

**NFHS Summary of the Department of Education-OCR Call this morning:**

For those of you who were unable to be on the call, here is my summary of the call:

Seth Galanter, Deputy Secretary of Education presented the information and fielded a few calls.

There were five points stressed.

1. You cannot rely on generalizations to determine participation for disabled students. Individual assessment is necessary in determining the appropriate level of participation for a disabled student.
2. If reasonable accommodations can be made to allow participation by a disabled student, that is the direction to go. You do not have to change the nature of the game. You also do not have to provide accommodations that give a disabled student an unfair advantage in competition.
3. School districts must provide needed aids and services for disabled students. This would mean if you provide services during the school day, then those must be provided for the student who participates on a team. The example included monitoring insulin intake.
4. These disability guidelines require inclusion where possible in existing programs or on existing teams. It does not require the student with disabilities automatically be given a spot on a team for which other students must try out. It does permit creation of a disabled team in sports such as tennis or basketball. The guidelines also recognized that there may need to be combined athletes from multiple schools on disabled teams. There also may be a need to mix male and female disabled students. And, the guidelines recognize that unified sports may serve the needs of the disabled students.
5. The goal of the guidelines is to expand opportunity and inclusion. Schools and state associations must still apply bona fide safety standards.

Please read the 13 page letter distributed earlier this morning. I believe it will answer some questions while generating others.

## **NFHS Response to OCR Disability Guidelines**

1. We believe in the values of participation for all students.
2. Providing programs for disabled students adds value to their educational experiences.
3. The NFHS and our member state associations will work together with the Department of Education Office for Civil Rights to enhance participation opportunities for all students, including those with disabilities.

## **Q and A: Disability in Sport Dear Colleague Letter**

### **Executive Summary**

On January 24, 2013 the Office for Civil Rights issued a Dear Colleague Letter clarifying schools' obligations under the Rehabilitation Act of 1973 to provide extracurricular athletic opportunities for students with disabilities. This Dear Colleague Letter provides a clear roadmap for interpreting the guidance so that schools can better integrate students with disabilities into mainstream athletic programs---and create adapted programs for students with disabilities.

### **I. Benefits of Participation**

#### **1. Why should schools offer athletic programs to students with disabilities?**

The benefits of athletic and physical education programs are equally important for students with disabilities as they are for all students. Physical activity is key in addressing the obesity epidemic that is especially problematic for individuals with disabilities, as 50% of people with disabilities do not engage in any physical activity. Participating in physical activity helps reduce obesity and prevent health problems, such as heart disease, breast cancer and debilitating stress-related illnesses like depression. Individuals with disabilities who participate in sports have higher self-esteem, better body images and higher rates of academic success; and are more likely to graduate from high school and matriculate in college; and experience greater career success and more options.

### **II. The Guidance**

#### **2. Does this guidance apply to high schools and colleges?**

Yes. Section 504 applies to all educational institutions that receive federal financial assistance. That includes all levels of education—from elementary schools to high schools to colleges and universities. While the examples written in the recent Dear Colleague Letter are focused on the secondary schools, the key principles also hold true for the intercollegiate level as well.

#### **3. Does this guidance also include private schools?**

Potentially. The Rehab Act applies to all educational institutions, both **public** and **private**, that receive federal funds. Private high schools and colleges must comply with the Rehab Act (and accordingly this Dear Colleague Letter) when they receive some form of federal funding.

#### **4. Does this Dear Colleague Letter create a new policy or law for schools?**

No. The Dear Colleague Letter does not create any new policies, but merely serves to give further clarification to the existing regulations and policies set forth under Section 504. For years, regulations

have existed that require schools provide “equal opportunity for participation” for students with disabilities in interscholastic, club and intramural athletics. (34 C.F.R. § 104.34 (a)) The guidance simply provides schools with examples and further explanations of what an equal opportunity for students with disabilities looks like.

**5. Does this guidance apply to individuals with both physical and intellectual disabilities?**

Yes. This guidance defines an individual with a disability as a person with a physical or mental impairment that substantially limits a major life activity. This includes students with cognitive as well as physical impairments.

**III. Legal Obligations**

**6. Do schools have an obligation to provide equal extracurricular athletic opportunities for students with disabilities?**

Yes. Schools are required to provide students with disabilities equal opportunities to participate in school’s extracurricular activities—including club, varsity and intramural sports programs.

**7. What does it mean for schools to provide an equal opportunity for participation?**

The legal definition of equal opportunity means that schools must conduct an individualized assessment of a student with disability to determine how to provide them with reasonable accommodations to include them to the fullest extent possible in athletic programs. A reasonable accommodation means that school systems must modify existing policies, practices or rules in order to include a student with a disability.

**8. What qualifies as an individualized assessment of a student with disability?**

An individualized assessment means that school systems must be able to evaluate a student with a disability based on the specific nature of their disability and the specific accommodations they need to participate in the athletic program. Essentially, it requires schools to be able to evaluate and adapt to students and programs on a case by case basis.

**9. What determines whether an accommodation that the student with disability requests is reasonable?**

A reasonable accommodation is one that does not fundamentally alter the nature of the services to provide the requested modification. A fundamental alteration of a sport competition rule occurs when a modification changes the essential competition and nature of the sport or gives the person with a disability a competitive advantage over non-disabled competitors.

*Examples of reasonable accommodations include modifying the general rule that disqualifies swimmers who fail to use a two-handed touch when they approach the pool wall to finish a race in breast stroke in order to permit a one-handed student to qualify with a one-handed touch or modifying the rule in wrestling to require constant contact between the opponents so that a blind athlete can compete. For example, consider Jim Abbott, who played professional baseball and had a 3.92 earned run average in his rookie year. Abbott was born with one hand, and Major League Baseball made an accommodation to its general rule that all ball players had to wear specific,*

*league-approved gloves.*

**10. Must students with disabilities be allowed to participate in any athletic program offered by a school?**

No. Students with disabilities, like any other student, must be qualified to participate in the athletic program or activity. School districts can require a level of skill or ability for a student to participate in sports, so long as the selection criteria are not discriminatory.

*For example, if a deaf student needs to have a sign language interpreter in order to participate on a basketball team, that accommodation should be provided so the student has a chance to play. However, if the deaf student gets this accommodation and is cut from the team because she doesn't demonstrate the same level of ability as hearing players who make the team, the school is not discriminating against the student with a disability. If a visually impaired student needs a modification of a rule, such as requiring constant contact during a wrestling match, and the student cannot effectively compete even with this accommodation, the school has not discriminated in cutting the student from the team. A student with a prosthetic device may or may not have the skills needed to be goalie on his high school team, but she must have the opportunity to try out for the position.*

**11. Can schools refer students with disabilities to community-based adapted sports programs as a way to meet their obligations under the law?**

No. Community-based adapted sports programs do not fulfill a school's obligation to provide individuals with disabilities with equal opportunities to participate in school athletic programs. Individuals with disabilities have the right to participate in both school-based and community-based athletics and recreation programs. Federal disability rights laws recognize these as distinct settings and require equal access to both.

**IV. Devising Programs**

**12. Should schools create adapted teams or programs for individuals with disabilities?**

Yes. Schools should create adapted programs for students with disabilities who cannot participate in the existing athletics programs even with reasonable accommodations.

*Examples of adapted athletic programs include wheelchair basketball, wheelchair team handball, wheelchair football, wheelchair tennis, power soccer and beep baseball. However, even if an adapted sports team is developed for students with disabilities, an individual student with a disability must be allowed to participate in mainstream programs for students without disabilities. For example, if a school system offered a golf program as part of its mainstream athletic program and also offered an adapted golf program, an individual student with a disability must be permitted the opportunity to participate in the mainstream program and must be offered reasonable accommodations.*

**13. How do school systems know how to provide adapted or mainstream physical activity programs for students with disabilities?**

School systems have the flexibility to devise programs to accommodate their students with disabilities that consider the specific needs, accommodations and abilities of the students in their communities.

Before creating such programs, school systems should review the numbers, ages and types of students with disabilities they serve, conduct outreach to these students and their families, and develop opportunities for participation. Numerous organizations and trained educators exist who can help schools design programs to accommodate students with disabilities.

*For example, the American Association of Adapted Sports Programs has been leading the way in the development of inclusive programs for students with disabilities in the secondary school level for years and will be leading a national effort to devise expanded programs in response to the new OCR guidance. [www.adaptedsports.org](http://www.adaptedsports.org).*

#### **14. How can schools create adapted teams when the numbers of students with disabilities at an individual school are insufficient to field a team?**

Schools must be flexible as they develop programs that consider the interests of students with disabilities. When the number of students with disabilities at an individual school is insufficient to field a team, school systems may:

- (1) develop district-wide teams as opposed to a school-based team in order to provide competitive experiences,
- (2) allow all players to compete in a wheelchair to help level the playing field which allows for more students with disabilities to engage in athletic programming,
- (3) mix male and female students on teams together,
- (4) combine elementary through high school age students on one team, where factors determining divisional placement are based on the functional ability of the players and not their age or grade level.
- (5) offer “allied sports” teams on which students with disabilities participate with students without disabilities, when there are not enough students with disabilities to field a team.

*All of these options have been used by numerous school systems such as in Georgia, Maryland, and Minnesota.*

#### **15. How do schools deal with the issue of mixed sex teams?**

If there are enough students to allow for it, distinct sex teams should be provided; however, the formation of adapted athletic teams must rely on the pool of available students. Rules governing adapted athletic programs allow for mixed-sex participation to ensure enough students.

#### **16. With already limited funds and resources available for athletic programming, how can schools afford to expand opportunities for students with disabilities?**

Schools have the flexibility to design programs and make accommodations to include students with disabilities in manners that take into account their existing facilities and resources.

*For example, if a school sponsors a wheelchair division within its track and field program, it can reduce costs because the wheelchair team would use the same track as the mainstream program. Additionally, mainstreaming students with disabilities into preexisting programs also helps keep programming affordable. For example, track and field, tennis and swimming teams would provide new opportunities with minimal budget impact. Coordinating sport/team offerings district-wide and/or statewide will create efficiencies in team travel, equipment acquisition, coaching expertise, uniforms, facilities, etc. Additionally, equipment, such as sports wheelchairs can be used for multiple sports. Students who use a wheelchair for daily mobility may use their wheelchair to participate.*



**17. Can schools deny individuals with disabilities the right to use competition and training facilities due to concerns about equipment (wheelchair, prostheses) damaging playing surfaces?**

No. Schools cannot deny access to competition and training facilities to students who use wheelchairs or prostheses based on misconceived notions of damaging playing surfaces.

*Universities with athletics programs for students with disabilities report no unusual damage or wear to competition and training surfaces by wheelchairs or prostheses. In fact, the most common wear on track surfaces is caused by runners using lane one more than any other lane. Sprinting spikes are also known to cause wear and tear on track surfaces.*

**V. Participation**

**18. What types of participation opportunities are available for students with disabilities?**

To allow students with disabilities to participate in athletics to the greatest extent possible, schools can provide the following participation opportunities:

- Mainstream programs—school-based activities that are developed and offered to all students. For example, providing visual cues for a deaf runner that is unable to hear the starting gun.
- Adapted athletic programs—programs that are specifically developed for students with disabilities. For example, wheelchair basketball teams.
- Allied or unified sports—programs that are specifically designed to combine groups of students with and without disabilities together in physical activity

**19. Given the myriad disabilities and interests of people with disabilities, is it in fact fair to assume that students with disabilities are not as interested in sports participation as students without disabilities?**

No. Students with disabilities are just as interested in sports participation as other students, and courts have repeatedly rejected the discriminatory reasoning that they are inherently less interested in playing sports.

*One needs to look no further than to the dramatic increase in girls' and women's participation in sport since Title IX was passed in 1972 (by 456 percent at the college level and 904 percent in high schools) to understand that it was lack of opportunity—not lack of interest—that kept females out of high school and college athletics for so many years. As courts have noted, "interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."<sup>1</sup> The same reasoning applies for students with disabilities. The single factor depressing sports participation for students with disabilities is the failure of schools to add more adapted or mainstream opportunities for students with disabilities—not the lack of interest of those students to participate.*

**20. Would creating opportunities for students with disabilities to participate in athletics take away opportunities for students without disabilities?**

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<sup>1</sup> 101 F.3d 155, 178 (1<sup>st</sup> Cir. 1996) (holding that Brown University violated Title IX's effective accommodation requirement by eliminating women's varsity gymnastics and volleyball.)

No. Athletics is not a zero-sum environment in which the participation of students with disabilities comes at the expense of a loss of participation for students without disabilities. Opening teams to students with disabilities should not be viewed as a loss of participation for the mainstream teams, but a broadening of opportunities for students to compete that will only serve to expand the participation and growth of students in sports.

Furthermore, allowing a student with a disability to try out for the mainstream team breeds competition. Her/his participation should be viewed no differently than if another student joined the program and competed against the rest of the squad for a slot on the team. In the arena of sports, the most talented athlete gets to play; students with disabilities have just as much of a right to demonstrate their ability to fill that spot as students without disabilities.

**21. Can schools automatically deny individuals with disabilities the right to participate in mainstream programs based on safety concerns?**

No. School systems cannot assume that sports and physical activity participation with and against students with disabilities by students without disabilities is unsafe or make generalizations that students with disabilities cannot safely participate in physical education or athletics.

*For example, in competition, recreation or teaching situations involving students without disabilities, a student in a wheelchair can generally participate in racing on the school track during gym class, intramural or interscholastic sports; a student who has only one leg can participate in wrestling; a student who is deaf or hard of hearing can participate in basketball; a student with diabetes may wear an insulin pump during football games.*

If students with disabilities are excluded from participation in an athletic activity, it must be based on an individualized assessment that inclusion of the student presents an objective risk of harm. If, for example, a student using a wheelchair is not able to remain in her or his lane during a track event, the student could be excluded from track meets based on the demonstrated safety risk she or he creates for others in the race. However, when the student can demonstrate that she or he is able to control the wheelchair enough to negate the risk of harm, the student should be allowed to participate in the program.

**22. Do the standard rules governing athletic participant eligibility (i.e., GPA, age) apply to students with disabilities?**

Yes. However, where a student does not meet athletic eligibility standards due to their disability, an individualized assessment must be conducted to determine whether a reasonable accommodation (i.e. a waiver of the rule) can be made in order to include them in the program.

*For example, rules governing adapted programs allow for participation of students in general and special education. Students receiving special education must be on track with their IEP goals.*

## VI. Grievances

**23. Do schools have obligations to resolve grievances regarding inclusion in school based athletic programs?**



Yes. A school district must adopt grievance procedures that provide for prompt and fair resolution of complaints regarding violations of Section 504. Appropriate due process standards must be integrated into these processes.

**24. Do parents or students have other remedies available to them if they are unsatisfied with the school's resolution of their grievance?**

Yes. Individuals have the right under Section 504 to file a complaint with the regional Office for Civil Rights (800-421-3481) or they may file a lawsuit with their own attorney or contact the American Association of Adapted Sports Programs ([www.AAASP.org](http://www.AAASP.org)) for further assistance.

**VII. Misc. Questions**

*Note: These answers are derived from experts in disability sports policy, as they were not addressed in the guidance specifically.*

**A. In individual sports, should events for individuals with disabilities be awarded points in the same manner as events for individuals without disabilities?**

Yes. Events for individuals with disabilities should be awarded points in the similar manner as events for individuals without disabilities.

*For example, wheelchair track and field competitors who are on their high school track and field team, compete within the wheelchair division in the girls and boys meets and at the state level. Team points are awarded within that division. A school who wins the wheelchair division is also awarded a state championship title.*

**B. Do prostheses provide an unfair advantage in competition?**

No. Having a missing limb and replacing that body part with a prosthetic does not give the athlete with a disability an advantage.

Contrary to popular thought, prostheses do not contain technological mechanisms that make the replacement part better than a real limb. For example, an athlete running with a prosthetic limb cannot correct for a foot hitting the ground at the wrong angle like an athlete running with feet and ankles. The athlete using a prosthetic lacks feet and ankle muscles and cartilage to absorb shock, which travels through her or his amputated legs and into the knees, hips and backs. Athletes with legs don't have swollen stumps or stumps that hurt and bleed due to their prostheses. In addition, in unilateral amputee studies, results indicate that the human ankle is three times more powerful than a carbon foot, and a unilateral amputee needs to generate more than twice as much power at the hips than a person without an amputation. The amputee with a prosthetic has to expend dramatically more energy than a non-amputee to run the same distance. These prosthetics are passive devices that do not generate any powered movement; they only return a percentage of what the athlete puts into them. As technology advances, sport governing bodies need to work with the athletes to determine fair parameters for mixed competition, i.e., runners without prostheses competing alongside amputee runners.