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SECTION 504 DISCRIMINATION CLAIMS EXTEND TO NONACADEMIC PROGRAMS AND SERVICES

While school districts are not required to make fundamental or even significant modifications to accommodate the handicapped in nonacademic programming, according to the courts, schools are required to make reasonable modifications in order to ensure participation by such students. Failure on the part of a school district to reasonably accommodate handicapped students in nonacademic programming may result in a school district facing discrimination claims under Section 504 of the Rehabilitation Act of 1973 ("Section 504") and the Americans with Disabilities Act ("ADA").

Nonacademic services can include, but are not limited to, such district-sponsored programs as day care, after-school care, summer recreational programs, interscholastic athletics, and dances. Generally, school districts are required to provide handicapped students with *reasonable* accommodations to ensure such students have an equal opportunity to participate in district sponsored services and activities. However, what constitutes *reasonable* is a vague standard, which has not been clearly defined by either the United States Department of Education's Office for Civil Rights ("OCR") or state and federal courts.

OCR has opined that little case law exists applying Section 504 to nonacademic programs offered by a school district. An OCR *Staff Memorandum* notes that because such programs are non-educational in nature, they are not regulated under the *Free Appropriate Public Education* mandates of Subpart D of the Section 504 regulations. Instead, under Section 504, non-educational programs are considered "nonacademic services" provided by a recipient of federal financial assistance. Accordingly, in operating any such program, a district is still bound by the antidiscrimination prohibition of Section 504.

OCR recently penned a "Dear Colleague Letter" in response to a recommendation from the Government Accountability Office's ("GAO") report which found that students with disabilities are not being afforded an equal opportunity to participate in extracurricular athletics in public elementary and secondary schools. The OCR "Dear Colleague Letter" provides guidance for school districts regarding the obligations of public schools under Section 504 which requires students with disabilities to have an equal opportunity for participation in nonacademic and extracurricular services and activities.

Schools may require a level of skill or ability for participation in a competitive program or activity; 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. However, a school district must afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student. This means that a school district must make reasonable modifications to its policies, practices, or procedures whenever such modifications are necessary to ensure equal opportunity, unless the school district can demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular athletic activity. An example of a fundamental alteration would be adding an extra base in baseball. OCR further states though that even if a modification would result in a fundamental alteration of the activity, the school district would still be required to determine if other modifications might be available that would permit the student's participation.

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What remains unclear is what the courts deem a reasonable accommodation under Section 504 and the ADA. Unfortunately, there appears to be no set standard, or litmus test to determine if a proposed accommodation to a nonacademic program is reasonable. Instead, the courts analyze each matter on a case by case basis. OCR provides some examples: providing a visual cue to a student with a hearing impairment as an alternative start in the track and field meets, allowing a swimmer with one hand to finish a race with one hand touching the wall and the other arm outstretched, and providing a student with diabetes glucose testing and insulin administration during the after-school gymnastics club.

Of particular concern to school districts in OCR's latest guidance is OCR's discussion of offering separate or different athletic opportunities to students with disabilities. OCR states, "When the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities." OCR encourages school districts to be creative in creating opportunities for students with disabilities to participate in the school community.

The above considerations are but a handful of the factors the OCR and the courts will analyze as part of a Section 504 discrimination claim relating to nonacademic programming. In order to minimize potential discrimination liability under Section 504, school districts should consider nonacademic programming and services in its school board policies related to handicapped students.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.