No. _____

In the Supreme Court of the United States

MIGUEL LUNA PEREZ,
Petitioner,
v.
STURGIS PUBLIC SCHOOLS; STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELLEN MARJORIE SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, RI 02806

MARC CHARMATZ
LEAH WIEDERHORN
NATIONAL ASSOCIATION OF THE DEAF
LAW AND ADVOCACY CENTER
8630 Fenton Street
Suite 820
Silver Spring, MD 20910

ROMAN MARTINEZ
Counsel of Record
CAROLINE A. FLYNN
JAMES A. TOMBERLIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

MITCHELL SICKON
DISABILITY RIGHTS MICHIGAN
4095 Legacy Parkway
Lansing, MI 48911

Counsel for Petitioner

QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) preserves the rights of children with disabilities to bring claims under the Constitution and other federal anti-discrimination statutes, so long as they exhaust the IDEA's administrative procedures if their non-IDEA suit "seek[s] relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). In the decision below, the Sixth Circuit affirmed the dismissal of petitioner's claim under the Americans with Disabilities Act for failure to exhaust—even though that claim had been dismissed from petitioner's IDEA administrative proceedings, and even though petitioner had settled his IDEA claim with the school district to the satisfaction of all parties. The Sixth Circuit broke with eleven other circuits by holding that Section 1415(*l*)'s exhaustion requirement is not subject to a futility exception. The Sixth Circuit also held that Section 1415(*l*)'s exhaustion requirement applies even when the plaintiff is seeking money damages, a remedy that is *not* available under the IDEA.

The questions presented are:

1. Whether, and in what circumstances, courts should excuse further exhaustion of the IDEA's administrative proceedings under Section 1415(*l*) when such proceedings would be futile.

2. Whether Section 1415(*l*) requires exhaustion of a non-IDEA claim seeking money damages that are not available under the IDEA.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Perez v. Sturgis Public Schools, No. 20-1076, United States Court of Appeals for the Sixth Circuit, judgment entered June 25, 2021 (3 F.4th 236), rehearing denied July 29, 2021.

Perez v. Sturgis Public Schools, No. 1:18-cv-1134, United States District Court for the Western District of Michigan, judgment entered December 19, 2019 (2019 WL 6907138).

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PETITION FOR A WRIT OF CERTIORARI

Miguel Luna Perez ("Miguel") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-35a) is published at 3 F.4th 236. The court's denial of rehearing en banc (App. 56a-57a) is not published. The opinion of the United States District Court of the Western District of Michigan granting Sturgis Public Schools' motion to dismiss (App. 43a-53a) is not published but available at 2019 WL 6907138. The court's related order granting Sturgis Public Schools Board of Education's motion to dismiss (App. 54a-55a) is not published.

JURISDICTION

The court of appeals entered judgment on June 25, 2021 (App. 1a-35a) and denied Miguel's timely petition for rehearing en banc on July 29, 2021 (App. 56a-57a). On October 14, 2021, Justice Kavanaugh extended the time to file a petition for a writ of certiorari through December 13, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the petition appendix. App. 58a-72a.

INTRODUCTION

This case raises two frequently recurring questions of exceptional importance to children with disabilities who seek to vindicate their legal rights under the Constitution or federal anti-discrimination statutes apart from the Individuals with Disabilities Education Act (IDEA). The Sixth Circuit violated this Court's precedent and created a square circuit split on the first question presented, which is whether and when the IDEA exhaustion requirement applicable to such claims is subject to a futility exception. And this Court has already granted certiorari—but did not resolve—the second question presented, which is whether that exhaustion requirement applies to non-IDEA claims seeking remedies (namely, money damages) that are not available under the IDEA. Both questions warrant this Court's review.

The Americans with Disabilities Act (ADA) and the IDEA each protect children with disabilities. Accordingly, unlawful discrimination by public schools can give rise to claims under both statutes. Here, respondents Sturgis Public Schools and Sturgis Public Schools Board of Education (collectively, "Sturgis") violated petitioner Miguel Luna Perez's rights under both laws. Sturgis failed to provide Miguel with a qualified sign language interpreter for *twelve years*—rendering him unable to learn or communicate with others and making him an academic and social outcast.

Miguel pursued remedies under both statutes. As the IDEA requires, Miguel first sought relief in state IDEA administrative proceedings. After the hearing officer dismissed the ADA claim for lack of jurisdiction, the parties settled his IDEA claim in full.

Having received all the relief the IDEA proceeding could give him, Miguel then brought suit under the ADA to obtain a remedy the IDEA could not provide: money damages for his past harm.

The district court dismissed Miguel's ADA lawsuit, and the Sixth Circuit affirmed. The Sixth Circuit found Miguel's claim barred by 20 U.S.C. § 1415(*l*), which requires a plaintiff to exhaust non-IDEA claims "to the same extent as would be required" for IDEA claims, if the plaintiff "seek[s] relief [in the non-IDEA claim] that is also available under" the IDEA. The Sixth Circuit held that Miguel's ADA claim was subject to this exhaustion rule, and that he had not sufficiently exhausted that claim in the IDEA proceedings because he accepted a settlement before the administrative hearing.

That decision rested on two core errors—each of which fundamentally misinterprets Section 1415(*l*) and deprives disabled children of their rights under the ADA and other federal antidiscrimination laws.

First, the Sixth Circuit rejected Miguel's argument that Section 1415(*l*) does not require exhaustion of non-IDEA claims when exhaustion would be futile. This Court has held that the IDEA's exhaustion requirement has a futility exception. And eleven other circuits have recognized that this exception carries over to non-IDEA claims required to be exhausted under Section 1415(*l*). The Sixth Circuit is alone in holding otherwise.

The Sixth Circuit compounded its error by holding (in the alternative) that further exhaustion of the administrative proceedings would not have been futile. The court reached that conclusion even though the state hearing officer had already dismissed

Miguel's ADA claim for lack of jurisdiction, and even though Sturgis had already offered to provide Miguel with the full IDEA relief he could have obtained in the proceedings, in the form of a settlement.

This alternative ruling itself conflicts with precedent from the First, Third, Ninth, and Tenth Circuits—all of which have excused Section 1415(*l*) exhaustion on futility grounds when the plaintiffs settled their IDEA claims and the administrative proceedings thus had nothing left to offer them. The Sixth Circuit's rule also defies common sense. It essentially requires children with disabilities to turn down even full IDEA settlements—and forgo their ability to immediately receive an IDEA-mandated "free appropriate public education"—to preserve their distinct non-IDEA claims. There is no way that is what Congress intended.

Second, the Sixth Circuit erred in holding that the IDEA's exhaustion requirement applies to non-IDEA claims seeking compensatory damages—a remedy the IDEA cannot provide. As the United States has previously argued, that holding flatly contradicts the IDEA's text and purpose. By its terms, Section 1415(*l*) requires exhaustion only when the plaintiff's non-IDEA suit "seek[s] relief that *is also available* under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added). That condition is not satisfied when the plaintiff seeks money damages that are *not* available under the IDEA.

This Court granted certiorari to address this important question in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). But it ultimately left the question "for another day." *Id.* at 752 n.4. This case presents an ideal vehicle to put the issue to rest

and hold that non-IDEA claims seeking money damages need not be exhausted in IDEA proceedings.

This Court's review is urgently needed on both questions presented. If allowed to stand, the Sixth Circuit's decision will inflict great harm on students with disabilities and their families, by requiring them either to forfeit their non-IDEA rights (if they accept an IDEA settlement), or to give up the settlement and undergo lengthy and costly IDEA administrative proceedings even when the school district otherwise stands ready to remediate the IDEA violation. This Court should address the circuit split on the first question, resolve the question left open in *Fry*, and vindicate statutory protections for children with disabilities. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

This case involves the interaction between two remedial schemes—the IDEA[1] and ADA, respectively—designed to protect children with disabilities.

1. The IDEA's core purpose is to "ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). The IDEA also sets forth procedures for resolving disputes between families and school officials when the family believes the child has been denied a FAPE. *See id.* § 1415; *Fry*, 137 S. Ct. at 749.

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[1] As originally enacted, the IDEA was called the Education of the Handicapped Act. For ease of reference, this petition refers to the law as the IDEA throughout.

First, the parent must file a "due process complaint" with the local or state educational agency. 20 U.S.C. § 1415(b)(6)-(7). The parties then have a "[p]reliminary meeting." *Id.* § 1415(f)(1)(B)(i). That meeting provides the educational agency with "the opportunity to resolve the complaint" at the outset by entering into a "[w]ritten settlement agreement." 20 U.S.C. § 1415(f)(1)(B)(i), (iii). Alternatively, the parties may pursue mediation. *Id.* § 1415(e)(1). The IDEA encourages the parties to resolve the dispute quickly: If a parent rejects a settlement offer that the agency presents ten days before a hearing, and then does not ultimately obtain relief more favorable than that offer, the parent cannot receive post-offer attorneys' fees. *Id.* § 1415(i)(3)(D)(i).

If such discussions fail, the parties proceed to the "due process hearing" before an administrative hearing officer. *Id.* § 1415(f)(1)(A). The hearing officer issues a decision "based on a determination of whether the child received a [FAPE]." *Id.* § 1415(f)(3)(E). Only then may the losing party file a civil action under the IDEA in state or federal district court to obtain review of that determination. *Id.* § 1415(i)(2)(A).[2]

Given these extensive statutory procedures, it is well understood that the IDEA imposes an exhaustion requirement: Parents may only bring IDEA claims in court if they have completed the administrative process first. At the same time, this Court has long recognized that exhaustion of the IDEA's administrative procedures is excused "if pursuing

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[2] If state law channels the parents to a local educational agency first, then the hearing officer's decision is first appealable to the state agency. 20 U.S.C. § 1415(g).

those remedies would be futile or inadequate." *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984); *see also Honig v. Doe*, 484 U.S. 305, 327-28 (1988) (explaining that "parents may bypass the administrative process where exhaustion would be futile or inadequate").

Courts hearing IDEA disputes may "grant such relief as the court determines is appropriate." 20 U.S.C. 1415(i)(2)(C)(iii). Such relief may include an injunction requiring the school district to provide special education and related services that will ensure a FAPE. Relief may also include financial compensation to cover expenses necessary to put the child in the position he would have been in absent the FAPE deprivation. *See School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009). However, courts lack authority to award compensatory "damages"—such as damages for past emotional distress or lost income. *See Fry*, 137 S. Ct. at 754 n.8.

2. Congress has enacted other statutes, including the ADA and the Rehabilitation Act, that more generally protect individuals with disabilities. As relevant here, the ADA provides that qualified individuals with disabilities shall not "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. It also authorizes individuals to bring suits for money damages to redress violations. *See Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

Over the years, Congress and this Court have addressed the relationship between the IDEA's remedial scheme and the ADA, other federal discrimination statutes, and the Constitution. In

1984, this Court held in *Smith* that the IDEA provided the "exclusive avenue" for students with disabilities to bring claims regarding their education—thus barring claims under other sources of federal law. 468 U.S. at 1009.

In 1986, Congress enacted 20 U.S.C. § 1415(*l*) to reject *Smith*'s holding and restore students' rights to bring both IDEA claims and non-IDEA discrimination claims. That provision now states in relevant part:

> 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 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities . . . .

20 U.S.C. § 1415(*l*); *see* Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797.

In the same provision, however, Congress also imposed an exhaustion requirement for certain non-IDEA claims, stating:

> [B]efore the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) [of Section 1415] 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*). The committee reports accompanying Section 1415(*l*) make clear that this new exhaustion requirement for *non*-IDEA claims is subject to futility and inadequacy exceptions, just like the exhaustion requirement applicable to IDEA claims. *See* H.R. Rep. No. 99-296, at 7 (1985); S. Rep. No. 99-112 at 15 (1985).

This Court considered Section 1415(*l*) in *Fry*. There, the petitioners did not exhaust the IDEA's administrative procedures because they were seeking monetary damages under the ADA and the Rehabilitation Act; they argued that exhaustion was not required because they were not "seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*); *see* Cert. Pet. i, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2007) (No. 15-497). The United States filed cert-stage and merits briefs supporting the petitioners, arguing that under Section 1415(*l*)'s plain language, IDEA exhaustion is not required for ADA and Rehabilitation Act actions seeking remedies the IDEA cannot provide. *See Fry* U.S. Br. 16.

Fry ultimately did not decide that question, however. Instead, the Court held that "exhaustion is not necessary when the gravamen of the plaintiff's [non-IDEA] suit is something other than the denial of . . . a 'free appropriate public education,'" and the Court remanded for further proceedings on that issue. *Fry*, 137 S. Ct. at 748, 758-59 (quoting 20 U.S.C. § 1412(a)(1)(A)).

B. Factual And Procedural Background

1. Miguel Luna Perez is a deaf individual who resides in the Sturgis Public School District ("Sturgis"). App. 1a. He attended schools in that district from age 9 through age 20. *Id.* at 1a, 6a.

Sturgis recognized that Miguel required sign language for communication. *Id.* at 1a. But Sturgis assigned Miguel an unqualified classroom aide who was not trained to work with deaf students and did not know sign language, and it misled Miguel and his parents about the aide's qualifications. *Id.* at 1a-2a, 18a. And in later years of Miguel's education, the aide would abandon him for hours a day—so he had no way to communicate with anyone. *Id.* at 18a.

During the same period, Sturgis also awarded Miguel grades that did not in any way reflect his mastery of the curriculum. *Id.* at 5a-6a. Based on Sturgis's misrepresentations, Miguel and his parents believed he would earn a high school diploma after twelfth grade, but months before graduation, they were informed that Miguel qualified only for a "certificate of completion." *Id.* at 2a, 6a.

2. On December 27, 2017, Miguel filed a due process complaint with the Michigan Department of Education alleging Sturgis's violations of the IDEA, ADA, Rehabilitation Act, and two Michigan laws (one an analogue of the IDEA, the other an analogue of the ADA). *Id.* at 2a; ECF 10 at 11.[3] On May 18, 2018, the hearing officer held a prehearing conference in which she dismissed the ADA, Rehabilitation Act, and Michigan ADA-analogue claims as "outside the jurisdiction of this Tribunal." App. 2a; *id.* at 36a-38a.

In advance of the hearing, Sturgis served Miguel with a "ten-day settlement offer," as the IDEA contemplates. ECF 12-2 at 12; *see also* 20 U.S.C. § 1415(i)(3)(D). On June 14, 2018, the parties met at the required preliminary meeting. ECF 12-2 at 12;

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[3] "ECF [#]" refers to documents in docket No. 1:18-cv-01134 (W.D. Mich.).

see also 20 U.S.C. § 1415(f)(1)(B)(i). The next day, they agreed to settle the IDEA claim. App. 2a; ECF 12-2 at 12.

Under the settlement, Miguel obtained the full relief he sought for his IDEA claim. Sturgis agreed to Miguel's placement at the Michigan School for the Deaf, it agreed to pay for post-secondary compensatory education and sign language instruction for Miguel and his family, and it paid the family's attorneys' fees. App. 2a. The settlement agreement did not release Miguel's ADA and Rehabilitation Act claims. *See id.* at 2a. After the parties informed the hearing officer of their settlement, she dismissed the case with prejudice. *Id.*

3. On October 2, 2018, Miguel filed a complaint against Sturgis in federal district court. *Id.*; ECF 1. He alleged violations of the ADA and its Michigan-law analogue. App. 2a; ECF 10 at 3. And he sought a declaration that those laws were violated as well as compensatory damages. *Id.*

Sturgis moved to dismiss, asserting that Miguel failed to exhaust administrative procedures as required by Section 1415(*l*). App. 3a. Sturgis contended that, to bring his ADA claim, Miguel was required to reject the IDEA settlement and instead go through with the scheduled due process hearing. *See id.* In response, Miguel argued that (1) exhaustion would have been futile because he had obtained all relief available in the IDEA proceedings via the parties' settlement, (2) his ADA claim had been dismissed from the administrative proceedings, and (3) his ADA claim sought damages unavailable under the IDEA. *See id.* at 42a-45a.

The district court agreed with Sturgis, dismissed Miguel's ADA claim, and declined to exercise supplemental jurisdiction over the Michigan-law claim. *Id.* at 45a-52a, 54a-55a.

4. A panel of the Sixth Circuit affirmed, with Judge Stranch dissenting. App. 1a-35a.

a. The majority first concluded that Section 1415(*l*)'s exhaustion requirement applied to Miguel's ADA claim. *Id.* at 5a-8a. The majority recognized that this claim seeks compensatory damages—"a specific remedy that is unavailable under the IDEA." *Id.* at 7a. But the majority found that Miguel nonetheless "'seek[s] relief that is also available under [the IDEA],'" insofar as "the crux of Perez's [ADA] complaint is that he was denied an adequate education." *Id.* at 5a-7a (quoting 20 U.S.C. § 1415(*l*)). Because the IDEA provides relief for that injury, the majority reasoned, Section 1415(*l*) applies—"even though Perez wants a remedy he cannot get" under that statute. *Id.* at 7a-8a. And the majority concluded that Miguel did not exhaust because the hearing officer "never determined whether Perez received an appropriate education under the IDEA," due to the parties' settlement. *Id.* at 9a.

The Sixth Circuit next rejected Miguel's argument that Section 1415(*l*) is subject to an exception when proceeding with the IDEA administrative process would be futile. *Id.* at 10a-14a. The majority observed that Section 1415(*l*)'s text "does not come with a futility exception." *Id.* at 10a. Invoking this Court's 2016 decision in *Ross v. Blake*, 578 U.S. 632 (2016), regarding the Prison Litigation Reform Act (PLRA), the Sixth Circuit reasoned that "[a]ny futility exception" recognized in prior decisions "cannot survive *Ross*, which prohibits judge-made exceptions

to statutory exhaustion requirements." App. 10a-12a & n.*.

In the alternative, the Sixth Circuit held that even if a futility exception existed, Miguel would not be entitled to it. *Id.* at 11a-14a. The majority reasoned that "when an available administrative process could have provided relief" for Miguel's IDEA claim, further exhaustion is "not futile" just because he "decide[d] not to take advantage of" that process and settled instead. *Id.* at 13a. In other words, the majority believed Miguel should have rejected the favorable IDEA settlement and litigated his IDEA claim through hearing and decision, to preserve his right to later bring a separate ADA damages claim.

b. Judge Stranch dissented. *Id.* at 15a-35a. As relevant here, Judge Stranch emphasized that "Supreme Court precedent compels the conclusion" that Section 1415(*l*) contains a futility exception, citing *Honig*. *Id.* at 24a; *see also id.* at 28a-29a. She noted that "every single one of our sister circuits" has recognized such an exception based on that controlling precedent. *Id.* at 29a-30a. And she argued that the majority had misread *Ross*. *Id.* at 30a-35a.

Judge Stranch also concluded that Miguel's circumstances established futility. *Id.* at 24a, 26a-28a. She criticized the majority for breaking with "[a] number of our sister circuits . . . in cases involving similar facts." *Id.* at 26a-27a (collecting cases). Those circuits "recognize [that] requiring litigants like [Miguel] to 'exhaust'—in other words, to reject an acceptable IDEA settlement offer—forces students to choose between immediately obtaining the FAPE to which they are entitled, or forgoing that education so they can enforce their ADA right of equal access to

institutions." *Id.* at 27a. That is "exactly the opposite of what Congress intended." *Id.*

5. Miguel filed a petition for rehearing en banc, which the Sixth Circuit denied, with Judge Stranch noting that she would grant the petition. *Id.* at 56a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO ADDRESS SECTION 1415(*l*)'S FUTILITY EXCEPTION

A. The Sixth Circuit's Decision Creates Two Circuit Splits

Below, the Sixth Circuit issued two holdings on futility: (1) that Section 1415(*l*) contains no futility exception at all, and (2) that even if a futility exception existed, Miguel's circumstances would not qualify. Both holdings create square circuit splits warranting this Court's attention.

1. The Sixth Circuit's Holding That Section 1415(*l*) Has No Futility Exception Splits With Eleven Other Circuits

In holding that Section 1415(*l*) does not contain any kind of a futility exception, the Sixth Circuit created a sharp circuit split. Every other federal court of appeals—except for the Federal Circuit, which does not hear IDEA cases—has recognized Section 1415(*l*)'s exhaustion requirement is excused when exhaustion would be futile. *See Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 22, 31 & n.21 (1st Cir. 2019); *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 157 & n.3 (2d Cir. 2016); *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 799 (3d Cir. 2007) (en banc); *MM ex rel. DM v. School Dist. of*

Greenville Cnty., 303 F.3d 523, 536 (4th Cir. 2002); *Heston v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 983 (5th Cir. 2020) (per curiam); *C.T. ex rel. Trevorrow v. Necedah Area Sch. Dist.*, 39 F. App'x 420, 422 (7th Cir. 2002); *J.M. v. Francis Howell Sch. Dist.*, 850 F.3d 944, 950 (8th Cir. 2017); *Porter v. Board of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069-70 (9th Cir. 2002), *cert. denied*, 537 U.S. 1194 (2003); *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 786 (10th Cir. 2013); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *Cox v. Jenkins*, 878 F.2d 414, 418-19 (D.C. Cir. 1989).

Those circuits have relied on this Court's recognition of a futility exception to the IDEA's exhaustion requirement in *Honig v. Doe*, which noted that "parents may bypass the administrative process where exhaustion would be futile or inadequate." 484 U.S. 305, 327 (1988) (citing *Smith v. Robinson*, 468 U.S. 992, 1014 n.17 (1984)); *see, e.g.*, *M.T.V. v. DeKalb Cnty. Sch. Dist.*, 446 F.3d 1153, 1159 (11th Cir. 2006); *Heston*, 816 F. App'x at 983; *C.T.*, 39 F. App'x at 422.

They have also pointed to unusually clear-cut legislative history explicitly recognizing a futility exception to the IDEA in general and to Section 1415(*l*) in particular. *See, e.g.*, *Doucette*, 936 F.3d at 31 (noting that "[t]he legislative history of the IDEA shows a special concern with futility"); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303-04 & n.4 (9th Cir. 1992); *W.B.*, 67 F.3d at 496; *see also infra* at 22.

Below, the Sixth Circuit reasoned that Section 1415(*l*)'s lack of a futility exception follows from this Court's interpretation of the PLRA in *Ross*. App. 10a, 12 n.*. But eight other circuits have recognized or

reaffirmed a futility exception in cases after *Ross*. *See Doucette*, 936 F.3d at 31 (1st Cir.); *B.C.*, 837 F.3d at 157 n.3 (2d Cir.); *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 129-30 & n.6 (3d Cir. 2017); *Z.G. ex rel. C.G. v. Pamlico Cnty. Pub. Schs. Bd. of Educ.*, 744 F. App'x 769, 777 (4th Cir. 2018); *Heston*, 816 F. App'x at 983 (5th Cir.); *J.M.*, 850 F.3d at 950 (8th Cir.); *Student A ex rel. Parent A v. San Francisco Unified Sch. Dist.*, 9 F.4th 1079, 1083 (9th Cir. 2021); *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1191 (11th Cir. 2018). And in *Doucette*, the First Circuit dismissed the argument that PLRA precedent governs the interpretation of Section 1415(*l*), noting that *Fry* "rejected" a comparison between the two statutes by "highlighting the differences in language between the two [exhaustion] standards and explaining that the IDEA's exhaustion standard is more forgiving." 936 F.3d at 23 n.10.

In addition to virtually every court of appeals, the United States has recognized (in a brief post-dating *Ross*) that Section 1415(*l*) contains "the standard administrative law exceptions" to exhaustion for futility and inadequacy. *See Fry* U.S. Br. 12, 21-23 (relying on *Honig*). Even the respondent school district in *Fry* readily conceded the existence of a futility exception. *Fry* Oral Argument Tr. at 45:21-24, 50:18-19, 55:6-8.

This lopsided circuit split will not disappear on its own. The Sixth Circuit adopted its outlier position—and denied rehearing en banc—fully aware of case law from every other circuit going the other way and in the face of a forceful dissent. *See* App. 29a-30a, 35a. And it did so based on a conviction that this Court's decision in *Ross* controlled the outcome. *Id.*

at 10a, 12a n.*. Only this Court's intervention can eliminate the divide.

2. The Sixth Circuit's Alternative Holding That An IDEA Settlement Does Not Establish Futility Conflicts With Four Circuits

The Sixth Circuit's alternative holding—that Miguel's circumstances do not establish futility even if such an exception existed—also creates a circuit split. The majority held that when a student "settle[s] his [IDEA] claim before allowing the process to run its course," he cannot demonstrate the futility of further administrative proceedings in bringing a later non-IDEA claim. App. 13a. The court reasoned that because it would not have been "futile" for Miguel to reject settlement and continue to pursue *the IDEA claim*, it followed that Miguel could not show futility for his ADA claim, either. *See id.* (explaining that "an available administrative process could have provided relief for his denial of a FAPE," but Miguel simply "decide[d] not to take advantage of it").

In contrast, the First, Third, Ninth, and Tenth Circuits have all found that a student's non-IDEA damages action could go forward where the student has obtained IDEA relief via settlement, because further exhausting the IDEA administrative process would be futile. The outcomes in those cases—as well as the courts' reasoning—clearly diverges from the decision below.

In *Doucette*, the First Circuit held that Section 1415(*l*) did not bar a student's damages action under Section 1983 when the family settled its IDEA claim with the school before the point of a hearing. 936 F.3d at 30-31. The court explained that "the Doucettes

engaged in the administrative process until they received the relief that they sought (and the only relief available to them through the IDEA's administrative process)." *Id.* "Having achieved success through their interactions with local school officials," the First Circuit concluded, "there was no need for the Doucettes to seek a hearing." *Id.* Accordingly, the First Circuit ruled that "enforcing the exhaustion requirement is unnecessary here because the circumstances establish the futility of such additional proceedings." *Id.* at 31; *see also id.* at 31-33.

Likewise, in *Muskrat*, the Tenth Circuit considered a case in which parents had not "formally request[ed] a due process hearing." 715 F.3d at 786. The Tenth Circuit held that Section 1415(*l*) nonetheless did not bar the parents' claim for damages under Section 1983, because they had "worked through administrative channels to obtain the [IDEA] relief they sought." *Id.* Thus, "given . . . the relief they obtained, it would have been futile" to "force them to request a formal due process hearing . . . simply to preserve their damages claim." *Id.* In a subsequent decision authored by then-Judge Gorsuch, the Tenth Circuit reaffirmed "that IDEA's administrative exhaustion requirement is subject to a traditional futility exception." *A.F. ex rel. Christine B. v. Española Pub. Schs.*, 801 F.3d 1245, 1249 (10th Cir. 2015) (citing *Muskrat*, 715 F.3d at 786, and *Honig*, 484 U.S. at 327).

The Third Circuit also found futility on similar facts in *W.B.* There, the parent had "entered into a settlement stipulating [to the relief the student] had sought" and providing for attorneys' fees. 67 F.3d at 490. The parent then sued for damages under Section

1983. In finding that exhaustion post-settlement would have been "futile," the court noted that "the relief sought by plaintiffs in this action was unavailable in IDEA administrative proceedings" and that it was doubtful "the administrative tribunal would even be competent to hear plaintiff's IDEA claim since any rights that can be had have already been settled." *Id.* at 496.

Finally, the Ninth Circuit in *Witte v. Clark County School District* held that Section 1415(*l*) did not bar a damages action where the plaintiff had "used administrative procedures to secure the remedies that are available under the IDEA." 197 F.3d 1271, 1276 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc), *cert. denied*, 565 U.S. 1196 (2012). The court held that "exhaustion of administrative remedies is not required" where a student "seeks only monetary damages" and "all educational issues already have been resolved to the parties' mutual satisfaction." *Id.* at 1275.[4]

Had Miguel filed his ADA action in one of those four circuits, he almost certainly would have been entitled to a futility exception. *Cf. D.D. v. Los Angeles Unified Sch. Dist.*, --- F.4th ----, 2021 WL 5407763, at

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[4] Although the *Witte* court did not couch its reasoning in terms of futility per se, its analysis tracked the futility exception already recognized in that circuit. *See Witte*, 197 F.3d at 1275; *Hoeft*, 967 F.2d at 1303. And the Ninth Circuit has since cited *Witte* for the proposition that exhaustion may be "futile where all the educational issues are resolved, leaving only issues for which there is no adequate administrative remedy." *Porter*, 307 F.3d at 1074; *see also D.D. v. Los Angeles Unified Sch. Dist.*, --- F.4th ----, 2021 WL 5407763, at *10 n.7 (9th Cir. Nov. 19, 2021) (en banc) (explaining that *Witte* relied on "a species of futility").

*11 (9th Cir. Nov. 19, 2021) (en banc) (pointing to *Doucette*, *Muskrat*, and *W.B.* as cases deeming "further exhaustion futile" based on IDEA settlements); *id.* at *21 (Berzon, J., dissenting) (similar). The result should not be different simply because his case was filed in the Sixth Circuit.

B. Both Of The Sixth Circuit's Holdings Are Wrong

1. Section 1415(*l*) Has A Futility Exception

The Court should also grant review because the Sixth Circuit got it wrong. The Court has already held—correctly—that IDEA exhaustion is not required where it "would be futile or inadequate." *Honig*, 484 U.S. at 327.

a. It is well established that "'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 572 U.S. 844, 857 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). And this Court has time and again recognized that the "[d]octrine[] of . . . 'exhaustion' contain[s] exceptions," including "when exhaustion would prove 'futile.'" *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 13 (2000) (citing *McCarthy v. Madigan*, 503 U.S. 140, 147-48 (1992); *McKart v. United States*, 395 U.S. 185, 197-201 (1969)); *Montana Nat'l Bank of Billings v. Yellowstone Cnty.*, 276 U.S. 499, 505 (1928).

Smith noted the widespread view that the IDEA's exhaustion requirement contained a futility exception. 468 U.S. at 1014 n.17. And two years later, Congress enacted Section 1415(*l*) to require "exhaust[ion]" of non-IDEA claims "*to the same extent* as would be required had the action been brought

under" the IDEA. 20 U.S.C. § 1415(*l*) (emphasis added). Congress thereby incorporated the same well-established futility exception for exhaustion of IDEA claims, to its new exhaustion requirement applicable to non-IDEA claims. *See Fry* U.S. Br. 21-22. This Court reaffirmed the IDEA's futility exception two years after that, in *Honig*: It recognized that "parents may bypass the administrative process where exhaustion would be futile or inadequate." 484 U.S. at 327.

Since *Honig*, Congress has amended the IDEA numerous times without eliminating this recognized futility exception.[5] This Court has held in the IDEA context that "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) (citation omitted). The courts of appeals' unanimous position that Section 1415(*l*) contains this exception—disrupted only recently by the decision below—further indicates that Congress was aware of and ratified that interpretation. *Cf. Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 536 (2015)

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[5] *See, e.g.*, Individuals With Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647; Education Flexibility Partnership Act of 1999, Pub. L. No. 106-25, 113 Stat. 41; Individuals With Disabilities Education Act Amendments for 1997, Pub. L. No. 105-17, 111 Stat. 37; Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat 3518; Individuals with Disabilities Education Act Amendments of 1991, Pub. L. No. 102-119, 105 Stat. 587; Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103; Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, 102 Stat. 3289.

("Congress' decision . . . to amend [a law] while still adhering to the operative language in [the provision at issue] is convincing support for the conclusion that Congress accepted and ratified the unanimous holdings of the Courts of Appeals" interpreting that provision).

b. The legislative history of the IDEA confirms Congress's intent to excuse exhaustion in certain circumstances. In 1975, the principal sponsor of the original IDEA explained that "exhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter." 121 Cong. Rec. 37,413 (1975) (remarks of Sen. Williams), *cited in Honig*, 484 U.S. at 327.

Congress likewise recognized the futility and inadequacy exceptions when enacting Section 1415(*l*) a decade later. The House committee report noted "it is not appropriate to require the use of" the IDEA's procedures where "it would be futile to use the due process procedures," or where "it is improbable that adequate relief can be obtained" because "the hearing officer lacks the authority to grant the relief sought." H.R. Rep. No. 99-296, at 7 (1985). The Senate committee report likewise explained that "[e]xhaustion of [IDEA] administrative remedies would . . . be excused where they would not be required to be exhausted under the [IDEA], such as when resort to those proceedings would be futile." S. Rep. No. 99-112, at 15 (1985).

Indeed, Justice Breyer picked up on this background at the *Fry* oral argument, when he noted that Congress enacted Section 1415(*l*) against the "well-known" background principle—recognized "for a hundred years or more"—that there is an

"exception . . . where exhaustion would be futile." *Fry* Oral Argument Tr. at 21:18-23:5.

c. The Sixth Circuit dismissed *Honig*'s recognition of a futility exception as "dictum." App. 11a. It also stated that "[a]ny futility exception to section 1415(*l*) . . . cannot survive *Ross*." *Id.* at 12a n.*; *see also id.* at 10a. Both points are misplaced.

Honig's treatment of the futility exception was not dicta. *Honig* held that schools are generally required to adhere to the IDEA's "stay-put provision," which prohibits schools from unilaterally changing a student's placement while administrative proceedings are ongoing. 484 U.S. at 323. In reaching that holding, the Court relied on the existence of the futility and inadequacy exceptions—which it noted are available to schools as well as parents—to conclude that schools would not necessarily have to fully exhaust the IDEA's procedures before turning to a court for relief in dealing with a dangerous student. *See id.* at 326-28. As Judge Stranch explained below, "[t]hat reasoning was essential to the judgment because it explained why the Court's interpretation of the [IDEA stay-put provision] would not lead to absurd results." App. 29a.

The Sixth Circuit also misread *Ross*'s PLRA-specific analysis. *Ross* rejected a "special circumstances" doctrine that would have excused exhaustion when the prisoner "'reasonably' . . . 'believed that he had sufficiently exhausted his remedies.'" 578 U.S. at 637 (citation omitted). The Court reasoned that—among other problems with this broad exception—adopting it would unequivocally contravene congressional intent. *Id.* at 640-42. The "precursor" to the PLRA had "made exhaustion 'in large part discretionary,'" and

Congress enacted the PLRA to do away with that approach. *Id.* at 640-41 (citations omitted). If the Court were to recognize the special circumstances doctrine, it would "resurrect" the exact kind of discretionary exhaustion scheme Congress had sought to discard. *Id.* at 641.

Crucially, *Ross* took care to clarify that it was not stating a general rule about exhaustion provisions other than the PLRA. "[A]n exhaustion provision with a different text and history . . . might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions." *Id.* at 642 n.2; *see also id.* at 649-50 (Breyer, J., concurring in part) (explaining that statutory exhaustion requirements remain subject to "administrative law's 'well-established exceptions'" (citation omitted)).

Unlike the PLRA, the IDEA's history firmly supports a futility exception to Section 1415(*l*). After all, Congress enacted that provision to *reaffirm* that other regimes like the ADA remain fully available to students with disabilities, *see Fry*, 137 S. Ct. at 750, and the provision's legislative history indicates that Congress fully intended to incorporate a futility exception, *see supra* at 22-23. Moreover, *Fry* characterized the PLRA as "a stricter exhaustion statute." 137 S. Ct. at 755. Section 1415(*l*)'s "different text and history" is "best read to . . . incorporate standard administrative-law exceptions." *Ross*, 578 U.S. at 642 n.2.

Honig cannot be so lightly disregarded by a lower court. *See Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them . . . . (citation omitted)). The Sixth Circuit was wrong to

unilaterally deem that case a dead letter based on its broad reading of a different decision concerning a different statute.

2. Further Exhaustion Would Have Been Futile In The Circumstances Presented Here

In this case, Miguel followed the IDEA process by bringing his ADA claim in the state administrative proceedings (where it was dismissed) and settling his IDEA claim pursuant to Section 1415's resolution procedures. Contrary to the Sixth Circuit's analysis, any further exhaustion of the administrative proceedings would have been futile.

a. Further exhaustion of the IDEA process after the parties' settlement would have been futile for two reasons: (1) the hearing officer had already ruled that she lacked jurisdiction to adjudicate Miguel's ADA claim in that hearing; and (2) the settlement gave Miguel and his family full relief for Sturgis's IDEA violations. In these circumstances, there was nothing else the hearing could provide.

The Sixth Circuit nonetheless reasoned that Miguel was obligated to refuse Sturgis's offer of immediate relief and continue litigating his IDEA claim to a decision, to preserve his ADA claim. But Miguel stood to gain absolutely nothing by rejecting the IDEA relief he sought and forging ahead to a hearing incapable of giving him more than what Sturgis was already offering. *See Futile*, *Webster's Third New International Dictionary* 925 (1986) ("serving no useful purpose"); *New Oxford American Dictionary* 707 (3d ed. 2010) ("incapable of producing any useful result; pointless").

"Surely" Miguel and his family did not "ha[ve] to pursue a further administrative hearing to get what they had already obtained." *Doucette*, 936 F.3d at 30 n.20. Indeed, turning down the proffered settlement and continuing the administrative proceedings would at a minimum have delayed Miguel's receipt of a FAPE, and could even have resulted in severe financial and educational loss if the hearing officer had somehow ruled for the district.

The United States has previously recognized that the situation here—where the plaintiff has "already reached a resolution with the school providing [him] with whatever IDEA relief [he] may be entitled to receive"—is a textbook example of when Section 1415(*l*)'s exhaustion requirement does not apply. *Fry* U.S. Br. 33. Such a plaintiff "should not be forced to exhaust a potentially burdensome, adversarial administrative process as a prerequisite to filing an inevitable civil action in court." *Id.*

b. The Sixth Circuit majority reasoned that by "giv[ing] up his IDEA claim," Miguel "also g[ave] up his right to" seek ADA relief. App. 4a. But Miguel did not "give up" his IDEA claim: He obtained all the relief that claim could provide, by following the prehearing settlement provisions set forth in the IDEA itself. *See supra* at 10-11. And as Sturgis was well aware, Miguel did not release his ADA claim in the settlement agreement.[6]

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[6] The Sixth Circuit was therefore wrong to compare this case to *Sango v. LeClaire*, where a prisoner "abandon[ed] the [administrative] process before completion" and then argued futility "because his grievance is now time-barred." App. 13a (second alteration in original) (quoting No. 16-2221, 2017 WL

The Sixth Circuit also speculated that the hearing officer might have created a record that might have "aided" Miguel's later ADA action. App. 13a-14a. But the purpose of the hearing—especially once the officer deliberately narrowed its scope by dismissing the non-IDEA claims—was to adjudicate the parties' dispute under the IDEA's standards. The record would not have addressed whether the ADA was violated. ADA claims differ significantly from IDEA claims, in that the ADA has an intent requirement and allows defenses inapplicable in the IDEA context. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 186-87 (2002) (ADA plaintiffs generally must show "intentional conduct" by defendant). Moreover, whereas Congress required district courts hearing IDEA cases to give "due weight" to factual findings in the IDEA administrative record, *see Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982); 20 U.S.C. § 1415(i)(2)(C), Congress made no similar provision for non-IDEA cases.

There is no dispute that Miguel fulfilled the IDEA's administrative process insofar as (1) he pursued an ADA claim in that process (until that claim was dismissed), and (2) he engaged in the IDEA's settlement procedures and accepted Sturgis's ten-day offer after the parties' prehearing conference.

3912618, at *2 (6th Cir. May 23, 2017)). Here, Miguel did everything the IDEA wanted him to do—filed a due process complaint and reached a mutually acceptable agreement with his district, which enabled him to receive a FAPE—before he brought a separate ADA suit.

That was enough: Any further exhaustion would have been futile and unnecessary.[7]

C. The Sixth Circuit's Rule Upends Congress's Intent And Will Hurt Children With Disabilities

As Miguel's case illustrates, the Sixth Circuit's rule will adversely impact the ability of students with disabilities to timely and effectively vindicate their federal rights.

Judge Stranch correctly observed that the Sixth Circuit's rule will force students with meritorious claims under both the IDEA and the ADA "to choose between immediately obtaining the FAPE to which they are entitled, or forgoing that education so they can enforce their ADA right of equal access to institutions." App. 27a. This is "the opposite" of what Congress wanted in enacting Section 1415(*l*). *Id.*

As *Fry* emphasized, Section 1415(*l*) "'reaffirm[s] the viability' of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less

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[7] Several judges have correctly recognized this sort of exhaustion is sufficient to satisfy Section 1415(*l*) even apart from any futility exception. *See D.D.*, 2021 WL 5407763, at *21 (Berzon, J., dissenting, joined by Thomas, CJ., and Paez, J.) (arguing that "[t]he exhaustion provision should be read to encompass a settlement reached through the IDEA's prescribed procedures"); *A.F.*, 801 F.3d at 1255-57 (Briscoe, CJ., dissenting) (Section 1415(*l*) "merely requir[es] a claimant to make full use of the procedures outlined in §§ 1415(f) and (g) to attempt to resolve her IDEA claim," so exhaustion is satisfied when a plaintiff resolves a claim through those "mediation or preliminary meeting" procedures); *cf. Witte*, 197 F.3d at 1275-76 (reasoning, in finding that no exhaustion was necessary, that the plaintiff "in fact has used administrative procedures to secure the remedies that are available under the IDEA").

integral than the IDEA, 'for ensuring the rights of handicapped children.'" 137 S. Ct. at 750 (alteration in original) (quoting H.R. Rep. No. 99-296 at 4). The Sixth Circuit's rule forces the child and his family to choose between these different statutory schemes—at least if they want educational relief in a timely manner.

Section 1415(*l*) was obviously not intended to pressure children with disabilities to give up their non-IDEA claims in order to obtain IDEA relief. Nor was the provision intended to discourage those children from reaching favorable settlements with their schools. On the contrary, the IDEA affirmatively *encourages* parties to settle their claims before the case gets to a full-blown hearing. *See supra* at 6 (discussing IDEA settlement procedures); 20 U.S.C. § 1400(c)(8) (congressional finding that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways").

The Sixth Circuit's rule would severely undermine the IDEA's pro-settlement structure. Most relevant here, the Sixth Circuit's rule undercuts the ten-day offer provision. When a district timely makes a settlement offer and the family rejects it, any post-offer fees and costs incurred by the parent are generally not recoverable if "the relief finally obtained . . . is not more favorable . . . than the offer." 20 U.S.C. § 1415(i)(3)(D)(i). Thus, in cases like Miguel's where a school district readily offers the IDEA relief a student seeks, Congress clearly wanted students to accept the deal and bring the proceedings to an end.

Conversely, rejecting such an offer—as the Sixth Circuit's decision would require Miguel to do—likely

means incurring substantial fees and costs in addition to forgoing the immediate possibility of a FAPE. Congress did not create a framework under which students may preserve their non-IDEA rights only at this steep price.

The Sixth Circuit's regime is especially unfortunate given that "administrative and judicial review under the [IDEA] is often 'ponderous.'" *Honig*, 484 U.S. at 322 (citation omitted); *see* Perry A. Zirkel, *Post*-Fry *Exhaustion Under the IDEA*, 381 Ed. L. Rep. 1, 4 n.21 (2020, Westlaw) (explaining that most IDEA proceedings last far longer than the statutory timeline). That is crucial lost time where the student could otherwise benefit from a FAPE negotiated through a cooperative settlement.

The Sixth Circuit's exhaustion rule requires additional drawn-out adversarial proceedings, with *no* meaningful benefit to children with disabilities or their schools—and indeed, a very real potential for harm. This Court should resolve the circuit split and overturn the Sixth Circuit's misguided interpretation of Section 1415(*l*).

II. THE COURT SHOULD ALSO RESOLVE THE QUESTION IT GRANTED CERTIORARI TO ADDRESS IN *FRY*

The Court should also grant certiorari to decide the question it planned to address in *Fry*: whether "exhaustion [is] required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award." 137 S. Ct. at 752 n.4. *Fry* shows this second question presented is independently certworthy. It is also logically antecedent to the first question

presented, and should be granted alongside that question to ensure that the Court is able to resolve all significant outstanding issues regarding the application of Section 1415(*l*). If Miguel prevails on either question, the decision below must be reversed.

1. As the United States explained in *Fry*, Section 1415(*l*)'s plain text does not require exhaustion when the child seeks only remedies the IDEA cannot provide. *Fry* U.S. Br. 16. Section 1415(*l*)'s exhaustion requirement applies to non-IDEA "civil action[s] . . . seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). Thus, exhaustion is not required when the civil action seeks relief is not "available" under the IDEA's remedial scheme. Because compensatory damages cannot be obtained under the IDEA, *see supra* at 7, a plaintiff who seeks such damages under a non-IDEA statute is not required to exhaust that claim.

That conclusion follows from the plain meaning of "available." *See Fry*, 137 S. Ct. at 753 ("available" means relief that is "accessible or may be obtained" (citation omitted)); *Ross*, 578 U.S. at 642 ("available" means "capable of use for the accomplishment of a purpose," and that which "is accessible or may be obtained" (citing dictionary)). It also tracks the "ordinary meaning" of the word "relief," which is a synonym for "remedy." *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 648 (5th Cir. 2019) (citing dictionary), *cert. denied*, 140 S. Ct. 2803 (2020). Indeed, Section 1415 elsewhere unequivocally uses "relief" in the sense of "remedy." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). In addition, Section 1415(*l*) directs courts to look at the relief that the plaintiff is actually "*seeking*" in their non-IDEA action—rather than requiring exhaustion whenever a plaintiff *could*

have sought IDEA remedies. *See Fry*, 137 S. Ct. at 755. Here, Miguel was seeking money damages and a declaration that Sturgis violated the ADA for years.

2. Notwithstanding Section 1415(*l*)'s clear text, the Sixth Circuit and other appellate courts have held that exhaustion is required any time a non-IDEA claim involves the denial of an appropriate education, regardless of the relief sought. *See* App. 7a ("A lawsuit that seeks relief for the denial of an appropriate education is subject to section 1415(*l*), even if it requests a remedy the IDEA does not allow."); *McMillen*, 939 F.3d at 647-48 (adopting this position and citing other circuits).

This approach disregards statutory language in favor of a pure policy argument: that Congress must have intended for state administrative hearing officers, who are "educational professionals," to "have at least the first crack at [addressing] educational shortfalls." *McMillen*, 939 F.3d at 648 (citation omitted). In these courts' view, "[a]llowing a plaintiff complaining about the denial of a [FAPE] to avoid exhaustion 'merely by tacking on a request for money damages' would subvert the procedures Congress designed for prompt resolution of these disputes." *Id.* (citation omitted).

Policy concerns cannot overcome Section 1415(*l*)'s plain language. *See D.D.*, 2021 WL 5407763, at *13 (Bumatay, J. concurring in part and dissenting in part) (rejecting this argument because "[a]t all times, we must be guided by the plain meaning of the statute"). But the argument is also unpersuasive on its own terms. A student who seeks relief the IDEA *can* provide would still be required to exhaust that request. *See Fry* U.S. Br. 32. And if the student seeks *only* remedies that the IDEA cannot offer (as was the

case with Miguel, post-settlement), requiring exhaustion would force the parties to participate in a time-consuming, adversarial, and potentially costly hearing that will create unnecessary burdens for all involved. That makes little sense, given that the student will inevitably fail to get the relief he seeks, and the parties will necessarily have to start over in court.

3. *Fry* ultimately did not resolve whether Section 1415(*l*)'s exhaustion requirement applies to non-IDEA claims for money damages because the Court ruled for the petitioner on other grounds. 137 S. Ct. at 752 n.4 ("[W]e leave [this question] for another day . . . ."); *see also id.* at 754 n.8. In the wake of that decision, lower courts have generally conformed to the dominant (but atextual) view that exhaustion is required whenever a non-IDEA claim involves the denial of an appropriate education, regardless of whether the relief sought is actually available in IDEA proceedings. *See McMillen*, 939 F.3d at 647-48; *D.D.*, 2021 WL 5407763, at *9 (interpreting circuit precedent to adopt the majority position).

At the same time, though, the lower courts have recognized that "[t]he question may be a closer one than the circuit scorecard suggests." *McMillen*, 939 F.3d at 647. For instance, even as it aligned with the majority view, the Fifth Circuit took pains to observe that the Solicitor General's position in *Fry* was the "textualist" one. *Id.* at 647-48; *see also Heston*, 816 F. App'x at 983 (again acknowledging the "good 'textualist case'" on the other side (citation omitted)).

Similarly, the First Circuit has expressed some hesitation post-*Fry* about whether the prevailing atextual approach is correct. *See Doucette*, 936 F.3d at 31 (acknowledging that "by its terms, § 1415(*l*) does

not appear to require exhaustion of the Doucettes' [damages] claim because that claim does not 'seek[] relief that is also available under [the IDEA]'" and noting that *Fry* "left open" this question (alterations in original)). And in the Ninth Circuit's recent en banc decision in *D.D.*, five judges dissented from the majority on this point. *See* 2021 WL 5407763, at *11-14 (Bumatay, J., concurring in part and dissenting in part) ("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.").

4. Because this second question goes to whether exhaustion was required under Section 1415(*l*) in the first place, it naturally accompanies the question whether, if exhaustion was required, Miguel qualified for a futility exception. It would make good sense for this Court to answer this outstanding issue from *Fry*, so that families, schools, and courts will no longer be forced to wrestle with the matter. And if it does, the Court should adopt the straightforward meaning of Section 1415(*l*)'s plain text.

* * *

This case is an ideal vehicle for this Court to address both questions presented. Each was squarely preserved and decided by the Sixth Circuit below. *See* App. 7a-8a, 10a-14a. And reversal on either question would allow Miguel's ADA case to go forward. By contrast, leaving the Sixth Circuit's decision in place will penalize students like Miguel—forcing them to needlessly reject the possibility of getting their education back on track as soon as possible, at the stark cost of preserving their rights under another statute. That is exactly the result Congress intended to avoid. Certiorari is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELLEN MARJORIE SAIDEMAN
LAW OFFICE OF ELLEN SAIDEMAN
7 Henry Drive
Barrington, RI 02806

MARC CHARMATZ
LEAH WIEDERHORN
NATIONAL ASSOCIATION OF THE DEAF
LAW AND ADVOCACY CENTER
8630 Fenton Street
Suite 820
Silver Spring, MD 20910

ROMAN MARTINEZ
Counsel of Record
CAROLINE A. FLYNN
JAMES A. TOMBERLIN
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-3377
roman.martinez@lw.com

MITCHELL SICKON
DISABILITY RIGHTS MICHIGAN
4095 Legacy Parkway
Lansing, MI 48911

Counsel for Petitioner

December 13, 2021

APPENDIX

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* The order is mistitled; as the corresponding docket entry and body of the order indicate, the order grants a motion to dismiss.

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UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT

Miguel Luna PEREZ, Plaintiff-Appellant,

v.

STURGIS PUBLIC SCHOOLS;
Sturgis Public Schools Board of Education,
Defendants-Appellees.

No. 20-1076

Argued: October 9, 2020

Decided and Filed: June 25, 2021

3 F.4th 236

OPINION

THAPAR, Circuit Judge.

Miguel Perez claims that his school district failed to provide him with an appropriate education. He brought his claim in the proper administrative forum, but he settled with the school before the process had run its course. Under the Individuals with Disabilities Education Act, the decision to settle means that Perez is barred from bringing a similar case against the school in court—even under a different federal law. The district court dismissed the case, and we affirm.

I.

Miguel Perez is a 23-year-old deaf student in Michigan. When he was nine, he emigrated from Mexico and started going to school in the Sturgis Public School District. Since Perez is deaf, the school assigned him a classroom aide—but the aide was not trained to work with deaf students and did not know sign language.

Still, Perez appeared to progress academically. His teachers gave him As or Bs in nearly every class, and he was on the Honor Roll every semester. So Perez and his parents assumed he was on track to earn a high-school diploma. But just months before graduation, the school informed the family that Perez did not qualify for a diploma—he was eligible for only a "certificate of completion."

Perez filed a complaint with the Michigan Department of Education. He alleged that Sturgis denied him an adequate education and violated federal and state disability laws: the Individuals with Disabilities Education Act (IDEA), the Americans with Disabilities Act (ADA), the Rehabilitation Act, and two Michigan disabilities laws. The school moved to dismiss the ADA claims and the Rehabilitation Act claims, and one state-law claim for lack of jurisdiction. The administrative law judge granted the motion and scheduled a hearing on the IDEA claim.

Before the hearing, the parties settled. As part of the settlement, the school agreed to pay for Perez to attend the Michigan School for the Deaf, for any "post-secondary compensatory education," and for sign language instruction for Perez and his family. It also paid the family's attorney's fees. The ALJ dismissed the case with prejudice.

A few months later, Perez sued Sturgis Public Schools and the Sturgis Board of Education in federal court. He brought one ADA claim and one claim under Michigan law. This time, Perez alleged that the school discriminated against him by not providing the resources necessary for him to fully participate in class. Along with declaratory relief, Perez sought compensatory damages for his emotional distress.

Sturgis moved to dismiss the case. It said that the IDEA required Perez to complete certain administrative procedures before bringing an ADA claim. And it argued that because Perez did not follow those procedures—Perez settled his IDEA claim before it was adjudicated—the IDEA barred Perez's suit. The district court agreed. It dismissed the ADA claim for failure to exhaust and declined to exercise supplemental jurisdiction over the remaining state-law claim. Perez appealed.

II.

A.

Under the Individuals with Disabilities Education Act, children with disabilities have a right to a "free appropriate public education" (FAPE). 20 U.S.C. § 1412(a)(1). To that end, public schools must provide educational services tailored to disabled children's individual needs. *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, —— U.S. ——, 137 S. Ct. 988, 993, 999, 197 L.Ed.2d 335 (2017).

Sometimes a school falls short. When that happens, parents can seek redress through the IDEA. The IDEA encourages informal conflict resolution, but it provides for increasingly formal mechanisms if a disagreement persists. First, the parents file a complaint with the school and meet with school officials. If the parties can't agree, either party can request mediation. Finally, if that doesn't work, the parents are entitled to a full hearing before an impartial "hearing officer." 20 U.S.C. § 1415(b)–(f). The hearing officer's job is to decide whether the student is receiving a "free appropriate public education." *Id.* § 1415(f)(3)(E). Either the state or the local school district can conduct the hearing. In the

latter case, the losing party may appeal the ruling to the state. *Id.* § 1415(f)(1)(A), (g).

Once the state has had its say, the administrative process is over. There remains one last option for aggrieved parents: a lawsuit in federal or state court. 20 U.S.C. § 1415(i)(2)(A).

Some parents would rather not trudge through an administrative process before coming to court. But federal law requires parents to complete the IDEA's administrative process before bringing any suit under federal law that concerns the "denial of a free appropriate public education." This requirement includes even parents who forgo their IDEA claims and sue under another statute: Parents must first "exhaust[ ]" the IDEA's administrative procedures "to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*).

That may seem strange—since when do we graft exhaustion requirements from one law onto another? We usually don't. But the provision is not a conventional exhaustion requirement: It doesn't require Perez to exhaust his *ADA* claim before bringing it to court. Instead, it requires him to exhaust his corresponding *IDEA* claim. So Perez can sue under "other [f]ederal laws protecting the rights of children with disabilities"—including the ADA—but he must first complete the IDEA's full administrative process. 20 U.S.C. § 1415(*l*). If he gives up his IDEA claim, he also gives up his right to "seek[ ] relief for the denial of an appropriate education" under other federal laws. *Fry v. Napoleon Cmty. Schs.*, —— U.S. ——, 137 S. Ct. 743, 755, 197 L.Ed.2d 46 (2017).

So what does this mean for Perez? He did not forgo his IDEA claim altogether, but he settled it before completing the administrative process. (And the negotiations for that settlement could have included compensation for the loss of his other claims.) Does this failure bar his current lawsuit? That depends on three questions: Is his case subject to the IDEA's exhaustion provision? If so, has Perez exhausted the IDEA's administrative procedures to the extent necessary? And if he has not, should we allow his suit to proceed anyway?

B.

Any lawsuit is subject to the IDEA's exhaustion provision if it "seek[s] relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). When interpreting that provision, the Supreme Court has told us to look beyond the surface of the pleadings and ask: Is the crux of the complaint the denial of a free appropriate public education? *Fry*, 137 S. Ct. at 755; *id.* at 757 (describing the key as whether the complaint's "essence—even though not its wording—is the provision of a [free appropriate public education]"). If so, the exhaustion requirement should apply.

1.

The crux of Perez's complaint is that he was denied an adequate education. Perez says that the school's failures denied him "meaningful access to the classroom or any other Sturgis activities," kept him from "access[ing] his education," and kept him from "participat[ing] and benefit[ting] from classroom instruction." R. 10, Pg. ID 115–19. He also says the school "misrepresented [his] academic achievement" by awarding him grades that "did not in any way

reflect the education he was receiving." *Id.* at 119. Those grades, he says, "masked the fact that [he] was learning nothing in his classes due to the absence of a qualified sign language interpreter." *Id.* All the while, "[Perez] and his parents believed that [he] had been receiving meaningful communication access to his classes," such that he would "graduat[e] with a regular high school diploma in . . . 2016 and [go] to college thereafter." *Id.* at 120. But it wasn't true. And Perez was understandably distressed to learn that he was years behind where he should have been. In short, Perez alleges that the school denied him an appropriate education and papered over the deficiencies.

Fry offers two questions as a "clue" when it is hard to determine whether a claim is fundamentally about the denial of an education. The two questions are: Could the plaintiff have brought "essentially the same claim" against a different kind of public facility, like a public theater or a library? *Fry*, 137 S. Ct. at 756–57. And could an adult at the school, like an employee or a visitor, have "pressed essentially the same grievance"? *Id.*

Here, the answer to both questions is no. As the complaint says, Perez and his parents believed that he *was* receiving "meaningful communication access to his classes." R. 10, Pg. ID 120. The problem is that—unbeknownst to him—his *education* wasn't up to snuff. He thought he was progressing adequately and would graduate on time. But because the school failed to provide him with the educational services he needed, he was not. Given that everything in Perez's complaint points to a "focus on the adequacy of [his] education," he could not bring essentially the same claim against a facility that had no responsibility to

educate him and no opportunity to conceal his lack of progress. *Fry*, 137 S. Ct. at 758. Nor could an adult at the school press the same grievance as Perez—the school would have no obligation to provide services necessary for the adult to progress at an appropriate educational pace. So under *Fry*, it's clear that Perez seeks relief for the school's failure to meet its IDEA obligations.

2.

Although Perez now seeks relief for the denial of a FAPE, he requests a specific remedy that is unavailable under the IDEA: compensatory damages for emotional distress. Recall that the exhaustion provision applies only to actions "seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*). So does his choice of remedy make a difference?

Our circuit has said no: A lawsuit that seeks relief for the denial of an appropriate education is subject to section 1415(*l*), even if it requests a remedy the IDEA does not allow. *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916–17 (6th Cir. 2000). Most other circuits agree. *See id.* (collecting cases); *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647–48 (5th Cir. 2019).

This reading makes sense. The key is how to understand the word "relief." At the most basic level, we say that people come to court for relief when they have been wronged. The court's goal is to rectify that wrong—to provide relief. Perez seeks relief for the denial of an appropriate education. The IDEA provides relief for the denial of an appropriate education. Since Perez seeks relief for the wrong that the IDEA was enacted to address, he seeks "relief that is also available under [the IDEA]." 20 U.S.C.

§ 1415(*l*). That's true even though Perez wants a remedy he cannot get. " 'Relief available' under the IDEA [means] relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *McMillen*, 939 F.3d at 648.

Although the Supreme Court has declined to answer this question, its reasoning in *Fry* supports this understanding of "relief." When the Court interpreted the phrase "seeking relief that is also available under [the IDEA]," it explained that the main consideration is the nature of the grievance: If the harm is the denial of the public education, then the lawsuit falls within the scope of section 1415(*l*). *Fry*, 137 S. Ct. at 754. The focus of the analysis is not the kind of relief the plaintiff wants, but the kind of harm he wants relief from. We thus agree that *Fry*'s analysis "comports with reading 'relief' to focus on the conduct the plaintiff complains about." *McMillen*, 939 F.3d at 648. And under that reading, the plaintiff's choice of remedy is irrelevant.

Thus, Perez's case is subject to the IDEA's exhaustion requirements. His core complaint is that the school denied him an appropriate education, so his suit "seek[s] relief that is also available under [the IDEA]."

C.

Since Perez's lawsuit is subject to the IDEA's requirements, the next question is whether Perez satisfied those requirements. Because he settled his IDEA claim rather than continue to litigate it in the administrative forum, he did not.

The provision affecting Perez's *ADA* claim requires that a plaintiff exhaust the *IDEA's*

administrative procedures "*to the same extent* as would be required had the [court] action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added). That means Perez can sue under the ADA only if he could also bring an IDEA action in court. *A.F. ex rel. Christine B. v. Espanola Pub. Schs.*, 801 F.3d 1245, 1248 (10th Cir. 2015) (Gorsuch, J.). If Perez has not taken the steps necessary to bring an IDEA claim in court, his ADA claim must fail.

An IDEA plaintiff cannot come to court until a state determines that the student has not been denied a free appropriate public education. Then, and only then, is a plaintiff "aggrieved by the findings and decision rendered" and eligible to sue. 20 U.S.C. § 1415(g)(1), (i)(2)(A). But if an administrative officer has conducted no hearings, made no findings, and issued no decisions, there is nothing to be aggrieved by.

Michigan never determined whether Perez received an appropriate education under the IDEA. The Michigan Department of Education had set a hearing date for Perez's IDEA case, but the school offered to settle before the hearing took place. And Perez's parents accepted the settlement offer. That decision involved tradeoffs: The school district agreed to pay for Perez to attend the Michigan School for the Deaf, for other compensatory education, and for sign language instruction for the family. But the settlement also meant that Perez's parents had to dismiss his complaint, which meant that he could never file the IDEA claim or any other corresponding statutory claim in court. Perez did not exhaust the IDEA's procedures as is needed to bring an IDEA action. To pursue his ADA claim, that is what he had to do.

D.

Perez contends that the court should excuse his failure to exhaust the IDEA's procedures before filing his ADA claim. He makes two arguments: First, exhaustion of the IDEA claim would have been futile because the administrative process could not provide damages for his emotional distress (and he had "obtained all the educational relief the IDEA [could] provide him" when he settled his claim). Appellant Br. at 26. Second, judicial estoppel prevents the defendants from invoking the exhaustion requirement. Neither argument is persuasive.

Section 1415(*l*) does not come with a "futility" exception, and the Supreme Court has instructed us not to create exceptions to statutory exhaustion requirements. *See Ross v. Blake*, 578 U.S. 632, 136 S. Ct. 1850, 1857, 195 L.Ed.2d 117 (2016) (explaining that only "judge-made exhaustion doctrines . . . remain amenable to judge-made exceptions"). Perez and the dissent cite *Honig v. Doe* for the contrary position, but that case does not support their argument. 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). In *Honig*, the Supreme Court interpreted a provision of the IDEA's precursor statute that required schools to keep disabled children in their normal classroom placements while the administrative proceedings ran their course. *Id.* at 323–25, 108 S.Ct. 592. The Court held that the rule did not contain an "emergency exception for dangerous students." *Id.* at 325, 108 S.Ct. 592. Then, addressing the school's policy concerns, the Court stated that it saw "no reason to believe" that schools couldn't try to "demonstrate the futility or inadequacy of administrative review" in some situations. *Id.* at 327, 108 S.Ct. 592 (acknowledging that the Court

"ha[d] previously noted [that] parents may bypass the administrative process where exhaustion would be futile or inadequate" (citing *Smith v. Robinson*, 468 U.S. 992, 1014 n.17, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984))). But this dictum about the policy consequences for schools struggling to accommodate dangerous students does not help Perez. Nor did *Smith v. Robinson*, to which *Honig* alluded, announce a futility exception to the exhaustion requirement in section 1415(*l*). *See* 468 U.S. at 1014 n.17, 104 S.Ct. 3457. It could not, because the requirement did not exist at the time. *See Fry*, 137 S. Ct. at 750 (explaining that Congress responded to *Smith* by passing the Handicapped Children's Protection Act of 1986, "overturn[ing] *Smith*'s preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement"). At best, *Smith* acknowledged that some lower courts had assumed that a futility exception would be available to those pursuing claims under the IDEA's precursor statute. *See* 468 U.S. at 1014 n.17, 104 S.Ct. 3457.

Even assuming that a general futility exception exists for IDEA claims, it would be of no use to Perez. Perez seeks an extended futility exception that could only apply to plaintiffs seeking different remedies under different federal statutes. This proposed exception—beyond anything *Honig* or *Smith* might have recognized—is incompatible with the text of section 1415(*l*). As we have explained, section 1415(*l*) requires exhaustion of the IDEA's procedures "*to the same extent* as would be required had the [court] action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added); *see supra* Part II.C. That means that a court cannot hear a plaintiff's ADA claim if it would have to dismiss that plaintiff's IDEA

claim for failure to exhaust. *See A.F.*, 801 F.3d at 1248. And Perez's basis for futility—the administrative process's inability to award damages for emotional distress—would never allow a court to excuse the failure to exhaust an IDEA claim. "One exhausts processes, not forms of relief." *Booth v. Churner*, 532 U.S. 731, 739, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001) (cleaned up). As Perez's argument could not save an unexhausted IDEA claim, neither can it save an ADA claim under section 1415(*l*).*

That conclusion is required by the text of section 1415(*l*), and it is the only one compatible with the structure of the statute. When a plaintiff seeks relief for the denial of a FAPE, the ALJ's inability to award money damages cannot be a source of futility. Given section 1415(*l*)'s focus on exhaustion of the IDEA's "procedures," we know that "Congress meant to require procedural exhaustion regardless of the fit

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* The dissent argues that Sixth Circuit precedent has extended *Honig* and recognized a futility exception to section 1415(*l*). Dissenting Op. at 249 (citing *Covington*, 205 F.3d at 917–18). It is true that in *Covington*, we said that a plaintiff's § 1983 claims for physically abusive treatment of a disabled student could proceed, notwithstanding the plaintiff's failure to exhaust the IDEA's administrative process. We "express[ed] no opinion as to whether [the] complaint [fell] within the ambit of the IDEA," but we concluded that exhaustion was futile because the "administrative process would be incapable of imparting appropriate relief." 205 F.3d at 916–18. "But we do not adhere to published precedent when an intervening decision of the United States Supreme Court requires modification of our prior decision." *United States v. King*, 853 F.3d 267, 274 (6th Cir. 2017) (cleaned up). Any futility exception to section 1415(*l*) recognized in *Covington* cannot survive *Ross*, which prohibits judge-made exceptions to statutory exhaustion requirements. 136 S. Ct. at 1857.

between [Perez's] prayer for relief and the administrative remedies possible." *Id.*; *see* 20 U.S.C. § 1415(*l*). But if a request for damages could excuse the failure to exhaust, then any student seeking money damages could skip the administrative process. Section 1415(*l*) would have no force.

The IDEA's administrative process was capable of providing Perez *relief* for his denial of a FAPE, even if not the specific *remedy* he might have wanted. True, Perez settled his claim before allowing the process to run its course. But when an available administrative process could have provided relief, it is not futile, even if the plaintiff decides not to take advantage of it. *Cf. Sango v. LeClaire*, No. 16-2221, 2017 WL 3912618, at *2 (6th Cir. 2017) (explaining, in the context of the Prison Litigation Reform Act, that a "prisoner cannot abandon the [administrative] process before completion and argue that he has exhausted his remedies or that it is futile for him to do so because his grievance is now time-barred under the regulations"). Thus, we cannot excuse Perez's failure to exhaust on the basis of futility.

Additionally, exhaustion would not have been an empty bureaucratic exercise for Perez. The development of an administrative record would have improved the accuracy and efficiency of judicial proceedings, especially because the ALJs have experience with special-education cases. *See Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989) (explaining that one advantage of the exhaustion requirement is that "[f]ederal courts—generalists with no expertise in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose"). And the ALJ could have made

findings supporting Perez's version of the facts, which would have certainly aided Perez's follow-on suit under the ADA. In other words, the exhaustion requirement would have worked just as it is supposed to.

Finally, Perez argues that we should estop the school from holding him to the IDEA's requirements. Judicial estoppel applies only when a party tries to take a position that is "clearly inconsistent" with an earlier one. *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). Recall that when Perez first filed his IDEA complaint in the administrative forum, he tacked on an ADA claim as well. The defendants successfully moved to dismiss the ADA claim for lack of jurisdiction—the administrative forum was available only for IDEA claims. Perez says that this dismissal made "exhaustion of his ADA claim impossible." Reply Br. at 25. But exhaustion of the *IDEA claim* was possible, and that is what section 1415(*l*) requires. Perez does not dispute that he would have satisfied the requirement had he continued to litigate his IDEA claim. There is no inconsistency in the defendants' position: Their motion to dismiss did not hinder Perez from bringing the ADA claim in court after exhausting the IDEA's procedures. There is thus no basis to apply judicial estoppel.

* * *

Because Perez failed to satisfy the IDEA's exhaustion provision in section 1415(*l*), his ADA claim is barred. We affirm.

JANE B. STRANCH, Circuit Judge, dissenting.

DISSENT

In *Fry v. Napoleon Community Schools*, —— U.S. ——, 137 S. Ct. 743, 197 L.Ed.2d 46 (2017), the Supreme Court handed lower courts the framework for evaluating whether a plaintiff seeks relief that is available under the IDEA and therefore must exhaust the IDEA's remedies under 20 U.S.C. § 1415(*l*). Analyzed within that framework, Miguel Perez's ADA complaint—read in his favor, as we must on a motion to dismiss—plainly does not seek IDEA relief, which entitles Perez to proceed with his claims. To reach the opposite conclusion, the majority disfigures Perez's allegations, ignoring the Supreme Court's express mandate to treat a plaintiff as "master" of his own claim. *Fry*, 137 S. Ct. at 755. The result undermines Congress's stated intent in passing § 1415(*l*): to reaffirm the viability of the federal anti-discrimination statutes and the IDEA as *separate* vehicles for protecting the rights of children with disabilities. *See id.* at 750. And even if we assume that Perez's suit qualifies as a claim seeking relief available under the IDEA, under binding Supreme Court and Sixth Circuit precedent he has adequately pled that he is excused from exhausting his remedies because it would be futile. I therefore respectfully dissent.

A. Legal Framework

As the majority explains, every child with disabilities has the right to a FAPE: instruction tailored to meet a child's individual needs, along with supportive services sufficient to enable that child to benefit from his or her education. *Id.* at 748–49 (citing 20 U.S.C. § 1401(9), (26), (29) and *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester*

Cnty. v. Rowley, 458 U.S. 176, 198, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). In contrast, Title II of the ADA protects the right of disabled people to access public programs and services, mandating that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

Before the passage of Title II, the Rehabilitation Act of 1973 and 42 U.S.C. § 1983, alongside the Education for the Handicapped Act—as the IDEA was previously known—ostensibly provided the statutory remedies for disability-based discrimination by government entities. *See Smith v. Robinson*, 468 U.S. 992, 1016–1018, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). But in 1984, in *Smith*, the Supreme Court concluded that the EHA was the "exclusive avenue" through which a child with disabilities could challenge the adequacy of his education. *Fry*, 137 S. Ct. at 750 (citing *Smith*, 468 U.S. at 1009, 104 S.Ct. 3457). Congress quickly overturned that holding by enacting § 1415(*l*), which, *Fry* explains, " 'reaffirm[ed] the viability' of federal statutes like the ADA or the Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children,' " while also "impos[ing] a limit on that 'anything goes' regime, in the form of an exhaustion provision." *Id.* (quoting H.R. Rep. No. 99–296, p. 4 (1985)).

That "exhaustion requirement" applies when a suit "seek[s] relief that is also available" under the IDEA. *Id.* at 752 (quoting § 1415(*l*)). And a suit seeks relief available under the IDEA when it seeks relief

for the denial of a FAPE, a free appropriate public education. *Id.* The court is to look to the "substance, or gravamen" of the complaint, not the labels used, to make this determination. *Id.* at 752, 755. In our legal system—including in disability complaints—the plaintiff is the "master of the claim," and the central question for the court is whether the complaint *actually seeks* relief available under the IDEA, not whether it *could have sought* such relief. *Id.* at 755. Two hypothetical questions may provide clues about the true nature of a given claim.

> 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 . . . .

Id. at 756. The same conduct might, of course, violate the IDEA as well as other statutes. *Id.* But the purpose of the questions is not to determine whether a plaintiff could have proceeded only under another statute. *Id.* at 757 n.10. Rather, they ask whether "a plaintiff who has chosen to bring a claim under Title II . . . instead of the IDEA—and whose complaint makes no mention of a FAPE—nevertheless raises a

claim whose *substance* is the denial of an appropriate education. *Id.* Courts should also consider the "diverse means and ends" of the relevant statutes, as well as the history of the proceedings in the case at bar. *Id.* at 755, 757.

B. The Gravamen of Perez's Complaint

In his complaint, Perez alleges that Defendants assigned him an unqualified interpreter—Gayle Cunningham, who did not know any form of sign language—to be his sole facilitator of communication, failed to properly evaluate her interpreting ability, and misrepresented to him and his family that she was qualified. And because Cunningham was not qualified and did not know any form of sign language, she was unable to effectively interpret for Perez the English that was spoken around him at school. At that time, Perez did not realize that Cunningham's interpretation was inaccurate, because he had no way of independently understanding what was actually being said. Perez was also excluded from the English Language Learner program and from Sturgis's extracurricular activities because he was deaf. Beginning in 2015, Cunningham was given duties away from Perez for several hours a day, leaving him without any means of communicating with others. As a result of Defendants' multiple failures, Perez alleges, he was deprived of effective "communication access" to "ELL services, teachers, classroom instruction, and extra-curricular activities," simply because he is deaf.

The majority opinion decides that the "crux of Perez's complaint is that he was denied an adequate education," and so his claim is subject to exhaustion. Maj. Op. at 240–41. In response to the *Fry* questions,

the majority concludes that Perez could not bring such a claim against another facility, nor could an adult against the school, because in neither case would the defendant have a responsibility to provide the services necessary to educate the plaintiff. *Id.* at 240–41.

That reasoning mischaracterizes the complaint and draws inferences against Perez, which we may not do on a motion to dismiss. *See Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 440, 451 (6th Cir. 2020). As illustrated by his allegations, Perez takes issue not with Defendants' failure to provide tailored educational services, but with their failure to provide appropriate *interpretation* services, which prevented him from understanding and communicating with anyone there—teachers, classmates, coaches, cafeteria workers, etc. That is a classic ADA claim; courts regularly entertain claims by deaf and hard-of-hearing people against a wide range of institutions for failing to provide them with an effective form of interpretation. *See, e.g.*, *Popovich v. Cuyahoga Cnty. Ct. of Common Pleas, Domestic Rels. Div.*, 276 F.3d 808, 816–18 (6th Cir. 2002) (reversing grant of summary judgment on Title II claim based on court system's failure to provide closed-captioning or real time transcription services to litigant in custody dispute); *Crane v. Lifemark Hosps., Inc.*, 898 F.3d 1130, 1134–35 (11th Cir. 2018) (reversing grant of summary judgment on Title III claim on hospital that had denied plaintiff's request for an ASL interpreter); *McGann v. Cinemark USA, Inc.*, 873 F.3d 218, 230 (3d Cir. 2017) (finding that movie theater's refusal to provide deaf individual with requested "tactile interpreter" was violation of Title III of the ADA);

Argenyi v. Creighton Univ., 703 F. 3d 441, 446–51 (8th Cir. 2013) (finding that there were issues of fact as to medical student's effective communication claim under Title III based on medical school's refusal to provide him with the auxiliary aids he requested as accommodations); *Rothschild v. Grottenthaler*, 907 F.2d 286, 292–93 (2d Cir. 1990) (holding that the Rehabilitation Act required public school district to provide sign language interpreters to student's deaf parents).

So for Perez's claim, the answer to both *Fry* questions is yes. And because his claim is at core about access, it closely resembles the prototypical claim of "simple discrimination" described in *Fry*—the suit by a wheelchair-bound child against a school without ramps—as distinct from a claim for denial of a FAPE. Just as that child is physically excluded from accessing the classrooms of his school, so too Perez alleges he was excluded from the programs and services of his school. That kind of exclusion is precisely the type of harm the ADA seeks to remedy. *See* 42 U.S.C. §§ 12101(a)(2) (finding that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"). Of course, because Perez is a former student suing his school, the absence of a qualified interpreter necessarily had "educational consequences," as would a lack of ramps barring a student from entering the classroom, but the fact that "the claim can stay the same in . . . alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education." *Fry*, 137 S. Ct. at 756. As *Fry*

explains, Perez "might well . . . be[ ] able to proceed under both" the ADA and the IDEA, but that does not make his claim subject to the exhaustion requirement if its substance is not the denial of a FAPE. 137 S. Ct. at 757 n.10; *see also Sophie G. by and through Kelly G. v. Wilson Cnty. Schs.*, 742 F. App'x 73, 78–79 (6th Cir. 2018) (concluding plaintiff did not need to exhaust her remedies on ADA claim challenging public childcare program's denial of access to child with autism and developmental delays because she was not toilet trained).

Consider, by contrast, *Fry*'s example of a prototypical claim that does concern denial of a FAPE: a Title II suit by a student with a learning disability against his school for failing to provide him with remedial tutoring in math. 137 S. Ct. at 756–57. Although that suit could be cast as one for disability-based discrimination, the essence of the claim is that the student was deprived of educational services, and "[t]he difficulty of transplanting the complaint to . . . other contexts suggests that its essence . . . is the provision of a FAPE." *Id.*; *see also L.G. by & through G.G. v. Bd. of Educ. of Fayette Cnty., Ky.*, 775 F. App'x 227, 231 (6th Cir. 2019) (holding that suit was for denial of a FAPE where student had been unable to attend school due to an *e. coli* infection and complained that the local board of education failed to "assist" with his "academic needs" failed to "locate and provide educational services for him," filed a truancy petition against him, and gave him failing grades).

While a complaint about a school's failure to provide the educational services a student needs is indeed subject to the exhaustion requirement, *see* Maj. Op. at 241, Perez's complaint is not because that is not what he alleges. And by misconstruing Perez's

allegations of simple discrimination in an educational context, the majority opinion replicates the errors of our Circuit's pre-*Fry* approach. In *Fry*, the Supreme Court observed that the Sixth Circuit panel below had incorrectly "asked whether E.F.'s injuries were, broadly speaking, 'educational' in nature," which "is not the same as asking whether the gravamen of E.F.'s complaint charges, and seeks relief for, the denial of a FAPE." *Id.* at 757–58. The Court also cited approvingly to *Payne v. Peninsula School Dist.,* 653 F.3d 863, 874 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), which "criticized an approach similar to the Sixth Circuit's for 'treat[ing] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students." *Fry*, 137 S. Ct. at 752 n.3 (quoting *id.,* at 875). The majority's focus today on the fact that Perez's factual allegations are about his education, and its disregard of what it is he "charges, and seeks relief for," impermissibly revives our prior error. *See id.* at 758. More broadly, it robs Perez, and other disabled students like him, of their ability to vindicate their independent right to damages under the ADA, undermining Congress's purpose in passing § 1415(*l*)—to " 'reaffirm[ ] the viability' of federal statutes like the ADA . . . 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.' " *Id.* at 750 (quoting H.R. Rep. No. 99–296, p. 4 (1985)).

The majority also disregards the second clue provided in *Fry*: the history of the proceedings. A plaintiff's initial pursuit of administrative procedures prior to switching to a judicial forum before full exhaustion could "suggest that she is indeed seeking

relief for the denial of a FAPE—with the shift . . . reflecting . . . strategic calculations about how to maximize the prospects of such a remedy." *Fry,* 137 S. Ct. at 757. Or it might reflect "a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely." *Id.* Which of these interpretations is true "depends on the facts." *Id.* In *Fry*, decided on a Rule 12 motion to dismiss, the Court concluded that the record was "cloudy" as to those facts, and so remanded for further factual development. *Id.* at 758.

The record is just as "cloudy" here. *Id.* While Perez did initiate an administrative proceeding for denial of a FAPE and obtained a settlement, the portion of his due process complaint that addresses that earlier FAPE claim sets forth an entirely different set of violations and injuries. Perez alleged in that proceeding that Defendants violated his right to a FAPE by: failing to provide him with sufficient educational and supportive services, like social work support and intensive language instruction; failing to address his lack of progress toward his IEP's goals; failing to address his functional need for socialization; discontinuing his speech and language services; failing to provide extended school year services; failing to provide training and education to his parents; failing to meaningfully involve his parents in the education process, and more. Read in the light most favorable to Perez, the federal complaint plausibly suggests that Perez's decision to bring a different claim here than he did before the ALJ reflects an awareness "that the school had fulfilled its FAPE obligation" and an intention to seek redress for "something else entirely." *Id.* So, like the Supreme

Court in *Fry*, I would reverse the district court's judgment and remand for further proceedings.

C. The Futility and Inadequacy Exceptions

Even if Perez's complaint sought relief for the denial of a FAPE, binding circuit and Supreme Court precedent compels the conclusion that Perez has plausibly alleged that he should be excused from the exhaustion requirement.

A request for money damages for emotional distress does not, on its own, allow a plaintiff to evade the exhaustion requirement. *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916–17 (6th Cir. 2000), *amended on denial of reh'g* (May 2, 2000). But we have held that exhaustion can be waived as futile or inadequate where a plaintiff seeks money damages *and* "money damages are the only remedy capable of redressing [his] injuries." *Id.* at 917. That rule originates in *Honig v. Doe*, 484 U.S. 305, 326–27, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988)), in which the Supreme Court explained that both parents and schools filing an IDEA suit "may bypass the administrative process where exhaustion would be futile or inadequate." (Citing *Smith,* 468 U.S. at 1014 n. 17, 104 S.Ct. 3457; 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) ("[E]xhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter")).

Covington applied that principle to § 1415(*l*)'s exhaustion requirement for claims under other statutes that seek relief available under the IDEA. 205 F.3d 912 at 915, 917–18. This, too, aligned with the IDEA's legislative history: the committee reports that accompanied the draft of § 1415(*l*) explained that exhaustion was not to be required in certain

circumstances, including when (1) "it would be futile to use the due process procedures"; (2) "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law"; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies"; and (4) an emergency situation exists." H. R. Rep. 99-296, p. 7 (1985) (1985 House Report); *see also* S. Rep. 99-112, p. 15 (1986) (1986 Senate Report) (explaining that under the new provision, "if that suit could have been filed under the [IDEA], then parents are required to exhaust [IDEA] administrative remedies to the same extent as would have been necessary if the suit had been filed under the [IDEA]. Exhaustion of [IDEA] administrative remedies would thus be excused where they would not be required to be exhausted under the EHA, such as when resort to those proceedings would be futile.") One of the bill's Senate sponsors made the same point in his remarks in support of the proposed legislation on the Senate floor. *See* 131 Cong. Rec. S10396-01 (1985) (remarks of Sen. Simon) ("It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of [IDEA] administrative remedies before filing a civil law suit . . . .").

We have subsequently applied the *Covington* rule in other cases. In *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014), the district court dismissed the § 1983 claim of a student (who had graduated) against his abusive aides for failure to exhaust under § 1415(*l*). We reversed, reasoning that exhaustion was not required because the complaint centered on non-educational injuries, and so the administrative process could not "provide either the type of relief he seeks or any other type of

remedy to redress wholly retrospective injuries." *Id.* Here, Perez has graduated, has already received equitable relief that he alleges satisfied Defendants' obligation to provide him with a FAPE, and his IDEA claim was dismissed with prejudice. He now seeks only money damages and declaratory relief under the ADA to compensate for the remaining unredressed harm—the discrimination he experienced and the resulting emotional and mental distress. An administrative law judge is incapable of compensating that harm, *see* Mich. Admin. Code R. 340.1724f, and so in these circumstances, exhausting the IDEA's remedies would be impossible and futile. *Covington*, 205 F.3d at 918; *F.H.* at 764 F.3d at 644. This conclusion does not turn solely on Perez's request for money damages, as the majority contends, nor it relevant that exhaustion would have developed an administrative record. Instead, *Covington* and *F.H.* make clear that the focus is on whether the IDEA's administrative process, designed to redress the inadequacy of a student's education, could have provided a remedy for the specific harms alleged by the plaintiff. *Covington*, 205 F.3d at 918; *F.H.*, 764 F.3d at 644. For Perez, it could not have.

A number of our sister circuits have reached the same conclusion in cases involving similar facts. *See, e.g.*, *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 30–32 (1st Cir. 2019) (finding exhaustion futile for § 1983 claim based on medical, emotional, and psychological injuries, because plaintiff had already obtained administrative relief and therefore had no further remedies under the IDEA, the IDEA only authorizes equitable relief, and the administrative process would have provided only a "negligible benefit"); *Muskrat v. Deer Creek Public Schs.*, 715

F.3d 775, 785–86 (10th Cir. 2013) (section 1983 claim based on medical consequences of timeouts was not subject to exhaustion where plaintiffs had obtained modification of IEP through administrative channels; "given the steps [they] took and the relief they obtained, 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"); *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275–76 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. 2011) (plaintiff seeking money damages under § 1983 for physical abuse was not required to exhaust IDEA's remedies where the parties had already informally agreed to provide the injured child with all remedies available under IDEA, and the child's injuries were retrospective); *W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995), *overruled on other grounds* by *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 799 (3d Cir. 2007) (exhaustion not required for § 1983 plaintiffs seeking money damages because those damages were not available through administrative process and plaintiffs had received all other relief available to them under the IDEA through a settlement agreement).

As these authorities recognize, requiring litigants like Perez to "exhaust"—in other words, to reject an acceptable IDEA settlement offer—forces students to choose between immediately obtaining the FAPE to which they are entitled, or forgoing that education so they can enforce their ADA right of equal access to institutions. That is exactly the opposite of what Congress intended: to "reaffirm[ ] the viability" of the ADA and other federal statutes as " 'separate vehicles,' no less integral than the IDEA, 'for ensuring

the rights' " of children with disabilities. *See Fry*, 137 S. Ct. at 750 (quoting H.R. Rep. No. 99-296, p. 4).

The majority contends, however, that the language of § 1415(*l*)—stating that exhaustion is required for non-IDEA claims "to the same extent" as required for IDEA claims—means that "the administrative process's inability to award damages for emotional distress" cannot be a basis for a finding of futility, because that same excuse "would never allow a court to excuse the failure to exhaust an IDEA claim." Maj. Op. at 243. That logic is foreclosed by our governing holdings that exhaustion is waived as futile or inadequate when a plaintiff seeks money damages for non-educational injuries and "[t]he administrative process cannot provide either the relief he seeks or any other type of remedy to redress wholly retrospective injuries," *F.H.*, 764 F.3d at 644; *see also Covington*, 205 F.3d at 918. And it is simply untrue that "Congress meant to require procedural exhaustion" in that scenario. *See* Maj. Op. at 244. To the contrary, the legislature voted to pass § 1415(*l*) after hearing its sponsors state explicitly and repeatedly that exhaustion should be excused when "it is improbable that adequate relief can be obtained by pursuing administrative remedies," such as where "the hearing officer lacks the authority to grant the relief sought." 1985 House Report at 7; *see also* 1986 Senate Report at 15. The majority's interpretation of § 1415(*l*) ignores the explanatory statements of the legislators who wrote this provision.

The majority also dismisses *Honig*'s announcement of the futility exception as mere dicta that, in any event, does not apply here. Maj. Op. at 242–44. In *Honig*, the Supreme Court was tasked with interpreting the so-called "stay-put" provision of

the EHA, which required schools to keep students with disabilities in their current placement during the pendency of administrative proceedings under the statute. 484 U.S. at 308, 108 S.Ct. 592. The petitioner, a school superintendent, contended the provision could not be read literally because it would have the "untenable[ ] result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course." 484 U.S. at 323, 108 S.Ct. 592. The Court disagreed, and in interpreting the provision narrowly, it explained that educators were not left "hamstrung" because they were entitled under the EHA to seek injunctive relief from the courts. *Id.* at 325, 108 S.Ct. 592. Nor did the exhaustion requirement render the possibility of judicial relief "more illusory than real." *Id.* at 326, 108 S.Ct. 592. Noting that "parents may bypass the administrative process where exhaustion would be futile or inadequate," the Court concluded the same exception was available to schools: "[t]he burden in such cases, of course, rests with the schools to demonstrate the futility or inadequacy of administrative review, but nothing in § 1415(e)(2) suggests that schools are completely barred from attempting to make such a showing." *Id.* at 327, 108 S.Ct. 592. That reasoning was essential to the judgment because it explained why the Court's interpretation of the statute would not lead to absurd results. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). It was not dicta. And every single one of our sister circuits has subsequently

acknowledged the existence of the futility and inadequacy exceptions to exhaustion of the IDEA's administrative procedures. *See, e.g.*, *Doucette*, 936 F.3d at 31; *Nelson v. Charles City Cmty. Sch.Dist.*, 900 F.3d 587, 593 (8th Cir. 2018); *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1191 (11th Cir. 2018); *Muskrat v. Deer Creek Pub. Sch.*, 715 F.3d 775, 786 (10th Cir. 2013); *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 494 (7th Cir. 2012); *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 249 (2d Cir. 2008); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002); *Matula*, 67 F.3d at 493; *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303–04 (9th Cir. 1992); *Gardner v. Sch. Bd. Caddo Par.*, 958 F.2d 108, 111–12 (5th Cir. 1992); *Cox v. Jenkins*, 878 F.2d 414, 418–19 (D.C. Cir. 1989).

Finally, the majority opinion's contention that our obligation to follow *Honig*, *Covington*, and *F.H.* is obviated by *Ross v. Blake*, 578 U.S. 632, 136 S. Ct. 1850, 195 L.Ed.2d 117 (2016), *see* Maj. Op. at 243–44 n.*, is unsupported—indeed, contradicted—by the text of *Ross* itself. *Ross* presented the narrow question of whether, under the Prison Litigation Reform Act (PLRA), incarcerated litigants need not exhaust their remedies when it would be futile. *Id.* at 1854–55. Under the PLRA, "[n]o action shall be brought with respect to prison conditions under . . . Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 997e(a). Because that language is "mandatory," the Supreme Court reasoned, "a court may not excuse a failure to exhaust." *Ross*, 136 S. Ct. at 1856. This conclusion was supported by the specific history of the PLRA, which made clear that Congress had intended to

reject the prior regime, in which exhaustion was discretionary. *Id.* at 1857. The Court was careful, however, to offer the following caveat:

> Of course, an exhaustion provision with a different text and history from § 1997e(a) might be best read to give judges the leeway to create exceptions or to itself incorporate standard administrative-law exceptions. See 2 R. Pierce, Administrative Law Treatise § 15.3, p. 1245 (5th ed. 2010). The question in all cases is one of statutory construction, which must be resolved using ordinary interpretive techniques.

Id. at 1858 n.2. By its own terms, then, *Ross* cannot be construed to silently impose a blanket prohibition on equitable exceptions to statutory exhaustion regimes. *Ross*, moreover, did not announce a new rule of law; it reified an old one. As the Court observed there, "[t]ime and again, this Court has taken [mandatory exhaustion] statutes at face value—refusing to add unwritten limits onto their rigorous textual requirements." *Id.* at 1857 (citing *McNeil v. United States*, 508 U.S. 106, 111, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 12–14, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000); 2 R. Pierce, Admin. L. Treatise § 15.3, p. 1241 (5th ed. 2010) (citing *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001); *Shalala*, 529 U.S. at 13–15, 120 S.Ct. 1084; *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992))). In *Booth*, for example, the Court stressed that it would "not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise." 532 U.S. at 741 n.6, 121 S.Ct. 1819. In support, the Court cited

McCarthy, 503 U.S. at 144, 112 S.Ct. 1081—"[w]here Congress specifically mandates, exhaustion is required"—and *Weinberger v. Salfi*, 422 U.S. 749, 766–67, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), which explained that the statutory exhaustion requirement at issue was "more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility." *McCarthy*, in turn, relied on precedents from 1988 and 1982. *See* 503 U.S. at 144, 112 S.Ct. 1081 (citing *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 579, 109 S.Ct. 1361, 103 L.Ed.2d 602 (1989); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 501, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982)).

In other words, the principle applied to the PLRA in *Ross* was well established in 1988, when the Supreme Court concluded in *Honig* that as a matter of "statutory construction," *Ross*, 136 S. Ct. at 1856, the IDEA *is* susceptible to an exhaustion requirement. *Ross* cannot be viewed as a turning point in the law that extinguished the precedents that came before. Indeed, every court of appeal that has addressed futility or inadequacy arguments since June 2016, when *Ross* was decided, has accepted the continuing viability of those exceptions. *See Doucette*, 936 F.3d at 33; *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 157 & n.3 (2d Cir. 2016); *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 136 (3d Cir. 2017); *Paul G. by & through Steve G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1102 (9th Cir. 2019), *cert. denied sub nom. Paul G. v. Monterey Peninsula Unified Sch. Dist.*, —— U.S. ——, 140 S. Ct. 2672, 206 L.Ed.2d 824 (2020); *Nelson*, 900 F.3d at 594; *Durbrow*, 887 F.3d at 1193; *Heston, Next Friend of A.H v. Austin Indep. Sch. Dist.*, 816 F. App'x

977, 983 (5th Cir. 2020); *Z.G. by & through C.G. v. Pamlico Cnty. Pub. Sch. Bd. of Educ.*, 744 F. App'x 769, 777 (4th Cir. 2018).

In any event, even under *Ross*'s own analysis, the IDEA *does* have a "different text and history" from the PLRA, which make it susceptible to equitable exceptions. *See Ross*, 136 S. Ct. at 1858 n.2. Under the IDEA, a party "aggrieved by the findings and decision" of the state agency has "the right to bring a civil action with respect to the complaint" he or she presented to the agency. 20 U.S.C. § 1415(i)(2)(A), (C)(iii). And before filing a civil action under another law protecting the rights of children with disabilities that "seek[s] relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(*l*). This language is meaningfully different from the much stronger, mandatory phrasing used in the PLRA: "[n]o action *shall* be brought." 42 U.S.C. § 1997e(a) (emphasis added).

And unlike the PLRA, the IDEA's legislative history demonstrates that Congress actively intended a futility exception to apply. As the Supreme Court explained in *Honig*, the statute's principal author made clear that exhaustion was not to be required when it would be "futile either as a legal or practical matter." *Honig*, 484 U.S. at 326–27, 108 S.Ct. 592 (quoting 121 Cong. Rec. 37416 (remarks of Sen. Williams)). Similarly, in advocating for the passage of § 1415(*l*), the bill's sponsors made clear that standard futility and inadequacy exceptions to the exhaustion requirement would apply. *See* 1986

Senate Report, p. 15; 1985 House Report, p. 7; 131 Cong. Rec. S10396-01 (remarks of Sen. Simon).

Courts have therefore permitted litigants to invoke that exception, as noted in *Smith*, 468 U.S. at 1014 n.17, 104 S.Ct. 3457, as explicitly endorsed in *Honig*, and as evidenced by the precedents of all the courts of appeal. *See supra*, at 251–52. Yet even though the IDEA was amended after *Smith* and several times more in the years following *Honig*, Congress has never seen fit to revisit the language or scope of the exhaustion requirement. That inaction in the face of Supreme Court decisions and unanimous circuit court agreement is probative, if not dispositive. *See Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 458 n.4, 135 S.Ct. 2401, 192 L.Ed.2d 463 (2015). And it contrasts sharply with Congress's swift action in passing § 1415(*l*) to overrule *Smith's* holding, 468 U.S. at 1009, 104 S.Ct. 3457, that the IDEA was the exclusive avenue through which a child with a disability could challenge the adequacy of his education. *See Fry*, 137 S. Ct. at 750.

"It is [the Supreme] Court's prerogative alone to overrule one of its precedents." *Bosse v. Oklahoma*, —— U.S. ——, 137 S. Ct. 1, 2, 196 L.Ed.2d 1 (2016) (quoting *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 149 L.Ed.2d 820 (2001)). Its "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Id.* (quoting *Hohn v. United States*, 524 U.S. 236, 252–53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). Instead of heeding that limitation on this panel's authority, the

majority today has chosen to overrule from below a precedent of our Supreme Court.

Nothing in *Ross* undermines or overrules the futility exception to exhaustion that was announced in *Honig* and applied by our court in *Covington* and later cases. And because Perez seeks only money damages for emotional distress and "money damages are the only remedy capable of redressing [his] injuries," *Covington*, 205 F.3d at 915, he has adequately pled that exhaustion would be futile.

Perez, as "master of his claim," filed a cognizable complaint under the ADA that is supported by the governing precedent of the Supreme Court and this Circuit. The majority opinion ignores that precedent and places us at odds with our sister circuits. Because it is wrong to dismiss this case, I respectfully dissent.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:	Docket No.: 18-000068
M.P. & J.L. o/b/o M.L.,	Case No.: 18-00001
Petitioner	Agency: Education
v	Case Type: ED Sp Ed Regular
Sturgis Public Schools Board of Education, St. Joseph Intermediate School District, St. Joseph Intermediate School District Board of Education, Sturgis Public Schools,	Filing Type: Appeal
Respondent /	

Issued and entered
this 18 day of May, 2018
by: Kandra Robbins
Administrative Law Judge

ORDER FOLLOWING PREHEARING CONFERENCE
AND
EXTENDING 45 DAY TIMELINE

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 *et seq*. On January 2, 2018, Petitioner filed an amended due process request/complaint with the Michigan

Department of Education on behalf of her child. (Student).[1] It was forwarded to the Michigan Administrative Hearing System and assigned to Administrative Law Judge (ALJ) Kandra Robbins.

During a Prehearing Conference was convened on May 18, 2018. Attorneys Caroline Jackson, Mark Cody and Mitchell Sikon appeared on behalf of Petitioners. Attorney Vickie Coe appeared on behalf of Respondent Sturgis Public Schools, and Attorneys Michell Eaddy and Jessica Baker appeared on behalf of Respondent St. Joseph ISD.

1. The parties were notified that Certified Deaf, ASL and Spanish Interpreters have been secured for the week of June 25, 2018. It was determined that the Oral Argument on the Motions to Dismiss would be heard on June 25, 2018. At the end of Oral Argument, the underlying matter would proceed.

2. To permit the parties to complete the activities discussed, the Hearing Deadline in this matter is being extended to **August 31, 2018**

3. Petitioner's Due Process Hearing Request raised concerns regarding the Americans with Disabilities Act, the Rehabilitation Act and the Michigan Persons with Disabilities Civil Rights Act. Respondents filed a Motion to Dismiss these claims. Petitioner filed a response. During the Prehearing Conference, Petitioner raised no objection to the dismissal of these claims as they are outside the

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[1] To protect the privacy of the minor child, Student is substituted the child's name.

jurisdiction of this Tribunal. Therefore, all such claims are DISMISSED without prejudice.

4. The dates selected to conduct the hearing are **June 25 through· June 29, 2018 beginning at 9:00 a.m.** The hearing shall be held at Sturgis Public Schools 107 W. West Street, Sturgis, Michigan
5. The Petitioner indicated that the hearing is to be closed to the public.
6. The parties shall exchange witness lists by **June 18, 2018**. A copy of the witness lists shall be filed with the ALJ at MAHS by 4:30 p.m. on the same day. The copy can be filed as a PDF. The list shall include the name and job title if applicable of each witness with a brief description of their expected testimony. The parties are expected to work cooperatively on scheduling witnesses and/or making witnesses available to one another. Should either party anticipate a problem in gaining a witnesses' participation, counsel is directed to address it by contacting opposing counsel where appropriate, seeking a subpoena or requesting an immediate pre-hearing conference.
7. The parties shall exchange a list of proposed exhibits as well as copies of the proposed exhibits by **June 18, 2018**. A copy shall be filed with the ALJ at MAHS by 4:30 p.m. on that same day. The copy filed can be filed as a PDF. **However, if the exhibits are submitted as a PDF, the submitting party will be expected to bring a hard**

copy of the exhibits to the hearing for use by the ALJ.

8. The Petitioner's exhibits shall be marked numerically beginning as P-1. The Respondent's exhibits shall be marked alphabetically beginning as R-a. If the Respondent has more than 35 exhibits, Respondent shall mark the exhibits numerically beginning as R-1.
9. The parties are encouraged to submit joint exhibits to the extent possible. Any Joint exhibits shall be marked as Jt-numerically beginning with Jt-1. A copy of any joint exhibits shall be filed wtth the ALJ at MAHS by 4:30 p.m. on **June 18, 2018**. This can be filed as a PDF. Again, if submitted to the ALJ as a PDF, the submitting party will be expected to bring a hard copy of each exhibit to the hearing to be used by the ALJ.
10. An Exhibit List form is enclosed. The Parties are encouraged to use this form to list their proposed exhibits using the Exhibit No. box and the Description box. Please contact Pamela Moore at MAHS if you would prefer to have the document in an electronic form. Please feel free to make as many copies of the form as necessary.
11. Failure to provide copies of proposed exhibits or witness lists to the opposing party may result in the denial of their admission or the denial of witness testimony as per 34 CFR 300.512(a)(3).
12. If a document proposed as evidence contains the social security number of an individual,

please render illegible all but the last-four sequential digits of the social security number. Have a copy of the document that is not redacted available for review.

13. The parties are encouraged to stipulate to as many facts as can be agreed upon to facilitate and expedite the taking of testimony on the day of the hearing. Any stipulated facts must be filed with the ALJ by **June 18, 2018**.
14. Potential witnesses that will not voluntarily appear to give testimony will need to be subpoenaed. The District will assist the parent as necessary in ensuring the presence of witnesses who are current employees of the school district. The parties must determine which witnesses will require a subpoena as soon as possible so that a written request for the correct number of subpoenas can be given to the ALJ. The request for subpoena shall be made to MAHS. Once the request is made in writing, the signed subpoenas will be sent to the requesting party/counsel. The party/counsel must arrange to serve the subpoenas on the witnesses. The subpoena documents sent to the party/counsel will be accompanied by a set of instructions.
15. The parties understand that there are to be no *ex parte* communication with the ALJ. Any written communications with the ALJ, whether by mail, electronic mail, or facsimile transmission must be simultaneously copied/delivered to the other party.
16. **Each party is required to bring an extra copy of their proposed exhibits to the**

hearing for use by the witnesses during the hearing.

17. **Each party shall bring a clean copy of the proposed witness list and proposed exhibit list to give to the Court Reporter for use during the hearing**.

18 The Michigan Administrative Hearing System will arrange for reporting and transcription services at the hearing.

19. Due Process Hearing Decisions may be accessed at the website of the Michigan Department of Education, Office of Administrative Law, and other relevant law may be accessed at the website of the Michigan Department of Education, Office of Special Education [www.michigan.gov/mde].

20. Administrative Hearing Rules may be accessed at the website of the Licensing and Regulatory Affairs Department, Michigan Administrative Hearing System, Administrative Rules [www.michigan.govnara].

21 If any motions are filed, the opposing party shall file a written response within 7 days of the filing of the Motion.

ORDER

NOW, THEREFORE, IT IS ORDERED that the participants complete the activities specified in this document and that they do so within the time limits stated.

It is further ordered that the participants review this document upon receipt and that any error or omission in the document be disclosed, in writing, to the opposing party and the ALJ without delay.

s/ Kandra Robbins
Kandra Robbins
Administrative Law Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARIA PEREZ, next friend of MIGUEL LUNA PEREZ, Plaintiff,	)	No. 1:18-cv-1134
-v-	)	Honorable Paul L. Maloney
STURGIS PUBLIC SCHOOLS and STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION, Defendants.	)	

2019 WL 6907138

OPINION AND ORDER ADOPTING REPORT AND RECOMMENDATION

Plaintiff Miguel Luna Perez, by his next friend Maria Perez, brings claims that Defendants, Sturgis Public Schools and the Sturgis Public Schools Board of Education, violated the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, and the Michigan Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.* Defendant Sturgis Public School District[1] moved to dismiss Perez's claims (ECF No. 11). On June 20, 2019, United States Magistrate Judge Ray Kent issued a Report & Recommendation ("R&R") recommending that the

[1] This motion to dismiss makes no reference to Defendant Sturgis Public Schools Board of Education, so Magistrate Judge Kent appropriately construed the motion as referring only to Defendant Sturgis Public School District.

Court grant Defendant Sturgis Public School's motion for summary judgment because Perez failed to exhaust his administrative remedies (ECF No. 19). This matter is before the Court on Perez's objections to the R&R (ECF No. 25). For the reasons to be discussed, the Court will overrule all objections and adopt the R&R as the Opinion of the Court.

Legal Framework

With respect to a dispositive motion, a magistrate judge issues a report and recommendation, rather than an order. After being served with an R&R issued by a magistrate judge, a party has fourteen days to file written objections to the proposed findings and recommendations. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). A district court judge reviews de novo the portions of the R&R to which objections have been filed. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Only those objections that are specific are entitled to a de novo review under the statute. *Mira v. Marshall*, 806 F.2d 636, 637 (6th Cir. 1986) (per curiam) (holding the district court need not provide de novo review where the objections are frivolous, conclusive, or too general because the burden is on the parties to "pinpoint those portions of the magistrate's report that the district court must specifically consider"). Failure to file an objection results in a waiver of the issue and the issue cannot be appealed. *United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005); *see also Thomas v. Arn*, 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (upholding the Sixth Circuit's practice). The district court judge may accept, reject, or modify, in whole or in part, the findings and recommendations made by the

magistrate judge. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

Analysis

I. Motion to Dismiss Standard

Perez's first objection is that Magistrate Judge Kent applied an incorrect legal standard to the Rule 12(b)(6) motion because he did not read Perez's allegation that his Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401 *et seq.*, claim had been settled in the light most favorable to Perez. Perez argues that because his IDEA claim was settled, the IDEA exhaustion requirement does not apply, and the R&R's conclusion is incorrect. This objection fails.

When considering a motion to dismiss, a court must accept as true all factual allegations, but need not accept any legal conclusions. *Ctr. For Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 369 (6th Cir. 2011) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007)). Magistrate Judge Kent was required to accept Perez's allegation that his IDEA claim was settled, and he did: the R&R notes that Perez resolved his IDEA claim and that in this case, Perez's complaint does not explicitly plead a claim under IDEA (ECF No. 19 at PageID.282-3). However, at its core, this case presents a legal question—do Perez's ADA and PWDCRA claims seek the same type of relief available under IDEA? The Supreme Court has recently clarified that "[w]hat matters is the crux—or in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry v. Napoleon Community Schools*, —— U.S. ——, 137 S. Ct. 743, 755, 197 L.Ed.2d 46 (2017). If his claims seek the same type of

relief available under IDEA (relief for the denial of a free and appropriate public education (FAPE)) they are subject to the IDEA's exhaustion requirement. *Id.* at 752. A plaintiff may not skirt the exhaustion requirement by avoiding references to IDEA in his pleading.

Under *Fry*, Perez cannot simply allege that the IDEA claim was settled to imply that his case does not involve denial of a FAPE and to avoid inquiry into the gravamen of his claim. *See id.* It follows that Magistrate Judge Kent was not required to accept the pleaded legal conclusion—i.e., that because the case does not reference IDEA, it does not involve denial of a FAPE. Accordingly, this objection is overruled.

II. Existence of Exhaustion Requirement

Perez next objects to the R&R's holding that he was required to exhaust his claims before bringing them in this Court. This objection also fails.

Section 1415 (*l*) of the IDEA "requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) [his] suit 'seek[s] relief that is also available' under the IDEA." *Id.* at 752 (citing 42 U.S.C. § 1415 (*l*)). Therefore, the IDEA's exhaustion rule "hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape 42 U.S.C. § 1415 (*l*) merely by bringing [his] suit under a statute other than the IDEA." *Id.* at 754. If, however, the plaintiff seeks redress for other harms, "independent of any FAPE denial," the IDEA's exhaustion requirement does not apply. *Id.* As explained above, the focus of this analysis is the substance of a plaintiff's complaint, not

any "magic words" or which labels a plaintiff uses. *Id.* at 755. The Supreme Court provided two questions that can guide the analysis:

> 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. A court may also consider that a plaintiff began to resolve the issue by invoking the IDEA's formal procedures: "A plaintiff's initial choice to pursue that process may suggest that [he] is indeed seeking relief for the denial of a FAPE." *Id.* at 757.

Perez argues that the R&R's conclusion that he seeks relief for denial of a FAPE is incorrect for two reasons: (1) because he was denied effective communication sufficient to provide him meaningful access to the classroom and (2) because Defendants intentionally discriminated against him by excluding him from participation in service, programs, and

activities based on his disability. Perez argues that these claims are ADA claims, unrelated to his FAPE, so exhaustion was not required.

The Court is not persuaded by this argument. Perez's case is nearly identical to this Court's recent decision in *Richards v. Sturgis Public Schools*, Case No. 1:18-cv-358, slip op. (W.D. Mich. Sept. 14, 2018). In *Richards*, a hearing-impaired student filed suit alleging that he was denied educational assistance when he was denied a competent interpreter, and that this denial impeded his access to a public education. *Id.* at 2-3. Richards had not exhausted his IDEA remedies before filing suit, so under the guidance of *Fry*, the Court examined whether Richards alleged the denial of a FAPE. *Id.* at 4-5. The Court found that he had alleged the denial of a FAPE, so IDEA exhaustion was required, and the Court dismissed his case for failure to exhaust administrative remedies. *Id.* at 5-6.

Perez has attempted to avoid the same fate Judge Jonker reached in *Richards* by eliminating all references to the IDEA or the denial of a FAPE. However, that is insufficient to avoid dismissal, given the Supreme Court's guidance in Fry: "[t]he use (or non-use) of particular labels and terms is not what matters." *Fry*, 137 S. Ct. at 755. The gravamen of Perez's complaint is substantially the same as Richards' was: the underqualified interpreter Defendants provided to him deprived him of meaningful access to his education. At its core, the claim is that Perez was denied a FAPE. Despite the complaint's labels, Perez's claim seeks the same type of relief available under IDEA. Thus, Magistrate Judge Kent properly determined that Perez was required to exhaust available IDEA administrative

remedies before filing the instant suit. Accordingly, this objection is overruled.

III. Meeting the Exhaustion Requirement

Perez next argues that even if exhaustion was required, he exhausted his claims and therefore, dismissal was improper. His argument can be summarized as follows: "[t]here is nothing in the statute to require a student to even bring an IDEA claim, let alone reject settlement of an IDEA claim, as a prerequisite for *litigating a non-IDEA claim*." (ECF No. 25 at PageID.332) (emphasis added). This is a misstatement of the law. Section 1415 (*l*) does not require exhaustion for only claims brought under IDEA; it requires exhaustion for any "civil action under such law seeking relief that is also available under [IDEA]." 20 U.S.C. § 1415 (*l*). Put differently, the statute requires a student to bring and exhaust an IDEA claim before litigating a non-IDEA claim, if the non-IDEA claim seeks relief for the denial of a FAPE. Given the Court's conclusion that the gravamen of Perez's claim is the denial of a FAPE, § 1415 (*l*)'s exhaustion requirement applies. *See Fry*, 137 S. Ct. at 754. Accordingly, this objection is overruled.

IV. IDEA Settlement while Pursuing ADA Claim

Perez's fourth objection is that "there is no legal basis for barring Plaintiff from proceeding with his separate ADA claim for money damages after settling his IDEA claim" (ECF No. 25 at PageID.340). He objects to the Magistrate Judge's reliance on *A.F. ex rel Christine B. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), and objects to the conclusion that the settlement of his IDEA claim does not

circumvent the exhaustion requirement of his related claims under the ADA and PWDCRA. Perez asserts that he should be permitted to continue pursuing these claims after settling his IDEA claim.

Section 1415 (*l*) requires a plaintiff to exhaust "the procedures under subsections (f) and (g) . . . to the same extent as would be required had the action been brought under [IDEA]." 20 U.S.C. § 1415 (*l*). Subsection (f) requires an impartial due process hearing; subsection (g) requires the appeal of a due process hearing if the hearing was conducted by a local education agency rather than a state administrative hearing officer. 20 U.S.C. § 1415 (f), (g).

A.F. is factually analogous to the case at bar: settlement of an IDEA claim followed by an ADA lawsuit seeking relief for the same injuries. *See id.* at 1247-48. The Tenth Circuit held that it is "clear" under § 1415(*l*) that a plaintiff may not "bring an IDEA lawsuit in federal court after choosing to settle [his] IDEA claims and agreeing to their dismissal with prejudice." *Id.* Such a process does not involve a due process hearing or an appeal of the results of that hearing, so it simply cannot comply with § 1415 (f) or (g), and in turn, does not satisfy the exhaustion requirement of § 1415 (*l*). *See id.* at 1247. Accordingly, the plaintiff's claim was dismissed for failure to exhaust. *Id.* at 1251.

This Court agrees with Magistrate Judge Kent's conclusion that *A.F.* is persuasive and applicable here: Perez settled his IDEA claim and then raised the same claims under a different name, just like the plaintiff in *A.F.* The Tenth Circuit's logic is sound: without a due process hearing and any applicable appeals, the exhaustion requirement set out in

§ 1415 (*l*) has not been met. Therefore, Perez's pre-hearing settlement did not exhaust the available administrative remedies, and this claim must be dismissed for lack of exhaustion. There is no error in the R&R on this point, and the objection is overruled.

V. Judicial Estoppel

Perez's fifth objection is that the R&R failed to apply the doctrine of judicial estoppel. He argues that he did not have a chance to exhaust his claim because Defendants succeeded in dismissing the ADA claim in the administrative proceedings. Therefore, Defendants should be estopped from obtaining dismissal of the claim in this Court for failure to exhaust administrative remedies. However, this argument is yet again premised on the incorrect assumption that Perez's ADA claim is separate and distinct from his IDEA claim. The Court has concluded that the claim before it is substantively an IDEA claim; the IDEA claim was settled before it could be exhausted. Importantly, neither the R&R nor this Court have considered the dismissal of Perez's ADA claim as evidence that he failed to exhaust his administrative remedies. To be clear, Perez's claim is considered unexhausted because it is, at its core, an IDEA claim, and he settled his IDEA claim before a due process hearing. Perez's argument here misses that fundamental fact. Accordingly, this objection is overruled.

VI. Futility of Further Exhaustion

Perez next objects that further exhaustion of his claim would be futile because the ALJ lacked jurisdiction to hear his ADA claim, and because further litigation of the IDEA claim was futile after it settled. Again, whether the ALJ dismissed his ADA

claim is irrelevant to the current proceeding, so this objection is overruled. And Perez's contention that further litigation of the IDEA claim was futile undercuts this entire lawsuit: this suit, at its core, is an IDEA claim by another name. Further litigation of the IDEA claim after settlement, as Perez recognizes here, is futile. This objection is overruled.

VII. Supplemental Jurisdiction

Perez's final objection is that the R&R erred when it determined that this Court should not exercise its supplemental jurisdiction over the PWDCRA claim. Given the above findings that the R&R contains no errors regarding the gravamen of Plaintiff's ADA claim, the R&R's conclusion that the ADA claim must be dismissed is correct. Accordingly, there are no remaining federal claims and the Court cannot exercise supplemental jurisdiction over the state claim. *See* 28 U.S.C. § 1367. This objection is overruled.

Order

This Court finds no error in the R&R, and accordingly,

IT IS ORDERED that the January 7, 2019 R&R (ECF No. 19) is **APPROVED** and **ADOPTED** as the opinion of the Court.

IT IS FURTHER ORDERED that Plaintiff's objections to the R&R (ECF No. 25) are **OVERRULED**.

IT IS FURTHER ORDERED that Defendant Sturgis Public Schools' motion to dismiss (ECF No. 11) is **GRANTED**.

Date: December 19, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARIA PEREZ, next friend of MIGUEL LUNA PEREZ, Plaintiff,	)	No. 1:18-cv-1134
-v-	)	Honorable Paul L. Maloney
STURGIS PUBLIC SCHOOLS and STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION, Defendants.	)	

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Plaintiff Miguel Luna Perez, by his next friend Maria Perez, brings claims that Defendants, Sturgis Public Schools and the Sturgis Public Schools Board of Education, violated the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*., and the Michigan Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. Defendant Sturgis Public School District moved to dismiss Perez's claims (ECF No. 11), but that motion made no reference to Defendant Sturgis Public Schools Board of Education. The Court granted that motion as to Defendant Sturgis Public School District (ECF No. 29). Sturgis Public Schools Board of Education now brings the exact same motion to dismiss, noting that the original filing was intended to apply to both Defendants (ECF No. 20).

Having granted Defendant Sturgis Public School District's motion to dismiss, the Court now adopts the

same reasoning and applies it to Defendant Sturgis Public Schools Board of Education's motion to dismiss. Accordingly, for the reasons outlined in ECF No. 29,

IT IS ORDERED that Defendant Sturgis Public Schools Board of Education's motion to dismiss (ECF No. 20) is **GRANTED**.

JUDGMENT TO FOLLOW.

Date: December 19, 2019

/s/ Paul L. Maloney
Paul L. Maloney
United States District Judge

FILED
Jul 29, 2021
DEBORAH S. HUNT,
Clerk

No. 20-1076

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIGUEL LUNA PEREZ, Plaintiff-Appellant, v. STURGIS PUBLIC SCHOOLS; STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION, Defendants-Appellees.	)	ORDER

BEFORE: BOGGS, STRANCH, and THAPAR, Circuit Judges

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Stranch would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF
THE COURT
s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

20 U.S.C. § 1400

§ 1400. Short title; findings; purposes

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

* * *

(c) Findings

Congress finds the following:

* * *

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

* * *

(d) Purposes

The purposes of this chapter are—

(1)(A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;

* * *

20 U.S.C. § 1415

§ 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

* * *

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of Title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

* * *

(c) Notification requirements

* * *

(2) Due process complaint notice

* * *

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

* * *

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are

established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

* * *

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

* * *

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

* * *

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in

such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

* * *

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

* * *

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

* * *

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was

substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

* * *

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

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