No. 19-1043

In The
Supreme Court of the United States

PAUL G., a conserved adult,
by and through his conservator Steve G.,

Petitioner,

vs.

MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT
and CALIFORNIA DEPARTMENT OF EDUCATION,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION OF CALIFORNIA DEPARTMENT OF EDUCATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether exhaustion of the administrative procedures provided by the Individuals with Disabilities Education Act (IDEA), as stated in 20 U.S.C. § 1415(l), is required when Plaintiffs seek damages premised on an alleged denial of a free appropriate public education (FAPE).

2. Whether the futility exception to the IDEA's exhaustion requirement applies where Plaintiffs settle their IDEA claim against the local educational agency (LEA) and then seek damages against the state educational agency premised on an alleged denial of FAPE.

3. Whether Petitioners met the IDEA's exhaustion requirement by filing a due process complaint and entering into a written settlement agreement with the respective LEA.

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In addition to the opinions below identified in the Petition, the U.S. District Court's Order Granting Motion to Dismiss with Leave to Amend in Part and Without Leave to Amend in Part, with respect to the First Amended Complaint (FAC), is published at *Paul G. v. Monterey Peninsula Unified School District*, 256 F. Supp. 3d 1064 (N.D. Cal. 2017).

RELEVANT STATUTORY AUTHORITIES

In addition to the citation to 20 U.S.C. § 1415(l) in the Petition, Respondent's Appendix includes the text of 20 U.S.C. §§ 1415(a), (b)(6), (f)(1)(A) and (i)(1) and (i)(2)(A).

COUNTER-STATEMENT OF THE CASE

The key facts alleged in the Second Amended Complaint (SAC), (Excerpts of Record or ER, 137-151) supplemented by judicially noticed facts, are as follows. Paul G. (P.G.), an adult, autistic, special education student, resided with his parents in Monterey Peninsula Unified School District (District), in California. (ER 139-140, ¶¶ 14, 16, 17.) On July 14, 2015, P.G. attempted to elope from a public library where he was receiving instruction from a District teacher, and injured a bystander. (ER 133-134, ¶¶ 35-37.) Following this event, on July 20, 2015, the District offered a residential

placement through the Individualized Education Program (IEP). (ER 144, ¶¶ 39.)

On August 25, 2015, P.G. filed an amended request for a special education due process hearing with the California Office of Administrative Hearings (OAH), naming the District, the California Department of Education (CDE) and the California Department of Social Services (DSS) as respondents. (ER 143, ¶ 33; *see also* ER 110-129.) The request alleged the District denied P.G. a FAPE under the IDEA, (ER 111-112) and that the CDE and the DSS denied P.G. a FAPE by failing to ensure the availability of an appropriate in-state residential placement. (ER 112, ¶ 5.) P.G. sought a variety of relief including compensatory education services, an appropriate residential placement and independent evaluations from the District (ER 128-129, ¶¶ 2, 3, 8), and an Order that the CDE and DSS develop in-state residential placements for adult students. (ER 128, ¶ 5.) On September 21, 2015, OAH dismissed the claims against the CDE and DSS (ER 146, ¶ 50), stating in relevant part as to the CDE:

> Here, the allegations in the Complaint make it clear that CDE did not provide any educational services to Student and that it was not involved in decisions regarding Student. Instead, Student relies upon CDE's general oversight authority of California special education law as the foundation for its claim against the CDE. However, that is not a proper basis for a due process case against CDE under the facts alleged in this case. See *M.M. v. Lafayette*

> *School District*, 767 F.3d 842, 860 (9th Cir. 2014). (Petitioner's Appendix or App., 51.)

OAH also stated that it examines only whether an individual offer of placement and services provided a particular child with a FAPE, and that " . . . OAH has no jurisdiction to order the type of statewide policy changes Student seeks such as ordering CDE to create in-state placements for students over the age of 18." (App. 52.)

P.G. was accepted by a residential placement in November 2015. (ER 144, ¶ 41.) P.G. alleges that he could not leave California pending resolution of criminal charges relating to the July 2015 incident. (ER 144, ¶ 38.) In January 2016, once a residential placement in Kansas was scheduled to begin, P.G. and the District entered into an agreement to settle the IDEA dispute. (ER 147, ¶ 52.) The Kansas placement began in February, 2016. (ER 144-145, 147, ¶¶ 42, 53.) P.G. alleges that he was placed in Kansas when California residential placements would not accept him because he was an adult. (ER 144, 147, ¶¶ 39, 53.)

In the settlement, P.G. reserved the right to continue to pursue Rehabilitation Act (Section 504) and Americans with Disabilities Act (ADA) claims, which remain pending, against the District. (ER 147, ¶ 52.) Thus, no determination about whether the District denied P.G. a FAPE was ever made. P.G. returned to California on an undisclosed date prior to the hearing on the motion to dismiss the SAC on January 25, 2018,

and was no longer placed in a residential facility. (ER 6, n. 2.)

On September 30, 2016, P.G. filed a Complaint in the District Court. (ER 153, Dkt. #1.) On December 30, 2016, P.G. filed his FAC. (Supplemental Excerpts of Record or SER, 1-19.) The FAC emphasized that the Section 504 and ADA claims were based on an alleged denial of FAPE under the IDEA. The FAC alleged that California's lack of residential placements for adult special education students violated the IDEA's mandate that students be educated in the least restrictive environment (LRE) (SER 3, ¶ 11), and noted that the OAH complaint had alleged that the District and the CDE denied P.G. a FAPE. (SER 7, ¶ 31.) The FAC contained multiple references to the CDE's duty to ensure FAPE in the LRE. (SER 9-10, ¶¶ 40-46.) The FAC alleged that the CDE failed to have policies and procedures in place to ensure that there are residential placements available in California for students with disabilities ages 18-22, and that the CDE violated the IDEA, Section 504 and the ADA. (SER 16-18, ¶¶ 78-94.) The FAC sought damages and injunctive relief requiring the CDE to ensure in-state residential placements for disabled students ages 18-22, and to develop policies and procedures for the CDE to assist a student when a LEA could not provide a FAPE. (SER 19.)

On June 21, 2017, the District Court granted the CDE's motion to dismiss the IDEA claim in the FAC, with prejudice, based on the statute of limitations. (SER 25-28 and 36); *Paul G.*, 256 F. Supp. 3d at 1079. P.G. has not appealed the dismissal of the IDEA claim.

Also, on that date, the District Court granted the CDE's motion to dismiss the Section 504 and ADA claims for failure to exhaust the administrative remedy, without prejudice. (SER 28-34 and 36); 256 F. Supp. 3d at 1079.

On July 21, 2017, P.G. filed his SAC. (ER 137-151.) P.G. did not allege that his IEP called for an "in-state" residential placement. (ER 21, ll. 23-24.) The SAC as a whole continued to emphasize that Plaintiffs' Section 504 and ADA claims were based on an alleged denial of FAPE under the IDEA. The SAC referenced: the CDE's oversight responsibility for special education, and an IDEA provision (20 U.S.C. § 1413(g)) requiring the CDE to provide direct services in extraordinary circumstances (ER 138, ¶ 6); the CDE's alleged failure to make in-state residential placements available for special education students ages 18-22 (ER 139, ¶ 9); that the OAH complaint alleged a denial of FAPE (ER 143, ¶ 33); that the CDE failed to ensure special education students' rights to FAPE in the LRE under the IDEA; and that the CDE failed to step in and directly serve P.G. under the IDEA. (ER 145-146, ¶¶ 43-48.) P.G. incorporated all of these IDEA-based allegations, by reference, into the Section 504 and ADA claims. (ER 149-150, ¶¶ 62, 70.) P.G. alleged that the CDE had: discriminated against P.G. under Section 504 (ER 149, ¶ 67); denied P.G. a FAPE under Section 504, as stated in 34 C.F.R. § 104.33 (ER 149, ¶ 65); and denied P.G. an equal opportunity under Section 504, as stated in 34 C.F.R. § 104.4. (ER 149, ¶ 66.) Specific items of relief requested as to the CDE included damages, injunctive

relief to ensure the availability of in-state residential placements for adult special education students, and injunctive relief as to the CDE's responsibility to directly provide FAPE pursuant to 20 U.S.C. § 1413(g) of the IDEA. (ER 151, ¶¶ 76, 79, 80.)

On June 8, 2018, the District Court granted the CDE's motion to dismiss the Section 504 and ADA claims in the SAC for failure to exhaust the administrative remedy, without leave to amend. (App. 45.) The District Court found that exhaustion was required because the gravamen of the SAC sought relief for a denial of FAPE, and the fact that P.G. previously pursued an OAH proceeding further supported this conclusion. (App. 25-28.) Having determined that exhaustion was required, the District Court found that exhaustion had not been satisfied (App. 33-37), and that no exception to exhaustion applied. (App. 37-42.) This was so even though the FAC sought damages, because the damages sought followed directly from the alleged denial of FAPE. (App. 28-33.)

On August 12, 2019, the Ninth Circuit issued its opinion affirming the District Court. (App. 1-12.) The Ninth Circuit noted that the operative complaint "did not and could not allege that Paul's IEP required a placement in California; he had not obtained such a decision from the OAH." (App. 4.) The court stated:

> The fundamental problem with Paul's position in the view of the district court, and in ours, is that he has no IEP that requires such an in-state placement. He settled his claim with the school district that had sought such

> an IEP. His existing IEP provides only for a residential placement. The district court therefore properly dismissed for failure to exhaust administrative remedies. (App. 6.)

The Ninth Circuit concluded that "Paul may not maintain this action after he failed to seek a final administrative decision regarding his alleged need for in-state residential education." (App. 11-12.)

REASONS TO DENY THE PETITION

A. There is No Circuit Split on the Issue of Whether Exhaustion is Required When Plaintiff Seeks Damages Premised on an Alleged Denial of FAPE, and the Ninth Circuit Properly Found that Exhaustion was Required

The IDEA entitles eligible students with disabilities to a FAPE in the LRE, based on an IEP. 20 U.S.C. §§ 1401(9), (29), 1412(a)(5)(A), 1414(d). Pursuant to the IDEA, the CDE is a state educational agency (SEA) with general supervisory responsibility for the overall provision of special education services in California. 20 U.S.C. §§ 1412(a)(11)(A), 1401(32). Congress left it to the states to devise systems for the provision of special education services through LEAs. 20 U.S.C. § 1401(19). In California, the LEA is responsible for identifying students with disabilities, determining appropriate educational placements and related services through the IEP process, and providing needed special education

and related services. Cal. Educ. Code §§ 56300, 56302, 56340, 56344(c).

Whenever there is a disagreement regarding a proposal, or refusal, to initiate or change the identification, evaluation, or educational placement of an individual child, or the provision of a FAPE, a parent may request an administrative "due process" hearing. 20 U.S.C. §§ 1415(b)(6)(A), (f)(1)(A). The law contemplates that the proper respondent to a parent's due process hearing request is the LEA responsible for educating the student. Cal. Educ. Code §§ 56501(a), 56502(d)(2). A proper respondent must be "providing special education or related services to individuals with exceptional needs" and must be involved in decisions regarding the student. Cal. Educ. Code §§ 56028.5, 56500, 56501(a).

The Administrative Law Judge (ALJ) at OAH determines if there has been a denial of FAPE. 20 U.S.C. § 1415(f)(3)(E). The OAH's decision is a final administrative decision. 20 U.S.C. § 1415(i)(1)(A). Section 1415(l) of the IDEA requires that to file a federal civil action pursuant to Section 504 or the ADA that seeks relief available under the IDEA, a party must first exhaust the IDEA's administrative remedy, by pursuing a special education due process hearing established by Section 1415(f)(1)(A) that addresses matters set forth in Section 1415(b)(6)(A), and obtaining a final decision pursuant to Section 1415(i)(2)(A). Either the parent or the public agency, if "aggrieved" by the final administrative decision at OAH, may seek judicial review. 20 U.S.C. § 1415(i)(2)(A), (b).

In *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the Supreme Court interpreted the exhaustion requirement in 20 U.S.C. § 1415(l). The court stated that a court must look to the gravamen of a complaint to determine if it seeks relief for a denial of FAPE under the IDEA. *Id.* at 752. The court identified two questions that assist in that analysis. When the answer to those questions is no, the complaint probably does concern FAPE, even if it does not explicitly say so. 137 S. Ct. at 756. The two questions are: (1) Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility other than a school?, and (2) Could an adult at the school (i.e., a non-student employee or visitor) have pursued the same claim? 137 S. Ct. at 756. In addition to suggesting consideration of the two questions, the Supreme Court in *Fry* stated that a plaintiff's prior pursuit of the IDEA's administrative process "will often provide strong evidence that the substance of the plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." 137 S. Ct. at 757.

The Ninth Circuit in *Paul G.* agreed with the District Court that the answer to both *Fry* questions supported a finding that exhaustion was required, because the issue of whether a student with a disability requires an in-state residential placement through his IEP is unique to students in the school setting. (App. 8-9.) The Ninth Circuit also agreed with the District Court that the fact that plaintiffs had pursued the

IDEA administrative remedy supported a finding that exhaustion was required. (*Id*.)

In *Fry*, the Supreme Court left undecided whether exhaustion is required when, even though the complaint alleges a denial of FAPE, the plaintiff seeks damages or another remedy that an IDEA administrative hearing officer cannot award. 137 S. Ct. at 1752, n. 4. Prior to *Fry*, the Ninth Circuit stated that exhaustion is required when a plaintiff seeks to enforce rights that arise as a result of a denial of FAPE, whether pled as an IDEA claim or any other claim that relies on the denial of FAPE to provide the basis for the cause of action (for example, in a Section 504 claim for damages that is premised on a denial of FAPE). *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 875 (9th Cir. 2011) (en banc), *cert. denied*, 132 S. Ct. 1540 (2012), overruled in part on other grounds, *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc).

Here, the District Court applied *Payne* and found that the fact that P.G. sought emotional distress damages pursuant to Section 504 did not change the conclusion that exhaustion was required. Because the damage remedy sought was based on an alleged denial of FAPE for failure to provide placement in the LRE (i.e., an in-state residential facility), it "follow[ed] directly" from the IDEA and exhaustion was required. (App. 32-33, citing *Payne*, 653 F.3d at 875.) The emotional distress was allegedly caused by denial of FAPE due to lack of in-state residential placement, which can be addressed under the IDEA. The Ninth Circuit in *Paul G.* agreed, finding that the Section 504 and ADA

damage claims sought relief for allegedly inappropriate educational services. (App. 9-10.)

The First Circuit's decision in *Doucette v. Georgetown Public Schools*, 936 F.3d 16 (1st Cir. 2019), relied on by Petitioner, does not create a split between the First Circuit and the Ninth Circuit on the "*Fry* footnote 4" issue of whether exhaustion is required when a plaintiff seeks damages. As explained below, *Doucette* was decided on other grounds. *Doucette* involved a family's ongoing dispute with the school district regarding the presence of a service dog at school. A special education administrative hearing decision denied the parent's request for placement in a different school district, but required the district to develop a new IEP. *Doucette*, 936 F.3d at 20. Aggrieved by the administrative decision, the parent could have, but did not, seek judicial review at that time. The district then stated it would permit the service dog, but only if the mother was present – which offer was apparently rejected – and the district again denied the parent's request for placement in a different school district. *Id.* at 20-21. Eventually, the district agreed, in an amended IEP, to placement in a different school district, without the parent having filed a request for a second special education administrative hearing. *Id.* at 22.

The First Circuit in *Doucette* found that although the gravamen of the subsequent Section 1983 claim sought relief for an alleged denial of FAPE under the IDEA, either (1) the parent satisfied the exhaustion requirement or (2) further resort to the administrative process would have been futile. *Id.* at 30-31. The court

stated that the parents ultimately received what they sought through the IEP process. The court stated:

> Having achieved success through their interactions with local school officials, there was no need for the Doucettes to seek a[n] administrative hearing. . . . *Id.* at 30.

The court found that the purposes of exhaustion would not be served by requiring the parent to return to the administrative forum before seeking damages in court, because there had already been a full administrative hearing that addressed the student's placement needs, and a full IEP process following that. *Id.* at 31.

In *Doucette*, unlike in *Paul G.*, the parents had (1) completed an administrative hearing that established a record as to the student's placement needs (in *Doucette*, as to whether the student required an out-of-district placement), and (2) ultimately achieved, through the IEP process, the specific IEP placement they sought (in *Doucette*, out-of-district). In *Paul G.*, the parent neither completed an OAH administrative hearing that established a record as to whether the student required an in-state residential placement in order to receive FAPE, nor achieved through the IEP process the in-state residential placement they sought. Rather, the parent in *Paul G.* accepted an out-of-state residential placement in a settlement with the LEA, and then sued the CDE for failing to ensure that the LEA provided the parent with an in-state residential placement. *Doucette* concluded (as did the Ninth Circuit

in *Paul G.*) that exhaustion was required. *Doucette*, unlike *Paul G.*, found that the requirement was either met or excused on the facts of that case.

Doucette did not hold that simply because the parents sought damages that cannot be awarded under the IDEA, exhaustion was not required. Instead, *Doucette* emphasized that the reason for its holding on exhaustion was that there had already been a full administrative hearing as to "liability" issues concerning the decision-making process of educators and school officials, and therefore there was no need to resort to the educational expertise of the administrative process to address the only remaining issues of medical causation relating to damages. *Doucette*, 936 F.3d at 32-33. The First Circuit did not address either *Paul G.* (decided two weeks earlier) or *Payne* (decided in 2011), and did not dispute the Ninth Circuit's position that exhaustion is required when a plaintiff seeks emotional distress or other damages that follow from an alleged denial of FAPE.

B. The Ninth Circuit Properly Found that the Futility Exception did not Apply

P.G. does not assert, nor could he properly assert, that OAH could not have awarded him the IDEA remedies he sought at OAH (compensatory education, prospective placement, and an Independent Educational Evaluation or IEE). If he had pursued his case at OAH, P.G. might have prevailed and received all of the individual relief he sought. Or, he might have prevailed

and received some, but not all, of the individual relief he sought. If OAH found that P.G. required an in-state residential placement but determined that the LEA was unable to provide one, P.G. could potentially bring a federal action against the CDE. Or, if the District prevailed at OAH, P.G. could appeal pursuant to 20 U.S.C. § 1415(i)(2). The District Court properly found that the futility exception did not apply. (App. 28-29.)

The Ninth Circuit similarly rejected Petitioner's argument that it would have been futile to go to OAH:

> Paul . . . settled the claim against the school district without obtaining any decision on his claim that the lack of in-state placement denied him a FAPE. He now argues it would have been futile to pursue the IDEA claim [at OAH] because the state could not be required [by OAH] to provide the [in-state residential] facility. . . . [However] [i]n this case, Paul is claiming that the state must provide him with an in-state residential placement and must pay damages for failing to do so. The only basis for such a claim is that such a placement is required under the IDEA. (App. 11.)

While Petitioner asserts that proceeding to an OAH hearing would have been futile because he resolved his IDEA claim to his satisfaction (by accepting an out-of-state residential placement), he has continued to seek relief relating to the alleged need for an in-state residential placement, which is not called for in his IEP. (ER 21, ll. 23-24.) Even after the District offered a residential placement on July 20, 2015, P.G.

filed an amended complaint at OAH seeking, among other relief, "placement at an appropriate residential treatment facility." (ER 128, ¶ 3.) Thus P.G. identified a dispute over educational placement under the IDEA, which would have been appropriate for an OAH hearing.

What constitutes the LRE for a particular student with a disability is "necessarily an individualized fact specific inquiry." *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995). In some cases, the closest appropriate residential placement is out-of-state. *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1501-1502 (9th Cir. 1996); *Taylor v. Honig*, 910 F.2d 627, 631-632 (9th Cir. 1990). Once P.G.'s residential placement in Kansas was scheduled to begin in February 2016, he chose to settle his IDEA claim with the District and bargained for the right to continue to pursue the Section 504 and ADA claims that remain pending in the District Court against the District. (ER 147, ¶ 52.) Having made the choice to settle the IDEA claim against the LEA, he could not then bring an action against the CDE that sought relief premised on an alleged denial of FAPE.

The First Circuit's decision in *Doucette*, cited by Petitioner, is not helpful to Petitioner on the futility issue. There, the plaintiff had already had an administrative hearing that developed a record as to his educational placement needs, and he subsequently received the placement he sought through the IEP process, so there was no need to resort to a second hearing. Here, there was no OAH hearing, and Petitioner brought a lawsuit seeking an educational placement that he had not achieved through the IEP process.

C. The Ninth Circuit Properly Found that the Fact that Petitioner Settled at OAH with the LEA does not Constitute Exhaustion as to the CDE

The plain text of 20 U.S.C. §§ 1415(l) and 1415(i)(2) read together indicates that exhaustion requires a final decision of an ALJ, following a hearing pursuant to Section 1415(f)(1)(A). See, e.g., *A.F. v. Espanola Public Schools*, 801 F.3d 1245, 1248-1250 (10th Cir. 2015). Therefore, settlement of an IDEA claim at OAH does not satisfy exhaustion. *Id.* P.G.'s assertion that he satisfied exhaustion by settling his IDEA claim with the LEA is not supported by law.

Further, the District Court properly concluded that the fact that OAH dismissed the CDE does not constitute exhaustion as to the CDE. (App. 33-34.) Because the claim against the CDE is premised upon an underlying allegation that an individual student was denied a FAPE by the LEA, P.G. was required to exhaust the OAH remedy against the LEA, developing a full record as to whether he required an in-state residential placement in order to receive a FAPE in the LRE. The District Court found that P.G. could not establish exhaustion as to the CDE when he has settled his underlying IDEA claim against the District without an OAH hearing on the merits. (App. 36-37.) Because the claim against the CDE involves the same alleged denial of FAPE, the same individual factual issues as to the development of the student's IEP, and the same substantive details of the educational placement, the claim against the LEA had to proceed through

the OAH process to completion, in order to exhaust the administrative remedy as to the CDE. As the Ninth Circuit stated, "The [OAH's] dismissal of the state does not excuse Paul's failure to pursue the claim against the school district, because that was the only way to obtain an administrative ruling on his claim that he was denied a FAPE." (App. 11.)

The First Circuit's decision in *Doucette*, cited by Petitioner, is not helpful to Petitioner on this point. *Doucette* does not hold that settlement satisfies exhaustion, nor does *Doucette* hold that an ALJ's dismissal of a state educational agency constitutes exhaustion as to the SEA in these, or any, circumstances.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: March 18, 2020

Respectfully submitted,

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