

Extracurricular Activities and Nonacademic Services: Implications Under Section 504 and the IDEA

by

Jose L. Martín, Attorney at Law

Richards Lindsay & Martín, L.L.P.

13091 Pond Springs Road, Suite 300

Austin, Texas 78729

jose@rlmedlaw.com

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As a civil rights nondiscrimination statute, §504 intends to ensure that its protections extend to all forms of disability-related discrimination. The §504 regulations prohibit many types of disability discrimination wholly unrelated to the provision of educational services, such as in the case of extracurricular activities and nonacademic services.

This overview will investigate the more common non-discrimination aspects of the Act that do not pertain to the provision of educational accommodations, but nevertheless affect public schools and their relationships with disabled students.

Extracurricular Activities and Section 504

- ***Basic Right to Equal Participation***—Under §504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 C.F.R. §104.37(a)(1). Disabled students may try out for any extracurricular activity they desire, but they must generally meet the regular performance standards applied to all students. Although some accommodations may be required of schools in this area, it appears that students must submit to the general behavioral, academic, and performance standards applied to non-disabled students. Clearly, disability does not offer a “free ride” to competitive sports. Some accommodations, however, may be required in order for students to have an “equal opportunity to participate.”
- ***Application of Athletic Eligibility Requirements***—OCR generally approves of uniform application of eligibility requirements of school extracurricular activities. See EQUAL EDUCATIONAL OPPORTUNITY AND NONDISCRIMINATION FOR STUDENTS WITH DISABILITIES: FEDERAL ENFORCEMENT OF SECTION 504, A Report of the United States Commission on Civil Rights

(September 1997), at p. 343 (hereafter cited as “CCR Report”). **OCR also indicates that when a reasonable accommodation is necessary to enable a disabled student to participate, the school district is required to modify non-essential eligibility requirements.** *Id.* Controversy can erupt, however, with regard to whether an eligibility requirement is essential or not, as will be seen in a review of the over-age eligibility cases.

- **“Reasonable” Accommodation Standard**—The good news is that although OCR does not recognize the “reasonable” limitation on accommodations that affect a FAPE, it appears to recognize that **accommodations to allow for participation in extracurricular/nonacademic activities are subject to the “reasonable” limitation.** Thus, there is a reasonableness limit to the type and scope of accommodations that districts will be obligated to provide students to assure their equal opportunity to participate in extracurricular/nonacademic activities.

- **Unreasonable Accommodations**—When does an accommodation in the field of extracurricular or nonacademic activities become an unreasonable accommodation? When it would require a “fundamental alteration in the nature of a program,” which in turn means “undue financial and administrative burdens.” See OCR SENIOR STAFF MEMORANDA, “Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance,” 17 IDELR 1233, (OCR 1990)

The following cases represent a sampling of the types of OCR decisions issued in this area of §504.

Grosse Pointe (MI) Public Schs., 35 IDELR 225 (OCR 2001)—A student with visual impairments was excluded from choir and dance activities. The school argued the exclusion was due to her limited skill level and the complexity of the coreography, which raised health and safety concerns. OCR found that the school raised legitimate nondiscriminatory reasons for the exclusion.

Salem (NH) Sch. Dist., 35 IDELR 260 (OCR 2001)—Student was excluded from hockey team partly due to not meeting state attendance requirements, and partly due to behavior and grades at school. OCR found no discrimination. Moreover, he was denied a waiver of the state age eligibility requirement (see below).

Shelby County (AL) Sch. Dist., 37 IDELR 41 (OCR 2002)—A student was suspended for three days, which caused her to miss three days of volleyball practice, which resulted in her dismissal from the team under the school’s rules. OCR found that the school applied the rule uniformly, and that thus, there was no disability discrimination.

Maine Sch. Administrative Dist. #1, 37 IDELR 160 (OCR 2002)—Student was removed from hockey team for missing three practices, and not allowed to travel with the team for an overnight trip due to his absence from school on that day. Both of the student's actions violated the rules for the hockey team. OCR found that the absences were not due to disability-related reasons, and thus, there was no discrimination.

Kaneland (IL) Community Unit Sch. Dist. #302, 37 IDELR 287 (OCR 2002)—Student was cut from baseball team although parent alleged he was one of the best players. The coach, however, indicated that the student did not meet the attitude and teamwork criteria set forth in the Baseball Team Guidelines. For example, the student had twice quit the team the year before. OCR found no discrimination.

Little Axe (OK) Pub. Schs., 37 IDELR 103 (OCR 2002)—The school applied its policy of making softball players run laps for missing practice in a uniform fashion. All players, disabled or not, were required to run laps if they missed a practice. No discrimination found. See also **Adlai Stevenson Dist. #125 (IL), 38 IDELR 157 (OCR 2002)** (running around the gym as punishment not discriminatory to disabled basketball player).

Marion County (FL) Sch. Dist., 37 IDELR 13 (OCR 2001)—School was required to provide accommodations to a girl with disabilities who wanted to try out for cheerleading. The school was required to allow her to videotape the sponsor's instructions and demonstrations.

Hernando Co. (FL) Sch. Dist., 56 IDELR 42 (OCR 2010)—OCR found school was in violation of §504 for failing to notify student who was receiving home instruction of a senior career interview day. The school improperly placed the burden on the student to find out about extracurricular opportunities, while OCR held that the school had a duty to notify the student in order to afford him an equal opportunity to access the activity. See also *Metro Nashville (TN) School District*, 53 IDELR 337 (OCR 2009).

Indeed, in another case, OCR held that such a notice had to be designed so that parents of students with severe disabilities would receive notice of upcoming extracurricular activities or nonacademic services. **Polk Co. (FL) Schs., 54 IDELR 331 (OCR 2009)**. Thus, OCR found that notices in the form of a marquee and scrolling type on closed-circuit TV was insufficient to alert severely disabled students or their parents of an upcoming activity, and they were therefore unable to participate.

Quaker Valley (PA) School District, 352 EHLR 235 (OCR 1986)—A student with mental retardation and a neuro-degenerative disorder wished to participate in the swimming team. OCR found that the district was required under §504 to provide accommodations to the student, in the form of an aide to assist with walking and dressing, since those functions were not essential eligibility standards for participation in swimming. In addition, those accommodations would not constitute a fundamental alteration of the program.

Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996)—17-year-old student with Down's Syndrome alleged that district failed to allow him to participate in extracurricular activities to maximum possible extent. Student was co-manager of basketball team, but was not allowed on away games, and was not allowed to sit with team at home games. He was also not included in team photos or newspaper articles. School district showed that student required too much supervision on away games, could not use the phone or count change, could not keep a shot chart, and could not perform most of the duties of a manager. In addition, student was not alert enough to get out of the way of an incoming play on the bench. Despite accommodations the student was unable to perform the basic functions of the position of manager, and thus, was reassigned to co-manager. Finally, neither managers nor co-managers participated in team photo opportunities. OCR found no violation of §504.

Marana (AZ) Unified School District, 53 IDELR 201 (OCR 2009)—A school staffperson's unilateral decision-making regarding which activities a student with Down syndrome could participate in during his marching band's trip to Disneyland violated Section 504 and Title II of the ADA. The staffperson unilaterally determined that the student was to be excluded from the band's recording session, a parade, and the band's group picture. The fact that the decision was made outside either the IEP team or §504 committee process meant that neither the teams nor the parent were able to participate.

Carmel Central School District, 20 IDELR 1177 (OCR 1993)—District violated §504 by denying late transportation to disabled student, who needed such transportation in order to access extracurricular activity. District policy requiring students to furnish their own transportation did not relieve the District of its obligation under §504.

Lambert v. West Virginia State Bd. of Education, 21 IDELR 647 (W. Va. 1994)—District violated §504 by failing to provide deaf student with a sign language interpreter for use in basketball games and practices.

Rockdale County (GA) School District, 22 IDELR 1047 (OCR 1995)— District policy requiring students who need accommodations in order to participate in extracurricular activities to notify school was appropriate. No formal policy on disabled students' participation in extracurricular activities is required.

Carmel (NY) Central School District, 23 IDELR 1195 (OCR 1995)— District did not violate §504 when it removed a disabled student from wrestling team for failing to follow instructions during practice, since non-disabled students were also removed for the same offense.

Cabarrus County (NC) School District, 22 IDELR 506 (OCR 1995)— District was not in violation of §504 when it suspended a student from participation in sports for four months due to his criminal conviction. The suspension was required by district policy and there was no evidence of discriminatory application.

IDEA Implications

In the 2004 reauthorization of IDEA, a provision was added to the section setting forth the required contents of an IEP that addressed extracurricular activities. The language states that the IEP must include

a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the 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)(bb).

The relevant 2006 federal regulation likewise includes the same requirement. See 34 C.F.R. §300.320(a)(4)(ii). Thus, IEP teams are required, as part of the IEP development process to consider whether a student needs supplementary aids and services, program modifications, or personnel supports, in order for them to participate in extracurricular and/or nonacademic activities. Another regulation adds that states must ensure that the IEP team addresses participation in nonacademic services:

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).

Yet another regulation states:

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 Sec. 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. 34 C.F.R. §300.117.

Some courts, moreover, have taken the position that the need to address supplementary aids and services necessary for a student with a disability to participate in extracurricular or nonacademic services arises whether or not the participation is tied to, or required in order to meet, the student's educational goals. In the case of *Independent Sch. Dist. No. 12, Centennial v. Minnesota Dept. of Educ.*, 110 LRP 58331 (Minn. 2010), the Minnesota Supreme Court ruled that the IEP of a child with autism and Tourette's had to address her need for supplementary aids and services to afford her participation in volleyball and school clubs regardless of whether participation in such activities was necessary in order to receive a FAPE. The court noted that none of the above-cited regulations required such a linkage to educational needs or FAPE in order for the student to receive supports required merely to participate in the extracurricular or nonacademic service. To the court, if participation in the student's selected activity requires the provision of supports, the IEP team must address that need.

A significant question is whether the IDEA requirement exceeds that imposed under §504, or whether it merely is intended to reiterate the requirement and ensure its compliance by means of the IEP team process. Certainly, if the IEP team has to address the provision of supplementary aids and services for participation in nonacademic/extracurricular activities, even if they bear no relation to the student's educational goals or receipt of FAPE, it would appear that the requirement applies as it is intended under §504—as a matter of non-discrimination and equal opportunity to access.

“No Pass, No Play” Eligibility Standards

Susquehanna Township (PA) School District, 20 IDELR 35 (OCR 1993)—As long as applied evenly, application of State athletics eligibility rules (such as "no pass, no play") does not violate §504. The §504 regulations require that interscholastic athletic activities be equally available to disabled students. But, the regulations do not require waiver

of State athletic association eligibility standards (i.e. academic performance minimums, attendance requirements, etc.).

Beaufort County (SC) School District, 26 IDELR 1154 (OCR 1997)— District’s refusal to permit a student with asthma and allergies to play baseball was based on the student’s failure to meet state academic and attendance requirements, not his disability. In addition, there was no evidence that the poor academic performance and absences were related to the student’s disabilities.

Compare the above cases to the state "no pass, no play" rules— Application would appear not to violate §504 as long as §504 plan (modifications) are appropriate and are being implemented.

Fundamental Lessons on §504 and Extracurricular Activities

1. Regular athletic or performance standards apply equally to §504 students;
2. Team standards of conduct apply equally to §504 students;
3. Requirements of “no pass, no play” apply equally to §504 students;
4. For hearing-impaired students, sign interpreters may be required (will be a special education issue in most cases);
5. Transportation accommodations may be required (i.e. late transportation to practices).
6. Reasonable accommodations will generally be required with respect to non-essential participation requirements.
7. If a requested accommodation would represent a fundamental alteration to a district’s extracurricular program, causing undue financial and administrative burdens, it will not be required under §504.
8. Extracurricular activities do not belong in §504 accommodation plans, unless the committee determines that the student will not have an equal opportunity to receive an education without participating the activity (should be rarely the case).

Other Non-Academic Services

Field Trips, After-school Programs, Recreational Programs, Summer Programs

As with extracurricular activities, districts must provide non-academic services or benefits in a non-discriminatory manner that allows disabled students an equal opportunity to participate. 34 C.F.R. §104.37(a)(1). In the student context, this issue arises primarily with respect to after-school programs, summer programs, field trips and recreational activities, all of which must be provided in a manner that allows for disabled students' participation. Schools may not condition the provision of the non-academic service on the parent's attendance or provision of a babysitter, exclude disabled students, or charge a higher cost than that charged non-disabled students' parents. **See OCR SENIOR STAFF MEMORANDA, "Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance," January 3, 1990 (attached).**

Williamstown (MA) Pub. Schs., 39 IDELR 43 (OCR 2003)—District failed to provide properly trained aides to assist a student with cerebral palsy to participate in field trips, causing her to miss them. OCR found a violation of §504. Thus, to OCR the provision of an aide during a field trip might be a reasonable and necessary accommodation to allow a disabled student to have an equal opportunity to participate in a field trip.

Fayette County (TN) Sch. Dist., 38 IDELR 219 (OCR 2002)—Student was excluded from field trip due to missing the deadline for special transportation arrangements to be made. Since the rule was applied uniformly, there was no discrimination.

St. Johns County (FL) Sch. Dist., 35 IDELR 257 (OCR 2001)—Exclusion from attendance at a play was warranted during a field trip, since the student was misbehaving on the trip and had misbehaved on previous trips despite staff efforts to correct him.

Rutherford County (TN) Sch. Dist., 34 IDELR 44 (OCR 2000)—Student was excluded from drama club and field trip due to absences, not disability.

Even in situations where the after-school program is not held on school property, §504 might still apply, as seen in the case below.

Snohomish (WA) School District No. 201, 23 IDELR 97 (OCR 1995)—After-school bowling program was subject to §504, and thus, had to be provided in non-discriminatory manner, because district provided

substantial assistance to the program (staff, facilities, transportation, and promotion).

Graduation

As with all other non-academic services or benefits available to non-disabled students, graduation and graduation ceremonies must allow for equal opportunity for participation by disabled students.

Capistrano (CA) Unified Sch. Dist., 38 IDELR 136 (OCR 2002)— Decision to exclude disabled student from graduation due to his posing a “threat to himself and others” was improper. The decision was neither based on current information, nor made by a 504 committee of knowledgeable persons.

Crenshaw County (AL) Sch. Dist., 34 IDELR 72 (OCR 2000)— Deadlines to purchase class rings and yearbooks applied equally to disabled students, especially in light of the fact that many announcements were made by the school regarding the deadlines. Thus, no discrimination found.

Moffat County (CO) School District RE-1, 26 IDELR 28 (OCR 1996)— Award of different diploma to students who receive all necessary credits for graduation, but do not pass the statewide exit assessment, is appropriate. Ostensibly, this decision would appear to approve of the denial of a diploma to §504 students who are unable to pass an exit-level state-mandated test.

Letter to Runkel, 25 IDELR 387 (OCR 1996)— Graduating students with disabilities cannot be excluded from the general graduation ceremonies.

Aldine (TX) Independent School District, 16 EHLR 1411 (OCR 1990)— District failed to show an educational justification for its separate graduation ceremony for disabled students.

ETS College Board Exams (ACT, SAT) Accommodations

Cambridge (MA) Public Schools, 17 IDELR 996 (OCR 1991)—OCR found the district in violation of §504 for failing to adequately inform students with disabilities of the possibility for accommodations or

modifications to the ACT or SAT college board tests (despite the fact that ETS, not the schools, would be responsible for such accommodations).