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**SPECIAL EDUCATION
LAW: CASES AND
MATERIALS**
Fourth Edition

2016 Supplement

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CHAPTER 1
EDUCATING STUDENTS WITH DISABILITIES:
CORE LEGAL CONCEPTS

PAGE 3, add to the end of note 1:

Another blog of interest is “Education Law Prof Blog,” found at http://lawprofessors.typepad.com/education_law/.

CHAPTER 2 ELIGIBILITY AND EVALUATION

PAGE 56, add to the end of note 56:

See generally Letter to Woolsey, 61 IDELR 144 (Office of Special Educ. Programs 2012) (“Each State has the discretion to define significant disproportionality for the LEAs and for the State in general. The State’s definition needs to be based on an analysis of numerical information, and may not include consideration of the State’s or IDEA’s policies, procedures, or practices. . . . Under IDEA section 618(d)(2), when the SEA identifies an LEA with significant disproportionality in any of the areas identified above, the State must: (1) provide for the review and, if appropriate, revision of its policies, procedures, and practices; (2) require the LEA to reserve the maximum amount of funds under section 613(f) to provide [early intervening services] to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified; and (3) require the LEA to report publicly on the revision or policies, procedures, and practices.”).

PAGE 123, add to the end of note 3:

But see D.F. v. Leon Cnty. Sch. Bd., No. 4:13CV3, 2014 U.S. Dist. LEXIS 144, at *5, (N.D. Fla. Jan. 2, 2014) (denying motion to dismiss case alleging violations of Section 504 and ADA by refusing to provide requested services for child with hearing impairment after parent revoked consent to services under IDEA that parent believed harmful to child; stating “there is no basis for asserting that by withdrawing consent to offered IDEA services, the plaintiff forfeited the right to different services that allegedly were available under a different federal statute.”).

PAGE 125, add to the end of note 6:

For commentary on the specific requirement of 20 U.S.C. § 1414(b)(3)(B) that schools assess children in all areas of suspected disability, see Mark C. Weber, “*All Areas of Suspected Disability*,” 59 LOY. L. REV. 289 (2013).

PAGE 129, add to the end of the second full paragraph:

School districts also need to pay attention to the impact of RTI on other procedural rights and protections. In *M.M. v. Lafayette School District*, 767 F. 3d 842 (9th Cir. 2014), the court ruled that the school violated IDEA by failing to furnish parents with the RTI data it collected on the child, preventing the parents from giving fully informed consent for the initial evaluation and special education services the child received. The court relied on 34 C.F.R. § 300.311(a)(7), which requires school districts to provide parents a statement of the student-centered data they collect; the court stated that the requirement applies even when RTI is not used to determine eligibility.

PAGE 129, add to the end of note 10:

In another *Letter to Zirkel*, 62 IDELR 151 (Office of Special Educ. Programs 2013), the Department stated that it does not endorse any particular RTI model, but spelled out that essential components of RTI include: “(1) high quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as ‘tiers’) of instruction that are progressively more intense and based on the student’s response to instruction; and (4) progress monitoring of student performance.”

**CHAPTER 3
RESIDENCY**

PAGE 155, add to the end of note 4:

In *Los Angeles Unified School District v. Garcia*, 314 P.3d 767 (Cal. 2013) the court declared that under California law, the cost of special education for those students is allocated to the school district of the parent's residence. The Ninth Circuit accepted that ruling in *Los Angeles Unified Sch. Dist. v. Garcia*, 741 F.3d 922 (9th Cir. 2014).

CHAPTER 4 FREE, APPROPRIATE PUBLIC EDUCATION (FAPE)

PAGE 168, at the end of the carryover paragraph at the top of the page insert:

The Supreme Court has an opportunity to revisit *Rowley* in a case that adhered to the traditional some-benefit standard. *Andrew F. v. Douglas Cnty. Sch. Dist. RE 1*, 798 F.3d 1329 (10th Cir. 2015), *petition for cert. filed*, No. 15-827 (Dec. 22, 2015). The Court has asked for the views of the Solicitor General regarding the case.

Add to the end of note 4:

A court failed to find that the Tennessee provision cited above imposes a higher standard for appropriate education than that applied in *Rowley*. *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 457-58 (6th Cir. 1993).

PAGE 202, add to the end of note 2:

In a variation on some of these cases, a court decided that a school itself was the wrong size – too big to provide appropriate education for a child with severe anxiety who became overcome in crowded and noisy places and experienced severe behavior problems at home, as well as a muscle tic and vomiting, when moved to a high school with 3600 students. *R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014).

PAGE 218, add to the end of note 3:

For an example of a case rejecting a school district's IEP for failure to include appropriate, measurable post-secondary transition goals, see *Jefferson County Board of Education v. Lolita S.*, 977 F. Supp. 2d 1091 (N.D. Ala. 2013), *aff'd*, 581 F. App'x 760, 64 IDELR 34 (11th Cir. 2014).

PAGE 229, add to the end of the first full paragraph at the top of the page:

On December 10, 2015, the Every Student Succeeds Act (ESSA), Pub. L. No. 114–95, 129 Stat. 1802, 2171 (2015), replaced the No Child Left Behind Law described in the previous paragraphs. Highlights of the ESSA include both state choice with respect to accountability indicators and new measures to guarantee high student participation rates in assessments. High schools with low graduation rates and all schools performing in the bottom 5 percent of schools must undertake interventions, but the interventions are not as draconian as those under NCLB. Of particular importance for students with disabilities, the interventions for schools whose performance with regard to the disability subgroup is poor include devising an evidence-based plan to help those students, district monitoring of the plan, and creating comprehensive improvement plans if the subgroup chronically underperforms despite interventions. Testing and reporting requirements of NCLB (including subgroup reporting) are retained, but the federal government cannot

force states to adopt any specific set of academic standards, such as the Common Core. Only 1 percent of students (or about 10 percent of special education students) may be evaluated under alternative standards. The highly qualified teacher requirement is now supplanted, and teacher evaluation need not be based on student outcomes. The new law takes full effect in the 2017-18 school year. Proposed regulations are found at 81 Fed. Reg. 34539 (May 31, 2016). *See generally* Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUCATION WEEK (Mar. 31, 2016), <http://www.edweek.org/ew/issues/every-student-succeeds-act/>.

PAGE 230, add to the end of the first full paragraph under note 7:

The United States Department of Education and the Department of Justice have issued an extensive guidance emphasizing the entitlement of students in juvenile justice facilities to appropriate education under Section 504. *Dear Colleague Letter*, 64 IDELR 284 (Office for Civil Rights & U.S. Dep’t of Justice 2014); *see also Dear Colleague Letter*, 64 IDELR 249 (Office of Special Educ. Programs & Office of Special Educ. & Rehabilitative Servs. 2014) (“Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.”).

PAGE 230, add to the end of the second full paragraph under note 7:

The bona fide security or compelling penological interest must be the subject of an individualized determination based on actual facts rather than deference to standard operating procedure. *See Buckley v. State Corr. Inst.-Pine Grove*, 98 F. Supp. 3d 704 (M.D. Pa. 2015) (in case of incarcerated 21-year-old confined to cell 23 hours per day, whose educational services were limited to generic self-study packets delivered through tray opening in door with teacher remaining outside cell, ruling that IEP did not provide appropriate education).

PAGE 231, add to the end of the first full paragraph on the page:

The Office for Civil Rights of the U.S. Department of Education has been active in enforcing Section 504 and Americans with Disabilities Act obligations of charter schools. *See, e.g., Prairie Crossing Charter Sch.*, 63 IDELR 25 (Office for Civil Rights 2013) (resolution agreement demanding accessibility of routes, thresholds, entrances and exits, restrooms, and signs at charter school); *Virtual Cmty. Charter Sch.*, 62 IDELR 124 (Office for Civil Rights 2013) (resolution agreement demanding that internet-based public charter school comply with requirements regarding evaluation, placement, notice of procedural rights, and accessibility for persons with visual and other impairments of web-based materials). *See generally Dear Colleague Letter*, 63 IDELR 138 (Office for Civil Rights 2014) (stating that all children enrolled in charter schools have to be provided free, appropriate public education, and that charter schools “may not ask or require students or parents to waive their right to a free appropriate public education in order to attend the charter school”)

CHAPTER 5 INDIVIDUALIZED EDUCATION PROGRAM

PAGE 252, in note 1, line 9, before “As a matter of policy and practice” insert:

School districts may feel themselves whipsawed by the combination of the parental participation requirement and a looming annual review date for the child’s IEP. *See Doug C. v. Hawaii Dep’t of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013) (holding that placing higher priority on strict compliance with annual review deadline than on parental participation was unreasonable under circumstances, declaring: “When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE.”).

PAGE 286, add to the end of note 6:

This comparable services requirement applies to extended school year (ESY) services as well. *See Letter to State Directors of Special Education*, 61 IDELR 202 (Office of Special Educ. & Rehabilitative Servs. 2013) (“[T]he new school district generally must provide ESY services as comparable services to a transfer student whose IEP from the previous school district contains those services, and may not refuse to provide ESY services to that child merely because the services would be provided during the summer.”)

CHAPTER 6
LEAST RESTRICTIVE ENVIRONMENT

PAGE 317, renumber note 6 as note 7 and insert after carryover paragraph at top of page:

6. The Second Circuit Court of Appeals has ruled that the least restrictive environment obligation applies with full force to summer school placements, a logical reading of the law but one that may present challenges to districts that maintain no summer school classes for children without disabilities. *See T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014) (holding that district violated IDEA by offering child only self-contained special education classroom options for extended year services when child was scheduled in fall to be in mainstream kindergarten class with aide and 90 minutes in special education classroom).

CHAPTER 7 RELATED SERVICES

PAGE 321, in note 4, at the top of the page, before “*Kennedy v. Board of Educ.*” insert:

K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, 1494 (2014) (requiring consideration of communication-access realtime translation (CART) captioning for students with hearing impairments as accommodation under Americans with Disabilities Act Title II) (reproduced *infra* Chapter 10);

PAGE 336, in note 4, three lines from the bottom, before “See generally Ralph D. Mawdsley, delete the period and insert:

; *see also Munir v. Pottsville Area Sch. Dist.*, 723 F.3d 423 (3d Cir. 2013) (denying tuition reimbursement for residential treatment facility on basis that placement was needed for mental health treatment and educational benefit was incidental).

CHAPTER 8 DUE PROCESS HEARINGS

PAGE 358, at the end of the carryover paragraph at the top of the page insert:

For a discussion of various recent criticisms of IDEA due process hearing rights and responses to the critique, see Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495 (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425896.

PAGE 364, add to the end of note 2:

Should the due process complaint provisions be applied strictly or loosely? What considerations should come into play when a court asks itself that question? *See generally C.F. v. New York City Dep't of Educ.*, 746 F.3d 68 (2d Cir. 2014) (stating that rule that alleged deficiencies in IEP have to be raised in due process complaint should not be applied mechanically and that parents gave adequate notice of charge that school district's placement would not be available before beginning of academic year).

PAGE 385, add to the end of note 1:

Other courts have found *R.E.*'s approach persuasive. *See, e.g., Jenna R.P. v. Chicago Sch. Dist.* 299, 3 N.E.3d 927, 939-40 (Ill. App. 2013).

PAGE 386, at the end of the carryover paragraph at the top of the page insert:

Sometimes, individual procedural failings are not enough to support a remedy, but the cumulative effects of multiple errors are. *See, e.g., L.O. v. New York City Dep't of Educ.*, No. 15-1019, 2016 U.S. App. LEXIS 9239 (2d Cir. May 20, 2016).

PAGE 437, add to the end of note 1:

The D.C. Circuit has emphasized that compensatory education is more than what an IEP providing appropriate education must include. *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015) (“IEPs are forward looking and intended to ‘conform[] to ... [a] standard that looks to the child's present abilities,’ whereas compensatory education is meant to ‘make up for prior deficiencies.’ *Reid [v. District of Columbia]*, 401 F.3d at 522-23. Unlike compensatory education, therefore, an IEP ‘carries no guarantee of undoing damage done by prior violations,’ *Reid*, 401 F.3d at 523, and that plan alone cannot do compensatory education's job.”).

PAGE 440, above heading “2. Enforcing Settlements” insert new note 3:

3. Will an offer to settle a case for the entirety of the relief sought moot the case? In a case not involving special education, the Supreme Court decided that an unaccepted

offer of settlement does not make the case moot even if it embodies everything to which the plaintiff is entitled. *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) (holding that offer to settle named plaintiff's claim in uncertified class action does not moot case if it is not accepted, reasoning that unaccepted offer is legal nullity).

PAGE 444, add to the end of note 5:

The Department, however, has cautioned school districts against stonewalling at the resolution session. *See Letter to Casey*, 61 IDELR 203 (Office of Special Educ. Programs 2013) (“[W]hen the LEA convenes a resolution meeting with the parent and other required participants, and in the absence of a written agreement that the resolution meeting need not be held, it would be inconsistent with the requirements in 34 C.F.R. § 300.510(a)(2) regarding the purpose of the resolution meeting for the LEA to refuse to discuss the issues raised in the parent's due process complaint during that meeting” and merely offer to convene IEP team meeting regarding those issues).

PAGE 445, above heading “D. Appeals and Judicial Review” insert new note 7:

7. The Department of Education has issued useful guidance concerning mediation, dispute resolution, and related topics. *See Questions and Answers on Dispute Resolution Procedures*, 61 IDELR 232 (Office of Special Educ. Programs 2013) (stating that school district cannot require pledge of confidentiality from parent as condition for mediation (A-24), district must act diligently to have parent who fails to appear at resolution session to appear before end of 30-day period and must not seek dismissal until then (D-12), and district must not exact confidentiality pledge as condition for participation in resolution session (D-16)).

CHAPTER 9
STUDENT DISCIPLINE

PAGE 476, add to the end of note 1:

H.B. 1893, the Keeping All Students Safe Act, died at the end of the 113th Congress. A renewed proposal (H.R. 927) was introduced in the 114th Congress but had not emerged from committee as of early July, 2016.

CHAPTER 10 COURT PROCEEDINGS

PAGE 478, in note 4, lines 20-21, replace the citation for the appellate decision in *DL v. District of Columbia* with 713 F.3d 120 (D.C. Cir. 2013), and following the citation add:

See generally Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 U. Tol. L. Rev. 471 (2014), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363145 (discussing *Jamie S., DL*, continuing viability of IDEA class actions, and alternative remedies).

PAGE 511, insert before “Notes and Questions”:

K.M. v. TUSTIN UNIFIED SCHOOL DISTRICT

725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, 1494 (2014)

The court held that compliance with IDEA obligations with respect to two children with hearing impairments did not necessarily establish compliance with the effective-communication duty imposed by ADA Title II, and that the ADA may potentially require a school district to provide word-for-word transcription of classes through Communication-Access Realtime Translation (CART).

BERZON, Circuit Judge:

These two cases, consolidated for oral argument, raise questions about the obligations of public schools under federal law to students who are deaf or hard-of-hearing. The plaintiffs' central claim is that their school districts have an obligation under the Americans with Disabilities Act ("ADA") to provide them with a word-for-word transcription service so that they can fully understand the teacher and fellow students without undue strain and consequent stress.

K.M., a high schooler in the Tustin Unified School District ("Tustin") in Orange County, California, and D.H., a high schooler in the Poway Unified School District ("Poway") in San Diego County, California, both have hearing disabilities. Each student, through her parents, requested that, to help her follow classroom discussions, her school district provide her with Communication Access Realtime Translation ("CART") in the classroom. 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. Also in both cases, the student first unsuccessfully challenged the denial of CART in state administrative proceedings and then filed a lawsuit in federal district court.

In the district court, both K.M. and D.H. claimed that the denial of CART violated both the Individuals with Disabilities Education Act ("IDEA") and Title II of the ADA. In each case, the district court granted summary judgment for the school district, holding

that the district had fully complied with the IDEA and that the plaintiff's ADA claim was foreclosed by the failure of her IDEA claim. On appeal, both K.M. and D.H. do not contest the conclusion that their respective school districts complied with the IDEA. They challenge, however, the district courts' grants of summary judgment on their ADA claims, because they maintain that Title II imposes effective communication obligations upon public schools independent of, not coextensive with, schools' obligations under the IDEA.

In light of this litigation history, these appeals present this court with a narrow question: whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA. For the reasons explained below, we hold that it does not. We do not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically pretermittting any Title II claim where a school's IDEA obligation is satisfied. Moreover, in one of these cases, *K.M. v. Tustin*, the Department of Justice ("DOJ") has filed an amicus brief in support of the plaintiff that includes an interpretation of the relevant Title II regulations, to which we accord deference under *Auer v. Robbins*, 519 U.S. 452, (1997), and which bolsters our conclusion.

FACTUAL AND PROCEDURAL BACKGROUND

K.M.

Because of her hearing loss, K.M. is eligible for special education services under the IDEA. Her eligibility means that Tustin must provide K.M. with a "free appropriate public education" ("FAPE") suited to her individual needs. As required by the statute, Tustin has convened regular meetings to develop an annual "individualized education plan" ("IEP") identifying K.M.'s educational goals and laying out which special services Tustin will provide to address those goals in the upcoming academic year.

In spring 2009, when K.M. was completing the eighth grade, Tustin and her parents began to prepare for her upcoming transition to high school. At a June 2009 meeting of K.M.'s IEP team, K.M.'s mother requested that Tustin provide her with CART beginning the first day of ninth grade, in Fall 2009. K.M.'s long-time auditory-visual therapist recommended that K.M. receive CART in high school. The IEP team deferred a decision on the CART request, instead developing an IEP that offered K.M. other accommodations.

Shortly thereafter, K.M. filed an administrative complaint challenging the June 2009 IEP. During the course of K.M.'s ninth grade year, her parents and Tustin officials met for several IEP meetings but were unable to come to an agreement that would resolve the complaint. After providing K.M. with trials of both CART and an alternative transcription technology called TypeWell, her IEP team concluded that she did not require transcription services to receive a FAPE under the IDEA, and reaffirmed the June 2009 IEP.

K.M.'s challenge to the June 2009 IEP proceeded to a seven-day hearing before a California administrative law judge ("ALJ"). K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of

K.M.'s teachers testified that, in their opinion, K.M. could hear and follow classroom discussion well.

Applying the relevant legal standards, the ALJ concluded that Tustin had complied with both its procedural and substantive obligations under the IDEA and had provided K.M. with a FAPE. The ALJ observed that K.M.'s mother was requesting CART so that K.M. could “maximize her potential,” but the IDEA, as interpreted by the Supreme Court in *Board of Education of Hendrick Hudson School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), does not require schools to provide “a potential-maximizing education.”

Dissatisfied, K.M. filed a complaint in district court challenging the ALJ decision on her IDEA claim. She also asserted disability discrimination claims under Section 504 of the Rehabilitation Act, Title II of the ADA, and California's Unruh Civil Rights Act. With respect to her ADA claim, she sought, in addition to other relief, “an Order compelling Defendants to provide CART.” The complaint alleges that CART “is commonly paid for by other Southern California public school districts,” including the Los Angeles Unified School District and the Santa Monica Malibu School District, and “is also commonly provided at the college level under the ADA.”

In declarations submitted to the district court, K.M.'s teachers declared that she participated in classroom discussions comparably to other students. K.M. saw her situation quiet differently, emphasizing that she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day.

The district court granted summary judgment for Tustin. First, as to K.M.'s IDEA claim, the district court stated that it was “reluctant to adopt fully teacher and administrator conclusions about K.M.'s comprehension levels over the testimony of K.M. herself,” and found “that K.M.'s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived.” Nevertheless, the district court agreed with the ALJ that, under the relevant legal standards, K.M. had been afforded a FAPE compliant with the IDEA. Second, the district court held that “K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reason that her claim under [the] IDEA failed.” Finally, the district court noted that Unruh Act liability requires intentional discrimination or an ADA violation, neither of which K.M. had shown.

This appeal followed, in which K.M. challenges only the district court's rulings on her ADA and Unruh Act claims.¹

D.H.

Like K.M., D.H. is eligible for and receives special education services under the IDEA, pursuant to an annual IEP. At an IEP meeting held towards the end of D.H.'s seventh-grade year, D.H.'s parents “agreed . . . that [D.H.] was making progress,” but said that they “believed that [she] needed CART in order to have equal access in the classroom.” The IEP team decided that CART was not necessary to provide D.H. with a FAPE, noting that D.H. was making good academic progress.

¹ [FN 1] Under California law, “a violation of the ADA is, per se, a violation of the Unruh Act.” *Lentini v. Calif. Ctr. for the Arts*, 370 F.3d 837, 847 (9th Cir. 2004). We therefore do not discuss K.M.'s Unruh Act claim separately from her ADA claim.

D.H. filed an administrative complaint challenging her April 2009 IEP. During the ensuing hearing, D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. “hears enough of what her teachers and fellow pupils say in class to allow her to access the general education curriculum” and “did not need CART services to gain educational benefit.”

D.H. challenged the ALJ decision on her IDEA claim in district court, and also alleged disability discrimination claims under Section 504 of the Rehabilitation Act and Title II of the ADA, seeking, in addition to other relief, “an Order compelling Defendants to provide CART.” Like K.M.’s complaint, D.H.’s complaint alleges that CART is commonly provided by other Southern California school districts and at the college level.

D.H. entered high school in Fall 2010. Before the district court, D.H. submitted a declaration in support of her motion for summary judgment which she declared that she has continued to have difficulty hearing in her classes. Although D.H. can use visual cues to follow conversations, “[u]se of these strategies requires a lot of mental energy and focus,” leaving her “drained” at the end of the school day. D.H.’s declaration questioned whether her teachers understood the extra effort it required for her to do well in school.

The district court initially granted partial summary judgment for Poway on D.H.’s IDEA claim, holding that the April 2009 IEP provided a FAPE under the IDEA. Although noting that it was “sympathetic to the parents’ view that the CART service would make it easier for [D.H.] to follow the lectures and class discussions,” the district court denied the request to order the service, on the ground that “the IDEA does not require States to ‘maximize each child’s potential’” Later, the district court granted summary judgment for defendants on D.H.’s remaining — ADA and Section 504 — claims. Relying in part on the earlier district court decision in *K.M. v. Tustin*, the district court held that “a plaintiff’s failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, accordingly, under the ADA.”

This appeal, in which D.H. challenges only the district court’s ruling on her ADA claim, followed.

DISCUSSION

I. General Statutory Background

Before discussing K.M. and D.H.’s specific claims, we provide some necessary context concerning the three statutes primarily implicated by these appeals, the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act, especially as they apply to accommodation of students with communication difficulties.

A.

The IDEA requires schools to make available to children with disabilities a “free appropriate public education,” or “FAPE,” tailored to their individual needs. States receiving federal funds under the IDEA must show that they have implemented “policies and procedures” to provide disabled children with a FAPE, including procedures to develop an IEP for each eligible child.

The . . . IDEA enumerates "special factors" that must be considered if a child has a particular type of disability. For a child who is deaf or hard-of-hearing, the IEP team is required to

consider the child's language and communication needs, opportunities for direct communications 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[.]

Id. § 1414(d)(3)(B)(iv). The IEP team is also required to “consider whether the child needs assistive technology devices and services.” *Id.* § 1414(d)(3)(B)(v).

The IDEA does not, however, specify “any substantive standard prescribing the level of education to be accorded handicapped children.” *Rowley*, 458 U.S. at 189. Rather, the IDEA primarily provides parents with various procedural safeguards, including the right to participate in IEP meetings and the right to challenge an IEP in state administrative proceedings and, ultimately, in state or federal court. *Rowley* saw the statute as resting on the premise “that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.” *Rowley*, 458 U.S. at 206. . . .

The IDEA does have a substantive component, but a fairly modest one: The IEP developed through the required procedures must be “reasonably calculated to enable the child to receive educational benefits.” *Rowley*, 458 U.S. at 206-07. The IDEA does not require states to provide disabled children with “a potential-maximizing education.” This access-centered standard means that, for a child being educated in mainstream classrooms, an IEP is substantively valid so long as it is “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”

B.

In contrast to the more process-oriented IDEA, the ADA imposes less elaborate procedural requirements. It also establishes different substantive requirements that public entities must meet.

Title II of the ADA, the title applicable to public services, provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*,” and requires that the DOJ promulgate regulations to implement this provision. 42 U.S.C. §§ 12132, 12134 (emphasis added). We have recognized that, under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the DOJ's Title II-implementing regulations “should be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.” *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010).

Among the DOJ's Title II-implementing regulations, and at the core of these appeals, is the so-called “effective communications regulation,” which spells out public entities’ communications-related duties towards those with disabilities. *See* 28 C.F.R. § 35.160 (2010). 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” . . . as including, inter alia, “real-time computer-aided transcription services” and “videotext displays.” *Id.* § 35.104. “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.” *Id.* § 35.160(b)(2).

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.” *Id.* § 35.164. The public entity has the burden to prove that a proposed action would result in undue burden or fundamental alteration, and the decision “must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion.” The public entity must “take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.”

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

C.

Finally, at least as a general matter, public schools must comply with both the IDEA and the ADA. The IDEA obviously governs public schools. There is also no question that public schools are among the public entities governed by Title II. *See* 42 U.S.C. § 12101(a)(3) (listing “education” in the ADA congressional findings section as one of “critical areas” in which disability discrimination exists); *Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (listing “public education” among the sites of discrimination that Congress intended to reach with Title II).

Moreover, Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc). After the Supreme Court interpreted an earlier version of the IDEA to provide the “exclusive avenue” for

pursuing “an equal protection claim to a publicly financed special education,” *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), Congress enacted legislation to overturn that ruling. An amendment to the IDEA, enacted in 1986, clarified that the IDEA does not foreclose any additional constitutional or federal statutory claims that children with disabilities may have, so long as they first exhaust their IDEA claims through the IDEA administrative process. *See* Pub. L. 99-372, 100 Stat. 796 (1986); *see also Mark H. v. Lemahieu*, 513 F.3d 922, 934 (9th Cir. 2008). In its current version, the IDEA non-exclusivity provision reads:

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 [42 U.S.C. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], 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) (alterations in original).

D.

It is against this statutory background that we shall consider how the IDEA and Title II interact with respect to school districts’ obligations to IDEA-eligible students, like K.M. and D.H., who are deaf or hard-of-hearing. First, however, we must clarify one way in which the statutes do not interact.

In the district court's analysis in *K.M.*, relied upon by the district court in *D.H.*, the plaintiffs' ADA claims were tethered to their IDEA claims through the connective thread of a third federal statute, Section 504 of the Rehabilitation Act. Section 504 bars the exclusion of individuals with disabilities from any program or activity receiving federal funds. The district court in *K.M.* reasoned that “the fact that K.M. has failed to show a deprivation of a FAPE under IDEA . . . dooms her claim under Section 504, and, *accordingly*, her ADA claim” (emphasis added). Similarly, the district court in *D.H.* reasoned that “a plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, *accordingly*, under the ADA” (emphasis added).

The district courts arrived at this reasoning by combining two lines of our case law. In the first line of cases, we have identified a partial overlap between the statutory FAPE provision under the IDEA and a similar provision within the Section 504 regulations promulgated by the Department of Education, requiring schools receiving federal funds to provide “a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction.” 34 C.F.R. § 104.33(a). Although both the IDEA and the Section 504 regulation use the locution “free appropriate public education,” or “FAPE,” we have concluded that the two FAPE requirements are “overlapping but different.” *See Mark H.*, 513 F.3d at 925, 933.² At the same time, we have noted that, as provided by the

² [FN 3] Most importantly, the Section 504 regulations define FAPE “to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focus[] on the 'design' of a

Section 504 FAPE regulation, “adopting a valid IDEA IEP is sufficient but not necessary to satisfy the [Section] 504 FAPE requirements.” *Id.* at 933 (citing 34 C.F.R. § 104.33(b)(2)).

In the second line of cases, we have discussed the close relationship between Section 504 and Title II of the ADA. Congress used the earlier-enacted Section 504 as a model when drafting Title II. *See Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). We have observed on occasion that “there is no significant difference in the analysis of rights and obligations created by the two Acts.” *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

Combining these two lines of cases, the district courts reasoned that (1) a valid IDEA IEP satisfies the Section 504 FAPE regulation; (2) Section 504 and Title II are substantially similar statutes; (3) therefore, a valid IDEA IEP also satisfies Title II. This syllogism overstates the connections both between the IDEA and Section 504, and between Section 504 and Title II.

First, we have never held that compliance with the IDEA dooms all Section 504 claims. In *Mark H.*, we held only that “adopting a valid IDEA IEP is sufficient . . . to satisfy the [Section] 504 FAPE requirements.” We so held because the Section 504 FAPE regulation itself provides that provision of a FAPE under the IDEA “is one means of meeting *the standard established in paragraph (b)(1)(i) of this section*,” 34 C.F.R. § 104.33(b)(2) (emphasis added), i.e., the Section 504 FAPE standard. Because a school district’s provision of a FAPE under the IDEA meets Section 504 FAPE requirements, a claim predicated on finding a violation of the Section 504 FAPE standard will fail if the IDEA FAPE requirement has been met. Section 504 claims predicated on other theories of liability under that statute and its implementing regulations, however, are not precluded by a determination that the student has been provided an IDEA FAPE.

Second, the connection between Title II and Section 504 is nuanced. Although the general anti-discrimination mandates in the two statutes are worded similarly, there are material differences between the statutes as a whole. First, their jurisdictions, while overlapping, are not coextensive: Section 504 governs all entities receiving federal funds (public or private), while Title II governs all public entities (federally funded or not). Second, Title II’s prohibition of discrimination or denial of benefits “by reason of” disability “establishes a ‘motivating factor’ causal standard for liability when there are two or more possible reasons for the challenged decision and at least one of them may be legitimate.” *Martin v. Cal. Dep’t of Veterans Affairs*, 560 F.3d 1042, 1048-49 (9th Cir. 2009). In other words, “if the evidence could support a finding that there is more than one reason for an allegedly discriminatory decision, a plaintiff need show only that discrimination on the basis of disability was a ‘motivating factor’ for the decision.” *Id.* By contrast, “[t]he causal standard for the Rehabilitation Act is even stricter,” *id.*, requiring a plaintiff to show a denial of services “solely by reason of” disability.

Congress has also delegated regulatory responsibility differently under the two statutes. Section 504 mandates generally that the head of each executive agency must promulgate its own regulations “as may be necessary” to implement Section 504’s nondiscrimination

child’s educational program,” while the IDEA definition of FAPE does not require a comparative analysis. *Id.* at 933.

mandate with respect to that agency's programs. *See* 29 U.S.C. § 794(a). Thus, for example, the Department of Education promulgates regulations implementing Section 504 with respect to federally funded education programs. For Title II, Congress made a more specific, and centralized, delegation, confiding regulatory authority wholly in the Justice Department.

Congress also mandated that the federal regulations implementing Title II be consistent with certain, but not all, of the regulations enforcing Section 504. Specifically, Congress mandated that the Title II regulations as to all topics “[e]xcept for ‘program accessibility, existing facilities,’ and ‘communications’” be consistent with the Section 504 regulations codified at 28 C.F.R. part 41, and that the Title II regulations as to “‘program accessibility, existing facilities,’ and ‘communications’” be consistent with the Section 504 regulations codified at 28 C.F.R. part 39. Congress did not, however, mandate that Title II regulations be consistent with the Section 504 FAPE regulation, which is codified at 34 C.F.R. part 104.

Neither K.M. nor D.H.'s theory of Title II liability is predicated on a denial of FAPE under any definition of that term; indeed, Title II does not impose any FAPE requirement. Rather, both K.M. and D.H. ground their claims in the Title II effective communications regulation, which they argue establishes independent obligations on the part of public schools to students who are deaf or hard-of-hearing. Insofar as the Title II effective communications regulation has a Section 504 analog, it is not the Section 504 FAPE regulation at 34 C.F.R. § 104.33 we construed in the *Mark H.* line of cases. Rather, it is the Section 504 communications regulation at 28 C.F.R. § 39.160, as that is the regulation with which Congress has specified that Title II communications regulations must be consistent.

II. The IDEA and ADA Communications Provisions

A.

The question whether a school meets the ADA’s requirements for accommodating deaf or hard-of-hearing students as long as it provides a FAPE for such students in accord with the IDEA is therefore one that cannot be answered through any general principles concerning the overall relationship between the two statutes. Instead, we must address the question by comparing the particular provisions of the ADA and the IDEA covering students who are deaf or hard-of-hearing, as well as the implementing regulations for those provisions. If the ADA requirements are sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA, then compliance with the IDEA FAPE requirement would not preclude an ADA claim. Because we have no cases addressing the parallelism between the IDEA and either the Title II effective communications regulation or its analogous Section 504 regulation, we must construe the relevant statutes and regulations as a question of first impression.

In doing so, “[w]e afford . . . considerable respect” to the DOJ's interpretation of the ADA effective communication regulation, as expressed in its amicus brief to this court. *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2011). “An agency's interpretation of its own regulation is ‘controlling unless plainly erroneous or inconsistent with the regulation.’” *Id.* (quoting *Auer*, 519 U.S. at 461). Applying that standard, we conclude from our comparison of the relevant statutory and regulatory texts that the IDEA FAPE

requirement and the Title II communication requirements are significantly different. 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.

First, the factors that the public entity must consider in deciding what accommodations to provide deaf or hard-of-hearing children are different. The key variables in the IDEA framework are the child's "needs" and "opportunities." When developing a deaf or hard-of-hearing child's IEP for IDEA purposes, the IEP team is required to consider, among other factors, "the child's language and communication *needs*," "*opportunities* for direct communications with peers and professional personnel in the child's language and communication mode," and "whether the child *needs* assistive technology devices and services." 20 U.S.C. § 1414(d)(3)(B)(iv) & (v) (emphases added). Under the ADA effective communications regulation, a public entity is also required to "furnish appropriate auxiliary aids and services *where necessary*." 28 C.F.R. § 35.160(b)(1) (emphasis added). But the ADA adds another variable: In determining how it will meet the child's needs, the ADA regulations require that the public entity "give primary consideration to the *requests* of the individual with disabilities." *Id.* § 35.160(b)(2) (emphasis added). That provision has no direct counterpart in the IDEA. . . .

Second, Title II provides the public entity with defenses unavailable under the IDEA. Specifically, Title II "does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. In particular, as the DOJ explained in its amicus brief to this court, the ADA effective communication obligation "is limited to the provision of services for *existing programs*;" the ADA does not require a school to provide new programs or new curricula" (emphasis in original). The IDEA does not provide schools with any analog to Title II's fundamental alteration and undue burden defenses.

Third, the specific regulation at issue here, the Title II effective communications regulation, requires public schools to communicate "as effective[ly]" with disabled students as with other students, and to provide disabled students the "auxiliary aids . . . necessary to afford . . . an *equal opportunity* to participate in, and enjoy the benefits of," the school program. 28 C.F.R. §§ 35.160(a)(1) & (b)(1) (emphasis added). That requirement is not relevant to IDEA claims, as the IDEA does not require schools to "provide 'equal' educational opportunities" to all students. *Rowley*, 458 U.S. at 198.

Given these differences between the two statutes, we are unable to articulate any unified theory for how they will interact in particular cases. Precisely because we are unable to do so, 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. We note, however, that nothing in our holding should be understood to bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims where the IDEA administrative appeals process has functionally adjudicated some or all questions relevant to a Title II claim in a way that precludes relitigation. . . .

B.

Both school districts make one final argument that requires a brief response. They argue that, even if analyzed independently under Title II, K.M. and D.H.'s claims must fail because ADA liability requires plaintiffs to show that they were denied “meaningful access” to school services, programs, or activities, and that they cannot make this showing. The phrase “meaningful access” derives not from the text of the ADA or its implementing regulations, but from the Supreme Court's opinion in *Alexander v. Choate*, 469 U.S. 287 (1985).

Choate involved a class-action lawsuit brought by individuals with disabilities who argued that cost-saving measures to Tennessee's Medicaid program would disproportionately affect them and therefore amounted to impermissible discrimination under Section 504. Rejecting both the contention that Section 504 reaches only purposeful discrimination and “the boundless notion that all disparate-impact showings constitute prima facie cases under [Section] 504,” the Court construed Section 504 as including a “meaningful access” standard that identified which disparate-impact showings rise to the level of actionable discrimination. In construing Section 504 in this manner, the Court considered and relied on the regulations applicable to Section 504.

We have relied on *Choate*'s construction of Section 504 in ADA Title II cases, and have held that to challenge a facially neutral government policy on the ground that it has a disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services. As in *Choate*, in considering Title II's “meaningful access” requirement, we are guided by the relevant regulations interpreting Title II. Consequently, in determining whether K.M. and D.H. were denied meaningful access to the school's benefits and services, we are guided by the specific standards of the Title II effective communications regulation.³

In other words, the “meaningful access” standard incorporates rather than supersedes applicable interpretive regulations, and so does not preclude K.M. and D.H. from litigating their claims under those regulations. The school districts' suggestion to the contrary therefore fails.

III. Application to This Case

Finally, we return to the specifics of the cases before us in this appeal. Here, in both cases, the district court held that the plaintiff's Title II claim was foreclosed as a matter of law by the failure of her IDEA claim. For the reasons explained above, the district courts legally erred in granting summary judgment on that basis. The failure of an IDEA claim does not automatically foreclose a Title II claim grounded in the Title II effective communications regulation.

Although we could review the record to determine whether there are alternate legal or factual grounds on which to affirm summary judgment, we are not bound to do so. In *Mark H.*, for example, we reversed a grant of summary judgment where the parties and

³ [FN 6] Neither school district has argued that the effective communications regulation is an impermissible application of Title II, including its meaningful access standard. Our court has applied the regulation before. *E.g. Duvall*, 260 F.3d 1124. As no party has challenged it, we do not address the regulation's validity.

the district court had misunderstood the interaction between two federal statutes, and remanded for further proceedings consistent with the relationship between those statutes as newly clarified by our opinion.

Here too, prudence counsels in favor of returning these cases to the district court for further proceedings. Having granted summary judgment on legal grounds, neither district court considered whether there was a genuine issue of material fact as to the school districts' compliance with Title II. Moreover, the school districts have litigated these cases thus far from the position that the plaintiffs' IDEA and Title II claims were coextensive. Now that we have clarified that the school districts' position is not correct, we expect that the parties may wish to further develop the factual record and, if necessary, revise their legal positions to address the specifics of a Title II as opposed to an IDEA claim.

To give the district courts an opportunity to consider the merits of K.M. and D.H.'s Title II claims in the first instance, we reverse the grants of summary judgment on the ADA claims in both cases and on the Unruh Act claim in *K.M. v. Tustin*, and remand for further proceedings consistent with this opinion, without prejudice to whether the school districts may renew their motions for summary judgment on other grounds. . . .

PAGE 512, add to the end of note 4:

For a challenge to the view that there must be a showing of gross misjudgment, bad faith, deliberate indifference, or some other stand-in for intentional discrimination when the student claims that the school denied reasonable modifications and asks for monetary relief, see Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015) (collecting and analyzing authorities), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579263. See generally *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195 (9th Cir. 2016) (stating that sustaining damages claim under section 504 and ADA entails showing that covered entity was on notice of need for accommodation and failed to act).

PAGE 513, in note 7, line 9, after the parenthetical description of *TK. v. New York City Dep't of Educ.* insert:

, *aff'd*, 810 F.3d 869, 877 (2d Cir. Jan. 20, 2016) (“Here, Plaintiffs were reasonably concerned that bullying severely restricted L.K.'s educational opportunities, and that concern powerfully informed their decisions about her education. By refusing to discuss that bullying during the development of the IEP, the Department significantly impeded Plaintiffs' ability to assess the adequacy of the IEP and denied L.K. a FAPE.”)

Add to the end of note 7:

A provocative discussion of legal remedies for bullying and harassment of children with disabilities is found in Paul M. Secunda, *Overcoming Deliberate Indifference:*

Reconsidering Effective Legal Protections for Bullied Special Education Students, 2015 U. ILL. L. REV. 175.

PAGE 513, at the bottom of the page insert new note 8:

8. *K.M. v. Tustin* raises intriguing questions. Are you persuaded by the court's opinion? What (if anything) did Congress have in mind when enacting the ADA fifteen or more years after IDEA and Section 504? Is the reach of *K.M. v. Tustin* limited to communications cases? Should it apply at least to other cases in which there are specific ADA regulations from the Department of Justice, such as service animal and accessibility controversies? The court relied heavily on the position of the Department of Justice in its amicus brief. Do you think the case would have come out the same way had the federal government not taken an active role? What do you expect will be the outcome on remand? See *D.H. v. Poway Unified Sch. Dist.*, No. 09-CV-2621, 2013 U.S. Dist. LEXIS 179116 (S.D. Cal. Dec. 19, 2013) (granting preliminary injunction requiring school district to provide CART transcription services in high school senior's classes), *reconsideration denied*, 2014 U.S. Dist. LEXIS 4738 (S.D. Cal. Jan. 14, 2014).

PAGE 551, add to the end of note 2:

Constitutional claims asserted under 42 U.S.C. § 1983 may also be subject to exhaustion. For an instance in which the court found exhaustion not to be required, see *F.H. v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014), a case involving allegations that a child with cerebral palsy, limited use of his hands, and other disabilities was frequently left unattended and unsupervised in the bathroom and was unable to clean himself properly. It was alleged that on one occasion, he suffered a seizure there, and on other occasions he was subject to verbal and physical abuse from aides and other school personnel for coming back to class soiled. The court reasoned that the injuries were not educational in nature, stating that requiring exhaustion of the § 1983 claims would create an administrative barrier that would not be present for children without disabilities subjected to comparable injuries. Does the comparison to claims that could be brought by non-disabled children without pursuing administrative complaints provide a useful frame for deciding when exhaustion should be required for children with disabilities?

Add to the end of note 3:

On the last day of its 2015-16 term, the Supreme Court granted review on an exhaustion case from Michigan in which parents sought damages under the ADA, section 504, and state law for the school district's refusal to allow their daughter, who has cerebral palsy, to bring Wonder, her service dog, to school. Unlike the *Payne* court, the Sixth Circuit employed an approach that emphasized the nature of the injury rather than the relief sought: "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." *Fry v. Napoleon Cmty. Schs.*, 788 F.3d 622, 628 (6th Cir. 2015), *cert. granted*, No. 15-497 (U.S. June 28, 2016).

Add to the paragraph at the bottom of the page:

Should the length of the limitations period operate as a limit on the compensatory education or other retroactive relief that a parent's due process challenge can achieve? In *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), the court answered no. It declared: "[O]nce a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the 'knew or should have known' date. If it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied. In other words, § 1415(f)(3)(C), like its synopsis in § 1415(b)(6)(B), reflects a traditional statute of limitations." *Id.* at 621-22.

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PAGE 608, add to the end of note 3:

However, in *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013), the appeals court upheld, under the state's constitution, a state statute providing scholarships to students with disabilities, even though the scholarships could be used to pay tuition to religious schools. The state appeals court held that the statute passed the state constitution's Religion Clause and Aid Clause tests because beneficiary families, not the private or sectarian schools, were the specified objects of the state program. *See generally Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016) (upholding state voucher program for special education students against claim that it violates state constitution's prohibition on use of public funds to benefit or support religion, declaring: "We are persuaded that the Act is completely neutral with regard to religion and that any funds deposited to a sectarian school occur as the sole result of the parent's independent decision completely free from state influence."). For a comprehensive discussion of voucher and scholarship programs, see Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291 (2010), and *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323 (2013).