Nos. 13-770 & 13-777

IN THE

Supreme Court of the United States

TUSTIN UNIFIED SCHOO L 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 Mi

Amici Curiae Brief of California School Boards Association and the National Sch ool Boards Association In Support of Petitioners

Marcy L. Gutie rrez
Counsel of Record
Michael E. Smith

Sacramento, CA 95814
(916) 329-7433
mgutierrez@lozanosmith.com

Francisco M. Negrón, Jr.
National Sch. Bds. Assoc.
1680 Du

fnegron@nsba.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

K.M.

K.M.

AUER
AMICUS

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Adams Fruit Co., Inc. v. Barrett,

Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.,

Anchorage Sch. Dist. v. M.P.,

Ardestani v. I.N.S.,

Auer v. Robbins,

Blackmon ex rel. Blackmon v.

M.T.V. v. DeKalb Cnty. Sch. Dist.,

Olmstead v. L.C. ex rel. Zimring,

Pace v. Bogalusa,

Payne v. Peninsula Sch. Dist.,

Petersen v. Hastings Pub. Sch.,

Urban v. Jefferson Cnty. Sch. Dist. R-1,

Weber v. Cranston Sch. Comm.,

Wilson v. Marana Unified Sch. Dist. No. 6 of Pima Cnty.,

Statutes and Regulations

et seq.

et seq

Other Authorities

available at

Fast Facts, Students with Disabilities, available at

available at

Digest of
Education – Statistics, *available at*

, available at

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

state courts and has participated as 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.

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

language to require school districts to wholly acquiesce to parent requests for certain DHH

Fourth,
expressly based upon the application of deference
under , 519 U.S. 452 (1997), to the

position regarding §
with the IDEA. This application of deference

, 567 U.S.
___, 132 S. Ct. 2156 (2012). deference t
views of §

understanding of § 35.160, constitutes a mere

DISTRICT'S DUTY TO E

By improperly vesting power over educational

ignores over
twenty years of Congressional, judicial, and
administrative direction confirming that the ,

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 (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), federal legislative and administrative action has continuously

of disabled students in a concrete and meaningful manner.

required by the IDEA and § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794)
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:

The

team implement or give dispositive consideration to

Congress echoed these sentiments in the 1997 and 2004 amendments to the IDEA. 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 basis. 20 U.S.C. § 1414(d)(3)(B)(iv); 34 C.F.R. 7(40( )-141(7(33(0)6(4))] TJ99.JET8g3-3(t)] TJETB

alters and imposes undue administrative and financial burdens on school districts. This result directly conflicts with 28 C.F.R.

request for a specific educational service, program, placement or support, such request result in a free, appropriate public education

, 166 F. Supp. 2d 1287, 1299 (C.D. Cal. 2001); 34 C.F.R. § 300.321. , however, discounts the IDEA team approach, and places decision-making power with parents. Op. at 19a-21a.[7] places

posits that the IDEA merely requires consultation ereas the ADA dictates that requests of parents be given & n.5. Specifically, educational benefits beyond what FAPE requires, because of the

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

delegating to parents decision-making power about communication devices for DHH students.[8] , 689 F.3d 1047, 1055

[7] Citations to are made to that version contained in

[8] For example, it is unclear under 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 dispositive, parental role in IEP process);

, 198 F.3d 648, 657 (8th

simp

, 735

power to provide handicapped children with an education which they consider more appropriate

Second, 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. 20 U.S.C. § 1414(d)(1)(B)-(D); 34 C.F.R. § 300.321;

35.160 is to occur before or after using the IEP process, or in lieu of the IEP process altogether. Op. at 20a-21a. also disrupts long-recognized IDEA processes and procedures by creating uncertainty about whether school districts are required to convene separate meetings under the

so, who should attend those meetings. The only certainty is that to satisfy , 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

that results from
assessment process. The IDEA mandates that IEP teams make educational decisions only after the completion of comprehensive evaluations by qualified professionals; however, disregards that process, requiring
of the requests of the parent irrespective of evaluation results. Op. at 21a-22a (citing 300.304

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

circumstances where exhaustion of IDEA administrative remedies is excused, contrary to precedent throughout the appellate circuits. cases cited note 9; , 869 F. Supp. 2d 174, 185-88 (D. Mass. 2012) (exemplifying correct analysis for resolving ADA claim under § 35.160 when

is also at odds with the Fifth and Eighth Circuit opinions in , 403 F.3d 272 (5th Cir. 2005) and ., 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 shoul ordinary principles of issue and claim preclusion in

overlooks or gravely minimizes their significance. Op. at 22a 23a. Proper application of issue and claim preclusion principles, as enunciated in and , 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 , the Fifth Circuit considered, , whether or not the plaintiff could proceed on his

, 403 F.3d at 290-97. The plaintiff argued that the

concerning accessibility. at 290. In finding that

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

TO DOJ'S BRIEF'S INTERPRE 35.160'S INTERACTION

improper position on iguous interaction with the IDEA. Op. at 3a, 19a- deference] standard brief cture and scope. Op. at 20a-23a, DOJ Brief.[10]

In , 567 U.S. __, 132 S. Ct. 2156 (2012) s interpretation of a regulation, this Court explained when it is improper for a court to apply deference. The Court held that deference n precisely

[10] www.justice.gov/crt/about/app/briefs/kmtustinbr.pdf (last visited on Jan. 8, 2014).

, 132 S. Ct. 2167 (citations omitted). Correspondingly, the Court held that deference is unwarranted, for example, ead to for conduct which occurred well before the interpretation was

interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct (quotation omitted). The Court also reaffirmed that deference is inapplicable

the

, 132 S. Ct. at 2166 (internal quotations and citations omitted). Under these standards, brief, and its application to the IDEA, is improper.[11]

surprise, as it is not widely known by other federal co
has previously asserted that its position (, 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. 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); Tustin Pet. at 10-11, 14, 28 (discussing IDEA regulation on same subject).

satisfied IDEA and discriminate under ADA that after the school district had implemented the

effective communication devices (where the district can demonstrate that another effective means of communication exists); and an administrative law

communication devices for an individual student is

establishes that the district that another effective means of communication exists, thus . 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. , 872 F. Supp. 14, 21 (E.D.N.Y. 1995)

regulation [under the ADA] to conflict with section 1415(f) [of the IDEA], the Court applies the fundamental principal of statutory construction that

,

, 69 F.3d 687 (2d Cir. 1995).

Third, the Court in cautioned against

---

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

the latter exception in detail, but fails to address at all how the former exception applies, or is reconciled with its current position.

Finally,
regarding §

For the foregoing reasons,