

Legal Developments Affecting
Private Special Education Schools

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Agenda

- **Applicability of IDEA and Section 504 to Private Schools**
- **Accommodation of Transgender Students**
- **Overtime under FLSA**

IDEA & Section 504

- Do they apply to you as a private school?
- Can you be stuck in “stay put”?
- Can you be sued for damages?

Legal Relationship with Students

- Private entity, not “state actor” for federal civil rights liability, *Hamlin v. City of Peekskill Bd. of Educ.*, 377 F.Supp.2d 379, 386 (S.D.N.Y. 2005)
- Relationship primarily contractual

IDEA

- IDEA places obligation on *states* and *local school districts* to provide appropriate education
- 20 *U.S.C.* § 1412(a)(11), 34 *C.F.R.* § 300.33
- Nothing in IDEA itself imposes any legal duty on private schools

- The IDEA contemplates that a public agency may place a student in a private school. §1412(a)(10)
- Must be “the means of carrying out the requirements of [the IDEA] or any other applicable law requiring the provision of special education and related services to all children with disabilities.” §1412(a)(10)(B)(i)

“Each public agency in the State is responsible for ensuring that the rights and protections [of the IDEA] are given to children with disabilities ... [r]eferred to or placed in private schools and facilities by that public agency.” 34 *C.F.R.* §300.2(c); § 300.146.

- Most courts have found private schools *not liable* for violations of IDEA
- *St. Johnsbury Acad. v. D.H.*, 240 F.3d 163, 171 (2nd Cir. 2001) (“IDEA’s implementing rules reinforce the principle that IDEA applies only to the State and other public agencies, *not* to private schools in which public agencies may place children.”)

Alternative Theories of Liability

- State regulations imposing IDEA responsibility
- Language in tuition contracts
- Contractual third party beneficiary exposure

State Regulations

“The rules in [New Jersey’s special education administrative code] shall apply to all public and private education agencies providing publicly funded educational programs and services to students with disabilities.”

N.J.A.C. 6A:14-1.1(c).”

Tuition Contracts

“The APPROVED PRIVATE SCHOOL as signatory to this contract agrees to operate in accordance with applicable federal and state laws, and rules and regulations”

Third Party Beneficiary

- General Rule: Only parties to a contract are entitled to seek enforcement of it.
- Exception: A non-party who is specifically intended as the beneficiary of a contract may have enforcement rights.

- **Compensatory education awards for failure to provide services required by IEP**
- **Exposure to “prevailing party” counsel fee awards**
- **Maintenance of “stay put” during pendency of disputes over termination**

Section 504

- Different than IDEA
- Accommodates disabilities that don't necessarily relate to learning, but may

Rehabilitation Act of 1973 (“Section 504”)

“No otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

“Federal Financial Assistance”

“Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which [USDOE] provides or otherwise makes available assistance in the form of: 1) Funds; 2) Services of Federal personnel; or 3) Real or personal property or any interest in the use of such property.”

Direct Receipt of Funds

- Title I of ESEA
- Drug-Free Schools and Communities Act of 1986
- National School Lunch Program
- E-Rate Program

Indirect Receipt of Funds

- Tuition from public school districts
- *P.N. v. Greco*, 282 F. Supp. 2d 221 (D.N.J. 2003), held receipt of tuition enough, but
- Other decisions apply “control” test, *J. v. School Dist. of Philadelphia*, 2007 WL 1221216 (E.D. Pa. 2007)

Take-Aways

- Be mindful of state regulations binding you to IDEA/504
- Be aware of contractual language
- Review your insurance coverage

Accommodation of Transgender Students

- Evolving notions of sexuality
- Non-discrimination vs. affirmative duty to accommodate
- Probably less than 1%

Title IX of the Education Amendments of 1972

“No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .” 20 U.S.C. § 1681(a)

Meaning of “Sex” under Title IX

- Biological sex assigned at birth, *or*
- How an individual identifies
- Who gets to decide – Congress? Federal Agencies? Courts? Each Individual??

Title IX Regulations

Permit “separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities for students of the other sex.” 34 C.F.R. § 106.33

USDOE Office for Civil Rights Opinion Letter (1/7/15)

“When a school elects to separate or treat students differently on the basis of sex ... a school generally must treat transgender students consistent with their gender identity.”

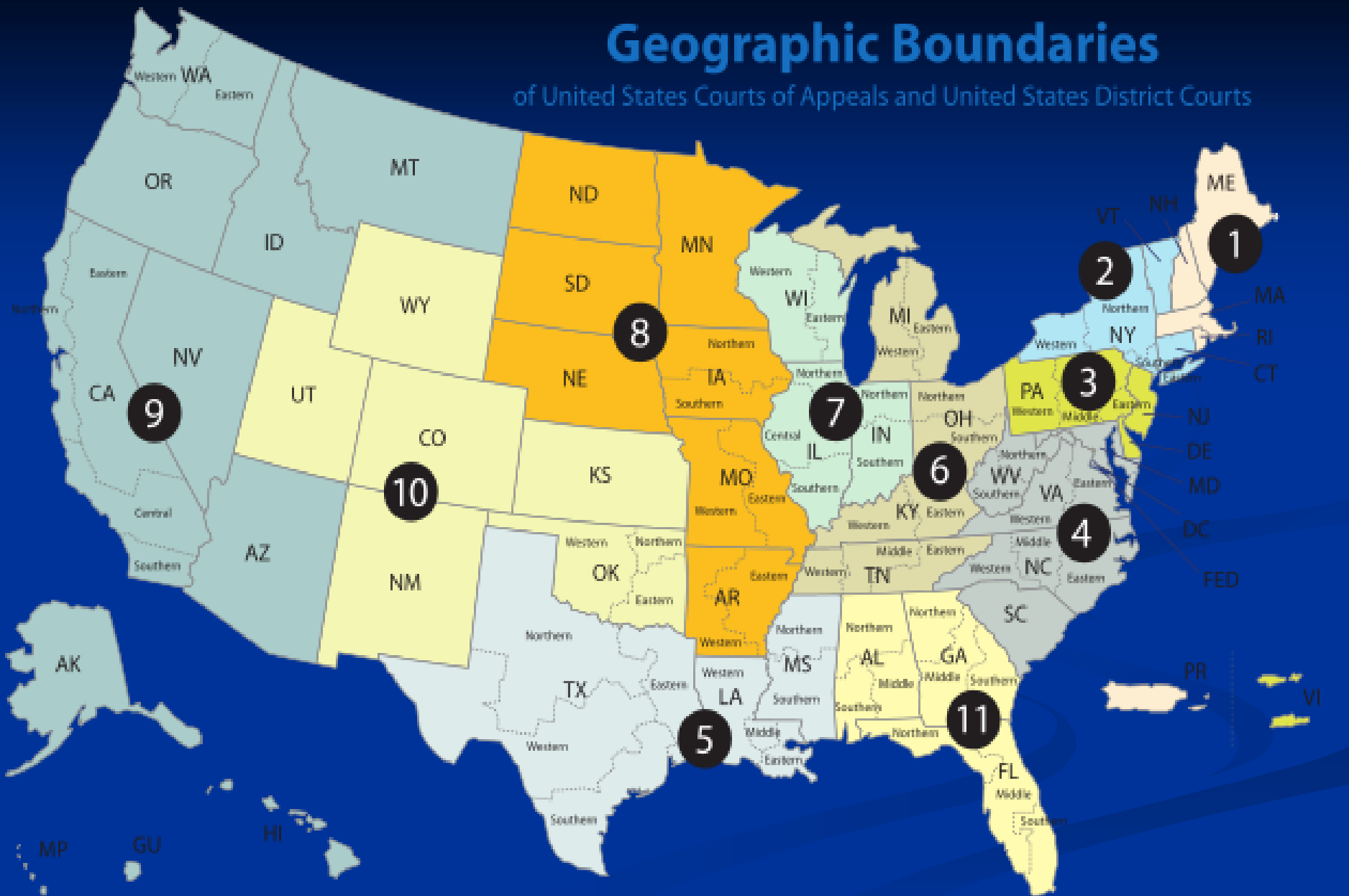
USDOJ/USDOE Guidance Memo (5/16)

- **Pronouns and Names**
- **Restrooms, Locker Rooms/Shower Facilities**
- **Single-Sex Classes/Extracurriculars**



Geographic Boundaries

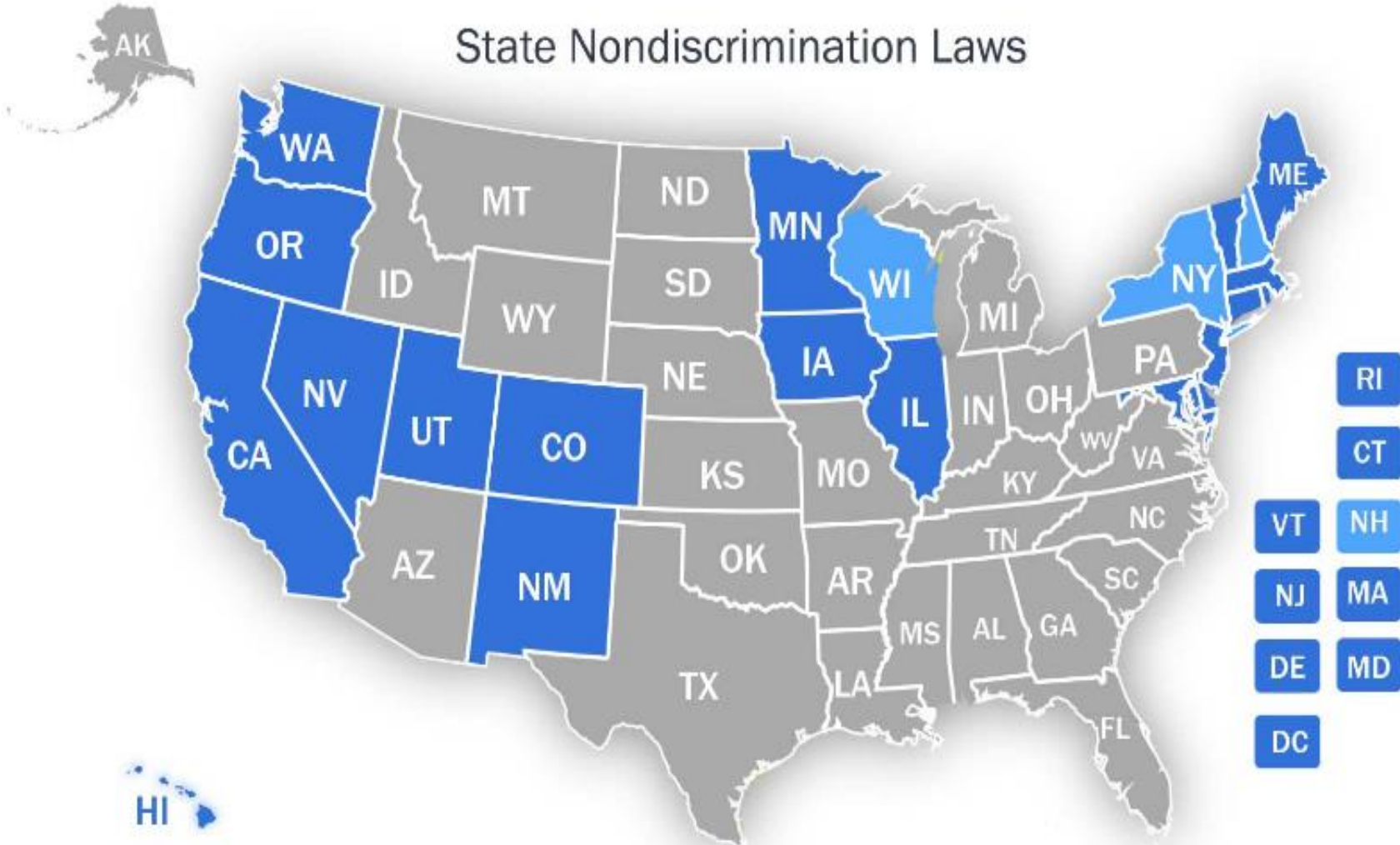
of United States Courts of Appeals and United States District Courts



G.G. v. Gloucester Co. Sch. Bd. (4th Cir. 2016)

- 4th Circuit gives deference to OCR Letter
- U.S. Supreme Court stays ruling pending review of decision
- Argument this spring, after Trump Administration in power

State Nondiscrimination Laws



- Dark Blue: Clear gender identity and sexual orientation protections
- Light Blue: Sex and sexual orientation protections only
- Grey: Sex discrimination protections only



Overtime under FLSA

- General Rule: Employees must receive hourly federal minimum wage plus over time pay (some states' minimum wage is higher)
- Time-and-a-half for more than 40 hours per week

Exempt Employees

- Executive
- Administrative
- Professional

Salary Test

- Must be paid on a “salary basis”
- At least \$455 per week

- Job titles alone are not controlling
- Receiving a salary alone is not controlling
- Substance over form, i.e., “If it walks like a duck”

Executive Exemption

- Primary duty: managing the enterprise or customarily recognized department or subdivision
- Must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent

Administrative Exemption

- Primary duty: performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- Exercise of discretion and independent judgment with respect to matters of significance

School Administrators

- \$455 weekly salary or at least equal to the entrance salary for teachers in the same educational establishment
- https://www.dol.gov/whd/overtime/fs17c_administrative.pdf

Professional Exemption

- Primary duty: work requiring advanced knowledge, predominantly intellectual in character, requiring the consistent exercise of discretion and judgment
- Must be in a field of science or learning
- Advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction

Teachers

- Primary duty: teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, as employed teacher in an educational establishment.
- Includes regular academic teachers, and teachers of gifted or disabled children
- No minimum salary requirement

School Nurses

- Registered nurses exempt as “Professionals”
- https://www.dol.gov/whd/overtime/fs17n_nurses.pdf

Highly-Compensated

- Total annual compensation of \$100,000 or more, which includes at least \$455 per week paid on a salary basis;
- Primary duty: performing office or non-manual work
- Customarily and regularly performs at least one of an exempt executive, administrative or professional employee.

Controlling Non-Exempt Worktime

- Time “voluntarily” spent must be compensated
- After-hours e-mailing/texting or events
- Adopt and enforce policies prohibiting after-hours work

New Overtime Rule

- Minimum weekly salary from \$455 to \$913 (\$23,660 to \$47,476 annually)
- “Highly compensated” annual compensation from \$100,000 to \$134,004
- Update to salary levels every three years (USDOE estimates \$51,168 in 2010)

Who's Affected?

- Teachers and Administrators OK if duties directly related to instruction
- All other exempt employees likely affected

Likely Impacted

- Licensed practical nurses
- Teacher Aides
- Business Office Employees
- Food Service Staff
- Technology Department
- Security Employees

Strategies

- Strictly prohibit work in excess of 40 hours for non-exempt employees
- Analyze pros and cons of paying overtime (including switching salaried employees to hourly) versus increasing salaries

New Rule on Hold

- Was to take effect December 1, 2016
- Texas Federal Court issued injunction on November 22, 2016, but expedited appeal pending before Fifth Circuit Ct. of Appeals
- On the Trump Chopping Block?

Thanks for Coming!

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