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An IDEA for Special Education: Why the IDEA Should Have Primacy over the ADA in Adjudicating Education Claims for Students with Disabilities

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By Angela Estrella-Lemus*

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I. INTRODUCTION

Education is a cornerstone of the American political landscape and a foundation of the "American dream." It prepares children for their future, it sustains a successful democracy as it continues to develop, and it propels us into our future as a nation. It is a unique issue in that support and strategy in education is far more bipartisan than in many other political issues.[1] There has been much discussion over the past several years about reforming a broken education system.[2] President Barack Obama has spoken extensively on education issues in the United States throughout his presidency,[3] with particular focus on early learning, postsecondary education, and

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[1] Alex Altman, *Education Reform: Obama's Bipartisan Issue?*, TIME (Mar. 17, 2010), http://content.time.com/time/politics/article/0,8599,1972820,00.html.

[2] John Converse Townsend, *How Should We Rebuild the U.S. Education System?*, FORBES (Feb. 15, 2013), http://www.forbes.com/sites/ashoka/2013/02/15/how-should-we-rebuild-the-u-s-education-system/.

[3] *See* President Barack Obama, Remarks by the President on a World-Class Education at McGavock High School (Jan. 30, 2014), transcript *available at* http://www.whitehouse.gov/the-press-office/2014/01/30/remarks-president-world-class-education (discussing the importance of education, rewarding the best teachers, and high-quality early education); *see also* Sam Dillon, *Obama Calls for Major Change in Education Law*, N.Y. TIMES, Mar. 13, 2010, http://www.nytimes.com/2010/03/14/education/14child.html?pagewanted=all (describing President Obama's call for an overhaul of No Child Left Behind); Jason Koebler, *Obama Pushes STEM in State of the Union*, U.S. NEWS & WORLD REPORT (Jan. 25, 2014), http://www.usnews.com/news/blogs/stem-education/2012/01/25/obama-pushes-stem-in-state-of-the-union (identifying President Obama's focus on STEM in the State of the Union); President Barack Obama, Prepared Remarks of President Barack Obama: Back to School Event (Sept. 8, 2009), transcript *available at* http://www.whitehouse.gov/MediaResources/PreparedSchoolRemarks (discussing personal responsibility for education).

teacher education.[4] Regardless of the issue, education is always at least part of the answer. President Obama says, "If we want America to lead in the 21st century, nothing is more important than giving everyone the best education possible—from the day they start preschool to the day they start their career."[5] The country needs quality teachers, smaller classrooms, and a focus on science, technology, engineering, and mathematics education. All of these things are important, but the education agenda caters to the majority (as is necessary for a national agenda of any kind), which inevitably leaves certain subgroups out of the big picture of education.

Special education, a term that refers to the education of students with disabilities, is a subset of the education system with specific requirements and strategies, as such students have specific needs.[6] By its nature, special education is different from general education because it *must* be different. Students with disabilities often have to overcome hardships due to their disabilities, which make it more challenging for them to learn and receive a valuable education. They have to exist in an education system that, on a large scale, was not built for them.

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[4] *See* Alyson Klein, *Obama Sells Race to the Top Early-Childhood Education in State of the Union*, EDUCATION WEEK BLOGS (Jan. 28, 2014, 9:44 PM), http://blogs.edweek.org/edweek/campaign-k-12/2014/01/president_obama_renews_call_fo.html (discussing President Obama's focus on early-childhood education in the State of the Union); *see also* Elizabeth Green, *Building A Better Teacher*, N.Y TIMES, Mar. 2, 2010, http://www.nytimes.com/2010/03/07/magazine/07Teachers-t.html?pagewanted=all (discussing the issues with improving teacher quality); Tamar Lewin, *Obama's Plan Aims to Lower Cost of College*, N.Y. TIMES, Aug. 22, 2013, http://www.nytimes.com/2013/08/22/education/obamas-plan-aims-to-lower-cost-of-college.html (discussing President Obama's proposals to make college more affordable).

[5] Press Release, Office of the Press Secretary, The White House, New Report Highlights Impacts of Teacher Layoffs, Need to Invest in Education (Aug. 18, 2012), *available at* http://www.whitehouse.gov/the-press-office/2012/08/18/new-report-highlights-impacts-teacher-layoffs-need-invest-education; *see also* EXECUTIVE OFFICE OF THE PRESIDENT, Investing in Our Future: Returning Teachers to the Classroom (Aug. 2012), *available at* http://www.whitehouse.gov/sites/default/files/Investing_in_Our_Future_Report.pdf.

[6] 20 U.S.C. § 1401(29) (2012).

This comment analyzes the Individuals with Disabilities Education Act (IDEA) and the Americans with Disabilities Act (ADA), and the protections they afford to students with disabilities. In theory, these two acts, which both provide for individuals with disabilities, should be able to coexist, but in practice, there is conflict between the ADA and the IDEA with respect to *how* to provide for students with disabilities.[7] The ADA and the IDEA have two significant differences.[8] First, the two acts have different purposes.[9] The ADA has noneducational objectives—providing individuals with disabilities the same opportunities as those without disabilities.[10] In comparison, the IDEA has specifically educational objectives—providing individuals with disabilities the same *educational* opportunities as those without disabilities.[11] Second, Congress intended the IDEA to govern issues of education, as seen through the most recent amendments to the ADA and the IDEA, respectively.[12] Given these differences, courts have difficulty developing a unified theory for addressing claims that are brought under both the ADA and the IDEA.[13]

Part II discusses the relevant federal statutes relating to the issue of educating students with disabilities.[14] Part III discusses the Ninth Circuit Court of Appeals case, *K.M. ex rel. Bright v. Tustin Unified School District*,[15] presenting the issue regarding the interrelationship of the IDEA and the ADA.[16] In this case, the court of appeals ruled that failure of an IDEA claim does not preclude an ADA claim on the same issue.[17] This case, deciding an issue of first impression for the Ninth Circuit, sets precedent for an inefficient and costly way of

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[7] *See infra* Part V.

[8] *See infra* Part V.A.

[9] *See infra* Part V.A.

[10] *See infra* Part V.A.

[11] *See infra* Part V.A.

[12] *See infra* Part V.B.

[13] *See infra* Part III.B.

[14] *See infra* Part II.

[15] 725 F.3d 1088 (9th Cir. 2013), *cert. denied* 134 S.Ct. 1493 (2014), *cert. denied* 134 S.Ct. 1494 (2014).

[16] *See infra* Part III.

[17] *See infra* Part III.

providing remedies for issues of special education in California.[18] Part IV discusses general education, special education, and funding education in California.[19] Part V compares the IDEA and the ADA and suggests that California courts should treat the IDEA as having primacy over the ADA in matters of special education.[20]

II. HISTORY OF FEDERAL STATUTES ADDRESSING EDUCATION OF INDIVIDUALS WITH DISABILITIES

A. Rehabilitation Act of 1973 Section 504

The first two major decisions to address individuals with disabilities and start the movement addressing special education were *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*,[21] and *Mills v. Board of Education*.[22] These cases "expand[ed] on the *Brown* decision . . . by establishing that denying education to children with disabilities or treating them differently within the educational system was a denial of equal protection and due process under the Fourteenth Amendment to the Constitution."[23] The Supreme Court held that a school district is obligated to provide school-age children a "free and suitable publicly-supported education regardless of the degree of the child's . . . disability or impairment."[24] Following these two cases was the 1973 Rehabilitation Act[25]—which

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[18] *See infra* Part III.

[19] *See infra* Part IV.

[20] *See infra* Part V.

[21] 334 F. Supp. 1257 (E.D. Pa. 1971). "Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training." *Id.* at 1259.

[22] 348 F. Supp. 866 (D.D.C. 1972). "[T]he Board of Education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly supported specialized education to which they are entitled, the Board of Education violates the above statutes and its own regulations." *Id.* at 874.

[23] LAURA ROTHSTEIN & JULIA ROTHSTEIN, DISABILITIES AND THE LAW 5 (Thomas Reuters, West 4th ed. 2009); *see also* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[24] *Mills*, 348 F. Supp. at 878.

[25] Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2012).

prohibits federal entities from discriminating against people with disabilities.[26]

Section 504 of the Rehabilitation Act of 1973 (Section 504) was the first law to be enacted protecting persons with disabilities as it exists today.[27] It paved the way for the ADA and the IDEA.[28] Section 504 applies to entities that receive federal funds; it prohibits discrimination against people based on disabilities, stating:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of his or her 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 . . . .[29]

Additionally, Section 504 requires employers to reasonably accommodate employees with disabilities by making changes in

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[26] ROTHSTEIN & ROTHSTEIN, *supra* note 23, at 5. The 1973 Rehabilitation Act consists of three major provisions: Section 501 mandates nondiscrimination and affirmative action by federal employers. *Id.* Section 503 imposes nondiscrimination and affirmative action in employment requirements for federal contractors. *Id.* The most far-reaching and significant section is section 504. *Id.* Section 504 applies to recipients of federal financial assistance, including education programs, public facilities, transportation, and health and welfare services. *Id.* It mandates nondiscrimination and reasonable accommodation and, until 1990, was the most significant federal protection for individuals with disabilities. *Id.*

[27] Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012). The statutory language in section 794 first appeared in section 504 of the Rehabilitation Act of 1973, and is therefore referred to throughout this article as "Section 504." Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 355, *available at* https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCUQFjAB&url=https%3A%2F%2Fwww2.ed.gov%2Fpolicy%2Fspeced%2Fleg%2Frehabact.doc&ei=S3K5VNnRHcTioATUqILgAw&usg=AFQjCNE_9FKCxGz4jspmciV7TIy0mSIZ3Q&sig2=UY0L7LOArRrZNoI6Ye6O8A.

[28] *See* Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012).

[29] 29 U.S.C. § 794(a) (2012). The term "individual with a disability" is defined as any individual who "(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter." 29 U.S.C. § 705 (20)(A) (2012).

working conditions.[30] In *School Board of Nassau County v. Arline*,[31] "the United States Supreme Court noted that the purpose of the Rehabilitation Act was to provide handicapped Americans with opportunities for an education, transportation, housing, health care, and jobs that other Americans take for granted."[32] After the Rehabilitation Act was passed, President Richard Nixon designated the Department of Health, Education, and Welfare as the agency to coordinate the enforcement of the Act.[33] When the Department of Health, Education, and Welfare split into the Department of Health and Human Services and the Department of Education in 1979, the Department of Education took over the responsibility of enforcing the provisions and preventing discrimination against people with disabilities.[34]

The first major case to interpret Section 504 was *Southeastern Community College v. Davis*.[35] The Court determined that an

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[30] Ronald D. Wenkart, *The Reasonable Accommodation Requirements of Section 504 of the Rehabilitation Act*, 62 ED. LAW REP. 11, 13 (1990).

[31] 480 U.S. 273, 275 (1987).

[32] Wenkart, *supra* note 30, at 12.

[33] *Id.* at 13.

[34] *Id.*

[35] *Id.* at 14; *see also* Se. Cmty. Coll. v. Davis, 442 U.S. 397, 400 (1979). The respondent in this case suffered from a serious hearing disability and was denied admission to Southeastern Community College's Associate Degree Nursing program (an institution that receives federal funds). *Id.* The Executive Director of the North Carolina Board of Nursing recommended that the respondent not be admitted because her hearing disability would make her unable to safely care for patients. *Id.* at 401. After this evaluation and recommendation, the nursing staff of Southeastern Community College voted to deny the respondent admission. *Id.* at 402. Upon review of the respondent's situation, the Court found that Southeastern's denial of admission was not discrimination, explaining that the purpose of the program was to train persons to serve in the nursing profession in customary ways. *Id.* at 403. It was undisputed that the respondent could not qualify for this program unless the program's standards were lowered, and Southeastern is not required to lower standards to accommodate a person with a disability. *Id.* at 413. An institution is not required to disregard disabilities or make substantial changes in order to allow that person to participate. *Id.* The fact that Southeastern was unwilling to make major adjustments to its program does not constitute discrimination in this situation because the respondent was not an otherwise qualified candidate—a person who is able to meet all of a program's requirements despite a handicap or disability. *Id.* at 406. Hearing was essential to the nature of this program. *Id.* at 400–12.

institution is not required to lower its standards or make substantial modifications in a program such that a person with a disability can participate.[36] A government-funded institution, cannot, however, discriminate against an otherwise qualified person solely by reason of a disability.[37] The cases that followed *Southeastern*[38] established that the reasonable accommodation requirements of Section 504 apply to all special education students, as well as aids and equipment that may assist these students and their parents.[39] The reasonable accommodation requirements do not require significant modification or fundamental alteration of the educational program, "but where accommodation is not financially or administratively burdensome, modification of nonessential requirements that prevent persons with disabilities from participating in the educational program must be made."[40] Section 504 is still in effect today.[41]

B. Americans with Disabilities Act

The ADA was signed into law by President George H. W. Bush on July 26, 1990.[42] The primary difference between Title II of the ADA and Section 504 is that Section 504 only applies to entities that receive federal funds, whereas the ADA applies to all public institutions. Modeled after the Civil Rights Act of 1964 and Section 504, the ADA was created in order to prohibit discrimination on the

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[36] Wenkart, *supra* note 30, at 15.

[37] *Id.* at 14.

[38] *Id.* at 16; *see also* Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 183 (7th Cir. 1983); Colin K. v. Schmidt, 715 F.2d 1, 9 (1st Cir. 1983).

[39] Wenkart, *supra* note 30, at 21.

[40] *Id.*

[41] Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796 (2012).

[42] INTRODUCTION TO THE ADA, http://www.ada.gov/ada_intro.htm (last visited Dec. 30, 2014). At the time that the ADA was enacted, there were approximately forty-three million Americans with physical or mental disabilities. ROTHSTEIN & ROTHSTEIN, *supra* note 23, at 2. That number continues to increase as technology and medicine advances, saving the lives of children with severe physical and mental disabilities. Neal Halfon et al., *The Changing Landscape of Disability in Childhood*, 22 THE FUTURE OF CHILDREN 1, 17 (2012), *available at* http://futureofchildren.org/futureofchildren/publications/docs/22_01_FullJournal.pdf.

basis of disability,[43] to ensure that Americans with disabilities would receive the same treatment as those without disabilities.[44] The ADA uses the same eligibility criteria as Section 504 to determine who qualifies as disabled, and the ADA also affords the same protections against discrimination as Section 504.[45] The legislative intent of the ADA was "to protect people, including children, with disabilities from being excluded based upon overprotective rules, policies, standards and criteria, and to provide these Americans with the ability to redress such discrimination in federal court."[46] In order to be protected under the ADA, one must have a disability as defined under the terms of the Act:[47]

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[43] Scott B. Mac Lagan, *Right of Access: How One Disability Law Enabled Another*, 26 TOURO L. REV. 735, 737 (2010); *see also* 42 U.S.C § 12101 (2012):

> 1. [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> 2. [T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> 3. [T]o ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
> 4. [T]o invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

[44] 42 U.S.C. § 12101 (2012).

[45] *See* Peter J. Maher, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but not by the IDEA*, 44 CONN. L. REV. 259, 261 (2011).

[46] Mac Lagan, *supra* note 43, at 738.

[47] INTRODUCTION TO THE ADA, *supra* note 42; *see also* HOW TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT: A GUIDE FOR RESTAURANTS AND OTHER FOOD SERVICE EMPLOYERS, http://www.eeoc.gov/facts/restaurant_guide_summary.html (last visited Dec. 30, 2014):

> A person must have a serious, long-term medical condition or disorder that makes it very difficult for him or her to do basic activities. The person also must be qualified to perform the job. This means that the person must have the education, experience or skills necessary to do the job AND must be able to perform the duties that are central to the job, with or without a reasonable

> The term disability means, with respect to an individual:
> (A) A physical or mental impairment that substantially limits one or more major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.[48]

The ADA prohibits discrimination against people with disabilities, but does not guarantee the right to free appropriate public education (FAPE), which is one of the primary objectives of the IDEA.

C. Individuals with Disabilities Education Act

For decades, *students* with disabilities were largely ignored, until the enactment of the IDEA[49]—the first piece of legislation that specifically addressed *educating* Americans with disabilities.[50] The

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accommodation.

Id.

[48] 42 U.S.C. § 12102(1) (2012). In general, "[']life activities' include, but are not limited to[:] caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. §12102(2)(A) (2012). Life activities also include "bodily functions," including, "but not limited to[:] functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C. §12102(2)(B) (2012).

[49] 20 U.S.C. §§ 1400–1475 (2012).

[50] *Id.*; *see also* Timothy E. Morse, Allan G. Osborne, Jr. & Charles J. Russo, *Ten Commandments of Special Education*, 237 ED. LAW REP. 571, 572 (2008). The Ten Commandments of Special Education are:

1. Be diligent in finding and identifying children with disabilities
2. Provide children and their parents with all of the due process that is due
3. Thoroughly and timely evaluate all children with suspected disabilities
4. Include parents as equal partners in the development of the IEP

first form of the IDEA was created in 1970 with the Education of the Handicapped Act, which was later reauthorized as the Education for All Handicapped Children Act of 1975 (EAHCA).[51] Congress recognized that the educational needs of children with disabilities were not being met because:

> (1) the children did not receive *appropriate* educational services;
> (2) the children were *excluded entirely* from the public school system and from being educated with their peers;
> (3) *undiagnosed disabilities* prevented the children from having a successful educational experience; and
> (4) a lack of *adequate resources* within the public school system forced families to find services outside the public school system.[52]

The EAHCA was reauthorized as the IDEA and was most recently reauthorized as the Individuals with Disabilities Education Improvement Act of 2004 (IDEIA).[53] Throughout the various forms of this Act, the purpose has remained to provide students with disabilities access to learning in schools.[54] The IDEA definition of "disability," as it exists today, is divided into two sections; the first

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5. Make sure that the IEP is reasonably designed to provide educational benefit
6. Include any necessary related services, assistive technology, and transition services
7. Provide all programs and services in the least restrictive environment
8. Review all IEPs at least annually and reevaluate children at least every three years
9. Act promptly to resolve disputes
10. Keep accurate records

Id. at 571–78.

[51] Mac Lagan, *supra* note 43, at 740.

[52] Kathryn M. Smith & Richard Bales, *Education for Americans with Disabilities: Reconciling IDEA with the 2008 ADA Amendments*, 37 N. KY. L. REV. 389, 391 (2010).

[53] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–1475 (2012); *see also* Mac Lagan, *supra* note 43.

[54] Mac Lagan, *supra* note 43, at 740.

section defines "child with a disability" generally as a child:

> with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and who, by reason thereof, needs special education and related services.[55]

The second section explains that disability as it pertains to children ages three to nine could, at the discretion of the State and local education agency, include a child "experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in [one] or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and who, by reason thereof, needs special education and related services."[56] The IDEA provides federal funding from the Department of Education to provide for students with special education needs,[57] but leaves the responsibility for developing and executing programs for children who qualify for assistance to the states.[58] All public schools must comply with the IDEA.[59] In addition to funding special education, the IDEA gives disabled students an "enforceable substantive right to public education."[60] But in order for a child to be protected under the

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[55] 20 U.S.C. § 1401(3)(A) (2012); *see also* William D. Goren, *Individuals with Disabilities Education Act: The Interrelationship to the ADA and Preventative Law*, 71 FLA. B.J. 76, 79 (1997).

[56] 20 U.S.C. § 1401(3)(B) (2012).

[57] ROTHSTEIN & ROTHSTEIN, *supra* note 23, at 70.

[58] 78A CORPUS JURIS SECUNDUM 262 (Joseph J. Bassano et al. eds., 2008). "Congress has enacted the Individuals with Disabilities Education Act, which provides federal money to assist state and local agencies in educating disabled children." *Id.*

[59] *Id.*

[60] *Id.* at 263; *see also* Steven Marchese, *Putting Square Pegs into Round*

IDEA, the child must suffer an adverse effect on his or her academic achievement as a result of the defined disability.[61]

The first Supreme Court case to discuss the concept of FAPE was *Board of Education v. Rowley*.[62] *Rowley* addressed the issue of whether the IDEA required a school to provide a sign language interpreter to a deaf child.[63] The Court ruled that if a state has complied with the procedural requirements of the IDEA *and* the individualized education program (IEP) developed through the Act's procedures is "reasonably calculated to enable the child to receive educational benefits," then the state has complied with its obligations under the IDEA.[64] The Court further held that "[t]he Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children,"[65] but it *does* require the state to provide FAPE to qualified students with disabilities to tailor to their individual needs so that the students can advance from grade to grade.[66] The Supreme Court

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Holes: Mediation and the Rights of Children with Disabilities Under the IDEA, 53 RUTGERS L. REV. 333, 335 (2001) (explaining that "the emphasis of the statute is on procedure—with detailed requirements to ensure parental participation in the initial evaluation and development of a child's educational plan, as well as a complex due process system to resolve disputes between parents, guardians, and the school district if an initial agreement is not possible.").

[61] CORPUS JURIS SECUNDUM, *supra* note 58, at 263.

[62] 458 U.S. 176, 179 (1982). Justice Rehnquist held that (1) FAPE is satisfied when the state provides personalized instruction that permits the child with a disability to benefit from that personalized instruction, (2) FAPE does not require a state to maximize the potential of each child with a disability, and (3) in light of finding that a deaf child was advancing easily from grade to grade, the EAHCA did not require that the school provide the child with a sign-language interpreter. *Id.* at 209–10.

[63] *Id.* at 184–85.

[64] *Id.* at 206–07.

[65] *Id.* at 177.

[66] *Id*. This decision can be read in different ways. A narrow understanding of the *Rowley* decision can be read to say that the IDEA requires that public entities provide an equal opportunity to benefit from a public education, not make any guarantees on their success once provided these opportunities. A more expansive view of the *Rowley* decision would show that the Court specifically refrained from establishing a test and instead conducted a case-specific analysis to determine if the educational benefits were adequate. This remains a controversial ruling:

> In addition to its contentious minimal educational standard, there is confusion among the circuits and commentators as to *Rowley's*

stated that under IDEA, a "free appropriate public education" means special education and related services that: "(A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity [with the IEP]."[67]

The Act requires "specially defined instruction, and related services, at no cost to parents, to meet the unique needs of a child with a disability."[68] The IDEA requires that the state provide these services to students with disabilities from the ages of three to twenty-two, or until the student graduates high school—whichever happens first.[69] The IDEA also specifies certain factors that must be considered for students that have particular disabilities.[70] After it is determined that a student has a disability and that the disability interferes with the student's education, an IEP is prepared, which is an individualized written statement that defines the services that will be provided to the student.[71] The required components of the IEP

> application. For example, there is a circuit split regarding what constitutes the "educational benefit" portion of *Rowley's* FAPE definition. Six circuits require the benefit to be meaningful, five require the benefit to merely be adequate or provide some benefit, and one uses a combination of both.

David G. King, *Van Duyn v. Baker School District: A "Material" Improvement in Evaluating a School District's Failure to Implement Individualized Education Programs*, 4 NW. J. L. & SOC. POL'Y 457, 461–62 (2009).

[67] Goren, *supra* note 55, at 79. In *Rowley*, Justice Rehnquist further stated, "[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189.

[68] Mac Taylor, *Overview of Special Education in California* (Jan. 3, 2013), *available at* http://www.lao.ca.gov/reports/2013/edu/special-ed-primer/special-ed-primer-010313.pdf.

[69] *Id.* at 5.

[70] K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1095 (9th Cir. 2013), *cert. denied* 134 S.Ct. 1493 (2014), *cert. denied* 134 S.Ct. 1494 (2014). In this case, which will be discussed in detail in Part III of this comment, the court discussed certain factors that must be considered for deaf or hard-of-hearing (DHH) students. *Id.*

[71] Taylor, *supra* note 68, at 8.

include current status, goals, progress measures, services to be provided, inclusion in mainstream setting, an assessment plan, and any additional considerations.[72] The purpose of an IEP is to have an education program that addresses each child's specific needs so that the child can receive an appropriate education.[73] The goal of an IEP is a cooperative process between the district and the parents of the child with special education needs.[74]

The Supreme Court in *Rowley* next addressed whether Congress intended education of students with disabilities to meet a substantive standard, and looked to legislative history to answer this question.[75] Support for the education of students with disabilities was relatively recent; therefore, the goals of recent legislation at that time had not been overly ambitious, with the primary intent of making education *available* to students with disabilities, and *without* the expectation of any particular outcome.[76] The Court took note of the fact that the courts in *PARC* and *Mills* discussed the legislative reports at length in their respective decisions.[77] This suggested that the principles

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[72] *Id.* at 9. An IEP "team" is also required. Wilkins v. District of Columbia, 571 F. Supp. 2d 163, 167 (D.D.C. 2008). The team is composed of the parents of the child with a disability, a regular education teacher, a special education teacher, a school district representative, an individual who can interpret the student's evaluation results, sometimes a person with particular knowledge of the student, and sometimes, the student herself. *Id.*; *see also* 20 U.S.C. § 1414(d)(1)(B) (2012).

[73] CORPUS JURIS SECUNDUM, *supra* note 58, at 266–67. More specifically, in *Rowley*, the Court said that an IEP must contain:

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

458 U.S. 176, 182 (1982).

[74] Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 53 (2005).

[75] *Rowley*, 458 U.S. at 190.

[76] *Id.* at 191–92. "Thus, the intent of the Act 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." *Id.* at 192.

[77] *Id.* at 193.

established in those two cases were principles that guided the drafters of the Act.[78] The Court explained that, considering the Act together with the legislative history, congressional intent was to provide access to education for students with disabilities so that they may advance from grade to grade,[79] but did not require any substantive level of education.[80]

III. *K.M. EX REL. BRIGHT*

A. Facts of the Case

The Ninth Circuit Court of Appeals case, *K.M. ex rel. Bright*, addressed the issue regarding the interrelationship between the IDEA and the ADA.[81] This case, decided in August 2013, consolidated two California cases, which both addressed public schools' obligations to deaf or hard-of-hearing (DHH) students.[82]

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[78] *Id.* at 194. The 1974 statute:

> "incorporated the major principles of the right to education cases," by "add[ing] important new provisions to the Education of the Handicapped Act[,] which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children . . . are educated with children who are not handicapped; . . . and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory."

Id. at n.18. This made it clear that the purpose of the Act was *access*, not substantive outcomes or achievement.

[79] *Id.* at 203–04.

[80] *Id.*

[81] K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1092 (9th Cir. 2013), *cert. denied* 134 S.Ct. 1493 (2014), *cert. denied* 134 S.Ct. 1494 (2014).

[82] *Id.*

The first plaintiff, K.M., was a high school student in the Tustin Unified School District (Tustin) in Orange County, California.[83] K.M. had a hearing disability, causing her to have trouble hearing her classmates, as well as difficulty hearing videos that were shown in the classroom.[84] Tustin had regular meetings to develop K.M.'s IEP, and at a June 2009 meeting of K.M.'s IEP team, K.M.'s mother requested that Tustin provide her with Communication Access Realtime Translation (CART) beginning on the first day of high school.[85] After several meetings and trials of both CART and an alternative transcription technology called TypeWell, K.M.'s IEP team determined that K.M. did not need a transcription service in order to receive FAPE under the IDEA.[86]

The second plaintiff, D.H., was a high school student in the Poway Unified School District (Poway) in San Diego County, California.[87] Like K.M., D.H. also had a hearing disability and was eligible to receive special education services under the IDEA.[88] D.H.'s hearing disability caused her to have difficulty following class discussions and teacher instructions, a problem that continued after she started high school.[89] Like in K.M.'s case, at an IEP meeting, D.H.'s parents requested that Poway provide her with CART, and the IEP team determined that CART was not necessary in order to provide D.H. with FAPE under the IDEA.[90]

D.H. and K.M. both had hearings before a California administrative law judge (ALJ), who determined that their respective districts had fulfilled their obligations to D.H. and K.M. under the IDEA.[91] D.H. and K.M. challenged their respective ALJ decisions in

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[83] *Id.*

[84] *Id.* at 1093.

[85] *Id.* at 1092. "CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor." *Id.* CART was a service that was recommended by K.M.'s auditory-visual therapist. *Id.* at 1093.

[86] *Id.*

[87] *Id.* at 1092.

[88] *Id.* at 1094.

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1092.

district court, alleging disability discrimination.[92] The plaintiffs conceded that their respective districts and schools complied with the IDEA; they challenged only the validity of their ADA claims.[93] Thus, the specific issue addressed was "whether a school district's compliance with its obligations to a [DHH] child under the IDEA also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA."[94]

B. Ninth Circuit Holding

The court held that "[t]he failure of an IDEA claim does not automatically foreclose a[n ADA] Title II claim grounded in the [ADA] Title II effective communications regulation,"[95] determining that compliance with one act is not necessarily compliance with the other, and that one act does not have primacy over the other.[96]

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[92] *Id.* K.M. challenged the ALJ decision under the IDEA, Section 504, the ADA, and California's Unruh Civil Rights Act. *Id.* at 1093. D.H. challenged the ALJ decision under Section 504, the ADA, and the IDEA. *Id.* at 1094.

[93] *Id.* at 1092.

[94] *Id.*

[95] *Id.* at 1102. The court of appeals decided not to review the record to determine whether there was an alternate ground on which to affirm summary judgment. *Id.* Because both districts on the original cases granted summary judgment on legal grounds, "neither district court considered whether there was a genuine issue of material fact as to the school districts' compliance with [ADA] Title II." *Id.* at 1103. Furthermore, the school districts litigated these cases as if the IDEA and ADA claims were equivalent. *Id.* As the court explains in footnote seven of this case, "Although [the school districts] made [ADA] Title II-specific arguments in the alternative, the IDEA claims were clearly the focus of their litigation efforts." *Id.* at n.7. The court of appeals reversed the grants of summary judgment on the ADA claims in both cases and remanded to the district courts for further proceedings. *Id.* at 1103. The United States District, S.D. received D.H.'s case on remand, and the court ordered the Poway District to provide D.H. with CART during classes at school. D.H. *ex rel.* Harrington v. Poway Unified Sch. Dist., No. 09–CV–2621–L, 2013 WL 6730163, at *8 (S.D. Cal. Dec. 19, 2013). Poway moved for reconsideration of the preliminary injunction granted by the S.D. court on remand; the court denied Poway's motion for reconsideration. D.H. *ex rel.* Harrington v. Poway Unified Sch. Dist., No. 09–CV–2621–L, 2014 WL 129070, at *1 (S.D. Cal. Jan. 14, 2014). K.M.'s case has not yet been heard on remand.

[96] *K.M. ex rel. Bright*, 725 F.3d at 1102.

Addressing both K.M.'s and D.H.'s decisions together, the court of appeals acknowledged that, at least generally, schools are required to comply with both the ADA and the IDEA, but that they differ in their ends as well as their means:[97]

> 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. [ADA] 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.[98]

But the Ninth Circuit suggested that Congress intended for these two pieces of legislation to coexist.[99] The court in *K.M. ex rel. Bright* specifically clarified that the IDEA does not foreclose any additional claims children with disabilities may have through other legislation, so long as they address their IDEA claims through the specified IDEA administrative procedure.[100]

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[97] *Id.* at 1097.

[98] *Id.*

[99] *Id.*

[100] *Id.* The IDEA non-exclusivity provision reads:

> 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 [42 U.S.C. § 12101 *et seq.*], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 *et seq.*], 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.

Id. (citing 20 U.S.C. § 1415(l) (2012)).

Specifically with respect to DHH children, the court looked at the language of the communication provisions contained in the ADA and the IDEA,[101] which was an issue of first impression for the court.[102] In comparing the communication provisions in these two pieces of legislation, the court of appeals identified three significant differences.[103] First, the factors that schools must consider when evaluating students with hearing problems under the IDEA and the ADA are different.[104] When evaluating an IEP for IDEA purposes, the IEP team must focus on the child's "needs" and "opportunities," considering factors including "the child's language and communication *needs*," "*opportunities* for direct communications with peers and professional personnel in the child's language and communication mode," and "whether the child *needs* assistive technology devices and services."[105] However, under the ADA, the school, as a public entity, is required to "furnish appropriate auxiliary aids and services *where necessary*."[106] As the court of appeals explains, the ADA includes another requirement that the public entity "give primary consideration to the *requests* of the individual with disabilities."[107] This provision in the ADA, the court of appeals pointed out, has no IDEA counterpart.[108]

Second, the ADA provides schools and districts with defenses that are not available under the IDEA.[109] The ADA does not require public entities to make any changes that would fundamentally alter the nature of a service, program, or activity.[110] It does not require a public entity to make changes that would pose an undue financial or administrative burden.[111] The ADA also does not require a school to provide new programs or new curricula to accommodate a child with

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[101] *Id.* at 1100.
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 1100–01 (citing 28 C.F.R. § 35.160(b)(2) (2014)).
[108] *Id.* at 1100.
[109] *Id.* at 1101.
[110] *Id.*
[111] *Id.*

a disability.[112] These ADA defenses have no IDEA counterpart.[113] Under the IDEA, the school district must do whatever is necessary to ensure that a child with special needs advances from grade to grade.[114]

Third, the ADA requires schools to provide equal education opportunities to all students, which is a requirement that is not relevant to IDEA claims.[115] Given these differences, the court reasoned that it was not possible to determine a unified theory for the interaction between the ADA and the IDEA.[116] Both cases were remanded for further proceedings consistent with the Ninth Circuit opinion.[117]

By ruling that K.M. and D.H. could litigate their claims under the ADA after their IDEA claims failed, the court presented an important question about the relationship between the IDEA and the ADA, but was unable to provide comprehensive guidance regarding how other courts should handle claims brought under both acts. The court acknowledged that it was speaking specifically about the issues facing DHH students and that the relationship between the IDEA and the ADA was a matter that had to be evaluated on a case-by-case basis.[118] However, the general interaction of the IDEA and the ADA is a critical issue to resolve in order to ensure that the needs of students with disabilities in California are being properly evaluated and addressed.

C. Analyzing the Ninth Circuit's Holding

In *K.M. ex rel. Bright*, K.M. and D.H. were both DHH students,[119] and both students were arguing for CART under the ADA, not the IDEA, even though they requested CART for educational purposes.[120] At first glance, the outright failure of their

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[112] *Id.*
[113] *See generally* 20 U.S.C. § 1400 (2012).
[114] *Id.*
[115] *K.M. ex rel. Bright*, 725 F.3d at 1101.
[116] *Id.*
[117] *Id.* at 1103.
[118] *Id.* at 1101.
[119] *See supra* Part III.A.
[120] *See supra* Part III.A.

IDEA claims is counterintuitive because these students did not receive the services that they believed would help them perform better in school. Even though the IDEA claims were not successful for D.H. and K.M., the IDEA does more to protect their educational interests than the ADA, as the ADA does not speak specifically to education. The existence of an IEP under the requirements of the IDEA ensures that students' needs are being considered on an individual basis, whereas the ADA ensures only that individuals are not discriminated against for reason of disability.[121] It is true that the definition of "disability" is broader under the ADA,[122] so at face value, the ADA would appear more beneficial for special education students. However, as previously mentioned, it is also true that the ADA does not require public entities to fundamentally alter an existing institution or system, or put themselves at financial risk in order to accommodate a student with a disability.[123] The IDEA, on the other hand, must accommodate a student with a disability to a certain extent regardless of the cost to the school or to the district.[124] By this reasoning, the district courts in K.M.'s and D.H.'s respective cases were right to conclude that compliance with the IDEA results in compliance with the ADA.

IV. EDUCATION IN CALIFORNIA

A. General Education in California

I have chosen California to evaluate this issue of the interrelationship of the ADA and the IDEA because California is known for its frequent changes in education policy, and therefore has the potential to set an example for model legislation in other states.[125]

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[121] *See supra* Part II.

[122] *See infra* Part V.

[123] *See supra* Part II.

[124] *See supra* Part II.

[125] PACE, *Californians and Public Education: Results from the Fourth PACE/USC Rossier Poll* 1 (Nov. 2014), http://www.edpolicyinca.org/sites/default/files/PACE%20USC%20Poll%20Nov%202014.pdf.

California is a state that is willing to adapt and grow as the education system continues to develop through laws and procedure.[126]

It is important to have some context for understanding how special education operates within California's broader education system. California has the largest population of any state in the country, and consequently also has the largest population of *students* of any state in the country, placing a greater strain on California's education system in a number of ways.[127] In the 2010–2011 school year, the student-to-teacher ratio in California was 24.1:1, compared to 16:1 nationally, ranking California forty-ninth out of fifty-one (fifty states and the District of Columbia) in student-to-teacher ratio.[128] The student-to-administrator ratio in California was 333.7:1, compared to 215.5:1 nationally, ranking California forty-eighth in the country in student-to-administrator ratio.[129] In 2013, California dropped to forty-ninth in per student spending in the nation, spending $8,482 per student, which is $3,342—or 28%—below the national average of $12,842 per student.[130] Based on these numbers, it is clear that one of California's biggest problems is the lack of professional adults—especially teachers—in the system to serve the sheer number of students in California.[131]

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[126] *Id.*

[127] PACE, *Reforming Education in California* 7 (2010), http://edpolicyinca.org/sites/default/files/2010_REFORMING_ED_IN_CA_WEB.pdf (last visited Dec. 30, 2014).

[128] Patrick Keaton, *Public Elementary and Secondary School Student Enrollment and Staff Counts from the Common Core of Data: School Year 2010–11*, NATIONAL CENTER FOR EDUCATION STATISTICS 14 (Apr. 2012), http://nces.ed.gov/pubs2012/2012327.pdf.

[129] *Id.*

[130] John Fensterwald, *California Drops to 49th in School Spending in Annual Ed Week Report*, ED SOURCE (Jan. 14, 2013), http://edsource.org/today/2013/california-drops-to-49th-in-school-spending-in-annual-ed-week-report/25379#.UwlqmhbbdUT.

[131] *Id.* California also has a unique student body:

> California educates approximately one-third of the nation's English language learners, more than three-quarters of whom are Spanish-speaking. More than [forty] percent of California's public school children speak a first language other than English. English language learners face significant challenges beyond those faced by native English speakers. The majority of these students are living in poverty with parents who have very little

The volume of students in the system places a huge strain on the resources available to the California education system,[132] without yet taking into account the additional resources required to run special education programs in California or the special needs of students with disabilities. The shortage of teachers and other professional personnel is particularly prevalent in high-need areas.[133] High-need schools face the challenge of attracting and retaining high-quality, experienced teachers, which is problematic in that teacher turnover has a high impact on student achievement and success.[134] Additionally, areas with high turnover rates lose money in teacher professional development.[135]

The independent, nonpartisan research center, Policy Analysis for California Education (PACE), determined that the education system in California is more dependent on state funding than almost every other state in the country,[136] making education finance an issue

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> education. They require teachers with special skills, as they need to learn both a new language and the academic curriculum. California faces a severe shortage of teachers with these skills.

Id. at 3.

[132] *Id.* at 4.

[133] *Id.* at 3–4. The term "high-need" refers to areas with high poverty rates and low Academic Performance Index (API) scores. *Id.* API measures the progress of the school itself, as opposed to the progress of the individual students. *Id.* at 4–7.

[134] *Id.* It is widely acknowledged that "[t]eachers are the single most important influence on the education of students." *Id.* at 6. Additionally, "compensation . . . represents the largest share of the state's education budget." *Id.* Some argue that more effective use of the state's education budget through "eliminating perverse incentives, increasing local flexibility and innovation, and encouraging experimentation with alternative approaches to recruitment, retention, and compensation would better equip California's schools to find and retain teachers who can ensure success for all of their students, especially those facing the biggest challenges." *Id.* at 6.

[135] *Id.* at 3.

[136] *Id.* at 15. California is more dependent on state funding than most other states, and the state's finance system itself is very complicated:

> [T]he state's system of finance is so complex that only a handful of experts understand how California's schools are financed. This complexity imposes costs without providing benefits to the education system. California would gain from policies that increase transparency and flexibility in funding. Increased flexibility would enable districts and schools to direct funds to

primarily for state and local agencies.[137] However, similar to most other states, California's system of education is fraught with inequalities in the money and resources available to different schools and school districts across the state.[138] It is clear that reforming and improving California's education system in general will require a great deal more funding.[139] California's greatest concern is the lack of funds to provide both regular students and special education students with the tools and resources they need to be successful. General funding principles in California affect how California evaluates and regulates special education, and has a big impact on how courts will likely view the interrelationship between the ADA and the IDEA.

B. Special Education in California

Special education in California operates differently than general education in California, affecting how the courts must view the IDEA and the ADA. In order to receive special education, the student must *have* a disability and the disability must *interfere* with his or her education.[140] A student is not qualified to receive special services until the school has tried to meet the student's needs within the parameters of the system as it exists for students without disabilities.[141] After it is determined that the school cannot meet the student's needs in the general education program, the student is referred for a professional evaluation of his or her disability to see if he or she is qualified for special education.[142] At the beginning of 2013, approximately 686,000 students with disabilities received special education services in the state of California,[143] which is approximately 10% of the students in the public education system in

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> meet local needs, and to avoid the costs of compliance with today's complex funding rules.

Id.

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Taylor, *supra* note 68, at 8.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 9.

the state.[144] About 618,000 of these students are in grades kindergarten through twelfth grade.[145] In California, 41% of students with disabilities have specific *learning* disabilities, "affecting one or more of the basic processes involved in understanding/using language or performing mathematical calculations."[146] Speech or language disabilities affect approximately 25% of students with disabilities in California, and autism affects approximately 10% of students with disabilities in California.[147] Over the past few decades, the number of students identified with specific learning disabilities

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[144] *Id.*; *see also Special Education CalEd Facts*, DEPARTMENT OF EDUCATION OF CALIFORNIA, *available at* http://www.cde.ca.gov/sp/se/sr/cefspeced.asp (last visited Dec. 30, 2014):

> Intellectual disabilities: 43,303
> Speech or language impairment: 164,600
> Visual impairment: 4,327
> Emotional disturbance: 25,984
> Orthopedic impairment: 14,261
> Other health impairment: 61,309
> Specific learning disability: 278,697
> Deafness: 3,946
> Hard of hearing: 9,991
> Deaf-blindness: 160
> Multiple disabilities: 5,643
> Autism: 71,825
> Traumatic brain injury: 1,771

Id.

[145] Taylor, *supra* note 68, at 9.

[146] *Id.* at 9; *see also* Department of Education, *Specific Learning Disability*, *available at* http://doe.sd.gov/oess/documents/sped_RtI_eligibility.pdf (last visited Dec. 30, 2014):

> Specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to students who have learning problems that are primarily the result of visual, hearing, or motor disabilities; cognitive disability; emotional disturbance; or environmental, cultural, or economic disadvantage.

Id.

[147] Taylor, *supra* note 68, at 9.

has dropped, while the overall number of students with disabilities has significantly increased.[148] The report, *Overview of Special Education in California*, generated by the California Legislative Analyst's Office, states that this is a general trend that is reflected across the nation, demonstrating the need for a unified theory regarding the relationship between the ADA and the IDEA nationwide.[149]

The most common service provided for students with special education needs is specialized academic instruction.[150] The next largest category of service provided is speech and language therapy—over 300,000 students receive this service.[151] Other services include occupational therapy, counseling services, interpreting services, and physical therapy.[152] Additionally, schools are required to develop specific services for students once they reach the age of sixteen in order to prepare them to transition into postsecondary activities.[153] These services include, "vocational and career readiness activities, college counseling, and training in independent living skills."[154] In addition to procedural requirements, federal law provides parents with the right to challenge the specific

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[148] *Id.* at 10.

[149] *Id.*

[150] *Id.* at 11.

[151] *Id.* "Speech-language pathology services" is defined as:

> I. Identification of children with speech or language impairments;
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> II. Diagnosis and appraisal of specific speech or language impairments;
>
> III. Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;
>
> IV. Provision of speech and language services for the habilitation or prevention of communicative impairments; and
>
> V. Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

34 C.F.R. § 300.34 (c)(15) (2014).

[152] 34 C.F.R. § 300.34 (c) (2014).

[153] Taylor, *supra* note 68, at 11.

[154] *Id.*

services that their children receive.[155]

In California, special education funding is administered through 127 Special Education Local Plan Areas (SELPAs) rather than through the districts in the state.[156] SELPAs are composed of districts, county offices of education, and charter schools, which all have unique organizational and operating structures.[157] In California, the average cost of providing for a student with disabilities as compared to a student without disabilities is more than double—$22,300 compared to $9,600.[158] The additional funds are supported by "an average of about $2,300 in federal funds, about $5,400 in state funds, and about $5,000 in local funds."[159] Excess costs to support special education in California have increased over the past several years, in part due to more students with severe disabilities.[160]

Special education in California is funded using a census-funding model, which means that the amount of state aid is determined based primarily on the number of students enrolled in the district and the amount of aid is fixed per student:[161]

> Census funding differs from all other methods used by states for distributing special education funds because aid is largely independent of the characteristics of special education programs, such as the number of students served. . . . States adopting census funding limited their fiscal exposure to rising disability rates by ceasing to provide aid based on factors that districts arguably can influence (e.g., the number of students identified, the nature of their disabilities, how students are served across educational environments, or the resources committed to helping each student),

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[155] *See, e.g.*, note 92 and accompanying text.

[156] Taylor, *supra* note 68, at 5.

[157] *Id.*

[158] *Id.* at 6.

[159] *Id.* at 14.

[160] *Id.* at 15–16.

[161] Elizabeth Dhuey, *Funding Special Education by Total District Enrollment: Advantages, Disadvantages, and Policy Considerations* 5, *available at* http://homes.chass.utoronto.ca/~edhuey/datastore/files/docs/EFP_policy_brief_Dhuey_Lipscomb_Jan_21_2013.pdf (last visited Dec. 30, 2014).

> thus forcing school districts to assume more fiscal responsibility for additional special education services.[162]

In applying this model, California assumes additional costs to meet special education needs, and funding for special education is distributed based on total enrollment instead of special education enrollment specifically.[163] The census-funding model has its advantages and disadvantages.[164] One advantage is that it is a transparent formula for calculating funding—it is purely based on enrollment.[165] Because school districts know how their funding is being calculated, they are able to make plans to effectively use their funding. The ability of school districts to know, more or less, how much money they will be receiving is a huge advantage given California's already scarce resources for the large population of students district to district.[166] Another major advantage is that census funding also lowers the incentive to over-identify disabilities in order to receive more funding because the amount of funding is based on enrollment of students as a whole, not only on the students with recognized disabilities.[167] However, this model also has its disadvantages. One disadvantage is that the census-funding model does not consider the actual number of students with disabilities per district and instead assumes uniformity of additional costs to meet the needs of special education students.[168] Studies assessing the special education needs across a state have flatly rejected the idea of uniformity across a state.[169]

Based on the numbers discussed above, it is clear that one of California's greatest issues in education is the lack of funding and resources to provide for all of the students in the system. The ADA and the IDEA impose standards on California schools, and

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[162] *Id.* at 5–6.
[163] *Id.* at 9–10.
[164] *Id.* at 9.
[165] *Id.*
[166] *Id.* at 9–10.
[167] *Id.* at 10.
[168] *Id.* at 13.
[169] *Id.*

compliance with these standards has a direct relationship to available funding and resources. Furthermore, access to education provided by the IDEA requires schools to spend more money on students with disabilities than on the average student.[170] The more obligations schools have to a student, the more funding schools need to fulfill their federal obligations to special education students. California is likely expending resources just to account for the disparity in the relationship between these two acts. In order to cope with an already overtaxed system, courts need to have one clear, cost-effective compliance standard for California districts and schools.

V. THE IDEA SHOULD HAVE PRIMACY OVER THE ADA IN SPECIAL EDUCATION

A. Comparing the Purposes of the ADA and the IDEA

While the Ninth Circuit held that compliance with the IDEA does not automatically guarantee compliance with the ADA, it is important to assess how the ADA and the IDEA differ and what these differences mean for school districts. The goals of the ADA and the IDEA are similar in that they both aim to protect the rights of individuals with disabilities; however, they have noticeable and measurable differences: "The ADA's goal of enabling people with disabilities to receive the same opportunities as people without disabilities is distinct from the IDEA's goal of enabling students with disabilities to receive the same educational opportunities as nondisabled students."[171] There are educational and noneducational distinctions between the ADA and the IDEA. The difference in purpose between the ADA and the IDEA, at its most basic level, is that the former piece of legislation deals with providing people with disabilities the same opportunities, while the latter deals specifically with providing people with disabilities the same *educational* opportunities as those without disabilities.[172] Due to this distinction, they have different definitions for what qualifies as a disability.

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[170] PACE, *supra* note 127, at 2. In 2006–2007, spending on special education students in California was 140% higher than spending for regular education students. Dhuey, *supra* note 161, at 3 n.4.

[171] Mac Lagan, *supra* note 43, at 743.

[172] *Id.* at 740.

As discussed below, the ADA definition continues to broaden with each reauthorization,[173] whereas the IDEA definition continues to narrow.[174] A broader ADA definition that defines disability as a physical or mental impairment limiting a major life activity incorporates more individuals with disabilities under the Act, but moves even further away from a focus on education.[175] In contrast, a narrower IDEA definition focuses more purposefully on disabilities that affect education, such as hearing impairments, autism, and specific learning disabilities.[176]

In addition, with a definition of disability that focuses more specifically on education, the IDEA has more extensive procedural requirements than the ADA.[177] The IDEA sets a standard for access to education and requires school districts to ensure that students with disabilities meet that standard of access through individualized programs regardless of the cost or administrative burden it takes to make that happen.[178] In contrast, the ADA requires school districts to make existing services equally accessible, but only so far as it does not unnecessarily burden or alter the existing programs.[179] This distinction demonstrates that the goal of the IDEA is access to *education*, whereas the goal of the ADA is preventing general discrimination based on *disability*. Due to their differing goals, the IDEA's obligations to students are different than the ADA's obligations to students. For example, under Title II of the ADA, a public school must provide DHH students with communications that are as effective as the communications that are provided for individuals without a disability.[180] Under the IDEA, a school must provide each individual DHH student with a specific education

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[173] *See infra* Part V.B.

[174] *See infra* Part V.B.

[175] *See supra* Part II.C.

[176] *See supra* Part II.B.

[177] K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1096 (9th Cir. 2013), *cert. denied* 134 S.Ct. 1493 (2014), *cert. denied* 134 S.Ct. 1494 (2014).

[178] *Id.* at 1097.

[179] *Id.*

[180] Brief for the Appellant as Amicus Curiae, Department of Justice at 10, K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013), *cert. denied* 134 S.Ct. 1493 (2014), *cert. denied* 134 S.Ct. 1494 (2014) (Nos. 11-56259, 12-56224).

program designed to meet that student's individual educational needs.

When comparing the IDEA and the ADA, it is clear that the IDEA puts more pressure on school districts to help and support individuals with disabilities through their education—this is the Act's specific purpose. In ruling that a student can bring claims under both the IDEA and the ADA for the same situation, the Ninth Circuit did not honor the purpose of the IDEA.

B. Congress Intended the IDEA to Govern Issues of Education

The existence of the IDEA's exhaustion requirement conveys to courts that Congress intended for the IDEA to take primacy over the ADA in issues related to students and special education.[181] The IDEA's exhaustion requirement[182] requires that parents and students exhaust remedies available to them under the IDEA before they seek the *same relief* under other federal laws that protect individuals with disabilities—the language of the exhaustion requirement specifically includes the ADA.[183] As it is explained by the California School Boards Association: "[A]s long as an ADA claim seeks relief that is also available under, or is the functional equivalent of relief under the IDEA, plaintiffs must exhaust IDEA remedies . . . ."[184] The IDEA's

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[181] *See supra* note 100 and accompanying text. "For example, the IDEA's administrative exhaustion requirement has resulted in courts consistently holding that, *inter alia*, while section 504 can be used to enforce educational rights, the administrative procedures required by the IDEA must be exhausted before relief can be granted." Mac Lagan, *supra* note 43, at 744.

[182] The language of the "Exhaustion requirement" in the IDEA reads:

> Nothing in this title 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 part, 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 part.

See supra note 100 (citing 20 U.S.C. § 1415(l) (2012)).

[183] *See supra* Part II.B–C.

[184] Amicus Curiae Brief of California School Boards Association and the National School Boards Association In Support of Petitioners at 14, K.M. *ex rel.*

language is more detailed than that of the ADA, and the process for making a claim is more extensive under the IDEA than under the ADA; this detail points in favor of the IDEA's primacy.

In addition to the inclusion of the exhaustion requirement in the IDEA, Congress's intent is demonstrated by comparing the most recent amendments to the ADA and the IDEA, respectively. The last major changes to the IDEA were the 2004 Amendments—also known as the IDEIA.[185] Following the IDEIA, the Department of Education Office of Special Education and Rehabilitative Services released the rules and regulations governing the new changes to the IDEIA to explain the new changes to the states, as well as how to implement them.[186] The changes to the IDEA, as a whole, through these amendments, were extensive and were made to broaden the scope of their application to more *students*. Their purpose was also to further guarantee that students with disabilities have access to disability services. [187]

As this comment has focused on a case that discussed two DHH students,[188] it is worth noting that the IDEIA included several provisions specifically to aid DHH students.[189] As the California School Boards Association notes, Congress has taken action to specifically address the needs of DHH students in amendments to the IDEA rather than through amendments to the ADA.[190] This reveals Congress's intent for the IDEA to govern these issues rather than the ADA.[191] The language and communication needs of DHH students are not even considered in the ADA.[192] For example, the definition

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Bright, 725 F.3d 1088 (Nos. 13-770, 13-777) [hereinafter Brief of California School Boards].

[185] Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. §§ 1400–1475 (2012).

[186] Brief of the United States as Amicus Curiae Supporting Appellant and Urging Remand at 10, K.M. *ex rel*. Bright, 725 F.3d 1088 (No. 11-56259), *available at* http://www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf.

[187] Brief of California School Boards, *supra* note 184, at 7.

[188] *See supra* Part III.

[189] Individuals with Disabilities Education Improvement Act of 2004, §§ 1400–1475.

[190] Brief of California School Boards, *supra* note 184, at 7.

[191] *Id.*

[192] *Id.*

of "interpreting services" in the IDEA was changed to include transcription services such as CART and Typewell for children who are deaf or hard-of-hearing.[193] This service was not an option prior to the 2004 Amendments, so the addition of this service in particular—the service at issue in *K.M. ex rel. Bright*—provides support for the notion that the IDEA should be controlling over the ADA. Furthermore, Congress also took care to ensure that the definition of supplementary aids and services included services that enable a child to participate in extracurricular and nonacademic settings in school.[194]

Additionally, sections in the IDEA regarding IEPs were amended in order to make the process more inclusive of parents of children with disabilities.[195] The Department of Education clarified that:

> [A] child does not have to fail or be retained in a course or grade in order to be considered for special education and related services. However, in order to be a child with a disability under the Act, a child must have one or more of the impairments identified in section 602(3) of the Act and need special education and related services because of that impairment.[196]

This is an important addition to the IDEA because it makes it clear that the intended purpose of the IDEA is to be *inclusive* rather than *exclusive* of students with disabilities. The amendments to the IDEA over time have taken care to include the far more specific needs of DHH students within the education system, showing that the IDEA should have primacy over the ADA when deciding matters concerning education of students with disabilities.

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[193] *See supra* Part II.C.

[194] *See supra* Part II.C.

[195] *See supra* Part II.C. *But see* Demetra Edwards, *New Amendments to Resolving Special Education Disputes: Any Good IDEAs?*, 5 PEPP. DISP. RESOL. L.J. 137, 159 (2005) (arguing that the IDEA amendments make the dispute resolution process less inclusive of parents of children with disabilities).

[196] Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities; Final Rule, 71 Fed. Reg. 156, DEP'T OF EDUC. (Aug. 16, 2006), *available at* http://idea.ed.gov/download/finalregulations.pdf.

While the IDEA amendments addressed more specific needs of students, the most recent set of major amendments to the ADA, the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) broadened the definition of "disability."[197] The language of the Act specifically references Congress's intent: "[T]he intent of Congress [is] that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations[.] . . . [T]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[198] Congress explained that the purpose of the ADA Amendments is to shift the focus away from defining a disability and to move toward assessing whether discrimination is taking place because of an individual's disability.[199] The purpose of the ADAAA had very little do with the education of individuals with disabilities. In fact, the word "education" is mentioned only once in the entire text of the Act.[200] The part of the Act that specifically

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[197] 42 U.S.C. §§ 12101–12213 (2012). One of the findings and purposes of the ADAAA was:

> [T]o convey congressional intent that the standard created by the Supreme Court in the case of Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) for ''substantially limits'', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis . . . .

ADA AMENDMENTS ACT OF 2008, http://www.gpo.gov/fdsys/pkg/BILLS-110s3406enr/pdf/BILLS-110s3406enr.pdf (last visited Dec. 31, 2014).

[198] ADA AMENDMENTS ACT OF 2008, *supra* note 197.

[199] *Id.*

[200] *See generally* 42 U.S.C. §§ 12101–12213 (2012). "Education" is mentioned in the section pertaining to Rules of Construction:

> Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally

mentions education does so only to explain that nothing in these amendments is to alter an institution's requirement to make reasonable modifications unless doing so fundamentally alters "the nature of the goods, services, facilities, privileges, advantages, or accommodations involved."[201] Broadening the definition of "disability" only causes confusion and liability for schools and districts trying to accommodate students with disabilities.[202] The ADAAA complicates education of individuals with disabilities rather than improves it,[203] and further demonstrates that Congress intended the IDEA, not the ADA, to govern issues of special education.

C. The Exhaustion Requirement and the IDEA in Other Federal Circuits

In *Pace v. Bogalusa City School Board*,[204] the Fifth Circuit Court of Appeals addressed this issue. The Fifth Circuit disagreed with the Ninth Circuit and concluded that the failure of an IDEA claim precludes an ADA claim when the claims under these acts are factually and legally indistinct.[205] In *Pace*, Travis Pace, a high school student with physical and developmental disabilities, brought claims against the school board and the State of Louisiana under the ADA and the IDEA.[206] Suffering from cerebral palsy, Travis was confined to a wheelchair and challenged the lack of handicap accessible facilities at Bogalusa High School, as well as deficiencies in Travis's IEP.[207] The court of appeals adopted the district court's ruling that the school had satisfied its obligations to Travis under the IDEA.[208]

The court next addressed the ADA claim, first comparing the

> alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

ADA AMENDMENTS ACT OF 2008, *supra* note 197.

[201] ADA AMENDMENTS ACT OF 2008, *supra* note 197; *see also supra* note 30.

[202] Smith & Bales, *supra* note 52, at 397.

[203] *Id.* at 413.

[204] 403 F.3d 272, 274–75 (5th Cir. 2005).

[205] Smith & Bales, *supra* note 52, at 396–97.

[206] *Pace*, 403 F.3d at 275.

[207] *Id.*

[208] *Id.* at 290.

accessibility standards under the IDEA and the accessibility standards under the ADA.[209] The court reasoned that if the accessibility standards are the same, then Travis's claim under the ADA is precluded by the court's rejection of Travis's claim under the IDEA.[210] The court of appeals agreed with the hearing officer that FAPE had been provided under the IDEA and dismissed the other claims on the grounds that they were legally "indistinct" from the IDEA issue that had already been resolved.[211] Therefore, the court concluded that because the evidence supported that the school had fulfilled its obligations under the IDEA, Travis was collaterally estopped from asserting an ADA claim.[212]

This court based its decision on the legal similarity between the ADA's and the IDEA's accessibility standards and remedies. This is synonymous with establishing that the IDEA has primacy over the ADA in issues of special education, but it is persuasive authority. The Fifth Circuit reasoned that if the remedies are similar or the same, then a plaintiff is precluded from bringing the same issue under both acts. Doing so addresses the inefficiency of adjudicating claims in special education, and as discussed above, Congress intended for the IDEA to govern issues of education. Travis had been provided FAPE under the IDEA, so he was precluded from bringing the same claim under the ADA.

The Eighth Circuit Court of Appeals held a similar position as the Fifth Circuit on the relationship between the ADA and the IDEA. In *Independent School District No. 283 v. S.D.*,[213] the court of appeals affirmed the district court's ruling that the school district satisfied the IDEA's FAPE requirements.[214] The court then explained that the resolution of this issue resolved the other non-IDEA claims.[215] While the ADA is not specifically mentioned in this court's opinion, the holding is consistent with the IDEA's primacy over other federal laws in issues of education, including the ADA, because the Fifth

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[209] *Id.*
[210] *Id.* at 292.
[211] *Id.* at 297.
[212] *Id.* at 296–97.
[213] 88 F.3d 556, 559 (8th Cir. 1996).
[214] *Id.* at 561–62.
[215] *Id.* at 562.

Circuit explained that the non-IDEA claims were necessarily satisfied through the IDEA ruling. The court specifically addressed the IDEA claims first, pursuant to the IDEA's exhaustion requirement.[216] As discussed above, the IDEA's exhaustion requirement places heavy weight on the IDEA's primacy over the ADA in matters of special education, which is seen in this case—the Fifth Circuit prevented the plaintiff from bringing an ADA claim under another law when there was an IDEA remedy.

In placing emphasis on the IDEA, the Fifth and Eighth Circuits were correct to decide that one act precludes the other in cases in which the remedies and legal standards for the claim are the same. As has been discussed, it is true that schools as public entities must comply with the ADA and schools as institutions of education must comply with the IDEA, but this causes inefficiency and inconsistency. Courts, especially in California, should take this one step further and accept the IDEA as having primacy over the ADA with all issues that pertain to special education.

VI. CONCLUSION

The ADA and the IDEA are two federal laws that focus *specifically* on individuals with disabilities. Historically, both have been used to address the same situations that arise with the education of individuals with disabilities, but this has caused inefficiency and confusion. While it is not possible, as the education system exists today, to give individuals with disabilities everything that they need, it *is* possible to make the first step towards helping students with disabilities by giving courts direction as to how they should treat the interrelationship of federal laws that protect and support these particular students.

Through the IDEA Exhaustion requirement, the 2004 IDEA Amendments, and the 2008 ADA Amendments, Congress made its intent clear—the IDEA should have primacy over the ADA in matters concerning the education of individuals with disabilities. By this reasoning, the Ninth Circuit Court of Appeals was wrong to conclude that K.M.'s and D.H.'s claims should be litigated under both the ADA and the IDEA. At first glance, the fairest option

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[216] *Id.*

would appear to be to give plaintiffs the opportunity to bring their education claims under every statute protecting individuals with disabilities, but to do so breeds inconsistent holdings by the judiciary and weakens the focus on education.

The IDEA, with all of its complications, does the most to address the specific learning needs of each student. In California in particular, a state that is supporting a large student body on limited resources, allowing courts to evaluate issues under the IDEA at the exclusion of the ADA will help the special education system develop in a way that is efficient, and in a way that is the most beneficial for students with disabilities.