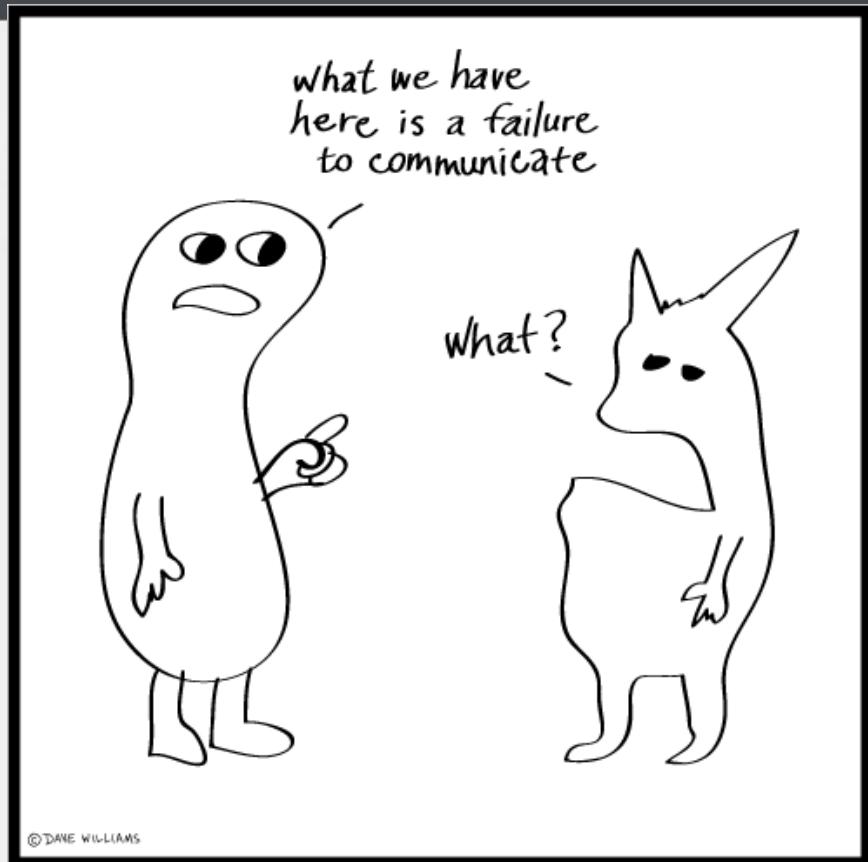


Effective Communication: Navigating the Intersection of Section 504, the ADA and the IDEA



Karen Haase



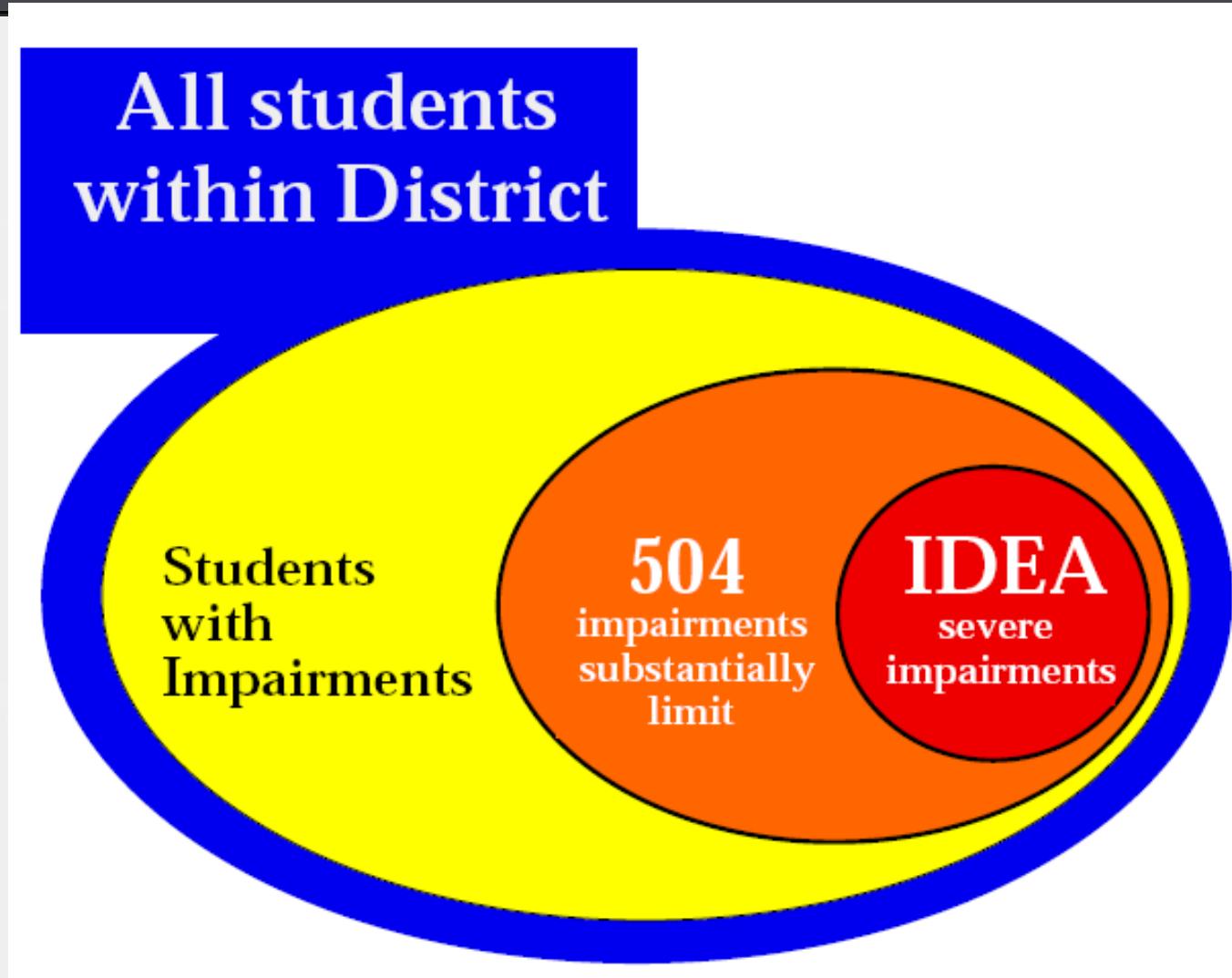
Sources of Schools' Obligations To Serve Students with Disabilities

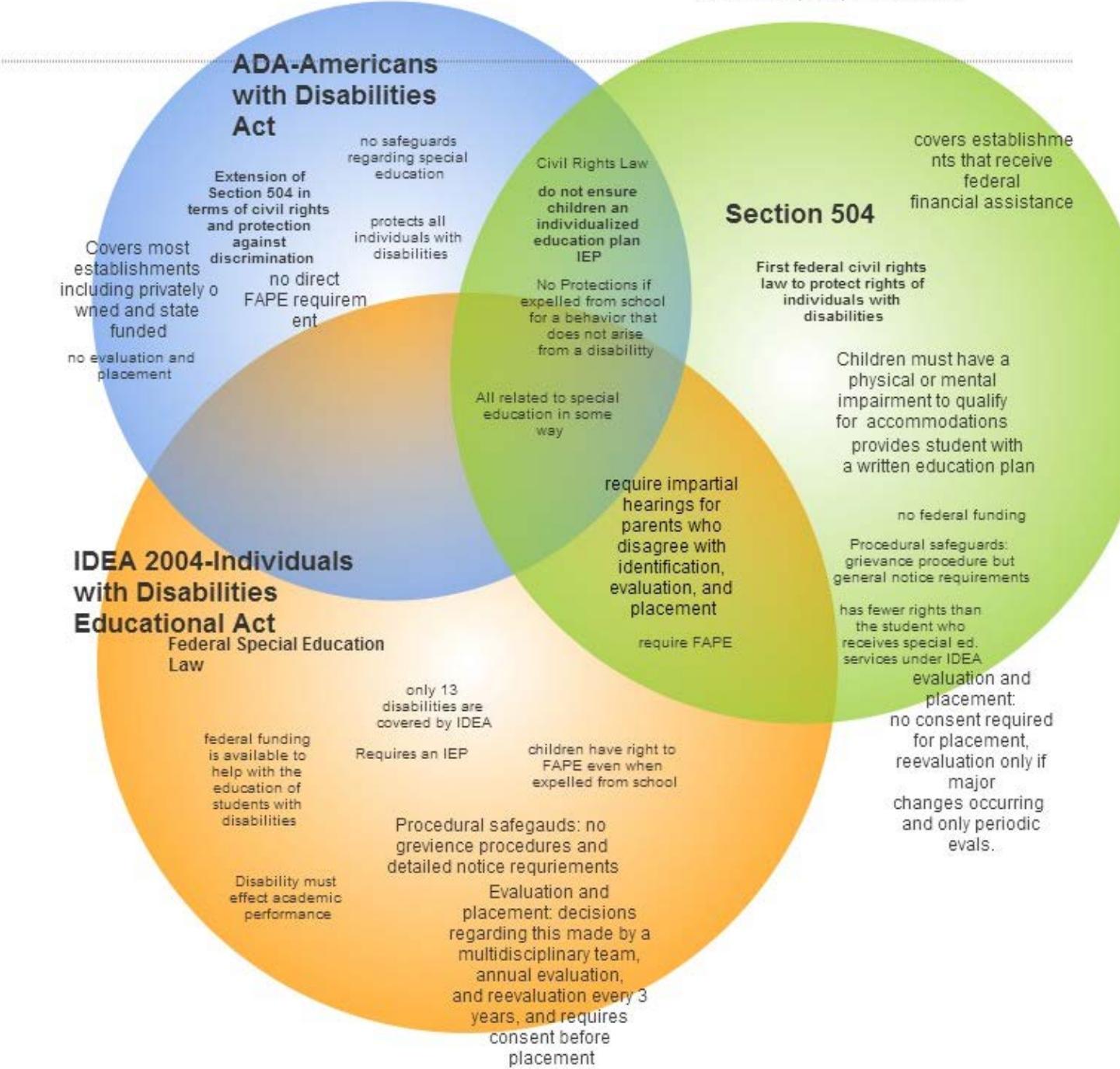
- Individuals with Disabilities in Education Act
- Section 504
- Americans with Disabilities Act

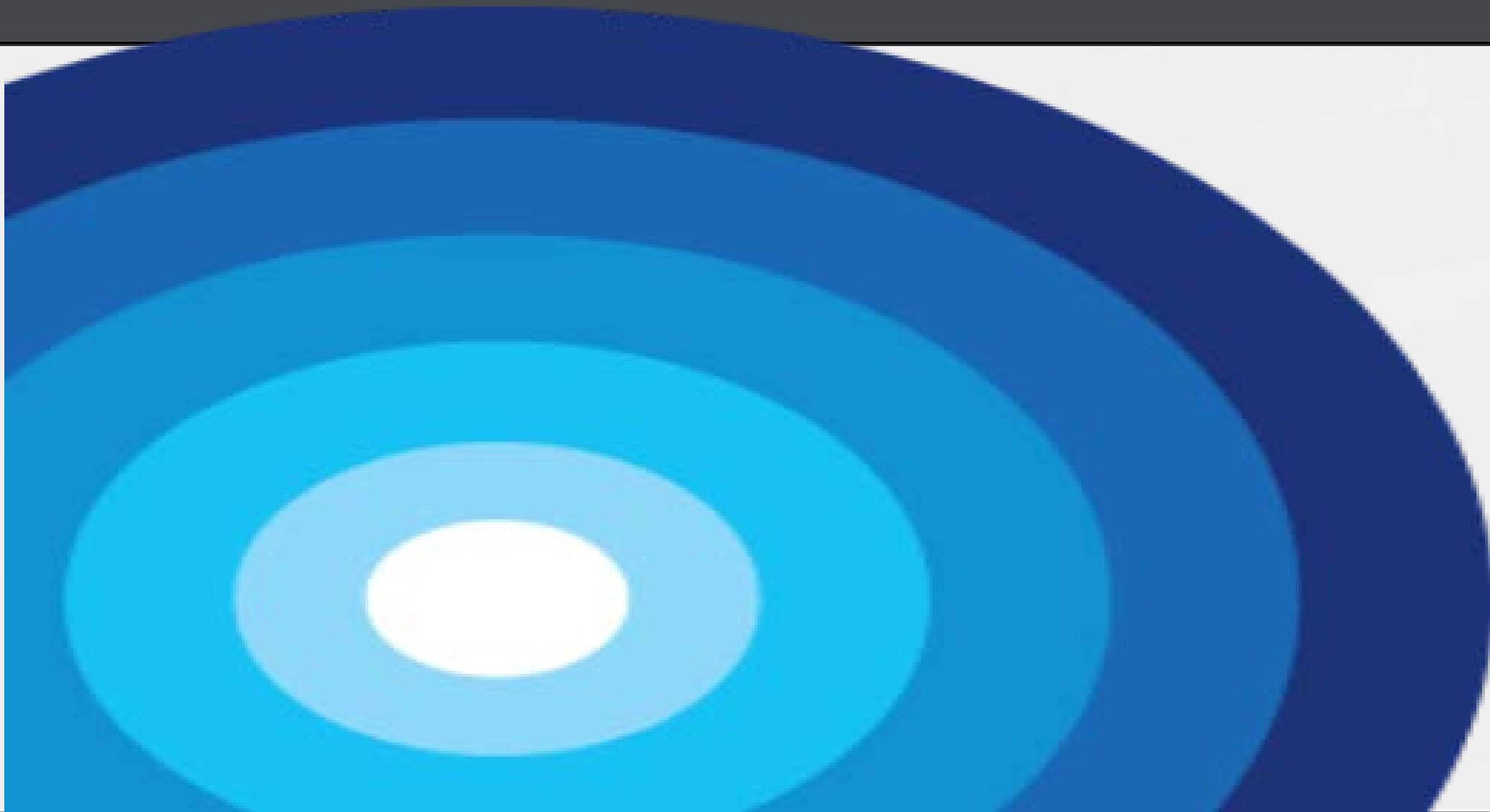


"This took me all night, and a Spirograph,
so pay attention..."

Confluence of ADA, 504 and IDEA







I IDEA/Rule 51

007.07B6 The IEP team shall consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, shall consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

I IDEA

“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. §1415(l).

Section 504 (29 U.S.C. § 794(a))

- "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance..."
- Entities receiving federal funding to furnish auxiliary aids which "afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement" as others. 45 C.F.R. § 84.4(b)(2).

Americans with Disabilities Act

“No 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”

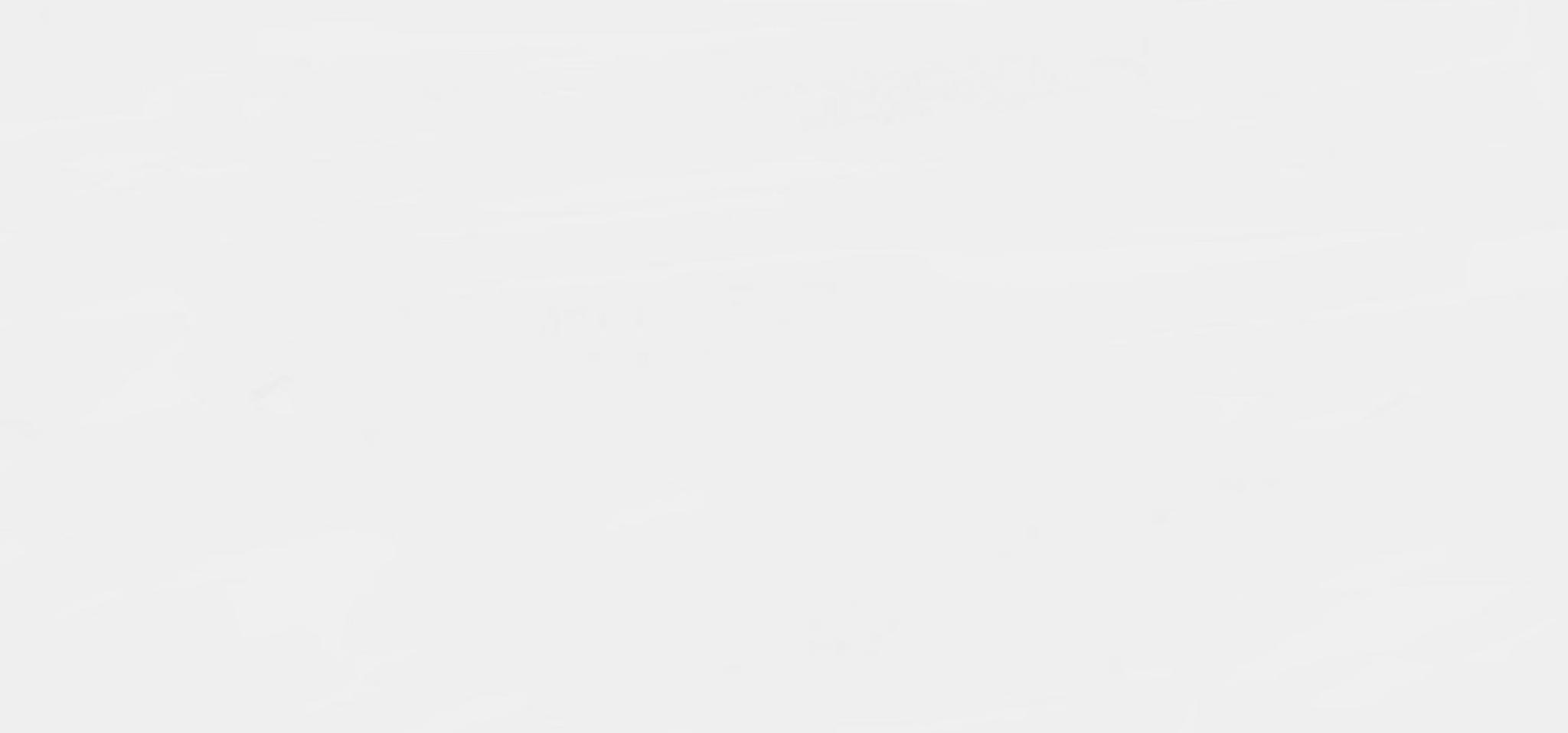
ADA Effective Communication Regulations

1. The District must "ensure that communications with applicants applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." (Emphasis added.) 28 C.F.R. § 35.160(a)(1)
2. The District must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in and enjoy the benefits of, a service, program or activity conducted by a public entity" 28 C.F.R. § 35.160(b)(1)

ADA Effective Communication Regulations

3. In determining what type of auxiliary aid and service is necessary, a school “shall give primary consideration to the requests of the individual with disabilities” or the student’s family in an educational context. 28 C.F.R. § 35.160(b)(2)
4. The District need not, under Title II, “take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity on in undue financial and administrative burdens.” 28 C.F.R. § 35.164

Got it?



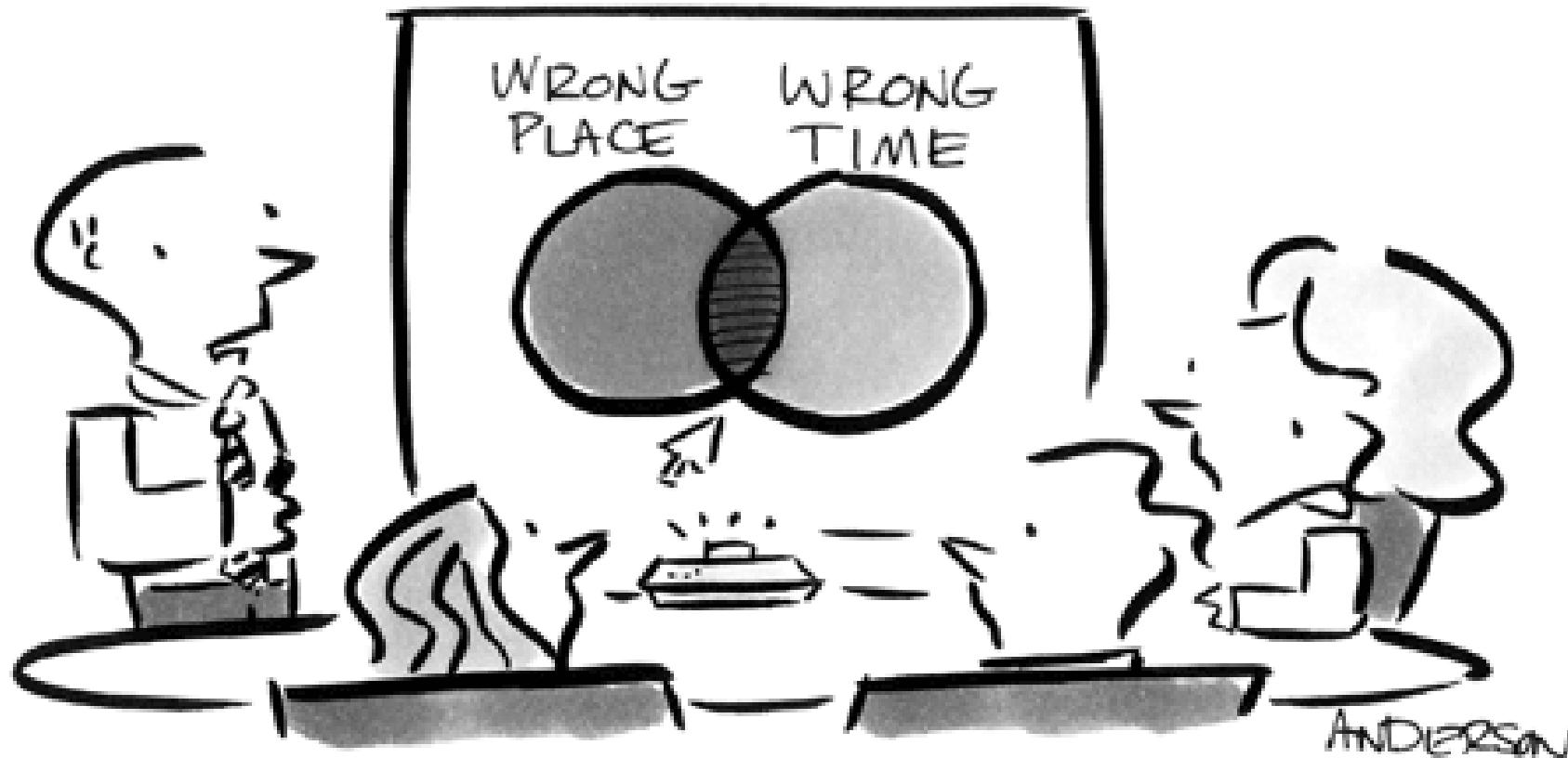
Got it?

#FALLONTONIGHT

I GOT IT, I GOT IT!

Interaction of ADA/504 & IDEA/Rule 51

- IDEA students all also have § 504/ADA protections *Letter to Mentink*, 19 IDELR 1127 (OCR 1993)
- Dual eligibility does *not* mean that schools provide an IDEA student with a § 504 plan in addition to his/her IEP. *Protecting Students with Disabilities*, 116 LRP 4782 (OCR 10/6/15)
- Parent **may** be able to reject IEP and demand § 504 plan
- Parent and student now can demand accommodations under § 504 that IEP team has rejected



"And, unfortunately, here's us."

K.M. by Bright v. Tustin Unified Sch. Dist., 61 IDELR 182 (9th Cir. 2013) *cert. denied*

- Hearing impaired students requested Communication Access Real-time Translation (CART) services from school
- IEP team said “no” – not required for FAPE
- Parents requested due process hearing
- Hearing officer and District Court ruled for the school—no denial of FAPE under the IDEA; and therefore, no violation of Title II of the ADA.

K.M. by Bright v. Tustin Unified Sch. Dist., 61 IDELR 182 (9th Cir. 2013) *cert. denied*

- 9th Circuit: compliance with IDEA standards does not necessarily satisfy ADA

“...the IDEA and Title II differ in both ends and means. Substantively, the 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, taken together, require public entities to take steps towards 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.”

Argenyi v. Creighton Univ.

46 NDLR 128 (8th Cir. 2013)

- Medical student with profound hearing loss and cochlear implants
- Requested
 - FM system transmitting directly to implants in groups of 8 or fewer students
 - CART for lectures
 - Cued speech interpreter for labs
- University provided only FM system
- Student paid for CART and interpreters himself (\$53,000)
- University later refused to allow interpreter in clinic

Argenyi v. Creighton Univ.

46 NDLR 128 (8th Cir. 2013)

- Student sued under Title II of the ADA and § 504
- University: FM transmitter should have been enough
- Court:
 - “the individual with a disability is most familiar with his or her disability and is in the best position to determine what type of aid or service will be effective”

Argenyi v. Creighton Univ.

46 NDLR 128 (8th Cir. 2013)

- “We conclude that the evidence produced in this case created a genuine issue of material fact as to whether Creighton denied Argenyi an equal opportunity to gain the same benefit from medical school as his nondisabled peers by refusing to provide his requested accommodations. At this stage the record supports Argenyi's claim that he was unable to follow lectures and classroom dialogue or successfully communicate with clinical patients. From such evidence a reasonable factfinder could determine that Argenyi was denied an opportunity to benefit from medical school equal to that of his nondisabled classmates. The district court's grant of summary judgment to Creighton should therefore be reversed and the case remanded.”

2014 Dear Colleague Letter

64 IDELR 180 (2014)

- DOJ/OSERS/OCR “Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools”
- On March 5, 2015, NSBA responded with a strong protest letter.
- On June 15, 2015, DOJ/OSERS/OCR replied to NSBA in Letter to Negron, 65 IDELR 304 (DOJ/OSERS/OCR 2015) and reiterated, “To comply with both statutes, a school may have to provide additional and different aids and services.”

In re Seattle (WA) Sch. Dist. No. 1 67 IDELR 22(OCR 2015)

- Dispute over hearing impaired student calling home
- Mother offered to provide the district with a captioned telephone
- School: TTY not required for FAPE
- Mother filed complaint with OCR
- OCR: “the regulation requires that, in determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the request of the individual with a disability. In order to be effective, auxiliary aids and services must be provided . . . in such a way as to protect the privacy and independence of the individual with a disability.”

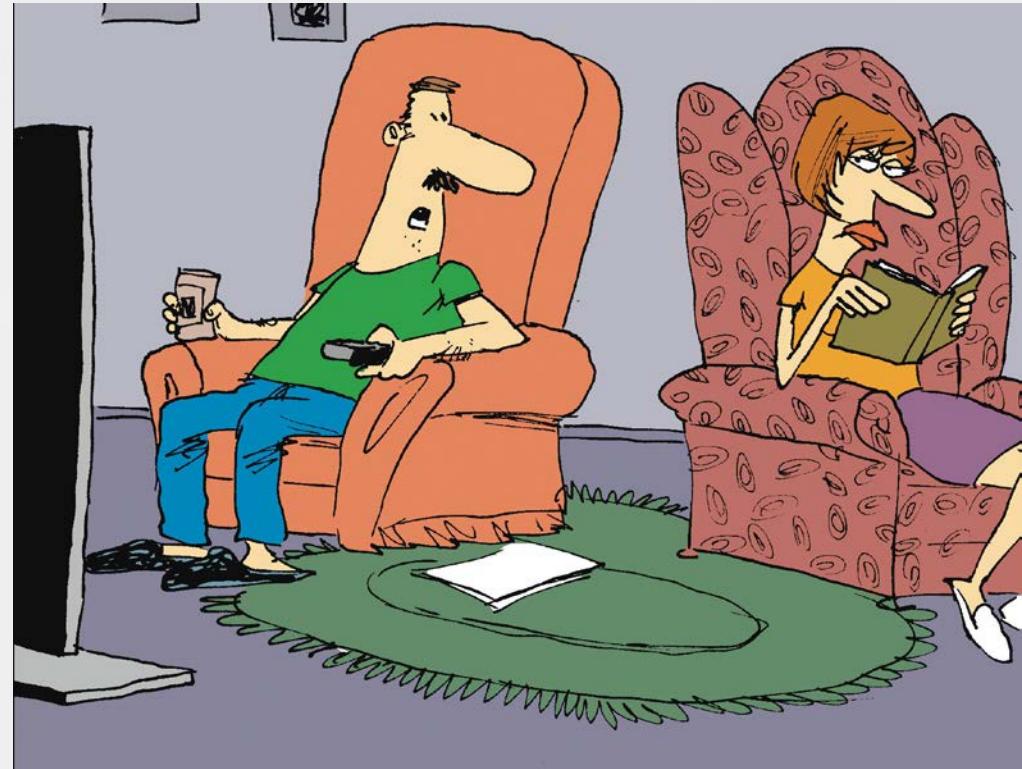
Riverside (CA) Unif. Sch. Dist.

115 LRP 51445 (OCR 2015)

- A student with a hearing impairment complained that appropriate services were not provided in the afterschool program at the school.
 - During the school day, the student utilizes hearing aids, sign language, and an FM system.
 - The afterschool program assigned a sign language interpreter for the student, but no protocol was in place for days when the interpreter was unavailable.
- OCR: found violation; district agreed to a resolution agreement with OCR that included the provision of an appropriate protocol during interpreter absences.

What is a “Communication Disability?”

- What is a “communication disability?”
 - Hearing impairment
 - Visual impairment
 - Processing errors
 - Autism?



"I WENT THROUGH ALL ONE HUNDRED AND FIFTY CHANNELS AND NOT A SINGLE THING ON. SO WHAT THE HECK, WANT TO TALK?"

Pollack v. Reg'l Sch. Unit. 75, 69 IDELR 271 (D.C. Maine 2017)

- Student with autism with limited verbal communication
- Parents requested that student be allowed to wear body camera at school
 - review announcements and other information that students are expected to convey to their parents
 - Assist student in telling parents about his day at school
 - Assist parents in advocating for student
- School refused
 - Violated school policy
 - Concerns about peer privacy
 - Violated negotiated agreement with teachers' union

Pollack v. Reg'l Sch. Unit. 75, 69 IDELR 271 (D.C. Maine 2017)

- Court:

- The Plaintiffs read the regulation as requiring the District to ensure that B.P.'s communication with his *parents* about his school day is as effective as nondisabled students. But this reading of the regulation extends its reach beyond the schoolhouse doors to communications between parents and child outside of the school setting.
- No evidence that the device was necessary to allow his parents to advocate for him

Effective Communication And Service Animal Claims

- *Gates-Chili Central School District, 65 IDELR 15251 (DOJ April 13, 2015)*
 - DOJ sued school for failing to allow service animal
 - Settlement agreement required district to agree to make reasonable modifications to their programming including “providing assistance to a student with a disability in tethering or untethering the service animal and escorting a student with a disability throughout the school or campus as he or she is accompanied by a service animal, **and assisting a student with a communication disability in issuing commands to the service animal.**” (emphasis added)

Effective Communication and the Internet

- Potential to affect:
 - Websites
 - Student Information Systems and On-line Gradebooks
 - Student Online Portfolios
- Department of Justice issued *Supplemental Advance Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities* (May 2016)

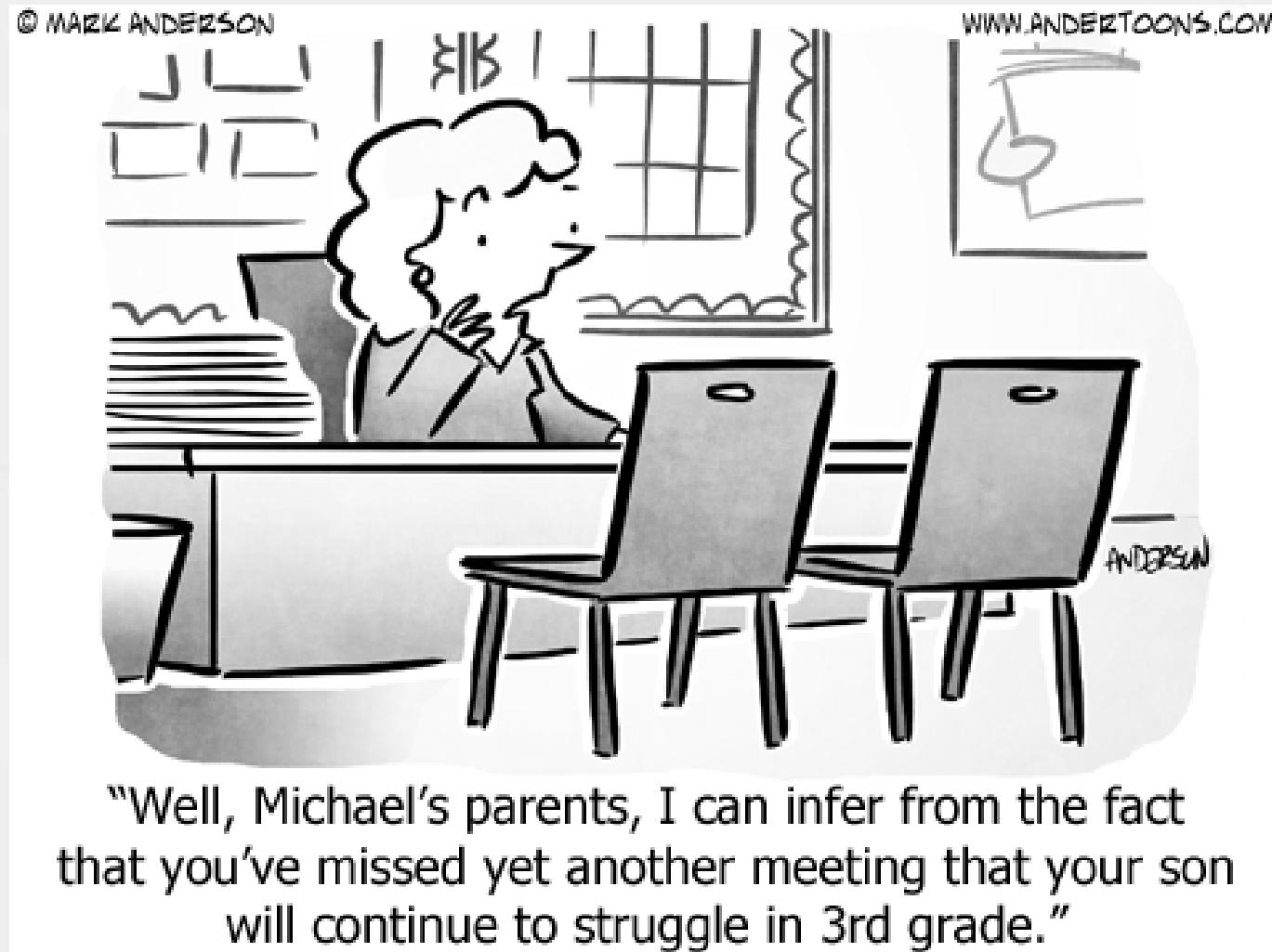
Effective Communication and the Internet

- OCR/DOJ Report: *Settlements reached in Seven States, One Territory to Ensure Website Accessibility for People with Disabilities* (June 29, 2016)
 - Images were missing text descriptions ("alt tags,") that describe the images to visually impaired who use special software;
 - Content could only be accessed by using a computer mouse, which meant that content was not available to those who are blind, and those with disabilities affecting fine motor control;
 - Website used color combinations that made text difficult people with low vision to see; and
 - Videos were not accurately captioned, so they were inaccessible to people who are deaf.



"What we've got here is a failure to communicate."

Communication Accommodations for Parents and Patrons



Talbot County (PA) Pub. Schs., 45 IDELR 45 (OCR 2005)

- Parent with severe hearing loss
- Asked district to use CART during IEP meetings
- District refused and instead instructed staff to accommodate in other ways
- The parent showed that during some of the meetings accommodations were not used
- OCR found violation of both section 504 and the ADA
 - Parent was unable to participate in her son's meeting effectively
 - District was not required to adopt the parent's preferred methodology
 - District ordered to provide a means of communication that would allow the parent to participate in the meeting effectively

Rothschild v. Grottenthaler, 16 IDELR 1020 (2d Cir. 1990)

- Deaf parents asked for ASL interpreter at school activities and meetings.
- School: parents not qualified because “Section 504 was designed to protect children, not their parents.”
- District Court: school pays for school-initiated activities; parents pay for extracurricular.

Rothschild v. Grottenthaler, 16 IDELR 1020 (2d Cir. 1990)

- 2d Cir.: Ruled for parents in entirety
 - Parents qualified to participate in any “Parent-oriented” activities incident to their children’s education that are offered by the school district.
 - The fact that a particular institution is primarily engaged in the provision of one category of service does not exempt it from Regulation 104.3(k) in its provision of other services.

Rothschild v. Grottenthaler, 16 IDELR 1020 (2d Cir. 1990)

- 2d Cir.: (cont'd)
 - Parents "are not excluded from the protection of section 504 merely because they are parents and not school children."
 - Reversed District Court re: extra-curriculars and graduation – school must pay for interpreter at all events and activities.

Mt. Diablo (CA) Unified Sch. Dist., 44 IDELR 261 (OCR 2005)

- Hearing impaired parents asked for interpreter so they could chaperone their child's field trip.
- The district refused; policy was to provide interpreter services to parents only for "mandatory" activities.
- The parents filed a complaint with OCR.

Mt. Diablo (CA) Unified Sch. Dist., 44 IDELR 261 (OCR 2005)

- OCR: no violation
 - Must provide equal access “to communication or participation in programs that are intended to benefit them.”
 - Field trips for benefit of students, not parents.
 - Parents entitled to interpreter for graduation ceremonies, parent-teacher conferences, etc.
 - OCR cautioned that only providing interpreters for “mandatory” activities could violate 504.

Escondido (CA) Union Elem. Sch. Dist., 17 IDELR 767 (OCR 1991)

- Hearing impaired parent demanded licensed ASL interpreter at conferences.
- District provided teacher who was qualified but not licensed in ASL.
- Parents cancelled parent/teacher conference, filed OCR complaint.

Escondido (CA) Union Elem. Sch. Dist., 17 IDELR 767 (OCR 1991)

- OCR:
 - Interpreter offered by the district was adequate.
 - No obligation to provide “independent” or “licensed” interpreter.

Letter to National Holistic University (CA), 103 LRP 47165 (OCR 2003)

- University refused to provide ASL interpreter at graduation.
- University argued that it had no obligation to father.
- Father paid for interpreter, filed OCR complaint.
- University agreed to revise its policy and to pay the parent his costs for the interpreter.

Hillsboro (OR) Sch. Dist. 1J, 59 IDELR 82 (OCR 2012)

- Parent who used service dog tried to volunteer in kindergarten class.
- Principal asked:
 - Why she needed dog; what it did
 - Proof of insurance
 - Vaccination records and training certifications
- Mother filed OCR complaint.

Hillsboro (OR) Sch. Dist. 1J, 59 IDELR 82 (OCR 2012)

- OCR:
 - Principal's inquiries and requests violated both Title II and Section 504.
 - Other volunteers weren't required to provide insurance information as they were covered by the district's liability and workers' compensation policies.
 - Ordered school to allow mom to volunteer with dog and without answering questions.

Hillsboro (OR) Sch. Dist. 1J, 59 IDELR 82 (OCR 2012)

- OCR (cont'd):
 - Referenced DOJ's regs re: service animals
 - Public entity may only ask if a service animal is required because of a disability and what work or task the animal has been trained to perform
 - Cannot require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal

Lake-Lehman (PA) Sch. Dist., 20 IDELR 546 (OCR 1993)

- Hearing impaired parent wanted sign language interpreter at board meetings.
- District refused to pay.
- District: no interpreter unless the meeting involved the academic or disciplinary situation of student.
- Parent planned to attend every board meeting until further notice.

Lake-Lehman (PA) Sch. Dist., 20 IDELR 546 (OCR 1993)

- OCR:
 - District's board meetings constitute "other services" as defined in 34 C.F.R. § 104.3(k)(4)
 - Limiting interpreters to meetings involving academic or disciplinary situation of disabled person's child was discriminatory
 - Disabled entitled to equally effective access to meetings – understanding board, asking questions, and making comments

Questions?



“Of course I know how to communicate without a phone. I have an app for that!”

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