APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

EN BANC OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT REINSTATING THE JUDGMENT OF THE DISTRICT COURT AND DISMISSING THE COMPLAINT (NOVEMBER 19, 2021)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D. D., a Minor, by and through
His Guardian Ad Litem, MICHAELA INGRAM,

Plaintiff-Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

No. 19-55810

D.C. No. 2:19-cv-00399-PA-PLA

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted En Banc June 24, 2021
Pasadena, California

Filed November 19, 2021

Before: Sidney R. THOMAS, Chief Judge,
and Ronald M. GOULD, Richard A. PAEZ,
Marsha S. BERZON, Johnnie B. RAWLINSON,
Jacqueline H. NGUYEN, Andrew D. HURWITZ,

Daniel P. COLLINS, Kenneth K. LEE,
Danielle J. FORREST and
Patrick J. BUMATAY, Circuit Judges.

HURWITZ, Circuit Judge:

D.D., an elementary school student, has an emotional disability that interferes with his ability to learn. D.D. sought relief from the Los Angeles Unified School District under the Individuals with Disabilities Education Act ("IDEA"), alleging that he was being denied a free appropriate public education ("FAPE"). D.D. claimed that the District had denied him a FAPE by, *inter alia*, failing to provide a one-to-one behavioral aide and related supportive services. The parties settled their dispute after mediation. D.D. then filed a complaint in the district court, alleging that the District had violated the Americans with Disabilities Act ("ADA") by failing to provide the same services sought in the IDEA proceedings. The district court dismissed the complaint without prejudice for failure to exhaust the IDEA process.

D.D. has appealed the district court's order. In its current posture, this is a case entirely about timing. It is common ground that D.D. can sue the District under the ADA for not providing reasonable accommodations. It is also common ground that the same omissions or actions can give rise to claims both under the IDEA and the ADA. But the Supreme Court has instructed us that if the gravamen of D.D.'s complaint is the school's failure to provide a FAPE, he must first exhaust the IDEA process before seeking ADA relief.

The only disputed issue is whether the gravamen of this complaint is the failure to offer a FAPE. Because it is, we affirm.

I

We begin by reviewing the statutory framework.

A.

"The IDEA offers federal funds to States in exchange for a commitment: to furnish a [FAPE] to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). A FAPE "comprises 'special education and related services'—both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Id.* at 748-49 (citing 20 U.S.C. §§ 1401(9), (26), (29)). An eligible child "acquires a 'substantive right' to such an education once a State accepts the IDEA's financial assistance." *Id.* at 749 (citing *Smith v. Robinson*, 468 U.S. 992, 1010 (1984)).

The "centerpiece of the [IDEA's] education delivery system" is an individualized education program ("IEP"). *Honig v. Doe*, 484 U.S. 305, 311 (1988). Crafted by an "IEP Team" of school officials, teachers, and parents, an IEP spells out a plan to meet a child's "educational needs." *Fry*, 137 S. Ct. at 749 (quoting 20 U.S.C. §§ 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B)). The IEP documents the child's current levels of academic achievement, identifies annual goals, and lists the instruction and services needed to achieve those goals. *Id.* "[S]ervices that enable a disabled child to remain in school during the day provide [him] with the meaningful access to education that Congress envisioned." *Cedar Rapids*

Cmty. Sch. Dist. v. Garret F., 526 U.S. 66, 73 (1999) (cleaned up).

The IDEA provides a framework for promptly addressing disputes over an IEP. The process begins with a complaint filed with the responsible state or local educational agency on "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. § 1415(b)(6)(A). Upon receiving a complaint, the agency must convene a "preliminary meeting" with the IEP team and the child's parents, *id.* § 1415 (f)(1)(B)(i), and offer an opportunity to resolve the dispute through mediation, *id.* § 1415(e)(1). If the grievance remains, the parties proceed to a due process hearing before an impartial arbiter, *id.* § 1415(f)(1)(A), who determines whether the child received a FAPE, *id.* § 1415(f)(3)(E)(i). Any party aggrieved by the agency's ruling may then seek judicial relief. *See id.* §§ 1415(i)(2)(A), 1415(l).

B.

Other statutes also protect the rights of children with disabilities. The ADA promises non-discriminatory access to "the services, programs, or activities" of any public facility, 42 U.S.C. § 12132, and requires "reasonable modifications" to the facility's "policies, practices, or procedures" to avoid discrimination, 28 C.F.R. § 35.130(b)(7)(i). Section 504 of the Rehabilitation Act imposes similar obligations on any federally funded "program or activity." 29 U.S.C. § 794(a). "[B]oth statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages." *Fry*, 137 S. Ct. at 750.

When disability issues arise in the school context, the substantive requirements of the IDEA may overlap with those of these other statutes. After the Supreme Court read the IDEA as providing the "exclusive avenue" for a child with a disability to challenge his special education program, *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), Congress amended the IDEA to provide that:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], [the Rehabilitation Act], 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 [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

20 U.S.C. § 1415(l). This provision makes plain that the IDEA does not preempt other statutory claims by children with disabilities, but requires that a plaintiff first exhaust the administrative process if "seeking relief that is also available under" the IDEA. *Id.* It is, in other words, "designed to channel requests for a FAPE (and its incidents) through IDEA-prescribed procedures," *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 882 (9th Cir. 2011) (en banc), and prevents plaintiffs from using artful pleading to litigate IDEA issues without first utilizing the IDEA process, *see* S. Rep. No. 99-112, at 12, 15 (1985) (add'l views); H.R. Rep. No. 99-296, at 7 (1985).

C.

In *Fry*, the Supreme Court addressed the issue of when a lawsuit "seeks relief that is also available under" the IDEA and is therefore subject to the exhaustion requirement. 137 S. Ct. at 748 (cleaned up). Because the IDEA only authorizes relief if a child has been denied a FAPE, the Court held that the exhaustion requirement of § 1415(l) is triggered only if a complaint "charges [the] denial [of a FAPE]." *Id.* at 754. "If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA." *Id.* Rather, she must "first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises." *Id.* But "[a] school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA." *Id.* "A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(l)'s exhaustion rule." *Id.* at 754-55 (emphasis added).

In determining "when a plaintiff 'seeks' relief for the denial of a FAPE," the Court has directed our focus to the "remedial basis" of the complaint. *Id.* at 755. Although the plaintiff is the "master of the claim," "artful pleading" cannot excuse exhaustion. *Id.* What matters is "substance, not surface." *Id.* So, we must set aside labels and ask whether the "gravamen of [the] complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." *Id.* In doing so, we must be mindful of the "means and ends of the" various statutes at play. *Id.* "[T]he IDEA guarantees individually

tailored educational services, while [the ADA] promise[s] non-discriminatory access to public institutions." *Id.* at 756. Because "[t]he same conduct might violate [both] statutes," a plaintiff may have a claim under the IDEA but can, without exhaustion, "seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Id.*

Fry offered two "clues" to direct the gravamen analysis. *Id.* The first comes from two hypothetical questions: (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library?"; and (2) "could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* If both answers are "yes," the complaint is likely not just about the denial of a FAPE, as the "same basic suit" could go forward without the FAPE obligation. *Id.* But if the answers are "no," the complaint probably concerns a FAPE, as "the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." *Id.* The Court provided two examples:

- Take a wheelchair-bound child who sues a school for the lack of access ramps. The missing "architectural feature" could have educational consequences and might be couched as an IDEA violation, for "if the child cannot get inside the school, he cannot receive instruction there." But he could bring the same complaint against another public building, and an adult could bring "a mostly identical complaint against the school," so the

"essence is equality of access to public facilities, not adequacy of special education."

- Take, by contrast, a child with a learning disability who sues for the lack of remedial tutoring in math. The action "might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation." But even absent reference to a FAPE, "can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?" "The difficulty of transplanting" this claim to other contexts suggests "its essence—even though not its wording—is the provision of a FAPE."

Id. at 756-57.

The second "clue" comes from the history of the proceedings, "in particular" whether "a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute." *Id.* at 757. "A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE." *Id.* "Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely." *Id.* "But prior pursuit of . . . administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." *Id.*

II.

With the statutory background in mind, we turn to the facts and procedural history of this case.[1]

A.

D.D. is an elementary school student with "a disability that interferes with his ability to learn." D.D. started receiving special education services to address his "emotional disturbance" in kindergarten (the 2015-16 school year). "His disability-related behaviors ranged from being off-task and impulsive to being physically aggressive toward peers and adults." "Starting early in the school year, school staff required one of D.D.'s parents to pick him up early from school due to his disability-related disruptive behavior." D.D.'s mother unsuccessfully requested a one-to-one aide "to accommodate D.D.'s needs and enable him to participate with his peers."

D.D. transferred to a different school for first grade (the 2016-17 school year), but his "behaviors escalated." He hit "himself, classmates, and school staff," "eloped from the classroom regularly," and "took his frustration out on the property of others." D.D.'s mother again asked about a "one-to-one aide," but D.D.'s teacher "did not make a referral for an aide or a functional behavior assessment." Instead, "[s]tarting in the beginning of the school year, staff again called [D.D.'s mother] regularly to pick D.D. up from school early due to his disruptive, disability-

---

[1] We draw the facts from the complaint, *see Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019), the administrative complaint that triggered IDEA proceedings, and the settlement agreement.

related behaviors, excluding him from participation in all school activities."

Staff soon gave D.D.'s mother "an ultimatum: either pick him up from school or have a family member serve as his one-to-one aide to enable D.D. to participate in the classroom." So, in October 2016, the mother's partner, Albert, quit his job to accompany D.D. "on a nearly daily basis." On a day that Albert was unable to do so, D.D. had a "severe behavioral incident" that prompted the school to summon a psychiatric emergency team. The episode subsided before the team arrived, but D.D. was ultimately hospitalized for a week. After the incident, D.D.'s mother "again explicitly [and unsuccessfully] requested a one-to-one aide for D.D."

The District was "still was not offering [D.D.] behavior supports and services" during the second grade (the 2017-18 school year). Albert continued to accompany D.D. "on most days to monitor [his] behavior and enable him to access his education." But "D.D.'s disruptive, disability-related behavior continued to escalate." D.D.'s mother again requested "a one-to-one aide or [non-public-school] placement," but the "District refused to provide either." After a particularly serious outburst prompted a police response, school staff told D.D. that "if he did not behave, they would call the police and he would end up either in jail or in the hospital again."

D.D.'s mother withdrew him from school in November 2017, and he "stayed out of school for a few weeks due to the stress of attending school at all." D.D. returned to his original elementary school in mid-December and was treated "with a similar pattern of neglect and discrimination." D.D.'s mother

"routinely requested communication and updates from his teacher," who never replied. A classroom aide "provided general support to the classroom, but D.D. was not offered any one-to-one behavior services." Rather, he was "left to his own devices."

D.D. was "finally referred . . . to a nonpublic school," Eko Multi-Purpose Center ("Eko"), in January 2018. While there, D.D. was "not offered one-to-one behavior aide services," but was placed in a smaller program with "more adult assistance." D.D.'s performance initially improved, but he was "routinely bullied on the bus to and from school without behavior[al] support." D.D.'s mother "requested an aide for the bus, but none was provided." Moreover, the "District repeatedly neglected D.D.'s personal safety and needs on campus," and he came home with bruises three times. D.D. was twice attacked by other students, and a staff member once "slammed [his] face against a wall."

In May 2018, D.D.'s mother stopped sending him to Eko for fear of his safety. D.D. transferred to a new non-public school, Vista Del Mar, in September 2018.

B.

In March 2018, while at Eko, D.D. filed a "Request for Mediation & Due Process Hearing" with the California Office of Administrative Hearings ("OAH"). The request asserted that the District had failed to offer the services, evaluations, and programs D.D. needed to receive a FAPE. The central allegation was the District's failure to include in D.D.'s IEP a one-to-one aide or behavioral services needed for him to "remain in school" and "access" his education. *See* Request for Hearing at 2 (alleging District's failure "to provide [D.D.] a one-to-one behavior aide or behavior

intervention implementation services); *see also id.* at 3 ("District [did not] offer a one-to-one behavior-trained aide to work with [D.D.] to enable him [to] remain in class and work effectively."), *id.* at 4 ("The IEP contained a behavior support goal . . . . Despite the described behaviors, [D.D.] was not offered behavior services and supports[.]").

The request identified thirteen "problems," including that the District:

- "den[ied] [D.D.] a FAPE" by not offering sufficient services and supports in various areas (*e.g.*, not offering "a more appropriate placement," "one-to-one behavioral aide," or "behavioral development services" for "behavioral management") (Problems 1-5);
- failed to conduct assessments in a manner that adequately informed the IEP team of D.D.'s needs (*e.g.*, that two assessments did not recommend offering D.D. services and supports to manage his behavior, like a one-to-one behavior aide) (Problems 6-9);
- "failed to offer [D.D.] a FAPE" in violation of § 504, including by not offering him "reasonable accommodations" that he needed to "gain meaningful access to his education" (*i.e.*, a one-to-one behavioral aide) (Problems 10-11); and
- discriminated against D.D. in violation of other laws, including the ADA, by not offering him reasonable "accommodations or supports to manage the extreme behaviors resultant from his disability" so he could "access the school's services" (*i.e.*, "a trained

> one-to-one behavior aide and related supports") (Problems 12-13).

D.D. sought modifications to his IEP "as an offer of FAPE" (including a "one-to-one behaviorally trained aide" and "[r]evis[ion] of [his] behavioral support plan"), funding for various assessments, compensatory services, and damages.

In April 2018, after mediation, D.D. settled his IDEA claims against the District. The settlement agreement waived all claims "related to, or arising from, [D.D.'s] educational program," except claims for damages. In exchange, D.D. received a modified IEP, with additional speech and language services; a psychoeducational assessment to be considered by the IEP team; and various compensatory services. The settlement agreement states that provision of these services "shall not be construed as[ ] an admission of what is a [FAPE] for [D.D.]," and it does not expressly provide for the one-to-one behavior aide or other related behavior supports that D.D. repeatedly sought from the District. *See* Settlement Agreement ¶ 5 (providing only for an additional psychoeducational assessment to "be considered" by the IEP team).[2]

C.

In January 2019, D.D. filed this action. The operative first amended complaint contends that the District discriminated against D.D. "by excluding him

---

[2] D.D. contends that his "due process complaint sought a change in placement to a non-public school," but no such request appears in his requested relief. D.D. further claims "[t]he settlement provided for . . . placement at Vista Del Mar non-public school," but no provision provides for such placement.

from school, refusing to offer an aide, only allowing him to stay in school if his [p]arent served as an aide, and by enabling him to be subjected to an unsafe school environment."[3] The ADA claim is predicated on the District's "fail[ure] to provide meaningful and equal access to its educational program in violation of the [ADA], including, but not limited to, by failing to provide D.D. with required accommodations, aids and services." D.D. alleges he "has suffered, and will continue to suffer loss of equal educational opportunity, as well as humiliation, hardship, anxiety, depression and loss of self-esteem." He "seeks damages and attorneys' fees and costs as a result" and "[s]uch other relief as the Court deems just and proper."

The district court dismissed D.D.'s operative complaint without prejudice for failure to exhaust the IDEA process. It found that by challenging the District's failure to provide a one-to-one aide or address his behavioral needs, the complaint was "in essence . . . contesting the adequacy of [his] special education program." *D.D. v. Los Angeles Unified Sch. Dist.*, No. CV 19-399 PA (PLAX), 2019 WL 4149372, at *3 (C.D. Cal. June 14, 2019) (quoting *Fry*, 137 S. Ct. at 755). The court rejected any argument that D.D. was not

---

[3] The first amended complaint is essentially identical to the original, except that it alleges no § 504 claim, *compare* Complaint ¶¶ 48-57, and deletes references to D.D.'s IEP, *compare, e.g.*, *id.* ¶ 13 ("The limited approach to [D.D.'s] disability-related behavior [in his December 2016 IEP] was not comprehensive."); *id.* ¶ 17 ("The IEP team again refused to offer a one-to-one aide for D.D."); *id.* ¶ 24 ("District convened an IEP meeting . . . at which [it] finally offered counseling services. Parent requested a one-to-one aide or [non-public-school] placement to enable D.D. to access his education. . . . District offered neither.").

required to exhaust simply because he sought damages in the ADA complaint. And it found D.D.'s settlement not tantamount to exhaustion.

A divided panel reversed. *D.D. v. Los Angeles Unified Sch. Dist.*, 984 F.3d 773 (9th Cir. 2020). The majority framed the complaint as challenging the denial of "access" to education and so found the IDEA's exhaustion requirement inapplicable. *Id.* at 787. The dissent read the complaint as in substance challenging the denial of a FAPE. *Id.* at 801 (Rawlinson, J., dissenting). We vacated the panel opinion after a majority of the active judges of the Circuit voted to rehear this case en banc. *D.D. v. Los Angeles Unified Sch. Dist.*, 995 F.3d 670 (9th Cir. 2021).

III.

On appeal, D.D. argues only that the operative complaint should not be subject to the exhaustion requirement, not that he has in fact exhausted the IDEA process or that further exhaustion would be futile. Review is *de novo* because D.D. raises only issues of law. *See N. Cnty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 741 (9th Cir. 2009). Applying *Fry*, we hold that exhaustion is required.

A.

We begin by rejecting D.D.'s argument that the remedial basis of his ADA complaint is not the denial of a FAPE. The crux of D.D.'s complaint is that the District failed to provide "required accommodations, aids and services" that he needed to "access" his education, and that "as a result" of its failure, he suffered loss of educational opportunity, exclusion from school, and harassment by others. The complaint identifies

the accommodations denied as a one-to-one aide or other supportive services to manage D.D.'s behavior. These are core components of a FAPE, *see Garret F.*, 526 U.S. at 73; *see also* 20 U.S.C. § 1414(d)(3)(B)(i); U.S. Dep't of Educ., Off. of Special Educ. and Rehab. Servs., *Dear Colleague Letter on Supporting Behavior of Students with Disabilities* 14 (Aug. 1, 2016), https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf, and ones that D.D. repeatedly asked the District to include in his IEP. In other words, the essence of D.D.'s complaint is that he was injured by the District's failure to provide an adequate special education program, thereby triggering § 1415(l)'s exhaustion requirement. *See Fry*, 137 S. Ct. at 755.

Our reading of D.D.'s complaint is confirmed by *Fry*'s hypotheticals. As the panel majority candidly conceded, it is "difficult to picture a child claiming that a public library or municipal theater should have provided him with the accommodation D.D.'s mother repeatedly requested of the District—a one-to-one behavioral aide—so the child could participate in the library's story time or attend a theatrical performance," and "even more incongruous" to picture "[a] school visitor asking the District to provide a personal aide." *D.D.*, 984 F.3d at 788. "The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE." *Fry*, 137 S. Ct. at 757.

D.D. argues we should not focus on the specific accommodations allegedly denied but rather on a more general theory of the case. But this is not what *Fry* requires. *See id.* (asking whether we could "imagine an adult visitor or employee suing the school to obtain a math tutorial"). Generalizing in the fashion D.D.

suggests reduces the first clue's utility, as it is the fact "[t]hat the claim can stay the same in . . . alternative scenarios [that] suggests that its essence is equality of access to public facilities, not adequacy of special education." *Id.* at 756. Here, "the FAPE requirement is all that explains why [D.D.] (not an adult in that setting or a child in some other) has a viable claim." *Id.*; *cf. Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1100 (9th Cir. 2019) ("Since a dog would not be among the services a school district would ordinarily provide in a FAPE . . . the gravamen of the *Fry* complaint was not an IDEA claim.").

Our reading of the gravamen of the complaint is also confirmed by application of the second *Fry* clue, the history of the proceedings. D.D.'s "prior pursuit of the IDEA's administrative remedies" is "strong evidence that the substance of [his] claim concerns denial of a FAPE." *Fry*, 137 S. Ct. at 757. Indeed, the allegations in his administrative and federal pleadings are remarkably similar. *See D.D.*, 984 F.3d at 795 (Rawlinson, J., dissenting) (summarizing similarities). In the former, D.D. stressed his disagreements with the District over its failure to include a one-to-one aide or other behavioral development services in his IEP, and expressly alleged that this amounted to "denying [him] a FAPE":

> Here, District has failed to offer [D.D.] adequate placement and services to address his behavioral needs from March 2016 to present. It has been well known to District that [D.D.] has serious behavioral needs, and yet, District has not offered a more appropriate placement to manage his behaviors and/or a one-to-one behavioral aide and behavioral

> development services to create a behavior support plan by a behavior specialist. . . .
>
> Despite Parent's continuous requests, District failed to provide a safe placement and behavioral services to enable him to access his education and support him by creating a safe environment for himself and others. Until just a few weeks before filing this complaint, [D.D.] was left in a placement where he was altogether unable to attend class. Finally, he moved to a nonpublic school where Parent is hopeful his behavior needs will be better addressed. Therefore . . . District denied [D.D.] a FAPE.

In the latter, the operative complaint, D.D. reframes the same actions and omissions by the District as an ADA violation, but the gravamen remains the same—that the District failed to offer D.D. supports needed to receive a FAPE. *See Fry*, 137 S. Ct. at 754.

Two recent decisions provide a useful comparison. In *Paul G.*, we required exhaustion where a student challenged denial of an in-state residential educational facility, as the claim could only be premised on the student's right to receive a FAPE, and he previously invoked the IDEA process to secure his rights. 933 F.3d at 1100-01. In contrast, in *McIntyre v. Eugene School District*, we did not require exhaustion because the ADA accommodations allegedly denied—quiet locations for exams, more time for exams, and compliance with an emergency health protocol—could have easily been sought outside of the FAPE context, and the student (who had no IEP) did not invoke the IDEA's machinery. 976 F.3d 902 (9th Cir. 2020). These cases teach that the inquiry necessarily turns

on the specific factual allegations of each complaint. The allegations in this case require exhaustion.

We recognize that D.D.'s operative complaint contains some allegations arguably unrelated to the District's obligation to offer a FAPE, such as physical abuse by students and harassment by staff. But D.D. is the "master of [his] claim," *Fry*, 137 S. Ct. at 755, and rather than drafting a complaint that focused on those allegations or seeking relief only for damages arising from them, he instead offered a complaint that maps almost perfectly onto his IDEA claims. Indeed, although D.D. claims his settlement with the District resolved the IDEA issues, the complaint alleges he "will continue to suffer loss of equal educational opportunity." *See Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017) (noting that access to education "is what the IDEA promises").

B.

We next reject D.D.'s argument that he need not exhaust because he seeks relief that is not available under the IDEA, namely, compensatory damages for emotional distress. The threshold problem with this argument is that it re-writes D.D.'s ADA complaint. The operative complaint's prayer for relief, which seeks unspecified "damages," is not as limited as D.D. now claims:

> As a result of the [alleged ADA violation], D.D. suffered injury, including, but not limited to, denial of equal access to the benefits of a public education. As a direct and proximate result of the [alleged ADA violation], D.D. has suffered, and will continue to suffer loss of equal educational opportunity, as well

> as humiliation, hardship, anxiety, depression and loss of self-esteem due to Defendant's failure to address and provide accommodations, modifications, services and access required due to D.D.'s disabilities[.] Plaintiff seeks damages and attorneys' fees and costs as a result.

As drafted, the complaint seeks damages to remedy loss of educational opportunity.

Moreover, to the extent that D.D. argues that a plea for damages alone vitiates the exhaustion requirement,[4] we disagree. *Fry* reserved the question of whether § 1415(l) requires exhaustion "when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests . . . is not one that an IDEA hearing officer may award[.]" 137 S. Ct. at 752 n.4. But we answered this question in our en banc decision in *Payne*: "[E]xhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a [FAPE], whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action (for instance, a claim for damages under § 504 . . . , premised on a denial of a FAPE)." 653 F.3d at 875. We squarely held that a plaintiff cannot avoid

---

[4] D.D.'s district court brief did not squarely argue that a complaint seeking only damages is exempt from exhaustion. But, the district court read it as doing so and rejected that claim. D.D.'s opening brief on appeal, while not a model of clarity, does argue that *Payne* does not require exhaustion because he seeks only damages for emotional distress. Given this background, and that the effect of seeking only damages post-*Fry* is a purely legal issue likely to recur, *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213-14 (9th Cir. 2020), we address the argument.

exhaustion "merely by limiting a prayer for relief to money damages." *Id.* at 877 (citation omitted).

We see no reason to revisit *Payne*. Our sister courts of appeal agree that a plea for damages does not categorically free a plaintiff from exhaustion. *See McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 648 (5th Cir. 2019); *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 950 (8th Cir. 2017); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63-64 (1st Cir. 2002); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487-88 (2d Cir. 2002); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002); *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916-17 (6th Cir. 2000); *Charlie F. v Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996); *N.B. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). Moreover, nothing has changed in the decade since *Payne* was decided to warrant reconsideration on this point, except perhaps for the membership of today's en banc panel. Although today's panel surely has the power to overrule a previous en banc decision, when we have already construed a statute that Congress has the authority to amend, *stare decisis* should govern. *See Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 456 (2015) (explaining that "*stare decisis* carries enhanced force when a decision . . . interprets a statute" because critics "can take their objections across the street, and Congress can correct any mistake it sees").[5]

---

[5] Amici ask us to follow *W.B. v. Matula*, which held that exhaustion is not required where a plaintiff seeks only damages. 67 F.3d 484, 496 (3d Cir. 1995). But even the Third Circuit now appears to read *Matula* as a case-specific exception to the general rule, not as excusing exhaustion *whenever* damages are sought. *See*

We recognize the facial attraction to a rule that seeking damages alone overcomes the exhaustion requirement, as compensatory damages are not available in IDEA proceedings. *See C.O. v. Portland Pub. Schs.*, 679 F.3d 1162, 1166-67 (9th Cir. 2012). But this approach ignores the central role of exhaustion in the IDEA framework. Congress entrusted the provision of FAPEs to state and local educational experts with the know-how to construct IEPs. Requiring exhaustion where disputes assert rights arising from the denial of a FAPE

> allows for the exercise of [such] discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.

Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992). In other words, exhaustion serves Congress's intent that educational experts—not the courts—address deficiencies in the provision, construction, or implementation of a student's IEP in the first instance. *See Payne*, 653 F.3d at 876.

By adding § 1415(l) to the IDEA, Congress did not merely enact "a pleading hurdle." *Fry*, 137 S. Ct. at 755. Rather, it ensured that non-IDEA claims predicated on the denial of a FAPE could proceed, but only after parents directly engage with the experts to seek resolution without litigation. *See* S. Rep. No. 99-

---

Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 280 (3d Cir. 2014).

112, at 12 (exhaustion should be required for claims that "could have been brought under the [IDEA]"); H.R. Rep. No. 99-296, at 7 (exhaustion should be required for complaints that "involve the identification, evaluation, education placement, or the provision of a [FAPE]"); 20 U.S.C. § 1415(f)-(g) (providing for resolution of IDEA claims through mediation and settlement or, failing that, an administrative hearing followed by appeal). Exhaustion is not needed where "it is improbable that adequate relief can be obtained by pursuing administrative remedies (*e.g.*, the hearing officer lacks the authority to grant the relief sought)." H.R. Rep. No. 99-296, at 7. But the IDEA process is designed to remedy the denial of FAPEs, so we can hardly say that plaintiffs alleging such denials will, as a rule, walk away empty handed.[6]

Reading the requirement any other way would do exactly what Congress and *Fry* told us not to—let artful pleading trump substance. *See* S. Rep. No. 99-112, at 15 (noting that § 1415(l) should not be interpreted to let parents "circumvent the [IDEA's] due

---

[6] Judge Paez's parade of horribles, including his contention that our decision today somehow discriminates against students with behavioral disabilities, ignores that we today hold only that a plaintiff must exhaust his remedies under the IDEA before filing a complaint whose gravamen is the denial of a FAPE. The only issue is timing—relief under another statute or theory is not barred, but simply must await exhaustion of IDEA remedies. And, far from being "oblivious" to the prospect that the same conduct may both result in the denial of a FAPE and give rise to an ADA claim, we expressly acknowledge that possibility.

process procedures and protections"); *Fry*, 137 S. Ct. at 755.[7]

C.

We conclude by addressing two questions suggested by Amici's briefing, beginning with whether D.D.'s settlement equates to exhaustion. A preliminary meeting is the first part of the IDEA process and, by design, a plaintiff need proceed no further if it works. *See* 20 U.S.C. § 1415(f)(1)(B)(i), (iii). This raises the interesting question of whether settlement after IDEA-prescribed mediation amounts to exhaustion. *But see Paul G.*, 933 F.3d at 1101-02. But we need not reach this issue, because D.D. has expressly disclaimed on appeal that he exhausted the IDEA process.

We similarly decline to reach the related question of whether D.D.'s settlement rendered further exhaustion futile. Despite brief references below to having "obtained all available relief through the administrative process," D.D. conceded at oral argument that he did not preserve the issue for our review. His failure to do so is underscored by the inadequate record on futility. *See, e.g.*, *supra* Part II.B & n.2. Indeed, if D.D. proceeds, the central question the district court must decide is whether D.D. required a one-to-one behavior aide or behavioral services to "access" his education,

---

[7] D.D. also relies on *Witte v. Clark County School District*, which excused exhaustion where a plaintiff sought only damages for past physical injuries and had obtained the relief available to him in IDEA proceedings for the denial of FAPE. 197 F.3d 1271, 1275 (9th Cir. 1999). The problem with this argument—which in any event strikes us as a species of futility—is that D.D. claimed a one-to-one aide was necessary to provide him with a FAPE and settled without obtaining that aide.

the very sort of issue an IDEA hearing officer would have addressed absent a settlement, and one that is not answered by the parties' agreement. We thus leave for another day whether a different settlement agreement—for example, one that gave the student the services allegedly denied, or in which the school district concedes that it has not provided a FAPE—can render further exhaustion futile. *See Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 33 (1st Cir. 2019); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 786 (10th Cir. 2013); *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995).

IV.

We do not today express a view on whether D.D.'s complaint states a plausible ADA claim, whether a differently drafted ADA complaint might not be subject to § 1415(l)'s exhaustion requirement, or whether D.D. can in fact exhaust certain claims. Given the procedural posture of this case, we simply hold that the first amended complaint that D.D. has drafted is subject to exhaustion and that the district court did not err in dismissing that complaint without prejudice.

AFFIRMED.

OPINION OF JUDGE BUMATAY JOINED BY JUDGE COLLINS CONCURRING IN PART AND DISSENTING IN PART

BUMATAY, Circuit Judge, with whom Judge COLLINS joins and with whom Chief Judge THOMAS, Judge PAEZ, and Judge BERZON join as to Parts I.B and II, concurring in part and dissenting in part.

Our court granted en banc review here to decide whether the Individuals with Disabilities Education Act ("IDEA" or "Act") mandates exhaustion when the operative complaint asserts only claims under the Americans with Disabilities Act ("ADA"). The Supreme Court has already answered *part* of this question. In *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 755 (2017), the Court instructed us to look to the "gravamen" of the complaint and see if it "seeks redress for a school's failure to provide a FAPE"—a free appropriate public education. If so, since the IDEA guarantees a FAPE to eligible students, a plaintiff must exhaust the IDEA process before suing under the ADA or a similar law. *Id.* On this question, I agree with the majority. The majority dutifully followed the *Fry* gravamen analysis and concluded that D.D.'s complaint concerns an injury to his right to a FAPE. So, I join Parts I, II, III-A, and III-C of the majority opinion.

But that is not the end of the analysis. The Supreme Court has also said that we may need to look to the "specific remedy" sought in the complaint in determining whether IDEA exhaustion is necessary. *Id.* at 752 n.4. Here, I part ways with my colleagues in the majority. In my view, by the Act's plain text, when the complaint seeks money damages not available under the IDEA, the plaintiff is freed from IDEA's exhaustion

requirement. I would thus vacate the district court order and remand. As a result, I respectfully dissent from Parts III-B and IV of the majority opinion.

I.

A.

The IDEA expressly does not alter the rights, procedures, and remedies available under the ADA, the Rehabilitation Act, or other laws "protecting the rights of children with disabilities." 20 U.S.C. § 1415(l). Instead, it says that "before the filing of a civil action under such laws seeking relief that is also available under" the IDEA, the Act's procedures "shall be exhausted to the same extent as would be required had the action been brought under" the IDEA. *Id.* In other words, no matter the named cause of action in the complaint, the IDEA imposes an exhaustion requirement if a plaintiff "seek[s] relief that is also available under" the Act. *Id.*

As the Supreme Court announced in *Fry*, for a plaintiff to be subject to the exhaustion requirement, the plaintiff "must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" 137 S. Ct. at 752. *Fry* then provided two "clues" to determine whether a complaint seeks redress for the denial of a FAPE. *Id.* at 756-57. First, *Fry* instructs courts to hypothetically ask whether the same claims could be raised outside the school context or by an adult at a school. *Id.* at 756. If so, then the complaint likely is not about a FAPE. *Id.* Second, *Fry* says to look at the history of proceedings and consider whether the plaintiff previously invoked the IDEA's procedures. *Id.* at 757. In the Court's view, beginning

(and later abandoning) IDEA procedures suggests a FAPE complaint. *Id.*

I agree with the majority that both *Fry* "clues" show that the gravamen of D.D.'s complaint is the denial of a FAPE. First, the complaint repeatedly identifies the lack of a one-to-one aide and other special education programs as the source of his injuries. No adult at a school could ask for such services. Second, D.D. pursued IDEA administrative proceedings before settling with the School District. So it's easy to conclude that the *Fry* clues support exhaustion here.

B.

Yet, as the Court told us in *Fry*, concluding that the complaint involves the denial of a FAPE may not be the end of the exhaustion analysis. The Court did not address, and explicitly reserved "for another day," whether exhaustion is required when the plaintiff seeks a "specific remedy" that "an IDEA hearing officer may [not] award." 137 S. Ct. at 752 n.4. In *Fry*, the plaintiffs sought money damages for emotional distress, but asserted that their complaint was not premised on the denial of a FAPE. *Id*. The Court remanded to the lower court to determine whether the Frys were right in light of its announced "clues." *Id.* The Court then said, "[o]nly if that court rejects the Frys' view of their lawsuit, . . . will the question about the effect of their request for money damages arise." *Id.* That open question is presented here—D.D.'s complaint is about the denial of a FAPE, but he only requests money damages. So we must resolve this issue.

For its part, the majority answers the question "no"—D.D.'s request for only damages does not excuse

him from the exhaustion requirement. Maj. Op. at 22-23. The majority believes that the *Fry* open question was resolved in *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011) (en banc). In that case, we held that a plaintiff cannot escape IDEA exhaustion "merely by limiting a prayer for relief to money damages." *Id.* at 877. Based on that line alone, the majority concludes that *Payne* mandates exhaustion here. *See* Maj. Op. at 23. The majority also relies on several of our sister circuits' cases, which, I concede, overwhelmingly favor the majority's view that exhaustion is necessary for any FAPE complaint—regardless of the type of remedy sought by the plaintiff. *Id.* at 23-24 (compiling cases). The majority also appeals to the IDEA's legislative history. Citing congressional reports, it concludes that exempting complaints for damages "would do exactly what Congress and *Fry* told us not to—let artful pleading trump substance." *Id.* at 26. I disagree with the majority's analysis on all counts.

1.

At all times, we must be guided by the plain meaning of the statute. As a refresher, the IDEA requires exhaustion when the plaintiff is "seeking relief that is also available under" the Act. 20 U.S.C. § 1415(l). First, to "seek" means "to try to obtain," "to ask for," and "[to] request." Random House Webster's Unabridged Dictionary 1733 (2d ed. 2001). Second, "relief" in the legal context means "redress or benefit . . . that a party asks of a court"; it's also termed a "remedy." Black's Law Dictionary (11th ed. 2019); *see also* Webster's Third New International Dictionary (9th ed. 2009) (defining relief as a "legal remedy or redress"); *Fry*, 137 S. Ct. at 753 (defining relief as a

"redress or benefit that attends a favorable judgment" (simplified)). Indeed, the IDEA itself uses "relief" to refer to the redress granted by courts. *See* 20 U.S.C. § 1415(i)(2)(C)(iii). Third, "available," in this context, means the relief is "accessible or may be obtained." *Fry*, 137 S. Ct. at 753 (simplified). Reading these terms in sync means that exhaustion is necessary when a plaintiff asks for a specific redress and "the IDEA enables a person to obtain [that] redress." *Id.*

With these definitions in mind, we need to ask whether money damages are a remedy available under the IDEA. The answer is generally "no." The IDEA incorporates no express grant of damages as a remedy for the denial of a FAPE. The closest it comes is allowing for the reimbursement of costs for parents who enroll their children in private schools without the consent or referral of the school district. *See* 20 U.S.C. § 1412(a)(10)(C)(ii). Instead, the IDEA empowers courts to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The Supreme Court has interpreted this language to allow plaintiffs to seek two types of redress: (1) "prospective injunctive relief" directed at school officials to ensure a FAPE; and (2) "retroactive reimbursement" for "expenditures on private special education"—meaning "placement in private schools"—that should have been borne by the State. *See Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985). The bottom line for our purposes then is this: "compensatory damages play no part" in the IDEA's enforcement scheme. *C.O. v. Portland Pub. Schs.*, 679 F.3d 1162, 1166 (9th Cir. 2012).

Based on this understanding of remedies under the IDEA, I would hold that a complaint seeking damages—other than reimbursement of private school expenses under § 1412(a)(10)(C)(ii)—does not require exhaustion under the IDEA. That's because general compensatory damages cannot be awarded under the IDEA and Congress only prescribed exhaustion when the plaintiff seeks relief that is "available" under the IDEA. And this is true even if the complaint is ultimately about the denial of a FAPE.

While the majority is rightfully concerned about exhaustion being avoided by "artful pleading," Maj. Op. at 26, my view of the law does not permit this. If a plaintiff seeks IDEA-style injunctive relief or reimbursement for placement in private school, tacking on a request for money damages will not excuse exhaustion. It is only when a plaintiff forgoes IDEA relief and seeks mere damages under the ADA or the Rehabilitation Act that the plaintiff may bypass § 1415(l). This reading accords with the Solicitor General's views in *Fry*. There, he advocated for this textualist approach and asserted that a court could dismiss "any request for relief that is available under the IDEA . . . while retaining jurisdiction only over the request for money damages." Brief for the United States as Amicus Curiae at 32, *Fry*, 137 S. Ct. 743 (No. 15-497).

Under this proper interpretation of the IDEA, this case is straightforward. D.D.'s prayer for relief requests (1) a finding that the School District violated the ADA; (2) damages, including, but not limited to, damages under the ADA; (3) any "other such damages" allowed under federal law; (4) attorneys' fees and costs; and (5) "[s]uch other relief as the Court deems

just and proper." D.D. accordingly does not request any IDEA-style injunctive relief or reimbursement for D.D.'s placement in private school.[1] Instead, D.D.'s complaint focuses on the emotional harms he suffered from the School District's handling of his FAPE grievances. For these reasons, I would hold that D.D. did not need to exhaust the IDEA procedures to continue with his claims.

2.

I also note that the majority does not paint the whole picture of *Payne*. It is true that *Payne* was concerned that artful pleading could be used to evade the IDEA's exhaustion requirements and stated that "merely . . . limiting a prayer for relief to money damages" does not by itself excuse exhaustion. 653 F.3d at 877. But *Payne* did not mandate exhaustion any time a complaint alleges a FAPE injury, as the majority seems to believe. *See* Maj. Op. at 23. Rather, *Payne* then said that exhaustion is only required in a damages suit "[i]f the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling—relief available under the IDEA." *Payne*, 653 F.3d at 877. In such cases, *Payne* viewed the plaintiffs as still seeking IDEA relief, but styling relief as damages showed a "willing[ness] to accept cash in lieu of services in kind." *Id.* In other words, *Payne* required exhaustion when a plaintiff seeks an IDEA remedy or its "functional equivalent," such as money to pay for

---

[1] While D.D. was placed in a nonpublic school for a portion of the 2017-2018 school year, his public-school assistant principal referred him there. This allegation therefore does not implicate reimbursement under § 1412(a)(10)(C)(ii).

private school or tutoring, but not when seeking other damages. *Id.* at 875-77.

So even if *Payne* answers the question left open by *Fry*, the majority is not properly applying it. The majority still needed to determine whether D.D.'s damages were directly tied to "counseling, tutoring, or private schooling." *Id.* at 877. If it did so, the majority would have seen that nothing in D.D.'s complaint shows that to be the case. So even under *Payne*, I would hold that D.D. did not have to exhaust the IDEA procedures here. I fear that the majority has needlessly narrowed *Payne*'s holding.[2]

II.

Because damages are not a form of relief available under the IDEA, I would hold that plaintiffs who seek them are generally not required to exhaust the IDEA process. It may be true that this textualist approach may allow more claims to escape exhaustion and frustrate Congress's supposed purpose to have "educational experts—not the courts—address deficiencies" in providing a FAPE in the first instance, as the majority contends. *See* Maj. Op. at 25. But, "[t]he fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank v. Wolas*, 502 U.S. 151, 158

---

[2] Indeed, the Fifth Circuit, reading *Payne*, considered the Ninth Circuit rule distinct from all the other circuits that mandate exhaustion no matter the remedy sought in the complaint. *See McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647 (5th Cir. 2019) (compiling cases). The majority then seems to be aligning us with these other circuits, but in doing so, it revises *Payne*'s holding.

(1991). This applies even if "Congress had a particular purpose in mind when enacting [the] statute." *In re New Investments*, 840 F.3d 1137, 1141 (9th Cir. 2016). Because the majority holds otherwise, I respectfully dissent.

DISSENTING OPINION OF JUDGE PAEZ JOINED BY CHIEF JUDGE THOMAS AND JUDGE BERZON

PAEZ, Circuit Judge, dissenting, with whom Chief Judge THOMAS and Judge BERZON join:

I respectfully dissent.

Oblivious to the Supreme Court's warning that the danger that the close connection between claims that a student has been denied a "free appropriate public education" ("FAPE") and claims of exclusion from educational opportunity could cause courts improperly to demand exhaustion of non-IDEA claims, the majority has done exactly that. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755, 757-58 (2017). Because the gravamen of D.D.'s operative complaint is a disability discrimination claim under the Americans with Disabilities Act ("ADA")—and not a disguised FAPE claim under the Individuals with Disabilities Education Act ("IDEA"), as the majority holds—I would reverse the district court's dismissal order and remand.

I.

As the majority explains, students with disabilities have rights under three different federal statutes: the IDEA, 20 U.S.C. §§ 1400-82, Title II of the ADA, 42 U.S.C. §§ 12131-34, and § 504 of the Rehabilitation Act ("§ 504"), 29 U.S.C. § 794. The IDEA specifically guarantees students a FAPE and provides for an administrative process and hearing for students and parents to pursue equitable relief to address a school district's failure to provide a FAPE. *Fry*, 137 S. Ct. at 748-49. This relief is limited to future special education

services and reimbursements for education-related expenditures. *See Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-71 (1985). Title II of the ADA and § 504 guarantee non-discriminatory access to all public activities and programs, and the implementing regulations of the ADA also require reasonable accommodations to enable access to public institutions. *See* 28 C.F.R. §§ 35.149, 35.150. Monetary damages are available under the ADA. *Fry*, 137 S. Ct. at 750 (citing 42 U.S.C. § 12133). Only when seeking relief for the denial of a FAPE must students exhaust the IDEA administrative procedures before pursuing those claims in court. *Fry*, 137 S. Ct. at 754.

The main difference between the IDEA and the ADA is that "the IDEA guarantees individually tailored educational services, while Title II [of the ADA] . . . promise[s] non-discriminatory access to public institutions." *Id.* at 756. A school district's satisfaction of its obligations to a student under the IDEA—*i.e.*, providing a FAPE—does not mean that the district has satisfied its obligations under the ADA. *See K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100-01 (9th Cir. 2013).

The district court dismissed D.D.'s complaint on the ground that he failed to exhaust his claim through the IDEA's administrative process. Under the Supreme Court's decision in *Fry*, and this court's en banc decision in *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011) (en banc), children with disabilities and their parents can select the statute that best fits the harm that they seek to remedy. The question here is whether D.D. plausibly alleges a claim of disability discrimination that is separate from the IDEA claim he previously settled, such that it is not subject to

administrative exhaustion under the IDEA, 20 U.S.C. § 1415(l).

In the administrative IDEA process, D.D. entered into a settlement agreement resolving all of his IDEA claims regarding his educational program and placement. He expressly preserved his non-IDEA claims for litigation. In this action, D.D. alleges in the first amended (operative) complaint that he suffered discrimination on the basis of his disability in violation of the ADA. He further alleges that he was regularly excluded from the classroom and experienced emotional and physical injuries as a result of Los Angeles Unified School District's ("the District") failure to provide him with reasonable accommodations. D.D.'s allegations address the more expansive access requirements of the ADA and the obligation to provide him, as an individual with a disability, with an equal opportunity to participate in the services of a public institution. In concluding that D.D.'s ADA claim is subject to administrative exhaustion, the majority has broken from legislative safeguards and Supreme Court guidance.

II.

"We begin, as always, with the statutory language at issue." *Fry*, 137 S. Ct. at 753. Here, 20 U.S.C. § 1415(l). The plain text of that statute requires administrative exhaustion only for claims seeking relief available under the IDEA. It provides:

> Nothing in [the IDEA] 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 [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

20 U.S.C. § 1415(l). "Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others." *K.M.*, 725 F.3d at 1097; *see Payne*, 653 F.3d at 872. In fact, Congress added § 1415(l) in response to the Supreme Court's interpretation of the IDEA in *Smith v. Robinson* as providing the "exclusive avenue" for pursuing "an equal protection claim to a publicly financed special education." *See* 468 U.S. 992, 1009 (1984). Sitting en banc, we previously observed that "the 'except' clause [of § 1415(l)] requires that parents and students exhaust the remedies available to them under the IDEA before they seek the same relief under other laws." *Payne*, 653 F.3d at 872 (emphasis in original).

Thus, if a plaintiff seeks relief available under the IDEA, he must first exhaust his claim through the statute's detailed administrative process. And "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA." *Id.* at 871. Disability-based discrimination is not FAPE-based simply because it occurs at school. *See McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 916 (9th Cir. 2020) (noting that a plaintiff is "not required to exhaust her

claims under § 1415(l) merely because" the events at issue "occurred in an educational setting"). Both the IDEA and the broader disability discrimination statutes may offer relief for the same mistreatment at school, but if the remedy sought is not for the denial of a FAPE, the child may pursue relief in a civil action premised on those other statutes, without exhaustion.

Although discriminatory conduct "might interfere with a student enjoying the fruits of a FAPE, the resulting [discrimination] claim is not, for that reason alone, a claim that must be brought under the IDEA." *Payne*, 653 F.3d at 880; *see also Fry*, 137 S. Ct. at 754 ("A school's conduct toward such a child [with a disability]—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA."). "If the school's conduct constituted a violation of laws other than the IDEA, a plaintiff is entitled to hold the school responsible under those other laws." *Payne*, 653 F.3d at 877. This is precisely what D.D. seeks to do here.

III.

In *Fry*, the Supreme Court directly addressed the relationship between the IDEA, the ADA, and § 504. The Court recognized that the same set of facts can give rise to overlapping claims for the denial of a FAPE under the IDEA and disability discrimination under other statutes. 137 S. Ct. at 756. The Court also held that exhaustion is required only when the plaintiff is seeking relief for the denial of a FAPE. *Id.* at 753. After all, an administrative hearing officer cannot give relief for anything else. *Id.*; *see Payne*, 653 F.3d at 871. The Court recognized that a school's conduct

toward a student with a disability may still cause cognizable injury other than denying her a FAPE, and in that case, exhaustion is unnecessary. *Fry*, 137 S. Ct. at 754-55. It then held that in such cases, to determine whether administrative exhaustion is required, the task is to discern "the gravamen" of the complaint—whether the complainant "is[,] in essence[,] contesting the adequacy of a special education program." *Id.* at 755. This assessment is to be guided by "the diverse means and ends of the statutes covering persons with disabilities." *Id.*

The majority critically errs in its assessment of the gravamen of D.D.'s operative complaint, demanding exhaustion where it is not required. "[T]he statutory differences [between the IDEA, the ADA, and § 504] mean that a complaint brought under Title II and § 504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Id.* at 756. D.D. first pursued his administrative remedies under the IDEA and successfully resolved his IDEA claims through the mediation and settlement process specifically contemplated by the statute. *See* 20 U.S.C. § 1415(e)-(f). In the present action, he seeks relief for simple disability discrimination. *See Fry*, 137 S. Ct. at 756.

In focusing on the factual common ground between the FAPE-based claim that D.D. settled and does not allege in this lawsuit, and the non-IDEA claim he does allege, the majority concludes that D.D. must exhaust his ADA claim in a forum from which he cannot obtain further relief. In reaching this result, the majority

relies on the *Fry* clues.[1] The *Fry* clues are intended to aid in determining whether a complaint alleging ADA or § 504 claims is nothing more than another way of seeking IDEA educational benefits. Fry does not answer the question of whether a plaintiff who seeks relief unavailable under the IDEA—*i.e.*, damages—must nevertheless pursue administrative exhaustion. *See* 137 S. Ct. at 752 n.4, 754 n.8. To read *Fry* and related Ninth Circuit cases consistently, we are required to analyze the complaint to determine the gravamen, or the harm alleged.[2]

---

[1] *Fry* emphasized that the suggested "clues" are neither exclusive nor determinative, but merely potentially useful. 137 S. Ct. at 756-57, 757 n.10. Justice Alito, in his partial concurrence joined by Justice Thomas, found them misleading and confusing, explaining that the "clues make sense only if there is no overlap between the relief available under [the IDEA and other federal disability discrimination laws]." *Id.* at 759 (Alito, J., concurring-in-part).

[2] *Payne*, which was decided before *Fry*, sought to provide a method to determine whether a plaintiff had to exhaust true IDEA claims alleged under non-IDEA statutes (the ADA and § 504). *See* 653 F.3d at 874-75. In *Payne*, we held that "[i]f a plaintiff can identify a school district's violation of federal laws other than the IDEA and can point to an authorized remedy for that violation unavailable under the IDEA, then there is no reason to require exhaustion under § 1415(l)." *Id.* at 881. *Payne* remains good law for its holding that the "exhaustion requirement applies to claims only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA." *Id.* at 874 (emphasis added). The issue in *Fry* was essentially the same as that in *Payne*, but *Fry* directed courts to focus on the gravamen of the complaint and not just on the relief sought, as in *Payne*. Although certain aspects of *Payne* have been supplanted by *Fry*'s gravamen approach, it remains instructive.

In D.D's due process hearing request, he alleged that the District had failed to address his learning needs, constituting the denial of a FAPE under the IDEA. Specifically, D.D. alleged that the District had failed to (1) provide him with an appropriate placement and services, such as a one-to-one aide, to address his behavioral needs; and (2) offer sufficient services and supports in the areas of (i) occupational therapy, (ii) speech and language development, (iii) psychological counseling, and (iv) social skills. The request also stated that the denial of a FAPE was a violation of § 504 and that the District also separately violated § 504 and the ADA. The request outlined five separate categories of relief, including services related to the provision of a FAPE, funding or reimbursement for parent expenditures related to the provision of a FAPE, compensatory education services, and damages due to violations of § 504 and the ADA.

As part of the IDEA settlement agreement, D.D. waived all of his educational claims arising under the IDEA and California special education statutes and regulations. The "agreement d[id] not release any claims for damages . . . which could not have been asserted in proceedings under the IDEA and/or California special education statutes and regulations." D.D. thus expressly reserved the right to pursue "any claims that can be made under" other federal laws, including the ADA.

After resolving his IDEA claims through settlement, D.D. followed the path prescribed by the Supreme Court in *Fry* and filed this action against the District for violations of the ADA and § 504 (for which the administrative IDEA process provides no remedy). In the operative complaint, D.D. omitted the § 504

claim, seeking only money damages for disability discrimination under the ADA.

IV.

A.

The first *Fry* clue offers two hypothetical questions for use in determining the gravamen of a school-based disability-discrimination complaint: 1) whether the plaintiff could bring the same claim outside the school setting, and 2) whether an adult could bring the same claim within the school setting. *Fry*, 137 S. Ct. at 756.

D.D.'s complaint focuses on his repeated exclusion from school. At the outset, he alleges that the District "excluded [him] from school and all of the programs and services made available to others without disabilities." He then alleges that the "District discriminated against [him] on the basis of his disability by removing him from his classroom; sending him home early on multiple occasions, and requiring a parent to attend school with [him] to serve as his one-to-one aide instead of providing one."

D.D. alleges that during his kindergarten and first-grade years, school staff "regularly" called D.D.'s parents to pick him up from school early, which "exclud[ed] him from participation in all school activities." When D.D. was in first grade, "staff presented Parent an ultimatum: either pick him up from school or have a family member serve as his one-to-one aide to enable D.D. to participate in the classroom." As a second-grader, "D.D. was left to his own devices" and was "commonly" allowed to "le[ave] class and walk[ ] around the campus for almost the entire school day unattended." In sum, D.D. alleges that "[r]ather than

offering meaningful and appropriate behavior accommodations and allowing D.D. to attend school for the same amount of time as typical peers, District discriminated against D.D. on the basis of his disability by excluding him from school, refusing to offer an aide, only allowing him to stay in school if his Parent served as an aide, and by enabling him to be subjected to an unsafe school environment."

D.D. further alleges that due to the District's failure to accommodate him, he was routinely bullied on the school bus, came home with bruises multiple times, was attacked by students, and had his head slammed into a wall by a staff member. To deal with the school bus issues, D.D.'s parents "requested an aide for the bus, but none was provided." District staff allegedly threatened D.D., telling him "that if he did not behave, they would call the police and he would end up either in jail or in the hospital again." These threats "traumatized" D.D., "making it impossible for him to attend school altogether." Along with a "denial of equal access to the benefits of a public education," D.D. alleges that he suffered "humiliation, hardship, anxiety, depression[,] and loss of self-esteem" as a result of the District's "failure to address and provide accommodations, modifications, services[,] and access required due to D.D.'s disabilities."

Clearly, the gravamen of D.D.'s complaint is a challenge to his lack of <u>access</u> to the educational program or services the District provided. I fail to understand how, for example, the District's alleged failure to provide a one-to-one aide on the school bus has anything to do with the <u>adequacy</u> of the instructional program the District provided, as the majority effectively insists. D.D. alleges that the District denied

him the opportunity to attend school at all because of his disability-related behavior, unless accompanied by a parent. D.D.'s claim thus sounds squarely in the ADA: he alleges that he was denied meaningful access to his public educational program because the District failed to provide reasonable accommodations for his disability. These allegations are more than sufficient to satisfy the pleading standard for an ADA claim.[3]

The difference in the statutes' goals is key to understanding whether administrative exhaustion should apply to D.D.'s Title II ADA claim: while the IDEA focuses on the provision of an individualized educational program to meet a child's specific educational needs, *see Honig v. Doe*, 484 U.S. 305, 311 (1988), the ADA focuses on the barriers that exist to deny the student the opportunity to obtain such individualized attention, *Fry*, 137 S. Ct. at 756. Administrative exhaustion "is not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist independent of the IDEA and entitles a plaintiff to relief different from what is available under the IDEA." *Payne*, 653 F.3d at 876 (emphasis in original).

---

[3] The District Court dismissed D.D.'s action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that the complaint failed to state a claim. Because D.D. stated a valid claim for disability discrimination under the ADA, the District's motion to dismiss under Rule 12(b)(6) should have been denied. Exhaustion is an affirmative defense subject to a motion for summary judgment, not dismissal for failure to state a claim. *See Albino v. Baca*, 747 F.3d 1162, 1169, 1171 (9th Cir. 2014) (en banc) (overruling *Payne* on the procedural issue and holding that exhaustion questions should be decided on summary judgment, not on a motion to dismiss under Rule 12(b)(6), unless the failure is clear from the face of the complaint).

D.D. requested reasonable accommodations from the District, including a one-to-one behavior aide, "so that he could have equal access to his public education, and the programs and services offered by LAUSD to the same extent as his peers without disabilities." D.D.'s requests for the District to support his behavioral needs so that he could remain in school, and do so without being subjected to attacks, threats, and abuse, could not be brought in exactly the same way against a public library, or by an adult plaintiff, such as an employee or visitor to the school. But visitors to public libraries and adults employed by or visiting schools could well request similar, if not precisely the same, relief, to ensure access and nondiscriminatory participation—for example, nearby security officers, or permission to bring in a service animal.

Like such officers or animals, D.D.'s requested one-to-one behavior aide was intended to enable D.D. to remain in the classroom and participate alongside his peers. For example, in the operative complaint, D.D. alleges that after he was sent home because of his problematic behavior, his mother requested a one-to-one aide to "accommodate D.D.'s needs and enable him to participate with his peers." He further alleges that school staff required his parents to "either pick [D.D.] up from school or have a family member serve as his one-to-one aide to enable D.D. to participate in the classroom." As a result, "[D.D.'s parent] attended school with D.D. on most days to monitor D.D.'s behavior and enable him to access his education to the same extent as students without disabilities." After "D.D.'s disruptive, disability-related behavior continued to escalate[,] Parent again requested reasonable accommodations for her son's disability-related behavior,

including a one-to-one aide." Additionally, "[D.D.] was routinely bullied on the bus to and from school without behavior support. Parent requested an aide for the bus, but none was provided." A library visitor or adult seeking school access could similarly request as an accommodation the presence of security personnel or service animals to address both the plaintiff's behavioral issues and discriminatory and abusive behavior by others in response to those issues.

Given these allegations, the first *Fry* clue is helpful in determining whether D.D.'s ADA claim is a disguised FAPE claim, as long as we recognize that the analogy between other locations or other plaintiffs and the child seeking to assure school access need not be exact. Indeed, it is unlikely that the *Fry* clues were intended to exclude students with behavioral—as opposed to physical—disabilities from recourse under Title II of the ADA because children's needs at school may require accommodations somewhat different from—but analogous to—those appropriate for adults or in other public buildings. The majority's rote application of the first *Fry* clue is therefore incorrect.

The majority makes much of the fact that D.D.'s operative complaint alleges that the District failed to provide one of the same services that he pursued administratively under the IDEA—a one-to-one classroom aide. But this overlap does not transform a claim that seeks relief under Title II of the ADA into a disguised FAPE claim. Where a child with disabilities has experienced both a denial of a FAPE in violation of the IDEA and exclusion from school in violation of the ADA, some overlap in the facts relevant to each is expected. As the Supreme Court observed, "[t]he same

conduct might violate all three [disability discrimination] statutes." *Fry*, 137 S. Ct. at 756. And as the "master of the claim," a plaintiff has a right to bring claims under each. *See id.* at 755. For purposes of determining the applicability of administrative exhaustion, the question is whether D.D. plausibly alleged a claim of disability discrimination separate from the IDEA claim he previously settled.

D.D. plausibly alleged a claim of disability discrimination based on his exclusion from the classroom, and he reasonably sought a one-to-one aide as one remedy for that exclusion, apart from any educational services an aide could have provided. As explained in *Fry*, a child may seek a wheelchair ramp to remedy the denial of access to a school building or to remedy the denial of his right to a FAPE—which he cannot receive "if [he] cannot get inside the school." *Id.* at 756. Similarly, a one-to-one aide could be necessary not only for D.D. to take advantage of other forms of instructional assistance as required by the IDEA but also for D.D. to access and remain in school, as required by the ADA. It is possible that the two different needs may even be met by two different aides, with different qualifications and attributes. The facts in D.D.'s operative complaint allege that without an aide, D.D. would not be able to remain in school at all, and thus would have no opportunity to receive a public education. "After all, if the child cannot get inside the school, he cannot receive instruction there." *Id.*

Further, even if the one-on-one aide were precluded under a *Fry* analysis—which I do not believe it is—the only consequence would be that any damages specifically traceable to denial of that aide could not be recovered. The gravamen of the complaint would

remain discriminatory exclusion from school and discriminatory abuse, threats, and physical attacks while in school, and damages traceable to those circumstances would still be available.

B.

The second *Fry* clue is the procedural history of the plaintiff's pursuit of relief. *See id.* at 757. The majority characterizes D.D.'s complaint as "artful pleading" because he first pursued an IEP, but does not allege this in his complaint—leading the majority to conclude D.D.'s claim is necessarily a disguised FAPE claim. But in his operative complaint, D.D. tells the story of the District's alleged violations of his rights. Under the majority's reasoning, it is not clear what D.D. could have done to avoid the accusation of "artful pleading." *Fry* urges courts to "consider substance, not surface": the principal inquiry is whether a plaintiff's complaint "seeks relief for the denial of an appropriate education." *Id.* at 755.

In concluding that administrative exhaustion of D.D.'s ADA claim is required, the majority has transformed § 1415(l) from a provision specifically crafted to preserve the availability of other forms of relief alongside the IDEA into one that forecloses all cases involving the mistreatment of students with disabilities by a school. The majority has taken away from D.D. and future litigants exactly what Congress and the Supreme Court in *Fry* sought to protect: the right to file an action alleging claims of disability discrimination outside the IDEA's limited, education-centered scope without having to exhaust the IDEA administrative process.

Having resolved his IDEA claims through settlement, D.D. now pursues a claim whose gravamen relates to his discriminatory treatment on the basis of his disability, not the adequacy of the individualized education provided by the District. *Fry* directs courts to ensure that students who receive special education and have an IEP are not denied their right to pursue their non-IDEA claims directly in court. 137 S. Ct. at 754-55. D.D.'s operative complaint makes clear that his ADA claim does not challenge the adequacy of his instruction and related services, and therefore, does not "seek[] relief that is also available under [the IDEA]." 20 U.S.C. § 1415(l); *see McIntyre*, 976 F.3d at 915 ("Thus, because McIntyre seeks relief for the District's failure to provide specific accommodations that are neither 'special education' nor a 'related service'—the constituent parts of the IDEA's FAPE requirement—she does not seek relief for the denial of FAPE.").

V.

Requiring IDEA exhaustion before seeking relief not available under the IDEA contravenes congressional intent, departs from Supreme Court precedent, and restricts students' rights under other disability discrimination statutes like the ADA. *See Payne*, 653 F.3d at 874 ("The IDEA's exhaustion requirement applies to claims only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA."). The majority opinion will discourage students and their families from settling IDEA administrative due process complaints and will be a trap for unsuspecting parents who believe that settlement language

that preserves non-IDEA claims does just that. By upholding the district court's dismissal order, the majority has effectively sanctioned a system in which students can involuntarily and unknowingly waive their civil rights claims, even when preserved in writing by the parties.

The scope of IDEA administrative hearings is limited: hearing officers can only address and resolve whether a school has met its obligation to provide a student with a FAPE. *Fry*, 137 S. Ct. at 754. A plaintiff like D.D., seeking redress for something other than a denial of a FAPE, cannot obtain any relief from the administrative hearing process. Where, as here, a student seeks monetary damages under the ADA for harms not redressable under the IDEA, further administrative efforts would be futile. *See Payne*, 653 F.3d at 871-72. There is simply no further relief that such a student could obtain through the IDEA's administrative process. The majority has unduly burdened students with disabilities with having to proceed with a full hearing at the administrative level for claims that do not implicate a FAPE simply because the discrimination they suffer happens at school.

For the above reasons, I would reverse the district court's dismissal order and remand for further proceedings related to D.D.'s ADA claim. I respectfully dissent.[4]

---

[4] Because I disagree with the majority's holding that the gravamen of D.D.'s operative complaint is a disguised FAPE claim, I do not address whether exhaustion is unnecessary when the relief sought—damages—cannot be awarded by an IDEA hearing officer. On that issue, I agree with Judge Bumatay's dissent that exhaustion is not required. I therefore join Parts IB and II of

Judge Bumatay's dissent as an alternative basis for allowing D.D.'s ADA damages claim to proceed.

I also agree with Judge Berzon that, if the question were properly before us, we should hold that the exhaustion requirement is satisfied when the parties have settled disputed IDEA issues through the administrative hearing and mediation process, as here. I therefore join Judge Berzon's dissent in full.

DISSENTING OPINION OF JUDGE BERZON JOINED BY CHIEF JUDGE THOMAS AND JUDGE PAEZ

BERZON, Circuit Judge, with whom Chief Judge Thomas and Judge Paez join, dissenting:

I join Judge Paez's dissent in full and join the dissenting portions of Judge Bumatay's opinion. I write separately to call attention to the "interesting question" mentioned, but not decided, by the majority: "whether settlement after IDEA-prescribed mediation amounts to exhaustion." Majority op. 27. Although the issue may not be a live one in this appeal, *see id.* at 27, it is a serious question that, had it been properly raised, would, in my view, have provided a much more straightforward resolution of this case than the fact-bound issue debated in the majority opinion and Judge Paez's dissent.

As then-Chief Judge Briscoe of the Tenth Circuit persuasively demonstrated, the exhaustion provision in the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(l), "can reasonably, and indeed should, be interpreted as merely requiring a claimant to make full use of the procedures outlined in §§ 1415(f) and (g) to attempt to resolve her IDEA claim"—including use of the mediation and settlement conference provisions included in the statute. *A.F. ex rel Christine B. v. Espanola Pub. Schs.*, 801 F.3d 1245, 1256 (10th Cir. 2015) (Briscoe, C.J., dissenting); *see* 20 U.S.C. § 1415(f)(1)(B)(i) (mandating a "[p]reliminary meeting" to allow "the parents of the child [to] discuss their complaint, and the facts that form the basis of the complaint," and to afford "the local educational agency . . . the opportunity to resolve the complaint,"

unless the parties agree in writing to waive the meeting or agree "to use the mediation process described in subsection (e)"); § 1415(f)(1)(B)(iii) (setting forth procedures for the parties to execute a "[w]ritten settlement agreement" if "a resolution is reached to resolve the complaint" at the preliminary meeting); *id.* § 1415(e) (detailing a mediation process allowing parents and educational agencies "to resolve the complaint" through "a legally binding agreement," *id.* § 1415(e)(2)(F)).

The exhaustion provision should be read to encompass a settlement reached through the IDEA's prescribed procedures "not only because the statutory framework anticipates, and in fact encourages, resolution of IDEA claims by way of mediation, but also because a mediated resolution leaves nothing to be decided at a due process hearing or in an administrative appeal." *A.F. ex rel Christine B.*, 801 F.3d at 1256 (Briscoe, C.J., dissenting). Here, for example, the settlement agreement expressly recognized that D.D.'s damages claims could not be resolved in an administrative hearing. The agreement did "not release any claims for damages required to be asserted in a court of law and which could not have been asserted in proceedings under the IDEA." A fair reading of this language is that the parties intended to allow damages claims under the Americans with Disabilities Act to go forward because they could not have been brought under the IDEA.

Both the First and Tenth Circuits have excused exhaustion as futile in cases in which the plaintiffs engaged in the IDEA's prescribed process and reached agreements with their school districts granting them all the relief they sought under the IDEA. *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 33 (1st Cir. 2019);

Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 786 (10th Cir. 2013). "Having achieved success through their interactions with local school officials, there was no need for the [plaintiffs] to seek a[n administrative] hearing," *Doucette*, 936 F.3d at 30, and "it would have been futile to then force them to request a formal due process hearing—which in any event cannot award damages—simply to preserve their damages claim," *Muskrat*, 715 F.3d at 786. But resort to the less-than-clear futility doctrine is unnecessary under Chief Judge Briscoe's persuasive interpretation of the statute.

I note that if our court were to adopt Judge Bumatay's position that exhaustion is not required when plaintiffs seek money damages not available under the IDEA, Bumatay op. 32, the settlement problem would be diminished. Typically, once plaintiffs have settled their IDEA claims, a claim for damages is what is left.

But even if that position is not adopted, I would still read the statute not to require further exhaustion after plaintiffs have settled their IDEA claims. As Chief Judge Briscoe asked, "why would Congress, after creating a framework that quite clearly encourages resolution of IDEA claims by various means, force a claimant to avoid resolution of her claim by mediation or preliminary meeting . . . ? Doing so would effectively render superfluous the mediation and preliminary meeting provisions of the statute." *A.F. ex rel Christine B.*, 801 F.3d at 1256 (Briscoe, C.J., dissenting).

We have also recognized the preeminent importance of settlement efforts in this context, given that "the slow and tedious workings of the judicial system make the courthouse a less than ideal forum in which to resolve disputes over a child's education." *Clyde K.*

v. Puyallup Sch. Dist., No. 3, 35 F.3d 1396, 1402 (9th Cir. 1994). "[E]veryone's interests are better served when parents and school officials resolve their differences through cooperation and compromise rather than litigation." *Id.* When the issue is properly raised, we should read the statute in a way that does not subvert one of its central goals—promoting the resolution of educational disputes through settlement.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT VACATING THE DISMISSAL OF THE COMPLAINT (DECEMBER 31, 2020)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

D. D., a Minor, by and through
His Guardian Ad Litem, MICHAELA INGRAM,

Plaintiff-Appellant,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

No. 19-55810

D.C. No. 2:19-cv-00399-PA-PLA

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Before: Kermit V. LIPEZ,* Johnnie B. RAWLINSON, and N. Randy SMITH, Circuit Judges.

---

* The Honorable Kermit V. Lipez, United States Circuit Judge for the First Circuit, sitting by designation

LIPEZ, Circuit Judge:

Appellant D.D., an elementary school student who has attention deficit hyperactivity disorder ("ADHD") and severe, disability-related behavioral issues, brought this action pursuant to the Americans with Disabilities Act ("ADA") alleging that the Los Angeles Unified School District ("the District") denied him "equal access to [a] public education" because of his disability. D.D. seeks damages for harms stemming from his repeated exclusion from school and for abusive treatment he experienced when he attended. The district court dismissed D.D.'s complaint on the ground that he failed to exhaust his claim through the administrative procedures prescribed by the Individuals with Disabilities Education Act ("IDEA"), as required when a plaintiff seeks relief under other federal statutes for the denial of a free appropriate public education ("FAPE"). *See* 20 U.S.C. §§ 1400, 1415(*l*).

Having appellate jurisdiction pursuant to 28 U.S.C. § 1291, we vacate that dismissal. A close review of D.D.'s allegations reveals that the gravamen of his ADA claim is discrimination separate from his right to a FAPE. Hence, his ADA claim is not subject to IDEA exhaustion. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748 (2017).

I. Factual Background[1]

D.D. is an elementary school student whose "disability-related behaviors ranged from being off-task

---

[1] We draw our factual summary from the well-pleaded allegations in the complaint, which we take as true, *see Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019), from the "Request for Mediation and Due Process Hearing" that triggered administrative proceedings pursuant to the IDEA, and from the

and impulsive to being physically aggressive toward peers and adults." As early as kindergarten (the 2015–2016 school year), D.D.'s mother was regularly called to take him home early from school "because his 'behaviors interfered [with] the other students.'" D.D.'s mother requested a one-to-one aide "to accommodate D.D.'s needs and enable him to participate with his peers," but the request was denied. D.D. transferred to a different school for first grade, but his behavior worsened. He struck himself, his classmates, and school staff members. D.D. left the classroom regularly and, at times, caused property damage, "once punching a classroom fire extinguisher."

Early in the first-grade year, D.D.'s mother was given "an ultimatum": she could either retrieve D.D. from school because of his "disruptive, disability-related behaviors," or have a family member serve as his one-to-one aide in the classroom. Both D.D.'s mother and her partner, Albert, worked full-time jobs, but they decided that Albert would leave his job to serve as D.D.'s aide. However, late in the school year, on a day that Albert was unavailable, D.D. had a "severe behavioral incident" that prompted the school to summon a Psychiatric Emergency Team ("PET team"). The episode subsided before the PET team arrived at the school, and D.D.'s mother took him home. That evening, the PET team came to the family's home and informed D.D.'s parents that he needed to be placed on a 24-hour psychiatric hold at a hospital. Ultimately, D.D. spent seven days at the

---

Final Settlement Agreement and Release that concluded those proceedings.

facility. After this incident, D.D.'s mother again unsuccessfully requested a one-to-one aide for him.

D.D.'s behavioral issues persisted through the second grade, even with Albert accompanying him on most days. His mother again sought accommodations, including a one-to-one aide or placement in a non-public school, which were denied. A particularly serious episode occurred in October 2017, when D.D. threw a chair and a water bottle, the latter hitting a classroom aide. The aide took D.D. out of the classroom so he could calm down, and, while outside, D.D. "stumbled down a few stairs." Upon his return to the classroom, D.D. claimed that the aide had pushed him down the stairs. The school principal called the police, who interviewed D.D. at school. His parents were not called. The episode left D.D. emotionally shaken.

After this incident, school staff members routinely taunted D.D., "telling [him] that if he did not behave, they would call the police and he would end up either in jail or in the hospital again." These threats traumatized D.D. and caused "lasting emotional harm, making it impossible for him to attend school altogether." At the end of November 2017, D.D.'s mother withdrew him from school for several weeks. In mid-December, he re-enrolled in his original elementary school, but his circumstances did not improve. "He commonly left class and walked around the campus for almost the entire school day unattended."

In January 2018, D.D. was referred to a non-public school with a small program and more adult assistance. That placement initially improved his academic experience, but he was routinely bullied on the bus and, on three occasions, he arrived home from school with noticeable bruises on his face. Two of those episodes

involved attacks by other students; on the third occasion, a staff member slammed D.D.'s face against a wall when he became aggressive. D.D. stopped attending school at the end of May "because [his mother] feared for his safety." He enrolled in a new nonpublic school in September 2018.

Meanwhile, in March 2018, D.D.'s mother had requested a due process hearing before California's Office of Administrative Hearings, Special Education Division, consistent with the requirements of the IDEA.[2] *See* 20 U.S.C. § 1415(f). The 43-page "Request for Mediation & Due Process Hearing" described in detail the District's asserted failures to provide D.D. with the evaluations, services, and programs necessary to provide him with a FAPE, despite the goals and assessments specified in his individualized education program ("IEP").[3] The Request noted that, in addition to his behavior issues and ADHD, D.D. "has need in the areas of communication and fine motor skills, for which he has received language and speech ("LAS") therapy and occupational therapy ("OT")." The Request stated that, for the 2015–2016 and 2016–2017

---

[2] D.D. was the "petitioner" filing the Request, which was prepared and submitted by an attorney.

[3] An IEP is "a comprehensive statement of the educational needs of a . . . child [with a disability] and the specially designed instruction and related services to be employed to meet those needs." *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985) (citing 20 U.S.C. § 1401(19)). The plan is "[c]rafted by a child's 'IEP Team'—a group of school officials, teachers, and parents." *Fry*, 137 S. Ct. at 749 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B)). A child's IEP is intended to ensure that he receives a FAPE. *See id.* D.D.'s initial IEP was formulated in March 2015, *i.e.*, before he started kindergarten.

school years, the District had failed, *inter alia*, to provide D.D. with a "one-to-one behavior aide or behavior intervention implementation ("BII") services."

The Request also asserted a litany of educational deficits resulting from the alleged inadequate provision of services. For example, the document stated that, as of December 2016, when D.D.'s IEP Team met for its annual review, "[h]e had not met any of his goals[ ] in the areas of find[sic] reading, writing, expressive language, math, and behavioral support." As of October 2017, his IEP indicated that he had met his math and reading goals, but not his goals in writing, expressive language, occupational therapy, or behavior support. The Request reported that D.D.'s mother had asked the IEP Team at that time to consider a one-to-one behavioral aide or moving D.D. to a non-public school. The IEP Team declined both options.

The Request identified thirteen "problems" that needed to be addressed. Problems One through Five listed deficiencies that allegedly denied D.D. a FAPE from February or March 2016 through the present (*i.e.*, early 2018), including the failure to provide behavioral, speech and language, psychological, and social-skills services. Problems Six through Nine disputed different assessments of D.D. performed by the District, noted the failure to reevaluate his occupational therapy needs, and requested independent evaluations at public expense. Problems Ten and Eleven asserted that the District had failed to offer D.D. a FAPE in violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(a), and Problem Twelve stated that the District "violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act when it discriminated against [D.D.] on the

basis of his disability." Problem Thirteen asserted a violation of a state civil rights statute (the "Unruh Civil Rights Act").

In the Requested Remedies section of the document, D.D.'s mother sought an order directing the District to provide eight specified services "as an offer of FAPE," including "a full time, one-to-one behaviorally trained aide by a nonpublic agency," twelve hours per month of "behavior intervention development," and revision of D.D.'s "behavioral support plan."[4] She also sought (1) funding or reimbursement for various assessments and evaluations,[5] (2) compensatory education services,[6] (3) damages for violations of the Rehabilitation Act, ADA, and Unruh Civil Rights Act, and (4) "any other remedies deemed appropriate by the hearing officer assigned to this case."

D.D. and the District eventually negotiated a settlement agreement resolving "all educational claims . . . arising under the IDEA, . . . and all California

---

[4] The other relief requested included: (1) "increased speech and language services to address pragmatic, expressive, and receptive language"; (2) "a social skills program"; (3) "increased occupational therapy services"; and (4) "increased psychological counseling services."

[5] These requests were for: (1) a psychoeducational evaluation, (2) a speech and language assessment, (3) an occupational therapy assessment, and (4) a functional behavior assessment.

[6] The specified compensatory education services included: (1) a minimum of 400 hours of "compensatory specialized academic instruction services," (2) 80 hours of "compensatory occupational therapy services," (3) 80 hours of "compensatory individual speech and language therapy services," (4) 72 hours of "compensatory individual psychological counseling services," and (5) 80 hours of a "social skills program."

special education statutes and regulations." The six-page agreement expressly did not "release any claims for damages required to be asserted in a court of law and which could not have been asserted in proceedings under the IDEA and/or California special education statutes and regulations," including "any claims that can be made under" the ADA.

In January 2019, D.D. filed this action against the District, alleging violations of the ADA and the Rehabilitation Act. A subsequent amended complaint dropped the Rehabilitation Act claim and sought only damages for disability discrimination under the ADA. The District filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and, as noted above, the district court dismissed the complaint. The court accepted the District's argument that D.D.'s federal action "mirrors the . . . due process complaint and does, at the end of the day, seek FAPE relief." Accordingly, the court held that the ADA claim must be exhausted through the administrative process and that, because D.D. had not done so, his complaint must be dismissed without prejudice.

II. Analysis

A. Standard of Review

The district court granted the District's motion to dismiss without expressly identifying the complaint's deficiency as lack of subject-matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), or failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6). This court has advised that a challenge to a complaint based on administrative exhaustion, which is an affirmative defense, ordinarily should be addressed through a motion for summary

judgment rather than through a motion to dismiss under Rule 12(b). *See Albino v. Baca*, 747 F.3d 1162, 1168, 1171 (9th Cir. 2014) (en banc).[7] We need not dwell on the procedural context, however, because the issue of exhaustion in this case is one of law; the parties dispute the significance of the alleged facts, not the facts themselves. Hence, our review would be de novo regardless of the motion filed. *See id.* at 1171 ("On appeal, we will review the judge's legal rulings on exhaustion de novo[.]"); *N. Cty. Cmty. All., Inc. v. Salazar*, 573 F.3d 738, 741 (9th Cir. 2009) ("We review de novo questions of law raised in dismissals under Rules 12(b)(1) and 12(b)(6).").

In reviewing Rule 12(b) dismissals, we accept as true the complaint's factual allegations, and we construe those allegations in the light most favorable to the plaintiff. *See N. Cty. Cmty. All.*, 573 F.3d at 741–42; *see also Albino*, 747 F.3d at 1173 (stating that, in reviewing a summary judgment on exhaustion, "we must view all of the facts in the light most favorable to the non-moving party").

B. Federal Law and School-Based Claims of Disability Discrimination

Three different federal statutes may come into play when a child with disabilities and his family assert education-based claims of unlawful treatment: the IDEA, 20 U.S.C. §§ 1400–51; Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("§ 504"); and Title II of the ADA, 42 U.S.C. §§ 12131–34. *See Fry*, 137 S.

---

[7] Before *Albino*, this court had endorsed using an unenumerated Rule 12(b) motion to seek dismissal of a complaint for failure to exhaust administrative remedies. *See Albino*, 747 F.3d at 1171.

Ct. at 749–50 (describing the three statutes); *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 909–910 (9th Cir. 2020) (same); *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1202 (9th Cir. 2016) (same).[8]

The IDEA is focused exclusively on special education and "ensure[s] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A)—a FAPE—that encompasses "both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry*, 137 S. Ct. at 748–49 (quoting 20 U.S.C. § 1401(9), (26), (29)). The IEP is the "primary vehicle" for providing a FAPE, *id.* at 749 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988)), and "[t]he IDEA provides an administrative process for parents to challenge their child's IEP or its implementation," *Doucette*, 936 F.3d at 22.

Both § 504 and the ADA sweep more broadly than the IDEA, covering claims of discrimination brought by "both adults and children with disabilities, in both

---

[8] A federal remedy for school-based disability discrimination also may be available via 42 U.S.C. § 1983, which protects every "citizen of the United States or other person within [its] jurisdiction" against deprivations of federally secured rights effected by persons acting under the color of state law. *See, e.g.*, *Fry*, 137 S. Ct. at 750 (noting a § 1983 claim brought under the Equal Protection Clause of the Fourteenth Amendment for the denial of a FAPE); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 883 (9th Cir. 2011) (en banc) (describing plaintiff's § 1983 claims alleging violations of the Fourth, Eighth, and Fourteenth Amendments), *overruled on other grounds by Albino*, 747 F.3d at 1171; *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 28–29 (1st Cir. 2019) (describing a § 1983 claim alleging a constitutional due process violation).

public schools and other settings." *Fry*, 137 S. Ct. at 749. Section 504 guarantees nondiscriminatory access to federally funded activities and programs, 29 U.S.C. § 794, and it requires public entities to make "reasonable modifications" to their practices to "accommodate" individuals with disabilities. *See Alexander v. Choate*, 469 U.S. 287, 300 (1985). The ADA is even more comprehensive, guaranteeing nondiscriminatory access not only to "the services, programs, or activities" of any "public entity," 42 U.S.C. § 12132, but also to commercial facilities and places of public accommodation, *id.* §§ 12181–84.

Thus, while all three statutes require public schools "to provide each child with meaningful access to education," *Fry*, 137 S. Ct. at 755 (referring to the IDEA); *see K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013) (referring to the ADA), "meaningful access" for purposes of these provisions is not always the same. Under the IDEA—focused on the schooling itself—a child must be given the individualized learning tools and services that he needs to advance his academic skills, *i.e.*, the capability to "access" learning within his classroom. *See Fry*, 137 S. Ct. at 748–49; *see also McIntyre*, 976 F.3d at 914 (emphasizing that "specially designed instruction" is the IDEA's core tool for providing a FAPE (quoting 20 U.S.C. § 1401(29))). Under the ADA and § 504, children with disabilities also must be given reasonable accommodations so they can "access" the school program at all—*i.e.*, to ensure they are not excluded from school or the classroom and, as a result, denied the opportunity to obtain the individualized attention necessary to receive an appropriate public education.

Significantly for this case, the IDEA has an exhaustion requirement. If it applies, a parent may not sue a school district under the IDEA unless she has first exhausted the administrative remedies provided by the statute. *See* 20 U.S.C. § 1415(i), (*l*). Although the ADA and § 504 do not themselves have exhaustion provisions, the IDEA's exhaustion requirement is pertinent to those statutes as well. It provides:

> Nothing in [the IDEA] 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 [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

Id. § 1415(*l*) (emphasis added). This provision has led to disputes over whether the relief a child seeks in a civil action is "also available under [the IDEA]"—requiring exhaustion before the claim may proceed in court—and whether the exhaustion requirement, when applicable, has been met. *See, e.g.*, *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1100 (9th Cir. 2019); *Payne*, 653 F.3d at 865; *Doucette*, 936 F.3d at 18–19.

Addressing the scope of the IDEA's exhaustion provision for the first time in *Fry*, the Supreme Court concluded that it applies only when a plaintiff is seeking "relief for the denial of a FAPE," 137 S. Ct. at

752—*i.e.*, when a complaint challenges the adequacy of a child's educational program, *see id.* at 755 (noting that the IDEA concerns "schooling"); *id.* at 754 ("The IDEA's administrative procedures . . . center on the Act's FAPE requirement."). The Court recognized that "[a] school's conduct toward . . . a child [with a disability] . . . might injure her in ways unrelated to a FAPE," *id.* at 754, and it explained that a complaint seeking redress for such harms would not be subject to IDEA exhaustion "because . . . the only 'relief' the IDEA makes 'available' is relief for the denial of a FAPE," *id.* at 754–55. As this court noted, presaging *Fry*, "§ 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under § 1983 or other federal laws." *Payne*, 653 F.3d at 872[9]; *see also McIntyre*, 976 F.3d

---

[9] In its decision issued nearly six years before *Fry*, this court, sitting en banc, held in *Payne* that "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA." 653 F.3d at 871. The court explained that it thus "overrule[d] our previous cases to the extent they state otherwise," and it "conclude[d] that . . . [the district court] should not have dismissed [the plaintiff's] non-IDEA claims on exhaustion grounds." *Id.* The en banc court remanded the case to the district court for application of "the new standards announced in this decision," and it directed the district court to "permit [the plaintiff] to amend her complaint in order to flesh out her specific claims and enable the court to determine which claims require IDEA exhaustion and which do not." *Id.* at 881. Here, by contrast, D.D. had the benefit of both *Payne* and *Fry* in crafting his complaint, and neither he nor the district court needs an opportunity to revisit the claims in light of new law. Hence, contrary to the dissent's assertion, our analysis is supported by, and consistent with, *Payne*. *See infra* Section II.C.

at 915 ("Exhaustion should not be required merely because the plaintiff's complaint 'has some articulable connection to the education of a child with a disability' or else 'falls within the general "field" of educating disabled students.'" (quoting *Fry*, 137 S. Ct. at 752 n.3, 753)).

Determining whether IDEA exhaustion is necessary, then, requires distinguishing between "when a plaintiff 'seeks' relief for the denial of a FAPE and when she does not." *Fry*, 137 S. Ct. at 755. To discern the difference, *Fry* instructs courts to carefully examine the allegations in a complaint, and the inquiry must turn on "substance," not labels. *Id.* The presence or absence of "the precise words[ ] 'FAPE' or 'IEP'" will not be dispositive; rather, § 1415(*l*) "requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." *Id.*; *see also McIntyre*, 976 F.3d at 913 (noting that "the inquiry does not turn on whether a complaint includes (or omits) any magic phrase, such as FAPE or IEP"). At the same time, however, courts must see beyond the school setting to determine if the plaintiff is claiming a violation of the equal access requirements of the ADA or § 504 rather than challenging the adequacy of special education services. *See, e.g.*, *McIntyre*, 976 F.3d at 916 (noting that a plaintiff is "not required to exhaust her claims under § 1415(*l*) merely because [the] events [at issue] occurred in an educational setting"); *Payne*, 653 F.3d at 875 (indicating that courts should not "treat[ ] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for

any case that falls within the general 'field' of educating disabled students").[10]

The Supreme Court recognized that, given the overlap among the statutes governing the education of children with disabilities, it may be difficult at times to distinguish between FAPE-based and non-FAPE-based claims. Indeed, the Court in *Fry* gave an example that highlights that challenge. A school building's lack of ramps to provide access for individuals who use wheelchairs could be the premise of a claim of unlawful discrimination under § 504 or the ADA—*i.e.*, a claim unrelated to the quality of the education provided within the building. *See Fry*, 137 S. Ct. at 756. But a child who uses a wheelchair might also fashion an IDEA claim premised on the absence of a ramp at his school because, "[a]fter all, if the child cannot get inside the school, he cannot receive instruction there." *Id.*[11] In other words, the same remedy may be sought for two different purposes: one, to address a

---

[10] As a reflection of the complexity of the relationship among the IDEA, the ADA, and § 504 of the Rehabilitation Act, the denial of a FAPE may itself serve as the basis for an ADA or § 504 claim—although such claims unquestionably would be subject to exhaustion under § 1415(*l*). *See Fry*, 137 S. Ct. at 754 (observing that a plaintiff who brings suit for the denial of an appropriate education under the ADA or § 504 would need to exhaust the IDEA's administrative procedures).

[11] In *Fry* itself, the plaintiff alleged, *inter alia*, that school officials violated the ADA and § 504 by refusing to allow her trained service dog to accompany her in the classroom, thereby denying her equal access to the school and causing harm that included emotional distress and pain. *See* 137 S. Ct. at 751–52; *see also Doucette*, 936 F.3d at 20–21 (also involving a school's refusal to allow a child to bring a service dog into the classroom).

child's exclusion from school—his access to any education—and, two, to address that child's ability to benefit from instruction so that he may obtain an "appropriate" education.[12]

Hence, in determining the need for exhaustion, the question is not "whether the suit 'could have sought' relief available under the IDEA," but "whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education." *Id.* at 755. The Court emphasized that "§ 1415(*l*) treats the plaintiff as 'the master of the claim': She identifies its remedial basis—and is subject to exhaustion or not based on that choice." *Id.* (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 & n.7 (1987)). Accordingly, as some courts have put it, even when allegations based on the conduct of school officials "touch on the denial of a FAPE"—to be expected when claims arise in the school setting—the question remains whether the gravamen of the complaint concerns discrimination outside the IDEA's scope. *Piotrowski ex rel. J.P. v. Rocky Point Union Free Sch. Dist.*, 462 F. Supp. 3d 270, 284 (E.D.N.Y. 2020); *see Lawton v. Success Acad. Charter Sch., Inc.*, 323 F. Supp. 3d 353, 362 (E.D.N.Y. 2018) (similar language); *see also J.S., III by and through J.S. Jr. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986 (11th Cir. 2017) (per curiam) (noting that a student's claim of isolation "cannot [be] easily divorce[d]" from the school setting, but finding the

---

[12] The dissent goes astray in failing to acknowledge that D.D.'s asserted need for a one-to-one aide may properly be the basis for his claims under both the IDEA and the ADA. As explained in Section II.C, the remedies sought here are not premised on the denial of a FAPE.

claim distinct from an IDEA claim and not subject to exhaustion); *Payne*, 653 F.3d at 880 (noting that, even if the "unconstitutional beating" of a schoolchild would have consequences for his FAPE, "the resulting excessive force claim" would not necessarily require IDEA exhaustion).

Any exhaustion analysis must thus begin with a close examination of the plaintiff's complaint to determine whether its allegations "concern[ ] the denial of access to public facilities" or "the denial of a FAPE." *Paul G.*, 933 F.3d at 1100. Aware that the facts underlying each of those claims will at times overlap, the Supreme Court in *Fry* offered two clues that may assist a court's inquiry and indicate whether the gravamen of the complaint concerns the denial of a FAPE or disability-based discrimination. *See Fry*, 137 S. Ct. at 756–57.

The first clue comes from the answers to "a pair of hypothetical questions," specifically, whether a child could bring the same claim outside the school context and whether an adult could "have pressed essentially the same grievance" within the school setting. *Id.* at 756. If the answer to both questions is "no," the claim probably concerns a FAPE; if the answer is "yes," the gravamen of the complaint is unlikely to implicate the IDEA's concern for "appropriate education." *Id.* The second clue is the history of the plaintiff's pursuit of relief. *See id.* at 757. If a parent initially invokes the IDEA's administrative procedures, that "may suggest that she is indeed seeking relief for the denial of a FAPE." *Id.* But the Supreme Court also recognized that "the move to a courtroom [may have come] from a late-acquired

awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely." *Id.*

C. Assessing the Complaint and the *Fry* Clues

The inquiry prescribed by *Fry* thus requires us to ascertain whether the district court correctly concluded that the gravamen of D.D.'s complaint "charges, and seeks relief for, the denial of a FAPE." *Id.* at 758. Put differently, we must answer this question: Is the "essence [of D.D.'s claim] equality of access to public facilities, [or] adequacy of special education"? *Id.* at 756. We begin our analysis with the complaint and then consider the *Fry* clues.

1. Examining the Complaint

D.D.'s amended complaint alleges only a violation of the ADA, but, as we have explained, the express labeling of his claim tells us little. However, importantly, the complaint summarizes his discrimination claim in language that reflects the broader access requirements of the ADA and the obligation to give individuals who have disabilities equal opportunity to participate in public programs. The complaint alleges that the District violated Title II "by failing to provide D.D. with . . . reasonable accommodations, auxiliary aids and services that he needed in order to enjoy equal access to the benefits of a public education, and to otherwise not exclude D.D. from its educational program." A similar description of the claim appears in the complaint's Introduction, with its assertion that D.D. sought reasonable accommodations from the District "so that he could have equal access to his public education, and the programs and services offered by [the

District] to the same extent as his peers without disabilities."

The more specific factual allegations further indicate that the thrust of D.D.'s complaint is his loss of educational opportunity because he was banished from his classrooms, rather than deficiencies in his individualized educational program. The complaint's Introduction notes that the District addressed D.D.'s "educational needs" by offering occupational, language, and speech therapy, "but [it] never addressed D.D.'s significant behavior needs" that repeatedly resulted in his exclusion from school. Instead, the complaint alleges, the "District discriminated against D.D. on the basis of his disability by removing him from his classroom; sending him home early on multiple occasions, and requiring a parent to attend school with D.D. to serve as his one-to-one aide instead of providing one." D.D. alleges that "[t]his pattern of discrimination" occurred at each of his elementary schools and that he was "subjected to taunting by District staff" and "received injuries caused by other students and a . . . staff member" at one of the schools. The complaint goes on to detail the circumstances D.D. faced in each of the three academic years at issue: 2015–16, 2016–17, and 2017–18.

For the first two years, the complaint alleges, the District's schools "exclud[ed] him from participation in all school activities" by regularly demanding that his mother pick him up early—sometimes shortly after the school day began. Early in both academic years, the schools declined to provide a one-to-one aide to "enable [D.D.] to participate with his peers," and instead issued the ultimatum that the family either provide an aide or remove D.D. from school. For the

next school year, 2017–18, the complaint states that D.D. was able "to access his education to the same extent as students without disabilities" only because of Albert's presence, and it recounts the incident in which D.D. claimed he was pushed down the stairs, followed by the taunting and threats from school staff members. The complaint reports another request by D.D.'s mother, rejected by the District, for "reasonable accommodations for her son's disability-related behavior, including a one-to-one aide or [non-public school] placement to enable D.D. to have equal access [to] his education to the same extent as his peers without disabilities."

After describing the additional difficulties D.D. faced during the 2017–18 school year—including being left to walk around school grounds "for almost the entire school day unattended," and being bullied on the bus to and from school—the complaint summed up his treatment as follows:

> Rather than offering meaningful and appropriate behavior accommodations and allowing D.D. to attend school for the same amount of time as typical peers, [the] District discriminated against D.D. on the basis of his disability by excluding him from school, refusing to offer an aide, only allowing him to stay in school if his Parent served as an aide, and by enabling him to be subjected to an unsafe school environment.

As a result of this discrimination, the complaint alleges, "D.D. suffered injury, including, but not limited to, denial of equal access to the benefits of a public education," "as well as humiliation, hardship, anxiety, depression and loss of self-esteem."

Notably absent from the complaint are references to the allegedly inadequate educational programs and IEP-related services that were addressed in the Request for Mediation and Due Process Hearing—*i.e.*, the asserted failures to provide D.D. with a suitable IEP and, concomitantly, the failure to provide him with the FAPE mandated by the IDEA. *See supra* Section I.[13] Stated simply, the complaint repeatedly highlights D.D.'s exclusion from the classroom, not the inadequacy of his experience in the classroom. It further alleges multiple instances of verbal and physical abuse in school and on the school bus, conduct unrelated to D.D.'s education.

The complaint thus manifestly supports a conclusion that D.D.'s lawsuit does not implicate the educational program of the IEP and, hence, that his ADA discrimination claim does not require exhaustion pursuant to § 1415(*l*). We nonetheless consider the *Fry* clues to see if they shed a different light on our inquiry.

2. The *Fry* Clues

The hypothetical questions posed by *Fry* as the first possible clue in ascertaining the gravamen of a

[13] The only reference to D.D.'s educational needs appears by way of background in the Introduction, which explains that, "[p]ursuant to the ADA, he is considered to have a disability that interferes with his ability to learn," and that "his educational needs have been explicit and include support for ADHD, communication and fine motor skills." As described above, the complaint goes on to state that the District offered services "to address those needs," but did not address his "significant behavior needs" and instead "discriminated against D.D. on the basis of his disability" by excluding him from school unless one parent accompanied him.

school-based disability-discrimination complaint—whether the plaintiff could bring the same claim outside the school setting and whether an adult or school visitor could bring the same claim within the school setting—have less obvious answers here than for the wheelchair ramp (the Supreme Court's first example to illustrate how the clue works) or for the service dog at issue in *Fry*. A child's need for a ramp or a service dog for equal access to a public program or service plainly could exist in contexts beyond education and a school building—for example, at a municipal library or theater, as the Supreme Court posited in *Fry*. *See* 137 S. Ct. at 756. Similarly, it is apparent that a school employee or an adult visitor to a public school could present the same claim as a student that the lack of a ramp or refusal to allow a service dog violates the ADA. *See id.*

It is more difficult to picture a child claiming that a public library or municipal theater should have provided him with the accommodation D.D.'s mother repeatedly requested of the District—a one-to-one behavioral aide—so the child could participate in the library's story time or attend a theatrical performance. A school visitor asking the District to provide a personal aide seems even more incongruous. To use the Court's access-ramp example in such a limited way, however, mistakes the point of the comparison the Court was suggesting. The hypothetical questions are not meant to shed light on whether the plaintiff was entitled to the specific accommodation he claims he was unlawfully denied—a ramp, a service dog, or a one-to-one aide—but, rather, to serve as a tool in determining whether the "essence [of his claim] is equality of access to public facilities [or] adequacy of

special education." *Id.* That is, the question in the exhaustion inquiry involving an ADA claim is the nature of the harm of which the child complains: is it access-based or education-based? The specific remedy requested may be a useful clue in answering that question, but *Fry* also contemplates that it may not be. *See id.* at 756–57 (noting that the hypothetical questions "can" provide a clue to the complaint's gravamen or "suggest" its essence).

Hence, we must not be misled in assessing the allegations in this case by the comparative ease of transplanting the lack of a ramp and the refusal to allow a service dog to non-school contexts. D.D.'s complaint similarly seeks a remedy for harms stemming from his exclusion from a public program—specifically, a public education. His disability-caused behavioral issues repeatedly resulted in his removal from school or his classroom, and D.D.'s mother identified a personal aide as one accommodation she believed reasonable and necessary for her son to obtain the same access to an education as his peers. In other words, she claims that a one-to-one aide would have assisted her son in managing his disruptive behaviors, enabling him to remain in school and in his classroom so that he had the opportunity to learn—akin to the access provided by the ramp and the service dog in the *Fry* scenarios.[14] The key similarity, however, is not

[14] To be clear, D.D.'s lawsuit does not seek as a remedy a one-to-one aide or any other prospective accommodation. He requests only damages for injuries allegedly caused by the District's past failure to provide him with reasonable accommodations in violation of the ADA. Although the allegations in the complaint suggest that the District recognized that D.D. needed a one-to-one aide to access his education *i.e.*, by demanding that his parents provide one—the merits question of whether the District's failure

between the ramp and the dog and the personal aide. It is the equivalent allegations of exclusion stemming from the school's failure to provide some accommodation to ensure equality of access to a public education.

Indeed, the Court in *Fry* observed that the context of a disability discrimination lawsuit—for example, whether the defendant is a school or a theater—may be pertinent in assessing the reasonableness of challenged conduct. *Id.* at 756 n.9. Our inquiry, therefore, does not turn on whether D.D. could bring the identical action against a different type of public facility; rather, "the plausibility of bringing other variants of the suit" can "indicate[ ] that the gravamen of the plaintiff's complaint does not concern the appropriateness of an educational program." *Id.* (emphasis added). We have no difficulty concluding that D.D. could bring a "variant of [his] suit" if he were refused entry to a public library or a municipal theater based on the behavioral symptoms of his disability. *See, e.g.*, *Lawton*, 323 F. Supp. 3d at 362 (noting that "disabled children [with behavioral issues] would have a claim against a public library" where, inter alia, the library "used strict disciplinary rules to remove them on a daily basis"). Likewise, "even an adult plaintiff may be entitled to receive assistance from others [within a school context] if such an accommodation is 'reasonable.'" *McIntyre*, 976 F.3d at 916.

Moreover, the second example in *Fry*, which the Court offered as a counterpoint to the access-ramp example, unmistakably indicates that the "substance"

---

to provide such an aide violated the ADA is not before us in this appeal.

of D.D.'s claim is not the denial of an appropriate education. *Fry*, 137 S. Ct. at 757 n.10. In this latter example, the Court described an ADA suit alleging a failure to provide remedial tutoring in mathematics in which the plaintiff made "no reference at all to a FAPE or an IEP." *Id.* at 757. Yet, the Court asked, "[C]an anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?" *Id.* The Court observed that the difficulty of visualizing the complaint in "those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE." *Id.*

As noted above, D.D.'s complaint contains no allegations asserting that the District provided inadequate programs or services to address deficiencies in his academic progress or performance. Nor does he seek a remedy premised on his failure to reach the goals set forth in his IEP. And, as we have explained, the mere fact that certain conduct that allegedly violated the ADA—the refusal to provide a one-to-one aide—also could be challenged under the IDEA does not mean that D.D.'s access-based claim is a FAPE claim in disguise. To be sure, a personal aide who helps a child control his behavior, allowing the child to remain within a school building or classroom, could also be a necessary component of a FAPE, enabling the child to benefit from any instruction provided to him. But the plaintiff, as "the 'master of the claim,'" *id.* at 755 (quoting *Caterpillar Inc.*, 482 U.S. at 392 & n.7), may, without exhaustion, seek damages in court under the ADA based on conduct that also could be challenged for a different reason under the IDEA. *See id.* at 756 ("The same conduct might violate all three

statutes[.]"); *see also Doucette*, 936 F.3d at 27 ("A child who requires an accommodation under an IEP because, without it, his education would be inadequate, might also require that accommodation to safely access a public space."); *Payne*, 653 F.3d at 880 (noting that, even when certain conduct "might interfere with a student enjoying the fruits of a FAPE, the resulting . . . claim is not, for that reason alone, a claim that must be brought under the IDEA").

Because the factual allegations in D.D.'s complaint address his exclusion from the classroom and the entire school program, and not his learning needs as set forth in his IEP, his claim is a far cry from one involving "remedial tutoring in mathematics." *Fry,* 137 S. Ct. at 757; *see also id.* at 758 ("The complaint . . . does not accuse the school even in general terms of refusing to provide the educational instruction and services that [the plaintiff] needs."). Thus, particularly when taken together, the two examples used by the Supreme Court (the access ramp and math tutoring) to illustrate the possible usefulness of its first clue on the exhaustion question reinforce our conclusion, based on the complaint's allegations, that D.D.'s civil action presents an independent ADA claim and is not—contrary to the District's contention—an artfully pled FAPE-based claim.

However, the possibility remains that the second *Fry* clue—the history of the proceedings—"might suggest something different." *Id.* at 758. Indeed, D.D.'s administrative Request sought remedies for the same harms alleged in his complaint (and more), including a request for damages based on a violation of the ADA. *See supra* Section I. In *Fry*, the Supreme Court

observed that "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." *Id.* at 757.

Nonetheless, as this court previously has emphasized, the IDEA's exhaustion requirement "is not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist independent of the IDEA and entitles a plaintiff to relief different from what is available under the IDEA." *Payne*, 653 F.3d at 876. Here, the use of litigation, and the repetition in D.D.'s complaint of allegations and relief initially requested in the administrative proceedings, cannot be attributed to "strategic calculations about how to maximize the prospects" of obtaining remedies for violations of the IDEA that D.D. failed to exhaust through the administrative process. *Fry*, 137 S. Ct. at 757. That is so for two reasons.

First, as we have repeatedly noted, D.D. is entitled to invoke the same requested accommodation for different purposes under the IDEA and the ADA. As described above, the allegations in the complaint and the *Fry* clues unequivocally demonstrate a non-FAPE basis for the damages D.D. seeks pursuant to the ADA. The fact that he also sought a one-to-one aide as a component of his IEP does not derail that independent claim. Moreover, D.D.'s settlement agreement with the District expressly preserved "any claims that can be made under" the ADA.

Second, the comprehensiveness of the administrative Request, expressly invoking the statutes that provide relief for disability discrimination, belies any

inference that D.D. attempted to change strategies midstream. Rather, it appears that D.D. was simply giving the District notice of all anticipated bases for relief for his complaints of mistreatment—whether available through the IDEA administrative process or not. That is, D.D.'s mother, on her son's behalf, did not initially present solely an IDEA claim in the administrative proceedings and then "switch[ ] mid-stream" to litigation pursuant to the ADA. *Id.* She transparently set forth all of his claims and, after resolving the issues concerning D.D.'s right to a FAPE, turned to the anticipated litigation under the ADA in pursuit of a remedy—one that is not "also available under [the IDEA]," 20 U.S.C. § 1415(*l*)—for the harms unrelated to his educational services.

There is nothing untoward—or inconsistent with *Fry*—in D.D.'s having followed resolution of his IDEA claims with a lawsuit alleging non-FAPE-based violations of another statute. In recognizing that a school's conduct toward a child with a disability "might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA," 137 S. Ct. at 754, *Fry* contemplates such a strategy. *See id.*; *see also, e.g.*, *Payne*, 653 F.3d at 879 ("It is hardly a[ ] nullification of the congressionally mandated exhaustion requirement to say that a complaint that presents sound claims wholly apart from the IDEA need not comport with the IDEA's requirements." (citation omitted) (internal quotation marks omitted)); *Doucette*, 936 F.3d at 26–28 (noting that parents' invocation of multiple laws to obtain relief for their son is "not surprising" given that a student may need the same accommodation under an IEP and for safe access to a public space). To conclude otherwise would effectively

bar plaintiffs from bringing a school-based disability-discrimination lawsuit simply because they also have pursued relief under the IDEA—a view emphatically rejected by this circuit, *see Payne*, 653 F.3d at 876, and inescapably at odds with *Fry*.

Of course, as explained above, *see supra* note 10, a lawsuit that claims an ADA violation based on an IDEA violation cannot be brought without first exhausting the IDEA's administrative procedures. *See Fry*, 137 S. Ct. at 754 (noting that, if "a lawsuit seeks relief for the denial of a free appropriate public education[,] . . . the plaintiff cannot escape § 1415(*l*) merely by bringing her suit under a statute other than the IDEA"). This court properly dismissed such a lawsuit for lack of exhaustion in *Paul G. v. Monterey Peninsula Unified School District,* where the parents of an autistic child sought damages for the district's failure to provide the child a school placement they claimed was necessary for him to receive a FAPE. *See* 933 F.3d at 1098; *see also Payne*, 653 F.3d at 875 (recognizing the need to exhaust FAPE-based claims); *S.B. by and through Kristina B. v. Cal. Dep't of Educ.*, 327 F. Supp. 3d 1218, 1247 (E.D. Cal. 2018) (finding that exhaustion was required where "[p]laintiffs' [Rehabilitation Act] and ADA claims appear predicated on the denial of [a] FAPE"). Here, however, as our assessment of the complaint's allegations and the *Fry* clues makes clear, we have a claim seeking to enforce the ADA's "promise [of] non-discriminatory access to public institutions" rather than the IDEA's "guarantee[of] individually tailored educational services." *Fry*, 137 S. Ct. at 756; *cf. Paul G.*, 933 F.3d at 1101 (observing that the relief sought was "fundamentally

educational": "access to a particular kind of school as required by his IEP").[15]

In sum, because D.D. has alleged a cognizable claim under the ADA, "irrespective of the IDEA's FAPE obligation," *Fry*, 137 S. Ct. at 756, the district court erred in dismissing his complaint. *See, e.g.*, *J.S., III by and through J.S. Jr.*, 877 F.3d at 986 (concluding that a plaintiff's claim of discriminatory exclusion from his regular classroom "could be brought as a FAPE violation for failure to follow [his] IEP, . . . [but] it is also cognizable as a separate claim for intentional discrimination under the ADA and § 504").[16]

---

15 We note that the Supreme Court in *Fry* expressly declined to decide whether exhaustion is required when a plaintiff seeks solely money damages for emotional distress resulting from the denial of a FAPE—a remedy unavailable under the IDEA. *See* 137 S. Ct. at 752 n.4; *id.* at 754 n.8. This court has indicated that such a claim must be exhausted. *See Payne*, 653 F.3d at 875 (observing that "exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a [FAPE], whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action").

16 In criticizing the majority's application of Ninth Circuit precedents, our dissenting colleague overlooks this distinction between a student's pursuit of an appropriate education and claims of discriminatory treatment in the school context. In *Paul G.* and *S.B. by and through Kristina B.*, the students were seeking specific instructional environments through their ADA and § 504 claims and, hence, administrative exhaustion was required. *See Paul G.*, 933 F.3d at 1101 (addressing plaintiff's claim for "access to a particular kind of school"); *S.B. by and through Kristina B.*, 327 F. Supp. 3d at 1252–53 (similarly addressing claims concerning the plaintiff's educational placement). In *McIntyre*, the panel concluded that exhaustion was not required because the student's claims focused on her discriminatory mistreatment and not her educational program. *See* 976 F.3d at 914. As in *McIntyre*,

We therefore VACATE the dismissal of the complaint and REMAND the case to the district court for further proceedings consistent with this opinion.

So ordered. The parties shall bear their own costs on appeal.

"the 'crux' of [D.D.]'s complaint seeks relief for the denial of equal access to a public institution," not relief for the denial of appropriate individualized instruction. *Id.* at 916.

DISSENTING OPINION OF JUDGE RAWLINSON

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent. I agree with the majority that the Supreme Court decision in *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017), informs our analysis. However, I part company with the majority's application of *Fry* to the facts of this case.

As the majority set forth, the Supreme Court has instructed courts to carefully examine the allegations in the complaint to distinguish between "when a plaintiff seeks relief for the denial of a [Free Appropriate Education] (administrative exhaustion required) and when she does not (administrative exhaustion not required)." *Id.* at 755 (internal quotation marks omitted) (parentheticals added). Our focus is on the "remedial basis" of the complaint and the plaintiff "is subject to exhaustion or not based on that choice." *Id.* (citation omitted).

The Supreme Court offered two hypothetical questions to aid in making the requisite distinction between a request for a Free Appropriate Public Education [FAPE] and a request for non-FAPE relief.

The first hypothetical question asks whether the plaintiff could "have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school," such as a public theater or library. *Id.* at 756 (emphasis in the original). The second question inquires whether "an adult at the school," such as an employee of the school or visitor to the school, could "have pressed essentially the same grievance." *Id.* (emphasis in the original). If the

answer to the questions is yes, "a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject." *Id.* On the other hand, if the answer to the questions is no, "the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." *Id.*

The Supreme Court then offered two contrasting examples. The first example described a wheelchair-bound child who brought an action against his school for discrimination due to the lack of access ramps. The Supreme Court initially recognized that the missing "architectural feature" could have educational consequences and might have been couched as a violation under the Individuals with Disabilities Education Act (IDEA). After all, the Supreme Court posited, "if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success." *Id.* But because this child could bring the same complaint against a library or other public building and an employee or visitor could bring "a mostly identical complaint against the school," the Supreme Court concluded that the "essence" of the complaint in those circumstances is "equality of access to public facilities, not adequacy of special education." *Id.* (citation omitted).

By way of comparison, the Supreme Court described a student with a learning disability who sued his school for failing to provide remedial tutoring in math. The Supreme Court observed that the action

"might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation." *Id.* at 757. Even if the complaint made no reference to a FAPE, the Supreme Court asked: "[C]an anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial?" *Id.* According to the Supreme Court, "[t]he difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE." *Id.* (footnote reference omitted).

The Supreme Court also noted that "[a] further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings." *Id.* The Court referenced "in particular" whether "a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute." *Id.* Indeed, "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." *Id.* (footnote reference omitted).

In my view, application of the analysis set forth in *Fry* militates toward a conclusion that D.D. sought FAPE relief. For starters, there is the "strong evidence" that D.D. previously pursued relief under the administrative procedures set forth in the IDEA.

At this juncture, it would be helpful to examine the issues raised and remedies sought in D.D.'s complaint brought under the IDEA's administrative procedures. D.D. raised the following issues:

1. [School] District failed to provide student appropriate placement and services to address his behavioral needs, thereby denying student a FAPE . . . (D.D.'s primary request under this issue was for "a more appropriate placement . . . and/or a one-to-one behavioral aide.")

2. [School] District failed to offer sufficient services and supports in the area of occupational therapy, thereby denying student a FAPE . . .

3. [School] District failed to offer sufficient services and supports in the area of speech and language, thereby denying student a FAPE . . .

4. [School] District failed to offer sufficient services and supports in the area of psychological counseling, thereby denying student a FAPE . . .

5. [School] District failed to offer sufficient services and supports in the area of social skills, thereby denying student a FAPE . . .

6. Parent disagrees with [School] District's . . . Functional Behavior Assessment and requests an independent Functional Behavior Assessment at public expense. . . . (Referencing the IDEA).

7. Parent disagrees with [School] District's . . . Psychoeducational Evaluation and requests an independent Psychoeducational Evaluation at public expense. . . . (Referencing the IDEA).

8. Parent disagrees with [School] District's . . . Speech and Language Assessment and requests an independent Speech and Language Assessment at public expense. . . . (Referencing the IDEA).

9. [School] District failed to re-evaluate student in the area of occupational therapy . . . , thereby denying student a FAPE.

10. [School] District failed to offer student a FAPE at all times relevant in violation of Section 504 of the Rehabilitation Act.

11. [School] District failed to offer student a FAPE at all times relevant in violation of Section 504 of the Rehabilitation Act.

12. [School] District violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (Asserting that student was denied access to his education).

13. [School] District violated the [California] Unruh Civil Rights Act.

D.D. sought the following remedies from the School District:

1. The following services to be provided to D.D. "as an offer of FAPE":

   - A full-time, one-on-one aide
   - Twelve hours of behavior intervention development
   - Revision of D.D.'s behavioral support plan
   - Increased speech and language services
   - A social skills program

- Increased occupational therapy
- A sensory diet in D.D.'s classroom
- Increased psychological counseling services

2. Direct funding or reimbursement for the following independent evaluations:
   - Psychoeducational evaluation
   - Speech and Language assessment
   - Occupational Therapy assessment
   - Functional Behavior assessment
3. School District to provide student with the following compensatory education services:
   - 400 hours of compensatory specialized academic instruction services
   - 80 hours of compensatory occupational therapy services
   - 80 hours of compensatory speech and language therapy services
   - 72 hours of compensatory individual psychological counseling services
   - 80 hours of a social skills program

D.D. also sought damages under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act (ADA), and the Unruh Civil Rights Act. However, no allegations other than the IDEA-based claims were asserted in conjunction with these requested remedies. As noted in *Fry*, this "prior pursuit of the IDEA's administrative remedies" constitutes "strong evidence that the substance of [D.D.'s] claim concerns the denial of a FAPE," particularly as it was coupled

with a request for relief under the ADA and under § 504 of the Rehabilitation Act. 137 S. Ct. at 757.

Despite a concerted effort to reframe D.D.'s complaint to state a claim for disability discrimination rather than a claim for a FAPE, the allegations of the First Amended Complaint are remarkably similar to those in the complaint brought pursuant to the IDEA.

In both complaints, the recurring theme was that the School District's failure to provide D.D. a one-to-one aide resulted in D.D.'s inability to access the programs and activities at his school. A chart comparing the two demonstrates this point.

IDEA Complaint	**First Amended Complaint**
"During the 2015–201[6] and 2016–17 school years, District failed to provide [D.D.] a one-to-one behavior aide . . . ."	"D.D. requested reasonable accommodations from District, including a one-to-one behavior aide, so that he could have equal access to his public education . . . ."
"Throughout that time, parents were called constantly to either take [D.D.] home or to come sit with him at school and serve as a one-to-one aide. One of [D.D.'s] parents quit his job, simply to sit with [D.D.] at school . . . because he needed someone with him to	"In the 2016–2017 school year, . . . Parent asked [D.D.'s teacher] about a one-to-one aide for [D.D.], but [the teacher] did not make a referral for an aide or functional behavior assessment. "[I]n October, 2016 [the parents] made the decision that [the father]

manage his behaviors and enable him to remain at school and participate in the classroom."	would quit his job to serve as D.D.'s one-to-one aide."
"In the 2015–2016 school year, . . . [at] no point during the year, did District offer a one-to-one behavior-trained aide to work with [D.D.] to enable him [to] remain in class and work effectively."	"D.D.'s mother requested a one-to-one aide . . . to accommodate D.D.'s needs and enable him to participate with his peers, but school staff told her it was impossible. . . . School staff presented Parent an ultimatum: either pick him up from school or have a family member serve as his one-to-one aide to enable D.D. to participate in the classroom. . . ."

Although the amended complaint now asserts disability discrimination, as reflected above the gravamen of the complaint remains the failure of the school district to assign a one-to-one behavior aide and other supportive services to manage D.D.'s behavior.

As the Supreme Court advised in *Fry*, we look beyond the labels in the pleadings and examine the substance of the complaint. In this case, the substance of D.D.'s federal complaint is the same as the substance of his IDEA complaint—failure of the School District to ensure the necessary support to provide D.D. a FAPE, thereby triggering the administrative exhaustion

requirement. *See id.* Indeed, even the mentions a one-to-one aide at least six times.

Comparison of D.D.'s complaints to the hypothetical questions in *Fry* reinforces the conclusion that the "essence [of the complaint]—even though not its wording—is the provision of a FAPE. *Id.* (footnote reference omitted).

The first hypothetical question asks whether D.D. could have brought "essentially the same claim if the alleged conduct had occurred at a public facility that was not a school," such as a public theater or library. *Id.* at 756 (emphasis in the original). The answer to this question is no. D.D. could not have brought a claim against a public theater or library on the basis of the denial of a one-to-one behavioral aide or the provision of behavioral analysis services. For that matter, it is doubtful that D.D. could even bring an action against a private entity for the repurposed claim of barring him from the premises due to his violent outbursts. Those claims are viable against the School District solely because of the School District's obligation to provide a FAPE. *See id.*

The second hypothetical question asks whether "an adult at the school," such as an employee or visitor could "have pressed essentially the same grievance." *Id.* (emphasis in the original). Again, in this case the answer to the question is no. It is inconceivable that an adult at the school could have pressed a claim for a one-to-one behavioral aide or behavioral assessments and evaluations to fully participate in school activities. As explained by the Supreme Court, because the answer to the *Fry* hypothetical questions is no, even though the amended complaint "does not

expressly allege the denial of a FAPE," *id.*, the complaint concerns a FAPE because "the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." *Id.*

The same outcome results from application of the examples discussed in *Fry*. The first example, a wheelchair-bound student who brought a discrimination action against his school due to the lack of wheelchair ramps is clearly a claim that could be brought by the child in a public setting outside of school; the claim is more likely under the Rehabilitation Act than the IDEA. *See Fry*, 137 S. Ct. at 756.; *see also Alvarez-Vega on behalf of E.A.L. v. Cushman & Wakefield/Prop. Concepts Com.*, 290 F. Supp. 3d 131, 132–34 (D.P.R. 2017) (describing action brought under the ADA on behalf of a child seeking equal access to theater facilities). By the same token, an adult employee of the school or visitor to the school could bring "a mostly identical complaint against the school" for lack of wheelchair access, Fry, 137 S. Ct. at 756; the "essence" of the complaint is "equality of access to public facilities, not adequacy of special education. *Id.* (citation omitted); *see also Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 984–86 (9th Cir. 2014) (discussing an ADA action seeking wheelchair access to bleachers in a football stadium).

The comparator example in *Fry* involved a student with a learning disability who sued his school for failing to provide remedial tutoring in math. Although the action "might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation," *id.* at 757, the more accurate description of the action is for failure to

provide a FAPE. The Supreme Court explained that even if there is no explicit reference to FAPE in the complaint, "can anyone imagine the student making the same claim against a public theater or library? Or similarly, imagine an adult visitor or employee suing the school to obtain a math tutorial? *Id.* As recognized by the Supreme Court, "[t]he difficulty of transplanting the complaint to those other contexts [student in a non-school setting or adult in school setting] suggests that its essence—even though not its wording—is the provision of a FAPE." *Id.* (footnote reference omitted).

The facts of this case fit much more cleanly into the second example. The requests made by D.D. are more akin to a request for a tutor than a request for wheelchair access. Applying the *Fry* analysis, the conclusion is inescapable that despite the concerted effort to avoid use of FAPE verbiage, the essence of D.D.'s complaint seeks FAPE relief, thereby requiring administrative exhaustion. *See id.*

I am not persuaded by the cases relied upon by the majority to reach a different outcome. Rather, a majority of the cases cited by the majority concluded that exhaustion was required.

The majority cites *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). However, in *Payne*, the en banc court did not actually make a determination regarding whether exhaustion was required under the facts of the case. Rather, the case was remanded for the district court to "examine each of Payne's requests for relief and determine whether the exhaustion requirement applies to each." *Id.* at 882. The holding in

Payne is inapposite here because, as discussed above, we know the relief requested by D.D. in the administrative proceedings and in the amended complaint. That requested relief was available under the IDEA, thereby requiring exhaustion. *See id.* In addition, *Payne* does not support the majority's statement that "[t]here is nothing untoward—or inconsistent with *Fry*—in D.D.'s having followed resolution of his IDEA claims with a lawsuit alleging non-FAPE-based violations of another statute." *Majority Opinion*, p. 31. Importantly, D.D.'s claim differs from *Payne* in that D.D. first brought his claims in a due process hearing asserting violations of the IDEA. *Cf. Payne*, 653 F.3d at 865 (noting that "Payne did not initially seek relief in a due process hearing"). In *Fry*, the Supreme Court advised that a plaintiff who "has previously invoked the IDEA's formal procedures to handle the dispute" is more likely "seeking relief for the denial of a FAPE." 137 S. Ct. at 757. The Supreme Court elaborated that "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." (footnote reference omitted). In sum, *Payne* does not really support the majority's reasoning.

Doucette v. Georgetown Public Schools, 936 F.3d 16 (1st Cir. 2019), a non-binding case from the First Circuit, is also cited by the majority. Nevertheless, *Doucette* offers little support for the majority's analysis. Most importantly, the case involved the denial of a service animal—the quintessential example of a non-IDEA accommodation. *See, e.g. Antoninetti v. Chipotle Mexican Grill*, 643 F.3d 1165, 1168 (9th Cir. 2010), *as amended* (involving the assertion of claims against a

restaurant under the ADA for failure to adequately accommodate a "wheelchair-bound customer"); *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1037–38 (9th Cir. 2008) (resolving a case brought against a convenience store for inadequate wheelchair access); *Long v. Coast Resorts, Inc.*, 267 F.3d 918, 920 (9th Cir. 2001) (same for hotel casino); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1024 (9th Cir. 2008) (interpreting the ADA as requiring a racetrack to provide wheelchair areas with line-of-sight over standing spectators); *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1127–28 (9th Cir. 2003) (reversing entry of summary judgment in favor of a theater on a claim that placing all "wheelchair-bound patrons" in the first few rows violated the ADA).

The next out-of-circuit case relied upon by the majority is a case from the Eleventh Circuit, *J.S., III, a minor, by and through J.S. Jr. and M.S.*, 877 F.3d 979 (11th Cir. 2017). However, *J.S.* is of little assistance because it completely failed to grapple with the analysis suggested in *Fry*. The sum total of the application of *Fry* to the facts was the following sentence: "The cause of action here does not fit neatly into *Fry*'s hypotheticals." *Id.* at 986. Enough said.

The third out-of-circuit case cited by the majority is a district court case from the Eastern District of New York, *Lawton v. Success Academy Charter Schools, Inc.*, 323 F. Supp. 3d 353 (E.D.N.Y. 2018), which relied on the Eleventh Circuit's decision in *J.S.* As explained, reliance on *J.S.* is unwarranted.

The two cases from within the Ninth Circuit cited by the majority do not support the majority's conclusion. In *Paul G. by and through Steve G. v. Monterey Peninsula Unified School Dist.*, 933 F.3d 1096 (9th

Cir. 2019), we considered a case in a similar procedural posture to the case before us. Paul G. filed an action under the ADA and under Section 504 of the Rehabilitation Act of 1973 (Section 504). *See id.* at 1098. We affirmed the district court's dismissal of the complaint for failure to exhaust administrative remedies under the IDEA. *See id.* We explained that "Plaintiffs failed to exhaust because they settled their IDEA case without receiving an administrative decision on whether Paul needed the placement." *Id.* We referenced the Supreme Court's instruction in *Fry* that we "determine whether the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—a free appropriate public education [FAPE]. *Id.* at 1100 (quoting *Fry*, 137 S. Ct. at 748) (alteration and internal quotation marks omitted).

We identified the "crucial issue" as "whether the relief sought would be available under the IDEA." *Id.* We referenced the "clues" provided in *Fry* including "whether the plaintiff could have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school, and whether an adult at the school could have expressed essentially the same grievance." *Id.* (quoting *Fry*, 137 S. Ct. at 756) (alteration and internal quotation marks omitted).

Just as D.D. could not have brought his claims for a one-on-one aide to prevent his disruptive behavior against a public facility that was not a school, we came to the same conclusion regarding Paul's demand for a particular school placement. *See id.* at 1101. Similarly, we concluded that an adult employee or visitor could not "present the same grievance." *Id.* We concluded that, at bottom, "the relief Paul seeks is fundamentally educational." *Id.* The same is true for

D.D. As we recognized in *Paul*, and as articulated in *Fry*, "one good indication that the plaintiff is seeking relief for denial of a FAPE is whether the plaintiff previously invoked administrative remedies." *Id.* at 1100 (citing *Fry*, 137 S. Ct. at 757). We confirmed that "an initial decision to pursue the administrative process and a later shift to judicial proceedings prior to full exhaustion is a strong indication that the plaintiff is making strategic calculations about how to maximize the prospects of such a remedy." *Id.* at 1101 (quoting *Fry*, 137 S. Ct. at 757) (internal quotation marks omitted). As with this case, "Paul['s] previous[ ] pursu[it of] an IDEA administrative proceeding based on identical or similar allegations supports the [district court's] conclusion that his claims are premised on the denial of a FAPE." *Id.*

As is the case here, we observed in *Paul G.* that "Paul pursued remedies under [the] IDEA and after settlement switched gears to turn to other remedies." *Id.* We identified this circumstance as "almost precisely the scenario the Supreme Court in *Fry* described as an indicator of an IDEA claim requiring exhaustion." *Id.*

The reasoning and conclusion in *Paul G.* are completely contrary to the reasoning and conclusion in the majority opinion`. The same is true for *S.B. by and through Kristina B. v. Cal. Dep't of Educ.*, 327 F. Supp. 3d 1218 (E.D. Calif. 2018). The district court relied on *Fry* to conclude that S.B.'s claims brought pursuant to the ADA and pursuant to Section 504 required exhaustion. *See id.* at 1252. S.B. asserted that the State acted in a discriminatory manner "by failing to ensure that appropriate residential treatment centers were available in the State of California." *Id.* The district court noted that S.B. was "unable to frame a theory

of the[ ] [Section 504] and ADA claims that could be brought against any public place of accommodation, not just a school, and by any person with a similar disability, not only a student, as explained in *Fry*." *Id.* at 1253. The district court also observed that the fact that S.B. "pursued administrative proceedings based on identical or similar allegations supports a conclusion that the claims are premised on a denial of FAPE." *Id.* (citing *Fry*, 137 S. Ct. at 755).

Finally, our most recent decision addressing this issue is consistent with the analysis in *Paul G.* and *S.B.* In *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 907 (9th Cir. 2020), we delineated circumstances under which administrative exhaustion was not required.

The student in *McIntyre* was diagnosed with attention deficit disorder (ADD) as a preteen. During her seventh-grade year, the school district developed a "504" plan (504 Plan) for the student, but she never sought or was provided an IEP under the IDEA. *See id.* at *907 and n.4.

The student's 504 Plan provided accommodations for her diagnosed ADD, "including extra time on tests and assignments, reduced assignments and projects, preferred seating, and a quiet and separate testing environment." *Id.* (footnote reference omitted). Unfortunately, one of her teachers refused to implement her 504 Plan. As a result, the student's parents filed a "Bullying/ Harassment" complaint against the teacher. *Id.*

The student studied abroad her sophomore year. At the beginning of her junior year, the student was

diagnosed with Addison's disease, a serious auto-immune disorder. *See id.* at 908 and n.5. As a result, the school district amended the student's 504 Plan "to include an emergency protocol that required school officials to call 911 if she were seriously injured" at school. *Id.* at 908. Despite the student suffering a fractured ankle during a physical education class, school officials failed to call 911 as required in the student's 504 Plan. *See id.*

In the spring of the student's junior year, the school district reassigned one of the teachers who had refused to implement the student's 504 Plan. The student's classmates organized a walk-out to protest the reassignment and the accommodations for students with disabilities. They blamed the "504 kids" for the transfer. *Id.* The social studies teacher gave permission for students to walk out of her class in protest. The student felt betrayed by the teacher and school administrators who sat idly by. She also felt isolated from her classmates. *See id.*

Throughout the balance of the student's junior year and the entirety of her senior year, her classmates "maintained their resentment, harassing and bullying [the student] for her perceived role in [the teacher's] transfer." *Id.* Her classmates designed a sweatshirt celebrating the teacher and wore the sweatshirts to their graduation. School administration never addressed this hostile environment. *See id.*

In addition to the harassment the student faced from her peers and teachers, the school district made it difficult for the student to apply for college. The school district failed to submit necessary documentation for the student to receive testing accommodations with the college testing board. The school district also

failed to properly record the student's credits for independent study and physical education classes. Finally, the school district refused to assist the student in obtaining required evaluations and approvals for college admission exams. *See id.* at 908–09.

Once the student turned eighteen, she filed a complaint against the school district, the two teachers who refused to comply with her 504 Plan, and other school district officials. The student asserted one claim under Title II of the ADA for failure to provide reasonable accommodations, and one claim under Section 504 for failure to provide reasonable accommodations and for creating a hostile learning environment. *See id.* at 909.

The district court determined that, although the student filed her complaint under the ADA and under Section 504, the gravamen of her claims "involved the provision of a [FAPE] and therefore exhaustion was required." *Id.* We reversed, concluding that "the crux of [the student's] complaint seeks relief for the disability-based discrimination and harassment she faced at school, and not for the denial of a FAPE under the IDEA. As a result, [the student] need not exhaust the administrative remedies under the IDEA." *Id.* at 914 (internal quotation marks omitted).

We gave several reasons for reaching the conclusion that exhaustion was not required. The first was that the accommodations requested (quiet location for exams, more time for exams, and compliance with emergency health protocol) "cannot be construed as special education because they do not provide specially designed instruction." *Id.* (internal quotation marks omitted) (emphasis in the original). We noted that "a child with . . . ADD may need preferential seating

and the use of a word processor, but not special education." *Id.*

We next explained that the student's complaint alleged that the school district "discriminated against her by creating a hostile learning environment." *Id.* at 915. This claim was predicated on the lack of support from school officials and harassment from her peers rather than denial of a FAPE under the IDEA. *See id.* Because the student's claim was predicated only on Section 504 and because the student "never sought or received special education and related services, a hostile learning environment could not be said to have interfered with any such services. Thus, . . . [the student did] not seek . . . only relief that an IDEA officer can give." *Id.* (citation and internal quotation marks omitted).

We applied the "clues" from *Fry* to "also support the conclusion that [the student's] lawsuit [did] not seek relief for the denial of a FAPE under the IDEA." *Id.* We observed that testing accommodations "may be required for a variety of entities that offer professional licensing and credentialing exams." *Id.* (citations omitted). Accordingly, under "*Fry*'s first hypothetical, a plaintiff could have brought essentially the same claim for testing accommodations at a public facility that was not a school." *Id.* at 915–16 (internal quotation marks omitted). Addressing the second hypothetical, we observed that "if the District used any sort of eligibility exam for its employees, an adult at the school could assert the same right to testing accommodations." *Id.* at 916 (internal quotation marks omitted). Thus, unlike with D.D., the answers to the *Fry* hypotheticals in *McIntyre* weighed in favor of the

plaintiff and against an exhaustion requirement. Because D.D. was unquestionably receiving special education and had an IEP, our decision in *McIntyre* does not support the majority's analysis. Instead, as noted, the cases cited by the majority from within our circuit concluded that cases similar to D.D.'s sought relief from the denial of a FAPE and required administrative exhaustion. *See Paul G.*, 933 F.3d at 1098–1100; *see also S.B.*, 327 F. Supp. 3d at 1252–53.

At bottom, and as we emphasized in *Payne*, the outcome of this case is determined by the allegations in the complaint. *See* 653 F.3d at 875 ("[W]hen determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA.") If the relief sought is not available under the IDEA, exhaustion is likely not required. On the other hand, if the relief sought is available under the IDEA, exhaustion is likely required. *See id.* We specified that "exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a [FAPE] . . . to provide the basis for the cause of action (for instance, a claim for damages under § 504 of the Rehabilitation Act . . . , premised on a denial of a FAPE." *Id.* We clarified that claims arise under the IDEA if the "IDEA violation is alleged directly" or "if a § 504 claim is premised on a violation of the IDEA." *Id.* A review of the claims for relief in D.D.'s amended complaint fit the description of a § 504 claim "premised on a violation of the IDEA." As discussed, D.D.'s complaint was replete with asserted violations of the IDEA, primarily through failure to provide a "one-to-

one behavior aide." Under our analysis in *Payne*, and more recently in *McIntyre* exhaustion was required.

I would affirm the judgment of the district court.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (JUNE 14, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

D.D.,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Case No. CV 19-399 PA (PLAx)

Proceedings: In Chambers – Court Order

Before: The Honorable Percy ANDERSON, United States District Judge.

Before the Court is a Motion to Dismiss (Docket No. 37 "Motion") filed by defendant Los Angeles Unified School District ("Defendant" or "District") challenging the sufficiency of the First Amended Complaint ("FAC") filed by plaintiff D.D. ("Plaintiff"), by and through his guardian ad litem, Michaela Ingram. Plaintiff filed an Opposition. (Docket No. 39.) Defendant filed a Reply. (Docket No. 42.) Pursuant to Rule 78 of the Federal

Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for June 17, 2019, is vacated, and the matter taken off calendar.

I. Factual and Procedural Background

According to the FAC, Plaintiff is eight years old and has been diagnosed with attention deficit hyperactivity disorder ("ADHD"), which interferes with his ability to learn and qualifies him for special education services. "His disability-related behaviors ranged from being off-task and impulsive to being physically aggressive toward peers and adults." (FAC ¶ 9.) Plaintiff has attended three different schools, and at various times "requested reasonable accommodations from District, including a one-to-one behavior aide, so that he could have equal access to his public education, and the programs and services offered by LAUSD to the same extent as his peers without disabilities. District refused those requests, and instead excluded D.D. from school and all of the programs and services made available to others without disabilities." (FAC ¶ 3.) The District failed to address Plaintiff's behavioral needs and instead discriminated against him "by removing him from his classroom[,] sending him home early on multiple occasions, and requiring a parent to attend school with D.D. to serve as his one-to-one aide instead of providing one." (FAC ¶ 4.) District staff, teachers, and students have also taunted and injured Plaintiff.

On March 7, 2018, Plaintiff's legal guardian filed a request for a due process hearing before the Office of Administrative Hearings ("OAH") and later settled

with the District. Plaintiff then brought this action, originally bringing two claims against the District for violations of the Americans with Disabilities Act ("ADA") and section 504 of the Rehabilitation Act. Defendant filed a Motion to Dismiss Plaintiff's original Complaint, which this Court denied as moot after Plaintiff filed an FAC. In the FAC, Plaintiff brings one claim under the ADA seeking damages. Defendant then filed this Motion under the Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) based on Plaintiff's failure to exhaust his administrative remedies.

II. Legal Standards

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the Federal Rules of Civil Procedure ("Rules") allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," Fed. R. Civ. P. 12(b)(6), they also require all pleadings to be "construed so as to do justice," Fed. R. Civ. P. 8(e). The purpose of Rule 8(a)(2) is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

However, in *Twombly*, the Supreme Court rejected the notion that "a wholly conclusory statement of [a] claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Twombly*, 550 U.S. at 561 (second alteration in original) (quoting *Conley*). Instead, the

Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." *Id.* at 556. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555 (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action")); *see also Daniel v. Cty. of Santa Barbara*, 288 F.3d 375, 380 (9th Cir. 2002) ("All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." (quoting *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000))). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal quotation marks omitted). In construing the *Twombly* standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

III. Request for Judicial Notice

Defendant filed a Request for Judicial Notice (Docket No. 38) of Plaintiff's Request for a Due Process Hearing and the Notice of Dismissal of the administrative action, which Plaintiff has not opposed. The Court grants Defendant's request. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (court may take judicial notice of court filings and other matters of public record); *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 256 F. Supp. 3d 1064, 1071 (N.D. Cal. 2017) (taking judicial notice of a due process complaint and notice of dismissal "because they are records of an administrative agency") (citing *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

IV. Discussion

Defendant argues that Plaintiff's FAC effectively alleges a denial of a free and appropriate education ("FAPE") and as such, Plaintiff was required to—but failed to—exhaust his administrative remedies under the Individuals with Disabilities Education Act ("IDEA"). Plaintiff argues that this action is about equal access guaranteed by the ADA because Plaintiff alleges he was excluded from the classroom, so exhaustion under the IDEA is not required.

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. § 1400(d)(1)(A). Section 1415(l) of the IDEA requires a plaintiff to exhaust the IDEA's administrative procedures before filing an action under the ADA or Rehabilitation Act when "her suit 'seek[s] relief that is also available' under the IDEA." *Fry v. Napoleon Cmty. Sch.*, 137 S.

Ct. 743, 752, 197 L. Ed. 2d 46 (2017). The Supreme Court held in *Fry* that seeking relief available under the IDEA means the suit seeks relief for the denial of a FAPE. *Id.* In deciding whether a complaint seeks relief for denial of a FAPE, and thus whether exhaustion is required, courts look at the gravamen of a plaintiff's complaint, "setting aside any attempts at artful pleading." *Id.* at 755. The Court provided hypothetical questions for courts to answer in considering this issue:

> 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—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Id. at 756.

Here, the FAC effectively alleges denial of a FAPE, despite the fact that the term was never explicitly used in the FAC. *See id.* at 755 ("The use (or non-use) of particular labels and terms is not what matters.

The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words . . . 'FAPE' or 'IEP.'"). Plaintiff alleges in the FAC that the District denied him reasonable accommodations, including a one-to-one behavior aide, and failed to address his behavioral needs. While Plaintiff attempts to recharacterize these allegations in his Opposition as claims of exclusion, "in essence [Plaintiff is] contesting the adequacy of a special education program." *Id.* Plaintiff's requests for the District to support his behavioral needs could not be brought against a public library, nor could an adult plaintiff bring the same claims against the District. "The Supreme Court also noted that the 'history of the proceedings' might shed light on whether a plaintiff's claims concern denial of a FAPE, particularly in cases where 'a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute.'" *L.D. v. Los Angeles Unified Sch. Dist.*, No. CV168588-MWFMRWX, 2017 WL 1520417, at *2 (C.D. Cal. Apr. 26, 2017) (citing *Fry*, 137 S. Ct. at 757). Here, Plaintiff did previously seek a due process hearing based on the same alleged conduct in this action, which further supports the conclusion that Plaintiff's FAC effectively seeks a remedy under the IDEA.

Plaintiff argues that because he only seeks damages, which are not available in administrative proceedings before the OAH, he is not required to exhaust his administrative remedies. The Supreme Court in *Fry* did not consider whether exhaustion is required when a plaintiff specifically requests a remedy, such as money damages, that the IDEA hearing officer does not have the power to award. 137 S. Ct. at 752 n.4. However, district courts within this Circuit have held

a plaintiff must still exhaust administrative proceedings when a plaintiff's request for damages stem from the alleged deprivation of a FAPE. *See S.B. by & through Kristina B. v. California Dep't of Educ.*, 327 F. Supp. 3d 1218, 1247 (E.D. Cal. 2018); *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, No. 16-CV-05582-BLF, 2018 WL 2763302, *7-*8 (N.D. Cal. June 8, 2018). The Court agrees with the analysis in *S.B.* and *Paul G.* and concludes Plaintiff was required to exhaust his administrative remedies before bringing suit for damages under the ADA.

After Plaintiff filed his due process complaint before the OAH, he settled with the District. Section 1415(l) requires a plaintiff to participate in a due process hearing and, if applicable, an appeal before filing suit. *See* 20 U.S.C. § 1415(l) ("[T]he 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."); *Soto v. Clark Cty. Sch. Dist.*, 744 F. App'x 529, 530 (9th Cir. 2018) ("Subsection (f) sets forth procedures for an impartial due process hearing, and subsection (g) provides a mechanism for appeal of a due process hearing decision. Those procedures were not exhausted within the meaning of § 1415(l) because, pursuant to the settlement agreement, Appellant explicitly withdrew her request for an impartial due process hearing, with prejudice."); *Paul G.*, 256 F. Supp. 3d at 1077–78 ("The Court further recognizes that Paul made the difficult decision to settle with the District rather than proceed with a full OAH hearing, a decision that was also made by the plaintiff in *Rivera*. Nevertheless, this does not obviate the exhaustion requirement and similar to the reasoning set forth in *Rivera*, Paul "must

bear the consequences that flow from [the decision to settle]." (quoting *Rivera v. Fremont Union High Sch. Dist.*, No. 5:12-CV-05714-EJD, 2013 WL 4674831, at *3 (N.D. Cal. Aug. 30, 2013)). Thus, Plaintiff has not exhausted his administrative remedies, and the Court must dismiss this action.

Conclusion

For the foregoing reasons, the Court grants Defendant's Motion to Dismiss and dismisses Plaintiff's FAC without prejudice. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

JUDGMENT OF DISMISSAL
(JUNE 14, 2019)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

D.D.,

Plaintiff,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT,

Defendant.

Case No. CV 19-399 PA (PLAx)

Before: The Honorable Percy ANDERSON,
United States District Judge.

In accordance with the Court's June 14, 2019 minute order dismissing the First Amended Complaint filed by minor plaintiff D.D. ("Minor Plaintiff") by and through his guardian ad litem, Michaela Ingram,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this action is dismissed without prejudice.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Minor Plaintiff take nothing and defendant Los Angeles Unified School District shall have its costs of suit.

/s/ Percy Anderson
United States District Judge

DATED: June 14, 2019