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**KALEVA LAW OFFICES**

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**TO:** KLO CLIENTS

**FROM:** KALEVA LAW OFFICES

**SUBJECT:** OCR “DEAR COLLEAGUE LETTER” RE: DISABLED STUDENTS AND EXTRACURRICULAR PARTICIPATION

**DATE:** 3/10/13

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On January 25, 2013, the U.S. Department of Education’s Office for Civil Rights (OCR) issued a “Dear Colleague” Letter regarding the participation of students with disabilities in extracurricular activities. Accordingly to the letter, the U.S. Government Accountability Office (GAO) suggested in June 2010 that OCR issue guidance to improve opportunities for students with disabilities to participate in athletics. OCR is responsible for enforcing Section 504.

According to OCR, a school district is required 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. For practical purposes, this equal opportunity usually means that the school district must provide a student with accommodations to allow him or her to access an extracurricular activity in a manner equal to a nondisabled peer. A “qualified” student is (i) of an age during which persons without disabilities are provided such services; (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities; or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). Thus, a qualified student is one who is generally under the age of 19 on or before September 10.

OCR’s definition of “qualified” does differ somewhat from court cases that have used the term “qualified” to set a standard for students to participate. For example, before OCR issued this guidance, a school district could have determined that a student was not “qualified” because the student lacked the level of skill required to compete. Although OCR does not consider skill in defining “qualified,” it makes it clear that a school district may require a level of skill or ability for participation in a selective or competitive activity so long as the selection or competition criteria are not discriminatory. In other words, a school district does not have to allow a student on a swim team if that student cannot swim, regardless of whether the student has a disability.

OCR outlined several acts which it finds to be violations of Section 504:

- denying a qualified student with a disability the opportunity to participate in or benefit from an activity;
- affording a qualified student with a disability an opportunity to participate in or

- benefit from an activity that is not equal to that afforded other students;
- providing a qualified student with a disability with activity that is not as effective as that provided to others and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement in the most integrated setting appropriate to the student's needs;
- providing different or separate activities to students with disabilities or to any class of students with disabilities unless such action is necessary to provide a qualified student with a disability with activities that are as effective as those provided to other students; and
- otherwise limiting a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by other students in an activity.

OCR also reiterated that school districts are required to adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging a violation of Section 504. It is also a violation for a school district to provide "significant assistance" to any association, organization, club, league, or other third party that discriminates on the basis of disability. Thus, school districts should work with athletic associations to ensure students with disabilities are not denied an equal opportunity to participate. It is advisable that districts review MHSAA guidelines that restrict students from participating and address any concerns where these restrictions more heavily burden disabled students. Furthermore, districts should review any agreements with other clubs or associations which use or lease facilities or to which district funds are transferred to ensure that students with disabilities are afforded an equal opportunity to participate in those programs.

OCR then provided specific examples (with analysis) to address regular issues that it has observed arise in regard to serving students with disabilities.

1. Acting on generalizations or stereotypes

A school district cannot rely on generalizations, assumptions, prejudices, or stereotypes regarding disabilities, generally or specific disabilities.

*Example 1:* A student with a learning disability tries out and makes the high school lacrosse team. The student had participated in the middle school's lacrosse club. The high school coach, aware of the student's disability, believes that all students with that disability would be unable to successfully play in an actual game because of time constraints and the pressure of the game. The coach refuses to play the student, but does allow her to practice.

*OCR Analysis:* This would be a violation of Section 504 because the coach made his decision based upon the characteristics he believes are associated with her disability. As a result, the student was denied an equal opportunity to participate. The coach should have allowed the student the opportunity to play in games. While students with disabilities do not have an automatic right to play in a competition, the decision regarding playing in competition must be based upon the same criteria used for all

players (i.e., performance during practice sessions).

*Lesson:* If a student with a disability is allowed to be on a team, you cannot base the decision not to play the student on the disability or assumptions regarding that disability. Decisions regarding playing time should be based on criteria applicable to all students and should not relate to disability.

## 2. Equal Opportunity to Participate

Providing an equal opportunity to participate usually means making reasonable modifications and providing those aids and services that are necessary to ensure an equal opportunity to participate. This does not mean, however:

- Providing modifications or aids or services that would fundamentally alter its program.
- Disregarding safety that cannot be alleviated through reasonable modifications or provision of aids and services. Thus, a school district can adopt legitimate safety standards needed to implement its program.

*Example 2:* A cognitively delayed student seeks to be a member of the high school football team. The student does not understand tackling. Despite the provision of special instruction from a coach on tackling, the student is unable to understand how to tackle another or be tackled in a safe manner.

*Analysis:* The district does not have to allow the student to participate as a member of the team or play the student. The district cannot modify football to avoid tackling because this would be a fundamental alteration to that program.

*Lesson:* Before excluding a disabled student on the basis of safety concerns, attempt modifications or aids or services to alleviate the concerns. Only if the modifications or aids or services do not alleviate the concerns should the district consider other alternatives to participation (i.e., participation in another activity or holding another role on the team such as manager).

- Guaranteeing spots for disabled students on athletic teams, but requiring non-disabled students to try out for spots. School districts may require a level of skill or ability for participation. Thus, students can be required to be able to play an instrument to join the marching band or swim before joining the swimming team.

School districts are required to provide reasonable modifications to its policies, practices, or procedures if necessary to ensure equal opportunity, unless they can demonstrate that the modification would fundamentally alter the activity. This equal opportunity to participate also means that students with disabilities should be integrated to the maximum extent appropriate to the needs of the individual students. Students are

entitled to modifications or aids or services not only as members of the team, but also in any try-outs required for membership on a team.

With regard to modifications, OCR advises a two-step inquiry: (1) an individualized inquiry to determine whether a modification is necessary; and (2) if necessary, does the modification result in a fundamental alteration of the activity. OCR considers a fundamental alteration to be one that alters an essential aspect of the activity in a manner that would be unacceptable if it affected all competitors equally, such as adding an extra base in baseball, or is one, even if small, that would provide a student with a disability an unfair advantage over others. OCR also advises that even if one modification or aid or service constitutes a fundamental alteration, a school district must consider whether there are other modifications or aids or services available to ensure an equal opportunity for participation.

*Example 3:* A hearing impaired high school student wants to run in sprint events for the track team. At try-outs, a coach used a visual cue to signal the start of a race. The hearing impaired student's times were fast enough to make the team. During practices, the coaching staff continues to use visual cues to signal the start of practice races. Before the first competitive meet, the student requests that simultaneous visual and auditory (i.e., starter pistol) cues be used. At least two neighboring districts used simultaneous visual and auditory cues at meets and did not have any complaints with regard to this system. The district engages in the individualized inquiry and determines that the modification is necessary for the student to compete, but refuses the modification out of concern that the visual cues may distract other runners. The coach informs the student that he can practice but not compete in meets.

*OCR Analysis:* This would be a violation of Section 504. The school district was entitled to set the benchmarks for speed/times required for membership on the team and was correct in providing modifications at try-outs and practices. Because the modification of providing a visual cue was necessary, the school district would only have been able to deny that modification if it had fundamentally altered the track program. The evidence regarding visual cues at other school districts did not support a finding of fundamental alteration. The visual cues should have been allowed.

*Lesson:* Engage in the two-part inquiry: is the modification necessary and does it fundamentally alter the activity. Before making a determination that a modification is a fundamental alteration, research how other districts address similar situations.

Note: Liability may still arise if the student was denied participation because of an Association or Sponsor's rule preventing a visual cue. The district should engage in a conversation with the Association or Sponsor to address this situation.

*Example 4:* A high school student with only one hand wishes to participate on the high school swim team. The school requires that students have a certain level of swimming ability and be able to compete at meets for membership on the swim team. The student

with one hand has the requisite ability to swim. At meets, students are required to touch both hands to the pool wall to finish a race. The student with one hand requests that the “two-hand touch” rule be waived and that she be allowed to finish with touching her one hand to the wall. The district refuses the request because it determines that a “one-hand touch” rule would give the student an unfair advantage.

*OCR Analysis:* The school district must engage in the two-part inquiry. Because the student has only one hand, modification of the “two-hand touch” rule is necessary. Although OCR believes it would not find allowing the waiver to be a fundamental alteration, it does recognize that a school may be able to produce sufficient evidence to demonstrate a fundamental alteration if the student was competing against other students who were required to touch with both hands. However, even if the school could demonstrate that a waiver would be a fundamental alteration, it must consider whether other modifications are available. For instance, the school could determine that it would not be an unfair advantage to ascertain the student’s finish by touching the wall with her one hand and stretching her other arm forward to the wall at the same time.

*Lesson:* A school district’s refusal to provide a modification because of a determination that it would fundamentally alter the activity must be supported by actual evidence. The school district must also be able to show consideration (and, if feasible, implementation) of other modifications or aids or services.

*Example 5:* A diabetic elementary school student wants to join the school-sponsored gymnastics club that meets after school. In the regular classroom setting, the student is provided Section 504 services that include assistance with glucose testing and insulin administration by trained school personnel. The student’s parents request that these services be provided to her during gymnastics participation. Although the district agrees that the services are necessary, it refuses to provide the assistance because the gymnastics club is an extracurricular activity.

*OCR Analysis:* This violates Section 504. With regard to providing the services (assistance with glucose testing and insulin administration by trained personnel), these services are necessary for the student to be able to participate (in light of their need in the regular education setting). Thus, the district is obligated to provide the services while the student is participating with the gymnastics club unless they would result in a fundamental alteration of the activity. In this situation, providing assistance with glucose testing and having trained personnel available for insulin administration during gymnastics for the student would not be a fundamental alteration.

### 3. Offering Separate or Different Athletic Opportunities

A school district may not provide *unnecessary* separate or different extracurricular activities to students with disabilities because this would be discriminatory. As such, OCR encourages school districts to work with community and athletic organizations to

develop a broad range of opportunities to include students with disabilities in these activities.

However, if students with disabilities are unable to participate in extracurricular activities, even with the provision of reasonable modifications or aids and services, they are still entitled to an equal opportunity to the benefits of extracurricular programs. If the interests and abilities of these students cannot be fully and as effectively met by the school district's existing program, the district should create additional opportunities. This means offering activities that are separate or different from those offered non-disabled students, but must be supported equally as those other activities. School districts throughout the country are creating disability-specific teams such as wheelchair tennis or wheelchair basketball.

The provision of these separate but equal programs requires flexibility to address the interests and abilities of the unique population of students with disabilities in the district. School districts should coordinate with students, families, community/advocacy organizations, athletic associations, or other interested individuals to develop such opportunities.

If there is an insufficient number of students to field a team, school districts should consider other options such as:

- Developing district-wide or regional teams (as opposed to school teams) for students with disabilities
- Mixing male and female students with disabilities on teams for activities for students with disabilities
- Offering "allied" or "unified" sports teams for students with disabilities to participate with students without disabilities.

It is important to remember that separate but equal opportunities for participation should only be considered when students with disabilities cannot participate in any of the existing programs, even with reasonable modifications or the provision of aids and services.

### **Key Lessons from the "Dear Colleague" Letter:**

- OCR distinguishes between modifications or aids and services for educational services provided in the classroom or in other settings and modifications or aids and services provided for extracurricular activities. A school district may consider the reasonableness of a modification or aid or service in the extracurricular setting, but cannot consider reasonableness of a modification or aid or service in the provision of educational services.
- Although OCR holds school districts to a "reasonable" standard for the provision of modifications or aids and services to students with disabilities in extracurricular

activities, it cautions against school districts arguing that a requested modification or aid or service is unreasonable because it poses an undue burden on the district. OCR does not believe that a school district can prevail on a defense of undue burden for refusing a modification or aid or service for an extracurricular activity.

- School districts cannot use the defense of undue burden or fundamental alteration to avoid providing FAPE to students with disabilities under Section 504 or IDEA.
- OCR recognizes that the provision of FAPE under Section 504 or IDEA may entail participation by the student in an extracurricular activity. This is going to be an individualized determination. While all students with disabilities, whether eligible under IDEA or Section 504, have the right to an equal opportunity to participate in extracurricular activities, only some of these students will require participation in extracurricular activities in order to receive FAPE.
- A school district cannot agree to a modification or aid or service for an IDEA-eligible student for whom FAPE requires participation in an extracurricular activity, and then deny a Section-504 student that same modification or aid or service as a fundamental alteration. In other words, a school district cannot provide modifications or aids and services to only IDEA-eligible students participating in extracurricular activities under their IEP and then refuse to provide Section 504-students those same modifications or aids and services. Thus, it is important for school districts to exercise caution when addressing extracurricular activities during IEP meetings. Team members should be aware that modifications and aids and services to which they agree may be required for all other disabled students participating in the same activity. Although school districts may not refuse a modification or aid or service to an extracurricular activity required for FAPE on the basis of a fundamental alteration, they may still be able to agree on other modifications or aids or services that would enable participation and could be implemented for all other disabled students.