BEST BEST & KRIEGER LLP

ATTORNEYS AT LAW

# NAVIGATING A LEGAL SWAMP: HOW DOES THE IDEA INTERACT WITH THE AMERICANS WITH DISABILITIES ACT AND WITH SECTION 504?

January 15, 2016

*Presented by:*

Jack B. Clarke, Jr.

# The Acts

- The IDEA
  - An educational access statute. “A Free Appropriate Public Education that provides ‘some education benefit’.” “IDEA 2004 is an education bill – it is neither a mental health bill nor a social welfare bill, and it was never intended to be a means to ensure and support the emotional health of children and youth. It is a limited, educationally focused law that has one purpose only – to ensure that all children receive a free appropriate public education.” (Tibbetts, Identifying and Assessing Students with Emotional Disturbance (2013).)
- Section 504
  - Section 504 “FAPE” prohibits discrimination against persons who present with disabilities that affect major life activities.
- The ADA (Title II)
  - Requires “reasonable accommodations of disabilities.”

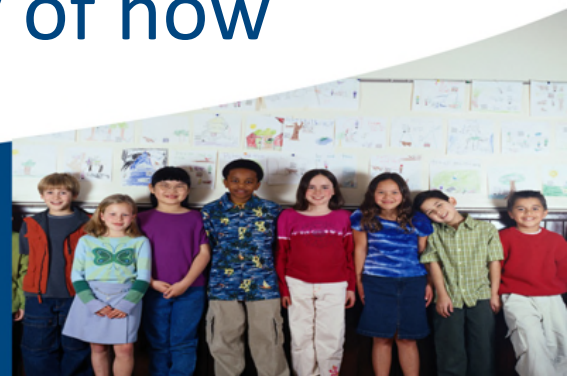
# The Acts (cont'd.)

- All three are civil rights Acts.
- Differ in several ways. Here are a few:
  - IDEA – procedural and substantive claims which can result in potential liability for compensatory education and possibly student/parent's attorney's fees.
  - Section 504 and the ADA – if violated, can possibly result in claims for damages, as well as attorney's fees. *K.I. by and through Jennie I. v. Montgomery Public School s* (M. Dist. of Ala. 2010) 54 IDELR 12. Can only be pursued after IDEA claims have been exhausted in administrative forum. Still have potential exposure for student/parent's attorney's fees.

Note: Section 504 claims can also be alleged as retaliation claims. This is a separate cause of action.

# *K.M. by and through Bright v. Tustin Unif. Sch. Dist.* and *D.H. by and through K.H. v. Poway Unif. Sch. Dist.* (9th Cir. 2013) 725 F.3d 1088

- Factual overview – what was at Issue?
- According to the 9th Circuit Court of Appeals, the IDEA substantive standard of FAPE is "a minimal one."
- The Court of Appeals concluded: "Given the differences between the two statutes, we are unable to articulate any unified theory of how they interact in particular cases."



# *Mark H. v. Lemahieu* (9th Cir. 2008) 513 F.3d 922

- "Although both the IDEA and the Section 504 regulations use the locution "free appropriate education" or "FAPE," we have concluded that the two FAPE requirements are overlapping but different."

# Section 504 (cont'd.)

- Before we move on to the "effective communication" analysis advanced by U.S. Department of Education, let's review the Section 504 retaliation claims. Remember, Section 504 is an anti-discrimination statute.
  - *M.M. v. Lafayette Sch. Dist.*, 115 LRP 54386 (N.D. Cal. 12/18/15) [Plaintiff asserted a colorable retaliation claim when District responded to IEE request by proposed additional evaluations.]
  - *Clearwater (KS) Unif. Sch. Dist. #264* (OCR Midwestern Division, Kansas City (Kansas) (January 2, 2015) 115 LRP 24560 [OCR found retaliation by the School District against a 13 year old boy who presented with Down Syndrome when the School District removed the boy from his position on football team manager.]
  - *Fall River Public Schools* (Mass. SEA July 30, 2014) 114 LRP 36314 [IHO found no retaliation by District against student when District initiated truancy proceedings and a complaint with CPS.]

# Section 504 (cont'd.)

- *Lee v. Natomas Unif. Sch. Dist*. (N.D. Cal. 2015) 65 IDELR 41 [Plaintiff alleged colorable claim of retaliation when District instructed parent to only communicate with District through the District's attorney and the District attempted to obtain a restraining order against the parent.]

- *Smith v. Herrington, et al.* (N.D. Cal. 2015) 65 IDELR 95 [District did not engage in retaliation against parent when the District reported the parent to CPS, even though the parent had advocated for student's civil rights, due primarily to parent's history of aggressive behavior.]

# U.S. Department of Education *Dear Colleague Letter*, Nov. 2014

- "The Federal laws – the Individuals with Disabilities Education Act (IDEA), Title II of the Americans with Disabilities Act of 1990 (Title II), and Section 504 of the Rehabilitation Act of 1973 (Section 504) – address the obligations of all public schools to meet the communication needs of students with disabilities, but do so in different ways. In particular, the IDEA requires that schools make available a free appropriate public education (FAPE), consisting of special education and related services, to all eligible children with disabilities (including those with disabilities that result in communication needs). Title II requires schools to ensure that students with disabilities receive communication that is as effective as communication with others through the provision of appropriate auxiliary aids and services." (Emphasis added.)

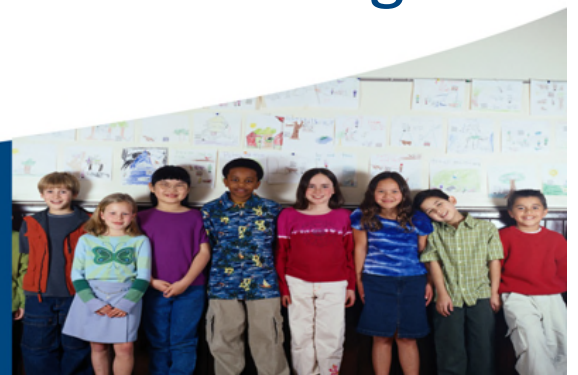
# The United States Department of Education's Position on the Interaction Between the Three Statutes

*Note: The Department focuses on effective communication for students with hearing, vision or speech disabilities*.

- Title II and Section 504 are "similar" but not identical.
  - Same definition of disability
  - Apply independent of the IDEA
- IDEA – Requires districts to provide FAPE in the LRE.
  - Also "must address the communication needs of eligible children."

# The U.S. Department of Education Guidance

- Under Title II:
  - "As effective communication as communication with students without disabilities."
  - "Must give primary considerations to the auxiliary aid or service requested by the student with a disability."
  - The head of the school district or his/her designee (authority to make budget and spending decisions) must determine if a specific requested aid or service would result in a "fundamental alteration in the nature of the service, program or activity or in undue financial and administrative burdens after considering all resources available. …



# The U.S. Department of Education Guidance (cont'd.)

- Must provide a written statement of reasons why the aid or service would create the alteration or burden.
- "Nothing in the ADA would prevent the head of the … district from delegating authority to an appropriate member of the child's IEP team. …"
- The focus is "equal opportunity to participate in the benefit from the service, program, or activity."

# The U.S. Department of Education Guidance (cont'd.)

- The aid/service must be provided in "accessible formats, in a timely manner, and in such a way as to protect the privacy and independence" of the student with a disability.
- Note! The USDE says the requirement to provide the aid or service is separate from the provision of services under the IDEA and must be provided even if the IDEA evaluation and IEP processes are pending.

# The U.S. Department of Education Guidance (cont'd.)

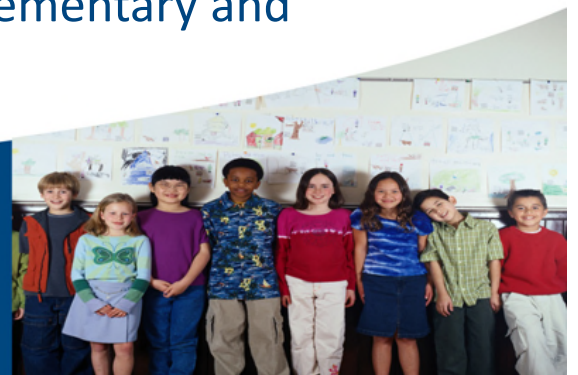
- The effective communication obligations of Title II apply to all individuals who seek to participate in or benefit from the district's services/programs/activities.
- District cannot require a person with a disability to bring a person to interpret for him or her. (Except in an emergency.)
- Cannot charge for the aids or services.

# What the USDE says about the relative effects of the ADA vs. the IDEA

- "The Title II regulations explicitly require that a district take appropriate steps to ensure that communications with persons with disabilities are 'as effective as' communications with other persons. They further require that a district provide appropriate auxiliary aids and services where necessary to afford a person with a disability an 'equal opportunity' to participate in and enjoy the benefits of the district's services, programs, or activities. Under the IDEA, FAPE must be individually designed to provide meaningful educational benefit to the child. The IDEA does not require that a district compare the effectiveness of communications with a student with a disability to the effectiveness of communications with students without disabilities, although there is nothing in the IDEA that precludes districts from doing so as part of FAPE."

  (U.S. Dept. of Educ., Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, Nov. 2014.)

- NOTE: Title II does not require IDEA eligibility.



# Title II and IDEA Enforcement (cont'd.)

- IDEA – Mediation and/or due process.
- Title II – Enforcement by U.S. Dept. of Education's Office of Civil Rights or U.S. Dept. of Justice Civil Rights Division, or file a grievance under school district policy (if there is one), or file a civil action in federal court.

# *Letter to Negron* (June 15, 2015) 111 LRP 33753

- "While, in many instances, the services a school provides under the IDEA to ensure a free appropriate public education (FAPE) will also satisfy the school's obligation under Title II of the ADA to ensure equally effective communication, this is not always the case. Simply because a school district provided a student with a FAPE does not necessarily mean that the student was provided all the services due under title II of the ADA. To comply with both statutes, a school may have to provide additional and different aids to services."

# *Snell v. North Thurston Sch. Dist.* (U.S.D.C. WD. Wash. 2015) 66 IDELR 75

- In ruling on motion for summary judgment, District Court ruled that a school district's failure to provide a FAPE under the IDEA is not, as a matter of law, sufficient to prove a basis for damages under Section 504.

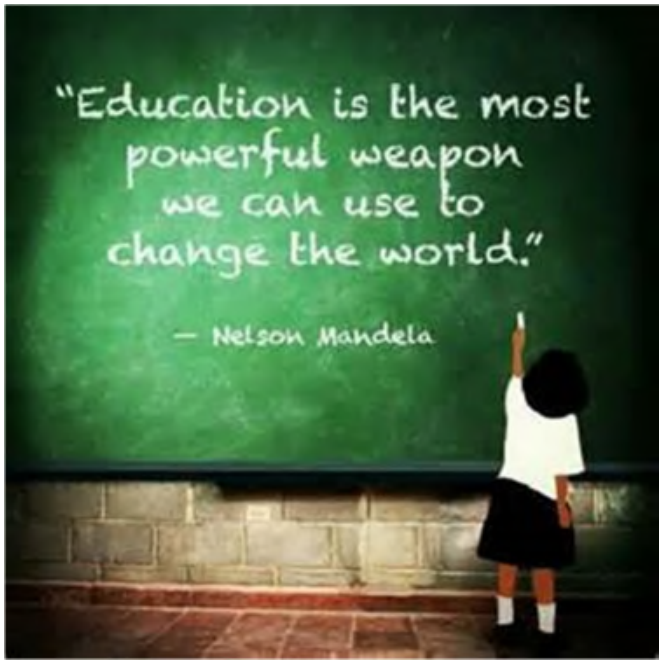
# *DeKalb County Brd. Of Educ. V. Denita Manifold on behalf of A.M.* (U.S.D.C. No. Dist. Al. 2015) 65 IDELR 268

- Court found a denial of FAPE under the IDEA when District had not provided CART or other speech to text method to student in high school who was deaf.
- Court based opinion substantially on expert testimony which opined student's use of FM System caused student to miss approximately 60% of the classroom instruction.

# What Can We Take From This?

- Develop a policy to address ADA and Section 504 requests.
- Train staff on the three statutes.
- Meet with Risk Management to discuss what matters may be covered by insurance.

# Thank you for attending.




Best Best & Krieger LLP

www.bbklaw.com

Nos. 13-770 & 13-777

IN THE

# Supreme Court of the United States

TUSTIN UNIFIED SCHOOL DISTRICT, *Petitioner*
v.
K.M., a Minor by and through her Guardian Ad Litem, Lynn Bright*, Respondent*

POWAY UNIFIED SCHOOL DISTRICT, *Petitioner*
v.
D.H., a Minor by and through her Guardian Ad Litem, K.H., *Respondent.*

**On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit**

## *Amici Curiae* Brief of California School Boards Association and the National School Boards Association In Support of Petitioners


Marcy L. Gutierrez
*Counsel of Record*
Michael E. Smith
Lozano Smith
One Capitol Mall
Suite 640
Sacramento, CA 95814
(916) 329-7433
mgutierrez@lozanosmith.com

Francisco M. Negrón, Jr.
National Sch. Bds. Assoc.
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes and Regulations**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

Established in 1931, the California School Boards Association ("CSBA") is a non-profit, member-supported organization that advocates for and advances the interests of more than 6 million public school students in the state of California. It is composed of nearly all of California's 1,000 school districts and county offices of education. The CSBA's Education Legal Alliance ("ELA") is composed of just under 725 CSBA member districts and is dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education. The purpose of the ELA, among other things, is to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law and to make appropriate policy decisions for their local agencies. The CSBA's and ELA's activities have included joining in litigation where the statewide interests of public education are at stake. The CSBA and ELA have been granted leave to participate as *amicus curiae* in numerous cases.

The National School Boards Association ("NSBA"), founded in 1940, is a non-profit organization representing state associations of school boards, and the Board of Education of the

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. In accordance with Supreme Court Rule 37.2(a), counsel for both parties received timely notice of *amici's* intention to file this brief and granted consent; the requisite consent letters have been filed with the Clerk of this Court.

U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern approximately 13,800 local school districts serving nearly 50 million public school students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in numerous cases.

This case is of extreme importance not only to school districts located within the Ninth Circuit and California, but to all school districts in the United States. *K.M. v. Tustin Unified Sch. Dist.*, Case Nos. 11-56259, 12-56224, 725 F.3d 1088 (9th Cir. 2013) ("*K.M.*" or "the opinion"), turns upside down decades of precedent interpreting the key federal statutes governing the education of students with disabilities, specifically students who are deaf or hard of hearing ("DHH"). Without review by this Court, *K.M.'s* misinterpretation of these laws—laws which affect all public schools in the country[2]—could impact over 6.4 million public school students with disabilities nationwide.[3]

---

[2] U.S. DEP'T OF EDUC., INSTITUTE OF EDUC. SCIENCES, NAT'L CTR. FOR EDUC. STATISTICS, *Digest of Education - Statistics,* Table 91 (2011), *available at* http://nces.ed.gov/programs/digest/d11/tables/dt11_091.asp (last visited on Dec. 30, 2013).

[3] *Id. Fast Facts, Students With Disabilities*, *available at* http://nces.ed.gov/fastfacts/display.asp?id=64 (last visited on Dec. 30, 2013) (showing statistics as of the 2009-2010 school year). Approximately 79,000 of the students with disabilities are DHH.

## SUMMARY OF ARGUMENT

The Court should grant review for one or more of the following compelling reasons:

First, *K.M.* overlooks long-standing direction and precedent from Congress, as well as judicial and administrative decisions, by improperly vesting power over the educational decisions of DHH students in the Americans with Disabilities Act's (42 U.S.C. §§ 12101 *et seq*.) ("ADA") "effective communication" regulation, 28 C.F.R. § 35.160 ("§ 35.160"), in a manner that puts it at odds with the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 *et seq*.) ("IDEA"). Consistent with the IDEA itself, current judicial and administrative decisions, and guidance provided by the United States Secretary of Education regarding the educational needs of DHH students, school districts are not required, as a matter of course, to provide those services preferred by parents. In fact, courts have consistently held that educational decisions for students with disabilities are governed by the provisions of the IDEA and its IEP team process.

Second, the Ninth Circuit's interpretation of the ADA's "effective communication" regulation *per se* fundamentally alters the IDEA's individualized education program ("IEP") process. For over three decades, the IEP team approach, in which parents are active participants, has been the appropriate vehicle to determine educational services for students with disabilities. Under this process, primary consideration is given to the individual's educational needs and the services that will result in educational benefit. *K.M.* undermines this process

by reading § 35.160's "primary consideration" language to require school districts to wholly acquiesce to parent requests for certain DHH services, rather than relying upon an IEP team's decision about the appropriate services for a DHH student.

The Ninth Circuit's material alteration of the IEP process creates undue administrative and financial burdens on school districts. It forces districts to guess whether separate meetings under the ADA's "effective communication" regulation are required (in addition to IEP team meetings), and permits the results of the IDEA's comprehensive statutory scheme for educating DHH students to be upended *post hoc*. *K.M.*'s alterations and undue burdens directly conflict with the ADA's 28 C.F.R. § 35.164. Additionally, *K.M.* causes significant confusion for districts, which must now speculate as to whether the IDEA's requirement that educational decisions be based on educational assessments—assessments discussed and considered by the *IEP team*—still controls. The opinion requires districts to yield to parental preference, irrespective of an IEP team decision.

Third, *K.M.* is inconsistent with Ninth Circuit and other federal precedent regarding the exhaustion of IDEA administrative remedies. *K.M.* broadens the circumstances where exhaustion of such remedies is excused, thereby conflicting with federal appellate precedent throughout the country. *K.M.* also is directly at odds with holdings from the Fifth and Eighth Circuits relative to claim preclusion resulting from IDEA proceedings, creating a circuit split.

Fourth, *K.M.*'s errant conclusions are expressly based upon the application of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to the Department of Justice's ("DOJ") *amicus curiae* position regarding § 35.160's ambiguous interaction with the IDEA. This application of *Auer* deference wholly ignores the Court's directives under *Christopher v. SmithKline Beecham Corp.*, 567 U.S. ___, 132 S. Ct. 2156 (2012). *Auer* deference to DOJ's views of § 35.160's interaction with the IDEA is improper because DOJ's interpretation is the model for "unfair surprise" to school districts everywhere, is inconsistent with DOJ's formerly stated understanding of § 35.160, constitutes a mere "litigating position," and is otherwise beyond the scope of DOJ's authority.

## ARGUMENT

### I. THE NINTH CIRCUIT FAILED TO ACCOUNT FOR DECADES OF FEDERAL GUIDANCE, CONGRESSIONAL ACTION, AND JUDICIAL PRECEDENT WHICH MAKE CLEAR THAT THE IDEA, NOT THE ADA, GOVERNS A SCHOOL DISTRICT'S DUTY TO EDUCATE ELIGIBLE STUDENTS WITH DISABILITIES.

By improperly vesting power over educational decisions for DHH students in the ADA's "effective communication" regulation, *K.M.* ignores over twenty years of Congressional, judicial, and administrative direction confirming that the *IDEA*,

not the ADA, governs school districts with regard to their duty to educate students with disabilities. Since the enactment of the Education for All Handicapped Children Act of 1975, now the IDEA (*see* Pub. L. No. 94-142, 89 Stat. 773 (1975); Pub. L. No. 101-476, § 901, 104 Stat. 1103, 1142 (1990); 20 U.S.C. §§ 1400 *et seq.*), federal legislative and administrative action has continuously demonstrated Congress' intent to address the needs of disabled students in a concrete and meaningful manner.

A 1988 report issued by the Commission on Education of the Deaf ("COED") described the state of education of DHH students as follows: "The present status of education for persons who are deaf in the United States is unsatisfactory. Unacceptably so. This is the primary and inescapable conclusion of the…[COED]." COMM'N ON EDUC. OF THE DEAF, TOWARD EQUALITY: EDUCATION OF THE DEAF, at viii (Feb. 1988).[4] Based in part on the COED's report, the U.S. Secretary of Education issued policy guidance in 1992 on the education of DHH students. *See* U.S. DEP'T OF EDUC., DEAF STUDENTS EDUCATION SERVICES (Oct. 22, 1992).[5] In that guidance, the Secretary provided directives to school districts on how to address DHH students' educational needs as

---

[4] Accessible via the U.S. Government Accountability Office's Archive, *available at* http://archive.gao.gov/t2pbat17 /135760.pdf (last visited Sept. 5, 2013).

[5] Accessible via the U.S. Department of Education's website, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/hq9806.html#1 (last visited on Sept. 5, 2013).

required by the IDEA and § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794): "The Secretary believes it is important that State and local education agencies, in developing an IEP for a child who is deaf, take into consideration such factors as: … Communication needs and the child's and family's preferred mode of communication …." *Id.* The Secretary's guidance does not require that an IEP team implement or give dispositive consideration to a parent's or child's preference. *See id.*

Congress echoed these sentiments in the 1997 and 2004 amendments to the IDEA. *See* Pub. L. No. 108-446, 118 Stat. 2647 (2004), § 614(d)(3)(B)(iv)-(v) (codified at 20 U.S.C. § 1414(d)(3)(B)(iv)-(v)); Pub. L. No. 105-17, 111 Stat. 37 (1997), § 614(d)(3)(B)(iv)-(v) (codified at 20 U.S.C. § 1414(d)(3)(B)(iv)-(v)). Based on those amendments, the IDEA requires that districts, in developing IEPs for DHH students, consider the language and communication needs of these children on an *individual* basis. *See* 20 U.S.C. § 1414(d)(3)(B)(iv); 34 C.F.R. § 300.324(a)(2)(iv); *see also* Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,540, 46,586 (Aug. 14, 2006). The IEP team must also take into account whether the child needs assistive technology devices and services. *See* 20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v). The actions of Congress in passing legislation to specifically address the *educational needs of DHH students within the IDEA*, as opposed to the ADA, confirms Congress' intent for the IDEA to govern educational decisions. *See* 20 U.S.C. § 1414(d)(3)(B)(iv)-(v). *K.M.*, in a vacuum, does not

adequately address this history of federal guidance and Congressional action. Paired with repeated judicial confirmations that the IDEA, not the ADA, governs school districts in their duty to educate (*see* Tustin Pet. at 16-24), these judicial, legislative, and administrative authorities confirm that the IDEA was intended, and has governed the duty to educate children with disabilities.[6]

Despite this well-settled authority, the Ninth Circuit effectively minimizes the IDEA's importance, by over-stating the breadth of the ADA and finding that the ADA affords DHH students greater protections. The opinion's reliance on the ADA and § 35.160 to effectively abrogate the IDEA, ignores a clear history of legislative actions, judicial precedent, and administrative guidance that public schools' responsibility for educating such students is governed by the IDEA.

## II. *K.M.* RESULTS IN A FUNDAMENTAL ALTERATION OF THE IDEA'S IEP PROCESS AND WILL UNDULY BURDEN SCHOOL DISTRICTS.

The central holding in *K.M.* is a question of law that needs correction and clarity. As demonstrated more thoroughly below, the opinion's interpretation of the ADA's "effective communication" regulation *per se* fundamentally

[6] This statement is not intended to imply that districts do not have obligations under the ADA. A school district's duties under the IDEA, however, cannot be abrogated by 28 C.F.R. § 35.160 promulgated under the ADA, which is what *K.M.* purports to do.

alters the IDEA's IEP process and imposes undue administrative and financial burdens on school districts. This result directly conflicts with 28 C.F.R. § 35.164, which specifies that a public agency is not required to take any action pursuant to the ADA's "effective communication" regulation that would result in a fundamental alteration of the nature of the service, program or activity, or in undue administrative or financial burdens.

*K.M.* inextricably changes the manner in which school districts determine appropriate auxiliary aids and services for DHH students under the IDEA. It demands significant alterations to the IDEA's IEP process by: (a) bestowing dispositive decision-making power to parents; (b) negating the IEP team process; (c) rendering the IDEA assessment process unnecessary or irrelevant; and (d) nullifying the results of administrative due process hearings. These fundamental alterations create precisely the undue administrative and financial burdens from which public agencies are spared under § 35.164.

First, *K.M.* fundamentally alters the IEP process with regard to the educational decision-making power of parents. As Tustin Unified School District's Petition for Writ of Certiorari (at 18) and Poway Unified School District's Petition for Writ of Certiorari (at 10-11) explain, parents play a substantial and critical role in the IEP process. Primary consideration to the student and parent is actually the trademark of the IEP process. Even so, the IEP team must make its determination based on the educational needs of the student. Under the IDEA, a school district *cannot* defer to a parent's

request for a specific educational service, program, placement or support, *if* such request *would not* result in a free, appropriate public education ("FAPE") under the IDEA. *See Goleta Union Elementary Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1299 (C.D. Cal. 2001); 34 C.F.R. § 300.321.

*K.M.*, however, discounts the IDEA team approach, and places decision-making power *solely* with parents. *See* Op. at 19a-21a.[7] *K.M.* places extreme weight on the ADA's "effective communication" regulation, and specifically its "primary consideration" requirement. *See id. K.M.* posits that the IDEA merely requires consultation with parents, "whenever appropriate," whereas the ADA dictates that requests of parents be given "primary" consideration. *See id.* & n.5. Specifically, *K.M.*'s holding that the ADA provides for educational benefits beyond what FAPE requires, because of the ADA's regulatory deference to a parent's preference as the "primary consideration," means that school districts will be required to provide a DHH student the specific auxiliary aid or service requested by the parent. This new mandatory obligation amends the IDEA's IEP process for school districts, largely by delegating to parents decision-making power about communication devices for DHH students.[8] *See Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1055

---

[7] Citations to *K.M.* are made to that version contained in Appendix A to Tustin's Petition.

[8] For example, it is unclear under *K.M.* whether a parent may request a specific aid or device one month, and then another device the next month, or if there is a limit on the number of requests that can be made in a school year.

(9th Cir. 2012) (discussing important and comprehensive, but *not* dispositive, parental role in IEP process); *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 657 (8th Cir. 1999) ("IDEA does not require school districts simply to accede to parents' demands without considering any suitable alternatives."); *Wilson v. Marana Unified Sch. Dist. No. 6 of Pima Cnty.*, 735 F.2d 1178, 1182 (9th Cir. 1984) ("states … have the power to provide handicapped children with an education which they consider more appropriate than that proposed by the parents.").

Second, *K.M.* materially alters the IEP team process. The IDEA mandates that educational decisions for students with disabilities be made by a comprehensive and multi-disciplinary IEP team. *See* 20 U.S.C. § 1414(d)(1)(B)-(D); 34 C.F.R. § 300.321; *M.P.*, 689 F.3d at 1055; *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). IEP decisions must be reviewed at least annually. *See M.P.*, 689 F.3d at 1055. Decisions about auxiliary aids and services are tied to an IEP team's decision about expectations for a student's annual progress. *See* 34 C.F.R. §§ 300.320(a)(2)(i), 300.321, 300.324(b)(1)(i). By deferring to parental preference under § 35.160, *K.M.* undercuts and fundamentally alters this team-based process required by the IDEA.

*K.M.* undermines this scheme and the IEP team process. By requiring that school districts give "primary consideration" to the disabled individual or parent, *K.M.* injects ambiguity into the IDEA's processes and raises questions as to whether a "primary consideration" determination under §

35.160 is to occur before or after using the IEP process, or in lieu of the IEP process altogether. *See* Op. at 20a-21a. *K.M.* also disrupts long-recognized IDEA processes and procedures by creating uncertainty about whether school districts are required to convene separate meetings under the ADA's "effective communication" regulation and, if so, who should attend those meetings. The only certainty is that to satisfy *K.M.*, school districts will have to do something different from—fundamentally different, if not directly contrary to—that required by the IDEA.

The third unavoidable, fundamental alteration to districts' special education programs that results from *K.M.* concerns the IDEA's assessment process. The IDEA mandates that IEP teams make educational decisions only after the completion of comprehensive evaluations by qualified professionals; however, *K.M.* disregards that process, requiring only "primary consideration" of the requests of the parent irrespective of evaluation results. *Compare* Op. at 21a-22a (citing § 35.160(b)(2)), *with* 34 C.F.R. §§ 300.15, 300.304–.311. If parent requests require "primary consideration," where does that leave IDEA evaluations? Under *K.M.*, districts can only speculate. *See* Op. at 21a-22a. Foregoing or ignoring IDEA evaluations regarding what educational services a student may require, and replacing IDEA procedures with the ADA's "primary consideration" of a parent's desires, incorrectly alters the way districts educate DHH students, putting districts at odds with the IDEA.

*K.M.*'s directed application of § 35.160 also automatically alters school districts' compliance with IDEA administrative due process hearing procedures in a way that will result in undue administrative and financial burdens. As discussed more fully below, disputes over educating students with disabilities must be exhausted under the IDEA's administrative remedies. *See* Part III *infra*. School districts that comply with all IDEA's requirements may still have to defend their actions in due process proceedings if a dispute over the offer of FAPE arises. Due process hearings require extensive administrative time, effort, and expense. The opinion makes inevitable that school districts will incur undue administrative and financial burdens when a dispute arises relating to a DHH student's auxiliary aids and services, *i.e.*, where the IEP process and due process procedures are completed in compliance with the IDEA. Under *K.M.*, these efforts may be fully negated *post hoc* in the courts because plaintiff students can now disregard the results of the IDEA process and seek relief under the ADA. *See, e.g.*, Op. at 3a-23a.

## III. *K.M.* CREATES A CONFLICT WITH EXISTING PRECEDENT NATIONWIDE AS WELL AS A DEFINITIVE CIRCUIT SPLIT.

*K.M.* undermines the uniformity of the application of the IDEA and ADA when such claims overlap with one another to the extent the opinion is inconsistent with the principles of exhaustion of administrative remedies as held by the Ninth Circuit

itself and federal circuits nationwide. Moreover, the opinion creates an express circuit split regarding the preclusion doctrine.

As addressed by Tustin's Petition (at 15, 30), *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011), controls the rules of exhaustion of IDEA administrative remedies in the Ninth Circuit. The IDEA requires exhaustion of IDEA remedies when an action brought under the ADA "seek[s] relief that is also available" under the IDEA. *Payne*, 653 F.3d at 872. Under *Payne*, as 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 and "a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages." *Id.* at 877. In fact, while all federal circuits require exhaustion of administrative remedies under the IDEA before filing suit in court, the Ninth Circuit's view of the IDEA's exhaustion requirement generally stands as one of the narrowest interpretations of the doctrine.[9]

*K.M.*, which allows litigation over § 35.160 where the relief sought under the ADA is the same or the functional equivalent of the relief sought under the IDEA, has incorrectly broadened the

---

[9] *See, e.g.*, *J.B. ex rel. Bailey v. Avilla R–XIII Sch. Dist.*, 721 F.3d 588, 592 (8th Cir. 2013); *M.L. v. Frisco Indep. Sch. Dist.*, 451 Fed. Appx. 424, 426-28 (5th Cir. 2011); *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 245-46 (2d Cir. 2008); *M.T.V. v. DeKalb Cnty. Sch. Dist.*, 446 F.3d 1153, 1158-59 (11th Cir. 2006); *C.T. ex rel. Trevorrow v. Necedah Area Sch. Dist.*, 39 Fed. Appx. 420, 422-23 (7th Cir. 2002); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51-52 (1st Cir. 2000); *see also* Poway Pet. at 6-8; Tustin Pet. at 15-16.

circumstances where exhaustion of IDEA administrative remedies is excused, contrary to precedent throughout the appellate circuits. *See* cases cited *supra* note 9; *see also I.M. v. Northampton Pub. Sch.*, 869 F. Supp. 2d 174, 185-88 (D. Mass. 2012) (exemplifying correct analysis for resolving ADA claim under § 35.160 when "inextricably intertwined" with "appropriateness of IEP" under IDEA).

*K.M.* is also at odds with the Fifth and Eighth Circuit opinions in *Pace v. Bogalusa*, 403 F.3d 272 (5th Cir. 2005) and *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556 (8th Cir. 1996). While the Ninth Circuit references these rulings, citing them for other propositions or qualifying that nothing within the opinion should "bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims," *K.M.* overlooks or gravely minimizes their significance. *See* Op. at 22a–23a. Proper application of issue and claim preclusion principles, as enunciated in *Pace* and *S.D.*, prevents litigation of the ADA claims at issue in this case, because those claims and the relief sought are the functional equivalent of and relief available under the adjudicated IDEA claims.

In *Pace*, the Fifth Circuit considered, *inter alia*, whether or not the plaintiff could proceed on his ADA "equal access" claims, where the district court affirmed the administrative agency's decision that the IDEA's FAPE standard had been satisfied. *Pace*, 403 F.3d at 290-97. The plaintiff argued that the ADA and § 504 had a legal standard "significantly different" from the IDEA's FAPE standard concerning accessibility. *Id.* at 290. In finding that

satisfaction of the IDEA's FAPE standard precludes litigation of similar claims under the ADA, the *Pace* court ultimately agreed with the hearing officer that FAPE had been provided, and dismissed the non-IDEA claims on the grounds that such claims "were indistinct from … [the] resolved IDEA claims." *Id.* at 297.

Similarly, in *S.D.*, after affirming the district court's decision finding that the school district satisfied the IDEA's FAPE requirements, the Eighth Circuit turned to the issue of whether the remaining non-IDEA claims were precluded by that judgment. *S.D.*, 88 F.3d at 562-63. The court held that, "resolution of the IDEA claims necessarily resolved" non-IDEA issues. *Id.* at 562; *see, e.g.*, *Petersen v. Hastings Pub. Sch.*, 31 F.3d 705, 708-09 (8th Cir. 1994); *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 727-28 (10th Cir. 1996). Put differently, after examining the nature of the claims and relief, when the administrative hearing process produces "an administrative decision that is upheld on judicial review under the IDEA, principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws." *S.D.*, 88 F.3d at 562 (citation omitted).

In the cases at hand, where Respondents sought access to certain communicative devices under the IDEA and such claims for relief were resolved in favor of the school districts, the proper holding, as found by the district courts below, is that resolution of the IDEA communicative devices claims also resolved the ADA communicative devices claims. *Amici* urge the Court to grant certiorari to rectify the conflict between *K.M.* and *Payne* and

IDEA administrative exhaustion precedent in all circuits, the circuit split caused by *K.M.* with *Pace* and *S.D.*, and the ensuing confusion created by *K.M.* for those charged with abiding by the IDEA and ADA.

## IV. THE NINTH CIRCUIT INAPPROPRIATELY GRANTED *AUER* DEFERENCE TO DOJ'S *AMICUS* BRIEF'S INTERPRETATION OF § 35.160'S INTERACTION WITH THE IDEA.

*K.M.*'s incorrect outcome is premised upon improper *Auer* deference to DOJ's *amicus* position on § 35.160's ambiguous interaction with the IDEA. *See* Op. at 3a, 19a-20a. "Applying that [*Auer* deference] standard …[,]" the Ninth Circuit proceeded to adopt DOJ's *amicus* brief pronouncement of § 35.160's interaction with the IDEA, and DOJ's views on IDEA statutory structure and scope. *Compare* Op. at 20a-23a, *with* DOJ *Amicus* Brief.[10] The Ninth Circuit's deference to DOJ's views is misplaced.

In *Christopher v. SmithKline Beecham Corporation*, 567 U.S. __, 132 S. Ct. 2156 (2012) ("*SmithKline*"), reviewing a federal agency's *amicus curiae* interpretation of a regulation, this Court explained when it is improper for a court to apply *Auer* deference. The Court held that *Auer* deference is undeserving when an agency's interpretation of its own ambiguous regulation "would result in precisely

[10]DOJ's *Amicus* Brief is accessible on DOJ's website, *available at* www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf (last visited on Jan. 8, 2014).

the kind of 'unfair surprise' against which our cases have long warned." *SmithKline*, 132 S. Ct. 2167 (citations omitted). Correspondingly, the Court held that *Auer* deference is unwarranted, for example, when an agency's interpretation would lead to "potentially massive liability … for conduct which occurred well before the interpretation was announced." *Id.* "[T]o defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Id.* (quotation omitted). The Court also reaffirmed that *Auer* deference is inapplicable

> "when the agency's interpretation is 'plainly erroneous or inconsistent with the regulation.' …" or "when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgment on the matter in question,]'" [such as] "when the agency's interpretation conflicts with a prior interpretation … or when it appears that the interpretation is nothing more than a 'convenient litigating position,' … or a '*post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack[.]"

*SmithKline*, 132 S. Ct. at 2166 (internal quotations and citations omitted). Under these standards, *K.M.*'s deference to DOJ's *amicus* brief, and its application to the IDEA, is improper.[11]

First, DOJ's interpretation results in unfair surprise, as it is not widely known by other federal courts, let alone the nation's school districts. DOJ has previously asserted that its position (*i.e.*, that a separate analysis is needed under § 35.160, as compared to the IDEA regulation on the same subject), has been a long-standing one, and that it has entered into numerous settlement agreements regarding the same issue. *See* Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56,164, 56,223 (Sept. 15, 2010) (preamble) (codified at 28 C.F.R. pt. 35 App. A, subpt. E); *see also* Tustin Pet. at 10-11, 14, 28 (discussing IDEA regulation on same subject). Settlement agreements are presumptively not agreements between the parties regarding the meanings of the federal regulations at issue. The view contained in DOJ's brief has never been formalized in regulations or any other formal guidance documents, and has not been recognized by other courts. *See Petersen*, 31 F.3d at 708-09 (district's provision of modified signing system for students instead of students' requested system,

---

[11] *K.M.* does not cite to *SmithKline*, and instead relies upon *M.R. v. Dryfus*, 697 F.3d 706 (9th Cir. 2012) and its discussion of *Auer*. *Dryfus* was issued on June 12, 2012, and amended on June 18, 2012 (in ways inapposite here). *SmithKline* was announced on June 18, 2012. The Ninth Circuit's turn to *Dryfus* thus inescapably led to an incomplete assessment of *Auer* deference, one lacking insight into *SmithKline*'s restraints.

satisfied IDEA and *did not* discriminate under ADA because for both claims, "there was ample evidence that after the school district had implemented the modified signing system, the children's scholastic performances improved. Therefore the system has proven to be an effective means of communication.").

*K.M.*'s adoption of DOJ's fresh and novel understanding of § 35.160's interaction with the IDEA comes without *any* fair warning. *K.M.*'s lack of notice could result in "potentially massive liability … for conduct which occurred well before the interpretation was announced." *SmithKline*, 132 S. Ct. at 2167. Districts that have completed the IDEA's IEP process and selected communicative devices and services for DHH students that, although not a parent's preference, are effective, and prevailed in a special education due process hearing on the issue, will now find that all efforts, resources, and expertise expended through that process are for naught. Instead, parents can now sue under the ADA to undo those IDEA procedures, resulting in the award of damages and attorneys' fees under the ADA against unsuspecting school districts.

Second, DOJ's interpretation of § 35.160 is contrary to its own prior interpretations. In 1991, DOJ's stated understanding of § 35.160 provided that an individual's "expressed choice [of auxiliary aids services] shall be given primary consideration by the public entity (Sec. 35.160(b)(2)). The public entity shall honor the choice *unless it can demonstrate that another effective means of communication exists* or that use of the means chosen would not be required under Sec. 35.164." Nondiscrimination on the Basis of Disability in State

and Local Government Services, 56 Fed. Reg. 35,694, 35,711-12 (July 26, 1991) (preamble) (codified at 28 C.F.R. pt. 35, App. A, subpt. E). This exact interpretation was confirmed in 2010 when DOJ reiterated this position relative to its new Final Rules for Title II of the ADA:

> The second sentence of § 35.160(b)(2) of the final rule restores the "primary consideration" obligation set out at § 35.160(b)(2) in the 1991 title II regulation. This provision was inadvertently omitted from the NPRM, and the Department agrees with the many commenters on this issue that this provision should be retained. As noted in the preamble to the 1991 title II regulation, and reaffirmed here: "The public entity shall honor the choice [of the individual with a disability] *unless it can demonstrate that another effective means of communication exists* or that use of the means chosen would not be required under § 35.164 …."

Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. at 56,224.

DOJ did not even attempt to address how its current view of § 35.160 can be read in harmony with this prior published understanding—because it cannot be.[12] Assuming that, under § 35.160, a

[12] DOJ's brief only hastily mentions this point on page 19: "State and local entities are not required to provide the

district is not required to adopt a parent's choice of effective communication devices (where the district can demonstrate that another effective means of communication exists); and an administrative law judge or a court finds that an IEP team's choice of communication devices for an individual student is appropriate (even though different than the child's parent's preference); such a result *under the IDEA* establishes that the district *has demonstrated* that another effective means of communication exists, thus *automatically satisfying the ADA and § 35.160*. DOJ's interpretation of § 35.160 is therefore not only inconsistent with its previously stated views, but also inconsistent with the most reasonable harmonizing of the regulation with the IDEA. *Cf. Hope v. Cortines*, 872 F. Supp. 14, 21 (E.D.N.Y. 1995) ("To the extent that one could interpret the DOJ regulation [under the ADA] to conflict with section 1415(f) [of the IDEA], the Court applies the fundamental principal of statutory construction that courts 'shall not interpret an agency regulation to thwart a statutory mandate.'") (citation omitted), *aff'd*, 69 F.3d 687 (2d Cir. 1995).

Third, the Court in *SmithKline* cautioned against *Auer* deference "[w]hen there is reason to suspect that the agency's interpretation 'does not

---

individual's choice of communication methods, however, if the entity provides an alternative that is as effective as communication with others, or if it can show that the means the individual requests would require a fundamental alteration or would impose an undue burden." DOJ's brief then discusses the latter exception in detail, but fails to address at all how the former exception applies, or is reconciled with its current position.

reflect the agency's fair and considered judgment on the matter in question.'" *SmithKline*, 132 S. Ct. at 2166 (citations omitted). "This might occur when the agency's interpretation … appears [to be] nothing more than a 'convenient litigating position,'…." *Id.* (citation omitted). Here, DOJ's brief must be understood as *an argument* supporting the student's position, not an interpretation of its regulation. In its brief, DOJ is not "interpreting" what § 35.160 means, but rather, is setting forth litigation arguments as to: (1) why the application of its regulation has a different analytical structure and outcome than the "auxiliary aids and services" regulation under the IDEA; and (2) how the district did not perform the requisite analysis to determine what auxiliary aids and services, if any, might be necessary to provide K.M. with modes of "effective communication" that would ensure equal access. These litigating positions are ineligible for *Auer* deference. *See SmithKline*, 132 S. Ct. at 2166. Further, this conclusion and DOJ's failure to reconcile its previously published understanding of § 35.160 confirms that DOJ's position "does not reflect the agency's fair and considered judgment on the matter in question." *Id.*[13] Under *SmithKline*, deference does not apply.

---

[13] This outcome is unchanged despite the U.S. Department of Education's ("ED") General Counsel's appearance on the cover of DOJ's brief. Whether the brief purports to contain DOJ's interpretation of § 35.160's interaction with the IDEA, or a joint view of DOJ and ED's General Counsel, the interpretation still falters and is not permitted *Auer* deference under *SmithKline* for the reasons stated above.

Finally, *K.M.*'s deference to and adoption of *DOJ's views* regarding § 35.160's interaction *with the IDEA* not only is inconsistent with *SmithKline*'s limits on *Auer* deference,[14] but also improperly stands on an agency's interpretation of a statute outside of its jurisdiction. DOJ's interpretation of § 35.160 constitutes an unauthorized extension of the obligations imposed by the ADA that effectively *subsumes and nullifies* portions of the IDEA. Specifically, while DOJ is authorized to promulgate regulations for and interpret the ADA (*e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-98 (1999)), DOJ has no such authority with regard to the IDEA, for which the U.S. Department of Education is responsible (*e.g.*, *D.P. ex rel. E.P. v. School Bd. of Broward Cnty.*, 483 F.3d 725, 730-31 (11th Cir. 2007)). Because DOJ's position is based on an interpretation of the IDEA, it goes too far and should not have received deference. *See Ardestani v. I.N.S.*, 502 U.S. 129, 148 (1991) ("courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer.") (citations omitted); *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990) ("it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.'") (citation omitted).

[14] Several members of the Court have recently indicated the potential need to revisit and possibly reconsider *Auer* deference. *See Decker v. Northwest Envtl. Defense Ctr.*, 568 U.S. __, 133 S. Ct. 1326, 1339 (2013) (Roberts, C.J., concurring); *see id*. at 1339, 1341 (Scalia, J., concurring in part & dissenting in part).

## CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the Court grant the Petitions for Writ of Certiorari.

Respectfully Submitted,

Marcy L. Gutierrez
*Counsel of Record*
Michael E. Smith
Lozano Smith
One Capitol Mall, Suite 640
Sacramento, CA 95814
(916) 329-7433
mgutierrez@lozanosmith.com

Francisco M. Negrón, Jr.
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722
fnegron@nsba.org

January 27, 2014

No. ____

IN THE
# Supreme Court of the United States

TUSTIN UNIFIED SCHOOL DISTRICT,

*Petitioner*,

v.

K.M.,

a Minor, by and through her Guardian Ad Litem, Lynn Bright,

*Respondent*.

On a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

KIRA L. KLATCHKO
*Counsel of Record*
JACK B. CLARKE, JR.
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER, LLP
74-760 Highway 111, # 200
Indian Wells, CA 92210
(760) 568-2611
Kira.Klatchko@bbklaw.com

## Question Presented

The Ninth Circuit held in its published decision below that a deaf or hard-of-hearing student may maintain a damages action against a local educational agency ("LEA") under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, for failure to provide "effective communications," even though the LEA established that the student is receiving communications consistent with "Free Appropriate Public Education" ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482 and Section 504 of the Rehabilitation Act of 1973 ("§ 504"), 29 U.S.C. § 794. The court of appeals held that as a matter of law the "equal opportunity" that must be provided under the ADA "effective communications" regulation, 28 C.F.R. § 35.160, is "more stringent" than the "meaningful benefit" or "meaningful access" standard governing provision of FAPE. The court of appeals did not consider whether the evidence presented established discriminatory animus, deliberate indifference, or denial of "meaningful access." This case presents the following question:

Whether, in the absence of evidence of discriminatory animus, deliberate indifference, or denial of "meaningful access," a LEA's provision of FAPE to hard-of-hearing students establishes its compliance with the ADA "effective communications" requirements as a matter of law.

**TABLE OF CONTENTS**

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Regulations And Other Authorities**

## Petition For A Writ Of Certiorari

Petitioner Tustin Unified School District respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

## Opinions And Orders Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 725 F.3d 1088. Pet. App. 1a-26a. The district court's order is available at 2011 U.S. Dist. Lexis 71850. Pet. App. 27a-57a. The decision of the Office of Administrative Hearings is unreported. Pet. App. 58a-121a.

## Jurisdiction

The judgment of the court of appeals was entered on August 6, 2013. Pet. App. 1a. On September 23, 2013, the court of appeals denied a timely petition for rehearing and rehearing en banc. Pet. App. 122a-123a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## Relevant Statutory Provisions And Regulations

The appendix to this petition reproduces the relevant portions of the following statutes and regulations:

- *IDEA*: 20 U.S.C. §§ 1401 (Pet. App. 124a-125a), 1412(a)(2) (Pet. App. 126a), 1414 (Pet. App.126a-136a), § 1415 (Pet. App. 136a-142a).
- *IDEA regulation*: 34 C.F.R. § 300.324(a) (Pet. App. 142a-144a).
- *ADA*: 42 U.S.C. §12132 (Pet. App. 144a-145a).

- *ADA regulations*: 28 C.F.R. §§ 35.160 (Pet. App. 145a-147a), 35.164 (Pet. App. 147a-148a).
- *Rehabilitation Act*: 29 U.S.C. § 794 (Pet. App. 148a-150a).
- *Rehabilitation Act regulations*: 34 C.F.R. § 104.33 (Pet. App. 150a-152a); 45 C.F.R. §§ 84.4(b)(2) (Pet. App. 152a), 84.37(a) (Pet. App. 152a-153a).
- *California Education Code*: Cal. Educ. Code §§ 56000.5 (Pet. App. 153a-155a), 56341.1(b)(4)-(5) (Pet. App. 155a-156a), 56345(d) (Pet. App. 156a-157a).

## Statement Of The Case

The focus of this case is what "equal opportunity" means under the ADA as a matter of law, and whether, as the court of appeals has held, it means more than what FAPE provides. The widespread belief among local educational agencies is that providing FAPE guarantees that students with disabilities receive the same type of equal access that is at the heart of the ADA and § 504. This case has drawn national attention from LEAs and students with disabilities because it significantly alters the current understanding of the relationship between the IDEA, ADA, and § 504. The question presented in this case arises every day in schools across the country: Whether, in the absence of evidence of discriminatory animus, deliberate indifference, or denial of "meaningful access," a LEA's provision of FAPE to hard-of-hearing students establishes its compliance with the ADA "effective communications" requirements as a matter of law.

### A. K.M.'s Request For CART Services

During the pendency of this case, K.M. was a high school student in the Tustin Unified School District, based in Orange County, California. K.M. is hard-of-hearing, and eligible for IDEA services. She uses a hearing aid in her left ear, and has a cochlear implant in her right ear. K.M. communicates primarily through spoken English, but is also an adept lip-reader. Pet. App. 62a-63a. K.M. was a good student, earning mostly A and B grades; she was promoted to honors classes beginning in eighth grade, and remained in those classes in high school. In June 2008, K.M.'s mother requested that K.M. be provided with CART services prior to entering high school. CART, or "communication access real-time translation," is comparable to court reporting, and involves a stenographer sitting in a classroom with a student and providing real-time captions that can be read on a computer. Pet. App. 65a-66a.

Between June 2008 and February 2010, K.M. and her mother participated in no fewer than four Individualized Education Program ("IEP") meetings regarding her educational progress and request for CART services. Pet. App. 65a, 80a, 83a-93a. During that time, audiologists, nurses, psychologists, and speech and language pathologists assessed K.M.'s abilities. K.M.'s teachers also assessed her abilities. Pet. App. 66a-80a, 92a-94a. All of those people played a role in K.M.'s IEP process, as did K.M. and her mother, who was very actively engaged in the process. Pet. App. 65a-95a.

As part of her IEP, Tustin provided K.M. with numerous classroom accommodations. K.M. had preferential seating, she received written homework

assignments, and her teachers repeated student comments during classroom discussions to ensure K.M. could hear them. Pet. App. 77a-83a. K.M. was given a FM sound-field system, which allowed her teachers to speak into a microphone that transmitted directly to a receiver connected to K.M.'s hearing aid and cochlear implant. Pet. App. 62a-63a. K.M. voluntarily stopped using the FM sound-field system after eighth grade, without any impact on her academic performance. Pet. App. 83a-84a; Supplemental Excerpts of Record ("SER") 45-46, 51-52, 167, 217, 234.

After thoroughly evaluating K.M., and allowing her to test a speech-to-text technology, TypeWell, and a more advanced FM sound-field system, the IEP team concluded that K.M. did not require CART services to receive FAPE. Pet. App. 83a-96a.

### B. Prior Proceedings

In 2009, K.M. filed an administrative "Due Process" complaint against Tustin, which was heard by an Administrative Law Judge ("ALJ") from the California Office Of Administrative Hearings. K.M. alleged that she was denied FAPE under the IDEA when Tustin refused to provide her with CART services. After an eight-day hearing involving twenty witnesses, the ALJ agreed with Tustin and concluded K.M. received FAPE, and that she and her parents were seeking services beyond what was required for K.M. to receive FAPE. Pet. App. 58a-121a.

K.M. appealed the ALJ's decision to the district court by filing a complaint alleging that the denial of her request for CART services violated her rights under the IDEA, Title II of the ADA, § 504 of the Rehabilitation Act, and California's Unruh Civil Rights

Act. K.M. sought injunctive relief, damages, and attorney's fees. SER 271. Among other things, K.M. specifically alleged that by failing to provide CART services, Tustin's actions "show a lack of impartiality and discriminates against K.M. because of her disability. K.M. has thus been denied FAPE and Defendant's actions violate the rights of K.M. under IDEA, ADA, and Section 504 of the Rehabilitation Act, the California Education Code and the Unruh Civil Rights Act." SER 267. K.M. invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1343. SER 264.

After the parties filed cross-motions for summary judgment, the district court granted Tustin's motion finding that providing FAPE under the IDEA required compliance with California's law protecting equal communication access for students with hearing disabilities. Pet. App. 39a. The court further found that the IEP team was required to consider special factors and review educational options that provide deaf and hard-of-hearing students with "an equal opportunity for communication access." Pet. App. 42a. In considering those legal standards and the OAH's determination, the district court concluded that Tustin did not violate any of K.M.'s procedural rights under the IDEA. Pet. App. 48a-49a. It also concluded that Tustin's refusal to provide CART services was not a substantive deprivation of FAPE because "[the] evidence overwhelmingly suggested that K.M.'s performance in class did not indicate a serious need for CART services in particular." Pet. App. 51a-52a.

The district court also considered whether K.M. was receiving communications that were "as effective" as communications with nondisabled students,

as required by the ADA (28 C.F.R. § 35.160), and whether K.M. was receiving FAPE under § 504. Pet. App. 53a. It found that K.M.'s claims under those two statutes were "doom[ed]" because "it is clear that K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reasons that her claim under IDEA failed." Pet. App. 55a. K.M. appealed from the resulting judgment.

### C. The Ninth Circuit's Opinion

On appeal, K.M. did not contest the district court's conclusion that Tustin complied with the IDEA and provided her with FAPE. Pet. App. 2a. Instead, K.M. asserted that Tustin failed to comply with the effective communication regulation under Title II of the ADA. She asserted Tustin's obligations under the regulation were independent of, and not coextensive with, its obligations under the IDEA.

In a published decision concerning both this case and another case with very similar facts, *D.H. v. Poway Unified School District*, the Ninth Circuit held that a school district's compliance with its obligations to a deaf or hard-of-hearing student under the IDEA does not necessarily establish compliance with its effective communication obligations to that child under Title II of the ADA. Pet. App. 22a. The court of appeals reversed the grant of summary judgment on K.M.'s ADA claim and concluded that "in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA." Pet. App. 20a, 26a.

The court of appeals reached that conclusion after finding differences among the IDEA, ADA, § 504, and

related regulations. The court concluded that "the IDEA and Title II differ in both ends and means." Pet. App. 12a. In the court's view, the IDEA "sets only a floor of access to education" but requires school districts to reach that floor regardless of its costs. *Id.* In contrast, the court found that Title II of the ADA and its implementing regulations require a public entity to make services "not just accessible, but *equally* accessible to people with communication disabilities," provided that doing so does not pose an undue burden or require a fundamental alteration of programs. *Id.* (emphasis in original).

Specifically, the court of appeals found that the IDEA—by requiring schools to make FAPE available to children with disabilities—primarily provides parents with procedural safeguards. Pet. App. 8a-9a. The court described the IDEA as including only a "fairly modest" substantive component: the IEP must be "reasonably calculated to enable the child to receive educational benefits." Pet. App. 10a (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-07 (1982)). The court contrasted this "more process-oriented" IDEA with the ADA, which "imposes less elaborate procedural requirements" and "different substantive requirements." Pet. App. 10a. The court described a regulation implementing the ADA—the "effective communications regulation," 28 C.F.R. § 35.160—as including two components. Pet. App. 11a. First, public entities must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." Pet. App. 11a (quoting 28 C.F.R. § 35.160(a)). Second, public entities must "furnish appropriate auxiliary aids and services

where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." Pet. App. 11a (quoting 28 C.F.R. § 35.160(b)(1)). The court explained that for a public entity to determine what type of auxiliary aid and service is necessary, it must give "primary consideration to the requests of the individual with disabilities." Pet. App. 11a (quoting 28 C.F.R. § 35.160(b)(2)). A separate Title II regulation limits the application of these requirements: a public entity need not "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." Pet. App. 12a (quoting 28 C.F.R. § 35.164). The court further found that "at least as a general matter, public schools must comply with both the IDEA and the ADA." Pet. App. 13a.

Critiquing the district court's analysis, the court of appeals also explained "one way in which the statutes do not interact." Pet. App. 14a. It noted that the district court had found that "the plaintiffs' ADA claims were tethered to their IDEA claims through the connective thread of a third federal statute, Section 504 of the Rehabilitation Act," (Pet. App. 14a): the "fact that K.M has failed to show a deprivation of a FAPE under IDEA . . . dooms her claim under Section 504, and, *accordingly*, her ADA claim." Pet. App. 15a (court of appeals' emphasis). The court of appeals explained that the district court arrived at this reasoning by combining two lines of cases. In the first, the Ninth Circuit identified a "partial overlap" between an IDEA FAPE and a regulation implementing § 504, 34 C.F.R. § 104.33(a), which requires "a

free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction." The court of appeals ruled in the past that "adopting a valid IDEA IEP is sufficient but not necessary to satisfy the [Section] 504 FAPE requirements." Pet. App. 15a (quoting *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008)). In the second line of cases, the Ninth Circuit found that "there is no significant difference in the analysis of rights and obligations" under the Rehabilitation Act and Title II of the ADA. Pet. App. 16a (quoting *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002)). By combining these two lines, the district court reasoned that: "(1) a valid IDEA IEP satisfies the Section 504 FAPE regulation; (2) Section 504 and Title II are substantially similar statutes; (3) therefore, a valid IDEA IEP also satisfies Title II." Pet. App. 16a.

The court of appeals found that this syllogism "overstates the connections" between the statutes. Pet. App. 16a. It explained that it has never held that compliance with the IDEA "dooms *all* Section 504 claims." *Id.* (emphasis in original). It explained that compliance with the IDEA dooms a § 504 claim for FAPE, not a claim "predicated on other theories of liability under that statute and its implementing regulations." Pet. App. 16a. The court of appeals also found what it termed "material differences" between Title II of the ADA and § 504. According to the court of appeals, the statutes govern different jurisdictions, are structured around different causal standards, and are implemented through different regulations promulgated by different agencies. Pet. App. 17a-18a.

The court therefore concluded that the question of whether a school district meets the ADA's require-

ments for accommodating deaf or hard-of-hearing students as long as it provides an IDEA FAPE is "one that cannot be answered through any general principles concerning the overall relationship between the two statutes." Pet. App. 19a. Instead, the court of appeals found that it must compare the particular statutes and implementing regulations to determine if "the ADA requirements are sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA." *Id.*

Conducting that analysis, the court of appeals found three relevant differences between the statutes: procedural differences, substantive differences, and available defenses. With regard to procedural differences, the court of appeals found that each statute required consideration of different factors. In the court of appeals' view, although both the IDEA and ADA look to the student's "needs" and "opportunities," only the ADA regulation requires the school to "give primary consideration to the *requests* of the individual with disabilities." Pet. App. 21a (citing 28 C.F.R. § 35.160(b)(2) (court's emphasis)). The court found no "direct counterpart" in the IDEA. *Id.* According to the court, although the IDEA requires schools to consult with parents and to include the child in IEP meetings "whenever appropriate," it does not require that parental or child requests be assigned "primary" consideration. Pet. App. 21a (citing 20 U.S.C. § 1414(d)(1)(B)(vii)).

In considering the procedural differences, the court of appeals did not analyze in detail the IDEA provisions and regulations, or their California counterparts, setting forth specific requirements that school districts must meet to assure that the unique communication needs of deaf and hard-of-hearing

students are met as part of providing FAPE. The court did not specifically analyze 20 U.S.C. §§ 1414(d)(3)(B)(iv)-(v), or the very similarly worded regulation at 34 C.F.R. § 300.324(a)(2)(iv)-(v), both of which require, in the case of deaf or hard-of-hearing students, that the IEP team consider special language and communication needs, opportunities for direct communications with peers and professional personnel in the context of the student's language and communication mode, academic achievement and full range of other disability-related needs including for assistive technology devices and services. The court of appeals also did not analyze California Education Code § 56345(d), which requires that an IEP must take into account the special needs of deaf and hard-of-hearing students with the goal of providing those students with "equal opportunity for communication access":

> Consistent with Section 56000.5 and Section 1414(d)(3)(B)(iv) of Title 20 of the United States Code, it is the intent of the Legislature that, in making a determination of the services that constitute an appropriate education to meet the unique needs of a deaf or hard-of-hearing pupil in the least restrictive environment, the *individualized education program team shall consider the related services and program options that provide the pupil with an equal opportunity for communication access*. The individualized education program team shall specifically discuss the communication needs of the pupil, consistent with "Deaf Students Education Services Policy

> Guidance" (57 Fed. Reg. 49274 (October 1992)).

Cal. Educ. Code § 56345(d) (emphasis added). That section goes on to list specific communication needs that the IEP team must analyze. The court of appeals did not explain why providing FAPE in accord with those laws and regulations was not sufficient to satisfy the effective communications regulation under the ADA.

The court of appeals also did not analyze § 504 regulations governing auxiliary aids, benefits and services. Those regulations make clear that "aids, benefits, and services, *to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement . . . ." 45 C.F.R. § 84.4(b)(2) (emphasis added). The court of appeals also did not address § 504 regulations requiring that LEAs provide students with "non-academic and extracurricular services and activities in such matter as necessary to afford handicapped students *an equal opportunity for participation* in such services and activities." 45 C.F.R. § 84.37(a) (emphasis added).

With regard to substantive differences between the ADA and IDEA, the court of appeals found that the ADA effective communications regulation requires public schools to communicate "as effective[ly]" with disabled students as with other students, and to provide disabled students the "auxiliary aids . . . necessary to afford . . . an *equal opportunity* to participate in, and enjoy the benefits of,"

the school program. Pet. App. 22a (citing 28 C.F.R. §§ 35.160(a)(1) & (b)(1)) (court's emphasis). Citing this Court's decision in *Rowley*, the court concluded that this requirement "is not relevant to IDEA claims, as the IDEA does not require schools to 'provide 'equal' educational opportunities' to all students." Pet. App. 22a (citing *Rowley*, 458 U.S. at 198).

With respect to defenses, the court of appeals found that the ADA provides the public entity with a defense that the IDEA does not. Specifically, under the ADA, a public entity need not take any action that "would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial or administrative burdens." Pet. App. 21a-22a (citing 28 C.F.R. § 35.164).

Based on what the court of appeals construed as significant differences, the court held that the failure of K.M.'s IDEA claim did not automatically foreclose her claim under the ADA effective communication regulation, and that the district court erred by granting summary judgment for the school district on that basis. Pet. App. 22a.

The court of appeals also rejected the argument that ADA claims must fail under *Alexander v. Choate*, 469 U.S. 287 (1985), if a plaintiff cannot demonstrate she was denied "meaningful access." Pet. App. 23a-24a. The court ruled that the "meaningful access" standard must be construed in light of the "relevant regulations interpreting Title II." Pet. App. 24a; *id.* (stating that the standard "incorporates rather than supersedes" applicable interpretive regulations). The court therefore ruled that the "meaningful access" standard did not preclude the plaintiffs from litigating claims under a regulation providing for "equal opportunity." *Id.*

The court of appeals denied rehearing and rehearing en banc. Pet. App. 122a-123a.

## Reasons For Granting The Writ

The decision below conflicts with this Court's holding in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), and cannot be reconciled with this Court's decision in *Alexander v. Choate*, 469 U.S. 287 (1985).

The decision also creates significant practical problems for school districts by undermining the efficacy of the assessment and IEP processes that are at the heart of the IDEA and § 504. The IEP process already requires a detailed and comprehensive evaluation of the unique educational needs, including communication needs, of deaf and hard-of-hearing students. *See*, 20 U.S.C. §§ 1414(d)(3)(B)(iv)-(v); 34 C.F.R. § 300.324; Cal. Educ. Code §§ 56000.5, 56341.1(b)(4)-(5), 56345(d). Under the IDEA, the IEP process requires that LEAs attempt to provide "full educational opportunity" to students with disabilities. 20 U.S.C. § 1412(a)(2). Under § 504, the IEP process also requires students with disabilities be provided with "equal opportunity" to obtain the same result as nonhandicapped students. 45 C.F.R. §§ 84.4(b)(2), 84.37(a).

Providing "full educational opportunity" requires more than complying with a procedural checklist, and implicates much more than a "modest" substantive component in the IDEA. Indeed, the "educational benefit" standard under the IDEA requires comprehensive evaluation of each student, and it mandates that each IDEA-eligible student make meaningful progress relative to their ability to do so. In

contrast, typically developing, or nondisabled, students are not entitled to the same evaluations or guaranteed a right to make educational progress. They also are not entitled to claim educational malpractice (*see Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 205, 209-14 (3d Cir. 2008), unlike students with disabilities who are legally entitled to make educational progress and are guaranteed a legal remedy if they do not.

The decision below fails to recognize that the IEP process is supposed to result in students receiving "meaningful access" to education—the same type of access the ADA and § 504 seek to provide. *See Choate*, 469 U.S. at 301-02; *Loye v. County of Dakota*, 625 F.3d 494, 496-97 (8th Cir. 2010). As a consequence, the decision expands tort liability, transforming reasonable decisions made by educational professionals in compliance with the IDEA and § 504 into independent torts that violate the ADA, even in the absence of evidence of disability-based animus, deliberate indifference, or denial of "meaningful access." It also appears that this new class of educational tort may not be subject to the IDEA's administrative exhaustion requirement. 20 U.S.C. § 1415(*l*). That would seem more likely in the Ninth Circuit, which focuses its exhaustion inquiry on whether a student's action is "seeking relief that is also available" under the IDEA. That is in contrast to numerous other circuits that consider all ADA claims relating generally to educational matters to be subject to the IDEA's exhaustion requirement. *Compare Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011) (en banc) *with M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158-59 (11th Cir. 2006); *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000); *Charlie F. v. Bd. of*

*Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992-93 (7th Cir. 1996); *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir. 1995), *aff'g* 872 F.Supp. 14, 21 (E.D.N.Y. 1995).

The court of appeals' conclusion that the ADA's effective communications regulation is "more stringent" than the requirement that LEAs provide FAPE cannot be harmonized with this Court's decision in *Rowley*. It also cannot be reconciled with IDEA, § 504, or California regulations governing the provision of FAPE. Nor is it consistent with the "meaningful access" test set out in *Choate*.

The decision, as it stands, will subject school districts to significant practical problems and risks, while eroding the efficacy of the IDEA, and its administrative exhaustion requirement, in a way that gives rise to a multiplicity of suits on the same educational issues. The facts in this case are not in dispute, and this case is typical of thousands of others that implicate the IDEA, ADA, and § 504. This Court should grant certiorari.

### A. The Decision Below Is At Odds With *Rowley* And Cannot Be Harmonized With *Choate*

1. *Rowley*, and cases interpreting it, conflict with the court of appeals' conclusion that providing FAPE, under the IDEA or § 504, is not consistent with providing "equal opportunity" under Title II of the ADA.

a. The IDEA provides federal funds to assist LEAs carry out their obligation to provide FAPE. *See* 20 U.S.C. § 1400(c). The IDEA "imposes extensive procedural requirements upon States receiving

federal funds under its provisions." *Rowley*, 458 U.S. at 182. The primary purpose of the IDEA is to ensure that all students with disabilities have the opportunity to obtain FAPE "that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). It requires students with disabilities receive FAPE that conforms with state law and an IEP. 20 U.S.C. § 1401(9). Under the IDEA, FAPE must include "related services" that allow a child to "benefit from" "specially designed instruction, at no cost to parents, to meet" a child's "unique needs." 20 U.S.C. §§ 1401(9),(26),(29).

An IEP is a detailed and formal plan, based upon extensive assessment of an eligible student, mapping out how that student's unique needs will be met. 20 U.S.C. §§ 1401(14), 1414; 34 C.F.R. § 300.320; *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). An IEP provides for services based on a highly individualized assessment of each student—cost is not a consideration. The IEP process involves assembly of a multidisciplinary IEP team, including a student's teachers. 20 U.S.C. § 1414(d)(1)(B). An IEP must be carried out in accordance with regulations promulgated by the Department of Education. 34 C.F.R. §§ 104.33, 300.320. An IEP requires direct interaction with, and observation of, the student at issue, and a comprehensive assessment of that student's individual needs, establishment of their educational goals, and ongoing evaluation of their educational progress in the context of the "general education curriculum." 20 U.S.C. § 1414(d)(1)(A). The process often involves specialized educational evaluations conducted by subject-area experts. The ADA does not require any

of those things. The IDEA, however, mandates compliance with detailed processes designed to guarantee that states and LEAs are, in fact, attempting to provide "full educational opportunity" to students with disabilities. 20 U.S.C. § 1412(a)(2). In states like California, IEP teams are expressly directed to consider options that provide students with "equal opportunity for communication access." Cal. Ed. Code § 56345(d).

The IEP process also mandates "meaningful parental participation." Parents are entitled to participate in the IEP preparation process (20 U.S.C. § 1415(b)(1)), to receive notices about IEPs (*id.*; 20 U.S.C. § 1415(d)(1)), to obtain independent evaluations for their children (20 U.S.C. § 1415(b)(1), and to serve as IEP team members (20 U.S.C. § 1414(d)(1)(B)(i)). Failure to include parents in the IEP process constitutes denial of FAPE *per se*, because parents have an independent stake in ensuring their children receive FAPE. *See Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 527-531 (2007). That is, the IDEA's requirement for "meaningful parental participation" guarantees accommodation requests by students and their parents receive the "primary consideration" required by the ADA.

Adopting a valid IEP is sufficient, but not necessary, to satisfy the FAPE requirement in § 504. 34 C.F.R. § 104.33(b)(2); *Mark H. v. Lemahieu*, 513 F.3d 922, 925, 933. Section 504 prohibits discrimination and is similar to the ADA, but for the fact that § 504 only applies to institutions that receive federal funding. The statues are so similar that many courts have held that cases interpreting § 504 are applicable to, and interchangeable with, cases interpreting the ADA. *Bahl v. County of Ramsey*, 695 F.3d 778, 783

(8th Cir. 2012); *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002); *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994). Department of Health and Human Services regulations governing § 504 make clear that students with disabilities must be afforded "equal opportunity" to participate and benefit from educational and extracurricular activities, though services provided need not "produce the identical result or level of achievement" to be considered "equally effective." 45 C.F.R. §§ 84.4(b)(2), 84.37(a).

b. In *Rowley*, this Court held that in order to provide students with disabilities FAPE under (the law now known as) the IDEA, a school district must provide eligible students with "some educational benefit" uniquely tailored to their individualized needs. *Rowley*, 458 U.S. at 188-90, 192, 200-01. This Court explained that providing "some educational benefit" was consistent with providing students with disabilities "equal access" to education but not with providing a potential-maximizing education. *Id.* at 198-200. As this Court noted after reviewing the legislative history underlying the IDEA: "Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a 'basic floor of opportunity' consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection [for handicapped children] required anything more than equal access." *Id.* at 200. While the Court found "free appropriate public education" to be "too complex" a phrase "to be captured by the word 'equal,'" *id.* at 198-99, it also adopted a standard that still controls under the IDEA today. That standard, while "more complex" than a stand-alone "equality" standard, is no less stringent than the ADA standard. The court

of appeals failed to address that unavoidable conclusion.

Following *Rowley*, numerous courts have found that "some educational benefit" means providing students with opportunities for "meaningful access" and "meaningful educational benefit" gauged in relation to each child's potential. *See e.g., Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 396 (5th Cir. 2012); *D.B. v. Esposito*, 675 F.3d 26, 34-35 (1st Cir. 2012); *J.L. v Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2010); *D.F. ex rel. N.F. v. Ramapo Cent. Sch. Dist.*, 430 F.3d 595, 598 (2d Cir. 2005); *Deal v. Hamilton Cnty. Bd. Of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004).

That standard, whether called "some educational benefit," "meaningful access," or "meaningful educational benefit," is consistent with § 504. Section 504 also requires students with disabilities be provided with "meaningful access" and with FAPE. 29 U.S.C. § 794. A regulation implementing § 504 defines "appropriate education" as meeting disabled students' educational needs "as adequately as the needs of nondisabled [students]." 34 C.F.R. § 104.33(b)(1) (emphasis added). Because meeting the IDEA FAPE standard is sufficient to establish FAPE has been provided under § 504, providing FAPE under the IDEA necessarily means meeting the needs of students with disabilities "as adequately as" the needs of nondisabled, or typically developing, students.

But, the published decision below interpreted *Rowley's* "some educational benefit" standard as inconsistent with providing IDEA-eligible students with "equal educational opportunities" or "meaningful access." Pet. App. 22a-24a. It also concluded that "equal opportunity" under the ADA, particularly un-

der the ADA "effective communications" regulation, 28 C.F.R. § 35.160, promulgated by the Department of Justice, means providing IDEA-eligible students with more than FAPE and more than "meaningful access." Pet. App. 22a. Those conclusions conflict with *Rowley*, and cases interpreting *Rowley*.

The court of appeals attempted to explain the apparent conflict by noting that the IDEA, § 504, and the ADA have different substantive standards, procedural components, and available defenses. The court of appeals also relied on the Department of Justice's interpretation of the phrase "equal opportunity." Pet. App. 19a-20a. That reliance was misplaced. The Department of Justice did not merely offer an interpretation of its own regulation; it essentially suggested why its regulation should be given primacy over regulations promulgated by the Department of Education and Department of Health and Human Services. That is, it necessarily interpreted regulations governing provision of FAPE. But neither the court of appeals' explanation, nor the Justice Department's interpretation of the effective communications regulation, supports the court's conclusion that the ADA is more "stringent" than the IDEA. Those explanations also do not support the conclusion that students with disabilities are entitled to maintain independent educational torts for disability discrimination in the absence of evidence of discriminatory animus, deliberate indifference, or denial of "meaningful access."

For example, the court of appeals suggests that the ADA effective communications regulation is more "stringent," or requires a higher level of benefit, than what FAPE provides (Pet. App. 21a), because it requires a LEA to give "primary consideration" to re-

quests for auxiliary aids and services made by individuals with disabilities. The relevant portions of the regulation state:

> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities . . .*an equal opportunity to participate in,* and enjoy the benefits of, a service, program, or activity of a public entity.
>
> (b)(2) . . . In determining what types of auxiliary aids and services are necessary, a public entity shall give *primary consideration to the requests of individuals with disabilities.* In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

28 C.F.R. § 35.160(b)(1)-(b)(2) (emphasis added).

The court of appeals' decision turns almost entirely on the phrases "equal opportunity" in 28 C.F.R. § 35.160(b)(1), and "primary consideration" in 28 C.F.R. § 35.160(b)(2). But, those phrases are consistent with the requirements of the IDEA and § 504, and do not provide more than what FAPE already guarantees. To provide FAPE a LEA must meaningfully include parents in the IEP process. 20 U.S.C. §§ 1415(b)(1), 1415(f). A LEA must conduct a comprehensive assessment of each student's individual needs. 20 U.S.C. § 1414(d)(1)(a). A LEA must ensure that students with disabilities have their educational

needs met "as adequately as the needs of nondisabled persons are met." 34 C.F.R. § 104.33(b)(1). A LEA must directly interact with each student, observe that student, establish specific educational goals, and conduct an ongoing evaluation of their educational progress in the context of the "general educational curriculum." 20 U.S.C. § 1414(d)(1)(A). In fact, LEAs must attempt to provide "full educational opportunity" to students with disabilities. 20 U.S.C. § 1412(a)(2). Furthermore, there is no practical difference between providing FAPE consistent with California law, which requires students be provided with "an equal opportunity for communication access," Cal. Ed. Code § 56345(d), and providing students with "an equal opportunity to participate in, and enjoy the benefits of" the school program, as required under 28 C.F.R. § 35.160(b)(1).

That is, FAPE provides as much, if not more, than the ADA effective communications regulation, and ensures that students have equal access to education based on their unique needs. This case evidences that fact—Tustin held no fewer than four IEP meetings with K.M. and her mother to discuss her request for CART services. Still, the court of appeals found that was not consistent with giving K.M.'s request "primary consideration," or with providing her "equal opportunity." Importantly, though, the effective communication regulation requires that a public entity give an individual's request primary "consideration," not primary substantive weight,[1] and the court of appeals seems to confuse the two.

---

[1] The Department of Justice has attempted to amend the rule—which the court noted in a footnote, Pet. App. 11a, n.2—although the Department failed to note the proposed change in its notice of proposed rulemaking. 75 Fed. Reg. 56164-01 (Sept.

The court of appeals' other attempts to distinguish the ADA effective communications regulation from the IDEA and § 504 are similarly without support and are contrary to *Rowley*.

c. The decision below is not reconcilable with this Court's opinion in *Alexander v. Choate*, 469 U.S. 287 (1985). In *Choate*, this Court found that an organization discriminates if it denies a qualified person with a disability a reasonable accommodation that the individual needs to have "meaningful access" to a public service. *Id.* at 301-02. The court of appeals found that the "meaningful access" standard in *Choate* was based on this Court's interpretation of the regulations governing § 504, which the court of appeals believed required less than "equal opportunity." Pet. App. 24a. That is, the court of appeals essentially found that the "meaningful access" standard articulated in *Choate*, and applicable to both § 504 claims and ADA claims, does not apply where interpretive regulations require provision of more than "meaningful access." That is not reconcilable with *Choate* or with other opinions concluding that *Choate* applies to the ADA. *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013); *Randolph v. Rogers*, 170 F.3d 850, 858 (8th Cir. 1999) (citing *Bonner v. Lewis*, 857 F.2d 559, 561 (9th Cir. 1988)).

In *Choate*, this Court held that plaintiffs were re-

---

15, 2010). Even if the amendment were effective, it only confirms that a public entity can disregard an individual's request if it prefers any other "effective means of communication." *Id.* (stating that "[t]he public entity shall honor the choice [of the individual with the disability] *unless it can demonstrate that another effective means of communication exists* or that use of the means chosen would not be required under § 35.164.") (emphasis added).

quired to show they were denied "meaningful access" in order to maintain § 504 disability-discrimination claims based on deliberate indifference or disparate impact (as opposed to discriminatory animus). 469 U.S. at 301-06. In reaching that conclusion, this Court reviewed regulations promulgated under § 504 that contained language very similar to the effective communication regulation at issue here, including regulations describing "equal" opportunity. This Court still determined that § 504 was intended to assure "evenhanded treatment and the opportunity for handicapped individuals to participate" and not to guarantee "equal results." That is, it did not alter its "meaningful access" analysis based on isolated regulatory language suggesting "equal" treatment was required. *See id.* at 305-06, incl., nn.24-25.

While it is true that the IDEA is not an anti-discrimination statute, provision of FAPE negates claims under the ADA and § 504 in the absence evidence of disability-based animus, deliberate indifference, or denial of "meaningful access." *See D.B. v.* Esposito, 675 F.3d 26, 40-42 (1st Cir. 2012); *Miller v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245-46 (10th Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 925 (9th Cir. 2008). To hold otherwise is to reject this Court's finding in *Choate* that not all disparate impact or deliberate indifference claims rise to the level of actionable discrimination. It also requires that courts interpret the ADA and § 504 as guaranteeing students with disabilities *equal results* instead of *equal access* to educational opportunity—that is exactly the type of standard this Court rejected in *Rowley* and in *Choate*. Indeed, interpreting the law that protects students with disabilities as requiring *equal results* would create an unsolvable legal

and social problem. The IDEA recognizes that each child is unique, and that uniqueness defies the easy categorization and measurement that is required to guarantee an *equal result*. The process of education is far too complex to distill it into a fictional concept of what *equal results* would mean for all students, without regard to the real-life circumstances confronting each student.

Yet, in this case, the court of appeals found summary judgment was not appropriate even though K.M. conceded she had been provided with FAPE—a requirement of which was that her specific communications needs be assessed by educational professionals and experts, without regard to cost. K.M. also failed to provide evidence that she was denied "meaningful access," and failed to provide evidence that she was the victim of intentional discrimination. That is, the court of appeals found that K.M. was not subject to the standards set forth in *Choate* because she strategically dropped her FAPE-related claims and proceeded only under the ADA effective communications regulations. Her ADA claims, however, are factually indistinguishable from her failed IDEA and § 504 claims. The result below is not consistent with the purpose of the ADA, IDEA, or § 504, nor is it reconcilable with this Court's decision in *Choate*.

* * *

By concluding that the ADA effective communication regulation requires LEAs to provide students with disabilities more than "meaningful access" or the educational opportunities and accommodations required for FAPE, the Ninth Circuit expanded tort liability beyond what Congress envisioned when it enacted the ADA, IDEA, and § 504. Reasonable deci-

sions made by educational professionals may now violate the ADA, even in the absence of evidence of disability-based animus or deliberate indifference.

### B. The Question Presented Concerns A Matter That Arises Frequently, And Must Be Resolved To Avoid Creation Of A New Class Of Educational Claims And Erosion Of The IDEA's Mandate

1. The question presented addresses a problem that arises in schools every day. Absent resolution by this Court, the decision will create significant practical problems for school districts. In *Rowley*, this Court cautioned against creating an "unworkable standard requiring impossible measurements and comparisons." 458 U.S. at 198. Yet the decision below has created an unworkable standard that puts LEAs in an impossible position. To this point, LEAs believed that providing FAPE meant meeting the unique needs of students and providing them with equal access to education. That is, LEAs believed that providing FAPE meant providing students with disabilities "equal access" or "meaningful access." Under the analytical framework set out in the decision below, that is not the case.

Under the decision, students may pursue ADA claims against LEAs that have provided FAPE, even in the absence of evidence of actionable discrimination. That is a significant change, and will require LEAs to completely reassess the relationship between the IDEA, ADA, and § 504. It will also require LEAs to figure out—without any guidance from Congress, regulatory agencies, or this Court—how to ensure that students receive both FAPE and "equal op-

portunity," if those things are not identical.

The IEP process already requires evaluation of the unique communication needs of deaf and hard-of-hearing students. *See* 20 U.S.C. §§ 1414(d)(3)(B)(iv)-(v); 34 C.F.R. § 300.324; Cal. Ed. Code §§ 56000.5, 56341.1(b)(4)-(5), 56345(d). But, under the decision, that process will not, and likely cannot, satisfy the requirement that LEAs provide "equal opportunity." In other words, LEAs will not be able to utilize the IEP process to assess whether a student is receiving "equal opportunity," or whether a student's request is being given "primary consideration." That is particularly so because the IEP process requires that student needs and services be assessed without regard to cost. Title II on the other hand only requires students with disabilities be provided with "reasonable" accommodations that are "necessary" and that do not result in a fundamental alternation of a service, program or activity, or impose an undue financial or administrative burden. 28 C.F.R. §§ 35.130(b)(7), 35.160, 35.164.

Those two analyses cannot be performed simultaneously under the analytical framework set out in the decision below. Do LEAs now need to provide two teams: one to consider whether a student is receiving FAPE and one to consider whether a student needs reasonable accommodation to receive "equal opportunity" under the effective communication regulation? May a student's primary teacher or teachers participate on both teams, or does that risk injecting cost considerations into the cost-blind IEP process? If the decision below stands, LEAs will have to answer those questions on their own.

LEAs will also have to determine how to reconcile the IDEA's administrative requirements with the

ADA's requirements. For example, under the IDEA, students with disabilities are entitled to speedy resolution of their claims. The IDEA's administrative procedures allow parents to file a special education complaint, have a hearing, and obtain a complete resolution, all within 75 days. 34 C.F.R. §§ 300.510(b), 300.515(a). The ADA does not provide students with such an expeditious framework for resolving claims for necessary accommodations. Nor does the ADA protect students from unnecessary delays in the evaluation process.

2. The decision below effectively creates a new class of educational claims that are independent of, and not subject to, the IDEA, or its administrative exhaustion requirement. As explained above, the court of appeals' decision rests on a distinction between the "some educational benefit" standard articulated in *Rowley* and the "equal opportunity" standard set out in the ADA effective communications regulation. Because the court of appeals has said that FAPE does not provide "equal opportunity," it has effectively transformed many "educational" claims, traditionally cognizable under the IDEA, into non-IDEA discrimination claims that are not subject to the IDEA's administrative exhaustion requirement under 20 U.S.C. § 1415(*l*).

After exhausting administrative remedies, students may bring their IDEA claims, and any other claims, in a civil action. But, before seeking relief through the courts for "relief that is also available under" the IDEA, students must exhaust their administrative remedies. 20 U.S.C. § 1415(*l*). In light of the decision below, it is difficult to imagine that "independent' claims under the ADA can be considered to provide "relief that is also available under"

the IDEA.

Students suing for "equal opportunity" under the ADA may now allege that they are seeking relief that is "not available" under the IDEA, and thus not subject to the IDEA's administrative exhaustion requirement. That will certainly be problematic in the Ninth Circuit, where the court of appeals, sitting *en banc*, explained that in evaluating whether exhaustion was required, and whether relief was "also available" under the IDEA, courts should examine the complaint's prayer for relief. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (en banc). The Ninth Circuit found in *Payne* that exhaustion was only required if a plaintiff sought: an IDEA remedy or its functional equivalent; prospective injunctive relief to alter an IEP or educational placement; to enforce rights arising from denial of FAPE. *Id.* at 875-76. That is in contrast with numerous other circuits that, unlike the Ninth Circuit, consider ADA claims relating generally to educational matters to be subject to the IDEA's exhaustion requirement. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158-59 (11th Cir. 2006); *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 992-93 (7th Cir. 1996); *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir. 1995), *aff'g* 872 F. Supp. 14, 21 (E.D.N.Y. 1995).

The decision below has potentially broad consequences for all claimants seeking "equal opportunity" under the ADA, not just those making claims under the communications regulations. Students may concede they are getting FAPE, avoid the entire IDEA administrative process, including the IEP process, and seek "equalizing" accommodations in federal court in the first instance, arguing exhaustion would

be either unnecessary or "futile." *See Payne*, 653 F.3d at 870-71. That result is not consistent with the IDEA's core purpose of allowing LEAs to exercise their discretion and educational expertise, while giving them the "first opportunity to correct shortcomings." See *Payne*, 653 F.3d at 890 (Bea, J., dissenting).

Narrowing the exhaustion requirement beyond *Payne* is also not consistent with the IDEA's other purpose, reducing parents' reliance on the judicial system as a means to remedy denial of services to their disabled children. S. Rep. No. 94-168, at 9 (1975), *reprinted in* 1975 U.S.C.C.A.N. 1425, 1433. As the dissent in *Payne* correctly observed, "providing plaintiffs with an easy end-run around the exhaustion requirement" has foreseeable results—plaintiffs will avoid the IDEA's administrative review and run to federal court to seek monetary damages under the ADA. 653 F.3d at 890 (Bea, J., dissenting).

If students can easily avoid the administrative process, the IDEA may be reduced to a dead letter. This threat extends beyond the context of claims brought by deaf and hard-of-hearing students because the phrase "equal opportunity" appears not only in the ADA's effective communications regulation, but also in the ADA regulation relating to "[g]eneral prohibitions against discrimination." 28 C.F.R. § 35.130. As a result, all students with disabilities, not just deaf and hard-of-hearing students, may try to stretch the decision's reasoning to demand more than the "meaningful educational benefit" and "meaningful access" that FAPE provides.

This case provides an example. Here, K.M.'s complaint was initially grounded in the IDEA, and her

ADA and § 504 claims stemmed from the same set of facts that gave rise to her IDEA claims. But, on appeal, K.M. abandoned her IDEA claims and did not contest that she received FAPE. Pet. App. 2a. Instead, K.M. sought CART services, which she claimed to be "independent[ly]" entitled to under the ADA communications regulations. *Id.* On that basis, and without considering the extensive factual findings demonstrating that K.M. did not need CART services, the court of appeals concluded that K.M. was independently entitled to seek relief under the ADA because she was seeking "equal opportunity" not FAPE. Pet. App. 22a. The court disregarded the IEP process entirely.

The decision below will allow other students with disabilities to avoid the IDEA by asserting that they are requesting "equal opportunity," and not relief "also available" under the IDEA. Res judicata and collateral estoppel would not, as the court of appeals suggests (Pet. App. 22a-23a), ever come into play to preclude re-litigation of IDEA claims in ADA-premised lawsuits because the two statutes, according to the court of appeals, deal with fundamentally different rights. That cannot be correct.

The decision also does not address what evidence courts should look to in the absence of the types of evaluations, assessments, and IEPs discussed by the 20 witnesses who appeared before the ALJ in this case. If students are easily able to avoid the IDEA, courts will not have the benefit of those extensive analyses in the future. Although the opinion will encourage students to avoid the IDEA administrative process, it fails to address the practical consequences of that result. For instance, how should courts evaluate, in the first instance and without the benefit of

the comprehensive evaluations central to the IEP process, whether an educational accommodation provides "equal opportunity"? How should school districts structure their IEP processes if students are always entitled to benefits beyond the IDEA? The court of appeals decision requires courts and school districts to struggle to answer these difficult questions without legal guidance. This case now presents this Court with the opportunity to make clear that the goals of the IDEA are consistent with the anti-discrimination concepts in the ADA and § 504.

* * *

The published decision below has serious consequences for students and LEAs throughout the country, all of which navigate, on a daily basis, the complex legal and regulatory system in place to protect students with disabilities. Prior to the decision, those LEAs understood that students with disabilities who were receiving FAPE were being afforded the same educational opportunities presented to typically developing students. According to the decision, that is not the case. The decision, therefore, redefines FAPE and "equal opportunity" and in doing so creates a new class of educational claims that are arguably exempt from the IDEA and from the IDEA's exhaustion requirement. That is not consistent with the purposes of the IDEA, the ADA, or § 504.

## Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 2013

Respectfully submitted,
Kira L. Klatchko
*Counsel of Record*
JACK B. CLARKE, JR.
MATTHEW K. SCHETTENHELM
BEST BEST & KRIEGER, LLP
74-760 Highway 111, Ste. 200
Indian Wells, CA 92210
Kira.Klatchko@bbklaw.com

# APPENDIX

## APPENDIX A

K.M., a minor, by and through her Guardian Ad Litem, Lynn Bright, Plaintiff-Appellant, v. TUSTIN UNIFIED SCHOOL DISTRICT, Defendant-Appellee. D.H., a minor, by and through her Guardian Ad Litem, K.H., Plaintiff-Appellant, v. POWAY UNIFIED SCHOOL DISTRICT, Defendant-Appellee.

No. 11-56259, No. 12-56224

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

725 F.3d 1088

December 3, 2012, Argued and Submitted, Pasadena, California

August 6, 2013, Filed

## OPINION

BERZON, Circuit Judge:

These two cases, consolidated for oral argument, raise questions about the obligations of public schools under federal law to students who are deaf or hard-of-hearing. The plaintiffs' central claim is that their school districts have an obligation under the Americans with Disabilities Act ("ADA") to provide them with a word-for-word transcription service so that they can fully understand the teacher and fellow students without undue strain and consequent stress.

K.M., a high schooler in the Tustin Unified School District ("Tustin") in Orange County, California, and D.H., a high schooler in the Poway Unified School District ("Poway") in San Diego County, California,

both have hearing disabilities. Each student, through her parents, requested that, to help her follow classroom discussions, her school district provide her with Communication Access Realtime Translation ("CART") in the classroom. 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. In both cases, the school district denied the request for CART but offered other accommodations. Also in both cases, the student first unsuccessfully challenged the denial of CART in state administrative proceedings and then filed a lawsuit in federal district court.

In the district court, both K.M. and D.H. claimed that the denial of CART violated both the Individuals with Disabilities Education Act ("IDEA") and Title II of the ADA. In each case, the district court granted summary judgment for the school district, holding that the district had fully complied with the IDEA and that the plaintiff's ADA claim was foreclosed by the failure of her IDEA claim. On appeal, both K.M. and D.H. do not contest the conclusion that their respective school districts complied with the IDEA. They challenge, however, the district courts' grants of summary judgment on their ADA claims, because they maintain that Title II imposes effective communication obligations upon public schools independent of, not coextensive with, schools' obligations under the IDEA.

In light of this litigation history, these appeals present this court with a narrow question: whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also

necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA. For the reasons explained below, we hold that it does not. We do not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied. Moreover, in one of these cases, *K.M. v. Tustin*, the Department of Justice ("DOJ") has filed an amicus brief in support of the plaintiff that includes an interpretation of the relevant Title II regulations, to which we accord deference under *Auer v. Robbins,* 519 U.S. 452, 117 S. Ct. 905, 137 L. Ed. 2d 79 (1997), and which bolsters our conclusion.

## FACTUAL AND PROCEDURAL BACKGROUND

### K.M.

Because of her hearing loss, K.M. is eligible for special education services under the IDEA. Her eligibility means that Tustin must provide K.M. with a "free appropriate public education" ("FAPE") suited to her individual needs. *See* 20 U.S.C. § 1412(a)(1). As required by the statute, Tustin has convened regular meetings to develop an annual "individualized education plan" ("IEP") identifying K.M.'s educational goals and laying out which special services Tustin will provide to address those goals in the upcoming academic year. *See id.* § 1412(a)(4).

In spring 2009, when K.M. was completing the eighth grade, Tustin and her parents began to prepare for her upcoming transition to high school. At a June 2009 meeting of K.M.'s IEP team, K.M.'s mother requested that Tustin provide her with CART be-

ginning the first day of ninth grade, in Fall 2009. K.M.'s long-time auditory-visual therapist recommended that K.M. receive CART in high school. The IEP team deferred a decision on the CART request, instead developing an IEP that offered K.M. other accommodations.

Shortly thereafter, K.M. filed an administrative complaint challenging the June 2009 IEP. During the course of K.M.'s ninth grade year, her parents and Tustin officials met for several IEP meetings but were unable to come to an agreement that would resolve the complaint. After providing K.M. with trials of both CART and an alternative transcription technology called TypeWell, her IEP team concluded that she did not require transcription services to receive a FAPE under the IDEA, *see* 20 U.S.C. § 1412(a)(1), and reaffirmed the June 2009 IEP.

K.M.'s challenge to the June 2009 IEP proceeded to a seven-day hearing before a California administrative law judge ("ALJ"). K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of K.M.'s teachers testified that, in their opinion, K.M. could hear and follow classroom discussion well.

Applying the relevant legal standards, the ALJ concluded that Tustin had complied with both its procedural and substantive obligations under the IDEA and had provided K.M. with a FAPE. The ALJ observed that K.M.'s mother was requesting CART so that K.M. could "maximize her potential," but the IDEA, as interpreted by the Supreme Court in *Board of Education of Hendrick Hudson School District, Westchester County v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), does not require

schools to provide "a potential-maximizing education."

Dissatisfied, K.M. filed a complaint in district court challenging the ALJ decision on her IDEA claim. She also asserted disability discrimination claims under Section 504 of the Rehabilitation Act, Title II of the ADA, and California's Unruh Civil Rights Act. With respect to her ADA claim, she sought, in addition to other relief, "an Order compelling Defendants to provide CART." The complaint alleges that CART "is commonly paid for by other Southern California public school districts," including the Los Angeles Unified School District and the Santa Monica Malibu School District, and "is also commonly provided at the college level under the ADA."

In declarations submitted to the district court, K.M.'s teachers declared that she participated in classroom discussions comparably to other students. K.M. saw her situation quiet differently, emphasizing that she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day.

The district court granted summary judgment for Tustin. First, as to K.M.'s IDEA claim, the district court stated that it was "reluctant to adopt fully teacher and administrator conclusions about K.M.'s comprehension levels over the testimony of K.M. herself," and found "that K.M.'s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived." Nevertheless, the district court agreed with the ALJ that, under the relevant legal standards, K.M. had been afforded a FAPE compliant with the IDEA. Second, the

district court held that "K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reason that her claim under [the] IDEA failed." Finally, the district court noted that Unruh Act liability requires intentional discrimination or an ADA violation, neither of which K.M. had shown.

This appeal followed, in which K.M. challenges only the district court's rulings on her ADA and Unruh Act claims.[1]

**D.H**.

Like K.M., D.H. is eligible for and receives special education services under the IDEA, pursuant to an annual IEP. At an IEP meeting held towards the end of D.H.'s seventh-grade year, D.H.'s parents "agreed . . . that [D.H.] was making progress," but said that they "believed that [she] needed CART in order to have equal access in the classroom." The IEP team decided that CART was not necessary to provide D.H. with a FAPE, noting that D.H. was making good academic progress.

D.H. filed an administrative complaint challenging her April 2009 IEP. During the ensuing hearing, D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. "hears enough of what her teachers and fellow pupils say in class to allow her to access the general educa-

---

[1] Under California law, "a violation of the ADA is, *per se*, a violation of the Unruh Act." *Lentini v. Calif. Ctr. for the Arts,* 370 F.3d 837, 847 (9th Cir. 2004). We therefore do not discuss K.M.'s Unruh Act claim separately from her ADA claim.

tion curriculum" and "did not need CART services to gain educational benefit."

D.H. challenged the ALJ decision on her IDEA claim in district court, and also alleged disability discrimination claims under Section 504 of the Rehabilitation Act and Title II of the ADA, seeking, in addition to other relief, "an Order compelling Defendants to provide CART." Like K.M.'s complaint, D.H.'s complaint alleges that CART is commonly provided by other Southern California school districts and at the college level.

D.H. entered high school in Fall 2010. Before the district court, D.H. submitted a declaration in support of her motion for summary judgment which she declared that she has continued to have difficulty hearing in her classes. Although D.H. can use visual cues to follow conversations, "[u]se of these strategies requires a lot of mental energy and focus," leaving her "drained" at the end of the school day. D.H.'s declaration questioned whether her teachers understood the extra effort it required for her to do well in school.

The district court initially granted partial summary judgment for Poway on D.H.'s IDEA claim, holding that the April 2009 IEP provided a FAPE under the IDEA. Although noting that it was "sympathetic to the parents' view that the CART service would make it easier for [D.H.] to follow the lectures and class discussions," the district court denied the request to order the service, on the ground that "the IDEA does not require States to 'maximize each child's potential . . . .'" Later, the district court granted summary judgment for defendants on D.H.'s remaining -- ADA and Section 504 -- claims. Relying in

part on the earlier district court decision in *K.M. v. Tustin*, the district court held that "a plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, accordingly, under the ADA."

This appeal, in which D.H. challenges only the district court's ruling on her ADA claim, followed.

## DISCUSSION

### I. General Statutory Background

Before discussing K.M. and D.H.'s specific claims, we provide some necessary context concerning the three statutes primarily implicated by these appeals, the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act, especially as they apply to accommodation of students with communication difficulties.

**A**.

The IDEA requires schools to make available to children with disabilities a "free appropriate public education," or "FAPE," tailored to their individual needs. 20 U.S.C. § 1400(d)(1)(A). States receiving federal funds under the IDEA must show that they have implemented "policies and procedures" to provide disabled children with a FAPE, including procedures to develop an IEP for each eligible child. *Id*. § 1412(a), (a)(1), (a)(4).

The IDEA enumerates several general factors that a child's IEP team must consider in developing her IEP. These are "the strengths of the child," "the concerns of the parents for enhancing the education of their child," "the results of the initial evaluation or most recent evaluation of the child," and "the aca-

demic, developmental, and functional needs of the child." *Id.* § 1414(d)(3)(A). In addition, the IDEA enumerates "special factors" that must be considered if a child has a particular type of disability. For a child who is deaf or hard-of-hearing, the IEP team is required to

> consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode[.]

*Id.* § 1414(d)(3)(B)(iv). The IEP team is also required to "consider whether the child needs assistive technology devices and services." *Id.* § 1414(d)(3)(B)(v).

The IDEA does not, however, specify "any substantive standard prescribing the level of education to be accorded handicapped children." *Rowley,* 458 U.S. at 189. Rather, the IDEA primarily provides parents with various procedural safeguards, including the right to participate in IEP meetings and the right to challenge an IEP in state administrative proceedings and, ultimately, in state or federal court. *Rowley* saw the statute as resting on the premise "that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley,* 458 U.S. at 206; *see also Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 59-60, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). "The core of the statute . . . is the cooperative process that it es-

tablishes between parents and schools." *Schaffer,* 546 U.S. at 53.

The IDEA does have a substantive component, but a fairly modest one: The IEP developed through the required procedures must be "reasonably calculated to enable the child to receive educational benefits." *Rowley,* 458 U.S. at 206-07. The IDEA does not require states to provide disabled children with "a potential-maximizing education." *Id.* at 197 n.21. This access-centered standard means that, for a child being educated in mainstream classrooms, an IEP is substantively valid so long as it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *Id.* at 204.

**B**.

In contrast to the more process-oriented IDEA, the ADA imposes less elaborate procedural requirements. It also establishes different substantive requirements that public entities must meet.

Title II of the ADA, the title applicable to public services, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*," and requires that the DOJ promulgate regulations to implement this provision. 42 U.S.C. §§ 12132, 12134 (emphasis added). We have recognized that, under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), the DOJ's Title II-implementing regulations "should be given controlling weight unless

they are arbitrary, capricious, or manifestly contrary to the statute." *Armstrong v. Schwarzenegger,* 622 F.3d 1058, 1065 (9th Cir. 2010) (internal quotation marks and citations omitted).

Among the DOJ's Title II-implementing regulations, and at the core of these appeals, is the so-called "effective communications regulation," which spells out public entities' communications-related duties towards those with disabilities. *See* 28 C.F.R. § 35.160 (2010).[2] The Title II effective communications regulation states two requirements: First, public entities must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." *Id.* § 35.160(a). Second, public entities must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." *Id.* § 35.160(b)(1). The Title II regulations define the phrase "auxiliary aids and services" for purposes of § 35.160 as including, *inter alia*, "real-time computer-aided transcription services" and "videotext displays." *Id.* § 35.104. "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." *Id.* § 35.160(b)(2).

---

[2] The Title II regulations, including *§ 35.160*, were amended effective March 15, 2011, *see* 75 Fed. Reg. 56164-01 (Sept. 15, 2010), but the language we quote was not changed in any substantive way relevant to this appeal.

A separate, more general Title II regulation limits the application of these requirements: Notwithstanding any other requirements in the regulations, a public entity need not, under Title II, "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id.* § 35.164. The public entity has the burden to prove that a proposed action would result in undue burden or fundamental alteration, and the decision "must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." *Id.* The public entity must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity." *Id.*

As should be apparent, the IDEA and Title II differ in both ends and means. Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but *equally* accessible to people with communication disabilities, but only insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.

**C**.

Finally, at least as a general matter, public schools must comply with both the IDEA and the ADA. The IDEA obviously governs public schools. There is also no question that public schools are among the public entities governed by Title II. *See* 42 U.S.C. § 12101(a)(3) (listing "education" in the ADA congressional findings section as one of "critical areas" in which disability discrimination exists); *Tennessee v. Lane,* 541 U.S. 509, 525, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004) (listing "public education" among the sites of discrimination that Congress intended to reach with Title II).

Moreover, Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others. *See Payne v. Peninsula Sch. Dist.,* 653 F.3d 863, 872 (9th Cir. 2011) (en banc). After the Supreme Court interpreted an earlier version of the IDEA to provide the "exclusive avenue" for pursuing "an equal protection claim to a publicly financed special education," *Smith v. Robinson,* 468 U.S. 992, 1009, 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984), Congress enacted legislation to overturn that ruling. An amendment to the IDEA, enacted in 1986, clarified that the IDEA does not foreclose any additional constitutional or federal statutory claims that children with disabilities may have, so long as they first exhaust their IDEA claims through the IDEA administrative process. *See* Pub. L. 99-372, 100 Stat. 796 (1986); *see also Mark H. v. Lemahieu,* 513 F.3d 922, 934 (9th Cir. 2008). In its current version, 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.

20 U.S.C. § 1415(l) (alterations in original).

**D**.

It is against this statutory background that we shall consider how the IDEA and Title II interact with respect to school districts' obligations to IDEA-eligible students, like K.M. and D.H., who are deaf or hard-of-hearing. First, however, we must clarify one way in which the statutes do not interact.

In the district court's analysis in *K.M.*, relied upon by the district court in *D.H.*, the plaintiffs' ADA claims were tethered to their IDEA claims through the connective thread of a third federal statute, Section 504 of the Rehabilitation Act. Section 504 bars the exclusion of individuals with disabilities from any program or activity receiving federal funds. *See* 29 U.S.C. § 794(a). The district court in *K.M.* reasoned that "the fact that K.M. has failed to show a deprivation of a FAPE under IDEA . . . dooms her claim under Section 504, and, *accordingly*, her ADA

claim" (emphasis added). Similarly, the district court in *D.H.* reasoned that "a plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, *accordingly*, under the ADA" (emphasis added).

The district courts arrived at this reasoning by combining two lines of our case law. In the first line of cases, we have identified a partial overlap between the statutory FAPE provision under the IDEA and a similar provision within the Section 504 regulations promulgated by the Department of Education, requiring schools receiving federal funds to provide "a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction." 34 C.F.R. § 104.33(a). Although both the IDEA and the Section 504 regulation use the locution "free appropriate public education," or "FAPE," we have concluded that the two FAPE requirements are "overlapping but different." *See Mark H.,* 513 F.3d at 925, 933.[3] At the same time, we have noted that, as provided by the Section 504 FAPE regulation, "adopting a valid IDEA IEP is sufficient but not necessary to satisfy the [Section] 504 FAPE requirements." *Id.* at 933 (citing 34 C.F.R. § 104.33(b)(2)); *see also A.M. v. Monrovia Unified Sch. Dist.,* 627 F.3d 773, 782 (9th Cir. 2010).

In the second line of cases, we have discussed the close relationship between Section 504 and Title II of

---

[3] Most importantly, the Section 504 regulations define FAPE "to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focus[] on the 'design' of a child's educational program," while the IDEA definition of FAPE does not require a comparative analysis. *Id.* at 933.

the ADA. Congress used the earlier-enacted Section 504 as a model when drafting Title II. *See Duvall v. Cnty. of Kitsap,* 260 F.3d 1124, 1135 (9th Cir. 2001). We have observed on occasion that "there is no significant difference in the analysis of rights and obligations created by the two Acts." *Vinson v. Thomas,* 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

Combining these two lines of cases, the district courts reasoned that (1) a valid IDEA IEP satisfies the Section 504 FAPE regulation; (2) Section 504 and Title II are substantially similar statutes; (3) therefore, a valid IDEA IEP also satisfies Title II. This syllogism overstates the connections both between the IDEA and Section 504, and between Section 504 and Title II.

First, we have never held that compliance with the IDEA dooms *all* Section 504 claims. In *Mark H.*, we held only that "adopting a valid IDEA IEP is sufficient . . . to satisfy the [Section] 504 *FAPE requirements*." 513 F.3d at 925 (emphasis added) (citing 34 C.F.R. § 104.33(b)(2)). We so held because the Section 504 FAPE regulation itself provides that provision of a FAPE under the IDEA "is one means of meeting *the standard established in paragraph (b)(1)(i)* of this section," 34 C.F.R. § 104.33(b)(2) (emphasis added), i.e., the Section 504 FAPE standard. Because a school district's provision of a FAPE under the IDEA meets Section 504 FAPE requirements, a claim predicated on finding a violation of the Section 504 FAPE standard will fail if the IDEA FAPE requirement has been met. Section 504 claims predicated on other theories of liability under that statute and its implementing regulations, however, are not

precluded by a determination that the student has been provided an IDEA FAPE.

Second, the connection between Title II and Section 504 is nuanced. Although the general anti-discrimination mandates in the two statutes are worded similarly, there are material differences between the statutes as a whole. First, their jurisdictions, while overlapping, are not coextensive: Section 504 governs all entities receiving federal funds (public or private), while Title II governs all public entities (federally funded or not). *Compare* 29 U.S.C. § 794 with 42 U.S.C. § 12132. Second, Title II's prohibition of discrimination or denial of benefits "by reason of" disability "establishes a 'motivating factor' causal standard for liability when there are two or more possible reasons for the challenged decision and at least one of them may be legitimate." *Martin v. Cal. Dep't of Veterans Affairs,* 560 F.3d 1042, 1048-49 (9th Cir. 2009). In other words, "if the evidence could support a finding that there is more than one reason for an allegedly discriminatory decision, a plaintiff need show only that discrimination on the basis of disability was a 'motivating factor' for the decision." *Id*. By contrast, "[t]he causal standard for the Rehabilitation Act is even stricter," *id*., requiring a plaintiff to show a denial of services "solely by reason of" disability. 29 U.S.C. § 794(a).

Congress has also delegated regulatory responsibility differently under the two statutes. Section 504 mandates generally that the head of each executive agency must promulgate its own regulations "as may be necessary" to implement Section 504's nondiscrimination mandate with respect to that agency's programs. *See* 29 U.S.C. § 794(a). Thus, for example,

the Department of Education promulgates regulations implementing Section 504 with respect to federally funded education programs. *See generally* 34 C.F.R. part 104. For Title II, Congress made a more specific, and centralized, delegation, confiding regulatory authority wholly in the Justice Department. *See* 42 U.S.C. § 12134(a).

Congress also mandated that the federal regulations implementing Title II be consistent with certain, but not all, of the regulations enforcing Section 504. *See id*. § 12134(b). Specifically, Congress mandated that the Title II regulations as to all topics "[e]xcept for 'program accessibility, existing facilities,' and 'communications'" be consistent with the Section 504 regulations codified at 28 C.F.R. part 41, and that the Title II regulations as to "'program accessibility, existing facilities,' and 'communications'" be consistent with the Section 504 regulations codified at 28 C.F.R. part 39. *Id*. Congress did not, however, mandate that Title II regulations be consistent with the Section 504 *FAPE* regulation, which is codified at 34 C.F.R. part 104.

Neither K.M. nor D.H.'s theory of Title II liability is predicated on a denial of FAPE under any definition of that term; indeed, Title II does not impose any FAPE requirement. Rather, both K.M. and D.H. ground their claims in the Title II effective communications regulation, which they argue establishes independent obligations on the part of public schools to students who are deaf or hard-of-hearing. Insofar as the Title II effective communications regulation has a Section 504 analog, it is not the Section 504 FAPE  27] regulation at 34 C.F.R. § 104.33 we construed in the *Mark H.* line of cases. Rather, it is the

Section 504 communications regulation at 28 C.F.R. § 39.160, as that is the regulation with which Congress has specified that Title II communications regulations must be consistent. *See* 42 U.S.C. § 12134(b).

## II. The IDEA and ADA Communications Provisions

**A**.

The question whether a school meets the ADA's requirements for accommodating deaf or hard-of-hearing students as long as it provides a FAPE for such students in accord with the IDEA is therefore one that cannot be answered through any general principles concerning the overall relationship between the two statutes. Instead, we must address the question by comparing the *particular* provisions of the ADA and the IDEA covering students who are deaf or hard-of-hearing, as well as the implementing regulations for those provisions. If the ADA requirements are sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA, then compliance with the IDEA FAPE requirement would not preclude an ADA claim. Because we have no cases addressing the parallelism between the IDEA and either the Title II effective communications regulation or its analogous Section 504 regulation, we must construe the relevant statutes and regulations as a question of first impression.

In doing so, "[w]e afford . . . considerable respect" to the DOJ's interpretation of the ADA effective communication regulation, as expressed in its amicus brief to this court. *M.R. v. Dreyfus,* 697 F.3d 706,

735 (9th Cir. 2011). "An agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Auer,* 519 U.S. at 461) (other citations omitted).[4] Applying that standard, we conclude from our comparison of the relevant statutory and regulatory texts that the IDEA FAPE requirement and the Title II communication requirements are significantly different. The result is that in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA.

*First*, the factors that the public entity must consider in deciding what accommodations to provide deaf or hard-of-hearing children are different. The key variables in the IDEA framework are the child's "needs" and "opportunities." When developing a deaf or hard-of-hearing child's IEP for IDEA purposes, the IEP team is required to consider, among other factors, "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." 20 U.S.C. § 1414(d)(3)(B)(iv)&(v) (emphases added). Under the ADA effective communications regulation, a public entity is also required to "furnish

---

[4] *Auer* deference does not apply where the regulation at issue "does little more than restate the terms of the statute itself." *Gonzales v. Oregon,* 546 U.S. 243, 257 (2006), 126 S. Ct. 904, 163 L. Ed. 2d 748. That exception is inapplicable here, where, as in *Auer*, the regulation does not parrot the statute but rather "[gives] specificity to a statutory scheme the [DOJ] was charged with enforcing." *Id.* at 256 (construing *Auer*).

appropriate auxiliary aids and services *where necessary*." 28 C.F.R. § 35.160(b)(1) (emphasis added). But the ADA adds another variable: In determining how it will meet the child's needs, the ADA regulations require that the public entity "give primary consideration to the *requests* of the individual with disabilities." *Id.* § 35.160(b)(2) (emphasis added).[5] That provision has no direct counterpart in the IDEA. Although the IDEA requires schools to consult with parents and to include the child in IEP meetings "whenever appropriate," 20 U.S.C. § 1414(d)(1)(B)(vii), it does not require that parental or child requests be assigned "primary" weight. *Cf. Bradley ex rel. Bradley v. Ark. Dep't of Ed.,* 443 F.3d 965, 975 (8th Cir. 2006) ("[T]he IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit.").

*Second*, Title II provides the public entity with defenses unavailable under the IDEA. Specifically, Title II "does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. In particular, as the DOJ explained in its amicus brief to this court, the ADA effective communication obligation "is limited to the provision of services for *existing programs*; the ADA does not require a school to provide new

---

[5] Where the individual is a minor, as will generally be the case in the schools context, we assume that such requests would ordinarily be made via the parent. We do not decide whether the child's preferences might trump the parent's in a situation in which they disagreed.

programs or new curricula" (emphasis in original). The IDEA does not provide schools with any analog to Title II's fundamental alteration and undue burden defenses.

*Third*, the specific regulation at issue here, the Title II effective communications regulation, requires public schools to communicate "as effective[ly]" with disabled students as with other students, and to provide disabled students the "auxiliary aids . . . necessary to afford . . . an *equal opportunity* to participate in, and enjoy the benefits of," the school program. 28 C.F.R. §§ 35.160(a)(1) & (b)(1) (emphasis added). That requirement is not relevant to IDEA claims, as the IDEA does not require schools to "provide 'equal' educational opportunities" to all students. *Rowley,* 458 U.S. at 198.

Given these differences between the two statutes, we are unable to articulate any unified theory for how they will interact in particular cases. Precisely because we are unable to do so, we must reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her Title II claim. As a result, courts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework. We note, however, that nothing in our holding should be understood to bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims where the IDEA administrative appeals process has functionally adjudicated some or all questions relevant to a Title II claim in a way that precludes relitigation. *Cf. Pace v. Bogalusa City Sch. Bd.,* 403 F.3d 272, 290-97 (5th

Cir. 2005) (en banc) (holding that ADA and Section 504 claims were issue-precluded by failure of IDEA claims based on identical accessibility guidelines); *Indep. Sch. Dist. No. 283 v. S.D.,* 88 F.3d 556, 562 (8th Cir. 1996) (when IDEA claims are exhausted through the administrative process, "principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws").

**B**.

Both school districts make one final argument that requires a brief response. They argue that, even if analyzed independently under Title II, K.M. and D.H.'s claims must fail because ADA liability requires plaintiffs to show that they were denied "meaningful access" to school services, programs, or activities, and that they cannot make this showing. The phrase "meaningful access" derives not from the text of the ADA or its implementing regulations, but from the Supreme Court's opinion in *Alexander v. Choate,* 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985).

*Choate* involved a class-action lawsuit brought by individuals with disabilities who argued that cost-saving measures to Tennessee's Medicaid program would disproportionately affect them and therefore amounted to impermissible discrimination under Section 504. *Id.* at 289. Rejecting both the contention that Section 504 reaches only purposeful discrimination and "the boundless notion that all disparate-impact showings constitute prima facie cases under [Section] 504," the Court construed Section 504 as including a "meaningful access" standard that identified which disparate-impact showings rise to the level of actionable discrimination. *Id.* at 299. In constru-

ing Section 504 in this manner, the Court considered and relied on the regulations applicable to Section 504. *Id.* at 304-05 & n.24.

We have relied on *Choate*'s construction of Section 504 in ADA Title II cases, and have held that to challenge a facially neutral government policy on the ground that it has a disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services. *See Crowder v. Kitagawa,* 81 F.3d 1480, 1484 (9th Cir. 1996). As in *Choate*, in considering Title II's "meaningful access" requirement, we are guided by the relevant regulations interpreting Title II. *See Duvall,* 260 F.3d at 1136; *accord Chisolm v. McManimon,* 275 F.3d 315, 325-26 (3d Cir. 2001). Consequently, in determining whether K.M. and D.H. were denied meaningful access to the school's benefits and services, we are guided by the specific standards of the Title II effective communications regulation.[6]

In other words, the "meaningful access" standard incorporates rather than supersedes applicable interpretive regulations, and so does not preclude K.M. and D.H. from litigating their claims under those regulations. The school districts' suggestion to the contrary therefore fails.

**III. Application to This Case**

Finally, we return to the specifics of the cases before us in this appeal. Here, in both cases, the dis-

---

[6] Neither school district has argued that the effective communications regulation is an impermissible application of Title II, including its meaningful access standard. Our court has applied the regulation before. *E.g. Duvall,* 260 F.3d 1124. As no party has challenged it, we do not address the regulation's validity.

trict court held that the plaintiff's Title II claim was foreclosed as a matter of law by the failure of her IDEA claim. For the reasons explained above, the district courts legally erred in granting summary judgment on that basis. The failure of an IDEA claim does not automatically foreclose a Title II claim grounded in the Title II effective communications regulation.

Although we could review the record to determine whether there are alternate legal or factual grounds on which to affirm summary judgment, *see Video Software Dealers Ass'n v. Schwarzenegger,* 556 F.3d 950, 956 (9th Cir. 2009), we are not bound to do so, *see Badea v. Cox,* 931 F.2d 573, 575 n.2 (9th Cir. 1991). In *Mark H.*, for example, we reversed a grant of summary judgment where the parties and the district court had misunderstood the interaction between two federal statutes, and remanded for further proceedings consistent with the relationship between those statutes as newly clarified by our opinion. *Mark H.,* 513 F.3d at 925, 939-40.

Here too, prudence counsels in favor of returning these cases to the district court for further proceedings. Having 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 Title II. Moreover, the school districts have litigated these cases thus far from the position that the plaintiffs' IDEA and Title II claims were coextensive.[7] Now that we have

---

[7] Although they made Title II-specific arguments in the alternative, the IDEA claims were clearly the focus of their litigation efforts. Their Title II defenses relied on arguments more

clarified that the school districts' position is not correct, we expect that the parties may wish to further develop the factual record and, if necessary, revise their legal positions to address the specifics of a Title II as opposed to an IDEA claim.

To give the district courts an opportunity to consider the merits of K.M. and D.H.'s Title II claims in the first instance, we reverse the grants of summary judgment on the ADA claims in both cases and on the Unruh Act claim in *K.M. v. Tustin*, and remand for further proceedings consistent with this opinion, without prejudice to whether the school districts may renew their motions for summary judgment on other grounds.[8]

**CONCLUSION**

For the foregoing reasons, we **REVERSE** the grants of summary judgment on the ADA claims in both cases and on the Unruh Act claim in *K.M. v. Tustin*, and **REMAND** for further proceedings in both cases consistent with this opinion.

---

properly related to the plaintiffs' IDEA claims, such as whether the plaintiffs had been provided with a FAPE.

[8] The Third Circuit has observed in a somewhat similar Title II communications case that, "[g]enerally, the effectiveness of auxiliary aids and/or services is a question of fact precluding summary judgment." *Chisolm,* 275 F.3d at 327; *see also Duvall,* 260 F.3d at 1136-38. In the education context, Title II communications claims may conceivably be more amenable to summary judgment given the extensive factual record that will often have been developed through IEP meetings and administrative appeals. We do not, at this juncture, express any general opinion on this question.

## APPENDIX B

K.M., a minor, by and through her Guardian Ad Litem, LYNN BRIGHT,

Plaintiff(s),

v.

TUSTIN UNIFIED SCHOOL DISTRICT,

Defendant(s).

CASE NO. SACV 10-1011 DOC (MLGx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

*2011 U.S. Dist. LEXIS 71850*

July 5, 2011, Decided

July 5, 2011, Filed

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court are cross-motions for summary judgment filed by Plaintiff K.M. ("K.M."), by and through her Guardian Ad Litem, Lynn Bright,[1] ("Plaintiff's Motion") and Defendant Tustin Unified School District ("Defendant" or "the District") ("Defendant's Motion"). The Court has considered the moving, opposing, and replying papers to both motions, as well as oral arguments, and has reviewed the extensive administrative record, and accordingly

---

[1] The Court refers to the Plaintiff only by her initials, as she is a minor. Many of the documents submitted by the parties reveal her full name, but the Court will take care not to do so.

DENIES Plaintiff's Motion and GRANTS Defendant's Motion.

## I. FACTUAL BACKGROUND

This case comes to this Court as both an appeal of an Administrative Law Judge's findings, as well as separate claims under the Americans with Disabilities Act; *Section 504* of the Rehabilitation Act; and the Unruh Act. The Court summarizes the relevant facts here, based on its careful review of the Administrative Record[2] and the additional evidence supplied by the parties. Additional facts, as well as discussion of prior factual and legal determinations made by the Administrative Law Judge ("ALJ") will be discussed when necessary throughout this Order. However, the facts relevant for the appeal of the ALJ's findings are limited to a narrower time period than the facts relevant for K.M.'s claims under the remaining claims.

### About K.M.

Plaintiff K.M. is a deaf, sixteen year-old[3] girl attending high school within Defendant Tustin School District. K.M. uses cochlear implants,[4] and relies on

---

[2] Citations to the Administrative Record are referred to by "AR."

[3] At the time of the due process hearing, K.M. was fifteen years-old. *See* AR001893.

[4] Both parties note that until only recently, K.M. had a cochlear implant in her right ear and a hearing aid in her left ear, but had surgery in or around March of 2011 to implant a cochlear implant in her left ear. The parties dispute whether this additional implant gives her improved hearing, and Plaintiff submits a Declaration of Margaret Winter ("Winter Decl.") in support of her argument that she still requires CART services. Defendant's objections to this late-filed Declaration are overruled in light of Plaintiff's argument that it was needed to rebut the

lip-reading and her observations of social cues to communicate with others. AR001556. Plaintiff's Declaration of K.M. in Opposition to Motion for Summary Judgment by Tustin ("K.M. Decl."), ¶ 1. Because of her difficulty hearing, she often needs to make eye contact so she can rely on her lip-reading and visual cues to follow along. *See* AR000043. K.M.'s primary mode of communication is spoken English, and she is an auditory/oral learner. AR000811. Her hearing loss in her right ear is considered in the minimal to mild range, and her left ear, with the help of a hearing aid, has been found to have hearing loss in the "mild to moderate or profound" range. AR000426, AR000974-000976; AR001991; AR002362.

K.M. qualifies for special education and since kindergarten, K.M. has been fully included in general education classes. AR001987, AR002012, AR002017. During that time, she has participated in weekly auditory-visual therapy ("AVT"), funded by the District. AR002012, AR002017. She received her AVT services from Karen Rothwell-Vivan ("Rothwell-Vivian"), a licensed audiologist and certified AVT therapist, who has worked with K.M. since she was about one year-old. AR000877.

**K.M.'s Disability and Its Effect on Her Classroom Experience**

According to K.M., her disability affects her classroom experience. She expresses that "[i]t is very difficult for me to hear what is said in the classroom" and that it "is generally easier for me to hear the

---

District's argument that the second cochlear implant improved K.M.'s hearing so that she no longer requires captioning.

teacher compared to other students and class discussion." K.M. Decl. ¶ 2. As a result of her need to "concentrate and focus even more intently" to hear other students in class talk, as well as the fact that the majority of her teachers require student participation in class, K.M. "work[s] very hard to participate." *Id.* at ¶ 4. "At the end of the day, [K.M. is] emotionally very tired from all the intense concentration" and "come[s] home mentally exhausted from trying to listen." *Id.* at ¶ ¶ 2-3; AR001553. K.M. has especially struggled when teachers have played videos without captioning in class, and in portable classrooms, though the parties dispute whether this continues to be a relevant issue.

K.M.'s difficulty hearing impacts her ability to follow what is happening in classrooms, particularly student discussions. She reports that she will laugh at school when she sees others laughing and worries about looking stupid if others realize she did not catch the joke. AR001554. She also nods along even when she does not hear what people are saying, because in the past she learned that people get frustrated with her if she asks for clarification too often. *Id.* This at times results in her pretending to hear things she does not hear in class. AR01556. K.M. says she typically struggles to follow a teacher about once a day, and in some classes has trouble hearing student discussion as often as every five minutes. AR001538-1541.

K.M.'s teachers agreed to provide accommodations for her disability. These have included at time preferential seating, repeating student comments back, providing closed captioning at times on videos, and providing copies of notes. District's SUF, ¶ ¶ 23-

24. K.M. has testified, however, that these accommodations were not always followed, and were violated in some instances, such as when one of her teachers frequently showed videos without captioning. *See* AR001544-1545; AR001547; *see also* K.M. Decl. Other evidence provided by Plaintiff also supports K.M.'s testimony that her teachers often forgot to repeat back classroom comments. AR000385; AR002114-2158.

Despite her difficulty in classes, K.M. has generally earned average to above-average grades in school. Many of her teachers have testified to the fact that she has participated in classes and appears to be following class discussions. *See* District's SUF, ¶ ¶ 25-27.

**CART, TypeWell, and FM Technologies**

As a result of the impact of her hearing loss on her education, K.M. seeks to be provided with Communication Access Real-time Translation ("CART"). The technology is comparable to court reporting, and involves a captionist entering spoken words and sounds into a machine, which then translates the entries into real-time captions to be displayed on a laptop computer screen. AR001895. CART provides word-for-word transcription. K.M. believes that access to CART would improve her comprehension as it is easier for her to read what people are saying than to try to listen. K.M. Decl ¶ 4. CART is used for students with hearing impairments in other public high schools in southern California, including Los Angeles Unified School District, Santa Monica Malibu Unified School District, and Irvine School District, among others. AR000305-306.

K.M. had the opportunity to test out CART, along with TypeWell, in both her English and Ancient Civilizations classes. AR001556-1557. She also observed CART being used at Santiago Community College. *Id.* She found CART extremely helpful, and preferred it to TypeWell, because it allowed her to follow along with exactly what was being said in class discussions. AR001557-1558. Nonetheless, she described TypeWell as "interesting" but did not find it as helpful as CART in some ways. AR001559-1560. According to the District, she also informed her IEP team that she did, in fact, like TypeWell. *See id.*

During middle school, the District had provided K.M. with access to FM Technology ("FM") in the classroom. AR001989, AR002070, AR002174, AR002185, AR002209. The personal FM system involved a microphone, which would be carried to each class for the teacher or speaker to hold, and a receiver to deliver the voice signal to the hearing aid or cochlear implant. K.M. did not like the FM system, which picked up a lot of static when the teacher moved around. The system would also distract K.M. by transmitting private conversations between the teachers and other students. K.M. refused to use FM after eighth grade, finding that it gave her headaches and that it picked up on distracting, background noises such as the teacher's movements, and impeded her ability to focus. AR001551-1553; *see also* AR001235.

**IEP Meetings**

On June 9, 2008, at the end of K.M.'s seventh-grade year of school, the District held an annual Individualized Education Program ("IEP") meeting, which included, among others, K.M.'s middle school

teacher, Jennifer Smith, and her mother. The purpose of this meeting was to develop K.M.'s special education program for eighth grade. The ALJ stated that under California's Standardized Testing and Reporting Program, K.M. scored proficient scores in English Language Arts and Math, and proficient scores in eighth grade. OAH decision, AR001894.

At that meeting, K.M.'s mother ("Mother") first requested CART services be provided to K.M., based on her concerns about K.M.'s transition to high school. Mother wanted to give the District sufficient time to research and budget for the CART services. She also indicated that she was concerned about K.M.'s refusal to use the FM system in light of the fact that all her middle school teachers had been warning her that the amount of work and discussion would dramatically increase in high school. AR001230-1231. Mother also knew other parents whose children were using CART in school, and knew that K.M. had relied heavily on captioning in other areas of her life, including watching television. *Id.* Mother's request was noted in K.M.'s IEP, including the notation that Mother had provided information and research on the technology. AR002270. The District indicated it would respond to the request by June 25, 2008. AR000031; AR00270; AR001233. It failed to do so. AR00074-75.

On June 5, 2009, at the end of K.M.'s eighth grade year, another IEP meeting was held. During that meeting, Karen Rothwell-Vivian presented her report to the IEP team, recommending that K.M. receive CART in all her academic high school classes so that she can access the information presented by her teachers and classmates. AR002322. Mother contin-

ued to request CART because of her concern about K.M.'s ability to hear class discussions. AR002286. The parties dispute whether she requested CART for all classes or for only honors classes. *See* Defendant Tustin Unified School District's Statement of Genuine Disputes of Material Fact ("District's SGD"), ¶ 83. The District did not agree to provide CART and proposed conducting additional assessments of K.M., but did not specify which kind of assessments, despite Mother's questioning. AR001248-1249. As a result, Mother became frustrated, believing that the District was attempting to stall to avoid providing the CART services. AR001251-1257.

On October 22, 2009, another IEP meeting was held with K.M. present. At this point, K.M. had started high school, and expressed that she could not hear much of what was happening in class, "especially students behind and to the left of her." AR002289. She also indicated that she had a particularly hard time in portable classrooms and when students talk over each other, but admitted to feeling uncomfortable speaking out in class because of her uncertainty as to what other students have said. AR002289. She further explained that captioning was important because she could process writing more quickly than speech. AR001291-1292. There is some dispute about whether K.M. raised her difficulties in certain classes to the District at this meeting; K.M. admits she may not have alerted the team to some problems in specific classes. *See* AR001561. The District once again offered K.M. use of the FM system, even though she explained that she did not want to force her classmates to pass around a microphone in class. AR002289. The District also raised the possibility of

TypeWell, which Mother opposed, given its lack of word-for-word access. AR001276-1277.

Another IEP meeting was held on February 20, 2010, during which K.M. described her preference for CART again. Mother raised the problem of many videos in class not using captioning. AR002294. Once again, the District promoted the FM system. AR002295. Rothwell-Vivian recommended CART for K.M., explaining her belief that it would allow her to follow class discussions and to improve her vocabulary and use of idioms, as well as develop note-taking skills. AR000895-947.

The parties dispute whether the requests for CART throughout the IEP meetings were seriously considered by the District. Plaintiff insists that throughout the IEP meetings, proponents of CART-including Mother, K.M., and Rothwell-Vivian-were not asked questions about CART and their support for it. *See* District's SGD, ¶ ¶ 66-104. Plaintiff further insists that the District improperly relied upon Maria Abramson, its audiologist, in rejecting CART services, despite her lack of expertise on CART. *See* Plaintiff's UF, ¶ ¶ 77-78. The District, however, points to the fact that Rothwell-Vivian's recommendation for CART was not personally tailored, as she makes that standard recommendation for each of her high school students and had not personally observed K.M. in the classroom. AR000935. Furthermore, Rothwell-Vivian had not considered other data available to the IEP team. AR000922.

**Procedural Background**

On July 31, 2010, K.M., acting through her Guardian ad Litem, filed a request for an adminis-

trative due process hearing ("DPH") before the Office of Administrative Hearings ("OAH") to force the District to provide K.M. with CART services. The DPH was conducted over eight days in April 2010. On June 1, 2010, the ALJ ruled in favor of the District and found that it was not obligated to provide K.M. with CART services. AR001923, ¶ 49. The ALJ further found that Defendant had attempted to assess K.M.'s needs for CART services and that the Individualized Education Program ("IEP") teams appropriately considered K.M.'s request for CART services. AR001918-1920.

On July 10, 2010, K.M. filed her Complaint in this Court. She appeals the ALJ's decision, and asserts claims under *Section 504* of the Rehabilitation Act of 1973; the Americans with Disabilities Act; and the Unruh Civil Rights Act. K.M. moves for partial summary judgment and the District moves for summary judgment in full.

## II. LEGAL STANDARD

### A. Administrative Record Review

Judicial review under IDEA is less deferential than in most administrative cases. *J.L. v. Mercer Island School Dist.,* 592 F.3d 938, 949 (9th Cir. 2010). When a party challenges the outcome of an IDEA due process hearing, the reviewing court receives the administrative record, [and] hears any additional evidence" and "basing its decision on the preponderance of the evidence," can grant relief as the court determines is appropriate. 20 U.S.C. § 1415(i)(2)(C). In applying the preponderance of the evidence standard, the court must reach "'independent'" decisions. *Bd. of Educ. v. Rowley,* 458 U.S. 176 at 205,

102 S. Ct. 3034, 73 L. Ed. 2d 690 (internal citations to legislative history of IDEA omitted).

Nonetheless, "[b]ecause Congress intended states to have the primary responsibility of formulating each individual child's education" this Court must give "'due weight' to the decisions of the states' administrative bodies." *Hood v. Encinitas Union School Dist.,* 486 F.3d 1099, 1104 (9th Cir. 2007) (internal citations and quotations omitted). Accordingly, any "'thorough and careful' findings of a hearing officer are entitled to deference." *Id.* The Court must also "not substitute [its] opinions of sound educational policy for those of the school authorities which [it is] reviewing." *Adams v. State of Oregon,* 195 F.3d 1141, 1149 (9th Cir. 1999). However, "the court is free to determine independently how much weight to give the state hearing officer's determinations." *Ashland Sch. Dist. v. Parents of Student R.J.,* 588 F.3d 1004, 1008 (9th Cir. 2009).

**B. Summary Judgment**

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1992); *Chevron Corp. v. Pennzoil Co.,* 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex*

*Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out that the non-moving party has failed to present any genuine issue of material fact. *Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990).

Once the moving party meets its burden, the opposing party must set out specific facts showing a genuine issue for trial; merely relying on allegations or denials in its own pleading is insufficient. *See Anderson,* 477 U.S. at 248-49. A party cannot create a genuine issue of material fact simply by making assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.,* 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific, admissible evidence identifying the basis for the dispute. *Id.* The Supreme Court has held that "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson,* 477 U.S. at 252.

## III. DISCUSSION

### A. Appeal of OAH

#### 1. IDEA

In 1970, Congress first passed the Individuals with Disabilities Education Act ("IDEA") as part of the Education of the Handicapped Act, which it amended in the Education for All Handicapped Children Act of 1975. *See Schaffer ex rel. Schaffer v. Weast,* 546 U.S. 49, 51, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). Following further amendments in 1983 and 1986, Congress changed the name of the Act to

the "IDEA" in 1990, but retained the same principles of the original Act. *J.L. v. Mercer Island Sch. Dist.,* 592 F.3d at 947-948. Congress enacted the IDEA to allow for federal funding to aid states and local agencies in educating students with disabilities. The IDEA aimed to "ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education . . . ." 20 U.S.C. § 1415(a). The statute conditions federal financial assistance on a showing that there is "in effect a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1).

The Act defined the notion of a "free appropriate public education," or "FAPE," as "special education and related services" which have been publicly funded and directed at no charge; that meet the standards of the state's educational agency; that include an "appropriate" education in the state; and "are provided in conformity with the individualized educations program required under section 614(a)(5)." Pub. L. No 94-142, § 4, 89 Stat. 773, 775 (1975) (codified as amended at 20 U.S.C. § 1401(8)(D)). Accordingly, in this case, the IDEA's requirement of a FAPE includes meeting the standards of California's law protecting equal communication access for students with hearing disabilities.

The "core" of the IDEA is the "'cooperative process that it establishes between parents and schools . . . .'" *Lake Washington Sch. Dist. No 414 v. Office of Superintendent,* 634 F.3d 1065, 1066 (9th Cir. 2011) (quoting *Schaffer v. Weast,* 546 U.S. 49, 53, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005)). That cooperative process in providing students with a FAPE is achieved

through the development of an individualized education program ("IEP") for each student with a disability. *Ojai Unified School Dist.,* 4 F.3d at 1469. An IEP is defined as "a written statement for each child with a disability that is developed, reviewed, and revised" by an IEP team consisting of the local educational agency, the student's teachers[5] and parents, and often, as was true at times in this case, the student herself. *See* 20 U.S.C. § 1414(a)(5); *Ojai Unified School Dist.,* 4 F.3d at 1469.

The Supreme Court in *Bd. of Educ. v. Rowley* established the controlling standard for defining a FAPE under IDEA. 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Court found that states must give students with disabilities a "basic floor of opportunity . . . ." *Rowley,* 458 U.S. at 197. To comply with IDEA, the IEP must be "reasonably calculated to enable the child to receive educational benefits." *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.,* 631 F.3d 1117, 1121 (9th Cir. 2011) (citations omitted). Under *Rowley*, schools are not required to provide "every special service necessary to maximize each handicapped child's potential . . . ." *Rowley,* at 199, n.21. Instead, courts must ask two questions: "First, has the State complied with the procedures set forth in the [IDEA] Act? And second, is the [IEP] developed through the [IDEA] Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley,* 458 U.S. at 206-207. Despite

---

[5] In 1997, this portion of IDEA was amended to require the inclusion of "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)" and "at least one special education teacher." 20 U.S.C. § 1414(d)(1)(B).

amendment to IDEA in 1997, the standards set out in *Rowley* still control. *J.L. v. Mercer Island Sch. Dist.,* 592 F.3d at 950-51. Accordingly, school districts must comply with the procedural and substantive requirements of the IDEA. *See N.B. v. Hellgate Elem. Sch. Dist.,* 541 F.3d 1202, 1207 (9th Cir.2008) (citations omitted).

The Ninth Circuit has found that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA." *Amanda J. v. Clark County Sch. Dist.,* 267 F. 3d 877 (9th Cir. 2001). The fact of a procedural violation, standing alone, however, does "not automatically require a finding of a denial of a FAPE.'" *M.L. v. Federal Way School Dist.,* 394 F.3d 634, 645 (9th Cir. 2005) (quoting *W.G. v. Board of Trustees of Target Range School Dist. No, 23, Missoula, Mont.,* 960 F.2d 1479, 1484 (9th Cir. 1992), *superceded by statute on other grounds, as stated in R.B. v. Napa Valley Unified School Dist.,* 496 F.3d 932 (9th Cir. 2007)). Nonetheless, the Ninth Circuit has found that procedural violations can be sufficient to find a denial of FAPE when they " result in the loss of educational opportunity, or seriously infringe on the parents' opportunity to participate in the IEP formulation process . . . ." *Id.*

As mentioned above, the IDEA's FAPE requirement also incorporates state law standards, which in this case include California's law requiring equal communication access for students with hearing disabilities. *See* Cal. Educ. Code § 56000.5. California's Education Code states that "[i]t is essential for the well-being and growth of hard-of-hearing and deaf children that educational programs recognize the

unique nature of deafness and ensure that all hard-of-hearing and deaf children have appropriate, ongoing, and fully accessible educational opportunities." *Id.* at § 56000.5(b)(1). It further mandates that deaf children have "direct and appropriate access to all components of the educational process." *Id.* at § 56000.5(b)(7). Education Code § 56345(d) sets forth requirements for IEP teams to follow when developing IEPs. Both California law as well as the IDEA require IEP teams to consider the services and program options that provide students with an equal opportunity for communication access. The team shall specifically discuss the communication needs of the pupil. " These factors may be "general" or "special." The general factors include an individualized look at the student's strengths, parents' concerns, assessment results, and the academic, developmental, and functional needs of the student. *See* 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a)(1) (2006); Cal. Ed. Code § 56341.1.

For students with hearing disabilities, IEP teams are further required to discuss "special factors" focused on the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's communication mode, academic level and full range of needs, including direct instruction in the student's communication mode. 20 U.S.C. § 1414(d)(3)(B)(iv). Under California law, the teams must also consider the "related services and program options that provide the pupil with an equal opportunity for education access." Ed. Code § 56345(d). They also must consider the services necessary to ensure communication-accessible academic instructions, school ser-

vices, and extracurricular activities consistent with Section 504 and the ADA. *Id.*

If parents disagree with "any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child," they may obtain review through an impartial due process hearing by the state educational agency. 20 U.S.C. § 1415(f). "The School District has the burden of proving compliance with IDEA at the administrative hearing . . . ." *Seattle Sch. Dist., No. 1 v. B.S.,* 82 F.3d 1493, 1498 (9th Cir. 1996), but the burden is on the moving party at the administrative hearing. Subsequently, parties may appeal the administrative agency's decision by filing suit in district court. § 1415(i)(2)(A), (f).

**2. The OAH Decision**

**Background:**

Following an eight-day hearing that included twenty witnesses, the OAH decision in this case was rendered on June 1, 2010. The hearing examined whether the District had denied K.M. a FAPE by failing to assess, consider, and provide her with CART services, based on the June 9, 2009 and October 22, 2009 IEP meetings. OAH Decision, AR001892. The ALJ determined that the District did not fail to assess and consider K.M.'s need for CART services at the June 2009 and October 2009 IEP meetings and that it did not deny her a FAPE by not providing her with CART services in her June and October 2009 IEPs.

As described above, the Court reviews the findings de novo, but gives due weight to the ALJ's find-

ings, particularly on witness credibility. *Ashland Sch. Dist.,* 588 F.3d at 1008; *see also Houston Indep. Sch. Dist. v. V.P. ex rel. Juan P.,* 582 F.3d 576, 583 (5th Cir. 2009) ("'Although the district court must accord 'due weight' to the hearing officer's findings, the court must ultimately reach an independent decision based on a preponderance of the evidence" therefore making the district court's review "'virtually de novo.'" (quoting *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.,* 118 F.3d 245, 252 (5th Cir.1997))).

In reaching his conclusions, the ALJ made a total of eighty-three factual findings, but did not make citations to the record. As a result, the Court must infer from the ALJ's decision as to which portions of the record he relied upon to reach his conclusions.

**ALJ's Factual Findings**

Though the Court must defer to the ALJ in weighing witness credibility, the Court is reluctant to adopt fully teacher and administrator conclusions about K.M.'s comprehension levels over the testimony of K.M. herself. Clearly a teacher in a classroom full of more than thirty students may lack the ability to assess accurately the full comprehension of individual students. Furthermore, K.M. has indicated that she often nods along to appear to be comprehending and that she sometimes pretends to be following. AR001555. As a result, though the Court does not dispute the ALJ's findings that the teachers who testified were "excellent instructors" and that their testimony was "persuasive," ALJ decision, AR001902, it nonetheless believes that K.M.'s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived.

Nonetheless, as the Court will discuss below, the fact that her comprehension may have been somewhat lower than believed by the District does not necessarily suggest that K.M. was deprived of a FAPE. To the contrary, this Court affirms the ALJ's findings that the District adequately assessed K.M. and considered her request for CART services.

The Court also questions the ALJ's characterizations of Mother's role in preventing CART services from being assessed. Throughout the ALJ opinion, he emphasized what he perceived as Mother's obstruction of the assessment process. He ultimately excused any failings of the District to assess K.M. as rigorously as Plaintiff argues it should have because of the Mother's lack of consent and some time delayed compliance with the District. This Court agrees that Mother's lack of cooperation no doubt impeded the assessment process in a not insignificant way. However, upon review of the record, this Court is persuaded that Mother at several points sought out more information from the District before providing consent, and that the District's evasiveness with her, as well as its longstanding refusal to provide CART services, may have played a role in Mother's unwillingness at times to cooperate with the District. Furthermore, Mother did cooperate in many of the proposed assessments, often after the District provided her with additional information. *See, e.g.*, ALJ decision, AR001896 (noting that Mother did not give parental consent to an April 26, 2009 assessment plan, but that after a discussion with Ms. Gonzalez, she provided the necessary consent). Accordingly, the Court does not find that Mother was solely responsible for any failures to assess by the District. At the same time, however, the Court recognizes that

Mother's role at times made timely assessments challenging.

**ALJ's Legal Conclusions**

The Court agrees with the ALJ that Plaintiff failed to meet her burden of proving a deprivation of a FAPE under the IDEA at her DPH. The first conclusions determined by the ALJ were that the District had not failed to assess or consider K.M.'s need for CART services at the June 2009 and October 2009 IEP meetings. AR001914. These findings led to the legal conclusion that there were no procedural or substantive violations of the District's obligations through the IEP process.

The ALJ found that Mother's refusal to provide consent to the CART assessments on multiple occasions had prevented any additional assessments from taking place. As described above, this Court declines to place the blame solely on Mother for the failure to conduct sufficient assessments. Mother had requested CART services since the June 2008 IEP meeting. AR001230-1231. The record reflects that her resistance to providing consent often stemmed from a lack of information. For example, in June 2009, when an assessment plan was developed, Mother asked followup questions about the kinds of assessments that would be performed, and did not receive direct answers. *See* AR 001248-1249. Mother also became frustrated by the District's insistence on using its own audiologists. Furthermore, it was not until she had filed her complaint to the OAH in July 2009 that the District began to conduct assessments and show an intent to assess. *See* ALJ decision, AR001905. It is more than understandable that Mother was frustrated and distrustful of the District,

which repeatedly failed to implement CART services. It was the District's duty to provide full information to Mother so she could consent to the necessary assessments. Nonetheless, the Court's sympathy for Mother notwithstanding, it cannot be said that the District did not conduct assessments.

The second prong of the ALJ's determination that the District had not committed a procedural violation of FAPE looked at the District's consideration of CART services in the IEP meetings. K.M. contends that the District did not adequately consider providing CART services, and much of her present Motion attacks the ALJ's finding that the District's discussion of CART services was sufficient to show that it considered providing the services. Essentially, this appears to be a predetermination challenge; K.M. argues that the District had already predetermined that it would not provide CART services, and therefore did not actually consider offering them. Predetermination of a decision not to provide specific services before an IEP can constitute a procedural violation. *See Deal v. Hamilton County Bd. of Educ.,* 392 F.3d 840 (6th Cir. 2004); *Spielberg ex rel Spielberg v. Henrico County Public Schools,* 853 F.2d 256 (4th Cir.1988).

K.M. offers into evidence emails between District teachers and administrators that suggest that the District had predetermined its CART services denial before some of the IEP meetings. She argues that the ALJ was deprived of the ability to consider these emails, because the District did not turn them over in response to requests for K.M.'s records. Plaintiff's Motion, 16 n.3. The District insists that these emails have never been part of K.M.'s student records file.

Declaration of Misty Jones ("Misty Jones Decl."), ¶ ¶ 5-7. The Court does not consider these emails for the purposes of the OAH appeal, as Plaintiff has failed to show that the emails should have been turned over before the OAH. Indeed, at oral argument, Plaintiff's counsel conceded that the ALJ had given him the opportunity to brief the issue of the emails, but that he chose not to take it.[6]

As the ALJ correctly described, the District was required to consider and discuss both the general and special factors described above when it developed K.M.'s IEP. K.M. argues that the mere consideration and discussion were not sufficient. Though the Court certainly has concerns about whether the District gave due weight to Mother's request for CART services, it also does not find that it failed to assess or consider those services under the law. Based on the preponderance of the evidence in the record that the IEP team reviewed Mother's request for CART services, carefully considered K.M.'s triennial assessment, received input from K.M.'s teachers, and proposed further assessments based on K.M.'s needs, the Court agrees with the ALJ's conclusions that the District assessed and considered K.M.'s needs in relation to CART services. *See* AR001919-1920. Though the team could have given more weight to the opinions of Rothwell-Vivian, who had worked with K.M. since she was an infant, it cannot be said that the District's belief that CART services were not necessary resulted in a failure to actually assess or consider adequately those services. To the contrary,

---

[6] Nonetheless, the Court finds that even if it were to consider the emails, it would not find that the District had predetermined the issue.

the record indicates that the IEP team carefully considered the special factors. AR000140-142; AR00153-156; AR000730-733; AR000824-829.

Even if there were procedural problems with the IEP process-namely, a failure to either properly assess or properly consider CART services-these certainly did not rise to the level of a FAPE violation. The procedural violations that have been found sufficient to deprive a student of a FAPE have been labeled "egregious." *Amanda J. v. Clark County Sch. Dist.,* 267 F.3d at 891; *see also M.L. v. Federal Way Sch. Dist.,* 394 F.3d 634 (9th Cir. 2005). Though it is true that in some instances procedural violations of the IDEA can be serious enough to demand a finding of a FAPE deprivation without looking to the substantive analysis of the IDEA violations, that is not the case here. The procedural violations alleged by K.M. here are de minimus; there are no allegations that anyone, including Mother, was excluded from the IEP meetings and there was no deceit or withholding of information by the District, as true of cases in which the procedural violations were found to be egregious. *See Amanda J., 267 F.3d*; *see also Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist.,* 317 F.3d 1072 (9th Cir. 2003). To the contrary, Mother was actively involved throughout the process-even when she was vigorously opposing the District's proposals or refusing consent to implementation of services. *See, e.g.*, Declaration of Raquel Rasmussen ("Rasmussen Decl."). Though the Court does not suggest that it was acceptable for the District to be biased against the idea of providing CART services, any preference it had against providing CART services did not manifest in a procedural vio-

lation of the IDEA sufficient to suggest a deprivation of K.M's right to a FAPE.

The Court also finds no substantive deprivation of a FAPE by the District's refusal to provide her with CART services. Under the *Rowley* "educational benefit" standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her. This Court agrees with the ALJ's finding that the testimony of Rothwell-Vivian, as discussed above, as well as of Sandy Eisenberg and Ms. Greenya did not establish that K.M. in particular needed the services. *See* AR000318-330 (Ms. Eisenberg's testimony that CART may provide generic benefits to a student, but that she had never met or examined K.M. specifically); AR000408-455 (Ms. Greenya's testimony about the extent of K.M.'s hearing loss and also revealing little information about K.M.'s classroom performance).

As the ALJ noted, the facts of *Rowley*, though not identical, are applicable. In *Rowley*, the student was a young, deaf girl, whose parents insisted that she be provided with a sign-language interpreter in all her classes. *Rowley,* 458 U.S. at 184. After assessing the student and determining that she did not require those services given the fact that she was performing well socially and academically, the parents brought a request for due process. *Id.* at 185. An ALJ ruled in favor of the school district, but on appeal, the district court found that the school district had denied the child a FAPE because of the disparity between her achievements and her potential. *Id.* The Supreme

Court reversed, and established the *Rowley* educational benefit standard discussed above.

To be sure, this case is somewhat distinguishable from *Rowley*. In *Rowley*, the school district made more accommodations for the student than the District made here, even going so far as to install a teletype machine in the principal's office to facilitate communication with student's parents. *Rowley,* at 184. Furthermore, part of the basis for the school's refusal to provide student's requested accommodation of an in-class sign-language interpreter was that the interpreter himself concluded that his services were not needed. *Id.* In this case, the testimony of Rothwell-Vivian, among others, indicates that there would be at least some benefit to the CART services. *See* AR000895-947. Indeed, the District does not dispute that the CART services would help K.M. Finally, the student in *Rowley* was a first-grader, whereas K.M. is a high school student, with differing classroom needs. Despite these distinguishing factors, though, K.M. is nonetheless unable to show that her claims should have succeeded under *Rowley's* "educational benefit" standard.

As the District emphasizes, and the ALJ stressed, K.M. has received average to above-average grades. Her teachers speak highly of her performance in classes, including class discussions. Repeated classroom observations of her performance in classes depict a student thriving despite the obstacles; her classroom participation, presentations, and feedback to other students speak highly of her classroom successes. *See, e.g.*, Rasmussen Decl. Indeed, much evidence was offered from teachers at the OAH; this evidence overwhelmingly suggested that K.M.'s per-

formance in class did not indicate a serious need for CART services in particular. For example, one high school teacher described conducting notebook checks in class, and finding that in addition to no appearances of participation problems in class, K.M.'s notebook suggested full comprehension and little to no difficulty taking notes in class. AR000357, AR000362-363; AR002083. Though, as discussed above, the Court declines to give disproportionate weight to their perceptions of K.M.'s participation and comprehension levels over K.M.'s own testimony, it is nonetheless clear that the District had a reasonable basis to believe that K.M. did not need CART services and that the accommodations it was making were designed-and succeeding-and providing an educational benefit for her. Indeed, as the ALJ discussed, the accommodations provided and set out in the June and October 2009 IEP meetings were reasonably calculated to provide her with educational benefit, as measured by her ability to successfully pass on to the next grade. *See* ALJ decision, AR001921-1922.

Most critically, under *Rowley*, the fact that CART services would "maximize" K.M.'s potential does not mandate the District to provide them so long as the District was providing sufficient accommodations for K.M. to offer her a reasonable educational benefit. Thus, based on the evidence relevant to the OAH, K.M. cannot show a substantive deprivation of her FAPE.

The ALJ's decision is therefore AFFIRMED.

**B. ADA and Section 504 of the Rehabilitation Act Claims**

The analysis for claims under the ADA and *Section 504* of the Rehabilitation is virtually the same. *See Martin v. California Dept. of Veterans Affairs,* 560 F.3d 1042, 1047 n.7 (9th Cir. 2009); *Mark H. v. Lemahieu,* 513 F.3d 922, 937 n.13 (9th Cir. 2008) (citing *Vinson v. Thomas,* 288 F.3d 1145, 1152 n.7 (9th Cir. 2002)). Both claims can therefore be analyzed together.

The ADA revolutionized the ways in which individuals with disabilities are treated under the law, as it called for a "clear and comprehensive national mandate for the elimination of the discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Congress intended for the ADA to be a broad remedial statute to combat the discrimination that has "excluded [disabled individuals] from American life." H.R. REP. 100-711 (1988). The bill established "equality of opportunity, full participation, independent living, and economic self-sufficiency" for [disabled] individuals." 42 U.S.C. § 12101(a)(7). The bill's expressed intent was to accommodate the disabled in a wide range of activities. More specifically, the ADA's language addressed an objective of removing "the discriminatory effects of architectural, transportation, and communication barriers." *Id.* § 12101(a)(5).

The regulations promulgated under the ADA provide that a public entity "shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications

with others." 28 C.F.R. § 35.160(a)[7]. The regulations further emphasize that "a public entity shall give primary consideration to the requests of individuals with disabilities." in making its determination about the type of service needed to ensure effective communications. 28 C.F.R. § 35.160(b)(2).

K.M. argues that the communication accommodations made for her by the District failed to ensure that communications with her were as effective as with other students. Plaintiff's Motion, 14. Though the majority of her challenge focuses on her difficulty picking up on class discussions, she also points to teachers' uses of videos without closed-captioning as a barrier to her effective communication. *Id.* As a result, K.M. insists that only CART would provide her with an appropriate accommodation that would enable her communications to be as effective as her non-deaf peers. Furthermore, under the ADA regulations, K.M. argues that the District was required to give "primary consideration" to her preference for CART. 28 C.F.R. § 35.160(b)(2).

*Section 504* goes even further, specifically mandating obligations on public schools to provide a FAPE. 34 C.F.R. § 104.33. The regulations explicate that an "appropriate" education includes the "provisions of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures"

---

[7] The Court cites to the revised regulations, which went into effect on March 15, 2011. These regulations retained the protections already in effect, but added additional protections that are not relevant to this Order.

satisfying the requirements under the regulations." 34 C.F.R. § 104.33(b).

The District insists that, because the facts alleged by K.M. are the same for each of her claims, K.M. must prevail on her IDEA claim in order to state a claim under *Section 504*. Both IDEA and *Section 504* address the notion of a FAPE and the FAPE standards under IDEA and *Section 504* are "similar but not identical." *Mark H. v. Lemahieu,* 513 F.3d 922, 933 (9th Cir. 2008). As the Court in *Lemahieu* discussed, however, the regulations for *Section 504* specify that "adopting a valid IDEA IEP is sufficient but not necessary to satisfy the *§ 504* FAPE requirements." *Id.* (citing 34 C.F.R. § 104.33(b)(2); *see also Scanlon by Birkner v. San Francisco Unified Sch. Dist.,* 1994 U.S. Dist. LEXIS 4817, 1994 WL 860768, *10 (N.D. Cal. 1994) ("Because the District complied with the requirements of the IDEA, the District also satisfied the education requirements of the Rehabilitation Act."), *aff'd mem.* 69 F.3d 544, 1995 WL 638275 (9th Cir. 1995). Therefore, the fact that K.M. has failed to show a deprivation of a FAPE under IDEA, as discussed above, dooms her claim under *Section 504*, and, accordingly, her ADA claim. *See D.F. v. Western Sch. Corp.,* 921 F. Supp. 559, 574 (S.D. Ind. 1996) ("Other courts entering summary judgment on IDEA claims have summarily dismissed accompanying Rehabiliation Act and ADA claims.").

Indeed, it is clear that K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reasons that her claim under IDEA failed. At oral arguments, Plaintiff's counsel conceded that there is no additional evidence relevant to the remaining claims that was not considered for purposes

of the OAH review. As the Court has discussed exhaustively, Plaintiff has not shown that the District failed to give meaningful consideration to her needs; to the contrary, the District repeatedly discussed and modified K.M.'s IEP to accommodate her evolving needs. It is true that the District did not do as much as K.M. would have liked or as much as would have been ideal. But this Circuit has found that "a school may establish compliance with *Section 504* by implementing a valid IEP." *A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.,* 627 F.3d 773 (9th Cir. 2010). Accordingly, the Court therefore GRANTS the District's Motion for Summary Judgment on this claim.

**C. The Unruh Act Claims**

The Unruh Act, Cal. Civil Code § 51*, et seq.* provides for general damages, statutory damages, and injunctive relief for civil rights violations. To prove a claim of discrimination under the Unruh Act, K.M. must prove intentional discrimination, or, alternatively, a violation of the ADA. *See Munson v. Del Taco,* 46 Cal. 4th 661, 94 Cal. Rptr. 3d 685, 208 P.3d 623 (2009). No showing of intentional discrimination is needed to support an Unruh Act claim if the claim is premised on an ADA violation. *Lentini v. California Center for the Arts, Escondido,* 370 F.3d 837 (9th Cir. 2004). As discussed above, Plaintiff has failed to show an ADA violation. Furthermore, she has put forth absolutely no evidence indicating that the District intentionally discriminated against K.M. Summary judgment as to this claim is therefore GRANTED.

**IV. DISPOSITION**

For the reasons stated above, the Court Orders that the District's Motion for Summary Judgment is GRANTED. Plaintiffs Motion for Partial Summary Judgment is DENIED.

(1) The ALJ's Decision at the DPH is AFFIRMED. Defendant's Motion for Summary Judgment as to the appeal of the decision is therefore GRANTED. Plaintiffs Motion is DENIED.

(2) Defendant's Motion for Summary Judgment as to the ADA claim is GRANTED.

(3) Defendant's Motion for Summary Judgment as to the *Section 504* of the Rehabilitation Act is GRANTED.

(4) Defendant's Motion for Summary Judgment as to the Unruh Act is GRANTED.

Defendant's pending ex parte motion to move the Pretrial Conference is hereby DENIED as MOOT.

IT IS SO ORDERED.

DATED: July 5, 2011

/s/ David O. Carter
DAVID O. CARTER
United States District Judge

## APPENDIX C

### Administrative Decision

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

| | |
|---|---|
| In the Matter of:<br>PARENTS ON BEHALF OF STUDENT,<br>v.<br>TUSTIN UNIFIED SCHOOL DISTRICT. | OAH CASE NO. 2009080029 |

### DECISION

The due process hearing in this matter convened on April 13, 14, 15, 19, 20, 21 and 27, 2010, before Timothy L. Newlove, Adminstrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH), State of California.

David M. Grey, attorney at law from the office of Grey & Grey, represented Parents and Student. Student attended the entire hearing. Student's Mother attended the majority of the hearing.

Jennifer Brown, attorney at law from the office of Best, Best & Krieger, represented the Tustin Unified School District (Tustin or District). Dr. Lori Stillings, an Assistant Superintendent of Special Education for the District, also appeared at the due process hearing.

On July 31, 2010, Parents on behalf of Student, through counsel, filed with OAH a Request for Due

Process Hearing and Mediation (Complaint). On November 17, 2009, pursuant to an order issued by OAH granting Student the right to file an amended pleading, counsel for Parents and Student filed with OAH a First Amended Request for Due Process Hearing and Mediation (First Amended Complaint). On January 5, 2010, OAH issued an order continuing the scheduled hearing date, thereby tolling the decision timeline in the matter.

For the due process hearing, Student's attorney requested communication access real-time translation (CART) services pursuant to Civil Code section 54.8. OAH granted this request and provided CART services for Student at the hearing.

At the close of the hearing, the parties agreed to a briefing schedule. On May 10, 2010, counsel for Student and the District submitted closing briefs. The ALJ marked Student's brief as Exhibit S-36 and the District's brief as Exhibit D-53, and closed the record.

## ISSUES

The issues in this case are whether, for the June 9, 2009 and October 22, 2009 individualized education program (IEP) meetings held by the District on behalf of Student, the District denied Student a free appropriate public education (FAPE) by failing to properly assess, consider and provide Student with CART services?

## CONTENTIONS

Student is hard-of-hearing. She has a cochlear implant in her right ear and a hearing aid on her left ear. She has difficulty hearing and understanding everything that is said in the classroom. The District

held IEP meetings in June and October 2009 relating to Student's freshman year in high school. At these meetings, her Mother requested that the District provide CART services for Student in her four academic classes. The District deferred making a decision on this request, and sought permission to assess Student's need for CART services in high school. Mother only recently provided consent for this assessment.

Student contends that the District denied her a FAPE by not assessing her need for CART services, by not properly considering her request for CART services, and by not providing CART services in her special education program developed at the June and October 2009 IEP meetings. Student contends that, as a hard-of-hearing pupil, California statutes guarantee that her special education program contain services that provide direct and equal communication access to instruction and discussion in the classroom. Student further contends that the real-time verbatim transcription provided by CART is the sole service that meets this standard.

In response, the District points to the excellent progress that Student has made in public schools. The District disagrees that Student's IEP team needed to develop an IEP that guaranteed equal communication access. Instead, the District contends that the "educational benefit standard" guided Student's IEP team and that the team met this standard because Student's June 2009 IEP, which established her special education program for ninth grade, was reasonably calculated to provide her with educational benefit.

Based upon the following Findings of Fact and Conclusions of Law, this Decision determines that the Tustin Unified School District did not commit procedural violations of special education law as regards the assessment of Student and the development of her IEP. The Decision determines that the state statutes advanced by Student require an IEP team to make certain considerations in the development of an individualized education program for a deaf or hard-of-hearing child, but do not create a substantive FAPE standard. Finally, the Decision determines that Student's June 2009 IEP was appropriate without providing for CART services.

FACTUAL FINDINGS

*The Student*

1. The Student in this matter is a fifteen-years-and-nine-month-old female who currently is a ninth-grade pupil at a District high school. Student qualifies for special education as a pupil who is hard-of-hearing. She resides with her family in a home that is within the confines of the Tustin Unified School District.

2. Student was born with severe to profound hearing loss in both ears, a condition that her Parents discovered when she was seven months old. At the age of 12 months, Student received hearing aids. A hearing aid is an electronic device that brings amplified sound to the ear and consists of a microphone, amplifier and receiver. At the age of 14 months, Student started receiving auditory-verbal therapy from Karen Rothwell-Vivian, a licensed Audiologist and certified Auditory-Verbal Therapist. Auditory-verbal therapy (AVT) is a methodology that teaches a hear-

ing-impaired child how to use a hearing aid or cochlear implant to understand speech and learn to talk. The principles of AVT stress the acquisition of spoken language, full mainstreaming into the regular education system, and parental involvement in helping the child to listen and speak. For the past 14 years, Ms. Rothwell-Vivian, as a licensed non-public agency, has provided AVT for Student, and the District has funded such services.

3. In May 1998, at the age of three years and nine months, Student underwent surgery for a cochlear implant in her right ear. A cochlear implant is a medical device designed to assist individuals with severe to profound hearing loss to interpret speech and sounds. A cochlear implant has external and internal components. The external components include a microphone, a speech processor and a transmitting coil. The internal components include a receiver/stimulator that is located directly under the skin and an array of electrodes, implanted in the cochlea, that emit electrical charges to stimulate the auditory nerve fibers. Student wears a hearing aid on her left ear.

4. Since receiving the cochlear implant, Student has made remarkable progress in her abilities relating to receptive and expressive communication. Shortly after the implant surgery, Ms. Rothwell-Vivian conducted an evaluation which showed that Student's language level was 11 months behind her hearing age and 23 months behind her chronological age. Gradually, Student closed this gap with improvements in language comprehension, language expression and auditory skills.

5. Student is an oral-deaf person. Her chosen mode of communication is spoken English. She has attended schools within the Tustin Unified School District since kindergarten which was the 2000-2001 school year. Student has attended regular education classes with typically developing peers, and she has passed from grade to grade. During elementary school, the District assisted Student with an FM sound-field system in her classes. With a sound-field amplification system, the teacher's voice is transmitted from a microphone to speakers that are mounted on the classroom ceiling or walls. During middle school, the District assisted Student with a personal FM system which has two main parts: a microphone for the person speaking (usually the teacher) and a receiver that delivers the voice signal to the hearing aid or cochlear implant of the pupil. With the personal FM system, Student carried the microphone to each class for use by her teachers.

6. Although Student's preferred mode of communication is the spoken word, she is adept at lip-reading which she uses to supplement her hearing. Student better understands spoken language when she is facing the person who is speaking.

7. Student has certain unique needs caused by her hearing impairment. She can experience difficulty following a discussion in a large group, including the classroom setting. In this vein, she has difficulty hearing and understanding a speaker when there is background noise. She has trouble hearing and repeating the final consonant blend in words. She also has trouble following rapid speech.

*Seventh Grade, the 2007-2008 School Year*

8. For the 2007-2008 school year, Student attended seventh grade at Pioneer Middle School which is within the District system. During this school year, Student took the following general education courses: Culinary Arts, Peer Assistance Leadership (PAL), Social Science, Pre-Algebra, Life Science and Physical Education. Except for a "C-" in Pre-Algebra, Student earned "A"s and "B"s in her classes, and she easily passed into the eighth grade. The PAL class was an elective course which involved the pupils performing community services such as tutoring children in elementary schools and fundraising.

9. California schools follow a Standardized Testing and Reporting Program (STAR) which requires districts to administer California Standards Tests (CST) to pupils in grades two to 11. In seventh grade, Student scored proficient scores in English Language Arts and Math on the CST. In eighth grade, Student scored basic in English Language Arts, and proficient in Math, History and Science on the CST.

10. On June 9, 2008, at the close of her seventh grade year, the District held an annual IEP meeting for Student. The purpose of the meeting was to establish Student's special education program for the 2008-2009 school year which was eighth grade for her. The IEP team, including Mother, agreed upon a program that contained the following features. The team developed five goals. One goal sought to improve Student's abilities in the area of written expression, and Ms. Rothwell-Vivian submitted four goals to improve Student's abilities of auditory comprehension and oral expression. The team agreed

that Student required an FM system in her classrooms. The team agreed to continue to provide Student with AVT services through Ms. Rothwell-Vivian in the amount of two 60-minute sessions each week. The team also agreed to provide Student with services which included resource consultation with her teachers and the monitoring of the FM system.

11. In addition, the June 9, 2008 IEP included numerous accommodations designed to assist Student in the classroom. These accommodations included the following: (1) preferential seating by placing Student with a clear view of the teacher and with her right ear closest to the speaker; (2) presenting directions and new words by facing Student; (3) helping Student to know who is talking or reading; (4) providing extended time on classwork, if needed; (5) providing homework assignments visually; (6) providing an extra set of textbooks; (7) providing Mother with tests in History, Language Arts and Science a week in advance; (8) providing study guides for tests a week in advance; and (9) providing hard copies of notes or outlines a week in advance before any test based upon such notes or outlines.

12. At the June 9, 2008 IEP meeting, for the first time, Mother raised the issue of providing Student with CART services. Mother informed the IEP team that she was concerned about her daughter's transition from middle to high school. Mother provided the team with a three-page document entitled "Real-Time Captioning" which described speech-to-text technology and the benefits that deaf or hard-of-hearing pupils derive from CART services. The IEP notes for the June 2008 meeting state that "The dis-

trict will respond to this request in writing by June 25, 2008," but no response was forthcoming.

13. Communication access real-time translation, or CART, is an assistive technology that is comparable to court reporting. CART services involve a captionist who, like a court stenographer, enters spoken words and sounds into a stenotype machine. Computer software then translates the entries into real-time captions which usually appear on a laptop computer screen placed near the deaf or hard-of-hearing individual who can view the screen to follow the discussion. CART is a speech-to-text system that provides word-for-word transcription.

14. Sandy Eisenberg testified on behalf of Student at the due process hearing. Ms. Eisenberg operates a business called Total Recall Captioning which provides CART services for many organizations, including school districts, colleges and universities. According to Ms. Eisenberg, a trained CART captionist should be able to make entries at 180 words per minute which results in an accuracy rate of 95 percent or greater. Ms. Eisenberg stated that for pupils CART offers many benefits, including an improved ability to understand classroom discussions, take notes, and build vocabulary. Through CART, a pupil also has the opportunity to receive a transcript of a classroom proceeding. Ms. Eisenberg stated that her company charges 55 to 60 dollars per hour for providing CART services. Before the due process hearing, Ms. Eisenberg had not met Student, and she has not observed Student in the classroom.

15. On August 18, 2008, Student presented for an audiology evaluation at the House Ear Institute. For the evaluation, Student had the cochlear implant in

her right ear, but did not wear her hearing aid for the left ear. The audiogram from this evaluation showed that Student had hearing in her right ear with the cochlear implant at 20 to 30 decibels from 250 to 4000 hertz. This result indicated that, with the cochlear implant, Student had access to hearing all sounds in the speech spectrum. The audiogram also showed that Student had profound hearing loss in her unaided left ear.

*Eighth Grade, the 2008-2009 School Year*

16. For the 2008-2009 school year, Student attended eighth grade at Pioneer Middle School. During the first semester, she took the following regular education classes: Spanish I, Algebra I, PAL, Language Arts, Social Science, Physical Science and Physical Education. For the second semester, Student maintained the same course work, except that she transferred into the honors classes for Language Arts (English) and Social Sciences (United States History).

17. Student used her personal FM system for each class during the first semester of eighth grade, but she ceased using the system for the second semester. Starting in sixth grade, Student had experienced problems with the FM system. The equipment produced static which annoyed Student and caused headaches. The FM system also amplified unwelcome noises such as the movement of the teacher and whooshing sounds. District personnel were not successful in attempts to fix these problems.

*The Triennial Assessment*

18. On April 24, 2009, the District sent to Parents an Individual Assessment Plan. Laura Gonzalez pre-

pared the plan. Ms. Gonzalez is a School Psychologist for Tustin Unified School District. The assessment plan concerned the District's triennial evaluation of Student. The plan informed Parents that the District intended to evaluate Student in the following areas: (1) academic/pre-academic achievement; (2) intellectual development; and (3) health/vision/hearing.

19. On April 26, 2009, Mother signed the assessment plan, but did not check the box indicating parental consent. Instead, with regard to the proposed evaluation for academic/pre-academic achievement, Mother wrote: "No not necessary. Look at her grades & STAR test results." With regard to the proposed evaluation for intellectual development, Mother wrote: "No not necessary. See 5th grade IQ test." Subsequently, Mother discussed the plan with Ms. Gonzalez. Mother informed Ms. Gonzalez that she did not have concerns about Student's academics, and did not like the intrusion of further testing. Ms. Gonzalez informed Mother that the District has a duty to assess a special needs pupil every three years. After this discussion, on May 1, 2009, Mother gave consent to the proposed assessment plan.

20. On May 5, 2009, the District sent to Parents a second Individual Assessment Plan. This plan amended the assessment plan dated April 24, 2009, by adding two additional areas of evaluation: (4) language/speech/communication development and (5) District audiologist testing. On May 6, 2009, Mother gave written consent to the amended assessment plan.

21. The District retained Maria Abramson, Doctor of Audiology, to perform the audiological evaluation referenced in the May 5, 2009 assessment plan for

Student. Dr. Abramson received a masters of science in audiology from the University of Washington in 1979. Since that time, she has provided audiology services in a variety of settings, including school districts throughout Southern California. She is highly qualified, and capable of performing an audiological assessment of Student.

22. Dr. Abramson testified at the due process hearing and was a persuasive witness. She stated that, after the District retained her services, she reviewed the House Ear Institute audiology evaluation, dated August 2008, which was the most recent information that the District possessed concerning Student's hearing. Dr. Abramson recommended that the District test Student to acquire information that did not appear in the House Ear Institute audiogram. This information included Student's ability to hear with her left ear aided by the hearing aid, and Student's ability to recognize words in quiet and in noise. With this additional information, Dr. Abramson intended to concentrate on adjusting or improving Student's FM system. She testified that a functional FM system would enhance the voices of persons speaking in the classroom and thereby improve Student's ability to hear and understand what was occurring in her courses. She opined that a functioning FM system would be appropriate for Student because she is an excellent auditory learner. Dr. Abramson testified that, with the cooperation of Student and her Parents, she could adjust or improve the FM system for use in the classroom. Despite repeated attempts to schedule an appointment, Mother did not permit Dr. Abramson to perform an audiological assessment of Student.

23. The District's triennial assessment of Student was conducted during May and June of 2009, and consisted of a health evaluation performed by a District nurse, an Auditory-Verbal Progress Report prepared by Karen Rothwell-Vivian, a Speech and Language Report prepared by Cynthia Negru, a Multidisciplinary Report prepared by Laura Gonzalez, teacher observations of Student and classroom observations of Student. For the evaluations, Student met with the District assessors in their respective offices and wore her hearing aid, but did not use the personal FM system.

*The Progress Report and Recommendations of Karen Rothwell-Vivian*

24. Ms. Rothwell-Vivian prepared her report in May 2009 to evaluate Student's annual progress in auditory-verbal communication and interaction skills. Her evaluation included the administration of several standardized tests. Ms. Rothwell-Vivian gave Student the Expressive Vocabulary Test, which measures expressive vocabulary and word retrieval. On this test, Student received a standard score which placed her in the 50th percentile in comparison to children with typical hearing of the same chronological age. Ms. Rothwell-Vivian gave Student the Peabody Picture Vocabulary Test, Third Edition, which measures understanding of standard American English through hearing. On this test, Student received a standard score which placed her in the 58th percentile in comparison to children with typical hearing of the same chronological age. Ms. Rothwell-Vivian also administered the Test of Auditory Comprehension (TAC) which measures auditory memory skills. On the TAC, Student displayed con-

tinued strength in sequencing three events and recalling details in a six-to-eight-sentence story. However, Student scored below average in sequencing events with a competing message, leading Ms. Rothwell-Vivian to conclude in her report that "(L)istening to information continues to be significantly compromised when a competing message is introduced."

25. In conjunction with her May 2009 Auditory-Verbal Progress Report, Ms. Rothwell-Vivian submitted proposed goals for consideration at the upcoming IEP meeting for Student. The goals concerned Student's auditory comprehension and oral expression abilities, and included the following: (1) a goal to help Student discriminate between words that differ in final consonant blends (e.g. week/weep, reason/raison, sedation/summation); (2) a goal to assist Student to distinguish between words and situations (e.g. the difference between "hurricane" and "cyclone"); (3) a goal to improve Student's ability to hear and pronounce final consonant blends in words; and (4) a goal to help Student understand idiomatic expressions (e.g. "it's raining cats and dogs").

26. In her Progress Report, Ms. Rothwell-Vivan recommended that Student continue to receive auditory-verbal therapy. She also recommended that Student "receive real-time captioning in all her academic classes in high school so she has access to the information presented by both her educators and peers."

27. Karen Rothwell-Vivian testified on behalf of Student at the due process hearing. Ms. Rothwell-Vivian has 25 years of experience working with deaf and hard-of-hearing individuals as an Auditory-

Verbal Therapist and Educational Audiologist. Regarding her recommendation that the District provide Student with CART services, Ms. Rothwell-Vivian stressed that Student has difficulty hearing in conditions with background noise, and, with her hearing loss, she will always need to improve her store of vocabulary. Ms. Rothwell-Vivian stated that the classes in high school are fast-paced, involving much discussion, and that Student can use CART services to understand what everybody is saying. She stated that the word-for-word transcription provided by CART will help Student take notes, build her vocabulary, better understand idiomatic expressions, and identify sounds like "ah" or "hmmm" which are otherwise not words. Ms. Rothwell-Vivian also opined that CART services will allow Student to be more fully included in her classrooms because she will not lose the context of class activity.

28. Ms. Rothwell-Vivian is highly qualified in her field and deserves much credit for her long-standing work with Student. However, for several reasons, her opinion on Student's need for CART services was less persuasive than the opinion of Student's teachers that she does not require further supports in the classroom in order to receive educational benefit. First, Ms. Rothwell-Vivian has not observed Student in the classroom. Second, Ms. Rothwell-Vivian admitted that she makes a standard recommendation for CART services whenever a deaf or hard-of-hearing client enters high school.

*The Speech and Language Assessment Performed by Cynthia Negru*

29. Cynthia Negru conducted a Speech and Language Evaluation as part of Student's triennial as-

sessment. Ms. Negru is a Speech and Language Pathologist with an educational background in communication disorders. She has worked for Tustin Unified School District since 2002. During Student's attendance at Pioneer Middle School, Ms. Negru had the responsibility of monitoring her hearing aid and personal FM system.

30. For her Speech and Language Evaluation, Ms. Negru employed formal and informal tests. She administered the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4), which measures a pupil's memory and skills in the semantic and linguistic domains of receptive and expressive language, and skills relating to word-finding and word retrieval. On the CELF-4, Student scored in the average range for core language, expressive language and language memory, and she scored in the above-average range for receptive language. Ms. Negru evaluated Student with the Comprehensive Assessment of Spoken Language (CASL), which measures oral language skills. On the CASL, Student scored in the average range in the areas of synonyms, grammaticality judgment, inferences and ambiguous sentences. She scored well above average in the subtest of pragmatic judgment which refers to the effective and appropriate use of communication in social situations. Ms. Negru also administered the Goldman-Fristoe Test of Articulation, Second Edition, which assesses a pupil's ability to articulate consonants in words and connected speech. On this test, Student had only one error: she dropped the final "z" sound in the word "scissors."

31. In her Speech and Language Evaluation, Ms. Negru held a reciprocal interview with Student and

determined that she conversed appropriately and that her conversational speech was 100 percent intelligible. Prior to her assessment, Ms. Negru had consulted with Karen Rothwell-Vivian and learned that Student had difficulty discerning words with final consonant blends (e.g. "best" and "cold"). Based upon this information, Ms. Negru performed an informal test of auditory discrimination by standing three feet behind Student and asking her to repeat two different lists of 39 words that had final consonant blends. On this test, Student repeated correctly only 79 and 85 percent of the words from the two lists. During the due process hearing, Ms. Negru admitted that a child with normal hearing would score 100 percent on this test.

32. For her evaluation, Ms. Negru requested four of Student's eighth grade teachers to complete the CELF-4 Pragmatic Profile Questionnaire. The Questionnaire asked the teachers to rate Student in the different areas of communication, including (1) rituals and conversational skills, (2) asking for, giving and responding to information, and (3) nonverbal communication skills. For the most part, the teachers rated Student in the "Always" appropriate range. The results of this survey corresponded to the superior score that Student received on the "pragmatic judgment" subtest of the CASL.

33. For her evaluation, Ms. Negru also observed Student for 30 minutes in her Physical Science class, and for 30 minutes during her Physical Education class. In the Physical Science class, Ms. Negru observed that Student was attentive, followed instructions, talked with peers and appeared to access the instruction. In the Physical Science class, Ms. Negru

watched Student participating in a softball game and saw that she was athletic, fully involved and a team leader. Ms. Negru's observations were consistent with previous occasions when she viewed Student functioning in the classroom while attending to her FM equipment.

*The Multidisciplinary Report of Laura Gonzalez*

34. Laura Gonzalez administered several tests and prepared a Multidisciplinary Report dated June 5, 2009, for Student's triennial assessment. Ms. Gonzalez is a licensed Educational Psychologist who has worked for the Tustin Unified School District since 2004. Ms. Gonzalez tested Student with the Universal Non-verbal Intelligence Test (UNIT), which measures a pupil's complex memory and reasoning abilities. On the UNIT, Student obtained a full-scale IQ score of 100, which placed her in the average range of cognitive abilities. Ms. Gonzalez also administered the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2), which measures a pupil's memory ability. On the WRAML-2, Student scored in the above-average range for verbal memory and in the average range for visual memory and screening memory. Student's average memory screen indicated that her learning potential is within the average range and was consistent with the test results from the UNIT.

35. The Multidisciplinary Report prepared by Ms. Gonzalez incorporated the results of the Woodcock-Johnson Test of Achievement, Third Edition (WJ-III), administered by Christine Kiernan. Ms. Kiernan is a resource teacher who has worked at Pioneer Middle School for three years. The WJ-III consists of a series of achievement tests designed to measure a

pupil's academic accomplishment in the areas of reading, math, written and oral expression, and listening comprehension. On the WJ-III, Student received average scores for reading comprehension, basic reading skills, oral expression and listening comprehension. She received above-average scores for mathematical reasoning, math calculation skills and written expression. Student's scores on the WJ-III indicated that she can function quite capably in a regular education classroom, and were consistent with the scores of memory ability from the WRAML-2 administered by Laura Gonzalez. Student's scores on the WJ-III were also consistent with other measures of academic performance, including her grades and results from the CST.

36. On June 2, 2009, Ms. Gonzalez sent an email to Student's eighth grade teachers. The email requested information about Student for consideration at the upcoming IEP meeting, and asked the teachers to answer the following questions: (1) Is she able to answer grade-level "Why" or inferencing questions appropriately in the class?; (2) Is she seated in the front of the class? If yes, can she hear what is being said behind her and respond appropriately?; (3) Does she participate in class discussions?; (4) Does she work well in groups?; (5) Does she use her FM system?; (6) How do you see her hearing impairment impeding her academic progress/performance?; and (7) Do you foresee any difficulties for (Student) as a ninth grader, considering the demands at high school?

37. The teachers provided responses which Ms. Gonzalez placed in her Multidisciplinary Report. In general, in their responses, Student's eighth grade

teachers described a model pupil who was highly motivated and enjoyed school, who paid attention, participated actively and performed well in class, who did not need further supports or accommodations to access the curriculum, and who was ready for high school.

*Eighth Grade Teacher Observations*

38. Four of Student's eighth grade teachers from Pioneer Middle School testified at the due process hearing: Melanie Miranda, John Billings, John Shafer and Christine Kiernan.

39. Melanie Miranda was Student's Language Arts teacher for eighth grade. She has taught and served as a counselor at Pioneer Middle School since 1999. During the first semester, Student was in Ms. Miranda's college preparatory Language Arts course, and she used her personal FM system. For the second semester, Ms. Miranda moved Student into the honors Language Arts class, and she did not utilize the FM system. There were 39 pupils in the honors class. Ms. Miranda arranged the room in a horseshoe with rows of seats facing the middle of the class. Student sat in the front row with her right ear closest to the teacher. Ms. Miranda taught the honors class through direct instruction, group discussion and work groups. Ms. Miranda described Student as a "standout" pupil. She opined that Student heard the teacher and her classmates because she paid attention, participated actively, made responsive comments and interacted with her peers. She found that Student's note-taking skills were comparable to other pupils in the class. She stated that Student never complained that she was not hearing classroom discussion.

40. John Billings was Student's eighth grade Social Science teacher. The class covered United States history from the colonial period to 1914. Mr. Billings has served as a U.S. History teacher within the Tustin Unified School District for 37 years. For the first semester of eighth grade, Mr. Billings taught Student in his college preparatory Social Science class. For the second semester, based upon her strong work, Mr. Billings advanced Student to his honors course. There were 38 pupils in the honors Social Science class. Mr. Billings also arranged his room in a horseshoe and Student sat in the front row near the teacher. Mr. Billings taught his history course primarily through the presentation and discussion of worksheets. He described Student as an "outstanding" pupil who made an easy transition into the greater demands of the honors class. He testified that he assumed that Student did not have difficulty hearing classroom discussion, including statements made behind her, because Student volunteered, made appropriate comments, and did not complain that she was missing material.

41. John Shafer was Student's Physical Science teacher for eighth grade. He has taught science at Pioneer Middle School for the last seven years. Mr. Shafer taught his Physical Science course through lectures, lab work and review of homework assignments. For his lectures, like Student's other teachers, Mr. Shafer projected written materials onto a screen. For the lab work, the class formed into small groups of four pupils to perform the assigned activities. There were 34 pupils in Physical Science, which he described as more noisy than most classrooms since he encouraged his pupils to participate. Mr. Shafer enjoyed having Student in his class since she

was attentive and active. Mr. Shafer testified that he did not think that Student had trouble hearing what occurred in class because he observed that she asked appropriate questions, made appropriate comments, and performed well.

42. In addition to her duties as a resource instructor, Christine Kiernan co-taught Student's eighth grade math class. The other teacher was Ms. Stoerger. The class was a Pre-Algebra course designed to prepare pupils for Algebra in high school. There were 36 pupils in the class. Ms. Kiernan and Ms. Stoerger arranged the room with seven rows of seats. They taught the class through direct instruction from an overhead projector, review of homework and pupil participation. The participation involved the pupils completing projects at a board in the front of the class, and breaking into groups called "Pair Share." Ms. Kiernan described the Math class as noisy because, at times, many pupils were talking. She stated that Student did "fantastic the whole year." Ms. Kiernan did not observe that Student had difficulty in the class, including the times that she performed problems at the board and participated in Pair Share. Ms. Kiernan also stated that Student took good notes which, at times, the teachers shared with pupils who had been absent.

43. Each teacher who testified at the due process hearing stated that he or she graded Student the same as other pupils. The Multidisciplinary Report prepared by Ms. Gonzalez contained Student's grades as of June 5, 2009. At this time, Student was earning an "A" in Math, a "B+" in Spanish, a "B+" in honors Social Science, an "A" in honors Language Arts, a "B" in Physical Science, an "A" in Peer Assis-

tance Leadership, and an "A+" in Physical Education. She ended the eighth grade year with an "A-" in Math, a "B+" in Spanish, a "B+" in honors Social Science, an "A-" in honors Language Arts, a "B" in Physical Science, an "A" in PAL, and an "A" in Physical Education, for an adjusted grade point average of 3.57.

44. The teachers from Pioneer Middle School who testified at the hearing evidenced skill, dedication and innovation. They are clearly excellent instructors, and each had a high opinion of Student. Their testimony was persuasive as regards the benefit Student received from her public education, and the lack of her need for additional supports in the classroom.

*The June 2009 IEP*

45. On June 5, 2009, the District convened an IEP meeting for Student. The purpose of the meeting was to discuss Student's triennial assessment and her transition from middle school to high school, and to formulate her special education program for ninth grade. The persons who attended this meeting included Mother and Karen Rothwell-Vivian. The discussion at the June 5th meeting followed the format of the standardized IEP document utilized by the District. This discussion included a consideration of Student's strengths, interests and learning preferences. In this regard, the IEP team described Student as "friendly, polite, active, likes school, involved in a lot of activities and is a leader at school." Mother informed the team that Student had lost more hearing and that the family was considering a cochlear implant for her left ear.

46. The IEP team reviewed Student's triennial assessment, including the Auditory-Verbal Services Progress Report prepared by Karen Rothwell-Vivian. From the triennial evaluation, the team discussed Student's present levels of performance and determined that she did not have unique needs in the areas of academic, cognitive and functional skills, in communication development, and in social and emotional development. Specifically, in her Speech and Language Evaluation, Cynthia Negru determined that Student did not have deficits in the areas of semantics, syntax and morphology, pragmatics, and articulation. From the reports of Ms. Rothwell-Vivian and Ms. Negri.", the IEP team recognized that Student continued to have problems producing final consonant blends in conversational speech. Ms. Rothwell-Vivian also underscored that, in terms of hearing and understanding, Student's area of weakness was in listening with competing noise.

47. At the June 5, 2009 meeting, Melanie Miranda served in the capacity as Student's general education teacher. Ms. Miranda reported on Student's progress in school. She informed the IEP team that, despite not using the personal FM system for the second semester of eighth grade, Student was performing well in her classes. Ms. Miranda reported that, through her PAL course, Student volunteered as a tutor at a local elementary school. She also reported that Student was social at school dances. Ms. Miranda informed the team that, like many other eighth grade pupils, Student needed to improve in the areas of critical thinking and analytical writing.

48. The IEP team discussed the subject of goals. The team determined that Student had met the goal

relating to written expression from her June 2008 IEP. Karen Rothwell-Vivian also reported that Student had met the four goals relating to auditory comprehension and oral expression that she had submitted at the June 2008 IEP. Based upon her strong showing in eighth grade, the IEP team decided that Student did not require goals in the area of academics for her freshman year in high school. Instead, from concern that Student was reluctant to report problems with the FM system, the team formulated a goal entitled "self-advocacy in relation to hearing loss" that required Student to report to her teachers when she experienced difficulty hearing in the classroom. The team also discussed the four goals proposed by Ms. Rothwell-Vivian in conjunction with her Progress Report. The proposed goals did not contain performance baselines, and the IEP team adjourned the meeting in order to permit Ms. Rothwell-Vivian to provide this information.

49. On June 15, 2009, the District reconvened Student's IEP meeting. Based upon Student's progress and academic proficiency, the team discussed a reduction in the amount of AVT services provided by Karen Rothwell-Vivian. At the conclusion of this meeting, the IEP team offered to provide Student a special education program that contained the following features. The team adopted five goals for Student, including the goals submitted by Ms. Rothwell-Vivian. The team offered Student AVT services through Ms. Rothwell-Vivian in the amount of one 60-minute session per week. The team offered 30 half-hour sessions of specialized deaf and hard-of-hearing consultations which involved a specialist checking with Student and her teachers. The team also offered 60 half-hour sessions of individual

speech and language therapy through a District provider.

50. In addition, the District offered to place Student in the general education classroom with the following accommodations: (1) preferential seating in the classroom by placing Student with her right ear closest to the speaker; (2) preferential seating at assemblies and other large gatherings by placing Student directly in front of the speaker and next to a friend; (3) providing Student with a clear view of the teacher and instructional resources; (4) presenting new words and directions by facing Student; (5) presenting homework assignments visually; (6) providing daily announcements in writing; (7) helping Student to know who is talking or reading; and (8) providing Student with an extra set of textbooks. The team also discussed and recommended that Student utilize a personal FM system in high school, but Mother stated that Student did not want to wear such a system.

51. At both the June 5 and 15, 2009 IEP meetings, Mother requested the District to provide CART services for Student at the beginning of high school in her academic classes. Mother stated that she was requesting the CART technology because she was concerned that Student would not follow classroom discussions in high school, and that she would miss much incidental information conveyed in class. Mother again provided the IEP team with information on real-time captioning. Melanie Miranda echoed Mother's concerns by informing the team that there are quantitative and qualitative differences in classroom discussion between the eighth and ninth grades, and that Student may struggle with the pace

of discussion in high school. However, based upon Student's strong performance in eighth grade, the IEP team decided to defer a decision on whether to provide Student with transcription services in high school. Instead, the team informed Mother that the District wanted to assess Student in the high school environment to determine the need for assistive technology and additional services.

52. To date, Parents have not provided consent to the June 2009 IEP for Student.

53. Francine Wenhardt is the Coordinator of Special Education for Tustin Unified School District. Ms. Wenhardt has worked in different capacities for the District since 2003. She attended and facilitated the June 2009 IEP meetings for Student. Ms. Wenhardt testified at the due process hearing and elaborated upon the team's response to Mother's request for CART services. Ms. Wenhardt explained that Student's IEP team did not disagree with the CART request. Instead, the team wanted to evaluate the request in the high school setting. This evaluation would address characteristics of Student's classrooms, including the number of pupils, the style of teaching, the nature of the discussion and the acoustics. The evaluation also would consider Student's performance in her classes. In addition, the IEP team wanted to explore other assistive technology options, including an improved personal FM system and a speech-to-text technology called TypeWell.

54. Mother testified at the due process hearing and further explained her request that the District provide Student with CART services in high school. Mother is aware of other pupils in Southern California who use CART in school. In fact, Mother ob-

tained the real-time captioning information provided to Student's IEP team from parents who were successful in obtaining CART services for their daughter in high school. Mother has seen Student struggle at understanding fast-paced conversation. She has also seen her daughter suffer from use of the personal FM system. Mother had concerns that Student was not hearing and learning "incidental" information in her classrooms. Mother wanted Student to have an "age-appropriate" technology through which she could maximize her potential and receive straight "A"s in high school. Mother believed that, as a hard-of-hearing pupil, Student deserved assistance which amounted to equal communication access with normal hearing pupils and that CART services was the sole technology that meets this standard.

55. On June 18, 2009, Ms. Wenhardt prepared and sent to Mother an Individual Assessment Plan for Student. The purpose of this assessment plan was to determine the need for real-time captioning services for Student in high school. The plan described the scope of the evaluation as follows: "Assessment may include review of records, audiological assessment, classroom observations, trial technologies, teacher interviews, Student interview, review of work samples, other testing deemed appropriate by assessors." The plan designated that the persons responsible for performing the evaluation were a District Audiologist and Speech and Language Pathologist.

56. Mother did not provide consent to this assessment plan. Mother testified that she was frustrated because she had raised the issue of real-time captioning services at Student's June 2008 IEP, giv-

ing the District a year to consider the matter, yet Student's IEP team was not ready to discuss, much less provide CART services at the June 2009 meetings. Mother also testified that the June 18, 2009 assessment plan did not set forth the specific audiological tests that the District Audiologist wanted to perform.

57. On July 31, 2009, OAH received the Complaint in this matter. Under special education law, when parents bring a due process proceeding, the named school district must hold a Resolution Session with the purpose of attempting to settle the issues in the complaint. In this case, the District held a Resolution Session on August 20, 2009. The persons who attended this meeting were Mother, Francine Wenhardt, and Lori Stillings who is an Assistant Superintendent of Special Education for Tustin Unified School District. Among the subjects of conversation at the Resolution Session, the parties discussed the June 18, 2009 assessment plan. Ms. Wenhardt explained that the assessment would include observations of Student by an Audiologist under contract with the District and by a District Deaf and Hard-of-Hearing (DHH) specialist. She also explained that the proposed evaluation would include interviews with Student and her teachers, and a review of available audiological information.

58. With the consent of Mother, the August 20, 2009 Resolution Session was also an IEP meeting. The parties discussed the team's proposed reduction in time of AVT services provided by Karen Rothwell-Vivian, and the replacement of this time with District-based speech therapy. Mother did not want Student removed from class, and she declined the of-

fer of speech therapy. The parties also discussed the team's offer to provide Student with DHH consultation services in order to monitor her progress in class. Mother also declined this offer. Instead, the District offered Student 10 half-hour on-site consultations by a Resource Specialist. With these modifications, despite the lack of parental consent, the District implemented Student's June 2009 IEP for her ninth-grade school year.

59. On August 28, 2009, Student presented for an audiological evaluation at Shohet Ear Associates. For this evaluation, the Shohet Audiologist tested Student's right ear with the cochlear implant and determined that she can access speech sounds. The audiologist also tested Student's left ear with and without her hearing aid. The audiogram from this evaluation showed that, aided, Student has mild to profound hearing loss in the left ear, but that she can detect sounds in the speech spectrum at 250, 500 and 1,000 hertz. Unaided, Student has severe to profound hearing loss in the left ear. Mother did not share the audiogram from this evaluation with the District until October 20, 2009.

*Ninth Grade, the 2009-2010 School Year*

60. For the 2009-2010 school year, Student has attended ninth grade at Beckman High School. For both semesters, she has taken the following regular education courses: English I, Algebra I, Earth Science, Ancient Civilizations, Spanish I and Physical Education. The English I and Ancient Civilizations courses are honors classes. For the first semester, Student was in Basketball, and for the second semester she has participated in Track. Student started the first semester in Spanish II but, at the recom-

mendation of her teacher, at mid-semester she moved to Spanish I. Student has attended her high school classes without the assistance of a personal FM system.

61. On October 3, 2009, Francine Wenhardt prepared and sent a letter to Mother. The letter concerned the parallel issues of Mother's request for CART services and the District's interest in improving Student's FM system. The letter described the scope of the June 18, 2009 assessment plan as follows: (1) an observation of Student in her academic classes by District personnel; (2) interviews of the teachers in Student's academic classes to determine her level of functioning; (3) an interview of Student; (4) consultation with the District Audiologist and the House Ear Institute concerning Student's cochlear implant, hearing loss and FM system; and (5) a trial implementation of a real-time captioning system in one or more of Student's academic classes. Regarding the Audiologist, the letter stated that the District wanted Mother to take Student to Dr. Abramson for an updated audiological evaluation which would include a troubleshoot of Student's personal FM system. Regarding the proposed trial of a real-time captioning system, the letter informed Mother that the District was willing to implement TypeWell. The letter also proposed an IEP meeting to discuss Student's transition into Beckman High School.

62. TypeWell is a speech-to-text technology that differs from the CART system. With TypeWell, a trained transcriber uses a computer with an abbreviation software to capture the conversation and sounds in a classroom and other settings. The TypeWell transcriber condenses matters into a meaning-

for-meaning transcription, rather than the verbatim word-for-word caption produced with CART. The TypeWell transcription then appears on a separate computer screen for the person who is using the service. As an example, if a teacher states four sentences to convey two ideas, the TypeWell transcriber will "chunk" the transcription to provide a description of the content, but with a reduction in the amount of text.

63. Chanel Carlascio testified on behalf of the District at the due process hearing. Ms. Carlascio operates a company called Strada Communication, Inc., which is located in Vancouver, Washington. Strada provides communication access for deaf and hard-of-hearing persons through speech-to-text technology like TypeWell and CART. Ms. Carlascio is a trained TypeWell transcriber. She has provided TypeWell services for pupils in both high school and college. For these pupils, she described the benefits of TypeWell to include instant access by the student to both conversation and sounds in the classroom, an improved ability to take notes, and the availability of a written transcript.

*The October 22, 2009 IEP*

64. On October 22, 2009, the District convened an IEP meeting for Student. The persons who attended this meeting included Student and Mother. The purpose of the meeting was to review Student's transition into high school. In a letter to Mother dated October 16, 2009, Ms. Wenhardt added that the review would include consideration by the IEP team of a trial of transcription services and whether Student required such services. To this end, the October 22nd IEP team included several of Student's ninth grade

teachers, including Sara Grexton and Allison Lowenstein. Ms. Grexton teaches Student's honors English I class. Ms. Lowenstein is the instructor in Student's honors Ancient Civilizations course.

65. At the IEP meeting, the teachers made comments on the status of Student in their respective classes, and Student and Mother then responded. Ms. Grexton reported that Student was performing well in her class, that she participated and asked great questions and that her grade was at 89.8 percent ("B+"). In response, Student stated that she did not hear everything in the English class, especially classmates seated behind her and to the left. Ms. Lowenstein reported that Student participated well in the Ancient Civilizations class which she teaches in a portable classroom. In response, Student informed the team that she has a harder time hearing in a portable and that she is sometimes reticent to speak because she is not certain of what her classmates have said. Mother stated that Student would perform better in Ms. Lowenstein's class if she could hear more. The teachers responded to the comments by Student and Mother with suggestions for improvement such as printing power point presentations, repeating the statements of soft-spoken classmates, and providing notes in advance.

66. At the October 22nd IEP meeting, the team discussed the issue of Student's FM system. District personnel informed Student and Mother that the team wanted to explore different technologies and make the FM system operational. Student and Mother balked at this suggestion. Student stated that, if a personal FM system is used and the teacher attempts to pass a microphone around the classroom,

the shyer pupils will not speak. Mother stated that, quite aside from a functioning FM system, she wanted Student exposed to all the vocabulary used in her classrooms. The team concluded the meeting by offering Student a sound-field and/or personal FM system, together with the services of a District Audiologist to maximize the functionality of the system.

67. At the October 2009 meeting, the IEP team also discussed the issue of real-time captioning services for Student. In particular, the team offered Student a trial of TypeWell. In response, Student informed the team that she believed that she would benefit from captioning because she is a good reader. Mother stated that she was concerned that the meaning-for-meaning transcription of TypeWell would "dumb-down" the classroom discussion and not provide Student with access to the higher level of vocabulary used in class. Mother also requested a trial of CART services for Student.

68. After the October 22nd IEP meeting, Francine Wenhardt and Mother exchanged a series of letters that amounted to a negotiation of the scope and terms of the District's request to assess Student on the need for assistive technology in high school. In this exchange, Ms. Wenhardt made clear that, at the least, the District wanted the opportunity to improve Student's FM system. In particular, the District sought Mother's consent for Dr. Abramson to consult with professionals regarding Student's cochlear implant, work with Student, and attempt to make adjustments in settings or channels that would improve the functioning of the FM system. For her part, Mother informed Ms. Wenhardt that she thought that the District was placing "too much emphasis on

the FM system," and she wanted more focus on CART services. In a letter to Ms. Wenhardt, dated November 19, 2009, Mother stated that "(T)he FM system does not allow (Student) to have equal communication access. Static and interference aside, (Student) will miss a significant amount of oral communication in the classroom with the FM system."

69. On December 1, 2009, Mother signed her consent to the long-debated District assessment of Student to determine the need for transcription services in high school. The scope of the assessment included observations of Student in her classes, interviews with her instructors, a trial of transcription services and an audiological assessment as needed. The trial of transcription services included both CART and TypeWell. The District conducted these trials in Student's two honors courses during the month of February 2010. For the observations, Gwen Berhstock, School Psychologist for the District, and Raquel Rasmussen, the District DHH Specialist, viewed Student in her Algebra, English and Ancient Civilization classes. Misty Jones, the Resource Specialist, observed Student in her Earth Science and Ancient Civilizations courses. The observations occurred during January and February 2010.

70. On December 11, 2009, Student presented to Megan Greenya, a Doctor of Audiology at Shohet Ear Associates, for a speech perception evaluation. The purpose of the evaluation was to measure Student's speech perception abilities in conditions of quiet and with background noise. Dr. Greenya evaluated Student with two tests: (1) the Hearing in Noise Test (HINT) and (2) the QuickSIN Speech-in-Noise Test

(QuickSIN). For both tests, Student had her cochlear implant and hearing aid. The HINT evaluated Student's hearing in different test conditions that included a lack of noise and competing noise from different directions. Student scored a "fail" in each of the HINT test conditions. The QuickSIN evaluated Student's ability to hear in noise through measurement of a signal-to-noise ratio. Student scored a relatively high signal-to-noise ratio which indicated that she requires amplification and assistive measures to improve her understanding of speech.

71. Dr. Greenya testified at the due process hearing. She explained that, as a person with a cochlear implant, Student has difficulty discerning the meaning of environmental sounds such as the noise of an air conditioner and the opening and closing of doors. Dr. Greenya also stated that, based upon her speech perception testing, Student has difficulty hearing and understanding speech when there is competing noise. Dr. Greenya testified that, based upon the results of the HINT and QuickSIN evaluations, she expected that Student would do poorly in school even with a cochlear implant and hearing aid. To the extent that the latter opinion was offered to support Student's request for CART services, the opinion was not helpful because Dr. Greenya has not observed Student in school, and, rather than doing poorly, Student is excelling in the classroom.

72. At the end of the first semester, Student received the following grades in her ninth-grade classes: a "B+" in honors English, a "B" in Spanish I, a "C" in Algebra I, a "B" in Earth Science, a "B" in honors Ancient Civilizations, and an "A" in Physical Education (Basketball).

73. On February 26, 2010, School Psychologist Gwen Behrstock prepared a Multidisciplinary Assessment Report. The report concerned the District assessment of Student's need for real-time captioning services in high school. The report set forth Student's semester grades and STAR results for middle school. The report included a review of the evaluations that were part of Student's June 2009 triennial assessment. The report documented the observations of Student in her ninth-grade classes by Ms. Behrstock, Ms. Jones and Ms. Rasmussen. The report also documented the input received from Student's freshman-year instructors. The report contained the results of a CELF-4 Observational Rating Scale that the teachers of Student's honors courses completed. The report noted the efforts by Dr. Abramson to work with Mother in improving Student's personal FM system. The report concluded, in part, by determining that the assessors found no academic concerns; and that her "(T)eachers noted that although (Student) does at times have problems hearing the discussion of other students, it does not inhibit her ability to participate in discussion. She is graded using the same expectation as the other students and her grades are strong. Her vocabulary is proficient in that (it) allows for classroom participation and educational growth."

*The February 26, 2010 IEP*

74. On February 26, 2010, the District convened an IEP meeting for Student. The persons who attended the meeting included Student, Mother and the attorneys for the respective parties. The purpose of the meeting was to review the Multidisciplinary

Asssessment Report of the same date and make a decision on Mother's request for CART services.

75. Student played an important role at this IEP meeting. She reported that she can hear the teachers in her classes, but that she has trouble hearing classmates. She informed the team about her impressions from the trial of transcription services. While she liked both TypeWell and CART, she preferred the word-for-word system because she was able to read exactly what other pupils were saying. She stated that she referred to the computer screen which contained the transcriptions when she did not hear a statement; and that she also looked at the screen to obtain clarification of the class discussion. She asked for a longer trial of the CART system. With reference to a discussion about improving her FM system, Student informed the team that she is not willing to use an FM system in the classroom. The teachers in Student's honors courses commented on the feasibility of passing a microphone about the room as part of a personal FM system, and informed the team that the class discussion is too rapid for a pass-around microphone to be beneficial.

76. At the conclusion of the February 26, 2010 meeting, the IEP team decided that Student did not require transcription services in order to receive a free appropriate public education. The special education program offered by the District remained the placement, accommodations and related services set forth in Student's June 2009 IEP, as modified by the agreements relating to speech therapy and DHH consultation reached at the Resolution Session of August 20, 2009. The team also continued to recommend improvement and use of an FM system in or-

der to enhance Student's ability to hear in her classes.

77. Student testified at the due process hearing. Student's testimony concerned her involvement in her academic classes, and did not include references to social situations or extracurricular activities at school. Student reiterated that in the classroom for the most part she can hear and understand her teachers, but that she has difficulty hearing her classmates. This difficulty increases if the classmate speaks softly or sits in the rear of the room. Student states that she rarely asks a teacher for clarification because she does not want to impose or draw attention to herself. In this vein, she stated that often she will nod in agreement or laugh when other pupils are laughing in order to fit-in. Student stated that she has difficulty taking notes when the teacher gives a lecture from a power point presentation because she must focus on the teacher rather than the projected material. Student also stated that at times a teacher will present a video that does not contain captions, and that she has difficulty following such videos. She stated that her personal FM system was not helpful because she heard many unwelcome noises. She stated that she prefers CART over TypeWell because CART makes the class easier to follow and she can see exactly what people have said.

78. Four witnesses from Beckman High School testified at the due process hearing: Sara Grexton, Allison Lowenstein, Tracy Scott and Misty Jones.

79. Sara Grexton has taught English at Beckman High School since 2006. Her honors English I course this year has 27 pupils. She has arranged the class with rows of seats facing the middle of the room.

Student sits in the front row where she is near the instructor and has visual access to much of the room. The honors English I course involves the study of literature, the writing of essays and the making of presentations. Ms. Grexton's teaching consists of lectures, class discussions and small work groups. She described Student as a strong performer with an outstanding work ethic. She stated that Student's relative weakness was in the area of critical thinking and writing. Regarding classroom discussion, Ms. Grexton stated that Student commonly turned to face the classmates who were speaking. She testified that, from her perspective, Student heard and understood the discussion in her classroom because she participated actively, made appropriate comments and performed well. She stated that Student never approached her outside of class to ask for help or seek clarification on matters that she did not hear in class. She opined that Student did not need further supports or accommodations to access the curriculum in her class.

80. Allison Lowenstein has taught Social Studies at Beckman High School since 2007. Her honors Ancient Civilizations course this year has 39 pupils. She has arranged the class by forming rows of seats in a horseshoe, and Student sits in the front row. The course involves the study of the important civilizations in history. Ms. Lowenstein teaches the class through lectures, desk activities, class discussion and small-group activities. Transcripts of the CART trial in her room show that the class discussion can get boisterous. Ms. Lowenstein described Student as very capable. She stated that, from her perspective, Student understood what transpired in class because she followed directions, made relevant comments,

completed assignments in a timely manner, and earned a good grade. Ms. Lowenstein has attempted to improve the room acoustics for Student by ensuring that during class the door to the portable is closed and the air-conditioning unit is not operating. She opined that Student did not need further supports or accommodations to access the curriculum in her class.

81. Tracy Scott is the teacher in the Earth Science class attended by Student. Ms. Scott has taught science classes at Beckman High School since 2007. The Earth Science class has 36 pupils. Ms. Scott has arranged the class with five rows of tables facing the front of the class. Student sits at a table in the front row. Ms. Scott teaches Earth Science through lectures, homework review and laboratory assignments. Like other instructors, Ms. Scott gives lectures in conjunction with power point presentations. She described Student as an excellent pupil who has a positive attitude and works well with classmates in lab activities. Ms. Scott testified that, from her perspective, Student's hearing impairment did not impede her access to the class because she is always focused, asks and answers questions, takes notes and earns good grades. At the time of the October 22, 2009 IEP meeting, Student had an "A" in the class. Ms. Scott stated that Student has not told her that she has problems hearing either during class or lab assignments. She opined that Student has had access to the curriculum and benefited from the instruction in the Earth Science class.

82. Misty Jones has been a teacher and resource specialist at Beckman High School for the last six years. She works with special needs pupils who are

entering high school. She is the Case Carrier for Student this school year. In this capacity, Ms. Jones has met with Student and her teachers both before and after the October 22, 2009 IEP meeting. Ms. Jones conducted these brief meetings in order to determine whether Student was experiencing any difficulties at school. Ms. Jones specifically asked Student if she was having trouble hearing in the classroom. Other than noise in the Ancient Civilizations course, Student answered in the negative. Ms. Jones made a point to visit this class and ensure that the door was closed and the air conditioner turned off. Ms. Jones also specifically asked Student's instructors if they thought that Student was not hearing classroom discussion. The teachers reported that they had no concerns in this regard.

83. The instructors from Beckman High School who testified at the hearing evidenced skill and competence. Like their counterparts at Pioneer Middle School, they are manifestly excellent instructors, and each had a high regard for Student. Their testimony was persuasive as regards the benefit Student was receiving from her high school education, and the lack of need for additional supports in this setting.

## CONCLUSIONS OF LAW

*Burden of Proof*

1. In a special education administrative due process proceeding, the party who is seeking relief has the burden of proof or persuasion. *(Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has brought the complaint and has the burden of proof.

*OAH Jurisdiction*

2. The Office of Administrative Hearings has the authority to hear and decide special education matters pertaining to the identification, assessment or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. (Ed. Code, § 56501, subd. (a).) In this case, the First Amended Complaint makes charges concerning the assessment of Student, the development of Student's individualized education program, and the provision of an appropriate educational program. OAH has the authority to hear and decide these issues. *(Wyner v. Manhattan Beach Unified School Dist.* (9th Cir. 2000) 223 F.3d 1026, 1029.)

*Background*

3. Special education law derives from the Individuals with Disabilities Education Act (IDEA). (20 U.S.C. § 1400 et seq.) The IDEA is a comprehensive educational scheme, conferring upon disabled students a substantive right to public education. *(Hoeft v. Tuscon Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1300.)

4. The IDEA ensures that "all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (20 U.S.C. § 1400(d)(1)(A).)

5. Under the IDEA, a FAPE is defined as follows: special education and services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C)

include an appropriate pre-school, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program (IEP) required under section 1414(d) of the Act. (20 U.S.C. § 1401(9).)

6. The term "special education" means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Specially designed instruction" means the adaptation, as appropriate to the needs of the disabled child, of the content, methodology or delivery of instruction to address the unique needs of the child that result from the child's disability. (34 C.F.R. § 300.39(b)(3) (2006).) In the context of the IDEA, "special education" refers to the highly individualized educational needs of the particular pupil. *(San Rafael Elementary v. California Education Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.)

7. The term "related services" means transportation and developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a)(2006).) In California, "related services" are called "designated instruction and services." (Ed. Code, § 56363, subd. (a).) Related services include speech-to-text systems like CART and TypeWell that provide interpretation for deaf or hard-of-hearing children. (34 C.F.R. § 300.34(c)(4)(i)(2006); see also Ed. Code, § 56363, subd. (b)(16) [transcribers].)

8. An assistive technology device means any item, piece of equipment or product system that is used to increase the functional capabilities of a child

with a disability. (20 U.S.C. § 1401(1); 34 C.F.R. § 300.5 (2006).) In this case, Student's FM system, as well as both CART and TypeWell transcription services are assistive technology devices.

9. The IDEA seeks to accomplish the objective of providing a disabled child with a FAPE through a complex statutory framework that grants substantive and procedural rights to children and their parents. *(Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 522-533 [127 S.Ct. 1994, 167 L.Ed.2d 904].) In general, a school district must evaluate a pupil, determine whether the pupil is eligible for special education and services, develop and implement an IEP, and determine an appropriate educational placement for the child. (20 U.S.C. § 1414.)

10. The United States Supreme Court has established a two-part test to determine whether a school district has provided a disabled pupil with a FAPE. *(Board of Education of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] *(Rowley).)* First, in an administrative due process proceeding, the ALJ must determine whether the school district has complied with the procedural requirements of the IDEA. *(Id.* at p. 206.) In this case, Student has raised two issues of procedure: (1) whether Tustin Unified School District assessed Student's need for CART services and (2) whether the District properly considered Student's request for CART services in the development of her June and October 2009 IEPs.

11. Second, the ALJ must determine whether "the individualized education program developed through the Act's procedures (is) reasonably calculated to enable the child to receive educational benefit." *(Row-*

*ley, supra,* at pp. 206-207.) This rule of substance is called the "educational benefit standard." *(J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-951.) Here, Student has challenged the substance of the special education program offered by the District in the June and October 2009 IEPs.

12. Federal and State law also require a school district to provide special education in the least restrictive environment. This means that a school district must educate a special needs child with non-disabled peers "to the maximum extent appropriate." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(2006); Ed. Code, § 56040.1, subd. (a).) In this case, Student is fully included in the regular education setting.

*Issue No. 1: Did the District fail to assess Student's need for CART services at the June 2009 and October 2009 IEP Meetings?*

13. Student contends that the District erred by not conducting an assessment of her need for CART services by the time of the June 5, 2009 IEP meeting, and, thereafter, for the October 22, 2009 IEP meeting.

14. Special education law recognizes a distinction between the "initial assessment" of the special needs child and the subsequent "reassessment" of the child. This distinction is explained as follows by the federal Office of Special Education and Rehabilitation Services, Department of Education: "An initial evaluation of a child is the first complete assessment of a child to determine if the child has a disability under the Act, and the nature and extent of special education and related services required. Once a child has been fully evaluated, a decision has been rendered

that a child is eligible for services under the Act, and the required services have been determined, any subsequent evaluation of a child would constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).) Under this authority, an evaluation of Student's needs for CART services would constitute a reassessment of her special education needs.

15. The following standards apply to a reassessment of a disabled child. A school district must perform a reassessment of the child (1) if the district "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation" and (2) "if the child's parent or teacher requests a reevaluation." (20 U.S.C. § 1414(a)(2)(A)(i), (ii); 34 C.F.R. § 300.303(a)(1), (2) (2006); Ed. Code, § 56381, subd. (a)(1).) In addition, at the least, a school district must reassess a special needs child once every three years, unless the parent and the district agree that the reevaluation is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2)(2006); Ed. Code, § 56381, subd. (a)(2).)

16. The District did not commit a procedural violation by not performing an assessment of Student's need for CART services. For the June 2009 IEP meeting, the District performed a thorough and complete triennial evaluation of Student which included formal and informal tests, a record review, teacher input and classroom observations. Prior to the June 2009 IEP meeting, Parents had not requested the District to assess for the need for real-time captioning services. In addition, except for Mother's June 2008 request that the District provide CART services in high school, there were no indications that Stu-

dent's educational or related service needs required speech-to-text technology. At the time of the June 5, 2009 IEP meeting, Student was finishing the eighth grade. Both her good marks and the uniformly positive teacher input indicated that Student was accessing the curriculum and benefiting from her education. In addition, the triennial assessment further confirmed that Student was achieving according to her native talents and that she did not display deficits in any area of academics.

17. For the October 22, 2009 IEP meeting, the District made a good faith attempt to evaluate Student's need for CART services in the high school setting, but Mother did not consent to such assessment. Before a school district can perform a reassessment, parental consent is required. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(1)(2006); Ed. Code, § 56381, subd. (f)(1).) Here, on June 18, 2009, the District submitted an assessment plan to determine Student's need for real-time captioning services in high school. The assessment plan explained that the evaluation would include classroom observations, teacher input and a trial of transcription technologies. On August 20, 2009, at the Resolution Session in this matter, Mother and District personnel discussed the proposed assessment. On October 2, 2009, Francine Wenhardt further described the parameters of this assessment. Despite these efforts, consent was not forthcoming. Parents cannot complain that the District failed to perform a procedure that they did not allow to occur.

18. The determination that the District did not commit a procedural violation with regard to the assessment of Student's need for CART services is sup-

ported by Findings of Fact, paragraphs 1 through 69, and Conclusions of Law, paragraphs 1 through 17.

*Issue No. 2: Did Tustin Unified School District fail to properly consider providing CART services for Student at the June 5, 2009 and October 22, 2009 IEP meetings?*

19. Student contends that the District failed to properly consider Mother's request for CART services at the June and October 2009 IEP meetings.

20. Student's contention that the District failed to properly consider her request for CART services challenges the District's development of her IEP for the current school year. One of the important procedures in the IDEA and companion State law concerns the development of a child's IEP. Federal and State law require that, in developing an IEP, the team must consider both general and special factors. (20 U.S.C. § 1414(d)(3); 34 C.F.R.§ 300.324(a)(2006); Ed. Code, § 56341.1.) The general and special factors are stated in broad terms, and do not include the requirement to consider a specific service, program option or parental request.

21. The general factors include a consideration of the strengths of the child, the concerns of the parents for enhancing the education of the child, the results of the most recent evaluations of the child, and the academic, developmental and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A)(i)-(iv); 34 C.F.R. § 300.324(a)(1)(i)-(iv)(2006); Ed. Code, § 56341.1, subd. (a)(1)-(4).)

22. For a pupil who is deaf or hard-of-hearing, the special factors include a consideration of "the child's language and communication needs, opportunities

for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode." (20 U.S.C. § 1414(d)(3)(B)(iv); see also 34 C.F.R. § 300.324(a)(2)(iv)(2006); Ed. Code, § 56341.1, subd. (b)(4).) In addition, the special factors include a consideration of whether the child needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v)(2006); Ed. Code, § 56341.1, subd. (b)(5).)

23. California law also has an extra set of special factors that an IEP must consider in developing the IEP for a pupil who is deaf or hard-of-hearing. (Ed. Code, § 56345, subd. (d).) State procedures that more stringently protect the rights of disabled pupils and their parents are consistent with the purposes of the IDEA, and are enforceable. *(Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527.) Education Code section 56345, subdivision (d), provides, in part: "Consistent with Section 56000.5 and Section 1414(d)(3)(B)(iv) of Title 20 of the United States Code, it is the intent of the Legislature that, in making a determination of services that constitute an appropriate education to meet the unique needs of a deaf or hard-of-hearing pupil in the least restrictive environment, the individualized education program team shall consider the related services and program options that provide the pupil with an equal opportunity for communication access."

24. Education Code section 56345, subdivision (d), makes reference to Education Code section 56500.5, which is a statute that expresses Legislative findings

and intent regarding deaf and hard-of-hearing children. In particular, the Legislature has found and declared that "(I)t is essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized and developed to an appropriate level of proficiency." (Ed. Code, § 56000.5, subd. (b)(2).) The Legislature has found and declared that "(I)t is essential that hard-of-hearing and deaf children, like all children, have an education with a sufficient number of language mode peers with whom they can communicate directly and who are of the same, or approximately the same, age and ability level." (Ed. Code, § 56000.5, subd. (b)(4).) The Legislature has further found and declared that "(I)t is essential that hard-of-hearing and deaf children . . . have programs in which they have direct and appropriate access to all components of the educational process . . . ." (Ed. Code, § 56000.5, subd. (b)(7).)

25. In addition to a consideration of "an equal opportunity for communication access," the team that is developing an IEP for a deaf or hard-of-hearing pupil "shall specifically discuss the communication needs of the pupil." (Ed. Code, § 56345, subd. (d).) his discussion includes the pupil's primary language mode and language. (Ed. Code, § 56345, subd. (d)(1).) It includes the "availability of a sufficient number of age, cognitive, and language peers of similar ability." (Ed. Code, § 56345, subd. (d)(2).) It includes "(A)ppropriate, direct and ongoing language access to special education teachers and other specialists who are proficient in the pupil's primary language mode and language." (Ed. Code, § 56345, subd. (d)(3).) Finally, a discussion of the communication needs of a deaf or hard-of-hearing pupil includes "(S)ervices

necessary to ensure communication-accessible academic instructions, school services, and extracurricular activities consistent with the federal Vocational Rehabilitation Act of 1973. . . and the federal Americans with Disabilities Act of 1990 . . . ." (Ed. Code, § 56345, subd. (d)(4).)

26. Referenced in Education Code section 56345, subdivision (d)(4), the Vocational Rehabilitation Act is a federal law designed to protect handicapped individuals from discrimination in any program or activity that receives federal monies. *(Liddy v. Cisneros* (S.D.N.Y. 1993) 823 F.Supp. 164, 177.) Section 504 of the Rehabilitation Act provides, in pertinent part, that "(N)o otherwise qualified individual with a disability in the United States. . . 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 U.S.C. § 794(a).) The term "program or activity" in Section 504 includes the operations of a school district. (29 U.S.C. § 794(b)(2)(B).)

27. Also referenced in Education Code section 56345, subdivision (b)(4), the Americans with Disabilities Act (ADA) is a comprehensive statute that further prohibits discrimination against individuals with disabilities. (42 U.S.C. § 12101 et seq.) "It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." *(Tennessee v. Lane* (2004) 541 U.S. 509, 516-517 [124 S.Ct. 1978, 158 L.Ed.2d 820].)

Title II of the ADA provides: "(N)o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity." (42 U.S.C. § 12132.) A school district is a "public entity" within the meaning of Title II. (42 U.S.C. § 12131(1).)

28. Education Code section 56345, subdivision (b)(4), requires an IEP team to discuss services that are "consistent" with Section 504 of the Rehabilitation Act and Title II of the ADA. Both statutes have similar standards. *(Coons v. Secretary of the Treasury* (9th Cir. 2004) 383 F.3d 879, 884.) Under Section 504 of the Rehabilitation Act and Title II of the ADA, discrimination in the educational context occurs when the school district deprives a disabled student from meaningful access to educational services through the failure to provide a reasonable accomodation. *(Alexander v. Choate* (1984) 469 U.S. 287, 301 [105 S.Ct. 287, 83 L.Ed.2d 712]; *Mark. H. v. Lemahieu* (9th Cir. 2008) 513 F.3d 922, 937.) "Meaningful access" is even-handed treatment of the disabled pupil in relation to non-handicapped students. *(Wiles v. Dept. of Education* (D. Hawaii 2008) 593 F.Supp.2d 1176, 1180-1182, fn.4; *Lemahieu, supra,* 513 F.3d at p. 938, fn. 4.)

29. Thus, in requiring an IEP team to consider "(S)ervices necessary to ensure communication-accessible academic instructions, school services, and extracurricular activities" consistent with Section 504 of the Rehabilitation Act and Title II of the ADA, Education Code section 56345, subdivision (b)(4), requires a discussion of reasonable accommodations

that will provide a deaf or hard-of-hearing child with meaningful access to such educational services. There are many accommodations that ensure communication access for deaf or hard-of-hearing individuals, including FM systems and transcription services such as CART and TypeWell. *(Duvall v. County of Kitsap* (9th Cir. 2001) 260 F.3d 1124 [real-time transcription]; *Robertson v. Las Animas County Sherriff's Dept.* (10th Cir. 2007) 500 F.3d 1185, 1195; 28 C.F.R. § 35.104 [defining "auxiliary aids and service"].)

30. The District did not commit a procedural violation in the development of Student's IEP for her freshman year in high school. At Student's June and October 2009 IEP meetings, the team reviewed her triennial assessment, received input from Mother and teachers, discussed Mother's request for CART services, proposed assessments relating to the need for real-time captioning services and improvement of the FM system, and formulated Student's special education program for ninth grade. Through this activity, Student's IEP team considered the overlapping general and special factors, including the specialized considerations mandated in California law, that a school district must consider in developing the individualized education program for a deaf or hard-of-hearing pupil.

31. The triennial assessment of Student included formal tests that evaluated her cognitive abilities (the UNIT), memory skills (the WRAML-2) and academic achievement (the WJ-III). The triennial assessment included a Speech and Language Evaluation that measured Student's receptive and expressive language skills through formal (the CELF-2 and

the CASL) and informal tests. The triennial evaluation included a Progress Report prepared by Karen Rothwell-Vivian who tested Student in the areas of vocabulary, word retrieval and the understanding of standard English. Ms. Rothwell-Vivian also tested Student's auditory memory skills. The triennial assessment included teacher input and classroom observations. By reviewing the triennial assessment at the June 2009 IEP meeting, the team considered the following general and special factors that a team must consider in developing an individualized education program for a deaf or hard-of-hearing child: Student's strengths; the results of her most recent evaluation; her academic, developmental and functional needs; her communication needs; and her primary language mode.

32. At the June 2009 IEP meeting, Student's team discussed and adopted goals for her freshman year in high school. One goal required Student to advocate for herself in the event that she did not hear or understand what occurred in class. Karen Rothwell-Vivian provided four goals relating to auditory comprehension and oral expression, including an effort to improve Student's discernment and articulation of words with final consonant blends and her understanding of idiomatic expressions. The discussion and adoption of such goals constituted a consideration of Student's academic and communication needs; the development of the proficiency of her language mode; and her ability to communicate with language mode peers.

33. At the June 2009 IEP meetings, the team offered Student a special education program that consisted of placing her in a general education classroom

with accommodations, resource help and auditory-verbal therapy. By discussing and developing this program, Student's team considered the following general and special factors that a team must consider in developing an individualized education program for a deaf or hard-of-hearing child: Student's academic, developmental and functional needs; her communication needs; her full range of needs including opportunities for direct communications with peers and professionals in her language mode; the development of the proficiency of her language mode; and appropriate access to all components of the educational process. Further, the special education program offered to Student respected her chosen mode of communication.

34. Finally, at the June and October 2009 IEP meetings, Student's team considered different methods to improve the classroom setting for her. At both the June and October 2009 IEP meetings, the team discussed and recommended the improvement of the FM system for use by Student in class. At the June 2009 IEP meeting, Mother discussed her request for CART services and provided the team with written material on real-time transcription. The team also reviewed Ms. Rothwell-Vivian's Progress Report which contained a recommendation that Student receive CART services. At the conclusion of the June 2009 meeting, the IEP team informed Mother that the District wanted to assess Student's need for speech-to-text services in high school. Subsequently, at the October 22, 2009 IEP meeting, Mother further discussed her request for CART services and the team offered a trial of TypeWell. The discussion of the FM system and real-time transcription technologies constituted a consideration of whether Student

needed assistive technology devices and services. Such discussion also satisfied the IEP team's duty to consider and discuss services and program options that would provide Student with an equal opportunity for communication access and ensure communication-accessible academic instruction and school services consistent with Section 504 of the Rehabilitation Act and Title II of the ADA.

35. Mother objected to the District's request to perform an audiological evaluation and assess the need for transcription services in the high school setting, in large part, because she thought that the District was placing too much emphasis on the FM system. However, such assessment requests were consistent with the duty of a public entity to undertake a fact-specific investigation upon receiving a request for a public accommodation. *(Duvall, supra,* 260 F.3d at p. 1139.) The party who requests a reasonable accommodation has a corollary duty to cooperate with such investigation. *(L. L.-M ex rel Liedtke v. Dieringer School* (W.D. Wash. 2008) 614 F.Supp.2d 1152, 1161.) Here, the District acted consistently with the mandates under Education Code section 56345, subdivision (b)(4), by exploring different services that would provide communication-accessible educational services for Student, including the FM system, TypeWell and CART.

36. The determination that the District did not commit a procedural violation in the development of Student's IEP is supported by Findings of Fact, paragraphs 1 through 67, and Conclusions of Law, paragraphs 1 through 12 and 19 through 35.

*Issue No. 3: Did the Tustin Unified School District deny Student a FAPE by not providing CART services in her June and October 2009 IEPs?*

37. Student contends that the District failed to provide a substantive FAPE in the special education program provided in her June 15, 2009 IEP because the program did not contain an offer of CART services. Student further contends that the standards set forth in Education Code sections 56000.5 and 56345, subdivision (d), mandated that the District provide Student with a special education program that guaranteed direct and equal communication access in the classroom. These State statutes are referenced and discussed in Conclusions of Law, paragraphs 23 through 29. Education Code section 56000.5 contains legislative findings and declarations concerning deaf and hard-of-hearing pupils. Education Code section 56345, subdivision (d), contains standards for an IEP team that is developing a special education program for a deaf or hard-of-hearing child. These statutes do not establish the substantive standard that a school district must meet in providing a deaf or hard-of-hearing child with a FAPE.

38. Instead, the California Legislature has clearly indicated that the *Rowley* "educational benefit standard" applies across the board in special education matters: "(I)t is also the intent of the Legislature that this part does not set a higher standard of educating individuals with exceptional needs than that established by Congress under the Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.)." (Ed. Code, § 56000, subd. (e).)

39. In actuality, the *Rowley* opinion is directly applicable to this case. In *Rowley,* the pupil was a young girl with minimal residual hearing and excellent lip-reading skills. *(Rowley, supra,* 458 U.S. at p. 184.) Her chosen mode of communication was sign-language. *(Ibid.)* She attended a regular education classroom where she used an FM system. *(Ibid.)* Although she performed well, she did not understand everything that occurred in class due to her hearing impairment. *(Id.* at. p. 185.) Consequently, upon entering first grade, her parents requested that the school district provide their daughter with a qualified sign-language interpreter in all her academic classes. *(Id.* at p. 185.) The district assessed the request and determined that the child did not require this service. *(Ibid.)*

40. The *Rowley* parents then brought a request for due process. *(Rowley, supra,* 458 U.S. at p. 185.) The hearing officer ruled in favor of the school district after finding that the child was achieving educationally, academically and socially without the assistance of a sign-language interpreter. *(Ibid.)* The parents then brought suit in a United States District Court which determined that the school district had denied the child a FAPE. *(Id.* at pp. 185186.) The District Court based this determination on the fact that there was a disparity between the child's achievement and her potential. *(Id.* at p. 185.) The FAPE standard applied by the District Court was "an opportunity to achieve [her] full potential commensurate with the opportunities provided to other children." *(Id.* at p. 186.) After the Court of Appeals affirmed this decision, the United States Supreme Court granted certiorari to review the District Court's interpretation of the meaning of FAPE. *(Ibid)*

41. In determining the FAPE standard intended by Congress, the Supreme Court recognized that the Education of the Handicapped Act, the predecessor of the IDEA, did not contain "any substantive standard prescribing the level of education to be accorded handicapped children." *(Rowley, supra,* 458 U.S. at p. 189.) In this regard, the court determined that the Act did not require school districts to provide disabled students with an equality of opportunity or services. *(Id.* at pp. 198-199.) The court also determined that the FAPE standard did not require school districts to maximize the potential of disabled pupils. *(Id.* at p. 197, fn. 21 ["whatever Congress meant by an 'appropriate' education it is clear that it did not mean a potential-maximizing education"].) Instead, the court determined that the Act provided disabled students with access to public education through a "basic floor of opportunity." *(Id.* at pp. 201-202.) The standard for determining whether a school district has met this duty is whether "the individualized program developed through the Act's procedures (is) reasonably calculated to enable the child to receive educational benefits." *(Id.* at pp. 206-207.) Or, more specifically, if the disabled child is being educated in the regular classrooms of the public education system, the standard is whether the IEP is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade." *(Id.* at pp. 203-204.)

42. The Supreme Court did not attempt "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *(Rowley, supra,* 458 U.S. at p. 202.) Nevertheless, the court recognized that, when a disabled pupil is mainstreamed in the general education

setting, "the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain and adequate knowledge of the course material." *(Id.* at pp. 202-203.) The court further recognized that the achievement of passing grades and advancement from grade to grade is an important factor in determining educational benefit under the FAPE standard. *(Id.* at p. 207, fn. 28.)

43. In determining whether an IEP was reasonably calculated to provide educational benefit, a tribunal must measure the IEP when it was drafted. *(Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Here, the District formulated Student's freshman-year special education program at the June 2009 IEP meeting. The October 22, 2009 IEP meeting focused on Student's transition into high school.

44. The special education program set forth in Student's June 2009 IEP was reasonably calculated to provide her with educational benefit. This program did not require CART services in order to enable Student to achieve passing marks and advance to the tenth grade.

45. The special education program developed at the June 2009 IEP meeting followed the model of the program from the previous year. Student's June 2008 IEP offered a specialized program that consisted of general education classes with accommodations, resource assistance and AVT. Student had thrived under this program, transferring into and succeeding in two honors courses, and completing the second semester with high marks even while eschewing the

use of her FM system. The IEP team continued with this program model after a review of Student's triennial assessment. The results of the triennial evaluation showed a pupil who was achieving in accordance with her cognitive and memory abilities. The results of the academic achievement testing in the WJ-III were consistent with Student's grades, her CST scores and teacher input. The results of evaluations in the areas of cognition, memory and language did not show areas of deficit. The testing of Ms. Rothwell-Vivian and Ms. Negru did show that Student had trouble in several areas of expressive and expressive language, including words with final consonant blends and idiomatic expressions. The June 2009 IEP addressed these trouble spots with specific goals adopted by the team.

46. The District established that Student is receiving educational benefit from the June 2009 IEP. By all accounts, she has made a smooth transition into high school. She is achieving passing grades and performing well in two difficult and fast-paced honors courses. Her teachers report that Student does not evidence difficulty hearing and understanding what is occurring in class: she is on-task, attentive, organized, makes appropriate comments and interacts well with peers. With few exceptions, her instructors also report that Student has not complained that she is not hearing or understanding classroom instruction and discussion.

47. Student established that she does not hear everything that is said in her classrooms. In particular, she has difficulty hearing and understanding statements made by peers who sit behind her. Student also established that she has difficulty hearing

and understanding speech when there is competing noise. However, in line with the District's February 26, 2010 assessment report, the evidence established that Student hears and understands well enough to access the curriculum and perform well in each of her courses.

48. Student and her Parents have offered various reasons supporting her need for CART services in high school: to hear everything said in class, to build her vocabulary, to maximize her potential, to get straight "A"s, and to receive equal communication access. Such reasons fall into the category of a potential-maximizing education which a school district is not required to provide for a special needs child. *(Rowley, supra,* 458 U.S. at p. 197, fn. 21; *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) Here, the Tustin Unified School District has offered Student several options that will help improve her educational experience. These options are improvement and use of a FM system and use of TypeWell transcription services. Student and her Parents prefer CART over these options. However, if an IEP is reasonably calculated to provide educational benefit, a school district is not required to provide a special needs child with a service that parents prefer or that confers the best possible education at public expense. *(Bradley v. Arkansas Dept. of Education* (8th Cir. 2006) 443 F.3d 965, 975; *Fort Zumwalt School Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 612.)

49. The determination that the District provided Student with a substantive FAPE in the June 2009 IEP, even without the provision of CART services, is supported by Findings of Fact, paragraphs 1 through

83, and Conclusions of Law, paragraphs 1 through 12 and 37 through 48.

ORDER

Student's claims for relief are denied.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extend to which each party prevailed on the issues heard and decided. (Ed. Code, § 56507, subd. (d).) The District prevailed on the issues presented for hearing and decision in this matter.

RIGHT TO APPEAL DECISION

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: June 1, 2010

/s/

TIMOTHY L. NEWLOVE
Administrative Law Judge
Office of Administrative Hearings

**APPENDIX D**

**FILED**

**SEP 23 2013**

**MOLLY C. DWYER, CLERK**
**U.S. COURT OF APPEALS**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| K.M., a minor, by and through her Guardian Ad Litem, Lynn Bright,<br>Plaintiff - Appellant,<br>v.<br>TUSTIN UNIFIED SCHOOL DISTRICT,<br>Defendant – Appellee. | No. 11-56259<br>D.C. No. 8:10-cv-01011-DOC-MLG<br>Central District of California,<br>Santa Ana<br><br>ORDER |

| | |
|---|---|
| D.H., a minor, by and through her Guardian Ad Litem, K.H.,<br>Plaintiff – Appellant,<br>v.<br>POWAY UNIFIED SCHOOL DISTRICT,<br>Defendant – Appellee. | No. 12-56224<br>D.C. No. 3:09-cv-02621-L-NLS<br>Southern District of California,<br>San Diego |

Before: BERZON, CLIFTON, and IKUTA, Circuit Judges.

The panel has unanimously voted to deny the petitions for rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

## APPENDIX E

**20 U.S.C. § 1401**:

§ 1401. Definitions

Except as otherwise provided, in this title [20 USCS §§ 1400 et seq.]:

…

(9) Free appropriate public education. The term "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 school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 614(d) [20 USCS § 1414(d)].

. . .

(14) Individualized education program; IEP. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 614(d) [20 USCS § 1414(d)].

. . .

(26) Related services.

(A) In general. The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(B) Exception. The term does not include a medical device that is surgically implanted, or the replacement of such device.

. . .

(29) Special education. The term "special education" means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

**20 U.S.C. 1412(a)(2)**:

§ 1412. State eligibility

(a) In general. A State is eligible for assistance under this part for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(2) Full educational opportunity goal. The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

**20 U.S.C. § 1414**:

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

. . .

(d) Individualized education programs.

(1) Definitions. In this title [20 USCS §§ 1400 et seq.]:

(A) Individualized education program.

(i) In general. The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

(I) a statement of the child's present levels of academic achievement and functional performance, including--

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to--

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program

modifications or supports for school personnel that will be provided for the child--

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI) (aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 612(a)(16)(A) [20 USCS § 1412(a)(16)(A)]; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why--

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

(VII) the projected date for the beginning of the services and modifications described in sub-

clause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter--

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this title [20 USCS §§ 1400 et seq.], if any, that will transfer to the child on reaching the age of majority under section 615(m) [20 USCS § 1415(m)].

(ii) Rule of construction. Nothing in this section shall be construed to require--

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

(B) Individualized education program team. The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

(i) the parents of a child with a disability;

(ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);

(iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

(iv) a representative of the local educational agency who--

(I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

(II) is knowledgeable about the general education curriculum; and

(III) is knowledgeable about the availability of resources of the local educational agency;

(v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);

(vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

(vii) whenever appropriate, the child with a disability.

(C) IEP team attendance.

(i) Attendance not necessary. A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child

with a disability and the local educational agency agree that the attendance of such member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(ii) Excusal. A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if--

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

(iii) Written agreement and consent required. A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

(D) IEP team transition. In the case of a child who was previously served under part C [20 USCS §§ 1431 et seq.], an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the part C service coordinator or other representatives of the part C system to assist with the smooth transition of services.

(2) Requirement that program be in effect.

(A) In general. At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

(B) Program for child aged 3 through 5. In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 636 [20 USCS § 1436], and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is--

(i) consistent with State policy; and

(ii) agreed to by the agency and the child's parents.

(C) Program for children who transfer school districts.

(i) In general.

(I) Transfer within the same State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

(II) Transfer outside State. In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in an-

other State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

(ii) Transmittal of records. To facilitate the transition for a child described in clause (i)--

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

(3) Development of IEP.

(A) In general. In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider--

(i) the strengths of the child;

(ii) the concerns of the parents for enhancing the education of their child;

(iii) the results of the initial evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

(B) Consideration of special factors. The IEP Team shall--

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;

(iii) in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) consider whether the child needs assistive technology devices and services.

(C) Requirement with respect to regular education teacher. A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

(D) Agreement. In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP.

(E) Consolidation of IEP team meetings. To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(F) Amendments. Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(4) Review and revision of IEP.

(A) In general. The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team--

(i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and

(ii) revises the IEP as appropriate to address--

(I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;

(II) the results of any reevaluation conducted under this section;

(III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);

(IV) the child's anticipated needs; or

(V) other matters.

(B) Requirement with respect to regular education teacher. A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

…

**20 U.S.C. § 1415:**

§ 1415. Procedural safeguards

…

(b) Types of procedures. The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with re-

spect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

. . .

(f) Impartial due process hearing.

(1) In general.

(A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session.

(i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint--

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing. If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall commence.

(iii) Written settlement agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is--

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period. If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations.

(A) In general. Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing.

(A) Person conducting hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum--

(i) not be--

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

(E) Decision of hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

. . .

(l) Rule of construction. Nothing in this title [20 USCS §§ 1400 et seq.] 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 [29 USCS §§ 790 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 part [20 USCS §§ 1411 et seq.], 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 [20 USCS §§ 1411 et seq.].

. . .

**34 C.F.R. § 300.324(a):**

§ 300.324 Development, review, and revision of IEP.

(a) Development of IEP --(1) General. In developing each child's IEP, the IEP Team must consider--

(i) The strengths of the child;

(ii) The concerns of the parents for enhancing the education of their child;

(iii) The results of the initial or most recent evaluation of the child; and

(iv) The academic, developmental, and functional needs of the child.

(2) Consideration of special factors. The IEP Team must--

(i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

(ii) In the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP;

(iii) In the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

(iv) Consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode; and

(v) Consider whether the child needs assistive technology devices and services.

(3) Requirement with respect to regular education teacher. A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of--

(i) Appropriate positive behavioral interventions and supports and other strategies for the child; and

(ii) Supplementary aids and services, program modifications, and support for school personnel consistent with § 300.320(a)(4).

(4) Agreement. (i) In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP.

(ii) If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.

(5) Consolidation of IEP Team meetings. To the extent possible, the public agency must encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

(6) Amendments. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

**42 U.S.C. § 12132:**

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activi-

ties of a public entity, or be subjected to discrimination by any such entity.

**28 C.F.R. § 35.160:**

§ 35.160 General.

(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

(2) For purposes of this section, "companion" means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate.

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

(2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a

timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.

(c)(1) A public entity shall not require an individual with a disability to bring another individual to interpret for him or her.

(2) A public entity shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except--

(i) In an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available; or

(ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.

(3) A public entity shall not rely on a minor child to interpret or facilitate communication, except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.

(d) Video remote interpreting (VRI) services. A public entity that chooses to provide qualified interpreters via VRI services shall ensure that it provides--

(1) Real-time, full-motion video and audio over a dedicated high-speed, wide-bandwidth video connection or wireless connection that delivers high-quality video images that do not produce lags, choppy, blur-

ry, or grainy images, or irregular pauses in communication;

(2) A sharply delineated image that is large enough to display the interpreter's face, arms, hands, and fingers, and the participating individual's face, arms, hands, and fingers, regardless of his or her body position;

(3) A clear, audible transmission of voices; and

(4) Adequate training to users of the technology and other involved individuals so that they may quickly and efficiently set up and operate the VRI.

**28 C.F.R. § 35.164:**

§ 35.164 Duties.

This subpart does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with this subpart would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this subpart would result in such an alteration or such burdens, a public entity

shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.

**29 U.S.C. § 794:**

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of--

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 USCS § 7801]), system of vocational education, or other school system;

(3) (A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers. Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(d) Standards used in determining violation of section. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

**34 C.F.R. § 104.33:**

§ 104.33 Free appropriate public education.

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped

persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) Free education -- (1) General. For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an oth-

erwise valid obligation to provide or pay for services provided to a handicapped person.

. . .

**45 C.F.R. §§ 84.4(b)(2):**

§ 84.4 Discrimination prohibited.

(b) Discriminatory actions prohibited.

…

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

**45 C.F.R. § 84.37(a):**

§ 84.37 Nonacademic services.

(a) General. (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped

persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

**Cal. Educ. Code § 56000.5:**

§ 56000.5. Needs of pupils with low-incidence disabilities

(a) The Legislature finds and declares that:

(1) Pupils with low-incidence disabilities, as a group, make up less than 1 percent of the total statewide enrollment for kindergarten through grade 12.

(2) Pupils with low-incidence disabilities require highly specialized services, equipment, and materials.

(b) The Legislature further finds and declares that:

(1) Deafness involves the most basic of human needs--the ability to communicate with other human beings. Many hard-of-hearing and deaf children use an appropriate communication mode, sign language, which may be their primary language, while others express and receive language orally and aurally, with or without visual signs or cues. Still others, typically young hard-of-hearing and deaf children, lack any significant language skills. It is essential for the well-being and growth of hard-of-hearing and deaf children that educational programs recognize the unique nature of deafness and ensure that all hard-of-hearing and deaf children have appropriate, ongoing, and fully accessible educational opportunities.

(2) It is essential that hard-of-hearing and deaf children, like all children, have an education in which their unique communication mode is respected, utilized, and developed to an appropriate level of proficiency.

(3) It is essential that hard-of-hearing and deaf children have an education in which special education teachers, psychologists, speech therapists, assessors, administrators, and other special education personnel understand the unique nature of deafness and are specifically trained to work with hard-of-hearing and deaf pupils. It is essential that hard-of-hearing and deaf children have an education in which their special education teachers are proficient in the primary language mode of those children.

(4) It is essential that hard-of-hearing and deaf children, like all children, have an education with a sufficient number of language mode peers with whom they can communicate directly and who are of the same, or approximately the same, age and ability level.

(5) It is essential that hard-of-hearing and deaf children have an education in which their parents and, where appropriate, hard-of-hearing and deaf people are involved in determining the extent, content, and purpose of programs.

(6) Hard-of-hearing and deaf children would benefit from an education in which they are exposed to hard-of-hearing and deaf role models.

(7) It is essential that hard-of-hearing and deaf children, like all children, have programs in which they have direct and appropriate access to all components of the educational process, including, but not

limited to, recess, lunch, and extracurricular social and athletic activities.

(8) It is essential that hard-of-hearing and deaf children, like all children, have programs in which their unique vocational needs are provided for, including appropriate research, curricula, programs, staff, and outreach.

(9) Each hard-of-hearing and deaf child should have a determination of the least restrictive educational environment that takes into consideration these legislative findings and declarations.

(10) Given their unique communication needs, hard-of-hearing and deaf children would benefit from the development and implementation of regional programs for children with low-incidence disabilities.

**Cal. Educ. Code § 56341.1(b)(4)-(5):**

(b) The individualized education program team shall include all of the following:

. . .

(4) A representative of the local educational agency who meets all of the following:

(A) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of individuals with exceptional needs.

(B) Is knowledgeable about the general education curriculum.

(C) Is knowledgeable about the availability of resources of the local educational agency.

(5) An individual who can interpret the instructional implications of the assessment results. The individual may be a member of the team described in paragraphs (2) to (6), inclusive.

**Cal. Educ. Code § 56345(d):**

Consistent with Section 56000.5 and Section 1414(d)(3)(B)(iv) of Title 20 of the United States Code, it is the intent of the Legislature that, in making a determination of the services that constitute an appropriate education to meet the unique needs of a deaf or hard-of-hearing pupil in the least restrictive environment, the individualized education program team shall consider the related services and program options that provide the pupil with an equal opportunity for communication access. The individualized education program team shall specifically discuss the communication needs of the pupil, consistent with "Deaf Students Education Services Policy Guidance" (57 Fed. Reg. 49274 (October 1992)), including all of the following:

(1) The pupil's primary language mode and language, which may include the use of spoken language with or without visual cues, or the use of sign language, or a combination of both.

(2) The availability of a sufficient number of age, cognitive, and language peers of similar abilities, which may be met by consolidating services into a local plan areawide program or providing placement pursuant to Section 56361.

(3) Appropriate, direct, and ongoing language access to special education teachers and other specialists who are proficient in the pupil's primary lan-

guage mode and language consistent with existing law regarding teacher training requirements.

(4) Services necessary to ensure communication-accessible academic instructions, school services, and extracurricular activities consistent with the federal Vocational Rehabilitation Act of 1973 (29 U.S.C. Sec. 794 et seq.) and the federal Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12101 et seq.).

(5) In accordance with Section 300.113 of Title 34 of the Code of Federal Regulations, each public agency shall ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(6) Subject to paragraph (7), each public agency, pursuant to Section 300.113(b) of Title 34 of the Code of Federal Regulations, shall ensure that external components of surgically implanted medical devices are functioning properly.

(7) For a child with a surgically implanted medical device who is receiving special education and a service under Section 56363, a public agency is not responsible for the postsurgical maintenance, programming, or replacement of the medical device that has been surgically implanted, or of an external component of the surgically implanted medical device.

No. 11-56259

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

K.M., a minor, by and through her
Guardian Ad Litem, Lynn Bright,

Plaintiff-Appellant

v.

TUSTIN UNIFIED SCHOOL DISTRICT,

Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

# BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REMAND

---

PHILIP H. ROSENFELT
Acting General Counsel
U.S. Department of Education

THOMAS E. PEREZ
Assistant Attorney General

MARK L. GROSS
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

## TABLE OF CONTENTS

**PAGE**

**TABLE OF CONTENTS (continued):** **PAGE**

## TABLE OF AUTHORITIES

**CASES:** **PAGE**

**CASES (continued):** **PAGE**



**STATUTES:**

**STATUTES (continued):** **PAGE**



**REGULATIONS:**

**REGULATIONS (continued):** **PAGE**



**MISCELLANEOUS:**

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

No. 11-56259

K.M., a minor, by and through her
Guardian Ad Litem, Lynn Bright,

Plaintiff-Appellant

v.

TUSTIN UNIFIED SCHOOL DISTRICT,

Defendant-Appellee

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

# BRIEF OF THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REMAND

---

## STATEMENT OF THE ISSUE

The United States will address the following issue:

Whether the district court erred in concluding that a school district's provision of a free appropriate public education under the Individuals with Disabilities Education Act (IDEA) establishes full compliance with the school district's obligation under Title II of the Americans with Disabilities Act to provide effective communication.

## INTEREST OF THE UNITED STATES

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a).

This case involves the application of Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*. The United States has a direct interest in this appeal because the district court erroneously interpreted 28 C.F.R. 35.160, a Department of Justice (Department or DOJ) Title II implementing regulation that addresses a public entity's obligation to provide effective communication to people with hearing or vision disabilities. See 42 U.S.C. 12134(a). The Department also can enforce Title II, see 42 U.S.C. 12133, and therefore has an interest in ensuring the proper interpretation of its regulations.

## STATEMENT OF FACTS

### *1. Overview Of Title II Of The ADA And The Effective Communication Obligation*

Title II of the ADA prohibits discrimination on the basis of disability by public entities. 42 U.S.C. 12131-12132.[1] The DOJ's Title II regulations address, *inter alia*, a public entity's obligations to provide effective communications. See

[1] "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.

28 C.F.R. 35.104 (definition of auxiliary aids and services); 28 C.F.R. 35.160-35.164 (2009).[2] The regulations require public entities to take "appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are *as effective as communications with others*." 28 C.F.R. 35.160(a)(1) (emphasis added). In order to provide equal access, a public entity "shall furnish appropriate auxiliary aids and services where *necessary to afford* individuals with disabilities an *equal opportunity* to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. 35.160(b)(1) (emphasis added).[3] The Department of Justice Technical Assistance

[2] The Title II communications regulations, issued in 1991, were amended on September 15, 2010, effective March 15, 2011. See *Nondiscrimination On The Basis Of Disability In State And Local Government Services*, 75 Fed. Reg. 56,164, 56,177, 56,183-56,184 (Sept. 15, 2010). The original regulations included the substantive protections addressed here: communication that is "as effective as communication with others" and provides an "equal opportunity" to participate in programs, and an entity's obligation to give "primary consideration" to the individual's requested communication method. 28 C.F.R. 35.160(a)-(b) (1992). The amendments, *inter alia*, expand the nonexhaustive list of devices that constitute an auxiliary aid or service, see 28 C.F.R. 35.104 (2011), and incorporate factors previously addressed in the Department of Justice Technical Assistance Manual for Title II (Title II TAM), that a public entity must consider to assess necessary, effective communication. See 28 C.F.R. 35.160(b)(2) (2011). The Title II TAM is available at http://www.ada.gov/taman2.html. The citations herein are to the 2009 version of the regulations unless otherwise indicated.

[3] In enacting Title II, Congress established that communications regulations "shall be consistent with" regulations promulgated by the DOJ under Section 504 for its federally conducted activities, which require a public entity to provide effective communications with auxiliary aids that afford an individual with a

(continued…)

Manual for Title II (Title II TAM) further explains that the type of necessary auxiliary aid will vary depending on several factors, including the individual with a disability's chosen method of communication, the "length and complexity of the communication involved," "the number of people involved, and the importance of the communication." Title II TAM, § II-7.1000-7.1100.

In determining what auxiliary aid is "necessary, a public entity shall give primary consideration to the requests of individuals with disabilities." 28 C.F.R. 35.160(b)(2). A public entity, however, is not required to provide an auxiliary aid that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. 35.164. If the specific auxiliary aid the individual requests would cause a fundamental alteration or impose an undue burden, the public entity must still take action to "ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity." 28 C.F.R. 35.164.

*2. Overview Of The IDEA*

Congress enacted the IDEA in 1975 to ensure that children with disabilities that affect their ability to learn are provided a "free appropriate public education that emphasizes special education and related services designed to meet their

---

(…continued)
disability an "equal opportunity to" enjoy and participate in the entity's programs and services. 42 U.S.C. 12134(b); 28 C.F.R. 39.160(a)(1).

unique needs." 20 U.S.C. 1400(d)(1)(A); see 20 U.S.C. 1401(3)(a); see also *School Comm. of Burlington* v. *Department of Educ. of Mass.*, 471 U.S. 359, 367 (1985). A central element of the IDEA, and the means to provide a free appropriate public education (FAPE), is the development of an individualized education program (IEP) for each child with a covered disability. 20 U.S.C. 1414(d)(1)(A). The IEP must describe comprehensively the child's educational needs, including communication needs, and the corresponding special education and related services that meet those needs. See *Burlington*, 471 U.S. at 368; 20 U.S.C. 1414(d)(1)(A); 34 C.F.R. 300.324(a)(2)(iv). For example, for a child with a hearing disability, the IEP team, which consists of school officials and the parents, will address the child's communication needs and what, if any, "assistive technology devices and services" are included as part of the child's educational program. See 20 U.S.C. 1414(d)(3)(B)(iv) and (v). In developing an IEP, school officials must consider a parent's request for particular educational programs or services. 20 U.S.C. 1414(d)(3)(A)(ii).

A FAPE must provide the student a "meaningful" educational benefit. See *N.B.* v. *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1210, 1213 (9th Cir. 2008) (citing *Adams* v. *Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999)). For some children with a disability, particularly those without intellectual or serious behavioral

disabilities, the educational program described by the IEP may well be comparable to the educational programs provided children without a disability.

The IDEA also contains procedural safeguards to protect the rights of the parents and the child. See 20 U.S.C. 1415(a) and (b). If a parent objects to a proposed IEP, the parent may initiate an administrative hearing and if unsuccessful there, may challenge the IEP in state or federal court. See 20 U.S.C. 1415(f)-(g) and (i). Reliance on the IDEA does not, however, preempt the applicability of other federal laws that establish rights of elementary and secondary students. See 20 U.S.C. 1415(*l*). Section 1415(*l*) provides, "[n]othing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA, Section 504 of the Rehabilitation Act], or other Federal laws protecting the rights of children with disabilities."[4] *Ibid.*

*3. Factual Background And Procedural History*

K.M. is a 16-year-old high school student with significant hearing loss. E.R. 4.[5] She has two cochlear implants, and also "relies on lip-reading and her observations of social cues to communicate with others." E.R. 4. She often needs eye contact with the speaker to assist with hearing. E.R. 4.

---

[4] A parent still must satisfy IDEA's administrative exhaustion requirements prior to initiating litigation under the IDEA or pursuing a claim under another law that could have been asserted under the IDEA. See 20 U.S.C. 1415(*l*).

[5] "E.R. __" refers to the page of Appellant's Excerpts of Record.

Since elementary school, K.M. has received services under the IDEA. E.R. 5. During middle school, the Tustin Unified School District (Tustin) provided K.M. with FM technology, which is a microphone held by the teacher and a receiver that transmits to K.M.'s implant. E.R. 7. During eighth grade, K.M. stopped using the FM receiver because it interfered with her ability to focus and gave her headaches from transmitted static and background noises. E.R. 7.

After seventh grade, K.M.'s mother notified school officials of K.M.'s request to receive Communication Access Real-time Translation (CART) services. E.R. 7. CART is an immediate transcription of spoken words to verbatim text on a computer screen. E.R. 6. Tustin did not respond to K.M.'s initial request for CART services, and K.M.'s mother renewed her request after eighth grade, several months before K.M. began high school. E.R. 7-8. At the start of ninth grade, Tustin provided K.M. preferential seating in classrooms, teachers repeated some student's comments, close-captioning was included on some videos, and some teachers gave K.M. course notes, but she was not provided CART. E.R. 6. K.M. maintains above-average grades. E.R. 6.

After ninth grade began, Tustin officials, some of K.M.'s teachers, K.M., and her mother met to discuss the elements of K.M.'s IEP. E.R. 8. At this meeting, K.M. discussed her difficulties with hearing conversations in her classes, particularly when she could not see the students speaking. E.R. 8. K.M. stated that

she is reluctant to participate in classes because often she is not aware of what other students have said, and admitted that she sometimes indicates that she has heard what others say even when she has not, as she is afraid others will be frustrated with her lack of comprehension. E.R. 5, 8.

K.M. stated that she benefitted significantly from her trial use of CART that Tustin provided because it allowed to her to follow the entirety of classroom discussions. E.R. 6. She believes CART would improve her comprehension because it allows her to immediately fill in the gaps of the classroom discussion she did not hear. E.R. 6. Karen Rothwell-Vivian, a licensed audiologist who has provided therapy to K.M. since elementary school, recommended that K.M. receive CART services. E.R. 5, 9.

TypeWell is an alternative program to CART that provides a transcript of the substance of oral communications in a summary form. K.M. testified that her trial use of the TypeWell program, also provided by Tustin, was not as helpful or effective for her as CART. E.R. 6.

When Tustin did not provide CART, K.M. filed an administrative complaint under the IDEA asserting that Tustin has not provided K.M. a FAPE. E.R. 9. While Tustin did not contest the effectiveness of CART, it argued that its IEP provides the appropriate educational benefits the IDEA requires through existing services. Tustin argued that K.M.'s continuing achievement of above-average

grades is evidence that K.M. receives meaningful educational benefits from Tustin's educational program.

The Administrative Law Judge (ALJ) ruled in favor of the school district. E.R. 9; see E.R. 97-130.

*4. The District Court Opinion*

Following the ALJ's decision, K.M. filed a complaint in federal court alleging violations of the IDEA; Section 504 of the Rehabilitation Act (Section 504), 29 U.S.C. 794; Title II of the ADA; and California's Unruh Civil Rights Act, Cal. Civ. Code 51 *et seq.* See E.R. 9. The parties filed cross-motions for summary judgment.

The district court affirmed the ALJ's decision on the IDEA, upholding the ALJ's finding that Tustin "adequately assessed K.M. and considered her request for CART services." E.R. 16. The district court also held that K.M.'s IEP satisfied the IDEA's substantive requirement by providing a "reasonable educational benefit." E.R. 21.

The district court then held that its ruling on K.M.'s IDEA claim fully resolved K.M.'s Section 504 and ADA claims. E.R. 21-23. The court first stated that the elements of a Section 504 and an ADA claim are essentially the same. E.R. 21. The court then briefly summarized the ADA effective communication regulation and Section 504's FAPE regulations, including the provision that states

that providing a FAPE under the IDEA is one means to satisfy Section 504. E.R. 22; 34 C.F.R. 104.33(b)(2). The court then concluded, "the fact that K.M. has failed to show a deprivation of a FAPE under IDEA, as discussed above, dooms her claim under Section 504 and, accordingly, her ADA claim." E.R. 23.

## SUMMARY OF ARGUMENT

The IDEA's FAPE obligation to students with a hearing disability, and Title II of the ADA's effective communication obligation, have different elements, specify different rights, and serve different purposes. Title II of the ADA is a nondiscrimination statute that requires, *inter alia*, public entities, including schools, to provide individuals with disabilities public services that are equal to those services provided individuals without disabilities. 42 U.S.C. 12131-12132. Under Title II, a public school must provide individuals with a hearing disability communications that are as effective as those provided individuals without a disability. See 28 C.F.R. 35.160(a)(1). Providing effective communications entails a comparative assessment of the services and information provided to individuals with and without disabilities. *Ibid*.

Under the IDEA, in contrast, a school must develop an educational program that is based on an individual child's specific and unique needs, including the child's communication needs. See 20 U.S.C. 1401(9), 1414(d)(1)(A), and 1414(d)(3)(A) and (B). A school is not required to compare an educational

program developed for a student with a disability to those provided to students without disabilities, although it may choose to do so as part of its FAPE determination. Under the IDEA, the educational program need provide only a "meaningful" educational benefit. See *N.B.* v. *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1210, 1213 (9th Cir. 2008). Moreover, the IDEA, unlike the ADA, does not include defenses of fundamental alteration or undue burden. Thus, the district court erroneously concluded that the school's compliance with the IDEA for this student automatically satisfied the school's Title II effective communication obligations to this student. It is possible that compliance with the IDEA can, for some students, also satisfy Title II's effective communication obligation. However, the court's decision effectively reads Title II's communication protections out of the elementary and secondary educational setting for all students with hearing disabilities who are eligible for communication services under the IDEA, a result fundamentally at odds not only with the broad remedial purposes of the ADA, but also with the precise text of the IDEA. See 20 U.S.C. 1415(*l*); 42 U.S.C. 12101(a)(3), (b)(1).

Finally, the evidence raises a material question of fact as to whether Tustin satisfied Title II's effective communication obligation. See 28 C.F.R. 35.160.

## ARGUMENT

## A SCHOOL'S OBLIGATION TO PROVIDE A STUDENT WITH A DISABILITY EFFECTIVE COMMUNICATION IS INDEPENDENT OF THE SCHOOL'S OBLIGATION TO PROVIDE A FREE APPROPRIATE PUBLIC EDUCATION

### *A. Elements Of A FAPE And Analysis Under The IDEA*

Under the IDEA, a school provides a student with a covered disability a FAPE through its development and implementation of an IEP, which is an educational program based on a specific determination of the student's abilities and needs. See 20 U.S.C. 1414(d)(1)(A). The IEP must identify, *inter alia*, special education and related services, the child's academic achievement thus far, how the child's disability may affect involvement in the general education curriculum, measurable annual goals, and evaluation criteria. 20 U.S.C. 1414(d)(1)(A)(i)(I)-(IV). For a child with a hearing disability, the IEP also must address the child's opportunities for communications with children and others and, if appropriate, identify "assistive technology devices and services." 20 U.S.C. 1414(d)(3)(B)(iv) and (v).

Overall, the IEP must provide the child with a disability a "meaningful" educational benefit. See *J.L.* v. *Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10

(9th Cir. 2010)[6]; *Adams* v. *Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Deal* v. *Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (an IEP must provide a "'meaningful educational benefit' gauged in relation to the potential of the child at issue"), cert. denied, 546 U.S. 936 (2005). The IEP, however, need not be designed to "maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist.* v. *Rowley*, 458 U.S. 176, 200 (1982). To establish a violation of the IDEA, a plaintiff must show that the IEP will not provide the student with a FAPE, or that procedural violations resulted in denial of a FAPE. See *N.B.* v. *Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1208 (9th Cir. 2008); *Deal*, 392 F.3d at 854.

In *Rowley*, the Supreme Court specifically rejected assertions that the IDEA requires schools to provide a student with disabilities an educational opportunity "equal" to that provided to a student without a disability. 458 U.S. at 198-200. The Court held that, under the IDEA, a school was not required to provide an interpreter for a hearing-impaired elementary school student because the student was achieving well academically with the services provided. *Id.* at 184-185, 209-210. The Court reviewed the legislative history of the IDEA and stated that the

[6] This Court stated that the phrases "educational benefit," "some educational benefit," and "meaningful" educational benefit "refer to the same standard." *J.L.*, 592 F.3d at 951 n.10.

precursor to the IDEA, the Education for All Handicapped Act of 1975 (EHA), 89 Stat. 773, 20 U.S.C. 1401 *et seq.*, was passed to address two primary issues facing children with disabilities at that time; their complete exclusion from public schools or their inappropriate placement (or "warehousing") in regular classrooms without any special programming to address their physical or cognitive needs. See *Rowley*, 458 U.S. at 191-192. Thus, the EHA was enacted to guarantee that a child with a disability had access to education with an individualized program that addressed his or her specific needs. See *id.* at 195-196, 200.

Significantly, while comparisons of FAPE for any child to the education provided students without disabilities are not *required* under the IDEA, school officials are not precluded from, for example, comparing a student with a hearing disability's communication and access to educational programs with communications and access provided to students without disabilities when assessing what educational program and related services will provide a "meaningful" educational benefit. However, in rejecting a mandatory equality standard, the Court noted the difficulty, in many instances, in comparing the educational programs provided to students with disabilities and those provided to students without disabilities. See *Rowley*, 458 U.S. at 198-200.

*B. The Requirement Of Effective Communication And Analysis Under Title II Of The ADA*

Title II of the ADA, enacted nearly 20 years after *Rowley*, states, "[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Under Title II, a plaintiff must show that (1) he or she is a qualified individual with a disability; (2) he or she was excluded from participation in a program, denied benefits, or otherwise discriminated against by a public entity; and (3) such treatment was because of his or her disability. See *Duvall* v. *County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001).

The DOJ's regulations implementing Title II, in the specific context of communications with individuals with vision or hearing disabilities, like K.M., state that a public entity "shall take appropriate steps to ensure that communications with * * * participants * * * with disabilities are *as effective as communications with others*." 28 C.F.R. 35.160(a)(1) (emphasis added). An individual must receive auxiliary aids that are "*necessary to afford* an individual with a disability an *equal opportunity* to participate in, and enjoy the benefits of, a service, program, or activity of a public entity." 28 C.F.R. 35.160(b)(1) (emphasis added). The Department, through its regulation and accompanying guidance,

provides specific direction on how an entity and court should assess whether a particular auxiliary aid is necessary and provides communication that is as effective as communication provided individuals without a disability. See 28 C.F.R. 35.160; Title II TAM, § II-7.1000-7.1100.

These DOJ communication regulations, 28 C.F.R. 35.104 and 35.160-35.164, are entitled to deference under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), because the regulations are a reasonable interpretation of the statute and they are not "arbitrary, capricious, or manifestly contrary to the statute." See *Armstrong* v. *Schwarzenegger*, 622 F.3d 1058, 1065-1066 (9th Cir. 2010) (*Chevron* deference given to another Title II regulation, 28 C.F.R. 35.130(b)(1)). This Court appropriately defers to the Department's interpretation of its regulation "unless [that interpretation is] plainly erroneous or inconsistent with the regulation." *M.R.* v. *Dreyfus*, 663 F.3d 1100, 1117 (9th Cir. 2011) (citation omitted). This deference applies to published materials, such as the TAM, and amicus pleadings in which the DOJ asserts its interpretation. See *id*. at 1116-1117 (deference to "statement of interest" pleading addressing Title II's integration regulation); *Balvage* v. *Ryderwood Improvement & Serv. Ass'n*, 642 F.3d 765, 775-776, 779 (9th Cir. 2011) (deference to amicus brief addressing the Fair Housing Act and regulations); *Bay Area Addiction Research & Treatment, Inc.* v. *City of Antioch*, 179 F.3d 725, 732 & n.11 (9th Cir.

1999) (deference to preamble to Title II regulations and TAM); see also *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011). As discussed below, the standard of effective communication is a reasonable interpretation of Title II's statutory objectives of ensuring that an individual with a disability is not denied the opportunity to participate in programs, denied a benefit, or otherwise discriminated against by a covered entity.

The need for a particular type of auxiliary aid to ensure effective communication will vary depending on several factors, including the individual with a disability's chosen method of communication, the "length and complexity of the communication involved," "the number of people involved, and the importance of the communication." Title II TAM, § II-7.1000-7.1100. A more sophisticated level of aid, such as an interpreter, would likely be necessary to ensure effective communication in an emergency room at a hospital, or if a police officer is interviewing a suspect or a victim with hearing loss. See Title II TAM, § II-7.1000; Title II TAM 1994 Supp., § II-7.1000.[7] However, handwritten notes or taking turns at a computer terminal typing questions and answers likely would be effective communication with an individual with hearing loss seeking a form at a government office. In these situations, the entity provided the level of aid or

[7] The 1994 Supplement to the Title II TAM is available at http://www.ada.gov/taman2up.html.

accommodation necessary to ensure that the individual with a disability has an equal opportunity to participate in the program.

Similarly, a public school's obligation to provide a specific auxiliary aid or service will depend on the individual's request and, *inter alia*, the complexity and duration of the communication and the number of participants. A sign language interpreter likely will be warranted, if requested, for attendees with hearing loss at a performance, assembly, or back-to-school night due, in part, to the multiple participants and the event's duration. Handwritten notes, however, likely will be sufficient to communicate with a parent seeking a form or brief assistance from a school administrator. While a specific auxiliary aid or service may be necessary for a child with hearing disabilities in a classroom and certain extra-curricular activities, a school may consider whether a different aid that also provides effective communication can be used in other settings that involve fewer participants, are less frequent, or are less structured, such as a cafeteria break. Moreover, the type of auxiliary aid that is appropriate and effective in a particular environment may change over time, as new technologies may provide less costly and better services than existed previously.

In all circumstances, when assessing the necessity of a specific auxiliary aid, public entities must "give primary consideration" to the individual's request as to how he or she can best receive communications. 28 C.F.R. 35.160(b)(2). Giving

primary consideration to an individual's request for a particular mode of communication is warranted due to the "range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication." *Nondiscrimination On The Basis Of Disability In State And Local Government Services*, 56 Fed. Reg. 35,694, 35,711-35,712 (July 26, 1991). The individual with the disability obviously is in the best position to identify his or her needs and the type of aid that will most effectively provide communications for him or her. See Title II TAM, § II-7.1100.

State and local entities are not required to provide the individual's choice of communication methods, however, if the entity provides an alternative that is as effective as communication with others, or if it can show that the means the individual requests would require a fundamental alteration or would impose an undue burden. 28 C.F.R. 35.160(a)(1), 35.164; 28 C.F.R. Pt. 35, App. A (discussing Section 35.160); Title II TAM, § II-7.1000. The head of the public entity or designee must decide and state in writing the reasons why the requested mode of communication will impose an undue burden or fundamental alteration, and provide an effective alternative auxiliary aid. See 28 C.F.R. 35.164. Thus, primary consideration does not mean that a public entity must always fulfill an individual's request for a particular mode of communication.

This Court has recognized that the assessment of what constitutes effective communication is done on a case-by-case basis. See *Duvall*, 260 F.3d at 1136-1139. In *Duvall*, the plaintiff alleged violations of Section 504 and Title II's effective communication obligation when judicial officials did not provide real-time transcription during his judicial proceedings. *Id*. at 1129. The officials did not provide the plaintiff's requested accommodation, but provided alternative accommodations by holding plaintiff's hearing in a courtroom with improved acoustics, providing plaintiff an assistive listening device, and permitting the plaintiff to move about the courtroom so he could be closer to the person speaking to have a better opportunity to lip-read. *Id*. at 1137. However, this system "impede[d] [plaintiff's] natural hearing ability" because he was required to remove his own hearing aids, which were adjusted to his hearing needs. *Ibid*. Moreover, when Duvall moved to sit closer to the witness to lip-read, he was unable to communicate with counsel. *Ibid.* Duvall also suffered headaches and discomfort from the added strain of trying to understand the various speakers' communications without adequate assistance, which interfered further with his ability to hear, and he eventually "gave up" trying to hear the communications. *Ibid*.

This Court, citing Title II's text and the effective communication regulations, reversed summary judgment for the defendants, holding that Duvall

raised a material question of fact of whether the alternative accommodations were adequate; that is, whether the defendants "prevented him from participating *equally* in the hearings at issue." *Duvall*, 260 F.3d at 1138 (emphasis added); see *id.* at 1136-1138, 1141-1142; see *Duffy* v. *Riveland*, 98 F.3d 447, 455-456 (9th Cir. 1996) (summary judgment under Title II reversed based on disputed facts of whether a deaf inmate was provided effective communication at a prison classification hearing).

In several instances, while analyzing the evidence in light of the effective communication regulation, this Court also discussed Duvall's claim as one of a "reasonable modification" or "accommodation." See *Duvall*, 260 F.3d at 1136 (a public entity must "investigate whether a requested accommodation is reasonable"); *id.* at 1139 (an entity cannot merely speculate or assume that a particular accommodation is not reasonable). Another Title II regulation states that a public entity "shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7).

The more precise analysis of what constitutes "effective communication" for the purpose of determining what is an appropriate auxiliary aid derives from DOJ

regulations implementing Title II. See 28 C.F.R. 35.160.[8] As discussed above, the Title II communications regulations and guidance set forth specific standards ("effective communication") and criteria (*e.g.*, the length and complexity of the communication, the number of participants, etc.) that a public entity and court must consider. See 28 C.F.R. 35.160; Title II TAM, § II-7.1000-7.1100; see also pp. 15-19, *supra*. These standards are more specific than the more general assessment of what constitutes a reasonable and necessary modification under 28 C.F.R. 35.130(b)(7).

The different analysis and criteria are appropriate in the communication context for several reasons. Auxiliary aids and services are defined in the Title II regulations as being for people with hearing, vision and speech disabilities. 28

[8] This Court's discussion of the reasonable modification analysis in *Duvall* may be due to that panel's analysis of *Memmer* v. *Marin County Courts*, 169 F.3d 630, 633-634 (9th Cir. 1999). In *Memmer*, *id*. at 633-634, a plaintiff with a visual impairment asserted a violation, *inter alia*, based on the court's failure to make a reasonable modification pursuant to 28 C.F.R. 35.130(b)(7), and not based on a failure to provide an auxiliary aid. Cf. *Duffy*, 98 F.3d at 455-456 (claim based on denial of effective communication pursuant to 28 C.F.R. 35.160).

This Court, citing *Memmer*, stated that if a public entity rejects an individual's requested form of communications and offers an alternative mode, the individual bears the burden of proving that the offered accommodation was not "reasonable." *Duvall*, 260 F.3d at 1137. While this Court need not address this specific issue at this time, this placement of the burden is inconsistent with 28 C.F.R. 35.164, which states that the public entity must explain why the chosen mode of communication would impose an undue burden or fundamental alteration.

C.F.R. 35.104. The communications at issue – the content of speakers' statements and the content (via text or audio) of books, videos, and other media – are well-defined and directly translatable through auxiliary aids. Because of the particularly personal nature of choosing a mode of communication (*i.e.*, American Sign Language, spoken words, Braille, etc.), it also is appropriate to give a preference to the individual with a disability's choice of communication. See Title II TAM, § II-7.1100.

### *C. The District Court Erred By Not Recognizing The Differences Between The FAPE Requirement Of The IDEA And The Effective Communication Requirement Of Title II Of The ADA*

The district court's conclusion that its IDEA ruling resolved K.M.'s ADA claims is clearly incorrect. It ignores the fact that, as explained above, the IDEA and Title II do not impose identical legal obligations. Here, K.M. alleged a denial of a FAPE under the IDEA, as well as a denial of effective communication under the ADA. While the district court cited and briefly described the ADA's regulations on effective communication (E.R. 22), it failed to address whether the school met its obligations pursuant to those regulations. Instead, the district court merely concluded, erroneously, that compliance with the IDEA *necessarily establishes* full compliance with effective communication under the ADA. E.R. 23.

The district court's citations (E.R. 23) do not support its ruling. The cases cited are inapposite because those courts did not address the combination of claims, an IDEA and a Title II effective communication claim, asserted here. See *A.M.* v. *Monrovia Unified Sch. Dist.*, 627 F.3d 773, 781-782 (9th Cir. 2010) (plaintiff asserted the IEP denied the child a FAPE and placement in the least restrictive environment under the IDEA and Section 504); *Scanlon* v. *San Francisco Unified Sch. Dist.*, No. C91-2559 FMS, 1994 WL 860768, at *9-11 (N.D. Cal. April 14, 1994) (plaintiff raised FAPE and accessibility claims under the IDEA, Section 504, and/or the ADA), aff'd on other grounds, 69 F.3d 544 (9th Cir. 1995); *D.F.* v. *Western Sch. Corp.*, 921 F. Supp. 559, 573-574 (S.D. Ind. 1996) (plaintiff sought placement in the least restrictive environment under the IDEA, Section 504, and the ADA). For example, these courts held, *inter alia,* that compliance with FAPE under the IDEA satisfied FAPE under Section 504. See *Monrovia*, 627 F.3d at 778, 781-782; *Scanlon*, 1994 WL 860768, at *5, *9-10; *D.F.*, 921 F. Supp. at 563, 571-574. Notably, the Department of Education's Section 504 regulations, 34 C.F.R. 104.33(b)(2), state that compliance with IDEA's FAPE requirements can satisfy Section 504 FAPE. See *Mark H.* v. *Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008) (IDEA and Section 504 FAPE are "similar but not identical").[9] In contrast, in this appeal K.M.'s claim to CART is

[9] As a general rule, a violation of Section 504 FAPE will violate Title II.

(continued…)

based on the school's ADA effective communication obligations, *not* its IDEA obligations. The fact that K.M. initially may have sought CART under both the IDEA and the ADA does not defeat the validity of her independent claim under the ADA.[10]

The district court's ruling essentially reads this IDEA-eligible student's effective communication protections under Title II of the ADA totally out of the elementary and secondary education context – a result that is erroneous for several reasons. First, as discussed herein, that result ignores the different statutory elements of each claim. Second, that result is contrary to the plain language of the IDEA, which states:

> [n]othing 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.A § 12101 *et seq.*), title V of the Rehabilitation Act of 1973 (29 U.S.C.A. § 791 *et seq.*), or other Federal laws protecting the rights of children with disabilities.

---

(…continued)
See 42 U.S.C. 12201.

[10] The district court's reference (E.R. 23), to the counsel's "conce[ssion] that there is no additional evidence relevant to the remaining claims" for purposes of the administrative hearing officer's review suggests the erroneous view that additional or different evidence was necessary to establish the ADA claims. Although the two statutes have different standards for liability, the claims may be assessed by considering, as here, much of the same evidence.

20 U.S.C. 1415(*l*). This Court has held that 20 U.S.C. 1415(*l*) "tells us in very plain terms that the IDEA must be construed to coexist with other remedies, including * * * the [ADA]." *Payne* v. *Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc), petition for cert. pending, No. 11-539 (filed Oct. 26, 2011). Moreover, the district court's ruling ignores the ADA's "comprehensive national mandate for the elimination of discrimination against individuals with disabilities," including discrimination "in such critical areas as * * * education." 42 U.S.C. 12101(a)(3) and (b)(1).

*1. The IDEA And ADA Requirements And Defenses Are Separate*

The IDEA remains the primary vehicle by which schools, parents, and students will address the educational needs of children with serious disabilities. Nothing asserted here alters a school's obligation under, or the existing legal standards to comply with, the IDEA. The FAPE obligation, as noted, is an affirmative duty to create a new, individualized education program that serves the unique needs of a child with a disability. See 20 U.S.C. 1401(9), 1414(d)(1)(A). A school district's obligations to provide a FAPE under the IDEA are not lessened or altered when a parent or child also asserts rights to effective communication under the ADA. Similarly, a school's obligation to provide a FAPE under Section 504 is not altered in any way if a school considers its additional obligations to a child under the ADA. See 34 C.F.R. 104.33.

Moreover, the obligations and the defenses under the ADA's effective communication provisions apply only to relief sought under the ADA, and not to IDEA's protections or to Section 504 FAPE determinations. Thus, the defenses of fundamental alteration and undue burden are available to a school district when a parent or child seeks a particular mode of effective communication under the ADA, see 28 C.F.R. 35.164, but these defenses are *not* available when seeking a FAPE through the development of an IEP. Consistent with Department of Education policies and guidance, the defenses under the ADA's communications provisions do not, and should not, come into play in developing a program that meets a child's needs for FAPE under the IDEA or Section 504. See 20 U.S.C. 1414(d)(1); 34 C.F.R. 104.33. To do so would be fundamentally at odds with the mandate of the IDEA and would alter the legal construct of a FAPE under the IDEA or the Department of Education's Section 504 regulations. See 20 U.S.C. 1414(d)(1); 34 C.F.R. 104.33, 300.112. A correct analysis of a school district's obligations under the different statutes would *not* allow schools to assert that they cannot and need not meet a child's needs as part of FAPE because doing so would impose an undue burden or fundamental alteration.

The statutes work together because each party's duties under the respective statutes do not change. For example, a school must continue to provide a parent or guardian notice if it is considering a change to an IEP under the IDEA, just as a

parent may request that a school reevaluate an IEP. See 20 U.S.C. 1414(a)(2). In addition, while a parent may request an auxiliary aid or service under Title II, the FAPE process need not be modified. A school district has discretion to determine who will address ADA requests, and whether a parent's request under the ADA for a child will be addressed during or separate from the meetings, including IEP team meetings, related to the FAPE process.

Significantly, we are not asserting that a valid IEP can never satisfy the ADA effective communication standard. As discussed above, an IEP team may assess the elements of communication for a child with a hearing disability without a formal request under the ADA, and it may find that the related services offered under the IEP also satisfy Title II standards. Thus, the ADA will not always require a school to provide different services than those it provides under the IDEA to address a student's communication needs. The analysis under these statutes simply is different.

Finally, the instances in which a school has an obligation under the IDEA and a duty to provide effective communication under the ADA to the same child are limited. The obligation to provide effective communication under the ADA is limited to the provision of services for *existing programs*; the ADA does not require a school to provide new programs or new curricula. Thus, while an auxiliary aid may be a new or additional means of communication or technology,

the school is not required to provide more or different educational programs to satisfy the ADA. The need for additional services for effective communication will apply to a discrete and fairly limited segment of students, those with serious hearing or visual disabilities.

*D. Sufficient Questions Of Fact Defeat Summary Judgment*

Because the district court failed to consider properly K.M.'s claim under the ADA, its grant of summary judgment should be vacated and the case remanded.

Analyzed under the proper standards, K.M. presented sufficient evidence to raise questions of fact regarding her allegation that Tustin failed to provide her effective communication under Title II. Legitimate factual disputes regarding whether a particular auxiliary aid is effective preclude summary judgment. See *Duvall*, 260 F.3d at 1138; *Chisolm* v. *McManimon*, 275 F.3d 315, 327 (3d Cir. 2001) (whether an inmate's lip reading skills and written communication were effective communication was a material fact precluding summary judgment based on evidence that the inmate's primary language was American Sign Language, and his lip reading skills were not proficient); *Duffy*, 98 F.3d at 456 (whether a proffered interpreter was "qualified" and the complexity of an administrative hearing were questions of fact regarding effective communication that could not be resolved on summary judgment).

K.M. notified Tustin, and testified during the administrative hearing that, based on Tustin's current arrangements and services, she could not fully hear or understand all that was said in the classroom. E.R. 5, 8. She cannot hear students who sit to her left or behind her, and a teacher does not always repeat another student's comment. E.R. 5-6, 8. K.M. further testified that the CART system was superior to TypeWell in providing her full communication capabilities and a better understanding of all the participants' communications in her classes. E.R. 6.

The district court stated that Tustin gave "meaningful consideration to [K.M.'s] needs" based on the school's modifications to K.M.'s IEP between elementary, middle, and high school. E.R. 23. While we do not contest the district court's findings supporting IDEA compliance, the district court also must assess whether Tustin gave primary consideration to K.M.'s request for CART to ensure she has effective communication under Title II. In addition, the court stated that K.M.'s "difficulty following discussions may have been greater than her teachers perceived." E.R. 15. This finding suggests that Tustin gave priority to its *own* determination of K.M.'s needs, and may have unnecessarily discounted K.M.'s statements about what she actually understood in class. See E.R. 15; *Duvall*, 260 F.3d at 1137.

The assessment of what constitutes an effective aid must take into account the numerous participants in the classroom who contribute to the educational

experience, and a child's ability to hear all that is said. After all, the classroom discussion is an essential part of the educational program a school provides to *all* of its students.

The ultimate resolution of this case depends on further analysis of disputed facts under the proper Title II standards. However, there are sufficient, unresolved questions of fact to bar summary judgment for Tustin on whether it satisfied its obligation under Title II to provide K.M. effective communications.

## CONCLUSION

The district court's grant of summary judgment in favor of Tustin should be reversed and remanded for further consideration in light of the principles set forth herein.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

s/ Jennifer Levin Eichhorn
MARK L. GROSS
JENNIFER LEVIN EICHHORN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 305-0025

## CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the foregoing Brief Of The United States As Amicus Curiae Supporting Appellant And Urging Remand:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains 6,993 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney

Dated: January 24, 2012

## CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2012, I electronically filed the foregoing Brief Of The United States As Amicus Curiae Supporting Appellant And Urging Remand with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which will send notice of the foregoing brief to the following registered CM/ECF users:

David Martin Grey
Grey & Grey
Suite 700
233 Wilshire Blvd.
Santa Monica, CA 90401

Jennifer C. Brown
BEST BEST & KRIEGER LLP
Suite 1500
5 Park Plaza
Irvine, CA 92614

Molly Stockey Askin
BAKER BOTTS, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400

I further certify that on January 24, 2012, an identical copy of the foregoing Brief Of The United States As Amicus Curiae Supporting Appellant And Urging Remand was served by certified, first class mail, postage prepaid, on the following counsel of record:

Cary K. Quan
DECLUES & BURKETT, LLP
Suite 400
17011 Beach Blvd.
Huntington Beach, CA 92647-5995

s/ Jennifer Levin Eichhorn
JENNIFER LEVIN EICHHORN
Attorney