IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Southern Division)

K.M.,	*	
Plaintiff	*	
v.	*	
MONTGOMERY COUNTY	*	
PUBLIC SCHOOLS,	*	**Civil Action No.: 8:17-cv-02759-PX**
Defendant	*	

* * * * * * * * * * * * *

BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFF

INTERESTS OF AMICUS CURIAE

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).

Because of its work involving education of students with disabilities and its concern that parents and children should be able to bring their anti-discrimination claims without devoting unnecessary resources to IDEA claims that cannot provide them with meaningful relief, COPAA filed an *amicus curiae* brief in *Fry v. Napoleon Community Schools,* 137 S. Ct. 743 (2017). Because COPAA members' clients include IDEA-eligible who have strong anti-discrimination claims under Section 504/ADA that are not available as claims under IDEA, COPAA has a compelling interest in the clarification of exhaustion requirements for cognizable claims arising under the ADA and Section 504 that do not present actionable claims under IDEA.

SUMMARY OF ARGUMENT

This Court should not allow MCPS to frustrate federal civil rights law by insisting that K.M. further exhaust administrative remedies and then moving to dismiss K.M.'s claims in the administrative proceeding when the student's attorney, consistent with his ethical obligations, declined to pursue a frivolous IDEA claim. 'Such unnecessary procedural hurdles frustrate IDEA's broad, remedial purpose. They become even more indefensible when they put children and their parents in 'Zugzwang''[1] *Moorestown Bd. of Educ. v. S.D.*, 811 F. Supp. 2d 1057, 1077 (D.N.J. 2011).

Amicus is profoundly concerned that parents and children should not be required to waste scarce time, money, and other resources in litigating IDEA claims when they have available stronger claims under the ADA and its regulations. Because ADA and Section 504 impose different substantive legal obligations on school districts, parents may have strong ADA and Section 504 claims even though a school district is meeting its obligations to provide a free

[1] Zugzwang is the unenviable position in chess where "a player is obliged to move but cannot do so without disadvantage." 811 F. Supp,2d at 1077 n.14 (quoting 3 Oxford English Dict. 1400 (1987)).

appropriate public education under IDEA. There is nothing in the Handicapped Children's Protection Act's (HCPA) exhaustion requirement that requires parents to bring losing IDEA claims as a prerequisite to bringing ADA/Section 504 claims. COPAA understands that Plaintiff sought an administrative remedy when directed to do so by the Court however, *Amicus* is concerned with the current proceedings and contend that plaintiff does not need to further exhaust. Accordingly, *Amicus* respectfully request that this Court deny the defendant's motion to dismiss for failure to exhaust administrative remedies.

I. ADA AND SECTION 504 IMPOSE DIFFERENT SUBSTANTIVE OBLIGATIONS THAN IDEA

Fry recognized the distinction between causes of action and relief available under IDEA, on one hand, and Section 504/ADA on the other. "IDEA guarantees individually tailored educational services" to children with disabilities. But 'Title II of the ADA and Section 504 of the Rehabilitation Act 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. while Title II and Section 504 promise non-discriminatory access to public institutions." 137 S. Ct. at 756. Thus, "a complaint brought under Title II and §504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Id.*

Indeed, in *Fry*, Justice Kagan discussed at length the distinction between a claim that E.F. needed her service dog to received educational benefit from an Individualized Education Program (IEP) and the assertion that the school district denied E.F. equal access in violation of the ADA. The school district asserted that the provision of a 1:1 aide resulted in an appropriate IEP and the Frys did not contest that. "The Frys instead maintained, just as OCR had earlier found, that the

school districts infringed E. F.'s right to equal access—*even if their actions complied in full with the IDEA's requirements*." *Id.* at 758 (emphasis supplied).

A good example of how ADA and Section 504 can impose a higher obligation on an agency to a person with a disability is found in the case of *K.M. v. Tustin Unified Sch. Dist*., 725 F.3d 1088 (9th Cir. 2013) In that case, a student who was deaf sought Communication Access Real-time Translation services—an accommodation that provides word-for-word transcription—to enable her to follow classroom instruction. The school district in that case declined to provide her with such supports and instead offered her different supports which did not provide her with the type of word-for-word transcription she felt she needed to be able to access instruction. *K.M. v. Tustin*, No. 10-1011, 2011 WL 2633673 (C.D. Cal. July 5, 2011), *rev'd in part*, 725 F.3d 1088 (9th Cir. 2013).

The District's failure to provide the CART services was deemed to not have denied K.M. a FAPE under IDEA because "[u]nder the *Rowley* 'educational benefit' standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her." Id. at *12. However, the ADA and Section 504 claims based on ADA and DOJ regulations regarding effective communication provided a completely different legal claim, and a good one at that. Those regulations require that communication be made equally accessible to people with communication disabilities, regardless of whether equal access is necessary for the child to benefit from education under IDEA. See, e.g., *K.M.*, 725 F.3d at 1098.

In *K.M.*, the Ninth Circuit recognized that IDEA sets the "floor of access to education," while Title II and its implementing regulations "require public entities to take steps toward making existing services not just accessible, but equally accessible to people with communication

disabilities." The court did "not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the school context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied." *Id*. at 1092.

II. THE HANDICAPPED CHILDREN'S PROTECTION ACT DOES NOT REQUIRE A PARENT TO PURSUE A NON-MERITORIOUS IDEA CLAIM IN ORDER TO PRESERVE DISTINCT ADA/504 CLAIMS

A. Title II of the ADA and Section 504 Do Not Require Exhaustion

Unlike IDEA, which requires IDEA 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 forth cases under IDEA and Section 504, *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011). For example, while documents and experts need to be exchanged at least 5 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 all Title II or Section 504 claims involving public elementary and secondary education. Just as it provided for all Title I ADA[2] 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 HCPA to provide that ADA claims, like Section 504 claims, could be brought separately and without IDEA exhaustion unless they seek the same relief

[2] Notably, in Title I of the ADA, Congress required that coordination of ADA and Section 504 employment claims to "prevent imposition of inconsistent or conflicting standards," 42 U.S.C. § 12117(b), but did not provide any similar statutory requirement that ADA/Section 504 claims be consistent with IDEA claims.

available under IDEA. *See* Individuals with Disabilities Education Act Amendments Act of 1997, 105 Pub. L. No 17, 111 Stat. 37. 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 and 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).

B. The Plain Language of the HCPA Does Not Require Parents to Allege a Non-Meritorious IDEA Claims as a Prerequisite to Filing ADA and Section 504 Claims

MCPS' position - that a student must present a frivolous IDEA claim to an administrative officer in order to preserve a meritorious ADA claim - defies common sense. In addition, it is entirely inconsistent with the statutory language of the HCPA. 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. HCPA's exhaustion, as amended, requirement reads, in full:

> 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 sub-chapter, 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) (alterations in original). The statute only requires that administrative remedies "be exhausted to the same extent as would be require had the action be brought under [IDEA]."

Id. The statute does not require that the parents bring an IDEA claim in addition to the ADA, Section 504, or other federal claims.

In all cases, the plain terms of a law control statutory interpretation. *King v. Burwell*, 576 U.S. __, __ 135 S. Ct. 2480, 2489 (2015); *Henson v. Santander Consumer USA, Inc.*, 580 U.S. __, __, 137 S. Ct. 1718 (2017); *Millbrook v. United States*, 569 U.S. 50, 57, 133 S. Ct. 1441, 1446 (2013); *In re Trump Entm't Resorts Unite Here Local 54*, 810 F.3d 161, 167 (3d Cir. 2016); *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." *King*,135 S. Ct. at 2492 (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. __, 134 S. Ct. 2427, 2441, (2014)); *see also In re Trump* 810 F.3d at 167-168; *G.L.*, 802 F.3d at 618 (interpreting IDEA's statute of limitations).

When construing statutory exhaustion provisions, federal courts must be particularly careful in their interpretation. The *Fry* Court cited to *Ross v. Blake*, 578 U.S. __, 136 S. Ct. 1850 (2016) in its discussion of the appropriate interpretation of the HCPA. *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).

Section 1415(*l*), by its own terms, is limited to cases where there is a colorable claim of a FAPE violation. 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 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).

C. Congress passed §1415(*l*) to provide greater protections to IDEA-eligible Students, not detract from their civil rights

The legislative history of IDEA, Section 504, and ADA make clear that Congress understood that, while there would be significant interplay between these three statutes, they 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 passed the Education for All Handicapped Children Act (EHA), IDEA's predecessor, which required education of all students with disabilities. P.L. 94-142 (1975). Congress passed this law because of its concern that students with disabilities were either being excluded from school or "sitting idly in regular classrooms." *See Rowley*, 458 U.S. at 179.

Due to the absence of a statute providing that Section 504 applied to EHA-eligible students and the comprehensive nature of EHA, the Supreme Court restricted civil rights of EHA-eligible children in *Smith v. Robinson,* 468 U.S. 992 (1984). Smith involved a student, who had brought identical claims under the EHA and Section 504 claims and 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 EHA." *Id.* at 1021 n.8.

Congress swiftly responded with HCPA, so as "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*. 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.

It was never Congress' intent that eligibility (or possible eligibility) for IDEA substantive or procedural rights would detract from the rights of individuals with disabilities under Section 504 and, by extension, ADA. Roughly five years later, in adopting ADA, Congress explained that its purposes in passing ADA included providing both "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1) & (2). In light of the history of *Smith* and HCPA, it is easily understood that Congress could have required the millions of public school students receiving special education through IDEA to go through IDEA administrative proceedings for any ADA or Section 504 claim, but it did not. In enacting ADA, Congress was familiar with both IDEA and HCPA,

yet it deliberately chose not to exclude public school students from ADA or to require exhaustion of administrative remedies for all ADA Title II claims. In contrast, Congress requires that all Title I ADA claims to be filed first with EEO agencies. Rather, well aware that IDEA students would also be protected by ADA and could have different legal claims under ADA, it simply amended the HCPA and limited the exhaustion requirement to those claims seeking "relief that is also available" under IDEA. Thus, like Section 504, ADA complements IDEA, so students with IEPs receive the same robust ADA protection as other individuals with disabilities.

D. MCPS' Interpretation of the Statute Would Waste Judicial Resources and Impose Onerous Burdens on Parents

Fry explained that relief is "available" under a statute when it is "accessible or may be obtained" under that law. 137 S. Ct. at 753 (quoting *Ross*, 136 S. Ct. 1858 (quoting *Booth v. Churner*, 532 U.S. 731, 727-28 (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.* Relief is not available when neither the school district nor the student's attorney think there is a viable IDEA claim. Indeed, in a case where there is no cognizable claim for a denial of FAPE, it would be sanctionable to bring such a claim. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II) (allowing awards of reasonable attorneys' fees and costs to school districts when attorneys for parents of students with disabilities are found to have filed cases that are "frivolous, unreasonable, or without foundation.").

Unnecessary and wasteful administrative hearings over nonexistent IDEA claims would not merely have a negative impact on parents and children forced to bring those claims. They would also adversely affect other parents and children who need legal assistance and depend on the few legal services, protection and advocacy agencies, law school clinics, and other public interest law firms available to help them.

Most families of children receiving special education services have limited resources, both independently and because of the strain raising a child with a disability can have on a family's finances. One-quarter of students on IEPs have families with incomes below the poverty line and two-thirds have family incomes of $50,000 or less. Congress understood that, absent a fee-shifting framework as part of the IDEA's due process procedures, many families would be unable to access counsel to undertake special education cases, and, without counsel, would face the nearly insurmountable to resolve their IDEA disputes. Senator Weicker explained that, without access to attorneys' fees, "the economic resources of parents become crucial to the protection of their children's rights regardless of the merits of the claim." 130 Cong. Rec. S9079 (daily ed. July 24, 1984). Senators specifically cited the example of Mary Tatro, who testified at a Senate hearing. She spoke about her family's experience in litigating *Tatro,* 468 U.S. 883. Her case was a "clear example of [a] school district extending judicial proceedings for more than 5 years in an attempt to force the Tatro family to drop their case due to the exorbitant cost of attorneys' fees." S. Rep. No. 99-112, 99th Cong., 1st Sess. at 17-18 (1985). *See also* Senate HCPA Hearing, at 24-25. Here, the exorbitant cost of pointless administrative hearings that only delay a decision on the merits of ADA/504 claims will deter both parents and attorneys from pursuing meritorious cases.

K.M. ex rel Bright v. Tustin Unified Sch. Dist., 78 F. Supp. 3d 1289, 1297 (C.D. Cal. 2015) illustrates the transaction costs of forcing litigation of IDEA claims when the gravamen of a student's complaint actually arises under the ADA. In that case, *K.M.* ultimately wanted to bring an ADA "effective communication" claim and elected to exhaust an IDEA claim because the remedy sought could, in theory, include compensatory education in the form of the appropriate communication device and the denial of the appropriate communication system could be deemed a denial of FAPE under the IDEA. The student lost her claim for FAPE under the IDEA but

prevailed in both the district court and Ninth Circuit that ultimately found in favor of K.M. on the grounds that ADA and Section 504's effective communication regulations imposed a higher standard than IDEA FAPE requirement. See *K.M.*, 725 F.3d at 1098. Even though the student in that case exhausted IDEA claims knowing that the relief sought was truly and more appropriately available under an ADA/504 claim, the student was penalized for doing so when she sought an award of attorneys' fees on her litigation. Though she had been required to exhaust so as to be able to bring her ADA/504 claims, the court held that the parents were entitled to be paid for only 50% of the work done on the IDEA due process hearing. *K.M.*, 78 F. Supp. 3d at 1297.

In this case, counsel for K.M. does not believe that there is a meritorious claim under IDEA. Consistent with his ethical obligations, when forced to return to the administrative proceeding as a result of MCPS' machinations, he did not assert a non-meritorious FAPE claim. MCPS then moved to dismiss those claims in the administrative hearing process and again in the federal court proceedings. There is nothing in the exhaustion requirement that requires parents to bring losing IDEA claims as a prerequisite to bringing ADA/Section 504 claims.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON THE **14TH OF JUNE a** copy of **BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFF** was electronically filed and served upon counsel of record.

Respectfully submitted,

/s/Selene Almazan-Altobelli
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