APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-20420

United States Court of Appeals
Fifth Circuit
FILED
October 2, 2019
Lyle W. Cayce
Clerk

CHRISTOPHER EDWARD MCMILLEN, an Incapacitated Person

Plaintiff - Appellant

v.

NEW CANEY INDEPENDENT SCHOOL DISTRICT,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas

Before BARKSDALE, STEWART, and COSTA, Circuit Judges.

GREGG COSTA, Circuit Judge:

In exchange for federal funding of special education services, schools must provide a "free appropriate public education" to students with physical or mental disabilities. 20 U.S.C.

§ 1412(a)(1)(A). As part of that deal, the Individual with Disabilities Education Act (IDEA) requires administrative procedures to address disputes about a disabled student's education. If those procedures do not fix the problem, parents may file a lawsuit to assert their children's rights. But the IDEA requires exhaustion of the administrative process before a suit may be filed over the denial of a free appropriate public education. See *id.* § 1415(i)(2)(A). The exhaustion requirement is not limited to suits enforcing the IDEA. It applies to suits under any laws that "seek[] relief that is also available under" the IDEA. *Id.* § 1415(l).

We must decide whether the exhaustion requirement applies to this suit seeking damages under the Rehabilitation Act and section 1983 for a student's expulsion from high school. In answering that question, we decide for the first time in our circuit whether the IDEA's exhaustion requirement applies when the plaintiff seeks a remedy that the IDEA does not supply.

I.

Because this suit was dismissed at the pleading stage, we assume the following allegations to be true. *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009.

Chris McMillen was enrolled in New Caney Independent School District from age 4 (pre-kindergarten) until early in his junior year of high school. During those years, the district developed and implemented an individualized education program (IEP) for McMillen, who had been diagnosed with autism spectrum disorder, emotional disturbance, and central-auditory-processing disorder. The

program successfully managed his behavioral challenges for several years.

McMillen's behavior worsened during his sophomore year to the point that he was threatening to harm himself and others daily. The committee overseeing McMillen's IEP met three times that year. By the middle of the year, McMillen was placed in the district's Pass Program, which is for students who "have demonstrated either serious emotional disturbance or behavior disorders" and have "not responded to less intrusive interventions."

Despite the problems during McMillen's sophomore year, the district returned him to the regular school setting for his junior year. His IEP for his junior year abandoned measures, like participation in the Pass Program, that had proven successful. McMillen's parents complained about the changes, but New Caney refused to amend his IEP. The new plan was "woefully inadequate and intentionally indifferent" to McMillen's needs.

McMillen's return to the traditional classroom put him in Margaret Hudman's English class. Hudman tried to "save" McMillen, in two senses of the word. She encouraged McMillen to take herbal supplements that she thought could cure his autism. She also tried to convert McMillen to Christianity, believing that if he converted his disabilities would be cured.

About a month into the school year, Hudman gave up and tried to have McMillen expelled. She collected material that McMillen wrote during class and their informal sessions which, taken out of context, made McMillen appear dangerous. Hudman emailed these materials to school administrators, who referred the

matter to the school's police department. The police arrested and charged McMillen with the felony of making a terroristic threat. Following McMillen's arrest, the district determined that he should attend an alternative campus.

McMillen's parents eventually accepted an offer from the county attorney to drop the felony charge in exchange for their agreeing to never return McMillen to the school district. McMillen's parents believed that accepting the deal was the only option and ceased all efforts to return him to New Caney ISD.

This lawsuit followed. The original complaint asserted claims under the IDEA as well as the Constitution and Texas law. But neither McMillen nor his parents, who were suing on McMillen's behalf before he reached 18, completed the IDEA administrative process (they only invoked some preliminary procedures early on to challenge McMillen's amended IEP). After the school district raised this failure to exhaust as a ground for dismissal, McMillen amended his complaint to remove the IDEA claim. The relevant complaint is his fourth try, which asserts a Rehabilitation Act claim and an equal protection claim under section 1983. Defendants again sought dismissal on, among other grounds, failure to exhaust. The district court granted the motion.

II.

A.

States receiving IDEA funding must maintain certain procedures to resolve disputes over the adequacy of a covered student's education. 20 U.S.C. § 1415(a). The procedures include: (1) the opportunity

for any party to file a complaint, which forces a local education agency to hold a preliminary meeting to resolve the complaint, *id.* § 1415(b)(6), (f)(1)(B)(i); (2) an impartial "due process hearing" to resolve the complaint, which a local or state education agency conducts, *id.* § 1415(f); and (3) mediation to resolve the complaint, at the state's expense. *Id.* § 1415(e)(1), (e)(2)(D). A party not satisfied with the result of the administrative process may bring an IDEA claim in federal court. *Id.* § 1415(i)(2).

In its original form, the IDEA was the "exclusive avenue" for enforcing a disabled student's right to an adequate education. See *Smith v. Robinson*, 468 U.S. 992, 1009 (1984). So a plaintiff seeking educational accommodations for a disabled student could not sue under other laws that protect the disabled, such as the Rehabilitation Act. *Id.* at 1009, 1021. But soon after the Supreme Court interpreted the law that way, Congress charted a different course. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 750 (2017) (citing Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986)). It took the following middle ground: IDEA does not displace other laws that may help disabled children receive an education, but parties must try the IDEA's administrative process first. *Id.* In other words, a plaintiff may invoke any federal law to support a disabled student's claim for an adequate education; the plaintiff just must first exhaust under the IDEA.

The statute allowing non-IDEA claims but only after exhaustion of the IDEA procedures 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, title V of the Rehabilitation Act of 1973, 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). Because McMillen did not exhaust the IDEA procedures, his suit asserting other federal claims must be dismissed if it "seek[s] relief that is also available under" the IDEA.

B.

The Supreme Court recently provided guidance to help us determine when a suit seeks relief available under the IDEA. It does so when the plaintiff seeks to remedy the deprivation of the free appropriate public education that the IDEA guarantees. *Fry*, 137 S. Ct. at 752. The IDEA achieves its goal by providing instruction and related services tailored to the child's unique needs. *Id*. at 755. So complaints that a school did not adopt a plan individualized to the student's needs sound in the IDEA. In determining whether a plaintiff seeks relief available under the IDEA, we focus on the substance of the complaint, rather than the "labels and terms" the plaintiff uses. *Id*.

But both the substance and language of McMillen's complaint reveal that he is challenging the denial of a free appropriate public education. McMillen treats the failure of his 2015–16 IEP as the precipitating event

for all that followed his junior year. The IEP was the district "giving up on Chris"; "abandon[ing] what had been working"; exhibiting "negligence, professional negligence and misjudgment, deliberate indifference, and malice towards Chris"; and "was nothing more than Defendant New Caney ISD and the IEP Team proverbially *throwing up their hands* and declaring *we are tired of dealing with Chris-Twelve years of putting up with him is enough*." The central failing of the IEP is that it removed McMillen from the Pass Program, which "was 'designed to *work with students who have demonstrated either serious emotional disturbance or behavior disorders*,' . . . and return[ed] him to the care of professionals [who] had already proven their inability to manage Chris's Disabilities." The IEP thus was the reason McMillen was in the English class where he lasted only about a month before the behavior problems that resulted in the criminal charge. And who was responsible for the problems with the IEP? The "ARD Committee"—more IDEA lingo meaning the Admission, Review, and Dismissal Committee that Texas schools use to develop and approve IEPs. See 19 TEX. ADMIN. CODE § 89.1050.

The complaint does not just allege failures to comply with the IDEA when formulating the IEP before McMillen's junior year. McMillen alleges that when the district decided to send him to an alternative school, it failed to "hold an MDR." That is yet another term from the IDEA and its regulations meaning the manifestation determination review that is required when discipline results in a disabled student's removal from the school for more than ten consecutive days. 34 C.F.R. § 300.530(c), (e). Such reviews determine whether the conduct was a manifestation

of the student's disability, in which case the student should receive additional support to address the behavior problems. *Id.* § 300.530(e), (f).

There is even more in the complaint that focuses on failures to provide a free appropriate public education, but these examples provide a strong flavor of the allegations that are laden with IDEA terminology. Those allegations blame what happened to McMillen on the district's failures to comply with the IDEA.

Because the face of a complaint will not always make it apparent whether a non-IDEA claim is still challenging the denial of a free appropriate public education, the Supreme Court suggested two questions that will help distinguish such claims from those asserting general disability discrimination. *Fry*, 137 S. Ct. at 756. "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school?" *Id.* Second, could an adult (a teacher, for example) have brought essentially the same claim against the school? *Id.*; *see also Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251, 256–57 (5th Cir. 2017) (drawing on *Fry*'s two questions). If the answer to both questions is yes—it was in *Fry* for the student suing to have a service dog with her at school—then the plaintiff is not seeking relief available under the IDEA and need not exhaust. *Fry*, 137 S. Ct. at 758.

McMillen argues that the answer to both *Fry* questions is also yes for his suit challenging his removal from the district. He compares his situation to a public library's excluding a disabled person, who would have Rehabilitation Act and equal protection

claims for discrimination. So too, he contends, would a disabled adult be able to sue if a school denied the person access to the school. But describing his lawsuit as the denial of access to the school facility characterizes it too generally. See *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 592 (8th Cir. 2018) (explaining that a plaintiff answered the Fry questions at too high a "level of generality" by framing the denial of a request to enroll in online learning in a different school district as a "broken promise of non-discriminatory access"). McMillen's view would mean that any case challenging the suspension, transfer, or expulsion of a disabled student would avoid the IDEA's exhaustion requirement—after all, such discipline denies access to a school—even though the IDEA regulations provide a hearing for those very situations. See 34 C.F.R. § 300.530(c), (e). A more specific description of this lawsuit would include what McMillen identifies as the contributing factor to his expulsion: the failure of the school to provide an education tailored to his needs that would have, among other things, prevented McMillen from being in Hudman's English class in the first place. That is a claim that McMillen would not have against the public library, nor one that a teacher would have against the school.

If any doubt remains that this lawsuit is about the denial of the education that the IDEA promises, there are two other signs. That McMillen first alleged violations of the IDEA in federal court "before switching midstream" on learning of an exhaustion defense indicates that his amended complaint is still seeking to enforce the IDEA. *Cf. Fry*, 137 S. Ct. at 757 (observing that a plaintiff's invoking the IDEA

administrative procedures before abandoning them is a "sign that the gravamen of a suit is the denial" of a free public education). And in trying to fix another problem with his earlier pleadings—the failure to identify a policy that might render the district liable under section 1983—McMillen again revealed that this case is really about failures to comply with the IDEA. For proof of the district's "policy," McMillen cites a Department of Education report concluding that Texas public schools "suppress" the number of students eligible for special education services and the IDEA services they receive.

We thus conclude that McMillen's lawsuit challenges New Caney ISD's failure to provide him with the free appropriate public education that the IDEA promised him.

C.

But determining what injury McMillen seeks to remedy is only half of the question that we must decide. McMillen argues that the IDEA's exhaustion requirement applies only when the remedy that a plaintiff seeks is available under the IDEA. Because his lawsuit seeks damages, McMillen contends the exhaustion requirement does not apply. In addressing this argument, both sides accept its premise—that damages are not available under the IDEA. The issue is not that simple. The IDEA allows equitable monetary rewards, such as reimbursement of expenses like private school tuition a family unnecessarily incurred in the past to provide special education services. 20 U.S.C. § 1412(a)(10)(C)(ii); *Spring Branch Indep. Sch. Dist. v. O.W.*, 2019 WL 4401142, at *13 (5th Cir. Sept. 16, 2019). It also allows

for "compensatory awards," which "are designed to provide 'services prospectively to compensate for a past deficient program.'" *Spring Branch*, 2019 WL 4401142, at *13 (quoting *Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1280 (11th Cir. 2008) (awarding a student the option of multi-sensory reading and tutor services, and a dedicated special education teacher or reimbursement for private school tuition)). But McMillen's suit does not seek awards tied to the cost of providing him with an adequate education. He instead seeks damages for injuries like emotional distress,[1] and such traditional compensatory damages are not available under the IDEA. *Fry*, 137 S. Ct. at 752 n.4.

We thus must address a question most circuits have answered but this one has not: whether the exhaustion requirement applies when a plaintiff is seeking remedies not available under the IDEA.[2] The Supreme Court declined to answer the question in *Fry*. 137 S. Ct. at 752 n.4. Most circuits hold that the

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[1] McMillen's complaint also seeks punitive damages. But punitive damages are not available under the Rehabilitation Act, *Barnes v. Gorman*, 536 U.S. 181, 189–190 (2002), or against a governmental entity for constitutional violations, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268, 271 (1981).

[2] *Doe v. East Baton Rouge Parish School Board*, 121 F.3d 705, 705 (5th Cir. 1997) (per curiam), a brief and unpublished opinion, affirmed the dismissal of a constitutional claim for damages because the plaintiff failed to exhaust IDEA procedures. A later case stated that "demanding monetary damages—which are unavailable under the IDEA—does not automatically remove a claim from the IDEA's ambit," *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 527 (5th Cir. 2013), but that opinion was vacated, 599 F. App'x. 534 (5th Cir. 2013).

IDEA requires plaintiffs who were denied a free appropriate public education to exhaust regardless of the remedy they seek. See *Z.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, 744 F. App'x. 769, 777 n.14 (4th Cir. 2018); *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276 (3d Cir. 2014); *J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 595 (8th Cir. 2013); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487–88 (2d Cir. 2002); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Cudjoe v. Indep. Sch. Dist.* No. 12, 297 F.3d 1058, 1068 (10th Cir. 2002); *Charlie F. ex rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 991–92 (7th Cir. 1996); *N.B. ex rel. D.G. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *but see Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 876–77 (9th Cir. 2011) (en banc) (requiring exhaustion when a plaintiff sought an IDEA remedy or its functional equivalent, such as money to pay for private school or tutoring, but not when seeking other damages), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc).[3]

The question may be a closer one than the circuit scorecard suggests. Although McMillen does not

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[3] The Sixth Circuit did not require exhaustion for a student who had graduated because the IDEA procedures could no longer provide him any relief. *Covington v. Knox Cty. Sch. Sys.*, 205 F.3d 912, 917–18 (6th Cir. 2000). But it indicated it would follow the majority approach outside that unusual situation, "disagree[ing] that the plaintiff's damages claim alone excuses her from exhausting her administrative remedies." *Id.* at 916.

advance it,[4] there is a textualist case that a claim does not "seek relief that is also available" under the IDEA if the plaintiff cannot seek the same remedy under the IDEA. After all, the ordinary meaning of "relief" in the legal setting is remedy. *Relief*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002) (defining relief as a "legal remedy or redress"). Indeed, the words define each other in the leading legal dictionary. See BLACK'S LAW DICTIONARY (9th ed. 2009) (stating that "relief" is "also termed *remedy*"); *id*. (defining "remedy" in part as "legal or equitable relief"). The Solicitor General took this textualist approach in *Fry*, arguing that exhaustion is not required "[w]hen a plaintiff seeks only compensatory damages under a non-IDEA statute." Brief for the United States as Amicus Curiae at 18, *Fry*, 137 S. Ct. at 743. And the IDEA uses "relief" not just in its exhaustion provision, but also when listing the remedies available under the statute. 20 U.S.C. § 1415(i)(2)(C)(iii). Reading those provisions in sync would further support the view that "relief" means remedy.

But as we have noted, most courts read the statute differently. They read "relief available" under the IDEA "to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Charlie F.*, 98 F.3d at 991–92. According to this view, because the IDEA can remedy the failure to provide a blind student with a reader by giving her one, a suit

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[4] When interpreting a statute, we are not bound by the interpretations "that the parties advocate." *See Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1353 (2015).

seeking damages for such a failure must first exhaust the IDEA's administrative procedures. *Id.* at 992.

We agree that such an approach is necessary to enforce the statutory scheme, under which "educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls." *Id.* Allowing a plaintiff complaining about the denial of a free appropriate public education to avoid exhaustion "merely by tacking on a request for money damages" would subvert the procedures Congress designed for prompt resolution of these disputes. *Polera*, 288 F.3d at 487–88; *accord N.B. ex rel. D.G.*, 84 F.3d at 1379. The statutory preference is to solve these disputes by providing the student with her promised education, not by awarding damages years after the problem arises in the classroom. *Polera*, 288 F.3d at 490.

Most other circuits addressed this issue pre-*Fry*. Although *Fry* did not answer this question, its broader reasoning on the exhaustion requirement tends to support the majority view. Interpreting the IDEA to prevent parties from circumventing the scheme that Congress established in section 1415(l) through clever pleading was central to *Fry*. 137 S. Ct. at 755. And the Supreme Court's test for exhaustion—whether the lawsuit seeks a free appropriate public education—comports with reading "relief" to focus on the conduct the plaintiff complains about. *Id.* at 752.

We therefore hold that the IDEA's exhaustion requirement applies to plaintiffs who seek damages for the denial of a free appropriate public education. Because McMillen did not first seek relief through the

IDEA administrative process, this lawsuit was properly dismissed.

* * *

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTOPHER EDWARD McMILLEN,	§	United States District Court Southern District of Texas **ENTERED** May 31, 2018 David J. Bradley, Clerk
Plaintiff,	§	
VS.	§	**CIVIL ACTION NO. 4:17-CV-2561**
NEW CANEY INDEPENDENT SCHOOL DISTRICT	§	
Defendant.	§	

FINAL JUDGMENT

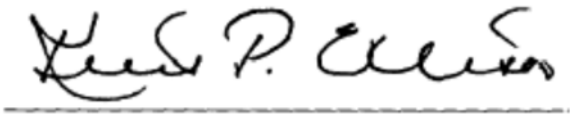
Plaintiff Christopher Edward McMillen ("Plaintiff") brought this suit against New Caney Independent School District alleging: (a) the deprivation of Plaintiff's rights under the United States Constitution by the assertion of a claim under 42 U.S.C. § 1983; (b) violations of the Rehabilitation Act of 1973; and (c) the deprivation of Plaintiff's rights to "Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process under the Constitution of

the United States of America." (Doc. No. 30.) Defendant New Caney Independent School District ("Defendant") moved to dismiss. (Doc. No. 33.) At a hearing on May 30, 2018, the Court granted the motion and dismissed all of Plaintiff's claims with prejudice.

Pursuant to Federal Rule of Civil Procedure 58(a), and for the reasons set forth at the hearing, final judgment is hereby **ENTERED** for Defendant New Caney Independent School District.

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 30th day of May, 2018.



HON. KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

KENNETH WAYNE MC MILLEN, et. al,	
Plaintiffs,	Civil Action No. H-17-CV-2561
VS.	
NEW CANEY INDEPENDENT SCHOOL DISTRICT, et. al.,	Houston, Texas May 30, 2018 3:42 p.m.
Defendants.	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEITH P. ELLISON
MOTION HEARING

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PROCEEDINGS

May 30, 2018

THE COURT: Let's turn to McMillen versus New Caney.

Appearances of counsel for McMillen, please.

MR. GORMAN: Terry Gorman, your Honor, from the Law Offices of Donald Henslee.

THE COURT: Thank you.

MR. BRUSH: Jonathan Brush on behalf of New Caney Independent School District.

With me is my partner Cory Rush.

THE COURT: Thank you.

Okay. This is a case that has always troubled me. I think it's unspeakably sad, which is a different question from whether there is a cognizable claim for relief. We do have Defendants' motion to dismiss the third amended complaint, and the Defendants get to go —

You-all can be seated.

Defendants can go first. You can assume I've read your papers.

MR. BRUSH: Thank you, your Honor.

As you'll recall, this is the second time we've been before the Court —

THE COURT: Yeah, it is. Yeah.

MR. BRUSH: — on the motion to dismiss hearing. We really have very little to add to what is in the papers. From

Defendants' perspective, this case is an IDEA claim, an Individuals with Disabilities Education Act claim, that is being pled as a Section 1983 claim.

The best evidence and the best indication of that, your Honor, is the allegations in the third amended complaint that rely on and complain of a United States Department of Education investigation into special education practices in Texas schools.

That is the gravamen of the McMillen's complaint at this juncture, is a claim that Chris McMillen was denied special education services purportedly, as far as we can glean, in alignment with the Texas Education Agency's unwritten policy or practice of encouraging school districts to only identify 8.5 percent of students as special education students.

Given what Plaintiffs have focused on, they've now revealed that their Section 1983 claim is no different than their already dismissed ADA and Section 504 claims which were claims that were subsumed by the IDEA's mandatory exhaustion requirement.

Courts have held that Section 1983 claims cannot be brought as a way to avoid the IDEA's exhaustion requirement. That's exactly what we have here. Analytically, we have the exact same issue that the Court's already granted dismissal on the Section 504 and the ADA claims.

As a secondary issue, even if the Court were to

find that there was a viable exhausted Section 1983 claim, which there is not, the McMillens have failed to

plead the elements of municipal liability.

As the Court well knows, there are stringent standards of pleading and proof for imposing municipal liability, one of which is the requirement of a policy of the governmental entity.

Here, there is no pleading that New Caney Independent School District had a policy that would support municipal liability. At best, Plaintiffs point to a purported policy of the Texas Education Agency. But review of the report from the Department of Education attached to the third amended complaint reveals that nowhere does it mention New Caney Independent School District.

While the Department of Education's conclusions may have some bearing on the identified school districts that were — where Department of Education conducted interviews, the Court would merely have to guess that any such policy existed at New Caney.

What's more, there is no dispute that Mr. McMillen was identified as a student receiving special education services. So, regardless of the TEA's rule or practice, there's no injury because Mr. McMillen was already identified.

So, the argument that there was a practice in the

State of Texas to not identify students necessarily, having already been identified as a special education student, having already received services, the McMillens' avenue for redress was to file a due process hearing; take it through an administrative hearing;

and, if dissatisfied, bring it to this Court for judicial review.

Because that was not done, the case is not justiciable and should be dismissed.

THE COURT: Thank you very much.

MR. GORMAN: Thank you, your Honor.

And first, I would like to thank the Court and counsel for the rescheduling of this matter as I was feeling ill.

THE COURT: Not at all. Happy to do it.

MR. GORMAN: That's very much appreciated.

Your Honor, the difficulty in this case from getting our hands around it, so to speak, is that there is so many facts.

THE COURT: There is what?

MR. GORMAN: So many facts and so many issues. And defense —

THE COURT: I think the facts are very supportive of your claim. It's just whether or not it should have been filed as an IDEA claim. I think what's happened to your client is extremely troubling. I have enormous empathy for him. I wish

the world were different, but that's not quite our issue.

MR. GORMAN: I raise that only to say that the defense has done a nice job of pointing to all of the IDEA violations that occurred that, frankly, I don't care about except for the following context:

The — after — after our hearing last time, I spent a lot of time with colleagues and myself working through these issues, working through these cases.

Justice Kagan didn't help us out very much with her tests. All of the cases talk about the gravamen. The issue that we've come up with — and I don't remember if I used it last time or not, your Honor. But the way I'm now viewing these cases and better understanding them myself is is it a fix-it case or is it a case for damages?

The whole purpose of IDEA administrative review is a fix-it case, the IEP isn't right, the Behavioral Intervention Program isn't right, the student is not being provided this or those services. That's not what this case is about.

All of that — IDEA cases, by definition, your Honor, as we know, does not allow for monetary damages. Why? Because they're fix-it cases. The gravamen of this case is really very simple; and if my pleading was not artful enough to put it, let me put it now.

Your Honor, we have a disabled student —

THE COURT: Yeah.

MR. GORMAN: — that the school is tired of and decides to get rid of him. That is the gravamen of this case. The school — the reason all of the other facts are relevant is it shows their exhaustion not of remedies but their exhaustion of dealing with Chris McMillen.

And so, what happens is, as a result of a teacher that tries to literally save him with Jesus Christ and fails, she then takes these private journals of him and

calls it a terrorist act. The school then just — then jumps to the police and the prosecutors; and as we discussed before, what do they all end up with? He's expelled. That is the gravamen of the case.

One of the things Justice Kagan said, after I went back and read it for the fiftieth time, is take an example of some other public facility and make the comparison to see if there is a violation.

So, your Honor, let's assume this is a public library. It's a public library. And Chris McMillen is in there, and he's reading. He's been in there a lot. Sometimes he rants. Sometimes he raves. Most often, he just writes in his journals, things that have to do with him.

Clearly disabled. At some point, the library, which is a public library, kicks him out. "You are a terrorist. Look at what you just wrote. You are a terrorist. Get out of

our library. We never want to see you again." That's what Justice Kagan said a better — another example is to do. And that's what we have here.

The other issue with regard to the facts, your Honor, is to show that, even though I don't think an administrative remedy is appropriate because it's not a fix-it case, we certainly have the basis of futility here. The futility doctrine, even if administrative remedies had been appropriate, is clear that it wouldn't have mattered.

But the gravamen, the center, of this case is not an IDEA case. This is not a lawsuit for damages because of the poor education or the quality. It's the

result of no education. And I mean that in the broadest sense.

THE COURT: Well, is there any support in the case law for the distinction you want to draw, though?

MR. GORMAN: With regard to which point?

THE COURT: Fix-it case versus damages.

MR. GORMAN: Your Honor, we know by definition IDEA cases are not — you're allowed attorney's fees, but you're not allowed monetary damages. And so, that is the distinction right there.

The other issue is, if you follow — the other thing that Justice Kagan said is look at whether the — and this is in *Fry* — look at whether the parties were pursuing administrative remedies. I took that to mean, if they're

pursuing administrative remedies, they are trying to fix it.

The record here shows that the McMillens did file grievances. Those grievances were being processed, ignored, whatever; but none of them mattered when they kicked him out. Your Honor, last week the Defendant's brother, Pedro, graduated from this high school. And what was it that Chris told his parents? With head down looking at them, he said, "You get to graduate. I didn't get to." And what he said was "The school wouldn't let me."

THE COURT: Well, I can't take note of ex rel record facts.

MR. GORMAN: I know that, your Honor. But my point in bringing it up is nobody is complaining about the quality of education he received prior to the day

that they arranged for his expulsion. This case — the gravamen of this case has to do with their decision to work together with the county and make sure that he never came back.

Thank you, your Honor.

THE COURT: Thank you.

MR. BRUSH: Briefly, your Honor?

THE COURT: Mr. Brush, yes, sir.

MR. BRUSH: With respect to the distinction that opposing counsel is attempting to draw, your Honor, it ignores a key element of the IDEA; and that is the requirement that before a school district can take disciplinary action against a

student who has a disability and is receiving services, the school district is required to hold a manifestation determination review.

If the student and family are not satisfied with the determination, the IDEA permits exhaustion; and it provides a remedy. If the case is an expulsion case, as opposing counsel just articulated, it could have been fixed, if they're right about the facts, by pursuing the IDEA's administrative exhaustion process because the IDEA expressly provides for a manifestation determination review, an appeal of an adverse determination to a state hearing officer and in turn judicial review of an adverse state hearing officer's determination.

This is an IDEA claim. It could have and should have been brought up through the state administrative proceedings. The fact that it wasn't

does not and cannot transform this into a damages case.

Opposing counsel's distinction that this is a damages case misses the mark. It's only a damages case because they seek damages for an expulsion because they did not pursue the administrative remedy which would have allowed this to be a fix-it case.

Finally, coming to *Fry*, expulsion is strictly a function of school districts. Only students are expelled from school districts. We know under the suggested two-part test in Fry that this case is likely to be an IDEA case; but because of

the IDEA's MDR requirements and the provision of available relief, Congress's directive that these issues first be decided by a state hearing officer who can bring their expertise to bear to develop a record would be frustrated if the Court were to allow a damages case to proceed under these circumstances.

THE COURT: Let me take a minute with my colleagues. No one need rise. No one need rise.

(In-court recess taken.)

THE COURT: Sit down, everybody.

My law clerk reminds me that most of the circuits who have ruled on the issue have found that a prayer for money damages alone is insufficient to bypass the exhaustion requirement of IDEA.

One Texas case that holds that is *Ripple versus Marble Falls ISD*, 99 F.Supp.3d, 662 at 689. I think that has to be the law; otherwise, you could just include a prayer for damages and defeat the statutory

framework. I don't think that's what Congress intended.

This case troubles me a lot. I think the bureaucracy was not as responsive as it should be. I'm deeply troubled by the idea that a teacher can force her religion on a student. That's — that's odious to me no matter how well-intentioned the proselytizer, no matter what the merits of the religion.

This to me, though, is classically an IDEA case;

and I'm afraid I'm going to have to grant the motion to dismiss under Rule 12(b). I'm very sorry.

(Proceedings concluded at 3:58 p.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter, to the best of my ability.

By: /s/Gayle L. Dye 09-29-2018
Gayle L,. Dye, CSR, RDR, CRR
Date

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTOPHER EDWARD	§	
McMILLEN, AN	§	
INCAPACITATED	§	
PERSON	§	**C.A. No.**
Plaintiff	§	**4:17-cv-2561**
	§	
vs.	§	
	§	
NEW CANEY	§	
INDEPENDENT	§	
SCHOOL DISTRICT	§	
Defendant	§	

PLAINTIFF'S THIRD-AMENDED COMPLAINT

Plaintiff **CHRISTOPHER EDWARD McMILLEN, AN INCAPACITATED PERSON** files this "Plaintiff's Third-Amended Complaint" against the foregoing described Defendant and respectfully shows as follows:

I. PROCEDURAL NOTE

On January 23, 2018, the Court dismissed the following two causes of action being asserted by Plaintiff:

a. DEPRIVATION OF CONSTITUTIONAL RIGHTS, and

b. VIOLATIONS OF SECTION 504.

The Court also granted Plaintiff leave to amend his complaint for the purpose of elaborating on Plaintiff's claim under 42 USC §§ 1983. Although the Court dismissed the Plaintiff's causes of action related to DEPRIVATION OF CONSTITUTIONAL RIGHTS and VIOLATIONS OF SECTION 504, the assertion of such causes of action, and the supporting facts, are included in this amended complaint, to preserve the record.

II. NATURE OF SUIT

1. CHRISTOPHER EDWARD McMILLEN (defined hereafter as Chris) is an eighteen year old young man diagnosed with various disabilities. Until recently, Chris was an active student in the New Caney Independent School District, which is Northeast of the Houston area. This is a civil action for compensatory damages and punitive damages to redress the blatant, egregious, and often intentional actions of Defendant New Caney ISD which constitute (a) the deprivation of Chris's rights under the United States Constitution and federal law by the assertion herein of a claim under 42 USC §§ 1983; (b) violations of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et*

seq.;[1] and (c) the deprivation of Chris's rights to Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process under the Constitution of the United States of America.[2]

III. PARTIES

2. Plaintiff **CHRISTOPHER EDWARD McMILLEN, AN INCAPACITATED ADULT** ("Chris") is an individual residing in Montgomery County Texas. Chris lives with his parents, KENNETH McMILLEN ("Ken") and LISA McMILLEN ("Lisa").

3. As a result of the actions taken by Defendant New Caney Independent School District, Chris has been declared to be an incapacitated adult under Texas law. Ken and Lisa were appointed to be the co-guardians of Chris. This action is brought by Ken and Lisa, as the court appointed co-guardians of their son, Chris.

4. Defendant **NEW CANEY INDEPENDENT SCHOOL DISTRICT** ("New Caney ISD") is a school district formed under the laws of the State of Texas and is located in Montgomery County, Texas. Defendant New Caney ISD has already been served with summons in this matter and has made an appearance herein.

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[1] This claim for relief was dismissed by the Court on January 23, 2018.

[2] *Id.*

IV. JURISDICTION AND VENUE

5. This Court has jurisdiction of this dispute as involving a *federal question* proceeding arising under the deprivation of rights granted to Plaintiff Chris under the United States Constitution and federal law resulting in the assertion herein of a claim under 42 USC §§ 1983, for such deprivation of rights was done under the color of law.

6. Venue is proper in the Southern District of Texas because the events forming the basis of this suit occurred in this District, and Plaintiff Chris resides in this District.

V. FACTUAL ALLEGATIONS

7. At the time of the filing of this action, Plaintiff Chris was an eighteen year old young man diagnosed with Autism Spectrum Disorder, Emotional Disturbance, and Learning Disabilities related to his Central Auditory Processing Disorder (hereafter, "Chris's Disabilities"). Until recently, Chris was an active student in the New Caney Independent School District, which is Northeast of the Houston area.

8. Plaintiff Chris resides with Ken, his father, and Lisa, his mother, in Montgomery County, Texas. Chris was born on February 18, 1999. As a result of the actions taken by Defendant New Caney ISD, Chris was recently declared to be an incapacitated adult under Texas law, with Ken and Lisa declared to be the co-guardians of Chris.

9. Plaintiff Chris began attending school in the New Caney ISD in 2003, at the age of 4 being in Pre-Kindergarten.

10. As a public school district located in the State of Texas that receives certain funding from the United State of America, Defendant New Caney ISD is mandated to implement policies and procedures assuring that all students (including students with Chris's Disabilities) are educated in accordance with the laws of the United States, including but not being limited to the Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process clauses under the Constitution of the United States of America ("Constitutional Rights"), and, the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*. ("Section 504"). For the purposes hereof, Chris's' Constitutional Rights, his rights under Section 504, and any regulations enacted pursuant to such laws shall be collectively referred to as the "Laws Protecting Chris."

11. While detailed in nature, the Laws Protecting Chris exist for the purposes:

(a) of preventing violations of Chris's Constitutional Rights and other federal laws;

(b) of insuring the delivery to Chris of a free, public education; and

(c) of protecting Chris from discrimination due to Chris's Disabilities.

12. As acknowledged by Defendant New Caney ISD, Chris is a highly intelligent young man.

13. In accordance with other laws, Defendant New Caney ISD also had the responsibility of developing an individualized education program ("IEP") for Chris which would provide Chris with a safe, non-hostile educational environment; complete with modifications

and accommodations geared toward Chris's Disabilities; including safe, meaningful access to programs; designed to prevent or remedy harassment by other students.

14. Chris's behavioral challenges were being managed with specified behavioral interventions adopted during prior IEPs.

15. On August 28, 2015, Defendant New Caney assembled a team of purportedly qualified and trained individuals (hereafter, "IEP Team") to conduct a review of the then most recent evaluations of Chris and Chris's Disabilities.

16. For reasons unknown, Defendant New Caney ISD offered a woefully inadequate and intentionally indifferent IEP for Chris (hereafter, the "August 2015 IEP").

17. The August 2015 IEP was Defendant New Caney ISD giving up on Chris.

18. Rather than developing and implementing a revised personalized IEP for Chris, Defendant New Caney ISD adopted the August 2015 IEP, which abandoned what had been working, including but not being limited to the specified behavioral interventions.

19. Defendant New Caney ISD's August 2015 IEP failed Chris in all respects.

20. Defendant New Caney ISD's adoption of the August 2015 IEP represented negligence, professional negligence and misjudgment, deliberate indifference, and malice towards Chris.

21. Through Defendant's actions of negligence, professional negligence and misjudgment, professional bad faith/gross misjudgment, deliberate

indifference, and malice, Defendant New Caney ISD failed to provide a meaningful and successful IEP for Chris.

22. Rather, the August 2015 IEP was nothing more than Defendant New Caney ISD and the IEP Team proverbially *throwing up their hands* and declaring *we are tired of dealing with Chris-Twelve years of putting up with him is enough*.

23. Ken and Lisa challenged and protested the August 2015 IEP by pursuing administrative complaints and grievances with Defendant New Caney ISD.

24. All such grievance and protest efforts by Ken and Lisa were to no avail, as Defendant New Caney ISD refused to modify the August 2015 IEP.

25. Coinciding with Chris's failed August 2015 IEP, Defendant New Caney ISD assigned Chris to a Junior English class. Working as a teacher for Defendant New Caney ISD and acting within her scope of employment, Margaret Angela Hudman ("Hudman") became Chris's English teacher.

26. Chris's life would never be the same.

27. Although Hudman has no professional training as a psychologist and notwithstanding that Hudman was an employee of Defendant New Caney ISD, Hudman took it upon herself to attempt *to save* Chris, both in the religious and behavioral contexts.

28. Hudman's proselytizing efforts towards Chris were a push to Christianity. Hudman apparently believed that if Chris became a Christian, or at least understood the doctrines of Christianity, Chris would be liberated from Chris's Disabilities.

29. Hudman's informal psychology sessions with Chris were likewise efforts to free Chris of Chris's' disabilities.

30. For the purposes hereof, Hudman's proselytizing and psychological efforts will be hereafter collectively referred to as "Hudman's Interference").[3]

31. Hudman's Interference was not solicited by Chris, Ken, or Lisa.

32. Hudman's Interference was done under the guise of Chris's Junior English class, but was certainly not a part of the August 2015 IEP.

33. Hudman's Interference was also extremely harmful to Chris.

34. With no regard for, and even because of, Chris's Disabilities and as a result of the August 2015 IEP, and various strategies developed as part of Chris's behavioral intervention plan (which was grossly outdated at that time), Hudman's Interference continued.

35. However, after a time, and with no regard for, and even, because of, Chris's Disabilities, Hudman unilaterally determined that Chris was incapable of *being saved* and decided to have Chris ostracized from his school and education.

---

[3] Hudman also apparently believes that Autism can be cured by taking *Kyani*, a purported herbal supplement that Hudman happens to sell. Quoting Hudman: "***If you have a child with ADHD or Autism, or any other issue, I want you to try Kyani! Get them off those meds-that have horrible side effects-and get them on natural vit and minerals!!! What could it hurt to try?***"

36. Hudman decided that since Chris could not be *saved*, Chris should be exiled and cast out by physically removing Chris from Defendant New Caney ISD's school system.

37. The vehicle Hudman would use to initiate the subsequent exile of Chris would be alleged threats to harm others.

38. As Chris's Junior English teacher, Hudman began literary writing and dialogue sessions with Chris related to views on humanity and the general human condition.

39. Chris participated in Hudman's writing and dialogue sessions, not knowing that Hudman was collecting the content of such sessions and planned on using such content against Chris.

40. The topics that Hudman delved into with Chris included:

(a) the purpose of life;

(b) gods and goddesses;

(c) Christianity;

(d) Religion in general;

(e) Chris's life goals and plans;

(f) Chris's visit with his biological mother;

(g) Chris's dating experiences;

(h) Karma and fate;

(i) pain, anguish, and death; and

(j) even Chris's future incarceration.

For the purposes hereof, the foregoing shall be collectively referred to as the "English Assignments."

41. Nor was Hudman constrained by Chris's rights of privacy, as Hudman reached out to other teachers within Chris's school and began openly discussing Chris.

42. By mid-September of 2015, Hudman decided that she had enough material and content to move forward in her effort to exile Chris. Upon information and belief, Hudman's disdain for Islam and Muslims might also been in-play as to her actions against Chris. The year prior, Chris, as part of a self-designed social experiment, announced to his school teachers and friends that he had adopted Islam. Chris would ask to be excused from class so he could recite his afternoon prayers to Allah. Based on Hudman's various social media posts, Hudman clearly appears to be anti-Islam and anti- Muslim.

43. On September 15, 2015, Hudman sent an email (marked "Urgent email!!! PLEASE READ NOW" (hereafter, "Hudman's Initial Email"), wherein Hudman began telling anyone who would listen, that "*[Chris] poses a threat to the students and Faculty of New Caney ISD*."

44. Beginning with Hudman's Initial Email, Hudman began sharing out of context snippets of what Chris had discussed with Hudman during Chris's English Assignments. For the purposes hereof, the Initial Email and the referenced snippets shall be collectively referred to hereafter as the "Lies."

45. Hudman's Initial Email was sent directly to Principal David Wayne Loyacano ("Loyacano"), Monique Yvonne Richardson Moss ("**Richardson-Moss**") one of Chris's school counselors, and staff members at Chris's school. Then, Loyacano brought

in Bridgett Ann Heine ("Heine"), being an assistant principal at Chris's school, and Dianne Elizabeth Gillis ("Gillis") an associate school psychologist. For the purposes hereof, Loyacano, Hudman, Heine, Richardson-Moss, and Gillis shall be collectively referred to as the "Gang of Five."

46. Instead of properly evaluating the Lies within the appropriate parameters of Chris's Disabilities, the Gang of Five began working in concert to permanently exile Chris from his school, not only in spite of Chris's Disabilities, but because of Chris's Disabilities. For the purposes hereof, the actions of the Gang of Five to exile Chris from his school shall be collectively referred to hereafter as "Illegal Expulsion."

47. If the Gang of Five succeeded with their Illegal Expulsion of Chris, not only would the Gang of Five and Defendant New Caney ISD be freed from their respective individual and collective responsibilities owed to Chris because of Chris's Disabilities, but all of the past failures, negligence, and intentional acts of Defendant New Caney ISD, the IEP Team, and the Gang of Five would be forever swept under the proverbial rug.

48. Upon information and belief, the Illegal Expulsion was also being pursued in retaliation for Ken and Lisa's continued efforts to force Defendant New Caney ISD to handle Chris properly.

49. To start the Illegal Expulsion, the Gang of Five took the Lies and transformed the Lies into a false assessment that Chris was threatening to harm others ("False Assessment").

50. Next, the Gang of Five, acting as employees of Defendant New Caney ISD, filed criminal charges

("False Charges") with the New Casey ISD Police Department within Defendant New Caney ISD.

51. Acting on the False Charges, the New Caney ISD Police Department had Chris arrested and charged with the felony of making a terrorist threat ("False Terrorist Threat").

52. After being arrested and held in custody for three days at the Montgomery County Juvenile Detention Center as a result of the False Terrorist Threat, Chris was released pending a final hearing.

53. Defendant New Caney ISD and the Gang of Five had succeeded with the first step of the Illegal Expulsion of Chris. However, Defendant New Caney ISD and the Gang of Five wanted to insure that Chris would never return to his school.

54. By then declaring the False Charges and the False Terrorist Threat to be a conduct violation, Defendant New Caney ISD and the Gang of Five maliciously decided that Chris should spend the rest of his school years separated and exiled to an alternative campus, not only in spite of Chris's Disabilities, but because of Chris's Disabilities.

55. Notwithstanding that applicable laws require that a student with identified disabilities (such as Chris) must have a manifestation determination review ("MDR") prior to the institution of additional or extreme discipline, Defendant New Caney ISD and the Gang of Five refused to hold an MDR, or any other required hearings and assessments, to review Chris's proposed sentence to an alternative campus ("School Jail").

56. Beginning when Ken and Lisa were informed of the False Report, Ken and Lisa began a frantic effort

to work with Defendant New Caney ISD to resolve the issues between Defendant New Caney ISD and Chris.

57. Conversations, phone calls, and meetings were held between Ken and Lisa, and, Defendant New Caney ISD. However, Defendant New Caney ISD would not budge: Chris was going to spend the rest of his school years at School Jail.

58. Defendant New Caney ISD, however, had yet another malicious step to inflict Chris Ken, and Lisa.

59. On September 18, 2015, Defendant New Caney ISD, acting through Hudman, filed an outrageous, false, malicious, and unfounded complaint with Texas Child Protective Services ("CPS") with regards to Ken and Lisa's care of their son Chris.

60. Such complaint was quickly reviewed and closed by CPS, but more harm had been done to Plaintiff.

61. On or about October 2, 2015, Ken filed an extensive set of grievances ("Grievances") with Defendant New Caney ISD, such Grievances being incorporated herein by reference for all purposes.

62. Wherever possible, the individual members of the Gang of Five also did their respective parts to insure Chris was never returning to school.

63. While pursuing civil relief from Defendant New Caney ISD, Ken and Lisa were also doing everything possible to resolve the False Terrorist Threat and the felony criminal charge. Once again, Defendant New Caney ISD did all they could to use the criminal charge of a False Terrorist Threat against Chris.

64. On October 30, 2015, the Montgomery County Attorney's Office dropped all criminal charges against Chris, **provided, that Ken and Lisa**:

> **(a) never re-enroll Chris into school with Defendant New Caney ISD; and**
>
> **(b) personally provide Chris with all mental health treatment that Chris may hereafter need with regard to Chris's Disabilities.**

Hereafter, the "Extorted Deal."

65. With the Extorted Deal being the only remedy that Ken and Lisa believed existed, Ken and Lisa ceased all efforts to return Chris to school within the New Caney ISD and have been trying to provide for Chris's mental health on their own.

66. Defendant New Caney ISD, and the Gang of Five had succeeded with the Illegal Expulsion.

67. In part, Defendant New Caney ISD has:

> (a) deprived Chris of completing his next two years of education at the New Caney ISD;
>
> (b) deprived Chris of his rights of expression and assembly;
>
> (c) deprived Chris of his substantive and procedural due process rights;
>
> (d) intentionally harmed Chris, not only in spite of, but because of, Chris's Disabilities;

(e) failed to maintain Chris's privacy (as verified by a separate investigation by the Texas Education Agency);

(f) failed to alert the appropriate public authorities of Chris's Disabilities (as verified by a separate investigation by the Texas Education Agency);

(g) failed to comply with record-keeping requirements as to Chris (as verified by a separate investigation by the Texas Education Agency); and

(h) failed to protect Chris from Hudman's religious proselytizing.

Hereafter, collectivity the "Deprivation of Chris's Rights."

68. The Deprivation of Chris's Rights, caused by Defendant New Caney ISD, is singularly, solely, and uniquely in spite of, and a direct result of, Chris's Disabilities and is an absolute violation of the Laws Protecting Chris.

69. As a direct result of the Deprivation of Chris's Rights, Chris's mental health deteriorated to such an extent, that Chris was no longer able to care for himself.

70. With Chris having turned 18 years of age, Ken and Lisa were required to proceed with the appointment of co-guardians for Chris.

71. As a result of Defendant New Caney ISD's Deprivation of Chris's Rights, Chris could easily remain a ward for the rest of his adult life, improperly:

(a) denying Chris of the ability to live an economically productive life, providing

for himself and in later years, for his parents Ken and Lisa;

(b) denying Chris the joys of expression of assembly;

(c) denying Chris the abilities to live as a full and independent adult;

(d) denying Chris the consortium of his parents Ken and Lisa; and

(e) denying Ken and Lisa the consortium of their loved son, Chris.

72. Although threatening criminal prosecution in order to aid a civil remedy is a form of extortion, Defendant New Caney ISD and the Gang of Five apparently believe that such tactics are acceptable and appropriate even for someone with Chris's Disabilities.

73. On September 21, 2015 (prior to the Extorted Deal to never return Chris to the New Caney ISD), Ken was discussing (with Heine) the logistics of possibly returning Chris to school. Speaking for the Gang of Five as well as Defendant New Caney ISD, Heine told Ken: "*if you return Chris to this school, [we] will just pursue additional charges*."

74. As superintendent of Defendant New Caney ISD, Ken Franklin ("Franklin") was required to insure that Defendant New Caney ISD followed the Laws Protecting Chris. Franklin was also required to act and to ensure that school employees act, to rectify any deprivation of due process or deprivation of any other rights which attach to students within the New Caney ISD, when said deprivation is caused by such school district. Clearly Franklin failed in all respects as to

Chris (including but not being limited to his allowance of the Gang of Five to harm Chris).

75. Defendant New Caney ISD's and the Gang of Five's Deprivation of Chris's Rights and the Illegal Expulsion were acts of negligence, gross negligence, and a reckless disregard for the harm inflicted upon Chris.

76. Chris has irrevocably been harmed as a result of the Deprivation of Chris's Rights and the Illegal Expulsion.

77. As co-guardians of Chris, Ken and Lisa are asserting Chris's right to seek redress and damages from Defendant New Caney ISD.

78. To protect the rights created by the Laws Protecting Chris, Chris was forced to engage an attorney and pursue this action.

79. By filing this action and electing to seek damages against Defendant New Caney ISD, Plaintiff is foregoing the right to proceed with individual actions against the Gang of Five and Superintendent Franklin.

80. Recently made public by the United States Department of Education is a decade long, coordinated effort by the Texas Education Agency ("TEA") and public school districts within the State of Texas to unlawfully suppress (a) the number of students in Texas receiving assistance under Section 504 and the Individuals With Disabilities Education Act of 2004, 20 U.S.C. § 1400 *et seq*. (hereafter, the "IDEA"), and (b) the level of services under Section 504 and the IDEA. A complete copy of the January 11, 2018 Letter and Report is attached hereto as Exhibit "A" and is

incorporated herein by reference for all purposes (hereafter, "DE Report").

81. According to the DE Report, the referenced repression began in 2004 and continued unabated through 2016 (hereafter, the "TEA and Districts Suppression Efforts"). The entirety of Plaintiff Chris' high school years attending Defendant New Caney ISD fall within the time period of the TEA and Districts Suppression Efforts.

82. Without discovery efforts through this proceeding, Plaintiff Chris has no means whatsoever to definitively determine whether (a) Defendant New Caney took part in the TEA and District Suppression Efforts; (b) how entailed such Suppression Efforts might have been, and (c) whether Chris was a victim of such Suppression Efforts. However, such limitation does not mean that Plaintiff Chris's time with Defendant News Caney ISD does not offer key indicators.

83. Because Plaintiff's Second-Amended Complaint was not seeking relief under the IDEA, the Factual Allegations contained therein focused primarily on issues related and leading up to the Illegal Expulsion, the Extorted Deal, and the Deprivation of Chris's Rights. The same is true with regards to the factual assertions set forth in the prior paragraphs of this Third-Amended Complaint.

84. With the knowledge that Plaintiff Chris might have been a victim of the TEA and Districts Suppression Efforts, additional factual allegation become relevant with regards to Chris and his time with Defendant New Caney ISD beginning with the

2014 school year and extending through the Extorted Deal in the Fall of 2016.

85. With a focus on actions by Defendant New Caney ISD that were violations of Plaintiff Chris's rights under the IDEA (which is now herein deemed to be included in the previously defined term of *Laws Protecting Chris)*, the depth of the Deprivation of Chris's Rights is staggering.

86. The 2014–2015 school year for Plaintiff Chris (while attending the New Caney High School, owned and operated by Defendant New Caney ISD) was a difficult and revealing year. Plaintiff Chris's Admission, Review, and Dismissal ("ARD") committee met three separate times because of behavioral manifestations of Chris's Disabilities.

87. Because of the apparent difficulties that Defendant New Caney ISD was having coping with Chris's Disabilities, in January 2015, Defendant New Caney ISD admitted Chris into its "Pass Program."

88. The Pass Program is designed to:

> *"Work… with student who have demonstrated either serious emotional disturbance or behavior disorders (and who have not responded to less intensive interventions…"*

In doing so, Defendant New Caney ISD was acknowledging that Chris's Disabilities were severe.

89. At the end of the 2014–2015 school year, a full psyche evaluation, complete with a Functional Behavior Assessment, was performed on Plaintiff Chris by Defendant New Caney ISD in an attempt to determine how to manage Chris's Disabilities and challenging behavior. One of the conclusions of such

evaluation was that Plaintiff Chris's participation in the Pass Program was actually causing Chris to self-mutilate, a manifestation that resulted in Chris' hospitalization in May of 2015.

90. With Defendant New Caney ISD determining that Plaintiff Chris's continuation in the Pass Program would be mentally and physically harmful to Plaintiff, Defendant New Caney ISD had three meaningful choices on how to proceed with Chris at the beginning of the 2015–2016 school year:

a. continue with Chris in the Pass Program;

b. locate a private placement for Chris; or

c. explore other solutions with persons qualified to manage Chris's' Disabilities.

91. Most unfortunately for Plaintiff Chris, Defendant New Caney ISD selected to simply return Chris to New Caney High School and continue with the same obviously ill-trained and disqualified professions that had been unable to manage Chris during the 2014–2015 school year, notwithstanding that the reports viewed by Plaintiff Chris's ARD committee in August 2015 showed that: ***threats of Chris harming himself and others had increased from 2 to 3 times every nine weeks, to threats then being made daily.***

92. After an entire school year (2014–2015) of attempting to manage Plaintiff Chris's serious emotional disturbance and serious behavior disorder, Defendant New Caney ISD decided to take Chris out of a program that was "designed to *work with students who have demonstrated either serious emotional*

disturbance or behavior disorders, the Pass Program, and return him to the care of professionals that had already proven their inability to manage Chris's Disabilities.

93. As explained by Ken, Plaintiff Chris's father:

> *"Chris can be likened to a can of gasoline. His behavior is quite explosive and without the proper qualified supervision, the can will explode without warning. Once the fire starts, it is difficult or impossible to extinguish. All persons involved will need to step back and stay away from the flames. Attempting to snuff out the fire usually results in spreading the flames and increasing the damage. Chris's explosive behavior has no off switch, and most conventional techniques to calm a person that is overwhelmed prove useless.*

Every day that Plaintiff Chris went to school at New Caney High School, the "gas can" was passed from Ken and Lisa's supervision to the ill-trained supervision provided by Defendant New Caney ISD.

94. During those first few weeks and months of the 2015–2016 school year:

a. Defendant New Caney ISD presented Chris with persons he had never met, but offered no protocols for transitioning a psychologically complicated special needs students like Plaintiff Chris from old to new personnel;

b. Plaintiff Chris disobeyed his required escort rule and bolted from class

without permission, but there was no one from Defendant New Caney ISD to stop him from leaving the classroom;

c. Chris's emotional outbursts increased, unabated by Defendant New Caney ISD;

d. Chris's threats to himself and others occurred daily;

e. As previously described, Defendant New Caney ISD abandoned Chris's IEP;

f. Defendant New Caney ISD failed to update Plaintiff Chris's Behavioral Intervention Plan;

g. Defendant New Caney ISD failed to amend Plaintiff Chris's IEP qualifications as directed by New Caney ISD personnel the prior school year;

h. When Hudman did contact Ken and Lisa to express her concerns about Chris, Ken and Lisa warned her that (a) Chris's Disabilities were very complicated, and (b) she (Hudman) should avoid explosive topics such as religion and politics;

i. However, Hudman stated that: she felt self-qualified due to her dealing with a nephew "with the same conditions" and the Hudman Interference continued unabated by Defendant New Casey ISD;

j. Predictably, on September 15, 2015, Plaintiff Chris erupted with inappropriate threatening words;

k. Although the federal regulations contained within the Laws Protecting Chris require the evaluation of a behavioral event, to the relationship of the individual's disabilities (the previously defined MDR) before any discipline is administered, Defendant New Caney ISD refused to perform an MDR for Chris;

l. Instead, Defendant New Caney ISD proceeded with the Lies and the False Assessment;

m. Although federal law mandated Defendant New Caney ISD to determine if Chris's' Disabilities prevented Chris from understanding the wrongfulness of the aggrieved behavior, Defendant New Caney ISD refused to even inform Chris of what was happening;

n. Hudman falsified documents to create the worst possible scenario for Chris;

o. Hudman altered documents;

p. Defendant New Caney ISD coordinated with law enforcement authorities to have Chris arrested, spend three nights in jail, and be charged with felony terrorist charge;

q. Defendant New Caney ISD failed to inform such law enforcement authorizes of Chris's Disabilities;

r. Defendant New Caney ISD proceeded with its Illegal Expulsion of Plaintiff Chris;

s. Defendant New Caney ISD coordinated with law enforcement authorities to push for the Extorted Deal, agreed to by Ken and Lisa under duress and threats of additional criminal charges being filed by Defendant New Caney ISD;

t. Defendant New Caney ISD allowed Plaintiff Chris's confidential psyche evaluation to became the "gossip" of the educators and staff at New Caney High School;

u. Defendant New Caney ISD ignored the Grievances filed by Ken and Lisa; and

v. On numerous occasions, Defendant New Caney ISD wrongly withheld public documents requested by Ken and Lisa.

For the purposes hereof, the foregoing shall be collectively deemed herein to be included in the previously defined term of Deprivation of Chris's Rights.

95. In essence, Defendant New Caney did everything possible to ignite the "gas can" and nothing to safely extinguish the resulting explosion.

96. By allowing the "gas can" to explode, Defendant New Caney ISD has caused irreparable damage to the can and those around the can. One cannot get the gas back in the fragments of the can, for the can is not even a can anymore.

97. The harm inflicted upon Plaintiff Chris by Defendant New Caney ISD has caused irreparable harm to Chris.

98. Because of the trauma caused by the Defendant New Caney ISD's Deprivation of Chris's Rights, Plaintiff Chris now suffers from severe agoraphobia, PTSD symptoms, lacks any level of trust, and is unable to sleep. When consulting with Chris mental health professionals who knew Chris before the Deprivation of Chris's Rights, Ken and Lisa were informed that Chris may not even be "fixable" at this point.

99. As a result of a complaint filed with TEA by Ken, the TEA conducted an investigation into some of the actions of Defendant New Caney ISD with regards to certain of the issues comprising some of Defendant New Caney's Deprivation of Chris's Rights

100. In a June 27, 2017 Investigative Report issued by TEA, TEA concluded that certain aspects of Defendant New Caney ISD's handling of Chris were violations of some of the Laws Protecting Chris.

101. The Deprivation of Chris Rights by Defendant New Caney ISD and the resulting violations of the Laws Protecting Chris were committed by persons acting under the cover and color of law, within their respective scope of employment by New Caney ISD. Further such Deprivation was the result of either (a) intentional acts to harm Plaintiff Chris, or (b) a

reckless, evil, and obvious wanton disregard of the outcome and harm to Chris.

102. There were numerous participants in Defendant New Caney ISD's Deprivation of Chris's Rights: the Gang of Five; the members of Chris's ARD Committee; those persons responsible for the denial of the Grievances filed by Ken and Lisa; the unknown staff members who facilitated such Deprivation, and the as yet unnamed New Caney ISD administrators and trustees that approved such Deprivation, or allowed such Deprivation.

103. As for the complicity of Defendant New Caney ISD's involvement with the Extorted Deal, there can be no doubt. Why would a prosecutor make any demands or conditions for a student to be barred from a public school, without first having discussed and coordinated such condition and demand with the school district itself?

104. Considering the breadth, swiftness, single-minded focus, and complexity of Defendant New Caney's ISD's Deprivation of Chris's Rights, how else could such actions have occurred if not:

(a) as the direct result of the execution of official "customs" and/or "policies" ("Customs & Policies") of Defendant New Caney ISD;

(b) approved or sanctioned by the New Caney ISD Board of Trustees; and

(c) executed (by the final policymaker within Defendant New Caney ISD) with deliberate indifference towards the harm that would be inflicted upon Plaintiff Chris.

Further, the Customs & Policies were clearly the moving force behind the of Deprivation of Chris's rights under the Laws Protecting Chris.

105. Educating Chris had become too difficult for Defendant New Caney ISD, or, too expensive, or both.

106. The driving force of the TEA and Districts Suppression Efforts can have been only to save money, by artificially and illegally limiting the number of students and the level of services within IDEA and Section 504 programs in the State of Texas.

107. In paragraph 10 of this Third-Amended Complaint, it was noted that:

> As a public school district located in the State of Texas that receives certain funding from the United State of America, Defendant New Caney ISD is mandated to implement policies and procedures assuring that all students (including students with Chris's Disabilities) are educated in accordance with the laws of the United States, including but not being limited to the Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process clauses under the Constitution of the United States of America, and, the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*.

The policies adopted by the New Caney ISD Board of Trustees parallel such mandate.

108. No doubt, Defendant New Caney ISD will assert that "Plaintiff Chris has no proof that the New Caney ISD Board of Trustees directed or otherwise allowed employees of Defendant New Caney ISD to

deviate from adopted policies and proceed with the Deprivation of Chris's Rights. Can Plaintiff, at this time, point to a piece of paper, a verbal directive, or a head turned away that directed or otherwise allowed employees of Defendant New Caney ISD to proceed with the Deprivation of Chris's Rights-No, not yet. What is indisputable, however, is that no one within the New Caney ISD or its Board of Trustees took any actions to prevent such Deprivation.

109. The DE Report indicates that thousands of students in the State of Texas were illegally deprived rights and services under the IDEA and Section 504 as a result of the TEA and Districts Suppression Efforts. Is it really that far fetched to believe that Defendant New Caney ISD's Deprivation of Chris's Rights was not a result or al least influenced by the TEA and Districts Suppression Efforts?

110. Defendant New Caney ISD chose to label and view Plaintiff Chris as a horrible, potentially harmful person that need to be sent away, solely because of Chris's Disabilities. Yet, in our society, we know that…*gas cans are not at fault when they explode…only those charged with monitoring the can for safety are to blame.*

111. All conditions precedent to Plaintiff bringing Plaintiff Chris asserting these claims have been met.

VI. PLAINTIFF'S CAUSES OF ACTION

112. Plaintiff incorporates by reference the facts set forth in Article V: GENERAL BACKGROUND hereof.

1. DEPRIVATION OF CONSTITUTIONAL RIGHTS[4]

113. The actions of Defendant New Caney ISD (as set forth in Article IV of this Complaint) including but not being limited to the Deprivation of Chris's Rights and the Illegal Expulsion, are violations by Defendant New Caney ISD of Plaintiff's Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process under the Constitution of the United States of America.

114. Plaintiff has been harmed by such actions of Defendant New Caney ISD, and Plaintiff now seeks all actual and consequential damages available to Plaintiff for same.

2. VIOLATIONS OF SECTION 504[5]

115. The actions of Defendant New Caney ISD (as set forth in Article IV of this Complaint) including but not being limited to the Deprivation of Chris's Rights and the Illegal Expulsion, are violations by Defendant New Caney ISD of the rights granted Chris under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 791 *et seq*.

116. Plaintiff has been harmed by such actions of the Defendant New Caney ISD, and Plaintiff now seeks all actual and consequential damages available to Plaintiff for same.

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[4] This claim for relief was dismissed by the Court on January 23, 2018.

[5] *Id.*

3. SECTION 1983 CLAIM

117. Section 1983 of Title 42 of the United States Code provides, in part,:

> "Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State…subjects, or causes to be subjected, and citizen of the United States…to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the part injured in an action at law, suit in equity, or other proper proceeding for redress…"

118. Defendant New Caney ISD's Deprivation of Chris's Rights under the color of law resulted in the violation of Chris' rights under the United States Constitution and federal laws. Plaintiff Chris was severely damaged (economically, physically, and emotionally) as a direct result of such Deprivation. Therefore, Plaintiff Chris asserts a claim for damages and other relief as provided for under 42 USC §§ 1983.

4. POST JUDGMENT INTEREST

119. Plaintiff also requests post judgment interest as may be allowed by the prevailing jurisprudence.

5. EXEMPLARY DAMAGES

120. The actions of Defendant New Caney ISD are of such a nature that Plaintiff is entitled to exemplary damages as allowed by 42 USC §§ 1983, for which Plaintiff now seeks.

6. ATTORNEYS' FEES

121. Plaintiff is entitled to recover reasonable and necessary attorney fees under the Laws Protecting Chris, and Plaintiff hereby requests same.

VII. JURY

122. Plaintiff has previously requested a jury and paid the required fee.

VIII. CONCLUSION

123. Plaintiff CHRISTOPHER EDWARD McMILLEN, AN INCAPACITATED PERSON now asks that upon final trial hereof, that judgment be entered in favor of Plaintiff, that all costs of Court be taxed against Defendant New Caney ISD, that Plaintiff recover all direct, consequential, and exemplary damages (upwards of $5 Million dollars) as allowed by law, that Plaintiff recover his attorneys' fees, and that Plaintiff have such further and other relief, general and special, both at law or in equity, to which he may show himself to be justly entitled.

Respectfully submitted,

Law Offices of Donald G. Henslee

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COUNSEL FOR CHRISTOPHER EDWARD McMILLEN, AN INCAPACITATED PERSON

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February 2018, I electronically filed the foregoing instrument with the Clerk of the Court using the CM/ECF system, which will send notification of the filing to the following:

Jonathan G. Brush
C. Cory Rush
Rogers, Morris & Grover, L.L.P.
5718 Westheimer, Suite 1200
Houston, Texas 77057
(Via CM/ECF notification)

s/Terry P. Gorman, Esq
Terry P Gorman, Esq.

EXHIBIT 'A'
TO
PLAINTIFF'S THIRD-AMENDED COMPLAINT

UNITED STATES
DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATION SERVICES

January 11, 2018

Honorable Mike Morath
Commissioner
Texas Education Agency
1701 N. Congress Ave.
Austin, Texas 78701

Dear Commissioner Morath:

This letter is to provide you with a summary of the results of the Office of Special Education Program's (OSEP) monitoring visit in Texas during the week of February 27, 2017. The visit was prompted by reports about the declining identification rate in Texas of children with disabilities under the Individuals with Disabilities Education Act (IDEA). As data from the Texas Education Agency (TEA) demonstrates, the number of children identified as children with disabilities under the IDEA significantly declined from the 2003–2004 to 2016–2017 school years from 509,401 to 477,281 students. While this represents a decrease of over 32,000 students, this decline is noteworthy given that during those same years, the total enrollment in Texas schools grew from 4,328,028 to 5,359,127 – an increase of 1,031,099 students.[1]

[1] This information is provided through TEA's enrollment trend reports, available at: http://tea.texas.gov/acctres/Enroll_2003-04.pdf and http://tea.texas.gov/acctres/enroll_2016-17.pdf.

Additionally, during this time period, Texas implemented a special education representation indicator in its Performance-Based Monitoring and Analysis System (PBMAS) to measure the percentage of students enrolled in special education and related services in an Independent School District (ISD) against a standard of 8.5 percent (8.5 percent indicator). Consequently, OSEP was interested in determining the extent to which the 8.5 percent indicator contributed to, or influenced, the identification and evaluation of children with disabilities under the IDEA.

Section 616 of the IDEA requires the U.S. Department of Education (Department) to monitor States with a focus on: (1) improving educational results and functional outcomes for all children with disabilities; and (2) ensuring that States meet the program requirements, particularly those most closely related to improving educational results for children with disabilities. One of these requirements is child find, described below.

The results of this monitoring visit were based on the following information:

- TEA's November 2, 2016 response to OSEP's October 3, 2016 letter regarding OSEP's concerns with Texas's PBMAS 8.5 percent Indicator;[2]
- Feedback from parents of children with disabilities and other interested parties at five

[2] Both letters are available on the Office of Special Education and Rehabilitative Services' (OSERS) website: https://www2.ed.gov/about/offices/list/osers/events/2016/texas-listening-sessions/index.html.

listening sessions held throughout Texas in December 2016;

- Review of over 400 individual comments received through a blog on the Department's website established to provide an opportunity for members of the public to comment on the issue;[3]
- Review of State- and district-level documents related to the identification and evaluation of students with disabilities, and policies and procedures regarding Response to Intervention (RTI), provision of related aids and services under Section 504 of the Rehabilitation Act of 1973 (Section 504), and the Texas Dyslexia Program;
- OSEP's visits to twelve ISDs to collect district-level and school-level data and to interview teachers, administrators, and ISD staff on referral, child find, and evaluation practices and procedures[4]; and
- Interviews with representatives from TEA to discuss TEA's oversight of district special education programs, specifically issues regarding referral, child find, and evaluation of children suspected of having disabilities.

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[3] The OSEP blog is currently available on OSERS' website: https://sites.ed.gov/osers/2016/11/texas-listening-sessions/.

[4] During the week of the on-site visit, OSEP visited Aldine ISD, Austin ISD, Ector County ISD, Everman ISD, Del Valle ISD, Ft. Bend ISD, Harlandale ISD, Houston ISD, Laredo ISD, Leander ISD, North East ISD, and United ISD.

Additional Background Regarding Monitoring Visit

On October 3, 2016, in response to concerns highlighted in an investigative report on special education published in the September 11, 2016 edition of the *Houston Chronicle*, OSEP wrote to TEA to request information regarding the steps the State had taken and would continue to take to address the allegation that the use of the 8.5 percent indicator resulted in a failure to identify and evaluate all children in Texas suspected of having a disability under the IDEA. We acknowledge that TEA took steps to address some of the initial issues we outlined in our letter, including informing each ISD in the State that it may not violate the rights of children with disabilities by delaying or denying referrals, evaluations, or the provision of special education and related services and announcing that the 8.5 percent indicator would not be used for intervention staging in future years. However, following TEA's November 2, 2016 response, OSEP determined there was a need to conduct listening sessions across the State to provide parents and other members of the public the opportunity to share concerns related to the 8.5 percent indicator.

We appreciated that TEA agreed to coordinate a series of evening listening sessions during the week of December 12, 2016.[5] Both OSEP and TEA staff attended the sessions held in five locations throughout the State: Dallas, Houston, El Paso, Edinburg, and

[5] In each of the five locations, OSEP also held afternoon meetings with ISD staff to provide an opportunity for staff to comment on the impact of the 8.5 percent indicator on special education identification rates in their districts.

Austin. Additionally, OSEP created a blog that was open for comment from December 5, 2016 through January 6, 2017. The listening sessions and the blog attracted significant interest, with hundreds of community members attending the listening sessions and 423 individuals providing comments on the blog.

Comments received during the listening sessions and through the blog raised questions about the State's compliance with the child find requirements in section 612(a)(3) of the IDEA to identify, locate, and evaluate children with disabilities who need special education and related services and the requirement in section 612(a)(1) of the IDEA, to make available a free appropriate public education (FAPE) to all eligible children with disabilities residing in the State. Through the listening sessions and the blog, parents described in great detail the steps they had taken to obtain services for their children who were struggling to learn in the general education environment. A fuller description and analysis of comments provided by parents is found in the Enclosure to this letter. Among the numerous issues identified through public comments, a number of parents described how their children were unsuccessfully provided interventions through RTI programs for years before finally being referred for an initial evaluation for special education and related services under the IDEA. Some parents explained that their children were provided related aids and services under Section 504, but continued to encounter educational difficulties. Multiple parents commented that they were informed by school officials that their children's diagnoses of dyslexia indicated that the dyslexia was not "severe enough" to warrant

an evaluation for special education and related services under the IDEA.

Due to the volume of the comments provided by parents, teachers, and other members of the public, OSEP decided to return to Texas to conduct site visits in select ISDs. OSEP provided TEA with additional details about this visit in a January 19, 2017 letter. We appreciated TEA's prompt attention to providing documentation from twelve ISDs in advance of the visit, coordinating the logistics for the visits across the State, and for attending each of the visits alongside OSEP staff. We also appreciated the opportunity to meet with TEA staff on March 3, 2017 to gain additional information about State-level policies, procedures, and practices.

Ten OSEP staff members conducted the onsite visits and were accompanied by a TEA staff member during each visit. OSEP staff generally visited two schools at each ISD. At each school, OSEP conducted interviews with two teams of teachers and a team of administrators. OSEP also conducted an interview with district administrators in each ISD. OSEP communicated to school and district staff that the intent of the visit was to gather additional information about the decline in the State's identification rate for children with disabilities, explaining that the interview would include questions about child find procedures, as well as questions about other programs and services offered in the school and/or district to serve students in need of additional support such as RTI, related aids and services under Section 504, and the State's dyslexia program. Although these interviews occurred at school and district levels, OSEP clarified that the purpose of the visit was to ensure

that the State carried out its general supervisory responsibility under the IDEA by ensuring that ISDs properly implement requirements under the IDEA. Therefore, OSEP noted that findings would not be issued with respect to specific schools or ISDs but rather, the visit would result in the issuance of a report to TEA identifying any statewide areas of concern.

Summary of Findings of Noncompliance

A full description of OSEP's monitoring and analysis is found in the Enclosure to this letter. Of particular note, OSEP determined that some ISDs took actions specifically designed to decrease the percentage of students identified for special education and related services to 8.5 percent or below, even though there was no evidence to indicate that students were improperly referred and found eligible for special education and related services. Consequently, TEA's use of the 8.5 percent indicator did result in a decline in the State's overall special education identification rate from 11.6 percent in 2004 to 8.6 percent in 2016.[6] Through evidence collected during the monitoring visit, OSEP staff also identified many situations where ISDs engaged in practices that violated the IDEA's child find requirements, particularly in situations in which ISDs provided supports to struggling learners in the general education environment through mechanisms including RTI, Section 504, and the State dyslexia program, even though the students were suspected of having disabilities and needing special education and related

[6] See data reported in the 2006 and 2016 PBMAS State Reports, available at http://tea.texas.gov/pbm/stateReports.aspx.

services under the IDEA. As such, OSEP's monitoring demonstrated that TEA did not ensure that all ISDs in the State properly identified, located, and evaluated all children with disabilities residing in the State who were in need of special education and related services, as required by 34 CFR § 300.111, and consequently, failed to make FAPE available to all eligible children with disabilities residing in the State, as required by 34 CFR § 300.101.

OSEP's specific findings of noncompliance include the following:

1. TEA failed to ensure that all children with disabilities residing in the State who are in need of special education and related services were identified, located, and evaluated, regardless of the severity of their disability, as required by IDEA section 612(a)(3) and its implementing regulation at 34 CFR § 300.111.
2. TEA failed to ensure that FAPE was made available to all children with disabilities residing in the State in Texas's mandated age ranges (ages 3 through 21), as required by IDEA section 612(a)(1) and its implementing regulation at 34 CFR § 300.101.
3. TEA failed to fulfill its general supervisory and monitoring responsibilities as required by IDEA sections 612(a)(11) and 616(a)(1)(C), and their implementing regulations at 34 CFR §§ 300.149 and 300.600, along with 20 U.S.C. 1232d(b)(3)(A), to ensure that ISDs throughout the State properly implemented the IDEA child find and FAPE requirements.

OSEP appreciates the cooperation and assistance provided by your State staff and others, including staff from the regional Education Service Centers that hosted the December 2016 listening sessions, and the teachers and district staff who participated in onsite interviews, as well as the hundreds of parents of children and youth with disabilities and members of the public who offered feedback and input on the State's systems for providing special education and related services to eligible children with disabilities under the IDEA. We also acknowledge that the State is still working to recover from the impact of Hurricane Harvey and that many staff resources at TEA are dedicated to recovery efforts. Because we acknowledge additional time may be needed to address some of the corrective actions and next steps outlined in the attached Enclosure, OSEP will work with TEA upon issuance of this letter to establish an agreeable timeline by which TEA will provide OSEP with a plan for corrective action.

We look forward to actively working with the State to improve results for Texas' children and youth with disabilities and their families. If you have any questions or wish to request technical assistance, please do not hesitate to call your OSEP State Lead, Leslie Clithero, at 202-245-6754.

Sincerely,

/s/
Ruth E. Ryder
Acting Director
Office of Special Education Programs

Enclosure

cc:

Justin Porter, Executive Director for Special Populations
Tammy Pearcy, Assistant Director for Special Education