TASC is sponsored by the Administration on Intellectual and Developmental Disabilities (AIDD), the Substance Abuse and Mental Health Services Administration (SAMHSA), the Rehabilitation Services Administration (RSA), the Social Security Administration (SSA), and the Health Resources Services Administration (HRSA). TASC is a division of the National Disability Rights Network (NDRN).

FACT SHEET

The ADA Provides Educational Rights That Are Distinct From Those Available Under IDEA

produced by Robert Fleischner and Deborah Dorfman
Center for Public Representation

with a grant from the Training and Advocacy Support Center (TASC)
October 2013

I. INTRODUCTION

Most parents of children with disabilities want their children educated in regular classrooms, side-by-side with children without disabilities. While federal and state education laws provide some support to the parents, advocates have often found it difficult to secure truly integrated school experiences for their young clients and their families. Frustrated that special education laws have often been ineffective, advocates are beginning to turn to the Americans with Disabilities Act ("ADA")[1] to argue for integrated school programs.[2]

In a very important opinion that may be a critical turning point, the Ninth Circuit Court of Appeals has held that the ADA includes communication access rights for students with disabilities that are separate and distinct from those under the Individuals with Disabilities Education Improvement Act[3] ("IDEA").[4] Although the case addresses only communication rights, its reasoning should apply equally to other requirements of the ADA, particularly to the right to receive services in an integrated setting.

This Fact Sheet analyzes the Ninth Circuit's opinion and its potential application

---

[1] 42 U.S.C. § 12131, *et seq*.

[2] A few scholars have suggested that useful ADA remedies may be available in special education cases. *See, e.g.,* Mark C. Weber, A New Look at Section 504 and the ADA in Special Education Cases, 16 Tex. J. on Civ. Liberties & Civ. Rights 1 (2010) and Perry A. Zirkel, A Comprehensive Comparison of the IDEA and Section 504/ADA, 282 Ed. L. Rptr. 767 (2012). Professor Zirkel, undoubtedly the most prolific author on the subject, has written many articles and a treatise, Perry A. Zirkel, Section 504, the ADA, and the Schools (2000).

[3] 20 U.S.C. § 1401, *et seq*.

[4] *K.M. v. Tustin Unified School District,* 2013 WL 3988677 (9th Cir. Dec. 3, 2012).

to the ADA's integration mandate, that is, to a school's obligation to provide education in integrated classrooms. Following the Ninth Circuit's reasoning, we argue that there are important differences between the IDEA and the ADA. Accordingly, a school district's compliance with the IDEA does not mean that it has complied with the ADA. In particular, we suggest that the IDEA's "least restrictive environment" ("LRE") requirement and the ADA's integration mandate are different in meaning and substance. Moreover, we suggest that there are important and significant differences between IDEA's requirement that a student with a disability be provided an education that is reasonably calculated to enable a child to receive educational benefits and the ADA's requirement that students with disabilities be provided an equal educational opportunity.

II. *K.M. v TUSTIN UNIFIED SCHOOL DISTRICT*

A. Schools must comply with both the ADA and IDEA.

In *K.M. v. Tustin Unified School District,* the Ninth Circuit Court of Appeals examined school districts' responsibilities under Title II of the ADA to reasonably accommodate students with hearing impairments. The student plaintiffs requested their schools, as reasonable accommodations, to provide them with word-for-word transcription (*i.e*., Communication Access Realtime Translation usually referred to as CART) to enable them to fully understand their teachers and peers.[5] The school districts denied the requests, asserting that under *Board of Education of Hendrick Hudson School Dist. v. Rowley*,[6] the IDEA required them only to provide services reasonably calculated to enable "the child[ren] to achieve passing marks and advance from grade to grade."[7] IDEA, they argued did not required them to provide a "'potential maximizing education.'"[8] They also argued that satisfaction of their obligation to provide a free appropriate public education ("FAPE") under the IDEA, as a matter of law, was compliance with both Section 504 of the Rehabilitation Act and Title II of the ADA.[9]

The court disagreed with the latter argument, rejecting that "the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of his or her Title II claim."[10] Instead, the court found that because the plaintiffs' Title II claims were not based upon a denial of FAPE, but were rooted in claims of discrimination based on Title II's "effective communications" regulations, their ADA claims were separate from the IDEA's FAPE requirement. Therefore, "public schools must comply with both the IDEA and the ADA."[11] The logic underlying

---

[5] *Id*. at *1.
[6] 458 U.S. 176 (1982).
[7] *K.M.,* 2013 WL 3988677 at *2 citing *Rowley*, 458 U.S. at 204.
[8] *Id.*
[9] *Id.* at *3.
[10] *Id.* at *11.
[11] *Id.* at *5. *See,* 20 U.S.C. § 1415(l)("Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the

this critical (but not obvious) holding is described in the following sections.

B. The ADA and Section 504 are similar but not identical.

Even though the court acknowledged that it had previously held "that 'there is no significant difference in the analysis of rights and obligations created by [the ADA and Section 504],'"[12] it now identified "nuanced" but significant differences between them.[13] For example, the court pointed out, their scopes differ -- Section 504 applies to entities receiving federal funds whereas Title II applies to all state and local entities.[14] The court also noted differences in the standards for determining whether there has been disability discrimination. Under Title II, the plaintiff need only show that disability was a "motivating factor" for a denial of services.[15] Under Section 504, however, the standard is more demanding, requiring the plaintiff to show "a denial of services 'solely by reason of' disability.'"[16]

The court also noted that responsibility for promulgating the regulations for parts of Section 504 and the ADA are different. Specifically, the Department of Education is responsible for promulgating the Section 504 education regulations but the Department of Justice ("DOJ") is responsible for Title's II regulations.[17] Additionally, the court pointed out that although Congress intended consistency between some parts of Title II regulations and the Section 504 regulations, it did not require consistency in the definition of FAPE.[18] Indeed, neither the ADA nor the DOJ's regulations use the term FAPE at all.

C. The definitions of FAPE in IDEA and in Section 504 are overlapping but not identical.

Although there is no reference to FAPE in the ADA, both the Section 504 and the

---

Americans with Disabilities Act, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities…"). Congress added this language to the IDEA to overrule the Supreme Court's opinion in *Smith v. Robinson,* 468 U.S. 992 (1984).

[12] *Id.* at *7. In reaching this conclusion, the court noted that it had never held that compliance with the IDEA necessarily constitutes compliance with Section 504 in every instance. Specifically, the court said its holding in prior cases finding that compliance with FAPE under the IDEA necessarily constituted compliance with Section 504 was specifically limited to cases where claims under Section 504's FAPE provisions were at issue—not other separate provisions of Section 504. *Id.* at *9.

[13] *Id*. at *8.

[14] *Id.*

[15] *Id.*

[16] *Id*. *quoting* 29 U.S.C. 794(a).

[17] *Id.* at *7.

[18] *Id.* at *9. Section 504's FAPE definition appears at 34 C.F.R. § 104.

IDEA regulations do use the term.[19] The Ninth Circuit noted in *K.M.* that it had previously held that the two requirements are "overlapping but different."[20] Nevertheless, the court had noted that, despite the differences, "a valid IDEA Individual Education Plan (IEP) is sufficient but is not necessary to satisfy" FAPE under Section 504.[21] The court reiterated that earlier holding in *K.M.*[22]

D. Despite the similarities between the ADA and Section 504 and between 504 and the IDEA, it does not follow that the ADA and IDEA are the same.[23]

The court analyzed the plaintiffs' specific claims to determine whether compliance the IDEA's FAPE requirement necessitates a finding of compliance with Title II. First, the court examined whether there are any differences between the obligations to provide services and accommodations under the IDEA and the ADA.[24] The court stated this required a comparison of the "*particular* provisions of the ADA and the IDEA" and the corresponding implementing regulations.[25] Upon review, the court concluded that the ADA provided more rights than the IDEA in the context of communications accommodations.[26] In its analysis, the court afforded DOJ's interpretation of its Title II's communications regulation "considerable deference."[27]

The court also considered whether there were any differences in available defenses, noting that Title II affords public entities with defenses— fundamental alteration and undue burden—that are not available under the IDEA.[28]

Finally, the court analyzed whether the Title II regulation at issue is relevant to IDEA claims. Importantly, the court determined that Title II's communications regulation requiring communications in schools to be as effective for students with disabilities as for those without disabilities and to provide "'auxiliary aids…necessary to afford…an equal opportunity to participate in, and enjoy the benefits of,' the school program" went beyond the IDEA requirements. Moreover,

---

[19] Compare 34 C.F.R. § 300.17 (IDEA) and 34 C.F.R. § 140.33(b)(Section 504). *See,* Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?,* 106 Ed. L. Rep. [471] (1996).
[20] *Id.* at *7 citing *Mark H. v. Lemahieu,* 513 F. 3d 922, 925 (9th Cir. 2008).
[21] *Mark H.,* 513 F.3d at 933 citing 34 C.F.R. 104.33(b)(2).
[22] *K.M.,* 2013 WL 398867 at *7.
[23] A formula of this proposition might look like this: ADA = § 504 *and* § 504 = IDEA *but* ADA ≠ IDEA.
[24] *K.M.*, 2013 WL 398867 at *7.
[25] *Id*. (emphasis in the original).
[26] *Id*.
[27] DOJ filed an amicus brief explaining its interpretation of its communication regulations. Citing *Auer v. Robbi*ns, 519 U.S. 452 (1997), the court accorded deference to the interpretation in the brief. *Id.* at *1. The very helpful DOJ brief is available at http://www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf ("DOJ Amicus brief).
[28] *K.M.*, 2013 WL 398867 at *10.

the ADA's communication regulation was not relevant to the IDEA because the IDEA was not an equal educational statute.[29]

Because of the nature of the differences between the Title II and the IDEA, the court determined that it was "unable to articulate any unified theory for how they will interact in particular cases" and therefore concluded that they had to reject the argument that compliance with the IDEA's FAPE mandate necessarily means that the school district has complied with its obligations to a student with a disability under Title II.[30] The court further held that "courts evaluating claims under the IDEA and Title II must analyze each claim under relevant statutory and regulatory framework."[31]

III. TITLE II'S INTEGRATION MANDATE PROVIDES SEPARATE AND GREATER RIGHTS THAN IDEA'S LRE REQUIREMENT

Some families and their advocates seeking integrated classrooms for students with disabilities find that schools refuse to offer integrated classes under the IDEA's LRE requirement. For these families, a key question is whether integration may still be required by the ADA. In other words, is the ADA's integration mandate a more powerful tool for integration than the IDEA's LRE requirement?

The *K.M.* opinion provides a roadmap to compare the two statues. Following that map leads to a conclusion that Title II's integration mandate includes separate and more robust rights than those afforded by the IDEA's LRE requirement. We will try to follow that roadmap after a short digression to discuss terminology.

A. Does "integration" mean the same thing to educators and courts as "inclusion," "mainstreaming," or "LRE"?

Although disability advocates usually begin an assessment of any program or service with an analysis of whether it is integrated, some educators and some families do not agree that integration is a worthy goal. Indeed, the word integration may not even mean the same thing to everyone engaged in the educational process. This is in part because several different words are commonly used to describe the children with disabilities being educated with children without disabilities. The most common words and terms are integration, mainstreaming, inclusion and least restrictive environment. Although they are

---

[29] *Id*.
[30] *Id.* at *11.
[31] *Id.* Finally, the court rejected the school districts' argument that even if Title II and the IDEA were construed to confer separate rights, the plaintiffs could not meet their burden to show that they were denied "meaningful access" to the schools' programs. Specifically, the court held that determination of whether the plaintiffs had suffered a denial of meaningful access had to be analyzed in the context of specific relevant regulations implementing Title II. *Id.*

often used interchangeably, they have different meanings.

As will be discussed in more detail below, LRE is a provision of the IDEA requiring that children with disabilities are educated to the maximum extent possible with their peers without disabilities. Mainstreaming is an educational term that emphasizes that students with disabilities spend a portion of their day with students without disabilities. For example, a student might be in a special education classroom for most of the day, but be mainstreamed for recess, lunch and art. Inclusion, another educational term, is usually understood to mean that the student spends the day exclusively in the regular classroom.[32] Integration, among its other uses, is an ADA construct that requires that people with disabilities live, work and learn in settings with people without disabilities, absent a fundamental alteration or undue burden.

Proponents of full integration argue, among other things, that integration is non-stigmatizing, has profound social and educational benefits both for children with and those without disabilities, promotes diversity, and breaks the cycle of harmful segregation. The proponents have ample evidence to support their beliefs.[33] P&A advocates are very familiar with these arguments.

Advocates will likely encounter school staff and others who dispute that integration is beneficial. These individuals argue that physical separation allows students with disabilities to learn in more appropriate environments without distraction and with increased personal attention. They are likely to believe that there is greater stigma from exposure to a regular education environment than from segregation. And, they may argue that having children with disabilities in regular classrooms will interfere with academic development for other students.[34]

Somewhere in the middle are those who believe that some children perhaps those with serious disabilities may need some segregated services, for at least part of the day, in order to learn.

Professor Keaney concludes that "most of the research on the efficacy of mainstreaming and inclusion programs supports some variation of integration if funded, designed, and executed properly."[35]

---

[32] For a helpful discussion of the terms and their interpretation by educators and courts, *see* Mark T. Keaney, Examining Teacher Attitudes Toward Integration: Important Considerations for Legislatures, Courts, and Schools, 56 St. Louis U. L. J. 827 (2012).
[33] *Id*. at 844-48, citing numerous studies at the text accompanying nn. 164-194 and citing Stacey Gordon, Making Sense of the Inclusion Debate Under IDEA, 2006 BYU Educ. & L.J. 189.
[34] *Id.*
[35] *Id.* at 848.

B. The IDEA's LRE Requirement

In order to provide FAPE under the IDEA, youth with disabilities who are eligible for special education must receive special education and related services in the least restrictive environment.[36] The LRE requirement mandates school districts to ensure that

> (i) [t]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (ii) special classes, separate schooling, or other removal of children with disabilities from the regular environment occurs only if the nature or severity of the disability in such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[37]

The IDEA has a "strong preference" for the education of students with disabilities in regular classrooms with supplementary aids and supports.[38] But, in spite of the strong preference, the IDEA obviously does not require that every child be educated in a fully integrated setting. Courts have created multi-factored tests, often balancing the factors, to determine when integration is appropriate.

Courts have not been consistent in establishing these tests. For example, the Sixth Circuit has interpreted the LRE this way:

> In a case where the segregated facility is considered superior [academically], the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the Act.[39]

The Third and Fifth Circuits, on the other hand, examine whether the child's education can be achieved satisfactorily in a regular education classroom with supplementary aids and services. [40] Factors to be considered in these circuits include:

- whether the district has made efforts to modify the regular classroom to accommodate the child;
- a comparison between the educational benefits that the child will receive in a regular classroom (with supplementary aids and services) and the benefits the child will receive in the segregated, special education class room; and

---

[36] 20 U.S.C. §1412(a)(1) & (5), 34 C.F.R. § 300.116, 603 CMR § 28.06(2)(c).
[37] 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §300.114 (a)(2)(i) & (ii).
[38] 20 U.S.C. § 1412(5)(B), 34 C.F.R. §§300.550-300.556.
[39] *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).
[40] *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

- the possible negative effects including the child in a regular classroom might have on other children in the classroom.[41]

"If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider…whether the school has included the child in school programs with nondisabled children to the maximum extent appropriate."[42]

For its part, the Ninth Circuit analyses the LRE requirement using a four-part balancing test. This test analyzes:

- the educational benefits of placement fulltime in a regular class;
- the non-academic benefits of such placement;
- the effect the child has on the teacher and children in the regular class; and
- the costs of mainstreaming the student.[43]

While each test considers the effect and impact on the student with the disability, they also include a balancing of the benefits of integration to the student with other factors, which may include the impact on other students and the cost to the school district.

C. Title II's Integration Mandate

In the ADA, Congress recognized that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem," and that "individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, …failure to make modifications to existing facilities and practices,...[and] segregation.[44]

The integration mandate is focused on ending segregation of individuals with disabilities in all aspects of public services, benefits and programs.[45] It requires public entities to make "reasonable modifications in policies, practices, or

---

[41] *Id. at* 1048-49; *Orberti by Orberti v. Bd. of Educ. of Clementon Sch. Dist*., 995 F.2d 1204, 1217 (3rd Cir.1993).
[42] *Id.* citing *Daniel R.R.,* 874 F.2d at 1048, 1050.
[43] *See Sacramento City Unified Sch. Dist. v. Rachel H*., 14 F.3d 1398, 1404 (9th Cir. 1994); *cert den*. 512 U.S. 1207 (1994).
[44] 42 U.S.C. § 12101(a)(2),(5).
[45] *Olmstead v. L.C*., 527 U.S. 581 (1999); *Tennessee v. Lane*, 541 U.S. 509, 524 (2004); *Arc of Washington State, Inc. v. Braddock*, 427 F. 3d 615, 618 (9th Cir. 2005) (describing Title II's integration mandate as "serv[ing] one of the principal purposes of Title II of the ADA: ending the isolation and segregation of disabled persons")(citations omitted).

procedures" that are "necessary to avoid discrimination on the basis of disability."[46] DOJ's implementing regulations require public entities to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities," which is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible."[47] This language has particular application to the inclusion of students with disabilities.

In the *Olmstead* case, the Supreme Court interpreted the ADA integration regulation, holding that the ADA prohibits "unjustified isolation of the disabled."[48] Resolving the claims of plaintiffs in an institution, the court said that unnecessary institutional placement is stigmatizing because it "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life," and such placement "severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." [49]

DOJ has clarified that the "most integrated settings" under the ADA are settings "located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible." [50]

Since *Olmstead,* courts have applied the integration mandate to a variety of programs and services, including institutions,[51] sheltered workshops,[52] TANF benefits programs,[53] voting and accessible polling places,[54] adult day health

---

[46] *Id*. *See also* 28 C.F.R. §§ 35.130(b)(7), 35.130(d). The DOJ's interpretation of the integration mandate and other regulations must be afforded "great weight" and "substantial deference." *Olmstead*, 527 U.S. at 598; *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 5 n.5 (1st Cir. 2000)(because Congress explicitly authorized the Attorney General to promulgate regulations to implement Title II of the ADA, these regulations must be given controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute). *See also Statement of the US Department of Justice on Enforcement of the Integration Mandate of Title II of the ADA and Olmstead* (June 22, 2011) ("DOJ Enforcement Statement") available at http://www.ada.gov/olmstead/q&a_olmstead.htm.

[47] 28 C.F.R. pt. 35, App. A, p. 450 & §35.130(d).

[48] 527 U.S. at 597.

[49] *Id*. at 600-01 (citations omitted).

[50] *See* DOJ Enforcement Statement, *supra* n. 42.

[51] *See Fisher v. Oklahoma Health* Care *Auth.*, 335 F. 3d 1175 (10th Cir. 2003)*, V.L. v. Wagner*, 669 F. Supp. 2d 1106*, Brantley v. Maxwell-Jolly,* 656 F. Supp 2d 1161 (N.D. Cal. 2009).

[52] *Lane v. Kitzhaber*, 841 Fed. Supp. 2d 1199 (D. Ore. 2012).

[53] *Lovely H. v. Eggleston*, 235 F.R.D. 248, 261 (SDNY 2006)(City's policy requiring individuals with psychiatric disabilities to go to one of three "hub" centers to address

care,[55] in-home supportive services,[56] and, for example, in a case involving a student with a disability forced to eat lunch alone, schools.[57]

The application of the elements of isolation identified in *Olmstead* to schools is straightforward. School children in segregated schools and classrooms are stigmatized by their exclusion from regular school activities. They are seen by others as "unworthy of participating in [school] life." They are harmed both socially and educationally by their isolation from students without disabilities. They are often excluded from social contacts and cultural enrichment activities that are part of the rhythm of a normal school day.

D. Comparison of the Integration Mandate and the LRE Requirement

While the LRE mandate and the integration mandate may share a similar goal of promoting integration, Title II is different from the LRE requirement in several significant ways. Some of these differences are discussed below.

1. Procedure v. Substance

The IDEA is primarily a procedural statute, providing parents with important safeguards to insure their rights to participate in IEP meetings and to challenge an IEP in an administrative process and in court if they are dissatisfied. The Supreme Court thought that "adequate compliance with the [IDEA's] procedures" in most cases would satisfy "much if not all of what Congress wished in the way of substantive content in an IEP."[58] "'The core of the statute…is the cooperative process that it establishes between parents and schools.'"[59] Congress's intent, according to the Supreme Court, was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."[60]

---

issues related to their TANF benefits while individuals without disabilities were permitted to go to numerous centers closer to their homes violated Title II, including the integration mandate.)

[54] *Kerrigan v. The Philadelphia Board of Election*, 2008 WL 3562521 at *18-19 (E.D. Pa. August 18, 2008).

[55] *Brantley v. Maxwell*-Jolly, 658 F. Supp. 2d 1161 (N.D. Cal. 2009).

[56] *V.L. v. Wagner*, 669 F. Supp. 2d 1106 (N.D. Cal. 2009) and *Oster v. Lightbourne*, 2012 WL 691833 (N.D. Cal. Mar. 2, 2012) at *15-16.

[57] *K.M. v. Hyde Park Central School Dist.,* 381 F. Supp. 2d 343 (S.D.N.Y. 2005). (School district violated the integration mandate by requiring the child to eat his lunch in the teacher's lounge away from other students in order to address ongoing abuse of the student by his peers because of his disability.)

[58] *Rowley,* 458 U.S. at 206.

[59] *K.M.*, 2013 WL 3988677 at *4 quoting *Schaffer v. Weast*, 546 U.S. 49, 53 (2005).

[60] *Rowley,* 458 U.S. at 192.

Not surprisingly, then, the Ninth Circuit described the IDEA's substantive component as a "modest one."[61] In other words, the LRE requirement and the other substantive parts of the IDEA, require only that a school provide services that meet a reasonable level of services or a "floor."[62] Providing services that meet that "floor" is sufficient.[63]

Title II of ADA, by contrast, is less procedural and more substantive. It does not include the complex procedural requirements, for example, for early identification, team meetings, independent expert evaluations, administrative appeals, and a requirement for exhaustion of administrative remedies that are part and parcel of the IDEA. Unlike the IDEA, the ADA is intended to accomplish more than merely to "open the door" and to provide a "floor" level of services. Rather, Title II emphasizes the substantive standards of equal access, equal opportunity and integration.

2. Equal Educational Opportunity v. Meaningful Progress

Under the IDEA, school districts must ensure that eligible children receive FAPE.[64] In order to provide FAPE, a school district must provide education reasonably calculated to enable the student to receive "meaningful educational benefits."[65] As the *K.M.* court found and as DOJ pointed out in its amicus brief the Supreme Court has specifically rejected the notion that in order to meet the FAPE requirements of the IDEA, that education had to "equal" that of students without disabilities.[66]

By contrast, the ADA specifically requires that students with disabilities be provided an equal educational opportunity. It prohibits "the denial of services or benefits on specified discriminatory grounds"[67] and unequal access to and

---

[61] *Id.*
[62] *Town of Burlington v. Dep't of Educ. of Mass.,* 736 F.2d 773, 789 (1st Cir. 1984).
[63] *Id.*
[64] 20 U.S.C. § 1400(d)(1)(A).
[65] *Rowley* 458 U.S. at 206-07; *see, also D.B. v. Esposito*, 675 F.3d 26, 37 (1st Cir. 2012)(a determination of a child's learning potential is not necessary before establishing an IEP); *A.J. v. Bd. of Educ., E. Islip Union Free Sch. Dist.,* 679 Fed. Supp. 2d 299 (E.D.N.Y. 2010)(child with Asperger syndrome not eligible for special education because academic performance was satisfactory); *E.M. v. Pajaro Valley Unified Sch. Dis't*, 2009 WL 2766704 (N.D. Cal. Aug. 27, 2009)(child with learning disability ineligible despite continual risk of grade retention).
[66] DOJ Amicus brief citing *Rowley,* 458 U.S. at 198-200; *Oberti by Oberti v. Board of Educ. of Borough of Clementon School Dist*., 995 F.2d 1204, 1217 (3rd Cir. 1993) citing *Rowley*, 452 U.S. at 189, ("We emphasize that the [IDEA] does *not r*equire states to offer *the same* educational experience to a child with disabilities as is generally provided for nondisabled children.")(emphasis in the original)
[67] 28 C.F.R. § 35.130(a) & (b)(1); DOJ ADA Title II Technical Assistance Manual, § II.3.2000.

participation in benefits, activities or services.[68] *Rowley's* interpretation that the IDEA does not include a right to equal educational opportunities is in contrast to the ADA's prohibition of disability discrimination based on unequal treatment. The concept of "meaningful progress" under the IDEA is not synonymous with an equal educational opportunity.[69] Accordingly, Title II affords different and probably greater rights to most students with disabilities than does the IDEA.[70]

3. Differing Available Defenses

Another important distinction between the integration mandate and the LRE requirement is the defenses available to a school district. Specifically, Title II provides for fundamental alteration and undue burden defenses that do not exist under the IDEA.[71]

4. Differing Proof Requirements

The integration mandate also differs from the LRE requirement in what is required to prove a violation.[72] Generally speaking, for a successful ADA integration claim, a qualified plaintiff must show that the public entity has failed to provide him with services in the most integrated setting, absent a valid defense.[73]

In order to prove a claim for a violation of the LRE mandate, however, a student likely must show that his or her IEP is not reasonably calculated to allow the student to make meaningful educational progress in the least restrictive environment. As discussed above, what specific factors will be considered and what actual facts must be proven to prevail in an LRE challenge varies from court to court and circuit to circuit.[74]

---

[68] 28 C.F.R. § 35.130(a) & (b)(2); DOJ ADA Title II Technical Assistance Manual at § II.3.3000.

[69] *K.M.,* 2013 WL 3988677 at *10.

[70] There is a possible flaw in the argument that equal opportunity is always a higher standard than the IDEA standard. That is, if equality for students with disabilities is measured solely by the opportunities provided to non-disabled students, in poorly funded, low performing districts where opportunities are limited, it is possible that the IDEA's standard may be higher. *See* Weber, A New Look, *supra* n. 2 at 13.

[71] *K.M.,* 2013 WL 3988677 at *10.

[72] *Id*. at 587.

[73] *Olmstead*, 527 U.S. at 598; 28 C.F.R. § 35.130(d).

[74] In 1998, Professor Zirkel, carefully analyzed a number of factors in nearly a decade of cases in which parents sought more inclusive placements than were being offered by the schools. He concluded:

> Despite the public or at least professional controversy concerning inclusion, the specifically relevant modern court decisions are relatively limited in published incidence, and no single factor seems particularly predictive of the ultimate judicial outcome. Of the factors compiled in this tabular analysis, the age/grade of the child seems to be the most closely related to outcome and the nature of the disability seems to be the least closely related to outcome. The year of the

4. Potentially Contradictory Standards

Finally, another important difference is that the IDEA regulations and a number of courts permit the consideration of the impact on other students in determining whether a school district has satisfied the IDEA's LRE mandate.[75] The ADA and the integration mandate do not permit a public entity to consider what the effect of integrating a person with a disability would have on a person without a disability. Indeed such a consideration is likely prohibited,[76] absent a valid defense.

IV. EXHAUSTION AND PRECLUSION BARRIERS TO LITIGATING THAT THE ADA PROVIDES MORE SUBSTANTIVE RIGHTS THAN THE IDEA.

Courts have sometimes confused and intertwined the procedures and substantive differences among the ADA, the IDEA and Section 504. This is particularly so in relation to IDEA's requirement that a plaintiff exhaust administrative remedies before pursuing an IDEA claim in court. [77] Unlike the IDEA, there is no exhaustion requirement under Title II of the ADA.[78] However, in cases that have limited the ability of families to pursue their remedies, courts have held that if a non-IDEA claim could have been addressed as an IDEA claim or if the IDEA could provide an adequate remedy, the administrative appeal route must be used first. Some courts have held that this is the case even when the

---

> decision, the applicable test, and the various criteria of these judicial tests tended to fit in the intermediate range of relationship. Although the several factors identified here seemed to have varying degrees of relationship, some of which may not entirely accord with prevailing expectations, the single most powerful conclusion revealed by this analysis is that inclusion, in terms of the modern published case law, defies stereotypes; like the IDEA within which these judicial analyses fit, the individual circumstances of the eligible child predominate. Predictions in this area, paraphrasing the Chinese proverb, are folly in terms of the future.

Perry A. Zirkel, The "Inclusion" Case Law: A Factor Analysis, 127 Ed. L. Rptr. [533] 1998 WL 656019 (Sept. 1998).

[75] 34 C.F.R. §300.116(d).

[76] See (42 U.S.C. §12132)

[77] The source of the confusion is 20 U.S.C. § 1415(l). Part of the text of this section appears at n.11 *supra.* The section also provides that "before the filing of a civil action under [other laws protecting children with disabilities] seeking relief that is also available under [the IDEA], procedures under [the IDEA] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]."

[78] *See, e.g., Flippin v. Town of Norton*, 1999 WL 191695 (D. Mass. Mar. 26, 1999)("The defendants' contention that Title II of the ADA requires that the plaintiff file his Title II claim in the first instance with an appropriate federal agency is in error") and case cited.

IDEA hearing officer has no jurisdiction over the legal claim and even if the hearing officer cannot order any relief on the claim.[79]

Exhaustion was not an issue in *K.M.* and the court did not address it. However, on a related issue, also not raised, the court cautioned that:

> [N]othing 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 of the questions relevant to a Title II claim in a way that precludes relitigation.[80]

Advocates contemplating litigating ADA issues in educational settings should carefully scrutinize the law in their circuit on exhaustion and issue preclusion.

V. CONCLUSION

The clear differences between Title II's integration mandate and the IDEA's LRE requirement support the argument that they should be analyzed separately and that compliance with the FAPE requirements of IDEA should not constitute compliance with the integration mandate of Title II. Advocates should seriously consider using specific Title II integration mandate claims, either instead of or in addition to IDEA claims, in special education cases where a school district seeks to segregate a child based upon on his or her disability.

---

[79] *See Frazier v. Fairhaven School Committee*, 276 F. 3d 52, 60-62 (1st Cir. 2002) ("Congress unmistakably evinced its intent to require exhaustion of *procedures* available under the IDEA" not merely exhaustion of remedies); *Weber v. Cranston School Committee*, 212 F.3d 41, 49 n. 8 (1st Cir. 2000); *I.M. ex rel. C.C. v. Northampton Pub. Sch.,* 869 F. Supp. 2d 174, 187-88 n. 2 (D. Mass. 2012); *CBDE v. Massachusetts Bureau of Special Education Appeals*, 2012 WL 4482296 (D.Mass. September 27, 2012).

[80] *K.M.,* 2013 WL 3988677 at *11.