COMPLEX SECTION 504 ISSUES FOR SPECIAL EDUCATORS

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A note about these materials: These materials are not intended as a comprehensive review of all new case law on Section 504, but as a summary of recent cases and decisions of interest. 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 read "ED."

I. Section 504 after Revocation of IDEA Consent.

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, the ED said (in the commentary to the December 2008 regulations implementing the revocation of consent rules) **"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). In the absence of a direct answer from the ED, two schools of thought have developed on the issue.

One school of thought is that a student leaving special education due to revocation of consent should be referred and evaluated under §504, since students with disabilities that are not IDEA-eligible may nevertheless have eligibility 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).

The other 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, but the student would continue to receive 504's nondiscrimination protection. *See, e.g., Letter to McKethan*, 25 IDELR 295, 296 (OCR 1996)(When parents reject the IEP developed under IDEA, they "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 IDEA requirements."). The thinking seems to follow the language of 34 C.F.R. §104.33(b)(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 [the Section 504 FAPE]."** (Bracketed material added by the author). This view is consistent with various pieces of the commentary indicating that when consent for special education is revoked, 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.… 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: 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 the 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?

And now some federal courts and hearing officers have weighed in…. 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.

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 requires 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."** [Emphasis added.]

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. The *Kimble* court in Colorado took the opposite position. 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 are a series of ideas, but 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.** 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 504 FAPE requirement.

II. Service Animal Update

While the 2010 U.S. Department of Justice (DOJ) regulations appeared to limit the public entity's responsibility for the supervision and care of the service animal, various decisions by DOJ, OCR and even a federal district court have expanded the public school's duty. The DOJ regulations appear clear: control of the animal is the sole responsibility of the person with disability.

Control of the Animal. For the animal to remain with the person with disability, the person with disability must be able to control the animal. **"A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)."** 28 C.F.R. §35.136(d). A lack of control of the service animal, coupled with the inability of the person with disability to take action to effectively control the animal is good cause for the school to ask that the animal be removed.

Care and supervision of the animal is also the duty of the person with a disability. **"A public entity is not responsible for the care or supervision of a service animal." 28 C.F.R. §35.136(e).** What if the person with disability is unable to care for the animal, because of the disability? DOJ indicates that the entity is still not responsible for care of the animal. "The Department recognizes that there are occasions when a person with a disability is confined to bed in a hospital for a period of time. In such an instance, the individual may not be able to walk or feed the service animal. In such cases, if the individual has a family member, friend, or other person willing to take on these responsibilities in the place of the individual with disabilities, the individual's obligation to be responsible for the care and supervision of the service animal would be satisfied." *Commentary, p. 56197.*

The expanding duty of the public school. The issue seems to have become more complicated. Slowly, DOJ, OCR and the courts seem to be moving responsibility for the service animal to the school. A few recent examples of the dynamic follow.

Assisting with voice commands requires minimal effort…. so the school should do it as a reasonable accommodation? *Gates-Chili Central School District (NY),* 65 IDELR 152 (DOJ April 13, 2015). The Department of Justice found a New York school district in violation of the ADA service animal regulations due to its refusal to allow a student to attend with a service animal and no adult handler. Further, the school refused the parent's request to provide "minimal and intermittent assistance to D.P., such that the child herself can handle her dog." The student at issue has Angelman Syndrome, autism, epilepsy, asthma, and hypotonia. The student suffers from seizures, has core body weakness limiting independent movement, and is nonverbal.

The service animal provides substantial work for the student. "It can detect an oncoming seizure before humans can and is capable of alerting others that D.P. is going to have a seizure. With regard to D.P.'s autism, the Service Dog is trained to prevent wandering (elopement), to apply deep pressure to prevent or limit meltdowns, and to disrupt stimming. In addition, the Service Dog provides mobility support for D.P.'s core body weakness." As a result of timely dog alerts, the district has documented instances where a nurse has been able to administer emergency medication to prevent the student's seizure from progressing. The parents have spent in excess of $40,000 to pay a handler to attend school with the animal and student.

D.P. is always accompanied at school by her 1:1 aide. When she moves about the building, the handler joins as well. The handler has limited responsibilities that require very little time to accomplish.

> "D.P.'s Service Dog is trained to go through the school day without needing to be walked, eat, or relieve itself. The Handler tethers and untethers the Service Dog from D.P. and assists D.P., who is nonverbal, in issuing commands to the Service Dog. The Handler reported that there are at most five commands used with the Service Dog during the school day: 'down,' 'down hold,' 'let's go,' 'wait,' and, very rarely, 'bring her.' The Handler estimated that she primarily uses two commands during the school day ('down' and 'let's go') approximately 15 times a day and that issuing a command takes about three seconds. The Service Dog is untethered and tethered about 15 times a day (during gym, for example), which takes approximately three seconds each to accomplish…..

D.P.'s 1:1 Aide already currently escorts D.P., her Service Dog, and the Handler around school property and ensures that D.P.'s seizure protocol is followed, including the Service Dog's role in that seizure protocol. And school staff already work with D.P. in learning how to communicate when handling her Service Dog. Staff assistance in issuing the few verbal commands necessary for D.P. to control the Service Dog would involve only minimal effort but would significantly further D.P.'s ability to use the assistance of the Service Dog."

DOJ finds that **"providing the requested assistance to D.P. falls well within the range of support and assistance that school staff provides to young children day in and day out. Accordingly, the District must reasonably modify its current 'hands off' policy with respect to D.P.'s Service Dog."** [Emphasis added.]

A little commentary: DOJ bases its conclusion on the limited nature of the required staff involvement (hence, no fundamental alteration of the school's program), and the fact that what is required is not "care and supervision." "Care and supervision relates to the animal's health and wellbeing and includes such things as proper veterinary care as well as feeding, walking, and grooming the animal. The care and supervision of the Service Dog is not at issue here since the Service Dog does not require any walking, feeding, grooming, or veterinary care while D.P. is at school."

U.S. Department of Education achieves school-provided handlers through a resolution agreement. *School Administrative Unit #23 (NH),* 62 IDELR 65 (OCR 2013). A district agreed to a resolution with OCR on a complaint that it prohibited a student with a seizure disorder from using a service animal, a seizure-alert dog, at school. The dog was handled at school by the student's babysitter at the time of the complaint. Interestingly, OCR and the District agreed that the school would provide an aide and a backup aide who would both be trained to handle the dog on school grounds. The agreement provided that

"The goal of the training program will be for the Aide to be able to appropriately issue commands so that, at any time, other than when Carina is responding to the Student's seizures, the animal is able to (1) obey verbal commands issued by the Aide; (2) lie, sit or stand quietly beside the Student in the classroom; (3) accompany the Student during transitions during the school day without interfering with the Student's movements; (4) not interfere with the Student's therapies; and (5) not disrupt the classroom or school environment by among other things, creating excessive noise or distracting contact with staff or other students."

The result of the agreement is that the school takes over the handling of the service animal at school. While the agreement was made to avoid a finding of violation, the result is consistent with ED's position taken shortly after the 2010 regulations were issued by DOJ that districts have a responsibility to handle service animals on behalf of some students. ED filings in other cases have expressed similar positions.

What about *supervising the student* who is controlling the service animal? *Alboniga v. School Bd. of Broward County Florida,* 65 IDELR 7 (S.D. FL. 2015). A.M. is a six-year-old with multiple disabilities: cerebral palsy, spastic quadreparesis, and a seizure disorder. He is "non-verbal and confined to a wheelchair; and needs care and support for all aspects of daily living and education." A.M.'s parents secured a service animal, Stevie, to alert to the student's seizures. The parents complain that school policy requiring them to provide a handler for the animal is in violation of the ADA.

"The 'handler's' only responsibilities in school are the following: **to walk Stevie alongside A.M. with a leash instead of allowing Stevie to be attached to A.M.'s wheelchair via a tether;** to take Stevie outside of the school premises to urinate; and to ensure that other people do not approach, pet or play with Stevie while he is working as a service dog. The 'handler' does not have any duties regarding A.M.'s education or care. **At all times while at home and in other public places, Stevie is**

tethered to A.M. There is nothing preventing Stevie from going outside to urinate tethered to A.M. Stevie is trained to physically indicate when he needs to urinate. While at school, Stevie does not eat or drink. Nor does Stevie defecate or make stains, or require cleaning or exercise, while at school. Plaintiff attends to Stevie's daily feeding, cleaning and care needs." [Internal citations to the record omitted, emphasis added.]

During a portion of the dispute, the school by administrative decision provided an employee (the school's custodian) to perform the handler's duties. Previously, the student's mother served as the handler. While the student is IDEA-eligible, there is no claim of FAPE violation. Claims are limited to violations of the ADA and Section 504. The court's thinking seems to follow that of DOJ: the focus is on reasonable accommodation of the student, as opposed to the service animal itself. Large pieces of the court's analysis are provided below. Bold emphasis is added by the author.

The court's analysis on "The Handler" (controlling the service animal).

"Turning to the specific regulatory provisions at issue, 28 C.F.R. § 35.136(d) provides that '[a] service animal shall be under the control of its handler.' 28 C.F.R. § 35.136(d). By implication, requiring a public entity to act as handler for and to control the service animal would not be a reasonable accommodation mandated by the ADA. On that basis, the School Board argues that it cannot be required to provide a handler for Stevie**. It further maintains that A.M., due to his disabilities, cannot act as the dog's handler.** Therefore, it concludes that, even if it is required to permit A.M. access for Stevie during school, Plaintiff is responsible for acting as or providing for a handler. The undisputed facts presented here do not bear out that conclusion….

[N]ormally, tethering a service animal to the wheelchair of a disabled person constitutes 'control' over the animal by the disabled person, acting as the animal's 'handler.' And, even absent tethering, voice controls or signals between the animal and the disabled 'handler' can constitute 'control.'

Here, it is undisputed that, at all times outside of school—including while at home and in other public places—Stevie is tethered to A.M. Stevie is fully trained. Throughout the school day, Stevie simply stays by A.M.'s side. The sole exception is when Stevie needs to urinate and Stevie is trained to physically indicate (i.e., poke) when he so requires. **Given the specific facts here, having Stevie tethered to A.M. in school would constitute control by A.M. over his service animal as the animal's handler within the meaning of the regulation.** As such, permitting A.M. to attend school with Stevie tethered to him would be a reasonable accommodation required of the School Board."

The court's analysis on "Care and Supervision" of the service animal.

"The final regulatory provision at issue provides that '[a] public entity is not responsible for the care or supervision of a service animal.' 28 C.F.R. § 35.136(e). The definition of 'care or supervision' is in dispute. **The School Board maintains that leading Stevie outside to urinate constitutes care or supervision, for which it cannot be made responsible."**

Based on the example from the DOJ commentary with respect to the hospital's responsibility for a service animal used by a patient (see above) the court wrote **"The clear implication is that 'care or supervision' means routine animal care–such as feeding, watering, walking or washing the animal."**

"Similar regulatory provisions enacted at the state level confirm that interpretation. In defining 'care or supervision' relevant to the rights of individuals with disability and the protection against discrimination of those using service animals, Florida law provides: 'The care or supervision of a service animal is the responsibility of the individual owner. A public accommodation is not required

to provide *care* or *food* or a *special location* for the service animal or assistance with *removing animal excrement.'* Fla. Stat. § 413.08(3)(d) (emphasis added)….

Taken together, the DOJ guidance, similar regulatory provisions, and non-precedential authority explain that 'care and supervision' refers to routine or daily overall maintenance of a service animal. **The pivotal question here is whether accommodating A.M. by assisting him to lead his dog outside the school to relieve itself is part of that routine overall maintenance.** The Court finds that, under the undisputed facts here, it does not.

> "Recall, the only accommodation requested involves Stevie's urination. While at school, Stevie does not eat or drink. Nor, while at school, does Stevie defecate or make stains, or require cleaning or exercise. Plaintiff attends to Stevie's daily feeding, cleaning, training, and all other 'care or supervision' needs, outside of school and on her own time and dime.…. **The School Board is not being asked to provide an employee to walk Stevie. Rather, the School Board is being asked to help A.M. do so. That is, the School Board is being asked to accommodate A.M., not to accommodate, or care for, Stevie….**
>
> [T]he accommodations requested by Plaintiff under the precise circumstances present here are reasonable within the meaning of the regulations implementing the ADA. With Stevie tethered to A.M., given Stevie's training and obedience, and A.M. thereby acting as Stevie's handler, the School Board is required to accommodate A.M. by (through its staff) assisting him and accompany Stevie outside of the school premises to urinate at the infrequent occasions when it is necessary to do so during the school day."

A little commentary: Note that the required assistance by the school is anticipated to be both infrequent and relatively brief when it occurs. The court seems to juxtapose that with the burden placed by school policy on the parents to provide a handler while school personnel appear to be present and capable of providing the same basic, infrequent support.

Finally, the case also addresses liability insurance for the service animal (requiring it is a surcharge prohibited by the ADA) and vaccination requirements. While a requirement that the service animal be vaccinated is appropriate, the school apparently required a higher level of vaccination, which under Florida law was applicable only to dog breeders. "Those requirements, therefore, constitute an impermissible discriminatory practice."

Other service animal cases/resources. *Frequently Asked Questions About Service Animals and the ADA,* 115 LRP 30805 (DOJ July 1, 2015)(A 37 question Q&A on basic service animal issues). The 6th Circuit's 2015 opinion in *Napoleon* on exhaustion of administrative remedies and service animals is discussed below.

III. The Interaction of ADA/504 Nondiscrimination with IDEA FAPE

A. The IDEA-Section 504/ADA Relationship

This section focuses on 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 Section 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 cannot 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).

1. An IDEA IEP AND a Section 504 plan? The fact that a student is eligible for Section 504 protections and 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 Section 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 Dec. 19, 2013, at 114 LRP 45980), 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.

2. 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).

Note, however, that ADA and non-FAPE Section 504 requests for accommodations are limited to those that do not result in fundamental alteration. More on this below….

B. When parents can choose services outside of the IDEA process

1. The wrong accommodation or service can jeopardize IDEA FAPE. 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.

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, in the home, is not allowed or required 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.")

The 6th Circuit affirmed the *Napoleon* decision. *Fry v. Napoleon Community Schools,* 65 IDELR 221 (6th Cir. 2015). The court of appeals agreed with the district court approach on exhaustion. The rationale embraced by the court is that regardless of the parents' argument that IDEA FAPE was not at issue, their insistence that the service animal be allowed at school evidences their belief that the school's services are inadequate, thus, an inference of denial of FAPE is inherent in the demand.

> "The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. **The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education.** 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. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents….
>
> **The primary harms of not permitting Wonder to attend school with E.F.—inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school—fall under the scope of factors considered under IDEA procedures.** 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. 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.' 20 U.S.C. § 1400(d)(1)(A). **Thus developing a working relationship with a service dog should have been one of the 'educational needs that result from the child's disability' used to set goals in E.F.'s IEP.** *Id.* § 1414(d)(1)(A)(i)(II). 'Educational needs' is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s 'academic, developmental, and functional needs,' which means that the IEP should include what a student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). '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.' *Cave v. E. Meadow Union Free Sch. Dist.,* 514 F.3d 240, 248 (2d Cir. 2008). The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F."

A little commentary: The dissent took aim at the speculative nature of the court's concerns. How could the court determine, for example, that the IEP was implicated? "[T]he Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to 'partially implicate" issues relating to education. If flimsy, however, the district court's 'implication' analysis was at least a test. On appeal, the majority offers no useful yardstick at all." In the author's opinion, the majority's recognition of the potential for conflict with the IEP is appropriate (see previous commentary), but so is the dissent's concern with the overbroad result. In the author's mind, the question to be asked should be "does this service animal interfere with the provision of FAPE for this student?"— a fact question that should be answered in the first instance by the student's IEP Team.

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 and 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 the 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.

C. Effective Communication under ADA Title I. *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. 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, 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 issued an opinion, ordering the school to provide CART during the pendency of the litigation. *See, D.H. v. Poway Unified School District,* 62 IDELR 176 (S.D. CA 2013).

2014 federal guidance letter. In response to the Ninth Circuit's *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 Public Elementary and Secondary Schools,* 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 the request 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 suggested 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 the 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 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 ARDC 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 through the IEP Team first. Since the duty to consider effective communication is on-going, 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?

IV. Section 504 & the student with a disability in advanced classes.

A. The Substantial Limitation problem

Does a student's educational success mean that she cannot be substantially limited under Section 504? One of the most interesting areas of evolution in the ADA (and thus §504) is recognition that identifying learning disabilities, including dyslexia, require some complex thinking. In the commentary to its ADA regulations implementing the ADAAA, the Equal Employment Opportunity Commission provides some excellent analysis on how to address eligibility for students with learning disabilities who despite the disability, experience educational success. Some of these students are likely twice-exceptional. Note that EEOC regulations and commentary are not binding on the K-12 public schools *with respect to their treatment of students* (the U.S. Department of Education has jurisdiction for rules for students) but the EEOC's rules are instructive, especially in the absence of anything from ED. Note further that EEOC regulations are binding on K-12 schools *with respect to their employment relationships with district employees.* Cites are to the EEOC commentary to 2011 ADA regulations, 76 Federal Register, March 25, 2011 *[hereinafter, "EEOC."]*.

1. **Successful academic performance does not rule out substantial limitation.** "As Congress emphasized in passing the Amendments Act, ''[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.'' *EEOC, p. 17012-13.*

"Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity." *EEOC, p. 17012.*

2. **Reading is effortless for most people, but not for folks with dyslexia.** "For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.'' *EEOC, p. 17013.*

3. **Time and effort must be considered.** "Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population." *EEOC, p. 17012.*

4. **Typical eligibility for individuals with dyslexia or other learning disabilities.** "Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act." *EEOC, p. 17009.*

B. Accommodations under Section 504 for IDEA & 504 students in advanced placement, GT, honors, and other accelerated classes.

Any discussion of accommodations in accelerated classes (here, shorthand for Advanced Placement, Honors, Magnet, Gifted, etc.) must begin with recognition of two competing, but polar opposite, assumptions. The first, held by some school folks, is that accommodations are not possible in accelerated classes. That position is rejected outright by a letter from OCR (with OSEP input) dated December 26, 2007, which clarified the basic Section 504 duty with respect to accelerated classes. Interestingly, the letter does not directly address the *other* assumption, commonly articulated by some parents, that students with disabilities are entitled to any accommodation they might need to be successful in accelerated classes, regardless of the effect of the accommodation on the "accelerated" nature of the class. The letter does seem to recognize limits to accommodations, but does not provide the clear guidance that schools desire when faced with unreasonable demands that may dilute above-grade level curriculum. *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (OCR 12/26/07). Note that state laws that may provide additional requirements are not addressed here. Check with your school attorney.

1. IDEA & §504 students do not give up their services and accommodations as a condition of attendance in accelerated programs. In its December 2007 letter, OCR focused on two major concerns with respect to disability discrimination in accelerated programs. **"Specifically, it has been reported that some schools and school districts have refused to allow qualified students with disabilities to participate in such programs. Similarly, we are informed of schools and school districts that, as a condition of participation in such programs, have required qualified students with disabilities to give up the services that have been designed to meet their individual needs.**

These practices are inconsistent with Federal law, and the Office for Civil Rights (OCR) in the U.S. Department of Education will continue to act promptly to remedy such violations where they occur." *Id.* [Emphasis added]. Further, **"conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504."** *Id.* OCR has enforced this position in *Wilson County (TN) School District,* 50 IDELR 230 (OCR 2008) ("the evidence shows that the District's decision was based on an erroneous interpretation and application of Section 504 requirements that resulted in an automatic denial of academic accommodations for the student in his honors class."). This letter of finding is discussed in greater detail below.

2. Legitimate, nondiscriminatory entrance criteria. OCR advises schools that "**nothing in Section 504 or Title II requires schools to admit into accelerated classes or programs students with disabilities who would not otherwise be qualified for these classes or programs."** *Rosemount-Apple Valley-Eagan (MN) ISD #196,* 112 LRP 56386 (OCR 03/22/11). To that end, schools are free to create appropriate eligibility requirements or criteria to determine which students should be admitted into the accelerated class or program. **"Section 504 and Title II require that qualified students with disabilities be given the same opportunities to compete for and benefit from accelerated programs and classes as are given to students without disabilities."** *Id* [Emphasis added]. Consequently, when the student in *Rosemount* auditioned for Wind Ensemble Band (on the same criteria applied to all band members seeking a spot in the elite band) and was placed by the band director in Varsity Band instead, OCR found no violation.

> "The District has employed eligibility criteria in determining which students are placed in the advanced band. The Student has not met the eligibility criteria despite having the same opportunity to compete for placement in the advanced band. The District has correctly noted that the Student has no identified educational need that would be met by being in the advanced band and is not entitled to placement in that band through the IEP team process." *Id*.

The IEP Team agreed to the parent's request that the student in *Rosemount* would take four honors classes (despite reservations "about any student transitioning to 9th grade with that level of rigor and workload without an Academic Prep course"). There did not seem to be any eligibility requirements for the honors courses in the district. Nevertheless, OCR reminded the school of the nondiscrimination requirements applied earlier to honors band, and now to academic honors classes.

> "Similarly, if the District has established eligibility requirements or criteria for honors courses, the Student has no identified educational need being met by placement in those courses and should only be admitted to those classes if he meets the same criteria in place for other students in the building. The Student is entitled to the same opportunities to compete for and benefit from honors courses, not a preferential opportunity based on eligibility for special education and related services." *Id.*

A little commentary: One problem with the "no entrance criteria for honors course" approach is that it seems to negatively impact the school's ability to later say that a student, now failing such a course, is ill-equipped to be there. Legitimate criteria solve that problem, to some degree, by making sure the students in the program are qualified to be there.

So, no violation where student's composite score was not high enough. OCR investigated a New Jersey district that had not accepted a disabled student into its Gifted and Talented program. Admission to the program was based on "multiple measures, including a standardized achievement test, the Test of Cognitive Skills, the student's cumulative record averages, a teacher/school nomination form, student interest inventory and self-nomination forms, a verbal interview and review of records, and an on-site demonstration depending upon the program area." The student at issue was a fourth grader diagnosed with anxiety (panic attacks) and ADD. The student applied for the program and was considered based on the data previously described. Like all other students, the disabled

student was given a composite score based on a review of the data by multiple reviewers. Upon review of the scores, OCR determined that **no student with a score lower than the complainants was admitted** into the program. Likewise, **several nondisabled students with scores better than complainant were not admitted.** OCR determined there was insufficient evidence to establish that the student had been denied admission due to disability. *Bayonne (NJ) School District,* 35 IDELR 36 (OCR 2001).

A little commentary: OCR noted that the student did not have a formalized 504 plan that would have required the district to provide modified testing or services during the application/testing process. The implication appears to be that had such a plan been in place (requiring modified testing, repeated instructions, etc.), it would have made a difference in the result. Second, OCR reviewed each grader's scores and interviewed each to determine whether the student's disability played into the decision. Several graders indicated that they had no knowledge of disability, others stated that the student told them she had an aide, but the graders reported that they did not consider that fact in their assessment of the student. Finally, it was helpful in the analysis of the composite scores that nondisabled students who scored higher than the complainant were not admitted, no one scoring lower than complainant was admitted, and that a student with asthma (and a higher score than complainant) was admitted. **In short, while it is nice to say that the decision is not based on disability, it's very helpful when the data supports the same conclusion.** A final thought: Doesn't it seem a tad counter-productive to push a kid with panic attacks into a high level gifted curriculum, where competition and expectations are dramatically increased?

And no discrimination where the student lacked a required credit in math…. *Horry County (SC) School District,* 35 IDELR 39 (OCR 2001). A student with severe hearing loss whose needs were met through a sign language interpreter was denied access to a school's Entertainment Technology magnet program at the Academy of Arts, Science & Technology. The parent alleged discrimination, and complained to OCR. OCR determined that the student was not denied admission, but his application was placed in pending status because his application showed that he lacked a math credit, and thus would not be able to graduate in two years were he enrolled at the academy. The district recommended that the student take the math class during the summer, allowing the student to enter the academy in the fall. The student declined to attend summer school. OCR found no violation as the student failed to meet the program's eligibility requirement.

…or when the student enrolled late, the program was full, and he did not fill out the application. *Southfield (MI) Public Schools,* 112 LRP 28804 (OCR 04/23/12). "OCR learned that the Complainant wanted the Student to participate in Southfield's University program, but that program was already at full enrollment at the time the Student entered the district, and other students, including students who did not have disabilities, were on a waiting list. Nonetheless, Southfield gave the Complainant an application, which was a criterion for enrollment in the University program, and the Complainant did not fill it out. The evidence does not indicate, therefore, that the Student's inability to participate in the University program was related to his disabilities; rather, it was due to the date when he enrolled in Southfield, and also because the Complainant did not fill out the application, which was a reasonable, non-discriminatory criterion for admission into the program."

What about refusal to allow a calculator on an entrance exam for a district's competitive high schools? *K.P. v. City of Chicago School District #299,* 65 IDELR 42 (N.D. Ill. 2015). An 8th grade student with a learning disability sought to use a hand-held calculator on the MAP test, a district-wide assessment. The MAP test is taken on the computer. An on-screen calculator is available for a portion of the exam, then disappears so that students must perform computations on their own. Success on the MAP test is 1/3 of the rubric for students wanting access to the district's selective enrollment high schools. The student's IEP allowed use of a calculator in the classroom, and required that the student will participate in district and state assessments "with allowable accommodations/modifications that are necessary to measure academic achievement and functional performance." The school refused to

allow the student to use a calculator on the MAP (other than that provided in the assessment itself). Parent sues, alleging a violation of ADA Title II.

The court found that use of the calculator as demanded by the parent was unreasonable. First it would invalidate the exam itself.

> "The record shows that the MAP test's creator: (1) deems the use of a hand-held calculator to be a non-standard accommodation, i.e., one that has the potential to bias the score; (2) cautions schools that 'the greater the use of non-standard accommodations..., the weaker the validity of the inference that can be drawn from the student's score,' and discourages them from relying on such inferences 'to make important educational decisions'; and (3) makes schools responsible for interpreting MAP test results and factoring the use of non-standard accommodations into those interpretations."

Second, the court points to the difference between a level playing field and an unfair advantage.

> "Allowing K.P. to use a calculator to answer questions that are designed to assess her ability to perform math calculations is not an accommodation that in the plaintiffs' words 'level the playing field.' Quite the contrary. It would permit K.P to replace her allegedly limited computational skills with a mechanical tool of infinite capacity (at least in the context of this case) that likely exceeds the computational capabilities of perhaps all—and certainly most—non-disabled students. That is not a reasonable accommodation but a substitution of artificial intelligence for the very skill the Test seeks to measure."

The parent's request for an injunction ordering the school to allow the accommodation was denied.

A little commentary: Consult your school attorney for concerns about the entrance criteria currently in use in your schools, or to review criteria to be adopted. Preclearance of your criteria from OCR can also prove helpful and provide peace of mind.

C. IEPs, Section 504 Plans & Accelerated Classes.

While OCR's declaration that accommodations are required in accelerated classes is not surprising (the notion that no accommodation would ever be required in an accelerated class seems indefensible in the context of a law that seeks equal participation and benefit in a recipient's programs and activities), OCR takes the position that accelerated classes are "generally" part of FAPE. That position is interesting, as it means that accommodation in accelerated classes is not then subject to the limitations of "reasonable accommodation," but is governed by the higher FAPE standard.

> "Participation by a student with a disability in an accelerated class or program ***generally*** would be considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations. **Thus, if a qualified student with a disability requires related aids and services to participate in a regular education class or program, then a school cannot deny that student the needed related aids and services in an accelerated class or program.** For example, if a student's IEP or plan under Section 504 provides for Braille materials in order to participate in the regular education program and she enrolls in an accelerated or advanced history class, then she also must receive Braille materials for that class. The same would be true for other needed related aids and services such as extended time on tests or the use of a computer to take notes." *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs,* 108 LRP 69569 (OCR 12/26/07) (emphasis added).

So, what does this mean?

1. Accommodations or services the student receives through §504 or IDEA in a regular education class or program are available to the student in an accelerated program.

2. As a corollary, a student with an IEP or §504 plan cannot be denied access to an accelerated class or program because he has an IEP or §504 plan, nor can the student's admission to the accelerated class be conditioned on the student giving up accommodations or services he receives from a 504 plan or IEP.

As OCR concluded "The requirement for individualized determinations is violated when schools ignore the student's individual needs and automatically deny a qualified student with a disability needed related aids and services in an accelerated class or program." *Id. See also Wilson County (TN) Sch. Dist.,* 50 IDELR 230 (OCR 2008) (OCR finds a §504 violation when the school refused to apply a student's existing §504 academic accommodations to his honors classes, including extra time on class work, homework, and routine classroom tests, although he continued to receive the plan's accommodations in his regular classes).

3. There is no indication in the OCR analysis/guidance that the student must be provided additional accommodations or services due to his participation in accelerated classes.

On the contrary, **the example provided in the OCR letter clearly envisions that the accommodations that the student was already receiving in regular classes will be those she receives when she enrolls in an accelerated or advanced history class.** Consequently, a student who wants additional accommodations (beyond those she currently receives) in order to tackle the more difficult subject matter, speed or coverage of the accelerated course would appear to have no entitlement to expanded accommodations based on the move to an accelerated class. Unfortunately, this was the only example provided by the 2007 letter, so whether this limitation is intended or is an unfortunate implication of the chosen example is unclear. Note, however, that in the *Wilson County* case, the result seems to follow that in the example. OCR's concern in *Wilson County* was that accommodations in the student's plan at the time he began accelerated classes were not applied to the accelerated classes. A clear statement of this rule from OCR would be helpful, especially as schools are confronted with parents demanding additional supports in the face of more difficult demands in accelerated classes.

4. There appears to be no concern over whether the accommodations or services provided in the regular class, when provided in the accelerated class, will still be appropriate.

Accelerated classes, by definition, are meant to be different from regular classes of the same subject matter. Accelerated classes typically move at a faster pace, involve more reading and writing, and can be otherwise more intense versions of their regular education counterparts. In some cases, these classes may also expose the student to curriculum in excess or above a grade-level class of the same subject matter, and may offer weighted grades to encourage participation and in recognition of the greater difficulty of the material. **Strangely, OCR treats grade level curriculum and accelerated curriculum as identical (although there may be significant differences).** While in other contexts OCR recognizes that remedial and special education classes may offer below-grade level curriculum, and accelerated classes may offer above grade level curriculum, OCR acknowledges no difference in curriculum level in this analysis on accommodations. *(See, for example,* OCR guidance on notations to transcripts to indicate classes with modified or alternative education curriculum, *In Re: Report Cards and Transcripts for Students with Disabilities,* 51 IDELR 50 (OCR 2008) (**"While a transcript may not disclose that a student has a disability or has received special education or related services due to having a disability, a transcript may indicate that a student took classes with a modified or alternate education curriculum. This is consistent with the transcript's purpose of informing postsecondary institutions and prospective employers of a**

student's academic credentials and achievements. Transcript notations concerning enrollment in different classes, course content, or curriculum by students with disabilities would be consistent with similar transcript designations for classes such as advanced placement, honors, and basic and remedial instruction, which are provided for both students with and without disabilities, and thus would not violate Section 504 or Title II.")(emphasis added).

OCR appears to assume here that accommodations appropriate in a regular class will not (regardless of the type or scale of the accommodation) take away from the accelerated nature of the class, and thus potentially provide the accommodated student with weighted credit for mere grade-level work. The possibility is not directly addressed in the OCR letter (unless that is the implication of the word "generally" in the 2007 Letter).

Doesn't an academic accommodation make an "accelerated" class a "regular" class, constituting a fundamental alteration? Perhaps, but not this time…. *Wilson County (TN) School District,* 50 IDELR 230 (OCR 2008). While not prevented from enrolling in honors courses, the school mistakenly refused to allow a Section 504 student with ADHD and OCD to receive his §504 accommodations in honors classes. During the 2005-06 school year, the student was determined eligible for §504 to address the student's difficulty focusing on and completing work and "expending extreme amounts of time" on homework that negatively impacted his grades. Extended time was among his accommodations. In 2006-07, the student (now a 9th grader) enrolled in honors English and algebra, but in a §504 meeting, his previous accommodation plan was amended to exclude extra time on class work, homework and classroom tests in his honors classes (although these same accommodations continued to apply to his other classes). Interestingly, the resistance to accommodate did not come from the honors classroom teacher as is generally the case, due to concerns over diluting the accelerated class' curriculum, *but from the school's §504 Coordinator,* who took the position that academic accommodations were not possible in the honors class, and if the work could not be done, the student should be placed in regular education classes. The rationale provided by the §504 Coordinator was that:

> (1) The school needed to provide behavioral, medical/physical accommodations in honors classes (distraction-free seating, behavior plans, scribes for students with broken arms, etc., but that "changing the testing requirements would effectively change the criteria for the honors program."
> (2) Academic accommodations "are appropriate in 'regular' classes that assess the basic core curriculum standards that are not advanced or enhanced in regard to academic expectations[.]"
> (3) Finally, "in her opinion, it would be direct contradiction to declare that a student has a limitation in learning, yet place them in an academic honors program."

OCR disagreed with the coordinator's thinking, citing its December 2007 letter, and data that Section 504 plans providing academic accommodations (including extra time on class work and homework) were provided to five other students, but not this one.

A little commentary: Note that the final "rationale" provided by the Section 504 Coordinator restates a very common misconception about substantial limitation analysis for students with learning disabilities analyzed above in the section on twice-exceptional students.

A view from a federal court: A gifted program and reasonable accommodation. *G.B.L. v. Bellevue School District #405,* 60 IDELR 186 (W.D. Wash. 2013). A special education eligible student with ADHD and sensoneural hearing loss was accepted into the school district's PRISM program, an "accelerated program for highly gifted students with more advanced curriculum and a faster pace" despite "an entrance score one point below the requirement." **During the summer prior to PRISM, a new IEP was developed that included 48 accommodations and modifications and 9 special education services.** While the year started well, "both his grades and mood quickly declined over the course of the school year." When things got rough, the parents requested additional accommodation that was refused, and the district suggested that the student leave the program. Before

the district took action to move the student, the parents unilaterally placed him in a private school, and filed this action seeking reimbursement. The court explains the reasonable accommodation analysis that it will apply to resolve the dispute.

> "Under the ADA and Section 504, 'an educational institution is not required to make fundamental or substantial modifications to its program or standards; it need only make reasonable ones.' *Zukle v. Regents of the Univ. of Cal.,* 14 NDLR 188 (9th Cir. 1999) *(citing Alexander v. Choate,* 556 IDELR 293 (1985)). If the Plaintiffs meet 'the burden of producing evidence of the existence of a reasonable accommodation that would enable [the Student] to meet the educational institution's essential eligibility requirements,' the burden shifts to the District 'to produce evidence that the requested accommodation would require a fundamental or substantial modification of its program or standards.' *Id*. The District 'may also meet its burden by producing evidence that the requested accommodations, regardless of whether they are reasonable, would not enable the student to meet its academic standards.'"

At issue here is the school's refusal to provide two accommodations requested by the parents. Both requests arise from the student's difficulty keeping pace with the required out-of-class work. Homework was a significant problem for the student**. In his regular education classes the previous year, "which has much less homework than the PRISM program, the Student spent four hours each night doing homework."**

> "The accelerated PRISM program has a critical component of homework and students are expected to develop understanding and comprehension of the material outside of class. **The homework is also more difficult than in the regular education program.** The PRISM program stresses the importance of keeping up with homework as class lessons are sequential and 'catching up' on homework creates problem." [Emphasis added].

Faced with the more difficult curriculum and sheer volume of material in the PRISM program, the student was unable to keep up. **His "therapist Dr. Kwon suggested a two hour per night limitation on the amount of homework assigned."** The therapist also argued that the homework burden was the student's "greatest source of stress." **The District denied the request "finding that this would fundamentally alter the PRISM program curriculum standards, grading standards, and performance expectations."** The ALJ believed that the student, even with the proposed limitation would not be successful since "the Student was already doing partial homework and was not mastering the course material." Imposing a limitation that merely allowed for the already self-imposed time limit would have made no difference in the Student's ability to continue in the program and learn the course material." Both ALJ and district court found the teacher's testimony on the issue persuasive, especially with respect to the finding that completing the required homework was essential to the PRISM program.

The second request by the parents was to allow extended time on assignments. **Parents argue that the school failed to provide extended time as required in the IEP ("if extended time is need for assignment [Student] or his parent will indicate a suggested new date on the daily progress report.")** since the student was failing. "The ALJ found that the Student's 'teachers uniformly gave full credit for the Student's homework regardless of when it was turned in.'" The court finds that the school provided reasonable accommodation, and that the additional request for homework limitation was not reasonable. Parent's action and demand for reimbursement of private school placement is denied.

A little commentary: Was the student "otherwise qualified for the program" if his entrance scores were below the established eligibility criteria? The court notes this fact in a single sentence, without any commentary. Assuming that eligibility criteria for the program are educationally-based, and are appropriate and nondiscriminatory, did the school accomplish anything by ignoring the criteria for this student?

The court notes that the District did not discuss the requested two-hour homework limitation with teachers prior to rejecting the request. During the hearing, the teachers testified that *had they been told* to limit homework, they would have complied, despite their belief that homework is a necessary part of the PRISM program. "The teachers also testified that setting a time limit would not be a good option for helping the Student be successful in the program because of the educational value in each assignment and the specific processing difficulties faced by the Student in completing homework." The author would be concerned if the natural inclination of educators here to meet student needs overrode the school's obligation to provide educational benefit. A student who due to services and accommodations is denied opportunity for equal access and benefit in the school's programs and activities is not, by definition, receiving FAPE. In other words, excessive or inappropriate accommodation can deny FAPE if it takes away learning opportunities from the child. Here, without the necessary homework component, the student would simply not be able to keep up. Hence, this requested accommodation, if provided, would deprive the student of opportunity to benefit in the PRISM program.

Note finally that this is a case where the school's good faith efforts were critical. Consider this language from the court's opinion.

> "This case presents the unfortunate story of a bright Student who qualified for special education services and was given an IEP allowing the Student to participate in the accelerated PRISM program for highly gifted students; Parents who worked every day to ensure the Student's academic success by monitoring daily reports, communicating with the Student's special education teacher, and enlisting professional support and services whenever needed; and a School District that took many extra steps to facilitate the Student's learning. Despite the interventions of the Parents and the District, the Student was unable to achieve success in the PRISM program and the Parents ultimately removed the Student from the District."

That's a "high ground" position from which a defense of this type of litigation is much easier.

What if the student was in advanced classes for gifted students prior to homebound? *K.K. v. Pittsburgh Public Schools, 64* IDELR 62 (3rd Cir. 2014). During her junior year in high school, the student was diagnosed with gastroparesis that required hospitalizations and prevented her from attending class. She had a reoccurrence her senior year. The school determined that she was Section 504-eligible and created a plan that provided for homebound services. An IDEA evaluation was offered by the school and refused. **The parents were unhappy with the level of instruction by the homebound teacher, arguing that it was far less than what she was accustomed to receiving in the school's Center for Advanced Studies (CAS) which "offered rigorous coursework in advanced subjects for gifted students." Her CAS course load included English, Japanese, Chinese, calculus, physics, European History, and biology.** As the homebound teacher could not personally provide "direct substantive guidance" in all of those classes, the student dropped two, and attempted to self-teach others with the help of a private tutor. Shortly thereafter, the school amended her 504 Plan to include a guarantee of at least one class period per week of direct instruction from a qualified instructor in English, Calculus, Japanese, Chinese, and Physics, and very generous accommodations. She returned to school after approximately three months of homebound services, and graduated 21st out of 336.

The parents sought compensatory services due to an alleged lack of FAPE during homebound. The court rejected the claim as there was not intentional discrimination (a required element in the Third Circuit) and because the 504 plan had been revised to "offer increasingly significant modifications to the school's advanced course requirements to fit (student's) needs as a gifted student." The homebound policy was not intended to duplicate the classroom, especially a gifted classroom. Wrote the court

"the District's homebound instruction policy was never intended to be a full substitute for in-class learning—but nor was it required to be. Instead, it is a stopgap procedure designed to give temporarily homebound students a reasonable opportunity to maintain pace with their coursework during a limited absence from the classroom setting. As implemented here, **the policy resulted in District personnel working actively with K.K. and her parents to provide a modest approximation of the high-caliber instruction that K.K. had received while actively attending class."** Emphasis added.

VI. Miscellaneous

The Family Educational Rights & Privacy Act (FERPA) and release of records to students targeted by harassment. *Letter to Soukup,* 115 LRP 18668 (FPCO February 9. 2015). In response to a question about language in a proposed draft resolution agreement with OCR, the Family Policy Compliance Office (FPCO) opined that information about the consequences imposed by the school on a harasser may be shared with the target of harassment under certain circumstances without consent and without violating FERPA.

"[T]he Department has long viewed FERPA as permitting a school to disclose to the parent of a harassed student (or to the harassed student if 18 or older or in attendance at a post-secondary institution) information about the sanction imposed upon a student who was found to have engaged in harassment when that sanction directly relates to the harassed student. The 2001 OCR guidance explained that one example of this would be "an order that the harasser stay away from the harassed student." OCR's April 4, 2011, guidance, which FPCO worked with OCR in drafting, expounded on this in the context of discriminatory harassment and indicated that sanctions that would directly relate to the student include "an order that the harasser stay away from the harassed student, or that the harasser is prohibited from attending school for a period of time, or transferred to other classes or another residence hall." **The April 4, 2011, OCR guidance also warned that disclosure of other information in the student's education record, including information about sanctions that do not directly relate to the harassed student, may result in a violation of FERPA.**….

Although the 2011 DCL was focused on discrimination on the basis of sex in education programs or activities as prohibited by Title IX, the foregoing… applies to all discrimination covered by the laws OCR enforces." Emphasis added.

Convene the IEP Team or Section 504 Committee following bullying or harassment to look for impact to FAPE. *Dear Colleague Letter: Responding to Bullying of Students with Disabilities,* 64 IDELR 115 (OCR 2014). In its latest guidance, OCR follows up on OSERS' concern that even bullying unmotivated by the targeted student's disability may result in a denial of Section 504 FAPE and needs to be considered appropriately.

"[U]nder Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE — an obligation that exists regardless of why the student is being bullied. **Accordingly, under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE.** The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior." *Id.*

OCR also weighs in on possible signs that FAPE has been implicated.

> **"Although there are no hard and fast rules regarding how much of a change in educational performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.** By contrast, one low grade for an otherwise straight-A student who shows no other changes in academic progress or behavior will generally not, standing alone, trigger the school's obligation to determine whether the student's needs are still being met." Emphasis added.

A little commentary: It should be apparent that OCR's bar for denial of FAPE concerns is very low. Note that while the federal courts have recognized for some time that bullying or harassment could result in a denial of FAPE, *an actual finding* of such a denial is rare. *See T.K., below in the section on disability harassment for an example of harassment constituting a FAPE violation.*

Finally, schools are reminded that the manner of response must be consistent with the student's federal disability rights. That is, teams make placement decisions, and LRE must be respected.

> "If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed, ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying. In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability." *Id.*

Disability harassment as denial of FAPE? *T.K. & S.K. v. New York City Dept. of Ed.,* 63 IDELR 256 (E.D.N.Y. 2014). In an earlier opinion, the district court had rejected the school's motion for summary judgment on the issue of deliberate indifference. Parents of a student originally diagnosed with autism (later re-classified as learning disabled) sought to discuss bullying incidents with the school's principal. **Those efforts were rebuffed during an IEP meeting when the principal stated that it was not the appropriate time to discuss bullying, but bullying could be discussed later. No future meeting was scheduled or took place. A year earlier, the parents brought the student to the principal's office to discuss bullying. When the parents tried to discuss the matter, "the principal asked them to leave.** As the parents continued to try to discuss their daughter's problem the principal opened the door to her office and said she would call security if they did not leave." The principal does not recall what she did to investigate the parent's claims.

> The testimony of the student's aides (the two alternated working with her every other day) painted a picture of "constant negative interaction" with peers, peers physically pushing her away, tripping her, and avoiding pencils and other objects that the student had touched. One aide described the situation as a "hostile environment" and indicated she was simply focused on "just trying to get [the student] by each day." **When an aide tried to bring incidents of bullying to the attention of teachers, she was ignored. When she tried to discuss a particular incident with the principal, she was turned away and told there was no time for a meeting.** The school had no written incident reports of bullying involving the student. "This lack of records is significant because it raises questions about whether the school was actually on notice, or if it was, whether it was deliberately indifferent." Despite the school's utter lack of documentation of the numerous incidents of alleged harassment experienced by the student, the school did have "several reports where the school alleges [the student] was the aggressor[.]" *T.K and S.K. v. New York City Dept. of Educ.,* 56 IDELR 228 (E.D.N.Y. 2011).
>
> In this phase of the case, the parents seek reimbursement for a private school placement, alleging that the school was both deliberately indifferent and that the harassment denied the student FAPE. The court found in favor of the parent on both issues.

With respect to deliberate indifference, the district court agreed with the hearing officer (and overruled the state review officer). The school was deliberately indifferent.

> "L.K.'s parents and SEITs made numerous attempts to discuss bullying with P.S. 6 personnel; they were largely ignored. When L.K.'s parents attempted to raise bullying and harassment issues with the principal of P.S. 6 during the 2007-2008 school year she rebuffed them and, in one instance, threatened to call security if they did not leave her office. Written requests by L.K.'s parents to see incident reports were consistently denied.
>
> The record shows that the school's responses to bullying within the classroom may have further alienated L.K. and given the other students in the class the impression that their behavior was appropriate. When the students in L.K.'s class refused to use a pencil because L.K. had touched it, the teacher's response was to label the pencil with L.K.'s name, reinforcing the other students' behavior. On another occasion, J., a student with whom L.K. had experienced conflict in the past, intentionally 'stomped' on L.K.'s toes. While J. was allowed to write an incident report denying the conduct, there is no evidence that he was ever asked to apologize, or that L.K. was offered the chance to file an incident report.
>
> When viewed as a whole, the evidence evinces a deliberate indifference on the part of P.S. 6's school personnel." Internal citations omitted.

On the issue of denial of FAPE, the court looked to the 2013 Dear Colleague letter from OSEP for examples of interference with educational opportunities that could arise from harassment and necessitate changes to the IEP. "Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression…. The consequences may result in students changing their pattern of school participation."

> "L.K.'s experience of these and other negative effects of bullying during the 2007-2008 school year is well documented. The record shows that L.K. complained to her parents almost daily about being bullied at school. Her parents stated that **L.K. withdrew emotionally, needed to bring dolls to school for comfort, and was more subdued during the 2007-2008 school year.** The developmental pediatrician, who evaluated L.K. in 2004, 2005, 2006, and 2007, observed that when she met with L.K. in February 2008 **she was 'not as happy and interactive as she had been before,' that she had gained a 'fair amount of weight, 13 pounds' since 2007,** and that her BMI was 'significantly elevated.' She stated that **L.K. was not as involved in the classroom as she had been the year before;** L.K. **'seemed to have shut down, and really needed her SEIT ... much more.'**
>
> Three of L.K.'s SEITs from the 2007-2008 school year testified that she was the subject of ridicule from other students and ostracized in the classroom. They stated that L.K.'s classroom was a 'hostile environment,' that the other students frequently avoided L.K., treated her like a 'pariah,' and laughed at her for trying to participate in class.
>
> During the 2007-2008 school year, **L.K. was late or absent 46 times, a notably high number.** Some of L.K.'s absences were due to illnesses. Her parents testified, however, that L.K. was consistently late because she did not want to go to school due to a fear of being ostracized.
>
> Although L.K. improved academically and made progress on her 2007 IEP, 'academic growth is not an all-or-nothing proposition.' It is difficult to know what academic progress L.K. would have made without these negative effects of bullying." Emphasis added.

The court was also concerned about the IEP Team's lack of appropriate efforts to address the harassment. When the parents attempted to raise the problem during an IEP Team meeting, they were told it was an inappropriate topic, despite the fact that the team was developing her 2008 IEP. Her IEP,

like her BIP avoids any mention of bullying. While the IEP did address her "interfering behaviors" (need to interpret and respond to social cues, for example), that "could have had the secondary effect of decreasing her 'vulnerability to bullying,' they were not designed to ensure that bullying of her by others did not substantially restrict her educational opportunities…. Instead, they put the burden of adjusting to bullying on L.K." The court's conclusion is that the IEP Team believed she alone was responsible for the bullying by others, and the fact that it continued.

The result: a FAPE violation and denial of meaningful participation. "The IEP team's refusal to allow L.K.'s parents to raise their legitimate concerns about bullying as it related to her FAPE deprived them of meaningful participation in the development of her IEP for the 2008-2009 school year." The lack of IEP attention to the problem was a violation of FAPE. **"Where there is a substantial probability that bullying will severely restrict a disabled student's educational opportunities, as a matter of law an anti-bullying program is required to be included in the IEP. An educational plan that fails to acknowledge a serious problem being faced by a disabled child cannot be said to have been reasonably calculated to offer her a FAPE."** Reimbursement is ordered for the parent's private placement.

What about LRE under 504/ADA? *S.S. v. City of Springfield, Massachusetts,* Civil Action No. 14-30116 (D.C. Mass. 2014). An interesting facet in the modern intersection of ADA/504 and the IDEA is found in a class action complaint filed in federal district court in Massachusetts entirely on ADA claims arising from the placement of disabled students with mental impairments in segregated Public Day Schools. A Statement of Interest in the case filed by the U.S. Department of Justice highlights DOJ's position that plaintiffs with both IDEA and ADA claims can, but are not required, to file both. "[A] plaintiff's decision, as here, to seek relief under the ADA but not the IDEA in a Federal court is plainly his or her choice." *DOJ Statement of Interest,* p. 8. Like the plaintiffs in *Tustin,* the plaintiffs here are not pursuing a denial of FAPE claim. "Rather, the theory of the case is that the Defendants have violated the equal opportunity principles fundamental to the ADA," including the claim that they were denied "the opportunity to receive educational programs and services in the most integrated setting appropriate to their needs." Opines the DOJ, "The Defendants' IDEA FAPE obligations, even if satisfied, do not foreclose the ADA claims in this case." Id., p. 9.

A little commentary: While the ADA claims may not be foreclosed, are they not flavored by the lack of an IDEA FAPE claim? It appears that the plaintiffs in *S.S.* argued an IDEA denial of FAPE as part of an IDEA due process hearing, but lost on the claim and did not pursue it on appeal. *DOJ Statement of Interest, p. 4, fn 3.* That said, what prevents the defendants from arguing that FAPE was in fact provided under IDEA, and that part of that FAPE is the balancing of educational benefit and LRE? To the extent that LRE is different under the IDEA and ADA (and the author is neither advancing such an idea nor accepting it as fact), which law wins? The joint guidance letter indicated that the school must satisfy both ADA and IDEA. To the extent that ADA includes language on yielding in the event of fundamental alteration (and IDEA does not), IDEA would seem to prevail in such a conflict.