

# CLIENT NEWS BRIEF

## School District May Violate Title II of the ADA Even If Providing FAPE Under IDEA

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A federal appeals court has ruled that a school district's compliance with its obligations to a deaf or hard-of-hearing student under the Individuals with Disabilities Education Act (IDEA) does not necessarily establish compliance with Title II of the Americans with Disabilities Act (ADA). The ruling by the United States Court of Appeals for the Ninth Circuit came on August 6, 2013 in a pair of consolidated cases involving two deaf and hard-of-hearing high school students (*K.M. v. Tustin Unified School Dist.*, \_\_\_ F.3d \_\_\_ (9th Cir. 2013), "*K.M.*").

Students K.M. and D.H. each requested that their school districts, Tustin Unified School District and Poway Unified School District, respectively, provide them with Communication Access Realtime Translation (CART), a word-for-word transcription services, in the classroom as part of their Individualized Education Plans (IEPs). CART uses a trained stenographer to provide real-time captioning that appears on a computer monitor. Both districts denied the students' requests for CART, but provided alternative accommodations, including an alternative transcription service (Typewell) and the use of visual cues. The students each brought due process complaints against their respective school districts alleging that they required CART in order to receive a free and appropriate public education (FAPE). Both students claimed that although they could hear their teachers, they sometimes had difficulty hearing their classmates or instructional videos. The school districts argued that the students were able to meaningfully participate in classroom discussions and make sufficient academic progress. The Administrative Law Judges (ALJs) in both cases found that the school districts had met their obligations to provide the students a FAPE and did not need CART to receive educational benefit.

Both students filed federal cases challenging the ALJs' decisions, and each claimed, in addition to a failure to provide FAPE, that their school districts had violated Section 504 of the Rehabilitation Act (Section 504) and Title II of the ADA. At the federal trial court level, the students' claims were denied, with the courts concluding that since the students were unable to show they had been denied a FAPE, they could not prove their Section 504 and ADA claims. The students appealed, and their cases were consolidated. On appeal, the students did not argue they had been denied FAPE under the IDEA and Section 504, but instead challenged the ruling that their ADA claims failed, arguing the school districts violated the ADA's regulations regarding effective communications.

In ultimately ruling for the students on their ADA claims, the federal appeals court held that the lower courts incorrectly relied on case law concluding that if a school district is found to have complied with its FAPE obligations under the IDEA, then it also complied with its FAPE obligations under Section 504, because the two FAPE requirements are substantially similar. However, a finding of FAPE under the IDEA does not preclude other Section 504 claims based on other theories of liability. Likewise, Congress did not create a similar FAPE requirement in the ADA. Therefore, a finding of FAPE under Section 504 does not necessarily mean a plaintiff's ADA claims are barred.



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Since neither student challenged the finding of FAPE, the appeals court looked at the requirements for effective communication under the ADA, and found that the regulations contain a higher standard than under the IDEA. The IDEA requires that a school district provide students with a basic floor of opportunity, and for a student who is deaf or hard-of-hearing, the IEP team must consider the student's communication needs, opportunities for direct communication, academic level, and opportunities for direct instruction in the student's primary mode of communication. The IEP team must also consider parent or student preferences, as appropriate, but need not provide any service solely to maximize potential benefit. In contrast, the ADA's effective communication regulations provide that public entities take steps to ensure that the communication of the individual with a disability is as effective as for others. The public entity must also "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." Finally, the public entity must give primary consideration to the requests of the individual with the disability.

Therefore, based on this higher standard for effective communication contained in the ADA, the appeals court held that a finding of FAPE under the IDEA does not necessarily establish compliance with the ADA. The appeals court remanded the cases back to the lower court to determine whether the alternative accommodations provided by each of the school districts met the higher standards for effective communication under the ADA.

Based on *K.M.*, school districts should carefully review the offered accommodations for deaf and hard-of-hearing students to ensure that they not only meet the FAPE requirements under the IDEA, but also the higher standards for communication under the ADA. As such, districts should take into consideration: 1) whether the accommodations allow the student to communicate to the same extent as non-disabled students, 2) what auxiliary aides and services may be needed, and 3) the student's or parents' preference. However, school districts should also keep in mind that even under the higher standard of the ADA, the ADA does not require a public entity to provide an accommodation which results in a fundamental alteration in the nature of the services provided or cause undue financial or administrative hardship.

For further detailed information regarding requirements under the IDEA, ADA, and other relevant anti-discrimination laws, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).