No. 21-887

IN THE
Supreme Court of the United States

MIGUEL LUNA PEREZ,
Petitioner,

v.

STURGIS PUBLIC SCHOOLS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF FORMER U.S. DEPARTMENT OF EDUCATION OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1090 Vermont Avenue, N.W.
Suite 220
Washington, D.C. 20005
(202) 467-5730

AARON M. PANNER
Counsel of Record
BETHAN R. JONES
JONATHAN I. LIEBMAN*
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@kellogghansen.com)
* Admitted only in New York; supervised by members of the firm

November 16, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER MATERIALS

INTEREST OF *AMICI CURIAE*[1]

Amici are former U.S. Department of Education officials responsible for special education policy.

Amicus Madeleine Will served as the Assistant Secretary of the Office of Special Education and Rehabilitative Services under President Ronald Reagan. Ms. Will has more than 35 years of experience advocating for individuals with intellectual disabilities and their families and developing partnerships of parents and professionals involved in creating and expanding high-quality education and other opportunities for individuals with disabilities. Since her adult son, Jonathan, was born with Down syndrome, she has been involved in disability policy efforts at the local, state, and federal levels. Ms. Will founded the Collaboration to Promote Self-Determination, a network of national disability organizations pursuing modernization of services and supports for persons with intellectual and developmental disabilities, so that they can become employed, live independently in an inclusive community, and rise out of poverty. She has also served as Vice President of the National Down Syndrome Society and Chair of the President's Committee for People with Intellectual Disabilities. She is currently a member of the Think College National Coordinating Center's Accreditation Workgroup.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

Amicus Stephanie Smith Lee served as the Director of the Office of Special Education Programs under President George W. Bush from 2002 to 2005. She has more than 40 years of experience in disability, education, and employment policy, including serving in senior legislative staff positions for Members of the U.S. House of Representatives and the U.S. Senate, and for the U.S. Senate Health, Education, Labor, and Pensions Committee. She has served as a Senate Majority Leader appointee to the Ticket to Work and Work Incentives Advisory Panel and as a member of a number of state and federal commissions and task forces. Since her daughter, Laura, was born with Down syndrome in 1982, Ms. Lee has organized and led many successful bipartisan, collaborative efforts to improve special education and disability policy in Virginia and nationally. She is currently the Senior Policy Advisor to the National Down Syndrome Congress and serves as Past Chair of the National Coordinating Center Accreditation Workgroup, a congressionally mandated workgroup that is developing model accreditation program standards for higher education programs for students with intellectual disabilities.

Amicus Michael K. Yudin served as the Assistant Secretary for Special Education and Rehabilitative Services and acting Assistant Secretary for Elementary and Secondary Education under President Barack Obama. In these roles, Mr. Yudin led the Department of Education's efforts to administer federal disability grant programs designed to improve the educational and employment outcomes of children and adults with disabilities. He also helped guide the implementation of policy designed to ensure equal opportunity and access to education and employ-

ment for individuals with disabilities. Prior to joining the Department, Michael served as a U.S. Senate staffer and HELP Committee counsel to Senator Jim Jeffords. Working for senior members of the HELP Committee, Michael helped draft, negotiate, and pass various pieces of legislation, including the No Child Left Behind Act of 2001, the Individuals with Disabilities Education Act, the Higher Education Opportunity Act, the Carl D. Perkins Career and Technical Education Act of 2006, and reauthorization of the Head Start Act.

Amicus Dr. Robert Pasternack currently serves as the Chief Executive Officer for Ensenar Educational Services, Inc., providing consultation to School Districts, State Departments of Education, and an array of companies serving students with disabilities across country. Dr. Pasternack served as the Assistant Secretary for the Office of Special Education and Rehabilitative Services under President George W. Bush and in that capacity worked on the 2004 Reauthorization of the Individuals with Disabilities Education Act. He served on the President's Commission on Excellence in Special Education and the President's Mental Health Commission; and he led the Federal Interagency Coordinating Committee during his tenure. During his 45 years in education, Dr. Pasternack has been a classroom teacher, Superintendent, and State Director of Special Education. As the guardian for his brother with Down syndrome, he has been an advocate for improving outcomes and results for students with disabilities and their families. Dr. Pasternack is a Nationally Certified School Psychologist, certified teacher, administrator, and educational diagnostician.

Amicus Dr. Alexa Posny has more than four decades of experience in education, from classroom teacher to Chief State School Officer to an Assistant Secretary in the U.S. Department of Education. Dr. Posny served as Assistant Secretary of the Office of Special Education and Rehabilitative Services in the U.S. Department of Education from 2009 to 2012 under President Barack Obama. In this position, she played a pivotal role in policy and management issues affecting special education and rehabilitative services across the country. She also served as the principal adviser to the U.S. Secretary of Education on all matters related to special education. Dr. Posny previously served as the Commissioner of Education for the Kansas State Department of Education ("KSDE") (2007-2009); Director of the Office of Special Education Programs for the U.S. Department of Education (2006-2007) under President George W. Bush; Deputy Commissioner of Education at KSDE (2001-2006); State Director of Special Education at KSDE (1999-2001); and Director of Special Education for the Shawnee Mission School District in Overland Park, Kansas (1997-1999). Prior to that, she was the Director of the Curriculum and Instruction Specialty Option as part of the Title 1 Technical Assistance Center network across the United States and a Senior Research Associate at Research and Training Associates in Overland Park, Kansas. Dr. Posny has also served on the board of directors for the Chief State School Officers and the National Council for Learning Disabilities, and she chaired the National Assessment Governing Board's Special Education Task Force. Dr. Posny was most recently the Senior Vice President of State and Federal Programs for Renaissance Learning.

Represented by undersigned counsel, former education officials, including Ms. Will, filed an *amicus* brief in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), explaining, among other things, that the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act of 1990 ("ADA"), and the Rehabilitation Act of 1973 together provide comprehensive and complementary protections to individuals with disabilities. As in *Fry*, the statutory context in which the IDEA operates provides important context informing the Court's resolution of this case.

Amici have devoted their professional lives to working on behalf of children with disabilities. In various capacities, they have been responsible for both enforcing and complying with the statutory rights and obligations enacted by Congress for the benefit of children with disabilities and their families. Having been involved in the implementation of the statutes at issue in this case, *amici* have a special interest in providing the Court with a perspective based on decades of practical experience.

Amici believe that the decision of the court of appeals, like the decision at issue in *Fry*, contravenes both the plain language of the IDEA and Congress's established anti-discrimination regime. Where individuals with disabilities settle their IDEA claims, such settlements should not preclude meaningful relief for injuries that the IDEA cannot redress.

SUMMARY OF ARGUMENT

I. The ADA and the Rehabilitation Act are broad anti-discrimination statutes that serve distinct goals and provide distinct remedies from those provided by the IDEA. As this Court recognized in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the former prohibit discrimination against individuals with disabilities and require public entities to make reasonable accommodations to avoid such discrimination. By contrast, the IDEA seeks to ensure that children with disabilities receive the specialized instruction or related services needed for a free appropriate public education ("FAPE"). Congress enacted the IDEA's predecessor against the backdrop of existing anti-discrimination law. And, after this Court ruled in *Smith v. Robinson*, 468 U.S. 992 (1984), that the IDEA's predecessor statute was the exclusive means of seeking relief for claims involving rights of students with disabilities, Congress enacted 20 U.S.C. § 1415(*l*), ensuring the rights guaranteed by federal anti-discrimination laws remain distinct and separately enforceable from the IDEA.

Just as in *Fry*, the Sixth Circuit's construction of the narrow exhaustion requirement in § 1415(*l*) ignores the plain language of the statute and leads to perverse and paradoxical results. Remedies available under the ADA and the Rehabilitation Act to redress discrimination are often unavailable under the IDEA. Those statutes serve different aims and provide redress for different harms. Moreover, Congress structured the IDEA to promote settlement of meritorious IDEA claims and thereby avoid the time and expense of an administrative hearing. In circumstances where a litigant has settled his IDEA claim, as petitioner did here, there is no reason

to require further exhaustion of an administrative process that cannot provide redress for the plaintiff's remaining non-IDEA claims. Forcing children with disabilities to forgo immediate relief and reject favorable settlement offers – simply to preserve claims that seek relief unavailable under the IDEA for injuries not redressed by that statute – finds no support in the statute or common sense.

II. Based on their long experience working in the field of special education, *amici* see no risk that construing the exhaustion provision narrowly according to its terms will risk any "flood" of litigation over alleged discrimination. Parents of students who require special education services are primarily concerned that their children receive those services. They also are typically aware that, to attain those services, they must first participate in the development of an Individualized Education Program ("IEP") and pursue administrative remedies in cases of disagreement. Petitioner in this case did not bypass that mechanism – he pursued administrative relief in precisely the manner contemplated by the IDEA and secured, through a settlement, all the relief that the IDEA could provide him. Only then did he file his ADA claim in federal court seeking relief for harms the IDEA could not remedy.

Furthermore, parents of children with disabilities – whether or not they are eligible for special education services – have available an alternative informal dispute resolution mechanism in cases of alleged discrimination. The Office of Civil Rights ("OCR") in the U.S. Department of Education has a four-decade history of enforcing the non-discrimination rights of students with disabilities. Parents can (and often do) pursue complaints about discrimination with OCR

without a lawyer; complaints are frequently resolved through informal negotiation and without litigation.

While *amici* believe that court litigation to address discrimination in schools will be relatively infrequent – respondents could have secured, but did not secure, a release of petitioner's ADA claim, for which money damages are limited – preserving the distinct remedial schemes of distinct federal statutes will best serve the interests of students and educators.

ARGUMENT

I. THE IDEA, THE ADA, AND THE REHABILITATION ACT EACH WORK TO VINDICATE THE RIGHTS OF CHILDREN WITH DISABILITIES

A. The ADA and the Rehabilitation Act Provide a Comprehensive Mandate for the Elimination of Discrimination

As this Court recognized in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the ADA and the Rehabilitation Act "aim to root out disability-based discrimination, enabling each covered person . . . to participate equally to all others in public facilities and federally funded programs." *Id.* at 756. These statutes impose an obligation on public services and entities receiving federal financial assistance to avoid discrimination against adults and children with disabilities, both within and outside of the school context. The ADA provides "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), and Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability," *id.* § 12132. Similarly, § 504 of the Rehabilitation Act – enacted in 1973 – bars entities

"receiving Federal financial assistance" (whether or not that entity is a public school) from discriminating against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a); *see School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 284 (1987) (noting that the "basic purpose of § 504" is to ensure that individuals with disabilities "are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others").

To effectuate their remedial non-discrimination policies, the ADA and the Rehabilitation Act establish a "reasonable modification" standard, by which public entities must make "reasonable modifications to rules, policies, or practices" to accommodate people with disabilities. 42 U.S.C. § 12131(2); *see also* 28 C.F.R. § 35.130(b)(7) (requiring public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"); *Tennessee v. Lane*, 541 U.S. 509, 517 (2004).

To show discrimination under Title II of the ADA and § 504, a plaintiff need not allege or prove that the plaintiff was denied a FAPE. Rather, a plaintiff must show that (1) the plaintiff has a qualified disability and (2) the plaintiff has been "excluded from participation in or [was] denied the benefits of the services, programs, or activities of a public entity, or [was] subjected to discrimination by any such entity" (3) "by reason of" their disability. 42 U.S.C. § 12132.

B. The IDEA Provides a Grant of Rights to Children with Disabilities That Complements, but Does Not Displace, the Rights and Remedies Afforded by the ADA and the Rehabilitation Act

The IDEA, which was originally enacted in 1975 as the Education for All Handicapped Children Act ("EHA"), ensures "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." 20 U.S.C. § 1400(d)(1)(A). Any State that accepts certain federal educational funding assistance must comply with its terms. *See Fry*, 137 S. Ct. at 748-49 ("An eligible child . . . acquires a 'substantive right' to such an education once a State accepts the IDEA's financial assistance.") (quoting *Smith v. Robinson*, 468 U.S. 992, 1010 (1984)); *see also Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 295 (2006). To be eligible for services under the IDEA, a student must (1) have a disability covered by the Act and (2) require specialized instruction and services. *See* 20 U.S.C. § 1401(3).

Providing a qualified student with a disability with a FAPE requires creating and following an IEP. *See id.* § 1401(9)(D); *see also Fry*, 137 S. Ct. at 748-49 (detailing this). A student's IEP must provide the student with a FAPE that "meet[s] their unique needs and prepare[s] them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). A team that includes the student's parents, a regular education teacher, a special education teacher, and others develops the IEP for that student before each year. *See id.* §§ 1412(a)(4), 1414(d). Among other things, the IEP describes the

student's present academic and functional performance, measurable annual goals, and the education services that will advance the student toward those goals. *See id.* § 1414(d)(1)(A).

The IDEA is thus a grant of rights that – in requiring special education services for students with disabilities – is distinct from the anti-discrimination and reasonable-accommodation requirements of § 504 of the Rehabilitation Act and the ADA. The predecessor to the IDEA, the EHA, was enacted after § 504 and against the backdrop of its prohibition on discrimination. In enacting the EHA, Congress would have recognized the existence of non-discrimination duties and remedies for their enforcement.

Fry acknowledged that, as "[i]mportant as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests," and the ADA and the Rehabilitation Act are "[o]f particular relevance" to Congress's overall statutory scheme. 137 S. Ct. at 755. Whereas the IDEA "concerns only the[] schooling" of children with disabilities, aiming "to provide each child with meaningful access to education," the ADA and § 504 are more expansive in the injuries they cover and the means of relief they provide, "authoriz[ing] individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages." *Id.* at 749-50. Notably, such compensatory damages are not available under the IDEA, which empowers hearing officers only to provide limited equitable relief to remediate the denial of a FAPE. *See id.* at 752 n.4, 754 n.8; *see also School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985) (rejecting the characterization of "retroactive reimbursement" for certain education expenses as "damages").

As such, the IDEA complements – but does not displace – the separate rights and remedies afforded to children with disabilities by the ADA and the Rehabilitation Act. Indeed, after this Court's ruling in *Smith* that the EHA (now IDEA) was the exclusive means of seeking relief for claims involving rights of students with disabilities, "Congress was quick to respond," *Fry*, 137 S. Ct. at 750, enacting 20 U.S.C. § 1415(*l*) to clarify that the rights guaranteed by the EHA and other federal laws protecting such students are distinct and separately enforceable. That section expressly states that nothing in the IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." *Id.* To be sure, under § 1415(*l*)'s narrow exhaustion provision, litigants "seeking relief that is also available under" the IDEA – that is, presenting complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education," or placement of the student in an interim alternative educational setting – must first exhaust administrative remedies with the State before filing a lawsuit. *Id.* § 1415(b)(6), (f), (g), (k), (*l*). But children with disabilities are not otherwise required to exhaust administrative remedies before vindicating their rights under § 504 and the ADA to be free of discrimination – as the statutory emphasis on otherwise available "rights, *procedures*, *and remedies*" makes clear. *Id.* § 1415(*l*) (emphasis added).

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

'for ensuring the rights of handicapped children.'" *Fry*, 137 S. Ct. at 750 (quoting H.R. Rep. No. 99-296, at 4 (1985)). In construing the provision's "carefully defined exhaustion requirement," "a court should attend to the diverse means and ends of the statutes covering persons with disabilities – the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other." *Id.* at 750, 755. As this Court's decision in *Fry* confirms, the IDEA's exhaustion provision is narrowly drawn to ensure that distinct claims, seeking remedies unavailable under the IDEA, are not impeded from going forward. Just as in *Fry*, the Sixth Circuit's overbroad interpretation of § 1415(*l*)'s scope distorts the IDEA's plain text and ignores its context.

C. This Court Should Limit § 1415(*l*)'s Reach for the Same Reasons It Did in *Fry*

In *Fry*, this Court, considering the reach of § 1415(*l*), held "that exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee," *i.e.*, a FAPE. 137 S. Ct. at 748. Such a suit does not, from a straightforward textual standpoint, seek "relief" that is "available" under the IDEA. *Id.* at 753-54 (explaining that "[t]he ordinary meaning of 'relief' in the context of a lawsuit is the 'redress[] or benefit' that attends a favorable judgment," and that relief is "available" under the IDEA only "when it is 'accessible or may be obtained'") (quoting *Black's Law Dictionary* 1161 (5th ed. 1979), and *Ross v. Blake*, 578 U.S. 632, 642 (2016)) (second alteration in *Fry*). Nor does it advance Congress's goal of protecting children with disabilities to force a plaintiff to trudge through an onerous and costly administrative process when the "plaintiff could not get any relief

from those procedures" and would be inevitably "sen[t] . . . away empty-handed." *Id.* at 754; *cf. Weinberger v. Salfi*, 422 U.S. 749, 765-66 (1975) (noting that "the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue"). Section 1415(*l*), this Court concluded, does not command that counterproductive result.

The same principles apply here. Just as exhaustion does not bar a claim premised on something other than the denial of a FAPE, it should not inhibit a plaintiff who, having already settled his IDEA claim in full, seeks separate statutory redress that the IDEA could never have rendered in the first place. After respondents offered petitioner the educational relief he sought, petitioner accepted the offer without releasing his non-IDEA claims. After that point, petitioner "could not get any relief" from further administrative procedures that could only "send h[im] away empty-handed." *Fry*, 137 S. Ct. at 754. And so, to redress his remaining *non*-IDEA claims, seeking *non*-IDEA relief for injuries cognizable only under other statutes, petitioner sought his day in federal court.

This procedure is in perfect keeping with the letter and spirit of the IDEA. Section 1415(*l*) channels a plaintiff's IDEA claims through the statute's administrative process until their conclusion, without "restrict[ing] or limit[ing] the rights, procedures, and remedies available under the Constitution," the ADA, the Rehabilitation Act, or "other Federal laws protecting the rights of children with disabilities." 20 U.S.C. § 1415(*l*). It makes no sense for § 1415(*l*) to preclude petitioner's distinct non-IDEA claims

solely because he reached a favorable settlement on his IDEA claim.

D. Affirming the Sixth Circuit's Decision Would Upend Congress's Intent, Produce Perverse and Paradoxical Results, and Hurt Children with Disabilities

The Sixth Circuit's reading of § 1415(*l*) is inconsistent with the statutory scheme Congress devised to vindicate the rights of children with disabilities. It is incompatible with the IDEA's structure, which creates incentives to settle claims. And it would, in practice, force students with disabilities to choose between immediately obtaining the FAPE to which they are entitled at the expense of ceding their non-IDEA claims or delaying resolution of their IDEA claims in order to vindicate their rights of equal access under the ADA and the Rehabilitation Act.

The IDEA places paramount importance on providing expeditious relief to children denied a FAPE. As the predecessor statute's principal sponsor stated:

> I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. . . . Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings . . . conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with a fair consideration of the issues involved.

121 Cong. Rec. 37,416 (1975) (statement of Sen. Williams); *see also Cory D. ex rel. Diane D. v. Burke Cnty. Sch. Dist.*, 285 F.3d 1294, 1299 (11th Cir. 2002) (relying on Sen. Williams' statement to construe the

IDEA); *C.M. ex rel. J.M. v. Board of Educ.*, 241 F.3d 374, 380 (4th Cir. 2001) (same).

To encourage efficient resolution of claims, the IDEA offers various avenues for the amicable and rapid resolution of denial-of-FAPE claims – without prejudicing a plaintiff's "rights, procedures, and remedies available under" other statutes. *See*, *e.g.*, 20 U.S.C. § 1415(*l*); *see also id.* § 1415(f)(1)(B) (mandating a "[p]reliminary meeting" whereby parties might arrive at a "[w]ritten settlement agreement"); *id.* § 1415(e) (requiring establishment of a mediation process). Whereas the IDEA encourages settlement, the Sixth Circuit would turn Congress's scheme on its head: the decision below penalizes settlement, forcing a plaintiff to forgo speedy relief and waste time, money, and administrative resources in order to preserve the plaintiff's non-IDEA claims. That approach not only finds no support in the statutory text, but also runs counter to the established purposes of administrative exhaustion, that is, "protect[ing] 'administrative agency authority'" and "promot[ing] efficiency." *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

If left in place, the Sixth Circuit's interpretation of § 1415(*l*) would have serious negative consequences for the ability of children with disabilities to obtain full relief for past discrimination. As it stands, the IDEA's established framework promotes the resolution of IDEA claims short of requiring a formal due process hearing. Most IDEA disputes are resolved via informal mechanisms, and settlement is common: In the past 11 years, of the 211,631 due process complaints received during 2010-2021 for children ages 3 through 21 served under the IDEA, Part B,

a hearing was conducted and a written decision was issued for only 24,081 (11%). For 124,496 (59%) of the due process complaints received, a resolution was achieved without a hearing, including through a settlement agreement for 18,012 (9%).[2]

It makes little sense to read § 1415(*l*) in a manner that forces the most deserving of plaintiffs either to forgo speedy relief under the IDEA to preserve their non-IDEA claims or to abandon their right to separate non-IDEA remedies as a condition of obtaining a FAPE more quickly. In light of the urgent need for children deprived of a FAPE to receive expeditious educational relief, such a decision will often be a Hobson's choice.

II. NARROWLY CONSTRUING THE IDEA'S EXHAUSTION PROVISION WILL ENCOURAGE EFFICIENT RESOLUTION OF DISPUTES

A. Parents of Children with Disabilities Seeking Education Services for Their Children Under the IDEA Have No Incentive To Bypass Administrative Procedures

In *amici*'s long experience working in the field of special education, they have found that parents of children with disabilities who need special education services are first and foremost concerned that their children receive services that will effectively address

---

[2] *See* Ctr. for Appropriate Disp. Resol. in Special Educ., *IDEA Dispute Resolution Data Summary for U.S. and Outlying Areas: 2010-11 to 2020-2021*, at 10-11 (Sept. 8, 2022), https://www.cadreworks.org/sites/default/files/resources/2022%20National%20IDEA%20Dispute%20Resolution%20Data%20Summary%20FINAL_accessible.pdf. A resolution was still pending at the end of the reporting period for the remaining 63,054 (30%) due process complaints. *Id.*

their children's needs. When parents are able to secure those services, they have no reason to seek further relief in court. Only when a parent is not seeking a remedy available under the IDEA (like money damages) does the parent have an incentive to turn to other potential remedies.

Parents are also aware that the only way to receive desired special education services – and secure a better education for their child – is to participate in the creation of their child's IEP and, should they disagree with the results, in the IDEA's administrative process. *See* 20 U.S.C. §§ 1414(d)(3)(A)(ii) (stating that school officials must consider a parent's request for particular educational programs or services in creating a student's IEP), 1415(f)-(i) (outlining the administrative remedies parents must exhaust before filing a lawsuit). In the vast majority of cases involving the denial of an academic or supportive service for a student with a disability, parents will not attempt to launch litigation; they will participate in and exhaust the IDEA's administrative remedies in hopes of obtaining that service for their child.

Petitioner's case illustrates this well. Petitioner filed his due process complaint with the Michigan Department of Education in December 2017. JA16-45. Before the hearing, respondents served a settlement offer granting petitioner the full equitable relief he had been seeking in the IDEA proceedings, including his placement at the Michigan School for the Deaf, post-secondary compensatory education, sign language instruction, and attorneys' fees. The parties thus agreed to settle on June 15, 2018. JA69-70. Only then, on October 2, 2018, did petitioner file his complaint in federal district court alleging violations of the ADA and seeking monetary damages for those alleged violations. JA10.

B. The Office of Civil Rights Offers an Informal Mechanism To Resolve Claims of Discrimination Between Parents and Schools

Even when the administrative mechanisms of the IDEA are inapplicable, it is *amici*'s experience that parents still tend to forgo litigation in cases of discrimination in favor of pursuing an informal remedy through OCR. This informal remedy is available to parents by filing a complaint with OCR, which enforces the ADA and § 504. *See* U.S. Dep't of Educ., *About OCR*, http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (Nov. 7, 2022).

OCR has a 40-plus-year history of intervening as an effective and efficient enforcer of the nondiscrimination rights of students with disabilities. *See* Catherine D. Anderle, *Helping Schools Make the Grade*, Mich. B.J., Feb. 2001, at 52, 53 (OCR senior attorney describing complaint process and stating that "OCR's goal is to resolve complaints as soon as possible," most often through negotiated and amicable agreements). When parents contact OCR with complaints of discrimination against their children, they do not need a lawyer. OCR operates as a "neutral fact-finder," U.S. Dep't of Educ., *How the Office for Civil Rights Handles Complaints*, http://www2.ed.gov/about/offices/list/ocr/complaints-how.html (updated July 2022), and often contacts school administrators directly to negotiate a solution informally and without litigation.

The OCR complaint process is typically much more parent-friendly than either the IDEA's administrative due process protocols or resorting to litigation. Like litigation, administrative due process hearings often entail representation by counsel, resort to

experts, and elaborate submissions. The OCR complaint process requires none of that. And, in most cases that come to OCR, the issue can be quickly and informally resolved, saving resources for schools and parents alike. It is not surprising that the complaint process is popular among parents, including as an alternative to litigation.

Children have the right to attend school in an environment that is free from discrimination. For most parents, the OCR complaint process is the fastest, most efficient, and most attractive way to achieve that goal, after direct engagement with the school system has failed. That will not change if this Court construes § 1415(*l*)'s exhaustion requirement narrowly to allow petitioner's separate ADA claim to go forward.

C. Parents Rarely Go to Court, and a Ruling for Petitioner Will Not Change That

Data reflect that formal administrative adjudication of IDEA disputes is rare, and court litigation is "far less frequent than due process hearings" still. Tessie Rose Bailey & Perry A. Zirkel, *Frequency Trends of Court Decisions Under the Individuals with Disabilities Education Act*, 28 J. Special Educ. Leadership 3, 4 (2015). In the experience of *amici*, the rare cases in which parents do go to court involve discrimination that persisted despite repeated efforts to resolve concerns through less formal means.

There is no reason to think that such cases will be any more frequent if the Court rules for petitioner. Moreover, as respondents observed in opposing certiorari, the types of money damages that parents may recover under the ADA are limited.

The interests of students and educators are best served – and the rights of students under federal law

best respected – when the distinct remedial schemes of distinct federal statutes retain their separate and important roles. Respecting those distinct remedial schemes by allowing petitioner to pursue his ADA claim will not open any litigation floodgates.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

LEWIS BOSSING
THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW
1090 Vermont Avenue, N.W.
Suite 220
Washington, D.C. 20005
(202) 467-5730

AARON M. PANNER
Counsel of Record
BETHAN R. JONES
JONATHAN I. LIEBMAN*
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(apanner@kellogghansen.com)
* Admitted only in New York; supervised by members of the firm

November 16, 2022