ADA in the K-12 Environment

Presented by Equip for Equality

Barry C. Taylor, VP for Civil Rights and Systemic Litigation
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May 16, 2018

ADA National Network
Information, Guidance and Training on the Americans with Disabilities Act

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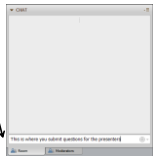

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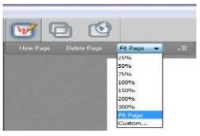

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Outline of Today's Webinar

- ADA, Section 504, and IDEA – Coverage Issues
- ADA in the K-12 Environment
  - General Nondiscrimination
  - Architectural and Programmatic Access
  - Reasonable Modifications, including Athletic Programs, Emergency Preparedness, Service Animals, Medication Management
  - Auxiliary Aids and Services, including Website Access
  - Abuse and Bullying
  - Olmstead in the School Environment
- Exhaustion Requirements (Supreme Court's *Fry* Decision)
- Employment Discrimination & Retaliation

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ADA, Section 504 and IDEA
Different Goals and Purposes

- **Americans with Disabilities Act (ADA)**
  - Broad anti-discrimination law
  - Goals: Equal opportunity, full participation, independent living, and economic self-sufficiency
- **Individuals with Disabilities in Education Act (IDEA)**
  - Goal: Provide meaningful access to education by offering individualized instruction and related services (IEPs)
  - Free Appropriate Public Education (FAPE)
  - Provides special education and related services
- **Section 504 of the Rehabilitation Act (Section 504)**
  - Anti-discrimination law that applies to all entities who receive federal funds, including K-12 schools
  - Additional regulations for K-12 education: Also require FAPE

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Which Law Applies
Relevant Qs: Public? Private? Federal Funds?

- **Section 504:** Any school/district that receives federal funding
  - Includes private school receiving IDEA funds from public school
    - ***Smith v. Tobinworld***, 2016 WL 3519244 (N.D. Cal. June 28, 2016)
- **Title II of the ADA:** Public schools
- **Title III of the ADA:** Private schools
  - **Exception** for "religious organizations or entities controlled by religious organizations, including places of worship"
    - ***Sky v. Haddonfield Friends School***, 2016 WL 1260061 (D.N.J. Mar. 31, 2016) – exempting school affiliated with Religious Society of Friends
    - ***Marshall v. Sisters of the Holy Family of Nazareth***, 399 F.Supp.2d 597 (E.D.Pa. 2005) – exempting Catholic school operated and controlled by religious community

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Exception for Private Schools Controlled by Religious Organizations

Consider - does school fall within religious exception?

Sloan v. Community Christian Day School
2015 WL 10437824 (M.D. Tenn. Dec. 11, 2015)

- Lawsuit about school's accessible parking spaces
- **Court:** Religious exception did not apply to school
  - Mission and learning is focused on God and religion
  - But, owners not ordained in any religion; no evidence that school was owned, affiliated with or supported by religious group

Even if private school falls within religious exception, remember:

- No religious exception under **Section 504**
- Some **state local laws or building codes** still apply
- Still have some **Title I** (employment) requirements

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Title II v. Title III v. Section 504

- **Similar requirements**
- **Regulations/enforcement** by different administrative agencies
  - Title II/III: Regulations and enforcement by DOJ
  - Section 504: Regulations and enforcement by OCR
  - Some overlap
- **Available relief**
  - Title III: No monetary damages
  - Section 504: Monetary damages for intentional discrimination
  - Title II: Monetary damages for intentional discrimination unless court finds sovereign immunity was not properly waived
- **Additional differences** will be discussed during presentation
  - Example: Architectural requirements for existing facilities

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What Programs Are Covered?

IDEA: Education and related services
ADA/Section 504: All programs, services, activities of school district

- Examples: Extra-curriculum programs, field trips, student clubs, recreational activities, summer school, and any other programs, services and activities available to students

Why? Due to broad language

- Title II applies to all "services, programs, or activities of a public entity." 42 U.S.C. § 12132
- Title III applies to the "full and equal enjoyment of goods, services, facilities, privileges, advantages of accommodations" or a place of public accommodation. 42 U.S.C. § 12182(a)
- Section 504 applies to "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a)

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What Programs Are Covered?

ADA/504 Applies Outside of the Classroom – Examples:

- Field trip to complement school's science curriculum. ***I.A. v. Seguin Indep. School District***, 881 F.Supp.2d 770 (W.D. Tex. 2012)
- Off-site golf athletic event planned, coordinated and controlled by a school. ***Miller v. Ceres Unified School District***, 141 F.Supp.3d 1038 (E.D. Cal. 2015)

  But see Ashby v. Warrick County School Corp. 2018 WL 746093 (S.D. Ind. Feb. 7, 2018)
- Private museum invited local schools to perform in holiday concert
- Museum lacked access; mom with a disability missed son's concert
- **Court:** Choir concert not a service, program, or activity of school
  - Event was not organized or intentionally selected by school
- **Status:** Currently on appeal to Seventh Circuit

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Who is Protected? Definition of Disability

- Individuals **are protected** by the ADA if they have:
  - A physical or mental impairment that substantially limits a major life activity; a record of such an impairment; been regarded as having an impairment
- Associated with a person with a disability (stay tuned)
- IDEA protections does not necessarily mean ADA protections

B.C. v. Mount Vernon School District

837 F.3d 152 (2d Cir. 2016)

- Plaintiffs brought an ADA case, arguing that students with disabilities were treated differently than students without disabilities
- Only evidence was students' eligibility for special education services
- **2nd Circuit:** No evidence that individuals were protected by ADA/Section 504; IDEA eligibility on its own is not enough

Who is Protected?

IDEA: Students
ADA/Section 504: Any qualified individuals with disabilities

Examples:
- Parents
- Family members
- Teachers and other employees
- Members of the general public

Already discussed cases—brought by parents with disabilities
- ***Miller v. Ceres Unified School District***
- ***Ashby v. Warrick County School Corp***

What Does the ADA Do? Nondiscrimination

Chadam v. Palo Alto Unified Sch. District

666 F. App'x 615 (9th Cir. 2016)

- School district removed student from neighborhood school due to mistaken belief that the student had cystic fibrosis
- Doctors (who never met or treated student) advised to remove student b/c he posed a threat to other students with cystic fibrosis
- **9th Cir:** Found for plaintiffs (reversed/remanded motion to dismiss)
  - Rejected district's argument that there was no denial of benefit because no right to specific school – ADA/504 doesn't require a "right" – a person may not be excluded from participation in or denied benefits of the services, programs, or activities
  - Lower court erred in finding direct threat b/c most objective evidence showed that student doesn't even have cystic fibrosis

What Does the ADA Do? Nondiscrimination

DOJ Settlement with Pea Ridge School District

- School removed students until they received HIV testing after reviewing document about HIV status of a family member
- Widespread media coverage; school press release about exclusion
- **DOJ Letter of Findings:** "A clear violation"
- **Settlement terms (highlights):** District will
  - Not seek HIV test results for any student or prospective student
  - Amend policies—HIV is not basis for exclusion from school
  - Adopt ADA/non-discrimination policy that prohibits discrimination, inquiries into HIV status, results of HIV testing
  - Training with outside trainer with opportunity to ask questions

Letter of findings: www.ada.gov/briefs/prsd_lof.pdf (12/13/16)
Settlement agreement: www.ada.gov/pea_ridge_sa.html (3/21/17)

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What Does the ADA Do? What Else Does "Discrimination" Mean?

ADA also defines discrimination to include:

- Failing to **remove architectural and communication barriers**
- Failure to make **reasonable modifications in policies, practices, or procedures** when necessary for people with disabilities
- Failing to **provide auxiliary aids and services** necessary for effective communication
- Failing to ensure services in the **most integrated setting appropriate** to the needs of qualified individuals with disabilities

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Architectural Access

Schools must ensure programmatic access and architectural accessibility

- Different standards based on date of construction and applicable law

New construction and alterations

- 2010 ADA Standards (current standard)

Existing facilities

- Date of construction: Built for first occupancy before January 1992 (ADA) or June 1977 (Section 504)
- Requirements:
  - Public schools = Program access
  - Private schools = Barrier removal
  - Schools that receive federal funding = Program access

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Architectural Access: Playground Accessibility

DOJ Agreement with North Canaan Elementary School

- 11-year old w/ cerebral palsy filed complaint about playground
- School argued student benefited from watching other kids play
- Pre-settlement: School built ramp into side of hill that only had stairs; paved path deeper into playground; adding accessible swing
- **Settlement (Nov 2017).** Applies 2010 Standards – highlights:
  - Accessible route within play area, connecting at least one of each type of ground play component and transfer platform
  - Half elevated play components accessible by transfer platform
  - Seat height on swings; wheelchair access at picnic table

Settlement: www.equipforequality.org/news-item/doj-settlement-agreement-accessible-playground-north-canaan-elementary-school

***See also* OCR Letter of Finding re: playground accessibility:**
www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131269-a.html

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Architectural Access: Meaningful Access to School Programs

Celeste v. E. Meadow Union Free School District
373 F. App'x 85 (2d Cir. 2010)

- Student with cerebral palsy challenged school accessibility
  - No accessible route to athletic field; concrete paths had significant gaps; step located on most direct route
  - Resulted in 10-minute detour each way to athletic fields
- **Jury:** Found for student
- **2nd Cir:** Upheld jury verdict on liability; vacated on damages
  - Barriers caused an "unnecessary usurpation of Celeste's time."
  - Expert was not necessary to show no meaningful access
  - Vacated emotional distress due to insufficient evidence
- **Settled:** $200,000 following the appellate court decision

See also OCR Agreement with Virginia Beach City (VA):
www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151318-b.pdf

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Architectural Access: Maintenance of Accessibility Features

OCR Agreement: Polk County (FL) Public Schools

- During home football games, accessible spaces were blocked and signs were changed to designate parking for event staff
- **OCR Resolution Agreement (2017): District agreed to**
  - Publish a statement on its website to inform the public that accessible parking spaces with designated signage would be available during each home game
  - Send a letter to remind various staff, including principals, athletic directors, and event staff of the accessibility requirements; and
  - Provide OCR with photographic evidence that the spaces remain available and accessible during each home game

www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04171035-b.pdf

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Reasonable Modifications Inside the Classroom

The ADA requires schools to make reasonable modifications to policies, practices and procedures, unless doing so results in a fundamental alteration to the program.

OCR Letter of Findings

Research Triangle (NC) High School (2017)

- Tenth grader with degenerative visual condition had 504 plan with classroom accommodations
- Asked to take a state required exam with a paper booklet instead of online
- District failed to respond – student had migraines and vomiting
- Impacted score so asked for grade modification – also denied
- Student ultimately transitioned to IEP – paper for all tests
- **OCR:** Violated Title II/Section 504

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Reasonable Modifications Outside the Classroom

K.K. v. North Allegheny School District

2017 WL 2780582 (W.D. Pa. June 27, 2017)

- District has program to transport kids from school to daycare
- Plaintiff had no daycare options within District due to significant medical needs – requested transportation outside of boundaries
- District refused; plaintiff sued for association discrimination
- **Court:** Denied both parties' motion for summary judgment
  - ADA applies to transportation and requires modifications
  - Here, Plaintiff requested modification. Question of fact re: whether District conducted a meaningful individualized inquiry
  - District focused only on cost and not setting a precedent without considering whether transportation was possible
  - Sufficient evidence no fundamental alteration or undue burden

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Reasonable Modifications Athletic Programs

Kempf v. Michigan High School Athletic Association

15-cv-14227 (E.D. Mich. Dec. 3, 2015)

- School district provided student wrestler with ASL interpreter
- During non-sanctioned competitions, interpreter moved freely around wrestling circle on the mat to maintain eye contact
- MHSAA restricted interpreter to coach's box citing safety concerns
- **Consent decree (Dec. 2015)**
  - Interpreter could have 360-degree access around the wrestling circle on the mat
  - If practical, required to stay at least six feet away from the circle
  - If not, appropriate distance determined by the referee and interpreter to avoid any contact or interference

www.mhsaa.com/portals/0/Documents/WR/sign%20language.pdf

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Reasonable Modifications Athletic Programs

Madigan and Callahan v. Illinois High School Association
12-cv-3758 (N.D. Illinois May 16, 2012)

- Brought by Illinois Atty. Gen. and 16-year-old student (rep by EFE)
- Athletes with disabilities not given equal opportunity to compete
- Mary Kate on school team, but could not advance to competitions
- **Settlement Highlights: '13 with Mary Kate; '15 with AG's Office**
  - Include four swimming events for students with disabilities
  - Create wheelchair division for track and field
  - Modify qualifying standards for swimming/diving, track/field
  - Change terms and conditions so that student athletes with disabilities can earn points for their teams
  - Create new policies and practices for accommodations
  - Appoint ADA coordinator to review all accommodation requests

www.equipforequality.org/news-item/callahan

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Reasonable Modifications Athletic Programs

A.H. by Holzmueller v. Ill. High School Ass'n
881 F.3d 587 (7th Cir. 2018)

- Athlete filed lawsuit seeking qualifying standards, separate division, and ability to earn points for para-ambulatory athletes
- **7th Cir: Affirmed summary judgment to IHSA**
  - Student did not establish that "but for" his disability, he would have been among the top 10% of athletes (qualify for State)
  - Creating para-ambulatory division would pose fundamental alteration because it would lower qualification standards
- **Strong dissent:** Issue is re: meaningful opportunity to compete
  - Criticizes "but for" by using comparison to female athletes
  - IHSA already creates separate divisions (small schools)

OCR Dear Colleague Letter: Students with Disabilities in Extracurricular Athletics:
www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.html

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Reasonable Modifications Service Animals

Recent legal issue: Service animals must be under the control of their handler – what does it mean to be a "handler"?

- **DOJ guidance:** "In the school (K-12) context and in similar settings, the school or similar entity may need to provide some assistance to enable a particular student to handle his or her service animal."
  - www.ada.gov/regs2010/service_animal_qa.html (Q27)

DOJ Letter of Findings (2015) – Gates-Chili Central School District

- District said D.P. cannot "handle" her service animal; she may only bring her service animal if her parent provides a full-time handler
- Parent said not asking for District to act as "handler" – just to provide minimal and intermittent assistance
- **DOJ:** District in violation of title II – required remedial action

www.ada.gov/briefs/gates-chili_lof.pdf

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Reasonable Modifications Service Animals

United States v. Gates-Chili Central School District

198 F.Supp.3d 228 (W.D.N.Y. 2016)

- District failed to comply with DOJ's required remedial terms
  - Ex: Permitting D.P. to be own handler; providing assistance tethering dog, issuing commands, and escorting D.P.
- DOJ filed lawsuit
- **Court:** Denied motion for summary judgment
  - If student needs help untethering and *occasional* reminders to issue commands = Student was in control
  - If school personnel required to actually issue commands = Student not in control, and the family would therefore need to supply a handler
- **Status:** Case is still pending

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Reasonable Modifications Service Animals

Alboniga v. School Bd. Of Broward County, Fla.

87 F.Supp.3d 1319 (S.D. Fla. 2015)

- Student with multiple disabilities, including seizure disorder asked school to help him take dog outside to urinate
- District refused request; required separate handler to have dog
- **Court:** Found for student (granted summary judgment to student)
  - Student acted as handler by having dog tethered to wheelchair
  - Exception when animal needed to urinate, which did not amount to "care and supervision" (which is overall/daily maintenance)
  - Question = Whether accommodating student by assisting him to lead his dog outside the school to relieve itself is part of overall maintenance. The court finds it does not.

DOJ Statement of Interest: www.ada.gov/briefs/broward_county_school_board_soi.pdf

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Reasonable Modifications Service Animals

Court's additional findings

- District's required liability insurance and vaccinations in excess of state law requirements were an unlawful surcharge
- District could not replace dog with specially-trained teachers
  - "[A]kin to allowing a public entity dictate the type of services a disabled person needs in contravention of that person's own decisions regarding his life and care."
  - Separating student and animal would have "detrimental impact" on the human-animal bond and would "diminish the animal's responsiveness and effectiveness outside of the school setting."

***But see Riley v. Sch. Admin. Unit #23*, 2015 WL 9806795 (D.N.H. Dec. 22, 2015)** (student could not act as handler as he did not have a wheelchair where the dog could be tethered; could not safely hold or grab leash; and could not control dog through verbal commands)

***Consider state laws: K.D. v. Villa Grove Comm. Unit School Dist.*, 936 N.E.2d 690 (4th Dist. Ill. 2010)** (permitting service animal under Illinois School Code)

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Reasonable Modifications Emergency Preparedness

Jagielski-Bazzell, et al. v. Los Angeles Unified School District
15-cv-2921 (C.D. Cal. filed April 20, 2015)

- Complaint against the Marlton School = School for Deaf and Hard of Hearing students
- Emergency information announced over a standard PA system
- As a result, deaf and hard of hearing teachers and staff:
  - Had no accessible information during some lockdowns/drills
  - Were left unaware of some emergencies
- **Sept. 2016: Settlement Agreement (select terms)**
  - New visual PA system w/ large HD screens, scrolling LCD display, and video phones added to classrooms and common areas to communicate emergency messages and are capable of two-way communication with the front office

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Reasonable Modifications Emergency Preparedness

- Flashing alarm system to differentiate between evacuations and shelter-in-place situations
- Flashing doorbells on classroom doors along with peepholes or windows in the doors
- ASL interpreter in the command center during emergencies
- Video in ASL describing emergency procedures at the school
- Meeting with first responders re: new procedures and equipment
- Two-way video camera at the entrance gate to the school allowing Deaf staff to communicate from gate
- Monetary relief of $30,000 per plaintiff - total of $150,000

www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/

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Reasonable Modifications Emergency Preparedness

U.S. v. City School District of New Rochelle
14-cv-5605 (S.D.N.Y. July 23, 2013)

- 2 students w/ disabilities not evacuated with others – on 2nd/3rd floor
- Previously—not part of drills; denied request for 1st floor classrooms
- **DOJ:** District failed to provide "meaningful access" to school's emergency preparedness programs (evacuations and drills)
- **Consent Decree:** www.ada.gov/new_rochelle_cd.htm
  - Policies and training to ensure meaningful access
  - Work w/ expert: Implement written individual evacuation plans
  - Modify policies so students can be placed in 1st floor classrooms

Feltenstein v. City School District of New Rochelle, 2015 WL 10097519 (S.D.N.Y. Dec. 18, 2015)) (brought by one of the students; District's third party complaint against fire department was dismissed; private settlement)

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Reasonable Modifications Medication Management

DOJ Settlement with West Intermediate School

- Complainant alleged failure to modify policies to provide diabetes-related assistance to ensure equal access to attend locally zoned public school or magnet school. DOJ: "issue of public importance"
- **Settlement—highlights:**
  - 3+ employees designated/trained to help with diabetes care
    - Blood glucose monitoring tests; Insulin; Glucagon
    - Supervise/monitor consumption of food and/or beverages
  - Permit students to carry/use diabetes supplies/medicines during school day and school-sponsored trips and afterschool activities
  - Permit students to consume food/water, use restroom
  - School to create and publicize administrative guidelines

www.ada.gov/mt_pleasant_sa.html (2015)

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Auxiliary Aids & Services

K.M. ex al Bright v. Tustin Unified School Dist.

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

- **Issue:** Interplay between Title II/Section 504/IDEA
- Consolidated cases of two hard of hearing students who requested CART
- **District court:** School met IDEA requirements so no need to look at ADA
- **9th Cir:** In some (but not all) situations, schools may be required under the ADA to provide services to deaf and hard of hearing students that are different than the services required by the IDEA
  - IDEA requires consideration of communication needs, opportunities for direct communication in child's language/communication mode and consideration of AT/services
  - ADA requires public schools to communicate "as effectively" as students without disabilities
  - IDEA does not require "equal" opportunities

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Auxiliary Aids & Services

D.H. ex rel. Harrington v. Poway Unified Sch. Dist.

2013 WL 6730163 (S.D. Cal. Dec. 19, 2013) *reconsideration denied,* 2014 WL 129070 (S.D. Cal. Jan. 14, 2014)

- **On remand:** Court ordered the school to provide CART services

Department of Justice Amicus in K.M. case

- www.justice.gov/sites/default/files/crt/legacy/2012/01/27/kmtustinbr.pdf

Department of Education & Department of Justice Guidance

- FAQ on Effective Communication for Students with Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools
  - www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf

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Auxiliary Aids & Services Website Accessibility

Resolution Agreement with Aurora Public Schools

www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161324-a.pdf

- OCR examined pages on the District's website and found:
  - Some important content required computer mouse to access
  - Videos did not have accurate captions
  - Links and forms were not meaningfully/properly labeled
  - Site used color combinations that were difficult to read
- Resolution Agreement (select terms):
  - Auditor will identify barriers and conduct thorough audit
  - All new website content and functionality will be accessible
  - Corrective action plan to remove barriers over 18-month period
  - Notice about requesting access to inaccessible information
  - Website accessibility training for appropriate personnel

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Abuse as Discrimination

Fortin on behalf of TF v. Hollis School District

2017 WL 4157065 (D.N.H. Sept. 18, 2017)

- Keehan provided 1:1 support for TF, a student with autism
- Reacted to lack of responsiveness by pulling ear – on videotape
- **Issue:** Can the District be held liable for Keehan's acts?
- **Court:** Yes—District may be vicariously liable if Keehan intentionally discriminated (denied MSJ-question of fact)
  - "Physically assaultive conduct" can be discrimination
  - District argues this was an "isolated incident"
  - Plaintiff provided evidence of pattern of conduct
- **Jury:** Awarded $285,000 for battery; Found for district on ADA claim
  - Private settlement with aide

B.A. v. Manchester Sch. Dist., 2017 WL 3049424 (D.N.H. July 18, 2017) (denying summary judgment on ADA/504 when teacher force fed student with autism)

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Bullying as Discrimination

Elements for ADA peer-to-peer harassment case:

- Student is a person with a disability
- Student was harassed on the **basis of his disability**
- Harassment was **severe or pervasive** that it altered the condition of the student's education and created an abusive educational environment
- Defendant knew about the harassment
- Defendant was **deliberately indifferent** to the harassment

S.S. v. Eastern Ky. Univ., 532 F.3d 445 (6th Cir. 2008) (citing ***Davis v. Monroe County Bd. of Ed.***, 526 U.S. 629 (1999) (establishing framework for establishing school liability for peer-on-peer sexual harassment case)

OCR Dear Colleague Letter on Disability Harassment:
www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

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Bullying as Discrimination

Sparman v. Blount County Board of Education
2016 WL 5110484 (N.D. Ala. Sept. 19, 2016)

- Student alleged a long history of disability-based bullying
- Court analysis:
  - Student is a person with a disability: Dyslexia, learning disabilities and asthma
  - Harassment based on disability: Called "retard"; made fun of his asthma; teased him when had difficulty reading in class
  - Severe or pervasive: Happened since kindergarten; caused student to resist school; had nightmares and nighttime incontinence; sought psychological counseling
  - Defendant knew about harassment: Due to complaints

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Bullying as Discrimination

But—Board was not deliberately indifferent

- Not enough to show that Board did not succeed in stopping bullying; instead must show Board's response was unreasonable
- ADA and Section 504 do not require the school board "to ensure that absolutely no disability-based harassment or bullying occur; that is an impossible burden."
  - "Federal law requires [that school districts] take reasonable steps to prevent and protect vulnerable students from suffering such harassment."
- Here, student had a specific safety plan
  - Given incident report or complaint forms to report bullying
  - When reported, it was investigated
  - If proven, perpetrating students were punished
  - When not proven, students counseled about behavior

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Bullying as Discrimination

OCR Resolution Agreement with Charlotte-Mecklenburg Schools
www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11161145-a.pdf

- **Letter of Findings**
  - Expressed "concerns" about District's response to complaints
  - Resolution Agreement before making final determination
- **Resolution Agreement**
  - Training for all teachers, administrators, 504 coordinators on addressing disability-based harassment
  - Re: obligation to respond promptly/effectively to disability-based harassment that it knows or reasonably should know about
  - If investigation reveals harassment occurred, take prompt and effective steps reasonably calculated to end harassment, eliminate hostile environment, and prevent recurrence

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Most Integrated Setting Appropriate Olmstead & ADA in schools

United States v. Georgia

16-cv-03088 (N.D. Ga. 2016)

- At issue = Georgia's Network for Educational and Therapeutic Support Program (GNETS Program)
- State administers mental health and therapeutic educational services and supports almost exclusively through GNETS
  - Segregated programs in self-contained buildings, separate wings
  - Inferior education: some only receive computer-based instruction
  - Lack access to electives, facilities and extracurricular activities
  - Inferior facilities in various states of disrepair
- **July 5, 2016:** DOJ issued letter of findings—program violates ADA
  - www.ada.gov/olmstead/documents/gnets_lof.pdf
- **August 23, 2016:** DOJ filed lawsuit alleging the State

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Olmstead & ADA in schools

- **Complaint:** www.ada.gov/olmstead/documents/gnets_complaint.html
  - GNET fails to serve students in the most integrated setting appropriate to their needs; places other students at risk of segregation; provides unequal educational opportunities; fails to modify policies, practices procedures to avoid discrimination
- **Status:** Court granted motion to stay pending outcome of *C.V. v. Dudek* 209 F. Supp. 3d 1279 (S.D. Fla. 2016) (finding DOJ lacked authority to sue under Title II) (currently on appeal to 11th Circuit)
- **Private lawsuit:** Meanwhile, disability rights groups filed class action, ***Georgia Advocacy Office and the Arc v. Georgia***, 17-cv-0399 (D.Ga. Oct. 17, 2017)
  - **Status:** Motion to dismiss pending
    www.centerforpublicrep.org/court_case/gao-v-georgia

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Bringing ADA Case Without IDEA Procedures

Fry v. Napoleon Community Schools

137 S. Ct. 743 (2017)

- **Facts:** E.F., a student with cerebral palsy, requested permission to bring her service animal, Wonder, to school – school denied request
- **OCR:** Violation of Title II of the ADA and Rehab Act
  - School agreed to allow E.F. to bring Wonder to school
  - E.F. started different school, filed ADA/504 lawsuit for damages
- **Dist. Ct.:** Dismissed case – failed to exhaust remedies under IDEA
  - **Reminder:** Case not brought under IDEA
  - 20 U.S.C. § 1415(l): Must use IDEA's administrative procedures when "seeking relief that is also available under [the IDEA]."
- **Sixth Circuit:** Affirmed decision
- **Sup. Ct.:** Found for student (reversed and remanded) – unanimous

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Bringing ADA Case Without IDEA Procedures

Court: Exhaustion is required when the "gravamen of the complaint" seeks relief for free and appropriate education (FAPE)

- Does not matter whether complaint expressly states FAPE/IEP
- Must consider primary purpose of the laws:
  - ADA/504: Disability discrimination that applies both inside and outside of the schools for people of all ages
  - IDEA: Meaningful access to education w/ individualized services
- **Tips for courts**
  - Consider procedural history of process. If used IDEA administrative process → FAPE
  - Consider whether the same complaint could be brought outside of the school context or by adults? If no → FAPE

Recent Cases Applying *Fry*

P.H. by Luna v. Tehachapi Unified School District

2017 WL 3085020 (E.D. Cal. June 9, 2017)

- Plaintiff is a 7-year old girl with multiple disabilities alleged abuse
  - Tied to chair with blanket; left for entire school days
- Brought lawsuit under ADA, Section 504 and various other laws
- District sought dismissal—need to exhaust remedies per IDEA
- **Court:** Disagreed (denied motion to dismiss)
  - Gravamen of complaint was not a failure to provide FAPE
  - Claims about isolation, resulting in the denial of school programs and services, and physically and psychologically abused
  - No claims/history about adequacy of special education services

***But see A.R. v. Sch. Admin. Unit #23*, 2017 WL 4621587 (D.N.H. Oct. 12, 2017)**
(finding issue of whether District needed to provide handler for student to require IDEA exhaustion because it was a required service, not just discrimination)

High Stakes Testing
ADA Applies to Credentialing / Licensing Tests

- Includes GED; PSAT; SAT; ACT; etc.
  - Exams must be "selected and administered to *best ensure*" the examination measures an individual's aptitude and achievement, rather than disability. 28 C.F.R. § 36.309(b)(1)-(3)
- DOJ regs/guidance: www.ada.gov/regs2014/testing_accommodations.html
- Most litigation about post-high school tests (LSAC, USMLE, Bar)
- **College Board (SAT, PSAT, AP):** Agreed to streamline accommodation procedures in 2017
  - Automatically approve accommodations for the vast majority of students who receive school-based testing accommodations through a formal school-based plan
  - www.collegeboard.org/students-with-disabilities/whats-new

Tip: Formalize accommodations in high school
Tip: Ask for ACT/SAT accommodations if need them

Employment: Title I
Exception to Employment Protections

Grussgott v. Milwaukee Jewish Day School
882 F.3d 655 (7th Cir. 2018)

- Teacher who had a brain tumor fired after confrontation with parent
- **7th Cir:** Found for school (affirmed summary judgment)
  - 2012: Supreme Court adopted the "ministerial exception"
  - Here, school is a religious institution entitled to exception
    - Even though it did not follow Orthodox principles, not run by a rabbi and had nondiscrimination policies
  - Here, teacher was a minister
    - Expected to integrate religious teachings in lessons
    - Performed religious functions, including teaching students about Jewish holidays, prayer and Torah
    - Belief that Judaism is a culture did not change analysis

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Employment
Request for Accommodations

Common issue in schools: How to make accommodation request?

- **Rule:** Employees do not *need* to use employer-created forms
- **Best Practice (employee):** User employer-created forms
- **Best Practice (employer):** Train staff to recognize requests
- **Resource--JAN:** http://askjan.org/media/educators.html

Jones v. Clark County School District
2017 WL 1042463 (D. Nev. Mar. 17, 2017)

- Bus driver with depression asked supervisor to transfer to new job
- Supervisor referred driver to ADA coordinator
- Driver told ADA coordinator he wanted to "retire" from driving
- **District argued:** Driver did not request accommodation
- **Court:** Request to supervisor was sufficient – not driver's fault that one administrator failed to communicate with another

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Employment:
Retaliation for Advocating for Students

Barker v. Riverside County Office of Education
584 F.3d 821 (9th Cir. 2009)

- Special education teacher voiced concerns that the special education services were noncompliant with federal and state law
- With coworker, filed complaint with OCR
- Subjected to retaliation (excluded from mtgs, reduced case load)
- **Dist. ct:** Dismissed case-no standing to sue (**Title II** or Section 504)
- **9th Cir:** Revered/remanded. Anti-retaliation provision grants standing to people without disabilities
  - Protections extend to "any individual"
  - Can bring claim under Title II because she was advocating for students' rights under Title II

Hamerski v. Belleville Area Special Services Coop., 2018 WL 1399595 (S.D. Ill. March 20, 2017) (analyzing principal's claim for retaliation under Titles I and II together)

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Continuing Legal Education Credit for Illinois Attorneys

- This session is eligible for 1.5 hours of continuing legal education credit for Illinois attorneys.
- Illinois **attorneys** interested in obtaining continuing legal education credit should contact Barry Taylor at: barryt@equipforequality.org
- Participants (non-attorneys) looking for continuing education credit should contact the Great Lakes ADA at 877-232-1990 (V/TTY) or webinars@ada-audio.org

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Questions

- **You may type and submit questions in the Chat Area Text Box or press Control-M and enter text in the Chat Area**

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Thank You!

You will receive an email following the session with a link to the on-line evaluation. Your feedback is important to us!

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