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THREE BIRDS WITH ONE STONE: DOES MEETING THE REQUIREMENTS OF THE IDEA FOR AN IDEA–ELIGIBLE STUDENT ALSO COMPLY WITH THE REQUIREMENTS OF SECTION 504 AND THE ADA? [a1]

The general view is that because its obligations are relatively detailed and deep, [1] the Individuals with Disabilities Education Act (IDEA) [2] serves as an effective means of also meeting the requirements of a pair of anti–disability discrimination laws—Section 504 [3] and its sister statute, [4] the Americans with Disabilities Act (ADA) [5] —for a student within the overlapping coverage of these statutory frameworks. [6] For example, it is not at all uncommon to find court decisions that in the wake of a ruling that the district fulfilled its obligation to provide a free appropriate public education (FAPE) under the IDEA summarily disposed of the § 504 FAPE claim. [7] An occasional case extends this automatic–interplay logic more broadly; for example, in response to a class action suit on behalf of IDEA–eligible youth, Washington's highest court concluded: "[the plaintiff class] has not cited, and ***30** this court has not found, any cases where a court held that § 504 was violated but the IDEA was not." [8]

The purpose of this case note is to illustrate that the general conception that fulfilling the IDEA requirements also "kills the other two birds"—Section 504 and the ADA—is either not the rule or at least—even when narrowed to the issue of FAPE for a public school child with an individualized education program (IEP) under the IDEA—is not without exceptions. The focal example will be the Ninth Circuit's recent decision in *K.M. v. Tustin Unified School District*. [9]

The subsequent discussion will offer additional examples of the various significant differences between the IDEA and § 504 or the ADA [10] that the courts have increasingly established in recent years in the K–12 public school context. [11]

The Ninth Circuit's Decision in *K.M.*

This decision was for two consolidated cases. The relevant facts in each case were that (1) the student was in secondary school with an IEP based on hearing impairment; (2) the parents requested, via the IEP process, the provision of Communication Access Realtime Translation (CART), a word–for–word transcription service in which, similar to court reporting, a trained stenographer provides captions in real time on a computer screen; (3) the student was able to follow the classroom conversation and make good progress with intense concentration, resulting in exhaustion at the end of the school day; (4) the district denied the request for CART as not being necessary for the child to access and benefit from the general curriculum; (5) the parents challenged the denial via an impartial hearing under the IDEA and lost; (6) their appeal to federal district court resulted in a ruling that the district complied with the IDEA and, as an automatic result, also met its alternate obligation under § 504 and the ADA; and (7) their appeal to the Ninth Circuit was limited to review of the lower court's ADA ruling.

As a result, the Ninth Circuit addressed "a narrow question: whether a school district's compliance with its obligations to a deaf or hard–of–hearing child under the IDEA also necessarily establishes compliance with its effective communications obligation to that child under Title II of the ADA." [12] Title II applies to public entities, including school districts, [13] and its effective communications regulation requires the provision of "appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in ... a program ...conducted by a public entity." [14] Moreover, the Title II regulations expressly include in the definition ***31** of auxiliary aids and services "real time computer–aided transcription services" [15] and require "giving primary consideration to the requests of the individual with disabilities" in the determination of what auxiliary aids and services are necessary. [16] Yet, a separate, more general Title II regulation provides an overriding limitation that the public entity need not take any action that would constitute either a fundamental alternation or an undue financial and administrative burden. [17]

The Ninth Circuit started its analysis with a general comparison of the IDEA and Title II of the ADA, concluding, for example, that "the IDEA and Title II differ in both ends and means." [18] More specifically, the court characterized the IDEA as substantively aimed at a floor of access but requires that access regardless of the costs or other burdens or alterations and Title II as aimed substantively at equal accessibility for individuals with communication disabilities but only to the extent as not posing an undue hardship or fundamental alteration. [19]

Next, the Ninth Circuit identified two lines of its case law—one interpreting the IDEA's FAPE provision and § 504's FAPE regulation [20] as " 'overlapping but different' " [21] and the other confirming the close interrelationship between § 504 and the ADA. [22] The reversible error at the district court level in these consolidated cases, according to the Ninth Circuit, was combining these two lines of cases without detecting and applying the nuanced differences within each one. For the first line, the Ninth Circuit distinguished between the effect of substantively complying with IDEA FAPE on a claim predicated on § 504 FAPE and its effect on claims predicated on other § 504 theories. [23] For the second line, the court pointed out differences between § 504 and the ADA in terms of jurisdiction, [24] causation, [25] administering agency, [26] and—specifically significant in this case, FAPE. For this last difference, the court concluded that whereas § 504 (and the IDEA) provide for FAPE, the ADA has no such requirement; instead, the plaintiff–parents predicate their claim on the aforementioned [27] ADA effective communication regulation.

***32** Thus unraveling these two general lines of case law, the Ninth Circuit concluded that they do not resolve the narrow question in this case, instead finding the answer by focusing on "the *particular* provisions of the ADA and the IDEA covering students who are deaf or hard–of–hearing, as well as the implementing regulations for those provisions." [28] More specifically, noting that the IDEA only requires special consideration for the needs and opportunities of students with hearing impairments or deafness, [29] the Ninth Circuit found these significant additions in the ADA Title II context: (1) the "where necessary" language in the effective communications regulation [30]; (2) the student–preference provision in the related regulation [31]; (3) the related equal opportunity standard [32]; and—on the limitation side—(4) the fundamental alteration defense. [33]

Finally, holding that "[t]he failure of an IDEA claim does not automatically foreclose a Title II claim grounded in the Title II effective communications regulation," [34] the Ninth Circuit remanded these cases to the district court level to apply these distinguishable ADA standards to the particular contours of this case. In doing so, the court acknowledged that this procedure allows (1) the parties to further develop the factual record and, if necessary, revise their legal positions; (2) the district to renew their motion for summary judgment on other grounds; and (3) the court to determine whether there is a genuine issue of material fact on this clarified basis or any alternate district grounds. [35]

***33 Discussion**

Although the Ninth Circuit's ruling shows the nuanced and potentially significant distinctions between the IDEA and the ADA for students in K–12 education, at least two tempering caveats are warranted. First, as the court clarified, [36] the scope of application is narrow, specifically limited to CART and other such auxiliary aids and services for public school students with communications disabilities. Second, even within this limited scope, the two plaintiff–students were not necessarily successful; upon remand, further proceedings could result in a ruling for the district based on the applicable fundamental alteration defense or alternate grounds. [37] Illustrating the indefinite effects of *K.M.*, one federal district in California recently granted another IDEA–eligible deaf student a preliminary injunction for CART [38] and yet another deaf student in the same district was unsuccessful in obtaining a summary judgment based on the fact–intensive issue of whether the district had provided her with meaningful access or an equal opportunity to gain the same benefits from her classes as her nondisabled peers by denying her requested accommodation of CART. [39]

Extending more broadly to FAPE, which is the mainstay of IDEA litigation, the Ninth Circuit in *K.M.* was careful to add dicta that preserved the two–birds–with–one stone effect where the IDEA and § 504 and/or ADA claims are identical. [40] At the same time, this limitation retained, at least in the Ninth Circuit, the partially analogous distinction between § 504 and the ADA where a district has denied FAPE under the IDEA. [41] More specifically, in the *Mark H.* decision, [42] on which the K.M. court repeatedly relied, [43] the ***34** Ninth Circuit preserved the possibility of a money damages claim under § 504 in the wake of a denial of FAPE under the IDEA. [44] This litigation, after another visit to the Ninth Circuit and a second remand ended in a costly settlement. [45] The intervening Ninth Circuit decision spelled out two alternative routes to liability in such circumstances—denial of reasonable accommodation resulting in lack of meaningful access or violation of § 504 regulatory standard for FAPE—both culminating in the requirement to proof deliberate indifference on the part of the defendant. [46] In the reported case law thus far, this particular development has not extended to the plaintiff–parents' advantage [47] beyond the Ninth Circuit. [48]

Finally, on its broadest side, *K.M.* serves as a reminder of the various subtle but potentially significant differences among the IDEA, § 504, and the ADA [49] that are being increasingly tested in the K–12 context. [50] In some cases, the result has been surprisingly disappointing for the plaintiff–parents of students with disabilities. [51] In others, as in *K.M.*, the plaintiff–parents have ***35** gained an advantageous handhold. [52] However, this handhold, if the purpose of the handhold is liability for money damages, [53] poses an uphill climb in terms of the rather daunting deliberate indifference or—depending on the jurisdiction [54] —similar standard. [55] In sum, the answer to whether the IDEA stone kills the other two birds—or whether the § 504 or ADA bird flies free [56] —is the same as it is for most special education questions: "It depends." [57]

Footnotes

a1 The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 300 Ed.Law Rep. [29] (February 27, 2014).

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1 For this general comparative view in terms of depth and breadth, see, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS One:5 (2011).

2 20 U.S.C. §§ 1400–1482 (2012).

3 29 U.S.C. § 794 (2012).

4 For the "sister statute" metaphor, see, e.g., *Arce v. Potter*, 818 F.Supp.2d 402, 407 (D.P.R 2011).

5 42 U.S.C. §§ 12101–12213 (2012).

6 For a systematic comparison among these three statutory frameworks and their implementing regulations, including the scope of eligibility—i.e., the definition of disability under the IDEA and the broader definition of disability shared by § 504 and the ADA—see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed. Law Rep. 767 (2012).

7 See, e.g., *D.K. v. Abington Sch. Dist.*, 696 F.3d 233 [285 Ed.Law Rep. [730]] (3d Cir. 2013); *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 53 IDELR ¶ 258 (S.D. Ohio 2009); *Greenwood v. Wissahickon Sch. Dist.*, 571 F.Supp.2d 654, 668 [237 Ed.Law Rep. [276]] (E.D. Pa. 2008); *C.N. v. Willmar Pub. Sch.*, 50 IDELR ¶ 274 (D. Minn. 2008); *Corey H. ex rel. B.H. v. Cape Henlopen Sch. Dist.*, 286 F.Supp.2d 380, 386 [182 Ed.Law Rep. [808]] (D. Del. 2003); *cf. Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278 [220 Ed.Law [482]] (7th Cir. 2007) (least restrictive environment requirement). Although not as common, some courts reach the same conclusion for the converse situation of a denial of FAPE, although pointing out additional requirements depending on the remedy sought. See, e.g., *Brennan v. Reg'l Sch. Dist. Bd. of Educ.*, 531 F.Supp.2d 245, 279 [229 Ed.Law Rep. [513]] (D. Conn. 2008); *Perrin v. Warrior Run Sch. Dist.*, 61 IDELR ¶ 257 (M.D. Pa. 2013).

8 *Tunstall v. Bergeson*, 5 P.3d 691, 707 [146 Ed.Law Rep. [528]] (Wash. 2000).

9 725 F.3d 1088 [296 Ed.Law Rep. [800]] (9th Cir. 2013).

10 For student cases in the K–12 public school context, the relevant part of the ADA is Title II, which applies to "public entities." For an overview of the various parts of the ADA and annotated rulings for each part, see ZIRKEL, *supra* note 1.

11 For a comprehensive overview of the differences, along with the commonalities, see Zirkel, *supra* note 6.

12 *K.M. v. Tustin Unified Sch. Dist.*, 728 F.3d at 1092.

13 See *supra* note 10.

14 28 C.F.R. § 35.160(b)(1) (2012).

15 *Id.* § 35.104.

16 *Id.* § 35.160(b)(2).

17 *Id.* § 35.164.

18 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1097.

19 *Id.*

20 34 C.F.R. § 104.33(a) (2012).

21 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1098 (citing *Mark H. v. Lemahieu*, 513 F.2d 922, 933 [229 Ed.Law Rep. [53]] (9th Cir. 2008)).

22 *Id.* (citing *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001)).

23 *Id.* at 1099.

24 Title II applies to all public entities, whereas § 504 applies to entities, both public and private, that receive federal financial assistance. *Id.*

25 Title II applies to discrimination based on disability (i.e., motivating factor analysis for mixed motive cases), whereas § 504 more strictly applies to discrimination based solely on disability. *Id.*; *see also CG v. Commonwealth of Pennsylvania*, 234 F.3d 229, 235–236 [298 Ed.Law Rep. [10]] (3d Cir. 2013).

26 Congress delegated regulatory responsibility for Title II centrally to the Department of Justice (DOJ) but for § 504 on a decentralized basis—e.g., to the U.S. Department of Education for K–12 (and postsecondary) schools. *Id.*

27 See *supra* notes 14–16 and accompanying text.

28 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1100 (emphasis in original).

29 *Id.* at 1100 (citing 20 U.S.C. § 1414(d)(3)(B)).

30 See *supra* note 14 and accompanying text.

31 See *supra* note 16 and accompanying text. Acknowledging but avoiding the thorny question of conflicting preferences between the parent and the child, which did not arise in these consolidated cases, the court noted: "We do not decide whether the child's preferences might trump the parent's in a situation in which they disagreed." *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1101 n.5.

32 *Id.* at 1101 (citing 28 C.F.R. § 35.160(a)(1) & (b)(1)). In the § 504 context, this standard is more accurately termed "commensurate opportunity." See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 186 & n.8 [5 Ed.Law Rep. [34]] (1982). For a discussion of this standard, see, e.g., Mark Weber, *A New Look at Section 504 and the Americans with Disabilities Act*, 16 TEX. J. C.L. & C.R. 1 (2010); Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?* 106 Ed. Law Rep. 471 (1996).

33 Applying this limitation to the effective communication regulation, the court reasoned as follows, with notable deference to the interpretation of the administering agency (see *supra* note 26): "In particular, as the DOJ explained in its amicus brief to this court, the ADA effective communication obligation 'is limited to the provision of services for existing programs; the ADA does not require a school to provide new programs or new curricula' (emphasis in original)." *Id.* at 1102. As a related matter, the court concluded that the "meaningful access" standard under the ADA (and § 504), which is attributable to *Alexander v. Choate*, 469 U.S. 287, 299, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985), "incorporates rather than supersedes the[se] applicable interpretive regulations." *Id.* at 1103.

34 *Id.* at 1102.

35 *Id.* at 1103. In adopting this remand approach, the court again cited *Mark H.*, here for the analogous situation "where the parties and the district court had misunderstood the interaction between two federal statutes, and remanded for further proceedings consistent with the relationship between those statutes as newly clarified by our opinion." *Id.* Interestingly, the two statutes in *Mark H.* were the IDEA and § 504, further illustrating the usual pairing but selective parsing of § 504 and the ADA.

36 See *supra* note 12 and accompanying text.

37 At least as likely, the outcome of the case may be a settlement, which is not uncommon in the wake of denials of dismissal or summary judgment. See, e.g., Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination in the Post Civil Rights United States*, 7 J. EMPIRICAL STUD. 175, 184–86 (2010) (finding that in the 14% of employment discrimination cases that survived summary judgment, 57% settled before a trial); *cf.* Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney, & Scott Burris, *Prevalence and Outcomes of Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 306 (2005) (finding approximately 60% of the ADA Title I lawsuits ended in settlement).

38 *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, 2013 WL 6730163 (S.D. Cal. Dec. 19, 2013). An alternative strategy, which a recent decision illustrates, is for the parent to exit the child from special education and request such technology

accommodations via § 504. *D.F. v. Leon Cnty. Sch. Bd.*, 62 IDELR ¶ 167 (N.D. Fla. 2014) (ruling that parent of deaf child who exited child under the IDEA but requested assistive technology stated a claim under § 504).

39 *Poway Unified Sch. Dist. v. K.C. ex rel. Cheng*, 2014 WL 129086 (S.D. Cal. Jan. 14, 2014).

40 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1101 (adding that "nothing in our holding should be understood to bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims where the IDEA administrative appeals process has functionally adjudicated some or all questions relevant to a Title II claim in a way that precludes relitigation").

41 In contrast, the Ninth Circuit adheres to the general judicial understanding, rooted in the § 504 regulations, that the provision of FAPE under the IDEA serves as compliance with the FAPE requirement under § 504. *A.M. v. Monrovia Sch. Dist.*, 627 F.3d 773, 782 [263 Ed.Law Rep. [44]] (9th Cir. 2010) (citing 34 C.F.R. § 104.33(b)(2)). Other jurisdictions agree. See *supra* note 7.

42 *Mark H. v. Lemahieu*, 513 F.2d 922 [229 Ed.Law Rep. [53]] (9th Cir. 2008). The court focused on the "design" language in what others (*supra* note 32) have characterized as the commensurate opportunity standard of the § 504 FAPE regulation. *Id.* at 233. The other, more significant difference is that the commentators focused on the purported affirmative differences between the IDEA and § 504 FAPE standards (i.e., when the district has provided an appropriate IEP under the IDEA), whereas *Mark H.* is premised on a denial of FAPE under the IDEA.

43 For examples, see *supra* notes 21 and 35.

44 The denial of FAPE was limited to an unappealed hearing officer decision, resulting in corrective actions that, according to the original, reversed decision in this line of litigation cost the defendant $250,000 for each of the two plaintiff children with autism. *Mark H. v. Lemahieu*, 372 F.Supp.2d 591, 594 [199 Ed.Law Rep. [214]] (D. Hawaii 2005). However, the allegations, accepted as facts for the purpose of summary judgment, spelled out a rather flagrant denial of FAPE. *Mark H. v. Lemahieu*, 513 F.2d at 925–28. For the summary judgment ruling, see *infra* note 45. The Fifth Circuit initially distinguished bad faith/gross misjudgment from deliberate indifference for liability under § 504, but subsequently vacated this opinion, remanding the case for resolution of the exhaustion issue. *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513 [290 Ed.Law Rep. [503]] (5th Cir. 2013), *vacated and remanded*, 61 IDELR ¶ 92 (5th Cir. 2013).

45 *Mark H. v. Hamamoto*, 620 F.3d 1090 [261 Ed.Law Rep. [48]] (9th Cir. 2010), *on remand*, 849 F.Supp.2d 990 [282 Ed.Law Rep. [913]] (D. Haw. 2012), *reconsideration denied*, 58 IDELR ¶ 222 (D. Haw. 2012). Subsequently, the state reportedly agreed to a $4.4 million settlement subject to approval by its legislature. Mary Vorsino, *State to Pay 4.4 Million in Landmark Settlement*, HONOLULU STAR ADVERTISER, Aug. 29, 2012, http://www.staradvertiser.com/s?ac tion=login&f=y&id=167809065

46 *Mark H. v. Hamamoto*, 620 F.3d at 1097–1103.

47 Indeed, in some cases in other jurisdictions the courts have relied on the first Ninth Circuit decision in *Mark H.* to rule in favor of the defendant–district. See, e.g., *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232 [244 Ed.Law Rep. [528]] (10th Cir. 2009) (ruling that the parents failed to prove discrimination, per *Mark H.*, beyond denial of FAPE under the IDEA); *Brown v. Dist. 299–Chicago Pub. Sch.*, 762 F.Supp.2d 1076 [267 Ed.Law Rep. [178]] (N.D. Ill. 2010) (ruling that the parents failed to prove that the lack of implementation of the IEP affected the student's access in comparison to nondisabled students).

48 For the latest example in the Ninth Circuit, see *D.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614 [294 Ed. Law Rep. [221]] (D. Idaho 2013) (denying summary judgment with regard to deliberate indifference in FAPE case).

49 See Zirkel, *supra* note 6.

50 For various examples, see Perry A. Zirkel, *Section 504 for Special Education Leaders: Persisting and Emerging Issues*, 25 J. SPECIAL EDUC. LEADERSHIP 99, 103–05 (2012).

51 See, e.g., *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248 [297 Ed.Law Rep. [58]] (3d Cir. 2013) (rejecting mis–identification case for lack of deliberate indifference); *Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815 [246 Ed.Law Rep. [713]] (10th Cir. 2009) (ruling that IDEA eligibility does not automatically, without specific showing, equate to eligibility under § 504). In some cases, the direction of the effect has depended on the jurisdiction. *Compare Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533 [260 Ed.Law Rep. [580]] (6th Cir. 2010) (applying tolling to statute of limitations for

§ 504), *with P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 [250 Ed.Law Rep. [517]] (3d Cir. 2009) (interpreting statute of limitations under § 504 as identical with that under IDEA).

52 See, e.g., *A. v. Hartford Bd. of Educ.*,—F.Supp.2d——, 2013 WL 5526624 (D. Conn. 2013) (ruling that § 504 is one means of enforcing an IDEA hearing officer decision); *I.H. v. Cumberland Valley Sch. Dist.*, 842 F.Supp.2d 762 [281 Ed.Law Rep. [1057]] (M.D. Pa. 2012) (ruling that expert witness fees are available under § 504); *C.C. v. Cypress Sch. Dist.*, 56 IDELR ¶ 295 (C.D. Cal. 2011) (granting preliminary injunction for IDEA student's service dog claim under the ADA); *D.R. v. Antelope Valley High Sch. Dist.*, 746 F.Supp.2d 1132 [265 Ed.Law Rep. [215]] (C.D. Cal. 2010)

53 As a major potential comparative advantage under § 504 and the ADA, this remedy is not available under the IDEA. See, e.g., *C.O. v. Portland Pub. Sch.*, 679 F.3d 1162 [280 Ed.Law Rep. [28]] (9th Cir. 2012), *cert. denied*, 133 S.Ct. 859, 184 L.Ed.2d 657 (2013); *Chambers v. Sch. Dist.*, 587 F.3d 176 [250 Ed.Law Rep. [884]] (3d Cir. 2009); Diaz–Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 [210 Ed.Law Rep. [544]] (1st Cir. 2006); *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005); *Polera v. Bd. of Educ.*, 288 F.3d 478 [164 Ed.Law Rep. [573]] (2d Cir. 2002).

54 The variations on this theme exemplified in the case law cited *infra* note 55 include bad faith and gross misjudgment.

55 For example, *compare B.M. v. S. Callaway R–II Sch. Dist.*, 732 F.3d 882 [297 Ed.Law Rep. [712]] (8th Cir. 2013); G.C. v. Owensboro Pub. Sch., 711 F.3d 623 [290 Ed.Law Rep. [597]] (6th Cir. 2013) (granting defendants' motion for summary judgment), *with Chambers v. Sch. Dist. of Philadelphia*, 537 Fed.Appx. 90 [299 Ed.Law Rep. [851]] (3d Cir. 2013); *A.G. v. Lower Merion Sch. Dist.*,—Fed.Appx.——, 2013 WL 6017408 (3d Cir. 2013) (denying defendants' motion for summary judgment).

56 Although ultimately rejecting the plaintiff's § 504/ADA challenge to Pennsylvania's special education funding formula, the Third Circuit cited *K.M.* for the general lesson that "compliance with the IDEA does not automatically immunize a party from liability under the ADA or [§ 504]." *CG v. Commonwealth of Pennsylvania*, 234 F.3d 229, 235 [298 Ed.Law Rep. [10]] (3d Cir. 2013).

57 It depends not only on the usual multiple factors, such as the particular provision and jurisdiction, but also whether "kills" in this proverbial context means fulfillment of FAPE, denial or FAPE, or—as in *K.M.*—a different issue.

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