Emerging Legal Issues: What Local Directors Need to Know About Effective Communication Under the ADA and Access to the General Curriculum Under the IDEA

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I. Introduction

This webinar will cover two major legal topics that the United States Department of Education has highlighted in recent guidance:

1. The requirement under the ADA that schools provide individuals with disabilities with “effective communication”, that is, communication that is as effective as communication with individuals who are not disabled.

2. That IEPs provide access to the general curriculum, that is, access to the academic standards for the grade in which the student is enrolled.

II. Americans With Disabilities Act (ADA)

The Americans With Disabilities Act (ADA) is a federal law passed in 1990. The ADA prohibits discrimination on the basis of disability. The ADA contains a specific section, Title II, which applies to local and state governmental agencies including public schools and school districts.

Jurisdiction for the enforcement of the ADA in public schools lies with both the United States Department of Education Office for Civil Rights (OCR) and the United States Department of Justice (DOJ). Although similar to Section 504 of the Rehabilitation Act of 1973, the ADA has specific provisions which the United States Departments of Education and Justice and the Courts have interpreted as creating legal responsibilities that are more specific than the provisions in Section 504. The ADA Title II regulations (28 Code of Federal Regulations, Part 35) can be found at: www.ada.gov
Not only do school administrators and staff need to be aware of the legal requirements of the IDEA, there is an increased need to be cognizant of the impact of the ADA. All students who qualify for IEP services will be deemed students protected by the ADA but there are also students who will be deemed disabled under the ADA who are not special education eligible.

III. Effective Communications (28 CFR 35.160)

A. A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

B. A public entity shall furnish appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity. (emphasis added)

C. Auxiliary aids and services include:

1. Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real-time computer-aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems; telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

2. Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

3. Acquisition or modification of equipment or devices; and

4. Other similar services and actions.
D. The type of auxiliary aid or service 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. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

E. A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

F. A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or (ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

G. Two students with hearing impairments requested the school to provide them 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. The parents pursued due process hearings and in each case the hearing officer found that the IEPs provided the students with a FAPE under the IDEA.

On appeal to the district court both students claimed that the denial of CART violated both the 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 therefore foreclosed by the failure of her IDEA claim. The Court of Appeals held that a school district's compliance with its obligations to a deaf or hard-of-hearing student under the IDEA does not necessarily establish compliance with its “effective communication”
obligations to that student under Title II of the ADA. 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." 28 CFR 35.160(a). 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." 28 CFR 35.160(b)(1). The Title II regulations define the phrase "auxiliary aids and services" as including "real-time computer-aided transcription services" and "videotext displays." 28 CFR 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." 28 CFR 35.160(b)(2).

The Court remanded the cases back to the District Court for further proceedings. K. M. v. Tustin Unified School District 725 F.3d 1088, 61 IDELR 182 (United States Court of Appeals, 9th Circuit (2013)) Petition for appeal to the United States Supreme Court denied (2014).

H. The United States Departments of Education and Justice issued a joint guidance document regarding a public school’s responsibility to provide effective communication to individuals with disabilities under the IDEA, Section 504 and the Americans With Disabilities Act (ADA), Title II applying to all state and local government entities. Frequently Asked Questions on Effective Communication for Students With Hearing, Vision or Speech Disabilities in Public Elementary and Secondary Schools 64 IDELR 180 (United States Departments of Education and Justice (2014)).

The Guidance Document addressed and clarified several points:

1. **ADA requirements may exceed IDEA**

   A student need not be eligible for IEP services before the ADA obligations arise. For students who are eligible for IEP services, the auxiliary aids and services required under Title II may be more than what is required in an IEP.

   **ADA Standard**

   Title II of the ADA requires that public schools ensure that communication with students with hearing, vision or speech disabilities is as effective as communication with students without disabilities.

   **IDEA Standard** (34 CFR 300.324(a)(2)(iii) and (iv))


The IDEA requires that the IEP Team must consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, 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;

In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

2. Obligation to Provide Effective Communication Supports

The school district has an affirmative obligation to provide effective communication supports to students with disabilities. Parents do not have to make a specific request for auxiliary aids or services.

Although a school may rely on IDEA evaluation information, it must analyze and determine the need for auxiliary aids and services under the ADA standard which provides that primary consideration be given to the request of the parent/adult student. A school may establish and implement its own procedures to collect information to make such a determination.

3. Primary Consideration of the Individual’s Needs

The ADA requires that the school give “primary consideration” to the auxiliary aid or service requested by the person with a disability. This means that the school must provide the opportunity for the person with a disability (or an appropriate family member such as a parent) the right to request a specific auxiliary aid or service in order to provide effective communication. The guidance states that the school “must honor” the request unless the school can “prove” that an alternate aid or service provides effective communication.

Note: As a best practice, the school should proactively consult with the parent/student as soon as a need for such support is known. If a parent requests a specific aid or service, it is highly recommended
that the school ask for the basis of their request and if there is any information that they would like the school to consider. Although the ADA does not contain procedural safeguards similar to the IDEA, best practice would be for the school to respond to the request in writing.

4. Factors for Consideration

The determination of needed auxiliary aids and services must be made on an individual basis and cannot assume that a student with a particular disability would need a specific type of aid or service. Factors for considerations include:

* The communication used by the student
* The nature, length and complexity of the communication involved;
* The context in which the communication is taking place; and
* The number of people involved in the communication:

5. Communication Needs Throughout the School

For students, the effective communication requirements are not limited to communications between the student and teacher. Ongoing exchanges with other students, coaches, and other school officials are also included.

6. Decision Maker for Auxiliary Aids/Services

The ADA does not specify a particular process or designate a particular individual or body within the school who is responsible for making a decision of necessary auxiliary aids and services.

If a student is on an IEP, neither the IDEA nor the ADA require that the IEP Team address the issue of ADA aids/services, however, a school may choose to delegate this responsibility to the IEP Team.

Caution!! If the IEP Team is given this responsibility by the school district, it is essential that the IEP Team members, including the parent, understand the different role and standards that apply. If it is determined that a student on an IEP would be provided FAPE without the auxiliary aid or service, consideration should be given to including an ADA/Sec.504 addendum to the IEP with the service or aid included.
7. Regular Review

Schools should be mindful that communications evolve depending on the individual circumstances. The decision as to what aids and services are required for effective communication should therefore be reviewed regularly.

Note: As a general rule, unless the individual student’s communication needs or parents’ request warrant a more frequent review, it is recommended that at least an annual review be conducted.

8. Timely Manner

The auxiliary aid or service must be provided in a timely manner although there is no specific time period in the law. The aid or services must be provided “as soon as possible” and cannot be delayed if the student is involved in a special education evaluation or the IEP process.

9. Privacy Considerations

The aid or service must be provided in a way that protects the privacy and independence of the individual. Conversations involving sensitive information must be conducted privately and aids/services must be provided in a manner that does not unnecessarily disclose the nature and extent of the individual’s disability.

10. Grounds for Refusing an Aid/Service

A school is required to provide an auxiliary aid or service unless the head of the school district or their designee determines that it would result in a “fundamental alteration in the nature of the service, program or activity” or results “in undue financial and administrative burdens” after consideration of all resources available in the funding and operation of the program. Such a determination must be in a written statement of the reasons for such conclusion. The school would have the burden of proving such a standard if challenged.

11. Costs of Aids/Services

The ADA prohibits a school from charging for auxiliary aids or services. The guidance “strongly advise school districts that they
inform students with disabilities and their parents” that there is no cost for such supports.

IDEA funds may be used to pay for auxiliary aids and services only if such services are also required under the IDEA to be included in the student’s IEP. If such services are not in the IEP, IDEA funds may not be used.

12. Individuals with Disabilities other than Students

The ADA requirements for effective communication applies to all of the school district’s programs such as parent-teacher conferences, meetings, ceremonies, open houses and field trips.

13. Dispute Resolution Procedures

Unlike the IDEA, the ADA has no due process hearing or state administrative complaint procedures. Although mediation is not required under the ADA there is nothing to prohibit a school from offering mediation as an option. If such option is offered, it is the school’s responsibility to provide and pay for the mediator.

The options that a parent of a student with a disability who disputes the school’s determination regarding necessary auxiliary aids and services are:

a. File an ADA Complaint under the school district’s complaint process.

Under the ADA (28 CFR 35.107), a public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part. Note: Since Section 504 also has a requirement for a school district to establish a complaint procedure, consideration should be given to incorporating the ADA requirements into the school district’s current Section 504 processes.

b. File a complaint with the United States Department of Education’s Office for Civil Rights

c. File a complaint with the United States Department of Justice’s Civil Rights Division
d. File a civil action in United States Federal Court. Note, however, if the parent is seeking relief that would also be available under the IDEA, then the parent must exhaust the IDEA’s due process hearing procedures.

I. OCR conducted a compliance review of a virtual charter school. The compliance review assessed whether the school discriminated against students with disabilities under the ADA and Section 504. OCR determined that the school had not established policies and procedures or practices required under both laws. Relevant to the effective communication requirements, OCR determined that the school's website and online learning environment did not comply with accessibility standards and were not accessible to individuals with disabilities, including visual impairments, to provide them with an equal opportunity to participate in or benefit from its web-based education program. Lastly, OCR found that the school had not provided training to the Section 504 Coordinator to ensure that she had sufficient knowledge of the legal requirements of Section 504 and Title II to effectively carry out her responsibilities. Virtual Community School of Ohio 62 IDELR 124 (United States Department of Education, Office for Civil Rights (2013)

J. A school district agreed to enter into a settlement agreement with the United States Department of Justice (DOJ) in response to a complaint under the ADA from a parent. The parent, who is deaf and uses American Sign Language to communicate, is the parent of a student who was placed in the school district’s Early Childhood Intervention Program. This program provides family-centered early intervention services for infants and toddlers with developmental delays. Parental involvement is a key component of the program. The complaint alleged that the School District denied her effective communication by refusing to provide her with a sign language interpreter at either the home or center-based teaching sessions, so that she could actively participate in the education of her child. The settlement agreement requires the school district to modify its policies, practices and procedures to ensure that communication with parents with disabilities are as effective as communication with other parents. The school district must submit any changes for approval by the DOJ. In addition, the school district must provide training to staff members who interact with parents on the ADA’s requirement for effective communication. Lastly, the agreement requires the school district to pay $5,000 in compensatory damages to the parent. Settlement Agreement Between the United States and the School District of the City of Detroit (DJ #204-37-342) (2015)
IV. IEPs and Grade Level Standards

A. When Congress reauthorized the IDEA in 1997, the IDEA emphasized access to the general curriculum for the first time. The findings in the statute state:

The Congress finds….over 20 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children and ensuring their access in the general curriculum to the maximum extent possible. (20 U.S.C. Section 1400(c)(5)). (emphasis added)

B. Special Education (34 CFR 300.39)

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction (i) To address the unique needs of the child that result from the child's disability; and (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. (emphasis added)

C. The United States Department of Education issued a guidance letter stating that an IEP “must be aligned with the State’s academic content standards for the grade in which the child is enrolled” (emphasis added) in order to have meaningful access to the general curriculum. However, the Department recognized that this alignment must guide but not replace the IEP Team’s individualized consideration of the student. The Department’s guidance further stated:

In a case where a child's present levels of academic performance are significantly below the grade in which the child is enrolled, in order to align the IEP with grade-level content standards, the IEP Team should estimate the growth toward the State academic content standards for the grade in which the child is enrolled that the child is expected to achieve in the year covered by
the IEP. In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious but achievable. In other words, the annual goals need not necessarily result in the child's reaching grade-level within the year covered by the IEP, but the goals should be sufficiently ambitious to help close the gap.

In addition, for students with significant cognitive disabilities the IEP Team may determine that the student’s performance will be measured against alternate academic achievement standards. Such standards must still be aligned with that State’s grade level content standards, however, they may be restricted in scope or complexity or take the form of introductory skills. Dear Colleague Letter 66 IDELR 227 (United States Department of Education, Office of Special Education and Rehabilitative Services (2015)).

D. The parents of a 17 year old student with a specific learning disability challenged his IEPs which they alleged were not based on his individual needs. The Court concluded that the IEPs’ reading goals were inappropriate given the student’s assessment data.

The IDEA requires IEPs that include a reasonably accurate assessment of students and meaningful goals based on the student’s individual needs. The evidence here indicated that the IEP goal for reading was not designed for this student but was the "state standard for ninth grade students" regardless of whether it fit his particular needs. The teachers testified that “they just inserted the standard 9th grade goal” even though his reading skills were assessed to be on a first grade level. The Court noted the school’s apparent use of boilerplate IEPs, with goals far above the student’s reading level, indicated that the reading goals of the student’s IEPs did not provide him with any educational benefits beyond those he would have received if he never had the IEPs. It appeared the student was treated as any other disabled student during the creation of his IEPs, and was held to the same standards that any student, with or without a disability, would have been.

The Court found that such a practice flies in the face of the purpose and goals of the IDEA, which require the district to develop an individualized program with measurable goals. The point of requiring an IEP is to have the program meet the child's unique needs, not to assume that all children in special education are capable of meeting state goals for that grade level. In addition, the Court found that the transition services were inappropriate. The IDEA requires IEPs to include "appropriate measurable post-secondary goals based on an age appropriate transition assessment" and to
describe the transition services to be provided. In this case, the vague language used to describe the student’s postsecondary goal -- "student will be prepared to participate in post-secondary education" -- did not match his diploma track. The student was placed on an alternate diploma track which is designed to prepare students with disabilities for employment upon exiting high school. The Court stated that this was another illustration of the school’s use of stock language in the planning and implementation of this student’s IEP. As a result, FAPE was denied.

Jefferson County Board of Education v. Lolita S. 64 IDELR 34 (United States Court of Appeals, 11th Circuit (2014)). Note: This is an unpublished decision.

Note: This outline is intended to provide workshop participants with a summary of selected Federal statutory/regulatory provisions and selected judicial interpretations of the law. The presenter is not, in using this outline, rendering legal advice to the participants. The services of a licensed attorney should be sought in responding to individual student situations.