



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION XV

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Re: OCR Docket #15-11-1080,
OCR Docket #15-12-4010
OCR Docket #s 15-13-5901 - 15-13-5904

Dear Messrs/Mmes:

This is to notify you of the disposition of the above-referenced complaints and directed investigations that were opened by the U.S. Department of Education (the Department), Office for Civil Rights (OCR). The initial complaint (#15-11-1080) was filed against the Wooster City School District (District) on January 24, 2011. The complainant alleged that the District denied a student with a disability (the Student), who uses a wheelchair, an equal opportunity to participate on the District's middle school track team during the 2009-2010 and 2010-2011 school years.

On December 30, 2011, OCR opened a related complaint (#15-12-4010) against the Ohio High School Athletic Association (OHSAA), as OCR determined that OHSAA, as the organization responsible for setting athletic participation rules for the District and an entity involved in the District's alleged denial of equal opportunity to the Student, was a necessary party to the resolution of the complaint against the District.

Subsequently, on April 15, 2013, pursuant to its authority under 34 C.F.R §100.7(c), OCR opened directed investigations (#15-13-5901 through #15-13-5904) against four school districts in the District's athletic conference, the Ohio Cardinal Conference ("OCC"): Ashland City School District, Lexington Local School District, Madison Local School District, and Mansfield City School District (hereafter collectively referred to as "the OCC Districts"). OCR opened these investigations to examine whether these OCC Districts were discriminating against the Student by denying him an equal opportunity to participate in track meets held during the 2012-2013 spring season.

OCR is responsible for enforcing Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. § 794, and its implementing regulation, 34 C.F.R. Part 104. Section 504 prohibits discrimination on the basis of disability by recipients of Federal financial assistance from the Department. As recipients of Federal financial assistance from the Department, the District and the OCC Districts are subject to the requirements of Section 504. OHSAA, while not a direct recipient of Federal financial assistance, is also subject to Section 504. OHSAA is subject to the provisions of Section 504 because its members are recipients of Federal financial assistance who have ceded to OHSAA controlling authority over portions of their interscholastic athletics programs. Although membership in OHSAA is voluntary, all public middle and high schools in Ohio that offer competitive interscholastic athletic programs are OHSAA members and failure to join OHSAA precludes an Ohio public school from engaging in interscholastic athletic competition against other Ohio public schools. OHSAA sets qualifications for the members of its Board of Directors and exercises ultimate authority over qualifications for coaches and participating athletes, rules governing individual athletic competitions and tournaments, and scheduling of athletic competitions. In addition, OHSAA is empowered to sanction public middle and high school athletics programs and athletes for violations of OHSAA rules.

OCR is also responsible for enforcing Title II of the Americans with Disabilities Act of 1990 (Title II), 42 U.S.C. § 12132 *et seq.*, and its implementing regulation, 28 C.F.R. Part 35. Title II prohibits discrimination on the basis of disability by public entities.¹ As public entities, the District and the OCC Districts are subject to the requirements of Title II. OHSAA, although a private entity, is also subject to the requirements of Title II. Specifically, the regulation implementing Title II, at 28 C.F.R. § 35.104, defines a public entity in part as any state or local government; and any department, agency, special purpose district, or other instrumentality of a state or states or local government. While OHSAA is a private organization, OHSAA's control over public school districts' interscholastic athletics, as discussed above, makes OHSAA an instrumentality of the State of Ohio, and thus a public entity for purposes of Title II.

Based on the complaint allegations and the information that led to the opening of the directed investigations, OCR investigated the following legal issue: whether the District, OHSAA, and the OCC Districts denied a qualified student with a disability an equal opportunity to participate in an Ohio school district's track program in violation of the

¹ All of the legal obligations discussed in this letter are required by both Title II and Section 504.

regulation implementing Section 504 at 34 C.F.R. § 104.37(c) and the regulation implementing Title II at 28 C.F.R. § 35.130.

OCR investigated these issues by reviewing documentation submitted by the District, OHSAA, the OCC Districts, and the Complainant. OCR also interviewed the Complainant, relevant District and OHSAA staff, and representatives from the OCC Districts.

After reviewing the above information, OCR finds that the District and OHSAA denied the Student an equal opportunity to participate in the District's athletic program in violation of Section 504 and Title II. In particular, they denied the Student an equal opportunity to participate in the District's middle school athletic track program in violation of Section 504 and Title II when the Student was not permitted to race on the same track at the same time as individuals racing on foot during the 2010 or 2011 track seasons and was not given the opportunity to earn points for his team when no other wheelchair racer was competing. This case does not raise, and OCR does not address, whether students in wheelchairs must be allowed to compete against (and not just race alongside) students without disabilities in the same race, competing for the same points.

The District agreed to enter into an agreement with OCR to voluntarily resolve the issues raised in the complaint. On February 11, 2013, the District signed the enclosed Resolution Agreement to resolve the issues raised. Subsequently, the District implemented the terms of the enclosed Resolution Agreement and is in compliance with the regulation implementing Section 504 and Title II with respect to the issues in this complaint. In addition, OHSAA took actions that resolved the issues raised in the complaint. With respect to the directed investigations, OCR's investigation revealed that the OCC Districts also took actions to resolve the allegation raised by those investigations. OCR is therefore closing the complaints against Wooster and OHSAA and the directed investigations against the OCC Districts effective the date of this letter. We set forth below the reasons for the foregoing determinations.

- **Summary of OCR's Investigation**

During the 2009-2010 school year, the Student who is the subject of these complaints attended the District's middle school (the middle school). The Student is a student with a disability and uses a wheelchair.

On August 12, 2009, at a middle school open house, the Student informed the middle school athletic director that he wanted to participate on the track team as a sprinter, and he turned in the necessary athletic participation forms. Subsequently, the Complainant asked for a meeting with the then-athletic director and the principal to discuss the Student's participation on the track team. The track season is in the spring. The Complainant stated that she was then contacted by the school counselor, who informed her that the meeting she requested had been scheduled for August 20, 2009, and that the school had contacted OHSAA, which sets athletic participation rules for the District, and that the District had information for her. The Complainant contends that she met with the

athletic director, the principal, the assistant principal, and the counselor on August 20, 2009, and that at this meeting the athletic director informed her that OHSAA had informed him that the Student could not participate on the track team due to “competitive inequity.” The Complainant stated that she asked how to appeal the decision and the athletic director referred her to the associate commissioner of OHSAA.

The Complainant stated that, on August 21, 2009, she sent a letter to the associate commissioner and the assistant commissioner of OHSAA asking that the Student be permitted to join the track team. On August 26, 2009, the associate commissioner responded that all requests for modifications had to come from the school itself. The Complainant thereafter asked the principal to contact OHSAA on the Student’s behalf.

In early October 2009, the middle school principal wrote OHSAA and asked OHSAA to review whether the Student would be eligible to participate in sprinting events in his track chair. The associate commissioner wrote back on October 21, 2009. The letter stated in relevant part:

Your request has prompted some research into the area of interscholastic track and field competition for persons with disabilities who use wheelchairs to compete. We have found that several state associations conduct event competition for athletes who use wheelchairs, and OHSAA is committed to further exploration of this opportunity for high school students in OHSAA regular season and post-season tournament events. No state, however, provides for competition in track events between athletes in wheelchairs and footed athletes in the same race. To permit this competition would fundamentally alter the event and could place students at risk.

Therefore, [the Student] may compete in track events that his coach would deem appropriate provided he maintains compliance with the three event limitation and the track events are not competed against footed athletes.

The Complainant subsequently met with the assistant principal, the middle school athletic director, the assistant athletic director, the track coach, a guidance counselor, and the District’s athletic director to discuss OHSAA’s response and the Student’s participation on the middle school track team. Ultimately, the school offered to allow the Student to participate on the track team, including sprinting events, but stated that his participation in running competitions would be “exhibition” only. This meant that the Student would have to race on the track alone, in a separate heat², and would not earn any points for his team. The only exception would be where the other school the District was competing against had a wheelchair athlete in the same race, in which case the Student could race

² A “heat” for purposes of a track meet is a single round of a race or event having two or more rounds for each contestant, or one of several preliminary contests held to eliminate contenders. For example, if there were 32 participants in the 100-meter dash, four preliminary “heats” might be run, with eight participants in each heat, to determine who will compete in the final.

against that athlete and earn points for his team. However, the Complainant noted that there was only one other wheelchair athlete at any of the schools the District's track team regularly competed against.

Throughout the 2010 track season, the Student participated on the track team, including competing in sprinting events. He raced in a separate heat, alone on the track, and did not earn points for his team, the only exception being one occasion where another team had a wheelchair athlete against whom the Student could compete.

In late 2010, the Complainant contacted the District about the Student's participation on the track team for the upcoming 2011 season. She asked that the Student be permitted to participate in sprinting events and earn points for his team. She explained, however, that she was not asking that the Student be permitted to compete against athletes who were running on foot, but that he be allowed to race with these athletes, *i.e.*, on the same track at the same time. The Complainant later asked the principal if he had heard any response to this request from OHSAA, and the principal stated that the District's athletic director had contacted OHSAA's associate commissioner by phone, and that she had indicated that OHSAA's ruling from the previous year had not changed.

On January 29, 2011, the Complainant emailed the principal and stated that she believed that OHSAA was confused about what she was asking for. She explained again that she wanted the Student to be able to race with but not against the athletes who were running on foot. Specifically, she did not want the Student to race alone in an exhibition if no other wheelchair racers were present. Instead, she wanted the Student to run his separate heat on the same track at the same time as the other athletes, but not have his time compared against their times. The Complainant informed OCR that many track competitions already do "mixed heat" races in order to save time.³ For example, she explained that at times male and female runners run the same race on the same track at the same time, with the female athletes' times being compared only to the other female athletes' times and the male athletes' times being compared only to the other male athletes' times. She wanted something similar for the Student.

On January 30, 2011, the principal responded via email, stating in part:

I don't believe OHSAA is confused at all. We have explained to them on several occasions (in writing and on the phone) what we would like to see and they have not allowed this at this time. I understand your frustration and we can only hope that at some point down the road, their position will change.

The Student participated on the track team during the 2011 season, practicing alongside his teammates and competing in heats by himself at track meets as he had the previous year.

³ A "mixed heat" would refer to several different heats occurring on the track at the same time.

After OCR began its investigation, OCR determined that it was necessary to open a complaint against OHSAA in order to fully resolve the original complaint allegation. Specifically, the District informed OCR that it could not allow the Student to participate in mixed heat races or earn points for his team without approval from OHSAA, which regulates and administers all aspects of interscholastic athletic competitions for school districts in Ohio. While membership in OHSAA is voluntary, because all Ohio school districts belong to OHSAA, if the District were excluded from OHSAA for violating its rules, it would essentially be precluded from participating in interscholastic athletic competition altogether. Further, the District had no authority to require the other school districts it competed against to allow the Student to compete in mixed heat races or earn points for his team if OHSAA determined that such participation violated its rules.

OCR opened a complaint against OHSAA on December 30, 2011. OCR thereafter spoke with OHSAA's associate commissioner, who informed OCR that OHSAA received the Complainant's request to allow the Student to participate in mixed heat races with students running on foot, but denied the request because it would have resulted in a fundamental alteration of those events. She explained that OHSAA did not at that time recognize wheelchair racing as a sport.⁴ She stated that in considering the Complainant's request OHSAA examined the rules for wheelchair racing, in particular the United States Olympic Committee's Paralympic rules, and noted that the rules for wheelchair racing events are different than the rules applicable to events for individuals running on foot. She stated that for OHSAA to allow the Student to compete in a mixed heat race would have required OHSAA to apply two different sets of rules to the same event, which OHSAA considered a fundamental alteration of the event.

OCR reviewed the United States Olympic Committee's Paralympics website, which stated in part that: "The rules of Paralympic track and field are almost identical to those of its non-disabled counterpart. Certain allowances are made to accommodate certain disabilities." OCR examined the Paralympic rules for running events, and noted that they contain rules regarding the wheelchairs that may be used in competition, as well as a few other requirements that would only be applicable to wheelchair racers. For example, the rules provide that no part of the front wheel of a wheelchair can touch the start line and all wheels must be in contact with the ground, that there can be no delays for equipment malfunctions, and that urine on the track results in an automatic disqualification. The rules also require wheelchair racers to wear helmets in races that are 800 meters or longer, unless the racers remain in their own lanes throughout the race.

The associate commissioner also stated that OHSAA believed that allowing wheelchair athletes to compete in a mixed heat race with athletes running on foot would be a fundamental alteration because it would create an unfair advantage for either the wheelchair athletes or the athletes running on foot, depending on the event. For example,

⁴ OCR notes that after this complaint was opened, on June 7, 2012, OHSAA's Board of Directors approved a recommendation to add eight wheelchair championship final events – four for boys and four for girls – to the OHSAA State Track and Field Tournament beginning in 2013. Wheelchair athletes in one boys' division and one girls' division now compete in 100-meter, 400-meter, and 800-meter races and shot put. OCR takes no position on whether these events, and their scoring, comply with federal law.

she stated that in long distance events wheelchair athletes would have an advantage over athletes competing on foot. However, the Complainant stated that the Student was not asking to race against athletes running on foot, just with them. Further, the Student's track coaches informed OCR that, in the races the Student wished to compete in, his track chair did not give him an advantage. They explained that the sprinting races the Student participated in were short distances, 100 meters, 200 meters, and 400 meters, and that, while his wheelchair allowed him to maintain high speeds more easily than the runners who were on foot, it took the Student longer than those runners to pick up speed. Thus, the shorter races were over before the Student's wheelchair could give him a competitive edge.

The associate commissioner acknowledged that, in determining that allowing a mixed heat race constituted a fundamental alteration, OHSAA did not do any type of individualized inquiry to determine whether the requested modification was necessary.

OCR also spoke with OHSAA's track and field rules interpreter, who stated that OHSAA did permit male and female athletes to compete in mixed heat races for three specific events, including the 1600 meter, the 3200 meter, and the 3200 meter relay, so long as the participating coaches agreed prior to the beginning of the meet to allow mixed heat races.

The associate commissioner also informed OCR that OHSAA believed that mixed heat races between the Student and athletes competing on foot posed a danger to the athletes. She said that being fouled by an individual using a wheelchair would be more dangerous than being fouled by an individual running on foot. However, the Student's coaches reported that he practiced alongside the runners who were on foot with minimal safety issues. The main safety concern they identified was that the Student could drift into another runner's lane, or that another runner could drift into the Student's lane, and that his track chair would injure the other runner. However, the coaches stated that they addressed this concern by giving the Student a designated lane – the first lane – when he raced against the other students. Further, the coaches stated that the Student did not typically collide with other runners during practice, and that in the few instances where this did occur the injuries that resulted were minor, such as scrapes. The coaches pointed out that students racing on foot encountered the same types of injuries when drifting into each other's lanes. The coaches noted that, at the seventh- to eighth-grade level, students are new to track and at times drift into each other's lanes.

The associate commissioner informed OCR that, in determining whether the requested mixed heat race would create a safety issue, OHSAA did not examine the Student's individual situation by speaking with his coaches or observing practices. Instead, OHSAA considered generally how wheelchair athletes participating with athletes running on foot might affect such events.

OCR also asked OHSAA's track and field rules interpreter about the Student's ability to earn points for his team during regular season meets. As noted above, the Student was only permitted to earn points when the other school had a wheelchair racer that he could compete against. However, according to OHSAA's rules interpreter, in other track and

field events, unless the schools made a different arrangement in advance of the meet, a student who was ready and able to compete in a particular event but against whom the other school had no one for him to compete received all of the points for that event.

OCR confirmed that pursuant to its Sports Regulations, specifically, General Regulation One, OHSAA uses the National Federation of State High School Associations (NFHS) rule book for scoring track and field events. OCR examined the NFHS rules for scoring track and field that were in effect during the time period at issue, and noted that Rule 2, Section 1, Article 6 provided as follows: “...in the absence of prior mutual agreement, if in a track meet normally contested under the standard order of events (excluding ‘specialty’ meets), the host school does not provide one or more of the events, points for each non-contested event shall be totaled and divided equally among the visiting teams. The host team shall receive no points.” The OHSAA rules interpreter acknowledged that the way the rules were written, if a student competed in an event uncontested, he or she would get all of the points for that event, absent a mutual agreement between the competing schools in advance to the contrary. The interpreter indicated that these rules had previously been applied in precisely this way with regard to the event of pole vaulting.

During the 2011-2012 school year, the Student entered high school and joined the high school track team. By the 2013 track season, the Student was participating in the 100-meter, 200-meter, 400-meter and 800-meter events. He competed as he had in the middle school, racing his heats alone in an exhibition setting and not earning points for his team unless another wheelchair athlete was available for him to compete against. On February 11, 2013, the District voluntarily signed a Resolution Agreement (copy enclosed). Pursuant to the Agreement, the District notified the parent of the Student, its athletic director and track and field coaching staff, and the high school athletic districts and track coaches of the school districts that the District competes against that it would allow the Student to participate in races at the same time as students racing on foot if no other wheelchair competitors were available for a particular event. In addition, the District agreed to permit the Student to earn points for his team even when he was the only competitor in a particular track and field event, unless the schools reached a separate agreement in advance that was nondiscriminatory and consistent with OHSAA and NFHS rules and decisions regarding solo competitor events involving students without disabilities.

OCR also continued discussions with OHSAA regarding the Student’s participation on the track team. On March 8, 2013, OHSAA issued “Guidance for Conducting Track and Field Contest for Foot Racers and Wheelers.” The guidance was posted on OHSAA’s public website.⁵ The Guidance states “there is **nothing** in the NFHS Track and Field Rule Book or the OHSAA Track and Field Sport Regulations that **prohibits** wheelers from racing at the same time as runners.” (Emphasis in original). With respect to scoring the results for “wheelers,” OHSAA “suggest[s]” “that schools “agree not to score these

⁵ http://www.ohsaa.org/news/sports/2013-Mar8-GuidanceForWheelchairEvents_TF.pdf

solo competitor events in the team totals for those meets in which there is only one wheeler competing.”

In a letter to OCR dated March 21, 2013, OHSAA reaffirmed its position that “nothing in OHSAA’s policies and/or procedures prohibits schools from permitting wheelers from racing on the same track at the same time as runners.” The letter states that the “*Guidance* makes it perfectly clear that the OHSAA would not and will not penalize any school/school official who, in their judgment, allows this occurrence to take place.” Importantly, the letter also clarifies that OHSAA will not penalize schools for engaging in a pre-meet arrangement to allow the Student to earn points for his team if he is a solo competitor for an event. The letter specifically states:

The schools have the authority and discretion to do whatever they believe is fair and equitable for their athletes in any given regular season context insofar as the Student’s scoring is concerned. Perhaps these schools may agree to award the Student “a point” or “10 points” for his participation. The OHSAA would never penalize schools for entering in such a pre-meet agreement if that is what they deem appropriate.

At the beginning of April 2013, OCR received information that at an OCC meeting the OCC voted that, at OCC away meets, the Student would not be permitted to race on the same track at the same time as athletes competing on foot and would not be allowed to earn points. He would only be permitted to race on the track with other athletes and earn points at home meets held at the District. OCR also received information that the Student was not permitted to race on the same track at the same time as students racing on foot or earn points for his team at a track meet that took place on April 13, 2013, and included the OCC Districts, among other teams.

In light of the information OCR received regarding the actions taken by the OCC Districts, OCR opened directed investigations against the OCC Districts on April 15, 2013. OCR subsequently had discussions with representatives from the District and the OCC Districts, wherein OCR explained the Student’s situation and the requirements of Section 504 and Title II with respect to athletic participation of students with disabilities. The Districts indicated that there are different types of track meets at the high school level. Dual track meets, for example, involve two districts competing against one another in the various track and field events. At an invitational meet, however, such as the meet that took place on April 13, 2013, multiple districts are invited to participate, and they might not all be from the same conference. Only two heats of each event are typically held at an invitational meet, and each district sends only its top two competitors for each event. Scoring is also different at an invitational meet, as each district is competing against many other districts instead of just one.

After these discussions, the OCC Districts worked cooperatively with the District to provide the Student with opportunities to race with students who were competing on foot during meets. OCR obtained information from the District and the Complainant, that, at the remaining regular season meets, the Student was permitted to race in races on the

same track at the same time as athletes racing on foot when no other wheelchair racer was available and was permitted to earn points for his team when appropriate, through pre-meet agreements between the districts.

Further, at a subsequent OCC meeting on May 1, 2013, which OCR staff attended, the OCC Districts expressly voted to allow the Student to compete on the same track at the same time as participants racing on foot in each of his events at the OCC conference meet if he was the sole wheelchair competitor, but that no solo competitors in any event would be permitted to score points. At this same meeting, OHSAA confirmed to all attendees that its policies do allow the Student to participate in regular season races with other athletes and that it would not penalize districts for pre-meet agreements that permit the Student to earn points for his team for his participation.

As noted above, the Student did participate on the same track at the same time as students racing on foot and received a non-discriminatory opportunity to earn points for his team during the regular 2012-2013 track season. OCR confirmed that OHSAA did not penalize either the District or the OCC Districts for the Student's participation during the 2012-2013 track season.

- **Legal Standards and Analysis**

The Section 504 implementing regulation at 34 C.F.R. § 104.4(a) states that no qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

Under Section 504, a disability is (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 34 C.F.R. § 104.3(j). This definition is identical to the definition of disability in the ADA. 29 U.S.C. § 705(9)(B); 42 U.S.C. § 12102(1). Section 504 requires recipients of Federal financial assistance to provide a student with a disability an opportunity to benefit from its program equal to that of nondisabled students. With respect to elementary and secondary educational services, “qualified” means a person (i) of an age during which persons with disabilities are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to persons with disabilities, or (iii) to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA). 34 C.F.R. § 104.3(l)(2).⁶

Among other things, Section 504 and Title II prohibit recipients/public entities from: (i) denying a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service; (ii) affording a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others; (iii) providing a qualified individual with a disability with an aid, benefit, or service that is not as effective as that provided to others; and

⁶ There is no dispute that this Student is a qualified individual with a disability.

(iv) providing different or separate aid, benefits, or services to persons with disabilities or to any class of persons with disabilities unless such action is necessary to provide a qualified individual with a disability with aid, benefits, or services that are as effective as those provided to others. 34 C.F.R. § 104.4(b)(1)(i)-(iv); 28 C.F.R. § 35.130(b)(1)(i)-(iv). Also, recipients/public entities must provide to a person with a disability the benefits and services of their education programs in the most integrated setting appropriate to the needs of that person. 34 C.F.R. § 104.4(b)(2); 28 C.F.R. § 35.130(d).

In implementing these nondiscrimination obligations, recipients/public entities may not operate on generalizations or assumptions about disability. One of the goals of the Section 504 and Title II legislation is to protect individuals with disabilities from discrimination based on prejudice, stereotypes, or unfounded fear. In the education context, this goal applies in the academic as well as nonacademic settings, and ensures students with disabilities are not wrongly excluded on the basis of disability. This means a recipient/public entity must provide students with disabilities an equal opportunity to participate in nonacademic and extracurricular services and activities, including athletics. 34 C.F.R. § 104.37(c). Extracurricular athletics, which can include interscholastic, club, or intramural athletics, can play an important role in a student's overall education program. According to Appendix A, Subpart D of the regulation implementing Section 504, as athletics are part of a recipient's education program they must, in accordance with the provisions of 34 C.F.R. § 104.34, be provided in the most integrated setting appropriate.

In order to provide an equal opportunity to participate in athletics, a recipient must make reasonable modifications in its policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless it can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity. 28 C.F.R. § 35.130(b)(7); 34 C.F.R. § 104.37(a), (c). In considering whether a reasonable modification is legally required, the recipient/public entity must first engage in an individualized inquiry to determine whether the modification is necessary. If the modification is necessary, the recipient/public entity must allow it unless doing so would result in a fundamental alteration of the nature of the extracurricular athletic activity. A modification might constitute a fundamental alteration if it alters such an essential aspect of the activity or game that it would be unacceptable even if it affected all competitors equally. Alternatively, a change that has only a peripheral impact on the activity or game itself might nevertheless give a particular player with a disability an unfair advantage over others and, for that reason, fundamentally alter the competition. Even if a specific modification would constitute a fundamental alteration, the recipient/public entity would still be required to determine if other modifications might be available that would permit the student's participation. For example, if an individual playing golf requested that the holes be widened from three to six inches in diameter to address a disability, that would be a change to an essential aspect of the game, and therefore could constitute a fundamental alteration. Accordingly, the recipient/public entity likely would not be required to make this change to accommodate a student with a disability. However, if a swimmer with one hand requested a modification to the rule that swimmers must finish a race with a two-handed

touch, granting such a modification likely would not affect an essential aspect of the race nor provide an unfair advantage, and thus would not constitute a fundamental alteration.

Modifications may also be denied where they create a safety issue. The regulation implementing Title II and Section 504, at 28 C.F.R. § 35.130(h) and 34 C.F.R. § 104.4(b)(1), permit a recipient/public entity to impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the recipient/public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.⁷

In the instant case, OCR finds that the District denied the Student an equal opportunity to participate in its middle school athletic track program in violation of Section 504 and Title II when it adhered to OHSAA's initial ruling that the Student could not participate in mixed heat races with students who were running on foot, albeit recognizing the District's position that, in order to maintain membership in good standing with OHSAA, a member school district must abide by OHSAA's rules and regulations. However, the requirement to follow federal law supersedes any OHSAA rule. 34 C.F.R. § 104.10(a).

While OHSAA initially concluded that allowing the Student to participate in mixed heat races with athletes competing on foot would have constituted a fundamental alteration of the events in question, as well as resulted in safety issues, OCR finds that allowing the Student to participate in this manner would neither constitute a fundamental alteration of the events in question nor create a safety issue. OCR also finds that OHSAA treated the Student differently from students without disabilities with regard to his ability to earn points for his team, as did the District in complying with OHSAA's rulings on this issue. Finally, OCR finds that allowing the Student to earn points for his team, either when competing in mixed heat races or alone, would not constitute a fundamental alteration of the track events in question. We set forth the bases for OCR's findings below.

- Mixed Heat Races

As discussed above, OHSAA asserted that, in determining that allowing a mixed heat race would result in a fundamental alteration, it examined the Paralympic rules for wheelchair racing and noted that they were different than the rules applicable to events for individuals running on foot. Thus, it concluded that allowing the Student to compete in a mixed heat race would have required OHSAA to apply two different sets of rules to the same event. However, while the Paralympic rules for wheelchair racing do contain some specific requirements that would only be applicable to wheelchair racers, *e.g.*, where the wheels should be at the start of the race, OCR found nothing in the rules that was different with respect to an essential aspect of the races. In other words, nothing in the rules would have prevented an individual racing in a wheelchair from participating on the same track, at the same time as individuals racing on foot, with the goal being to cover a certain distance and reach the finish line in the fastest time possible. The U.S.

⁷ For more information about the application of Section 504 to athletics, see OCR's Dear Colleague Letter at <http://www.ed.gov/ocr/letters/colleague-201301-504.pdf>.

Paralympics organization itself states that the rules for wheelchair track and field events are almost identical to the rules for athletes without disabilities. Further, OCR noted that OHSAA permitted mixed heat races between male and female athletes for certain racing events. Thus, OHSAA was already permitting two separate events to take place on the same track at the same time. OCR found no evidence to support that the same situation would result in a fundamental alteration of the event because one of the competitors is using a wheelchair.

OHSAA also argued that racing using a wheelchair created an unfair competitive advantage or disadvantage depending on the race;⁸ however, the associate commissioner acknowledged that no one from OHSAA spoke with the Student or his coaches regarding whether he would have had an unfair advantage. As noted above, the Student's coaches informed OCR that his wheelchair did not give him an unfair advantage, as the races in which he competed were short distances. After considering the Student's disability, reviewing the rules applicable to wheelchair racing, and speaking with the Student's coaches, OCR finds that allowing the Student to participate in a race at the same time as individuals racing on foot would not constitute a fundamental alteration of the events in which the Student wished to compete.

Further, while OHSAA also argued that a mixed heat race would create safety issues, OCR finds that this conclusion was based on generalizations about students competing in wheelchairs, not the Student's individual situation. OCR finds that the Student's participation would not have posed any greater risk to the runners' safety than that which already exists in races consisting only of students who race on foot.

The law also requires that a requested modification be necessary in order for that student to have an equal opportunity to participate in an integrated manner to the maximum extent appropriate to the needs of the student. OHSAA did not argue that the modification the Student requested, *i.e.*, a mixed heat race, was unnecessary. It is undisputed that without this modification the Student was forced to race alone in a separate heat. According to the Complainant, she wanted the Student to participate in a mixed heat race so that he would feel like a part of the team and not feel ostracized because of his disability. One goal of Section 504 and Title II is for students with disabilities to be provided access to their education programs, including athletics, in the most integrated setting appropriate. The need for integration is particularly compelling in the middle school setting, where many students are experiencing school-sponsored team athletics for the first time. OCR finds that allowing the Student to race at the same time as his peers without mobility-related disabilities was necessary for him to have an equal opportunity to participate in the most integrated setting appropriate.

⁸ Since the Student is not competing against other individuals racing on foot, but just running next to them, arguments about unfair competitive advantage or disadvantage are irrelevant. Nonetheless, OCR has addressed OHSAA's competitive advantage arguments.

- Earning Points

As noted above, during the time period at issue in this investigation, the Student was only permitted to earn points for his team when another wheelchair racer was present to compete against him; otherwise, he could not earn any team points. However, based on information provided by OHSAA, this was not how track and field events were typically scored when only one competitor was present. In such cases, the sole competitor received all of the points for the event unless the competing schools had another arrangement in advance of the meet. Thus, OCR finds that OHSAA treated the Student differently from students without disabilities, without a nondiscriminatory reason, in violation of Section 504 and Title II as OHSAA acknowledged that it already allowed for such scoring in track and field events. Moreover, OCR finds that, in deferring to OHSAA on this issue, the District also violated Section 504 and Title II. As explained above, however, since signing the Agreement, the District has made advanced arrangements with opponent teams for the Student to earn team points in dual meets regardless of whether he is a solo competitor. At invitational meets, the District also made arrangements with all competing districts in advance of the meet that all solo competitors in single events (regardless of whether the competitor was a student athlete with a disability or not) would not earn any team points because earning team points in such instances would result in an unfair advantage.

- **Resolution and Conclusion**

- Complaints Against the District and OHSAA

In light of the foregoing, OCR finds that the evidence is sufficient to support a finding that the District and OHSAA discriminated against the Student based on his disability in violation of Section 504 and Title II when the Student was not permitted to race at the same time as individuals racing on foot during the 2010 or 2011 track seasons or given the opportunity to earn points for his team when no other wheelchair racer was competing.

As noted above, the District signed a Resolution Agreement to address the identified violation findings. Specifically, the Agreement required the District to notify the parent of the Student and its athletic directors and track and field coaching staff that OHSAA's policies and procedures allow the Student, now attending the District's high school, to:

- participate in races at the same time as individuals racing on foot when no other wheelchair competitors are available for a particular track and field event, and
- to earn points for his team in track and field events, even when he competes alone, unless the schools reach a separate agreement in advance that is nondiscriminatory, and is consistent with OHSAA and NFHS rules and their decisions regarding other solo competitor events involving athletes without mobility-related disabilities, such as pole vaulting.

The District has provided OCR with documentation that it has fully implemented the Agreement and is in compliance with Section 504 and Title II. During the 2012-2013 track season, the Student participated in races at the same time as individuals racing on foot and earned points for his team. Accordingly, OCR is closing its investigation against the District and its monitoring of the District's implementation of the Agreement, as of the date of this letter.

OHSAA also took actions that resolved OCR's violation findings. Pursuant to OCR's *Case Processing Manual*, OCR will close a complaint where it obtains credible information indicating that the allegations raised by the complaint have been resolved. In such a case, OCR will attempt to ascertain the apparent resolution. If OCR determines that there are no current allegations appropriate for further complaint resolution, the complaint will be closed.

As noted, OHSAA clarified on its public website that nothing in its policies and procedures *prohibits* wheelchair athletes from racing at the same time as other athletes. OHSAA also confirmed to OCR in a March 21 letter and verbally to OCC school districts at a meeting that its policies and procedures allow the Student to earn points for his team in track and field events even when he is the only competitor competing in a particular event and that it would not penalize schools for engaging in a pre-meet agreement to allow the Student to earn points for his team if he is a solo competitor for an event. For the 2012-2013 regular track season, OHSAA allowed the Student to race in his wheelchair at the same time as students racing on foot if no other wheelchair competitors were available to race against the Student in a particular track meet and/or event during the regular 2012-2013 track season and allowed the Student to earn points for his team.

In light of the foregoing, OCR has determined that OHSAA's actions have resolved the compliance issue raised by its involvement in the District's denial to the Student of an equal opportunity to participate in the track program. Accordingly, OCR is closing its complaint against OHSAA as of the date of this letter.⁹

⁹ While OCR is closing the present individual complaint against OSHAA, OCR strongly recommends that OSHAA revise its March 8, 2013 *Guidance* to clearly state that OSHAA will allow its member school districts to enter into agreements to award points to athletes in wheelchairs who participate in races with other athletes. The *Guidance* currently includes OSHAA's "suggestion" that no points be allowed and is not consistent with OSHAA's position with respect to the Student as stated in its subsequent March 21, 2013 letter to OCR and its statement at the May 2013 meeting with OCC members and by its actions during the 2013 track season. For the same reasons, OCR also strongly recommends that OSHAA revise the language in Section 12.13. "Scratch or exhibition competition," in its *2014 Track and Field Manual for Coaches and Officials*. <http://www.ohsaa.org/sports/tf/tfmanual.pdf> That section states that "scratch" or "exhibition" running is not permitted but notes the following exception: "The OHSAA Board of Director may authorize competition in events within specific sports in order to accommodate students with disabilities **without affecting team scoring in those sports**. For guidance on contests with foot racers and wheelers, go to [website link for March 2013 Guidance]." (Emphasis added.) The language in the *Manual* regarding team scoring should be deleted as it is unclear and may not be consistent with OSHAA's position with respect to the awarding of points for the Student, as described above, on which OCR is relying to close the complaint against OSHAA.

- Directed Investigations Against OCC Districts

On April 15, 2013, OCR opened directed investigations against the OCC Districts after receiving information indicating that the OCC voted to preclude the Student from participating in mixed heat races or earning points for his team during the 2012-2013 season. OCR also received information that, subsequent to that vote, during one invitational meet involving OCC Districts, the Student was not permitted to race in mixed heats, despite being the only wheelchair competitor, and was not permitted to earn points for his team.

Subsequently, the OCC Districts worked with the District to allow the Student to participate in mixed heat races and earn points for his team during the remainder of the 2012-2013 regular track season. As a result, OCR finds that the actions taken by the OCC Districts have resolved the allegation raised by the directed investigations. As there are no current allegations appropriate for further complaint resolution, OCR is closing its directed investigations against the OCC Districts effective the date of this letter.

- Overall Conclusion

In conclusion, as a result of the above investigations and resolutions, the opportunities for students who use wheelchairs to participate in school track and field in the state of Ohio have expanded significantly since the initial complaint was filed in January 2011. The District and OCC Districts took actions this past track season to provide the Student greater participation on his track team, allowing him to race alongside his teammates and other athletes, and earn points for his team, instead of racing alone without any opportunity to earn points for his team. OHSAA has also made clear that the Student is permitted to race alongside students racing on foot and to earn points during regular season high school track meets. In addition, OHSAA has now made clear that it will not penalize or otherwise discourage member schools from allowing students who use wheelchairs to race alongside other racers at regular season track meets.

This concludes OCR's investigations of this matter and should not be interpreted to address the District, OHSAA, or the OCC Districts' compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

Please be advised that the District, OHSAA, and the OCC Districts may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a

complaint or participated in the complaint resolution process. If this happens, the individual may file a complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, we will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about this letter, please contact me at (216) 522-4970 or by e-mail at Catherine.Criswell@ed.gov.

Sincerely,

Catherine D. Criswell
Director

Enclosure