

Region IV Webinar
Legal Updates
September 2, 2015

Ron Hager, Senior Attorney
National Disability Rights Network
Washington, DC

1

United States Court System

- **District Courts:** The nation's 94 district or trial courts are called U.S. District Courts. District courts resolve disputes by determining the facts and applying legal principles to decide who is right.
- Trial courts include the district judge who tries the case and a jury that decides the case. Magistrate judges assist district judges in preparing cases for trial.
- There is at least one district court in each state, and the District of Columbia. Each district includes a U.S. bankruptcy court as a unit of the district court. Four territories of the United States have U.S. district courts that hear federal cases, including bankruptcy cases: Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands.

2

United States Court System

- **Courts of Appeals:** There are 13 appellate courts that sit below the U.S. Supreme Court, and they are called the U.S. Courts of Appeals. The 94 federal judicial districts are organized into 12 regional circuits, each of which has a court of appeals. The appellate court's task is to determine whether or not the law was applied correctly in the trial court. Appeals courts consist of three judges and do not use a jury.

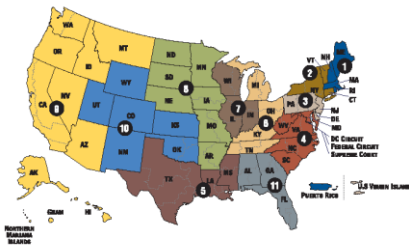
3

United States Court System

- **The Supreme Court** is the highest court in the United States. Article III of the U.S. Constitution created the Supreme Court and authorized Congress to pass laws establishing a system of lower courts. In the federal court system's present form, 94 district level trial courts and 13 courts of appeals sit below the Supreme Court.

4

Geographic Boundaries of United States Courts of Appeals and United States District Courts



5

2014 Court Decisions

6

Seventh Circuit Holds District Reasonably Accommodated Diabetes Needs

- *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524 (7th Cir. 2014).
 - Parents disputed the school district’s ability to meet their son’s needs arising as a result of his Type I diabetes.
 - Parents sued the school district for damages and both the district court and the Seventh Circuit held that not only did the evidence fail to show intentional discrimination, it also failed to show that the school district failed to reasonably accommodate the student.

7

Trebatoski v. Ashland Sch. Dist. (cont.)

- The district developed a Section 504 plan and hired a licensed nurse to manage the student’s diabetes care.
- Although the plan called for three people to be trained, the evidence supported a finding that the nurse was the only person properly trained.
- Additionally, the supervisor believed Wisconsin law required strict adherence to a doctor’s orders, so she would not allow the nurse to follow the parents’ instructions to modify the insulin dosage.
- The Wisconsin Department of Public Instruction agreed with the supervisor’s interpretation.

8

Trebatoski v. Ashland Sch. Dist. (cont.)

- The parents obtained a doctor’s order to allow the student to self-treat, but the order was not received by the school until after school had dismissed, so the supervisor did not allow the student to self-treat.
- In response the parents pulled the student out of school and enrolled him in a private school with no nurses, trained staff and no formal plan for diabetes care.
- On these facts, the Seventh Circuit held that the district had not failed to accommodate the student.

9

Trebatoski v. Ashland Sch. Dist. (cont.)

- The court noted, “for 504 plan violations to constitute disability discrimination they must be significant enough to *effectively* deny a disabled child the benefit of a public education and reasonable accommodations may have to be made.”
- Here, the student regularly attended school, performed well and had no adverse health consequences.

10

Trebatoski v. Ashland Sch. Dist. (cont.)

- Although the district did not fully implement the student’s plan, by having only one trained staff person instead of three, it also required a trained staff person be with him at all times and this requirement was not met only once.
- Therefore, this “was at most a minor violation of the 504 plan and in no way made Charlie unsafe or denied him the benefit of a public education.”
- Additionally, the school’s refusal to allow for case-by-case adjustments to his inulin doses was essentially a dispute over doctor’s orders, which were confusing.
- The parents could have resolved this issue “by obtaining more flexible doctor’s orders.”

11

Sixth Circuit Holds Parent Not Required to Exhaust in Damages Action Based on Abuse of Student

- *F.H. ex rel. Hall v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014)
 - F.H. is a person with multiple disabilities who required the assistance of aides while he was a student, particularly when using the bathroom.
 - The parent brought an action under § 1983 for damages for the alleged abuse of her son, as well as an IDEA claim for breach of a settlement reached at a resolution session.
 - The district court dismissed all claims and the Sixth Circuit reversed.

12

FH v Memphis City Schools (cont.)

- Key allegations of abuse by his aides:
 - being frequently left unattended in the bathroom and unable to clean himself, and in one case having a seizure;
 - being physically and verbally abused on multiple occasions and on one occasion allowing him to return from the bathroom with bloody underwear;
 - being ridiculed about his disability by the aides until he screamed and banged his head against the wall in frustration;
 - regularly not helping him to clean himself so that he returned to class with dirty underwear and on at least one occasion an aide announced to the class that he smelled like “shit;”
 - being sexually abused by an aide on more than one occasion in a private bathroom.

13

FH v Memphis City Schools (cont.)

- The district court dismissed the § 1983 claims, finding that a settlement agreement between the parties included a release of these claims and that the IDEA required exhaustion of these claims prior to litigation.
- The Sixth Circuit disagreed with the district court on both grounds.

14

FH v Memphis City Schools (cont.)

- First, the court noted that the settlement agreement released any claims “arising under the IDEA.”
- However, these “allegations clearly point to physical, non-disciplinary, and non-educational injuries, which cannot be redressed by any remedy available under the IDEA.”

15

FH v Memphis City Schools (cont.)

- Second, the court noted that the student’s alleged injuries, that he was verbally, physically and sexually abused by his aides, do not relate to the denial of a FAPE.
- They “are non-educational in nature and cannot be remedied through the administrative process.”
- The court also noted that to require exhaustion here “would create an additional administrative burden not present for non-disabled children.”
- Accordingly, he was not required to exhaust the § 1983 claims.

16

FH v Memphis City Schools (cont.)

- Finally, the Sixth Circuit held that the student was not required to exhaust his breach of contract claim as found by the district court.
- Pursuant to the IDEA, if an agreement is reached at a resolution session the parties must execute a legally binding agreement that is enforceable in state or federal court.
- The terms of the settlement agreement itself stated that the agreement was reached at a Resolution Session and was enforceable pursuant to the IDEA.
- Therefore, the breach of contract claim is not subject to exhaustion.

17

Third Circuit Holds School District's Lack of Individualized Goals Denied FAPE to Student

- *Jefferson County Bd. of Educ. v. Lolita S.*
 - district developed IEP that listed goals based on the state standard for ninth-grade students even though student was reading at first-grade level.
 - impartial hearing officer determined district had offered FAPE, but district court reversed.
 - Third Circuit affirmed district court's decision.

18

Jefferson County Bd. of Educ. v. Lolita S. (cont.)

- no evidence that student had progressed from first to ninth-grade reading level
- district provided no program to address this gap in his reading program
- IEP for one year had one student's name typed in, which was crossed out and replaced with correct name
- His "IEP did not provide him with any educational benefits beyond those he would have received if he never had the IEPs."

19

Jefferson County Bd. of Educ. v. Lolita S. (cont.)

- Transition goals also failed to provide FAPE
- A box was checked on the IEP that transition assessments were completed, but no evidence they were
- Student received same vocational program as peers with no determination of whether it was appropriate
- Student's post-secondary goal did not meet his diploma track

20

Second Circuit Holds LRE Obligation Applies to ESY Services

- *T.M. ex rel. A.M. v. Cornwall Cent. School Dist.*
 - Second Circuit held that LRE applies to ESY services the same as for school year placements
 - Student could be successful in regular education setting with appropriate supports
 - District recommended a more restrictive setting
 - District argued it only had to provide a less restrictive setting if it had one available
 - Second Circuit said no

21

T.M. v. Cornwall Cent. School Dist. (cont.)

- LRE is based on the needs of student, not what district has available
- LRE does not allow a district to escape its duty for ESY by only choosing to offer restrictive placements
- District need not create a summer program of its own
- District may contract with another public or private school program

22

Ninth Circuit Holds Failure to Provide Parents with RTI Data Violated Right to Be Full Participants in IEP Meetings

- M.M v. Lafayette Sch. Dist.
 - district's failure to provide RTI testing data to parents violated the procedural requirements of IDEA and prevented them from meaningfully participating in IEP meeting, thereby denying FAPE
 - core principle throughout IDEA is meaningful participation by parents and informed consent, making parents an integral part of the IEP Team

23

M.M v. Lafayette Sch. Dist. (cont.)

- Failing to provide RTI data violated IDEA's procedural requirements
 - IEP Team must draw on a variety of sources and ensure it is carefully considered by entire IEP Team
 - IEP Team must ensure lack of performance is not result of lack of adequate instruction by considering results of assessments repeated at reasonable intervals and provided to parents
 - Parents entitled to examine all student records

24

M.M v. Lafayette Sch. Dist. (cont.)

- Procedural violation denied FAPE because parents' right to participate in IEP process seriously infringed
 - Other members had this data and met three times per year to discuss
 - Data showed student had declined, yet no change to IEP
 - Without this data, "the parents were struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefiting from services, and thus unable to properly advocate for changes to his IEP."

25

DOJ Files Statement of Interest in Springfield, MA Schools ADA Case

- *S.S. v. City of Springfield MA*
 - Case brought under ADA, claiming city discriminates against students with mental health disabilities by providing inferior education in segregated school where they are disproportionately subjected to discipline, suspension, and arrest.
 - City moved to dismiss
 - Plaintiffs and DOJ opposed motion

26

S.S. v. City of Springfield MA (cont.)

- DOJ points:
 - District may be providing FAPE under IDEA but still violate ADA
 - Plaintiff may choose to litigate only under the ADA, which may require district to take different or additional measures to avoid discrimination than IDEA
 - ADA regulations give a right to sue to enforce ADA violations

27

2014 Administrative Documents

28

OSEP Issues Guidance About Classroom Observations and Recording Resolution Meetings

- *Letter to Savit*, 114 LRP 50211 (OSEP, Feb. 10, 2014)
 - OSEP was asked whether it was legal for a district to prohibit “third parties” such as attorneys and advocates from observing classrooms while students were there.
 - The policy did not apply to parents or evaluators.
 - OSEP said the IDEA regulations do not provide a general right for third parties to observe students in their current or proposed classrooms. It is up to state or local policy.

29

Letter to Savit (cont.)

- The next question was whether it was legal for the district to limit evaluators to a two-hour evaluation of the student in the classroom.
- OSEP said that the rules for IEEs must be the same as they are for school district evaluators.
- So, the only way a district could limit the time for an IEE classroom observation would be if they had the same limit for its evaluators.

30

Letter to Savit (cont.)

- OSEP asked whether legal for district to forbid parents or representatives from recording resolution sessions.
- Previous policy letters said IDEA is silent about allowing video or audio recordings of meetings between school and parents, such as IEP meetings.
- Therefore, state and districts free to develop policies which could prohibit use of recording devices at IEP meetings.
- Policy must have exception where recording is necessary to ensure parent understands IEP process or to enable parent to participate in process.
- Same analysis for IEP meetings applies to resolution sessions.

31

OSEP Declares Parents Have Right to IEE When They Allege District's Evaluation Was Not Comprehensive

- *Letter to Baus*, 115 LRP 8855 (OSEP, Feb. 23, 2015)
 - OSEP stated if parent disagrees with district's evaluation because student was not evaluated in a particular area "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs."
 - OSEP relied on comprehensive nature of IDEA's evaluation requirements, including requirement that "the evaluation is sufficiently comprehensive to assess the child in all areas related to the suspected disability, and must identify all of the child's special needs, whether or not commonly linked to the disability category in which the child has been classified."

32

OSEP Makes Clear the "Burden of Proof" Does Not Apply to State Complaints

- *Letter to Reilly*, 114 LRP 49672 (OSEP, Nov. 3, 2014)
 - OSEP noted state complaint procedure is a "powerful tool to address noncompliance" with IDEA.
 - It is intended to be less adversarial than the due process hearing.
 - Like due process hearings, state complaints may be used to address whether a district is providing FAPE.
 - Unlike due process hearings, state complaints are "investigative in nature, rather than adversarial."
 - Not be appropriate to assign the burden of proof to either party when the state receives a state complaint.

33

Letter to Reilly (cont.)

- OSEP noted it is solely the SEAs obligation “to investigate the complaint, gather evidence, and make a determination” whether or not a district violated IDEA.
- The SEA required to “independently review and weigh the evidence, generally by reviewing student and school records, data and other relevant information to come to a determination.”
- Not the burden of either party to produce sufficient evidence to persuade the SEA “one way or the other.”

34

OSEP Provides Guidance on Definition of Students with Visual Impairments or Blindness

- *Letter to Kotler*, 115 LRP 5832 (OSEP, Nov. 12, 2014)
 - IDEA regulations define “visual impairment including blindness” to include both partial site and blindness.
 - It means “an impairment in vision that, even with correction, adversely affects a child’s educational performance.”
 - OSEP made it clear that state definitions must be consistent with the requirements of the IDEA.

35

Letter to Kotler (cont.)

- Because definition does not include any modifiers such as “significant” or “severe” as some definitions, “any impairment in vision, regardless of severity, is covered, provided that such impairment, even with correction, adversely affects a child’s educational performance.”
- Because evaluation must also consider child’s future needs, a child’s current vision status would not necessarily determine whether or not the child might be eligible to receive services.

36

OSEP: Students Whose Hearing Loss Has Been Corrected May Still Be Eligible for Services

- *Letter to Blodgett*, 115 LRP 5869 (OSEP, Nov. 12, 2014)
 - Students whose conductive hearing loss has been medically corrected may still be eligible for IDEA if they meet definition of another eligibility category and require special education.
 - Before a student may be declassified they are to be reevaluated "in all areas related to the suspected disability."
 - "The evaluation must be sufficiently comprehensive to identify the child's potential need ... whether or not commonly linked to the disability category in which the child was previously identified."
 - OSEP particularly singled out speech and language impairment "because hearing loss during the crucial early years can have a long-term impact on a child's speech and language acquisition and development."

37

OCR Issues Letter on Charter Schools

- OCR letter clarifies that charter schools are public schools and as such must comply with federal civil rights laws, regulations, and guidance.
- Under Section 504, charter schools need to be mindful of the rights of children and parents in the community when publicizing the school, in order to attract students, and when evaluating their applications for admission.
- In addition, communications with parents with disabilities must be as effective as communications with other parents.

38

OCR Issues Letter on Charter Schools (cont.)

- Charter school's eligibility criteria for admission must be nondiscriminatory on its face and applied in a nondiscriminatory manner.
- When addressing discipline for students with disabilities, charter schools must comply with applicable legal requirements governing the discipline of a child for misconduct caused by, or related to, the child's disability.

39

OCR Issues Letter on Charter Schools (cont.)

- Under Section 504, every student with a disability enrolled in a public charter school, must be provided a FAPE.
- Charter schools may not ask or require students or parents to waive their right to a FAPE to attend the charter school.
- Charter schools must provide nonacademic and extracurricular services and activities in a manner that students with disabilities are given an equal opportunity to participate.
- The OCR Letter is available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201405-charter.pdf>.

40

IDEA Strategies to Reduce R&S

41

IDEA Strategies

- Students must be free from abusive and dangerous practices in school.
 - No child should be subjected to the abusive or potentially dangerous use of seclusion or restraint in school.

42

IDEA Strategies

- Restraint or seclusion may not be used to discipline a student or as a planned intervention
 - The IEP must include all special education and related services and supplementary aids and services to be provided to child, or on behalf of child, based on peer-reviewed research to the extent practicable.
 - There is no evidence that using restraint or seclusion is effective in reducing the behaviors that frequently precipitate the use of such techniques.
 - There are other, effective, evidence-based practices that can be used to reduce inappropriate behaviors.

43

IDEA Strategies

- The IEP Team must take steps to address the underlying behaviors giving rise to the perceived need to use restraint or seclusion.
 - When developing the IEP, for any child whose behavior impedes the child's learning or that of other students, the IEP Team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior.

44

IDEA Strategies

- Conducting an FBA may be necessary to determine the antecedents to the behavior.
 - A FBA is an assessment that attempts to determine what purpose the behavior serves for the student and to find alternative ways for the student to fulfill the same need.
 - An FBA analyzes environmental factors that contribute to a student's inappropriate behaviors and the FBA data is to be used to develop positive behavioral strategies to address the behavior.

45

IDEA Strategies

- A BIP will need to be developed to address the underlying behaviors without the need to resort to restraint or seclusion.
 - A BIP is used to pro-actively address the student's inappropriate behaviors.
 - It is based on an FBA.
 - A BIP should describe strategies to:
 - Address settings and events
 - Address antecedents that trigger affect behavior
 - Address consequences
 - Teach appropriate alternative behaviors

46

IDEA Strategies

- Individual psychological counseling or social work services should be considered.
 - Psychological services include individual counseling and assisting in PBIS strategies.
 - Social work services include:
 - Group and individual counseling with child and family
 - Mobilizing community resources
 - Assisting in developing PBIS strategies.

47

IDEA Strategies

- The IEP may need to be amended.
 - IEP must be reviewed at least annually to determine that annual goals for child are being achieved and IEP is revised as needed.
 - Teachers must be given the necessary training and support to address unique needs of students they teach.
 - IEP must also list all program modifications, and supports for school personnel.
 - Accessibility of child's IEP to teachers and others, and told of their obligations.

48

IDEA Strategies

- Parents must be informed about use of R&S on their children.
 - Parents equal members of IEP Team and, therefore entitled to same information available to school staff to enable them to perform their role.
 - Parental notification is particularly important because "inadequate parental notification can contribute to a lack of relevant information about the student's individualized behavioral needs."

49

IDEA Strategies

- Parents may be in need of parent counseling and training to ensure consistency between home and school.
- Parent training may include helping parents acquire necessary skills that will allow them to support implementation of child's IEP or IFSP.
- School districts must consider providing additional supplementary aids and supports or modification of the student's program before considering placing a student in a more restrictive setting.

50

Section 504 Strategies to Reduce Use of R&S

51

Section 504 Strategies

- Students with disabilities are entitled to be safe in school under Section 504
 - "No student or adult should feel unsafe or unable to focus in school, yet this is too often a reality."
 - We can borrow from principles enunciated in cases involving Peanut and Tree Nut Allergies
 - "As the vast majority of District students without disabilities do not face a significant possibility of experiencing serious and life-threatening reactions to their environment while they attend District schools, Section 504 and Title II of the ADA require that the District provide the Student with an environment in which he also does not face such a significant possibility."

52

Section 504 Strategies

- OCR can adopt Department's finding that restraint or seclusion are not effective at reducing negative behaviors, and, therefore, to apply restraint or seclusion as a planned intervention would violate the anti-discrimination provisions of Section 504
- OCR can Adopt the Department's Definitions of FBAs and BIPs

53

Section 504 Strategies

- OCR can require that schools fully evaluate students in all areas of suspected disability and develop an IEP or Section 504 Plan that addresses all of the areas of need.
- When a student's behavior rises to the point that the district believes restraint or seclusion is necessary, it must ensure that it has fully evaluated the student in all areas of suspected disability and developed an IEP or Section 504 Plan that fully addresses all identified areas of need.

54

Section 504 Strategies

- OCR can require that when student behavior is sufficiently severe for a district to believe use of restraint or seclusion is necessary, that district conduct or revise an FBA and BIP that meets Education Department standards or take other appropriate steps to address the behavior.
 - School districts have an ongoing obligation to ensure that a student receiving services under either the IDEA or Section 504 continues to receive FAPE.

55

Section 504 Strategies

- OCR noted that a sudden decline in the student’s grades as well as changes in her behavior:
 - were sufficient to put the school on notice of its obligation to promptly convene the Section 504 team to determine the extent of the FAPE-related problems and to make any necessary changes to her services, or, if necessary, reevaluate her, in order to ensure that she continues to receive FAPE. *Response to Bullying*

56

Section 504 Strategies

- North Carolina Charter Schools Decision—School district did not provide FAPE (procedural) by:
 - not conducting any meaningful evaluation of the student’s behavior or making any significant changes to the BIP even though the student’s behavior continued to deteriorate;
 - not having staff with appropriate behavioral expertise participate in the IEP or Section 504 meeting;
 - not considering a different educational placement for the student, in line with LRE requirements.

57

Section 504 Strategies

- OCR Virginia School Decision—procedural FAPE violation:
 - students did “not have individualized plans with specific behavioral interventions designed to meet their individual needs;”
 - students did not have access to the curriculum when placed in restraint, seclusion or time out;
 - that “the frequency with which many of the students continue to act out behaviorally despite, or possibly even because of, the use of these interventions” gives the program “reason to believe it should re-evaluate individual students” to ensure it is meeting their needs;

58

Section 504 Strategies

- Virginia decision (cont.)
 - staff used “restraint and seclusion broadly to respond to disruptive behaviors;”
 - staff failed to conduct “systematic review of each incident;”
 - staff failed to consider whether less restrictive interventions were available to address behavior; and
 - program failed to convene a group of knowledgeable people to examine whether additional evaluations or a change of placement or services was “needed, as required by Section 504.”

59

Section 504 Strategies

- Virginia decision (cont.)
 - OCR noted importance of notifying the parents as soon as possible after each incident of restraint or seclusion,
 - so that parents are in position to participate in process of ensuring a school is meeting child’s individual needs in providing a FAPE.
 - particularly true because inadequate parental notification can contribute to lack of relevant information about student’s individual behavioral needs.

60
