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

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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

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(…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.

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[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,

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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.

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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:

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