20-2084

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

T.R., a minor, individually, by and through her parent, Barbara Galarza, and on behalf of all others similarly situated; BARBARA GALARZA, individually, and on behalf of all others similarly situated; A.G., a minor, individually, by and through his parent, Margarita Peralta, and on behalf of all others similarly situated; MARGARITA PERALTA, individually, and on behalf of all others similarly situated; L.R.; D.R., a minor, individually, by and through her parent, Madeline Perez, and on behalf of all others similarly situated; J.R.; MADELINE PEREZ, individually, and on behalf of all others similarly situated; R.H., a minor, individually, by and through his parent, Manqing Lin, and on behalf of all others similarly situated; MANQING LIN, individually, and on behalf of all others similarly situated,

Plaintiffs,

—v.—

SCHOOL DISTRICT OF PHILADELPHIA,

Defendant-Appellee,

L.R., D.R. and their mother, Madeline Perez,
and R.H. and his mother Manqing Lin,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. AND NATIONAL DISABILITY RIGHTS NETWORK IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

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

Council of Parent Attorneys and Advocates
National Disability Rights Network

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 *AMICI CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to those individuals 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).

COPAA's primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy. COPAA provides

[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 *Amici* and their members.

resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education such children are entitled to under the Individuals with Disabilities Education Act (IDEA or Act), 20 U.S.C. § 1400 *et seq*.[2]

COPAA brings to the Court the unique perspective of parents, advocates, and attorneys for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cmty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.

The National Disability Rights Network (NDRN) is the non-profit membership association of protection and advocacy (P&A) agencies that is located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. In addition, there is a P&A / CAP affiliated with the Native American Consortium which includes

[2] "Improving educational results for children with disabilities is an essential element of [the U.S.] 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).

the Hopi, Navajo and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in various settings. The P&A system is the nation's largest provider of legally based advocacy services for persons with disabilities.

NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination. Education cases make up a large percentage of the P&A networks' casework. P&A agencies handled close to 14,000 education matters in the most recent year for which data is available. These education matters include claims under IDEA, Section 504, and the ADA.

NDRN has filed as amicus curiae in the United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009); *Bd. of Educ. v. Tom F.*, 552 U.S. 1 (2007); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), and in numerous cases in the United States Courts of Appeal.

Many children with disabilities experience significant challenges. Whether these children eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education (FAPE) guaranteed under IDEA and other educational policies. Indeed, the core of IDEA is its codified goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living .. . ." *Id*. at § 1400(d)(1)(A).

IDEA embodies substantial procedural safeguards for students and their parents, including the right to equal and meaningful participation in the educational planning process. *Amici* write to explain the centrality of meaningful parental participation to the provision of a FAPE. Congress built a series of procedures into the statute and understood the importance of a parent's role and experience in the educational (and educational planning) process. *Amici* also provide this Court with information that is key to the experience of parenting a child with unique needs through the special education process, and how various statutes' exhaustion requirements (as implemented by various Local Educational Agencies) negatively impact their ability to participate in the due process protections of the IDEA and Section 504. With this information, this court can evaluate whether the practical

implementations of these exhaustion practices align with Congress' underlying intent for the remedial statutes.

Counsel for appellants and for appellee have consented to the filing of this brief.

SUMMARY OF ARGUMENT

IDEA, enacted to ensure that students with disabilities obtain a FAPE, requires that parents are partners with school districts in developing Individualized Educational Programs (IEPs) for their children. Parental participation is integral to the provision of FAPE under IDEA. The decision below significantly undermines IDEA by negating the participation of parents with limited English proficiency. The decision then exacerbates the error by interpreting IDEA's exhaustion provision to curtail appellants' civil rights under an entirely different statute, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI).

FACTUAL BACKGROUND

Amici adopt fully by reference herein the Statement of the Case in the Appellants' Brief at pages 3 to 9.

ARGUMENT

I. THE DECISION IN THIS CASE DEPRIVES PARENTS WHO ARE LIMITED ENGLISH PROFICIENT OF ANY POSSIBILITY OF MEANINGFULLY PARTICIPATING IN THE FAPE PROCESS

IDEA establishes a substantive right to FAPE for all eligible children with disabilities. *Endrew F.*, 137 S. Ct. at 993; *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). School districts deliver FAPE through the IEP. At the outset of *Endrew F.*, the Supreme Court recognized the centrality of parental participation to the IEP development process.

> The IEP is "the centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305 (1988). A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. § 1414(d)(1)(B) (internal quotation marks omitted). These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. § 1414

137 S. Ct. at 994.

Delivery of a substantively appropriate IEP – a program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" – depends upon the informed involvement of parents. Congress found that "the education of children with disabilities can be made more effective by . . . strengthening the role and responsibility of parents and ensuring that families

of such children have meaningful opportunities to participate in the education of their children at school and at home." 20 U.S.C. § 1400(c)(5).

Endrew F. expands upon this Congressional finding:

> The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. [*Rowley*, 458 U.S.] at 207. *The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians*.

137 S. Ct. at 999 (emphasis added). "The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue." 137 S. Ct. at 1001. The IEP process also contemplates that parents should understand not only their children, but the law. Under the Act, parents must be provided with notice of their (and their child(ren)'s) rights regularly, and the failure to do so is viewed as a procedural violation that constitutes a denial of FAPE. *See El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 948 (W.D. Tex. 2008), vacated in part on other grounds, *El Paso Indep. Sch. Dist. v. Richard R.,* 591 F.3d 417 (5th Cir. 2009) ("[T]he IDEA states, without equivocation, that local education agencies shall provide procedural safeguards following a request for special education and must provide written notice of a refusal to perform a special education evaluation.").

The importance of parental understanding of the Act's procedures and protections is "one of the central innovations of the special education law, and a key to its success, is that it empowers parents to participate in designing programs for their children and to challenge school district decisions about educational services and placement." Mark C. Weber, *Litigation Under the Individuals with Disabilities Education Act After Buckhannon Board & Care Home, Inc. v. West Virginia Dep't of Health & Human Resources,* 65 Ohio St. L.J. 357, 369 (2004). Informed parental participation is central to the provision of a substantively appropriate program. *Winkelman*, 550 U.S. at 530; *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("core of the statute . . . is the cooperative process that it establishes between parents and schools"); *Honig,* 484 U.S. at 311 ("Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessment of its effectiveness"); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 368 (1985) ("In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness"); *Rowley*, 458 U.S. at 205-06 ("Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . as it did upon the measurement of the resulting IEP against a substantive standard"); *Pardini v. Allegheny Intermed. Unit,* 420 F.3d 181,

189 n.10 (3d Cir. 2005); *L.H. v. Hamilton Cnty. Dep't of Educ.*, 900 F.3d 779, 790 (4th Cir. 2018).

The importance of the parental participation procedures apply equally to all families, regardless of any unique needs of the student and/or of the parents, including needs relating to English language proficiency. *See* 20 U.S.C. § 1415(b)(4) and 1415(d)(2) (requiring prior written notice and procedural safeguard notice documents to be "in the native language of the parents, unless it clearly is not feasible to do so"); 20 U.S.C. § 1414(a)(3)(A)(ii) (requiring assessments to children "in the language and form most likely to yield accurate information"); 20 U.S.C. § 1414(d)(3)(B)(ii & iv) (requiring IEP teams to consider limited English proficiency as part of the development of an IEP). A school district's failure to provide appropriate translation services vitiates the rights of children with parents who are limited English proficient. The failure to provide translation services creates a power imbalance that "restrict[s] parents' ability to advocate successfully in the special education arena, thereby hindering access to appropriate special education programming and services." Jennifer N. Rosen Valverde, *A Poor IDEA: Statute of Limitations Decisions Cement Second-Class Remedial Scheme for Low-Income Children with Disabilities in the Third Circuit*, 41 Fordham Urb. L.J. 599, 619 (2013). This effectively excludes parents with limited English proficiency "from having meaningful involvement in the special education process for their children."

Elisa Hyman, *et al.*, *How IDEA Fails Families Without Means: Causes and Corrections from the Front*, 1 Am. U. J. Gender Soc. Pol'y and L. 107, 134-35 (2011). Such interference with parental participation in the IEP formulation process undermines the very essence of IDEA. *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1195 (9th Cir. 2017) (quoting *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 891 (9th Cir. 2001)). Any decision that does not account for a family's lack of English language proficiency undermines the procedural importance of parental input and participation in the IEP planning and monitoring procedures laid out in the IDEA.

II. IDEA DOES NOT SUPPORT THE COURT'S DECISION ON EXHAUSTION OF TITLE VI CLAIMS

A. The Plain Language of IDEA's Exhaustion Provision Controls

Congress passed the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, now codified at 20 U.S.C. § 1415(*l*), to protect students with disabilities, not to diminish their rights under other laws. Section 1415(*l*) provides:

> 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.

Prior to *Fry*, the Supreme Court had never interpreted this provision.

When interpreting legislation, federal courts must "ascertain and follow the original meaning of the law . . . . That is the only 'step' proper for a court of law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020) (citing *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019)); *see also Fry*, 137 S. Ct. at 753 (federal courts begin interpretation, "as always, with the statutory language at issue."); *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*, 576 U.S. 473, 492 (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 Section 1415(*l*). *See Fry*, 137 S. Ct. at 753. *Ross*' 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 Court of Appeals held that inmate Sheldon Blake 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. "In 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 Court of Appeals adopted an "extra-textual" exception to the exhaustion requirement. "And that failure makes a difference because 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 impose 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 1856 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.

B. IDEA's Exhaustion Requirement Does Not Apply to Claims Arising Under Title VI

Title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000(d). A special education hearing officer has no ability to rule on claims alleging violations of Title VI. Because Title VI is not aimed at protecting children with disabilities, Section 1415(*l*) does not apply to Title VI claims.

By its terms, the Section 1415(*l*) does not apply to Title VI claims under any circumstances. This provision requires exhaustion only for claims arising under the Constitution, the Americans with Disabilities Act, Section 504 or "other Federal laws *protecting the rights of children with disabilities*." Section 1415(*l*) applies *only if a plaintiff seeks relief available under IDEA* and relief under IDEA is limited to recovery for a denial of FAPE. *Fry*, 137 S. Ct. at 753.

Ordinary rules of statutory construction support this result. When "a more general term follows more specific terms in a list, the general term is usually understood to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct 1612, 1625 (2018) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001

(discussing *ejusdem generis* canon). *Fry* itself recognized that the IDEA exhaustion requirement potentially applies to suits "under the ADA, Rehabilitation Act, or similar laws." 137 S. Ct. at 750. Congress easily could have applied the exhaustion requirement to all suits raising claims under any federal law, but it did not. It included a specific list and it is inappropriate to read that list out of the statute.

Wellman v. Butler Area School District, 877 F.3d 125 (3d Cir. 2017), relied upon by the district court, is not to the contrary. The student in *Wellman* sought to press claims under Section 504, the ADA, and 42 U.S.C. § 1983 asserting disability discrimination. This falls squarely within the statutory language requiring exhaustion under the Rehabilitation Act, ADA, or similar laws (Section 1983 discrimination claim). Claims under Title VI, like claims under Title IX or state law claims, do not fall within the statutory language. *See Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 228 (5th Cir. 2019); *see also Graham v. Friedlander*, 223 A.3d 796 (Conn. 2020) (Section 1415(*l*) did not preclude state law negligence claims for lack of exhaustion); *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).

CONCLUSION

For the reasons stated above and in appellants' brief, COPAA respectfully requests that this Court reverse the Orders of the District Court.

Date: August 26, 2020

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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COMBINED CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e) because, excluding the parts of the document exempted by Fed R. App. P. 32(f), this document contains 3,523 words.

I certify that this document complies with the typeface and type-style requirements of the Federal Rules of Appellate Procedure because the document is in a proportionately spaced typeface, Times New Roman, 14-point, using Microsoft Word for Mac.

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s/ Catherine Merino Reisman
Catherine Merino Reisman

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I certify that on the 26th of August 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system as they are registered users.

/s/ Catherine Merino Reisman
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