

# The Rehabilitation Act of 1973: Why the OCR's Small Reminder Will Likely Spark Big Change for High School Athletics in 2014 and Beyond

Timothy D. McPeters

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# THE REHABILITATION ACT OF 1973: WHY THE OCR'S SMALL REMINDER WILL LIKELY SPARK BIG CHANGE FOR HIGH SCHOOL ATHLETICS IN 2014 AND BEYOND

TIMOTHY D. MCPETERS\*

## I. INTRODUCTION

Over the past fifty years, the United States has enacted different legislation to ensure that schools provide equal education opportunities for all.<sup>1</sup> Indeed, its smorgasbord of federal laws provide individuals, regardless of their race, national origin, religion, gender, disability, etc., an equal opportunity at an education,<sup>2</sup> which includes an equal opportunity to participate in interscholastic athletics.<sup>3</sup> Unfortunately, many high school students do not engage in physical activity, let alone interscholastic athletics, regularly.<sup>4</sup> More specifically, disabled students are even less physically active than nondisabled students.<sup>5</sup> Some attribute this disparity to disabled students' lack of physical capability; in other words, they do not participate simply because they physically cannot participate.<sup>6</sup> This may be true in some circumstances, but many high schools simply provide unequal athletic participation opportunities for their disabled students,<sup>7</sup> a more likely culprit for their physical inactivity. Indeed, a school providing

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\* The author is a graduate of Marquette University Law School, where he earned a Certificate in Sports Law from the National Sports Law Institute.

1. See generally *Types of Educational Opportunities Discrimination*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/edu/types.php> (last visited May 7, 2015).

2. *Id.* For the federal law at issue in this Article, which provides disabled individuals an equal opportunity at an education, see Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

3. See 34 C.F.R. §§ 104.34(b), 104.37(c) (2014). See also U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-519, STUDENTS WITH DISABILITIES: MORE INFORMATION AND GUIDANCE COULD IMPROVE OPPORTUNITIES IN PHYSICAL EDUCATION AND ATHLETICS 2 (2010), available at <http://www.gao.gov/assets/310/305770.pdf>.

4. DEP'T EDUC., CREATING EQUAL OPPORTUNITIES FOR CHILDREN AND YOUTH WITH DISABILITIES TO PARTICIPATE IN PHYSICAL EDUCATION AND EXTRACURRICULAR ATHLETICS 1 (2011), available at <http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>.

5. *Id.* Physical activity is 4.5 times lower for disabled children than nondisabled children. *Id.*

6. *Id.*

7. *Id.* See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3.

unequal athletic participation opportunities for its disabled students violates the Rehabilitation Act (Rehab Act).<sup>8</sup> Moreover, the Department of Education's Office for Civil Rights (OCR) recently reminded school officials that providing unequal athletic opportunities for disabled students violates the Rehab Act.<sup>9</sup> That small reminder, also serving as an interpretation of the Rehab Act, will likely spark big change in high school athletics. What specific changes it will likely ignite remains unanswered.

This Article examines the Rehab Act's impact on high school athletics. Part II analyzes the athletic participation disparity between disabled and nondisabled high school students, and the suggested reasons why the disparity exists. The section also analyzes the athletic participation disparity between physically disabled and intellectually disabled high school students, and suggests why that disparity likely feeds the participation disparity between disabled and nondisabled students. Part III outlines the Rehab Act and explains how a disabled high school student, seeking an equal opportunity to participate in interscholastic athletics, would bring a successful Section 504<sup>10</sup> claim. Part IV breaks down the OCR's recent Dear Colleague Letter that emphasizes high schools' obligations under the Rehab Act to foster equal athletic participation opportunities for disabled students. Part V discusses how the Dear Colleague Letter will likely impact interscholastic athletics moving forward, arguing that it will likely spark more integration of intellectually disabled students into traditional athletics and likely lead to more separate or different opportunities, particularly Adapted Sports, for physically disabled students.

## II. PARTICIPATION DISPARITY IN HIGH SCHOOL ATHLETICS

In its recent report (developed after contacting schools in seven different states and reviewing additional studies)<sup>11</sup> comparing athletic participation of disabled students to nondisabled students, the United States Government Accountability Office (GAO) determined that “[disabled] students participated in school-based extracurricular athletics . . . at a lower rate than their peers without disabilities.”<sup>12</sup>

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8. See Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012). For the federal regulations specifically addressing nonacademics and athletics, see 34 C.F.R. §§ 104.34, 104.37.

9. See Seth M. Galanter, Acting Assistant Secretary for Civil Rights, *Dear Colleague Letter*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T EDUC. (Jan. 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html>.

10. Section 504 is shorthand for the Rehabilitation Act. See 29 U.S.C. § 794.

11. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 3–4.

12. *Id.* at 20.

*A. Participation Disparity Between Disabled and Nondisabled Students*

Overall, disabled students participated in “‘traditional’ school-based . . . athletics . . . athletics not specially designed for students with disabilities,” at a much lower rate than nondisabled students.<sup>13</sup> Among the eleven reporting schools, 6%–25% of their disabled students participated in traditional school-based athletics, yet 18%–73% of their nondisabled students participated in the same athletics.<sup>14</sup> When the GAO compared the difference at each school, the participation rate for disabled students ranged 10–56 percentage points lower than nondisabled students.<sup>15</sup> The school that reported the largest participation disparity between its disabled and nondisabled students revealed that 73% of its nondisabled students participated in traditional school-based athletics, but only 17% of its disabled students participated in the same athletics.<sup>16</sup> The school that reported the smallest participation disparity revealed that 25% of its nondisabled students participated in traditional school-based athletics, and 15% of its disabled students participated in the same athletics.<sup>17</sup> However, when the schools’ participation rates for each group are averaged together, the mean participation rate differential between the two groups is staggering: a little more than 13% of disabled students and 37% of nondisabled students participated in traditional school-based athletics.<sup>18</sup> That is, nondisabled students, on average, participated in traditional school-based athletics at a rate nearly three times higher than their disabled peers.

The GAO also reported participation disparity at the school district level between nondisabled and disabled students in traditional school-based athletics.<sup>19</sup> Among the five reporting school districts, 3%–10% of their disabled students participated in traditional school-based athletics, yet 5%–22% of their nondisabled students participated in the same athletics.<sup>20</sup> The school district that reported the largest disparity revealed that 22% of its nondisabled students par-

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13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 21 (referring to Figure 4).

17. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 21.

18. The Author generated the 13% and 37% figures by totaling the participation rates of disabled and nondisabled students and dividing each group’s total by eleven (the number of schools that participated in the report). *See id.*

19. *See id.* at 40 (referring to Table 4).

20. *Id.*

ticipated in traditional school-based athletics, but only 6% of its disabled students participated in the same athletics.<sup>21</sup> The school district that reported the smallest disparity revealed that 5% of its nondisabled students participated in traditional school-based athletics, and 3% of its disabled students participated in the same athletics.<sup>22</sup> At first blush, there seems to be less disparity at the school district level. However, when the school districts' participation rates for each group are averaged together, the mean participation rate differential between the two groups is similar to the disparity at the school level: a little more than 5% of disabled students and 14% of nondisabled students participated in traditional school-based athletics.<sup>23</sup> That is, even at the school district level, nondisabled students, on average, still participated in traditional school-based athletics at a rate nearly three times higher than their disabled peers.

The schools attributed the participation disparity between their disabled and nondisabled students to a variety of factors: “[lack of] outreach to students with disabilities, priorities of school officials, and the level of competitiveness among athletic teams.”<sup>24</sup> Indeed, lack of outreach to disabled students may discourage them to participate, and a team's competitiveness might also negatively impact the participation rates among disabled students.<sup>25</sup> In addition to competitive pressures, a negative self-perception that one is not athletic enough to participate may also dissuade a disabled student from participating in traditional school-based athletics.<sup>26</sup> Health and safety concerns might also play a role in a school or school district's decision to prevent disabled students from participating in traditional school-based athletics.<sup>27</sup> The schools also attributed the disparity to their coaches' inexperience and lack of training.<sup>28</sup> Many schools stated that their coaches never received adequate training on how to coach disabled students.<sup>29</sup> Schools also explained the lack of opportunities due to cost.<sup>30</sup> The schools often

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21. *Id.*

22. *Id.*

23. The Author generated the 5% and 14% figures by totaling the participation rates of disabled and nondisabled students and dividing each group's total by five (the number of school districts that participated in the report). U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 40.

24. *See id.* at 21.

25. *Id.*

26. *Id.* at 22.

27. *Id.*

28. *Id.* at 25.

29. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 25.

30. *Id.* at 26.

stated that their “budget constraints” made it difficult to expand athletic opportunities.<sup>31</sup> While these factors likely contribute to the participation disparity between disabled and nondisabled students participating in traditional school-based athletics, the participation disparity between physically disabled and intellectually disabled students likely evidences the major underlying contributor.

*B. Participation Disparity Between Physically and Intellectually Disabled Students*

When it comes to participating in school-based athletics, the GAO also reported a disparity between students with different disabilities.<sup>32</sup> That is, “students with hearing impairments, speech impairments, learning disabilities, or other health impairments . . . participat[ed] on sports teams at a higher rate compared to students with orthopedic impairments, mental retardation, visual impairments, autism, or multiple disabilities.”<sup>33</sup> Moreover, the GAO reported, “[S]tudents with physical disabilities have fewer opportunities in extracurricular athletics compared to students with cognitive disabilities because fewer programs were designed for them.”<sup>34</sup>

School officials attributed the participation disparity to intellectually disabled students’ capability to participate in traditional school-based athletics with little or no modifications, but physically disabled students often require modifications before they can participate.<sup>35</sup> They attributed more athletic opportunities for intellectually disabled students to the Special Olympics creating additional programs for them and inversely attributed less athletic opportunities for physically disabled students to the lack of a similar organization doing the same for them.<sup>36</sup> That presumption is not entirely accurate, however. Indeed, there is a very reputable organization providing additional athletic opportunities for physically disabled high school students.<sup>37</sup>

The athletic participation disparity between physically disabled and intellectually disabled students is a problem and is likely contributing to the athletic participation disparity between nondisabled students and all disabled students.

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31. *Id.*

32. *Id.* at 22–23.

33. *Id.* at 22. *See id.* at 48 (referring to Table 19).

34. *Id.* at 22.

35. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

36. *Id.* at 22–23.

37. *See Partners, AM. ASS’N ADAPTEDSPORTS PROGRAMS*, <http://www.adaptedsports.org/adaptedsports/about/partners.html> (last visited May 7, 2015).

That is, if a school integrates its intellectually disabled students into its traditional athletics, but is unable to also integrate its physically disabled students, then, without doing more for physically disabled students, participation opportunities for all of its disabled students will likely remain unequal to the opportunities for its nondisabled students. In sum, although the Rehab Act seeks to correct unequal participation opportunities between disabled and nondisabled students,<sup>38</sup> unequal participation opportunities between physically disabled and intellectually disabled students likely contribute to unequal participation opportunities between nondisabled students and all disabled students.

### C. Common Methods to Create Equal Athletic Opportunities

The following three subsections each introduce a method schools have used to create more athletic participation opportunities for disabled students in an attempt to create equal athletic opportunities. That is, schools (1) integrate their disabled students into traditional school-based athletics; (2) offer additional participation opportunities through community-sponsored athletics (Unified Sports); and (3) offer additional participation opportunities through “Adapted Sports.”<sup>39</sup> Because one method alone may or may not be required to create equal participation opportunities for disabled athletes,<sup>40</sup> schools should be aware that many different methods exist.

#### 1. Participation Opportunities via Integration into Traditional Sports Teams

Equal participation opportunities begin with opportunities to participate in traditional school-based athletics. Integrating students into traditional athletics means “students with disabilities [have] the opportunity to participate at the same events as able-bodied students.”<sup>41</sup> According to the GAO’s report, officials from all fifteen school districts stated that all of their students are allowed to tryout for their traditional teams.<sup>42</sup> Some officials stated that some teams accept everyone who tries out; others stated that the more competitive teams do not select disabled students but encourage them “to play on a team that accept[s]

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38. See Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

39. Juli Doshan, *NFHS Task Force Discusses Inclusion of Students with Disabilities*, NFHS (Jan. 12, 2015), <http://www.nfhs.org/articles/nfhs-task-force-discusses-inclusion-of-students-with-disabilities/>.

40. Schools often satisfy their obligations under the Rehab Act without undertaking all three methods. See Galanter, *supra* note 9. Rather, parts (2) and (3) are necessary only when integrating disabled students into traditional school-based athletics does not fully and effectively meet the interests and abilities of the disabled students. *Id.*

41. Doshan, *supra* note 39.

42. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 23.

all students.”<sup>43</sup> Some officials stated that they modified their traditional sports, when necessary, so disabled students could participate (e.g., interpreters for deaf students and age limit exceptions for learning disabled students).<sup>44</sup> However, even if a disabled student is accepted on a traditional school-based sports team and necessary modifications are made, the coach must still provide the disabled student with an equal opportunity to participate in games.<sup>45</sup> This Article will discuss why integrating disabled students into traditional school-based athletics is the first step to providing them with equal participation opportunities.<sup>46</sup>

## 2. Participation Opportunities via Community-Sponsored Sports Teams

Participation opportunities often grow when schools offer community-sponsored sports teams, programs often created through formal partnerships with schools, school districts, and state athletic associations.<sup>47</sup> According to the GAO’s report, a few schools offered community-sponsored sports teams, usually through a partnership with the Special Olympics or another community organization, to provide their disabled students with more participation opportunities.<sup>48</sup> However, many schools reported that they referred their disabled students to community-sponsored sports teams and did not provide “transportation, coaching, or fund[ing]” for the teams.<sup>49</sup> Hence, a problem: many schools offering community-sponsored opportunities are unlikely facilitating them to the same extent as their traditional sports.<sup>50</sup> Although community-sponsored sports teams can help provide more participation opportunities for disabled students, schools must facilitate them in the same manner they do traditional sports.<sup>51</sup> This Article will discuss one of the more popular community-sponsored sports programs, Unified Sports, and suggest how, in some circumstances, supplementing it with the integration of traditional sports can help promote equal participation opportunities for disabled students.<sup>52</sup>

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43. *Id.*

44. *Id.*

45. Galanter, *supra* note 9 (referring to Example 1).

46. *See infra* Part V.

47. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 3, at 24.

48. *Id.*

49. *Id.*

50. *See id.*

51. *See* Rehab Act, 29 U.S.C. § 794 (a) (2012); Galanter, *supra* note 9.

52. *See infra* Part V.

### 3. Participation Opportunities via Adapted Sports Teams

Participation opportunities continue to grow when schools offer Adapted Sports teams, programs usually overseen by state athletic associations.<sup>53</sup> Adapted Sports target disabled students, especially ones who have difficulties participating on traditional sports teams.<sup>54</sup> According to the GAO's report, only "four states (Georgia, Minnesota, Ohio, and Vermont) offered adapted athletics through their state high school associations in the 2007–2008 school year . . . [although] Maryland, New Jersey, and Florida planned to offer new adapted athletics . . . in the coming year."<sup>55</sup> Although Adapted Sports can help provide more participation opportunities for disabled students, like community-sponsored sports teams, schools that incorporate them into their athletic programs must facilitate them equally with their traditional sports teams.<sup>56</sup> This Article will discuss Adapted Sports and suggest how, in some circumstances, supplementing them with the integration of traditional sports can help promote equal athletic participation opportunities for disabled students.<sup>57</sup>

In sum, each Subsection provides a piece to the puzzle for offering equal athletic participation opportunities for disabled students. To decipher the puzzle, the Rehab Act clarifies if, and when, schools must implement each method for their disabled students.<sup>58</sup>

## III. THE REHABILITATION ACT OF 1973

Congress enacted the Rehab Act and its later amendments with the intent to address several different areas: "employment, education, and . . . eliminat[ing] . . . physical barriers to access."<sup>59</sup> In regards to equal education opportunities, the Rehab Act seeks to ensure that disabled students have an equal opportunity to participate in interscholastic athletics.<sup>60</sup>

### A. Section 504

Section 504 of the Rehab Act contains broad language regarding the rights of disabled high school students. It states:

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53. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 24.

54. *Id.*

55. *Id.*

56. See 29 U.S.C. § 794; Galanter, *supra* note 9.

57. See *infra* Part V.

58. See 29 U.S.C. § 794 (a); 34 C.F.R. §§ 104.34, 104.37 (2014).

59. *Alexander v. Choate*, 469 U.S. 287, 306–07 (1985).

60. 34 C.F.R. §§ 104.34(b), 104.37(c). See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 2.

No otherwise qualified individual with a disability . . . as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .<sup>61</sup>

While that language does not address interscholastic athletics specifically, the Code of Federal Regulations (CFR) reemphasizes that the Act includes both nonacademics and athletics.<sup>62</sup>

*B. CFR §§ 104.34 & 104.37*

Sections 104.34 and 104.37 of the CFR refine the broad language of Section 504 by specifically addressing nonacademic settings and athletics.<sup>63</sup> In addressing nonacademic settings, Section 104.34 states:

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including . . . the services and activities set forth in §104.37(a)(2), a recipient shall ensure that *handicapped persons participate with nonhandicapped persons* in such activities and services *to the maximum extent appropriate* to the needs of the handicapped person in question.<sup>64</sup>

In addressing athletics, Section 104.37 states:

(1) In providing . . . athletics . . . , a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that . . . operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

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61. 29 U.S.C. § 794(a).

62. *See* 34 C.F.R. §§ 104.34(b), 104.37(c).

63. *Id.*

64. § 104.34(b) (emphasis added).

(2) A recipient may offer . . . athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of §104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.<sup>65</sup>

While Section 504 of the Rehab Act does not specifically address interscholastic athletics, the CFR reinforces that they are certainly included under the Act.<sup>66</sup>

### C. *Bringing a Successful Rehab Act Claim*

To bring a successful claim under the Rehab Act, a disabled student will have to prove four different elements: (1) he or she is disabled as defined by the Act; (2) he or she is an “otherwise qualified” individual; (3) the defendant (school or school district) engaged in an act prohibited under the Act; and (4) the defendant (school or school district) receives federal funding.<sup>67</sup>

#### 1. He or She is Disabled as Defined by the Rehab Act

The disabled student must prove that he or she has a disability.<sup>68</sup> The Rehab Act defines “disability” as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>69</sup>

#### 2. He or She is an Otherwise Qualified Individual

The disabled student must also prove that he or she is otherwise qualified to participate.<sup>70</sup> To prove that he or she is an otherwise qualified individual, the disabled student must show that he or she “meets all the essential requirements of a program in spite of his [or her] disability.”<sup>71</sup> If the student is unable to prove that he or she meets all the essential requirements of the program, the

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65. § 104.37(c)(1)–(2).

66. *See* 34 C.F.R. §§ 104.34(b), 104.37(c).

67. *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) (citing *Johnson v. Fla. High Sch. Activities Ass’n*, 899 F. Supp. 579, 582 (M.D. Fla. 1995)).

68. *Id.*

69. Rehabilitation Act, 29 U.S.C. § 705(9)(A) (2012) (citing Americans with Disabilities Act, 42 U.S.C. § 12102(1) (2011)).

70. *Dennin*, 913 F. Supp. at 668.

71. *Id.* (citing *Pottgen v. Mo. State High Sch. Activities Ass’n*, 40 F.3d 926, 929 (8th Cir. 1994); *Johnson*, 899 F. Supp. at 584).

student must then show that a “‘reasonable accommodation’ would enable [him or her] to become ‘otherwise qualified.’”<sup>72</sup> However, an accommodation is not reasonable if it “‘fundamentally alters the nature of the program’” or creates “‘undue financial or administrative burdens.’”<sup>73</sup> Moreover, Section 504 does not require a school to “lower or to effect substantial modifications of standards to accommodate a handicapped person.”<sup>74</sup>

### 3. The Defendant Engaged in an Act Prohibited Under the Act

The disabled student must also prove that he or she is “being excluded from participation in, being denied the benefits of, or being subjected to discrimination, in the interscholastic athletic program . . . solely by reason of [his or her] disability.”<sup>75</sup> While the statute is, perhaps, unclear of what acts it prohibits, the Supreme Court expressly rejected “that [Section 504] proscribes only intentional discrimination against the handicapped.”<sup>76</sup> On the other hand, it also rejected the proposition that Section 504 “reach[es] all action disparately affecting the handicapped.”<sup>77</sup> Rather, “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, so long as the selection or competition criteria are not discriminatory.”<sup>78</sup> However, a school or school district must offer separate or different participation opportunities when its existing athletic program cannot “fully and effectively” satisfy its disabled students’ interests and abilities.<sup>79</sup> Furthermore, “*unnecessarily* separate or different [opportunities are] discriminatory.”<sup>80</sup>

### 4. The Defendant is a Recipient of Federal Funding

The disabled student must finally prove that the defendant (school or school

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72. *Id.* (citing *Pottgen*, 40 F.3d at 929; *Johnson*, 899 F. Supp. at 584).

73. *Id.* (citing *Pottgen*, 40 F.3d at 929; *Johnson*, 899 F. Supp. at 584).

74. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411–12 (1979) (footnote omitted).

75. *Sandison v. Mich. High Sch. Athletic Ass’n*, 863 F. Supp. 483, 488 (E.D. Mich. 1994).

76. *Alexander v. Choate*, 469 U.S. 287, 294 (1985).

77. *Id.* at 298.

78. *Galanter*, *supra* note 9.

79. *Id.*

80. *Id.*

district) receives federal funding. That is, both public and private schools receiving federal funding must comply with the Act.<sup>81</sup> Moreover, even state athletic associations that receive indirect federal funding must comply with the Act.<sup>82</sup> Consequently, if a disabled student is unable to prove that the defendant receives federal funding, the court will not assess any claims brought under the Rehab Act.<sup>83</sup>

If a disabled student can prove these four elements, then he or she can likely bring a strong Section 504 claim. Disabled students bringing a Section 504 claim are entitled to grievance procedures with “appropriate due process standards.”<sup>84</sup> Moreover, such procedures must “provide for prompt and equitable resolution of complaints alleging violations of the Section 504 regulations.”<sup>85</sup>

#### IV. THE OCR’S DEAR COLLEAGUE LETTER

“The Department[of Education]’s Office for Civil Rights (OCR) is responsible for enforcing Section 504 . . . to protect the rights of individuals with disabilities in programs and activities . . . that receive Federal financial assistance.”<sup>86</sup> Although not actual law, the OCR’s recently published Dear Colleague Letter reminds high schools that the Rehab Act requires them to provide their disabled students with equal education opportunities.<sup>87</sup> According to the OCR, and perhaps unbeknownst to many high schools, “the provision of extracurricular athletics” opportunity falls within reach of the Rehab Act as “an important component of an overall education program.”<sup>88</sup> That is, high schools must provide their disabled students with equal opportunities to participate in interscholastic athletics.<sup>89</sup>

The Dear Colleague Letter outlines general prohibitions under Section 504: denying disabled students the opportunity to participate in athletics; affording disabled students with athletic participation opportunities unequal to that of non-disabled students; providing disabled students with less effective athletics that do not provide “an equal opportunity to obtain the same result, gain the same

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81. Amy Nate Dearden et al., *Promoting Greater Inclusion of Disabled Student-Athletes in Interscholastic Sports Programs*, 278 ED. L. REP. 1, 5–6 (2012).

82. *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996).

83. *See Cruz v. Pa. Interscholastic Athletic Ass’n*, 157 F. Supp. 2d 485, 496 (E.D. Pa. 2001).

84. Galanter, *supra* note 9.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

benefit, or reach the same level of achievement;” providing disabled students with “different or separate” athletics, unless doing so is necessary to provide them with athletics that are equally effective as those offered to nondisabled students; and limiting disabled students’ “enjoyment of any right, privilege, advantage, or opportunity enjoyed by others” participating in the athletics.<sup>90</sup>

#### A. *Comporting with the Rehab Act*

In addition to outlining Section 504’s general requirements and prohibitions, the Dear Colleague Letter also outlines several specific practices that high schools must follow.<sup>91</sup> That is, high schools must (1) avoid generalizations and stereotypes; (2) ensure equal athletic opportunities for their disabled students; and (3) in some circumstances, offer disabled students separate or different athletic opportunities.<sup>92</sup>

##### 1. Avoiding Generalizations and Stereotypes

The OCR first states that a school or “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.”<sup>93</sup> It also clarifies that a school district may not assume that certain disabilities make participating in a given sport impossible.<sup>94</sup> That is, even if a student with a particular disability is unable to participate in a specific sport, the school district must not assume that another student with the same disability is also unable to participate in that same sport.<sup>95</sup> Rather, the school district must afford both students an equal opportunity to participate in the sport.<sup>96</sup>

##### 2. Ensuring Equal Athletic Opportunities

As mentioned before, a disabled student is not “guaranteed a spot on [a sports] team.”<sup>97</sup> Rather, the OCR commands schools and school districts that offer athletics to “afford qualified students with disabilities an equal opportunity

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90. Galanter, *supra* note 9.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See id.*

95. *Id.*

96. Galanter, *supra* note 9.

97. *Id.*

for participation.”<sup>98</sup> Indeed, schools must reasonably modify an athletic activity when necessary to afford equal participation opportunities, unless the modification would fundamentally alter the activity.<sup>99</sup> On the other hand, schools may adopt safety rules for their programs that exclude disabled students but must consider whether they can achieve the same level of safety by reasonably modifying their programs to include disabled students.<sup>100</sup>

To determine whether a modification is necessary, schools must make individualized inquiries.<sup>101</sup> If a school deems a modification necessary, then it must allow it, unless doing so would fundamentally alter the nature of the activity.<sup>102</sup> A modification that “fundamental[ly] alter[s] . . . the nature of the . . . activity” is likely one that “alters. . . an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally.”<sup>103</sup> Moreover, a fundamental alteration is likely one “that has only a peripheral impact on the activity or game” but gives the disabled student “an unfair advantage over other[]” students.<sup>104</sup> Even if a modification is deemed a “fundamental alteration,” the school is required to consider “if other modifications might be available that would permit the student’s participation.”<sup>105</sup>

### 3. Offering Separate or Different Athletic Opportunities

The OCR finally requires schools and school districts to offer disabled students “opportunities for athletic activities that are separate or different from those offered to students without disabilities” if “the interests and abilities of . . . students with disabilities cannot be as fully and effectively met by the school district’s existing . . . athletic program.”<sup>106</sup> However, schools must first provide opportunities for disabled students to participate in traditional athletics.<sup>107</sup> That is, schools must include their disabled students in existing athletic activities as fully and effectively as possible because it is discriminatory to offer “unnecessarily separate or different” athletic opportunities.<sup>108</sup> If, after reasonably modifying its existing athletic activities, a school is unable to incorporate its disabled

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98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Galanter, *supra* note 9.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Galanter, *supra* note 9.

students, then it must offer those disabled students separate or different opportunities (e.g., wheelchair basketball).<sup>109</sup>

If a school has an insufficient number of disabled students to field a full separate or different team, it can create district-wide teams as opposed to school-based teams, offer teams with both male and female disabled students, or offer teams with both disabled and nondisabled sports (e.g., Unified Sports).

In sum, the OCR's recent letter interprets the Rehab Act as applied to high school athletics.<sup>110</sup> The letter states that a school is required to first integrate its disabled students into its traditional athletics to meet their interests as "fully and effectively" as possible.<sup>111</sup> This requires reasonably modifying an athletic program or sport when necessary to ensure equal participation opportunities, unless the "modification would . . . fundamental[ly] [alter] . . . the nature of the . . . athletic" program or sport.<sup>112</sup> If a school's traditional athletics cannot fully and effectively meet, or cannot be reasonably modified to fully and effectively meet, its disabled students' interests and abilities, then it can create separate or different opportunities for those disabled students.<sup>113</sup>

#### V. THE OCR LETTER'S IMPACT ON INTERSCHOLASTIC SPORTS

The OCR's recent Dear Colleague Letter will likely spark change in high school athletics across the United States. Since the GAO's recent report shows that schools often find it more difficult to integrate their physically disabled students into traditional athletics than it is to integrate their intellectually disabled students into traditional athletics,<sup>114</sup> the letter will likely increase separate or different athletic opportunities for physically disabled students, while causing more integration of intellectually disabled students into traditional sports.

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109. *Id.*

110. *See generally id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

A. *Increased Integration of Intellectually Disabled Students*

Although schools must first integrate all their disabled students into traditional athletics,<sup>115</sup> they often face more ease in doing so for intellectually disabled students.<sup>116</sup> That is, intellectually disabled students, on average, participate in traditional sports at a much higher rate than physically disabled students.<sup>117</sup> Schools attribute this disparity to intellectually disabled students being able to participate with little or no modifications, whereas, physically disabled students often require modifications to participate.<sup>118</sup>

Given that schools often find it easier to integrate their intellectually disabled students into traditional sports,<sup>119</sup> the OCR's letter will likely cause a growth in intellectually disabled students participating in traditional sports. A growth in the number of intellectually disabled students participating in traditional sports will likely cause a decline in the number of intellectually disabled students participating in separate or different athletic opportunities, and, logically, it should. However, an estimated 2,000 schools in forty-two states offer Unified Sports, a separate or different athletic opportunity, for their intellectually disabled students.<sup>120</sup> It is unclear whether schools that offer Unified Sports are offering unnecessarily separate or different opportunities; however, those schools should certainly be cautious when offering them to their intellectually disabled students.

Unified Sports' main goal is to promote shared sports training and competition experiences among people with and without intellectual disabilities.<sup>121</sup> It is similar to Adapted Sports in that it is a separate or different participation opportunity for disabled students.<sup>122</sup> However, it is different from Adapted Sports in that disabled and nondisabled students are competing together.<sup>123</sup> The program groups individuals with similar age and skill to foster more competitive and exciting games.<sup>124</sup> Although Unified Sports is a Special Olympics program,

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115. Galanter, *supra* note 9.

116. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

117. *Id.*

118. *Id.*

119. *Id.*

120. Dan Frosch, *Unified Teams Take Special Olympics Approach to School Sports*, N.Y. TIMES (Feb. 12, 2012), [http://www.nytimes.com/2012/02/13/sports/unified-sports-teams-open-doors-for-special-education-students.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/02/13/sports/unified-sports-teams-open-doors-for-special-education-students.html?pagewanted=all&_r=0).

121. *Unified Sports*, SPECIAL OLYMPICS, <http://www.specialolympics.org/unified-sports.aspx> (last visited May 7, 2015).

122. See *id.*

123. *Id.*; see also Doshan, *supra* note 39.

124. *Unified Sports*, *supra* note 121.

some state high school athletic associations have partnered with the program to reach school-aged athletes.<sup>125</sup> In addition, at least one high school athletic association offers single Unified Sports events as opposed to implementing the entire program.<sup>126</sup> In sum, Unified Sports is quite popular across the United States, and the National Federation of State High School Association (NFHS) appears to be a strong supporter of its continued growth.<sup>127</sup>

Whether school-based Unified Sports violate the Rehab Act as unnecessarily separate or different opportunities is not fixed. Schools should assess their athletic programs on a case-by-case basis.<sup>128</sup> Certainly, intellectually disabled students participating in school-based Unified Sports are entitled to first compete on their school-based traditional sports teams.<sup>129</sup> Assuming schools offering Unified Sports also provide their intellectually disabled students the opportunity to compete on their traditional sports teams, their Unified Sports would not be considered unnecessarily separate or different opportunities if integrating their intellectually disabled students into the traditional athletics could not fully and effectively meet their interests and abilities.<sup>130</sup> Moreover, school-based Unified Sports are unique in that they provide an opportunity for disabled and nondisabled students to participate in sports together,<sup>131</sup> in that regard, Unified Sports seem to comport with the Rehab Act, which requires separate or different opportunities to still allow disabled students to compete with nondisabled students to the maximum extent possible.<sup>132</sup> On the other hand, if a school offered its intellectually disabled students the opportunity to participate in its Unified Sports, but not its traditional sports, then the school is at more risk of offering

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125. Jason Haddix, *State Associations Offer Athletic Opportunities for Students with Disabilities*, NFHS (Nov. 21, 2014), <http://www.nfhs.org/articles/state-associations-offer-athletic-opportunities-for-students-with-disabilities/>. See also *Unified Sports*, UTAH HIGH SCH. ACTIVITIES ASS'N, <http://www.uhsaa.org/unifiedsports.html> (last visited May 7, 2015) (Utah's High School Activities Association is not included in the National Federation of State High School Associations' report).

126. See *Unified Track & Field Tournament Announced by IHSAA, Special Olympics Indiana*, IND. HIGH SCH. ATHLETIC ASS'N, INC. (Nov. 14, 2013) <http://www.ihsaa.org/Media/MediaReleases/201314/111413/tabid/1560/Default.aspx>.

127. Ken Devoe, *Accommodating Student-Athletes with Disabilities*, NFHS (Sept. 2, 2014), <http://www.nfhs.org/articles/accommodating-student-athletes-with-disabilities/>. See also Shane Monaghan, *NFHS Coach Education Offers Free Online Course—“Coaching Special Olympics Unified Sports@”*, NFHS, <http://old.nfhs.org/content.aspx?id=7943> (last visited May 7, 2015).

128. Galanter, *supra* note 9.

129. See 34 C.F.R. § 104.34 (b) (2014).

130. Galanter, *supra* note 9.

131. *Unified Sports*, *supra* note 121.

132. 34 C.F.R. § 104.37(c)(2).

unnecessarily separate or different participation opportunities for its intellectually disabled students. To be safe, schools should integrate their intellectually disabled students to the maximum extent possible and should not offer them Unified Sports unless integrating them into traditional athletics will not fully and effectively satisfy their interests and abilities.<sup>133</sup> Because schools often find it easier to integrate their intellectually disabled students into traditional athletics,<sup>134</sup> there should be a presumption that Unified Sports are unnecessarily separate or different opportunities.

*B. Increased Separate or Different Opportunities for Physically Disabled Students*

Schools express more difficulty integrating physically disabled students into traditional sports.<sup>135</sup> That is, physically disabled students, on average, participate in traditional sports at a much lower rate than intellectually disabled students.<sup>136</sup> Again, schools attribute this disparity to intellectually disabled students being able to participate with little or no modifications, whereas, physically disabled students often require modifications to participate.<sup>137</sup>

Given that schools often find it more difficult to integrate their physically disabled students into traditional sports,<sup>138</sup> the OCR's letter will likely cause a growth in physically disabled students participating in separate or different athletics (e.g., Adapted Sports). A growth in the number of physically disabled students participating in Adapted Sports will likely cause a decline in the number participating in traditional athletics, and, logically, it should. However, current statistics show that only eight states offer Adapted Sports for their physically disabled students.<sup>139</sup> It is unclear whether schools offering Adapted Sports are offering unnecessarily separate or different opportunities; however, those schools should certainly be cautious when offering them to their physically disabled students.

Adapted Sports' main goal is to improve the well-being of physically disabled students by promoting high quality, cost-effective interscholastic Adapted Sports.<sup>140</sup> The program creates opportunities for physically disabled students to

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133. Galanter, *supra* note 9.

134. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Haddix, *supra* note 125.

140. About, AM. ASS'N ADAPTEDSPORTS PROGRAMS, <http://www.adaptedsports.org/adaptedsports/about/about.html> (last visited May 7, 2015).

participate with other disabled students in an attempt to create separate participation opportunities.<sup>141</sup> The main difference between school-based Adapted Sports and school-based Unified Sports is that Adapted Sports is not an opportunity for disabled and nondisabled students to participate together.<sup>142</sup> To further its mission, the program seeks partnerships with state athletic associations across the United States.<sup>143</sup> In addition to its two partnerships, six more states offered the program to their disabled students in 2011–2012, totaling eight states.<sup>144</sup> While Adapted Sports have sprouted in a handful of states, the NFHS continues to endorse the program as a serious, viable option for increasing the athletic participation of physically disabled students.<sup>145</sup>

Whether school-based Adapted Sports violate the Rehab Act as unnecessarily separate or different opportunities is not fixed. Schools should assess their athletic programs on a case-by-case basis.<sup>146</sup> Indeed, physically disabled students, like intellectually disabled students, are entitled the opportunity to first compete on their traditional sports teams;<sup>147</sup> however, there are likely some sports that physically disabled students simply cannot participate in (e.g., a student in a wheelchair likely cannot participate on his or her swim team). Assuming schools offering Adapted Sports also provide their physically disabled students the opportunity to compete on traditional sports teams, their Adapted Sports would not be considered unnecessarily separate or different opportunities if integrating their physically disabled students into traditional athletics could not fully and effectively meet their interests and abilities.<sup>148</sup> However, because Adapted Sports do not provide the opportunity for disabled and nondisabled students to participate together,<sup>149</sup> offering them seems to be more risky than offering Unified Sports. That is, Adapted Sports seem to violate the Rehab Act by offering a separate or different opportunity that does not allow physically

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141. *Adapted Sports*, AM. ASS'N ADAPTEDSPORTS PROGRAMS, <http://www.adapted-sports.org/adaptedsports/athletics/overview.html> (last visited May 7, 2015).

142. Compare *id.* with *Unified Sports*, *supra* note 121.

143. Partners, *supra* note 37.

144. Haddix, *supra* note 125.

145. Terri Lakowski & Bev Vaughn, *Developing School Sports Programs for Students with Disabilities*, NFHS (July 27, 2014), <http://www.nfhs.org/articles/developing-school-sports-programs-for-students-with-disabilities/>.

146. Galanter, *supra* note 9.

147. See 34 C.F.R. § 104.34 (b) (2014).

148. Galanter, *supra* note 9.

149. See *AdaptedSPORTS*, *supra* note 141; Doshan, *supra* note 39.

disabled students to participate with nondisabled students to the maximum extent possible.<sup>150</sup> On the other hand, a school offering Adapted Sports would likely comport with the Rehab Act if integrating its physically disabled students into traditional athletics cannot fully and effectively meet their interests and abilities and the Adapted Sports also allow the physically disabled students to participate with nondisabled students. To be safe, schools should integrate their physically disabled students into traditional athletics to the maximum extent possible and should not offer Adapted Sports unless integrating them into traditional athletics cannot fully and effectively satisfy their interests and abilities.<sup>151</sup> Because schools often find it more difficult to integrate their physically disabled students into traditional athletics,<sup>152</sup> there should be a presumption<sup>153</sup> that Adapted Sports are necessarily separate or different opportunities.

### *C. Comparing Opportunities for Physically and Intellectually Disabled Students*

When comparing the number of states with Adapted Sports to the number of states with Unified Sports, the numbers are quite staggering. In 2014, the NFHS confirmed that eight states offered Adapted Sports in 2011–2012.<sup>154</sup> However, in 2008, there were forty-two states that offered some form of Unified Sports.<sup>155</sup> Again, these numbers are quite opposite of what one might expect, since the GAO reported that it is often more difficult for schools to integrate their physically disabled students into their traditional sports than their intellectually disabled students.<sup>156</sup>

If schools find it more difficult to integrate physically disabled students into traditional sports than intellectually disabled students,<sup>157</sup> one would expect more states to offer separate or different opportunities (Adapted Sports) for physically disabled students and less states to offer separate or different opportunities (Unified Sports) for intellectually disabled students. In the alternative, one would expect the number of states to at least be the same or close. Perhaps, more states are offering separate or different opportunities for physically disabled students,

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150. 34 C.F.R. § 104.37(c)(2).

151. Galanter, *supra* note 9.

152. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

153. Like Unified Sports, Adapted Sports should allow nondisabled students to participate with disabled students. If a school offering Adapted Sports allowed only physically disabled students to participate, then the presumption that Adapted Sports are necessarily separate or different should fail.

154. Haddix, *supra* note 125.

155. Frosch, *supra* note 120.

156. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

157. *Id.*

just not Adapted Sports. This seems unlikely, given the GAO's report that schools find it difficult to create Adapted Sports programs because of unfamiliarity and high costs associated with them.<sup>158</sup> In sum, the OCR's recent letter will likely change this: it will likely spark more separate or different opportunities (Adapted Sports) for physically disabled students and less separate or different opportunities (Unified Sports) for intellectually disabled students. Inversely, it will likely spark less integration of physically disabled students into traditional athletics and more integration of intellectually disabled students into traditional athletics.

## VI. CONCLUSION

The Rehab Act is one of many federal laws enacted to ensure that recipients of federal funding do not discriminate against individuals.<sup>159</sup> Particularly, Section 504 of the Act prohibits federal funding recipients from discriminating against students on the basis of their disability,<sup>160</sup> which includes an equal opportunity to participate in interscholastic athletics.<sup>161</sup> However, the United States Government Accountability Office recently revealed that schools are challenged with providing their disabled students, particularly physically disabled students, with an equal opportunity to participate in traditional athletics.<sup>162</sup> In response to the GAO's finding, the OCR reminded high schools of their obligations under the Rehab Act to better ensure disabled students receive the same opportunities as nondisabled students.<sup>163</sup>

High schools are now on notice that they must do more to comport with the Rehab Act. This means schools must first integrate their disabled students into traditional sports.<sup>164</sup> If integrating their disabled students into traditional sports does not fully and effectively meet their interests and abilities, schools must offer separate or different opportunities.<sup>165</sup> Indeed, some high schools have begun providing separate and different opportunities for their disabled students (e.g., Unified Sports and Adapted Sports).<sup>166</sup> However, most states offering

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158. *Id.* at 25–26.

159. *Types of Educational Opportunities Discrimination*, *supra* note 1.

160. Rehabilitation Act of 1976, 29 U.S.C. § 794(a) (2012).

161. 34 C.F.R. §§ 104.34(b), 104.37(c)(1) (2014).

162. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

163. *See* Galanter, *supra* note 9.

164. *Id.*

165. *Id.*

166. *See* Frosch, *supra* note 120; Haddix, *supra* note 125.

Unified Sports<sup>167</sup> and few states offering Adapted Sports<sup>168</sup> does not reflect the frequent problem schools reportedly face: more difficulty integrating physically disabled students into traditional athletics and less difficulty integrating intellectually disabled students.<sup>169</sup>

Given that reported problem,<sup>170</sup> one should expect the OCR's recent letter to cause the number of schools offering separate or different opportunities (Adapted Sports) for physically disabled students to move towards, if not surpass, the number of schools offering separate or different opportunities (Unified Sports) for intellectually disabled students. Overall, there should be a presumption that Unified Sports are unnecessarily separate or different athletic opportunities and a presumption<sup>171</sup> that Adapted Sports are necessarily separate or different opportunities.

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167. *See* Frosch, *supra* note 120.

168. *See* Haddix, *supra* note 125.

169. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 3, at 22.

170. *Id.*

171. *See supra* note 153.