National School Boards Association

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September 19, 2017

Via Electronic Submission
www.regulations.gov

Hilary Malawer
Assistant General Counsel, Division of Regulatory Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Room 6E231
Washington, D.C. 20202-

Re: ED Request for Comments on Evaluation of Existing Regulations
Docket ID ED-2017-OS-0074

Dear Ms. Malawer:

The National School Boards Association (NSBA), representing through our state associations approximately 13,800 school districts nationwide, offers the following comments to the Request for Comments, *Evaluation of Existing Regulations*, ED-2017-OS-0074,[1] issued by the U.S. Department of Education (Department) on June 22, 2017. NSBA understands that through this Request for Comments, the Department is seeking to alleviate unnecessary regulatory burdens by evaluating existing regulations and guidance documents and repealing, replacing or modifying those regulations that have a negative effect on jobs, are outdated, unnecessary or ineffective, impose excessive costs, create serious inconsistencies, are inconsistent with 44 U.S.C. 3516 note, or derive from or implement Executive Orders or directives that have been subsequently rescinded or substantially modified. We note that the Department is particularly interested in regulatory provisions that are "unduly costly or unnecessarily burdensome."

In response to this request for comments, NSBA wishes to bring to the Department's attention the following regulatory provisions and guidance documents that meet one or more of the specified criteria.

[1] Request for Comments, 82 Fed. Reg. 28431 (June 22, 2017); Extension of Filing Date for Comments, 82 Fed. Reg. 37,555 (Aug. 11, 2017).

REGULATORY PROVISIONS

Provision of FAPE under Section 504—34 CFR 104.3; and Frequently Asked Questions About Section 504 and the Education of Children with Disabilities Q14,
https://www2.ed.gov/about/offices/list/ocr/504faq.html

NSBA urges the Department to rescind 34 CFR 104.33, which asserts that public elementary and secondary fund recipients must provide a free appropriate public education under Section 504 of the Rehabilitation Act. NSBA's recommendation, supported by the points below, is based on years of compliance efforts by school districts and the attorneys advising them.

- The FAPE regulation far exceeds the language and purpose of Section 504, which prohibits discrimination on the basis of disability in programs receiving federal funds;
- The regulations establish two legal standards for different recipients of federal financial assistance. For employers, higher education and other recipients of federal financial assistance, the standard is reasonable accommodation. For K-12 schools, the standard is free appropriate public education.
- The definition of FAPE under Section 504 is ill-defined, vague and different from that under the IDEA, a statute which creates an individual entitlement. This confusion makes it difficult to implement, especially with respect to students who are covered by both statutes. This increases the risk of litigation and has resulted in confusing court decisions and inconsistency in the state of the law.
- While no federal funds are provided under Section 504 to ensure FAPE, the regulation requires that school districts provide non-IDEA eligible students with disabilities (e.g., those who have diabetes, food allergies, and other physical disabilities) with potentially costly services and procedural safeguards that may even exceed those required under the IDEA;
- Removing the FAPE requirement will not relieve school districts of the duty to provide covered students with reasonable accommodations to ensure non-discriminatory participation in programs and activities.

If the Department decides to retain the FAPE requirement under section 504, NSBA urges it to make the following clarifications:

- With respect to children eligible for services under the IDEA, a district's compliance with that statute satisfies FAPE obligations under Section 504; and
- Parental revocation or withholding of consent for services under the IDEA (34 CFR 300.9) effectively withholds or revokes consent for applicable services under Section 504.

Definition of "Day" under IDEA regulations —34 CFR 300.11

Change default definition of "day" in IDEA regulations to "school day." When a request for due process is filed immediately preceding an extended break in the school calendar, school districts experience substantial burden and expense in meeting the requirement to respond in 10 calendar days and to hold a resolution meeting in 15 calendar days. School staff must be called in to gather records and to assist with drafting the response. School buildings may be closed, making it difficult to find needed records. Staff and service providers may be off contract during the break, requiring the district to pay these

personnel for the time they are needed to assist with a response or resolution meeting or to prepare for the actual hearing. Necessary staff may be completely unavailable due to prior commitments such as summer jobs or travel.

"Calendar day" should be specifically stated as the appropriate measure where that is the Department's intention.

Local Educational Agency Maintenance of Effort (MOE) Requirement – 34 CFR 300.203(a)-(c), 300.204; Non-regulatory Guidance, July 27, 2015,
https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osepmemo1510leamoeqa.pdf

Current regulations set out four methods by which school districts can meet the eligibility and compliance standards with respect to MOE under the IDEA. In addition, a reduction in expenditures is permitted for 1) the voluntary departure of staff (for example, by retirement); (2) the costs of a special education student who has left the district, graduated, or aged out of the program; (3) the costs of a specific special education student who no longer requires the specific services; and (4) the cost of capital equipment purchased in prior years. The regulations also require that when a school district fails to meet the MOE standard, its compliance in subsequent years must be measured against the most recent preceding year in which the district met MOE, not against the deficient amount from the immediately preceding year.

NSBA urges the Department to provide more flexibility to school districts in meeting MOE requirements by withdrawing the subsequent year rule set out in 300.203(c). NSBA continues to believe this rule is without statutory support. Additional flexibility could also be achieved in one of several ways: 1) expand exceptions to allow for expenditure reductions when school districts find ways to operate more efficiently and can demonstrate no reduction in services to students; 2) provide waivers in the event of uncontrollable or exceptional circumstances, such as a natural disaster or unforeseen decline in a school district's financial resources; and/or 3) allow districts to apply the same MOE percentage under IDEA as permitted under ESSA.

Independent Education Evaluation (IEE) under IDEA regulations—34 CFR 300.502(b)

The IDEA statute requires states and school districts, as a condition of receiving federal funding for special education programs, to adopt procedures that afford students and parents "procedural safeguards" with respect to FAPE. 20 U.S.C. §1415(a). These procedures must include " (1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, *and to obtain an independent educational evaluation of the child*." 20 U.S.C. §1415(b)(1) (emphasis added).

The Department regulation on independent educational evaluations (IEEs) goes beyond the statute's requirement that parents be allowed to obtain an IEE, and affirmatively requires school districts to pay for such evaluations upon a parent request, or initiate a due process complaint. 34 CFR 300.502(a) and (b).

IEEs requested by parents can result in substantial expense to a school district, even after it has conducted its own appropriate evaluation. In light of these potential costs, the regulation should be amended to:

- place on parents the burden of showing that the challenged evaluation does not comply with specific provisions of the IDEA;
- require parents to make any request for an IEE within 30 days after the challenged evaluation is considered by the IEP team;
- where a school district refuses the IEE request, require parents to bring any due process hearing seeking the IEE at public expense within 30 days of the school district's refusal;
- clarify the meaning of "an" IEE does not include a separate evaluation of each area of need considered by the school district's evaluation nor does it cover an annual IEE; and
- clarify that the purpose and content of any IEE are limited to determining the child's eligibility under the IDEA and the type and extent of special education and related services needed to address the child's disability(ies); specific placement recommendations and determinations of district liability are beyond the scope of an evaluation and should be excluded.

Specificity of Due Process Complaints under IDEA—34 CFR 300.508(5), (6)

Because due process proceedings may become unduly protracted and expensive, the regulation should be amended to require that the problems identified in the due process complaint match specific requests made at an IEP meeting and that parents demonstrate that the school district refused to meet the requests so that a genuine impasse exists and require that a "case conference" be held on an open record basis before the due process hearing may begin; during the case conference, or shortly thereafter, allow the district to make on the record offers to resolve the dispute.

Stay-put Placement under IDEA Regulations—34 C.F.R. 300.518(d)

IDEA requires a child to remain in his or her "then current educational placement" during the pendency of due process proceedings, except in limited circumstances involving discipline or the parties agree otherwise. 20 U.S.C. §1415(j). This concept is referred to as "stay put."

The Department's regulation at 300.518(d) requires that a hearing officer's decision in favor of the parents transforms the parents' desired placement into the child's stay-put placement in the event of subsequent appeals by treating the decision as an agreement between the state and the parent as to placement. This legal contrivance obligates school districts in some circuits to pay the cost of the parents' unilaterally selected placement until appeals are completed even when the school district is ultimately found to have provided FAPE. This result conflicts with the IDEA provision that clearly states school districts are not obligated to pay for private unilateral placements except where they have denied FAPE. NSBA recommends that this regulatory provision be removed.

GUIDANCE AND OTHER DEPARTMENT DOCUMENTS

Alignment of IEPs with State Academic Content Standards – OSEP Dear Colleague Letter November 16, 2015
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf

This Dear Colleague Letter "clarifies that individualized education programs (IEP) for children with disabilities must be aligned with state academic content standards for the grade in which a child is enrolled." As this letter was issued before the Supreme Court's decision in *Endrew F. v. Douglas Cnty. Dist. Re-1*, 137 S. Ct. 988 (2017), NSBA urges the Department to rescind this letter and consider, after input from stakeholders, whether to issue guidance regarding alignment of IEPs with state standards consistent with the Supreme Court's directive that IEPs be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Effective Communication under the American with Disabilities Act (ADA)—2014 Dear Colleague Letter and FAQ on Effective Communication, November 12, 2014
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/doe-doj-eff-comm-ltr.pdf
https://sites.ed.gov/idea/files/idea/policy/speced/guid/idea/memosdcltrs/doe-doj-eff-comm-fct-sht.pdf
https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

Serving Children under IDEA

NSBA urges the Department to clarify its interpretation of the Department of Justice regulation at 28 CFR 35.160 in a manner that makes clear that with respect to a student with disabilities receiving services under the Individuals with Disabilities Education Act (IDEA):

- the ADA's effective communication requirement is satisfied if the school district is providing the child with a free appropriate public education (FAPE) as specified in the IDEA, negating any need for the district to engage in a separate ADA analysis; and

- the IDEA's process for developing an Individualized Education Plan supersedes any ADA requirement that the district give primary consideration to the parent's preferred communication method.

NSBA believes the Department should make changes to the 2014 DCL on Effective Communications it issued jointly with the U.S. Department of Justice, in keeping with these recommendations and as otherwise set forth in its letter sent to the Department on March 5, 2015 (See Appendix A.). NSBA urges the Department to withdraw statements that suggest the holding in *K.M. v. Tustin Unified Sch. Dist.*[2] applies beyond the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, and to provide additional guidance on the standards (1) to determine a fundamental alteration in the nature of a program or activity and (2) to assess undue financial and administrative burden on schools.

[2] 725 F.3d 1088 (9th Cir. 2013).

Website Accessibility

Recognizing that enforcement positions are beyond the scope of the Department's request to identify burdensome and costly regulations, NSBA nonetheless urges the Department to retreat from enforcing the effective communications regulation under the ADA and general non-discrimination regulations under Section 504 to assign to school districts burdensome and costly requirements related to the accessibility of district websites. While achieving web site accessibility is a laudable goal, there is no clear statutory or regulatory support for some of the requirements and timelines that OCR has imposed in the agreements to resolve accessibility issues, including requiring school district websites to meet the WCAG 2.0 standards, compelling districts to close caption all web accessible videos, and burdening districts with responsibility for the accessibility of third party vendor sites.

Fiscal Equity under Title VI –OCR Dear Colleague Letter, October 1, 2014

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf

In this DCL, the Department significantly expands OCR's jurisdiction over school districts' day-to-day operations to ensure that students are provided with equal educational opportunity and access to district resources. OCR indicates it will apply both intentional discrimination and disparate impact rubrics under Title VI to evaluate school district matters traditionally within the control of local school boards: 1) the quality, adequacy, and appropriateness of courses, academic programs and extracurricular activities will be examined to ferret out disparities in the allocation of resources; 2) access to strong teaching and instruction will be measured by looking at factors such as teacher effectiveness data, workforce stability, teacher qualifications, school leadership, support staff, teacher absenteeism, turnover rates and evaluations systems; 3) school facilities will be inspected to assess their actual physical condition, lighting, cleanliness, HVAC systems, and paint; and 4) technology and instructional materials will be reviewed for availability and currency. NSBA urges the Department to refrain from engaging in the expansive reviews this DCL appears to envision. Because the educational decision-making of local and state leaders should not be usurped by detailed federal demands that overstep the agency's authority to enforce civil rights laws, NSBA recommends that the Department withdraw this DCL.

OCR Dear Colleague Letter on Students with Disabilities In Extracurricular Athletics – January 25, 2013,

https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf

This guidance appears to expand OCR's authority under Section 504 to regulate school district decision-making concerning the participation of students with disabilities in sports and other extracurricular programs. The guidance is unclear as to whether school districts must undertake assessments for these activities separate from the required annual 504 educational meeting whenever a request for participation is made. It also fails to provide any details as to who should compose the assessment team or to clarify whether OCR's review will focus on the process used to arrive at the decision as opposed to the team's decision itself. Additional clarification is also needed concerning the "opportunity to benefit" and "fully and effectively" standards. This DCL also erroneously suggests that a FAPE standard applies to participation in elective extracurricular programs. For these reasons (as more fully discussed in NSBA's Letter Response to the DCL, May 21, 2013, Appendix B here), NSBA recommends that the Department revise the DCL to provide much-needed clarification.

Bullying and Harassment under Title IX—OCR Dear Colleague Letter, October 26, 2010, https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html

In its guidance document on bullying and harassment, the Department articulates an enforcement standard to be applied by OCR that veers significantly from the standard for school district liability under Title IX established by the U.S. Supreme Court in *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999). The DCL changes key aspects of *Davis*' "actual knowledge" component and expands the types of harassment for which districts are may be found responsible. The DCL also erroneously suggests that Title IX requires districts to eliminate harassment and ensure it does not recur by taking multiple remedial steps and responding to remedial requests of parents. The DCL also does not adequately consider school district obligations under the Family Educational Rights and Privacy Act, the First Amendment free speech clause, and the multiple bullying and harassment standards under which schools must operate. For these reasons (as more fully explained in NSBA's Letter to Charlie Rose, December 7, 2010—Appendix C here) NSBA urges the Department to issue a clarification that provides an accurate legal standard regarding school official's responsibilities with respect to harassment and presents examples as one view of best practices rather than Title IX requirements. In addition, OCR should apply a standard consistent with the *Davis* decision and Title IX in investigation and enforcement activities related to bullying and harassment.

OCR Procedures-Revised Case Processing Manual (CPM),
www2.ed.gov/about/offices/list/ocr/docs/ocrcprm.pdf

NSBA urges the Department to modify the CPM and OCR practices to align with the Secretary's stated goal of OCR acting as a neutral factfinder in a manner consistent with its regulatory and statutory authority to enforce civil rights laws and that respects due process protections for school districts. This would include eliminating past practices including: using an individual complaint to initiate a class- or school-wide inquiry; unreasonable data requests beyond the scope of the complaint; wide-ranging and/or one-sided interviews; refusing to allow districts to challenge inaccurate evidence; exceeding timelines for completing investigations; proposing voluntary resolution agreements without review of information; issuing letters of findings after voluntary resolution; directing educational policies without legal basis; failing to respond to written requests; and confidentiality restrictions on public communication by school districts

Civil Rights Data Collection
81 Fed. Reg. 96,466 (Dec. 30, 2016); 82 Fed. Reg. 33880 (July 21, 2017)

Consistent with the concerns NSBA raised with respect to the 2015 Civil Rights Data Collection (CRDC) (see Appendix D), NSBA continues to believe there is questionable statutory and regulatory authority that allows OCR to require in its biennial survey of school districts the submission of data for items and categories that are not connected to civil rights enforcement, have any civil rights implications for students, or impact the provision of equal educational opportunities to students under the five specific statutes (Title VI, Title IX, Section 504, Title II/ADA, and the Age Discrimination Act) for which OCR has investigative authority and are the bases of OCR's mission. NSBA remains concerned about the authority of OCR to require school districts to collect and report non-civil rights-related data on behalf of other offices in ED which do not have such authority of their own, and may involve conduct or information that is not relevant to the programs operated by such other ED offices.

NSBA appreciates the opportunity to submit its concerns about burdensome and costly regulations and guidance documents issued by the Department. We reiterate our strong support of our common purposes to ensure that public schools understand and comply with their responsibilities under federal laws affecting the education of children. We look forward to working with the Department to develop regulations and resources to help school districts in their efforts to provide the nation's public school children with educational opportunities that prepare them for the future.

Sincerely,

Thomas J. Gentzel
Executive Director & CEO

Enclosures (4): Appendix A—NSBA Letter in Response to Effective Communications DCL
Appendix B—NSBA Letter in Response to Students with Disabilities in Extracurricular Activities DCL
Appendix C—NSBA Letter in Response to Bullying and Harassment DCL
Appendix D—NSBA Letter in Response to Proposed 2015 Civil Rights Data Collection

Appendix A
NSBA Response to Effective Communication Dear Colleague Letter
(March 5, 2015)

National School Boards Association

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VIA EMAIL AND USPS

March 5, 2015

The Honorable Catherine E. Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The Honorable Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

The Honorable Michael K. Yudin
Acting Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Dear Colleague Letter Issued November 12, 2014

Dear Assistant Secretaries Lhamon and Yudin and Assistant Attorney General Gupta:

The National School Boards Association (NSBA) shares the goal of the Departments of Education and Justice to protect students, disabled and non-disabled, from all forms of discrimination and to provide them with the opportunity to participate fully in the programs our public schools offer. We also share your view that communication with stakeholders is a critical aspect of such participation. NSBA is committed to helping school districts across the country develop and implement policies to address discrimination against all students,[1] to create a school climate of

[1] Among many policy statements expressing its commitment to preventing discrimination against all students, including students with disabilities, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. II, § 3.1: NSBA believes that school boards should strive to recognize the special needs and strengths of every student and provide access to a high quality education in a safe and supportive environment.

inclusion in all educational programs offered by public schools,[2] and to bring awareness to the benefits brought about by making certain that all students—including those with hearing, speech, and vision disabilities—have the tools they need to benefit from the educational programs being offered to them.

NSBA, our member state associations of school boards, our 3,000-member Council of School Attorneys, and the more than 13,500 public school districts across the nation we represent, welcome guidance to address the very important issue of how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability. It is in this spirit of cooperation and common purpose that we write to express concern and request clarification of certain aspects of the November 12, 2014 Dear Colleague Letter (DCL) issued jointly by the U.S. Department of Justice (DOJ), the U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS), and the U.S. Department of Education's Office for Civil Rights (OCR) (collectively, the "Departments").

As outlined in greater detail below, NSBA is concerned that absent clarification, the Departments' joint position that public schools across the country must now apply both an Individuals with Disabilities Education Act (IDEA) analysis and an effective communication analysis under the Americans with Disabilities Act (ADA) in determining how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability 1) is a misplaced statement of the law that threatens to dismantle the IEP process, which is the appropriate and congressionally mandated process for educating students with disabilities; 2) will potentially disrupt

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Beliefs & Policies, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or sexual orientation.

Beliefs & Policies, Art. IV, § 2.11: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders….

[2] Beliefs & Policies, Art. I, § 1: NSBA believes that to help all students achieve state standards and reach their full academic potential, federal, state, and local policy makers should: … provide the highest quality education for each child, and equal educational opportunity for all children; …. [and]; ensure that all children receive the services for which they are eligible; ….

Beliefs & Policies, Art. I, § 1.1: School districts should be organized so they can provide the best education programs for all public elementary and secondary students…. School boards should have the authority to develop restructuring strategies, as they deem appropriate.

Beliefs & Policies, Art. III, § 2: NSBA believes that full funding of federal public education programs is an essential step in improving educational opportunities for all children [,and ensuring] that our nation's students have the opportunity to meet the challenge of world-class standards and responsible citizenship through these priorities: ... (k) providing funding to meet school infrastructure and personnel needs to improve the safety and health of all students and to improve the quality of the learning environment;. . . .

Beliefs & Policies, Art. IV, § 1.2: Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, disability or religion.

Beliefs & Policies, Art. IV, § 2: NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn….

Beliefs & Policies, Art. IV, § 3.4: NSBA urges local school districts, intermediate units, and others who provide educational materials to specify a preference for videos that are closed captioned when purchasing such materials.

Beliefs & Policies, Art. IV, § 3.12: NSBA believes in fairness for students at every phase of special education.

necessary activities, services and programs for students; and 3)will burden schools both administratively and financially. NSBA believes that clarification is imperative to avoid the uncertainty, confusion, needless litigation, and unnecessarily adversarial relationships between schools, students and parents that will be brought about by the absence of clear, appropriate and judicially recognized national legal standards for determining how best to serve students who have speech, hearing, and vision impairments.

To avoid these potential outcomes, NSBA urges the Departments to join us in a dialogue that can lead to additional points of clarification of the positions expressed in the DCL. With a clear understanding of the requirements of the law, we believe that school districts can continue their work to ensure that all students—including students who have speech, hearing, or vision disabilities—will have the opportunity to participate in the educational programs provided by their schools.

NSBA's concerns with the DCL fall into two main areas of concern:

I. The Departments' Reliance on *Tustin* to Express a National Standard is Misplaced.
   a. This Erroneous Standard Will Confuse Parents and School Districts Across the Country About the Requirements of the Law.
   b. Confusion about the Applicable Standard Will Promote Needless Litigation.

II. The Departments Should Further Clarify the Following:
   a. The Role of the IEP Process vis-à-vis Section 504 and the ADA.
   b. The Standard to Use to Determine a Fundamental Alteration in the Nature of a Service, Program, or Activity.
   c. The Standard to Use to Determine an Undue Financial and Administrative Burden on Schools.

I. The Departments' Reliance on *Tustin* to Express a National Standard is Misplaced.

In the DCL, the Departments express an expansive view of their authority by instructing all school districts that they must now apply both an IDEA analysis and a Title II effective communication analysis in determining how to meet the communication needs of students who have a speech, hearing, or vision disability. The Departments indicate that this instruction is based upon the holding in *K.M. v. Tustin Unified Sch. Dist.*[3] Because the holding in *Tustin* controls only in the Ninth Circuit, we believe that the Departments' reliance on it to impose a *national* standard is in error.

a. This Erroneous Standard Will Confuse Parents and School Districts Across the Country About the Requirements of the Law.

In *Tustin*, a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled that compliance with the IDEA does not satisfy all claims under Section 504 of the Rehabilitation Act (Section 504) or under the (ADA). The panel held that the school district's provision of a valid IEP

[3] 725 F.3d 1088 (9th Cir. 2013); Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, Michael K. Yuding, U.S. Dep't of Educ. Acting Ass't Sec'y for Office of Special Education and Rehabilitative Services, Vanita Gupta, U.S. Dep't of Justice, Acting Ass't Attorney General for Civil Rights Division, to Colleagues, at 2 (November 12, 2014) [hereinafter referred to as "Dear Colleague Letter" or "DCL"].

under the IDEA does not automatically preclude liability under Section 504 or the ADA. Contrary to the decision of the district court, the panel determined that there are material differences in the obligations imposed by the IDEA and ADA to provide services to hearing impaired students. It remanded the case so that the district court could analyze the facts under both standards to determine if the student's needs had been adequately met. The Departments now rely on this singular decision to provide "guidance" to school districts throughout the country, advising that districts must follow the *Tustin* standard without regard to the state of the law in their own federal circuit.

To the contrary, the only school districts legally bound by the holding in *Tustin* are those within the jurisdiction of the Ninth Circuit Court of Appeals: Arizona, Washington, Oregon, California, Montana, Idaho, Nevada, Alaska, and Hawaii. Secondly, and most importantly, the *Tustin* holding directly conflicts with the holdings in other circuits where the courts have held either that providing a free appropriate public education (FAPE) under the IDEA amounts to compliance with the meaningful access and effective communication standards under the ADA, or that satisfaction of the IDEA standards precludes litigation of similar standards under the ADA and Section 504.[4] Other courts have approached the IDEA-ADA/Section 504 question similarly, summarily dismissing Rehabilitation Act and ADA claims when granting summary judgment to school districts with respect to the provision of FAPE under the IDEA.[5] The *Tustin* decision is at best an outlier among federal courts considering this issue.

b. Confusion about the Applicable Standard Will Promote Needless Litigation.

Equally troublesome is the failure of the DCL to explain the Departments' rationale for choosing the *Tustin* approach as the national enforcement standard and for discounting the prevailing view established in other circuits. Imposing an administrative enforcement standard at odds with existing court rulings will cause needless confusion and disputes as to school district responsibilities for serving students with communication disabilities. It will also encourage litigation, which will further deprive school districts of resources needed to educate students.

Does v. Board of Educ. of Prince George's County[6] illustrates how the failure to clarify an overstatement of the law in OCR guidance, no matter how well-meaning, can result in needless litigation. In *Does*, the parents of a student sued a school district, seeking money damages under Title IX based on alleged peer-on-peer sexual harassment that their child endured. The U.S. Supreme

[4] *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 994-95 (5th Cir. 2014) (holding that a Texas school district did not violate a disabled student's right to a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act because the individualized education plan (IEP) that the district developed for the student provided him with FAPE under the IDEA); *Independent Sch. Dist. v. S.D*., 88 F.3d 556, 562 (8th Cir. 1996) (holding that non-IDEA claims based on the violation of other federal and state laws were precluded by the IDEA judgment in favor of the school district); *D.F. v. Western Sch. Corp.*, 921 F. Supp. 559, 557 (S.D. Ind. 1996) (holding that the plaintiff's ADA claim failed for the same reason that his IDEA and Rehabilitation Act claims failed: he did not meet his burden of proof in challenging the Hearing Officer's decision that defendants have integrated him into the general education environment to the maximum extent appropriate); *Pace v. Bogalusa*, 403 F.3d 272, 292-93 (5th Cir. 2005) (holding that regulations governing accessibility in schools under the ADA/504 require a school engaged in new construction to conform to the same standards as the IDEA. Court held that Pace's argument that accessibility standards under the IDEA and ADA/504 are different is without merit).

[5] *Hudson v. Bloomfield Hills Pub. Schs*., 910 F. Supp. 1291, 1306-07 (E.D. Mich. 1995); *Tarah P. v. Board of Educ. of Freemont Sch. Dist. 79*, No. 94 C 3896, 1995 WL 66283, at *4 (N.D. Ill. 1995); *Scanlon v. San Francisco Unified Sch. Dist*., No. C 91-2559 FMS, 1994 WL 860768, at *10-11 (N.D. Cal. 1994), *aff'd mem*., 69 F.3d 544, 1995 WL 638275 (9th Cir. 1995).

[6] 982 F. Supp. 2d 641 (S.D. Md. 2013).

Court held in *Davis v. Monroe County Bd. of Educ.*[7] that school districts are liable for money damages in Title IX peer-on-peer sexual harassment cases only when school officials are deliberately indifferent to severe, pervasive, and objectively offensive harassment of which they have actual knowledge. In lieu of the stringent *Davis* standard, the parents relied on an OCR Dear Colleague Letter, disseminated on October 26, 2010, to justify their position that the school board should be liable for money damages because it behaved in a "clearly unreasonable manner" with regard to alleged harassment about which the district knew or should reasonably have known.[8] The federal district court rejected the parents' argument in granting the district's motion for summary judgment. The parents have appealed to the U.S. Court of Appeals for the Fourth Circuit, where they continue to assert a legal standard of liability premised on the OCR guidance letter.

Significantly, NSBA had warned OCR precisely of the dangers that its unclarified guidance could present: well-meaning advocates and parents mistakenly would seize on confusing language in a DCL to bring lawsuits that are subsequently dismissed on a faulty legal theory. Such actions come at great expense to all parties involved: school districts lose already scarce dollars in defending legally insufficient lawsuits; and misguided parents and students optimistically bring forth claims based on agency administrative enforcement standards ineffective to impose monetary liability.

To avoid a similarly harmful result with respect to the Departments' guidance on effective communication, NSBA requests that the Departments provide the legal justification for propounding the minority view expressed in *Tustin* as the national administrative enforcement standard. Because the *Tustin* analysis dramatically departs from the law in other circuits, the need for clarification is especially high in order to reduce confusion among school districts, parents and students with respect to districts' legal obligations under the IDEA and ADA.

To promote this shared understanding, NSBA requests that the Departments address at least the following points: 1) the legal reasoning for the Departments' conclusion that the ADA effective communication requirement in the educational context may in some instances require aids and services beyond those specified in an IEP determined to provide FAPE; 2) the legal reasoning for the Departments' conclusion that the evaluation, review, discussion and collaboration among a team of educational experts and *parents* that is inherent in developing an IEP for a student with a hearing, vision or speech disability does not *per se* meet the effective communication analysis required by Title II of the ADA; and 3) the legal justification for the Departments' interpretation of the two statutes in a manner that minimizes collaboration by promoting deep conflicts with and serious disruption of the comprehensive IEP process and due process procedures established by the IDEA when courts confronted with the same issue have overwhelmingly reconciled them in a non-disruptive manner.

II. The Departments Should Further Clarify the Following:

a. The Role of the IEP Process vis-à-vis Section 504 and the ADA.

The Departments' "guidance" states that under the Title II standards, school districts must give "primary consideration" to the preferences of the student with a speech, hearing, or vision disability or her parent in determining what auxiliary aid or service to provide.[9] The guidance further

[7] 526 U.S. 629 (1999).
[8] Letter from Russlyn Ali, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, to Colleagues, at 2 (Oct. 26, 2010).
[9] Dear Colleague Letter, *supra* note 3 at 6.

indicates that once a student, or parent on behalf of the student, requests a specific aid or service, the school district must provide that aid or service in a "timely" manner, which appears to mean that it should be provided immediately.[10] According to the DCL, this is the case even if the child's IEP team is in the process of making a determination about which IDEA aids or services will provide educational benefit for the child.[11] NSBA believes this requirement will adversely impact the way that schools serve students eligible under the IDEA. For this reason, we ask the Departments to clarify the role the IEP team will play in this area of overlap between the IDEA and Title II.

Historically, the IEP process has been the primary method by which schools determine the services or aids that will best assist a student in receiving the FAPE required by the IDEA and its implementing regulations. The IEP team consists of the parents, the student (when necessary), several qualified staff members, and often others experienced at educating students with disabilities and knowledgeable about the student's disability. The team spends hours evaluating the student, analyzing her needs, and determining appropriate special education and related services to provide the child with FAPE. By invoking a separate and distinct Title II standard that requires a school district to provide a student with whatever aid or service she or her parent requests – even if the IEP team is in the process of trying to determine what is educationally appropriate for the student under the IDEA – the DCL threatens to undermine the collaboration essential to the IEP process. As a crucial participant in the IEP team, the parent has the opportunity to request and discuss appropriate communication aids and services in that context. By encouraging parents to do what amounts to an end-run around the IEP process by requesting a specific communication aid apart from the other members of the team, the Departments' approach risks exposing the child to assistance or services that might not be the most educationally sound and effective. Such well-meaning, but potentially misplaced, preferences could in the context of the overall educational program disserve the educational interests of the child. This is especially the case when this practice is examined in light of the totality of the child's educational needs as required by the IDEA.

The IEP process is collaborative by design.[12] Through it, parents, students and subject matter experts work together to determine what services will provide a sound educational program based on the child's unique needs, and work to implement that program. When the Departments advise schools that parents can request the communications aid of their choice *outside of the IEP process*, and that the school has to provide it, the Departments risk marginalizing the role of the IEP process and team. In effect, the Departments' view takes a crucial educational decision out of the hands of the team envisioned by Congress as the decision maker and replaces it with unilateral – and potentially uninformed – decisions by parents about the kind of aids and assistance a child needs. In effect, this approach creates an unsupported presumption that the parents' preferred aid or service will provide effective communication but inexplicably denies that same presumption to the aid or service deemed appropriate by a team of trained education professionals.

School districts need clarification on the role that the IEP team plays in this effective communications analysis, which now – according to the Departments – involves a complex interplay between the IDEA and Title II. Other than giving "primary consideration" to a specific parental

[10] *Id.* at 11.
[11] *Id.* at 19.
[12] *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531 (2007*); Lance*, 743 F.3d at 989; *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2007); Viola S. Lordi, *Enduring Themes in Special Education Law: A Free Appropriate Public Education and Least Restrictive Environment,* 2013 WL 6116858 at 9, Thomson Reuters/Aspatore (2014).

request, what additional steps must the IEP Team take beyond those already required by the IDEA to ensure it has fully engaged in the effective communications analysis under the ADA, which the Departments contend is separate and distinct from ensuring FAPE is being offered? Once the IEP Team has engaged in the ADA analysis, are parents free to ignore the recommendations of the IEP team and demand something that they believe will be useful? What is the team to do when it finds that the aid or service that the parent has requested is actually impeding the child in meeting her educational goals, yet the parent insists on continuing to use that aid or service?

Perhaps most importantly, this new scheme threatens the many due process rights of children set forth in the IDEA. For instance, where a parent has requested an aid outside of the IEP process that proves to be ineffective, can the parent still assert a claim that FAPE has been denied? If so, the Departments' guidance puts school districts in an untenable position that makes them unable to comply with either law. This amounts to a Catch-22: What is the school district's responsibility if the parent requests at any point the removal of an effective aid or service in favor of an unproven one? Similarly, will districts be in violation of the IDEA's FAPE requirement when a parent demands repeated changes in the communication aids and services that disrupt the ability of the district to implement the child's IEP? Without clarification in this area, educators accustomed to a collaborative process will be very confused and frustrated about the obligation that they have to educate students with vision, hearing and speech disabilities and the role of the IEP team.

b. The Standard to Use to Determine a Fundamental Alteration in the Nature of a Service, Program, or Activity.

The Departments indicate that a school district must provide a specific auxiliary aid or service to a student with a hearing, speech or vision disability unless it can prove that such an auxiliary aid or service would result in a fundamental alteration in the nature of the service, program, or activity.[13] However, the Departments fail to provide any criteria that would assist a school district in determining what circumstances constitute a fundamental alteration in the nature of a program, service or activity. Clarifying the appropriate criteria and processes school districts should use to determine whether a requested aid or service results is a fundamental alteration in the nature of a program, service or activity will avoid improper denials that deprive students with disabilities of needed aids and services, give rise to additional legal disputes, or both. Given the relative scarcity of case law on this issue, the Departments' clarification would serve the interests of all.

In *Southeastern Community College v. Davis*[14] a prospective nursing student with a hearing disability requested an accommodation that would have allowed her to take academic classes, but not clinical classes. The school refused to grant the request on the ground that exempting the student from the clinical classes constituted a fundamental alteration of its nursing program because those classes were essential to preparing her to be a nurse and excusing her from them would keep her from enjoying the full benefits of the nursing program. The U.S. Supreme Court ruled in favor of the college, finding the school's refusal to alter its program to accommodate her was not a violation of Section 504. While providing some elucidation of the issue, *Davis* is insufficient to answer many questions raised by the Departments' guidance:

[13] 28 C.F.R. § 35.164.
[14] 442 U.S. 397 (1979).

- May a school district deny the requested aid or service based solely on the fact that its proposed alternative provides communication that is as effective as that provided students without disabilities even absent a showing of fundamental alteration or undue burden?
- For which programs, activities or services must the school district prove fundamental alteration? The student's IEP as a whole? Each separate component of the IEP? The district's academic program? Extracurricular activities in which the student seeks participation? Discrete activities such as individual field trips? Would proof of fundamental alteration of any one of the above or an element thereof be sufficient to meet the district's burden?
- What types of evidence would the district need to provide to justify its assertion of a fundamental alteration?
- Are explanations provided in a child's IEP that demonstrate that a requested aid or service would impede or prevent the delivery of FAPE, thus denying the child the full benefit of his/her IEP, sufficient to prove a fundamental alteration?
- Will a school district's determination that providing a requested aid or service would entail dispensing with a fundamental component of a program be given weight by the Departments in responding to parent/student complaints? What criteria do the Departments propose to use to reject the district's determination?
- What role, if any, does the consideration of "all resources available"[15] for use by the school district in the funding and operation of the service, program or activity play in the fundamental alteration determination? For example, if the Departments find that a district has resources available that would permit the district to make a fundamental alteration, will the Departments deem the district to be in violation of the ADA for refusing to make the alteration in favor of an equally effective alternative?

c. The Standard to Determine an Undue Financial and Administrative Burden on Schools.

Despite their own admonition that effective communications determinations require a case-by-case analysis, the Departments state that "Compliance with the effective communication requirement would, in most cases, not result in undue financial and administrative burdens."[16] NSBA requests that the Departments provide the basis for this sweeping conclusion. As in the case of the fundamental alteration exception, there is little case law to guide school districts in determining the factors that may be relevant to establishing an undue financial or administrative burden, making clarification of the Departments' legal analysis in reaching its conclusion particularly necessary.

The decisions that do exist on the issue provide some guidance but also raise additional questions. For example, in *Timothy H. v. Cedar Rapids Comm. Sch. Dist.*, the parents of a disabled student asked, and were granted, permission for the child to attend a school outside her neighborhood boundaries. As a matter of policy, the school district required parents to provide transportation as a condition of receiving an intradistrict transfer. But the parents asked the district to provide transportation as an accommodation under Section 504. After determining that the requested accommodation would require developing a special bus route that would cost $24,000, the district refused to provide the accommodation. The parents filed suit alleging a violation of Section 504. The court determined that the cost of establishing a bus route just for that student constituted an undue

[15] DCL, *supra* note 3 at 12.
[16] *Id.*

financial burden and fundamentally altered the nature of the intradistrict transfer program. It ruled in favor of the school district.[17]

It would be helpful for the Departments to clarify the following:

- Will the Departments require a specific minimum dollar amount as a threshold when assessing whether a district will face an undue financial or administrative burden when attempting to accommodate a request for an aid or service?

- Will that dollar amount be the same for every district without regard to size or will the Departments consider the magnitude of available financial resources in determining undue financial burden? What criteria will the Departments use to determine which funds in a district's budget are "available"? For example, will the Departments look to all district resources, including categorical or restricted funds?

- Title II indicates that recipients must assert that a requested accommodation constitutes both an undue financial *and* administrative burden. Do the Departments interpret this language to require a school district to prove both elements or may a district meet its burden by proving one of them?

- Many of the auxiliary aids and services for students with hearing, speech and vision disabilities are costly. For example, the manufacturer's price for an augmentative communication device used by elementary school children to assist with specific communication needs is $7500. An eye-tracking, speech-generating device that enables effective communication in all forms—from voice output, environmental control and computer access—has a manufacturer's price of $17,979. Communication Access Realtime Services (CART) services cost a $60.00-$200.00 per hour. This means that CART services for 5 hours a day for 180 school days could cost a district $54,000 to $180,000 a year for one child. In light of these costs, what comparatives will the Departments use to determine whether the requested aid or service imposes an undue financial burden? Given that determinations are made on a case-by case basis, would the Departments give due consideration to a district's assertion that multiple parental requests for high end devices result in undue financial burden? In sum, what level of proof will satisfy the Departments that a district's determination of financial burden is sufficient?

- When a particular service or device is requested, may a school district reject the request as an undue financial burden when the IEP Team has proposed an equally effective alternative? For example, in Case Study #1 in Appendix A of the DCL, the student had difficulty hearing other students in his classes when using the FM system provided by the district. The IEP Team met and determined that the CART services requested by the family were unnecessary and proposed to provide an updated FM system, preferential seating, close captioned videos, and course notes and to require teachers to repeat comments and questions by other students. Yet the Departments concluded that the district must provide CART under the ADA but offered no explanation as to why costly CART services are necessary to provide effective communication given that the IEP Team's proposed alternative appears to address the communication difficulties the student experienced.

[17] *Timothy H. v. Cedar Rapids Comm. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999).

Finally, the process outlined in the DCL will result in the fundamental alteration in the manner in which school districts deliver special education to children with disabilities. It disrupts the collaborative IEP process set forth by the IDEA by giving dispositive decision-making power to parents to determine the kinds of auxiliary aids or services their children will receive. By requiring school districts to defer to parental preference as the primary consideration in this regard, the ability of districts to provide a FAPE to children may be seriously compromised. Furthermore, complying with the guidance itself may result in the fundamental alteration of due process procedures as well as the IDEA's exhaustion requirement. These drastic alterations usurp the comprehensive statutory scheme Congress established to ensure that children with disabilities receive special education and related services, and replace it with imprudent deference to parental choices that may be well meaning, but educationally ineffectual.

III. Conclusion

It is our hope that through NSBA's comments here, the Departments recognize and address some unintended legal and practical challenges arising from the DCL. First, the DCL puts forward an expansive view of the law when it states that all school districts must apply both an IDEA and a Title II effective communications analysis in determining how to meet the communication needs of IDEA-eligible students with hearing, vision, and speech disabilities. Second, the DCL may dismantle the entire IEP process if the Departments do not clarify the issues with regard to the impact that the analysis of the Title II effective communications standard will have on that process. Finally, school districts need clear criteria regarding what kind of situations constitute a fundamental alteration in a program, service or activity, and/or constitute an undue administrative and financial burden sufficient to prevent them from having to provide a specific requested auxiliary aid or service.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose, which is to keep schools free from discrimination against students, including those with disabilities. We continue to be available to OCR, DOJ, and OSERS for consultation to provide the perspective of school boards and their counsel *before* issuance of guidance such as the latest DCL.[18] NSBA stands ready to work in partnership with OCR, DOJ, and OSERS on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

Francisco M. Negrón Jr.

Francisco M. Negrón, Jr.
General Counsel
National School Boards Association

[18] The Departments' continued issuance of guidance intended to be treated as non-rule policy making minimizes the opportunity for public input before administrative positions are issued. The Departments risk producing well-meaning, but ill-informed expressions of policy that place unnecessary and onerous burdens on regulated entities, such as school districts, without significantly advancing the underlying goals of the statutes on which they are ostensibly premised.

Appendix B
NSBA Response to Students with Disabilities in Extracurricular Athletics Dear Colleague Letter (May 21, 2013)

VIA EMAIL AND USPS

May 21, 2013

The Honorable Seth M. Galanter
Acting Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Dear Colleague Letter Issued January 25, 2013

Dear Mr. Galanter:

The National School Boards Association (NSBA) shares the Department of Education's (US Ed) deep concern for protecting students, disabled and non-disabled, from all forms of discrimination in our nation's schools, including those students with disabilities who may wish to participate in their public school district's extracurricular athletics program. NSBA is committed to helping school districts across the country develop and implement policies to address discrimination against all students,[1] to create a school climate of inclusion in all educational programs offered by public schools,[2] including extracurricular athletics, and to bring awareness to the health, educational, and

[1] Among many policy statements expressing its commitment to preventing discrimination against all students, including students with disabilities, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or sexual orientation.

Beliefs & Policies, Art. IV, § 2.11: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders....

[2] Beliefs & Policies, Art. I, § 1: NSBA believes that to help all students achieve state standards and reach their full academic potential, federal, state, and local policy makers should: ... provide the highest quality education for each child, and equal educational opportunity for all children; .... [and]; ensure that all children receive the services for which they are eligible; ....

Beliefs & Policies, Art. I, § 1.1: School districts should be organized so they can provide the best education programs for all public elementary and secondary students.... School boards should have the authority to develop restructuring strategies, as they deem appropriate.

Beliefs & Policies, Art. III, § 2: NSBA believes that full funding of federal public education programs is an essential step in improving educational opportunities for all children [,and ensuring] that our nation's students have the opportunity to meet the challenge of world-class standards and responsible citizenship through these priorities: ... (k) providing funding to meet school infrastructure and personnel needs to improve the safety and health of all students and to improve the quality of the learning environment;

Beliefs & Policies, Art. IV, § 1.2: Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of

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social benefits to be gained by students as a result of participation in extracurricular athletics at school.[3] NSBA, our member state associations of school boards, our 3,000-member Council of School Attorneys, and the more than 13,500 public school districts across the nation we represent welcome guidance to address the very important issue of how to provide equal opportunities for participation in extracurricular athletics by all students, including students with disabilities. It is in this spirit of cooperation and common purpose that we write to express concern and request clarification over certain aspects of the January 25, 2013 Dear Colleague Letter (DCL) issued by the Office for Civil Rights (OCR).

As outlined in greater detail below, NSBA's concern is that absent clarification, OCR's expansive reading of the law in some aspects, and what now appears to be the blending of OCR enforcement standards to be applied in Section 504 matters,[4] as stated in the DCL, will generate uncertainty in the courts about applicable standards;[5] create confusion among school attorneys, educators, school officials and parents as to methods of implementation; invite misguided litigation that will needlessly drain precious school resources; and, create adversarial climates distracting schools from their overall educational mission.

To avoid these potential outcomes, NSBA urges OCR to join us in a dialogue that can lead to additional points of clarification of OCR's position as expressed in the DCL. With a clear understanding of the requirements of the law and the suggestions made in the DCL, school districts can continue to work to ensure all students, including students with disabilities, have equal

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factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, socioeconomic status, or disability.

Beliefs & Policies, Art. IV, § 2: NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn....

[3] Beliefs & Policies, Art. IV, § 1.1: NSBA recognizes the importance of the social, emotional, physical, and cognitive development of children and encourages local school boards to adopt policies, pass resolutions, and support effective practices toward that end.

Beliefs & Policies, Art. IV, § 3.20: NSBA supports locally determined school policies and programs that promote lifelong physical activity and healthy eating habits as necessary strategies for improving student achievement and preventing health problems. NSBA believes that local school boards should: (a) provide adequate opportunities for students to participate in physical education classes and related activities; ....

Beliefs & Policies, Art. IV, § 4.5: ... NSBA believes that before and after-school, as well as weekend and summer programs, particularly when they engage diverse community resources, are effective strategies for improving academic achievement, enhancing student wellness, reducing chronic absenteeism, preventing juvenile crime, and fostering 21st Century Skills while building and strengthening positive relationships between schools and communities.

[4] One issue is the FAPE vs. "equal opportunity to participate" standards. The other is the FAPE vs. "reasonable accommodation" standards, which are thoroughly discussed in an article by Ronald D. Wenkart, titled "*The OCR-Created 'Right' to a Free Appropriate Public Education Under Section 504: Time for a Challenge*," INQUIRY & ANALYSIS (Nat'l Sch. Bds. Ass'n January 2013), http://www.nsba.org/SchoolLaw/Issues/SpecialEd/IA-Section-504-January-2013.pdf In Mr. Wenkart's article, he identifies the two different standards OCR applies in Section 504 discrimination cases depending on the **type** of federal funds recipient involved: the "reasonable accommodation" standard (applied to employers, post-secondary education institutions, and other recipients of federal assistance); and the "free appropriate public education" standard (applied **only** to K-12 public education recipients).

[5] *See, e.g., T.K. v. New York City Dept. of Educ.*, 779 F.Supp.2d 289, 312 (E.D.N.Y. 2011) (While the general requirements of IDEA are well established, the question of whether bullying can be grounds for finding that a school district deprived a student of a free and appropriate education is an open question in the Second Circuit. There is, however, some indication from this circuit's court of appeals that it might be willing to extend FAPE protections to bullying. Three other circuit courts of appeals have expressly noted that bullying can be a basis for denial of a FAPE, but a common framework under which to analyze the issue has not emerged. (internal citations omitted)).

opportunities to participate in their school district's extracurricular athletics program.

NSBA's concerns with the DCL fall into three main areas of inquiry:

I. Expansion of OCR's View of Its Authority Under Section 504
II. Confusing Blend of OCR Enforcement Standards
III. Need for Clarity in Ultimate Conclusions in DCL

I. Expansion of OCR's View of Its Authority Under Section 504.

In the DCL, OCR appears to be taking a more expansive view of its authority under Section 504 to regulate the conduct of school districts with respect to the issues listed below.

A. Individual Assessments.

OCR's regulation[6] on evaluations of students with disabilities focuses on individual assessments of a student's *educational* abilities and possible need for modifications, services, and/or aides in the classroom, basing those decisions on educational data, testing, academic performance, and input from a student's *educators*. However, in the DCL, it now seems that OCR is suggesting, possibly requiring, that an individual assessment of a disabled student's ability to participate in athletics needs to take place, as well.[7] OCR's regulation does not speak to this suggestion/requirement at all, nor does it list the types of information that must be considered, and what qualifications the members of the assessment team (presumably, a type of "504 team") need to make an informed decision on a disabled student's athletic abilities and any related safety/health hazards for the student and other athletes.

OCR's suggestion that schools undertake another individual assessment seems to contemplate a wholly separate 504 Team meeting, should the student's athletic participation request occur at a time other than the annual 504 *educational* meeting. It also seems to suggest that a different make-up of the team may be required for an "athletics" assessment. But, because the regulations and the DCL provide no guidance as to that make-up, school districts now could be placed in the unenviable position of attempting to comply with the new "guidance" in good faith and still face second-guessing by OCR.[8]

NSBA agrees that decisions arising in an inquiry into providing an equal opportunity for participation in extracurricular athletics to a particular student must be individualized. Depending on the student and the sport, the issues under inquiry might pertain to safety, skill level, modifications, or fundamental alterations. To prevent confusion over how these decisions are to be made, OCR

[6] 34 C.F.R. § 104.35 (2013).

[7] Letter from Seth M. Galanter, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, to Colleagues, at 7 (Jan. 25, 2013) [hereinafter "Dear Colleague Letter"].

[8] *Hollenbeck v. Board of Educ. of Rochelle Twnp.*, 699 F. Supp. 658, 665 (N.D. Ill. 1988) (The IEP/Section 504 team and the evaluation data to be considered for placement decisions "are primarily academically based .... Thus, [the team] is not ideally suited for determining safety in athletic pursuits." Notwithstanding, the court found that "[t]his type of procedure, however unwieldy, was chosen to determine safety and if tailored to the task at hand, is as appropriate as any procedure.").

should clarify whether an individualized inquiry process is, in fact, required to be performed for every disabled student's request for an equal opportunity to participate, with decisions made by a team comprised of the parents, student, individuals familiar with the student, individuals with expert knowledge on the student's physical/mental condition and performance capabilities, and individuals with expert knowledge on any relevant aspect of the athletic activity involved. OCR should also clarify whether it will apply its customary standard of review if a district decision is challenged, *i.e.*, reviewing the ***process*** used to ensure consistency with the law, as opposed to the team's ***decision*** and not substituting OCR's judgment for that of a disabled student's 504 (athletics) team.

Additionally, NSBA hopes that OCR's position, that its Section 504 regulations supersede "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, . . . on the basis of disability,"[9] is not so inflexible with regards to students with *physical disabilities*, as opposed to mental disabilities, as to prohibit school districts and athletic associations from "err[ing] on the side of caution and restrict[ing] the type of athletic events such students can participate in"[10] where their physical safety/health might be put in jeopardy.

The health and welfare of the nation's students are paramount to NSBA. NSBA believes experienced, professional educators, and school and athletics association officials are best placed to implement decisions to ensure the safety, health and welfare of students in athletics. OCR should extend a great degree of deference to the decision-making processes of these professionals who on a case-by-case basis routinely rely on available medical and other related information to balance the potential safety/health risks to students with physical disabilities with participation in extracurricular athletics.[11]

B. Need for Clarity in Participation Opportunities for Students with Disabilities.

1. "Opportunity to Benefit."

The DCL states that Section 504 regulations require "a school district . . . to provide a qualified student with a disability *an opportunity to benefit* from the school district's program equal to that of students without disabilities."[12] It is helpful that OCR reiterates in the DCL that "simply because a student is a 'qualified' student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district." Similarly helpful is OCR's emphasis that "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

[9] Dear Colleague Letter, *supra* note 7 at 5.
[10] Brianna Forbes, "Effects of Restrictions in Athletic Policies on Students with Disabilities," INQUIRY & ANALYSIS (Nat'l Sch. Bds. Ass'n July 2007).
[11] *Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948 (D.N.J. 1980) (concluding student with one kidney could compete on high school wrestling team, since only reason for exclusion was doctor's fear of injury); *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996) (concluding that objective evidence, such as reasonable medical judgment, student's medical history, and fatality of illness (heart defect), are all criteria used to decide student was not otherwise qualified to participate on basketball team; student's heart defect could not be easily eliminated, thus he was not otherwise qualified under Section 504).
[12] Dear Colleague Letter, *supra* note 7 at 3 (emphasis added).

selection or competition criteria are not discriminatory."[13] Unfortunately, neither OCR nor its Section 504 regulations elaborate on what it means for a school district to provide "an opportunity to benefit" from its *elective* extracurricular athletics program.[14]

If OCR's position is that the Section 504 regulations require "an opportunity to ... ***benefit***" from a school district's *elective* extracurricular athletics program,[15] as opposed to the original statutory purpose of Section 504 to *prohibit* discrimination on the basis of disability,[16] OCR should clarify whether an "opportunity to benefit" means that a public school district must *affirmatively provide*[17] a student with a disability the opportunity to participate in any/all of the aspects of the day-to-day operations/activities of the teams that make up a district's extracurricular athletics program. Beyond this specific issue, school districts would benefit from clarification about those instances in which OCR would require schools to provide a student with a disability with "an opportunity to benefit" from a school district's athletic program and what has changed in OCR's approach to its enforcement of the regulations that would impact the way school districts approach implementation and compliance.[18]

2. "Fully and Effectively" Standard.

In the DCL, OCR indicates that in assessing Section 504 compliance, it considers whether a public school district's extracurricular athletics program "fully and effectively" meets the "interests and abilities" of its students with disabilities.[19] This language mirrors in some respects the standards used to assess "Title IX" compliance in athletic programs. This mixing of standards causes confusion in the school community, and raises three concerns: (1) there is no provision/requirement in OCR's Section 504 regulations addressing the "fully and effectively" standard; (2) there is no requirement in the Section 504 regulations that a public school district's extracurricular athletics program "fully and effectively" meet the "interest and abilities" of its students **without** disabilities (separate and apart from the gender issue); and (3) reading such a legally-unsupported standard into the Section 504 regulations would seem to ***create a preference*** in favor of students with disabilities related to athletics that is neither currently available nor required for students **without** disabilities.

School districts would benefit from clarification by OCR that disavows any intent to conflate the compliance assessment standards under Title IX with Section 504. Failure to clarify this position

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[13] *Id.*
[14] *Id.*
[15] 34 C.F.R. 104.4(a), (b)(1)(i)-(iv).
[16] 29 U.S.C. § 794 (2013).
[17] In *Southeastern Community College v. Davis*, 442 U.S. 397, 411-12 (1979), the U.S. Supreme Court described the limits on the authority of a federal agency to impose affirmative obligations in the Section 504 context. ("Although an agency's interpretation of the statute under which it operates is entitled to some deference, 'this deference is constrained by an obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history.' ... Here, neither the language, purpose, nor history of Section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we hold that even though HEW has attempted to create such an obligation itself, it lacks the authority to do so." (internal citations omitted)). *See also* Wenkart, "*The OCR-Created 'Right,'*" *supra* note 4.
[18] Richard E. Kroopnick, *Section 504, OCR and Extracurricular Athletic Activities: Confusion Over the Rules of the Game*, INQUIRY & ANALYSIS (Nat'l Sch. Bds. Ass'n, March/April 2013), http://www.nsba.org/SchoolLaw/Issues/SpecialEd/IA-MarchApril-2013-Section-504.pdf.
[19] Dear Colleague Letter, *supra* note 7 at 11.

will create confusion that detracts from an understanding of the requirements of the law. This lack of clarification will also invite courts to sanction what amounts to un-promulgated, untested rules under the guise of deference to US Ed, which would deny both OCR and school districts the opportunity respectively to consider and provide valuable input that could facilitate the implementation and development of effective guidance.

C. Need for Clarity as to Availability of Other Modifications.

The DCL appears to expand a school district's obligations under Section 504 by requiring districts to do more than demonstrate that a specific requested modification would constitute a fundamental alteration to limit a student's participation in extracurricular athletics. Instead, the DCL appears to create and impose on the school district an affirmative obligation by which the district "***is required***" to determine whether other modifications might be available that would permit the student's participation. While some alternative modifications may be readily apparent to the district, this may not always be the case. In such situations, it is unclear to what extent and at what point a school district may cease its inquiry into the availability of other modifications, and not be found out of compliance. In essence, how much searching is enough and how great should the scope of the inquiry be?

II. Confusing Blend of OCR Enforcement Standards.

A. FAPE vs. "Equal Opportunity to Participate."

OCR also should clarify its position on the application of OCR's statutorily-unsupported FAPE standard to the *elective* extracurricular athletics program of a public school district to the degree and in the manner that OCR now asserts. In parts of the DCL, primarily footnote 8 and related language, OCR states that the Section 504 FAPE standard "may include services a student requires in order to ensure that he or she has an equal opportunity to participate in extracurricular and other nonacademic activities," citing its regulation.[20] The DCL further states that "[i]n general, OCR would view a school district's failure to address participation or requests for participation in extracurricular athletics for a qualified student with a disability with an IEP in a manner consistent with IDEA requirements ***as a failure to ensure Section 504 FAPE and an equal opportunity for participation***."[21]

Without further clarification about OCR's intent, this sweeping language in the DCL appears to have the insalubrious consequence of rendering a great number of extant IEPs in violation of Section 504, for "fail[ing] to ensure Section 504 FAPE." Why? Because few IEPs likely contain any reference to or provision about a student's request (if any) for an equal opportunity to participate in extracurricular athletics. Saddling school districts with such a presumption of noncompliance is unfair, and minimizes the good faith efforts of the student's IEP team, *including the attending parents and students*, particularly in those instances where the issue may not have been raised, or where it may have been considered and the outcome was such that no notations in the IEP or 504 Plan or the meeting minutes were deemed necessary. As a result, OCR should clarify that it did not intend to

[20] Dear Colleague Letter, *supra* note 7 at 4 n.8.
[21] *Id.* (emphasis added).

render most of the hundreds of thousands of current IEPs in public school districts across the country insufficient under the IDEA as to this particular issue.

But, the confusion does not stop there. Because the Section 504 regulations could be read to mean literally a "free appropriate public *education*," participation in a public school's *extracurricular athletics* program could be understood to be purely *elective* and not related to the student's *required* educational component. This appears to be supported by the DCL's treatment of the Section 504 regulations, which discuss a disabled student's evaluation and placement in terms of *educational*, rather than *athletic*, needs. Similarly, much of the DCL speaks to this "equal opportunity" in looking at disabled students' requests to participate. Thus, it would seem that a FAPE standard would have no applicability to extracurricular athletics activities, particularly when looking at Section 104.37(a)(1), which focuses on an "equal opportunity for participation." This confusion will create a new litigious path for those plaintiffs seeking to capitalize on a school district's uncertainty as to how to identify and meet its obligations to accommodate a disabled student's request for an opportunity to participate in extracurricular athletics.

III. Need for Clarity in the Ultimate Conclusions in the DCL.

A. Findings of Noncompliance.

The need for clarity with respect to the issues described above is highlighted by apparent tensions in the text of the DCL and public statements made by US Ed. Earlier this year, US Ed spokesperson Daren Briscoe suggested that the DCL is offered only as permissive, rather than mandatory, guidance for school districts in a blog posting on *Education Week*. According to the posting, US Ed's position is that [t]he guidance does not say that there is a right to separate sports programs such as wheelchair basketball. Rather, the guidance 'urges' – but does not require – that when inclusion is not possible, school districts find other ways to give students with disabilities the opportunity to take part in extracurricular athletics."[22] Given this apparent conflict, school districts would benefit from a more definite statement from OCR as to whether a school district's failure to meet the "obligations" will be considered a violation of Section 504 (and Title II of the ADA) and subject to agency enforcement, or whether US Ed is offering aspirations—suggestions which school districts may consider, but are not required to implement.

B. No New Requirements Set By the DCL.

OCR should state in clear and unambiguous terms that it is neither adding requirements to the applicable law, nor establishing a new enforcement standard. Although a footnote does state that the DCL "does not add requirements to applicable law,"[23] the examples cited in the DCL imply that OCR is taking a more expansive view of the law and its implementing regulations.

[22] Michele McNeil, "Did the Ed. Dept. Really Create a Right to Wheelchair Basketball?" Education Week Blog, Jan. 25, 2013, *available at* http://blogs.edweek.org/edweek/campaign-k-12/2013/01/did_the_ed_dept_really_create_.html?qs=michele+mcneil.

[23] Dear Colleague Letter, *supra* note 7 at 2.

C. No Mandates to Create New Teams.

In its discussion about a school district's consideration of creating "separate and different teams" for students with disabilities, through any of the avenues identified, OCR may be overstepping its federal statutory bounds by inserting itself into a local school district's ability to guide its own programs.[24] Moreover, when the DCL states that "support" for such teams should be provided equally to that of the school district's other athletic activities, OCR may be creating another unfunded mandate.[25] At a time when school districts struggle to meet the fiscal demands brought about by the recent national economic down turn, the federal government should be partnering with school districts to address these challenges, rather than burdening local communities with federal, one-size-fits-all overregulation.

Fiscal realities notwithstanding, NSBA agrees that expanded athletic opportunities for students with disabilities may provide a worthwhile benefit to many students, both disabled and nondisabled. Many school districts in the nation are actively developing and implementing these types of opportunities, with allied and unified sports programs being among the most popular and beneficial. School districts implement these programs because they believe in their value, and because they are able to design them with local input and resources to meet the specific needs of their communities. NSBA reads the DCL as supportive of the benefits of programs like allied and unified sports. But, it is important for OCR to clarify formally that the DCL is not a mandate that school districts adopt these programs. Concerns persist in school districts about OCR's expectations and potential enforcement findings. NSBA fears that this legal uncertainty may slow the natural process in which school boards are addressing this need by implementing programs tailored to meet local interests.

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[24] 20 U.S.C. § 1232a (2013) ("No provision of any applicable program shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, ..."); 20 U.S.C. § 3403(b) (2013) ("No provision of a program administered by the Secretary or by any other officer of the Department shall be construed to authorize the Secretary or any such officer to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system, ... except to the extent authorized by law.").

[25] Beliefs & Policies, Art. III, § 3: NSBA supports the provision of adequate funding and efficient procedures for financing federal public education programs and urges Congress to: (a) eliminate the practice of imposing federal unfunded mandates on states and local education agencies;...

Beliefs & Policies, Art. III, § 5.1: The federal government, through the Department of Education, should support, promote, and advocate on behalf of public education at the national, state, and local levels. The Department of Education should: ... (f) provide safeguards against federal control of curricula in American schools; ....

Beliefs & Policies, Art. III, § 4: NSBA supports federal education policies that make the education of all children a national priority, while recognizing that education is primarily a state and local function for which the federal role should be one of support and assistance rather than direct regulation....

Beliefs & Policies, Art. III, § 4.2: NSBA opposes unfunded mandates imposed by federal laws and regulations....

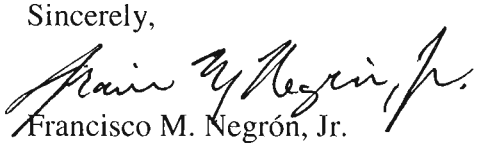
See also Crocker v. Tennessee Sec. Sch. Athletic Ass'n, 735 F. Supp. 753, 755 (M.D. Tenn. 1990): "The Court found that although the [now-IDEA] ***did not require*** that the local and state educational agencies ***affirmatively provide*** extracurricular activities for handicapped students, it did prohibit discrimination against those students."

IV. Conclusion.

It is our hope that through NSBA's comments here, OCR recognizes and addresses some unintended legal and practical challenges arising from the DCL. First, the DCL puts forward an expansive view of the requirements of Section 504 for school districts regarding equal opportunities for participation by students with disabilities in extracurricular athletics, and increases the potential for exposure of school districts to liability. Second, the DCL may encourage litigation by plaintiffs' attorneys relying on similarly expansive views of the law and confusion on the appropriate enforcement standards to be used in investigating Section 504 cases related to the provision of equal opportunities for participation of students with disabilities in extracurricular athletics. Lastly, OCR, through its DCL, seems to overstep its federal statutory bounds regarding US Ed's ability to insert itself into a school district's authority to direct its own educational programs, particularly interscholastic athletics. To this final point, NSBA cautions OCR against the use of informal guidance such as a DCL in a way that expands the substance and applicability of federal law and rules administered by US Ed. Because the informal guidance practice utilized by OCR lacks the formal input of important stakeholders that is part and parcel of the formal rule-making process, US Ed is denying itself the opportunity to understand the needs of school districts in a way that can help the agency develop truly useful guidance to meet and implement the objectives of the law. NSBA urges OCR to reach out to school boards, school attorneys, administrators, educators and other school officials in addition to parents and students, in a collaborative spirit to identify realistic, workable solutions to implementation across the spectrum of laws and rules enforced by US Ed and OCR.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose to keep schools free from discrimination and the exclusion of any student, not just those with disabilities, who want the opportunity to participate in extracurricular athletics. We look forward to working with OCR to develop guidance and resources to help schools understand the requirements of the law in supporting such an environment, and, specifically, in responding effectively to the requests of students with disabilities in this area. We continue to be available to OCR and US Ed for consultation to provide the perspective of school boards and their counsel *before* issuance of guidance such as the latest DCL. NSBA stands ready to work in partnership with OCR on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,



Francisco M. Negrón, Jr.
General Counsel
National School Boards Association

Appendix C
NSBA Response to Bullying and Harassment Dear Colleague Letter
(Dec. 7, 2010)

VIA EMAIL AND USPS

December 7, 2010

Charlie Rose
General Counsel
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Ave., S.W.
Washington, DC 20202

·NSBA·

Working with and through our State Associations, NSBA Advocates for Equity and Excellence in Public Education through School Board Leadership

Re: "Dear Colleague" Letter Issued October 26, 2010

Dear Mr. Rose:

It was a pleasure speaking to you recently regarding the Department of Education's recent efforts on bullying. As you know, the National School Boards Association's (NSBA) shares the Department's deep concern for protecting students and is committed to helping school districts across the country develop and implement policies to address bullying and school climate.[1] NSBA, its member state associations of school boards, its 3,000-member Council of School Attorneys and school districts across the nation welcome guidance to address this very real problem. It is in this spirit of cooperation and common purpose that we write to express concern over the Department's "Dear Colleague" Letter (DCL) of October 26, 2010. As outlined in greater detail below, our fear is that absent clarification, the Department's expansive reading of the law as stated in the DCL will invite misguided litigation that needlessly drains precious

[1] *See* NSBA publication, *Dealing with Legal Matters Surrounding Students' Sexual Orientation and Gender Identity* (2004), http://www.nsba.org/SecondaryMenu/COSA/Search/AllCOSAdocuments/DealingwithLegalMattersSurroundingStudentsSexualOrientationandGenderIdentity.aspx.

Among many policy statements expressing its commitment to safe, supportive learning environments, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. IV, § 2: NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn and that are free of abuse, violence, bullying, weapons, and harmful substances including alcohol, tobacco, and other drugs. NSBA urges federal, state and local governments, as well as parents, business and the community, to cooperate fully with local school boards to eliminate violence, weapons, and harmful substances in schools and to ensure safe, crime-free schools. NSBA urges local school boards to incorporate into their policies and practices approaches that encourage and strengthen positive student attitudes in, and relationship to, school.

Beliefs & Policies, Art. IV, § 2.7: NSBA supports state and local school board efforts to become more proactive in the elimination of violence and disruptive behavior at school, school-sponsored events, during school bus travel and while traveling to and from school. Such behavior, includes, but is not limited to physical violence, physical and verbal "bullying," disrespect of fellow students and school personnel, and other forms of harassment.

Beliefs & Policies, Art. IV, § 2.10: NSBA believes that all public school districts should adopt and enforce policies stating that racial, ethnic, and sexual harassment against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders. Such policies should include a complaint mechanism. . . . .

school resources and creates adversarial climates that distract schools from their educational mission. But, more importantly, our hope is that this conversation will lead to clarification of the Department's position as expressed in the DCL so that with a clear understanding of the requirements of the law school districts can develop and implement the best policies and procedures to keep students safe.

I. The DCL significantly expands the standard of liability set forth in *Davis v. Monroe County Board of Education.*

In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), the U.S. Supreme Court laid out the standard for when school districts may be sued for damages related to peer harassment. The DCL veers significantly from the requirements set forth in *Davis*. In doing so, it significantly broadens school districts' obligations to recognize and respond to harassment.

Actual knowledge

The DCL deviates from *Davis* regarding the actual knowledge standard in at least two respects. First, *Davis* holds that school districts are liable only for harassment about which they had "actual knowledge."[2] In contrast, the DCL states that a school district is "responsible for addressing harassment incidents about which it ***knows or reasonably should have known***."(Emphasis supplied.)[3]

Second, the DCL seems to suggest that if harassment is out in the open, the school district has actual notice of it.[4] This conclusion is not supported by *Davis*, where the Court applied an actual knowledge standard even though the harassment was very much out in the open. In fact, in concluding the district had actual knowledge, the Court focused on the fact that the harassment had been *brought to the attention of the principal.*[5]

Nature and effect of harassment

Davis holds that only "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" may result in

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[2] "We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, *of which they had actual knowledge*, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 650 (emphasis added).

[3] Letter from Russlynn Ali, U.S. Dep't. of Educ. Assistant Secretary for Civil Rights to Colleagues: Harassment and Bullying at 2 (Oct. 26, 2010) (hereafter "Dear Colleague Letter").

[4] "In some situations, harassment may be in plain sight, widespread, or well-known to students and staff, such as harassment occurring in hallways, during academic or physical education classes, during extracurricular activities, at recess, on a school bus, or through graffiti in public areas. In these cases, the obvious signs of the harassment are sufficient to put the school on notice." Dear Colleague Letter, *supra* note 3, at 2.

[5] "Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F's misconduct to seek an audience with the principal." *Davis*, 526 U.S. at 653.

liability for the school district.[6] The DCL, in contrast, states the following: "Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, ***or*** persistent so as to ***interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by the school.***"(Emphasis supplied.)[7]

Davis' requirement that harassment must be "severe, pervasive, and objectively offensive" is much narrower than "severe, pervasive, or persistent." The DCL has converted the *Davis* cumulative standard that requires the presence of three elements--- severity, pervasiveness and objective offensiveness---into a standard where any of the three alone can constitute sufficient evidence for a hostile environment. Likewise, the DCL expands the second prong of *Davis'* hostile environment test by declaring that a hostile environment exists when the harassment "interfere[s] with or limit[s]" participation rather than "effectively bar[rring]" access to an "educational opportunity or benefit."

Eliminate the harassment and ensure it does not recur

The DCL states a number of times that school districts are required to eliminate harassment and the hostile environment it creates and to prevent it from occurring again.[8] In *Davis* the Court explicitly rejects the notion that school districts must remedy and prevent peer harassment: "The dissent mischaracterizes [the deliberate indifference] standard to require funding recipients to 'remedy' peer harassment . . . and to 'ensur[e] that . . . students conform their conduct to' certain rules . . . . Title IX imposes no such requirements. On the contrary, the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable."[9] In summary, *Davis* states that a school district's legal obligations to deal with harassment under Title IX are very limited; school districts need only respond to the harassment in a way that is not clearly unreasonable.

Multiple remedial steps to systematically address a hostile environment

The DCL repeatedly states that districts "need to" or are "required to"[10] take multiple remedial measures to "systematically"[11] address the harassment. Particularly in the race, color,

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[6] 526 U.S. at 633.

[7] Dear Colleague Letter, *supra* note 3, at 2.

[8] "A school's responsibility is to eliminate the hostile environment created by the harassment, address its effects, and take steps to ensure that harassment does not recur." Dear Colleague Letter, *supra* note 3, at 3-4. "If an investigation reveals that discriminatory harassment has occurred, a school must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring." Dear Colleague Letter, *supra* note 3, at 2-3.

[9] 526 U.S. at 648-49.

[10] "Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser." Dear Colleague Letter, *supra* note 3, at 3. "In addition, depending on the extent of the harassment, the school may need to provide training or other interventions not only for the perpetrators, but also for the larger school community, to ensure that all students, their families, and school staff can recognize harassment if it recurs and know how to respond. A school

or national origin examples the letter explains that it is not enough to recognize and respond to individual acts of harassment on an *ad hoc* basis. Instead, school district must recognize and respond to a "hostile environment" with a "systematic response"[12] "reasonably calculated to end the harassment and prevent its recurrence."[13]

As discussed above, according to the Supreme Court in *Davis*, school districts' only legal obligation to address harassment is to respond to it in a way that is not clearly unreasonable. *Davis* does not require that school districts take any of the particular steps suggested in the letter, much less all of them. For example, in *Davis* the Court concluded that the school board was deliberately indifferent because it "made no effort whatsoever either to investigate or to put an end to the harassment."[14] The Court did not find the school district deliberately indifferent because it failed to systematically respond to a sexually hostile environment by offering the plaintiff counseling, more adequately publicizing its sexual harassment policy, providing staff training on sexual harassment, etc.[15] Likewise, nothing in *Davis* suggests that some undefined threshold exists where responding to specific incidents of sexual harassment is not enough and instead school districts must implement a more "systematic" response to "end" a "hostile environment."

Significantly, none of the DCL's numerous suggestions of what school districts "should have done" to deal with harassment include reliance on an administrator's own education, experience, judgment, and personal knowledge of the students and school community involved when deciding how to deal with harassment and bullying. The professional judgment of educators is key to addressing the problem of bullying, a fact recognized by *Davis,* where the Court explicitly found that courts should not second-guess the judgment of school administrators in making disciplinary and remedial decisions related to harassment.[16]

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also may be required to provide additional services to the student who was harassed in order to address the effects of the harassment, particularly if the school initially delays in responding or responds inappropriately or inadequately to information about harassment. An effective response also may need to include the issuance of new policies against harassment and new procedures by which students, parents, and employees may report allegations of harassment (or wide dissemination of existing policies and procedures), as well as wide distribution of the contact information for the district's Title IX and Section 504/Title II coordinators." *Id.* "At a minimum, the school's responsibilities include making sure that the harassed students and their families know how to report any subsequent problems, conducting follow-up inquiries to see if there have been any new incidents or any instances of retaliation, and responding promptly and appropriately to address continuing or new problems." *Id.*

[11] By failing to acknowledge the racially hostile environment, the school failed to meet its obligation to implement a more systemic response to address the unique effect that the misconduct had on the school climate. *Id.* at 4.

[12] *Id.*

[13] *Id.* at 6.

[14] 526 U.S. at 654.

[15] While lower courts have viewed school district favorably when they have, as appropriate, taken some or all of the steps discussed in the letter, the Supreme Court and lower courts have not required school districts to take any, much less, all of the steps listed in the letter to avoid Title IX liability.

[16] *Davis*, 526 U.S. at 648 ("In fact, as we have previously noted, courts should refrain from second-guessing the disciplinary decisions made by school administrators.").

Remedial demands

The DCL also implies that school districts may be required to respond to the remedial requests of parents whose child was the target of harassment, for example, by not requiring the target of harassment to change his or class schedule.[17] However, responding to the remedial demands of parents might not always be reasonable or even possible. More importantly, the Court in *Davis* rejected the notion that doing so is required under Title IX, stating: "Likewise, the dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands."[18] Indeed, although the Supreme Court did not address this specific factual issue in *Fitzgerald v. Barnstable School Committee*,[19] the First Circuit had found the parents' Title IX claim to lack merit because the response of the school committee and the Superintendent to the reported harassment had been objectively reasonable.[20] There, the principal had suggested that the victim be transferred to another bus, but the parents had asked the perpetrator to be transferred, or that a monitor be placed on the bus; the Superintendent had not implemented the parents' requests.[21]

II. "Publicly labeling" an incident as harassment as a remedial measure, may violate the Family Educational Rights and Privacy Act (FERPA).

FERPA prohibits school districts from releasing personally identifiable information from student records unless school districts have received consent from parents or eligible students.[22] Personally identifiable information includes information that is linkable to a specific student that would allow a reasonable person in the school community, who does not have knowledge of the relevant circumstances, to identify the student with reasonable certainty.[23] The second example in the DCL, which involves anti-Semitic speech, states that remedial steps could have included "publicly labeling the incidents as anti-Semitic."[24] As the example is written, however, doing so might violate FERPA.

Presumably the incident where the ninth-grade students told the seventh-grade students "You Jews have all the money, give us some" is recorded in the ninth-grade students' disciplinary records, as they were disciplined. The facts of the example reveal that these statements likely are linkable to particular students. The specific perpetrators appear to be well

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[17] "Appropriate steps to end harassment may include separating the accused harasser and the target, providing counseling for the target and/or harasser, or taking disciplinary action against the harasser. These steps should not penalize the student who was harassed. For example, any separation of the target from an alleged harasser should be designed to minimize the burden on the target's educational program (*e.g.*, not requiring the target to change his or her class schedule)." Dear Colleague Letter, *supra* note 2, at 3.

[18] *Davis*, 526 U.S. at 648.

[19] 129 S.Ct. 788 (2009).

[20] *Id.* at 792.

[21] *Id.*

[22] 34 C.F.R. § 99.30.

[23] 34 C.F.R. § 99.3.

[24] Dear Colleague Letter, *supra* note 3, at 5-6

known; seventh grade students are now avoiding the locations where lockers of ninth grade students are located. In other words, in this example, the school district publicly announcing that some students stated that "You Jews have all the money, give us some" and that such a statement is anti-Semitic could result in revealing personally identifiable information from student records in violation of FERPA. [25]

III. The DCL only minimally acknowledges student First Amendment free speech rights.

The DCL expects school districts to respond to harassment by disciplining students (and taking other remedial measures) but only briefly mentions students' First Amendment free speech rights in footnote eight. School districts have a limited ability to discipline students for speech that occurs on-campus and off-campus. To be truly useful, these limitations should be discussed in greater detail.

Specifically, pursuant to Supreme Court precedent, school districts may discipline students within the limitations of First Amendment for on-campus, non-school sponsored speech in the following instances only: if the speech is likely to cause a "substantial disruption of or material interference with school activities"[26] or the speech collides with "the rights of other students to be secure and to be let alone;"[27] if the speech is "sexually explicit, indecent, or lewd;"[28] or if it "can reasonably be regarded as encouraging illegal drug use."[29] While no Supreme Court case has discussed a "true threat" in a school setting, presumably schools may also discipline students who make them.[30] Even so, as Justice (then Judge) Alito wrote in an opinion he authored while on the Third Circuit, harassing speech in a school setting (or elsewhere) isn't categorically denied First Amendment protection.[31] Likely for this reason, a number of state legislatures have attempted to define bullying and harassment in state statutes to include only speech for which the Supreme Court allows school district to discipline students.[32]

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[25] Some state anti-bullying statutes specifically require some level of confidentiality when addressing incidents of school bullying and harassment. The West Virginia anti-bullying statute requires each county board to establish a policy prohibiting harassment, intimidation or bullying, which must contain "A requirement that any information relating to a reported incident is confidential, and exempt from disclosure under the [West Virginia Freedom of Information Act]." W.Va. Code §18-2C-3(b)(10).

[26] *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 514 (1969).

[27] *Id.* at 508.

[28] *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 684 (1986).

[29] *Morse v. Frederick,* 551 U.S. 393, 397 (2007).

[30] *Watts v. United States*, 394 U.S.705 (1969).

[31] *Saxe v. State College Area School District*, 240 F.3d 200, 210 (3d Cir. 2001) (holding that a school district's anti-harassment policy was unconstitutionally overbroad).

[32] *See, e.g.,* N.C. GEN. STAT. § 115C-407.5 (2009) (bullying or harassing behavior must (1) place a student or school employee in actual and reasonable fear of harm to his or her person or damage to his or her property; or (2) create or is certain to create a hostile environment by substantially interfering with or impairing a student's educational performance, opportunities, or benefits).

Bullying and harassment that takes place over the internet or through other electronic communication often occurs entirely off-campus. The DCL, however, fails to discuss the fact that disciplining students for speech is even more difficult when the speech occurs off-campus. None of the Supreme Court cases discussing disciplining students for speech contemplate whether school districts can discipline students for off-campus speech. Only one federal circuit to date has definitely ruled whether and when a school district may discipline students for off-campus, internet speech.[33] Nevertheless, a number of the examples in the DCL (sexual harassment, gender-based harassment) presume that school districts can and must consider off-campus speech when disciplining students.

IV. By suggesting that school officials will be responsible for identifying race and gender-based harassment that overlaps conduct falling outside of the Department's enforcement areas, the DCL creates a legal climate ripe for federal suits against school districts.

The DCL provides several examples in which school officials "should have" recognized overlapping discrimination based on categories protected by federal anti-discrimination laws enforced by the Department. In the examples provided, school officials should have been able to recognize that harassment based on *sexual orientation* (not enforced by the Department) may also constitute harassment based on *gender* (enforced by the Department) if the harassers are emphasizing sex-based stereotypes.[34] Similarly, building administrators should have known that harassment based on *religion* (not enforced by the Department) may also constitute harassment based on *actual or perceived shared ancestry or ethnic characteristics* (enforced by the Department).[35] While it is important for school officials to act on any incident of bullying or harassment, these kinds of nuanced legal distinctions create confusion that detracts from an understanding of the requirements of the law.

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[33] *See Wisniewski v. Board of Education of the Weedsport Center School District*, 494 F.3d 34 (2d Cir. 2007) (applying *Tinker*'s substantial disruption test to off-campus speech that was "reasonably foreseeable" to come on-campus). The Third Circuit will also rule on this issue shortly. *J.S. v. Blue Mountain Sch. Dist.*, 593 F.3d 286 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet harassment of a school administrator; decided in favor of the district); *Layshock v. Hermitage School District*, 593 F.3d 249 (3d Cir. 2010), *rehearing en banc granted, opinion vacated* (Apr. 9, 2010) (involving off-campus internet harassment of a school administrator; decided in favor of the student).

[34] "The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under title IX to investigate and remedy overlapping sexual harassment or gender-based harassment." Dear Colleague Letter, *supra* note 3, at 8.

[35] "[G]roups that face discrimination on the basis of actual or perceived shared ancestry or ethnic characteristics may not be denied protection under Title VI on the ground that they also share a common faith. These principles apply not just to Jewish students, but also to students from any discrete religious group that shares, or is perceived to share, ancestry or ethnic characteristics (*e.g.*, Muslims or Sikhs)." *Id.* at 5.

Harassment based on gender

Federal courts have recognized a cognizable claim under Title IX of sexual harassment based on failure to conform to gender stereotypes.[36] As a practical matter, however, the DCL asks administrators to tease out legal distinctions that may or may not affect an investigation of a bullying or harassment incident. The DCL seems to suggest that if the harassment is based solely on sexual orientation rather than gender or gender-based stereotypes, the remedial steps listed in the letter may not be required and schools should treat the incident(s) as "simple" bullying. This is an extremely difficult determination for teachers and building administrators to make, and may be a distinction without a difference, as many state civil rights laws and school district anti-bullying policies prohibit bullying *and* harassment based on sexual orientation.[37]

Harassment based on national origin

The DCL provides the example of anti-Semitic conduct that may also constitute harassment based on perceived shared ancestry or ethnic characteristics (i.e., race or national origin). The example raises two difficult questions for school districts.

First, while schools recognize the importance of eliminating all forms of harassment, and often specifically list religion as a characteristic with heightened status under state civil rights law, it is not clear that the conduct can be assumed to be based on national origin/race/ethnicity, when it is – at least explicitly – based on religion. Second, the case law indicates that a school district could be found to have intentionally discriminated based on race or ethnicity, and therefore liable under Title VI, only if the *Davis* standard is met.[38] Lower courts have recognized that the *Davis* deliberate indifference standard applies in cases alleging race-based harassment.[39]

The DCL suggests a standard well beyond the *Davis* deliberate indifference standard, as discussed above, thereby making nearly every teasing/bullying incident with a sexual orientation or religious component eligible for the letter's remedial measures. The numerous steps

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[36] *See Theno v. Tonganoxie Unified Sch. Dist. No. 454*, 377 F.Supp.2d 952 (D. Kansas 2005)(rational trier of fact could infer that plaintiff was harassed because he failed to satisfy his peers' stereotyped expectations for his gender); *Montgomery v. Independent Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000) (complaint stated Title IX same-sex harassment claim under gender stereotyping theory where plaintiff did not meet his peers' stereotyped expectations of masculinity).

[37] *See* Chicago Public Schools Comprehensive Non-discrimination, Title IX and Sexual Harassment policy, *infra* notes 42 and 43.

[38] *Bryant v. Independent School District No. I-38,* 334 F.3d 928 (10th Cir. 2003) (plaintiff alleging intentional race discrimination must allege and show that the district: (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits or opportunities provided by the school).

[39] *See Williams v. Port Huron Area Sch. Dist. Bd of Educ.*, 2010 WL 1286306 (2010) (noting federal court precedent and finding that a school district can be liable under Title VI for student on student racial harassment, and that the deliberate indifference standard applies).

suggested in the letter, though well advised in many instances and well intended in most, may not be legally required.

V. Clarifying the legal standards, exercising federal administrative restraint and recognizing judicial deference to school officials in compliance with local policy and state law is the best way to stem bullying and harassment.

At latest count, 44 states have anti-bullying statutes in place. These statutes require school districts to adopt anti-bullying policies, often with specified components, including procedures.[40] The statutory definition of bullying often includes or references "harassment and intimidation" to encompass a wide range of behavior. Most statutes note that bullying *can be* based on characteristics otherwise protected by law, but *need not* be to constitute prohibited conduct. At least one state, Missouri, specifically prohibits school districts from listing protected categories.[41]

Many school districts have at least two sets of policies and procedures that address bullying and harassment. Chicago Public Schools, for instance, has in its Student Code of Conduct, an anti-bullying statement with a definition of "bullying behaviors."[42] The district also has a Comprehensive Non-discrimination, Title IX and Sexual Harassment policy that covers categories protected by federal and state law, including religion and sexual orientation. [43]

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[40] NSBA State Anti-Bullying Statutes table, http://www.nsba.org/MainMenu/SchoolLaw/Issues/Safety/Resources/Table.aspx

[41] "Each district's antibullying policy shall be founded on the assumption that all students need a safe learning environment. Policies shall treat students equally and shall not contain specific lists of protected classes of students who are to receive special treatment. Policies may include age appropriate differences for schools based on the grade levels at the school. Each such policy shall contain a statement of the consequences of bullying." V.A.M.S. 160.775(3.).

[42] CPS 705.5 – Student Code of Conduct for 2010-2011 school year, http://policy.cps.k12.il.us/documents/705.5.pdf.

[43] CPS 102.8 – Comprehensive Non-discrimination, Title IX and Sexual Harassment policy, http://policy.cps.k12.il.us/documents/102.8.pdf.

The Broward County Public Schools in Florida, similarly have an Anti-Bullying Policy, http://www.browardschools.com/schools/pdf/bully/Anti-BullyPolicy%205.9.pdf, which encompasses a wide range of behavior, including harassment based on characteristics protected by federal laws, but also categories such as religion and sexual orientation. The district has a separate policy to address the requirements for discrimination against defined federal and state/local protected categories of persons, Nondiscrimination Policy Statement, http://www.broward.k12.fl.us/sbbcpolicies/docs/P4001.001.pdf. Sexual harassment is defined, as is "discriminatory harassment":

> Discriminatory harassment other than sexual, shall be defined as physical or verbal conduct based on race, color, national origin, religion, age, disability, marital status, or gender directed toward an individual when the conduct:
> 1. has the purpose or effect of creating an intimidating, hostile or offensive academic or working environment;
> 2. has the purpose or effect of substantially or unreasonably interfering with an individual's academic or work performance;
> 3. has the purpose or effect of demeaning or otherwise disrespecting the dignity of an individual in the academic or work environment; or
> 4. adversely affects an individual's academic or employment opportunities.

Likewise, most state education agencies have model policies, many of which are required by statute. The Michigan Board of Education has adopted a model policy that prohibits both bullying and harassment, but defines them separately.[44] "Harassment" is defined using the *Davis* standard: the conduct "adversely affects the ability of a pupil to participate in or benefit from the school district's educational programs or activities because the conduct, as reasonably perceived by the pupil, is so severe, pervasive, and objectively offensive as to have this effect." [45]

With a clarifying document, the Department could recognize the multiple standards under which school districts must operate as they attempt to comply with all applicable bullying and harassment laws. The clarification would provide accurate legal standards regarding school officials' responsibilities with respect to harassment, noting that courts have recognized the *Davis* deliberate indifference standard.

The clarification would note that the multiple remedial measures suggested in the DCL provide one view of best practices in this area. The document should note, however, that a single, *effective* remedial measure will meet the legal standard.

VI. Conclusion

It is our hope that through this letter, we have addressed what we see as some unintended legal and practical challenges arising from the DCL. First, the expansive position on what conduct constitutes "harassment" protected by federal civil rights laws and what remedial measures are legally required will unnecessarily complicate investigations and possibly expose school districts to liability beyond that envisioned by the Supreme Court. Second, the DCL may arm plaintiffs' attorneys hoping to sue school districts based on similarly expansive views of the law. Third, the DCL does not recognize, as courts have, that educators must enjoy professional

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[44] Michigan State Board of Education model policy on bullying and harassment, http://www.michigan.gov/documents/mde/SBE_Model_AntiBullying_Policy_Revised_9.8_172355_7.pdf. The Wisconsin Department of Public Instruction model bullying policy, http://dpi.wi.gov/sspw/doc/modelbullyingpolicy.doc states that bullying may be motivated by an actual or perceived characteristic, including gender identity, sexual orientation, or religion. It provides a brief list of remedial measures;

> If it is determined that students participated in bullying behavior or retaliated against anyone due to the reporting of bullying behavior, the school district administration and school board may take disciplinary action, including: suspension, expulsion and/or referral to law enforcement officials for possible legal action as appropriate. Pupil services staff will provide support for the identified victim(s).

The Delaware Department of Education model policy on bullying, http://www.doe.k12.de.us/infosuites/students_family/climate/files/Bully%20Prevention%20Policy%20Template.pdf includes intentional acts that have the effect of (among other effects) ". . . creating a hostile, threatening, humiliating or abusive educational environment due to the pervasiveness or persistence of actions or due to a power differential between the bully and the target; or interfering with a student having a safe school environment that is necessary to facilitate educational performance, opportunities or benefits . . ." The policy provides examples of different types of bullying, and a list of eleven "formative" activities to address the bully in lieu of or in addition to discipline, (counseling, reparation to victim, psych evaluation, behavior management program).

[45] *Id.*

deference to address the educational environments in their schools using their unique expertise and knowledge of individual students.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose to keep schools safe for all students. We look forward to working with you to develop guidance and resources to help schools understand the requirements of the law in maintaining safe learning environments, and, specifically, in responding effectively to bullying and harassment.

NSBA stands ready to work in partnership with the Department on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

Francisco M. Negrón, Jr.

Francisco M. Negrón, Jr.
General Counsel
National School Boards Association

Appendix D
NSBA Response to Proposed 2015 Civil Rights Data Collection
(Aug. 20, 2013)

National School Boards Association

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August 20, 2013

Via Electronic Submission
www.regulations.gov, and ICDocketMgr@ed.gov

Stephanie Valentine, Acting Director
Information Collection Clearance Division
Office of Management
U.S. Department of Education
400 Maryland Avenue, S.W.
LBJ Room 2E105
Washington, D.C. 20202-4537

Re: ED Notice of Information Collection
Docket ID: ED-2013-ICCD-0079
Title of Collection: Mandatory Civil Rights Data Collection
OMB Control Number: 1870-NEW

To the ICCD Director:

The National School Boards Association (NSBA), representing through our state associations approximately 13,800 school districts nationwide, offers the following comments to the Notice, *Agency Information Collection Activities; Comment Request; Mandatory Civil Rights Data Collection*, ED-2013-ICCD-0079,[1] issued by the U.S. Department of Education (Department) on June 21, 2013. NSBA understands that through this Notice, the Department is seeking approval from the Office of Management and Budget (OMB) to permit the Department's Office for Civil Rights (OCR) to make its mandatory civil rights data collection (CRDC) for the 2013-14 and 2015-16 school years a separate data collection from ED*Facts*.

In reviewing the Notice and supporting documents,[2] NSBA has identified several areas of concern with regards to certain proposed new data groups and data categories, as well as proposed revisions to existing data groups and data categories, contained in Attachments A-2 and A-3. NSBA appreciates the opportunity to share with OMB, the Department, and OCR the specific information regarding the types of data being proposed to be collected, the burden and expense to already financially-strapped public school districts of such proposed collections, the confusion certain requests will generate because of the differences between OCR's characterization of certain ideas and actions and the actual definitions and obligations, responsibilities, and rights of public school districts as

[1] Notice, 78 Fed. Reg. 37,529 (June 21, 2013).
[2] References to Attachments and Supporting documents refer to those included with the electronic file attached to the Notice, ED-2013-ICCD-0079, and are not included with NSBA's comment submission.

defined by state law, and the areas of proposed data collection for which NSBA believes there is questionable legal jurisdiction to support, or be the basis for, OCR's inquiries.

In the Notice, OCR states that it is especially interested in public comment addressing the following issues: "(1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology." NSBA will address these issues, as applicable, in the context of the areas of concern identified below.

I. Comments and Discussion

OCR states that the proposed additions and changes to the CRDC "reflect the need for a deeper understanding of and accurate data about the educational opportunities and school context for our nation's students."[3] However, there are several proposed new and revised data groups and categories for which NSBA questions not only their relevance to OCR's CRDC, but whether the data requested raises federal civil rights enforcement questions such that OCR would have any jurisdiction, and which may result in an unnecessary burden and labor- and cost-expense to each district. As drafted, the Notice appears to be a hypothesis in search of support — a hypothesis about students' educational opportunities and school contexts – with the proposed expanded CRDC data elements searching for data to support the hypothesis.

A. School & District Characteristics

Civil Rights Coordinator.[4] OCR states that the item related to civil rights coordinators "will measure compliance with civil rights regulations and permit OCR to communicate with coordinators."[5] However, the collection of this particular data item is not "necessary to the proper functions of the Department,"[6] and a portion of the scope of this item goes beyond the statutory requirements of federal law. Also, the collection of this data item will not achieve the two goals OCR stated as its reason for doing so.

Public school districts are already required to make publicly available the contact information of its civil rights compliance coordinators. Districts usually make this available in a variety of places, such as on their websites, in student codes of conduct or behavior, or in the school board's policies and regulations. OCR can access this information now via the internet. OCR should clarify how adding it to the CRDC adds value to the agency's work.

[3] *Supporting Statement, Part A: Justification* at p. 3.
[4] Data Group 916: Civil Rights Coordinators, Attachment A-2, p. A2-28.
[5] *Supporting Statement, Part A: Justification* at p. 3.
[6] Issue No. 1 in the Notice, 78 Fed. Reg. at 37,529.

More importantly, the definition of "civil rights coordinator" in this data group, and the "Permitted Value" in this item's data category exceed OCR's statutory jurisdiction. The definition statement identifies the coordinator as having responsibilities to coordinate a school district's efforts to prohibit discrimination on the basis of sex, disability, and race/color/national origin.[7] Similarly, the "Permitted Value" includes "race, color, or national origin."[8] This is statutorily unsupported.

There is no legal requirement mandating school districts have civil rights coordinators for race, color, or national origin under OCR's Title VI implementing regulations, as reiterated in OCR's own October 2010 Dear Colleague Letter on bullying and harassment.[9] In that Dear Colleague Letter, OCR correctly states that only Title IX (sex),[10] Section 504 (disability),[11] and Title II of the ADA (disability)[12] require school districts to have civil rights compliance coordinators. It is not NSBA's position that a school district should not have a designated employee to coordinate its efforts at combating race, color, and national origin discrimination. Rather, NSBA contends only that existing law does not require said position. If this data element is included ultimately in the CRDC, NSBA recommends it be revised to remove race, color, and national origin from the data group's definition and data category's "Permitted Values" sections, so as to remain consistent with existing federal law.

Moreover OCR's goal that this data item requires school districts provide the name and email address of the civil rights coordinator[13] to "permit OCR to communicate with coordinators," raises important process concerns for school districts. It would be inappropriate for OCR personnel, particularly as part of enforcement actions and investigations, to make direct contact with school district employees without first contacting school district counsel. Also, depending on OCR's areas of inquiry when "reaching out" to the civil rights coordinators, the coordinator may not be the appropriate person to respond. If this data element is included ultimately in the CRDC, NSBA recommends that the contact information question be removed, leaving just the basic "Yes/No" inquiry of whether a district has a civil rights compliance coordinator for sex and disability. For those districts that identify in the CRDC that they do not have such coordinators, OCR can then contact those divisions individually.

B. Discipline

1. Expulsion

This category raises concerns regarding the reporting of the number of students removed from their primary educational setting for disciplinary reasons. NSBA's concern is the Department's (mis)characterization of "removal" of a student in grades K-12 through an involuntary transfer process

[7] Attachment A-2, p. A2-28 ("Civil Rights Coordinator" definition) (emphasis added).
[8] Data Category: Civil Rights Law (Coordinators), Attachment A-3, p. A3-12.
[9] *See* Dear Colleague Letter, OFFICE FOR CIVIL RIGHTS, at p. 3 n.11 (Oct. 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[10] 34 C.F.R. § 106.8(a).
[11] 34 C.F.R. § 104.7(a).
[12] 28 C.F.R. § 35.107(a).
[13] Attachment A-2, p. A2-28 ("Comment" section).

from the student's then-present educational setting to some other setting as an "expulsion",[14] even when the student continues to receive educational services in the new setting.[15] The lack of a unique federal definition of "expulsion," and its typical definition by state law, raises the spectre at the misapprehension of a term in ways that taint reported "findings". Additionally, the reasons for a transfer of a student through the disciplinary process from the student's then-present educational setting to another education setting could be for reasons in addition to discipline, including a setting that is more academically appropriate for the student, as well as the student's physical safety. Thus, though OCR may identify such school board actions as "expulsions" for CRDC-purposes, OCR's (mis)characterization of what constitutes an "expulsion" could cause confusion in reporting, and could result in an over-reporting of the actual number of true "expulsions" that took place in a given school year.

Another possible source of confusion in a school district's reporting of expulsion counts exists under the data category "Discipline Method (Preschool), where OCR specifically excludes as an "expulsion" the transition of a preschooler from one educational setting to another, without providing justification for such a difference in the treatment of K-12 students and preschoolers.

The additional staff time and expense each school district will incur by performing manual checks of student discipline records to separate out from the total count of expulsions, those expulsions that occurred under "zero-tolerance policies" is onerous. It is unlikely that existing student information systems collect information about the reasons supporting expulsions, thus collection of this data item will not only increase the staff time and expense of each reporting district, but will likely result in an over-reporting of expulsions for this subcategory.

2. Differences in Terms of Out-of-School Suspensions

In the attachments accompanying the Notice regarding the expansion in data collection, OCR has stated a difference in the minimum length of time an IDEA-disabled student must be removed from school for an out-of-school suspension, as compared to a non-disabled student or a Section 504-disabled student. Specifically, the data categories "Discipline Method" and "Discipline Method (Preschool)" both state that an out-of-school suspension of an IDEA-disabled student is "an instance in which a child is temporarily removed ... for at least half a day", whereas for all other students, the child must be "temporarily removed ... for at least a day ...."[16] However, OCR has not provided any justification, legal or otherwise, for such difference in treatment. Not only will this likely cause confusion among school district personnel responsible for reporting this information, it will likely require a manual check of attendance and discipline records by school personnel to determine which of all the students serving an out-of-school suspension were IDEA-disabled students and which were not. The increased staff time and expense of identifying the necessary data for this reporting data item is unreasonable and overly burdensome.[17]

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[14] *Supporting Statement, Part A: Justification*, at p. 4.
[15] Attachment A-3, p. A3-17.
[16] Attachment A-3, pp. A3-16, A3-19.
[17] NSBA is also concerned about another possible area of data collection that will require additional staff time and expense in reporting, and possibly result in over-inflation of discipline data. Specifically, Data Group 966, "School days missed due

3. Incidents Triggering Discipline

This category raises concerns for the quality and integrity of data to be collected. First, OCR is requiring that "[i]ncidents should be counted ***regardless of whether any disciplinary action was taken***, and regardless of whether students ***or non-students*** were involved."[18] This is problematic for two reasons: (1) some "incidents" are resolved without any subsequent disciplinary action after school staff and administrators have an opportunity to investigate matters and interview the students involved; and (2) schools should not be required to report "incidents" that involve strictly ***non***-students, since the school does not have control of the behavior of non-students who may visit campus. Having to report incidents that ultimately do not result in disciplinary action and incidents involving strictly non-students will result in total reported numbers that are overinflated and not truly representative of what is occurring in schools.

Second, OCR defines the "incident" that should be reported as "a specific criminal act involving one or more victims or offenders."[19] Here, OCR has arbitrarily established not only a definition of "incident", but also the types of criminal offenses to be reported in this category, including "weapon", "rape", "sexual battery", "robbery", "physical attack or fight", "threat", "threat of physical attack with a weapon", and "threat of physical attack without a weapon."[20] As with "school removal", NSBA is not aware of any definition of these terms in the laws administered by the Department or OCR. Again, the lack of a unique definition in federal education statutes, and the potential with inconsistency with each state's legal definitions under their respective criminal codes, poses grave concern for the integrity of the data, creates the opportunity for misreporting, and clouds the understanding of data collectors at the school district level. This data category and related "definitions" create numerous problems for school districts costing ever-decreasing public taxpayer dollars in both staff time and expense in the following ways in trying to respond to related data items:

- School districts will have to conduct new training of any and all possible staff members who may be involved in the disciplinary process, from the staff member who initially receives the student report and drafts the disciplinary report, to the staff member who conducts the investigation, or a staff member who may simply witness possible conduct warranting disciplinary action, on what are the definitions of "incident" and the related "criminal offenses" for which data is to be collected and reported. This will likely include every administrator, teacher, teacher's aide, front office staff member, school security officer, school nurse, guidance counselor, school psychologist, cafeteria worker, bus driver, custodian, athletic coach, school secretary, bookkeeper, attendance officer, or any other staff member who comes into contact with students.

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to suspensions table," would require schools to count as **full days of suspension** those days "when students **were dismissed** early from school, but school staff were not, …." Attachment A-2, p. A2-70 (emphasis added). If the rest of the student body has been dismissed early from school, then the suspended student has not missed any additional educational time than other non-disciplined students. This presents yet more examples of the kind of manual examination of student records to complete this data item count, and of the opportunities for over-reporting of disciplinary data.

[18] Attachment A-2, Data Group 952: Offenses Table, p. A2-58 (emphasis added).

[19] Attachment A-2, Data Group 952: Offenses Table, p. A2-58.

[20] Attachment A-3, Category Name: Offense Type, pp. A3-27 to -28.

- Current student information systems may not contain data fields that ask reporting staff members to input the type of "criminal offense" as that is defined in this data category. Thus, in collecting the requisite information for this data item, school staff will have to either manually review every disciplinary record for the school year at issue and determine what "offense" occurred, if any, or engage the services of IT staff to manually adapt existing computer systems or develop an additional recordkeeping system to capture this new data. At a minimum, to be truly integrated throughout a school district, this requirement could require the implementation with new software and database reconfiguration processes that could prove to be both time consuming and expensive – particularly for under-resourced small and rural districts.

Additionally, the data collected for this data item encourages a school official to engage in a subjective determination of which "offense" may have occurred based on a student's own possibly incomplete/inaccurate description of events. For example, a student reporting an incident is not going to know the difference between sexual harassment, sexual assault, rape, attempted rape, or sexual battery. This calls into question the validity and accuracy of the data, particularly in cases of the "eggshell" plaintiff in which a person may unreasonably perceive actions or words of others as threats or attacks, when they actually are not. Consequently, school districts should be reluctant to define a particular incident as falling into a certain category based on a student's description of the "incident" for fear of mischaracterizing it. In doing so, a school district risks having the reported numbers being perceived by OCR as those of a district having less of a safe school environment than actually exists.

Perhaps most significantly, this requirement could chill the professional discretion of seasoned educators by compelling classification of low-level incidents using a criminal framework. Such behavior could force childish behavior such as pushing or shoving into criminal definitions of battery, limiting the ability of educators to exercise classroom management, maintain order, and teach appropriate conduct through educational behavior techniques.

Lastly, using the definitions of "offenses" proposed by OCR, the numbers reported by school districts may be over-inflated, since some offenses can fall into multiple categories. For example, in the "number of incidents of possession of a firearm or explosive device,"[21] data group incidents involving just possession of a firearm or explosive device might well be counted again in the "robbery with a firearm or explosive device", "physical attack or fight with a firearm or explosive device", and "threats of physical attack with a firearm or explosive device" data groups, since each of these data groups also necessarily requires the possession of a gun in the first place. Similarly, under OCR's definition, "rape" could also fall into the "sexual battery" and "physical attack or fight" categories, again, causing an over-inflation of reported "incidents". All of these possible areas of redundancy in reporting ultimately call into question the validity of the data set, and contribute to a final product based on inaccurate reports.

[21] Appendix, *Supporting Statement, Part A: Justification* at p. 21.

C. Harassment and Bullying

In proposing to expand the data categories and data groups to be collected, OCR states in the Notice that it is proposing to include "sexual orientation" and "religion" in the data request for the "number of reported allegations of harassment or bullying of K-12 students on the basis of: sex; race, color, or national origin; disability." In gathering this data, OCR states that the school district employee is not to determine the actual status of the victim, *i.e.*, the victim's sexual orientation or religion, but is to "**look to the likely motive** of the harasser/bully" in determining if a particular allegation made by a student-victim involved harassment or bullying on the basis of the student-victim's sexual orientation or religion.[22] This "look" at the "likely motive of the harasser/bully" opens a wide door to speculation and subjective interpretation by, the district employee investigating and/or completing the disciplinary report for a given incident.

Moreover, NSBA continues to be concerned with OCR's conflating of the two issues of harassment and bullying on the basis of sexual orientation and religion under the umbrellas of Title IX (sex) and Title VI (race/ethnic origin). To be clear, NSBA is opposed to and condemns harassment and/or bullying of any kind, and in particular when it is premised on a student's actual or perceived sexual orientation or religion. All students should be protected from such hurtful conduct. However, under existing law as currently written, OCR is limited to enforcing only clearly articulated federal civil rights laws. Conflation clouds the parameter of OCR's authority and confuses the legal standards under which schools act to protect students.

Additionally, for this specific data item, judgment calls may be difficult to make as to the motive behind the harasser's/bully's negative behavior, when sometimes it might not be so clear or obvious from the circumstances, and how to report it in the student information system. The disciplinary incident reporting system used by any given district may not currently contain, or be able to accommodate the addition of, a section for the "motive" or "basis" for the harassing/bullying behavior. Consequently, such information may then be required to be entered manually on district forms, databases, etc., thus making later CRDC data-gathering at the district-wide level extremely labor-intensive, time-consuming, and expensive. And, again without clear definitional language, different districts may report incidents based on different understandings of what constitutes a "motive" or a "basis" for the alleged misbehavior.

D. Pathways to College and Career

OCR notes its proposed change measuring which schools have high and low chronic absenteeism rates,[23] adding a new item inquiring of the number of students who are absent 15 or more school days.[24] While this may be valuable information, this data item fails to raises a civil rights issue under any of the statutes OCR enforces.

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[22] *Supporting Statement, Part A: Justification* at pp. 4, 11-13 (emphasis added); Attachment A-2, p. A2-41; Attachment A-3, p. A3-10 to -11.

[23] *Supporting Statement, Part A: Justification* at p. 4.

[24] Appendix, *Supporting Statement, Part A: Justification* at p. 23.

Though OCR states "[c]hronic absenteeism can be a sign of serious school climate issues that are driving children out of school,"[25] there are myriad other reasons why a student may miss 15 or more school days in a particular year that have no relation to "school climate." Chronic absenteeism can pose a challenge to a student's success in school, and district monitoring of the number of students with chronic absenteeism is important, but its connection to the laws OCR enforces appears tenuous at best. NSBA recommends that this data item be deleted as it is not "necessary for the proper functions of the Department," and there is no established connection to any civil rights issue.

E. Homicides

A new item OCR proposes is "[a]n indication of whether any of the school's students, faculty, or staff died as a result of a homicide committed at the school."[26] It is unclear as to what civil rights issue this data group raises. Specifically, how will this data item provide OCR with any information as to whether a school district is complying with its ***civil rights*** obligations under the five statutes OCR is charged with enforcing. NSBA suggests deleting this item altogether.

II. How might the Department minimize the burden of this collection on the respondents, including through the use of information technology?

To minimize the burden of OCR's CRDC on NSBA's 13,800+ member school boards and school district staff, NSBA recommends the following:

- Because OCR is requesting OMB's approval to separate OCR's CRDC from the Department's ED*Facts* information collection (OMB 1875-0240), OCR should significantly reduce the amount of information being requested by eliminating the data elements in the CRDC that ***do not raise a civil rights issue*** and are not specifically authorized by law under any of the statutes and implementing regulations (as enacted, not as OCR expansively interprets them) OCR is charged with enforcing. NSBA has provided examples of such data elements in its comments above.

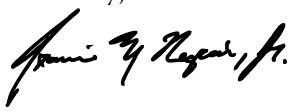
- Definition – Eliminate or clarify.

School districts are becoming more financially strapped each year, as state and federal contributions to the districts' annual budgets continue to shrink. School districts already have to do more with less. Expanding the scope of inquiry of the CRDC into even more areas of a school district's operations, for which the connections between the requested data elements and potential civil rights concerns involving equal educational opportunity become less and less legally supportable, only further hampers each school district's ability to succeed in its mission of educating and protecting this nation's students.

[25] *Supporting Statement, Part A: Justification* at p. 4.
[26] Attachment A-2, Data Group 919: Deaths Due to Homicide, p. A2-29.

NSBA thanks the Department for its review and consideration of the issues raised here regarding OCR's upcoming Civil Rights Data Collection. We look forward to the Department's response to, and resolution of, these comments, and urge the Department to do so in a way that minimizes the potential adverse impact on school districts regarding both staff time and expense, and the educational services they provide to our nation's students.

Sincerely,



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General Counsel
National School Boards Association

cc: Catherine Lhamon, Esq., Assistant Secretary for Civil Rights, U.S. Department of Education
(*via electronic mail at Catherine.Lhamon@ed.gov*)