

## **Game Changer: Will Policy Clarification Level the Playing Field?** **Cheryl D. Johnson<sup>1</sup>**

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The U.S. Department of Justice and U.S. Department of Education together published policy guidance titled, *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*, on November 12, 2014, to address obligations of schools to provide these services. This guidance describes eligibility and accommodations under Title II of The Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA) as well as important differences between the laws. The implications of this policy clarification may be the most significant development since the inclusion of special factors to the IEP towards “leveling the playing field” for children and youth who are deaf or hard of hearing. Furthermore, the ADA applies to all children whether they have an IEP, 504 Plan or no plan; which is a much needed clarification for the growing number of non-IEP students. While this guidance is specifically written for public school students, Title II of the ADA also applies to students attending state operated institutions of higher education<sup>2</sup>. (Title III addresses requirements for business and commercial facilities including private schools, colleges and universities.) This guidance deserves our thoughtful consideration and discussion.

### **Bottom Line**

Students in public schools who are deaf and hard of hearing have rights under IDEA, Section 504, and Title II of the ADA. Because each law has a slightly different intent, their individual provisions must be considered when addressing the communication needs of students from preschool through high school graduation. Title II non-discrimination requirements may require additional accommodations beyond the IDEA to ensure communication is as effective as for non-disabled peers. The communication preferences of the individual are paramount when determining appropriate auxiliary aids and services. Pertinent components of these laws that are associated with effective communication are summarized below followed by the case law considerations that led to this policy clarification.

### **Requirements of IDEA, Section 504 and Title II of the ADA**

IDEA provides a free and appropriate public education which includes special education and related services to all eligible children with disabilities ages 3-21. The IEP must address the special education, related services, supplementary aids and services, program modifications, and supports for school personnel to be provided to enable the student to participate in extracurricular and other nonacademic activities [IDEA 34 C.F.R. §300.320(a)(4)(ii)] and be designed to meet each student’s individual needs to provide a reasonable education program that includes

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<sup>2</sup>See Title III language at [http://www.ada.gov/regs2010/titleIII\\_2010/titleIII\\_2010\\_regulations.htm](http://www.ada.gov/regs2010/titleIII_2010/titleIII_2010_regulations.htm)

consideration of special factors.<sup>3</sup> Compliance with IDEA also satisfies the requirements of Section 504.

Title II of ADA and Section 504 protect students with disabilities in public schools regardless of their eligibility for IDEA. The definition of qualified individuals is the same under both laws, e.g., (1) a physical or mental impairment that substantially limits a major life activity; (2) a record of such an impairment; or (3) being regarded as having such an impairment. Title II covers all public places even if they do not receive federal funds. Both Title II and Section 504 also apply to all individuals with disabilities who access public school activities and programs. Title II is managed through the Department of Justice while Section 504 is managed through the Office of Civil Rights.

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance. It requires schools to provide FAPE, including education services and related aids designed to meet the needs of students with disabilities as adequately as the needs of nondisabled students are met and equal to the quality of services provided to nondisabled students. Section 504 does not provide special supplemental educational supports, e.g., specially designed instruction also known as special education, nor does it provide the procedural safeguards required through IDEA. Eligibility under IDEA generally meets the requirements of Section 504. Violation under 504 is also a violation of Title II.

### **Effective Communication under Title II of ADA**

Title II of the ADA requires schools to ensure that communication for students who are deaf or hard of hearing “are as effective as communication for others” [ADA Title II 28 C.F.R. 35.160 (a)(1)] through the provision of appropriate aids and services “affording an equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others” [ADA Title II 28 C.F.R. 35.130 (b)(1)(iii)] and “to participate in and enjoy the benefits of the district’s services, programs, and activities” (DOJ-DOE p14). These requirements apply to all school-related communications.

Effective communication may require auxiliary aids and services. For students who are deaf or hard of hearing these include qualified interpreters, note takers, real-time computer-aided transcription services, written materials, exchange of written notes, telephone handset amplifiers, assistive listening devices and systems, and open and closed captioning, accessible electronic and information technology [see ADA Title II 28 C.F.R. 35.104 (1) for additional considerations]. Personal devices such as hearing aids and cochlear implants are exempt from this regulation (ADA Title II 28 D.F.R. 35.135).

When determining what types of auxiliary aids and services are necessary, the school must analyze the student’s needs, how to meet those needs based on the Title II standard and give primary consideration to the specific request of the student (DOJ-DOE FAQ, p19). The type of auxiliary aids or services necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved and the context in which the communication is taking place. They

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<sup>3</sup> For a student who is deaf or hard of hearing, the IEP team must consider these factors, known as “special considerations” per the IDEA: (1) the child’s language and communication needs; (2) opportunities for direct communication with peers and professional personnel in the child’s language and communication mode; (3) academic level; and (4) full range of needs, including opportunities for direct instruction in the child’s language and communication mode. The IEP team must also consider whether the child needs assistive technology devices and services to enable the child to receive meaningful educational benefit [IDEA 34 C.F.R. §300.324 (2) (iv-v)]

must also be provided in a way to protect the privacy and independence of the individual [ADA Title II 28 C.F.R. 35.160 (b)(2)] and be continuously evaluated to ensure that the students are receiving effective communication (DOJ-DOE FAQ, p13).

Schools may implement separate or additional procedures to assess effective communication in addition to those provided under IDEA. Schools must provide auxiliary aids or services in a timely manner [ADA Title II 28 C.F.R. 35.160 (b)(2)] which may be prior to the completion of the IDEA evaluation process and eligibility determination.

The school must honor the individual's choice unless the school can prove that an alternative auxiliary aid or service provides communication that is as effective as that provided to students without disabilities and affords an equal opportunity to participate in and benefit from the service, program, or activity (DOJ-DOE FAQ p9). If the school can demonstrate that the particular auxiliary aid or service would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, the school must provide a written statement of the reasons for reaching that conclusion and provide a satisfactory alternative auxiliary aid or service (ADA Title II 28 C.F.R. 35.164, DOJ-DOE FAQ p12-13).

Qualified interpreter means an interpreter who, via a video remote interpreting (VRI) service or an on-site appearance, is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators [ADA Title II 28 C.F. R. 35.104 (1)].

### **Dispute Resolution**

Under IDEA, parents may request mediation, file a complaint with the State education agency, or request an impartial administrative hearing by filing a due process complaint and participating in the resolution process. An administrative hearing decision can be appealed to the appropriate State or Federal court. A Title II complaint can be filed with the U.S. Department of Education's Office of Civil Rights or with the U.S. Department of Justice's Civil Rights Division. School districts may also have a grievance procedure for Title II complaints.

### **Higher Standard: Case Law Backstory**

The impetus for this policy clarification was two independent cases in California (K.M. v. Tustin Unified School District and D.H. v. Poway Unified School District) where both students were requesting Communication Access Real Time Translation (CART) services under both IDEA and ADA (K.M. v. Tustin Unified School District, 2013). Both students lost the state challenge to their school district's denial of CART, as well as a lawsuit in federal district court. In their appeal to the Ninth Circuit Court of Appeals, neither student contested their IEP services but continued to claim that Title II of ADA's effective communication clause should be addressed independently, rather than as part of, the IEP obligations. They each stated CART was necessary to provide effective communication so that they could fully understand the teacher and the students in their classrooms without undue strain and stress. The Ninth Circuit Court of Appeals reversed the federal court's decisions on the basis that a school district's compliance with IDEA does not necessarily mean compliance with effective communication obligations under Title II of ADA. The Appeals panel stated that the ADA requirements for students who are deaf and hard of hearing are different than those of IDEA and also that 504 and Title II of ADA have substantive differences.

## Summary

IDEA provides reasonable access to public education through individualized services regardless of costs, administrative burden, or programming required. Title II of ADA requires that the services are not only accessible to the individual student, but also that they provide effective communication that is equal to that of non-disabled persons so long as they do not impose an undue burden or require a fundamental alteration of their programs. Let's hope that school districts do not use this "out" to avoid providing students with full access and the opportunity to communicate and learn as effectively as their hearing peers. If addressed appropriately, this guidance should result in a significant positive impact on the development of communication access accommodations for all students who are deaf and hard of hearing regardless of IDEA eligibility. While the IDEA supports providing a basic floor of opportunity for students, the ADA addresses equal access. The following checklist summarizes some of the additional considerations required under Title II of ADA.

- Does the student meet disability criteria under ADA?
- Does the student attend a public preschool, elementary, or secondary school? (Note that charter and magnet schools are public schools.)
- Does the student require auxiliary aids and services to achieve communication that is as effective as communication for individuals without disabilities?
- Are the auxiliary aids and services provided by the school based on an appropriate assessment and analysis in accordance with:
  - the method of communication used by the individual,
  - the nature, length, and complexity of the communication involved, and
  - the context in which the communication is taking place?
- Are the auxiliary aids and services provided by the school primarily based on the preferences of the student, or his/her parents/guardian, with disabilities?
- Are the auxiliary aids and services provided in a timely manner?
- Are the auxiliary aids and services provided in such a way as to protect the privacy and independence of the student?
- Is the student continuously assessed to assure the auxiliary aids and services are providing effective communication?
- Does the school district have a designated person that coordinates implementation and compliance with the district's responsibilities under Title II?
- Does the school consult with the parent or guardian, and the student him/herself as appropriate, at the first opportunity regarding preferences for auxiliary aids and services and at least annually or whenever a change is requested?

## References

*K.M. v. Tustin Unified School District*, 725 F.3d 1088 (9<sup>th</sup> Cir. 2013), cert. denied, 134 S. Ct. 1493 (2014). Retrieved November 15, 2014 from <http://cdn.ca9.uscourts.gov/datastore/opinions/2013/08/07/11-56259%20web%20revised.pdf>

U.S. Department of Justice (2010, September 15). Americans with Disabilities Act Title II Regulations: Non discrimination on the basis of disabilities in state and local government services. Retrieved November 27, 2014 from [http://www.ada.gov/regs2010/titleII\\_2010/titleII\\_2010\\_regulations.pdf](http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.pdf)

U.S. Department of Education Individuals with Disabilities Education (2006, Aug 14). Assistance to states for the education of children with disabilities and preschool grants for

children with disabilities. Final Rule (34 C.F.R. parts 300 and 301). *Federal Register*, 71, 156, 46753-46845.

U.S. Department of Justice & U.S. Department of Education (2014, Nov 12). *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools*. Retrieved November 12, 2014 from <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-faqs-effective-communication-201411.pdf>