

# Johnny Wants to Be Quarterback!: A Student with Special Needs & Participation in Extracurricular Activities

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## Housekeeping

- Neither these materials nor the presentation are intended to be legal advice.
- My focus is on the federal law. State law and local policy can play a part on these issues as well. Talk to your school attorney for application of these rules to a particular set of facts.

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**The IEP Must Address Extracurricular & Nonacademic Activities** 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb).

- The IEP must include statement of special ed & related services and program modifications or supports for the student to participate in extracurricular and other nonacademic activities.
- Doesn't that mean that the IEP has to include services that are NOT required for FAPE? Yep.

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**The IEP Must Address Extracurricular & Nonacademic Activities** 34 C.F.R. § 300.107(a).

“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.”

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## **The IEP Must Address Extracurricular & Nonacademic Activities**      34 C.F.R. § 300.117

- LRE obligation. “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.
- Note, this IDEA obligation is not FAPE based. *Independent Sch. Dist. No. 12, Centennial v. Minnesota Dept. of Educ.*, 110 LRP 58331 (Minn. 2010).

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## **The Section 504 Plan Must Address Extracurricular & Nonacademic Activities**      34 C.F.R. § 104.37(a)

- Section 504 says the same thing:

“(1) A recipient to which this subpart applies 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.”

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## **Any guidance on extracurricular athletics?**

*Students with Disabilities: More Information and Guidance Could Improve Opportunities in Physical Education and Athletics*, General Accounting Office, (June 23, 2010) (“GAO”).

- 2010 GAO report found that students with disabilities were not being afforded equal opportunity to participate in extracurricular athletics in public elementary and secondary schools.
  - One reason for the failure? Confusion in the schools with respect to their legal obligations
- GAO recommended that ED “clarify and communicate schools’ responsibilities” under Section 504 and ADA, Title II.

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## **Any guidance from the U.S. Department of Education (ED) on extracurricular athletics?**

*Dear Colleague Letter*, 60 IDELR 167 (OCR 2013)(hereinafter “Athletics DCL”),

- In 2011, ED released *Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Education and Extracurricular Athletics*, U.S. Department of Education (August 2011),
  - The document provided suggestions to help school increase opportunities for students with disabilities to participate,
- And In 2013, ED released a Dear Colleague Letter intended to address the schools’ confusion on equal opportunity to participate.

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## Any guidance from the U.S. Department of Education (ED) on extracurricular athletics?

*Dear Colleague Letter*, 60 IDELR 167 (OCR 2013)(hereinafter “Athletics DCL”),

- The 2013 OCR guidance contained 4 main pieces,
  - Overview of schools’ obligations under § 504 and ADA Title II.
  - Cautions against making decisions on the basis of presumption & stereotype.
  - Details on specific obligations for extracurricular activities.
  - Discussion of separate or different athletic opportunities (which section was later significantly revised). *Dear Colleague Letter*, 113 LRP 51638 (OCR 2013).

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## Note that the guidance does not address IDEA FAPE or the IEP process

*Athletics DCL*, p. 7.

- How does this work for special ed-eligible kids?

“Because the IDEA is not enforced by OCR, this document is not intended as an explanation of IDEA requirements or implementing regulations, which include the requirement that a student’s IEP address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to, among other things, participate in extracurricular and other nonacademic activities.”

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## **Note that the guidance does not address IDEA FAPE or the IEP process**

Athletics DCL, p. 7.

- How does this work for special ed-eligible kids? OCR looks at the IDEA student through the 504 lens.

“In general, OCR would view a school district’s failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements as a failure to ensure Section 504 FAPE and an equal opportunity for participation. ”

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## **Do Not Act on Generalizations & Stereotypes**

(All subsequent quotes are from the Athletics DCL unless otherwise noted)

- It helps to remember that Section 504 is a civil rights law....
  - The Individualized Determination Rule: “A school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular.”
  - “one student with a certain type of disability may not be able to play a certain type of sport, but another student with the same disability may be able to play that sport.”

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## **Guidance Example #1: Lacrosse**

“A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club.

As she enters the ninth grade in high school, she tries out and is selected as a member of the high school's lacrosse team.”

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## **Guidance Example #1: Lacrosse**

“The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game.”

“Based on this assumption, the coach decides never to play this student during games. In his opinion, participating fully in all the team practice sessions is good enough.”

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## **Guidance Example #1: OCR Analysis**

- The coach's actions were clearly based on stereotype.

“OCR would find that the coach's decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability.”

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## **Guidance Example #1, OCR Analysis**

### **What should the coach have done instead?**

“Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices.”

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## Guidance Example #1, OCR Analysis

**Does that mean she should have participated in games? No.**

- “The student, of course, does not have a right to participate in the games; but the coach’s decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions).”
- *A little commentary:* OCR understands the desire to win and the underlying necessity to put the best team on the field.

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## Ensure Equal Opportunity for Participation

### **The Reasonable Modification Rule:**

“A school district that offers extracurricular athletics must do so in such manner as is necessary to afford qualified students with disabilities an equal opportunity for participation.... in an integrated manner to the maximum extent appropriate to the needs of the student.”

- “This means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate, unless the school district can show that doing so would be a fundamental alteration to its program.”

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## **Nondiscriminatory Selection & Competition Criteria**

school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity,

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## **Ensure Equal Opportunity for Participation**

The right to participate depends on whether the student satisfies nondiscriminatory talent/skill criteria.

“equal opportunity does not mean, for example, that every student with a disability is guaranteed a spot on an athletic team for which other students must try out.”

A few examples...

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## **Ensure Equal Opportunity for Participation**

*Maryville City (TN) School District, 25 IDELR 154 (OCR 1996).*

### **Baseball tryouts.**

Student with Tourette Syndrome was not subjected to discrimination when he was allowed to try out, albeit unsuccessfully, for a school baseball team. The parent was concerned that having supervised the in-school-suspension room, the baseball coach had knowledge of the student's behaviors, and had excluded him from the team because of that knowledge.

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## **Ensure Equal Opportunity for Participation**

*Maryville City (TN) School District, 25 IDELR 154 (OCR 1996).*

### **Baseball tryouts.**

OCR found otherwise. The coach ranked the students on a variety of performance criteria: speed, balance, coordination, hand-eye coordination, sprint speed, lateral movement, and softness catching the ball. Out of fourteen students vying for two openings, the claimant finished eighth, and did not receive a position on the team. OCR found no violation since the "student was given an equal opportunity to compete for a position."

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## **Ensure Equal Opportunity for Participation**

*McDowell County (W.V.) Schools, 55 IDELR 82 (OCR 2010).*

### **Cheerleading tryouts.**

- Twenty-four girls tried out for the 12 available cheerleader positions. Complainant argued that Student was not selected due to her small stature, the result of a growth hormone deficiency.
- The cheerleading coach explained the selection criteria to OCR. Five judges was given a rubric to fill out... and students were rated on the following: set, smile, loudness, clap, coordination and attitude.
- Students were also rated on two types of jumps, and a jump of their choice....

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## **Ensure Equal Opportunity for Participation**

*McDowell County (W.V.) Schools, 55 IDELR 82 (OCR 2010).*

### **Cheerleading tryouts.**

- In addition to the judge's rubrics, each girl's classroom teacher fill out a rubric rating the girls on classroom performance in the following areas: behavior, attendance, attitude, responsibility and grades."
- OCR notes that while the parent and student "were of the opinion that the Student was better at cheerleading and gymnastics than at least three of the other students who made the team" the judges disagreed.
- The scores were tallied. Girls with the highest scores received the positions

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## **Ensure Equal Opportunity for Participation**

*McDowell County (W.V.) Schools, 55 IDELR 82 (OCR 2010).*

### **Cheerleading tryouts.**

- Interestingly, the tally sheets had been destroyed and could not be reviewed as part of the investigation.
- OCR did not see any evidence to suggest that the Student did or should have scored in the top 12.
- OCR notes that while the parent and student “were of the opinion that the Student was better at cheerleading and gymnastics than at least three of the other students who made the team” the judges disagreed.

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## **Ensure Equal Opportunity for Participation**

*Festus (MO) R-VI School District, 47 IDELR 17 (OCR 2006).*

### **Volleyball tryouts. There has to be chemistry in volleyball.**

- Explaining to OCR that the Student at issue in a discrimination complaint did not have the required skills, the varsity volleyball coach discussed the importance of on-court chemistry.
  - “Ms. Eggemeyer explained ‘chemistry’ between the players on the court is extremely important in volleyball. Ms. Eggemeyer explained how she used the term chemistry to describe how well the team members interacted or worked together, including their communication and confidence in each other on the court.

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## **Ensure Equal Opportunity for Participation**

*Festus (MO) R-VI School District, 47 IDELR 17 (OCR 2006).*

### **Volleyball tryouts. There has to be chemistry in volleyball.**

- “Student A’s chemistry on the court with the other players was just decent because she was really quiet, not out-going, lacked confidence and was not vocal enough or consistent enough.”
- “Being vocal is crucial because players have to talk to each other on the court to prevent dropped balls and collision with other players.”
- The coach explained her efforts to help the student identify the skills she needed. The Student needed “to be more consistent, more vocal, quicker, and not walk through drills.”

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## **Ensure Equal Opportunity for Participation**

*Festus (MO) R-VI School District, 47 IDELR 17 (OCR 2006).*

### **Volleyball tryouts. There has to be chemistry in volleyball.**

- OCR found no discrimination. While the evidence suggests that “Student A is a very capable athlete, she was not considered one of the top six volleyball players by at least three coaches who were familiar with her play.”

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## **Nondiscriminatory Selection & Competition Criteria**

*Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996).*

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## **Nondiscriminatory Selection & Competition Criteria**

*Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996).*

### **The Facts:**

- The school alleged that, despite accommodations, the student was unable to perform the essential functions of the basketball manager position.
  - the student required too much supervision on away games
  - could not use the phone or count change
  - could not keep a shot chart
  - was not alert enough to get out of the way of an incoming play on the bench and
  - could not perform most of the other duties of a manager.
  
- As a result, the school needed to replace him with someone who could perform the required duties.

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## **Nondiscriminatory Selection & Competition Criteria**

*Crete-Monee (IL) School District 201-U, 25 IDELR 986 (OCR 1996).*

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## **Ensure Equal Opportunity for Participation**

The right to participate depends on whether the student satisfies nondiscriminatory eligibility criteria.

- Uniform application of eligibility requirements
  - Participation on a competitive team required that the student be enrolled at the school, *Paul v. Henrico County Public Schools*, 32 IDELR 173 (E.D.VA. 2000).
  - Attendance requirements for team eligibility (miss a practice, miss a game). *Houghton Lake (MI) Community Schools*, 45 IDELR 199 (OCR 2005).

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## Ensure Equal Opportunity for Participation

The right to participate depends on the student following coach's instructions, team rules & laws that apply to all students.

- District did not violate § 504 when it removed a disabled student from the wrestling team for **failing to follow instructions during practice**, since non-disabled students were also removed for the same offense. *Carmel (NY) Central School District*, 23 IDELR 1195 (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. *Cabarrus County (NC)*, 22 IDELR 506 (OCR 1995).

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## Ensure Equal Opportunity for Participation

The right to participate depends on the student following coach's instructions, team rules & laws that apply to all students.

- No violation when Student was cut from baseball team although parent alleged he was one of the best players. Coach indicated that the **student did not meet the attitude/teamwork criteria in team rules**, i.e., the student had twice quit the team the year before. *Kaneland (IL) CUSD. #302*, 37 IDELR 287 (OCR 2002).
- No violation when Student was removed from the football team after **drinking alcohol from a soft drink bottle at school**, in violation of the school's rules on extracurricular participation. *Alief ISD*, 26 IDELR 202 (SEA TX. 1997).

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## Ensure Equal Opportunity for Participation

What would be a Fundamental Alteration? Think *Crete Monee*.

-“A modification might constitute a fundamental alteration if the modification alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally (such as adding an extra base in baseball).”

-“Alternatively, a change that has only peripheral impact on the activity or game itself might give a particular player with a disability an unfair advantage...”

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## Guidance Example #3: The Swimmer with One Hand

- “A high school student born with only one hand is eligible under Section 504.
- The student wants to participate on the school swim team.
- The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets.
- The student meets those requirements.

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### Guidance Example #3: The Swimmer with One Hand

- “She asks the school district to waive the “two-hand touch” finish it requires of all swimmers in swim meets, and to permit her to finish with a “one-hand touch.”
- The school district refuses the request because it determines that permitting the student to finish with a “one-hand touch” would give the student an unfair advantage over the other swimmers.”

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### Guidance Example #3: The Swimmer with One Hand

- **Analysis...** “In determining whether making the necessary modification—eliminating the two-hand touch rule—would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.”
- The Question: what is essential to a swim race?

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### Guidance Example #3: The Swimmer with One Hand

**Analysis....** “OCR would find a one-hand touch does not alter an essential aspect of the activity. If, however, the evidence demonstrated that the school district’s judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.”

*A little commentary:* Just touching one hand can make a difference.

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### Guidance Example #3: The Swimmer with One Hand

**Analysis if unfair advantage is determined....** “In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation.”

Question: What else could be done that is neither unfair advantage nor fundamental alteration?

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### Guidance Example #3: The Swimmer with One Hand

**Analysis....** “In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete.”

*A little commentary on unfair advantage....*

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### Ensure Equal Opportunity for Participation

Fundamental alteration does not apply to an extracurricular activity if required for IDEA or 504 FAPE.

- “To be clear, however, neither the fundamental alteration nor undue burden defense is available in the context of a school district’s obligation to provide a FAPE under the IDEA or Section 504.”
- *In the author’s opinion, while it’s certainly possible for participation in a particular extracurricular activity to be required to provide FAPE for a student, it will be quite rare.*

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## **Offering Separate or Different Athletic Opportunities: An Update...** *Dear Colleague Letter, 113 LRP 51638 (OCR 2013).*

Revised OCR guidance on separate teams....

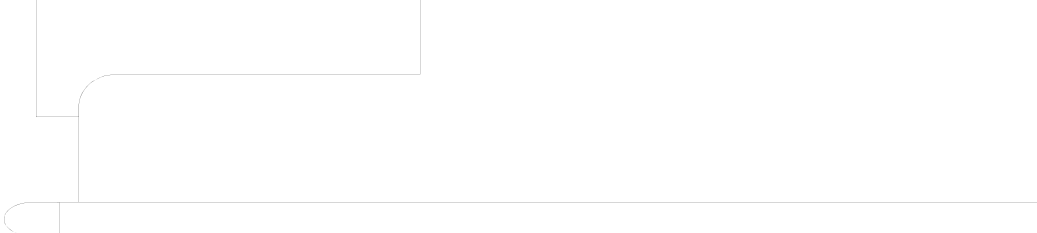
- “For students with disabilities who cannot participate in the school district’s existing extracurricular athletics program, even with reasonable modifications or aids and services, the guidance urges school districts to create additional opportunities for such students, which could include separate or different activities from those already provided. However, it is not OCR’s view that a school district is required to do so.”

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## **So, does Johnny get to be quarterback?**

- The only answer is the legal answer “It Depends”
  - Does Johnny meet the nondiscriminatory requirements for participation?
  - Does Johnny have the requisite skills and did he demonstrate the skills at tryouts?
  - Does Johnny follow team and school rules and coach’s directions?
  - Does Johnny attend and participate enthusiastically in practices?
  - Is Johnny the best candidate on the basis of quarterback skills?
- You don’t have to be quarterback to get FAPE, but you have to have the same opportunity to try out as your nondisabled peers.

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**Thanks for all that you do!**  
**Best wishes for the rest of the**  
**NELI Conference and a**  
**Happy, Safe Holiday Season!**