹⁵

A case from higher education provides another example of a required accommodation. Here a court in North Carolina agreed that a university discriminated against a student who was dismissed from a golf team because he missed practices due to his having seen his doctor at medical appointments.¹⁶ Similarly, in an unpublished, but instructive opinion, the Second Circuit determined that a student in New York with cerebral palsy was denied meaningful access to participation in extracurricular activities because architectural barriers forced him to make detours to get to and from athletic fields which reduced the time

he could spend in the capacity of manager of the football team.¹⁷

In 2013 the Office for Civil Rights (OCR) in the U.S. Department of Education issued a *Dear Colleague* letter advising school officials of their responsibilities for providing accommodations to students with disabilities participating in extracurricular activities.¹⁸ In emphasizing that officials must provide qualified students with disabilities with equal opportunities to participate in their extracurricular activities, the letter advised that personnel must make reasonable modifications and provide necessary aids and services to allow such participation. Compliance with this letter may require school officials to undertake individualized inquiries into what specific children require.

The letter does make it clear that school officials are not required to make fundamental alterations to their extracurricular programs in order to allow students with disabilities to participate. For example, officials would not be required to waive skill requirements for children who cannot meet the minimum requirements even with reasonable accommodations. OCR's guidance further recommends that educators consider offering alternative extracurricular activities for students with disabilities who are unable to participate in the usual programs their schools make available even with reasonable accommodations.¹⁹

Including Extracurricular Activities in IEPs

The IDEA expressly includes recreation and therapeutic recreation as related services.¹ The definition of *recreation* contained in the IDEA's regulations includes assessment of leisure function, recreation programs in schools and community agencies, and leisure education, along with therapeutic recreation.² Further, the IDEA's regulations require school boards to supply nonacademic and extracurricular services and activities to the extent necessary to afford students with disabilities equal opportunities for participation.³ Nonacademic and extracurricular services and activities may include athletics, recreational activities, special-interest groups or clubs, employment, and many of the supportive services listed in the IDEA's description of related services; these activities must be offered in inclusive settings to the maximum extent appropriate.⁴ The IDEA regulations further require that supplementary aids

and services be provided to the maximum extent appropriate to enable students with disabilities to participate in extracurricular and nonacademic activities.⁵

The Supreme Court of Minnesota described circumstances under which a school board might be obligated to include participation in extracurricular activities in a child's IEP.⁶ The dispute began when the parents of a student with disabilities, who received special education services, requested that school officials include accommodations for their daughter's participation in extracurricular activities in her IEP. School officials indicated that accommodations for extracurricular activities would be provided under Section 504 but refused to include any in the student's IEP. The parents objected and filed a complaint with the state Department of Education which decided that school personnel violated the IDEA by failing to include accommodations for extracurricular activities in the student's IEP. On further review, an appellate court emphasized that the child's IEP team had an obligation to consider whether her IEP should have included a specific extracurricular activity as well as what supplementary aids and services may have been required in order for her to participate. Even so, the court ruled that the IEP need only include such activities as are required for the child's education. For those activities to be addressed in an IEP, the court noted, there must be some connection to educational objectives. The court added that it is not the parents' prerogative to require accommodations for every activity in which they may wish their child to participate. On further review, the Supreme Court of Minnesota affirmed those portions of the earlier order requiring the school board to provide supplementary aids and services so the student could participate in extracurricular activities. At the same time, the court pointed out that the IDEA's regulations did not limit extracurricular activities to those required to educate students with disabilities. In reviewing the IDEA's regulations, the court did not find any sections or language limiting extracurricular and nonacademic activities for inclusion in IEPs to those required to educate students. The court determined that school boards must take steps to provide extracurricular and nonacademic activities in a manner necessary to afford students with disabilities equal opportunities to participate. According to the court, IEP teams must first evaluate whether extracurricular



or nonacademic activities are appropriate for students with disabilities before selecting which supplementary aids and services are suitable and necessary for participation in these activities.

An earlier case provides an example of when extracurricular activities might need to be included in a student's IEP for educational purposes. Although it is not unusual for school boards to provide summer school programs for special education students, a court in Michigan ordered a school board to provide a summer enrichment program to a student with autism.⁷ Testimony at trial revealed that the student needed a program including outdoor activities, such that the court was convinced that the requested program fell within the parameters of special education and related services because physical education fit within the definition of special education and recreation was a related service. In a more recent example, a federal trial court in Ohio issued a preliminary injunction requiring a school board to include participation in interscholastic athletics in a student's IEP. The court was persuaded by evidence that the student's participation in sports resulted in academic, physical, and personal progress.⁸

On the other hand, a state court in New York declared that a school board had no duty to provide an after-school program for a student with disabilities when his participation was unnecessary for him to receive a free appropriate public education (FAPE).⁹ The court agreed with the board that it met the student's needs by placing him in a private day program and was not required to do more.

Recently, the Eighth Circuit agreed that educational officials in Iowa did not deny a child a FAPE when they refused to allow her to participate in her school's show choir.¹⁰ The student, who had Asperger syndrome, obsessive compulsive disorder, mood disorder, adjustment disorder and Tourette syndrome, but was also academi-

cally gifted, received special education and related services in the district's autism spectrum program. The dispute arose when the student auditioned for the school's show choir but was not selected. As a concession to her mother, school officials agreed to allow the student to participate in a lower level choir. Even so, the mother insisted that her daughter be placed in the upper level, contending that she was excluded because of her disabilities. For its part, the child's IEP team thought that participation in the show choir was not necessary for her to receive a FAPE. The mother then withdrew her daughter from the public schools, unilaterally placed her in a private school, and filed a due process complaint, seeking tuition reimbursement. An administrative law judge rendered a decision in favor of the board and a federal trial court agreed that officials offered the student a FAPE.

The Eighth Circuit affirmed that the child's IEP was providing her with some educational benefit when her mother removed her from the public school. In the court's view, the child's academic progress undermined her mother's contention that she was not receiving educational benefit. The court concluded that the refusal of school officials to override the results of the show choir audition process and place the student in the upper level of the choir did not deny her a FAPE.

Discussion

Two issues emerge when considering the obligations of school boards to provide students with disabilities with opportunities to participate in extracurricular activities. The first issue concerns student entitlements under Section 504 and the ADA to receive accommodations to allow them to participate. The second issue is whether the IDEA entitles students with disabilities to have extracurricular activities written into their IEPs.

It is well-settled that Section 504 and the ADA entitle students with disabilities to participate in extracurricular and non-academic activities for which they are otherwise qualified. If necessary, school boards must provide reasonable accommodations such as those commonly offered in academic programs, so that students with disabilities can participate in extracurricular programs on an equal basis with their peers. An analysis of court decisions and OCR guidance indicates that boards need to be prepared to provide supplementary

aids and services to allow students with disabilities opportunities to participate fully in extracurricular programs. Making such modifications may require school officials to make usual accommodations such as providing a sign-language interpreter to a hearing impaired student who has the skills to compete successfully on an athletic team.

However, greater accommodations may be required to allow some students to take part in extracurricular programs. For example, school boards could be required to provide special after-school extracurricular activities for students who are unable to participate in the regular programs offered at their schools due to their disabilities. In this regard, school personnel may need to develop recreational programs for students who are physically-challenged and cannot participate in the usual athletic activities. The bottom line is that students with disabilities are entitled to have opportunities to participate in their schools' programs comparable to those available for peers who are not disabled.

IEP teams should also consider whether participation in extracurricular activities is necessary to provide students with FAPES. As with other related services, it is not necessary to include participation in extracurricular activities in the IEPs of students who are already receiving FAPES without such participation. On the other hand, if participation in extracurricular or nonacademic activities would assist students in reaching the goals and objectives of their IEPs so that they would receive educational benefit, it could be an important and necessary component of their IEPs.

To ensure compliance with Section 504, the ADA, and the IDEA, school personnel should consider the following:

- 1) Annually evaluate students to determine whether they
 - have impairments covered under Section 504 and/or the ADA;
 - are otherwise qualified for the activities in which they wish to participate;
 - may be unfairly excluded from activities due to their impairments;
 - are entitled to waivers, modifications, or accommodations if they do not meet requirements such as age, academic qualifications, or residency requirements due to their disabilities;
 - whether the costs of making accommodations would be unrea-

sonable under Section 504 or the ADA:

- whether the presence or participation of students in activities might create a reasonable risk of harm to themselves or others;
- have long- or short-term impairments because this can impact the types of accommodations and related costs, such as extra personnel, that boards may have to provide; and,
- whether requested accommodations would alter the nature of the programs or create undue financial burdens.

2) While school personnel cannot exclude students with disabilities from extracurricular programs because of their impairments, students with disabilities do not have a right to differential treatment. Thus, students with disabilities must meet participations requirements concerning skill levels and disciplinary rules.

3) Qualified students with disabilities are not entitled to receive identical benefits; they need only be given reasonable accommodations to facilitate their participation such as more frequent breaks to take part in sports programs or sign-language interpreters so as to better communicate with instructors, coaches, and their peers.

4) For safety reasons, school authorities may request medical clearance or waivers from parents before allowing students with disabilities to participate in extracurricular programs if personnel have reason to believe that they may be at increased risk of injuries, or even death, because of their impairments.

5) Personnel running extracurricular activities are not required to make substantial modifications or fundamental alterations to their programs in order to provide accommodations to students with disabilities if doing so would fundamentally alter the activities or have a negative effect on the rights of participants.

6) IEP teams should consider inclusion of extracurricular activities in the IEPs of students with disabilities just as they would other related services, namely, asking when participation would provide educational benefit.

7) School personnel should be creative in developing extracurricular activities for students with disabilities who are unable to participate in the usual offerings provided by their schools.

Conclusion

Extracurricular activities have long been part of students' overall school experience. As such, students who have disabilities are entitled to equal opportunities to participate in extracurricular events and activities as their peers who are not disabled. School officials need to be prepared to accommodate the needs of students with disabilities so that they may enjoy this experience to the same extent as other students.

While students with disabilities have an entitlement under Section 504 and the ADA to participate in extracurricular activities, this does not mean that such participation must be incorporated into their IEPs. Participation in extracurricular activities needs to become part of students' IEPs only when such participation is required for the students to receive educational benefit.

ENDNOTES

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¹ 20 U.S.C. § 1400-1482 (2012).

² 20 U.S.C. § 1401(26).

³ *Id.*

⁴ *See* Irving Independent School District v. Tatro, 468 U.S. 883, 18 Ed.Law Rep. 138 (1984).

⁵ 29 U.S.C. § 794 (2012).

⁶ 42 U.S.C. §§ 12101-12213 (2012).

⁷ Charles J. Russo & Allan G. Osborne, SECTION 504 AND THE ADA (2009).

⁸ *See, e.g.,* Hoot v. Milan Area Schs., 853 F. Supp. 243, 92 Ed.Law Rep. 841 (E.D. Mich. 1994), *Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298, 81 Ed.Law Rep. 1145 (Tex. App. Ct. 1993).

⁹ *See, e.g.,* Sandison v. Michigan High Sch. Ath. Ass'n, 64 F.3d 1026, 103 Ed.Law Rep. 56 (6th Cir. 1995), *rev'g* 863 F. Supp. 483, 94 Ed.Law Rep. 1271 (E.D. Mich. 1994), *Pottgen v. Missouri State High Sch. Ath. Ass'n*, 40 F.3d 926, 95 Ed.Law Rep. 867 (8th Cir. 1994).

¹⁰ *Starego v N.J. State Inter. Ath. Ass'n*, 970 F. Supp. 2d 303, 302 Ed.Law Rep. 998 (D.N.J. 2013).

¹¹ *Crocker v. Tennessee Second. Sch. Ath. Ass'n*, 735 F. Supp. 753, 60 Ed.Law Rep. 502 (M.D. Tenn. 1990), *aff'd sub nom. Metropolitan Gov't of Nashville and Davidson County v. Crocker*, 908 F.2d 973, 61 Ed.Law Rep. 1187 (6th Cir. 1992) (table).

¹² *Mann v. La. High Sch. Ath. Ass'n*, 535 F. App'x 405, 299 Ed.Law Rep. 445 (5th Cir. 2013).

¹³ *Long v. Bd. of Educ., Dist. 128*, 167 F. Supp. 2d 988, 158 Ed.Law Rep. 301 (D. Ill. 2001).

¹⁴ *Doe v. Eagle-Union Cmty. Sch. Corp.*, 101 F. Supp. 2d 707, 145 Ed.Law Rep. 413 (S.D. Ind. 2000), *vacated* 2 F. App'x 567, 153 Ed.Law Rep. 532 (7th Cir. 2001). The Seventh Circuit vacated the lower court's decision with instructions to dismiss on mootness grounds.

¹⁵ *W. Va. ex rel. Lambert v. W. Va. State Bd. of Educ.*, 447 S.E.2d 901, 93 Ed.Law Rep. 1031 (W.V. Ct. App. 1994).

¹⁶ *Costello v. Univ. of N.C. at Greensboro*, 394 F. Supp. 2d 752, 204 Ed. Law Rep. 220 (M.D.N.C. 2005).

¹⁷ *Celeste v. East Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 258 Ed.Law Rep. 1005 (2d Cir. 2010).

¹⁸ Seth M. Gallanter, *Dear Colleague*, U.S. Department of Education, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html> (January, 25, 2013).

¹⁹ For a thorough review of the *Dear Colleague* letter, see Perry A. Zirkel, *Students with Disabilities and Extracurricular Athletics in the K-12 Contest: OCRs Recent "Significant" Guidance*, 289 Ed. Law Rep. 13 (2013). Reprinted in 49(2) *ELA Notes* 12 (2014).

²⁰ 20 U.S.C. § 1402(22).

²¹ 34 C.F.R. § 300.34(c)(11).

²² 34 C.F.R. § 300.107.

²³ 34 C.F.R. § 300.117.

²⁴ 34 C.F.R. § 320(a)(4).

²⁵ *Indep. Sch. Dist. No. 12, Centennial v. Minn. Dep't of Educ.*, 767 N.W.2d 478, 246 Ed.Law Rep. 394 (Minn. Ct. App. 2009), *aff'd in part rev'd in part* 788 N.W.2d 907, 260 Ed.Law Rep. 409 (Minn. 2010).

²⁶ *Birmingham and Lamphere Sch. Dist. v. Supt. of Pub. Instr.*, 328 N.W.2d 59, 8 Ed.Law Rep. 467 (Mich. Ct. App. 1982).

²⁷ *Kling v. Mentor Pub. Sch. Dist.*, 136 F. Supp. 2d 744, 153 Ed.Law Rep. 105 (N.D. Ohio 2001).

²⁸ *Roslyn Union Free Sch. Dist. v. Univ. of the State of N.Y., State Educ. Dep't*, 711 N.Y.S.2d 582, 146 Ed.Law Rep. 369 (N.Y. App. Div. 2000).

²⁹ *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, ___ Ed.Law Rep. ___ (8th Cir. 2015).

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