

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

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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 country²—could impact over 6.4 million public school students with disabilities nationwide.³

² U.S. DEPT 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

¹⁰DOJ'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

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