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NOT TURNING A DEAF EAR: HOW *K.M. v. TUSTIN UNIFIED SCHOOL DISTRICT* EXPANDS THE RIGHTS OF DEAF OR HARD-OF-HEARING STUDENTS

*Liliana Kim**

I. INTRODUCTION

*K.M. ex rel. Bright v. Tustin Unified School District*¹ was a matter of first impression before the Ninth Circuit Court of Appeals.² The court consolidated two California district court cases that were strikingly similar in their facts and procedural histories.³ Both cases involved claims by deaf or hard-of-hearing students,⁴ K.M. and D.H., under Title II of the Americans with Disabilities Act (ADA).⁵ The plaintiffs claimed that their school districts, Tustin Unified School

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1. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013).

2. *Id.* at 1100.

3. See *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, No. SACV 10-1011 DOC (MLGx), 2011 WL 2633673 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013); *D.H. v. Poway Unified Sch. Dist.*, No. 09CV2621-L NLS, 2011 WL 883003 (S.D. Cal. Mar. 14, 2011).

4. Much confusion surrounds the use of the terms “deaf” and “hard of hearing,” the most socially accepted terms to describe those with hearing loss. UNIV. OF WASH., *How Are the Terms Deaf, Deafened, Hard of Hearing, and Hearing Impaired Typically Used?*, DO-IT (Jan. 22, 2013), <http://www.washington.edu/doit/Faculty/articles?86>. Generally, “deaf” refers to a hearing loss so severe that there is little or no functional hearing. *Id.* “Hard of hearing” refers to a hearing loss with enough residual hearing that an auditory device can adequately assist the processing of speech. *Id.* “How people ‘label’ or identify themselves is personal and may reflect identification with the deaf and hard of hearing community, the degree to which they can hear, or the relative age of onset.” *Community and Culture—Frequently Asked Questions*, NAT’L ASS’N OF THE DEAF, <http://www.nad.org/issues/american-sign-language/community-and-culture-faq> (last visited Mar. 30, 2014). The Ninth Circuit referred to the plaintiffs K.M. and D.H. as “deaf or hard of hearing,” and the author follows suit in this Comment. *Tustin*, 725 F.3d at 1092.

5. *Tustin*, 725 F.3d at 1092; see *infra* note 47 and accompanying text about Title II of the ADA.

District in Orange County and Poway Unified School District in San Diego County, had an obligation to provide them with Communication Access Realtime Translation (CART) services.⁶ Also known as Computer Aided Realtime Captioning, CART is a speech-to-text, word-for-word transcription service that is becoming one of the most requested services for the deaf or hard of hearing.⁷

The main question before the court was whether the plaintiffs were foreclosed from pursuing a claim under the ADA when they had already failed on a claim under the Individuals with Disabilities Education Act (IDEA).⁸ In answering this question, two derivative issues surfaced. First, the court considered whether the IDEA and the ADA impose similar and overlapping obligations on school districts to accommodate the needs of disabled students.⁹ Second, the court considered who is in the best position to assess the needs of disabled students, and to what extent those needs should be met.¹⁰

K.M. v. Tustin was the first case to address these issues with regard to assistive technology devices for deaf or hard-of-hearing students in a school setting.¹¹ The court held that the ADA and IDEA imposed different and sometimes non-overlapping requirements on school districts to meet the educational and communication needs of disabled students.¹² Thus, the plaintiffs could pursue an independent claim under the ADA, even though they had previously failed on an IDEA claim.¹³ The decision also emphasized that under Title II of the ADA, primary consideration should be given to the requests of students with disabilities.¹⁴

This Comment will argue that *K.M. v. Tustin* is a precedential decision that expands the rights of deaf or hard-of-hearing students.

6. *Tustin*, 725 F.3d at 1092.

7. *Computer Aided Realtime Translation*, E-MICH. DEAF AND HARD OF HEARING PEOPLE, http://www.michddh.org/assistive_devices/cart.html (last visited Mar. 30, 2014). Using trained stenographers and computer software, CART can “translate the spoken word into the written word nearly as fast as people can talk,” even capturing dialogue and a description of sounds. *Id.* Another benefit of this service is the “legacy of a text file that may be received at the conclusion of the class.” *Id.*

8. *Tustin*, 725 F.3d at 1092; see *infra* notes 36–40 and accompanying text about the IDEA.

9. *Tustin*, 725 F.3d at 1098–99.

10. See *id.* at 1100–01.

11. See *id.* at 1100 (“[W]e must address the question by comparing the *particular* provisions of the ADA and the IDEA covering students who are deaf or hard-of-hearing . . .”).

12. *Id.* at 1102.

13. *Id.*

14. *Id.* at 1096.

Part II will discuss the relevant facts and procedural history of the case. Part III will trace the court's reasoning in reaching its decision, particularly the procedural and substantive differences between the ADA and IDEA requirements. Part IV will analyze the decision's significance, especially the court's unique role in identifying key misunderstandings of the law and reinterpreting a school district's obligations under the statutes. Most noteworthy is the court's close analysis of statutory text, implementing regulations, and legislative intent to establish that primary consideration should be given to the student's needs. Lastly, Part V will conclude with some final remarks.

II. STATEMENT OF THE CASE

Though K.M. and D.H. (collectively, "the plaintiffs") appeared to be above-average students, their hearing loss presented significant social and communication barriers.¹⁵ K.M. had been diagnosed with a severe binaural (affecting both ears) hearing loss as an infant.¹⁶ As a result, she wore two cochlear implants,¹⁷ hearing devices for those with severe-to-profound hearing loss.¹⁸ K.M. also depended on lip reading and visual cues.¹⁹ Schools included her in general education classes since kindergarten, and K.M. performed well academically.²⁰ Some of her teachers reported that K.M. participated in classroom discussions just as capably as other students.²¹ But K.M. saw her situation differently.²² She reported that following along in class required intense concentration, and this effort left her mentally exhausted at the end of the day.²³ She had a particularly difficult time hearing when there was background noise, such as the hum of the air

15. See Reply Brief of Appellant at 5–7, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (No. 11-56259); Brief of Appellant, *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (No. 12-56224).

16. Brief of Appellee-Defendant *Tustin Unified Sch. Dist.* at 3, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (No. 11-56259).

17. *Id.* at 4. A cochlear implant is a "device that provides direct electrical stimulation to the auditory (hearing) nerve in the inner ear." *Cochlear Implants*, AM. SPEECH-LANGUAGE-HEARING ASS'N, <http://www.asha.org/public/hearing/Cochlear-Implant/> (last visited Mar. 30, 2014).

18. *Id.*; Brief of Appellee-Defendant, *supra* note 16, at 4.

19. Reply Brief of Appellant, *supra* note 15, at 5.

20. Brief of Appellee-Defendant, *supra* note 16, at 4.

21. *Tustin*, 725 F.3d at 1093.

22. Reply Brief of Appellant, *supra* note 15, at 5–6.

23. *Id.* at 5.

conditioner or when more than one person was talking.²⁴ She found taking notes taxing because she needed to choose between looking down at her paper to write or watching the speaker to decipher the words.²⁵ Wanting to fit in, K.M. sometimes nodded to pretend that she was listening, or laughed along when she did not hear a joke.²⁶

Likewise, D.H. had moderate-to-profound hearing loss and heard only forty to fifty percent of what was said in the classroom.²⁷ She wore a cochlear implant in one ear and a hearing device in the other.²⁸ She needed to listen carefully when people spoke, and she paid close attention to their body language.²⁹ She was not always aware when she missed something that was said.³⁰ She struggled with small group projects and with understanding directions to homework assignments, requiring extra time outside of class and help from family members.³¹ However, D.H. learned to adapt to the environment of a general classroom by observing her classmates, imitating what they did, picking up context clues, and “put[ting] together the pieces of the puzzle” based on what she did hear.³² As a result of her efforts to blend in, none of her private struggles were visible to teachers.³³ She earned mostly As in her classes and was well liked by peers and teachers.³⁴

In preparation for high school, both K.M. and D.H. requested CART and were denied by their respective school districts.³⁵ The plaintiffs then filed an administrative complaint challenging the denial under the IDEA.³⁶ The IDEA is a federal statute that funds supplemental educational services and support for disabled students

24. *Id.* at 10.

25. *Id.* at 6.

26. *Id.* at 5.

27. Brief of Appellant, *supra* note 15, at 11.

28. Answering Brief of Appellee-Defendant at 3, D.H. *ex rel.* Harrington v. Poway Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (No. 12-56224).

29. Brief of Appellant, *supra* note 15, at 13.

30. *Id.* at 15–16.

31. *Id.* at 12, 15, 18.

32. *Id.* at 14.

33. *Id.* at 16–17; *see* Answering Brief of Appellee-Defendant, *supra* note 28.

34. *See* Answering Brief of Appellee-Defendant, *supra* note 28, at 3, 7.

35. K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1092 (9th Cir. 2013).

36. *Id.* at 1093–94. The Individuals with Disabilities Education Act was enacted “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A) (2004).

to ensure that they have access to a free and appropriate public education.³⁷ These additional services revolve around a written Individualized Education Plan (IEP) that is designed for each student to specifically address their needs and tailor services to them.³⁸ Any challenge to the IEP must be made through either a due process hearing or a state complaint procedure, both of which are administrative proceedings.³⁹ The IDEA does not foreclose disabled students from pursuing additional constitutional or federal claims, as long as they first exhaust their administrative remedies.⁴⁰

The administrative law judges (ALJ) in K.M.'s and D.H.'s cases concluded that the school districts had complied with their obligations under the IDEA to provide students with a "free appropriate public education" (FAPE).⁴¹ The legal standard for a FAPE is fairly low: the student's IEP must be "reasonably calculated to enable the child to receive educational benefits."⁴² The IDEA does not require that disabled students be provided with a "potential-maximizing education."⁴³ In essence, this means that as long as a student receives passing marks and advances from grade to grade, a district has met the legal standard for a FAPE.⁴⁴

Because both K.M. and D.H. were above-average students who had been mainstreamed into general education classes from grade to grade, the ALJ concluded that CART was a "potential-maximizing"

37. *Section 504 and IDEA Comparison Chart*, NAT'L CENTER FOR LEARNING DISABILITIES, <http://www.ncl.org/disability-advocacy/learn-ld-laws/adaaa-section-504/section-504-idea-comparison-chart> (last visited Apr. 12, 2014). See *infra* note 42 and accompanying text about the FAPE requirement.

38. *A Guide to the Individualized Education Program*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/parents/needs/speced/iepguide/index.html> (last visited Apr. 12, 2014). The IEP team consists of parents, teachers, administrators, and other educational services providers that regularly monitor and evaluate the student's progress. *Id.*

39. *Id.*

40. *Tustin*, 725 F.3d at 1097; see also *Mark H. v. Lemahieu*, 513 F.3d 922, 934 (9th Cir. 2008).

41. *Tustin*, 725 F.3d at 1093–94.

42. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 207 (1982). *Rowley* is a landmark U.S. Supreme Court decision that set the standard for a FAPE. It reversed a Second Circuit decision directing a New York school board to provide sign-language interpretation in the classroom for an eight-year-old deaf child. *Id.* at 209–10. The Supreme Court defined a FAPE by holding that it does not require a state to maximize a disabled student's educational potential to match that of non-disabled students. *Id.* at 177. Because the child was performing above average and advancing from grade to grade, the Court found that the district had met its obligation to provide a FAPE under the IDEA. *Id.* at 209.

43. *Id.* at 197 n.21.

44. *Id.* at 204.

service not required under the IDEA.⁴⁵ The plaintiffs already received supplemental services and supports such as preferential seating, auditory-verbal therapy, FM amplification, repeating and paraphrasing of class discussions, copies of class notes, and extra time for assignments that the ALJ found satisfied the standard for a FAPE.⁴⁶

Dissatisfied, the plaintiffs filed a complaint in district court challenging the administrative decision and claiming disability discrimination under Title II of the ADA.⁴⁷ Title II is a federal statute, enacted in 1990, that prohibits public entities from discriminating on the basis of disability.⁴⁸ The district courts granted summary judgment in favor of the defendants, affirming the administrative decision on the IDEA claim.⁴⁹ Regarding the ADA claim, the district courts held that “a plaintiff’s failure to show a deprivation of a FAPE under the IDEA dooms a claim . . . under the ADA.”⁵⁰ The plaintiffs then challenged the district courts’ rulings on their ADA claims.⁵¹

III. REASONING OF THE COURT

The Ninth Circuit Court of Appeals began by comparing the IDEA’s and the ADA’s procedural and substantive requirements.⁵² First, it noted that the IDEA provides primarily *procedural* protections for disabled students, rather than substantive ones: “States receiving federal funds under the IDEA must show that they have implemented ‘policies and procedures’ to provide disabled students with a FAPE.”⁵³ For students who are deaf or hard of hearing, an IEP team must consider “the child’s language and communication needs,” “the concerns of the parents for enhancing the education of their child,” and “whether the child needs assistive

45. See *Tustin*, 725 F.3d at 1093–94.

46. Answering Brief of Appellee-Defendant, *supra* note 28, at 22; Brief of Appellee-Defendant, *supra* note 16, at 6.

47. *Tustin*, 725 F.3d at 1093–94.

48. 42 U.S.C. § 12132 (1990) (“[N]o 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.”).

49. *Tustin*, 725 F.3d at 1093–95.

50. *Id.* at 1098.

51. *Id.* at 1094–95.

52. See *id.* at 1095–97.

53. *Id.* at 1095.

technology devices and services.”⁵⁴ The IDEA provides parents with procedural safeguards, such as “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.”⁵⁵ As previously mentioned, the IDEA’s substantive standard is fairly low: the IEP must be “reasonably calculated to enable the child to receive educational benefits.”⁵⁶ It does not require states to provide disabled students with a “potential-maximizing education.”⁵⁷ Instead, it only requires a threshold minimum for students who are mainstreamed into regular classrooms: passing grades and advancement from grade to grade.⁵⁸

In contrast to the IDEA, the ADA establishes more stringent substantive requirements for public entities.⁵⁹ Title II of the ADA, which applies to public services, assigns the Department of Justice (DOJ) with the task of establishing regulations to implement its provisions.⁶⁰ The key regulation at the heart of the plaintiffs’ argument is the “effective communications regulation” in 28 C.F.R. § 35.160, which has two requirements.⁶¹ 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*.”⁶² 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.”⁶³ In determining which services are necessary, “a public entity shall give primary consideration to the requests of the individual with disabilities.”⁶⁴

According to the appellate court, the essential difference between the IDEA and the ADA is that the IDEA emphasizes access,

54. 20 U.S.C. § 1414(d)(3)(A)(ii), (B)(iv)–(v) (2012).

55. *Tustin*, 725 F.3d at 1095.

56. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 206–07 (1982).

57. *Id.* at 197 n.21.

58. *Id.* at 204.

59. *Tustin*, 725 F.3d at 1100.

60. *Id.* at 1096.

61. 28 C.F.R. § 35.160 (1991).

62. *Id.* § 35.160(a) (emphasis added).

63. *Id.* § 35.160(b)(1) (emphasis added).

64. *Id.* § 35.160(b)(2).

while the ADA emphasizes *equal* access:

[T]he 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 . . . require public entities to take steps toward 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.⁶⁵

While the IDEA is concerned with meeting a threshold level of education by an IEP, Title II of the ADA is concerned with meeting the communication and educational needs of disabled students as effectively as those of other students.⁶⁶ However, the court noted that there are limitations to the application of these Title II requirements: a public entity need not “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.”⁶⁷ Thus, Title II provides public entities a defense that is unavailable under the IDEA.⁶⁸

The appellate court weighed other factors in its decision to allow the plaintiffs to pursue their ADA claims. The court emphasized that the ADA regulations require that “primary consideration” be given “to the requests of the individual with disabilities”⁶⁹—a provision that “has no direct counterpart in the IDEA.”⁷⁰ While the IDEA requires that schools involve parents and students in the decision-making process, it does not give their requests “primary” weight.⁷¹ Furthermore, the court gave great deference to the DOJ’s interpretation of the Title II effective communication regulations, as

65. *Tustin*, 725 F.3d at 1097.

66. *Id.*

67. *Id.* at 1096 (citing 28 C.F.R. § 35.164).

68. *Tustin*, 725 F.3d at 1101.

69. 28 C.F.R. § 35.160(b)(2).

70. *Tustin*, 725 F.3d at 1101.

71. *Id.* (citing *Bradley ex rel. Bradley v. Ark. Dep’t of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006)).

expressed in the DOJ's amicus brief:⁷² "An agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation.'"⁷³ Based on the court's statutory analysis and the DOJ's own interpretation of the effective communication regulation, the court concluded that "the IDEA FAPE requirement and the Title II communication requirements are significantly different."⁷⁴ As a result, the court reversed the district courts' grant of summary judgment for the defendants and remanded the case to give the plaintiffs an opportunity to argue the merits of their claims.⁷⁵

IV. ANALYSIS

K.M. v. Tustin is influential for two important reasons. First, the case explicitly recognized that the IDEA and the ADA impose different and sometimes non-overlapping requirements. Second, the case established that an inquiry into a school district's compliance with Title II requirements should give primary consideration to the student's needs.

A. K.M. v. Tustin Is the First Case to Explicitly Recognize a Difference Between the IDEA and the ADA in Meeting the Needs of Deaf or Hard-of-Hearing Students

K.M. v. Tustin addressed a matter of first impression in the Ninth Circuit. It is the first case to consider the differences between a school district's obligations under the IDEA's FAPE requirement and the Title II "effective communications" requirement in meeting the needs of deaf or hard-of-hearing students.⁷⁶ In doing so, *K.M. v.*

72. *Id.* at 1100. The DOJ argued in its amicus curiae brief to the court that *K.M.* presented a legitimate question of fact regarding the district's failure to meet her effective communication needs under Title II, thus precluding summary judgment. The court's interpretation of the effective communication regulation closely resembles the DOJ's interpretation. See Brief of the United States as Amicus Curiae Supporting Appellant and Urging Remand, *K.M. ex rel. Bright v. Tustin* Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (No. 11-56259) [hereinafter DOJ Amicus Curiae Brief], available at <http://www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf>.

73. *Tustin*, 725 F.3d at 1100 (citing *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2012)).

74. *Id.*

75. *Id.* at 1103.

76. *Id.* at 1100 ("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.").

Tustin identified several misunderstandings of the law by the lower district courts.⁷⁷ First, district courts have overstated the connection between the IDEA and Section 504 of the Rehabilitation Act of 1973.⁷⁸ Section 504 is a “civil rights law to prohibit discrimination on the basis of disability in programs and activities, public and private, that receive federal financial assistance.”⁷⁹ Second, district courts have overstated the connection between Section 504 and Title II of the ADA, which has led to the misunderstanding that a failed claim under the IDEA necessarily dooms all claims under Title II of the ADA.⁸⁰

Other circuits have perpetuated this misunderstanding that the IDEA, Section 504, and the ADA are essentially equivalent.⁸¹ In *Chambers ex rel. Chambers v. School District of Philadelphia Board of Education*,⁸² the Third Circuit held that the “same standards” governed the plaintiffs’ Section 504 and ADA claims on behalf of their cognitively disabled child, so the claims could be addressed “in the same breath.”⁸³ The court did, however, vacate the lower court’s grant of summary judgment for the defendants on the Section 504 and ADA claims, recognizing that a failed IDEA claim did not necessarily foreclose a claim under Section 504 and the ADA.⁸⁴ But this distinction was never explicit in the court’s reasoning, nor did the court elaborate on the differences between the statutes.⁸⁵ In fact, the court preferred to “refrain from wading into this dispute.”⁸⁶

The Tenth Circuit acknowledged a difference between the

77. *Id.* at 1098–1100.

78. *Id.* at 1098–99.

79. *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RIGHTS EDUC. & DEF. FUND, <http://dredf.org/advocacy/comparison.html> (last visited Mar. 14, 2014). Along with the IDEA and the ADA, Section 504 provides disabled students a third cause of action when asserting a district’s failure to meet their educational needs. *See id.* Section 504, like the IDEA, also contains a FAPE requirement, but the Ninth Circuit held that the two are “overlapping but different.” *See Mark H. v. Lemahieu*, 513 F.3d 922, 924 (9th Cir. 2008).

80. *Tustin*, 725 F.3d at 1098–1100.

81. *See infra* notes 83, 88, 95.

82. 587 F.3d 176 (3d Cir. 2009).

83. *Id.* at 189 (citing *McDonald v. Pa., Dep’t of Pub. Welfare, Polk Ctr.*, 62 F.3d 92, 95 (3d Cir. 1995) (holding that “[w]hether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same”).

84. *Id.* at 189–90.

85. *Id.* (“We think that the record contains enough of a genuine factual dispute about whether the School District in fact provided Ferren with a FAPE, not to mention whether the School District otherwise committed [Section 504] and ADA violations.”).

86. *Id.* at 190.

statutes in *Ellenberg v. New Mexico Military Institute*,⁸⁷ but its application is limited.⁸⁸ In *Ellenberg*, the plaintiffs sued a public military boarding school for denying admission to their emotionally disabled child in violation of the IDEA.⁸⁹ The appellate court dismissed the IDEA claim because the plaintiffs had failed to exhaust the IDEA's procedural requirements.⁹⁰ However, the court held that:

[O]ur precedent does not hold that a party's discrimination claims under [Section 504] and the ADA must automatically be dismissed if an IDEA claim fails. . . . Thus, even if plaintiffs conceded that New Mexico fully satisfied its IDEA obligations . . . they could pursue claims under the ADA and [Section 504] on the grounds that [the plaintiff] was precluded from receiving a state benefit—military-style education—provided to her non-disabled peers.⁹¹

Ellenberg recognized that compliance with the IDEA's FAPE requirement did not establish compliance with Section 504 or the ADA.⁹² Any other interpretation of the statutes would allow a school to discriminate against a disabled student as long as it provided the student with a FAPE.⁹³ However, it is not clear whether *Ellenberg* extends to claims by deaf or hard-of-hearing students who are not requesting a state benefit provided to non-disabled peers but, instead, an auxiliary transcription service.

In *Moseley v. Board of Education of Albuquerque Public Schools*,⁹⁴ the Tenth Circuit avoided defining how far *Ellenberg* extends.⁹⁵ The plaintiff in *Moseley*, like K.M. and D.H., was a deaf student who requested and was denied CART.⁹⁶ The district court ruled against him, finding that “denial of the IDEA claim precluded the [Section] 504 and Title II claims as all three claims shared the same substantive standard and the same set of facts gave rise to

87. 478 F.3d 1262 (10th Cir. 2007).

88. *Id.*

89. *Id.* at 1271–73.

90. *Id.* at 1276.

91. *Id.* at 1281–82.

92. *Id.*

93. *Id.* at 1281–82.

94. 483 F.3d 689 (10th Cir. 2007).

95. *Id.* at 692 n.5.

96. *Id.* at 690–92.

each.”⁹⁷ The plaintiff appealed the decision, arguing that the lower court had improperly dismissed his Section 504 and ADA claims by conflating their substantive standards with that of the IDEA.⁹⁸

In *Moseley*, the Tenth Circuit avoided ruling on the plaintiff’s appeal because it found that his claims were moot.⁹⁹ By the time of the appeal, the plaintiff had graduated from high school, thereby mooting his claim to a FAPE under the IDEA.¹⁰⁰ In a sweeping statement, the court also held that “[l]ikewise, Mr. Moseley’s general request for other appropriate relief is moot.”¹⁰¹ The court’s reasoning reflects the persistent presumption that a plaintiff’s Section 504 and ADA claims have no independent basis if his IDEA claim fails.¹⁰²

Against this statutory background, it is easy to see why *K.M. v. Tustin* is a precedent-setting case. The Ninth Circuit is one of the first to delve into and analyze the actual text of the statutes, their implementing regulations, and the intent of the legislators.¹⁰³ In particular, the court provided valuable insight into the connection between Title II of the ADA and Section 504, a relationship more nuanced than even the Ninth Circuit previously acknowledged.¹⁰⁴

In *K.M. v. Tustin*, the Ninth Circuit emphasized that Congress mandated that the federal regulations implementing Title II of the ADA be consistent with “certain, but not all of the regulations enforcing Section 504.”¹⁰⁵ Specifically, Congress mandated that the regulations concerning “communications” for Title II be consistent with Section 504 regulations codified at 28 C.F.R. § 39, which is not

97. *Id.* at 692 (relying on *Urban by Urban v. Jefferson Cnty. Sch. Dist.*, R-1, 89 F.3d 720, 728 (10th Cir. 1996) (holding that “[r]elying on the similarity between the substantive and procedural frameworks of the IDEA and Section 504 . . . we conclude that if a disabled child is not entitled to a neighborhood placement under the IDEA, he is not entitled to such a placement under section 504”).

98. *Id.* at 692.

99. *Id.* at 689.

100. *Id.* at 693 (relying on *T.S. v. Indep. Sch. Dist. No. 54*, Stroud, Oklahoma, 265 F.3d 1090, 1092 (10th Cir. 2001) (holding that “[o]nce a student has graduated, he is no longer entitled to a FAPE; thus any claim that a FAPE was deficient becomes moot upon a valid graduation”).

101. *Id.*

102. *See K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1098–1100 (9th Cir. 2013).

103. *See id.* at 1095–1101.

104. *See id.* at 1095–98 (“We have observed on occasion that ‘there is no significant difference in the analysis of rights and obligations created by the two Acts.’” (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002))).

105. *Id.* at 1099.

the Section 504 FAPE regulation.¹⁰⁶

This departure is significant. It proves that Congress did not intend Title II of the ADA to impose a FAPE requirement, so a Title II claim is not predicated on a district's provision of a FAPE under either the IDEA or Section 504.¹⁰⁷ The "effective communications" provision of Title II of the ADA "establishes independent obligations on the part of the public schools to students who are deaf or hard-of-hearing."¹⁰⁸ While the IDEA is concerned with meeting the threshold educational needs of disabled students, Title II of the ADA is concerned with meeting the educational needs of disabled students as effectively as the needs of non-disabled students.¹⁰⁹ Thus, a plaintiff has standing to sue under Title II regardless of the outcome of his or her IDEA claim.¹¹⁰

*B. K.M. v. Tustin Recognizes That Disabled
Individuals Are in the Best Position
to Speak About Their Disability.*

K.M. v. Tustin is a triumph for the deaf or hard-of-hearing community in less obvious but radical ways. The case raised the controversial question of who is in the best position to assess whether a disabled student's needs are being met, and to what extent those needs should be met.¹¹¹ The court's decision indicates that the challenges and intricacies of being deaf or hard of hearing are best understood by those who actually suffer the disability.¹¹²

As K.M.'s and D.H.'s stories illustrate, a student's daily experiences with a disability do not always match a teacher's limited perception and understanding of it.¹¹³ The district court that ruled against K.M. acknowledged in its decision that it was "reluctant to adopt fully teacher and administrator conclusions about K.M.'s

106. *Id.*; see also 42 U.S.C. § 12134(b) (1990) ("With respect to 'program accessibility, existing facilities,' and 'communications,' such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations . . .").

107. *Tustin*, 725 F.3d at 1099.

108. *Id.*

109. See *id.* at 1097.

110. *Id.* at 1101 ("[W]e 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.").

111. See *id.* at 1100–01.

112. See *id.* (emphasizing that the ADA gives primary consideration to the requests of the individual with disabilities).

113. Compare Reply Brief of Appellant, *supra* note 15, at 5–8, with Brief of Appellee-Defendant, *supra* note 16, at 7–12.

comprehension levels over the testimony of K.M. herself.”¹¹⁴ The court further recognized that K.M.’s “difficulty following discussions may have been greater than her teachers perceived.”¹¹⁵ K.M. argued that the school district focused solely on teachers’ favorable observations of her, which was only a result of “her own considerable effort” to fit in and appear normal.¹¹⁶ The school district mistook K.M.’s above-average performance in school for effective communication, unaware of the mental exhaustion, frustration, and confusion that K.M. experienced on a daily basis.¹¹⁷

The school district also ignored teachers’ less favorable observations of K.M. that hinted at signs of trouble.¹¹⁸ One teacher had noted that K.M. lost focus during lectures and needed to take better notes.¹¹⁹ The same teacher could not recommend K.M. for an advanced placement history class because she was not active enough in class discussions.¹²⁰ Arguably, the observations of a teacher—who juggles multiple tasks and manages a classroom full of students—is “not an accurate determination” of individual hearing loss.¹²¹ But the ALJ and the district court relied heavily on these observations in deciding that K.M.’s needs had been met—and relied on them selectively, disregarding all evidence to the contrary.¹²²

K.M. v. Tustin is a triumph for the deaf or hard-of-hearing community because it recognizes that disabled students are in the best position to speak about their disability. As the DOJ noted in the *Americans with Disabilities Act Title II Technical Assistance Manual* and amicus curiae brief to the Ninth Circuit, “the individual with a disability is most familiar with his or her disability,”¹²³ and can best “identify his or her needs and the type of aid that will most

114. K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 WL 2633673, at *9 (C.D. Cal. July 5, 2011), *rev’d in part*, 725 F.3d 1088 (9th Cir. 2013).

115. *Id.*

116. Reply Brief of Appellant, *supra* note 15, at 6–8.

117. *Id.* at 7.

118. *See id.* at 9–11.

119. *Id.* at 9–10.

120. *Id.* at 10.

121. *See id.*

122. *See* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., No. SACV 10-1011 DOC (MLGx), 2011 WL 2633673, at *9 (C.D. Cal. July 5, 2011), *rev’d in part*, 725 F.3d 1088 (9th Cir. 2013).

123. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., THE AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL § II-7.1100 [hereinafter TITLE II TECHNICAL ASSISTANCE MANUAL], available at <http://www.ada.gov/taman2.html#II-7.1100>.

effectively provide communications for him or her.”¹²⁴ It is especially important to give “primary consideration” to the disabled individual’s preferences because of the “particularly personal nature of choosing a mode of communication.”¹²⁵ The difference between one assistive technology device and another might seem inconsequential to an individual who does not rely on such devices. But for deaf or hard-of-hearing persons, this choice may determine how they interact with and process the world around them.¹²⁶

The decision of which assistive technology device to use is highly personal and tailored to the individual’s needs.¹²⁷ It considers a variety of relevant factors, such as the student’s abilities and difficulties accessing information, environmental considerations such as noise and room acoustics, the student’s own familiarity and comfort level with certain technology, and the peculiarities of the class itself (whether it involves lecture or discussion, the amount of group work, the types of assignments, even the teacher’s own movements and walking patterns).¹²⁸ In assessing these highly variable factors and their daily impact on a student’s learning experience, the inquiry must revolve around the student.¹²⁹

By giving “primary consideration” to the needs of deaf or hard-of-hearing students, *K.M. v. Tustin* has potentially far-reaching and radical social implications. Deaf or hard-of-hearing students face communication obstacles that can significantly impact their social interactions with peers.¹³⁰ When mainstreamed into regular classrooms, they are likely surrounded by only hearing individuals,

124. DOJ Amicus Curiae Brief, *supra* note 72, at 19 (citing TITLE II TECHNICAL ASSISTANCE MANUAL § II-7.1100).

125. *Id.* at 23 (citing TITLE II TECHNICAL ASSISTANCE MANUAL § II-7.1100).

126. See Stacie Heckendorf, *Assistive Technology for Students who are Deaf or Hard of Hearing*, WIS. ASSISTIVE TECH. INITIATIVE (WATI) 1, 6 (2009), <http://www.wati.org/content/supports/free/pdf/Ch13-Hearing.pdf> (“Assistive technology for deaf or hard of hearing students often has a profound impact on their ability to access information and be part of a community . . .”).

127. See *id.* at 4 (“Each deaf or hard of hearing student performs differently in regards to how they utilize their residual hearing, are affected by different environments, and benefit from technology.”).

128. *Id.* at 4–5.

129. *Id.* at 4–6 (“[A]ccessibility needs are highly variable and may require different technologies over time, within different environments and even among students.”).

130. See Yael Bat-Chava & Elizabeth Deignan, *Peer Relationships of Children with Cochlear Implants*, 6(3) J. DEAF STUD. DEAF EDUC. 186 (2001), <http://jdsde.oxfordjournals.org/content/6/3/186.full.pdf+html>.

which makes social integration difficult.¹³¹ In particular, “[o]ral communication poses the greatest difficulty in establishing and maintaining social relationships.”¹³² As a result, students often “report feelings of loneliness and a lack of close friendships.”¹³³ A 2001 study of children with cochlear implants found that, despite the social benefits of using the implants, communication difficulties and feelings of isolation were lasting and persistent.¹³⁴ Residual lags in speech and hearing and a lack of patience and acceptance by hearing peers were barriers to oral communication.¹³⁵ The seemingly casual verbal exchanges between individuals that are often taken for granted—a phone call, chitchat, or the shared understanding of verbal cues—are the building blocks of successful social relationships.¹³⁶

Providing plaintiffs with the CART service can play a crucial role in including deaf or hard-of-hearing students in the classroom and the world beyond the classroom.¹³⁷ On a micro level, the CART service can enhance students’ understanding of and participation in class discussions, augmenting their academic enjoyment and potential.¹³⁸ On a macro level, the CART service has the potential to improve students’ social relationships with peers, increasing their self-esteem and sense of belonging in society at large.¹³⁹

V. CONCLUSION

In its *K.M. v. Tustin* decision, the Ninth Circuit reversed a grant of summary judgment for the defendants and remanded the decision to the district courts, holding that a genuine issue of material fact existed.¹⁴⁰ In light of the court’s clarification of the differences between the IDEA and the ADA, the district courts must now decide whether the school districts met the educational and communication needs of the plaintiffs as effectively as the needs of non-disabled

131. *Id.* at 187 (citations omitted).

132. *Id.* (citation omitted).

133. *Id.* (citation omitted).

134. *Id.* at 195.

135. *Id.* at 191–92.

136. *See id.* at 190–92.

137. *See* Heckendorf, *supra* note 126, at 6.

138. *See id.* at 15.

139. *See* Bat-Chava & Deignan, *supra* note 130.

140. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1103 (9th Cir. 2013).

students under Title II of the ADA.¹⁴¹

Nevertheless, *K.M. v. Tustin* is a step in the right direction for the deaf or hard-of-hearing community. For the first time, the Ninth Circuit explicitly recognized that a school district has different and sometimes non-overlapping obligations to disabled individuals under the Title II effective communications requirement than under the IDEA's FAPE requirement.¹⁴² The court clarified that the standard under the ADA is not one of access, but of *equal* access, and that a failed IDEA claim does not necessarily foreclose an ADA claim.¹⁴³ Lastly, the court reaffirmed that the requests of disabled individuals must be given primary consideration in determining what constitutes appropriate services.¹⁴⁴ In doing so, the court established that disabled individuals are in the best position to speak about their needs and disabilities.¹⁴⁵

Giving deaf or hard-of-hearing students primary consideration in the assessment of appropriate assistive services allows them to participate in a dialogue that extends far beyond the classroom. It is a dialogue that asks who is in the best position to determine disabled students' needs, and demands that deaf or hard-of-hearing students be allowed to speak for themselves.

141. *Id.* at 1102–03. At the time of this Comment's publication, defendants Tustin and Poway Unified School Districts had unsuccessfully sought a rehearing before the Ninth Circuit. The U.S. Supreme Court also denied their petition for a writ of certiorari. The district court granted D.H.'s motion for preliminary injunction and ordered that Poway Unified School District provide her with the CART service. *See* D.H. *ex rel.* Harrington v. Poway Unified Sch. Dist., No. 09-CV-2621-L NLS, 2013 WL 6730163 (S.D. Cal. Dec. 19, 2013).

142. *See id.* at 1102.

143. *Id.* at 1097, 1099, 1101.

144. *Id.* at 1096.

145. *See id.* at 1100–01.

