

Legal Briefings

ADA in the K-12 Setting

Prepared by Equip for Equality¹

I. Introduction

The Americans with Disabilities Act (ADA) is a federal civil rights law, passed by Congress in 1990. When enacting this law, Congress intended to provide a clear and comprehensive national mandate to eliminate discrimination against individuals with disabilities. The ADA's goals include fostering equal opportunity, full participation, independent living, and economic self-sufficiency.² To achieve these goals, Congress created a broad law that applies to almost all aspects of public life—including the kindergarten through twelfth grade (K-12) environment.

Although the ADA applies to elementary and secondary schools, when asked to identify relevant laws to students with disabilities in the K-12 setting, many people name the Individuals with Disabilities in Education Act (IDEA)³ instead of the ADA. The IDEA's goal is to provide meaningful access to education. It requires public schools to provide a free, appropriate public education to children who need special education or related services because of a disability. Students who qualify for special education services are given individualized education program (IEP).

The other relevant federal law in the K-12 setting is Section 504 of the Rehabilitation Act (Section 504).⁴ Section 504 applies to all entities that receive federal funding, including K-12 schools. In addition to its broad anti-discrimination requirements, the U.S. Department of Education promulgated regulations under Section 504 specifically for educational entities, including a requirement that students with disabilities receive a free

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² Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7).

³ Individuals with Disabilities Education Act, 20 U.S.C. § 1400.

⁴ Section 504 of the *Rehabilitation Act of 1973*, as amended, 29 U.S.C. 794.

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appropriate public education.⁵ Given the similarities between the ADA and Section 504, this legal brief will reference the ADA. Unless explained otherwise, the ADA requirements also apply for Section 504.

In some ways, the ADA is broader than the IDEA. While the IDEA applies only to students, the ADA applies to students, parents, members of the public, and employees with disabilities. Similarly, while the IDEA applies only to students' educational and related experiences, the ADA applies to all aspects of the school experience. In recent years, more advocates, students with disabilities and their allies, recognize that the breadth of the ADA provides protections that might otherwise be unavailable under other laws.

This legal brief explores how the ADA applies in the K-12 environment. Through a review of the ADA's statutory and regulatory language, recent case law and settlement agreements, and administrative determinations, this legal brief will discuss how the ADA interplays with the IDEA and how it has been used to protect the rights of students, family members, community members, and employees.

II. Coverage Issues

A. What Schools Are Covered?

Almost all elementary and secondary schools are covered by either Title II or Title III of the ADA, as well as Section 504.⁶ Which law applies depends on whether the school is public or private, and whether it receives federal funding.

Public schools are covered by Title II of the ADA, which applies to the programs, services, and activities of state or local governments, or instrumentalities of state or local government.⁷ Private schools are covered by Title III of the ADA, as elementary and secondary schools are specifically listed within the definition of places of public accommodation.⁸

Title III does exempt "religious organizations or entities controlled by religious organizations, including places of worship," and this exemption can apply to private,

⁵ 34 C.F.R. § 104.33.

⁶ 42 U.S.C. §§ 12131–12134 (Title II of the ADA); 42 U.S.C. §§ 12181–12189 (2016) (Title III of the ADA); 29 U.S.C. § 794 (2016) (Section 504 of the Rehabilitation Act).

⁷ 28 C.F.R. § 35.104

⁸ 42 U.S.C. § 12181(7)(J).

religious schools.⁹ For instance, in ***Sky v. Haddonfield Friends School*, 2016 WL 1260061 (D.N.J. Mar. 31, 2016)**, parents of a ten-year old with ADHD and dyslexia brought an ADA case. The court granted partial summary judgment to the school finding that it was controlled by a religious entity, and thus, exempt from Title III of the ADA. The court noted that the ADA's religious exemption is broad and could apply even when the school's activities are secular, so long as the school was established for a religious purpose and infused religious doctrine into the curriculum. In support of its decision, the court reviewed the school's governing documents, which demonstrated that its purpose was maintaining a school "in accordance with the principles of the Society of Friends," and to "promote the principles, testimonies and concerns of the Religious Society of Friends." **See also *Marshall v. Sisters of the Holy Family of Nazareth*, 399 F.Supp.2d 597 (E.D. Pa. 2005)** (finding Catholic school operated and controlled by the Sisters of the Holy Family of Nazareth, a religious community composed of Roman Catholic nuns which were given the 501(c)(3) tax exemption to be exempt from Title III as a religious entity).

There has been recent litigation around Title III's religious exception. In ***Sloan v. Community Christian Day School*, 2015 WL 10437824 (M.D. Tenn. Dec. 11, 2015)**, the plaintiff argued that the school had violated the ADA by refusing to offer accessible parking spaces. The school sought dismissal of the case by asserting that it was a religious school exempt from Title III. The court disagreed, and permitted the plaintiff's case to move forward. Although the school had a mission of learning about God and religion, the school's owners were not ordained in any religion, nor was there any evidence that the school was owned, affiliated with, or financially supported by any recognized religious group. Accordingly, the plaintiff was permitted to proceed with her Title III case.

Under Section 504 any school, regardless of whether it is public or private, that receives federal funding is covered.¹⁰ Courts have held that Section 504 applies to private schools, even if the only federal funding received is channeled through the public school's IDEA funding provided when a public school places and supports a student at a private school to meet their IDEA obligations. For instance, in ***Smith v. Tobinworld*, 2016 WL 3519244 (N.D. Cal. June 28, 2016)**, the parents of a first grader with multiple disabilities brought

⁹ *Id.* at § 12187; see also *White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1174 (D. Colo. 2001) (holding that a seminary is "exempt from the provisions of Title III of the ADA"); 28 C.F.R. § Pt. 36, App. C ("The ADA's exemption of religious organizations and religious entities controlled by religious organizations is very broad [I]f a church itself operates a day care center, a nursing home, a private school, or a diocesan school system, the operations of the center, home, school, or schools would not be subject to the requirements of the ADA").

¹⁰ 29 U.S.C. § 794. The application of Section 504 is not limited by the purpose of the federal funds the school receives. *Id.* ("For the purposes of this section, the term 'program or activity' means all of the operations of . . . a local educational agency . . . any part of which is extended Federal financial assistance.).

a lawsuit alleging improper use of restraints in violation of various laws, including Section 504. In defense, the private school asserted that it had never received federal assistance for its education programs. The court disagreed, and concluded that Section 504 applies if the private school received IDEA funding either directly or indirectly through the public school system.

There is no religious exemption under Section 504, so it also covers schools considered to be religious institutions. Accordingly, the only exception to coverage is for private, religious schools that do not accept any federal funds. Private, religious schools, however, should remember that they may have requirements under state and local anti-discrimination laws or building codes. Although religious schools are not covered by Title III of the ADA, they are still covered by Title I—ADA’s employment discrimination provisions—in most employment situations. (See Section VI below)

While there are certain differences, as a general rule, what is prohibited by Titles II or III of the ADA is also prohibited by the Section 504. One difference is that the Department of Education, rather than the Department of Justice, promulgates regulations implementing and interpreting Section 504, which apply specifically to institutions providing elementary and secondary education.¹¹ Another difference is that under Section 504, a plaintiff may receive compensatory damages if he shows intentional discrimination because the school district waived the defense of sovereign immunity when it accepted the federal funds.¹² In contrast, under Title III of the ADA, a plaintiff may not receive compensatory damages, as such remedy is not afforded by statute. With respect to Title II entities, compensatory damages are statutorily permitted, and are recoverable for intentional discrimination, as long as the court does not find that Congress inappropriately abrogated sovereign immunity under Title II for claims regarding education.¹³ There are substantive differences as well, which will be discussed later in this brief. For example, a school district’s obligations in terms of architectural accessibility depend on which laws cover the district.

B. What Programs Are Covered?

¹¹ 34 C.F.R. §§ 104.1 to .61.

¹² 29 U.S.C. § 794; 42 U.S.C. § 2000d-7; *see also, e.g., Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 289 (5th Cir. 2005).

¹³ *See Tennessee v. Lane*, 541 U.S. 509 (2004) (concluding that Congress lawfully abrogated state sovereign immunity for denial to courtroom access because it is a fundamental right).

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The ADA's and Section 504's anti-discrimination protections are broad and generally apply to all of a school's programs, services and activities.¹⁴ In addition to the student's classroom experience, the ADA could apply to students' extra-curriculum programs, field trips, student clubs, recreational activities, summer school, and any other programs, services and activities available to students. The ADA could also apply to all programs, services and activities available to parents and members of the general public, including but not limited to parent-teacher conferences, adult education programs, school board meetings, graduation ceremonies, sporting events at the school and school plays.

Title II requires non-discrimination to the public entity's "services, programs, or activities."¹⁵ Consequently, courts have analyzed whether various school-related activities fall within this definition. In *I.A. v. Seguin Independent School District*, 881 F.Supp.2d 770 (W.D. Tex. 2012), the court found that a field trip planned by a school and intended to complement its science curriculum was a service, program or activity of the school district, though ultimately finding that the school district satisfied its requirements. Similarly, off-site events that are planned, coordinated and controlled by the school are also considered programs, services, or activities. See *Miller v. Ceres Unified School District*, 141 F.Supp.3d 1038 (E.D. Cal. 2015) (parent with a disability stated a claim against school district who held a golf athletic event off-site at an inaccessible location).

However, there is one case that found an extra-curricular activity outside the scope of Title II, and seemed to draw a line between events organized by or intentionally selected by a school, and events in which the school participated without a more direct role. In *Ashby v. Warrick County School Corp.*, 2018 WL 746093 (S.D. Ind. Feb. 7, 2018), the court considered whether a choir concert at a museum was a "service, program, or activity" of a school district subject to Title II. The mother of a choir student was unable to see her son perform in the holiday choir concert two years in a row due to the museum's inaccessibility. Since that time, the museum has become accessible, but the plaintiff brought a claim against the school for monetary relief, asserting that the choir concert was a program, service or activity of the school. In support, the plaintiff pointed to the

¹⁴ Title III states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." 42 U.S.C. § 12182(a) (2016). Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."¹⁴ 42 U.S.C. § 12132. Section 504 provides that "[n]o otherwise qualified individual with a disability in the United States . . . 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 activity receiving Federal financial assistance . . ." 29 U.S.C. § 794(a).

¹⁵ 42 U.S.C. § 12132.



facts that the choir was under the direction of the choir teacher, and the school had advertised the concert in the school calendar. The court disagreed. It said this was a “close case” but concluded that the concert was not a program, service, or activity of the school. It reasoned that the museum that hosted the concert was not affiliated with the school and that the museum—not the school—was the entity responsible for coordinating, scheduling and inviting schools for the concert. It noted that the ADA’s regulations state that a service, program, or activity is one that is “provided or made available” by the public entity. This case is currently on appeal to the Seventh Circuit.

C. Who is Protected?

The ADA protects qualified individuals with a disability. Under the ADA, an individual has a disability if he or she has a physical or mental impairment that substantially limits a major life activity, has been regarded as having an impairment; or has a history or a record of a disability.¹⁶

The ADA’s definition of disability differs from the eligibility standards found in the IDEA. There may be situations where a student will be a person with a disability under the ADA, but not eligible for special education services. This principle was recently discussed in ***B.C. v. Mount Vernon School District, 837 F.3d 152 (2d Cir. 2016)***. In this case, plaintiffs brought a claim for disparate impact—asserting that the District’s practice of providing academic intervention services (non-credit courses to help students at risk of not meeting state performance standards) were offered to children with a disability at a greater rate than to children without a disability. To support their claim, plaintiffs relied on statistics of the numbers and percentages of students who qualify for special education services under the IDEA who receive academic intervention services, versus students who do not receive special education services but do receive academic intervention services. The court, therefore, was charged with considering whether information about individuals who qualify for special education services sufficiently established that the individuals were also protected by the ADA. After an extensive analysis of the definitions under these two laws, the Second Circuit concluded while many, if not most, students with disabilities will be covered by both laws, there are situations where someone could receive services under the IDEA and not have a substantially limiting impairment, and thus, affirmed summary judgment to the district. The Second Circuit also reviewed the purposes of the two laws—explaining that disability in the ADA is defined generically in the ADA given its broad scope, and is more tailored in the IDEA given its focus on education and related services. Thus, “an IDEA disability is not equivalent to a disability

¹⁶ 42 U.S.C. §§ 12102(1).

as cognizable under the ADA and Section 504” and plaintiffs “cannot rely solely on ‘receipt of special education’ to establish an ADA or Section 504 disability.” *Id.* at 161.

The ADA also protects people without disabilities who are discriminated against because they associate with a person with a disability.¹⁷ There is a body of case law analyzing the retaliation provision when teachers or others who advocate on behalf of students with disabilities, discussed in the Employment/Retaliation section below.

Further, unlike the IDEA, the ADA has no age limitation and is not limited to a particular educational setting, so it applies to parents and members of the public with disabilities, in addition to students. **See, e.g., *Miller v. Ceres Unified School District*, 141 F.Supp.3d 1038, 1044 (E.D. Cal. 2015)** (parent with a disability stated a claim against school district who held a golf athletic event off-site in an inaccessible location); ***Ashby v. Warrick County School Corp.* 2018 WL 746093 (S.D. Ind. Feb. 7, 2018)** (evaluating case about mother with disability who was prevented from seeing her son’s choir concert due to a museum’s inaccessibility).

III. ADA and Section 504 Requirements in the K-12 Environment

As anti-discrimination laws, the ADA and Section 504 prohibit discrimination on the basis of disability.¹⁸ Generally speaking, schools must provide students, parents, and others with disabilities equal access and an equal opportunity to participate in school services, programs, and activities.

A recent example comes from ***Chadam v. Palo Alto Unified Sch. District*, 666 F. App'x 615, 616 (9th Cir. 2016)**. The complaint alleges that a school district removed a student from his neighborhood school based on its mistaken belief that the student had cystic fibrosis. As a result of this mistake, the school district believed that the student posed a threat to other students who did have cystic fibrosis based on direction from medical professionals who had never met with or treated the student, and failed to review records explaining that while the student had a genetic marker for cystic fibrosis, he did not have cystic fibrosis. The Ninth Circuit found for the plaintiffs, reversing and remanding the lower court’s decision granting a motion to dismiss. In so doing, the Ninth Circuit rejected the district’s argument that it did not deny the student a “benefit” because he had no “right” to attend a particular school within the district. The Ninth Circuit explained that the ADA does not require that type of “right”—instead, the student was allegedly excluded from participation in the district’s neighborhood school services and that was sufficient to state a claim under Title II. The Ninth Circuit also found the lower court erred in finding a direct

¹⁷ 42 U.S.C. § 12112(B)(4).

¹⁸ 42 U.S.C. § 12182(a) (Title III); 42 U.S.C. § 12132 (Title II); 29 U.S.C. § 794(a) (2016) (Section 504)

threat because the most objective evidence demonstrated that the student did not have cystic fibrosis.

Another example of a recent exclusion based on incorrect information and stereotypes was resolved after intervention from the U.S. Department of Justice (DOJ). In 2016, DOJ issued a **Letter of Findings against the Pea Ridge School District** which resulted in a settlement agreement in 2017.¹⁹ Here, after reviewing a document that referenced the HIV status of a family member of three students, the school removed the students until they underwent HIV testing. There was widespread media coverage of this exclusion in the local area, and the school even issued a press release confirming that it had “required some students to provide test results regarding their HIV status.” The students ultimately were permitted to return to school before submitting their test results. Nonetheless, in its Letter of Findings, DOJ called this a “clear violation” of the ADA. Among other requirements, the settlement agreement calls for the district to refrain from asking for any student’s or prospective student’s HIV test results. The district will also amend its Communicable Diseases policy to make clear that HIV is not a condition requiring a student’s exclusion from school. It will adopt an ADA/non-discrimination policy that includes general anti-discrimination provisions, prohibits inquiries into HIV status as a precondition of services, and prohibits results of HIV testing as a precondition of services. It also agreed to provide ADA training on Title II, the ADA’s application to individuals with HIV, information about ADA and updated policy, and requires the training to be conducted by an outside trainer during a live training with the opportunity to ask questions.

The ADA also recognizes that sometimes, schools, like all covered entities, need to take affirmative steps to ensure equal access and opportunity for people with disabilities. For that reason, the ADA has a number of proactive requirements schools must do to ensure non-discrimination, including:

- Ensuring programmatic access and architectural accessibility;²⁰
- Making reasonable modifications to policies, practices and procedures;
- Providing auxiliary aids and services necessary for effective communication; and
- Failing to ensure services in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

A. Programmatic and Architectural Access

The ADA and Section 504 require school district’s programs, services, and activities to ensure programmatic and architectural accessibility. For both public and private schools,

¹⁹ Letter of Findings: www.ada.gov/briefs/prsd_lof.pdf (12/13/2016); Settlement Agreement: www.ada.gov/pea_ridge_sa.html (3/21/2017)

²⁰ 42 U.S.C. § 12183; 28 C.F.R. § 36.401; 28 C.F.R. § 35.151; 34 C.F.R. § 104.21-104.23.

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all newly constructed or altered facilities must be built in accordance with the ADA's accessibility requirements.²¹ In 2010, the U.S. Department of Justice adopted standards that are currently in effect, known as the 2010 ADA Standards for Accessible Design (2010 ADA Standards).

Schools housed in older facilities are not exempt from the ADA, but they are subject to different accessibility requirements than newly constructed or altered schools. These are facilities built for first occupancy before January 1992 (ADA) or June 1977 (Section 504). The legal requirements for an older facility depend on whether the school is public, private, and/or receives federal funds. Public schools and private schools that receive federal funds are required to provide "program access." Program access means that the school's programs or activities, when viewed in their entirety, must be readily accessible to and useable by individuals with disabilities.²²

For example, if an individual who used a wheelchair could not access a science lab because it was on the second floor of an inaccessible school, the school would have to provide the student with program access. To achieve program access, a school could choose to install an elevator so that a person with a disability who uses a wheelchair could access the second floor independently. If possible, this option would provide a systemic solution that will help others in the future as well. Under the ADA, however, this type of architectural modification is not necessarily required so long as there is another effective way to provide program access. Instead of installing an elevator, the school could provide program access by relocating classes and activities to the first floor to accommodate a student with a disability, if that's possible given the classroom and grade configurations.

An example of these differing standards between new construction and program accessibility can be found in a recent **OCR Resolution Agreement with Virginia Beach City (VA)** in 2016.²³ The U.S. Department of Education, Office of Civil Rights (OCR) conducted an investigation into various architectural elements of a school in Virginia. Because the different elements were built at different times, OCR applied different standards to assess liability and determine the appropriate remedy. For instance, OCR found that the outdoor classroom had inaccessible ground surface, including from the route from the entrance to the seating. This part of the school was built in 2001; as a remedy, OCR ordered and the school agreed to remedy the space to comply with specific provisions §§ 302, 402, and 403 of the 2010 ADA Standards. OCR also noted that the

²¹ 42 U.S.C. § 12183; 28 C.F.R. § 36.401; 28 C.F.R. § 35.151; 34 C.F.R. § 104.21-104.23.

²² 28 C.F.R. § 35.150; 34 C.F.R. § 104.22

²³ *OCR Resolution Agreement with Virginia Beach City (VA)*, No. 11-15-1318 (OCRXI D.C. (VA), 2016). Available: www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151318-b.pdf See also Letter of findings: www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11151318-a.pdf

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baseball dugout did not have accessible entrance/exit routes; a floor/ground surface that is firm, stable, and slip-resistant; or access to the space between the metal fence and the seating. However, for its review of a baseball field, which had been built in 1957, the agreement required the district to create a plan to “ensure accessibility of the baseball field should the need arise, or as appropriate move activities or programs currently held at the baseball field to an accessible location.” **See also Letter of Findings of DOJ to NYC Department of Education (2015)** (detailing significant violations of the ADA in light of City’s inadequate accessible elementary schools and outlining the minimum modifications necessary for compliance—ensuring all post-ADA alterations and new construction comply with ADA, providing access to first floor, auditorium, gym, cafeteria at every school, remedying protruding objects and providing compliant signage).

The ADA’s architectural and access requirements also apply outside the classroom, and there have been recent developments to ensure kids have access to playgrounds. In 2004, the U.S. Access Board published guidelines about how to make playgrounds accessible, and such guidelines became part of the 2010 ADA Standards. OCR has had a history of working on playground access cases. As one example, the **OCR Resolution Letter to St. Johns County School District (2013)** engaged in a thorough review of the ADA Standards’ requirements for playgrounds, and determined that three of the four playgrounds in question did not comply with such standards.²⁴ The District later entered into a **Resolution Agreement**,²⁵ whereby it agreed to develop a written maintenance plan for the three playgrounds, and to ensure that the ground surfaces along accessible routes, clear floor or ground spaces, and maneuvering spaces within play areas will be stable, firm, and slip-resistant.

Additional detail can be reviewed in the **OCR Agreement with Cabell County Schools (2017)**,²⁶ the District agreed to review its playground facilities and develop a written plan to ensure that they are accessible to and useable by people with disabilities in accordance with Section 504, Title II, and the 2010 ADA Standards—specifically provisions 240 and 1008, which apply to play areas.

The Plan will address:

- Accessible route from the schools to the playground settings, as well as accessible routes that connect and surround accessible activities within the playground setting
- Ground surfaces along accessible routes, clear floor or ground spaces, and maneuvering spaces within play areas that are stable, firm and slip-resistant

²⁴ www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131269-a.html

²⁵ www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131269-b.html

²⁶ www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03161315-b.pdf

- Modification of existing playground equipment, or installation of additional equipment, as necessary, to ensure that an equivalent range of different types of play activities are accessible to children with mobility impairments
- Play experience, so that students with mobility impairments can access at least one type of each play experience available to students without disabilities (e.g. climbing, sliding, swinging, and crawling)
- Ground level and elevated play areas will be set at a height useable by children with various disabilities, including those who use wheelchairs, and elevated play activities will be connected to the playground surface through an appropriate ramp or transfer system
- Ground level play components accessed by children with mobility impairments are dispersed throughout the play area and integrated with other play components
- Ground surfaces shall be inspected and maintained regularly and frequently to ensure continued compliance with applicable accessibility standards
- Provide individualized assistance, as needed, to students with mobility impairments enrolled at the Schools so that they may participate in a range of activities in the existing play setting

In 2017, DOJ entered into its first public settlement on the topic in the ***Settlement Agreement Between the United States and North Canaan Elementary School (2017)***.²⁷ The family of an 11-year old girl with cerebral palsy and resulting mobility limitations filed a complaint about her school's playground accessibility with the U.S. Attorney's Office for the District of Connecticut. The school had argued that the student was benefiting because she was able to watch other kids play. Following its investigation, DOJ concluded that students with disabilities are "excluded from participation in or denied the benefits of the School's programs, services or activities because of the inaccessibility playground facilities."²⁸ Before reaching a settlement, the school built a ramp into side of hill that previously only had stairs; paved a path deeper into the playground; and added an accessible swing. Per the terms of the settlement agreement, the school agreed to comply with the ADA's program access requirements for existing facilities. The playground, which is for public use, must comply with the 2010 ADA Standards. In addition to other requirements, the school agreed to have an accessible playground with an accessible route within play area, connecting at least one of each type of ground play component and transfer platform, ensure that half of the elevated play components are

²⁷ www.equipforequality.org/news-item/doj-settlement-agreement-accessible-playground-north-canaan-elementary-school/ (agreement with exhibits); www.ada.gov/north_canaan_elementary_sa.html (agreement without exhibits).

²⁸ *Id.*; After the agreement, the student's mother posted a video to YouTube showing her daughter using this new equipment. Available at <https://cca-ct.org/disability-rights-win-for-sasha/>



accessible by transfer platform, modify seat height on swings, and ensure wheelchair access at the picnic table.

Courts have also evaluated architectural access cases as precluding a student from having meaningful access to school programs. In ***Celeste v. E. Meadow Union Free School District***, 373 F. App'x 85, 88 (2d Cir. 2010), a student with cerebral palsy who used crutches at times and a wheelchair at times, brought a lawsuit about the architectural barriers at his school—specifically there was no accessible route to the recreation fields, concrete pathways have significant gaps which pose a tripping hazard, and a step is located on the most direct route to the athletic field. As a result of such barriers, it took the student on a ten-minute detour each way when travelling to his school's athletic fields. This impacted the student because he was a manager on the school's football team, and this additional time cut almost in half his time to participate in a typical 45-minute physical education class. A jury found in the student's favor, and the district appealed. The Second Circuit affirmed the holding on liability, finding the architectural barriers to cause an "unnecessary usurpation of [the student's] time." The Second Circuit also rejected the District's argument that an expert was necessary to opine on the question of meaningful access to programs. The appellate court did, however, vacate the jury verdict and remand on damages, finding that the plaintiff failed to provide adequate testimony to support the verdict in his favor as he testified only to feeling embarrassed at the bus depot (which the jury did not find was an ADA violation). This case settled for \$200,000 (inclusive of attorneys' fees) following the appellate court decision.

Private schools have an additional obligation as a Title III entity – they are also required to engage in readily achievable barrier removal.²⁹ Readily achievable barrier removal means that for existing facilities, a school must remove its architectural barriers when it is readily achievable to do so. This means barriers that can be removed without significant difficulty or expense. Examples of barrier removal include: widening door frames; installing grab bars in a restroom; changing the inaccessible hardware on doors; installing ramps; and restriping parking lots to include accessible parking spaces. When determining whether it is readily achievable to remove a barrier, a private school should consider all of its resources, including tax credits that may be available. Schools have had the barrier removal obligation since the ADA was passed in 1990, and have a continuing obligation to do this in the future.

Regardless of whether a school is public or private, it is important that its accessible features be maintained and available for use, as demonstrated by a recent **OCR**

²⁹ 42 U.S.C. § 12182(b)(2)(iv); 28 C.F.R. § 36.304.

Resolution Agreement with Polk County (FL) Public Schools (2017).³⁰ While the district had accessible parking spaces, a complainant filed with OCR because during three football games, those spaces were blocked and accessible parking signs were covered by signs designating the parking spaces for event staff only. As a result of the OCR investigation, the district entered into a Resolution Agreement where it agreed to: (1) publish a statement on its website to inform the public that accessible parking spaces with designated signage would be available during each home game; (2) send a letter to remind various staff, including principals, athletic directors, and event staff of the accessibility requirements; and (3) provide OCR with photographic evidence that the spaces remain available and accessible during each home game.

B. Modifying Policies, Practices and Procedures

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

Reasonable modifications can include changes to the classroom that may or may not be part of a student's IEP. This is an area where the ADA and IDEA may overlap. Examples of common modifications include permitting a student who is hard of hearing to sit in the front of the classroom when students typically rotate seats or extending the time permitted to complete a test or assignment for a student with a learning disability, as long as speed is not an essential element being tested.

A recent example comes from an **OCR Letter of Findings against Research Triangle (NC) High School (2017)**,³¹ where OCR found that a North Carolina charter school violated Title II and Section 504 by failing to ensure that a tenth grade student with a degenerative visual condition was able to take a state required exam with a paper booklet. In this case, the student had a 504 plan and already received certain classroom accommodations for her disability. When the state exam was approaching, the student and her parent approached the school with their concerns that the state exam, offered online, would not be accessible. The school failed to respond, and the student took the exam online. Unfortunately, the student experienced migraine headaches and vomiting after staring at the computer screen, which negatively impacted her performance and thereby her grade. Her parents then asked for a grade modification, which was also denied. Ultimately, this student was transitioned to an IEP and received the accommodation of paper tests for all standardized tests moving forward.

³⁰ OCR Resolution Agreement with Polk County (FL) Public Schools, No. 04-17-1035 (OCR1V, Atlanta (FL) 2017). Available: www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04171035-b.pdf

³¹ OCR Letter of Findings against *Research Triangle (NC) High School*, (OCRXI, D.C. (NC) 2017).

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Many people with disabilities require restricted or scent-free environments, and this is the case in the educational environment as well. In a recent ***OCR Resolution Agreement with Legacy (AZ) Traditional School (2016)***,³² an OCR complaint was filed after an air freshener was used in a classroom with a student with a respiratory disability who had a 504 plan that restricted the use of air fresheners. The school staff explained that there had been some confusion about which type of air fresheners were permissible. After that incident, the student's father filed an OCR complaint and removed the child from the school. The school entered into a resolution agreement in which it agreed to adhere to the no air-freshener provision of the student's 504 plan and provide staff training.

Under the ADA, reasonable modifications are not limited to the classroom. Another example of a reasonable modification comes from ***K.K. v. North Allegheny School District, 2017 WL 2780582 (W.D. Pa. June 27, 2017)***. This case questioned whether it was a reasonable modification of district policy to require the district to transport a child with significant disabilities to and from a day care provider outside of the district's attendance boundaries which, plaintiff asserts, was necessary due to his disabilities because no child care providers within the boundaries would serve him. The case was brought by the child's mother on the basis of association discrimination. The court held that this type of modification may be required under the ADA, and criticized the district for failing to conduct an individualized inquiry. The court found a reasonable fact finder could conclude that the district's focus was on cost and not setting a precedent for having to transport students to and from day care facilities, and it did not consider whether there was a way to reasonably accommodate this particular student's need for transportation. It was determined that the transportation would cost \$70-\$72 per day, and the court concluded it was a question of fact as to whether that was reasonable. This court also had a broad interpretation of the association provision and concluded that given the child's inability to attend a child care center within the district's attendance boundaries, the district's refusal to modify its transportation program to give the parent access to the program equal to that of parents with nondisabled children, then a reasonable jury could find that she was also discriminated against due to her association.

Note that this case was originally brought on behalf of the son. But in ***S.K. v. North Allegheny School District, 2015 WL 1285794 (W.D. Pa. Mar. 20, 2015)***, because the transportation was necessary due to the mother's work needs, the court granted the District's motion to dismiss the case on behalf of the student, and granted leave to amend to the mother to bring the case on her own behalf.

³² OCR Resolution Agreement with Legacy (AZ) Traditional School (OCRVIII, Denver (AZ) 2016).

i. Athletic Programs

Whether modifications are reasonable and necessary for athletic programs has been a significant topic of recent litigation. To help schools and students navigate these issues, OCR published a Dear Colleague letter in 2013, which made clear that students with disabilities have the right, under Section 504, to an equal opportunity to participate in their schools' extracurricular activities. Ensuring that students with disabilities are given the opportunity to play alongside their peers—both with and without disabilities—is at the heart of the Guidance.³³

Some recent cases have considered whether school districts and their athletic departments need to modify certain rules to provide accessibility. For instance, in ***Kempf v. Michigan High School Athletic Association, 15-cv-14227 (E.D. Mich. Dec. 3, 2015)***, a student who is deaf was on the wrestling team. Though he had cochlear implants that partially restored his hearing, for safety reasons, he could not wear them during his matches. As a result, he was unable to hear his coach or the referee. His school district provided an ASL interpreter, and during non-sanctioned competitions, permitted the interpreter to move freely around the perimeter of the wrestling circle on the mat so that the student was able to maintain eye contact with the interpreter regardless of his body position. However, the Michigan High School Athletic Association restricted the interpreter to the coach's box during their events, citing safety concerns, such as preventing collisions between the interpreter, wrestlers, or referees. The student filed a lawsuit, which was resolved through a consent decree³⁴ shortly thereafter. As a result, the interpreter will be permitted 360-degree access around the wrestling circle on the mat. If practical, the interpreter will be required to stay at least six feet away from the circle, with the appropriate distance to be determined by the referee in conjunction with the interpreter to avoid any contact or interference.

Another issue that has arisen is the opportunity for student athletes with disabilities to participate fully in sporting events through the creation of separate divisions or varying qualifying standards. In 2012, in ***Madigan and Callahan v. Illinois High School Association, 12-CV-3758 (N.D. Illinois May 16, 2012)***,³⁵ the State of Illinois and a 16-year-old high school student who used a wheelchair, filed a lawsuit against the Illinois High School Association (IHSA) to ensure that student athletes with disabilities have full and equal opportunities to compete in interscholastic sports competitions throughout the

³³ www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201301-504.html

³⁴ www.mhsaa.com/portals/0/Documents/WR/sign%20language.pdf

³⁵ Press release: http://www.illinoisattorneygeneral.gov/pressroom/2015_06/20150624.html.

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state. The complaint challenged IHSA's policy of prohibiting athletes with disabilities from competing with able-bodied athletes and preventing them from advancing to state meets. Although Callahan was a member of her high school's swim team, and had support from her high school, she was unable to participate in competitions or competing in meets at the sectional or state championship level. The remedy sought was the creation of qualifying standards and rules for student athletes with disabilities, so that they can compete, earn points in high school meets, set records, and earn medals like all other students.

Prior to the Court's ruling on a motion for preliminary injunction, in 2012, IHSA resolved Callahan's complaint through a private settlement where it agreed to include Callahan and other student athletes with disabilities.³⁶ In this agreement, IHSA agreed to include student athletes in swimming and diving meets by including four swimming events for students with disabilities; include student athletes in track and field events by creating a wheelchair division with four track events and two field events for students with disabilities; modify the swimming qualifying standards for the state championship and for the track and field wheelchair division, to provide student athletes the opportunity to complete at sectional meets and qualify for state championship meets; adopt policies and procedures to ensure student athletes with disabilities are integrated as part of the main meet and interspersed with events for students without disabilities; permit schools to institute a point system in seasonal meets; implement procedures to request reasonable accommodations and/or modifications; and provide student athletes official times, championship medallions, and records that are the same as those as their non-disabled peers.

After two additional years of litigation, in 2015, IHSA agreed to settle the Illinois Attorney General's complaint. In so doing, it agreed to change the terms and conditions of its swimming and diving teams, and its track and field teams, so that students with disabilities can earn points for their teams and win a combined state championship. It also agreed to implement a revised accommodation policy to better meet the needs of students with disabilities; publicize its new policy and accommodation request form; designate a staff member to serve as its ADA coordinator who will review all requests for accommodations; provide training for IHSA staff at least every two years; and provide annual reports to the Illinois Attorney General for a four year period.

However, these settlements did not have any specific requirements about student athletes with disabilities who do not use wheelchairs. This issue was then litigated in the case, ***A.H. by Holzmüller v. Illinois High School Association*, 881 F.3d 587 (7th Cir. 2018)**, by a high school athlete who filed a lawsuit asking IHSA to implement qualifying standards

³⁶ Settlement: www.equipforequality.org/news-item/callahan/



for para-ambulatory athletes; create a separate division for this class of athletes; and formulate rules enabling them to earn points for their high school teams. The district court granted summary judgment to IHSA, and the Seventh Circuit affirmed the decision. In so doing, the Seventh Circuit concluded that the plaintiff had not established that “but for” his disability, he would be among the 10% of athletes that qualify for State each year. The Seventh Circuit also held that creating a separate division would be a fundamental alteration as a matter of law because it would lower the qualification standards. Judge Rovner filed a strong dissent challenging the reasoning of this opinion. She reframed the issue to explain that plaintiff should only need to show that he lacked access to a meaningful opportunity to qualify for state finals, and likened a division and standards for athletes with disabilities to separate divisions for female athletes. She also cited the fact that IHSA creates separate divisions for smaller schools, without undermining any competitiveness of the championship to discredit the fundamental alteration finding. **See also *K. L. v. Missouri State High Sch. Activities Ass'n*, 178 F. Supp. 3d 792, 801 (E.D. Mo. 2016)** (denying plaintiff’s request for a preliminary injunction in the form of creating a para-ambulatory division with qualifying standards for track team).

OCR has also had the chance to review cases about athletes with disabilities. In 2017, there was an ***OCR Resolution Agreement with Huron (SD) #02-2 School District (2017)***, after receiving a complaint from a high school student about inequitable access on her high school tennis team.³⁷ The student had a number of disabilities including a visual impairment and chronic migraines. She received medical clearance to participate, but her doctor advised that she “take it easy.” The student alleged that as a result of her disabilities, the coaches did not offer her equitable coaching, rarely watched her, provided little individual instruction during practices and gave her an arbitrary rating. While disagreeing with these allegations, the district agreed to ensure that qualified students with a disability are provided with equal opportunity to participate in all nonacademic and extracurricular activities.

ii. Service Animals

Another common modification of policy is the modification of a no-pets policy to permit the use of service animals by people with disabilities. This is an issue that has been litigated in the school setting and, most recently, courts have focused on whether the student with disability can act as his or her own “handler.” The ADA requires that service animals be under the control of their handler. The question then becomes, what does it mean to be a handler? In its guidance document on service animals, DOJ stated that “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

³⁷ 56 NDLR 150 (OCR VII, Kansas City (SD) 2017).



animal.”³⁸ The case law has, thus far, suggested that a student can maintain control by tethering the dog to a wheelchair, but that a student must be able to issue commands, at least most of the time, without assistance.

A key case on this issue, ***United States v. Gates-Chili Central School District*, 198 F.Supp.3d 228 (W.D.N.Y. 2016)**, was brought by the DOJ. Prior to initiating litigation, DOJ conducted an investigation and issued a Letter of Finding³⁹ concluding that the District had violated Title II. The District claimed that the student, D.P., could not “handle” her service animal and thus, could only bring the service animal if her parent provided a full-time handler. The parent, on the other hand, argued that she was not asking the District to act as a handler; instead, she was just asking for minimal and intermittent assistance. The District failed to comply with the DOJ’s directives, and DOJ filed a lawsuit. In the suit, it was undisputed that the student was unable to untether the dog, but that did not seem to be the issue. Instead, the parties disputed whether the student was able to issue commands independently. The court denied the District’s motion for summary judgment, and concluded that if the only assistance the student needed was help untethering and occasional reminders to issue commands, then the student was in control. On the other hand, if school personnel were required to actually issue commands to the service dog, then the student was not in control, and the family would need to supply a handler.

In ***Alboniga v. School Board of Broward County, Florida*, 87 F.Supp.3d 1319 (S.D. Fla. 2015)**, the mother of a student with multiple disabilities brought suit so that her son could use a service animal at school without having to provide a separate handler for the dog.⁴⁰ The student’s service animal was trained to detect and respond to seizures. The student’s mom asked the school to permit a staff member to accompany the student outside of the school premises when the animal needed to urinate. The school board objected to this requests and argued not only that it did not need to provide this level of assistance, but also that the student could not act as handler due to his disabilities. The court disagreed and explained that the student could, in fact, act as a handler as the service dog was tethered to the student’s wheelchair, was fully trained, and remained with him throughout the day, which constituted control over the animal, with the student acting as handler. The court also found it reasonable to have the school assist the student with respect to the dog’s urination, given that all other elements of daily care, such as feeding, cleaning and exercise, were performed by the plaintiff outside of school hours. It also found the requested accommodation one that really assisted the student, not the animal.

³⁸ Frequently Asked Questions about Service Animals and the ADA, U.S. Department of Justice, www.ada.gov/regs2010/service_animal_qa.html (Q27) (July 2015).

³⁹ Letter of findings: www.ada.gov/briefs/gates-chili_lof.pdf

⁴⁰ *Alboniga v. School Bd. Of Broward County, Fla.*, 87 F.Supp.3d 1319 (S.D. Fla. 2015).

Another reason for the school board's denial was that specially-trained teachers could (and did) provide the same seizure detection and care provided as the student's service dog. After acknowledging the truth of this contention, the court rejected it, opining that if this outcome were permitted, it would be "akin 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." The court also found that the school board was imposing an impermissible surcharge, as it was requiring the student to have liability insurance and vaccinations in excess of state law. Finally, the court noted that it would be problematic to separate the student and the animal, as it would have a "detrimental impact" on the human-animal bond and would "diminish the animal's responsiveness and effectiveness outside of the school setting." The Department of Justice filed a Statement of Interest in this case.⁴¹

In contrast, in ***Riley v. School Administrative Unit #23*, 2015 WL 9806795 (D.N.H. Dec. 22, 2015)**, the court denied a student's request for a preliminary injunction. Here, the court found that the student could not act as handler because he could not exercise control over the animal. The student did not use a wheelchair, so the animal could not be tethered to him. He walked with assistance and required hand-under-hand guidance, making him unable to safely hold or grab the leash. Further, the student was unable to communicate verbally, so he could not exercise control over the animal in that manner. In addition to the issues with respect to handling, the court found the accommodations requested by the student and his family were too broad. The student had requested that the school district provide someone to issue commands to the service dog and hold the dog's leash when it accompanied the student. The court concluded that the student's parents' request to effectively be asking for a handler, which was not required under the ADA.

In addition to cases brought under the ADA, many state laws have additional protections for service animals in schools. ***See, e.g., K.D. v. Villa Grove Community Unit School District*, 936 N.E.2d 690 (4th Dist. Ill. 2010)** (Illinois School Code permitted student with autism to be accompanied by service animal)

iii. Emergency Preparedness

Since the passage of the ADA, there has been a dramatic increase in mass shootings, including at elementary and secondary schools. Courts have confirmed that the ADA's reasonable modification requirements extend to emergency planning. The first reported case on emergency preparedness under the ADA was ***Shirey v. City of Alexandria School Board*, 98-cv-00313 (E.D. Va. Mar. 6, 1998)**. Cady Shirey attended G.W. Middle School in Alexandria Virginia and she used a wheelchair. In 1996, the school was

⁴¹ DOJ Statement of Interest: www.ada.gov/briefs/broward_county_school_board_soi.pdf

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evacuated because of a bomb threat. While all of the non-disabled students were evacuated, Cady and another student with a disability remained in the school for seventy minutes with one of the teachers. Although no bomb was discovered in the school, Cady's parents were upset that their daughter was not evacuated and filed a complaint with OCR alleging that she was discriminated against for failing to be evacuated. The parties reached a resolution during OCR's Early Complaint Resolution process where the school board committed to developing a new emergency preparedness plan to address the needs of students with disabilities with input from Cady's parents. Students would be sent to a designated safe room where a responsible adult with a special flag and cell phone would be placed to facilitate communication with school and emergency responders. If an actual evacuation were necessary, emergency personnel would evacuate the students with disabilities from the identified safe room. Training was provided on the new plan and practice drills were run to ensure that it worked smoothly. However, the following year, an unscheduled fire alarm went off. Although Cady went to the designated safe room while other students evacuated the building, the faculty member designated to stay with Cady in the safe room evacuated with the non-disabled students and Cady was left alone until her math teacher found her and stayed with her for the duration of the incident. At this point, Cady's parents filed a lawsuit under Title II and Section 504 about both incidents.

The trial court granted summary judgment for the school board, and the plaintiffs appealed. The Fourth Circuit ruled for the plaintiffs in ***Shirey v. City of Alexandria School Board*, 2000 WL 1198054 (4th Cir. Aug. 23, 2000)**, with respect to the first incident and for the defendants with respect to the second incident. For the first incident, the court found that undisputed facts demonstrated that the School Board had no reasonable plan in place to evacuate students with disabilities during an emergency and thus, violated the ADA and Section 504. However, the court held that the remedy for that violation would be for the school board to develop and implement a reasonable evacuation plan for students with disabilities, and because they had already done so, the court determined that no further relief was warranted. With respect to the second incident, the Fourth Circuit found that the School Board had developed and implemented an emergency preparedness plan to safely evacuate students with disabilities, and held that the imperfect execution was not an ADA violation, as long as the plan itself conformed to the ADA and that reasonable implementation efforts, such as training and practice drills, had been made. Because the School Board's plan and its subsequent implementation efforts were deemed reasonable, the court held there was no ADA violation.

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More recently, an emergency evacuation gone wrong prompted two lawsuits—***United States v. City School District of New Rochelle, 14-cv-5605 (S.D.N.Y. July 23, 2013)***⁴² and ***Feltenstein v. City School District of New Rochelle, 2015 WL 10097519 (S.D.N.Y. Dec. 18, 2015)***). In 2013, students at a high school in New Rochelle School District in New York were evacuated after smoke from the electrical room triggered the smoke alarm and the evacuation of a high school. Two students, however, both with cerebral palsy who used wheelchairs, were not evacuated. They were on the second and third floors of the school, with their respective aides, but the elevators had stopped working. It was learned that these two students had also not been evacuated during earlier safety drills, and safety plans had not adequately addressed how to evacuate students with disabilities. Indeed, one of the student’s specifically requested to have classrooms on the first floor, but this request was rejected by the school. The school, instead, bought evacuation chairs, but those chairs remained in storage until after the incident. The DOJ filed a lawsuit asserting that the District failed to provide the students with “meaningful access” to the school’s emergency preparedness programs by failing to evacuate them during a school-wide evacuation. It filed a proposed consent decree the same day in which the District agreed to ensure that students with disabilities can participate in evacuations and drills. It required training to District employees, and required the District to get technical assistance from an expert for the purpose of creating and implementing a written evacuation plan for students with disabilities. It also agreed to make reasonable modifications to its policies about the placement of students in particular classrooms.

One of the students filed a separate, private lawsuit against the school district and ultimately reached a private settlement. Interestingly, during that lawsuit, the District filed a third party complaint against the New Rochelle Fire Department seeking indemnification and contribution because it claimed it alerted the fire department to the presence of students with disabilities and the fire department said to keep the students inside. The Fire Department filed a motion to dismiss, which the court granted. The court held that the school district cannot pass on its ADA obligations to the fire department.

In an interesting combination between reasonable modifications and auxiliary aids and services, a school in California settled a case related to communication access during emergencies. In ***Jagielski-Bazzell v. Los Angeles Unified School District, 15-cv-2921 (C.D. Cal. April 20, 2015)***,⁴³ the school at issue was Marilton School, a public school for students who are deaf or hard of hearing. The plaintiffs in this case were not students with disabilities, but instead were five deaf or hard of hearing faculty. They brought their claim under Title I for employment discrimination, as well as under Section 504 and California state law. Specifically, they alleged that the emergency evacuation plan was

⁴² Consent decree available at www.ada.gov/new_rochelle_cd.htm

⁴³ 15-cv-2921 (C.D. Cal. April 20, 2015).

discriminatory because it did not allow them to safely evacuate themselves and their students. The complaint alleged Marlton has historically broadcast emergency information over loudspeakers, which was not accessible to the plaintiffs, and that after plaintiffs complained, the school had not made meaningful changes to its emergency procedures. Plaintiffs further alleged that when an emergency arises, they cannot determine whether they should evacuate themselves and their students or whether they should shelter in place because it is not safe to evacuate.

Following the filing of the complaint, the parties entered into a settlement agreement.⁴⁴ Highlights of the settlement include:

- installation in classrooms and common areas of a new visual PA system with large HD screens, scrolling LCD display, and video phones to communicate emergency messages and allow two-way communication with the front office;
- installation of flashing doorbells and peepholes or windows on classroom doors;
- an ASL interpreter in the command center during emergencies;
- addition of ASL to the video describing emergency procedures at the school;
- a meeting with first responders regarding the new procedures and equipment;
- installation of a two-way video camera at the entrance gate to the school facilitating better communication for staff who are deaf; and
- monetary relief of \$30,000 per plaintiff – for a total of \$150,000

iv. Medication Management

Another common modification of school policy comes in the form of providing medication management assistance to students with disabilities such as diabetes and epilepsy. One example is the ***DOJ Settlement Agreement with West Intermediate School located in Mt. Pleasant, Michigan (2015)***.⁴⁵ In this case, the complainant alleged that the school district failed to modify its policies to provide diabetes-related assistance to ensure equal access to attend locally zoned public school or magnet school. When reviewing the allegations, the DOJ concluded that permitting students to attend their locally zoned school was an “issue of public importance.” Highlights of the settlement agreement include that at least three employees will be designated and trained to provide students with diabetes with appropriate care in monitoring, supervising, or assisting with blood glucose monitoring tests, administering insulin, and administering glucagon in the event of an emergency. The school also agreed to supervise and monitor the consumption of food and beverages. It will modify its policies to permit students with diabetes to carry and

⁴⁴ A copy of the Settlement Agreement can be found at: www.equipforequality.org/news-item/settlement-agreement-addresses-emergency-preparedness-people-disabilities-school-setting/

⁴⁵ www.ada.gov/mt_pleasant_sa.html (2015).

use their diabetes supplies and medicines at any time during the school day, and during school-sponsored trips and afterschool activities. They will permit students to consume food and water, and use the restroom at any time. The school will also agree to create and publicize administrative guidelines for students with diabetes.

OCR has also taken action on issues related to diabetes management. It recently entered into a **Resolution Agreement with Eastern (OH) Local Schools (2017)**, after a student with diabetes was prohibited from attending two field trips.⁴⁶ OCR found that the District violated Section 504 by excluded her from one trip and making her participation in another contingent on her parent also attending. OCR confirmed that Section 504 requires equal opportunity to extra-curricular activities. It required as part of the resolution agreement that should the student reenroll in the district, she would have a new 504 plan that ensured that she was not excluded from field trips based on her disability.

C. Auxiliary Aids and Services for Effective Communication

The ADA requires schools to ensure that communication with individuals with disabilities is as effective as communication with individuals without disabilities. To do this, schools must provide auxiliary aids and services when necessary to ensure effective communication. Auxiliary aids and services are anything that makes communications accessible. Many students will receive these services for classroom instruction in their IEP. However, the ADA has these requirements for students both inside and out of the classroom, as well for parents, family members, and visitors.

An important recent case about effective communication in education comes from the Ninth Circuit, and serves to inform students and school districts about the interplay between effective communication under the ADA/Section 504, and the school's obligations to provide a free and appropriate public education under the IDEA. In ***K.M. ex al Bright v. Tustin Unified School District*, 725 F. 3d 1088 (9th Cir. 2013)**, the Ninth Circuit concluded that 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.⁴⁷

As background, the ***K.M.*** case consolidated cases of two hard-of-hearing students who requested CART (real time captioning) services, K.M. and D.H. The students' requests were denied, as the school instead provided alternate accommodations through the students' IEPs. The district court ruled in favor of the school district, finding that because

⁴⁶ OCR Resolution Agreement with Eastern (OH) Local Schools, 55 NDLR 102 (OCRXII, Cleveland (OH) 2017)).

⁴⁷ *K.M. ex al Bright v. Tustin Unified School Dist.*, 725 F. 3d 1088 (9th Cir. 2013). Department of Justice Amicus in K.M. case: www.justice.gov/sites/default/files/crt/legacy/2012/01/27/kmtustinbr.pdf



the school met its IDEA requirements, there was no need for a separate inquiry under the ADA because the laws were so similar. On appeal, the Ninth Circuit held that while the ADA/Section 504 and IDEA are similar, compliance with an IDEA IEP may—but may not—satisfy the requirements under the ADA/Section 504. While the IDEA must consider “the child’s language and communication needs”, “opportunities for direct communications with peers and professional personnel in the child’s language and communication mode,”⁴⁸ and “whether the child needs assistive technology devices and services,” the ADA requires public schools, as a part of its effective communication regulation, to communicate with disabled students “as effectively” as with other students and “to provide disabled students the auxiliary aids necessary to afford an equal opportunity to participate in” school programming.⁴⁹ However, the IDEA does not require schools to provide “equal” opportunities to all students. For this reason, the Ninth Circuit ruled that the district court erred when they held that a failure of an IDEA claim also constituted a failure of a Title II claim. Thus, the Ninth Circuit remanded the case to the district court to determine whether the school’s failure to provide CART services constituted an ADA violation. On remand, the court ordered the school to provide CART services.⁵⁰

Following this case, the DOJ and the U.S. Department of Education released a document entitled “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools” providing further explanation and clarification regarding the provision of effective communication.⁵¹

What auxiliary aid or service is required for effective communication depends on the needs of the person with a disability and the context of the communication. For instance, a deaf parent may need a sign language interpreter to communicate during a parent-teacher conference, while another deaf parent may not use American Sign Language and may prefer CART captioning for this communication. Likewise, a blind member of the public may ask for all materials in Braille to participate in a public school board meeting, while another may prefer to receive materials electronically so that she can review the materials using her screen reading software.

⁴⁸ 20 U.S.C. §1414(d)(3)(B)(iv) & (v).

⁴⁹ 28 C.F.R. § 35.160(a)(1) & (b)(1).

⁵⁰ *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, 2013 WL 6730163 (S.D. Cal. Dec. 19, 2013) *reconsideration denied*, No. 09-CV-2621-L NLS, 2014 WL 129070 (S.D. Cal. Jan. 14, 2014).

⁵¹ U.S. Department of Justice and the U.S. Department of Education released a document entitled “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools (Nov 2014), available at www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf

Another recent trend in the case law and in settlement agreements has to do with accessible information technology, course materials, and website accessibility. More and more educational entities are providing educational information through electronic means, which can be a great benefit to students, but requires consideration of ensuring effective communication to students with disabilities. From a legal standpoint, it is largely undisputed that accessible electronic and information technology is an auxiliary aid and service.

The DOJ, OCR, and private bar have all been active in bringing cases about website accessibility. As one example, in 2016, OCR reached a **Resolution Agreement with Aurora Public Schools (2016)**.⁵² OCR responded to a complaint and determined a number of accessibility barriers, including some important content required computer mouse to access; some videos did not have accurate captions; various links and forms were not meaningfully/properly labeled; and the site used color combinations that were difficult to read. To resolve this investigation, the school system agreed to retain an auditor to identify barriers; update all new website content and functionality to be accessible; create a corrective action plan to remove barriers over 18-month period; issue notice about requesting access to inaccessible information; and provide training on website accessibility for appropriate personnel.

D. Most Integrated Setting Available

In 1999, the U.S. Supreme Court held in **Olmstead v. L.C., 527 U.S. 581 (1999)** that the unjustified isolation of people with disabilities was discrimination. There are currently two cases pending, both against the State of Georgia, seeking to address the application of *Olmstead* to the public school system. In **United States v. Georgia, 16-cv-03088 (N.D. Ga. 2016)**,⁵³ DOJ filed suit asserting that the State administers its mental health and therapeutic educational services and supports almost exclusively through GNETS, Georgia Network for Educational and Therapeutic Support Program. DOJ alleges that in so doing, it places students with disabilities in segregated programs in self-contained buildings or separate wings of buildings, provides them with an inferior education, as some students only receive computer-based instruction, deprives them of access to electives, facilities and extracurricular activities, and places them in inferior facilities in various states of disrepair. DOJ brought this case in August 2016, after issuing a Letter of Findings that the program violates the ADA.⁵⁴ This case is currently stayed as whether DOJ has authority to sue under Title II is an issue currently on appeal to the Eleventh

⁵² www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08161324-a.pdf

⁵³ www.ada.gov/olmstead/documents/gnets_complaint.html

⁵⁴ www.ada.gov/olmstead/documents/gnets_lof.pdf

Circuit in ***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).

Meanwhile, private disability rights groups filed another lawsuit against the State of Georgia about the same issues. This case is ***Georgia Advocacy Office and the Arc v. Georgia*, 17-cv-0399 (D. Ga. Oct. 17, 2017)**, and the State's motion to dismiss is currently pending.⁵⁵ This is an area expected to see additional litigation in the future.

E. Abuse, Harassment and Bullying

Courts have held that abuse of students with disabilities, as well as harassment, can constitute discrimination and be unlawful under the ADA if they are based on a disability. How abuse can interplay with the ADA can be illustrated by ***Fortin on behalf of TF v. Hollis School District*, 2017 WL 4157065 (D.N.H. Sept. 18, 2017)**. In this case, the District employed Keehan to provide one-on-one support for the student, TF, who had autism. Keehan reacted aggressively to TF's apparent lack of responsiveness by pulling TF's ear. This act was caught on videotape. It was brought to the school administrator's attention, who immediately sent Keehan home and then placed her on administrative leave. Keehan ultimately resigned from her position. The family filed a lawsuit for various tort claims, including battery, as well as the ADA against the aide and the District. The issue was whether the District could be held liable for the aide's acts when it had no knowledge of them. The court held that it could, and denied the District's motion for summary judgment on this issue. It found that the District could be vicariously liable if the aide had engaged in intentional discrimination. Whether intentional discrimination occurred remained an issue of fact—while the District argued that this was an isolated incident, the Plaintiff provided evidence demonstrating a pattern of conduct. The court also noted that “physically assaultive conduct” can be discrimination. The case went to a jury, which awarded the plaintiffs \$285,000 on their battery charged. The jury found for the District, however, on the plaintiff's ADA case. The plaintiffs also entered into a private settlement agreement with the aide. **See also *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).

Courts have also recognized that students can bring claims for peer-to-peer harassment under the ADA. The elements to bring such a claim are: (1) the student is a person with a disability; (2) the student was harassed on the basis of his disability; (3) the harassment was severe or pervasive that it altered the condition of the student's education and

⁵⁵ www.centerforpublicrep.org/court_case/gao-v-georgia



created an abusive educational environment; (4) the defendant knew about the harassment; and (5) the defendant was deliberately indifferent to the harassment.⁵⁶ OCR has published a Dear Colleague Letter on Disability Harassment.⁵⁷

Individuals pursuing harassment or bullying claims under the ADA often have a difficult time proving the conduct was severe or pervasive, and also that the defendant was deliberately indifferent. A case on the latter point, which also shows a court's analysis of all five elements is ***Sparman v. Blount County Board of Education*, 2016 WL 5110484 (N.D. Ala. Sept. 19, 2016)**. In this case, the student alleged a long history of disability-based bullying. The court concluded that the student was a person with a disability, as he had dyslexia, learning disabilities and asthma. It also found that the harassment alleged was based on his disability. The student was called a "retard," made fun of because of his asthma, and teased when he had difficulty reading aloud in class. The court also found that the conduct was severe and pervasive, as the student had experienced bullying since kindergarten, it had caused him to resist school, have nightmares and nighttime incontinence, and seek psychological counseling. The court also noted that the defendant knew about harassment due to the student's and student's family's complaints.

Nonetheless, the court found that the plaintiff could not proceed with the case because the Board was not deliberately indifferent. The court said that it is not enough to show that Board did not succeed in stopping bullying; instead, the plaintiff must show Board's response was unreasonable. Neither the ADA nor Section 504 requires the Board "to ensure that absolutely no disability-based harassment or bullying occur; that is an impossible burden." Instead, the court explained, "[f]ederal law requires [that school districts] take reasonable steps to prevent and protect vulnerable students from suffering such harassment." In this case, the Board had worked with the student to develop a specific safety plan where the student had access to incident report or complaint forms to report bullying. When bullying and harassment was reported, it was investigated. When it was proven, the perpetrating students were punished. And when it wasn't, the students were still counseled about appropriate behavior.

OCR has had a number of investigations and resolutions about bullying. It reached a ***Resolution Agreement with Charlotte-Mecklenburg Schools (2016)*** before

⁵⁶ *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).

⁵⁷ OCR Dear Colleague Letter on Disability Harassment: www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf

concluding its investigation into complaints of harassment.⁵⁸ In the agreement, OCR required the school to provide training for all teachers, administrators, and 504 coordinators on addressing disability-based harassment and about their obligation to respond promptly and effectively to disability-based harassment that it knows or reasonably should know about. It also required the district to agree that if a harassment investigation reveals that harassment occurred, it must take prompt and effective steps reasonably calculated to end harassment, eliminate hostile environment, and prevent recurring conduct.

IV. Does IDEA Exhaustion Apply to ADA Claims

The IDEA contains an administrative process students must go through prior to filing a lawsuit in federal court. Given the potential overlap between claims brought under the ADA and Section 504 and IDEA, until 2017, courts were divided as to whether individuals could bring ADA claims directly in court without proceeding through IDEA's administrative process. This was the issue in the 2017 U.S. Supreme Court case ***Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017)**. In *Fry*, E.F., a student with cerebral palsy, requested permission to bring her service animal, Wonder, to school, but her school denied her request. She filed a complaint with OCR and the school agreed to permit her to bring Wonder to school. Fearing retaliation, E.F. transferred schools, and then filed a lawsuit under the ADA and Section 504 for monetary damages. The district court dismissed the plaintiff's case, finding that she had failed to exhaust administrative remedies under IDEA. Note that IDEA provides that its procedures must be used whenever "seeking relief that is also available under [the IDEA]."⁵⁹ Although the Sixth Circuit affirmed the decision, the Supreme Court reversed and remanded, in an unanimous decision for the student.

The Supreme Court held that exhaustion is required only when the "gravamen of the complaint" seeks relief for free and appropriate public education (FAPE). When making this determination, it is irrelevant whether the complaint expressly states IDEA or FAPE or IEP; instead, the court must consider primary purpose of the laws. The ADA and Section 504, on one hand, address disability discrimination that applies both inside and outside of the schools for people of all ages. IDEA, on the other hand, addresses meaningful access to education with individualized services. The Supreme Court offered some "tips" to lower courts when performing this analysis. It advised to consider the procedural history of process. If the litigants had previously used IDEA administrative process, then the complaint was likely about FAPE. The Supreme Court also advised courts to consider whether the same complaint could be brought outside of the school

⁵⁸ www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11161145-a.pdf

⁵⁹ 20 U.S.C. § 1415(l)



context or by adults? If not, then the complaint was likely about FAPE and governed by the IDEA.

Courts have been applying the *Fry* analysis when determining whether a federal court complaint about the ADA in schools can proceed absent first going through the administrative process. For instance, in ***P.H. by Luna v. Tehachapi Unified School District*, 2017 WL 3085020 (E.D. Cal. June 9, 2017)**, the court concluded that the plaintiff's case could move forward without IDEA exhaustion of administrative remedies. Here, a seven year old girl with multiple disabilities brought a lawsuit under the ADA, Section 504, and various other laws and torts, asserting that she had been tied to a chair, with a blanket, and left for entire school days, leaving her bruised, battered, and soiled. The district sought dismissal of the case, arguing that the plaintiff had not exhausted her IDEA remedies. The court disagreed, and denied the district's motion to dismiss. It held that the gravamen of the complaint was not about a failure to provide FAPE, but rather about isolation, resulting in the denial of school programs and services, and physically and psychologically abuse. The complaint had no claim about the adequacy of her special education services and there was no history suggesting that the complaint was actually focused on the adequacy of her education. ***But see A.R. v. Sch. Admin. Unit #23*, 2017 WL 4621587 (D.N.H. Oct. 12, 2017)** (concluding that plaintiff was required to exhaust IDEA remedies when seeking service animal because plaintiff was also asking the District to provide a handler, which would be a service under the IDEA, not just the ADA's nondiscrimination requirements).

V. High Stakes Testing

The ADA also extends to entities that offer “examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, professional, or trade purposes.”⁶⁰ This applies to the GED, PSAT, SAT, ACT, and other tests typically taken by high school students. The ADA requires such examinations to be “selected and administered to *best ensure*” the examination measures an individual's aptitude and achievement, rather than disability.⁶¹

Most of the litigation on this topic has addressed examinations taken for graduate school admission, such as the Law School Admission Test (LSAT), U.S. Medical Licensing Examination (USMLE) or on Bar Examinations. DOJ has actively enforced this area of the law, and released new regulations in 2014 clarifying the obligations of testing

⁶⁰ 28 C.F.R. § 36.309(a).

⁶¹ 28 C.F.R. § 36.309(b)(1)-(3).



entities.⁶² Perhaps as a result, many testing entities have revised their policies to be more consistent with DOJ expectations. For example, the College Board, which administers the SAT, PSAT and AP exams, agreed to streamline their accommodation procedures in 2017 to, among other things, automatically approve accommodations for the vast majority of students who receive school-based testing accommodations through a formal school-based plan.⁶³ Because of this, and other DOJ regulatory guidance, it is a best practice for students with disabilities to formalize the accommodations that they are receiving in elementary and high school.

VI. Employment Discrimination and Retaliation

In addition to protecting the rights of students with disabilities, the ADA also protects the rights of employees with disabilities, under Title I. Title I applies to all private employers with 15 or more employees with a limited exception, relevant to the K-12 discussion, called the “ministerial exception” for certain employees at a religious institution. In 2012, the U.S. Supreme Court in *EEOC v. Hosanna Tabor*, 565 U.S. 171 (2012), held unanimously that federal anti-discrimination laws do not apply to employees with ministerial or religious functions.

The Seventh Circuit recently applied this exception to confirm that a teacher at a Jewish day school fell outside the scope of the ADA’s protections, even though she herself viewed her teaching about Judaism as a culture. In *Grussgott v. Milwaukee Jewish Day School*, 882 F.3d 655 (7th Cir. 2018), a teacher who had cognitive difficulties stemming from a brain tumor had a confrontation with a parent and was ultimately fired. She sued under the ADA. The Seventh Circuit affirmed the lower court’s decision granting summary judgment to the school based on the ministerial exception. The Seventh Circuit first found that the school was a religious institution entitled to this exception, even though it did not follow Orthodox principles, was not run by a rabbi, and had nondiscrimination policies. It then concluded that the teacher was a minister as she was expected to integrate religious teachings in lessons, and she performed religious functions, including teaching students about Jewish holidays, prayer and Torah. The fact that she believed Judaism was a culture, as opposed to a religion, did not change that analysis.

For all employees where the ADA does apply, one common question in the K-12 environment is how to make a request for a reasonable accommodation in light of the size of the school district and diverse decision-making. While the rule is that employees need not use any specific forms, the best practice for employees is to use employer-

⁶² www.ada.gov/regs2014/testing_accommodations.html

⁶³ www.collegeboard.org/students-with-disabilities/whats-new

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created forms and for employers is to train staff to recognize requests for accommodation. In ***Jones v. Clark County School District*, 2017 WL 1042463 (D. Nev. Mar. 17, 2017)**, a bus driver with depression asked his supervisor to transfer to a new job due to his disability. While this was a clear request for an accommodation, the supervisor referred the driver to the school's ADA coordinator. The driver told the ADA coordinator that he wanted to “retire” from driving, which the coordinator did not understand to be a request for an accommodation. He was not transferred and filed suit under the ADA. In defense, the school district argued that the driver failed to request an accommodation. The court disagreed, finding that the driver's request to his supervisor was sufficient. It noted that it was not the driver's fault that one administrator failed to communicate with another. The Job Accommodation Network has a technical assistance document about providing reasonable accommodations for educators.⁶⁴

Another issue regularly found in the case law is when a teacher or administrator without disabilities is retaliated against for advocating for students with disabilities. Courts have analyzed these cases under both traditional employment discrimination claims under Title I as well as Title II retaliation claims.

For instance, in ***Barker v. Riverside County Office of Education*, 584 F.3d 821(9th Cir. 2009)**, a special education teacher voiced her concerns that the special education services were noncompliant with federal and state law and then filed a class action complaint with OCR. Following that complaint, she alleges that she was subjected to retaliation in the form of being excluded from meetings, having a reduced case load, being given assignments further away and more, leading to constructive discharge. She filed another complaint with OCR for retaliation, and OCR found in her favor. Following that, she filed a lawsuit in federal court, but the district court dismissed her case finding that she lacked standing to sue under Title II or Section 504. On appeal to the Ninth Circuit, the case was reversed and remanded. The Ninth Circuit concluded that the ADA's and Section 504's anti-retaliation provisions grant standing to people without disabilities by extending protection to “any individual.” The court further opined that the plaintiff could bring claims under Title II—not just employment discrimination—because she was advocating for her students' rights under Title II.

Other courts have analyzed retaliation claims under both Titles I and II. In ***Hamerski v. Belleville Area Special Services Coop.*, 2018 WL 1399595 (S.D. Ill. March 20, 2017)**, the plaintiff had worked as an interim principal for a school for students with emotional and behavioral disabilities in 2008. During that time, she implemented procedures opposing the use of arrest, isolation, seclusion and restraint on students with disabilities.

⁶⁴ <http://askjan.org/media/educators.html>

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In 2015, the plaintiff was investigated and forced to resign or be demoted. The investigator said that the most serious acts of misconduct were about her positions on student arrests. She filed a lawsuit under Titles I and II for retaliation. The court found for the employee, denying the employer's motion for summary judgment. The court explained that these facts "fit squarely within the ADA's protections for any individual who opposed an act or practice made unlawful by that statute."

VII. CONCLUSION

The ADA is a federal civil rights law that fosters equal opportunity, full participation, independent living, and economic self-sufficiency. The ADA is different from the IDEA because in addition to students, it also applies to parents, members of the public, and employees with disabilities. The ADA also applies to all aspects of the school experience, not just a student's educational experience. With the Supreme Court's decision in Fry giving clarity about when ADA cases can proceed without exhausting IDEA remedies, and with more advocates learning of the breadth of the ADA and its possible applications to the K-12 setting, this is certainly an area of law that will continue to expand in the future.