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VIA EMAIL AND USPS

March 5, 2015

The Honorable Catherine E. Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

The Honorable Vanita Gupta
Acting Assistant Attorney General
Civil Rights Division
U. S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

The Honorable Michael K. Yudin
Acting Assistant Secretary
Office of Special Education and Rehabilitative Services
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Re: Dear Colleague Letter Issued November 12, 2014

Dear Assistant Secretaries Lhamon and Yudin and Assistant Attorney General Gupta:

The National School Boards Association (NSBA) shares the goal of the Departments of Education and Justice to protect students, disabled and non-disabled, from all forms of discrimination and to provide them with the opportunity to participate fully in the programs our public schools offer. We also share your view that communication with stakeholders is a critical aspect of such participation. NSBA is committed to helping school districts across the country develop and implement policies to address discrimination against all students,¹ to create a school climate of

¹ Among many policy statements expressing its commitment to preventing discrimination against all students, including students with disabilities, NSBA's Delegate Assembly has adopted the following:

Beliefs & Policies, Art. II, § 3.1: NSBA believes that school boards should strive to recognize the special needs and strengths of every student and provide access to a high quality education in a safe and supportive environment.

inclusion in all educational programs offered by public schools,² and to bring awareness to the benefits brought about by making certain that all students—including those with hearing, speech, and vision disabilities—have the tools they need to benefit from the educational programs being offered to them.

NSBA, our member state associations of school boards, our 3,000-member Council of School Attorneys, and the more than 13,500 public school districts across the nation we represent, welcome guidance to address the very important issue of how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability. It is in this spirit of cooperation and common purpose that we write to express concern and request clarification of certain aspects of the November 12, 2014 Dear Colleague Letter (DCL) issued jointly by the U.S. Department of Justice (DOJ), the U.S. Department of Education’s Office of Special Education and Rehabilitative Services (OSERS), and the U.S. Department of Education’s Office for Civil Rights (OCR) (collectively, the “Departments”).

As outlined in greater detail below, NSBA is concerned that absent clarification, the Departments’ joint position that public schools across the country must now apply both an Individuals with Disabilities Education Act (IDEA) analysis and an effective communication analysis under the Americans with Disabilities Act (ADA) in determining how to meet the communication needs of an IDEA-eligible student with a hearing, vision, or speech disability 1) is a misplaced statement of the law that threatens to dismantle the IEP process, which is the appropriate and congressionally mandated process for educating students with disabilities; 2) will potentially disrupt

Beliefs & Policies, Art. II, § 3.2: NSBA believes that school boards should ensure that students and school staff are not subjected to discrimination on the basis of socioeconomic status, race, color, national origin, religion, gender, disability, or sexual orientation.

Beliefs & Policies, Art. IV, § 2.11: NSBA believes that all public school districts should adopt and enforce policies stating that harassment for any reason, including but not limited to harassment on the basis of race, ethnicity, gender, actual or perceived sexual orientation, gender identity, disability, age, and religion against students or employees will not be tolerated and that appropriate disciplinary measures will be taken against offenders....

² Beliefs & Policies, Art. I, § 1: NSBA believes that to help all students achieve state standards and reach their full academic potential, federal, state, and local policy makers should: ... provide the highest quality education for each child, and equal educational opportunity for all children; [and]; ensure that all children receive the services for which they are eligible;

Beliefs & Policies, Art. I, § 1.1: School districts should be organized so they can provide the best education programs for all public elementary and secondary students.... School boards should have the authority to develop restructuring strategies, as they deem appropriate.

Beliefs & Policies, Art. III, § 2: NSBA believes that full funding of federal public education programs is an essential step in improving educational opportunities for all children [,and ensuring] that our nation’s students have the opportunity to meet the challenge of world-class standards and responsible citizenship through these priorities: ... (k) providing funding to meet school infrastructure and personnel needs to improve the safety and health of all students and to improve the quality of the learning environment; . . .

Beliefs & Policies, Art. IV, § 1.2: Public schools should provide equitable access and ensure that all students have the knowledge and skills to succeed as contributing members of a rapidly changing, global society, regardless of factors such as race, gender, sexual orientation, ethnic background, English proficiency, immigration status, disability or religion.

Beliefs & Policies, Art. IV, § 2: NSBA believes that students must have safe and supportive climates and learning environments that support their opportunities to learn....

Beliefs & Policies, Art. IV, § 3.4: NSBA urges local school districts, intermediate units, and others who provide educational materials to specify a preference for videos that are closed captioned when purchasing such materials.

Beliefs & Policies, Art. IV, § 3.12: NSBA believes in fairness for students at every phase of special education.

necessary activities, services and programs for students; and 3) will burden schools both administratively and financially. NSBA believes that clarification is imperative to avoid the uncertainty, confusion, needless litigation, and unnecessarily adversarial relationships between schools, students and parents that will be brought about by the absence of clear, appropriate and judicially recognized national legal standards for determining how best to serve students who have speech, hearing, and vision impairments.

To avoid these potential outcomes, NSBA urges the Departments to join us in a dialogue that can lead to additional points of clarification of the positions expressed in the DCL. With a clear understanding of the requirements of the law, we believe that school districts can continue their work to ensure that all students—including students who have speech, hearing, or vision disabilities—will have the opportunity to participate in the educational programs provided by their schools.

NSBA's concerns with the DCL fall into two main areas of concern:

- I. The Departments' Reliance on *Tustin* to Express a National Standard is Misplaced.
 - a. This Erroneous Standard Will Confuse Parents and School Districts Across the Country About the Requirements of the Law.
 - b. Confusion about the Applicable Standard Will Promote Needless Litigation.

- II. The Departments Should Further Clarify the Following:
 - a. The Role of the IEP Process vis-à-vis Section 504 and the ADA.
 - b. The Standard to Use to Determine a Fundamental Alteration in the Nature of a Service, Program, or Activity.
 - c. The Standard to Use to Determine an Undue Financial and Administrative Burden on Schools.

I. The Departments' Reliance on *Tustin* to Express a National Standard is Misplaced.

In the DCL, the Departments express an expansive view of their authority by instructing all school districts that they must now apply both an IDEA analysis and a Title II effective communication analysis in determining how to meet the communication needs of students who have a speech, hearing, or vision disability. The Departments indicate that this instruction is based upon the holding in *K.M. v. Tustin Unified Sch. Dist.*³ Because the holding in *Tustin* controls only in the Ninth Circuit, we believe that the Departments' reliance on it to impose a *national* standard is in error.

a. This Erroneous Standard Will Confuse Parents and School Districts Across the Country About the Requirements of the Law.

In *Tustin*, a three-judge panel of the United States Court of Appeals for the Ninth Circuit ruled that compliance with the IDEA does not satisfy all claims under Section 504 of the Rehabilitation Act (Section 504) or under the (ADA). The panel held that the school district's provision of a valid IEP

³ 725 F.3d 1088 (9th Cir. 2013); Letter from Catherine E. Lhamon, U.S. Dep't of Educ. Ass't Sec'y for Civil Rights, Michael K. Yuding, U.S. Dep't of Educ. Acting Ass't Sec'y for Office of Special Education and Rehabilitative Services, Vanita Gupta, U.S. Dep't of Justice, Acting Ass't Attorney General for Civil Rights Division, to Colleagues, at 2 (November 12, 2014) [hereinafter referred to as "Dear Colleague Letter" or "DCL"].

under the IDEA does not automatically preclude liability under Section 504 or the ADA. Contrary to the decision of the district court, the panel determined that there are material differences in the obligations imposed by the IDEA and ADA to provide services to hearing impaired students. It remanded the case so that the district court could analyze the facts under both standards to determine if the student's needs had been adequately met. The Departments now rely on this singular decision to provide "guidance" to school districts throughout the country, advising that districts must follow the *Tustin* standard without regard to the state of the law in their own federal circuit.

To the contrary, the only school districts legally bound by the holding in *Tustin* are those within the jurisdiction of the Ninth Circuit Court of Appeals: Arizona, Washington, Oregon, California, Montana, Idaho, Nevada, Alaska, and Hawaii. Secondly, and most importantly, the *Tustin* holding directly conflicts with the holdings in other circuits where the courts have held either that providing a free appropriate public education (FAPE) under the IDEA amounts to compliance with the meaningful access and effective communication standards under the ADA, or that satisfaction of the IDEA standards precludes litigation of similar standards under the ADA and Section 504.⁴ Other courts have approached the IDEA-ADA/Section 504 question similarly, summarily dismissing Rehabilitation Act and ADA claims when granting summary judgment to school districts with respect to the provision of FAPE under the IDEA.⁵ The *Tustin* decision is at best an outlier among federal courts considering this issue.

b. Confusion about the Applicable Standard Will Promote Needless Litigation.

Equally troublesome is the failure of the DCL to explain the Departments' rationale for choosing the *Tustin* approach as the national enforcement standard and for discounting the prevailing view established in other circuits. Imposing an administrative enforcement standard at odds with existing court rulings will cause needless confusion and disputes as to school district responsibilities for serving students with communication disabilities. It will also encourage litigation, which will further deprive school districts of resources needed to educate students.

*Does v. Board of Educ. of Prince George's County*⁶ illustrates how the failure to clarify an overstatement of the law in OCR guidance, no matter how well-meaning, can result in needless litigation. In *Does*, the parents of a student sued a school district, seeking money damages under Title IX based on alleged peer-on-peer sexual harassment that their child endured. The U.S. Supreme

⁴ *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 994-95 (5th Cir. 2014) (holding that a Texas school district did not violate a disabled student's right to a free appropriate public education (FAPE) under Section 504 of the Rehabilitation Act because the individualized education plan (IEP) that the district developed for the student provided him with FAPE under the IDEA); *Independent Sch. Dist. v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (holding that non-IDEA claims based on the violation of other federal and state laws were precluded by the IDEA judgment in favor of the school district); *D.F. v. Western Sch. Corp.*, 921 F. Supp. 559, 557 (S.D. Ind. 1996) (holding that the plaintiff's ADA claim failed for the same reason that his IDEA and Rehabilitation Act claims failed: he did not meet his burden of proof in challenging the Hearing Officer's decision that defendants have integrated him into the general education environment to the maximum extent appropriate); *Pace v. Bogalusa*, 403 F.3d 272, 292-93 (5th Cir. 2005) (holding that regulations governing accessibility in schools under the ADA/504 require a school engaged in new construction to conform to the same standards as the IDEA. Court held that Pace's argument that accessibility standards under the IDEA and ADA/504 are different is without merit).

⁵ *Hudson v. Bloomfield Hills Pub. Schs.*, 910 F. Supp. 1291, 1306-07 (E.D. Mich. 1995); *Tarah P. v. Board of Educ. of Fremont Sch. Dist.* 79, No. 94 C 3896, 1995 WL 66283, at *4 (N.D. Ill. 1995); *Scanlon v. San Francisco Unified Sch. Dist.*, No. C 91-2559 FMS, 1994 WL 860768, at *10-11 (N.D. Cal. 1994), *aff'd mem.*, 69 F.3d 544, 1995 WL 638275 (9th Cir. 1995).

⁶ 982 F. Supp. 2d 641 (S.D. Md. 2013).

Court held in *Davis v. Monroe County Bd. of Educ.*⁷ that school districts are liable for money damages in Title IX peer-on-peer sexual harassment cases only when school officials are deliberately indifferent to severe, pervasive, and objectively offensive harassment of which they have actual knowledge. In lieu of the stringent *Davis* standard, the parents relied on an OCR Dear Colleague Letter, disseminated on October 26, 2010, to justify their position that the school board should be liable for money damages because it behaved in a “clearly unreasonable manner” with regard to alleged harassment about which the district knew or should reasonably have known.⁸ The federal district court rejected the parents’ argument in granting the district’s motion for summary judgment. The parents have appealed to the U.S. Court of Appeals for the Fourth Circuit, where they continue to assert a legal standard of liability premised on the OCR guidance letter.

Significantly, NSBA had warned OCR precisely of the dangers that its unclarified guidance could present: well-meaning advocates and parents mistakenly would seize on confusing language in a DCL to bring lawsuits that are subsequently dismissed on a faulty legal theory. Such actions come at great expense to all parties involved: school districts lose already scarce dollars in defending legally insufficient lawsuits; and misguided parents and students optimistically bring forth claims based on agency administrative enforcement standards ineffective to impose monetary liability.

To avoid a similarly harmful result with respect to the Departments’ guidance on effective communication, NSBA requests that the Departments provide the legal justification for propounding the minority view expressed in *Tustin* as the national administrative enforcement standard. Because the *Tustin* analysis dramatically departs from the law in other circuits, the need for clarification is especially high in order to reduce confusion among school districts, parents and students with respect to districts’ legal obligations under the IDEA and ADA.

To promote this shared understanding, NSBA requests that the Departments address at least the following points: 1) the legal reasoning for the Departments’ conclusion that the ADA effective communication requirement in the educational context may in some instances require aids and services beyond those specified in an IEP determined to provide FAPE; 2) the legal reasoning for the Departments’ conclusion that the evaluation, review, discussion and collaboration among a team of educational experts and *parents* that is inherent in developing an IEP for a student with a hearing, vision or speech disability does not *per se* meet the effective communication analysis required by Title II of the ADA; and 3) the legal justification for the Departments’ interpretation of the two statutes in a manner that minimizes collaboration by promoting deep conflicts with and serious disruption of the comprehensive IEP process and due process procedures established by the IDEA when courts confronted with the same issue have overwhelmingly reconciled them in a non-disruptive manner.

II. The Departments Should Further Clarify the Following:

a. The Role of the IEP Process vis-à-vis Section 504 and the ADA.

The Departments’ “guidance” states that under the Title II standards, school districts must give “primary consideration” to the preferences of the student with a speech, hearing, or vision disability or her parent in determining what auxiliary aid or service to provide.⁹ The guidance further

⁷ 526 U.S. 629 (1999).

⁸ Letter from Russlyn Ali, U.S. Dep’t of Educ. Ass’t Sec’y for Civil Rights, to Colleagues, at 2 (Oct. 26, 2010).

⁹ Dear Colleague Letter, *supra* note 3 at 6.

indicates that once a student, or parent on behalf of the student, requests a specific aid or service, the school district must provide that aid or service in a “timely” manner, which appears to mean that it should be provided immediately.¹⁰ According to the DCL, this is the case even if the child’s IEP team is in the process of making a determination about which IDEA aids or services will provide educational benefit for the child.¹¹ NSBA believes this requirement will adversely impact the way that schools serve students eligible under the IDEA. For this reason, we ask the Departments to clarify the role the IEP team will play in this area of overlap between the IDEA and Title II.

Historically, the IEP process has been the primary method by which schools determine the services or aids that will best assist a student in receiving the FAPE required by the IDEA and its implementing regulations. The IEP team consists of the parents, the student (when necessary), several qualified staff members, and often others experienced at educating students with disabilities and knowledgeable about the student’s disability. The team spends hours evaluating the student, analyzing her needs, and determining appropriate special education and related services to provide the child with FAPE. By invoking a separate and distinct Title II standard that requires a school district to provide a student with whatever aid or service she or her parent requests – even if the IEP team is in the process of trying to determine what is educationally appropriate for the student under the IDEA – the DCL threatens to undermine the collaboration essential to the IEP process. As a crucial participant in the IEP team, the parent has the opportunity to request and discuss appropriate communication aids and services in that context. By encouraging parents to do what amounts to an end-run around the IEP process by requesting a specific communication aid apart from the other members of the team, the Departments’ approach risks exposing the child to assistance or services that might not be the most educationally sound and effective. Such well-meaning, but potentially misplaced, preferences could in the context of the overall educational program disserve the educational interests of the child. This is especially the case when this practice is examined in light of the totality of the child’s educational needs as required by the IDEA.

The IEP process is collaborative by design.¹² Through it, parents, students and subject matter experts work together to determine what services will provide a sound educational program based on the child’s unique needs, and work to implement that program. When the Departments advise schools that parents can request the communications aid of their choice *outside of the IEP process*, and that the school has to provide it, the Departments risk marginalizing the role of the IEP process and team. In effect, the Departments’ view takes a crucial educational decision out of the hands of the team envisioned by Congress as the decision maker and replaces it with unilateral – and potentially uninformed – decisions by parents about the kind of aids and assistance a child needs. In effect, this approach creates an unsupported presumption that the parents’ preferred aid or service will provide effective communication but inexplicably denies that same presumption to the aid or service deemed appropriate by a team of trained education professionals.

School districts need clarification on the role that the IEP team plays in this effective communications analysis, which now – according to the Departments – involves a complex interplay between the IDEA and Title II. Other than giving “primary consideration” to a specific parental

¹⁰ *Id.* at 11.

¹¹ *Id.* at 19.

¹² *Schaffer v. Weast*, 546 U.S. 49, 53 (2005); *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531 (2007); *Lance*, 743 F.3d at 989; *C.G. v. Five Town Cmty. Sch. Dist.*, 513 F.3d 279, 285 (1st Cir. 2007); Viola S. Lordi, *Enduring Themes in Special Education Law: A Free Appropriate Public Education and Least Restrictive Environment*, 2013 WL 6116858 at 9, Thomson Reuters/Aspatore (2014).

request, what additional steps must the IEP Team take beyond those already required by the IDEA to ensure it has fully engaged in the effective communications analysis under the ADA, which the Departments contend is separate and distinct from ensuring FAPE is being offered? Once the IEP Team has engaged in the ADA analysis, are parents free to ignore the recommendations of the IEP team and demand something that they believe will be useful? What is the team to do when it finds that the aid or service that the parent has requested is actually impeding the child in meeting her educational goals, yet the parent insists on continuing to use that aid or service?

Perhaps most importantly, this new scheme threatens the many due process rights of children set forth in the IDEA. For instance, where a parent has requested an aid outside of the IEP process that proves to be ineffective, can the parent still assert a claim that FAPE has been denied? If so, the Departments' guidance puts school districts in an untenable position that makes them unable to comply with either law. This amounts to a Catch-22: What is the school district's responsibility if the parent requests at any point the removal of an effective aid or service in favor of an unproven one? Similarly, will districts be in violation of the IDEA's FAPE requirement when a parent demands repeated changes in the communication aids and services that disrupt the ability of the district to implement the child's IEP? Without clarification in this area, educators accustomed to a collaborative process will be very confused and frustrated about the obligation that they have to educate students with vision, hearing and speech disabilities and the role of the IEP team.

b. The Standard to Use to Determine a Fundamental Alteration in the Nature of a Service, Program, or Activity.

The Departments indicate that a school district must provide a specific auxiliary aid or service to a student with a hearing, speech or vision disability unless it can prove that such an auxiliary aid or service would result in a fundamental alteration in the nature of the service, program, or activity.¹³ However, the Departments fail to provide any criteria that would assist a school district in determining what circumstances constitute a fundamental alteration in the nature of a program, service or activity. Clarifying the appropriate criteria and processes school districts should use to determine whether a requested aid or service results in a fundamental alteration in the nature of a program, service or activity will avoid improper denials that deprive students with disabilities of needed aids and services, give rise to additional legal disputes, or both. Given the relative scarcity of case law on this issue, the Departments' clarification would serve the interests of all.

In *Southeastern Community College v. Davis*¹⁴ a prospective nursing student with a hearing disability requested an accommodation that would have allowed her to take academic classes, but not clinical classes. The school refused to grant the request on the ground that exempting the student from the clinical classes constituted a fundamental alteration of its nursing program because those classes were essential to preparing her to be a nurse and excusing her from them would keep her from enjoying the full benefits of the nursing program. The U.S. Supreme Court ruled in favor of the college, finding the school's refusal to alter its program to accommodate her was not a violation of Section 504. While providing some elucidation of the issue, *Davis* is insufficient to answer many questions raised by the Departments' guidance:

¹³ 28 C.F.R. § 35.164.

¹⁴ 442 U.S. 397 (1979).

- May a school district deny the requested aid or service based solely on the fact that its proposed alternative provides communication that is as effective as that provided students without disabilities even absent a showing of fundamental alteration or undue burden?
- For which programs, activities or services must the school district prove fundamental alteration? The student's IEP as a whole? Each separate component of the IEP? The district's academic program? Extracurricular activities in which the student seeks participation? Discrete activities such as individual field trips? Would proof of fundamental alteration of any one of the above or an element thereof be sufficient to meet the district's burden?
- What types of evidence would the district need to provide to justify its assertion of a fundamental alteration?
- Are explanations provided in a child's IEP that demonstrate that a requested aid or service would impede or prevent the delivery of FAPE, thus denying the child the full benefit of his/her IEP, sufficient to prove a fundamental alteration?
- Will a school district's determination that providing a requested aid or service would entail dispensing with a fundamental component of a program be given weight by the Departments in responding to parent/student complaints? What criteria do the Departments propose to use to reject the district's determination?
- What role, if any, does the consideration of "all resources available"¹⁵ for use by the school district in the funding and operation of the service, program or activity play in the fundamental alteration determination? For example, if the Departments find that a district has resources available that would permit the district to make a fundamental alteration, will the Departments deem the district to be in violation of the ADA for refusing to make the alteration in favor of an equally effective alternative?

c. The Standard to Determine an Undue Financial and Administrative Burden on Schools.

Despite their own admonition that effective communications determinations require a case-by-case analysis, the Departments state that "Compliance with the effective communication requirement would, in most cases, not result in undue financial and administrative burdens."¹⁶ NSBA requests that the Departments provide the basis for this sweeping conclusion. As in the case of the fundamental alteration exception, there is little case law to guide school districts in determining the factors that may be relevant to establishing an undue financial or administrative burden, making clarification of the Departments' legal analysis in reaching its conclusion particularly necessary.

The decisions that do exist on the issue provide some guidance but also raise additional questions. For example, in *Timothy H. v. Cedar Rapids Comm. Sch. Dist.*, the parents of a disabled student asked, and were granted, permission for the child to attend a school outside her neighborhood boundaries. As a matter of policy, the school district required parents to provide transportation as a condition of receiving an intradistrict transfer. But the parents asked the district to provide transportation as an accommodation under Section 504. After determining that the requested accommodation would require developing a special bus route that would cost \$24,000, the district refused to provide the accommodation. The parents filed suit alleging a violation of Section 504. The court determined that the cost of establishing a bus route just for that student constituted an undue

¹⁵ DCL, *supra* note 3 at 12.

¹⁶ *Id.*

financial burden and fundamentally altered the nature of the intradistrict transfer program. It ruled in favor of the school district.¹⁷

It would be helpful for the Departments to clarify the following:

- Will the Departments require a specific minimum dollar amount as a threshold when assessing whether a district will face an undue financial or administrative burden when attempting to accommodate a request for an aid or service?
- Will that dollar amount be the same for every district without regard to size or will the Departments consider the magnitude of available financial resources in determining undue financial burden? What criteria will the Departments use to determine which funds in a district's budget are "available"? For example, will the Departments look to all district resources, including categorical or restricted funds?
- Title II indicates that recipients must assert that a requested accommodation constitutes both an undue financial *and* administrative burden. Do the Departments interpret this language to require a school district to prove both elements or may a district meet its burden by proving one of them?
- Many of the auxiliary aids and services for students with hearing, speech and vision disabilities are costly. For example, the manufacturer's price for an augmentative communication device used by elementary school children to assist with specific communication needs is \$7500. An eye-tracking, speech-generating device that enables effective communication in all forms—from voice output, environmental control and computer access—has a manufacturer's price of \$17,979. Communication Access Realtime Services (CART) services cost a \$60.00-\$200.00 per hour. This means that CART services for 5 hours a day for 180 school days could cost a district \$54,000 to \$180,000 a year for one child. In light of these costs, what comparatives will the Departments use to determine whether the requested aid or service imposes an undue financial burden? Given that determinations are made on a case-by case basis, would the Departments give due consideration to a district's assertion that multiple parental requests for high end devices result in undue financial burden? In sum, what level of proof will satisfy the Departments that a district's determination of financial burden is sufficient?
- When a particular service or device is requested, may a school district reject the request as an undue financial burden when the IEP Team has proposed an equally effective alternative? For example, in Case Study #1 in Appendix A of the DCL, the student had difficulty hearing other students in his classes when using the FM system provided by the district. The IEP Team met and determined that the CART services requested by the family were unnecessary and proposed to provide an updated FM system, preferential seating, close captioned videos, and course notes and to require teachers to repeat comments and questions by other students. Yet the Departments concluded that the district must provide CART under the ADA but offered no explanation as to why costly CART services are necessary to provide effective communication given that the IEP Team's proposed alternative appears to address the communication difficulties the student experienced.

¹⁷ *Timothy H. v. Cedar Rapids Comm. Sch. Dist.*, 178 F.3d 968 (8th Cir. 1999).

Finally, the process outlined in the DCL will result in the fundamental alteration in the manner in which school districts deliver special education to children with disabilities. It disrupts the collaborative IEP process set forth by the IDEA by giving dispositive decision-making power to parents to determine the kinds of auxiliary aids or services their children will receive. By requiring school districts to defer to parental preference as the primary consideration in this regard, the ability of districts to provide a FAPE to children may be seriously compromised. Furthermore, complying with the guidance itself may result in the fundamental alteration of due process procedures as well as the IDEA's exhaustion requirement. These drastic alterations usurp the comprehensive statutory scheme Congress established to ensure that children with disabilities receive special education and related services, and replace it with imprudent deference to parental choices that may be well meaning, but educationally ineffectual.

III. Conclusion

It is our hope that through NSBA's comments here, the Departments recognize and address some unintended legal and practical challenges arising from the DCL. First, the DCL puts forward an expansive view of the law when it states that all school districts must apply both an IDEA and a Title II effective communications analysis in determining how to meet the communication needs of IDEA-eligible students with hearing, vision, and speech disabilities. Second, the DCL may dismantle the entire IEP process if the Departments do not clarify the issues with regard to the impact that the analysis of the Title II effective communications standard will have on that process. Finally, school districts need clear criteria regarding what kind of situations constitute a fundamental alteration in a program, service or activity, and/or constitute an undue administrative and financial burden sufficient to prevent them from having to provide a specific requested auxiliary aid or service.

We appreciate the opportunity to comment on the DCL and reiterate NSBA's strong support for our common purpose, which is to keep schools free from discrimination against students, including those with disabilities. We continue to be available to OCR, DOJ, and OSERS for consultation to provide the perspective of school boards and their counsel *before* issuance of guidance such as the latest DCL.¹⁸ NSBA stands ready to work in partnership with OCR, DOJ, and OSERS on this and other issues of importance to our members, and to the nation's public school children.

Sincerely,

Francisco M. Negrón Jr.

Francisco M. Negrón, Jr.
General Counsel
National School Boards Association

¹⁸ The Departments' continued issuance of guidance intended to be treated as non-rule policy making minimizes the opportunity for public input before administrative positions are issued. The Departments risk producing well-meaning, but ill-informed expressions of policy that place unnecessary and onerous burdens on regulated entities, such as school districts, without significantly advancing the underlying goals of the statutes on which they are ostensibly premised.