Disability Law—Ninth Circuit Holds Public Schools' Compliance with IDEA Does Not Automatically Establish Compliance with ADA—*K.M. ex rel. Bright v. Tustin Unified School District*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, *cert. denied sub nom. Poway Unified Sch. Dist. v. D.H. ex rel. K.H.*, 134 S. Ct. 1494 (2014)

The rights of deaf and hard-of-hearing students in public schools derive primarily from two federal laws: the Individuals with Disabilities Education Act (IDEA)[1] and Title II of the Americans with Disabilities Act (Title II of the ADA).[2] The IDEA requires public school districts to provide disabled children, including those who are deaf or hard of hearing, with a free appropriate public education (FAPE).[3] Under IDEA, a FAPE necessitates the development and implementation of an individualized education plan (IEP) for each disabled child addressing his or her unique needs.[4] Meanwhile, Title II of the ADA and its effective communications regulations prohibit public schools from

1. Individuals with Disabilities Education Act §§ 601-682, 20 U.S.C. §§ 1400-1482 (2012) (originally enacted as Education of the Handicapped Act, Pub. L. No. 91-230, §§ 601-662, 84 Stat. 121, 175-88 (1970)).

2. Americans with Disabilities Act of 1990, §§ 201-246, 42 U.S.C. §§ 12131-12165 (2012); *see also* 28 C.F.R. § 35.160 (2015) (setting forth Department of Justice's Title II effective communications requirements for disabled individuals). A third federal law, Section 504 of the Rehabilitation Act of 1973, is also relevant to deaf and hard-of-hearing students, in that it prohibits the exclusion of disabled individuals from federally funded programs, including public education. *See* Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2012). However, this Comment focuses primarily on the interplay of IDEA and Title II of the ADA, rather than on Section 504 of the Rehabilitation Act. *See infra* notes 22-45. Generally, a violation of Section 504 of the Rehabilitation Act will also be a violation of Title II of the ADA, and "the vast majority of students [who are deaf or hard of hearing] will be IDEA-eligible, and for these students, the Section 504 analysis concerning a free appropriate public education will align with the IDEA." U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS ON EFFECTIVE COMMUNICATION FOR STUDENTS WITH HEARING, VISION, OR SPEECH DISABILITIES IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS 1 n.3 (2014), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf, *archived at* http://perma.cc/MXN9-5EGK (describing relative insignificance of Section 504 in litigation concerning interplay of IDEA and ADA).

3. *See* Individuals with Disabilities Education Act § 602, 20 U.S.C. § 1401(9) (requiring public schools to provide FAPE for disabled children); *id.* § 612, 20 U.S.C. § 1412(a)(1) (highlighting contingency of federal funding under IDEA on states' provision of FAPE to disabled children); 34 C.F.R. § 300.8(c)(2)-(3) (2015) (listing "deafness" and "hearing impairment" as covered disabilities under IDEA); *see also* Mindy LaBrosse, *A FAPE Revolution: Reforming the FAPE Standard Under the Individuals with Disabilities Education Act,* Rowley*, Deaf Education, and No Child Left Behind*, 12 WHITTIER J. CHILD & FAM. ADVOC. 87, 92-93 (2013) (reiterating IDEA's FAPE requirement). "When a school violates the provisions of the IDEA in a manner that deprives a student of a FAPE, a court will grant appropriate relief, including monetary recovery . . . ." LaBrosse, *supra*, at 93 (describing consequences of noncompliance with IDEA's FAPE requirement).

4. *See* Individuals with Disabilities Education Act § 614, 20 U.S.C. § 1414(d)(1)(A) (establishing IEP requirement); *see also* Brief of the United States as Amicus Curiae Supporting Appellant and Urging Remand 4-5, K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (Nos. 11-56259, 12-56224) [hereinafter Brief of the United States] (describing role of IEP in schools' provision of FAPE).

discriminating against deaf and hard-of-hearing children and require schools to ensure that these students have access to effective communications.[5] In *K.M. ex rel. Bright v. Tustin Unified School District*,[6] the Ninth Circuit considered the interplay of these two laws and held that a public school's provision of a FAPE to a hearing-disabled student (as required under IDEA) does not automatically mean that the school has complied with Title II of the ADA.[7]

Plaintiff K.M. was a hearing-disabled high school student at Tustin Unified School District (Tustin) in Orange County, California.[8] In June 2009, K.M.'s mother asked Tustin to provide Communication Access Realtime Translation (CART) services to help K.M. follow classroom discussion.[9] Tustin deferred a decision regarding K.M.'s CART request, proposing that she try other

5. *See* Americans with Disabilities Act of 1990 § 202, 42 U.S.C. § 12132 (2012) (prohibiting public entities from subjecting qualified disabled individuals to discrimination). Specifically, the statute states that public entities may not exclude disabled individuals from participation in or deny them the benefits of public services, programs, or activities or otherwise engage in disability-based discrimination. *See id*. "Hearing impairments" are specifically recognized as covered disabilities under Title II of the ADA. *See* 28 C.F.R. § 35.104 (2015). Taking the ADA's prohibition on discrimination a step further, the Department of Justice's implementing regulations require public schools to ensure that communications with deaf and hard-of-hearing children are "as effective as communications with others." *See* 28 C.F.R. § 35.160(a)(1) (2015). Furthermore, public schools are obligated to provide children with "appropriate auxiliary aids and services" as may be necessary to ensure equal access. *See* 28 C.F.R. § 35.160(b)(1) (2015).

6. 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, *cert. denied sub nom.* Poway Unified Sch. Dist. v. D.H. *ex rel.* K.H., 134 S. Ct. 1494 (2014).

7. *See id.* at 1102 (stating court's holding). The court highlighted the significant differences between IDEA and Title II of the ADA and its implementing regulations, and the resultant possibility that, in some situations, Title II of the ADA might require special services that IDEA would not. *See id.* at 1100. In light of this possibility, the failure of a hearing-disabled plaintiff's IDEA claim should not automatically foreclose a claim founded in Title II of the ADA's effective communications requirements. *See id.* at 1101.

8. *See id.* at 1092 (outlining details of case). K.M. has mild-to-moderate hearing loss in her left ear and minimal-to-mild hearing loss in her right ear. *See* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850, at *3 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014). She depends on cochlear implants, hearing aids, and various observation techniques to communicate with others. *See id.* at *2. Due to her hearing loss, K.M. has been eligible for special education services under IDEA since she was in kindergarten. *Id.* at *3.

9. *See* 725 F.3d at 1092-93 (noting when, and purportedly why, K.M. requested CART). CART is a real-time transcription service that provides word-for-word captioning on a computer screen. *See id.* at 1092. CART can "translate the spoken word into the written word nearly as fast as people can talk" and offers the "legacy of a text file that may be received at the conclusion of the class." *Communication Access Realtime Translation (CART)*, E-MICH. DEAF & HARD OF HEARING PEOPLE, http://www.michdhh.org/assistive_devices/cart.html (last visited Feb. 13, 2015), *archived at* http://perma.cc/VJ4F-NPLV (further describing educational benefits associated with CART). K.M. requested CART because she can read more easily and effectively than she can listen, and she depends heavily on captioning services in other areas of her life, like watching television. *See* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850, at *8-9 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014). At a June 2009 IEP meeting, K.M.'s mother emphasized the importance of K.M.'s access to CART in light of her impending transition to high school, where her workload and the amount of classroom discussion would presumably increase. *See id.* K.M.'s auditory-visual therapist, with whom she had a long-standing treatment relationship, also recommended that she utilize CART in high school. *See id.* at *3, 9.

accommodations instead.[10] The denial of CART prompted K.M. to file an administrative complaint challenging her IEP.[11] K.M.'s parents and her IEP team continued to meet over the course of her ninth-grade year to explore alternative technologies, but the IEP team ultimately determined that K.M. did not need CART to receive a FAPE.[12] Subsequently, K.M.'s administrative complaint proceeded to a hearing before an administrative law judge (ALJ) in California, who concluded that Tustin had provided a FAPE to K.M. and complied with its obligations under IDEA.[13]

Plaintiff D.H. was a hearing-disabled high school student in the Poway Unified School District (Poway) in San Diego County, California.[14] During an IEP meeting at the end of D.H.'s seventh-grade year, her parents requested that Poway provide her with CART.[15] Upon Poway's denial of their request, D.H.'s

10. K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850, at *3 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014).

11. *See* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 U.S. Dist. LEXIS 71850, at *12 (C.D. Cal. July 5, 2011) (discussing Tustin's initial response to K.M.'s request and basis of her administrative complaint), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493 (2014). Among the alternatives to CART that Tustin proposed was a personal FM Technology system (FM). *See id.* at *6. K.M. had previously used FM in middle school, however, and found that it picked up background noise, gave her headaches, and was cumbersome and conspicuous. *See id.* at *7-8.

12. *See* 725 F.3d at 1093 (describing ongoing efforts to achieve consensus on K.M.'s IEP). During this period, Tustin provided K.M. with access to CART as well as TypeWell, a different type of transcription program, on a trial basis. *See id.* In accordance with its belief that K.M. did not actually need these services, however, the IEP team ultimately refused to incorporate CART, TypeWell, or any other comparable service into her IEP. *See id.*

13. *See id.* (summarizing progression and disposition of K.M.'s challenge to June 2009 IEP). The ALJ perceived K.M.'s request for CART as an attempt to maximize her academic potential, which is beyond the scope of IDEA's FAPE requirement. *See id.* (describing ALJ's perception of CART request as unnecessary under IDEA).

14. *See* D.H. v. Poway Unified Sch. Dist., No. 09-CV-2621-L (NLS), 2012 U.S. Dist. LEXIS 81326, at *2 (S.D. Cal. June 11, 2012) (outlining background of case), *rev'd sub nom.* K.M. *ex rel.* Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), *cert. denied sub nom.* Poway Unified Sch. Dist. v. D.H. *ex rel.* K.H., 134 S. Ct. 1494 (2014). D.H. has moderate-to-profound hearing loss and relies on a cochlear implant in her right ear, a hearing aid in her left ear, and visual strategies such as lip reading in order to follow discussion. *See id.* at *2-3.

15. *See* D.H. v. Poway Unified Sch. Dist., No. 09-CV-2621-L (NLS), 2012 U.S. Dist. LEXIS 81326, at *4 (S.D. Cal. June 12, 2012) (providing background regarding D.H.'s request for CART), *rev'd sub nom.* K.M. *ex rel.* Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), *cert. denied sub nom.* Poway Unified Sch. Dist. v. D.H. *ex rel.* K.H., 134 S. Ct. 1494 (2014); *see also* 725 F.3d at 1094 (describing IEP meetings with D.H). D.H.'s parents acknowledged that their daughter was making progress, and they expressed amenability to a number of other accommodations offered by Poway, including: specialized academic instruction; audiological and speech language services; an FM amplification system; extra time to complete assignments; and preferential classroom seating. *See* D.H. v. Poway Unified Sch. Dist., No. 09-cv-2621-L (NLS), 2012 U.S. Dist. LEXIS 81326, at *3-4 (S.D. Cal. June 12, 2012) (describing options offered to D.H. through IEP process), *rev'd sub nom.* K.M. *ex rel.* Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), *cert. denied sub nom.* Poway Unified Sch. Dist. v. D.H. *ex rel.* K.H., 134 S. Ct. 1494 (2014); *see also* 725 F.3d at 1094 (explaining parents' appreciation of D.H.'s progress and their openness to variety of accommodations). Nonetheless, D.H.'s parents insisted that she specifically needed CART to ensure that she received "equal access in the classroom." *See* 725 F.3d at 1094.

parents filed an administrative complaint contesting the IEP.[16] The ALJ agreed with Poway's assessment that D.H. did not need CART to have a FAPE, notwithstanding D.H.'s testimony that she struggled to keep up with classroom discussions and her teachers' instructions.[17]

Following unsuccessful attempts to challenge their IEPs in state administrative proceedings, K.M. and D.H. filed lawsuits in federal district court, claiming their school districts' refusals to provide CART violated IDEA and Title II of the ADA.[18] In each case, the court awarded summary judgment to the school districts, finding that they satisfied their obligations under IDEA, thereby preventing the plaintiffs from prevailing on the ADA claims.[19] K.M. and D.H. appealed, and the Ninth Circuit consolidated the cases for oral argument.[20] The appeal presented a question of first impression in the Ninth Circuit: whether a school's compliance with IDEA automatically establishes its compliance with Title II of the ADA and its effective communications requirements.[21]

In 1970, Congress enacted the Education for All Handicapped Children Act (which was later renamed IDEA) in response to a widespread perception that children with disabilities were excluded from public education.[22] The IDEA

16. *See* 725 F.3d at 1094 (stating basis of D.H.'s administrative complaint). The IEP team concluded that D.H. did not need CART in order to have a FAPE in view of her satisfactory progress without it. *See id.*

17. *See id.* (stating result of ALJ hearing). The ALJ reasoned that D.H. did not need CART because she could hear portions of classroom discussion without it, which enabled her to access the general curriculum. *See id.*

18. *See id.* at 1092 (describing procedural history of cases). Both plaintiffs sought an order compelling their school districts to provide them with CART in addition to other relief. *See id.* In support of their requests, K.M. and D.H. alleged that other public school districts and colleges in Southern California routinely provided CART to deaf and hard-of-hearing students. *See id*. at 1093. K.M. also asserted in a declaration to the court that "she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day." *Id*. Similarly, in D.H.'s declarations, she emphasized the inordinate amount of effort she had to expend just to follow classroom discussion and its draining effect on her. *See id*. at 1094.

19. *See id.* at 1092 (recounting holdings in district court cases). Stated differently, the district courts held that a school's compliance with IDEA establishes, as a matter of law, its compliance with Title II of the ADA. *See id.*

20. *See* 725 F.3d at 1092 (explaining cases' progression to Ninth Circuit). On appeal, the plaintiffs did not challenge the district courts' conclusions regarding Tustin's and Poway's compliance with IDEA. *See id*. Rather, they argued that the failure of their IDEA claims should not automatically prevent them from prevailing on their ADA claims, as the laws impose distinct obligations on public school districts. *See id.*

21. *Id.* (clarifying nature of question on appeal).

22. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982); H.R. REP. NO. 94-332 (1975) (describing congressional concerns prompting comprehensive special education reform). Congress was concerned that the majority of learning-disabled schoolchildren "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (alteration in original). Displeased by earlier legislative efforts designed to encourage States to take action, Congress believed that an "ambitious federal effort to promote the education of handicapped children" was necessary. *See id*. (recalling historical circumstances of statute's enactment); *see also* Caroline Jackson, Note, *The Individuals with Disabilities Education Act and Its Impact on the Deaf Community*, 6 STAN. J. C.R. & C.L. 355, 356 (2010) (describing Congress's effort to redress lack of appropriate educational services for disabled children). Prior to 1975, disabled children were often compelled

guarantees each disabled child a FAPE "that emphasizes special education and related services designed to meet their unique needs."[23] The hallmark of the IDEA—and the mechanism through which a FAPE is brought to fruition—is the IEP.[24] Applied to a deaf or hard-of-hearing child's situation, the IEP team must consider the child's communication-related needs, and whether any "assistive technology devices and services" might be necessary to address those needs.[25]

Title II of the ADA prohibits disability-based discrimination by public entities, including public school districts.[26] In contrast to IDEA, Title II of the

to enroll in inferior state and private institutions and those who did attend public school struggled to obtain the necessary resources to benefit from it. *See* Jackson, *supra*, at 356.

23. *See* Individuals with Disabilities Education Act § 601, 20 U.S.C. § 1400(d)(1)(A) (2012) (indicating purpose of IDEA and introducing FAPE requirement). Part B of IDEA authorizes federal funding for state educational agencies and local public school districts to facilitate the provision of a FAPE to each disabled child. *See id.* §§ 601-619, 20 U.S.C. §§ 1400-1419; *see also* Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 368 (1985) (noting expenditure of federal funds to assist schools in providing FAPE to disabled children).

24. *See* § 614, 20 U.S.C. § 1414(d)(1)(A) (defining IEP). IDEA stipulates that an IEP must take the form of a "written statement" and include: an assessment of the child's present functional and academic performance; his or her academic goals; a mechanism for measuring the child's progress; and a description of the special education services to be provided to the child; among other items. *See id*. The IEP must be reviewed at least once a year to ensure that the child is meeting his or her educational goals. *See A Guide to the Individualized Education Program*, U.S. DEP'T OF EDUC. (July 2000), http://www2.ed.gov/parents/needs/speced/iepguide/index.html, *archived at* http://perma.cc/AU9T-DRAW. For a deaf or hard-of-hearing child, the IEP team must specifically consider the child's communication-related needs and determine what, if any, "assistive technology devices and services" should be incorporated into the IEP. *See id.*; *see also* Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 368 (1985) (emphasizing importance of IEP in fulfilling FAPE requirement). The IEP must be tailored to the individual child, addressing his or her specific educational needs. *See* Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359, 368 (1985). IDEA also encompasses extensive procedural safeguards to protect the rights of disabled children and their parents, including the rights to participate in the IEP's development, challenge the IEP's terms in state administrative proceedings, and if unsuccessful, to sue the school district in state or federal court. *See* § 615, 20 U.S.C. §§ 1415(a)-(i) (listing key procedural safeguards built into IDEA for protection of children and parents). The Supreme Court has opined that IDEA does not require states to maximize the potential of each disabled child or offer educational opportunities commensurate with those enjoyed by nondisabled children. *See* Bd. of Educ. v. Rowley, 458 U.S. 176, 190 (1982). It merely requires states to provide each disabled child with a FAPE through the cooperative IEP process outlined in the statute. *See id.* (clarifying scope and purpose of FAPE and highlighting process oriented nature of IDEA). Indeed, the "core of [IDEA] . . . is the cooperative process that it establishes between parents and schools," rather than its few substantive requirements. *See* Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 53 (2005) (emphasizing prominence of procedural, rather than substantive, requirements in IDEA).

25. *See* § 614, 20 U.S.C. §§ 1414(d)(3)(B)(iv)-(v) (elucidating IEP considerations specific to hearing-disabled children).

26. *See* Americans with Disabilities Act of 1990 §§ 201-202, 42 U.S.C. §§ 12131-12132 (2012) (setting forth overarching purpose of Title II of ADA). The statute elaborates on this prohibition as follows: "Subject to the provisions of this subchapter, 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." *Id.* § 202, 42 U.S.C. § 12132. Generally, under Title II of the ADA, a plaintiff is required to demonstrate that he or she is a qualified individual with a disability; a public entity discriminated against him or her; and the discrimination was based on his or her disability. *See* 725 F.3d at 1096-97 (listing three criteria plaintiff must satisfy under Title II of ADA); *see also*

ADA is less concerned with procedural safeguards, but imposes stringent substantive requirements on public schools.[27] The Department of Justice's (DOJ's) implementing regulations require public schools to ensure that communications with disabled children are *just as effective* as those with other children, which may require the provision of certain auxiliary aids and services.[28] Furthermore, when such an aid or service proves necessary, public school districts are required to give primary consideration to the disabled child's preferred accommodations.[29] In light of these extensive substantive requirements, an analysis of a public school district's compliance with Title II of the ADA and its effective communications regulations is usually quite fact-intensive.[30] The DOJ's effective communications regulations and its published

Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001) (explaining plaintiff's burden of proof regarding Title II of ADA violations).

27. *See* Liliana Kim, Comment, *Not Turning a Deaf Ear: How* K.M. v. Tustin Unified School District *Expands the Rights of Deaf or Hard-of-Hearing Students*, 47 LOY. L.A. L. REV. 1031, 1037 (2014) (differentiating ADA from IDEA).

28. *See* 28 C.F.R. §§ 35.160(a)-(b) (2015) (announcing requirements of equally effective communications and auxiliary aids and services). The first of these two substantive requirements—that communications with hearing-disabled students be as effective as those with other students—is an ostensibly different standard than IDEA's FAPE test, which simply requires schools to ensure that IEPs facilitate passing marks and grade advancement. *See* Brief of the United States, *supra* note 4, at 10-11 (emphasizing significant differences between IDEA's and Title II of ADA's substantive components); *see also* Kim, *supra* note 27, at 1037 (noting IDEA only requires meaningful educational benefit, not equality). Similarly, the second substantive requirement in Title II of the ADA's effective communications regulations—that public schools provide auxiliary aids and services to ensure equal opportunity—effectively guarantees specific accommodations to hearing-disabled students that they might not otherwise be entitled to receive under IDEA. *See* Brief of the United States, *supra* note 4, at 10-11 (observing possibility of student entitled to particular accommodation under ADA, but not IDEA). Several factors can influence which, if any, services or devices are required for a particular student, such as the "length and complexity of the communication involved." *See* U.S. DEP'T OF JUSTICE, THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL: COVERING STATE AND LOCAL GOVERNMENT PROGRAMS AND SERVICES § II-7.1000, *available at* www.ada.gov /taman2.html#11-7.0000 (last visited Mar. 9, 2015), *archived at* http://perma.cc/29MB-6GBQ (demonstrating variability in types of auxiliary aids and services through examples). For instance, an individual who became deaf prior to learning to write or speak might prefer sign language to the use of a notepad, but an individual whose hearing diminished more gradually may prefer written communication and/or depend upon computer-assisted transcription. *See id*. Notably, the definition of "[a]uxiliary aids and services" explicitly includes real-time transcription services. *See* 28 C.F.R. § 36.303 (2015).

29. *See* U.S. DEP'T OF JUSTICE, *supra* note 28, § II-7.1100 (recapitulating school's obligation to give primary consideration to student preference). However, a public school district does not have to effectuate a student's preference where it can demonstrate that the preferred aid or service would cause an "undue financial and administrative burden[]" or fundamentally alter the service or program involved, or that an equally effective alternative is available. *See* 28 C.F.R. §§ 35.160(a)(1), 35.164 (2015) (presenting possible exceptions to primary consideration requirement). If a school successfully asserts one or more of these defenses, it is still required to "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." 28 C.F.R. § 35.164.

30. *See, e.g.*, Chisolm v. McManimon, 275 F.3d 315, 327 (3d Cir. 2001) (designating questions regarding effectiveness of alternative aides and existence of undue burden as factual issues); Duvall v. Cnty. of Kitsap, 260 F.3d 1124, 1136-38 (9th Cir. 2001) (identifying allegation of failure to accommodate hearing disability as issue of material fact); Duffy v. Riveland, 98 F.3d 447, 456 (9th Cir. 1996) (characterizing disputes over deaf

guidance on this topic are entitled to deference to the extent that they represent "a reasonable interpretation" of Title II of the ADA and provided that they are not "arbitrary, capricious, or manifestly contrary" to the statute.[31]

In *K.M. ex rel. Bright v. Tustin Unified School District*, the Ninth Circuit considered whether the plaintiffs were precluded from pursuing ADA claims because their IDEA claims had already failed.[32] The Ninth Circuit had to analyze, for the first time, the differences between public school districts' obligations to deaf and hard-of-hearing students under IDEA and Title II of the ADA.[33] The court's analysis turned largely on a comparison of the provisions in each statute that specifically apply to hard-of-hearing students.[34] The court identified several key differences between IDEA's and Title II of the ADA's relevant provisions, which made it impossible for the court to "articulate any unified theory for how they will interact."[35] Further to this point, the court recognized the possibility that in certain situations Title II of the ADA might require a school to provide a specific accommodation that IDEA would not.[36] As a result, the court held that public schools' obligations to hearing-disabled students under IDEA and Title II of the ADA are independent of one another and must be analyzed separately.[37]

inmate's disability and interpreter's qualifications as fact questions precluding summary judgment).

31. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (summarizing principle of judicial deference to administrative agency and outlining parameters thereof).

32. *See* 725 F.3d at 1092 (describing "narrow question" presented by consolidated appeals).

33. *See id.* at 1100 (articulating why issue was one of first impression); *see also* Kim, *supra* note 27, at 1039 (setting forth question of first impression in Ninth Circuit).

34. *See* 725 F.3d at 1100 (reiterating court's approach to issue). The court compared the procedural and substantive provisions of IDEA and Title II of the ADA that apply specifically to hearing-disabled students, as opposed to comparing the statutes' general principles. *See id.* In doing so, the court conferred a high degree of deference to the DOJ's interpretation of Title II of the ADA's effective communications regulations, as conveyed in the DOJ's amicus brief to the court. *See id*. In its amicus brief, the DOJ urged the court to accept its view that IDEA and Title II of the ADA "have different elements, specify different rights, and serve different purposes." Brief of the United States, *supra* note 4, at 10.

35. *See* 725 F.3d at 1101 (detailing significant differences between IDEA and ADA); *see also* Kim, *supra* note 27, at 1037-38 (noting appellate court's interest in key statutory differences). Indeed, "the essential difference between the IDEA and the ADA is that the IDEA emphasizes access, while the ADA emphasizes *equal* access." *See* Kim, *supra* note 27, at 1037-38. The court observed that IDEA merely requires access to a FAPE from which the child can benefit educationally. *See* 725 F.3d at 1100. This stands in stark contrast to Title II of the ADA's requirement that public schools communicate *just as* effectively with hearing-disabled students as they do with other students. *See id.*

36. *See* 725 F.3d at 1100 (foreseeing potentially different outcomes in application of statutes).

37. *See id.* at 1100 (describing logic behind court's holding). In the context of litigation, this effectively means that a hearing-disabled plaintiff should be able to pursue, and potentially prevail on, a claim grounded in Title II of the ADA, even if their IDEA claim has already failed. *See id.* The plain language of IDEA's non-exclusivity provision seems to support this characterization, stating in relevant part: "Nothing in [IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], . . . or other Federal laws protecting the rights of children with disabilities . . . ." *See* Individuals with Disabilities Education Act § 615, 20 U.S.C. § 1415(l) (2012) (setting forth IDEA non-exclusivity provision); *see also* Payne v. Peninsula Sch. Dist., 653 F.3d 863, 872 (9th Cir. 2011) (affirming remedies under IDEA supplement, not swallow, remedies under other laws), *overruled by* Albino v. Baca, 747 F.3d 1162 (9th Cir.

The *K.M.* decision is a much needed recognition that IDEA and Title II of the ADA are materially different statutes, such that a public school district's compliance with one should not necessarily establish its compliance with the other.[38] The decision comports with congressional intent that the statutes coexist and forecloses the strange possibility that a deaf student's receipt of services under IDEA could effectively deprive her of additional services under Title II of the ADA.[39] The Ninth Circuit's appreciation of this implication not only led to a positive outcome for the deaf community, but it avoided a potentially disastrous one: namely, that students would lose access to critical auxiliary aids and services, in contravention of the plain language of IDEA.[40] Similarly, such a decision would have seriously undermined the ADA's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," including discrimination "in such critical areas as . . . education."[41]

Although the Ninth Circuit's decision represents a significant victory for hearing-disabled students, it also raises a secondary question regarding the effectiveness of IDEA, an inquiry that is perhaps better suited for the legislature.[42] IDEA's reliance on procedure versus substance, and its disregard for student preference, may be depriving hearing-disabled students who have "easily remedied learning disabilities" of critical accommodations.[43] Arguably, this concern is less pressing because of the Ninth Circuit's decision in *K.M.*, which effectively ensures that Title II of the ADA's more robust protections remain fully available to hard-of-hearing students who may also receive services under IDEA.[44] However, the need for protracted litigation in the first

2014) (en banc). Since the initial denial of CART to K.M. and D.H. was premised on an erroneous understanding of the law (i.e., that a school's compliance with IDEA portends its compliance with Title II of the ADA), the Ninth Circuit declined to review the record for alternate grounds on which to affirm summary judgment and remanded the cases for further proceedings consistent with the appellate opinion. *See* 725 F.3d at 1103.

38. *See* Brief of the United States, *supra* note 4, at 10 (summarizing important ways in which IDEA and Title II of ADA differ).

39. *See* Individuals with Disabilities Education Act § 615, 20 U.S.C. § 1415(1) (stating congressional intent IDEA coexist with other laws).

40. *See* § 601, 20 U.S.C. § 1400 (noting goals and objectives of IDEA). The Ninth Circuit has previously held that IDEA must be interpreted to coexist with other remedies, including, but not limited to, the ADA. *See* Payne v. Peninsula Sch. Dist., 653 F.3d 863, 872 (9th Cir. 2011) (emphasizing non-exclusivity provision of IDEA), *overruled by* Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en banc).

41. *See* Americans with Disabilities Act of 1990 § 2, 42 U.S.C. §§ 12101(a)(3), (b)(1) (2012) (describing primary purpose and intended effect of ADA).

42. *See* LaBrosse, *supra* note 3, at 94-95 (questioning effectiveness of IDEA). The courts' tendency to focus on the process-oriented facets of IDEA, rather than the sufficiency of the services that a child is receiving, persists "to the detriment of deaf and disabled students." *See id.* at 96.

43. *See* LaBrosse, *supra* note 3, at 89 (addressing IDEA's failure to provide students with easily remedied disabilities with equal access to education).

44. *See* 725 F.3d at 1101 (holding failure of IDEA claim does not automatically foreclose claim under Title II of ADA).

place begs us to consider whether IDEA's focus on procedural safeguards comes at the expense of disabled students' access to high quality public education.[45]

In *K.M. ex rel. Bright v. Tustin Unified School District*, the Ninth Circuit considered whether a public school district's compliance with IDEA automatically establishes its compliance with Title II of the ADA. The court appropriately held that the procedural and substantive differences between the statutes require them to be analyzed separately. As a result, hard-of-hearing plaintiffs who lose their IDEA claims can still pursue, and potentially prevail on, claims under Title II of the ADA. Although the Ninth Circuit resolved this question of first impression in a favorable manner for deaf and hard-of-hearing children, the opinion highlights several shortcomings of IDEA, which the legislature needs to address.

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45. *See* LaBrosse, *supra* note 3, at 89-90 (deeming FAPE insufficient for providing disabled students with equal access to public education).