No. 15-1804

United States
Court of Appeals for the Third Circuit

A.D. and R.D., individually
and on behalf of their son, S.D., a minor,
Plaintiffs-Appellants,
v.
HADDON HEIGHTS BOARD OF EDUCATION,
***Defendant-Appellee*.**

On Appeal from the United States District Court for the District of New Jersey No. 14-cv-01880

BRIEF AMICI CURIAE OF COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, EDUCATION LAW CENTER IN SUPPORT OF PLAINTIFFS-APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
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No. 15-1804 Caption:*A.D. and R.D. Individually and on behalf of their son, S.D. v. Haddon Heights Board of Education*
Pursuant to FRAP 26.1
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1. Amici is not a publicly held corporation or other publicly held entity;

2. Amici have no parent corporations;

3. Amici do not have 10% or more of stock owned by a corporation.

/s/ David J. Berney
David J. Berney

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INTERESTS OF AMICI CURIAE[1]

COPAA is a national not-for-profit organization for students with disabilities and their families, attorneys, advocates, and related professionals. COPAA provides trainings and support to its members to assist them in obtaining the free appropriate public education (FAPE) to which children with disabilities are entitled under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.* COPAA's membership also includes students, their families, and advocates whose rights are violated, and who seek relief, under Section 504 and/or the ADA for claims of discrimination or retaliation, and so the organization also works to safeguard civil rights guaranteed under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

ELC is a non-profit law firm established in 1973 to advocate on behalf of public school children, particularly at-risk students, students with disabilities, and students of color, in accessing equal and adequate educational opportunities under state and federal law. ELC uses a multi-pronged strategy in advancing this goal,

[1] Pursuant to this Federal Rule of Appellate Procedure 29(4)(E), no part of this brief was authored by counsel for any party, and no person or entity other than *Amicus* listed here or its members made any monetary contribution to the preparation or submission of the brief.

including the use of research, public education, technical assistance, advocacy and legal representation. Since its founding, ELC has provided a full range of direct legal services to hundreds of parents and students in public education cases, the vast majority of which involve students with disabilities.[2]

The implications of the Supreme Court's *Fry* decision are of vital importance to COPAA and ELC because its members and clients include students who are not eligible under IDEA, but seek accommodations or equal access to their school programs and/or facilities under Section 504/ADA. As such, COPAA and ELC have a compelling interest in the clarification of exhaustion requirements for educational claims raised under the ADA, Section 504, and IDEA.

Both parties consent to the filing of this brief and the Court issued an Order (Doc. 003112666971) on July 5, 2017 granting *Amici's* Motion to File.

SUMMARY OF ARGUMENT

Amici are profoundly concerned that parents and children should not be required to waste scarce time, money, and other resources on IDEA due process hearings when they raise allegations of discrimination or retaliation under Section 504/ADA in the absence of IDEA claims. Compelling parents and children to pursue IDEA due process hearings will delay ultimate resolution of claims by months, and

[2] A complete Statement of *Amici's* Interests may be found in the Motion for Leave to File Brief of Amici Curiae (Doc. 003112664423) filed June 30, 2017.

even years, during which time students, parents, and their legal advocates may continue to experience violations of their federal rights. Further, there are many instances where IDEA simply *cannot* provide the requested or requisite relief. Accordingly, Amici Curiae respectfully request that this Court find on remand that exhaustion of administrative remedies is not warranted in this case.

ARGUMENT

I. S.D. CANNOT SEEK RELIEF UNDER IDEA

Section 1415(*l*) requires that a plaintiff exhaust IDEA's procedures prior to filing an action under the ADA, the Rehabilitation Act, or similar laws when (and only when) her suit "seek[s] relief that is also available" under IDEA. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 752 (2017).[3] As the Supreme Court held in *Fry*: "The only relief that an IDEA officer can give—hence the thing a plaintiff must

[3] The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 (HCPA), now codified at 20 U.S.C. § 1415(*l*), states:

> 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.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, 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.

20 U.S.C. § 1415(*l*), as amended (alterations in original).

seek in order to trigger §1415(*l*)'s exhaustion rule—is relief for the denial of a FAPE." *Id.* at 753.[4] Therefore, as Section 1415(*l*) and the Supreme Court's holding in *Fry* make clear, exhaustion of IDEA administrative remedies for Section 504/ADA is required only where the claims implicate a denial of FAPE and relief is available under IDEA. *Id.*; *see also Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011).

The Supreme Court recently further clarified the term "available" in the context of a statutory provision under the Prison Litigation Reform Act that mandates administrative exhaustion. *Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016). The Court explained that "available" means that which "is 'capable of use for the accomplishment of a purpose,' and that which is 'accessible or may be obtained.'" *Id.* Notably, the Court focused on the present tense, whether relief *is* available, not whether relief *might be* available under some hypothetical. *Accord with Payne*, 653 F.3d 863.

Accordingly, under *Ross*, relief is only available under IDEA if a remedy can in fact be obtained under IDEA. *Id.* And in *Fry*, the Supreme Court further explained that the Individualized Education Program (IEP) is the vehicle for obtaining IDEA

[4] Critically, *Fry* dealt with a child eligible under IDEA and Section 504/ADA, who brought only Section 504/ADA claims. In contrast, here, all parties agree S.D. was not IDEA eligible, and therefore, cannot assert IDEA FAPE claims.

FAPE and that "meaningful access based on her educational needs" is the yardstick for measuring the appropriateness of IDEA FAPE. *Fry*, 137 S. Ct. at 753. Thus, in accordance with *Ross* and *Fry*, a child, like S.D.—who is not even eligible for an IEP under IDEA and who has only brought claims under Section 504/ADA arising from the for denial of disability-related accommodations, disability-based discrimination, and for retaliation in the form of modifying the school's attendance policy—has no way to "access" or "obtain" relief for a denial of FAPE under IDEA.[5]

To settle any question that non-IDEA eligible students like S.D. need not exhaust IDEA administrative remedies, the Supreme Court warned against ALJs asserting jurisdiction in cases that do not implicate FAPE:

> In the IDEA's administrative process, a FAPE denial is the *sine qua non*. Suppose that a parent's complaint protests a school's failure to provide some accommodation for a child with a disability. If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. **There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might *require* the accommodation on one of those alternative grounds. See *infra*, at ___, 197 L. Ed. 2d, at 62. But still, the hearing officer cannot**

[5] Furthermore, legal scholars have uniformly agreed that § 1415(*l*) does not apply to 504-only claims. *See* Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but not by the IDEA*, 44 Conn. L. Rev. 259 (2011); Mark C. Weber, *A New Look at 504 and the ADA in Special Education Cases*, 16 Texas J. on C. L. & C. R. 1, 26 (2010).

> **provide the requested relief.** His role, under the IDEA, is to enforce the child's "substantive right" to a FAPE. *Smith,* 468 U. S., at 1010, 104 S. Ct. 3457, 82 L. Ed. 2d 746. And that is all.

Id. at 754 (emphasis added).

Therefore, if an accommodation is needed to fulfill IDEA's FAPE requirement through the child's IEP then 1415(*l*) requires administrative exhaustion. *Id.* But whereas, here, S.D., a child undisputedly ineligible under IDEA, brought claims to address a denial of accommodations for his disability-related absences and for discrimination and retaliation arising from his disability and his parents' advocacy for his protected rights, those claims squarely fall within the purview of 504/ADA and are incapable of IDEA remediation through an IEP (he does not have one). Consequently, under *Fry*, an ALJ would be unable to provide relief to S.D. and his parents, and therefore, exhaustion of administrative remedies would be futile.

II. THE SUPREME COURT'S GRAVAMEN OF THE COMPLAINT ANALYSIS IN *FRY* IS INAPPROPRIATE WHEN A CHILD IS INELIGIBLE UNDER IDEA

Because S.D. is undisputedly ineligible under IDEA, this Court's inquiry on the question of exhaustion is complete—S.D. does not have to exhaust his Section 504/ADA claims. This Court does not, and should not, delve into the further analysis of determining "the gravamen of the complaint" utilizing the hypothetical questions set forth in the latter portion of the *Fry* decision. *Fry*, 137 S. Ct. 743 at 755. As the Supreme Court explained, the analysis for determining whether Section 504/ADA

claims are really FAPE claims *only* applies when a student is dually covered under IDEA and Section 504/ADA but chose to pursue claims only under the latter statutes. *Id.* at 757 n. 10 ("[T]hese [hypothetical] questions help determine whether a plaintiff who has chosen to bring a claim under Title II or §504 instead of IDEA—and whose complaint makes no mention of a FAPE—nevertheless raises a claim whose *substance* is the denial of an appropriate education."). Accordingly, utilizing the hypothetical questions is unwarranted in this case.

CONCLUSION

For the foregoing reasons, COPAA and ELC respectfully request that the Court find that exhaustion of administrative remedies is not required in this case.

Respectfully submitted,
__/s/ David J. Berney__

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COMBINED CERTIFICATIONS

I, David J. Berney, hereby certify that I am a member of the bar of this court.

I further certify that this brief complies with the page limitation of the Court's Order because it is 7 pages in length.

I further certify that the text of this electronic brief is identical to the text in the paper copies.

I further certify that a virus detection program, Malware Bytes, an anti-virus software, has been run on the electronic file and no virus was detected.

I further certify that on this date, I caused a Copy of Amici Curiae's Brief in Support of Appellants to be deposited in the Court's ECF system and I understand that it will automatically be served on counsel listed below:

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