

No. A-____

IN THE
SUPREME COURT OF THE UNITED STATES

D.D., a minor, by and through his Guardian Ad Litem,
MICHAELA INGRAM

Applicant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Respondent.

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

**APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI**

Patricia A. Van Dyke
LAW OFFICE OF PATRICIA A. VAN
DYKE
1120 Forest Avenue, #292
Pacific Grove, CA 93950

Alexis Victoria Casillas
LEARNING RIGHTS LAW CENTER
1625 W. Olympic Blvd., Ste. 500
Los Angeles, CA 90015

Ephraim McDowell
O'MELVENY & MYERS, LLP
1625 Eye Street, NW
Washington, D.C. 20006

Jeffrey L. Fisher
Counsel of Record
O'MELVENY & MYERS LLP
2765 Sand Hill Road
Menlo Park, CA 94025
(650) 473-2633
jlfisher@omm.com

Shawna L. Parks
Law Office of Shawna L. Parks
4470 W. Sunset Blvd., Ste. 107-347
Los Angeles, CA 90027

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

TO: Justice Elena Kagan, Circuit Justice for the Ninth Circuit:

Under this Court’s Rules 13.5 and 22, Applicant D.D. by and through his Guardian Ad Litem, Michaela Ingram, requests an extension of sixty (60) days to file a petition for a writ of certiorari in this case. His petition will seek review of a judgment of the U.S. Court of Appeals for the Ninth Circuit, affirming the dismissal of his claim under the Americans with Disabilities Act (ADA). The decision of the Ninth Circuit is reported at 18 F.4th 1043 (9th Cir. 2021), and a copy is attached. App. 1-55. In support of this application, Applicant states:

1. The Ninth Circuit issued its en banc decision in this case on November 19, 2021. Without an extension, the petition for a writ of certiorari would be due on February 17, 2022. With the requested extension, the petition would be due on April 18, 2022. This Court’s jurisdiction will be based on 28 U.S.C. § 1254(1).

2. This case is a serious candidate for review. It presents a question involving the intersection of the ADA and the Individuals with Disabilities Education Act (IDEA) that the Court expressly reserved in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017): Can exhaustion under the IDEA be required where “the specific remedy [a plaintiff] requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?” *Id.* at 752 n.4. In *Fry*, the Solicitor General maintained that exhaustion is not required under these circumstances. *See id.* Yet here, a 6-5 majority of the Ninth Circuit’s en banc panel rejected this view and held

that exhaustion is indeed required even when the IDEA hearing officer would be powerless to award the relief the plaintiff seeks.

The majority's rejection of the position of the United States on an important issue of federal law would be reason enough to justify this Court's review. But the majority's reasoning makes review all the more warranted. The majority did not analyze the operative text of the IDEA, which provides that exhaustion is required only where the plaintiff "seek[s] relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). Instead, the majority relied primarily on what it surmised to be Congress's "intent," as evidenced by snippets of legislative committee reports, to require exhaustion even where the plaintiff seeks a remedy that is unavailable under the IDEA. App. 23-26.

As the dissenters pointed out, such atextual reasoning is inappropriate. "[T]he plain meaning of the statute" controls. App. 31 (Bumatay, J., concurring in part and dissenting in part). And under the plain meaning of the key terms: "[A] complaint seeking damages—other than reimbursement of private school expenses under [20 U.S.C.] § 1412(a)(10)(C)(ii)—does not require exhaustion under the IDEA. That's because general compensatory damages cannot be awarded under the IDEA and Congress only prescribed exhaustion when the plaintiff seeks relief that is 'available' under the IDEA. And this is true even if the complaint is ultimately about the denial of a FAPE." App. 32-33 (Bumatay, J., concurring in part and dissenting in part).

3. This case presents an excellent opportunity for the Court to provide clarity to the recurring and important question whether exhaustion is required under the circumstances here. The issue is outcome-determinative of this appeal. The Ninth

Circuit affirmed the dismissal of Applicant's claim on the ground that exhaustion was required and Applicant had failed to exhaust. But if exhaustion is not required, the district court's decision would need to be reversed, and Applicant would be able to pursue his ADA claim.

The Ninth Circuit also considered the question presented at length in majority and dissenting opinions.

4. This application for a sixty-day extension seeks to accommodate Applicant's legitimate needs. Applicant has only recently affiliated undersigned counsel at O'Melveny & Myers. The extension is needed for new counsel to fully familiarize themselves with the record, the decisions below, and the relevant case law. The press of other business and deadlines means those tasks will take several weeks.

For these reasons, Applicant requests that the due date for his petition for a writ of certiorari be extended to April 18, 2022.

Dated: February 7, 2022

Respectfully submitted,

By: Jeffrey L. Fisher

Patricia A. Van Dyke
LAW OFFICE OF PATRICIA A. VAN
DYKE
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