NO. 12-232

IN THE
Supreme Court of the United States

SOLANA BEACH SCHOOL DISTRICT
AND MARY ELLEN NEST,

Petitioners,

v.

KA.D., A MINOR, BY HER MOTHER, KY.D., AS HER
NEXT FRIEND; KY.D. AND B.D.,

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) requires a covered school district to provide a disabled student with an appropriate education in the least restrictive environment. Petitioner school district offered respondent, a disabled student, a classroom placement split between a special education classroom and a general education classroom. The administrative law judge and the courts below found that the plan violated the IDEA because the special education class was not the least restrictive environment, the general education class was an inappropriate setting for the student because of its large class size and frequent transitions, and combining the two programs aggravated the class-size and transition problems. The questions presented are:

1) Whether a plan that requires a disabled student to spend part of her day in a special education classroom satisfies the least restrictive environment requirement of the IDEA, where the student has demonstrated her ability to make progress in a general education classroom; and

2) Whether a plan that requires a disabled student to spend part of her day in a setting that is inappropriate for her needs, and is part of an overall plan involving excessive numbers of classmates and transitions, satisfies the requirements of the IDEA.

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RESPONDENTS' BRIEF IN OPPOSITION

Petitioners Solana Beach School District and Mary Ellen Nest (collectively, the District) seek review of an unpublished and fact-bound decision that correctly applies well-established principles for determining whether a disabled child has received a free appropriate public education (FAPE) in the least restrictive environment as required by the Individuals with Disabilities Education Act (IDEA). The District has failed to show any reason to grant the writ.

The District argues that the IDEA imposes conflicting requirements that can be met only by a two-part plan. Although each part of the plan violates the IDEA for a different reason, the District argues that, viewed as a whole, the plan satisfies the Act. The District's novel theory, which is based on errors of both fact and law, has never been addressed by any court, including the courts below and, accordingly, does not warrant review.

The District also asserts that the decision of the Ninth Circuit held the District to a higher standard than required by this Court's decision in *Board of Education v. Rowley*, 458 U.S. 176, 203 (1982). But the District's argument is based on a misreading of the Ninth Circuit's decision.

Finally, although the District admits that the issue was not addressed in the decision below, it urges this Court to grant certiorari to resolve a supposed circuit split over the test for determining whether a disabled child has been placed in the least restrictive environment. Even if there were such a split, this case would not be an appropriate vehicle to address it

because the outcome of this case would be the same under any test.

STATEMENT

Statutory Background. The IDEA, 20 U.S.C. § 1400 *et seq.*, provides federal grants to States to fund special education and related services for children with disabilities, and it conditions those grants on compliance with certain standards and procedures. Specifically, the Act requires recipients of federal funding to ensure that a FAPE—free appropriate public education—is available to children with disabilities. *Id.* § 1412(a)(1)(A). A FAPE must include special education and related services necessary to meet each child's unique needs, and, "[t]o the maximum extent appropriate," must ensure that disabled children "are educated with children who are not disabled, and special classes, separate schooling, or other removal of children from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.* § 1412(a)(5)(A).

Facts and Proceedings Below. Ka.D. is a student with autism who resides with her parents in the Solana Beach School District. During the 2006-2007 school year, pursuant to a settlement with the District, Ka.D. attended a class for three-year-olds at the Hanna Fenichel preschool. Pet. App. 7a-8a. Hanna Fenichel is a private preschool serving typically developing children. *Id.* 38a. Ka.D.'s class at Hanna Fenichel had six to eight children and two adult

instructors. *Id.* 106a. With the support of a one-on-one aide, Ka.D. made "substantial and impressive progress" in her general education classroom at Hanna Fenichel. *Id.* 4a.

For the 2007-2008 school year, the District offered to place Ka.D. in a public school and split her classroom time between the District's special day class and its general education preschool class. *Id.* 4a-5a. The District proposed that Ka.D. spend eight hours per week in each classroom. In addition, the District proposed for Ka.D. to spend ten hours per week in one-on-one therapy at the school site.[1] *Id.* 53a. Ka.D.'s parents rejected the District's offer and chose to have Ka.D. remain at Hanna Fenichel, where she attended a general education class for four-year-olds that had fourteen students. Supplementary Excerpts of Record, Volume 1, p. 91, II. 10-19.

Pursuant to the IDEA, Ka.D.'s parents requested a due process hearing and sought reimbursement for the cost of Ka.D.'s tuition at the Hanna Fenichel preschool for the 2007-2008 school year. The dispute between the parties centered, in relevant part, on whether the special day class offered by the District was the least restrictive environment for Ka.D., and whether the structure of the District's general education classroom—in particular, the class size and number of

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[1]Although the District makes repeated reference to its "two-part educational plan," *see, e.g.,* Pet. 3, the District's plan actually had three parts, the largest of which the District omits from its program description. Pet. App. 53a.

transitions—was an appropriate instructional setting. *Id.* 31a-32a.

First, the administrative law judge (ALJ) found that the special day class was not the least restrictive environment for Ka.D. because she did not need the structure of the special day class to access her education. *Id.* 76a. In its petition, the District recites the evidence it purportedly presented to the ALJ in support of its argument that Ka.D. needed specialized instruction that could *only* be provided in a special education classroom, Pet. 10-11, and concludes that "profound evidence" showed that Ka.D. "could not be educated in a regular education classroom all day." *Id.* 11. But the ALJ rejected that contention, finding that although the special education classroom could meet Ka.D.'s instructional needs, Pet. App. 70a, Ka.D.'s experience in her preschool class at Hanna Fenichel during the 2006-2007 school year demonstrated that she could, at a minimum, make satisfactory progress in a general education classroom. *Id.* 77a, 104a. Thus, the ALJ concluded that the District's offer to place Ka.D. in a special education classroom for a portion of her school day denied her a FAPE because it was not the least restrictive environment for her. *Id.* 77a, 105a.

Second, the ALJ found that the general education component of the District's offer denied Ka.D. a FAPE because Ka.D. needed a smaller class size and fewer transitions during the school day than were available in the District's general education program, and the proposal to split Ka.D.'s time between different classrooms aggravated both of these problems. *Id.* 78a-

79a, 106a-107a. Specifically, the ALJ found the District's proposal to be inappropriate for Ka.D. because she was not capable of "interacting with some 42 students a day and transitioning not only between multiple activities in a classroom but also transitioning between two groups of students in two very different classes." *Id.* 80a.

In sum, the ALJ determined that "the District failed to offer [Ka.D.] a FAPE for the 2007-2008 school year by not offering her a placement in the least restrictive environment, and by offering her a placement in the District's [] general education class which failed to meet [her] unique needs." *Id.* 87a. The ALJ further found that Hanna Fenichel was an appropriate placement for Ka.D. and ordered the District to reimburse Ka.D.'s parents the cost of the tuition they paid for the 2007-2008 school year. *Id.* 89a-90a, 115a. In its petition, the District claims that "the education provided by the private school failed to provide the specialized education required" by the IDEA, Pet. 11, but that claim was rejected by the ALJ. *See* Pet. App. 88a ("The weight of the evidence is that Hanna Fenichel was an appropriate placement for Student.").

The District appealed the ALJ's decision to the federal district court. The district court affirmed the ALJ's decision in its entirety, finding that the ALJ's decision was "well-reasoned, thorough, and careful," and "based heavily upon the evaluation of live witnesses." *Id.* 22a.

The court of appeals affirmed. In an unreported decision, the court "agree[d] with the ALJ's

determination that the District's general education class was an inappropriate education setting for the Student, and therefore, the District's offer substantively failed to provide a FAPE." *Id.* 5a. The court of appeals did not address specifically the issue of whether placement in the special education class denied Ka.D. a FAPE because it was not the least restrictive environment, but found all of the District's "remaining contentions on appeal" to be "unpersuasive." *Id.*

The District sought rehearing and rehearing en banc. No judge requested a vote on whether to rehear the case en banc, and the petition was denied. *Id.* 120a.

REASONS FOR DENYING THE WRIT

I. The District's Theory That The IDEA Imposes Conflicting Requirements Is Without Merit.

The District's primary argument for review is based on the erroneous premise that Ka.D.'s educational needs cannot be met in a general education classroom with supplemental aids and services. *See* Pet. 11. From this false premise, the District argues that the IDEA imposes conflicting requirements with respect to Ka.D. that can be met only by a two-classroom plan. The District's theory is that, although each classroom is deficient on its own, taken together, they satisfy the requirements of the Act. The District asserts that the courts below and the ALJ erred in assessing each part of the educational plan separately, and that this Court should grant review to correct that error. The District's argument is unavailing.

The record shows that Ka.D.'s special needs could be met in a general education classroom of appropriate size because she had made progress in such an environment at Hanna Fenichel. Thus, the courts below rejected each part of the District's two-classroom plan, finding that Ka.D. did not require the structure of the District's special education classroom but would not benefit from the District's general education classroom because it was too large and involved too many transitions, features that were aggravated by the plan to split Ka.D.'s time between different classrooms. The solution, the courts found, was to place Ka.D. in a general education classroom of appropriate size, like the class at Hanna Fenichel. Because there is a placement that meets Ka.D.'s special needs in a general education environment, the District's claim that it faced conflicting requirements that could only be met with a two-classroom plan is wrong as a matter of fact and does not provide a basis for this Court's review.

Moreover, the District's claim that the IDEA's least-restrictive-environment requirement conflicts with the statutory imperative to provide an education that meets the specialized needs of a disabled child ignores the statutory qualification that an education in the least restrictive environment must be provided only "to the maximum extent appropriate." 20 U.S.C. § 1412(a)(5)(A). Thus, if a disabled child cannot obtain an educational benefit from placement in a general education classroom for the entire day, a two-part placement including a special education classroom may constitute the least restrictive environment for that particular student. Nothing in the decisions below

suggests that a two-part plan cannot satisfy the IDEA when a disabled student requires a special education classroom for part of the day. In this case, the District's plan was rejected because Ka.D. does not.

The District does not cite a single case in which any court has addressed the District's theory that the IDEA imposes conflicting requirements that can be met only by a two-part plan. A novel theory that has never been addressed by any court does not warrant this Court's attention.

II. The Decision Below Does Not Conflict with *Rowley*.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), this Court held that a school district is not required to maximize the potential of each disabled student; rather, a school district provides a disabled student with a FAPE if it offers "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203. The District asserts that the decision below held the District to a higher standard than *Rowley* requires because the Ninth Circuit noted that Ka.D. "had made substantial and impressive progress" in her general education classroom at Hanna Fenichel. Pet. App. 4a. Seizing on the adjectives used to describe Ka.D.'s progress, the District leaps to the conclusion that the Ninth Circuit compared the quality of the education at Hanna Fenichel to the quality of the placement offered by the District and picked the better of the two, rather than assessing whether the District's proposed placement met the minimum requirements of the IDEA. The District is wrong. The

Ninth Circuit found that "the District's general education class was an inappropriate education setting" for Ka.D. "because she required a program with a smaller number of children." Pet. App. 4a, 5a.

Having determined that the District failed to provide a FAPE, the Ninth Circuit turned to the question whether the parental placement qualified for reimbursement. The court concluded that it did, because "there is no question that Hanna Fenichel . . . met the Student's unique needs, and she benefitted from her instruction." Pet. App. at 5a (citing *C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-60 (9th Cir. 2011) ("To qualify for reimbursement under the IDEA, parents . . . need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.")); *see Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) ("IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate."). Thus, there is no support for the District's claim that the decision below conflicts with *Rowley*, much less that it requires this Court's intervention to correct an alleged error in an unreported and fact-bound decision.

III. The Decision Below Does Not Conflict With The Decision of Any Court of Appeals.

The District concedes that "[t]he Ninth Circuit did not address the issue of the 'least restrictive environment' in its decision," Pet. 6, yet it urges this

Court to grant certiorari to resolve a supposed split in the Circuits over the test to be applied to determine the least restrictive environment. *Id.* 7. Even if there were such a conflict, this case would not be an appropriate vehicle to address it because the answer would not change the outcome of the case. Moreover, the issue is not fairly encompassed in the questions presented by the District, as required by Supreme Court Rule 14.1(a). *See* Pet. i.

In any event, although the courts have articulated varying approaches to determine whether a particular placement is the least restrictive environment for a disabled student, all require "an individualized and fact-specific inquiry into the nature of the student's condition and the school's particular efforts to accommodate it, ever mindful of the IDEA's purpose of educating children with disabilities, to the maximum extent appropriate, together with their non-disabled peers." *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 120 (2d Cir. 2008) (citations and internal quotation marks omitted).

For example, the Second, Third, Fifth, Ninth, Tenth, and Eleventh Circuits "consider, first, whether education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child, and, if not, then whether the school has mainstreamed the child to the maximum extent appropriate." *Id.* (internal quotation marks omitted) (citing *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004); *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1403-04 (9th Cir. 1994); *Oberti v. Clementon Sch. Dist.*, 995 F.2d 1204,

1215 (3d Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991); and *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)). Under the first-prong of this approach, courts consider various factors, "including: (1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; (2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and (3) the possible negative effects of the inclusion of the child on the education of the other students in the class." *Id.*[2]

The Sixth and Eighth Circuits frame the issue by asking whether the services that make a segregated placement superior could feasibly be provided in a non-segregated setting, recognizing that "some handicapped children simply must be educated in segregated facilities either because the handicapped child would not benefit from mainstreaming, because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting, or because the handicapped child is a disruptive force in the non-segregated setting." *Roncker ex rel. Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983); *see A.W. v. Nw. R-1 Sch.*

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[2]Some circuits, including the Ninth and Eleventh, also consider inclusion costs as a factor depending on the circumstances of a particular case. *See Rachel H.*, 14 F.3d at 1404; *Greer*, 950 F.2d at 697. In this case, cost was not put at issue and was not addressed. Pet. App. 72a.

Dist., 813 F.2d 158, 163 (8th Cir. 1987) (same). Thus, under either approach, the factors to be considered are remarkably similar.

Although the tests are stated differently, the choice of approach would make no difference here, and the District does not contend that it would. In this case, it is clear that the special education classroom was not the least restrictive environment for Ka.D. under any test, because it is undisputed that she was able to make substantial educational progress in her general education classroom at Hanna Fenichel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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