

## OCR Issues “Dear Colleague Letter” Addressing Equal Opportunities in Athletic Programs for Students With Disabilities

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### SUMMARY

A “Dear Colleague Letter” just issued by the Department of Education Office of Civil Rights interpreting Section 504 of the Rehabilitation Act of 1973 clarifies that colleges and universities must provide disabled students equal opportunities to participate in intercollegiate, club and intramural athletics.

On January 25, 2013, the Department of Education Office of Civil Rights (the “OCR”) issued a “Dear Colleague Letter” [<http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201301-504.html>] (the “DCL”). The DCL provides guidance for schools and school districts with respect to their obligations under Section 504 of the Rehabilitation Act of 1973 (“Section 504”) and the Department’s implementing regulations. As OCR reiterated in the DCL, Section 504 prohibits discrimination against students with disabilities. In this latest communication with educators, OCR attempts to clarify how schools can provide equal opportunities to disabled students in the context of student athletics.

### To Whom Does the New Guidance Apply?

OCR acknowledged that the “*specific details of illustrative examples offered in [its] guidance are focused on the elementary and secondary school context,*” but further stated that “students with disabilities at the postsecondary level must also be provided an equal opportunity to participate in athletics, including intercollegiate, club and intramural athletics.” Colleges and universities will need to consider how the DCL impacts athletic offerings for students with disabilities, but will have to do so with somewhat less specific guidance than their K-12 counterparts.

### What Does Section 504 Require?

As OCR articulates, Section 504, at its core, requires a school district “to provide a qualified student with a disability an opportunity to benefit from the school district’s program equal to that of students without disabilities.” Section 504 regulations delineate additional prohibitions and procedures necessary to accomplish this goal. OCR explains that schools may not utilize discriminatory criteria when determining which students will be permitted to participate, or to what extent they may participate, in student athletic programs.

### How Does the DCL Clarify a School’s Obligations Under Section 504?

Contemporaneous with the issuance of the DCL, Acting Assistant Secretary for Civil Rights, Seth M. Galanter, hosted a conference call in which he highlighted five overarching principles of the DCL:

1. Schools may not operate their programs in reliance upon generalizations about (a) disability in general; or (b) a student’s particular category of disability. Rather, each student must be

judged individually based on his or her ability to participate in the desired activity.

2. Schools must make reasonable modifications to existing programs, based on the needs of the individual student, to allow that student an equal opportunity for participation, unless the modification would fundamentally alter the game or allow an unfair advantage to a student or group of students. Note that modifications would only be made in response to a request by a student.
3. Schools must provide the same aid and services during extracurricular activities as are provided during the school day if such aid and services are necessary to facilitate the student's participation in the extracurricular activity.
4. Compliance with Section 504 means that schools must allow inclusion of disabled students whenever possible, but when inclusion is not possible, OCR recommends that the school create additional and/or new opportunities for disabled students. But note that OCR further states: "[t]he provision of *unnecessarily* separate or different services is discriminatory." It should also be noted that this is a recommendation by OCR, not a mandate under Section 504. Again, there exists no affirmative obligation for schools or school districts to create programs for which there is no demand.
5. The intent of Section 504 and the DCL is to expand opportunities for disabled students, especially through inclusion in existing programs wherever possible. Although athletic teams may continue to select the best players and impose safety standards, in so doing schools may not discriminate against a student based on his or her disability.

### Does Everybody Make the Team?

No. The DCL states that "equal opportunity does not mean . . . that every student with a disability is guaranteed a spot on an athletic team for which other students must try out."

### How Does the DCL apply at the College and University Level?

During the January 25th conference call, Acting Secretary Galanter acknowledged that athletics are far more competitive at the post-secondary level. Nonetheless, he advised that the principles in the DCL are "generally transferable" to the higher education context. It appears that colleges and universities will be expected to apply the principles outlined in the DCL. However, they will have to do so based primarily on the DCL and its illustrative examples (which are based on scenarios more likely to arise at the primary and secondary levels). Institutions of higher education should remain receptive to requests for modifications, aid and services by students with disabilities seeking to participate in all levels of college athletics. Upon receipt of such requests – which may be on the rise following issuance of the DCL – colleges and universities should allow the principles highlighted in the DCL to steer their response to the extent possible.

Although it does not appear that any guidance tailored to higher education institutions will be forthcoming, Saul Ewing will continue to monitor developments and trends in this area. Stay tuned.

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