

ADA EFFECTIVE COMMUNICATION & THE IDEA STUDENT

Presented by David M. Richards, Attorney at Law

RICHARDS LINDSAY & MARTÍN, L.L.P.

13091 Pond Springs Road • Suite 300 • Austin, Texas 78729

Telephone (512) 918-0051 • Facsimile (512) 918-3013 • www.504idea.org

©2014, 2015 RICHARDS LINDSAY & MARTÍN, L.L.P. All Rights Reserved. Wyoming 2015

A note about these materials: These materials are not intended as a comprehensive review of all new case law on Section 504 or IDEA, but as a summary of some of the more interesting cases and decisions from the last few years on the interaction between the two laws in the areas of revocation of IDEA consent and ADA Effective Communication. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

I. The IDEA-Section 504 relationship.

These materials emphasize the Section 504 & ADA nondiscrimination rights of IDEA eligible students. Section 504 and ADA protections extend to IDEA students because of the high hurdle for IDEA eligibility, and the lower hurdle (relatively speaking) for Section 504/ADA eligibility. According to the U.S. Department of Education, students determined to be IDEA-eligible are also eligible under §504. “In order to be eligible for services under the IDEA, a child must be found to have one or more of the 13 disability categories specified *and* must also be found to need special education. OCR can not conceive of any situation in which these children would not also be entitled to the protections extended by Section 504.” *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).

An IEP AND a Section 504 Plan? The fact that a student is eligible for Section 504 protections as well as IDEA protections does not mean that he can be served by a Section 504 plan since that Section 504 plan is neither created nor maintained through the more stringent procedural protections of the IDEA. A school attempting to comply with its IDEA duties to a child by offering a §504 Plan denies the IDEA-eligible student the procedural protections due under IDEA. OCR’s online Q&A addresses the issue quite simply.

“If a student is eligible for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504? No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements for a free appropriate public education is to implement an IEP.” *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified December 19, 2013), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html, Question 36.

In other words, a Section 504 Plan will not satisfy the school’s duty to serve an IDEA-eligible student due an IEP. The IDEA student receives an IEP and is also entitled to the nondiscrimination protections of Section 504 and the ADA.

IDEA rights and Section 504/ADA rights for the IDEA-eligible student. By its own language, the IDEA provides that special education eligibility does not foreclose other rights the student may have under Section 504 or ADA.

“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities,

except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. §1415(l).

These materials will focus on the Section 504/ADA Title II rights of students who were once IDEA-eligible (but are no longer eligible due to revocation or refusal of IDEA consent for services) or are currently IDEA-eligible and served by IEPs.

II. Section 504 Duties After IDEA Revocation or Refusal of Consent

A. A Refresher on the Problem

What happens when parents who revoke consent for special education services demand pieces or all of the student’s now-rejected IEP delivered by way of a Section 504 Plan? The answer is uncertain. When asked, ED said (in the commentary to the December 2008 changes) **“these final regulations implement provisions of the IDEA only. They do not attempt to address any overlap between the protections and requirements of the IDEA, and those of Section 504 and the ADA.”** 73 Fed. Reg. 73,013 (December 1, 2008)(emphasis added).

In the absence of a direct answer from ED, two schools of thought have developed on the issue.

School of Thought #1: Two FAPE responsibilities for IDEA students. One school of thought is that a student leaving special education should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility under §504. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993). Consequently, when a parent refuses or revokes consent for IDEA services the student would be entitled to the Section 504 FAPE. Unfortunately, this school of thought ignores Section 504’s regulatory language and is at odds with ED commentary to the regulations on IDEA revocation of consent (detailed below).

School of Thought #2: The rejection of IDEA FAPE satisfies both IDEA and Section 504 FAPE obligations to the student. Another, more logical, school of thought is that rejection of a FAPE under IDEA is tantamount to rejection of FAPE under §504, and thus, schools would have no FAPE obligations under §504 to children whose parents revoked consent to IDEA services. The Section 504 regulations recognize that students who are IDEA-eligible are also protected by Section 504, and the Section 504 FAPE regulations recognize the primacy of the IEP for students who are IDEA-eligible.

“§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.*

(1) For the purpose of this subpart, the provision of **an appropriate education is the provision of regular or special education and related aids and services that**

(i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and

(ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.” (Emphasis added).

In the *Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996) OCR addresses the offer of an IEP under IDEA and its impact on the Section 504 FAPE requirement.

“Specifically, you ask if, **once a school district has determined that a student is disabled within the meaning of IDEA and has developed an IEP which conforms to the requirements, can a parent reject IDEA services and then compel the school district to develop an individualized education program (IEP) under Section 504?** ...I suspect that the confusion may be the result of some of the wording in the regulation implementing Section 504. Specifically, the confusion may stem from 34 C.F.R. § 104.33(b)(2) which states that the implementation of an IEP developed under the IDEA is *one means* of meeting the appropriate education requirement under Section 504.

Essentially, there are two groups of students who are “qualified students with a disability” under Section 504. The first group includes students who qualify for regular or special education and related aids and services under Section 504 and, additionally, are eligible for services under the IDEA. The second group would include students who are qualified for purposes of Section 504 but do not have a disability recognized by the IDEA. **For the first group of students (qualified for services under Section 504 as well as under the IDEA), the implementation of an IEP developed under the IDEA is how the Section 504 requirements found in Section 104.33 are met.** Some other means of providing an appropriate education under Section 504 must be available for those students in the second group (qualified under Section 504 but *not* under the IDEA).

Therefore, the answer to your question would be that **by rejecting the services developed under the IDEA, the parent would essentially be rejecting what would be offered under Section 504. The parent could not compel the district to develop an IEP under Section 504 as that effectively happened when the school followed the IDEA requirements.”** (Emphasis added).

Note that even under the *Letter to McKethan* type of approach, while the Section 504 *FAPE* obligation is met, the student would still be entitled to the nondiscrimination protections of §504/ADA.

What services, exactly, are refused by a revocation of consent or refusal to consent under IDEA?
The IDEA regulations at §300.300 on parental consent provide:

“(b) *Parental consent for services.*

(1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency—

(i) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(iii) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child.

(4) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

(i) **May not continue to provide special education and related services to the child,** but must provide prior written notice in accordance with § 300.503 before ceasing the provision of special education and related services;

(ii) May not use the procedures in subpart E of this part (including the mediation procedures under § 300.506 or the due process procedures under §§ 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP under §§ 300.320 and 300.324 for the child for further provision of special education and related services.” (Emphasis added).

The ED commentary to the revocation of consent regulations provides some interesting insight into the school’s obligations during periods when the parent does not consent to special education services. Clearly, IEP procedures are not required. “If a parent revokes consent for special education and related services, the child will be treated as a general education student and will not be eligible for FAPE, triennial evaluations, or an annual IEP.” 73 Fed. Reg. 73,013-014. “If a child whose parent has revoked consent is placed in a classroom that is co-taught by a general education teacher and a special education teacher, then that child is placed in the classroom as a general education student and should be treated the same as all other general education students in that classroom.” 73 Fed. Reg. 73,013. IDEA discipline procedures also disappear, and the student will be subject to regular discipline.

“When a parent revokes consent for special education and related services under Sec. 300.300(b), the parent has refused services as described in Sec. 300.534(c)(1)(ii); therefore, **the public agency is not deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and is not entitled to the Act's discipline protections.** ... Students who are no longer receiving special education and related services due to the revocation of parental consent to the continued provision of special education and related services will be subject to the LEA's discipline procedures without the discipline protections provided in the Act. However, students will continue to receive the full benefit of education provided by the LEA as long as they have not committed any disciplinary violations that affect access to education (e.g., violations that result in suspension). **We expect that parents will consider possible consequences of discipline procedures when making the decision to revoke consent for the provision of special education and related services.**” 73 Fed. Reg. 73,012 (emphasis added).

A little commentary: The comment seems at odds with ED’s position on not addressing the overlapping duty of Section 504. ED wants parents to understand that their children will be disciplined as regular education students after either refusal of IDEA services or revocation of consent to IDEA services. Of course, if the student is eligible for FAPE under Section 504, that eligibility includes manifestation determination protection (and thus no regular discipline for the child). *Why would ED warn of the loss of manifestation protection if every student for whom consent were revoked is entitled to manifestation determination due to 504 FAPE eligibility?*

While a duty to *provide* IDEA FAPE does not exist in the absence of consent, the duty to have FAPE *available* continues to exist. ED notes this duty in response to a commenter’s concern with respect to a parent’s ability to revoke consent, then request services, and then revoke consent again, seemingly without limit, and conceivably harming the child.

“Nothing in the Act or the implementing regulations prevents a parent from requesting an evaluation when their child has a discipline issue or is at risk of not succeeding in school. This is because, **consistent with § 300.101, the public agency has an affirmative obligation to make FAPE available to a child with a disability. The child’s right to have FAPE available does not cease to exist upon the revocation of consent.** Therefore, a parent may consider discipline and graduation requirements when determining whether to request special education and related services for their child.

We do not agree with the commenter that the Department should limit how frequently a parent may revoke consent and then subsequently request reinstatement in special education services because retaining flexibility to address the unique and individualized circumstances surrounding each child’s

education is important. A public agency will not be considered in violation of the obligation to make FAPE available to the child for failure to provide the child with further special education services following a parent's revocation of consent. We understand the commenter's concern that placing a child in and out of special education services may affect the provision of FAPE; however, **a public agency is only responsible for providing FAPE during the time period that the parent has provided consent for special education and related services.**" p. 73, 3014

A little commentary: Note that while the duty to provide special education and related services only exists with respect to the time period for which the parent has provided consent, the child's right to have an IDEA FAPE *available* persists for as long as the student is IDEA-eligible, (the child was not dismissed by IEP Team action) and without regard to parent consent for the provision of such services. The continuing offer of FAPE, despite the lack of consent to actually provide FAPE, is required.

The regulations contemplate the possibility that the student's academic struggles, in the absence of special education services, may motivate the parent to consent to restore special education services.

"Concerning the comments asserting that parental revocation of consent for special education and related services could be detrimental to the academic future of a child with a disability, the Act presumes that a parent acts in the best interest of their child. If a child experiences academic difficulties after a parent revokes consent to the continued provision of special education and related services, nothing in the Act or the implementing regulations would prevent a parent from requesting an evaluation to determine if the child is eligible, at that time, for special education and related services." 73 Fed. Reg. 73,009-010.

Section 504 services could encourage the parents to delay a return to the necessary special education services. As a practical matter, provision of some help reduces the possibility of "epiphany" moments where the parent realizes the impact of revoking consent for special education. A long, slow, painful educational journey (with §504 helping the student but not fully meeting a student's need for special education) is much more easily tolerated than an acute, serious, and obvious academic problem that would cause the parent to rethink consent for special education services.

Finally, ED provides an interesting statement with respect to the duty of regular education teachers to assist students for who consent for special education has been revoked.

"Once a parent revokes consent in writing under Sec. 300.300(b)(4) for the continued provision of special education and related services, a teacher is not required to provide the previously identified IEP accommodations in the general education environment. However, general education teachers often provide classroom accommodations for children who do not have IEPs. Nothing in Sec. 300.300(b)(4) would prevent a general education teacher from providing a child whose parent has revoked consent for the continued provision of special education and related services with accommodations that are available to non-disabled children **under relevant State standards.**" 73 Fed. Reg. 73,012 (emphasis added).

Of course, even if there is no residual FAPE duty under Section 504, that does not excuse the school from its other nondiscrimination duties under the Section 504 and ADA Title II. While ED provides some guidance but no real resolution to the issue of Section 504's duties to IDEA-eligible children from whom consent for special education and related services is refused or revoked, the federal courts have taken up the issue.

B. The Federal Courts & Hearing Officers Weigh In.

While there is no consensus in the existing cases, there is a growing body of cases circling the reasoning in the *Kimble* case, discussed below. What seems to be emerging is the notion that either a Section 504 FAPE duty survives the refusal/revocation of IDEA consent, or that the Section 504

nondiscrimination protections allow for services and accommodations for students for whom IDEA consent has been refused/revoked. The trouble is that there is no consensus, and no federal court of appeals has addressed the issue thus far. For schools in four states you have some decisions to look at with your school attorney to help plot out a response. The relevant cases are summarized below.

For folks in Missouri, *Lamkin v. Lone Jack C-6 School District*, 58 IDELR 197 (W.D. Mo. 2012) provides some guidance. The court found the “*Letter of McKethan* persuasive” and consequently, the “Plaintiff’s revocation of services under the IDEA was tantamount to revocation under Section 504 and the ADA.” The court noted the parent’s objection to applying the *McKethan* letter, but recognized that the parents “failed to cite any judicial or administrative decision that calls it into doubt.”

If you’re from Colorado, you look to the *Kimble* decision, which seems to require the school to do a Section 504 evaluation, and offer a Section 504 Plan. Here, the school made the same offer through 504 that the district made via the IEP, satisfying its Section 504 FAPE duty to the student. *Kimble v. Douglas County School District*, 60 IDELR 221 (D.C. Col. 2013).

“[I]n this case, Defendant held a Section 504 meeting subsequent to Plaintiffs’ revocation of consent under the IDEA.... At that meeting, a Section 504 plan was proposed, whose substance was equivalent to that in the previously proposed IEP, and Plaintiffs refused to accept that plan. (*Id.*) Because the statutory language of Section 504 permits a school district to meet its obligations under that statute by implementing an IEP, the Court cannot find that Defendant’s attempt to implement the IEP it developed violated its obligations to provide B.K. with a FAPE under Section 504 and the ADA. Because Defendant convened a Section 504 meeting and its committee proposed a 504 plan, once Plaintiffs refused to accept it, Plaintiffs cannot hold Defendant liable for failing to provide accommodations that they rejected as part of the 504 plan.”

A little commentary: Why the school has to go through this extra step to offer the same thing that the parent rejected under IDEA is not clear. Here’s what the court says: “The IDEA’s specified process for developing an IEP, which requires a stricter definition of FAPE, is only ‘one way’ of meeting Section 504’s broader FAPE requirement. See 34 C.F.R. §§104.33(b)(2), 104.36. The language of the regulations suggests that permitting a school district to meet its Section 504 obligations through implementing an IEP is merely an expediency to avoid a duplicative process that would have the same result, rather than establishing a legal equivalency.” So, in Colorado, schools have to conduct the 504 evaluation and offer a plan to meet the 504 FAPE duty.

Schools in Florida have two federal court decisions in the same case that, while not addressing the issue squarely, look at whether rejection of the IEP forecloses all Section 504 requests for services.

PART 1, The Motion to Dismiss: *D.F. v. Leon County School Board*, 62 IDELR 167 (N.D. FL. 2014). Simultaneously with the revocation of IDEA consent for services, the grandparent requested services under Section 504, including “technology that would assist the Plaintiff’s hearing in the classroom.” As characterized by the court, the school argued that “the withdrawal of IDEA consent waives any right a student otherwise would have under the Rehabilitation Act and ADA.” The court rejected the over-broad implication of revocation. Applied to these facts, the grandparent’s revocation of consent for IDEA services “does not necessarily authorize a school district to refuse to provide technology to help a student hear in other classes.” The result is even more clear based on the notion of revocation acting as waiver of other rights. The Court cites the IDEA regulation on the limited impact of revocation of consent.

“So under § 300.300(b)(4), the withdrawal of consent absolves the public agency from any obligation to provide ‘special education and related services’ and from any claim for failing to provide a free appropriate public education. But the same rule goes on to establish an explicit limit on this principle: the public agency ‘may not use a parent’s refusal to consent to one service or

activity under ... this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.’ *Id.* § 300.300(d)(3).”

Here, the grandparent simultaneously refused special education services and requested other services from the school. **“A waiver is an intentional relinquishment of a known right. An explicit request for services can hardly constitute a waiver of those services.”** The court’s position is that FAPE does not even have to come into play here.

“The school district cannot be required to provide the technology based solely on the statutory requirement to provide a free appropriate public education—under the IDEA and perhaps even under the Rehabilitation Act—but the school district can be required to provide the technology based on another provision of law, including, if applicable, the Rehabilitation Act or ADA. So this plaintiff’s complaint states a claim on which relief can be granted. And that is so regardless of which side is right on a different issue: whether a parent’s withdrawal of consent to an IEP developed under the IDEA also terminates the right to a free appropriate public education (‘FAPE’) under the Rehabilitation Act.”

The claim for services under 504 and ADA survive the motion to dismiss.

A little commentary: Actually, a review of the Section 504 FAPE requirement reveals that the answer to the revocation question is still very important. Recall that the Section 504 FAPE is inherently focused on non-discrimination. The Section 504 regulations provide the following language to describe an appropriate Section 504 plan or the Section 504 FAPE.

“For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sec. 104.34, 104.35, and 104.36.” 34 CFR §104.33(b).

The court’s answer seems to allow for parents under Section 504 to cherry-pick the services or accommodations they like and reject others, even if necessary for FAPE. Recall that OCR has taken the position in an online Q&A document that parents can refuse consent prior to the initial provision of Section 504 services and can revoke consent once services have begun. *See, Revised Q&A Questions 32 and 43.* If the package of services/accommodations that comprise the Section 504 FAPE is rejected, can the parent then demand pieces of that offer by way of nondiscrimination? And more interestingly, what if the demanded service, accommodation or device deprives the student of access or benefit or results in a more restrictive placement? *See discussion below on the collision of FAPE and nondiscrimination.*

PART 2, Summary Judgment: *D.F. v. Leon County School Board*, 65 IDELR 134 (N.D. FL. 2015). While the decision dismissed the parent’s Section 504 claims of retaliation, intentional discrimination and bad faith on the grounds of failure to exhaust administrative remedies under IDEA, it does provide some language on Section 504 after revocation of IDEA consent. The district had argued that, following the *Letter to McKethan*, it had no obligation to provide educational services to the student under Section 504 following the parent’s revocation of IDEA consent. Wrote the court

“As it turns out, the letter falls short of a full and correct analysis of the relationship between the IDEA and the Rehabilitation Act. The letter recognizes that some students qualify for services under the Rehabilitation Act but not under the IDEA; the statutes have different definitions of disability. **But the letter fails to recognize that even when a student’s disabilities meet both definitions, the IDEA and the Rehabilitation Act may impose different requirements; services sufficient to provide ‘some educational benefit’ may not be sufficient to meet the student’s needs ‘as adequately as the needs of a typical student.’** More importantly, the IDEA provides

that it does not limit a student's rights under the Rehabilitation Act, so long as the student exhausts specific administrative procedures.

The School Board could not know in advance that a court would level these criticisms of the letter. Without definitive guidance from a court, the letter was the best available guidance, other than the statutes and rules themselves. In short, the School Board acted in good faith in relying on the letter." [Emphasis added.]

A little commentary: The case is an excellent example of the common dynamic in revocation cases. Almost without exception in the reported cases, revocation of consent for IDEA services is prompted by the parent's disagreement with a portion of the student's IEP or conflict with a service provider. Here, the parent "did not wish for him to attend the learning-strategies class, apparently viewing the class as unnecessary and detrimental. Because of this... D.F.'s mother sent a letter to the School Board explicitly withdrawing her consent to the new individualized education program." An important lesson is that parents do not always proceed to additional IEP meetings or due process when concerned about the appropriateness of the placement. IEP Teams that carefully address these types of parent concerns and look for areas of compromise can probably prevent some revocations

If you're in Pennsylvania, you have a hearing officer's decision that largely adopts the positions taken in *Kimble*, and finds a violation under Section 504 and a state law implementing Section 504 due to the school's failure to offer a written 504 plan to a student for whom consent for IDEA services was revoked. *Northampton Area School District*, 63 IDELR 89 (SEA PA 2014). *See also, Fox Chapel Area School District*, 59 IDELR 208 (SEA PA 2012)(The case involves an odd interpretation of *Letter to McKethan*, and its application to a student exited from special education by IEP Team action with the agreement of the school and parent as opposed to a revocation of consent. During a 504 meeting where eligibility was considered, the district's special education director opined that having been exited from IDEA a year earlier, the student could not get a 504 Plan now due to *Letter to McKethan*. The IHO rejected the position as the parent had not refused an IEP—there is no IEP offered due to the student's dismissal or exiting from IDEA by IEP Team action.).

Bottom line on IDEA Revocation of Consent and the impact on Section 504: What we are left with is no real authority from a court with jurisdiction over much of the country. While there is difference of opinion on the issue, the *Kimble* approach, despite its flaws, appears to be gaining momentum. ED declined the opportunity to resolve the issue in December of 2008, and has taken no published position on the issue since. **Schools should talk with the school attorney to determine how to respond to this issue.**

The Conservative Approach: As a conservative position to consider, when faced with a student for whom consent for special education services has been refused/revoked, offer a Section 504 evaluation. If the parent refuses, there is no Section 504 FAPE obligation, but the general prohibitions against disability discrimination will apply. If the parent accepts, then the student will be Section 504 eligible (given his IDEA-eligibility) and will need to be offered a 504 Plan to meet the FAPE requirement.

Offering the IEP through Section 504. Here, the school has to acknowledge and address some risk. If the school offers the IEP that was developed for the child under the IDEA and rejected, by definition it will be offering specially designed instruction and doing so through a process that likely cannot access IDEA-B funds to help pay for the services. Further, to the extent that the student needs a life skills or specialized autism or behavior unit, that unit may not be available to non-IDEA eligible students. Is the school prepared to create and provide what could be very expensive services without any access to special ed funds? In essence, the *Kimble* decision forces the school to take the risk of the offer if it wants to satisfy the Section 504 FAPE obligation. Should the parents refuse the Section 504 offer of the IEP services by way of a Section 504 Plan, the school's Section 504 FAPE obligation is satisfied. *But if the parent consents to services under Section 504,* can the school create and provide

the required services? If the *Letter to McKethan* were the rule, the refusal of consent or revocation of consent to the IEP would satisfy the Section 504 FAPE obligation without the risk.

III. ADA Effective Communication Update

A. The IDEA-Section 504/ADA Relationship: What happens when the rights conflict?

IDEA-eligible students with IEPs are also protected from nondiscrimination rights under the ADA's effective communication regulations. While IDEA students are simultaneously protected by IDEA, Section 504 and the ADA, the intersection of those laws can result in conflicting duties.

1. Choosing the wrong accommodation can impact FAPE. You can use a calculator, just not THAT calculator. *Sherman v. Mamaroneck Union Free School District*, 340 F.3d 87 (2nd Cir. 2003). A student with a learning disability in math was allowed through his IEP to use a scientific/graphing calculator in class. The plan did not designate a particular model of calculator, but provided that the student's teachers would determine the appropriate device. In the past, he had utilized a TI-82 that required the student to work through various steps before getting to an answer. The student's parent insisted that he be allowed to use a TI-92 that would provide the final answer but not require the student to work through the various steps (the factoring) necessary to get there. The student's teachers were convinced that he could learn to factor, and that use of the TI-92 would be inappropriate because it would circumvent the learning process by doing too much of the work for him. According to his teachers, factoring is a significant component of the Math 3A curriculum. "It is educationally beneficial for Grant to acquire new skills, well within his capability. It would, therefore, be inappropriate for him to retake tests using the TI-92 to factor." The TI-92 is inappropriate because "it would allow Grant to answer questions without demonstrating any understanding of the underlying mathematical concepts." The court concluded that the student's failing grades in math did not mean that the assistive technology provided was inappropriate. Instead, the failing grades were the result of the student's lack of effort. **"The IDEA does not require school districts to pass a student claiming a disability when the student is able, with less than the assistive aides requested, to succeed but nonetheless fails. If a school district simply provided that assistive device requested, even if unneeded, and awarded passing grades, it would in fact deny the appropriate educational benefits the IDEA requires."** The student did not need the advanced calculator. In fact, a more advanced calculator was inappropriate on these facts.

Accommodations cannot replace direct instruction. *City of Chicago School District 299*, 62 IDELR 220 (SEA IL 2013). The student is IDEA-eligible, diagnosed with autism, multiple learning disabilities, and speech and language impairments. As a result, the student struggles in comprehension of basic math. For example, the student can only count up to the number five, cannot complete most addition and subtraction calculations above a basic level, has problems with visual and spatial reasoning, and is unable to complete basic math facts. **Further, his IEP reflects that his level of performance in basic math skills have not changed significantly since 2010.** In its post-hearing brief, the District took the position that **"Student will never be able to understand abstract mathematical concepts so that Student could understand the meaning behind basic math."**

The Hearing Officer was unconvinced, believing that the student's lack of progress was not due to lack of capability but poor choices in terms of teaching strategies and inappropriate accommodations. For example, during a summer of compensatory services provided by a special education teacher (required due to a settlement agreement with the parent arising from an earlier dispute), the student made progress in math.

"District Summer Teacher testified that by using some of the techniques in multi-sensory instruction, Student was able to make progress on basic math. Moreover, Student's IEPs suggest that 'hands on learning' is a way in which Student can learn. Hands on learning is a key component of multi-sensory researched based instruction. Therefore, the undersigned makes an inference that

Student can learn basic math concepts when provided with an appropriate methodology which meets Student's unique needs.”

These successes convinced the hearing officer that the student could make better progress on math goals, given appropriate services and in the absence of some inappropriate accommodation. The student’s current math teacher testified that the **“Student is currently not being taught basic math skills. Rather, Student is being provided the accommodations to make up for Student's failure to understand basic math in an attempt to teach advance math skills.”** Translated: the student is using a calculator to handle basic math skills but does not understand the basic functions handled by the calculator.

A little commentary: While the case is in reverse posture to the concerns we’re discussing here (it’s the school substituting a calculator for specialized instruction rather than the parent) the case summary is provided to illustrate the negative impact to FAPE that is possible if devices or accommodations are added without concern for the impact on the IDEA FAPE.

2. ADA and Section 504 rights exercised by parents can conflict with the IDEA FAPE. As the two calculator cases illustrated, an improper use of an otherwise worthwhile accommodation can implicate FAPE. When that accommodation decision is made for an IDEA-eligible student outside of the IEP Team process, similar conflict is possible. When parents make decisions with respect to whether to send a service animal to school with the student, or whether to request a device or service under ADA Title II effective communication regulations, the choice can interfere with the IDEA FAPE. A couple of service animal cases and an OCR letter introduce the problem.

A service animal and potential conflict with the IDEA IEP. *E.F. v. Napoleon Community Schools*, 62 IDELR 201 (E.D. Mich. 2014). E.F. is an eight-year-old IDEA-eligible student, born with spastic quadriplegic cerebral palsy. Her pediatrician wrote a prescription for a service animal as she requires physical assistance in daily activities. Her service animal is named “Wonder.” **Wonder is a Goldendoodle, trained to retrieve dropped items, help her balance when using a walker, open/close doors, turn on/off lights, transfer to and from toilet, etc. Wonder also “enables [EF] to develop independence and confidence and helps her bridge social barriers.”** Parents allege that Wonder is specially trained and certified, although Department of Justice service animal regulations do not require formal training or certification for service animals. Both before and after a trial period during which Wonder performed without any apparent problem, the school refused to allow Wonder to attend school with the student.

The parents sued, alleging violations of Section 504, the ADA and a Michigan civil rights law protecting persons with disabilities. They sought a declaratory judgment, money damages and attorneys’ fees. Defendants argued that the parents failed to exhaust their administrative remedies by not first filing for IDEA due process with the Michigan DOE. “States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert fact-finding by a state agency devoted to this very purpose.” **But the Parents didn’t argue that the school failed to provide a FAPE under IDEA. Instead, they argued that the school failed to meets its ADA/Section 504 burden to accommodate a disabled student in a place of public accommodation (the school).** The court looked past the Parent’s legal position, to the implications of the Parents’ demand on the student’s IEP.

“The Court concludes that IDEA’s exhaustion requirement was triggered here. **Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder’s presence would not—at least partially—implicate issues relating to EF’s IEP....** [I]t appears conceivable that E.F.’s IEP would undergo some modification, for example, to accommodate the ‘concerns of allergic students and teachers and to diminish the distractions [Wonder’s] presence would engender.’

Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (i.e., the school and school district) would also have to make certain practical arrangements—such as developing a plan for Wonder’s care, including supervision, feeding, and toileting—so that the school continued to maintain functionality. All of these things undoubtedly implicate EF’s IEP and would be best dealt with through the administrative process.” (Emphasis added).

The school’s motion to dismiss for failure to exhaust administrative remedies was granted.

A little commentary: While the court understands the potential for conflict with the IEP, the examples cited seem extremely generic—applicable to any student with an IEP. **The author wonders what goals and objectives were in place for the student with respect to independent living, mobility, self-care etc., and how Wonder’s service to the child would interfere with the student making progress on those goals.** It does not appear that the district raised the issue or argued any such conflict, leaving the court to speculate. A similar dynamic is sometimes created where the student is not allowed to use skills learned at school. *See, for example, Montgomery County Public Schools, 23 IDELR 852 (SEA MD 1996)* (“The evidence is strongly suggestive that the young adult-soon-to-be in this case may be engaging (not unexpectedly) in a form of ‘learned helplessness’ while in the home. Skills or behaviors that he independently performs at school or in the work setting are apparently being provided by [] in the home. Such actions on the part of the mother or other family members only serve to exacerbate dependencies and prolong the road to independence.”)

A service animal and an actual conflict with the IDEA IEP. *Cave v. E. Meadow Union Free School District, 49 IDELR 92 (2nd Cir. 2008)*. Despite the student’s IDEA eligibility, the parent did not allege a violation of IDEA’s FAPE requirement, but instead, a violation of the ADA/Section 504 arising from the school’s refusal to accommodate their request to utilize a service animal. The Second Circuit focused on the impact of the 504/ADA equal access request on the student’s special education IEP.

“We are not convinced that appellants’ claims are materially distinguishable from claims that could fall within the ambit of the IDEA. **The high school principal and the school district’s director of special education testified before the district court that John, Jr.’s class schedule under his existing IEP would have to be changed to accommodate the concerns of allergic students and teachers** and to diminish the distractions that Simba’s presence would engender. School authorities would also have to make certain practical arrangements to maintain the smooth functioning of the school and to ensure both that Simba was receiving proper care and that John, Jr. continued to receive necessary and appropriate educational and support services. **It is hard to imagine, for example, how John, Jr. could still attend the physical education class while at the same time attending to the dog’s needs;** or how he could bring Simba to class where another student with a certified allergic reaction to dogs would be present. **These issues implicate John, Jr.’s IEP and would be best dealt with through the administrative process.** The local and state education agencies are ‘uniquely well suited to review the content and implementation of IEPs ... and to determine what changes, if any, are needed.’” (Emphasis added).

Note that the class change was required as one of John’s regular education teachers suffered from serious dog dander allergies. The result was more resource instruction for John as, apparently, no other regular education teacher for that subject was available. The court further reflected on the goals of IDEA and the impact of the service animal on those goals.

“We note in that regard that one of the goals of the IDEA is ‘to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related *services designed to meet their unique needs and prepare them for further education, employment, and independent living.*’ 20 U.S.C. §1400(d)(1)(A) (emphasis added). A

request for a service dog to be permitted to escort a disabled student at school as an ‘independent life tool’ is hence not entirely beyond the bounds of the IDEA’s educational scheme.”

The court noted that the parent’s failure to exhaust administrative remedies under the IDEA (the issue was neither raised to the IEP team nor subject of a due process hearing) raised “a serious question regarding whether this Court has jurisdiction to award” the injunction sought. Ultimately, the request was dismissed due to failure to exhaust, but the court addressed the merits to complete the record.

OCR discusses fundamental alteration. *Catawba County (NC) Schools*, 61 IDELR 234 (OCR 2013). The school argued that the use of service animal conflicted with FAPE under IDEA, and was therefore a fundamental alteration.

“In this case, OCR need not address what rare circumstances, if any, the use of a service animal could conflict with a student’s IEP or 504 Plan and could, therefore, constitute a fundamental alteration. In promulgating the amended Title II regulation, the Department of Justice intended the ‘fundamental alteration’ exception to be narrow. **Here, there is no conflict between the IEP and the Student’s use of the service animal.** Rather, the District has misinterpreted the provisions of the Student’s IEP. The Principal and the Superintendent, the decision-makers in this instance, were unable to articulate how the Student’s IEP goals conflicted with the presence of the service animal, in large part because they lacked a basic understanding of how the Student’s service animal performs its functions.” (Emphasis added.)

A little commentary: First, it would be interesting to see OCR’s position if an IEP Team had looked at the implications to FAPE, done the analysis, and provided the talking points to the principal and superintendent. Would not the case for negative impact be better made by the folks that understand the goals and objectives and “speak” the language of special education? This point becomes significant below as the effective communication guidance letter looks to the principal or superintendent to articulate fundamental alteration. Second, while OCR can’t imagine a potential conflict between equal access and FAPE, the federal courts (see above) have had less trouble. Further, should a conflict exist, it is the school’s responsibility to raise and present the issue in a convincing way.

B. The *Tustin* Case: CART services under the ADA “Effective Communication” regulations. *K.M. v. Tustin Unified School District*, 61 IDELR 182 (9th Cir. 2013), *cert. denied*, 114 LRP 9909, 134 S. Ct. 1494 (2014) (D.H.); *cert. denied*, 114 LRP 9688, 134 S. Ct. 1493 (2014) (K.M.).

This case consolidates two separate appeals by two IDEA-eligible students after summary judgment was awarded to their respective districts. Both students have hearing impairments and both seek CART services. “CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both cases, the school district denied the request for CART but offered other accommodations.” Both students claim that their schools’ refusals to provide CART services violate both the IDEA and ADA Title II. Interestingly, both make similar claims regarding the impact of their hearing impairments in class.

“K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of K.M.’s teachers testified that, in their opinion, K.M. could hear and follow classroom discussion well.... K.M.’s teachers declared that she participated in classroom discussions comparably to other students. K.M. saw her situation quiet differently, emphasizing that **she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day....** the district court stated that it was ‘reluctant to adopt fully teacher and administrator conclusions about K.M.’s comprehension levels over the testimony of K.M. herself,’ and found ‘that K.M.’s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived.’”

“D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. ‘hears enough of what her teachers and fellow pupils say in class to allow her to access the general education curriculum’ and ‘did not need CART services to gain educational benefit.... Although D.H. can use visual cues to follow conversations, **‘[u]se of these strategies requires a lot of mental energy and focus,’ leaving her ‘drained’ at the end of the school day.** D.H.’s declaration questioned whether her teachers understood the extra effort it required for her to do well in school.” (Emphasis added.)

Summary judgment was ordered against both students based on District Court findings that the respective schools had complied with the IDEA and that therefore, the ADA claims were foreclosed by failure of the IDEA claims. **On appeal, the students do not contest the findings that their schools complied with the IDEA, but urge that they nevertheless have rights under ADA Title II to CART on the theory that “Title II imposes effective communication obligations upon public schools independent of, not coextensive with, school’s obligations under the IDEA.”**

The 9th U.S. Circuit Court of Appeals agreed with the students, finding that the Title II effective communication regulations differ in both ends and means. **For example, while the IDEA FAPE is measured by meaningful benefit, the Title II rules (where there is no FAPE) address equality of opportunity to participate and benefit.** There are important differences between the two laws.

“Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. **Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.**” (Emphasis added.)

Further, the Title II rules contain specific regulatory requirements with no IDEA counterpart.

“The Title II effective communications regulation states two requirements: **First, public entities must ‘take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.’** Second, public entities must ‘furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity.’ The Title II regulations define the phrase ‘auxiliary aids and services’ for purposes of 28 CFR §35.160 as including, inter alia, ‘real-time computer-aided transcription services’ and ‘videotext displays. **In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities.**”

A separate, more general Title II regulation limits the application of these requirements: Notwithstanding any other requirements in the regulations, **a public entity need not, under Title II, ‘take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.’**” [Internal citations omitted, emphasis added.]

Given the differences between the statutes, the notion that provision of the IDEA FAPE will preclude an ADA Title II claim in all cases is simply incorrect. “The result is that in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA.... we must reject the argument that the success or failure of a student’s IDEA claim dictates, as a matter of law, the success or failure of her

Title II claim. As a result, courts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework.”

Both cases were remanded to the respective District Courts to determine the students’ rights to CART under the ADA Title II. One District Court has now issued an opinion.

D.H. v. Poway Unified School District, 62 IDELR 176 (S.D. CA 2013). On remand following the 9th U.S. Circuit Court of Appeals decision discussed above, D.H. sought a preliminary injunction from the District Court that would order her school district to provide CART services during the pendency of the litigation. No oral argument or evidentiary hearing was held with respect to the motion. At the time of the motion, D.H. was a high school senior, set to graduate in 2014. The district court provided some additional facts not revealed in *Tustin*.

“She has moderate-to-profound hearing loss, and a cochlear implant in her right ear and uses a hearing aid in her left ear... **She uses speech and listening as her primary mode of communication....** She relies on visual strategies, such as lip reading and observation of the actions of her peers, as well as educated guesses to fill in for sentences that she does not hear. She is not always aware of when she has not heard something.”

While it had not provided CART, the district had provided significant aids and services to address the student’s hearing issues:

“Deaf/hard of hearing (‘DDH’) services; audiological services; speech language services; and extended school-year services. The assistive technology devices included, but were not limited to, an FM amplification system for the classroom and school assemblies, a pass-around microphone, and close-captioning access during class videos.”

“The communication strategies, accommodations, and modifications called for in the IEP included, but were not limited to, written directions, access to copies of peers’ notes, consistent home/school communication, access to quiet work environments, classroom doors closed to eliminate noise, teachers repeating/rephrasing other students’ responses, extra time for some assignments, and preferential seating.”

D.H. alleged that the district’s offered services were ineffective, and she was left with headaches due to intense concentration and her straining to hear what was being said in class. Specifically, the “meaning for meaning” transcription provided by the school was “so confusing to D.H. that she would rather have no transcription at all than have to use the alternatives.” CART, on the other hand, makes it very easy for her to find exactly what she missed “and pick right back up with what is being said.” Further, the district’s accommodations including closed captioning, the FM system, pass around microphone and even teacher repetition or rewording of class comments were not provided consistently as promised.

The district’s attempt to show overall educational success as evidence of equally effective communication likewise failed.

“While it is undisputed that D.H. is doing well in school, the District fails to explain how this shows that it complies with the ADA effective communication regulation in light of D.H.’s ongoing difficulties. **These difficulties, which result in both physical and psychological pain, tend to show that the District does not communicate with D.H. in a manner ‘as effective as [it] communicat[es] with others.’** 28 C.F.R. §35.160(a)(1).” (Emphasis added.)

The District Court granted the injunction request, finding that the student was likely to show that the district had not met its obligations under the ADA.

A little commentary: Since the ADA Title II regulations take a civil rights approach and require: 1) equality between disabled and nondisabled students with respect to effective communication at school; and 2) that the school furnish appropriate auxiliary aids and services to provide equal participation and benefit, it seems a bit odd that the court's decision did not include any apparent determination of the effectiveness of the communication between the school and nondisabled students or analysis of the level of participation and benefit enjoyed by nondisabled peers. As detailed below, the absence of that analysis may arise from the ADA's assumption that the disabled individual is in the best position to know his or her needs for accommodation, and the burden on the school to show that some other accommodation, service, or device is equally effective.

The court seems to equate the plaintiff student's effort (and the impact of that effort on the student) with a lack of equality in effective communication. At the very least, the student's academic success seems to evidence that communication with classroom teachers was effective (assuming that her passing grades are actually indicative of skill acquisition and benefit) *without the use of CART services*. While the evidence indicates that the plaintiff student was missing pieces of the classroom discussion, we have no benchmark to compare how much of the classroom instruction and discussion her nondisabled peers were missing (what level of participation and benefit did nondisabled peers enjoy with respect to classroom instruction and discussion, *and how did the Plaintiff student compare?*). In short, how can one determine equality with nondisabled peers *without a comparison to nondisabled peers?* **The law does not require "effective communication." It requires "as effective communication."**

A final note: The district's motion for reconsideration of the decision on the basis of the plaintiff's failure to exhaust administrative remedies was denied. The court concluded that while the district had raised the issue in its answer, the affirmative defense had not otherwise been argued during the litigation. *D.H. v. Poway Unified School District*, 62 IDELR 200 (S.D. Ca. 2014). At the District Court, the plaintiff did not allege a violation of IDEA FAPE, but argued that the school's attempts to address her impairment were ineffective. Note the absence of an allegation of denial of IDEA FAPE due to ineffective aids and services (because Plaintiff lost on that issue previously in District Court).

C. Department of Justice, OCR, & OSERS Joint Guidance on Effective Communication

In response to the *Tustin* case, three federal agencies with jurisdiction over the IDEA, ADA and Section 504 intersection joined together to issue a guidance letter providing assistance to schools attempting to comply with ADA's Effective Communication requirements in the public schools. *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Pub. Elem. and Secondary Schs.*, 114 LRP 49205 (DOJ/OCR/OSERS 11/12/14) (hereinafter, "2014 Guidance"). Extensive highlights from the guidance are reproduced here, with footnote references removed for ease of reading.

1. Sometimes an IDEA IEP will be enough to satisfy ADA Title II, but not always. "Public schools must apply both the IDEA analysis and the Title II effective communication analysis in determining how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability. In many circumstances, an individualized education program under the IDEA will also meet the requirements of Title II. However, as a recent Federal court decision highlighted, the Title II effective communication requirement differs from the requirements in the IDEA. In some instances, in order to comply with Title II, a school may have to provide the student with auxiliary aids or services that are not required under the IDEA. In other instances, the communication services provided under the IDEA will meet the requirements of both laws for an individual student." *Id.*, p. 2.

Can a student be asked to give up ADA rights because she's in special ed.? No. "A student with a disability does not, and cannot be asked to, give up his or her rights under Title II in exchange for, or because he or she already receives, special education and related services under the IDEA. That

is, the provision of FAPE under the IDEA does not limit a student's right to effective communication under Title II." *2014 Guidance*, p. 11.

So schools have to satisfy the requirements of both IDEA and ADA, and protect the student's rights under both laws? Yes. "For a student with a disability who is covered under both laws—such as all IDEA-eligible students with hearing, vision, or speech disabilities—the school district must ensure that both sets of legal obligations are met, and that none of the student's rights under either law are diminished or ignored." *Id.*, p. 11.

A little commentary: Just as a service animal or other equal access accommodation can interfere with the IDEA, so too can an effective communication aid or service. While the 2014 Guidance is heavy on ADA compliance, the IDEA FAPE must be satisfied as well.

2. How does the student or parent make a request for auxiliary aids or services under ADA Title II? Title II does not designate a contact person or the process of determining aids and services. The school must provide this structure. Once the school determines the identity of this contact and the process to pursue when making a Title II request, the school should "make sure that the identity and contact information of the designated school official is made publicly available in accessible formats." *2014 Guidance*, p. 12. **The guidance encourages schools (as best practice) to "proactively notify parents and students about the right to effective communication under Title II" including contact information for the school official to contact should the parent/student desire to make a request for services.** School staff should also be aware of the designated official so that employees may forward requests appropriately.

Could the IEP team be designated for this purpose? Yes. "If a child has an IEP, neither the IDEA nor Title II require that the child's IEP Team address a parent's Title II request for his or her child; however, a school district may choose to delegate this responsibility to the child's IEP Team." *2014 Guidance*, p. 12. "Under the IDEA, the school must ensure that the child's educational program, as part of FAPE, is based on the individual needs of the child and is reasonably calculated to enable the child to receive meaningful educational benefit. **If a school district designates the IEP Team as having the responsibility of making decisions about the auxiliary aids and services required under Title II, then the IEP Team may make this decision.**" *2014 Guidance*, p. 13. (Emphasis added).

But the IEP team will NOT use FAPE analysis for determining Title II services. "However, the IEP Team needs to be aware that the decision regarding the auxiliary aids and services needed to ensure effective communication as required under Title II poses a different question than the FAPE determination under the IDEA and must be made using the Title II legal standards." *Id.*

A little commentary: The author believes that delegating this authority to the IEP Team is critical. After all, the student's rights under both the IDEA and ADA/504 must be satisfied. Further, there are complications when someone or some group other than the IEP Team performs the function. **For example, what if the school believes that the effective communication choice by the parent will prevent the student from developing the skills targeted by IEP goals?** Wouldn't such a choice potentially violate FAPE? **Is it possible that the parent is seeking the service, accommodation, or device through ADA because a request for same was denied by the IEP Team?** Is it also possible that the IEP Team never had a chance to weigh in? In both *Napoleon* and *Cave*, discussed previously, equal access by way of service animal could impact or interfere with IDEA FAPE, requiring the use of the IDEA administrative process to work through the interplay, as well as provide the parents a mechanism for challenging and appealing IEP decisions on the issue. **Regardless of the finding with respect to ADA, the IEP Team will need to make a finding as to whether the service or device is necessary for FAPE.** If so, it should be added to the IEP. If not necessary for FAPE, the IEP Team would need to determine whether the aid or service is required under the effective communication rules. *Tustin* and the guidance makes clear that the school

cannot assume that IDEA FAPE always satisfies effective communication. That decision must be made on a case-by-case basis. **If a device is required by effective communication, but not required for FAPE, the IEP Team will need to determine whether the aid or service negatively impacts FAPE.**

3. Does the parent have to ask for Title II aids or services? No, the school has affirmative duty to raise the issue. “Parents do not have to make a specific request for different or additional auxiliary aids. **When the school district knows that a student needs assistance with communication because, for example, he or she has a hearing, vision, or speech disability, the school district also has an affirmative obligation to provide effective communication under Title II, whether or not a parent requests specific auxiliary aids and services under Title II.** This obligation is in addition to the requirement that the school district make FAPE available if the student is eligible under the IDEA. As a best practice, schools should consult with the parent or guardian (and students, as appropriate) at the first opportunity regarding what auxiliary aids or services are appropriate and update information about these preferences at least every year or whenever the parent or guardian requests a change. Nothing prevents the parent, guardian, or student from specifically requesting a particular auxiliary aid or service if not so consulted.” *2014 Guidance*, p. 12. (Emphasis added).

A little commentary: To satisfy the affirmative obligation to provide effective communication, the IEP Team having been delegated the authority as mentioned above, will need to add effective communication analysis to the IEP Team meeting agenda (on an on-going basis) for students with vision, hearing, and speech disabilities.

4. Primary consideration must be given to student’s preference. “Title II requires covered entities, including public schools, to give ‘primary consideration’ to the auxiliary aid or service requested by the student with the disability when determining what is appropriate for that student.” *2014 Guidance*, p. 6.

How is that preference communicated? “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.” (Emphasis added).

“For example, if a high school student was deaf at birth or lost his or her hearing before learning language, that person may use American Sign Language (ASL) as his or her primary form of communication and may be uncomfortable or not proficient with other forms of communication. A high school student who lost his or her hearing later in life and who uses a cochlear implant may not be as familiar with sign language and may feel most comfortable and proficient with an oral interpreter or with the use of a computer or other technology. A young student who is nonverbal and is fluent in ASL but cannot read yet may not be able to use a computer with written text and may be most comfortable and proficient communicating with a sign language interpreter.” *2014 Guidance*, p. 7-8.

A little commentary: Should the school utilize the IEP Team process for reviewing these requests and considering needs for equally effective communication, the requirement to provide meaningful participation would seem to address this concern as long as the parent is aware of the IEP Team’s role. Note that the ADA places great weight on the disabled person’s information about which service, device, etc., will be most effective. That approach is somewhat at odds with the IDEA data-based approach to disability services. Note that the ADA does not require IEP Team to ignore evaluation data. Instead, the ADA simply gives priority or primary consideration to the student/student’s parent’s information about which aids or services to provide.

5. What factors does the school consider in determining necessary Title II aids and services to provide equal opportunity to participate and benefit? “The determination of what auxiliary aids or services will provide effective communication must be made on a case-by-case basis, considering the communication used by the student, the nature, length, and complexity of the communication involved, and the context in which the communication is taking place... [S]chools must make an individualized determination and cannot assume, for example, that simply because a student is deaf, the student is fluent in ASL.”

“In addition to giving primary consideration to the particular auxiliary aid or service requested by the student with a disability, the public school should also consider, for example, the number of people involved in the communication, the expected or actual length of time of the interaction(s), and the content and context of the communication. For example, will the communication with a deaf student be fairly simple so that handwritten or typed notes would suffice; or is the information being exchanged important, somewhat complex, technical, extensive, or emotionally charged, in which case, a qualified interpreter may be necessary.” *2014 Guidance*, p. 8.

6. Does the school have to address all communications involving the student at school? Yes. “The Title II regulations’ requirements apply to all of a student’s school-related communications, not just those with teachers or school personnel. Therefore, given the ongoing exchanges students experience with teachers, students, coaches, and school officials, any student who requires a sign language interpreter in order to receive effective communication in an academic class would likely need interpreter services throughout the day and may also need them to participate in school-sponsored extracurricular activities.” *2014 Guidance*, p. 8.

What does it mean for auxiliary aids and services to be provided in ‘accessible formats, in a timely manner, and in such a way as to protect the privacy and independence’ of a student with a disability? “The Title II regulations require that when a public school is providing auxiliary aids and services that are necessary to ensure effective communication, they must be provided in ‘accessible formats, in a timely manner, and in such a way as to protect the privacy and independence’” of a student with a disability. This regulatory provision has several requirements.

- “First, the auxiliary aid or service provided must permit the person with the disability to access the information. For example, if a blind student is not able to read Braille, then provision of written material in Braille would not be accessible for that student. If homework assignments are available on-line, then the on-line program used by the school must be accessible to students who are blind. Similarly, for a student with limited speech who does not yet read, a computer that writes words would not be accessible for that student. Instead, a device that uses pictures to communicate words, thoughts, and questions may be appropriate.”
- “Second, the auxiliary aid or service must be provided in a timely manner. That means that once the student has indicated a need for an auxiliary aid or service or requested a particular auxiliary aid or service, the public school district must provide it (or the alternative, as discussed above) as soon as possible. If the student is waiting for the auxiliary aid or service (as opposed to requesting and arranging for it in advance), DOJ and ED strongly advise that the public school keep that student (and parent) informed of when the auxiliary aid or service will be provided. This requirement is separate from the provision of special education and related services under the IDEA. For example, where the student or his or her parent(s) requests auxiliary aids and services for the student under Title II, the appropriate aids and services must be provided as soon as possible, even if the IDEA’s evaluation and IEP processes are still pending.”

A little commentary: This piece of guidance, in the context of a student with an initial evaluation under IDEA pending, creates an interesting data problem for the school. The student’s preference

of aid or service must be addressed prior to the completion of the evaluation and thus before the school may have the data necessary to counter what could be excessive or inappropriate requests. Once the aid or service is in place, making changes afterwards, even with fresh data to substantiate the change, can be difficult. Note that the guidance cites no authority for the “ASAP” response. *See additional commentary below following the case study.*

- “Third, the auxiliary aid or service must be provided in a way that protects the privacy and independence of the student with the disability. For example, for someone who is deaf and uses ASL, if other people in the environment understand ASL, then conversations that involve sensitive information must be conducted privately. Additionally, auxiliary aids and services must be provided in a manner that does not unnecessarily disclose the nature and extent of an individual’s disability. For example, if a student who is hard of hearing needs assistance with taking notes, a teacher should not call out for volunteers in the front of the whole class. Auxiliary aids and services also must be provided in a way that protects the independence of the student. For example, if a blind student requested an accessible electronic book (e-book) reader to complete in-class reading, instead of using a reading aide, the school district should provide the e-book reader because it would allow the student to go through the material independently, at his own pace, and with the ability to revisit passages as needed.” *2014 Guidance, p. 9-10.*”

7. Can the school figure out Title II services as part of the IDEA FIE? Sure, says the guidance, as long as you don’t wait to address the Title II offerings until the FIE is complete. “[A] school district must provide the auxiliary aids or services in a timely manner and cannot wait for the IEP process to run its course before providing necessary auxiliary aids and services under Title II. The IDEA does not prohibit a school district from providing the needed auxiliary aids and services under Title II while the IDEA evaluation is pending.” *2014 Guidance, p. 14.* Upon completion of the initial evaluation, the previously provided Title II aids and services would then be reviewed in the context of the completed IDEA evaluation. *Id.*

A little commentary: See previous commentary in #6 regarding the timing of the decision.

8. What if another service or aid can provide equally effective communication? “The public school must honor the choice of the student with the disability (or appropriate family member) unless the public school can prove that an alternative auxiliary aid or service provides communication that is as effective as that provided to students without disabilities. **If the school district can show that the alternative auxiliary aid or service is as effective and affords the person with a disability an equal opportunity to participate in and benefit from the service, program, or activity, then the district may provide the alternative.**” *2014 Guidance, p. 8* (emphasis added).

A little commentary: Note that rejection of the student’s choice places the burden of proof on the school as to the effectiveness of the school’s proposed alternative aid or service.

9. Can IDEA funds be used to pay for Title II auxiliary aids and services? “IDEA funds may be used only to pay for auxiliary aids and services under Title II that also are required to be provided under the IDEA, such as assistive technology or interpreter services that are included in the student’s IEP. If a child receives auxiliary aids and services under Title II that are not included in the child’s IEP, IDEA funds may not be used to pay for those services.” *2014 Guidance, p. 15.*

A little commentary: The funding problem is especially problematic as the aids and services necessary for FAPE can be quite expensive, and the ADA rules seem to require what may sometimes be conflicting or redundant aids or services (*see D.H. v. Poway, supra*). The result is that despite the IEP Team’s ability to choose among appropriate services for FAPE, the student’s choice under ADA may be the *de facto* decision should the school want to reduce duplicative expenses. Why provide both sign language interpreter and CART? That financial pressure can implicate

student progress on goals (why develop signing skills if CART is provided?) implicating FAPE.

10. How does the school determine fundamental alteration or undue burden? This decision is left to central administration—“the head of the school district or his or her designee (i.e., another school official with authority to make budgetary and spending decisions).” **The decision is made in writing including a written explanation of why the aid or service would cause an undue burden or fundamental alteration.** “Compliance with the effective communication requirement would, in most cases, not result in undue financial or administrative burdens.” *2014 Guidance*, p. 10.

Could the IEP Team do this? The guidance indicates that *someone on the IEP team* (but not the team itself) could serve in this role. “While there is nothing in the ADA that would prevent the head of the school district from delegating this authority to an appropriate member of the child’s IEP team, that designee must have authority to make budgetary and spending decisions and must have the knowledge necessary to consider all resources available to the school district for use in the funding and operation of the service, program, or activity.” *2014 Guidance*, p. 10.

A little commentary: As noted above, the author believes that the IEP Team must be involved in these decisions. Since the IEP Team itself cannot be delegated the authority to determine fundamental alteration, designating the administrator on the IEP Team to perform that function is the next best thing. After all, only the IEP Team can determine the student’s FAPE services, and the same IEP Team can be delegated the task of determining ADA effective communication aids and services. The peril of not involving the IEP Team is clear in the guidance letter’s case study discussed below.

11. If school proves fundamental alteration or undue burden, what happens next? If pursuant to the process described above, “the district must take other steps that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, the individual with a hearing, vision, or speech disability can participate in, and receive the benefits or services provided by, the school district’s program or activity. Generally, this would involve the provision of an auxiliary aid or service that would not result in a fundamental alteration or undue burden.” *2014 Guidance*, p. 10.

12. A Guidance Letter Case Study. The following is a case study included in the Joint Guidance Letter. It addresses the underlying point of *Tustin* that auxiliary aids and services under Title II may be different from special education and related services under the IDEA. It is instructive on many levels. The author has added brief paragraph tags in a few places where the guidance letter did not.

The Student. “Tommy is a thirteen-year-old student with significant hearing loss. He has a cochlear implant, and also relies on lip-reading and social cues to communicate with others. He has been evaluated under the IDEA and determined eligible for special education services.”

The Task. “When addressing the communication needs of a child who is deaf or hard of hearing, the IEP Team must consider the child’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode. The IEP Team also must consider whether the child needs assistive technology devices and services.”

The Problem. “For the past three years, Tommy’s IEP Team, which includes Tommy’s parents, agreed that Tommy would use FM technology, which consists of a microphone held by the teacher and a receiver that transmits to Tommy’s implant. During this time period, Tommy has maintained above average grades, completed grade level work, and interacted appropriately with his peers. Recently, however, Tommy expressed concern that he cannot hear other classmates during class discussions and often must ‘fake it.’ He also stated that the FM system transmitted static and background noises and interfered with his ability to focus. Based on these concerns Tommy’s

mother requested that he receive communication access real-time translation (CART) services, which is an immediate transcription of spoken words to verbatim text on a computer screen.”

“FAPE determination under the IDEA: After Tommy expressed his concerns about the FM system and requested CART services, Tommy’s IEP Team timely reconvened. Under the IDEA, the IEP Team must determine the special education and related services necessary to provide FAPE and ensure those services are reasonably calculated to enable Tommy to receive meaningful educational benefit. Included in this analysis is whether CART services are necessary for Tommy to receive FAPE. Based on Tommy’s above average grades, his grade-level work and teachers’ reports on Tommy’s interactions in class with his peers, the IEP Team determined that transcription services (e.g., CART) were not necessary for Tommy to receive FAPE. The IEP Team did, however, recommend that Tommy receive an updated FM system and preferential seating in classrooms, and that teachers repeat student’s comments, use closed-captioning videos, and provide Tommy with course notes.”

“Effective Communication determination under Title II: Because Tommy is a student with a hearing disability already identified under the IDEA, the school district also has an affirmative obligation under Title II to ensure that he receives effective communication. Under Title II, the school district must take appropriate steps to ensure that communication with Tommy is as effective as communication with students without disabilities. The school district also must provide appropriate auxiliary aids and services, where necessary, to afford Tommy an equal opportunity to participate in, and enjoy the benefits of, the school program. In determining what auxiliary aids and services are appropriate for Tommy, the school must give primary consideration to the requests made by Tommy and his parents.”

The District ADA Coordinator’s Decision. “Tommy’s school district has delegated the responsibility of determining the appropriate auxiliary aids and services needed to ensure effective communication to the ADA Coordinator. As soon as Tommy made his request, his teacher alerted the ADA coordinator about Tommy’s request for CART services. In this case, Tommy cannot hear many of the students in the classroom, and by not hearing a student’s question or comment, he does not always understand a teacher’s response. **The ADA coordinator timely determined that because Tommy cannot fully hear or understand all that is said in the classroom, he is not receiving effective communication.** The Coordinator gives primary consideration to Tommy’s request for CART services and agrees that CART services would provide Tommy with effective communication. **Because the CART services would not result in a fundamental alteration or in undue financial and administrative burdens,** Tommy will receive CART services as an auxiliary service under Title II and not as a related service under the IDEA.” (Emphasis added).

A little commentary: The author is concerned by some the assumptions made in the case study, as well as the recommended approach of using the ADA Coordinator to make effective communications decisions for IDEA-eligible students. **The following concerns ought to be discussed with the school attorney as the school seeks to create an appropriate process to address these rules.**

- 1. To comply with the ADA requirements, how effective does the resulting communication have to be?** The language of the regulation requires the school to “take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are *as effective as communications with others.*” The language is that of civil rights. The law’s focus is on ensuring that whatever level of communication is enjoyed by nondisabled students at school is also provided to students with disabilities (specifically, hearing, vision, and speech impairments). The plain language requires a comparison.

Interestingly, neither the district court in the remand in *Tustin* nor the 2014 Joint Guidance Letter seem to give much attention to the comparative nature of the effective communication analysis—that is, how effective is the school’s communication with nondisabled students? For example, in

the *D.H.* remand from *Tustin*, there was no apparent attempt by the district court to determine how effective the school's communication was with nondisabled peers. Instead, the court simply focused on the fatigue and stress resulting from the student's focus to hear in the classroom environment. Since she was having difficulty, the court simply concluded that communication with her was not effective. The school does not seem to have proposed a standard by which to compare her to nondisabled peers. Perhaps more troublesome is the example created in the 2014 Joint Guidance where the ADA Coordinator determined that "because Tommy cannot fully hear or understand all that is said in the classroom, he is not receiving effective communication." There is no indication that this standard is created through data-gathering or analysis. It is simply the pronouncement that "as effective" communication must be "perfect communication."

Note that in other fact situations, OCR has applied a real-world Section 504/ADA standard with which to compare the student with disability. Consider this approach in determining how safe the school environment should be for a student with a peanut allergy. In response to a complaint by a student with a severe allergy to peanuts and tree nuts, OCR reminded schools of the nondiscrimination duty as it pertains to student safety. *Washington (NC) Montessori Public Charter School*, 60 IDELR 78 (OCR 2012). Following a brief overview of the relevant nondiscrimination provisions, OCR provided the following:

"OCR interprets the above provisions to require that public schools take steps that are necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. As the vast majority of students without disabilities do not face a significant possibility of experiencing serious and even life-threatening reactions to their environment while they attend school, **Section 504 and Title II require that the School provide students with peanut and/or tree nut allergy (PTA)-related disabilities with a medically safe environment in which they do not face such a significant possibility.** Indeed, without the assurance of a safe environment, students with PTA-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program.

See also the very similar language in an earlier OCR letter, Saluda (SC) School District One, 47 IDELR 22 (OCR 2006) ("OCR interprets these provisions to require that public school districts take those steps necessary to ensure that the school environment for students with disabilities is as safe as the environment for students without disabilities. **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 require that the District provide the student with an environment in which he also does not face such a significant possibility.**" (emphasis added)).

Schools wishing to demonstrate that they have met the effective communication standard should seriously consider methods to determine how much is both heard and understood by nondisabled peers. **The author respectfully argues that this benchmark cannot be that nondisabled students hear everything and understand everything.**

- 2. What will the school do with respect to timing of the ADA decision and the data to be reviewed to make the decision?** The case study provides an interesting backdrop for a discussion of the data problem and the timing problem. Note that even though the communication pieces of the IEP were not working perfectly, the student was not being denied FAPE. Nevertheless, the IEP Team made changes to the IEP calculated to address the problems. There is no indication that the ADA Coordinator reviewed any assessment data from the IEP Team, knew that changes had been made to the IEP to address the parent's concerns, and perhaps most importantly, did not know whether the changes made now satisfied the effective communication requirement. Even if the Coordinator had the data, the IEP Team will still be in a better position to make the ADA effective communication decision and no one will be better qualified than the IEP Team to determine possible impact on IDEA FAPE. In the author's opinion, any decision-

maker other than the IEP Team seems risky.

While the case study indicates that the parent’s request was immediately forwarded to the ADA Coordinator, such speed (especially where changes to the IEP have yet to be reviewed for effectiveness) seems rather reckless with respect to expenditure of district funds. **Interestingly, while the Joint Guidance insists on ASAP decisions for effective communication, no authority is cited for the proposition. Further, OCR has traditionally expected that 504/ADA processes occur within a reasonable time, and that in the absence of a specific timeline, the school could look by analogy to state IDEA timelines.** *See, for example, Rockbridge County (VA) School Division, 57 IDLER 144 (OCR 2011)* (OCR provided the following guidance. “Section 504 does not contain a specific requirement for the period of time from a parental request or consent for an assessment to the actual assessment, but requires that an evaluation be conducted within a reasonable period of time.” A “reasonable time” is generally viewed as the time allowed by IDEA rules for similar events—i.e., how long does your state allow between consent and completion of the evaluation? *See also, Rose Hill (KS) Public Schools, USD #394, 46 IDELR 290, 106 LRP 35103 (OCR 2006)* (While there is no timeline in the §504 regulations with respect to completion of an initial evaluation, “the various steps in the process, which includes the evaluation, must be completed in a reasonable period of time. Unreasonable delay may be discrimination against a student with a disability because it has the effect of denying the student meaningful access to educational services.”). Applying the traditional OCR rule would allow an initial IDEA evaluation to be reviewed before making the decision on effective communication, and would also allow a time period following changes to the IEP to go into effect before adding considering additional services.

What to do? Where Section 504 equal access or ADA Title II effective communication demands can result in services, accommodations, or access to devices without an IEP Team review, these demands could implicate and frustrate IDEA FAPE. Consequently, when demands are made by IDEA-eligible students for services, accommodations or devices pursuant to the ADA Title II or Section 504, consider involving the school attorney in the discussion to ensure that the IDEA FAPE is preserved and the other two laws are respected as well.

Consider this basic framework in discussions between school and school attorney:

1. For the IDEA-eligible student, requests for services, devices, or notice of use of a service animal should go to through the IEP Team first. Since the duty to consider effective communication is ongoing, the author believes that the IEP Team should add discussion of effective communication to annual reviews.
2. The IEP Team should determine:
 - a. Is it necessary for IDEA FAPE? If so, the IEP Team adds it to the IEP and provides it.
 - b. If not necessary for IDEA FAPE, is it required under Section 504 or ADA Title II?
 - (1) If required under Section 504 or ADA Title II, and the request does not negatively impact IDEA FAPE, provide the appropriate accommodation, changes to policy, practice and procedure to make the request possible. Talk your school attorney about documenting the school’s response.
 - (2) If required under Section 504 or ADA Title II, what does the school do if the request negatively impacts IDEA FAPE? Talk with your school attorney about the appropriate options. For example, should the school refuse the request on the basis of fundamental alteration? Should the school provide notice to the parent identifying areas where growth under the IEP will be prevented or limited due to the ADA choice? What other options might be available?