

# ANDREWS AND BEARD

# EDUCATION LAW REPORT

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## U.S. Dept. of Education Calls on Schools to Provide Equal Opportunity to Students with Disabilities to Participate in Extracurricular Athletics

In an article written by United States Department of Education Secretary, Arne Duncan, on January 25, 2013, Duncan made clear that Federal Civil Rights Laws require schools to provide equal opportunities to students with disabilities to participate alongside their peers in after-school athletics and clubs. Duncan expressly stated that schools “may not exclude students who have intellectual, developmental, physical or any other disability from trying out and playing on a team, if they are otherwise qualified.” While stating that schools don’t have to change the essential rules of the game, and they do not have to do anything that would provide the student with a disability an unfair competitive advantage, Duncan did state that schools need to make reasonable modifications to ensure that students with disabilities get the same chance to play as everyone else. Duncan pointed out that, “while it’s the coach’s job to pick the best team, students with disabilities must be judged based on their individual

abilities, and not excluded because of generalizations, assumptions, prejudices, or stereotypes.” He called on adults to create possibilities for participation among America’s children and youth, both those with, and without, disabilities.

This news release by the United States Department of Education comes on the heels of a Dear Colleague letter issued by the United States Department of Education Office for Civil Rights (“OCR”), dated January 25, 2013. This Dear Colleague letter is a result of the United States Government Accountability Office recommending that the OCR clarify and communicate school’s responsibilities under Section 504 of the Rehabilitation Act of 1973 regarding the provision of extracurricular athletics. The Government Accountability Office had previously published a report finding that access to, and participation in, extracurricular athletic opportunities provide important health and social benefits to all students, particularly those with disabilities. As such, OCR wanted to clarify and communicate those responsibilities on the heels of the Government Accountability Office’s findings that students with disabilities are not being afforded an equal opportunity to participate in extracurricular athletics in public elementary and secondary schools.

Under Section 504 regulations, a school district is required to provide a qualified student with a disability (continued next page)

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## Students with Disabilities

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an opportunity to benefit from the school district's program equal to that of students without disabilities. Furthermore, school district's legal obligation to comply with Section 504 and the Department of Education's regulations supersedes any rule of any association, organization, club, or league that would render a student ineligible to participate, or limit the eligibility of a student to participate, in any aid, benefit, or service on the basis of disability. Therefore, OCR recommends that to avoid violating Section 504 obligations, in extracurricular activities, "school districts should work with their athletic associations to ensure that students with disabilities are not denied an equal opportunity to participate in interscholastic athletics."

In reviewing a number of examples, OCR sets forth various situations wherein OCR believes that a student's Section 504 rights would be violated. The first example is of a 9th grade student who has a learning disability and is a person with a disability as defined by Section 504. This student tries out and is selected as a member of the high school's lacrosse team, however, the coach is aware of the student's learning disability and believes that all students with that student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game, and based on this assumption, the coach decides never to play this student during games. OCR would find, in this situation, that the coach's decision to never play the student during games because of an assumption about this student's particular learning disability would violate Section 504. In discussing this scenario, OCR recommends and instructs that school districts, including its athletic staff, not to operate on generalizations or assumptions about a disability, or about how a particular disability may limit one particular student.

OCR does note that a coach's decision on whether a student gets to participate in games must be based on the same criteria the coach uses for all other players, because a student does not have a

right to participate in games, and OCR recognizes that performance reflected during practice sessions would be one such criteria to determine the eligibility of players to participate in active games.

Next, the Dear Colleague letter outlines ways in which schools can ensure equal opportunity for participation by considering whether safe participation by a particular student with a disability can be assured through a reasonable modification with a provision of aids and services. In this discussion, OCR points out that a school district must afford qualified students with disabilities an equal opportunity for participation in extracurricular athletics in an integrated manner to the maximum extent appropriate to the needs of the student, meaning that a school must make a reasonable modification to its policies, practices, or procedures whenever such modifications would ensure equal opportunity. The only time a school district would not be required to make reasonable modifications would be if they could demonstrate that the requested modification would constitute a fundamental alteration of the nature of the extracurricular activity.

A modification that might constitute a fundamental alteration of the nature of the extracurricular athletic activity would be something such as adding an extra base in baseball, because the game of baseball would be fundamentally altered by adding this aspect to the game, even though it would affect all competitors equally.

OCR gives the specific example of a student who is interested in running track for the school team, however, this student has a hearing impairment. If the student's speed was fast enough to qualify for the team in the sprinting events in which he is interested, the school district would have an obligation to allow the hearing impaired student to use visual cue, rather than an auditory cue, to signal the start of the race. Another such modification outlined by OCR would be a situation in which a student who was born with only one hand wants to participate on the school's swim team, and the student asks the school to waive the "two-hand touch" finish it requires of all swimmers. In such a situation, OCR finds that the school district must conduct an

individualized assessment to determine whether or not that modification is necessary for the student's participation, and whether or not such a modification would fundamentally alter the nature of the activity. Here, OCR finds that modification of the two-hand touch is necessary for the student to participate and that a one-hand touch does not alter the essential aspect of the activity. Similarly, OCR would also find that altering the start of a track meet for a hearing impaired student to permit the hearing impaired student to add the use of a visual aid to signal the start would also not fundamentally alter the nature of the activity.

In its last example, OCR sets out a situation in which a school student with diabetes is provided services under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel. This same student wants to join the gymnastics club that meets after school, and when the parent asks the school to provide glucose testing and insulin administration while the student needs to participate in the gymnastics club, the school personnel insists that they are not required to provide the student with assistance because gymnastics club is an extracurricular activity. In this example, OCR states that they would find the school district must provide glucose testing and insulin administration for the student during the gymnastics club in order to comply with the Section 504 obligations because the student needs assistance in order to participate in the gymnastics club, and because the assistance is available under the IDEA for extracurricular activities, providing this assistance to the student would not constitute a fundamental alteration of the district's education program and it would be required to be provided to the student.

Finally, the Dear Colleague letter discusses the situation wherein a school district may need to offer separate or different athletic opportunities for disabled students. In providing or arranging for extracurricular athletics, a school district must ensure that a student with a disability participates with students without disabilities to the maximum extent appropriate to the needs of that student with the disability. OCR points out, however, that providing unnecessarily separate

or different services is in fact discriminatory.

Therefore, students with disabilities who cannot participate in the school district's existing extracurricular athletics program, even with a reasonable modification or aids and services, should still have an equal opportunity to receive the benefit of extracurricular athletics. Thus, OCR states that when the interests and abilities of some students with disabilities cannot be as fully and effectively met by the school district's existing extracurricular athletic program, the school district should create additional opportunities for those students with disabilities. OCR gives an example of the creation of disability-specific teams for sports such as wheelchair tennis or wheelchair basketball and when the number of students with disabilities and an individual school is insufficient to field a team, school districts can also develop district-wide or regional teams for students with disabilities, mixed male and female students with disabilities on a team together, or offer "allied" or "unified" sport teams on which students with disabilities participate with students without disabilities.

Thus, it is important for school districts to ensure that the extracurricular activities that provides to all students within its district are being provided in equal measure to students with disabilities and that if a student with a disability requests a modification of an athletic activity in order to participate, the school district undertakes weighing the determination as to whether the modification is necessary, and whether the school district must allow it, unless doing so would result in the fundamental alteration of the nature of the extracurricular athletic activity.

Solicitor involvement is particularly important once an inquiry and analysis of this type is undertaken by a district to ensure that the legal ramifications of the district's decision are weighed carefully and the potential risks and possibility for liability are assessed prior to the district making a decision with regard to a student with disabilities participation in extracurricular activities.

## School Security Following Sandy Hook

**R**ecently a western Pennsylvania school district school board voted to arm its school police and many other school districts in the state of Pennsylvania are looking at similar protections, including, preparing students and faculty for situations wherein they may have to deal with an active shooter situation.

Amongst these discussions comes confusion regarding the state of the law in Pennsylvania with respect to weapons on school property. A person commits a misdemeanor of the first degree if they possess a weapon in the buildings or on the grounds of any elementary or secondary school in Pennsylvania. Therefore, as of now, it remains a violation of the crimes code, and many school district policies, to have weapons on school property. However, the state of that law could change within Pennsylvania depending on our legislature. The reality is, unless an individual has Act 120 training and are an approved police officer or otherwise approved by the court to be a school resource officer, bringing a weapon onto school property will violate the Crimes Code. Furthermore, for any school employee, it would be a dischargeable offence. Certainly, consultation with the school solicitor is imperative before undertaking any measure on behalf of a school entity to arm faculty and staff or change policies regarding the issue.

Another thing to consider would be liability, both for teachers as individuals, staff as individuals, and for the school entity, should an individual bring a weapon into the property for the purposes of safety, and the same cause an accident. In that same regard, school district insurance policies may prohibit schools from allowing teachers or visitors to carry such items into their buildings and on their property without an increase in insurance costs.

The Pennsylvania Department of Education is also putting emphasis on school safety as they have recently announced that \$479,513.00 in safe schools targeted grants have been awarded to 37 public schools throughout the Commonwealth. These grants were established to implement programs to prevent and

reduce incidents of violence by assisting schools and reducing unnecessary student disciplinary actions in promoting an environment of greater productivity, safety, and learning, providing professional development to staff using research-based violence prevention and classroom management programs, and enhancing antiviolence efforts between schools and parents, local governments, law enforcement and community organizations. The schools were eligible to receive money with the following programs to be considered for funding: conflict resolution or dispute management, school-wide positive behavior support, school-based diversion programs, classroom management, research-based violence prevention programs that address risk factors to reduce incidents of problem behaviors among students, training for Student Assistance Program team members, staff training in the use of positive behavior supports, de-escalation techniques and appropriate responses to student behavior that may require immediate intervention.

The Pennsylvania School Board Association is also pushing a model of “Deter, Detect, Delay” with regard to school security and threat assessments. Detering involves providing countermeasures such as policies, procedures, technical devices and controls to defend against attacks, intruders, and unauthorized individuals. As part of the “detering” efforts, the organization recommends having visitors sign in and out of all buildings and present photographic identification, having the ability to lock classrooms from the inside, providing an under-the-counter duress alarm system to signal a supervisor, security personnel or law enforcement if a visitor becomes threatening or violent, an established escape area, and something as easy as rearranging office furniture and partitions so that frontline employees in daily contact with the public are surrounded by natural barriers such as desks, countertops, and partitions.

As part of the “detect” efforts, the organization recommends monitoring for potential failures and breakdowns in protective mechanisms because it is

known that almost every school attacker, whether they are a student or a terrorist, conducts extensive reconnaissance on the subject school, and that both human and video surveillance can help a school district pattern these reconnaissance missions. Accordingly, taking such action as to require identification and verification of all individuals requesting access to school district buildings, having panic and alert alarms in several locations, and disseminating and posting information in prominent locations both internally and throughout school community will help a school to detect whether or not an attack is being planned.

As part of the “delay” efforts, the organization recommends slowing down intruders if there is a breach in security, to allow security to respond. They

recommend, as part of this effort, to lock doors in areas of refuge and avoid evacuating into an area not proven safe. More information on this program is available at [www.psba.org](http://www.psba.org).

Overall, the implementation of any new program or policy should be done with solicitor involvement, and the involvement of local law enforcement. New procedures and policies should also be readily shared with the school community once finalized.

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## *Charter School Standards Are Changing*

**T**he Federal Government recently struck down a PSSA Rule change that made significant changes for charter school federal testing benchmarks than that of traditional brick and mortar public schools. The Pennsylvania Department of Education had argued that the Commonwealth of Pennsylvania could treat charter schools the same way it treated traditional school districts in calculating student test scores, with Adequate Yearly Progress (AYP) grades; however, the United States Department of Education had recently demanded that since charter schools are individual school buildings, they must have their separate AYP grades under the No Child Left Behind Act. Since that order was handed down, the Pennsylvania Department of Education has recalculated AYP, and those recalculations show that charter school achievement is in significant decline.

Specifically, the recalculations show a decline in the number of schools that met targets for adequate yearly progress and an increase in those charter schools that are in warning, improvement, or corrective action status. Astoundingly, the recalculations show only 28% of all charter schools met AYP, as compared to the 49% determined under the previous calculations

that were ordered to be recalculated by the United States Department of Education.

In the September AYP calculation, of the 156 charter schools, the Pennsylvania Department of Education calculated that 77 had made AYP, however, according to the January recalculation, only 43 had made AYP. Additionally, the September calculation indicated that 15 schools were making progress, while the January recalculations showed that only 8 were making progress. The September calculation indicated that 34 schools were in warning, and with the recalculation, this number almost doubled to 61 schools in warning. Significantly, the September calculations showed that 13 schools were in corrective action, with the January recalculation showing that actually 21 schools were in corrective action. Interestingly, of the 12 cyber charter schools, the September calculation showed that one of them made AYP, with the January calculation showing that none of them made AYP and none of them were making progress either.

In another move related to charter schools, the Pennsylvania Department of Education Secretary, (continued next page)

## *Charter School Standards*

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Ronald Tomalis, denied eight (8) cyber charter school applications for the 2013-2014 school year. These denials cited significant deficiencies in curriculum, finance and overall operations. In a news statement, Secretary Tomalis stated, “The proposal submitted by the applicants lack adequate evidence and sufficient information of how prospective students would be offered quality academic programs... the financial plans presented call into question each applicant’s ability to maintain a long-term, viable education program for the benefit of Pennsylvania students.” The eight cyber charter schools were Akoben Cyber Charter School in Philadelphia County, Insight PA Cyber Charter School in Delaware County, MB Resiliency Cyber Charter School in Philadelphia County, Mercury Online Cyber Charter School in Dauphin County, Pennsylvania Career Path Cyber Charter School in Lehigh County, PHASE 4 America Cyber Charter School in Allegheny County, Urban Cyber Charter School in York County, and V3 Cyber Charter School in Dauphin County. In addition to the reasons stated by Secretary Tomalis in the news statement, apparently many of the denials of these cyber charter school applications were based on the fact that many of the applicants wanted to use Learning Centers as part of the curriculum, and that component made the cyber charter schools more like brick and mortar charter schools. Secretary Tomalis recognized a difference between brick and mortar and cyber charter schools and noted that Learning Centers should not be used as an alternative to the brick and mortar model.

Because under Section 17-1741-A of the School Code, the Pennsylvania Department of Education has the power and obligation to receive, review, and act on applications for the creation of a cyber charter school and has the power to request further information from cyber charter school applicants, obtain input from interested persons or entities, and hold hearings regarding applications, this denial was within the purview of Secretary Tomalis.

Thus, under the law, the Pennsylvania Department of Education has the sole responsibility of ensuring that cyber charter school obligations are thoroughly reviewed and that cyber charter school charters are not unnecessarily granted. While each applicant has the availability under the law to resubmit their application to the Department of Education for reconsideration or appeal the decision of the Department of Education Secretary, it is important to note that the Pennsylvania Department of Education is taking a strong stance on ensuring that Pennsylvania cyber charter schools are in fact providing adequate evidence and sufficient information as to their offering quality academic programs, and will not hesitate to deny cyber charter school applications should the Department feel the same are not prepared to provide an educational program that benefits Pennsylvania students.

Thus, it seems that the standards for charter schools are changing, first, with the requirement that the Pennsylvania Department of Education recalculate AYP for charters schools, but also, this recent decision by the Department of Education to deny eight (8) cyber charter school applications.

## Join Us for School Law Day: A Legal Cafeteria of Experts and Topics

March 14, 2013

Lewis Katz Building of the Penn State Dickinson School of Law,  
University Park, Pennsylvania

8:30 a.m. – 3:30 p.m.

**T**he Pennsylvania School Study Council and the Partners of Andrews & Beard wish to invite you to School Law Day: A Legal Cafeteria of Experts and Topics. This event will take place on Thursday, March 14, 2013, from 8:30 a.m. to 3:30 p.m. in the Lewis Katz Building of the Penn State Dickinson School of Law in University Park, Pennsylvania. The presentation will also be remotely broadcast at the Dickinson School of Law in Carlisle, Pennsylvania.

School Law Day is a cooperation between the Penn State College of Education and Penn State University, Dickinson School of Law, and will feature a presentation of new and evolving legal concerns, an opportunity to “ask the Solicitors,” as well as some legal forecasts and potential developments. Some of the scheduled topics are: historical viewpoint of the juvenile court system; the law and ethics of child advocacy; furloughs, demotions, and recall in education; mandatory reporting and Act 126; special education law; hot topics in education such as First Amendment issues, child labor, small games of chance, as well as teacher and principal effectiveness concerns and administrator contracts.

The presenters will be Judge Cheryl Lynn Allen of the Pennsylvania Superior Court; Lucille L. Johnson-Walsh, the Director of the Penn State Law Child Advocacy Clinic; Stacy Parks-Miller, the Centre County District Attorney; Emily Leader, Acting Chief Counsel of the Pennsylvania School Boards Association; David P. Andrews, Managing Partner of Andrews & Beard Law Firm; Carl P. Beard, Partner of Andrews & Beard Law Firm; Aimee L. Willett, Partner of Andrews & Beard Law Firm; and Patrick J. Fanelli, Partner of Andrews & Beard Law Firm.

Please contact **Sue Tighe** at [slt11@psu.edu](mailto:slt11@psu.edu) or **814-865-0321** for more information and to register.

## Andrews and Beard Education Law Focus

**A**s solicitors, labor counsel and special counsel, Andrews and Beard represents more than 100 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts. Andrews and Beard is also one of the first firms in the state to pioneer Timed Mediation to successfully negotiate teacher-union contracts in a 48-hour process. This process can result in the settlement of the contract six months before expiration, at a large financial savings to the School District.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Negotiation of teacher and support staff contracts; Employment Discrimination; Special Education Litigation; Veterans' Preference Litigation; Teacher and Student Discipline Hearings; and Leaders in Timed Mediation Contract Negotiations.

### About the Pennsylvania School Study Council

**T**he Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, [www.ed.psu.edu/pssc/](http://www.ed.psu.edu/pssc/) or contact the Executive Director Dr. Lawrence Wess at [ljw@psu.edu](mailto:ljw@psu.edu).

## *Subsequent Issues*

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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