

The IDEA Student's ADA Right to Effective Communication

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A little housekeeping...

- These slides are intended to summarize rules and cases that are often very complex. Neither the slides nor the presentation are legal advice.
- Please consult your attorney for questions with respect to a particular set of facts.

2

I. Interaction of ADA/504 and IDEA FAPE

- Some basics on the IDEA-504/ADA relationship
 - IDEA students also have § 504 protections. *Letter to Mentink*, 19 IDELR 1127 (OCR 1993).
 - Dual eligibility does *not* mean that schools provide the IDEA student a § 504 plan in addition to the IEP. *Protecting Students with Disabilities*, 116 LRP 4782 (OCR 10/16/15).
 - IDEA language on other rights.

3

I. Interaction of ADA/504 and IDEA FAPE

- IDEA 20 U.S.C. § 1415(l) on "other laws"
 - "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...."

4

I. Interaction of ADA/504 and IDEA FAPE

- IDEA 20 U.S.C. § 1415(l) on "other laws"
 - "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."

5

ADA Effective Communication Regulations

- 1. The District must "ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." 28 C.F.R. § 35.160(a)(1).

6

ADA Effective Communication Regulations

- 2. The District 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.” 28 C.F.R. § 35.160(b)(1).

7

ADA Effective Communication Regulations

- 3. In determining what type of auxiliary aid and service is necessary, a school “shall give primary consideration to the requests of the individual with disabilities.” 28 C.F.R. § 35.160(b)(2).

8

ADA Effective Communication Regulations

- 4. The District 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.” 28 C.F.R. § 35.164.

9

A. What happens when the rights conflict?

- 1. Recognizing how simple choices can have a big impact:
 - The wrong accommodation or service can jeopardize IDEA FAPE.
 - *Sherman v. Mamaroneck*, 39 IDELR 181 (2d Cir. 2003);
 - *City of Chicago Sch. Dist.*, 62 IDELR 220 (SEA IL 2013).

10

When parents can choose services outside the IEP Process...

- 2. ADA and Section 504 rights exercised by parents can conflict with the IDEA FAPE.
 - The question: When services or devices can be added outside of the IEP process, how can the IEP Team protect FAPE?

11

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*, 62 IDELR 201 (E.D. Mich. 2014).
 - E.F. is 8 years old, IDEA-eligible, and was born with spastic quadriplegic cerebral palsy. She requires physical assistance in daily activities.
 - Pediatrician wrote prescription for service animal.
 - "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.

12

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*
 - Wonder also "enables [E.F.] to develop independence and confidence and helps her bridge social barriers." [NOTE: Sounds kind of like something an IEP would do....]
 - Parents allege that Wonder is specially trained and certified. [NOTE: DOJ regs don't require certification, and informal training is OK].

13

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*
 - *October 2009*, School: Wonder can't come to school.
 - *January 2010*, IEP Team determines Wonder not necessary for FAPE. "E.F. was successful in school environment without Wonder, and that all of her 'physical and academic needs' were being met by the IEP program and services in place."

14

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*
 - By agreement, Wonder comes to school for 30-day trial period beginning on April 12, 2010 (and stays through end of the year).
 - After the trial, the school refuses to modify its policy and refuses to recognize Wonder as a service animal.
 - Parents complain about limits placed on trial period.

15

ADA/504 rights exercised by parents can conflict with IDEA FAPE

• *E.F. v. Napoleon Cmty. Schs.*

- Parents sue alleging violations of Section 504, the ADA, and a Michigan civil rights law protecting persons with disabilities. They seek a declaratory judgment, money damages, and attorney's fees.
- Defendants argue that the parents failed to exhaust their IDEA administrative remedies.

16

ADA/504 rights exercised by parents can conflict with IDEA FAPE

• *E.F. v. Napoleon Cmty. Schs.*

- Parents don't argue that the school failed to provide FAPE under the IDEA.
- Instead, they argue the school failed to accommodate a student with a disability in a place of public accommodation (the school).
- Court looks past parents' posture.

17

ADA/504 rights exercised by parents can conflict with IDEA FAPE

• *E.F. v. Napoleon Cmty. Schs.*

- The court: "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 E.F.'s IEP."

18

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*

"...it appears conceivable that E.F.'s IEP would undergo some modification, for example:

- to accommodate the 'concerns of allergic students and teachers.'
- to 'diminish the distractions [Wonder's] presence would engender.'
- having Wonder accompany E.F. to recess, lunch, the computer lab, and the library would likewise require changes to the IEP."

19

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*

- The IEP would need to include plans for handling Wonder on the playground or in the lunchroom.
- Defendants 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

20

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *E.F. v. Napoleon Cmty. Schs.*

- School's motion to dismiss for failure to exhaust was granted.
- Isn't this analysis awfully generic?
 - Court is right about the possibility, but where is the evidence of the conflict?
 - *Montgomery Pub. Schs.*, 23 IDELR 852 (SEA MD 1996)

21

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *Napoleon* affirmed on appeal, 65 IDELR 221 (6th Cir. 2015), *cert. granted* (2016).
 - The court looked at the parents' allegations as subtle attacks on the IEP and its ability to provide FAPE.
 - There is a lot of inferring going on in this decision....

22

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- "The Frys allege in effect... denial of FAPE."
- "In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school."

23

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- "Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read Braille or learning to operate an automated wheelchair would be."

24

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- “The goal falls squarely under the IDEA’s purpose of “ensur[ing] that 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.”

25

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- “Had the Frys pursued IDEA procedures at this point, they would have achieved one of two outcomes. Either they would have prevailed and effectively resolved their dispute without litigation, making it possible for E.F. to attend school with Wonder, or else they would have failed but in the process generated an administrative record that would have aided the District Court in evaluating their complaint.”

26

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- “The IDEA’s purposes of giving state educational agencies the opportunity to ensure compliance with federal law and ensuring that local experts are able to analyze disputes before litigation begins are well served by requiring exhaustion here.”
- District Court’s dismissal of the claims is affirmed.

27

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- Note similar facts and findings in *Cave v. East Meadow Union Free School District*, 49 IDELR 92 (2d Cir. 2008).

- Animal would require schedule changes due to allergic students and one of student's teachers.
- Issues best dealt with through administrative process (IEP Team).
- Service animal as an "independent life tool" and link to IDEA's goal of independent living.

28

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- OCR can't imagine service animal interference with IEP. *Catawba County (NC) Schs.*, 61 IDELR 234 (OCR 2013).

- "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."

29

ADA/504 rights exercised by parents can conflict with IDEA FAPE

- *Catawba County (NC) Schs.*

- "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."

30

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- ADA/504 Equal access rights to real-time, computer assisted transcription services. *K.M. v. Tustin Unified Sch. Dist.*, 61 IDELR 182 (9th Cir. 2013), *cert. denied*, 114 LRP 9688, 134 S. Ct. 1493 (2014); and 114 LRP 9909, 134 S. Ct. 1494 (2014).

- In consolidated case, court rejects notion that providing FAPE under IDEA forecloses all ADA/504 equal access claims, and reverses summary judgment victory by the schools in both cases.

31

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- Both students have hearing impairments and both students seek CART services.
- CART is a word-for-word transcription service, similar to a court reporter, in which a trained stenographer provides real-time captioning that appears on a computer monitor.

32

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- On the need for CART service:
 - *K.M.*: "Could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day..."
 - *D.H.*: "[U]se of these strategies requires a lot of mental energy and focus, leaving her 'drained' at the end of the school day."

33

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- The students do not contest the findings that their schools complied with the IDEA.
 - Both urge that they nevertheless have rights under ADA Title II to CART. Court says it's possible.
- How? "Title II imposes effective communication obligations upon public schools independent of, not coextensive with, school's obligations under the IDEA."

34

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- Under ADA Title II, 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."
 - "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."

35

**B. K.M. v. Tustin Unified School District:
IDEA & ADA Effective Communication**

- Under ADA Title II: "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 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."

36

B. K.M. v. Tustin Unified School District: IDEA & ADA Effective Communication

- “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....”
- “[C]ourts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework.”

37

B. K.M. v. Tustin Unified School District: IDEA & ADA Effective Communication

- *On remand: D.H. v. Poway Unified Sch. Dist.*, 62 IDELR 176 (S.D. Cal. 2013).
 - “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.’”

38

C. Joint Guidance Letter on Effective Communication under ADA Title II

- DOJ, OCR, & OSERS issued a joint guidance letter in November 2014 (64 IDELR 180). A summary:
 1. Sometimes an IDEA IEP will be enough to satisfy ADA Title II, but not always.
 - Can a student be asked to give up ADA rights because she’s in special ed?
 - So schools have to satisfy the requirements of both IDEA and ADA, and protect the student’s rights under both laws?

39

C. Joint Guidance Letter on Effective Communication under ADA Title II

- 2. How does the student or parent make a request for auxiliary aids or services under ADA Title II?
 - Could the IEP Team be designated for this purpose? Yes, and it's Dave's preference.
 - But the IEP Team will not use FAPE analysis for determining Title II services.

40

C. Joint Guidance Letter on Effective Communication under ADA Title II

- 3. Does the parent have to ask for Title II aids or services?
- 4. Primary consideration must be given to student's preference.
 - How is that preference communicated?

41

C. Joint Guidance Letter on Effective Communication under ADA Title II

- 5. What factors does the school consider in determining necessary Title II aids and services to provide equal opportunity to participate and benefit?
- 6. Does the school have to address all communications involving the student at school?

42

C. Joint Guidance Letter on Effective Communication under ADA Title II

- "What does it mean for auxiliary aids and services to be provided in... a timely manner?"

"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.**"

43

C. Joint Guidance Letter on Effective Communication under ADA Title II

7. Can the school figure out Title II services as part of the IDEA initial evaluation?
8. What if another service or aid can provide equally effective communication?
9. Can IDEA funds be used to pay for Title II auxiliary aids and services?

44

C. Joint Guidance Letter on Effective Communication under ADA Title II

10. How does the school determine fundamental alteration or undue burden?
 - Could the IEP Team do this?
11. If the school proves fundamental alteration or undue burden, what happens next?

45

C. Joint Guidance Letter on Effective Communication under ADA Title II

- Watch for these issues in the case study:
 1. Is ADA Coordinator the right person to review requests and identify ADA devices for IDEA kids?
 2. What data is reviewed (other than parent preference) to make the decision?
 3. How effective is communication with nondisabled students?
 4. How does school ensure no conflict with IDEA FAPE?

46

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **The Student:** Tommy is a 13-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 is IDEA-eligible and has an IEP.

[SKIP next paragraph "The Task." It simply reviews school's IDEA duty to Tommy.]

47

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **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."

48

D. Joint Guidance Letter on Effective Communication under ADA Title II

- **The Problem (cont'd):** "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."

49

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **The Problem (cont'd):** "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."
- The IEP Team promptly convened.

50

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **FAPE under IDEA:** "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."

51

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **FAPE under IDEA (cont'd):** “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.”
- But Tommy has ADA Title II rights as well....

52

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **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.”

53

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **Effective Communication determination under Title II (cont'd):** “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.”

54

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **Effective Communication determination under Title II (cont'd):** "...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."

55

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **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."

56

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **ADA Coordinator's Decision:** "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."

57

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **ADA Coordinator’s Decision:** “The Coordinator gives primary consideration to Tommy’s request for CART services and agrees that CART services would provide Tommy with effective communication.”

58

C. Joint Guidance Letter on Effective Communication under ADA Title II

- **ADA Coordinator’s Decision:** “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.”

59

C. Joint Guidance Letter on Effective Communication under ADA Title II

- Some concerns with the case study:
 1. Did the ADA Coordinator consider the IEP Team’s decision or data?
 2. Why not see what happens with the IEP changes *before* ordering more services?
 3. Does Tommy have to hear and understand *everything* said in the classroom? Do his nondisabled peers hear/understand 100 percent?

60

So what to do?

- Talk to your school attorney about this....
 - For the IDEA-eligible student, ADA/504 requests for services, devices, etc., should go to the IEP Team.
 - The IEP Team should determine:
 - Is it necessary for IDEA FAPE? If so, the school adds it to IEP and provides it.
 - If not necessary for FAPE, is it required under Section 504 or ADA Title II? Does the request negatively impact IDEA FAPE?
 - What to do if it impacts IDEA FAPE?

61
