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In Brief: School Law Update

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U.S. DEPARTMENT OF EDUCATION GUIDANCE

Equal Access to Athletic Programs for Students with Disabilities

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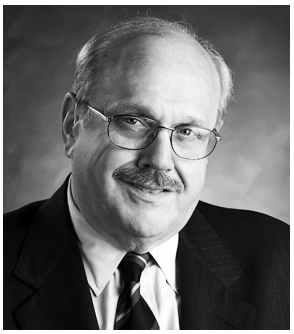

On January 25, 2013, the U.S. Department of Education, Office for Civil Rights (OCR), released a "Dear Colleague" letter addressing students with disabilities and equal access to extracurricular athletics – which include club, intramural and interscholastic athletics.

The U.S. Department of Education has advised school districts that they should look to create parallel athletic programs for students with disabilities where their participation cannot be maintained on existing athletic teams by instituting reasonable modifications or accommodations, or by providing aids and services necessary to ensure an equal opportunity to participate. Section 504 of the Rehabilitation Act of 1973 requires school districts, as the recipients of federal funding, to provide students with an equal opportunity to participate in extracurricular athletics, unless such participation would fundamentally alter the nature of the extracurricular activity.

Students must be provided with an equal opportunity to participate in extracurricular athletics, unless such participation would fundamentally alter the nature of the extracurricular activity.

A fundamental alteration would be recognized if, for example, the proposed modification alters an "essential aspect of the activity" that would be unacceptable even if applied to all participants equally (e.g., addition of an extra base in baseball) or would fundamentally alter the character of the competition by giving a participant with a disability an unfair advantage over other competitors. OCR guidance also makes clear that districts may not operate extracurricular athletic programs "on the basis of generalizations, assumptions, prejudices or stereotypes about disability generally, or specific disabilities in particular."

When requests for accommodations, modifications, aid or services come up…

In the context of equal access to athletics, schools must conduct an individualized assessment of the student's needs to determine: (1) whether the requested accommodation, modification, aid or service is necessary for the student's participation, and (2) whether the request would fundamentally alter the nature of the activity. If a fundamental alteration would occur by virtue of the proposed modification, the school district is still required under the law to determine availability of other reasonable modifications which would allow the student to participate.

Although OCR has expressed that districts should expand athletic offerings for students with disabilities who cannot participate even with reasonable accommodations, it is important to note the "Dear Colleague" letter's use of permissive ("should") language, rather than mandatory ("must") language. Although OCR interpretations are not binding in any court of law or administrative tribunal, such as a Pennsylvania Special Education Due Process Hearing Officer, OCR interpretations are frequently granted deference as they represent OCR's interpretations of its own regulations. OCR is the governmental unit charged with enforcement of Section 504.

OCR's "Dear Colleague" letter is clearly aimed at addressing the apparent gap in access to programs. Available data from the U.S. Government Accountability Office (GAO) indicates that students with disabilities participate in extracurricular athletics at much lower rates than their non-disabled peers, and that equal opportunities to participate are not being provided. The new guidance is expected by some to increase athletic opportunities for students with disabilities in the same way Title IX expanded such opportunities for female students after its passage in 1972.

Districts can access the full text of OCR's "Dear Colleague" letter at: **http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf**

Street Preacher Evokes First Amendment Right and Loses:

How and When You Can Limit Third Party Access to School Children

(Excerpts from a partner law firm bulletin article published by King, Spry, Herman, Freund & Faul, LLC, based in Bethlehem, PA)

By Keely J. Collins, Esquire
King, Spry, Herman, Freund & Faul, LLC

One of the many challenges facing public school administrators is defining the contours of students' First Amendment rights in the public school. This challenge is even greater when it comes to reigning in third–party access. On one hand, parents expect their children to be protected from third-party messages; while, on the other hand, even third-party speakers have some right to access certain forums of speech.

As of lately, federal courts have issued several confusing First Amendment cases: Several cases allowed students impunity, absent disruption, to attack administrators on social media; another case allowed students to wear "I [heart] Boobies!" bracelets in school over the objection of administrators; and one other case allowed a third party to distribute solicitation materials via an elementary school child notwithstanding the superintendent's safety concerns. All of these cases leave schools in a lurch to manage student behavior. However, on September 20, 2012, the Dauphin County Court of Common Pleas issued a decision that gives public schools some latitude to manage third-party behavior.

How It All Began

Self-proclaimed street preacher and evangelist, Stephen Garisto, waited at the Central Dauphin School District bus on a daily basis to "save" and "disciple" schoolchildren to his religious beliefs. There were multiple confrontations between Garisto and concerned parents. Garisto refused to leave, claiming that he had a "First Amendment right" to be there.

The Outcome

The district sued Garisto to get a court order that would keep him in a safe distance of no less than twenty yards from the school bus stops where schoolchildren are waiting to board and de-board. In response to Garisto's First Amendment claim, the district maintained that it did not want to restrict Garisto's message, only his proximity to students to address safety concerns. It was the approaching and pursuit of children, not the content of the message that created the district's ultimate concern.

The court of common pleas agreed with the district. Because Garisto, a non-school third party speaker, was approaching students within a bus loading zone, the district had a prerogative to implement reasonable and viewpoint neutral restraints on his speech. The court believed that the restriction was reasonable and related to the district's legitimate concern for its children. After all, as aptly noted by the court, schoolchildren are a "captive audience" for speech as they board and de-board the school bus.

Bottom Line for Schools

When safety concerns are at stake, third party speakers can and should be prohibited from accessing schoolchildren. However, when communicating the restriction, district administrators should be advised that the reasons given must be reasonable and viewpoint neutral. In other words, when an outside party is denied access to the school, they must be informed of a legitimate education or safety-based reason for the denial. Also, a distinction should not be made on the basis of viewpoint. Any time that an outside speaker requests access to the school or school property, we strongly advise you to contact your solicitor before responding to the request.

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