



## What I've learned litigating to get *real* ABA into public schools

That's Nala, my name is Andréa  
Marcus, I practice law for  
children with disabilities, suing  
public schools who abuse and  
neglect them. Most my clients  
and some of my family are on the  
autism spectrum. Most of my  
clients are low-income and non-  
white.

# Getting *real* ABA in school

## What is "real ABA?"

- Data-driven
- Qualified providers
- Insurance Code Defined
- patient rights

## IDEA

An education act to provide federal financial assistance to State and local education agencies to guarantee special education and related services to eligible children with disabilities.

## 504/ADA

Civil rights laws to prohibit discrimination on the basis of disability in programs and activities, public and private, that receive federal financial assistance.

A FEW EXAMPLES OF OTHER DISABILITIES REQUIRING OTHERS  
“ATTENDING” WHICH ARE TREATED OH SO DIFFERENTLY FROM ABA

# Effective Communication

The Title II regulations require a public school district to give “primary consideration” to the request of the student with a disability when making the decision to provide a particular auxiliary aid or service

## **U.S. Department of Justice & U.S. Department of Education (still referencing “effective communication”):**

When determining what is appropriate for that student, the school must provide an opportunity for the person with the disability (or an appropriate family member, such as a parent or guardian) to request the aid or service the student with a disability thinks is needed to provide effective communication. It is the person with the disability (or his or her appropriate family member) who is most familiar with his or her disability and can provide relevant information about which aids or services will be most effective.

## Service Animals (According to the DOJ):

**Under the ADA, State and local governments, businesses, and nonprofit organizations that serve the public generally must allow service animals to accompany people with disabilities in all areas of the facility where the public is allowed to go.**

# Inquiries and Specific Rules Related to Service Animals:

- When it is not obvious what service an animal provides, **only limited inquiries are allowed**. Staff may ask two questions:(1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform. Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.



Mobility Accommodations: *Baughman v. Walt Disney World Co.*, 9<sup>th</sup> Circuit -

- Disney's policy is to allow wheelchairs and motorized scooters; “two-wheeled vehicles or devices,” like bicycles and Segways, are prohibited. Disney refused to make an exception for Baughman, who suffers with limb girdle muscular dystrophy.

## In the 9<sup>th</sup> Circuit:

- Baughman was “estopped from claiming she can't use a motorized wheelchair or scooter. We analyze her ADA claim based on the presumption she can.”

# The 9<sup>th</sup> Circuit:

- “Disney argues vigorously ... that “necessary” means only one thing: can't do without. Because Baughman can access Disneyland by using a wheelchair or scooter, a Segway isn't “necessary” for her to use the park.”
- “Read as Disney suggests, the ADA would require very few accommodations indeed. After all, a paraplegic can enter a courthouse by dragging himself up the front steps...That's not the world we live in, and we are disappointed to see such a retrograde position taken by a company whose reputation is built on service to the public.”

# Holding:

“Disney simply takes the position that, even if Baughman's access is made “uncomfortable or difficult” by its policies, any discomfort or difficulty she may suffer is too darn bad.”

“Disney is obviously mistaken. If it can make Baughman’s experience less onerous and more akin to that enjoyed by its able-bodied patrons, it must take reasonable steps to do so.”

“We do not hold that Disney must permit Segways at its theme parks. It might be able to exclude them if it can prove that Segways can't be operated safely in its parks...But any safety requirements Disney imposes “must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities.” 28 C.F.R. § 36.301(b).”

“New technology presents risks as well as opportunities; we must not allow fear of the former to deprive us of the latter. We have every confidence that [Disney] can lead the way in using new technology to make its parks more welcoming to disabled guests. As the man who started it all said, “Disneyland will never be completed as long as there is imagination left in the world.”

# Why is ABA in schools treated differently?

- The biggest nightmare of a school administrator is someone with education and credibility taking data in their classrooms. (Public schools generally won't let Teach for America into their schools, why would they want ABA?)
- School districts gain traction in courts regarding the confusion of what ABA consists of, and by using terms like “based in ABA principals” or “ABA-trained” and even just “ABA.”

# Additional hurdles in getting ABA into schools:

- **Unearned assumptions about what goes on in schools, and who the “good guys are,” i.e., lack of awareness of the abuse and neglect, and deference to the educational “experts” and teachers;**
- Reluctance to tell the schools what to do, particularly with staffing\* & FAPE\* arguments;
- The underlying belief that autistic children and others with behavioral disabilities are “acting out” and/or not capable of benefiting from ABA, i.e., Judges do not understand it works and is important for the long-haul in our communities.

# *K.M ex. rel. Markham v. Tehachapi Unified Sch. (E.D. Cal. May 7, 2018):*

A case seeking permission to have ABA treatment accommodated by the public school pursuant to 504/ADA, and not IDEA.

Without discussion by the IEP team, the school district denied the request for her insurance-funded ABA provider to provide treatment during school. As a result, K.M.'s mother kept her home from August 2016 to June 2017 so she could receive the doctor-prescribed 40-hour per week ABA. The parent believed that without the ABA therapy at school, K.M. was unsafe because otherwise the student would not have guidance on appropriate behaviors with peers, and because K.M. previously wandered off during school outings, ingested another student's medication, and returned home with unexplained bruises and a severe sunburn.

In K.M, the court's decision is in response to the school district's motion to dismiss on the grounds of exhaustion, and was not a substantive decision after hearing a trial.



- In *K.M.*, Judge O'Neill's decision turned on whether K.M. sufficiently plead her allegations. To plead a failure to accommodate under the ADA or Section 504, K.M. needed to allege facts showing: (1) she needed specific services (ABA therapy at school) to enjoy meaningful access to the benefits of a public education; (2) the school district was on notice of the need for those disability-related services, but did not provide those services, and (3) the services were available as a reasonable accommodation. The Judge found that K.M. adequately pled all three prongs.

... K.M. has alleged facts showing the alleged discrimination was by reason of her disability as well as solely by reason of her disability. K.M. alleges she required the services of an ABA therapist during school hours, as prescribed by her physician ... to treat and manage her autism. ... K.M.'s mother requested that K.M.'s insurance-funded ABA therapist be permitted to accompany her during her school day so that her behavior could be monitored appropriately under the effective and necessary ABA treatment paradigm, but the District refused the request... The District's refusal was made despite its acknowledgment during administrative proceedings that such accommodation would be minor and "could be worked out." ... [and]...would be provided at no cost to the District by an ABA professional the District had contracted with in the past. ... K.M. claims that as a result of this failure to accommodate K.M.'s ABA therapist, as prescribed by her treating pediatrician, K.M. was unable to attend school, and she was therefore denied the benefit from the curriculum and other opportunities provided to her nondisabled peers....

# K.M. Court significantly held:

The allegation of K.M.'s medical prescription ... gives rise to an inference that the therapy ... was .... a medical necessity ... Plaintiffs contend, the District refused to make reasonable accommodation during school and thus forced Plaintiff to stay home to receive the needed therapy. These allegations are sufficient at the pleading stage to show K.M. was precluded from access to school solely on account of her disability...

# Reasonable accommodations are required

- ADA regulations require that "[a] public entity . . . make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." ([28 C.F.R. § 35.130\(b\)\(7\)\(i\)](#)). *Alhidir v. L. A. Cmty. Coll. Dist.*, No. B284635, at \*9 (Cal. Ct. App. Jan. 29, 2019)

## **Court's Language which now guides creative but effective defenses:**

Given “the summary denial after only one alleged meeting between two District personnel, it can be inferred that there was a lack of investigation to determine whether the accommodation requested was reasonable.”

\*Schools are now advised to “investigate” and stall until the family leaves the school.

Additional successful arguments against allowing real ABA in schools:

School districts are not required to provide a specific accommodation requested by the parent if another accommodation will provide the student with meaningful and equal access.

But remember:

*The burden is on the school district to prove that the requested accommodation would fundamentally alter the nature of the program or constitute an undue burden. (28 C.F.R. § 35.164.)*

In my experience, that's not how Courts are deciding these cases:

- If the school can prove it can offer "ABA" they win.
- If the family cannot prove they "need" ABA to access school, they lose, but it remains very, very, unclear what "need" means.
- "Medical Necessity" runs both ways .... against the family.



# Some arguments which need to be considered:

- What does it look like in school?
  - What does it mean to have it in school – practically?
    - How does it interfere with or “fundamentally alter” the functioning/programs of the school or classroom?
      - Who gets to measure this, and how?

# Practical Problems the Courts are Sympathetic to:

- Availability of *any* ABA across vast geographic areas of need (remote?)

# Practical Problems the Courts are Sympathetic to:

- The Berlin Wall of public school settings
  - Schools set up private ABA for failure – don't want the standard to be established and be left with the tab for future services;
  - School climate of resistance to “experts”;
  - “We've been doing it this way forever...” and, “I know ABA, but it doesn't work for everyone...”;

Practical Problems as a Litigator – the bottom falls out of the ABA program while you are arguing it's supreme efficacy:

- \*Alienation of families

- \*Dilution of services by ABA Companies

  - Poor data-keeping

  - Poor communication

  - Poor staffing (and recommending fewer hours based upon staffing issues and not patient needs)

  - Poor supervision

**i.e., it's starting to sound like the public schools....**

**THANK YOU!**