Case Nos. 19-1407, 19-1429

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

C.W., a minor, by and through his parents B.W. and C.B.,

Plaintiff-Appellant/Cross-Appellee,

—v.—

DENVER COUNTY SCHOOL DISTRICT NO. 1,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
HONORABLE MARCIA S. KRIEGER
D.C. NO. 1:17-CV-02462-MSK-SKC

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES AND THE ARC OF THE UNITED STATES IN SUPPORT OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of:

Council of Parent Attorneys and Advocates

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE *AMICI*

Council of Parent Attorneys and Advocates (COPAA) is an independent, nationwide nonprofit organization of attorneys, advocates, and parents in forty-nine states and the District of Columbia who are routinely involved in special education matters throughout the country, and in protecting the rights of students with disabilities. COPAA's primary goal is to secure appropriate educational services for children with disabilities, echoing a Congressional finding that "[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1). Children with disabilities are among the most vulnerable in our society, and COPAA is particularly concerned with assuring a free appropriate public education (FAPE) as the Individuals with Disabilities Education Act (IDEA or Act) requires.[1]

The Arc of the United States (The Arc) is the nation's largest community-based organization of and for people with intellectual and developmental disabilities;

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amicus* and its members.

it consists of over 600 state and local chapters across the country. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes.

Amici are organizations dedicated to protecting the rights of students with disabilities in this Circuit and beyond. *Amici* have extensive experience enforcing rights under the ADA and Section 504 in the school context. Exhaustion of administrative remedies under IDEA is not required when parents seek damages as a remedy for their discrimination claims. And, in any event, the parents in this case, proceeding pro se, exhausted their claims that their son's right to a free appropriate public education were violated in a due process proceeding.

Appellants have consented to the filing of this brief; Appellees responded they were unable to consent prior to the filing of the brief and the accompanying Motion for Leave to File Amici Curiae brief; *Amici* adopt the Statement of the Case contained in Appellants' Brief at pp. 4-13.

SUMMARY OF ARGUMENT

The District Court incorrectly interpreted 20 U.S.C. §1415(*l*) to mean that students seeking monetary damages, relief not available under the IDEA, must nonetheless exhaust ADA and Section 504 claims even when the administrative

hearing officer is unable to grant the relief sought under Section 504 or the ADA and even when the student has exhausted an IDEA claim.[2]

The District Court found that C.W. failed to bring his non-IDEA claims before the administrative law judge in his IDEA related hearing and therefore failed to exhaust his administrative remedies. This ruling is at odds with the text of 20 U.S.C. section 1415(*l*) and the Supreme Court's guidance in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 187 L. Ed. 2d 46 (2017).

The plain text of the IDEA's exhaustion requirement clearly applies only to claims that seek "relief that is also available" under IDEA. 20 U.S.C. § 1415(*l*). Further, the statute's text makes clear that the IDEA due process proceeding needs to be exhausted only "to the same extent as would have been required if the action had been brought under [IDEA]." 20 U.S.C. § 1415(*l*). As such, IDEA only requires exhaustion of ADA/Section 504 claims seeking the same relief available under IDEA. Thus, the parents met their exhaustion requirement when they pursued their due process claims, pro se, and completed the administrative hearing and obtained a final adjudication of their claim that their son was denied a FAPE.

The elements of an ADA/Section 504 claim and an IDEA claim are different: with each statutory scheme allowing for different forms of relief. It is only when the

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[2] Appellants raise an Equal Protection Clause claim in addition to ADA/Section 504 claims. All references in the *amici* brief to Section 504 and ADA are meant to encompass the Equal Protection Clause claim.

relief sought is also available under IDEA that administrative remedies must be exhausted. Further, the District Court tried to follow the Supreme Court's *Fry* guidance that "in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint[,]" to determine whether the student's suit sought "relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" *Fry*, 137 S. Ct. at 752. Unfortunately, in doing so it applied this test incorrectly to a situation that was specifically carved out by the Court. At issue in C.W.'s case was whether the parents had to argue their ADA/Section 504 claims for monetary damages, within their IDEA administrative proceeding. However, the Supreme Court in *Fry* "[left] for another day a further question about the meaning of § 1415(*l*): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?" *Id*. at 752, n. 4.

Further, in this case, the parents did exhaust administrative proceedings. Although they were pro se and did not formally cite to the ADA and Section 504 in their complaint, they obtained a final decision on the merits of their claim that their son was denied a FAPE. The exhaustion requirement is a complex legal issue that even experienced attorneys find challenging. In many states, hearing officers do not have jurisdiction even to hear ADA and Section 504 claims. The lack of clarity

creates significant barriers to students—particularly those who are unrepresented through the administrative hearing stages. As exhaustion is not jurisdictional but rather a claims processing matter, the District Court erred in barring these parents, who had exhausted their IDEA FAPE claim, from vindicating their son's right to be free from discrimination under ADA/Section 504 and his right to equal protection under 42 U.S.C. § 1983.

ARGUMENT

I. THE PLAIN LANGUAGE OF 20 U.S.C. § 1415(*l*) MAKES CLEAR THAT FOR NON-IDEA CLAIMS SEEKING DAMAGES AS A REMEDY, EXHAUSTION OF ADA AND OTHER NON-IDEA CLAIMS IS NOT REQUIRED TO PROCEED TO COURT

A. ADA/Section 504 Claims Address Discrimination Not Actionable Under IDEA and Offer Remedies Not Available Under IDEA

IDEA offers federal funds to States in exchange for a commitment to furnish a FAPE "to children with certain disabilities, 20 U.S.C. § 1412(a)(1)(A), and establishes formal administrative procedures for resolving disputes between parents and schools concerning the provision of a FAPE." *Fry*, 137 S. Ct. at 749. As *Fry* recognized other federal statutes protecting the interests of school children with disabilities, including ADA and Section 504, are of equal importance. *Id.*

Courts must "attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and [Section 504] (most notably) on the other." *Id.* at 755. IDEA protects children and concerns only

their schooling. *Id.* (citing 20 U.S.C. § 1412(a)(1)(A)). IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way. By contrast, ADA and Section 504 "cover people with disabilities of all ages and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs." *Id.* at 756. "In short, the IDEA guarantees individually tailored educational serves, while [ADA/Section 504] promise non-discriminatory access to public institutions." *Id.*

Congress enacted Section 504 of the Rehabilitation Act, codified at 29 U.S.C. § 794, on September 26, 1973. It was the first federal civil rights law directed at protecting people with disabilities and paved the way for the passage of the laws now known as IDEA and ADA. Section 504 is an antidiscrimination statute that provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794. Section 504 prohibits discriminatory conduct, policies, and programs, access. It is important to note, though, that despite its having been a lead-up to the passage of IDEA, its protections

and procedures were maintained in light of the distinct purpose and procedures that Congress intended to continue to people (including students) with disabilities.

In 1990, Congress passed the Americans with Disabilities Act, a landmark law protecting the rights of individuals with disabilities. Title II barred discrimination by public entities, including school districts. The scope of ADA and Section 504 is much broader than that of IDEA. In fact, ADA includes a mandate to eliminate discrimination against individuals with disabilities, and it required the United States Department of Justice to promulgate regulations to implement ADA to that end. 42 U.S.C. § 12134. To achieve elimination of discrimination, ADA and Section 504 both include the ability to pursue damages. Damage claims serve two purposes: damages make victims of discrimination whole, and damages also provide an incentive to eliminate unlawful discrimination.

IDEA and ADA/Section 504 thus provide purposely distinct rights and scopes of remedy. *See, e.g., Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 25 (1st Cir. 2019) (refusal to allow use of service dog "involves the denial of non-discriminatory access to a public institution, irrespective of school district's FAPE obligation"); *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013) (denial of real time transcription actionable under ADA even if not a FAPE violation); *E.F. v. Napoleon Cmty Sch.*, 371 F. Supp. 3d 387, 407 (E.D. Mich. 2019) (no exhaustion required because student sought compensatory damages available only under ADA/Section

504 for refusal to allow student to bring service animal to school)); *A.F. v. Portland Pub. Sch. Dist.*, No. 3:19-cv-01827, 2020 U.S. Dist. LEXIS 61380, at *10-11 (D. Or. Apr. 7, 2020) (student seeking access under ADA/Section 504 to medically necessary services to treat autism as a reasonable accommodation not subject to IDEA's exhaustion requirement); *A.K.B. v. Indep. Sch. Dist.*, 19-cv-2421 (SRN/KMM), 2020 U.S. Dist. LEXIS 52688, at *14-15 (D. Minn. Mar. 26, 2020) (student seeking damages for failure to accommodate asthma resulting in lifelong brain injury not required to exhaust administrative remedies); *Ga. Advocacy Office v. Georgia*, No. 1:17-cv-03999, 2020 U.S. Dist. LEXIS 58721, at *27-28 (N.D. Ga. Mar. 19, 2020) (exhaustion not required because stigmatization and isolation in violation of ADA was gravamen of complaint).

B. Congress Chose Not to Impose an Exhaustion Requirement on 504/ADA claims that Seek Different Relief from IDEA; Imposing One under IDEA Undermines Important Protections against Disability Discrimination

Unlike IDEA, which requires claims be heard by an independent hearing officer prior to any suit being brought before a state or federal court, Section 504's federal regulations do not require administrative due process exhaustion prior to bringing suit in federal court. *Compare* 20 U.S.C. § 1415(f)(3)(A) *with* 34 C.F.R. § 104.36 (2015). There are also other significant procedural differences in bringing cases under IDEA and Section 504. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc). For example, while documents and experts need to be

exchanged at least five days before an IDEA due process hearing, there is no such requirement for a Section 504 hearing. *Compare* 20 U.S.C. § 1415(f)(2) *with* 34 C.F.R. § 104.36.

Congress was familiar with IDEA, yet it chose not to require exhaustion of administrative remedies for every ADA or Section 504 claim involving public elementary and secondary education. Just as it provided for all Title I ADA claims to be filed first with EEO agencies, it could have required all Title II ADA claims involving public elementary and secondary education claims to be brought first in the same due process proceedings provided for IDEA claims. It chose not to do so, but instead later amended IDEA[3] to provide that ADA claims, like Section 504 claims, could be brought separately and without IDEA exhaustion unless they seek the same relief available under IDEA. *See* Individuals with Disabilities Education Act Amendments Act of 1997, 105 Pub. L. No 17, 111 Stat. 37.

[3] For similar reasons, IDEA does not require exhaustion of claims arising under other civil rights laws or state laws, even for incidents causing harm to students with disabilities that occurred within the school setting. *See Graham v. Friedlander*, 223 A.3d 796 (Conn. 2020) (IDEA did not preclude state law negligence claims for lack of exhaustion); *Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 228 (5th Cir. 2019) (although sexual harassment claim under Title IX requires denial of educational opportunity, plaintiff sought relief irrespective of IDEA's FAPE obligations and exhaustion not required); *F.H. v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014) (student did not have to exhaust claims of physical, verbal and sexual abuse under Section 1983).

But beyond that, ADA regulations do not set out any due process procedures for ADA claims. Instead, apart from § 1415(*l*), Congress used the same format for ADA education claims as it did with Title VI and Title IX of the Civil Rights Act, which bar discrimination on the basis of race, national origin, and sex, and allow individuals with disabilities to bring suit in federal court directly, without any administrative exhaustion. *See Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement")*; Cannon v. Univ. of Chicago,* 441 U.S. 677, 707 n.41 (1979) (noting Title VI does not provide for exhaustion of administrative remedies).

Because ADA and Section 504, as civil rights statutes, are designed to protect all individuals with disabilities, they not only cover all students who are eligible for IDEA, but they also cover other students with disabilities, students who do not need special education under IDEA. Thus, while students who are IDEA-eligible generally are also protected by ADA and Section 504 by virtue of having a disability that significantly impairs their ability to learn, there are many students with disabilities under ADA/Section 504 who do not need special education and, therefore, are not eligible for IDEA.

II. THE DISTRICT COURT'S DECISION CONFLICTS WITH THE PLAIN LANGUAGE OF 20 U.S.C. § 1415(*l*) AS WELL AS ITS STATUTORY PURPOSE

A. *Fry v. Napoleon Community Schools* Clarified that the Plain Language of 20 U.S.C. §1415(*l*) Controls

The language of 20 U.S.C. § 1415(*l*) reads:

> Nothing 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. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Id. Prior to *Fry*, the Supreme Court had never interpreted the IDEA's exhaustion provision.

Fry reaffirmed that the federal courts must begin interpretation, "as always, with the statutory language at issue." 137 S. Ct. at 753; *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718 (2017); *Millbrook v. United States*, 569 U.S. 50, 56 (2013); *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 611 (3d Cir. 2015). Federal courts must also interpret statutes in context, "and with a view to their place in the overall statutory scheme." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1748 (2019) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *see also King v. Burwell*, 135 S. Ct. 2480, 2492 (2015); *G.L.*, 802 F.3d at 618 (interpreting IDEA's statute of limitations). This approach "calls on the

judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts." *Heuso v. Barnhart*, 948 F.3d 324, 333 (6th Cir. 2020) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012)).

When construing statutory exhaustion provisions, federal courts must be particularly careful in their interpretation. The *Fry* Court cited to *Ross v. Blake*, 136 S. Ct. 1850 (2016), in its discussion of the appropriate interpretation of § 1415(*l*). *See Fry*, 137 S. Ct. at 753. *Ross*'s discussion of judicial interpretation of statutory exhaustion provisions is therefore particularly instructive.

Ross interpreted the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a). The PLRA requires that inmates exhaust "such administrative remedies as are available" prior to litigating claims related to prison conditions. 136 S. Ct. at 1855. The Fourth Circuit had held that an inmate satisfied the PLRA because its "exhaustion requirement is not absolute." *Id.* at 1856 (quoting *Ross v. Blake*, 787 F.3d 693, 698 (4th Cir. 2015)). The Fourth Circuit held that under "certain special circumstances," a prisoner need not exhaust, "[i]n particular, that was true when a prisoner 'reasonably—even though mistakenly—believed that he had exhausted his remedies.'" *Id.* (quoting 787 F.3d at 695). The Court granted certiorari and vacated the judgment of the Court of

Appeals because "[s]tatutory text and history alike foreclose the Fourth Circuit's adoption of a 'special circumstances' exception" to exhaustion. *Id.*

In *Ross,* the Supreme Court held the Court of Appeals adopted an "extra-textual" exception to the exhaustion requirement, stating that "the statute speaks in unambiguous terms opposite to what the Fourth Circuit said." *Id.* The PLRA contains a mandatory exhaustion provision, with one qualifier—remedies must be available to the inmate. The Court of Appeals erred in using a "special circumstances" test.

In a discussion markedly pertinent to this case, the Court noted:

> No doubt, judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions . . . . But a statutory exhaustion provision stands on a different footing. There, Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion . . . . Time and again, this Court has taken such statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements.

Id. at 1857 (citations omitted).

This strict statutory interpretation rule applies regardless of which party benefits. The Supreme Court has "thus overturned judicial rulings that imposed extra-statutory limitations on a prisoner's capacity to sue—reversing, for example, decisions that required an inmate to demonstrate exhaustion in his complaint, permitted suit against only defendants named in the administrative grievance, and

dismissed an entire action because of a single unexhausted claim" *Id.* at 1857 n.1 (citing *Jones v. Bock*, 549 U.S. 199, 203 (2007)). Crafting and imposing rules not required by the PLRA "exceeds the proper limit on the judicial role." *Jones*, 549 U.S. at 203. Here, the District Court "exceed[ed] the proper limit on the judicial role" by imposing extra-statutory limitations on the parents' right to vindicate their child's right to be free of discrimination in the school setting.

B. The District Court's Decision Is Inconsistent with the Statutory Language, IDEA's Statutory Scheme as a Whole, and the Legislative History of 20 U.S.C. § 1415(*l*)

Fry addressed "confusion in the courts of appeals as to the scope of §1415(*l*)'s exhaustion requirement." *Fry*, 137 S. Ct. at 752. In *Fry*, E.F. and her parents alleged that the school district violated the ADA and Section 504 by refusing reasonable accommodations regarding her use of a service dog and otherwise discriminated against E.F. on the basis of her disabilities. E.F. sought declaratory relief that the districts had violated the ADA and Section 504 and money damages to compensate her for emotional distress, embarrassment, and mental anguish. *Id.* at 752 (citing *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 627 (6th Cir. 2015), *rev'd* 137 S. Ct. 743 (2017)). The Sixth Circuit had held that E.F. had to exhaust administrative remedies because, although E.F. did not allege that the school violated IDEA, the "genesis and manifestations" of the injury were educational. *Fry v. Napoleon Cmty. Schs.*, 788 F.3d

622, 627 (6th Cir. 2015) , *rev'd* 137 S. Ct. 743 (2017) (quoting *Charlie F. by Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996)), *rev'd*, 137 S. Ct. 743 (2017).

Fry rejected this injury-centered approach to interpretation of Section 1415(*l*), because it ignores the explicit text of §1415(*l*). Specifically, "Section 1415(*l*) requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when **(but only when)** her suit 'seek[s] relief that is also available' under the IDEA." *Fry*, 137 S. Ct. at 752 (emphasis supplied).

To meet the §1415(*l*) standard, a suit must seek relief for a denial of FAPE as defined by IDEA, "because that is the only 'relief' that IDEA makes available." *Id.* "The statutory language asks whether a lawsuit in fact 'seeks' relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit 'could have sought' relief available under the IDEA (or what is much the same, whether any remedies 'are' available under that law)." *Id.* at 755.

Fry explains that relief is "available" under a statute when it is "accessible or may be obtained" under that law. *Id*. at 753 (quoting *Ross*, 136 S. Ct. 1858, in which the Court, in turn, quoted *Booth v. Churner*, 532 U.S. 731, 737-38 (2001) and Webster's Third New International Dictionary 150 (1993)). The scope of § 1415(*l*), therefore, is limited to "the circumstances in which the IDEA enables a person to obtain redress (or, similarly, to access a benefit))." *Id.* Here, C.W. did not seek bring

his ADA and Section 504 claims to seek relief for denial of FAPE and did not seek a remedy available under IDEA. He had filed an IDEA claim to seek relief for denial of FAPE. Applying the plain statutory language, the exhaustion requirement simply did not apply.

Moreover, the statutory scheme as a whole precludes the District Court's interpretation because it produces a substantive effect that is not compatible with the rest of the law. *King*, 135 S. Ct. at 2492. A court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* (quoting *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 559 U.S. 280, 290 (2010)). The legislative history of IDEA, Section 504, and ADA make clear that Congress understood that there would be non-IDEA legal claims under Section 504 and ADA that did not require exhaustion of IDEA administrative remedies.

The IDEA cannot provide IDEA relief (e.g. educational placement and services or reimbursement for educationally related expenses) if no IDEA claim has been made. IDEA hearing officers also cannot provide non-IDEA relief (e.g. monetary damages to remedy discrimination) in IDEA proceedings. This, then, is precisely the type of situation the *Fry* Court envisioned: whether exhaustion would be required where a student sought non-IDEA relief in a case where the District both denied FAPE under the IDEA and discriminated under Section 504 and the ADA. While conceding that the student

had put forth all of the evidence necessary to demonstrate the IDEA denial (which facts also demonstrate the discrimination the student would allege under Section 504 and the ADA), the District Court erroneously dismissed C.W.'s antidiscrimination claims on the grounds that the student failed to argue the legal theories relating to Section 504 and the ADA before the IDEA hearing officer.

II. MISAPPLYING 20 U.S.C. § 1415(*l*) TO REQUIRE EXHAUSTION FOR ALL EDUCATIONALLY-RELATED DISCRIMINATION CLAIMS UNLAWFULLY CONSTRICTS THE CIVIL RIGHTS OF INDIVIDUALS WITH DISABILITIES WHO ARE ENROLLED IN PUBLIC SCHOOLS

A. Congress Passed §1415(*l*) to Provide Greater Protections to IDEA-Eligible Students, Not to Detract from Their Civil Rights

The legislative history of IDEA, Section 504, and ADA make clear that Congress understood that, while there was some overlap between these three statutes, the special education law, IDEA, and the antidiscrimination laws, Section 504 and ADA, were complementary and not identical. Thus, there would be non-IDEA legal claims under Section 504 and ADA that would not require exhaustion of IDEA administrative remedies.

Two years after it passed Section 504, Congress enacted the Education for All Handicapped Children Act (EHA)[4], IDEA's predecessor, which required education of all students with disabilities. P.L. 94-142 (1975). As discussed above, Congress

4. For simplicity, this Brief generally refers only to IDEA. *See Fry*, 137 S. Ct. at 750.

passed this law because of its concern that students with disabilities were either being excluded from school or "sitting idly in regular classrooms." *See Board of Education v. Rowley*, 458 U.S. 176, 179 (1982).

The Court restricted the civil rights of IDEA-eligible children to bring non-IDEA claims in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* involved a student, who, after bringing identical claims under the EHA and Section 504, had been awarded attorney's fees under Section 504. The Court held that the EHA provided the exclusive avenue of relief for appropriate education claims. Thus, the plaintiff in *Smith* could not assert a claim for attorney's fees either under Section 504 or under 42 U.S.C. § 1983. The Court "emphasize[d] the narrowness of our holding," and specifically stated that it did not apply where "the EHA is not available or where § 504 guarantees rights greater than those available under the EHA." *Id.* at 1021.

Congress swiftly responded with Handicapped Children's Protection Act of 1986 (HCPA), so as to "to reaffirm . . . the viability of Section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children," and to restore attorney's fees for prevailing parents. H.R. Rep. No. 296, 99th Cong., 1st Sess. 4, 6-7 (1985); *see also* S. Rep. No. 112, 99th Cong., 1st Sess. 2, 15 (1985).

In introducing HCPA, Senator Weicker explained that "the Court has not only misinterpreted the congressional intent underlying the EHA, but it has also frustrated

Congress' intent in enacting section 504 and 1983 which I and many members of this body assumed protected the civil rights claims of handicapped children." 130 Cong. Rec. S9078 (daily ed. July 24, 1984). He said that the legislative record and "a decade of unbroken executive branch interpretation. . . by the Nixon, Ford, Carter, and Reagan administrations—reflect a consistent assumption that Public Law 94-142 and Section 504 were intended to be **freestanding, complementary—but not identical**—legislative acts." *Id.* (emphasis added). He further noted that when Congress added 505(b) of the Rehabilitation Act, "there was no exception made for handicapped children seeking an education." *Id.* He specifically noted "the section 504 regulations defines [sic] several crucial terms—that is, appropriate education—more broadly than does Public Law 94-142." *Id*. at S9079.

Thus, HCPA unequivocally placed a single restriction on non-IDEA litigation under Section 504 and ADA and requires potential litigants to exhaust administrative remedies only when seeking relief that is **also available under IDEA.**

As the Supreme Court observed in *Fry,* the HCPA "overturned *Smith's* preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement." 137 S. Ct. at 750. The Court found that the hearing officer's role was limited to enforcing "the child's substantive right to a FAPE." *Id.* at 754. Therefore, if "the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required." *Id.* As the Court stated, in such a case, "A

hearing officer, as just explained would have to send [the student] away empty-handed." *Id.* And that is the case with the damages sought here; the hearing officer has no power to award damages and would send the student away empty-handed. Because damages are not an available remedy under IDEA, C.W.'s damages claim is not a FAPE claim but instead is a discrimination claim.

B. Federal Courts' Misapplication of 20 U.S.C. § 1415*(l)* to Deprive Students with Disabilities of Access to ADA/Section 504 Remedies Violates the Federal Courts' Unflagging Obligation to Exercise Jurisdiction of Federal Constitutional and Statutory Claims

Apart from public school students, individuals with disabilities can file claims under Section 504 or the ADA without worrying that an administrative exhaustion requirement will delay a court's exercise of its original jurisdiction under 28 U.S.C. § 1331. Courts have recognized that a plaintiff asserting Section 504 claims need not be exhausted because an administrative process could not provide the requested relief.[5] *Freed v. Consol. Rail Corp.*, 201 F.3d 188, 192 (3d Cir. 2000) (referencing cases from the First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits). Similarly, Title II of the ADA does not require exhaustion of remedies. *See* 28 C.F.R. § 35.172, App. A (according to United States Department of Justice analysis, a Title II "complainant may elect to proceed with a private suit at any time").

[5] The 1978 amendments to the Rehabilitation Act of 1973 incorporated the "remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964" for enforcing Section 504. 29 U.S.C. § 794a(a)(2).

Although the HCPA restored the right of public school students who were dually covered by IDEA and Section 504 to bring Section 504 and other civil rights claims that had been eliminated by *Smith,* 468 U.S. at 1021, the District Court's decision, if upheld, would require every public student with a disability to exhaust administrative remedies in every case, regardless of the merits of such an IDEA case. This approach only causes a denial or a delay of aggrieved students with disabilities access to court. This misapplication of §1415(*l*) is erroneous. Federal courts "have no more right to decline the exercise of jurisdiction, which is given, than to usurp that which is not given. The one or the other would be treason to the [C]onstitution." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.). Indeed, federal courts have a "virtually unflagging obligation" to exercise jurisdiction of properly presented federal constitutional and statutory claims. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

As discussed above, HCPA's plain language makes clear that exhaustion of IDEA administrative remedies is not required for all ADA or Section 504 claims involving public school students, but only in the limited scenario where a student's ADA and Section 504 claims are, in fact, also IDEA claims and seek relief that is already available under IDEA. *See* 20 U.S.C. § 1415(*l*). Indeed, this was done because "Congress understood that parents and students affected by the IDEA would

likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under . . . other federal laws[,]" and, as such, the only time 20 U.S.C. §1415*(l)* was intended to apply was, specifically, when "that filing of a civil action under [other] laws seek[ing] relief that is also available under" the IDEA. *See Payne*, 653 F.3d at 872.

As the Supreme Court has observed, "it is for Congress, not this Court, to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419 (1971). Nor is it for any court to do so, as the District Court did in this case. Congress was clear that HCPA did not strip students of their rights under ADA and Section 504 and did not create a new exhaustion requirement for all ADA and Section 504 claims. It did not grant courts the ability to transform any claim by any public school student with a disability into an IDEA claim because the claim had something to do with education and the student had a disability of some kind. It only required students to exhaust IDEA rights to the extent that the provision of an IDEA FAPE related to antidiscrimination claims.

C. Section 1415(*l*) Gives Parents the Ability to Bring Section 504 or ADA Claims in Addition to IDEA Claims

To bar C.W. from proceeding with his ADA/Section 504 claims for failure to exhaust a different legal claim is contrary to the express purpose of the HCPA, which added the exhaustion requirement as a statutory fix for the Court's decision in *Smith*, as discussed above. Below, C.W. has exhausted his IDEA claims. He has raised all of the facts underlying his IDEA theories. In his IDEA administrative hearing, C.W.

also raised all of the facts that would constitute violations under additional antidiscrimination statutes over which the IDEA hearing officer would have no authority to grant relief. Because § 1415(*l*) "reaffirm[ed] . . . the viability of section 504, 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children," H.R. Rep. 296, at 4, there is no legal basis for barring C.W. from proceeding with his separate Section 504 or ADA claims for money damages after he obtained a decision from the hearing officer on his IDEA claim. To say that by exhausting C.W.'s IDEA administrative hearing process but not arguing entirely separate legal theories, which would have no place before the IDEA hearing officer, C.W. has waived those claims, flies in the face of the entire statutory structure.

Section 1415(*l*) only requires exhaustion for claims that seek "relief that is also available under this chapter." There can be no dispute that the monetary damages that Plaintiff seeks from this complaint are not available under IDEA but may be available under Section 504 or ADA. *Chambers v. Sch. Dist. of Phila. Bd. of Educ.,* 537 Fed. Appx. 90, 96 (3d Cir. 2013); *Crocker v. Tennessee Secondary Sch. Athletic Ass'n,* 908 F2d 382, 386 (6th Cir. 1992). While money damages are not available in routine IDEA claims, they may be available in those cases that meet the specific requirements for damages under Section 504 or the ADA. *See, e.g., Chambers,* 537 Fed. Appx. at 96-97 (finding genuine issue of material fact under

Section 504 as to whether school district was deliberately indifferent to student with disabilities).

III. IN ANY EVENT, THE PRO SE PARENTS MET THE EXHAUSTION REQUIREMENT BY OBTAINING A DECISION ON THE MERITS OF THEIR FAPE CLAIM.

Here, the record reflects that the parents, without legal representation, obtained a decision from the hearing officer on the issue of FAPE for their son by reaching a decision on their IDEA claim. *Fry* makes clear that a FAPE denial "is the *sine qua non*" of the IDEA administrative process. *Fry,* 137 S. Ct. at 754 (emphasis in original). It is the FAPE claim that requires exhaustion. *Id.* Thus, the hearing officer's decision fulfilled the objective of the exhaustion requirement.

Here, the adjudicating court has the benefit of the record developed at the administrative hearing on the IDEA FAPE claim. In *Doucette,* the First Circuit found the parents had met the exhaustion requirement for their § 1983 claims by obtaining IDEA relief through the administrative process although they had not needed to go through a hearing to get the relief. 936 F.3d at 30-31. The First Circuit also noted that the district court had the benefit of the record of an earlier hearing between the parties. *Id.* at 32, n.22. It was entirely unnecessary for the parents to go through a second hearing on ADA, Section 504, and Section 1983 claims after they obtained legal counsel.

The Supreme Court has recognized that parents often have no alternative but to proceed pro se to enforce rights under IDEA, and that they have the right to do so, *See Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516, 535 (2007) (holding parents have the right to proceed unrepresented in federal court to vindicate their IDEA rights). *Amici* know well that many parents are unrepresented at due process hearings.

Amici are concerned that the District Court's decision imposes unreasonable and onerous pleading requirements on *pro se* parents seeking to vindicate their students' rights under IDEA and ADA/Section 504. The question of whether ADA/Section 504 claims are appropriately included in due process complaints is confusing even to experienced lawyers, as many states do not give their hearing officers jurisdiction to determine ADA/Section 504 claims. *See also* Perry A. Zirkel, *Impartial Hearings for Public School Students Under Section 504: A State-by-State Survey*, 279 Ed. L. Rep. 1, 6 (June 21, 2012) (only 41% of states allow parents to bring Section 504 claims in administrative proceedings under at least some circumstances).

This Court has held that it is appropriate to afford latitude to pro se litigants. *See Faircloth v. Raemisch*, 692 Fed. App'x 513, 519 (10th Cir. 2017) (for giving "informalities of form" in motion to proceed in forma pauperis for pro se litigant). In *Fry,* the Supreme Court cautioned against a "magic words" approach to

exhaustion under § 1415(*l*). 137 S. Ct. at 755. Thus, "the exhaustion inquiry does not ride on whether a complaint includes (or, alternatively omits) the precise words 'FAPE' or 'IEP.'" *Id.* Similarly, the "magic words" approach, requiring the use of the term "ADA," or "Section 504," or "Section 1983" in a due process complaint to establish exhaustion would be wrong, especially when parents are pro se.

Finally, the recent Supreme Court jurisprudence on exhaustion of administrative remedies teaches that exhaustion of statutory claims is not jurisdictional. Thus, last year, the Supreme Court held that administrative exhaustion, at least under Title VII, it is merely a "claims processing rule" and is not jurisdictional. *Fort Bend County v. Davis*, 139 S. Ct. 1843, 1846 (2019).

Here, the District Court erred in dismissing C.W.'s claims for failure to exhaust when his parents had in fact exhausted his FAPE claim in a due process proceeding.

CONCLUSION

For the reasons stated above, this Court should reverse the District Court's decision, so that C.W.'s claims of intentional discrimination under Section 504 or the ADA can be decided on their merits, as specifically provided by § 1415(*l*), which overturned *Smith* and made it possible for parents to pursue their independent but complementary ADA, Section 504, and Section 1983 claims.

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Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,440 words.

/s/ Ellen Marjorie Saideman
Ellen Marjorie Saideman

CERTIFICATE OF SERVICE

I certify that on May 7, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF.

/s/ Ellen Marjorie Saideman
Ellen Marjorie Saideman

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) if required to file additional hard copies, that the ECF submission is an exact copy of those documents;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Bit Defender Version 6.2.23.932 (last updated May 7, 2020) and according to the program are free of viruses.

Respectfully Submitted,
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