



Revisiting the Administration's Regulatory Overreach and NSBA's Response

SHORTLY AFTER PRESIDENT OBAMA TOOK OFFICE IN 2008, school districts across the country began seeing a spike in the number and scope of complaints being opened against them. Also, federal agencies began issuing “technical assistance” in the form of guidance documents, Dear Colleague Letters, FAQs, practice manuals. These documents explained what the administration believed were the obligations of those who receive federal funds, such as school districts. The administration has an expansive view of the reach of federal policies and regulations. Federal agencies also have been using the federal administrative rulemaking and amicus brief processes to push interpretations of their authority to the regulatory limit.

NSBA's Executive Director Thomas J. Gentzel has been monitoring the federal government's attempts to expand its reach into the operations of school districts. NSBA has been shining bright, public light on areas it believes the federal government is intruding upon local school board authority.

Using the federal “Notice and Comments” process, NSBA has submitted comments in response to:

(1) An IRS Proposed Rule on an employer's responsibility regarding health coverage under the Affordable Care Act.

(2) A U.S. Education Department Dear Colleague Letter on a school district's obligations to ensure equal opportunities for disabled students to participate in extracurricular athletics.

(3) An Education Department request for approval to expand the data categories and items in its Civil Rights Data Collection.

(4) An FCC Proposed Rule regarding the modernization of the E-Rate program, which would require already financially strapped districts to spend their

limited funds on technology.

(5) An Education Department proposed rule regarding changes to maintenance of effort requirements under the Individuals with Disabilities Education Act. NSBA believes this would inadequately serve disabled students and limit a district's flexibility to deal with shrinking budgets and changing student demographics.

NSBA'S PUSHBACK GETS THE DEPARTMENT OF EDUCATION'S ATTENTION

Early last year, The Office of Civil Rights (OCR) at the Department of Education issued a Dear Colleague Letter to public schools regarding their responsibility, under Section 504 of the Rehabilitation Act of 1973, to ensure that students with disabilities have an equal opportunity to participate in extracurricular athletics.

NSBA expressed concern that the letter would “cause uncertainty in the courts and invite misguided litigation.” Specifically, NSBA asked OCR to clarify three areas:

- (1) The expansion of OCR's view of its authority
- (2) Its confusing blend of OCR enforcement standards
- (3) The need for clarity in the letter's conclusions

In a positive shift in past practice, high level Education Department officials reached out to NSBA to start a dialogue. The result was written by Deputy Assistant Secretary for Policy John K. DiPaolo.

DiPaolo responded to NSBA's concerns as follows:

1. Equal Opportunity

NSBA concern: The Dear Colleague letter expands Section 504 law beyond existing regulations and created new rights and responsibilities.

DiPaolo responded that the letter



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does not create new obligations or rules. Instead, he said, it clarifies how his agency applies Section 504 regulations. Current regulations “require that school districts provide students with disabilities an equal opportunity to participate in and benefit from the district’s nonacademic services, including their existing extracurricular athletic opportunities.”

He also provided examples of issues that are not part of a school district’s equal opportunity obligations.

Equal opportunity does not mean:

- Every student with a disability has a right to be on an athletic team
- Districts must create separate or different activities just for students with disabilities
- Compromising student safety
- Changing the nature of selective teams. Students with disabilities have to compete with everyone else and legitimately earn their place on the team
- Giving a student with a disability an unfair advantage over other competitors
- Changing essential elements that affect the fundamental nature of the game

In many situations, disabled students will be able to participate in the school’s athletic activities without any consideration of their disability. When there is a question concerning a student’s disability, the Education Department interprets the district’s “equal opportunity”

obligation to mean that the district “must make an individualized inquiry to determine if reasonable modifications could be made, or aids or services provided, that would allow [the student] an equal opportunity for participation.”

2. Individualized Inquiry

NSBA concern: Does the letter require that a district’s 504 team do an individualized inquiry? If so, what should that team look like?

DiPaolo did not address this question definitively. However, the department set out examples of circumstances when a 504 team decision was not needed, and in so doing implied that there may be circumstances when a 504 team decision *would be required*.

In some circumstances, the inquiry simply could be a coach or athletic staff member consulting with the student and student’s parents to determine what reasonable modifications could be provided. In other circumstances, the district might ask an athletics official to address adaptations to standard rules or practices in competitions. A teacher might advise on a coaching modification that could support a student with a disability.

Informal practices might be enough when the outcome is school-provided modifications or aids and services that allow the student’s participation. But what happens when a student is denied participation? Would OCR expect a more formal process? Since an OCR investigation under Section 504 typically

focuses on a school district's compliance with the process requirements, the adequacy of the district's process—in OCR's view—becomes critical.

The department did not say that an informal process would suffice in all circumstances or that a 504 team review will never be required. Districts should not assume that an informal process will always comply with OCR's interpretation of its obligation to comply with Section 504. Until OCR issues definitive guidance, districts would be wise to make process decisions on a case-by-case basis.

3. Equal Opportunity to Participate

NSBA concern: Is OCR establishing new requirements

under the Individuals with Disabilities Act (which OCR does not enforce) and stating that athletic participation was a requirement of a Free and Appropriate Education (FAPE)?

DiPaolo responded that OCR was not saying that IEPs *must* address participation in extracurricular athletics or that students' participation in nonacademic services was part of providing FAPE.

4. Creation of New Athletic Opportunities

NSBA concern: Is the Education Department requiring districts to create new, separate, or different athletic opportunities for disabled students?

DiPaolo answered with a definite "no." While OCR

NSBA's pushback is gaining traction, resulting in greater engagement with federal officials and positive clarification for school districts.

You can read NSBA's responses by visiting the following links:

1. NSBA Comments on IRS Proposed Rule re Employer Responsibility Regarding Health Coverage: www.nsba.org/SchoolLaw/Federal-Regulations/IRS-Proposed-Rule-for-Shared-Responsibility-for-Employers-Regarding-Health-Coverage.pdf
2. NSBA Comments on ED/OCR DCL re Participation of Disabled Students in Athletics: www.nsba.org/SchoolLaw/Issues/Athletics/NSBA-Response-to-OCRs-January-25-2013-Dear-Colleague-Letter.pdf
3. NSBA Comments on ED/OCR First Notice re Request to Expand Its Civil Rights Data Collection: www.nsba.org/SchoolLaw/Issues/NSBA-Submits-Comments-to-the-US-Department-of-Education-on-its-Notice.pdf
4. NSBA Reply Comments on FCC Proposed Rulemaking re: Modernization of the E-Rate Program: www.nsba.org/SchoolLaw/Issues/Reply-Comments-on-Notice-of-Proposed-Rulemaking-Modernizing-the-E-Rate-Program-for-Schools-and-Lib.pdf
5. NSBA Comments on ED/OSERS Proposed Rulemaking re: Maintenance of Effort Requirements under IDEA: www.nsba.org/SchoolLaw/Issues/Comments-on-Notice-of-Proposed-Rulemaking-34-CFR-300-Docket-ID-ED-2012-OSERS-0020.pdf
6. NSBA Dec. 2010 Response to ED/OCR DCL on Bullying: www.nsba.org/SchoolLaw/Issues/NSBA-letter-to-Ed-12-07-10.pdf

urges districts to add additional opportunities or activities for such students, they are not required to do so.

While his response contains good news, there is a nugget of potential bad news as well. The department also says that any new or separate athletic opportunities must be equal to the district's other athletic programs.

School districts across the nation are adding programs that create athletic opportunities for disabled students. Unified and allied programs are some of the more popular, and they have proven to be very successful. We hope that this measure will not have the effect of shutting down or stalling these programs.

CONGRESS PUSHES BACK ON FEDERAL INTRUSION

In the appropriations bill for 2014 that became law on Jan. 17, U.S. Congress pushed back on federal intrusion in local education decision-making by three agencies: the Department of Agriculture, the Department of Education, and the Department of Health and Human Services. School districts could gain additional resources and local flexibility in two key areas: early childhood education and child nutrition.

Early childhood education: Congress approved \$250 million a new round of Race to the Top (RTT) state grants in the bill. It will award grants to states for pre-school development by Dec. 31. Unlike the earlier early childhood grants that focused on systemic reforms, the new program will build, develop, and expand high-quality preschool and early childhood programs. Successful state applications must include comprehensive services and family engagement. They may include workforce development for providers to obtain credentials and degrees. NSBA supports voluntary, sufficiently funded preschool programs that are locally designed to meet local needs. NSBA does not support competitive grant funding for essential education purposes, as many school districts do not have the capacity to prepare complex grant applications.

The pushback: Written into the bill is a requirement for the cabinet agencies responsible for administering the grants to engage with Congress before awarding funds. It is not unusual for cabinet agencies to report to congressional committees, but it is rare to require them to consult on a work-in-progress. This gives members of Congress

the power to influence the administration's implementation of the new funding. It reins in executive power and potentially puts local school districts back in the drivers' seat if they desire to participate in the program.

Child nutrition: The bill also pushes back on federal intrusion in the child nutrition reauthorization of 2010. Two provisions represent significant unfunded mandates for some districts: new national school breakfast standards, and competitive foods standards. Unlike the new school lunch standards, there is no reimbursement increase for school districts that comply with the new school breakfast standards. Further, the cost increase of complying (as much as 50 cents per breakfast according to the Department of Agriculture) is much higher than compliance with school lunch standards. New national competitive food standards are similar to school lunch standards, and apply to all foods sold outside of the federal school meal programs, such as a la carte lines, school stores, vending machines, and fundraisers. In addition to directly impacting district operations and revenue, new reporting requirements create another burden on school districts.

The pushback: The Secretary of Agriculture is directed by Congress to establish a waiver approval process within 90 days of enactment of the appropriations bill for states to grant waivers for the 2014-15 school year. The waivers are for any district that certifies it cannot operate a food services program without incurring increased costs in order to comply with the new school breakfast standards or competitive food rules. The secretary is required to technical assistance to schools with waivers to help them implementation in the future. In short, Congress has directed the administration to give school districts more flexibility under the child nutrition reauthorization. Districts could request a waiver, which could eliminate an unfunded mandate. The new waiver process is due from the department by mid-April.

Read *Federal Insider* for updates on how pushback by Congress is creating options for school districts. Advocacy by local school boards, state school board associations, and NSBA has left a big footprint on Capitol Hill, and members of Congress are beginning to challenge federal overreach in education. 🗳️