

MAKING THE CUT: THE STATE OF PUBLIC SCHOOL ATHLETICS FOR DISABLED STUDENTS ♦

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INTRODUCTION

In order to actively participate in a regular classroom setting, a student with diabetes must be provided with glucose testing and insulin administration from trained school personnel throughout the day.¹

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¹ “*Dear Colleague*” Letter, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (Jan. 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf> [hereinafter *Letter*] (Under Section 504, a student with diabetes has a disability, and “the student is provided services

Suppose that this student is a natural athlete. As a freshman in high school, he tries out for the school track and field team. To be on the team, the school requires each player to meet certain levels of physical ability and to commit to compete at every competition. The student completes the physical assessments with ease. Before the first scheduled meet, he asks the school to provide him with glucose and insulin administration during practices and competitions. School administrators are then left to determine whether they are legally mandated to provide the student with the necessary assistance.

The process to determine the student's eligibility would play out one of two ways, depending on where the student attends school. In Westchester, New York, an affluent county with solidified athletic programming and adequately funded schools, the school would provide assistance, perhaps by training the coach in the administration of the diabetes treatments or arranging for transportation of a school nurse or external aide to the meet. In contrast, at a high school in the South Bronx, the school would simply refuse the request. The South Bronx school does not meet the Public Schools Athletic League requirements for financing, including availability of coaches and interest of enough students who satisfy academic eligibility requirements, and is therefore responsible for funding its own athletic programs.² The South Bronx school might have allocated resources elsewhere, perhaps to address its academic underperformance or inferior facilities. The student is told that the school is not required to provide such assistance because track and field is an extracurricular activity.

School districts do not provide sufficient opportunities for athletic participation for students with disabilities.³ Athletic programming, far from existing in a bubble, is fundamentally intertwined with a myriad of critical issues facing education. Socioeconomic disparities, such as those separating Westchester and the South Bronx, create further obstacles to a disabled student's access to athletics because under the current laws and guidance, there is no uniform standard for ensuring athletic opportunities are offered to students with disabilities.

The United States Department of Education (DOE) Office for Civil Rights (OCR) recently issued a "Dear Colleague" letter to clarify

under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel.").

² *PSAL Student Athlete Eligibility Rules and Regulations*, PUBLIC SCH. ATHLETIC LEAGUE, <http://www.psal.org/articles/article-detail.aspx?21581> (last updated Oct. 24, 2014).

³ Terri Lakowski, *Athletes with Disabilities in School Sports: A Critical Assessment of the State of Sports Opportunities for Students with Disabilities*, 27 B.U. INT'L L.J. 283, 288 (2009). See also Amy Nate Dearden et al., *Promoting Greater Inclusion of Disabled Student-Athletes in Interscholastic Sports Programs*, 278 ED. LAW REP. 1, 4 (2012) ("As a group, students with physical disabilities have fewer opportunities to participate in extracurricular activities than other disabled students, in part because it appears that fewer programs are designed, or adapted, to fit their specific needs." (footnote omitted)).

and communicate schools' responsibilities regarding the provision of extracurricular athletics for disabled students.⁴ This Note argues that the Letter falls short: instead of articulating mandatory compliance and communicating the penalties for failing to comply, schools continue to be "left to their own devices . . . and will not assume the responsibility of creating athletic programs for students with disabilities,"⁵ further perpetuating educational and extra-educational disparities between socioeconomic classes. Part I of this Note discusses the benefits of and the need for athletics for children with disabilities. Part II explains the federal statutory framework and administrative guidance regarding the protection of students with disabilities and offers a comparison to the regulations and enforcement of Title IX of the Education Amendments of 1972. Part III analyzes the existing inequitable and discriminatory funding of public school athletics, with a focus on New York schools. New York offers a particularly appropriate context for analysis because it is one of only five states with a regressive funding system, which provides less funding to districts with higher poverty rates.⁶ Finally, Part IV explores recommendations for ensuring access to athletics for all students with disabilities.

I. THE NEED: BENEFITS OF ATHLETIC PARTICIPATION

Physical activity is essential to the overall health of all individuals, and is essential to the improvement of both the physical and mental health of children with disabilities.⁷ Children with disabilities have "lower levels of cardiorespiratory fitness, lower levels of muscular endurance, and higher rates of obesity than typical children."⁸ Obesity rates for disabled children are thirty-eight percent higher than for children without disabilities.⁹ Athletics are essential for overall health maintenance, as regular physical activity for children with disabilities has been shown to aid in "controlling or slowing the progression of the chronic disease, improving overall health and function, and mediating

⁴ Letter, *supra* note 1, at 1.

⁵ Lakowski, *supra* note 3, at 312.

⁶ Bruce D. Baker et al., *Is School Funding Fair? A National Report Card 5*, RUTGERS GRAD. SCH. OF EDUC., EDUC. LAW CENTER (3d ed. 2014), http://www.schoolfundingfairness.org/National_Report_Card_2014.pdf ("The level of funding should increase relative to the level of concentrated student poverty—that is, state finance systems should provide more funding to districts serving larger shares of students in poverty. . . . [A] 'progressive' finance system allocates more funding to districts with high levels of student poverty; a 'regressive' system allocates less to those districts . . .").

⁷ Dearden, *supra* note 3, at 2–3. *See also* Nancy A. Murphy & Paul S. Carbone, *Promoting the Participation of Children with Disabilities in Sports, Recreation, and Physical Activities*, 121(5) PEDIATRICS 1057 (2008).

⁸ *See* Murphy & Carbone, *supra* note 7, at 1057.

⁹ *Disability and Obesity*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/ncbddd/disabilityandhealth/obesity.html> (last visited Feb. 17, 2016).

the psychosocial impact of the condition on children and their families.”¹⁰ In addition, sport participation enhances psychological well being both in and out of the classroom setting.¹¹ In sum, regular physical exertion can provide people with disabilities the “strength and stamina” required to participate fully in all aspects of life.¹²

Participation in today’s complex youth sports system requires considerable resources, such as “time, access, and money.”¹³ It follows that significant athletic participation and physical activity gaps exist between wealthy and poor children.¹⁴ Further compounding these participation and activity gaps is that high-poverty, racial minority students have higher rates of disability, primarily due to their increased exposure to poverty.¹⁵ Students at schools with the highest poverty concentration and the highest proportion of minority enrollment are least likely to have recess.¹⁶ Only one-third of children from lower-income families participate in a sport, in contrast to more than half of children from higher-income households.¹⁷ The problem is cyclical, as low socioeconomic environments are detrimental to physical health and

¹⁰ Murphy & Carbone, *supra* note 7, at 1057.

The primary goals for increasing physical activity in children with disabilities are to reverse deconditioning secondary to impaired mobility, optimize physical functioning, and enhance overall well-being. Regular physical activity is essential for the maintenance of normal muscle strength, flexibility, and joint structure and function and may slow the functional decline often associated with disabling conditions.

Id. at 1058.

¹¹ *Id.* at 1058 (“[P]articipation in regular physical activity can foster independence, coping abilities, competitiveness, and teamwork among children with disabilities.” (footnote omitted)).

¹² Jayne Greenberg, *Call To Action: Commit To Inclusion!*, PRESIDENT’S COUNSEL ON FITNESS, SPORTS & NUTRITION (Oct. 6, 2014), http://www.fitness.gov/blog-posts/commit_to_inclusion_blog.html.

¹³ Michael Sagas & George B. Cunningham, *Sport Participation Rates Among Underserved American Youth*, ASPEN INSTITUTE: PROJECT PLAY RESEARCH BRIEF (Jan. 2014), http://www.aspeninstitute.org/sites/default/files/content/docs/education/Project_Play_Underserved_Populations_Roundtable_Research_Brief.PDF.

¹⁴ *Id.*

¹⁵ See Paul W. Newacheck et al., Disparities in the Prevalence of Disability Between Black and White Children, 157(3) ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 244 (2003) (“[T]he potential mechanisms through which economic disadvantage exerts an influence on disability in children are numerous. They include, but are not limited to, restricted access to care, increased exposure to environmental causes of disability, poor nutrition, and low-quality health care services, which affect the consequences of illness or injury. These potential mechanisms and others need to be addressed if the nation is to be successful in reducing disparities in disability in children due to poverty.”).

¹⁶ See U.S. Dep’t of Educ., Nat’l Ctr. for Educ. Statistics, Calories In, Calories Out: Food and Exercise in Public Elementary Schools, 2005 (May 2006), <http://nces.ed.gov/pubs2006/2006057.pdf> (“Public elementary schools with the highest poverty concentration were more likely than those with lower concentrations of poverty to have no scheduled recess for elementary grades. . . . Differences were also observed for differences by minority enrollment, with schools with the highest proportion of minority enrollment being more likely than those with lower minority enrollments to have no scheduled recess.”).

¹⁷ See University of Michigan C.S. Mott Children’s Hospital, *Pay-to-Play Sports Keeping Lower-Income Kids Out of the Game*, 15 NAT’L POLL ON CHILDREN’S HEALTH 3, 1 (May 14, 2012), <http://www.mottnpch.org/sites/default/files/documents/051412paytoplayreport.pdf>.

fewer opportunities for physical activity are provided to high-poverty students.

II. THE “DEAR COLLEAGUE” LETTER AND CURRENT STATUTORY FRAMEWORKS

A. *Federal Legal Protection*

The United States Department of Education Office for Civil Rights (OCR) issued a “Dear Colleague” Letter (the “Letter”) on January 25, 2013 outlining the steps that schools must take in order to comply with Section 504’s requirements regarding the provision of extracurricular athletic opportunities for students with disabilities. Students with disabilities are protected by both the Rehabilitation Act of 1973 (“Rehab Act”)¹⁸ and the Americans with Disabilities Act of 1990 (ADA).¹⁹ Both statutes prohibit educational institutions from excluding qualified individuals from programs on the basis of their disability and require schools to provide reasonable accommodations to ensure that students with disabilities have equal access to educational programs.²⁰

However, the U.S. Supreme Court does not classify disabled individuals as a suspect or quasi-suspect class entitled to heightened protections.²¹ Therefore, a school district can feasibly discriminate against disabled athletes if the treatment is “rationally related to a legitimate governmental purpose,”²² such as protecting the safety of students or preserving competitive equality.²³ Likewise, disabled athletes are not protected by substantive due process under the Fourteenth Amendment because athletic participation is not considered a fundamental right.²⁴

Section 504 requires that school districts provide an equal opportunity to all students to participate in athletic programs; it prohibits schools from offering programs to disabled students that are not equal to those afforded to others or that do not allow for equal opportunities to obtain the same result or benefit.²⁵ A person with a

¹⁸ 29 U.S.C. § 794 (2000).

¹⁹ Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified at 42 U.S.C. §§ 12101-12213 (2000)).

²⁰ The Rehabilitation Act applies to all educational institutions receiving federal funding, whether public or private. The ADA is modeled after the Rehabilitation Act, and both statutes contain “similar enforcement schemes” as applied to educational programs. Lakowski, *supra* note 3, at 289–90.

²¹ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

²² *Id.* at 446.

²³ See Lakowski, *supra* note 3, at 289.

²⁴ Maureen A. Weston, *The Intersection of Sports and Disability: Analyzing Reasonable Accommodations for Athletes with Disabilities*, 50 ST. LOUIS U. L.J. 137, 139 (2005).

²⁵ *Letter*, *supra* note 1, at 3–4. The Rehab Act provides that: “No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or

disability, for the purposes of Section 504, is someone who currently has a record of having, or is regarded as having, a “physical or mental impairment that substantially limits one or more major life activities.”²⁶ A “qualified individual,” with respect to services provided in elementary and secondary education, must be either of an age during which nondisabled persons are provided services, of any age which state law mandates services be provided, or a person to whom a state is required to provide a free, appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA).²⁷ Under IDEA, the federal government provides funding to states to furnish an appropriate education to all children with disabilities and to “provide services related to education, such as transportation, physical and occupational therapy, sign language interpretation, and school health services.”²⁸

Simply being classified as a “qualified individual” does not automatically earn the student a right to participation.²⁹ School districts may require a level of skill or ability in order for a disabled student to participate in a selective or competitive program, “so long as the selection or competition criteria are not discriminatory.”³⁰ Eligibility criteria apply to all students, and are “typically designed to ensure that student athletes meet minimum academic requirements and that their involvement does not create health or safety risks.”³¹ For example, a particular school district may require a baseline grade point average or minimum number of credits completed, and students over the age of eighteen or those who have been in high school for more than eight semesters will be ineligible.³²

B. *The Letter’s “Clarifications”*

The Letter explains that a district may not “operate its program or activity on the basis of generalizations, assumptions, prejudices, or

activity receiving Federal financial assistance . . .” 29 U.S.C. § 794(a).

²⁶ *Letter, supra* note 1, at 3. The ADA Amendments Act of 2008 expanded the list of “major life activities,” which now includes, but is not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working . . . the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” ADA Amendments Act of 2008, 42 U.S.C. §§ 12102(2)(A)–(B).

²⁷ *Letter, supra* note 1, at 3.

²⁸ Mark C. Weber, *The Idea Eligibility Mess*, 57 BUFF. L. REV. 83, 87 (2009) (footnote omitted).

²⁹ *Letter, supra* note 1, at 3.

³⁰ *Id.*

³¹ Lakowski, *supra* note 3, at 298–99.

³² *Id.* at 299. These requirements, although applied equally to all students, create conflict when they bar a student with disabilities from participating when their ineligibility is “due to their disability” and they are “forced to spend more time in school” to meet promotional requirements. Dearden et al., *supra* note 3, at 10.

stereotypes about disability generally, or specific disabilities in particular.”³³ Although this behavior is not often at issue in litigation surrounding the application of Section 504 or the ADA,³⁴ countering disability-based discrimination is consistent with the stated purpose of the legislation.³⁵ As an example, the Letter describes a violation of Section 504 in a coach’s decision to never play a student who has a specific learning disability, based on his assumption that the student would be unable to play successfully under the time constraints and pressures of an actual game.³⁶ The Letter does not offer guidance for ensuring inclusion of the student, noting only that the coach’s decision on the disabled student’s participation in games must be based on the same criteria used for all other players.³⁷

Just as a qualified student is not automatically entitled to a spot on an athletic team, a school district cannot simply bar a student’s opportunity to participate without assessing the nature of the disability and the attendant required modifications. Modifications in the context of athletics are adjustments to school policies, practices, or procedures that will enable the student to “participate in extracurricular and other nonacademic activities . . . with other children with disabilities and nondisabled children.”³⁸

The OCR calls for an “individualized inquiry” to determine whether a modification is necessary for a students’ participation in the mainstream program.³⁹ A school must determine whether providing reasonable modifications in order to ensure equal opportunity is feasible or whether it would constitute a “fundamental alteration.”⁴⁰ A fundamental alteration is a change that gives the student with a disability an unfair advantage over the other participants or that alters an essential aspect of the activity or game, even if it affects all participants equally.⁴¹ If a school district finds that a specific modification would constitute a fundamental alteration, it would still be required to “determine if other modifications might be available that would permit the student’s participation.”⁴² In sum, a district must analyze the size of

³³ Letter, *supra* note 1, at 5.

³⁴ See Perry A. Zirkel, Students with Disabilities and Extracurricular Athletics in the K-12 Context: OCR’s Recent “Significant” Guidance, 289 EDUC. L. REP. 13, 13–14 (2013).

³⁵ The stated findings of the ADA include that “physical or mental disabilities in no way diminish a person’s right to fully participate in all aspects of society, yet many people with physical or mental disabilities are frequently precluded from doing so because of discrimination.” ADA Amendments Act of 2008, 42 U.S.C. § 12101(a)(1).

³⁶ Letter, *supra* note 1, at 6.

³⁷ *Id.*

³⁸ 34 C.F.R. §§ 300.320(a)(4)(ii)–(iii) (2007).

³⁹ Letter, *supra* note 1, at 7.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

a potential program, its overall budget compared to the potential cost of the accommodation, and possible disruptions to other central elements of the athletic program that may be caused by the requested modification.⁴³

The Letter also discusses the creation of “additional opportunities” for students when no reasonable modification would enable a student with a disability to participate in existing extracurricular athletics: “OCR thus encourages school districts to work with their community and athletic associations to develop broad opportunities to include students with disabilities in all extracurricular athletic activities.”⁴⁴ “Separate or different” athletic activities should only be offered when a student cannot be fully and effectively included in mainstream activities, and these additional programs “should be supported equally.”⁴⁵

C. GAO Report and DOE Guidance

The OCR explained that it issued the Letter in response to a 2010 Government Accountability Office (GAO) report that highlighted the benefits of athletic participation for students with disabilities but concluded that students with disabilities were not provided with the equal opportunity to participate.⁴⁶ The report pointed to budgetary constraints that prevented adequate physical education (PE) teacher training and resulted in large general PE classes, a lack of paraprofessional aides for PE classes, and limited resources for special adapted equipment or facility renovations.⁴⁷

In response to this GAO report, in 2011 the DOE issued guidelines and suggestions for increasing opportunities for disabled students’ access to PE and athletics. The Department identified common barriers to participation, which included environmental accessibility, equipment, personnel preparation, curriculum, and achievement measures.⁴⁸ It provided suggestions for increasing access: a school could allow for safe use of play areas for students in wheelchairs by converting concrete or wood chip areas to “solid soft surfaces.”⁴⁹ “Appropriate equipment,” whether modified or specialized, could be provided, such as treadmills

⁴³ Telephone Interview with Terri Lakowski, Chief Executive Officer, Active Policy Solutions (Oct. 15, 2014).

⁴⁴ Letter, *supra* note 1, at 11.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 1.

⁴⁷ U.S. Gov’t Accountability Office, GAO-10-519, Students with Disabilities: More Info. and Guidance Could Improve Opportunities in Physical Educ. and Athletics (2010), <http://www.gao.gov/assets/310/305770.pdf>.

⁴⁸ U.S. Dep’t of Educ., Creating Equal Opportunities for Children and Youth with Disabilities to Participate in Physical Educ. and Extracurricular Athletics (2011), <http://www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf>.

⁴⁹ *Id.* at 7.

or “gaming systems that support movement detection technologies.”⁵⁰ The DOE notes that “[a]ppropriate personnel preparation and professional development to adapt games and activities to various ability and fitness levels are needed in order to increase opportunities”⁵¹ for disabled students’ participation. It suggests using “bug-in-the-ear” technology to allow coaches to communicate with and personalize instruction for student athletes with disabilities.⁵² In its appendices, it provides general references and resources for increasing athletic opportunities.

D. *The Supreme Court’s Interpretation of Section 504 and Athletics*

PGA Tour, Inc. v. Martin is the Supreme Court’s only interpretation of Section 504 in the context of athletics.⁵³ The decision clarified guidelines for assessing the reasonableness of modifications in professional sports, yet the guidelines are applicable to school-based litigation.⁵⁴ Golfer Casey Martin sued the Professional Golf Association (PGA) when it denied his request for use of a golf cart, in lieu of walking and carrying his clubs, while competing on the PGA Tour.⁵⁵ Martin has Klippel-Trenaunay-Weber Syndrome, “a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart.”⁵⁶ Walking caused Martin to experience “pain, fatigue, and anxiety” and also created a “significant risk of hemorrhaging, developing blood clots, and fracturing his tibia so badly that an amputation might be required.”⁵⁷ It was uncontested that the use of the golf cart was a necessary modification, as the pain and risk of serious injury he would experience walking the course would prevent him from participating.⁵⁸

The Court clarified that an individualized inquiry must be made to determine whether a specific modification for a particular person’s disability is necessary for participation and reasonable under the circumstances, and yet, at the same time, not constitute a fundamental alteration.⁵⁹ According to the court, a fundamental alteration results if the modification alters such an essential aspect of the particular sport, so as to be “unacceptable even if it affects all competitors equally,” or, alternatively, if a modification gives the disabled individual not only

⁵⁰ *Id.* at 8.

⁵¹ *Id.* at 8.

⁵² *Id.* at 11.

⁵³ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

⁵⁴ Lakowski, *supra* note 3, at 298.

⁵⁵ *PGA Tour*, 532 U.S. at 669.

⁵⁶ *Id.* at 668.

⁵⁷ *Id.*

⁵⁸ *Id.* at 673.

⁵⁹ *Id.* at 688.

access, but an advantage in the sport over other competitors.⁶⁰ The Court held that the walking requirement was “at best peripheral” to the game of golf,⁶¹ and that the purpose of the rule (to subject players to fatigue) was not compromised by Martin’s use of a cart, as he experienced greater fatigue than other able-bodied golfers, even with the use of a cart.⁶² The Letter does not require school districts to engage in this inquiry “in the light most favorable to the student,”⁶³ but instead leaves the criteria vague. Schools have the discretion to determine whether they can practicably accommodate a proposed modification.

E. *Defining Equal Opportunity: A Title IX Lens*

The OCR is also responsible for enforcing Title IX of the Education Amendments of 1972, which is a comprehensive federal law prohibiting discrimination on the basis of gender in any federally-funded athletic education or extracurricular program.⁶⁴ It is useful to examine the issue of prohibited discrimination on the basis of sex as it compares to the protection of the rights of individuals with disabilities; Title IX legislation provides a useful model for creating a structure to expand opportunities for students with disabilities.⁶⁵ While the language of Title IX is nearly identical to that of the Rehab Act,⁶⁶ legislative acts have provided detailed regulations that clearly define Title IX obligations and implementation strategies. The Title IX legislation was supplemented by a 1979 Policy Interpretation and subsequent guidance issued by OCR.⁶⁷ An “equal opportunity” in the Title IX context mandates the creation of a separate team if opportunities for the excluded sex have been historically limited, if sufficient interest and ability exists, and if the members of the excluded sex do not possess sufficient skill to participate or “compete actively” on the single

⁶⁰ *Id.* at 682–83.

⁶¹ *Id.* at 689.

⁶² *Id.* at 690.

⁶³ Lakowski, *supra* note 3, at 311.

⁶⁴ 20 U.S.C. § 1681(a).

⁶⁵ *See generally* Lakowski, *supra* note 3 at 312–14.

⁶⁶ Title IX provides, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The text of the Rehab Act mirrors that of Title IX. *See* 29 U.S.C. § 794.

⁶⁷ *See* Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979); “Dear Colleague” Letter from Gerald Reynolds, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003), <http://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>; “Dear Colleague” Letter from Norma V. Cantú, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>; Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. (Apr. 20, 2010), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf>.

integrated team.⁶⁸ It follows that Title IX allows for integration of the sexes into a single co-ed team in some circumstances but might require separate male and female teams in others.⁶⁹ A district must provide for separate men's and women's teams when the provision of one integrated team would not "accommodate the interests and abilities of members of both sexes."⁷⁰ This framework is similar to the implementation of athletic programming for disabled student athletes: a district must determine whether it is appropriate to integrate and include disabled athletes in existing extracurricular athletics, or create additional, separate programming to accommodate their interests and abilities.⁷¹

Title IX specifically requires that the sexes receive comparable benefits and resources from athletic programming, evaluating the equivalence of opportunities based on the following enumerated criteria: "locker room, practice and competitive facilities, equipment and supplies, scheduling of games and practice times, publicity, coaching, travel and daily allowance, academic tutoring, medical and training facilities and services, housing and dining facilities and services, recruitment of student athletes, and support services."⁷² Title IX enumerates clear requirements for supplies, equipment, and facilities that must be met in order to provide an equal opportunity for both sexes.⁷³ Compliance will be assessed by analyzing the equivalence of quality, amount, and suitability of equipment and supplies provided to each gender.⁷⁴ Likewise, the quality and availability of facilities for both practice and competitive events must be equivalent.⁷⁵

The Title IX legislation put every school on notice of the detailed criteria and regulations with which they must comply. In contrast, no existing federal regulation or guidance, including the Letter's policy directives, has articulated such clear standards for evaluating additional athletic opportunities for disabled students. The Letter only states that the separate athletic opportunities "should be supported equally" as the school district's other athletic opportunities.⁷⁶ It does not announce additional requirements or articulate specific measures with which a school district must comply.⁷⁷ Further, in response to inquiries from the

⁶⁸ See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, *supra* note 67.

⁶⁹ Robert C. Farrell, *Title IX or College Football?*, 32 HOUS. L. REV. 993, 1021 (1995).

⁷⁰ Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86 (1975).

⁷¹ Telephone Interview with Terri Lakowski, *supra* note 43.

⁷² Lakowski, *supra* note 3, at 314 (footnote omitted).

⁷³ A Policy Interpretation: Title IX and Intercollegiate Athletics, *supra* note 67.

⁷⁴ *Id.*

⁷⁵ *Id.* at 71,417.

⁷⁶ Letter, *supra* note 1, at 12.

⁷⁷ "This letter does not add requirements to applicable law, but provides information and

National School Boards Association, John DiPaolo, the Deputy Assistant Secretary for Policy at OCR, issued subsequent clarification, stating that the Letter was not intended to create any additional legal mandates or regulations.⁷⁸

In regards to developing additional adapted programs for disabled students who cannot participate in mainstream offerings, the Letter shifts from the mandatory language of the previous parts to merely “encourage” districts to “provide or arrange for” these activities.⁷⁹ The Letter vaguely suggests developing teams for students with disabilities on a district-wide, regional, or coed basis if one school has insufficient numbers to field a team.⁸⁰ DiPialo confirmed that this “does not mean every student with a disability has the right to be on an athletic team, and it does not mean that school districts must create separate or different activities just for students with disabilities.”⁸¹ Further, it is not OCR’s view that a school district is *required* to create additional opportunities for students who cannot participate with reasonable modifications in existing programs, but if a district “voluntarily wishes to provide such separate activities, those must be supported equally as compared with the school district’s other athletic activities.”⁸² It is not difficult to imagine that without a legal mandate to create additional athletic programming for disabled students, a budget-strapped school will not voluntarily assume the responsibility.

III. SOCIOECONOMIC CONCERNS AND THE IMPACT OF “DEAR COLLEAGUE” LETTER

A. *Reactions to the Letter*

The Letter has drawn both praise and criticism.⁸³ Advocates note that the Letter is not new law but that it does “have teeth,”⁸⁴ and it will put schools on notice so that “automatic exclusion”⁸⁵ cannot happen

examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.” *Id.* at 2 n.4.

⁷⁸ Letter from John K. DiPaolo, Deputy Assistant Secretary for Policy, U.S. Dep’t of Educ., Office for Civil Rights, to Francisco M. Negrón, Jr., Esq., National School Boards Association (Dec. 16, 2013), <http://www.nsba.org/sites/default/files/reports/OCR%20Dec.%202016%20%20Letter%20-%20RE%20-%20NSBA%20May%202013%20Letter.pdf>.

⁷⁹ Zirkel, *supra* note 34, at 2.

⁸⁰ Letter, *supra* note 1, at 11–12.

⁸¹ Letter from John K. DiPaolo, *supra* note 78, at 1.

⁸² *Id.* at 3.

⁸³ Christina A. Samuels, *Guidance on Athletics and Spec. Ed. Students Draws Sharply Split Response*, EDUC. WEEK (Feb. 5, 2013), http://www.edweek.org/ew/articles/2013/02/06/20sports_ep.h32.html.

⁸⁴ Sean Gregory, *For Disabled Athletes, A Right to Compete in School?*, TIME: KEEPING SCORE BLOG (Jan. 28, 2013), <http://keepingscore.blogs.time.com/2013/01/28/for-disabled-athletes-a-right-to-compete-in-school/>.

⁸⁵ *Id.* (quoting Barry Taylor, a civil rights attorney at Equip for Equality).

anymore. The guidance was referred to as a “landmark moment,” a “game changer,” and was predicted to “do for students with disabilities what Title IX has done for women and girls.”⁸⁶ Commentators say that it “gives very clear guidance of what equal opportunity for students with disabilities looks like.”⁸⁷

In contrast, critics accuse the OCR of demanding unprecedented and excessive accommodations: “public schools nationwide must provide such programs or risk their federal education funding. Talk about executive overreach! Talk about a regulatory rampage! Talk about an enormous unfunded mandate!”⁸⁸ Skeptics note that because there is no set date for compliance, the enforcement will be “piecemeal, through individual cases launched by the education department’s Office of Civil Rights . . . and individual families’ lawsuits against school systems.”⁸⁹

Both sides miss the point: the Letter, prompting districts to either include disabled athletes in existing programs or create separate, equal opportunities means nothing when a district already fails to offer athletics to their high-poverty, racial minority students. Disabled students cannot be included in mainstream programs when a school has already cut its extracurricular programs. OCR’s call for offering separate programs equaling the quality of existing programs is worthless when there are no existing programs offered for nondisabled students. Athletic participation does not occur in a bubble, and socioeconomic disparities create further obstacles to a disabled student’s access to athletics. The concern for disabled students’ participation in athletics intersects with educational inequality.

B. Existing Inequality

In the public education context, Section 504 prohibits a district from denying a qualified student with a disability the “opportunity to participate in or benefit from . . . [or] limiting [the student] in the enjoyment of any right privilege, advantage, or opportunity *enjoyed by others receiving an aid, benefit, or service.*”⁹⁰ In addition, a district is prohibited from providing an opportunity to participate in a program

⁸⁶ Preston Williams, *U.S. Department of Education Issues ‘Landmark’ Directive for Disabled Student Athletes*, WASH. POST (Jan. 25, 2013), http://www.washingtonpost.com/sports/highschools/us-department-of-education-issues-landmark-directive-for-disabled-student-athletes/2013/01/25/b03f5cae-6737-11e2-9e1b-07db1d2ccd5b_story.html.

⁸⁷ *Id.*

⁸⁸ Michael J. Petrilli, *The Obama Administration Invents a Right to Wheelchair Basketball*, HUFF. POST EDUC. (Jan. 26, 2013, 5:27 PM), http://www.huffingtonpost.com/michael-j-petrilli/the-obama-administration-_3_b_2550683.html.

⁸⁹ Bob Cook, *Can We Increase School Sports Access for the Disabled Without Title IX-Style Bickering?*, FORBES (Jan. 25, 2013, 3:51 PM), <http://www.forbes.com/sites/bobcook/2013/01/25/can-we-increase-school-sports-access-for-the-disabled-without-title-ix-style-bickering/>.

⁹⁰ Letter, *supra* note 1, at 3–4 (emphasis added).

“that is not equal to *that afforded others* . . . [or that] is not as effective as *that provided to others* and does not afford that student with an equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement”⁹¹ Schools are prohibited from offering athletics programs in such a way that does not provide equality of opportunity to disabled students in comparison to their nondisabled peers.

The Letter directs schools to include students with disabilities in mainstream programs but does not provide a clear framework or guidelines to mandate the creation of adapted athletic programming. The amorphous and diverse nature of mental and physical disabilities differs from the well-defined Title IX gender distinction, requiring a case-by-case analysis that is not necessary in the gender context.⁹² Providing athletic opportunities for every disabled student is harder to visualize than implementation of the Title IX proportionality requirements. Title IX’s “substantive equality” emphasis requires equality in outcomes, not merely in initial provision of opportunity.⁹³ It follows that Title IX requires schools to build opportunities for female students in order to allow female students to *develop* interests and act on them accordingly.⁹⁴ The existing statutory framework does not require a similar preemptive creation of athletic programming for disabled athletes. For example, a school with eight percent of Section 504 qualified students cannot simply offer separate teams proportionate to that number, because, as the Letter clarifies, *every* disabled student is entitled to an individual inquiry as to whether a reasonable modification can allow for participation in the mainstream program.⁹⁵ In light of the diverse nature of physical and mental disabilities, the U.S. Supreme Court has confirmed that governmental bodies must be allowed a certain amount of freedom and discretion in planning and designing

⁹¹ *Id.*

⁹² However, it is interesting to make the comparison between this Dear Colleague Letter and OCR’s 1996 Title IX Clarification Statement, which clarified and expanded upon Title IX compliance requirements. That statement, akin to this Letter, would be helpful to a district or school with established and well-funded athletic programs that include opportunities for women and disabled students, respectively, but would have little impact on the offerings of a bare-boned, underfunded athletic program. See Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371, 378–79 (1997) (“While it will provide a guide to athletic programs that may be on the verge of Title IX compliance, the Clarification Statement will have little impact on the majority of litigation seeking to improve interscholastic athletic programs that are, all too often, far from meeting Title IX mandates.”).

⁹³ Deborah L. Brake & Verna L. Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VA. SPORTS & ENT. L.J. 199, 213 (2008).

⁹⁴ *Id.*

⁹⁵ Letter, *supra* note 1, at 11 (“The provision of *unnecessarily* separate or different services is discriminatory.” (footnote omitted)).

their programming.⁹⁶

The difficulties presented by the multifarious nature of disabilities, compounded by the fact that the schools, when left to their own devices, do not assume the responsibility of creating athletic opportunities for students with disabilities, result in extremely unequal access to athletics for students depending on disability status, race, and economic status.⁹⁷

C. *New York: A Critical Look*

States shoulder much of the burden in funding public education, as federal funds account for only roughly ten percent of the nation's total education expenditure.⁹⁸ New York offers a particularly useful context for analyzing the provision of athletics for disabled students in various socioeconomic positions, because New York's regressive funding distribution allocates less state money for poor districts.⁹⁹ Thus, it follows that high-poverty districts in New York are the most pressured to prioritize instructional expenditures by cutting non-instructional spending.¹⁰⁰

1. Athletic Opportunities for New York's Disabled Student Athletes

New York mandates that all of its districts establish procedures to ensure that students with disabilities have the opportunity to participate in athletics "to the maximum extent appropriate to the needs of the student."¹⁰¹ In New York, every disabled student's Individualized Education Program (IEP)¹⁰² must include a description of the student's

⁹⁶ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) ("Especially given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts.").

⁹⁷ For an analysis of the overlap between gender equality in athletics and inequalities in public education, see Brake & Williams, *supra* note 93, at 212 ("Significantly, even with the win in the state supreme court, the school system remains out of compliance with the state constitution, remaining, as the court found, over-reliant on local property taxes to fund the state's school system. In circumstances where, in some places, toilet paper is a luxury item, what relevance does athletics have? Moreover, does Title IX hold any promise for addressing inequalities at that level?" (footnotes omitted)).

⁹⁸ *The Federal Role in Education*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last modified Feb. 13, 2012).

⁹⁹ Baker et al., *supra* note 6.

¹⁰⁰ Rajashri Chakrabarti & Max Livingston, *Waiting for Recovery: New York Schools and the Aftermath of the Great Recession*, FED. RESERVE BANK OF N.Y. (Sept. 23, 2013), <http://libertystreeteconomics.newyorkfed.org/2013/09/waiting-for-recovery-new-york-schools-and-the-aftermath-of-the-great-recession.html>.

¹⁰¹ N.Y. Comp. Codes R. & Regs. tit. 8, § 200.2(b)(1) (2016).

¹⁰² *A Guide to the Individualized Education Program*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/parents/needs/speced/iepguide/index.html> (last modified Mar. 23, 2007) ("Each public school child who receives special education and related services must have an Individualized Education Program (IEP). Each IEP must be designed for one student and must be a truly individualized document. The IEP creates an opportunity for teachers, parents, school

physical development and must specify what physical education program the student should receive.¹⁰³ The state requires physical education for all students,¹⁰⁴ and the State Education Department is responsible for monitoring district compliance with identifying students in need of adapted physical education and the sufficiency of the programming offered, including equal access to physical education facilities and provision of one-to-one aides if necessary.¹⁰⁵ The New York City Department of Education, for example, provides specifically for Adaptive Physical Education teachers, allowing flexibility for administrators to arrange for the delivery of services based on the level of need in their individual schools.¹⁰⁶ However, the state does not provide such strict requirements in regards to interscholastic athletic participation. Instead, it advises school districts specifically that either their Committees on Special Education or the individual schools' multidisciplinary teams should "discuss with students with disabilities their interest in interscholastic athletics to guarantee equal opportunity to participate in these activities."¹⁰⁷

Disabled students are often forced to spend more time in school and are thus ineligible to participate in athletic programs because of a district athletic program's age limit or semester requirements.¹⁰⁸ Although there is no constitutionally protected right to participate in athletics,¹⁰⁹ interscholastic athletic associations have developed rules

administrators, related services personnel, and students (when appropriate) to work together to improve educational results for children with disabilities.").

¹⁰³ N.Y. Comp. Codes R. & Regs. tit. 8, § 200.4(d)(2)(vii) (2016).

¹⁰⁴ N.Y. Comp. Codes R. & Regs. tit. 8, § 135.4.

¹⁰⁵ *Adapted Physical Education: Regulations, Recommendations, Resources*, STATE EDUC. DEP'T OF THE UNIVERSITY OF THE STATE OF N.Y. (1997) at 7–8, <http://www.p12.nysed.gov/cia/pe/documents/qa.pdf>. A student may be recommended for adapted physical education when his/her disabilities interfere with his/her ability to perform activities involved in the regular physical education program. *Id.* New York defines "adaptive physical education" as "a specially designed program of developmental activities, games, sports and rhythms suited to the interests, capacities and limitations of pupils with handicapping conditions who may not safely or successfully engage in unrestricted participation in the activities of the regular physical education program." N.Y. COMP. CODES R. & REGS. tit. 8, § 135.1(e) (2016).

¹⁰⁶ Resources are also provided for central administration, including positions to support the APE program and scheduling, and Other Than Personal Services (OTPS) for items such as travel, instructional supplies, and testing booklets. Allocations representing services that may be shared across schools have the word "shared" in the allocation category name. Examples of shared services are: principal decisions to collaborate with other schools; funds transferred from a school or group of schools to a host school or payroll site for payroll and timekeeping purposes; or where services are clustered for many schools.) School Allocation Memorandum No. 38, FY 15, from Raymond J. Orlando, Chief Fin. Officer, N.Y.C. Dep't of Educ., (June 3, 2014), http://schools.nyc.gov/offices/d_chanc_oper/budget/dbor/allocationmemo/fy14_15/FY15_PDF/sam38.pdf.

¹⁰⁷ Adapted Physical Education, *supra* note 105, at 9.

¹⁰⁸ Dearden et al., *supra* note 3, at 10.

¹⁰⁹ *Friends Acad. v. Section VIII of N.Y. State Pub. High Sch. Athletic Ass'n*, 588 N.Y.S.2d 525, 530 (Sup. Ct. Nassau Cty. 1992) ("Participation in interscholastic athletics is a privilege and is not a constitutionally secured right.").

prohibiting “red-shirting”¹¹⁰ in order to defeat “anti-intellectual and anti-academic” conduct.¹¹¹ However, the state provides a waiver process to allow for continued athletic participation for disabled students. Rather than allowing a student to be barred from participating past the age of nineteen or the fourth year of high school due to eligibility requirements, the waiver allows students with disabilities who would otherwise be unable to participate in interscholastic athletic competition, due to their age or years in school, to participate in a sport for one additional season if they have not graduated “*as a result of their disability delaying their education.*”¹¹² The waiver is limited to non-contact sports and the student’s participation cannot be scored for purposes of competition.¹¹³

2. A Primer on Funding New York Public Schools

Funding of public schools in the United States is decentralized and funds are distributed through non-uniform systems to states, districts, and individual schools.¹¹⁴ “Unfair describes school funding in New

¹¹⁰ WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW § 12:6 (“‘Red shirting’ is tendency of some schools and school districts to hold students back academically so they can develop their bodies and playing capabilities more in regards to athletic competition. To thwart this somewhat anti-intellectual tendency, some interscholastic associations have devised eligibility rules to prevent red shirting.”).

¹¹¹ *Id.* (“[T]he rationale for supporting one of these regulations is that the classification made by the high school athletic association’s rule—e.g., that, beginning with sixth grade, a student repeating any grade in school which he has passed shall lose his fourth year of eligibility in high school—is neither inherently suspect nor an encroachment on a fundamental right but is, rather, grounded in and reasonably related to a legitimate state interest, namely, defeating the anti-intellectual and anti-academic tendency of red-shirting activities.” (footnote omitted)).

¹¹² N.Y. COMP. CODES R. & REGS. tit. 8, § 135.4(c)(7)(ii)(1) (2016) (“A waiver shall only be granted upon a determination . . . that the given student meets the following criteria: (i) such student has not graduated from high school as a result of his or her disability delaying his or her education for one year or more; (ii) such student is otherwise qualified to compete in the athletic competition for which he or she is applying for a waiver and the student must have been selected for such competition in the past; (iii) such student has undergone a physical evaluation by the school physician, which shall include an assessment of the student’s level of physical development and maturity, and the school physician has determined that the student’s participation in such competition will not present a safety or health concern for such student; and (iv) the superintendent of schools or chief executive officer of the school or school system has determined that the given student’s participation in the athletic competition will not adversely affect the opportunity of the other students competing in the sport to successfully participate in such competition.”).

¹¹³ N.Y. COMP. CODES R. & REGS. tit. 8, § 135.4(c)(7)(ii)(2) (“Such student’s participation in the additional season of such athletic competition shall not be scored for purposes of such competition.”). *But see* *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) *judgment vacated, appeal dismissed*, 94 F.3d 96 (2d Cir. 1996) (invalidating a rule prohibiting a disabled athlete from scoring points, explaining that “[s]uch losses of points would negatively impact plaintiff’s self-esteem. In a close meet, the coach may be placed in the position of having to choose between allowing [plaintiff] to swim or losing the meet. The harm is immediate and irreparable.”).

¹¹⁴ Baker et al., *supra* note 6.

York.”¹¹⁵ Although the state ranks second highest in the nation in per pupil spending, this average spending does not reflect the way in which funds are distributed among districts.¹¹⁶ Fair funding requires a state to provide additional resources for districts serving students with additional, costly needs, such as high-poverty students, students with disabilities, and English language learners.¹¹⁷ In New York, low-wealth, high-poverty districts spend eighty-seven cents for every dollar spent in high-wealth, low-poverty districts.¹¹⁸

The Campaign for Fiscal Equity challenged the constitutionality of New York’s funding, alleging that the state’s finance system underfunded New York City public schools and thus denied New York City students their constitutional right to a sound, basic education.¹¹⁹ In 2006, the New York Court of Appeals determined that the existing state system for financing public education was unconstitutional.¹²⁰

The Court declared that the New York Constitution requires the state to provide the opportunity for a meaningful education, which includes providing additional funding to educate at-risk students.¹²¹ The legislature responded to the judgment, implementing a “Contracts for Excellence” accountability plan to provide roughly \$5.5 billion in increased operating aid for New York City’s schools, with an addition \$4 billion for schools in the rest of the state.¹²² The funds were to be distributed under a new “Foundation Aid” formula in order to more fairly distribute aid across the state.¹²³ The state designed this formula with the purpose of using “objective criteria to better target State funds to high needs districts.”¹²⁴ The approach purported to allocate per-pupil funds based on the legislature’s analysis of the actual cost of operating successful schools.¹²⁵ Adjustments were made to account for “efficiency” of distribution, “low property wealth,” and certain “needs-

¹¹⁵ *A Tale of Two States: Equity Outperforms Inequity*, EDUC. LAW CTR., PUB. POL. & EDUC. FUND OF N.Y. (Feb. 11, 2014), http://www.aqeny.org/wp-content/uploads/2014/02/Tale-of-Two-States-Report_FINAL.pdf. In this report, “fair” school funding is defined as a state finance system that ensures equal educational opportunity by providing a sufficient level of funding distributed to districts within the state to account for additional needs generated by student poverty. *Id.*

¹¹⁶ *Id.* “New York’s average funding level is \$16,752” annually per pupil.

¹¹⁷ *Id.* at 5.

¹¹⁸ Baker et al., *supra* note 6.

¹¹⁹ *Id.* at 24 (citing Campaign for Fiscal Equity, Inc. v. New York, 8 N.Y.3d 14 (2006)).

¹²⁰ Michael A. Rebell, *CFE v. State of New York: Past, Present and Future*, 13 N.Y. STATE BAR ASS’N: GOV’T, LAW. & POL. J. 24 (2011).

¹²¹ *A Tale of Two States*, *supra* note 115, at 3.

¹²² Rebell, *supra* note 120, at 25.

¹²³ *A Tale of Two States*, *supra* note 115, at 3.

¹²⁴ *School Aid Budgets (2008–2009 Archive)*, N.Y. STATE, DIV. OF THE BUDGET, <https://www.budget.ny.gov/pubs/archive/fy0809archive/eBudget0809/fy0809localities/schoolaid/schoolaid.html> (last visited Feb. 23, 2016).

¹²⁵ Rebell, *supra* note 120, at 26.

based” allocations.¹²⁶ However, the formula did not account for the additional costs of providing programs, staff, or resources for students with disabilities.¹²⁷

Not only did the legislature fail to provide additional funds to districts with higher populations of students with disabilities, but it also only complied with the disbursement plan for the 2007–2008 school year.¹²⁸ From 2010–2012, the state suspended the foundation funding and significantly reduced overall educational spending.¹²⁹ The national *School Funding Fairness* Report Card confirms the state’s failure to remedy its unconstitutional funding. In 2014, the Education Law Center’s report, *Is School Funding Fair? A National Report Card*, gave the state of New York an “F” and deemed it “regressive,” making it one of only five states actively allocating *less* to districts with high levels of student poverty and imposing budget cuts that target high-poverty districts.¹³⁰

3. The Current State of Athletic Funding in New York Public Schools

The State Education Department acknowledges the benefits of interscholastic athletic opportunities.¹³¹ Not surprisingly, however, when districts are faced with budget constraints, many lack the

¹²⁶ A Tale of Two States, *supra* note 115, at 3.

¹²⁷ *Id.* See also *State Aid to Schools: A Primer*, N.Y. STATE EDUC. DEP’T, at 22 (July 2014), <http://www.oms.nysed.gov/faru/PDFDocuments/Primer14-15.pdf> (“The Foundation Amount is the cost of providing *general education services*. It is measured by determining instructional costs of districts that are performing well.” (emphasis added)).

¹²⁸ Rebell, *supra* note 120, at 26. (“This increase was to be phased in over four years as follows: 20% in 2007–2008, 22.5% in 2008–2009, 27.5 % in 2009–2010, and the remaining 30% in 2010–2011. In 2007–2008, the governor and the legislature provided the 20% increase called for under the Act, and in 2008–2009 it provided a further significant increase, 17.5% (which was, however, a reduction from the original 22.5% commitment for that year). Thus, during the first two years of the phase-in period, foundation aid statewide was increased by approximately \$2.1 billion, leaving a balance of \$3.4 billion to be appropriated over the next two years.”).

¹²⁹ *Id.* at 26–27. (“The 2010–2011 school year should have been the fourth and final year of the phase-in. However, for that year, the state further extended the freeze on foundation aid, and further deferred the date for fully funding the promised increases. In addition, through a ‘gap elimination adjustment,’ basic foundation funding for education was actually reduced by about \$740 million for the 2010–2011 fiscal year. . . . The budget that the governor and the legislature have now adopted for 2011–2012 continues the freeze on foundation aid for a third year and deepens the ‘gap elimination’ cuts in operating aid to a total of \$2.56 billion, with foundation aid, on average, absorbing about 80% of that cut.” (citations omitted)).

¹³⁰ Baker et al., *supra* note 6, at 17.

¹³¹ New York State Selection/Classification Program for Interscholastic Athletic Programs, N.Y. STATE EDUC. DEP’T (Mar. 2005), <http://www.p12.nysed.gov/ciai/pe/documents/scrivised2005.pdf> (“[P]hysical education and interscholastic athletic competition are important to the development of the whole child and . . . students benefit when they can participate in such activities at appropriate levels of maturity and physical ability.”); See also N.Y. EDUC. LAW § 803(1) (McKinney 2015) (“Such courses shall be designed to aid in the well-rounded education of pupils and in the development of character, citizenship, physical fitness, health and the worthy use of leisure.”).

resources necessary to maintain existing athletic departments and cannot afford to hire more staff and create new programming.¹³² Moreover, at least one New York court has held that a school district which cut athletic spending in order to ensure its “basic educational mission” was not required to provide any funding at all for interscholastic athletics, either for disabled or non-disabled individuals.¹³³

Administrators in New York public school districts determine how to spend their allotted budget.¹³⁴ Athletics are included under a discretionary umbrella of funds.¹³⁵ When faced with the aforementioned budgeted constraints, athletics are often the first to shoulder the burden. For example, when the state cut funding for the 2011–2012 school year,¹³⁶ the Syracuse City School District cut approximately \$1 million from its athletic expenditures.¹³⁷

Wealthier New York districts spend more per student on athletics. To illustrate, the Byram Hills School District, with a total enrollment of 2,643 students, allotted \$954,200 to interscholastic athletics for the 2014–2015 school year.¹³⁸ By contrast, the Utica City School District only allotted \$306,250 to fund athletics for its 9,709 students.¹³⁹

In New York City, the Public Schools Athletic League (PSAL) funds high school athletics for 37,000 students at the roughly 400 member schools.¹⁴⁰ Principals can request funding from PSAL’s \$23 million budget by filing a new team request.¹⁴¹ The school must demonstrate a “high level of student interest for the team that is

¹³² Dearden et al., *supra* note 3.

¹³³ *Polmanteer v. Bobo*, 19 A.D.3d 69, 74–83, 794 N.Y.S.2d 171 (4th Dep’t 2005) (confirming the district’s authority in allocation funds because, “given the budget reductions already made by the District in ‘staffing and personnel costs,’ the District could not fund interschool athletics and extracurricular activities without imperiling its basic educational mission. . . . To construe the statute as prohibiting a board of education from eliminating certain ordinary contingent expenses, particularly including such non-core items as interschool athletics . . . would likely result in the imposition of irreconcilable statutory obligations upon a board of education, as this case illustrates.”) (citations omitted).

¹³⁴ N.Y. EDUC. LAW § 2576 (McKinney 2016).

¹³⁵ N.Y. EDUC. LAW § 2601–a(5) (McKinney 2016). “Such contingency budget shall include the sum determined by the board to be necessary for: . . . (f) expenses incurred for interschool athletics, field trips and other extracurricular activities.” *Id.* § 2601–a(5)(f).

¹³⁶ *Rebell*, *supra* note 120.

¹³⁷ Donnie Webb, *Budget Cuts Force High Schools to Trim Down Athletics*, SYRACUSE.COM, <http://highschoolsports.syracuse.com/news/article/8968877660456701839/budget-cuts-force-high-schools-to-trim-down-athletics/> (last updated Aug. 22, 2013, 3:20 PM).

¹³⁸ *Proposed School Budget 2014–15*, BYRAM HILLS SCH. DIST., <http://www.byramhills.org/files/filesystem/2014-15-BudgetBrochure.pdf> (last visited Feb. 23, 2016).

¹³⁹ *Business and Finance*, UTICA CITY SCH. DIST., <http://www.uticaschools.org/site/default.aspx?PageID=244> (last visited Feb. 23, 2016).

¹⁴⁰ *Mission*, PUB. SCHS. ATHLETICS LEAGUE, http://www.psal.org/articles/article-detail_sp.aspx?21945 (last updated Jan. 21, 2015).

¹⁴¹ *New Team Request Procedures for 2014–2015*, PUB. SCHS. ATHLETICS LEAGUE (May 28, 2014), <http://www.psal.org/articles/article-detail.aspx#23546>.

requested,” the “availability of facilities to support the team requested,” and must commit to hire and train a New York City certified teacher as a coach and to “support the requested team financially” by providing uniforms and equipment necessary for participation.¹⁴² Schools without these resources are denied PSAL funding, resulting in both racial and economic disparities in the provision of athletics. A complaint filed in November 2014 with the U.S. Department of Education by David Garcia-Rosen, Dean of International Community High School in the Bronx and founder of the Small Schools Athletic League, alleges that *all* schools without any PSAL-funded teams are schools with student bodies comprised of ninety percent or more minority students and with the highest rates of free or reduced lunch.¹⁴³

4. The Letter’s Impact in New York

Out of New York’s 3,074,000 students, 476,484 have physical or mental disabilities.¹⁴⁴ Although the Letter does not announce a new legal standard for providing athletics to these students,¹⁴⁵ it is useful to examine precedent in New York and the potential implications on these cases in light of the Letter’s guidance.

Baker v. Farmingdale Union Free School District questioned whether the “best interests” of a visually impaired student were served by allowing her participation on the swimming and track and field teams.¹⁴⁶ The plaintiff, Amanda Baker, required modifications for participation due to blindness caused by neurofibromatosis.¹⁴⁷ As a member of the swim team, Amanda required the use of a kickboard in her lane as well as someone to accompany her to meets hosted at other schools.¹⁴⁸ In order to compete on the track team, Amanda needed a guide or companion to assist her during practices and competitions.¹⁴⁹ The court granted part of Baker’s claim, holding that because of her extensive experience swimming, it was in her best interest to participate and that she would not cause a hazard to herself or others.¹⁵⁰ However,

¹⁴² *Id.*

¹⁴³ Interview with David Garcia-Rosen, Dean of International Community High School in the Bronx and founder of the Small Schools Athletic League (Sept. 19, 2014).

¹⁴⁴ Data Summaries on Children with Disabilities Receiving Special Education Programs & Services, N.Y. STATE DEP’T OF EDUC., <http://www.p12.nysed.gov/sedcar/goal2data.htm#2012> (last updated July 8, 2015).

¹⁴⁵ *See* Part II *supra*.

¹⁴⁶ *Baker v. Farmingdale Union Free Sch. Dist.*, 887 N.Y.S.2d 766 (Sup. Ct. Nassau Cty. 2009). The court adopted the standard set forth in New York Education Law § 3208-a(3), which states that “[t]he court shall grant such petition if it is satisfied that it is in the best interest of the student to participate in an athletic program and that it is reasonably safe for him to do so.” N.Y. EDUC. LAW § 3208-a(3) (McKinney 2016).

¹⁴⁷ *Baker*, 887 N.Y.S.2d at 767.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (“Her record of performance coupled with her keen desire to participate in the respondent

because neither the parent nor the school had produced a plan to ensure her safety on the track and field team, the court denied her petition for participation.¹⁵¹

The Second Circuit ruled in favor of a student with cerebral palsy who, as a result of his condition, was deprived of equal access to the athletic facilities.¹⁵² The court compared this student's access to the athletic facilities with that of "all other students at Woodland Middle School,"¹⁵³ affirming the jury verdict that the ten minute detour the student was forced to take to get to the fields for his duties as manager of the football team and for his physical education class denied him meaningful access. The court viewed the evidence in a light most favorable to the plaintiff, holding that the school violated the ADA and Rehabilitation Act for failure to provide him with reasonable accommodations for accessing the facilities.¹⁵⁴

As mentioned above, despite the Letter's guidance, ensuring equal athletic opportunities for disabled students is not a "cookie cutter" process but instead entails a detailed, individual inquiry into each student's needs and each school's resources. The Second Circuit has also confronted the issue of *who* is responsible for implementing *what* services in order to ensure a student's participation. A visually impaired student alleged that her school had failed to provide her with the supplies and aids needed for full participation.¹⁵⁵ The court ruled that the school's failure to provide services was not attributable to a violation of Section 504, but rather to deficiencies in the student's IEP.¹⁵⁶

The issuance of the Dear Colleague Letter would potentially alter each of the aforementioned cases. New York school districts should consider the Dear Colleague Letter as the signaling of an era that "warrants more affirmative efforts" for the benefits of these students

school district swimming events and the safeguards put in place by the presence of a companion or guide give reasonable assurance to Court that it is in her best interest to participate in such swimming activities and that it is safe for her to do so.").

¹⁵¹ *Id.* at 768 ("The absence of a specific plan by either the petitioner or respondent to supervise and monitor her performance in track and field events, beyond the presence of a companion or guide who would run nearby her militate against Amanda's involvement in such activities.").

¹⁵² *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85, 88 n.1 (2d Cir. 2010) ("The jury found that there were three areas of the school that had the effect of denying Celeste access to the programs offered there: (1) the walkway between the gym and athletic fields, (2) the gates between the gym and athletic fields, and (3) the athletic [and/or] physical education programs on the athletic fields.")

¹⁵³ *Id.* at 88 (citation omitted).

¹⁵⁴ *Id.*

¹⁵⁵ *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478 (2d Cir. 2002).

¹⁵⁶ *Id.* at 489 ("IEPs failed to spell out the services to be provided. . . . [The IEP includes] long lists of abstract goals . . . but are virtually silent as to what materials or services the school should provide. In order to identify those services . . . we are left either to speculation or to reliance on extrinsic evidence . . .").

with disabilities.¹⁵⁷ For example, the emphasis in *Baker* was whether it was in the student's "best interest" to participate on the swimming and track and field teams despite her visual impairment.¹⁵⁸ Instead, the analysis should follow that which is prescribed in the Rehab Act: (1) whether the student had a disability; (2) whether the student otherwise qualified for participation; (3) whether the student was excluded from participating solely on the basis of the disability; and (4) whether the denial was discriminatory because the student could have participated with a reasonable modification.¹⁵⁹ Amanda's partial visual impairment impacted areas of her life beyond solely athletics and is thus qualified under Section 504.¹⁶⁰ She was also otherwise qualified, as she had the reasonable physical qualifications for athletic participation.¹⁶¹ The only grounds for denying her participation were her visual impairment and the school's fear for her personal safety. Lastly, in regards to reasonable accommodations, Amanda requested the use of a kickboard in the pool and a companion to accompany her during track and field participation. Under the Letter's newly articulated guidance, it is plausible that the court would have mandated her participation in both sports, holding the school responsible for creating the necessary accommodations. As the Letter clarifies, this school would be held in violation of Section 504. The Letter provides an example of a student with a hearing impairment who needs a visual cue for participation in the track and field team, and clarifies that the visual cue, which in *Baker* would be an auditory cue, "does not alter an essential aspect of the activity or give this student an unfair advantage over others."¹⁶²

5. Hurdles to Implementation in New York

The unintended consequences of socioeconomic disparities on disabled students should inform how state and district decision-makers interpret the federal OCR guidance. Through individual lawsuits and developments in state legislation, positive changes can be made to allow for participation. However, in order to avoid lengthy litigation and potentially moot claims,¹⁶³ problems should be addressed by multidisciplinary teams that implement a student's IEP. As student

¹⁵⁷ Zirkel, *supra* note 34, at 18 ("OCR's latest Dear Colleague letter, like periodic earlier agency guidance, serves more as a positive and proactive use of the bully pulpit to stimulate reform in a normative direction rather than as a representative recitation of legal requirements as interpreted by the courts.")

¹⁵⁸ *Baker v. Farmingdale Union Free Sch. Dist.*, 877 N.Y.S.2d 766 (Sup. Ct. Nassau Cty. 2009).

¹⁵⁹ Lakowski, *supra* note 3, at 292-93.

¹⁶⁰ *Id.* at 293.

¹⁶¹ *Baker*, 877 N.Y.S.2d 766.

¹⁶² Letter, *supra* note 1, at 8-9.

¹⁶³ See, e.g., *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) *judgment vacated, appeal dismissed*, 94 F.3d 96 (2d Cir. 1996) (dismissing student's claim because athletic season had ended).

strengths and talents are recognized, critical stakeholders should be brought to the table to discuss participation in extracurricular activities and to take note of the policies and limitations that should be considered and faced before a student is deemed ineligible to participate.¹⁶⁴

To illustrate, New York Education Law Section 3208–a prescribes the process for a special proceeding to determine the physical capacity of a student to participate in athletic programs—both adapted physical education and interscholastic athletic activities.¹⁶⁵ Assuming the school has existing athletic teams that a disabled student wants to join, the first step is a “medical examination conducted by the school physician.”¹⁶⁶ Based on this examination, the school district makes a determination as to whether the student is capable of participating, or, as a result of their physical impairment, is not permitted.¹⁶⁷ This initial hurdle is potentially problematic for both schools and students, as school physicians are funded by the district and are responsible for numerous schools.¹⁶⁸ This physical examination by a school physician is mandated by state law, yet, access to a school physician requires tremendous coordination between parents, students, and individual school administrators. For example, the New York City Department of Education operates 142 School-Based Health Centers (SBHCs) to provide various medical services, including the Pre-participatory Sports Examination.¹⁶⁹ However, the city reported a gap in communication between principals and SBHC staff, as well as an insufficient availability of services.¹⁷⁰ It is not difficult to imagine a student and his

¹⁶⁴ Dearden et al., *supra* note 3, at 23.

¹⁶⁵ N.Y. EDUC. LAW § 3208–a (McKinney 2016).

¹⁶⁶ *Id.* § 3208–a(1).

¹⁶⁷ *Id.*

¹⁶⁸ New York State provides the following procedure for districts’ employment of School Physicians: “[t]he board of education, and the trustee or board of trustees of each school district, shall employ, at a compensation to be agreed upon by the parties, a qualified physician, or a nurse practitioner to the extent authorized by the nurse practice act and consistent with the written practice agreement pursuant to subdivision three of section six thousand nine hundred two of this chapter, to perform the duties of the director of school health services, including any duties conferred on the school physician or school medical inspector under any provision of law, to perform and coordinate the provision of health services in the public schools and to provide health appraisals of students attending the public schools in the city or district.” N.Y. EDUC. LAW § 902(2)(a) (McKinney 2016). For example, the New York City Department of Education defines the School Health Physician as a “board certified/eligible pediatrician with public health knowledge who cares for the school children and adolescents in a designated number of public schools and parochial schools in all NYC boroughs. He/she is the physician for the child/adolescent who has not complied with the mandated . . . Pre-participatory Sports Examination . . .” N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/Offices/Health/SBHC/SBHC.htm> (last visited Sept. 15, 2016).

¹⁶⁹ *School-Based Health Centers*, N.Y.C. DEP’T OF EDUC., <http://schools.nyc.gov/Offices/Health/SBHC/SBHC.htm> (last visited Feb. 23, 2016).

¹⁷⁰ Marcelo De Stefano et al., *Bridging the Gap Between Principals and School-Based Health Center Staff*, N.Y.C. DEP’T OF EDUC., OFFICE OF SCH. HEALTH, <http://schools.nyc.gov/NR/rdonlyres/0130F78B-2D8E-4711-B7E0->

parents being thwarted from securing the physical examination from a school physician in a timely manner in order to ensure the student is qualified to participate by the start of the sport's season.¹⁷¹

If a student and his parents have the resources and resilience to protest a determined ineligibility, New York Education Law Section 3208—a provides that the “student may commence a special proceeding in the supreme court . . . in the county in which the student resides or in the county in which the school district is located.”¹⁷² State law requires the student provide affidavits of at least two licensed physicians setting forth that, in their opinion, the student is physically capable of participating in an athletic program, that participation would be reasonably safe, as well as any special or preventive measures or devices needed to protect the student.¹⁷³ Subsequently, the court will grant the petition if it is satisfied that it is in the “best interest of the student” to participate in the specified athletic program, and that it is reasonably safe for him to do so.¹⁷⁴ However, the state is not responsible for funding or providing the specialized or preventative measures and devices to ensure full, safe participation unless specifically included in the student's IEP.¹⁷⁵

8D3C93145454/68364/Paper_BridgingtheGap_093020091.pdf, at 13 (last visited Feb. 23, 2016) (“A further concern for principals relates to SBHC medical staff absences that complicate the normal operation of a SBHC, in particular when the SBHC does do not have funding to provide coverage. . . . Under the current economic crisis and, because of the limited funding they receive, SBHCs need as much support from the school as possible.”).

¹⁷¹ It is also interesting to note that, in certain cases where the student's physical impairment is relatively “simple,” this physical examination could be conducted by a school nurse. See Alison Nodvin Barkoff, *Revisiting De Jure Educational Segregation: Legal Barriers to School Attendance for Children with Special Health Care Needs*, 8 CORNELL J.L. & PUB. POL'Y 135, 136–37 (1998). However, in New York State, there is also a chronic shortage of school nurses, with each nurse servicing an average of 1,007 students. *A National Look at the School Nurse Shortage*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/35691.htm> (last visited Feb. 23, 2016).

¹⁷² N.Y. EDUC. LAW § 3208–a(1) (McKinney 2016).

¹⁷³ *Id.* § 3208–a(2). It is also important to recognize that securing two affidavits from independent doctors is much harder for a child living in poverty. See Janet Currie, *Poverty Among Inner-City Children*, in *MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA* (Robert P. Inman ed., 2009) (“Roughly 20 percent of children receive no doctor visits at all in a given year, although it is recommended that children receive at least an annual checkup. . . . Children on Medicaid are more likely than uninsured children to have a usual source of care, and to receive routine care on an appropriate time frame, but they are less likely than privately insured children to be seen in doctor's [sic] offices rather than clinics or emergency rooms.”).

¹⁷⁴ N.Y. EDUC. LAW § 3208–a(3). See also *Dennin v. Conn. Interscholastic Athletic Conf., Inc.*, 913 F. Supp. 663, 667 (D. Conn. 1996) *vacated, appeal dismissed*, 94 F.3d 96 (2d Cir. 1996).

¹⁷⁵ N.Y. EDUC. LAW § 3208–a(7). See also *Pace ex rel. Pace v. Dryden Cent. Sch. Dist.*, 574 N.Y.S.2d 142, 144 (Sup. Ct. Tompkins Cty. 1991) (“Petitioners' lawyer has made them aware that by choosing this course they waive any liability claim against the district in the event that the subject injury does occur. The medical affidavits supporting their position—one from a specialist in urology, the other from Mark's family physician—provide ample information from which to conclude not only that Mark's continued participation in contact sports is ‘reasonably safe’ but that the medical professionals have discussed with Mark and his parents the health risks involved. It is equally clear to the court—from the four corners of the petition and other thoughtful writings submitted therewith—that Mark's parents fully understand the risks and legal consequences

IV. INFORMED FUTURE GUIDANCE

The OCR issued another “Dear Colleague” letter (the “2014 Letter”) on October 1, 2014, addressing school districts’ legal obligations under Title VI of the Civil Rights Act of 1964.¹⁷⁶ The 2014 Letter addresses chronic and widespread racial disparities in access to high-quality educational facilities and resources. It notes that athletic opportunities “build students’ academic and social skills outside of class,”¹⁷⁷ asserting that students of color should not be consigned to “dilapidated” athletic facilities.¹⁷⁸ The 2014 Letter should also be read as a notice of heightened compliance oversight, forcing district administrators to be aware of their legal obligation to examine policies and practices for resource allocation, as well as ensuring that the distribution of funding does not have the “unjustified effect” of discriminating against racial minorities in underserved schools.¹⁷⁹

States are legally bound by the ADA and Section 504 and have been since each law’s respective promulgation.¹⁸⁰ However, it is clear that merely encouraging school districts to create additional programs or to form partnerships is not sufficient. Instead, the federal government must promulgate regulations akin to those passed in the wake of Title IX, clarifying when “should”¹⁸¹ becomes a “must” in the context of providing athletic opportunities for students with disabilities.

Maryland’s state legislature passed the Fitness and Athletic Equity for Students with Disabilities Act, which requires school districts to report annually to the Maryland State Department of Education with details of their compliance with Section 504.¹⁸² The Act recognizes that the schools will need technical assistance in making case-by-case determinations, and the State Department of Education has collaborated with Special Olympics Maryland in order to work directly with districts and administrators to ensure compliance with federal mandates.¹⁸³

In the meantime, or as an alternative to clarified federal guidance,

attendant to the mature decision which they have made, in unity with their son, that the assumption of that risk is outweighed by the potential benefits to Mark from continuing to participate in football and basketball and to contribute to the teams which represent his school. Mark and his parents obviously believe that his ‘best interests’ in growing toward the person he can be lie with such participation.”)

¹⁷⁶ Catherine E. Lhamon, “*Dear Colleague*” Letter, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS (Oct. 1, 2014), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf> [hereinafter *2014 Letter*].

¹⁷⁷ *Id.* at 3.

¹⁷⁸ *Id.* at 4.

¹⁷⁹ *Id.* at 6.

¹⁸⁰ Telephone Interview with Terri Lakowski, *supra* note 43.

¹⁸¹ Letter, *supra* note 1, at 12.

¹⁸² Md. Code Ann., Educ. § 7-4B (West 2016).

¹⁸³ Fitness and Athletic Equity for Students with Disabilities: 2013 Report, MD. STATE DEP’T OF EDUC., [http://dlslibrary.state.md.us/publications/Exec/MSDE/ED7-4B-05\(d\)_2013.pdf](http://dlslibrary.state.md.us/publications/Exec/MSDE/ED7-4B-05(d)_2013.pdf) (last visited Feb. 23, 2016).

New York must issue a “roadmap” to each district’s administration detailing a plan for compliance monitoring and outlining available state resources for districts to increase inclusion, with necessary modifications, or, if necessary, to offer alternative athletic opportunities.¹⁸⁴ New York officials should take proactive steps to expand access to athletics for its underserved districts and to provide guidance for district administrators so that they can remedy existing inequitable resource allocation amongst their schools.¹⁸⁵ Each New York district should review its current athletic offerings, focusing on and prioritizing the equitable distribution of funding to districts with low academic achievement, high poverty students, and budget constraints.¹⁸⁶ New York should either increase its funding for at-risk students or create special funding programs outside of the state’s primary funding formula.¹⁸⁷

The following provides one example of successful collaboration, which could be replicated if additional regulations and oversight were provided. The Letter directs school districts to be “flexible” in designing additional athletic opportunities when students cannot fully and effectively participate in mainstream programs.¹⁸⁸ An alternative method is to form partnerships with existing organizations specialized in adapted athletics. For example, a new initiative in New York between the New York State Public High School Athletic Association and Special Olympics New York launched an inclusive Unified Sports program that combines an approximately equal number of athletes with intellectual disabilities and “partners,” or students without disabilities,

¹⁸⁴ Telephone Interview with Terri Lakowski, *supra* note 43.

¹⁸⁵ The Letter offers the following suggestion: “[i]n some cases, remedies might include finding ways for schools to share facilities such as athletic fields or auditoriums if that can be done without placing additional burdens in areas such as scheduling and transportation disproportionately on the same students who were being denied the facilities in the first place.” 2014 Letter, *supra* note 176, at 4. However, the OCR cautions that it “would accept sharing of facilities and other physical resources *only as a last resort or as a temporary measure* while the district and local officials raised the capital funds to provide additional facilities.” *Id.* at 24 (emphasis added).

¹⁸⁶ Currently pending is *Maisto v. State of New York*, a resource equity case brought by parents and children in eight small city school districts across New York State. *See Maisto v. New York*, Supreme Court, Albany County, Index No. 8997/0808. The Education Law Center reports that the failure of the State to adequately fund schools denies students in all eight districts the basic resources they need for a sound basic education. The *Maisto* districts all have low property wealth, higher than average local tax rates, significant family poverty and high student need. These districts struggle to educate their students without enough funding to provide reasonable class sizes, a full and rigorous curriculum, programs for high-needs students, and other essentials for academic success.

Maisto (“Small Cities”) Overview, EDUC. LAW CTR., <http://www.edlawcenter.org/cases/maisto-overview.html> (last visited Feb. 23, 2016).

¹⁸⁷ Educ. Comm’n of the States, *Who Pays the Tab for K-12 Education?*, 14(4) PROGRESS OF EDUC. REFORM 4 (2013).

¹⁸⁸ Letter, *supra* note 1, at 12.

on teams for training and competitions.¹⁸⁹ To date, there has been a pilot basketball program in one of eleven state sections.¹⁹⁰

CONCLUSION

It must be recognized that providing athletic opportunities for disabled students mandates consideration of broader educational inequalities. Analysis of recent federal data confirms that for the first time in at least fifty years, the majority of U.S. public school students come from low-income families.¹⁹¹ This statistic has profound implications for shaping funding decisions, as it highlights the importance of allotting funds to “wraparound services,” such as athletic opportunities, to address and overcome the existing opportunity gaps.¹⁹²

The U.S. Supreme Court, in discussing the legislative history of the Rehabilitation Act, observed that discrimination against disabled individuals is most often not indicative of hostility or malevolence “but rather of thoughtlessness and indifference-of benign neglect.”¹⁹³ State and district athletic associations should be prepared to explain the purpose of their eligibility requirements and rules of competition in order to articulate the connection between the requirements and purpose and to evaluate, on an individual basis, whether modification of such rules can be made without undermining the legitimate purpose or fundamentally altering the nature of the game. The playing field becomes balanced when athletes with disabilities are also given an equal opportunity to participate.

*Olivia Clement**

¹⁸⁹ *Unified Sports*, N.Y. STATE PUB. HIGH SCH. ATHLETIC ASS'N, <http://www.nysphsaa.org/Portals/0/PDF/Handbook/20142015%20Handbook/Unified%20Sports%20814.pdf> (last visited Feb. 23, 2016).

¹⁹⁰ N.Y. COMP. CODES R. & REGS. tit. 8, § 135.1(v) (2016) (“*Section* means an organization of schools within a specified geographic area which holds membership in an athletic association, and is established for the purpose of administering athletic programs for the member schools and leagues within such area.”).

¹⁹¹ Lyndsey Layton, *Majority of U.S. Public School Students Are in Poverty*, WASH. POST (Jan. 16, 2015), https://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4_story.html. See also *A New Majority Research Bulletin: Low Income Students Now a Majority in the Nation's Public Schools*, SOUTHERN EDUC. FOUND., <http://www.southerneducation.org/Our-Strategies/Research-and-Publications/New-Majority-Diverse-Majority-Report-Series/A-New-Majority-2015-Update-Low-Income-Students-Now> (last visited Feb. 23, 2016) (stating that the national average of low income students in public schools is fifty-one percent, and forty-eight percent of New York public school students are low income).

¹⁹² Layton, *supra* note 191.

¹⁹³ *Alexander v. Choate*, 469 U.S. 287, 295 (1985) (footnote omitted).

* *Cardozo Arts & Ent. L.J.* Vol. 34, J.D., Benjamin N. Cardozo School of Law (2016); B.A., History, University of Pennsylvania (2010). Thank you Stephanie Diehl and Professor Leslie Salzman for your invaluable insight. Thank you to kids playing sports everywhere! © 2016 Olivia Clement.