No. 21-887

In the Supreme Court of the United States

MIGUEL LUNA PEREZ, PETITIONER

v.

STURGIS PUBLIC SCHOOLS, ET AL.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) includes a statutory exhaustion requirement, 20 U.S.C. § 1415(*l*), which provides that before a plaintiff may file "a civil action" under a federal law "seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) [of the IDEA] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." In *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 754 (2017), the Court unanimously held that § 1415(*l*)'s exhaustion rule "hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education" (FAPE).

This case presents two questions:

1. Whether § 1415(*l*)'s exhaustion rule applies to all actions seeking relief for the denial of a FAPE no matter the plaintiff's preferred remedy.

2. Whether Congress' decision not to codify an exception to § 1415(*l*)'s exhaustion rule prevents this Court from reading an atextual futility exception into the statute.

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INTRODUCTION

Several federal laws protect the rights of children with disabilities. In the education context, the Individuals with Disabilities Education Act (IDEA) comes first, as the primary law that guarantees qualifying children a free appropriate public education (FAPE). A FAPE means instruction and supportive services designed to meet a student's unique needs, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754 (2017), as part of an individualized program "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

Children can enforce their FAPE rights under both the IDEA and other federal laws, like Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act of 1973. But given the importance of the IDEA in a child's educational program, Congress channeled all claims for the denial of a FAPE through the IDEA's administrative procedures: a plaintiff may not file "a civil action" "seeking relief that is also available under [the IDEA]" unless she exhausts "the procedures under subsections (f) and (g) [of the IDEA] … to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*).

1. Petitioner Miguel Perez first claims that he did not need to exhaust the IDEA's administrative procedures under § 1415(*l*) before bringing an ADA claim for lost-income damages, a remedy the IDEA does not provide. But statutory text, history, and context all refute that argument. Section 1415(*l*)'s exhaustion rule is focused on the right to be

enforced—the FAPE—not the remedy requested, like money damages or injunctions. Indeed, *Fry* underscores "the primacy of a FAPE in the statutory scheme," 137 S. Ct. at 753, and the importance of honoring the IDEA's reticulated procedures. Congress designed those procedures in response to the Court's holding in *Smith v. Robinson*, 468 U.S. 992, 1019-20 (1984), that a non-IDEA plaintiff could never pursue damages for the denial of a FAPE. While Congress overturned that rule and made clear that non-IDEA plaintiffs could pursue damages for denial of a FAPE, it fashioned § 1415(*l*)'s exhaustion rule to cover those very claims.

All this makes sense, and it explains why the circuits uniformly agree that § 1415(*l*) applies to all non-IDEA FAPE actions no matter the plaintiff's preferred remedy. Educational agencies, not courts, are the experts in education policy. They might not be able to give plaintiffs every desired remedy for the denial of a FAPE. But they are tasked with determining whether a student has received a FAPE and, if not, how to make sure she gets one. Congress had good reason to require exhaustion no matter the remedy, because it prioritizes children's educational needs and allows experts to develop a record facilitating judicial review.

2. Perez next contends that he can escape § 1415(*l*)'s exhaustion rule by invoking futility because he wants only lost-income damages and he settled his IDEA claim. But that argument lacks merit, too.

First, § 1415(*l*) imposes a statutory exhaustion requirement with no futility exception, and courts may not read one in. Congress knew how to create a futility exception. It did not do so in § 1415(*l*).

Second, even assuming § 1415(*l*) ports in a futility exception, it would do so, on Perez's theory, only "to the same extent" as if "the action [had] been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). As Perez recognizes (Br. 18-19), that language requires a court to analyze exhaustion as if the non-IDEA claim were an IDEA claim. Perez cannot prevail under that framework. Futility sometimes applies when a court can grant relief that an agency cannot, but courts and agencies are equally powerless to grant damages under the IDEA. The problem is not futility before the agency, but that the desired remedy is unavailable anywhere. And once a plaintiff has settled an IDEA claim, he cannot invoke futility to bring the same claim in court. Settling an IDEA claim makes futility an irrelevant concept.

Perez protests that courts have the power to grant *ADA* damages while hearing officers do not. But there he departs from his own reading of § 1415(*l*). An *IDEA* plaintiff who wants damages can't go straight to court claiming futility; "to the same extent," neither can an ADA plaintiff.

This, too, makes sense. Whatever remedies a FAPE plaintiff may desire, Congress made the IDEA's procedures the first step. Those procedures are designed to promote the best interests of the student by ensuring prompt access to a FAPE, and to enable courts to do their job, when the time comes, with the aid of a record developed by educational experts.

Judge Thapar's opinion for the Sixth Circuit got it right. The Court should affirm.

STATEMENT

A. Legal background

The IDEA ensures that children with disabilities receive special education services. Other federal laws, like Title II of the ADA, also protect disabled children. Congress envisioned some overlap in federal coverage, and in 20 U.S.C. § 1415(*l*) it established an order of operations for when such overlap exists:

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

The questions presented are (1) whether § 1415(*l*) applies to all actions seeking relief for the denial of a FAPE, no matter the plaintiff's preferred remedy, and, (2) if so, whether courts should honor Congress' decision not to include a futility exception in § 1415(*l*).

1. The IDEA safeguards substantive rights by mandating compliance with reticulated procedures.

a. At its core, the IDEA guarantees a FAPE, which includes "both 'instruction' tailored to meet a child's 'unique needs' and sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry*, 137 S. Ct. at 748-49 (citation

omitted). Naturally, a FAPE for one is not a FAPE for all. The IDEA thus focuses on the child's "individualized education program," *id.* at 749, and encourages parents and schools to collaborate to design that program, *Endrew F.*, 137 S. Ct. at 994, 999.

Congress anticipated disagreement between parents and schools. So it established "elaborate and highly specific procedural safeguards" designed to avoid, minimize, and quickly resolve those disputes. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205 (1982); *see* 20 U.S.C. § 1415. Congress directed that all FAPE disputes be resolved pursuant to a three-tiered process: informal resolution, administrative review, and judicial review. *See* 20 U.S.C. § 1415(c), (f)–(g), (i). Those tiers ensure that parents and schools have the opportunity to "fully air their respective opinions," and that courts will not review FAPE disputes until education professionals are given "a complete opportunity to bring their expertise and judgment to bear on areas of disagreement." *Endrew F.*, 137 S. Ct. at 1001-02.

i. Parents initiate informal resolution by filing a complaint with the appropriate state or local agency. After that, the process moves quickly. Schools have 15 days to meet and confer with the parents. 20 U.S.C. § 1415(f)(1)(B)(i). If the parties do not agree to "voluntary" mediation, *id.* § 1415(e)(2)(A)(i), and if the school does not resolve the parents' concerns "within 30 days of the receipt of the complaint," *id.* § 1415(f)(1)(B)(ii), then the matter proceeds to an "impartial due process hearing" conducted by the educational agency, *id.* § 1415(f)(1)(A). The agency has 45 days to resolve the dispute. 34 C.F.R. § 300.515(a).

Congress baked the freedom to contract into the informal-resolution process. Parties can settle their differences on whatever terms they please. *See* 20 U.S.C. § 1415(f)(1)(B)(iii). For example, schools can stipulate that they failed to provide a FAPE, or they can settle without conceding any facts or fault on the FAPE issue. And parents can contract around the IDEA to obtain remedies unavailable under the IDEA, like damages for non-IDEA FAPE claims. *See* Pet. App. 5a; *accord* Perez Br. 37.

ii. Administrative review serves dual purposes: development of the record and prompt determination by an educational expert on the FAPE issue. A developed record is important for agencies and courts alike. IDEA hearing officers make "findings and decisions" based on the evidence presented, 20 U.S.C. § 1415(h), and reviewing courts must give "due weight" to those findings and conclusions, *Rowley*, 458 U.S. at 206, including the officers' "explanation for their decisions," *Endrew F.*, 137 S. Ct. at 1002.

A hearing officer's principal duty is to determine "whether the child received a [FAPE]." 20 U.S.C. § 1415(f)(3)(E)(i). That decision is crucial, because a hearing officer's ability to grant "substantive relief" turns entirely on "the denial of a FAPE." *Fry*, 137 S. Ct. at 754 & n.6. As for specific remedies, a hearing officer can declare that the school has failed to provide a FAPE, issue an injunction ordering the school to take certain actions that will guarantee a FAPE, and award parents reimbursement for past expenses that should have been funded by the state. *See School Comm. of Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369-70 (1985) (*Burlington*); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11 (2009). Hearing officers cannot, however, award

money damages. *See Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246, 254-55 n.1 (2009).

iii. Judicial review of the FAPE issue is available after the agency has issued a final decision based on the record: "Any party aggrieved by the findings and decision [of the agency] … shall have the right to bring a civil action." 20 U.S.C. § 1415(i)(2)(A). Like hearing officers, courts may grant "substantive relief" only if the school "has denied a FAPE." *Fry*, 137 S. Ct. at 754 & n.7. Courts reviewing IDEA FAPE claims can award the same remedies as agencies, and no more. *See Burlington*, 471 U.S. at 369-70; *supra* pp. 6-7.

The prerequisite to judicial review—a final agency decision—applies to any action under any federal law that "seeks relief for the denial of a [FAPE]." *Fry*, 137 S. Ct. at 754. For example, while Congress clarified that the IDEA does not "restrict or limit the rights, procedures, and remedies available under … other Federal laws," Congress also determined that before a plaintiff files "a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g)"—*i.e.*, obtaining an agency decision on the FAPE issue—"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*).

b. In 1970, Congress enacted the IDEA, then called the Education of the Handicapped Act. Pub. L. No. 91-230, §§ 601-662, 84 Stat. 121, 175-88 (1970).

In 1975, Congress amended the IDEA to include 20 U.S.C. § 1415, the section at issue. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 5(a), 89 Stat. 773, 776, 788-89 (1975 Act). Like the IDEA today, the 1975 Act provided that judicial

review is available after the agency has decided the FAPE issue. *See id.* Unlike the IDEA today, the 1975 Act did not mention attorney's fees or other federal laws providing relief for the denial of a FAPE.

In 1984, this Court decided *Smith*, which involved the availability of attorney's fees in FAPE litigation. 468 U.S. at 994. The plaintiffs sought relief for the denial of a FAPE under the IDEA, § 504 of the Rehabilitation Act, and the Constitution. *Id.* at 1009. *Smith* held that the IDEA was "the exclusive avenue" for enforcing the right to a FAPE and that the IDEA did not allow attorney's fees, so the plaintiffs could not win attorney's fees for any of their FAPE claims. *Id.* at 995, 1005, 1009, 1021. Any other ruling, *Smith* said, would allow plaintiffs to "circumvent[] [the IDEA's] administrative procedures and go[] straight to court," obtain "a damages award in cases where no such award is available under the [IDEA]," and win "attorney's fees." *Id.* at 1019-20.

In 1986, Congress responded to *Smith* by amending the IDEA. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (1986 Amendment). The 1986 Amendment addressed just three things: the availability of attorney's fees, the availability of damages under other federal laws, and the ability to circumvent the IDEA's procedures. *See id.* §§ 2-3, 100 Stat. at 796-97. Congress covered the latter two issues in § 1415(*l*). *Id.* § 3, 100 Stat. at 797. Congress did not include any exception to § 1415(*l*)'s exhaustion rule, and Congress has not substantively amended that provision since.

2. Title II of the ADA and § 504 of the Rehabilitation Act address disability-based discrimination. "Title II forbids any 'public entity' from discriminating

based on disability; Section 504 applies the same prohibition to any federally funded 'program or activity.'" *Fry*, 137 S. Ct. at 749 (citing 42 U.S.C. §§ 12131–12132; 29 U.S.C. § 794(a)). Both statutes cover adults and children, both apply in public schools and other settings, *id.*, and both provide the same remedies, 42 U.S.C. § 12133. Both laws allow injunctions and compensatory damages, but neither authorizes punitive damages or the emotional-distress damages at issue in *Fry*, 137 S. Ct. at 752-53 & n.4. *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1571-72 (2022); Opp. 1-2. As for other remedies, the rule is that states and local governments, under Spending Clause statutes, are on the hook for only those remedies explicit in the statute's text or "traditionally available in suits for breach of contract." *Cummings*, 142 S. Ct. at 1571 (citation omitted).

There is "some overlap in coverage" between the IDEA, on the one hand, and Title II of the ADA and § 504 of the Rehabilitation Act, on the other. *Fry*, 137 S. Ct. at 756. Plaintiffs thus might seek relief for the denial of a FAPE under "all three statutes." *Id.* But while the IDEA provides only "relief for the denial of a FAPE," *see id.* at 752-55, Title II and § 504 allow "relief for simple discrimination," *id.* at 756. A plaintiff alleging simple discrimination, and not seeking relief for the denial of a FAPE, need not satisfy § 1415(*l*)'s exhaustion rule. *Id.* at 754-55.

B. Factual and procedural background

1. In December 2017, Perez and his parents filed a complaint with the Michigan Department of Education alleging that Sturgis Public Schools and Sturgis Public Schools Board of Education (together, Sturgis) had failed to provide Perez a FAPE. J.A. 17.

Perez sought relief under the IDEA and Michigan's IDEA analogue, plus the Rehabilitation Act, the ADA, and Michigan's ADA analogue. *See* Pet. App. 2a; Pet. 10. After conferencing with the parties, the hearing officer dismissed the non-IDEA claims and scheduled a June 25, 2018, hearing for the IDEA claims. Pet. App. 2a, 36a-38a.

On June 2, 2018, Sturgis sent Perez a settlement offer. J.A. 70. On June 15, 2018, the parties settled. *Id.* Sturgis "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." Pet. App. 2a. Sturgis did not stipulate that it had denied Perez a FAPE, and Perez did not secure compensation for his non-IDEA FAPE claims, although he "could have." Pet. App. 5a.

2. In October 2018, Perez sued Sturgis seeking relief for the denial of a FAPE under the ADA and Michigan's ADA analogue. J.A. 56-58. Perez requested damages for "severe emotional distress." J.A. 55, 58. Sturgis moved to dismiss, arguing that Perez had not exhausted the procedures under § 1415(f) and (g). The district court agreed and dismissed the complaint. Pet. App. 43a-55a.

3. The Sixth Circuit, in an opinion by Judge Thapar, held that § 1415(*l*)'s exhaustion rule applies whenever a plaintiff seeks relief for the denial of a FAPE, even when he wants a remedy the IDEA does not permit. The court also held that § 1415(*l*) does not include a futility exception and that, even if it did, Perez could not satisfy it. The court affirmed the dismissal of Perez's complaint.

a. The court first explained that § 1415(*l*) applies because, "under *Fry*, it's clear that Perez seeks relief for … the denial of a FAPE." Pet. App. 7a. The court held that Perez could not dodge § 1415(*l*) by requesting emotional-distress damages, a "specific remedy" that "the IDEA does not allow." *Id.* Section 1415(*l*) requires exhaustion whenever a lawsuit seeks "relief that is also available under [the IDEA]." *Id.* (quoting 20 U.S.C. § 1415(*l*)). That means "relief for the wrong that the IDEA was enacted to address"—"the denial of a FAPE." *Id.* Said differently, what matters is "the kind of harm [the plaintiff] wants relief from," not the specific "remedy" the plaintiff prefers. Pet. App. 8a.

The court then held that because Congress did not include a futility exception in § 1415(*l*), it could not read one in. Pet. App. 10a-11a. Perez had to exhaust the procedures for obtaining an agency decision on the FAPE issue, and his failure to do so could not be excused based on a judge-made futility exception. *See* Pet. App. 8a-11a. *Smith* and *Honig v. Doe*, 484 U.S. 305 (1988), the court explained, do not hold otherwise. *Smith* did not "announce a futility exception" to § 1415(*l*) because § 1415(*l*) "did not exist at the time." Pet. App. 11a. And although *Honig* mentioned futility in dictum while discussing "policy consequences" in the context of the IDEA's stay-put provision, 20 U.S.C. § 1415(j) (then codified at § 1415(e)(3)), *Honig* did not suggest, much less hold, that courts may decide FAPE issues before agencies. Pet. App. 11a.

Lastly, the court held that Perez could not invoke a futility exception to § 1415(*l*) even if one existed. Pet. App. 11a-14a. Because any futility exception must apply "to the same extent" as if the "action [had] been brought under [the IDEA]," the court explained, the ultimate question is whether a court would "dismiss

that plaintiff's *IDEA* claim for failure to exhaust." Pet. App. 11a-12a (emphasis added; quoting 20 U.S.C. § 1415(*l*)). "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." Pet. App. 12a. "As Perez's argument could not save an unexhausted IDEA claim, neither can it save an ADA claim under section 1415(*l*)." *Id.* That Perez settled, the court continued, makes no difference, because "when an available administrative process could have provided relief, it is not futile, even if the plaintiff decides not to take advantage of it." Pet. App. 13a. Moreover, exhaustion would have served the dual purposes of developing the record and securing an expert decision on the FAPE issue. Pet. App. 13a-14a.

b. Judge Stranch dissented. She agreed that a "request for money damages for emotional distress does not, on its own, allow a plaintiff to evade the exhaustion requirement." Pet. App. 24a. But she argued that § 1415(*l*) includes an unwritten futility exception that Perez could satisfy. Pet. App. 24a-28a.

c. The Sixth Circuit denied rehearing en banc. Judge Stranch would have granted rehearing. Pet. App. 56a.

SUMMARY OF ARGUMENT

I. Section 1415(*l*) applies to all actions seeking relief for the denial of a FAPE, no matter the plaintiff's preferred remedy.

A. Congress tied § 1415(*l*)'s exhaustion rule to the right to a FAPE, and it did not authorize plaintiffs seeking relief for the denial of a FAPE to bypass the IDEA's reticulated procedures.

1. Section 1415(*l*)'s text focuses on the right to a FAPE, not the specific remedy sought. A plaintiff files an "action" to obtain relief for a wrong. When a tribunal rectifies that wrong, it provides "relief" from it. The IDEA provides relief for the denial of a FAPE. So plaintiffs bringing an action to enforce their right to a FAPE under other federal laws are "seeking relief that is also available under [the IDEA]."

2. Statutory history and context show that § 1415(*l*)'s exhaustion rule covers damages claims. Section 1415(*l*) was a response to *Smith*'s holding that non-IDEA FAPE plaintiffs could not pursue damages. While Congress permitted non-IDEA FAPE claims, it designed § 1415(*l*)'s exhaustion rule to cover all of them, *especially* damages claims.

3. *Fry* emphasized "the primacy of a FAPE in the statutory scheme" and the importance of the IDEA's reticulated procedures for resolving FAPE disputes. 137 S. Ct. at 749, 753, 755. These "elaborate and highly specific procedural safeguards," *Rowley*, 458 U.S. at 205, would have little value if plaintiffs could easily evade them by writing "damages" in their complaint. Unsurprisingly, the circuits uniformly agree that § 1415(*l*) applies to all FAPE actions no matter the remedy requested. And it is not unusual to require exhaustion when plaintiffs want a specific remedy that the administrative process cannot provide, as *Booth v. Churner*, 532 U.S. 731, 734 (2001), shows. Exhaustion channels grievances, not remedies, through the administrative process.

4. Congress had practical reasons for requiring exhaustion no matter the plaintiff's preferred remedy. Educational agencies, not courts, are the FAPE experts. Requiring them to go first promotes rapid,

expert resolution of FAPE issues. It also prioritizes the best interests of the child over nonurgent suits for damages, and also allows development of an administrative record facilitating judicial review.

B. Perez's counterarguments fail. *First*, Perez takes the statutory terms in isolation and ignores the contrast between *Smith* and the 1986 Amendment showing that Congress meant to channel damages claims through the IDEA's procedures. *Second*, Perez cannot find support in *Fry*, which underscored the IDEA's reticulated procedures and rejected "a 'magic words' approach [that] would make § 1415(*l*)'s exhaustion rule too easy to bypass." 137 S. Ct. at 755 (citation omitted). *Third*, Perez wrongly tries to minimize the benefits of exhaustion: prioritizing the child's education through a process with input from educational experts while developing a record that benefits litigants and courts.

C. This case highlights the risks associated with allowing plaintiffs to circumvent the administrative process. Perez's novel rule would raise difficult questions, like whether the requested damages overlap with IDEA relief and whether they are even available under the other law. Indeed, *Cummings* shows that the emotional-distress damages in *Fry* are not actually available under the ADA, and the lost-income damages Perez now wants (for the first time) likely are not, either.

II. Section 1415(*l*) does not contain a futility exception, much less one Perez can invoke.

A. Congress did not include a futility exception in § 1415(*l*). Courts may not read judge-made exceptions into statutory exhaustion requirements. *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992), *superseded by*

statute as stated in Woodford v. Ngo, 548 U.S. 81 (2006). And § 1415(*l*)'s exhaustion rule is mandatory, with no statutory exceptions. What's more, both § 1415 and other statutes show that Congress knows how to write exceptions when it wants to. Its decision not to do so in § 1415(*l*) makes sense given agencies' expertise in fact-intensive FAPE disputes, and the goal of delivering a FAPE quickly and efficiently.

B. Even if § 1415(*l*) allows some futility exception, Perez cannot invoke it. Perez's only argument is that § 1415(*l*) ports in a futility exception from elsewhere in the IDEA because it requires exhaustion only "to the same extent" as if "the action [had] been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). The key question, then, is whether an *IDEA* plaintiff seeking damages for the denial of a FAPE could invoke a futility exception to circumvent the IDEA's reticulated procedures. If not, then a *non-IDEA* plaintiff seeking damages for the denial of a FAPE cannot do so either.

When a plaintiff seeks relief for the denial of a FAPE under the IDEA, neither the unavailability of damages nor settlement constitutes futility. Exhaustion can be excused as futile or inadequate if the agency cannot decide the legal issues presented, or otherwise is powerless to grant relief that a court can award. *See McCarthy*, 503 U.S. at 146-49. But exhaustion is not excused when *neither* the court *nor* the agency can award the requested relief. That claim is not futile to bring before an agency; it simply lacks merit anywhere. Just so here: courts can no more award IDEA damages than agencies. Moreover, once an IDEA plaintiff has settled, he cannot invoke futility to bring that same claim in court. Perez thus cannot invoke futility, because a non-IDEA plaintiff must

exhaust "to the same extent" as a hypothetical IDEA plaintiff. Perez Br. 18-19.

Perez's counterarguments lack merit. He does not confront how futility works, or cite any authority suggesting that the powerlessness of courts and agencies *alike*, or the settlement of his claim, could constitute futility. He also ignores his own framework, focusing on his *non-IDEA* action rather than "a hypothetical *IDEA* action." Br. 18 (emphasis added). And his approach is likely to inflict the very harm he claims his rule will prevent. If Perez wins, more FAPE disputes will focus on money damages, rather than on quickly securing a FAPE for students through the reticulated administrative procedures that Congress created.

C. This case, and particularly the third question Perez and the government try to add, underscores the risks of adopting an atextual futility exception.

1. Perez and the government's new argument that settlement equals exhaustion is both improper and incorrect. Settling does not exhaust the procedures under subsections (f) and (g). It resolves and ends the IDEA dispute without completing the administrative process—thus, under Perez's own porting theory, ending his non-IDEA FAPE dispute, too.

2. Adopting a futility exception would lead to confusion in many IDEA cases, all while producing little benefit in the rare case like this one. Parties will remain free to contract around whatever rule the Court announces. And Perez's rule, in all likelihood, will prioritize money over education, reducing parties' willingness to settle and producing the very harm Perez decries—all in the pursuit of damages the ADA probably does not even authorize.

ARGUMENT

I. Section 1415(*l*) applies to all actions seeking relief for the denial of a FAPE, no matter the plaintiff's preferred remedy.

Statutory text, history, and context all show that § 1415(*l*)'s exhaustion rule hinges on whether the action seeks relief for the denial of a FAPE, not the plaintiff's preferred remedy. That understanding aligns with *Fry*, the circuit consensus, familiar statutory exhaustion rules, and practical considerations. Perez's counterargument that "relief" must mean the specific remedy requested ignores statutory context and history, misreads *Fry*, and makes little sense.

A. Congress tied § 1415(*l*)'s exhaustion rule to the right to a FAPE and did not authorize a plaintiff seeking relief for the denial of a FAPE to bypass the IDEA's reticulated procedures.

1. Section 1415(*l*)'s text focuses on the right to a FAPE, not the specific remedy sought.

To file an "*action*" under federal law "seeking *relief* that is also *available* under [the IDEA]," plaintiffs must exhaust "the procedures under subsections (f) and (g) … to the same extent as would be required had the *action* been brought under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphases added). In the context of a lawsuit, the ordinary meaning of "action"—which appears twice in § 1415(*l*)—is a "proceeding … by which one party prosecutes another for the enforcement or protection of a right, [or] the redress or prevention of a wrong." *Black's Law Dictionary* 26 (5th ed. 1979). Relatedly, "relief" means "the 'redress or benefit' that

attends a favorable judgment." *Fry*, 137 S. Ct. at 753 (citation omitted). And something is "available" when it is "accessible or may be obtained." *Ross v. Blake*, 578 U.S. 632, 642 (2016) (citation omitted).

Putting everything together, non-IDEA plaintiffs must satisfy § 1415(*l*)'s exhaustion rule when they seek to enforce their right to a FAPE, no matter the specific remedy sought. The whole point of an "action" is to redress the denial of a right—*i.e.*, obtain "relief" from harm. So when a plaintiff files an "action" seeking "relief" under the IDEA, he seeks redress for the denial of a FAPE. The redress sought centers on "the kind of harm [the plaintiff] wants relief from"—the denial of a FAPE—not the specific steps courts (or agencies) can take to remedy the situation. Pet. App. 8a. Such redress is "accessible or may be obtained" under the IDEA, whether in courts or agencies, because "the denial of a FAPE" is the very thing for which the IDEA provides "relief." *Fry*, 137 S. Ct. at 752. Because the IDEA, by design, provides relief for the denial of a FAPE, plaintiffs seeking to enforce their right to a FAPE under other federal laws, like Title II of the ADA, are "seeking relief that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*).

2. Statutory history and context show that § 1415(*l*) channels damages claims through the administrative process.

Section 1415(*l*) is Congress' response to *Smith*, which held that the IDEA was the "exclusive avenue" for enforcing the right to a FAPE. 468 U.S. at 1009. Any other ruling, *Smith* explained, would allow plaintiffs to (1) "circumvent[] [the IDEA's] administrative procedures and go[] straight to court," (2) obtain "a

damages award in cases where no such award is available under the [IDEA]," and (3) win "attorney's fees." *Id.* at 1019-20 (emphasis added).

Congress addressed all three issues in § 1415(*l*). For example, it clarified that although the IDEA is not the exclusive avenue for FAPE claims, plaintiffs seeking to enforce their FAPE rights under other federal laws cannot sue until they exhaust the IDEA's reticulated procedures. Most notably, Congress did not authorize non-IDEA FAPE plaintiffs to go straight to court whenever they want damages—a remedy the IDEA does not provide—even after *Smith* had dealt with that very scenario. *Supra* p. 8.

That silence is telling. Had Congress wanted to endorse the "'anything goes' regime" *Smith* rejected, *Fry*, 137 S. Ct. at 750, it would have let non-IDEA FAPE plaintiffs seeking damages ignore § 1415(*l*). But it didn't. Congress instead mandated exhaustion whenever a non-IDEA plaintiff seeks to enforce her FAPE rights, no matter her preferred remedy. Said differently, Congress enacted § 1415(*l*) to channel all non-IDEA FAPE claims, *especially* damages claims, through the administrative process.

3. *Fry*, circuit uniformity, and familiar statutory exhaustion rules support reading § 1415(*l*) to focus on the FAPE.

a. As the courts of appeals have correctly observed, *Fry*'s reasoning supports the conclusion that § 1415(*l*) focuses on the right to be enforced or "the conduct the plaintiff complains about," not the specific remedy desired. Pet. App. 8a (quoting *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 648 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 2803 (2020)). *Fry*

underscored "the primacy of a FAPE in the statutory scheme," 137 S. Ct. at 753, suggesting that the "main consideration" in analyzing § 1415(*l*)'s reach is "the nature of the grievance," Pet. App. 8a, or the "conduct" underlying the request for "redress," *Fry*, 137 S. Ct. at 754, not the specific ways to make the plaintiff whole. *Fry*'s reasoning shows that an action falls under § 1415(*l*) when the plaintiff charges a denial of a FAPE, "the IDEA's core guarantee." *Id.* at 748.

Fry also stressed the importance of honoring the IDEA's reticulated procedures, *id.* at 749, 755, just like *Endrew F.*, 137 S. Ct. at 994, 1001-02, and *Rowley*, 458 U.S. at 205-08. That objective is especially important here. There would be little point in creating "elaborate and highly specific procedural safeguards," *id.* at 205, if a plaintiff could easily evade compliance with the "formal procedures for resolving disputes," *Fry*, 137 S. Ct. at 749, simply by writing "damages" in his complaint. Moreover, why would Congress promote "collaboration" between schools and parents, telling them to "fully air their respective opinions" about a FAPE "through state administrative proceedings," if parents could sidestep those discussions by suing for damages in court? *Endrew F.*, 137 S. Ct. at 994, 1001. The IDEA's carefully crafted procedures—and their goal of promoting school-based collaboration to help children learn—would mean little if § 1415(*l*)'s exhaustion rule did not reach all non-IDEA FAPE claims.

Given all this, it is unsurprising that the circuits uniformly agree that § 1415(*l*) applies to all actions seeking relief for the denial of a FAPE, no matter the plaintiff's preferred remedy. *See* Cert Reply 7.

b. It is not unusual to require exhaustion when plaintiffs want a remedy, "notably money damages," that the administrative process cannot provide. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

Take the Prison Litigation Reform Act (PLRA), which provides that "[n]o action shall be brought with respect to prison conditions … until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). In *Booth*, 532 U.S. at 734, the Court held that a prisoner must exhaust the administrative process even when he seeks a remedy (damages) that the administrative process does not offer. While the PLRA mandates exhaustion of available *remedies*, the Court explained, exhaustion is "decidedly procedural," meaning the specific remedy sought does not matter. *Id.* at 739. Indeed, *Booth* rejected as "inconclusive" the prisoner's argument that "remedy" must mean the "specific relief obtainable at the end of a process of seeking redress," because "depending on where one looks," "remedy" is also the "means of enforcing a right or preventing or redressing a wrong." *Id.* at 738 (citation omitted). *Booth* thus held that the prisoner had "to exhaust the grievance procedures offered, whether or not" those procedures authorized damages. *Id.*

The point of statutory exhaustion requirements, *Booth* confirms, is to channel *grievances* through administrative regimes, meaning parties cannot proceed piecemeal based on their preferred *remedy*. So it makes sense that Congress would require exhaustion of § 1415(f) and (g)'s procedures whenever the grievance involves the denial of a FAPE.

4. Congress had practical reasons for requiring exhaustion no matter the plaintiff's preferred remedy.

a. Exhaustion serves two main purposes: it enables agencies to exercise their "special expertise," *McCarthy*, 503 U.S. at 145, and it "promotes efficiency," *Woodford*, 548 U.S. at 89. Both purposes are essential to the IDEA.

The IDEA does not empower courts "to elaborate a federal common law of public education." *Endrew F.*, 137 S. Ct. at 998. Congress instead gave educational agencies the "primary responsibility" for ensuring that every qualifying child receives a FAPE. *Rowley*, 458 U.S. at 207. Congress also established a tiered resolution process to ensure that educational agencies "will have had a complete opportunity to bring their expertise and judgment to bear" before "any dispute reaches court." *Endrew F.*, 137 S. Ct. at 1001. Those policy decisions make sense. With all FAPE issues, agencies have "specialized knowledge and experience" that "courts lack," *Rowley*, 458 U.S. at 208 (citation omitted), whatever the law at issue and whatever the remedy sought. That's why courts rely on the administrative record even in non-IDEA FAPE cases. *See, e.g.*, *J.L. v. Lower Merion Sch. Dist.*, No. 20-cv-1416, 2022 WL 4295291, at *21 (E.D. Pa. Sept. 15, 2022); *Zachary J. v. Colonial Sch. Dist.*, No. 19-cv-652, 2022 WL 580309, at *14 (E.D. Pa. Feb. 24, 2022); *Rogich v. Clark Cnty. Sch. Dist.*, No. 17-cv-01541, 2021 WL 4781515, at *8-10 (D. Nev. Oct. 12, 2021).

Speed and efficiency are also critical to the IDEA. As explained, the administrative process is designed to progress quickly and "produce a useful record for subsequent judicial consideration." *McCarthy*, 503

U.S. at 145; *see supra* pp. 5-7. If plaintiffs could bypass that process, however, they would burden courts with developing the record and sifting through difficult questions of education policy. *Rowley*, 458 U.S. at 208. What's more, requiring exhaustion in all FAPE actions is a manageable rule; requiring exhaustion only after a court separates law from equity is not. *Contra* Perez Br. 21. Disentangling legal and equitable remedies is often "difficult," *Ross v. Bernhard*, 396 U.S. 531, 533 (1970), especially given artful pleading, *see Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002). *Fry* suggests the better rule: A court should ask whether "the gravamen of a complaint seeks redress for a school's failure to provide a FAPE." 137 S. Ct. at 755. If it does, then § 1415(*l*)'s exhaustion rule applies, no matter the remedy requested.

b. Requiring exhaustion in all FAPE cases, no matter the plaintiff's preferred remedy, is consistent with Congress' primary purpose behind the IDEA: "to ensure that all children with disabilities have available to them a [FAPE]." 20 U.S.C. § 1400(d)(1)(A). In crafting the IDEA's administrative procedures, Congress found that "[p]arents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways" to achieve the law's purpose. *Id.* § 1400(c)(8).

Indeed, Perez agrees that "the IDEA administrative process … is geared toward ensuring that students with disabilities receive a FAPE, and seeking relief through that process is usually faster and more cost-effective than filing a non-IDEA lawsuit." Br. 25. And he acknowledges that, "[i]n most cases, parents whose children are not receiving a FAPE will want educational relief from the school district as quickly and

efficiently as possible." Br. 24-25. But he fails to draw those premises to their logical conclusion. Because of "the primacy of a FAPE in the statutory scheme," *Fry*, 137 S. Ct. at 753, and the fact that Congress crafted administrative procedures specifically to deliver a FAPE to a student as quickly as possible, it makes sense that Congress would want those procedures followed whenever a student has alleged that he has been denied a FAPE. That's why § 1415(*l*) makes clear that a student with, for example, a money damages claim for the denial of a FAPE under another federal law has the right to pursue those damages—but only after following the procedures designed to ensure that he receives a FAPE as quickly as possible.

The policy implications of the competing rules clarify Congress' intent. The downside of Perez's rule—not requiring exhaustion every time a plaintiff claims a FAPE denial—is that parents could shift the focus of the dispute to recovering money damages rather than securing a FAPE for their child as quickly as possible. The result is that some students might never receive the FAPE the IDEA promises them. The downside of Sturgis' rule—requiring exhaustion in all FAPE cases—is that a claim for damages might have to wait for the IDEA's administrative procedures to finish. That delay is minor in the timescale of litigation, and it makes sense that Congress would be willing to tolerate it to focus everyone's efforts on first ensuring that a child *receives* a FAPE. That is especially true where the damages requested—like lost-income—turn on the adequacy of the contested education in the first place.

B. Perez's counterarguments fail.

1. Statutory text, history, and context all undermine Perez's position.

a. Perez begins by asserting that "Congress enacted Section 1415(*l*) to overturn *Smith*." Br. 15. But he then ignores what *Smith held* (that plaintiffs cannot pursue damages for non-IDEA FAPE claims) and how Congress responded (by allowing such damages under other statutes, but prioritizing the IDEA and its administrative process). The contrast between *Smith* and the 1986 Amendment shows that § 1415(*l*)'s exhaustion rule applies to all non-IDEA FAPE claims, especially damages claims. *Supra* pp. 18-19.

b. As to text, Perez begins with the word "seeking," Br. 16-17, 27. But as *Fry* explains, "seeking" makes § 1415(*l*)'s exhaustion rule turn on the "crux" of the plaintiff's complaint rather than on what the plaintiff "could have sought." 137 S. Ct. at 755. Perez doesn't dispute that the "crux" of his complaint concerns his right to a FAPE. That means § 1415(*l*) applies unless the text recognizes a distinction based on the specific remedies requested. The ordinary meaning of "seeking" sheds no light on that question.

Perez also argues that because "relief" can be "a synonym for remedies," exhaustion is not required when a FAPE-seeking plaintiff wants "a remedy that the IDEA cannot provide." Br. 18, 28; *see* U.S. Br. 16-17. But even assuming "relief" can sometimes mean "remedy," it doesn't follow that "relief" in § 1415(*l*) "necessarily refers to the specific remedies requested." Perez Br. 28. As *Booth* explained, while "remedy" can sometimes refer to specific awards, like damages, it also can refer to the "means of enforcing a right or

preventing or redressing a wrong." 532 U.S. at 738 (citation omitted); *see also Black's Law Dictionary* 1163 (5th ed. 1979); *American Heritage Dictionary* 1045 (2d College ed. 1982). Because "this exercise in isolated definition is ultimately inconclusive," "the congressional objective" must be discerned through "statutory history" and "context." *Booth*, 532 U.S. at 738-39. And as explained, the contrast between *Smith* and the 1986 Amendment shows that § 1415(*l*)'s exhaustion rule applies to *all* non-IDEA FAPE claims. *Supra* pp. 18-19. Still more, the ordinary meaning of "action" demonstrates that the trigger for exhaustion focuses on the right to be enforced—the FAPE—not the specific steps courts (or agencies) can take to remedy the problem.

Those clues are a better indication of § 1415(*l*)'s meaning than the two instances of "relief" in other subsections. *Contra* Perez Br. 17-18; U.S. Br. 17-18. For one thing, playing the isolated-definition game with "relief" in 20 U.S.C. § 1415(i)(2)(C)(iii) and (3)(D)(i)(III) is no more conclusive than it is with "relief" in § 1415(*l*). For another, the definition of "relief" in other subsections does not control the meaning of "relief" in § 1415(*l*). As explained, § 1415(*l*) is best read to focus on the harm the plaintiff complains about. As *Fry* put it, a "complaint seeking redress for those other *harms*, independent of any FAPE denial, is not subject to § 1415(*l*)'s exhaustion rule." 137 S. Ct. at 754-55 (emphasis added).

2. *Fry* does not support Perez.

Leaning on *Fry*, Perez argues that "exhausting a money damages claim is not required." Br. 20. But § 1415(*l*) mandates exhaustion of the *procedures* for obtaining a final agency decision on the FAPE issue,

not *specific remedies*. In fact, it would be "very strange" to require parties to exhaust specific remedies. *Booth*, 532 U.S. at 739.

Perez misreads *Fry*, too. *Fry* said that § 1415(*l*) "treats the plaintiff as 'the master of the claim,'" 137 S. Ct. at 755 (citation omitted), not master of the statute. Indeed, *Fry* highlighted the IDEA's reticulated procedures and rejected "a 'magic words' approach [that] would make § 1415(*l*)'s exhaustion rule too easy to bypass." *Id.*; *see supra* pp. 19-20. Yet that is precisely what Perez wants. Under his view, plaintiffs may circumvent the administrative process by writing "damages" in their complaint.

Perez's foray beyond *Fry* fails. Pointing to opinions that use "relief" and "remedy" interchangeably, *see* Perez Br. 17; U.S. Br. 17, doesn't prove anything, because courts "don't read precedents like statutes." *Herr v. United States Forest Serv.*, 803 F.3d 809, 819 (6th Cir. 2015) (Sutton, J.). That this Court sometimes says "relief" when describing the specific steps a court might take to remedy a problem, *see, e.g.*, *Biden v. Texas*, 142 S. Ct. 2528, 2536 (2022), sheds no light on what "relief" means in § 1415(*l*). Statutory history and context are the best indicators of congressional intent, and they support Sturgis.

Federal Rule of Civil Procedure 8 is likewise inapposite. *Contra* Perez Br. 17. Unlike § 1415(*l*), Rule 8 explicitly states that a complaint may include "different *types* of relief." Fed. R. Civ. P. 8(a)(3) (emphasis added). That difference in language suggests a difference in meaning. And again, just because "relief" can, in some circumstances, mean "remedy" does not prove that Congress intended "relief" in § 1415(*l*) to mean the specific remedies requested. Moreover, Perez

ignores Rule 54(c), which instructs the court to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings," *id.* 54(c)—that is, what the law provides for the alleged harm, but not necessarily the specific type of redress the plaintiff asks for. Context matters.

3. Perez's policy arguments fail.

Perez tries to downplay the benefits of exhaustion, calling them "marginal at best" when plaintiffs want damages for the denial of a FAPE. Br. 24. That is incorrect. While non-IDEA FAPE actions involve other issues, they "arise out of [the alleged] denial of a FAPE," *J.L.*, 2022 WL 4295291, at *21, the precise issue hearing officers are uniquely qualified to decide, and that courts are ill-suited to answer without expert guidance, *see Endrew F.*, 137 S. Ct. at 1001. As explained, courts in non-IDEA FAPE cases often rely on the administrative record. *Supra* p. 22. That record can be especially helpful for damages claims, which often are bound up with educational policy. Here, for example, Perez wants lost-income damages, but even assuming the ADA authorizes such damages, calculating them would depend on exactly what FAPE Perez allegedly didn't get, and what he will receive in the next several years.

Perez admits that his interpretation would allow "parallel litigation" in state agencies and federal courts. Br. 26. The problems associated with parallel litigation are well-known: it undermines "core principles of federalism, comity, consistency, and judicial economy." *McDonough v. Smith*, 139 S. Ct. 2149, 2158 (2019). While Perez suggests (Br. 26) that stays are a good solution, he ignores that IDEA FAPE actions and non-IDEA FAPE actions are "in essence" the same

thing. *Fry*, 137 S. Ct. at 755. Thus, "there is no reason to put the onus to safeguard comity on district courts exercising case-by-case discretion." *McDonough*, 139 S. Ct. at 2158.

C. This case highlights the risks associated with allowing plaintiffs to circumvent the IDEA's reticulated procedures.

Courts have no difficulty applying the rule that § 1415(*l*) covers all actions for the denial of a FAPE, no matter the plaintiff's preferred remedy. But courts would have trouble with Perez's novel rule. The questions would multiply: Are the requested damages equitable or legal? Is there some overlap between the requested damages and monetary relief available under the IDEA? Could IDEA-provided FAPE services mitigate the requested damages (and how would litigants or courts know without exhaustion)? Are the requested damages even available?

This case highlights these concerns. Until his cert-stage reply brief, Perez wanted only emotional-distress damages, Opp. 10, the same kind of damages at issue in *Fry*, 137 S. Ct. at 752-53 & n.4. But *Cummings* makes clear that the ADA doesn't authorize emotional-distress damages, 142 S. Ct. at 1571-72; Opp. 6, so Perez has pivoted to a lost-income theory. But lost-income damages likely aren't available under the *Cummings* Spending Clause inquiry, either. Section 504 of the Rehabilitation Act (and Title II of the ADA, by extension) does not expressly provide for lost-income damages, and lost-income damages are not traditionally available because students cannot bring "a breach of contract claim attacking the general quality of an education." *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (citing cases). And *Cummings*

aside, even if lost-income damages are available, they depend on the quality of the education and any FAPE already—or still to be—provided. Given all this, the Court should be particularly cautious to adopt the circumvention rule Perez seeks.

* * *

Section 1415(*l*)'s exhaustion rule applies to all actions seeking relief for the denial of a FAPE, no matter the specific remedy requested. Because Perez seeks relief for the denial of a FAPE, § 1415(*l*) applies.

II. Section 1415(*l*) does not contain a futility exception, much less one Perez can invoke.

Courts may not read judge-made exceptions into statutory exhaustion requirements. Because § 1415(*l*) is a statutory exhaustion requirement—with no exceptions—the Court may not read one in. Congress knew how to create a futility exception, and it had good reasons for not doing so in § 1415(*l*).

Perez doesn't claim otherwise. Instead, he raises a new argument—that there's a futility exception somewhere in § 1415, and it can be ported into § 1415(*l*). Perez is wrong. But even if such an exception exists, Perez cannot invoke it, a conclusion that flows directly from Perez's own analytical framework.

A. The Court should honor Congress' choice not to put a futility exception in § 1415(*l*).

1. Courts may not read judge-made exceptions into statutory exhaustion requirements.

Statutory and common-law exhaustion differ. Common-law exhaustion is pliable. *See Ross*, 578 U.S. at 639. As a leading treatise explains, "a large portion

of all exhaustion opinions … are often not decisions about exhaustion but decisions about how far exhaustion law can be bent to produce desired results on the merits." 4 K. Davis, *Administrative Law Treatise* § 26:10, p. 457 (2d ed. 1983).

Statutory exhaustion is fixed. "Where Congress specifically mandates, exhaustion is required." *McCarthy*, 503 U.S. at 144. As the Court unanimously reaffirmed in *United States v. Palomar-Santiago*, 141 S. Ct. 1615, 1621 (2021) (citation omitted), at the government's urging, courts "may not excuse a failure to exhaust" mandatory exhaustion requirements by reading in atextual exceptions. *See* U.S. Br. 16, *Palomar-Santiago*, No. 20-437 (U.S. Feb. 22, 2021). "Time and again, this Court has taken [mandatory exhaustion] statutes at face value," *Ross*, 578 U.S. at 639, refusing to "read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise," *Booth*, 532 U.S. at 741 n.6.

2. Section 1415(*l*) mandates exhaustion, barring courts from creating futility exceptions.

Section 1415(*l*)'s exhaustion rule is mandatory. Before a plaintiff may file a non-IDEA FAPE action, he "shall" exhaust "the procedures under subsections (f) and (g) … to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). That language is mandatory—Perez doesn't argue otherwise—and it doesn't contain any exceptions, including futility. Thus, a student who wants to sue a school district for the denial of a FAPE must obtain an agency decision on the FAPE issue. Courts "may not" engraft an exception onto § 1415(*l*), *Palomar-Santiago*, 141 S. Ct. at 1621 (citation

omitted)—not for "futility," *Booth*, 532 U.S. at 741 n.6; "special circumstances," *Ross*, 578 U.S. at 635; or any of the other "numerous exceptions" that might have applied had Congress not spoken explicitly, *McKart v. United States*, 395 U.S. 185, 193 (1969). Because § 1415(*l*) mandates exhaustion of specific procedures, with no exceptions, courts may not excuse exhaustion based on an atextual futility exception.

3. Context confirms that Congress knew how to create a futility exception in § 1415(*l*) if it wanted to.

Congress knows how to write exceptions. Section 1415 itself includes over 20 exceptions to the IDEA's reticulated procedures. Yet Congress did not create an exception to § 1415(*l*)'s exhaustion rule, including futility. The Court should "ascribe significance" to this disparate treatment, *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020), because it "strongly suggests [Congress] acted 'intentionally and purposefully'" in not creating a futility exception, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1813 (2019) (citation omitted). Other statutes confirm that Congress knows how to create exhaustion exceptions. And the contrast between *Smith* and the 1986 Amendment shows that Congress did not silently adopt a futility exception in § 1415(*l*).

a. Start with § 1415(*l*). The first half (up until "except that") states a rule: Nothing in the IDEA affects plaintiffs' rights and remedies under other federal antidiscrimination laws. The second half (from "except that" onward) states an exception: before plaintiffs can enforce their FAPE rights under other federal laws, they must exhaust certain procedures. This explicit exception to a rule—in the very provision at issue—strongly counsels against reading a futility

exception into § 1415(*l*). Had Congress wanted courts to excuse a plaintiff's failure to exhaust on futility grounds, it would have said so.

Other provisions show that Congress codified exceptions when it wanted to. For example, Congress provided that certain information communicated to parents shall be "in the native language of the parents, *unless it clearly is not feasible to do so*." 20 U.S.C. § 1415(b)(4) (emphasis added); *see id.* § 1415(d)(2). Congress' choice to create a feasibility exception in 1975, 1975 Act, § 5(a), 89 Stat. at 776, 788, highlights its decision not to create a futility exception in 1986.

The fact is, § 1415 includes over 20 exceptions to rules. Congress used clear excepting language like "except that," 20 U.S.C. § 1415(i)(1)(A), "[e]xcept as," *id.* § 1415(j), or "unless," *id.* § 1415(f)(3)(B). What's more, some of the exceptions are headers, showing that Congress is often unambiguously clear when it wants to create exceptions. *See id.* § 1415(f)(3)(D), (i)(3)(E), (i)(3)(G), (k)(5)(C). Section 1415(*l*) contains no such clarity as to futility.

b. Statutes predating § 1415(*l*) likewise show that Congress knew how to enact exceptions to exhaustion. For example, Congress included a futility exception in the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, § 413(c), 83 Stat. 742, 794. While Congress required parties seeking benefits to first file their claims with a state agency, it excused that exhaustion requirement when "the filing of a claim under [state] law would clearly be futile." *Id.* Similarly, Congress put a "reasonable grounds" exception to exhaustion in the Fair Labor Standards Amendments of 1955, Pub. L. No. 391, § 5(f), 69 Stat. 711, 712, and an "extraordinary circumstances"

exception to exhaustion in the Occupational Safety and Health Safety Act of 1970, Pub. L. No. 91-596, § 11(a), 84 Stat. 1590, 1602, and the Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, § 201, 91 Stat. 1290, 1291, 1306.

c. Statutory context and history confirm that Congress did not silently adopt a futility exception when it enacted § 1415(*l*). Contrary to Perez's argument (Br. 43-44), *Smith* did not "emphasize[] that courts had long excused an IDEA plaintiff from exhausting the IDEA's administrative process if such proceedings 'would be futile or inadequate.'" U.S. Br. 28 (quoting *Smith*, 468 U.S. at 1014 n.17). Instead, *Smith* noted—without resolving—a split of authority on whether such an exception existed, specifically in the context of "procedural deficiencies." *Smith*, 468 U.S. at 1014 n.17 (contrasting "some courts" with "other courts").

Given the unresolved split among a "smattering of lower court opinions," the existence of a futility exception was not so "unquestioned" that Congress must have known about and silently "endorsed it," *BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1541 (2021) (citation omitted), when amending the IDEA in 1986. And because the split involved only "procedural deficiencies," Congress could not have silently adopted a futility exception extending to *FAPE disputes* anyway. Drawing meaning from silence is problematic "in any context." *Cummings*, 142 S. Ct. at 1574. That is particularly true here, where Congress responded emphatically to *Smith* yet said nothing about futility.

4. Congress had good reasons not to create a futility exception.

When Congress enacted § 1415(*l*), it knew that resolving FAPE issues requires "specialized knowledge and experience," something "courts lack." *Rowley*, 458 U.S. at 208 (citation omitted). It therefore had good reason not to allow FAPE plaintiffs to run straight to court, cutting off hearing officers' opportunity to "bring their expertise and judgment to bear." *Endrew F.*, 137 S. Ct. at 1001. That FAPE issues are "fact-intensive" proves the point. *Id.* at 999. FAPE plaintiffs will obtain relief faster if agencies "experienced in addressing" these difficult issues can resolve them first, *Fry*, 137 S. Ct. at 754—under deadlines that don't apply to courts, 34 C.F.R. § 300.515(a). And getting students prompt FAPE relief through the statute's administrative procedures is the IDEA's primary goal. *Supra* pp. 23-24. Federal proceedings will move faster, too, because a developed administrative record, which courts can look to in non-IDEA FAPE cases, *supra* p. 22, will expedite discovery.

Doctrinal and practical justifications also support honoring Congress' decision not to include a futility exception in § 1415(*l*). The rule that courts may "not read 'exceptions into statutory exhaustion requirements,'" *Ross*, 578 U.S. at 640 (citation omitted), is just a specific application of the rule that courts "cannot" "read into the law words which plainly are missing," *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939), as they are here. And the consequences of abandoning that principle would be significant. If one can read a futility exception into § 1415(*l*), then one can read the other "numerous exceptions" to common law exhaustion into § 1415(*l*). *McKart*, 395 U.S. at 193. Such an unprincipled

approach would turn § 1415(*l*)'s exhaustion rule "into a largely useless appendage," *Woodford*, 548 U.S. at 93, devaluing the detailed procedures Congress crafted.

B. Even if § 1415(*l*) allows some futility exception, Perez cannot invoke it.

The only way § 1415(*l*)'s exhaustion rule can have a futility exception is if the exception exists somewhere else. So that's all Perez (Br. 42-45) and the government (Br. 24) argue. They say a futility exception is lurking somewhere in § 1415—the government says § 1415(i)—and that it applies under § 1415(*l*) "to the same extent" as if "the action [had] been brought under [the IDEA]." 20 U.S.C. § 1415(*l*).

For starters, this "porting" theory rests on the incorrect premise that Congress silently adopted a futility exception in § 1415(i) (or somewhere else) when it enacted § 1415(*l*) in 1986. It couldn't have, given the contrast between *Smith* and the 1986 Amendment. *Supra* p. 34.

But even assuming § 1415(*l*) ports in an exception, it is of no use to Perez. The exception could extend only "to the same extent" as if "the action [had] been brought under [the IDEA]." And when a plaintiff seeks relief under the IDEA for the denial of a FAPE, neither the unavailability of damages nor settlement constitutes futility. Because Perez could not have invoked a futility exception had he sued under the IDEA, he cannot invoke a futility exception here.

1. Assuming § 1415(*l*) contains a futility exception, the exception extends only "to the same extent" as if "the action [had] been brought under" the IDEA.

If a futility exception applies to § 1415(*l*), it extends only as far as whatever futility exception applies to FAPE actions brought under the IDEA. The statute says that a plaintiff shall exhaust "to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). That plain text means that any futility exception in § 1415(*l*) cannot be broader than the exception for IDEA FAPE actions.

This textual condition is critical, because it instructs courts to treat an action for the denial of a FAPE under "other Federal laws protecting the rights of children with disabilities" as if it were an IDEA action. *Id.* Perez agrees, explaining that "a court must imagine a hypothetical IDEA action based on the same alleged misconduct and seeking the same relief as the non-IDEA action actually at issue." Br. 18-19. Thus, for instance, when a plaintiff seeking damages under Title II of the ADA claims futility, the key question is whether a plaintiff seeking damages under the IDEA for that FAPE denial could invoke a futility exception to circumvent the IDEA's reticulated procedures. If not, then the ADA plaintiff cannot invoke futility, either.

2. When a plaintiff seeks relief for the denial of a FAPE under the IDEA, neither the unavailability of damages nor settlement constitutes futility.

There is no futility where a claim simply lacks merit or has settled. Neither situation resembles any of the three circumstances in which this Court has

excused exhaustion: (1) the agency cannot decide the legal issues presented, or otherwise is powerless to grant relief available in court; (2) resort to an agency would prejudice a subsequent lawsuit; or (3) the agency is biased. *See McCarthy*, 503 U.S. at 146-49. Perez invokes only the first category. But he cannot satisfy it. An IDEA claim for damages isn't futile. It is meritless, because no tribunal—neither a hearing officer nor a court—can grant a remedy the statute doesn't authorize. And a settled IDEA claim doesn't satisfy futility, either. It is resolved.

a. Subject to an important limitation discussed below, exhaustion may be futile where an agency lacks "competence to resolve the particular type of issue presented" or "authority to grant the type of relief requested." *Id.* at 147-48. In *Carr v. Saul*, 141 S. Ct. 1352, 1361 (2021), for example, this Court excused the plaintiffs' failure to exhaust their claim that Social Security Administration ALJs were unconstitutionally appointed because the ALJs could not rule on, much less provide relief for, such claims. In *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 404-06 (1988), the Court similarly excused a plaintiff's failure to exhaust a challenge to a regulation before an agency "fiscal intermediary" because the intermediary's role was "confined to the mere application of [agency] regulations," whereas a court was competent to entertain the challenge and provide relief. In *Montana National Bank of Billings v. Yellowstone County*, 276 U.S. 499, 505 (1928), the Court excused a taxpayer's failure to exhaust because the agency, unlike a court, "was powerless to grant any appropriate relief." And in *Reiter v. Cooper*, 507 U.S. 258, 269 (1993) (citation omitted), the exhaustion doctrine was "inapplicable" because an agency had reasonably interpreted the relevant

statutory scheme as giving it "no power to decree" the requested remedy, whereas a party's "recourse *must* be to the courts."

But the rule that exhaustion may be futile when an agency cannot decide a claim or grant relief applies only when a reviewing court *can* do those things. If a reviewing court cannot decide the issue or grant relief either, then the claim is simply nonjusticiable or meritless; the issue is not that it's futile to bring it before a particular decisionmaker. To put it another way, if a plaintiff has requested a remedy that he plainly cannot get from either an agency *or* a reviewing court, the problem is not that he is uniquely unable to get his desired remedy through administrative procedures but that he has brought a meritless claim. And a meritless claim does not provide an express lane into federal court.

That makes sense practically, too. A key justification for the futility exception is that it promotes judicial efficiency. *See Carr*, 141 S. Ct. at 1361. Constitutional challenges are a good example. Agencies lack special competence to resolve such disputes, *McCarthy*, 503 U.S. at 147-48, meaning courts likely will not benefit from having an agency decision based on a developed record. It thus may make sense to excuse exhaustion as futile or inadequate. But when agencies are the subject-matter experts, *id.* at 145, judicial efficiency considerations favor exhaustion because "the [agency] may give a statement of its reasons that is helpful to the district court in considering the merits." *Greene v. Meese*, 875 F.2d 639, 641 (7th Cir. 1989) (Posner, J.).

b. These principles make clear that the futility exception does not apply when a plaintiff wants

damages under the IDEA for the denial of a FAPE or when he settles an IDEA FAPE claim.

Suppose a plaintiff sues under the IDEA for damages for the denial of a FAPE. He cannot circumvent the IDEA's reticulated procedures on futility grounds. For one thing, a hearing officer could determine the FAPE issue and award relief for the denial of a FAPE. For another, although the agency cannot award damages, neither can the court. The remedies available in both forums are identical. *See Burlington*, 471 U.S. at 369-70; *supra* pp. 6-7. The problem isn't that *the agency* is "powerless to grant the relief requested," *Carr*, 141 S. Ct. at 1361, but that the IDEA doesn't authorize that relief in the first place.

Settling an IDEA claim doesn't let an IDEA plaintiff get into court, either. Futility is not a relevant concept, much less a "practical" one, *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (citation omitted), where the plaintiff has forgone administrative procedures and settlement has resolved the claim.

Efficiency considerations too show why these outcomes make sense. When it comes to FAPE issues, agencies are the experts, not courts. Thus, unlike with constitutional issues, courts will benefit from having an agency decision based on a fully developed record and accompanied by "a cogent and responsive explanation." *Endrew F.*, 137 S. Ct. at 1002. And these efficiency considerations will benefit plaintiffs, too. FAPE plaintiffs will likely obtain relief faster if agencies, not courts, resolve these disputes first. *Supra* pp. 22-24.

3. Because Perez could not have invoked a futility exception had he sued under the IDEA, he also cannot invoke a futility exception here.

a. Because a plaintiff cannot invoke futility to circumvent the IDEA's procedures and bring an IDEA action for damages, an ADA plaintiff complaining about the denial of a FAPE cannot do so either. Perez himself explains why: The § 1415(*l*) inquiry requires the court to "imagine a hypothetical IDEA action based on the same alleged misconduct and seeking the same relief as the non-IDEA action actually at issue." Br. 18-19; *see supra* p. 37. And as explained, that hypothetical IDEA plaintiff has a merits or settlement problem, not a futility opportunity.

That makes sense. Assuming the porting theory is a proper interpretation of § 1415(*l*), Congress had good reason to instruct courts to treat non-IDEA claims just like IDEA claims. Doing so recalibrates the inquiry to the FAPE, "the IDEA's core guarantee," *Fry*, 137 S. Ct. at 748, and reemphasizes the importance of hearing officers in the IDEA's reticulated procedures. Claims premised on the denial of a FAPE are well-suited for educational-expert review. That is why Congress established dispute-resolution procedures that so heavily depend on the "expertise and the exercise of judgment by school authorities." *Endrew F.*, 137 S. Ct. at 1001. And as explained, several benefits flow from the administrative process to courts and parties. *See supra* pp. 22-24. Requiring exhaustion whenever a student alleges the denial of a FAPE maximizes the likelihood that the student will *receive* a FAPE—which was Congress' primary purpose in crafting the IDEA's procedures.

b. The freedom to contract that Congress baked into the IDEA confirms that there is little reason to read a futility exception into § 1415(*l*). *Supra* p. 6. If the Court honors Congress' decision not to put a futility exception in § 1415(*l*), then parties will likely negotiate their IDEA and non-IDEA FAPE disputes together, just as they can now. In reality, that text-driven outcome would provide even *more* incentive to settle, especially for schools seeking to minimize their exposure to liability. Conversely, if the Court reads a futility exception into § 1415(*l*), then schools will simply demand that students release their non-IDEA FAPE claims as a condition of settlement. No release, no deal. That result would hurt students.

* * *

As Judge Thapar explained, Perez's situation "would never allow a court to excuse the failure to exhaust an IDEA claim." Pet. App. 12a. Perez could not have brought his IDEA FAPE claim in court without exhausting the procedures for obtaining an agency decision on the FAPE issue. "And from this it follows ineluctably," under Perez's porting theory, "that an ADA or Rehabilitation Act or § 1983 lawsuit seeking the same relief is also barred." *A.F. ex rel. Christine B. v. Española Pub. Schs.*, 801 F.3d 1245, 1248 (10th Cir. 2015) (Gorsuch, J.).

4. Perez's counterarguments lack merit.

Perez's counterarguments have four major flaws: (a) he fails to explain how this Court traditionally applies the futility exception; (b) he ignores his own analytical framework for the porting theory, (c) he misreads *Smith* and *Honig*; and (d) his policy arguments wrongly minimize the value of exhaustion.

a. Perez does not even attempt to articulate how the futility exception works in practice. Instead, he broadly gestures toward some futility cases (Br. 42-43) and cites the dictionary definition of "futile" (Br. 49). But Perez does not cite any decision that has applied a futility exception in a way that would help him here. He cites no decision where a court held that exhaustion would be futile because the underlying claim settled. He likewise cites no decision where exhaustion was futile because the plaintiff could not win damages from either the agencies or courts. Instead, as explained above, what Perez's cases show is that a futility exception may apply when the agency cannot make a determination on the legal issues or cannot grant relief that a court can. *See McCarthy*, 503 U.S. at 146-49; *supra* pp. 37-39. But monetary damages for an IDEA claim are equally unavailable before a hearing officer and a court, and a settled IDEA claim is simply over.

b. Perez argues (Br. 48-49) that post-settlement exhaustion would have been futile because he already had obtained "full relief" for the alleged IDEA FAPE violation. But that argument is incompatible with the very framework that, according to Perez, enables courts to apply a futility exception in the first place.

For the porting theory to work, courts must first ask whether the futility exception would apply to an "IDEA action based on the same alleged misconduct and seeking the same relief as the non-IDEA action." Perez Br. 18-19. If so, then a futility exception would apply to the non-IDEA action "to the same extent." But if not, then a futility exception would not apply to the non-IDEA action. Thus, the question is not whether post-settlement exhaustion of the *non-IDEA* FAPE claim would be futile, but whether exhaustion

of *a settled IDEA* FAPE claim would be futile. While a settled IDEA FAPE claim can no longer be exhausted, the reason is not futility, but that the claim is resolved, so there is nothing left to exhaust. Perez does not suggest (much less cite any authority) suggesting otherwise. And if Perez cannot identify an IDEA futility exception for settled IDEA claims, then there is nothing for courts to port into § 1415(*l*).

At bottom, Perez has failed to explain how and when an IDEA FAPE action could qualify for a futility exception. One of his amicus briefs tries filling the gap, arguing that a futility exception would help students vindicate their IDEA rights: (1) not to be temporarily moved during a pending dispute, *see* 20 U.S.C. § 1415(j)–(k); (2) to enforce agency decisions that have already been issued; and (3) to challenge certain structural issues, *i.e.*, "procedural deficiencies," *Smith*, 468 U.S. at 1014 n.17. *See* Advocates for Children of N.Y. Br. 19-29. Those examples do not help Perez. None of those rights is at issue here—meaning that even if those exceptions are ported into § 1415(*l*) they cannot be applied to Perez's non-IDEA action "to the same extent."

c. Contrary to Perez's argument (at 43-44), *Smith* and *Honig* do not establish a futility exception that Perez can invoke.

Start with *Smith*. As explained, because Congress said nothing in response to the unresolved split *Smith* had identified, it could not have silently embraced a futility exception when it enacted § 1415(*l*). *Supra* p. 34. At most, *Smith* hinted at the possibility of a futility exception for "procedural deficiencies," not FAPE issues. 468 U.S. at 1014 n.17.

Honig, which postdates the 1986 Amendment, similarly did not hold that § 1415(i) is subject to an unlimited futility exception. *Contra* Perez Br. 44; U.S. Br. 25. At most, *Honig*'s dictum suggested a futility exception in the context of temporary educational placements under the IDEA's stay-put provision. *See* 484 U.S. at 326-27. *Honig* did not, however, hold that a futility exception is also appropriate in cases involving FAPE issues.

For these reasons, Perez's ratification argument (Br. 44) fails. Because this Court has never held that a party (student or school) seeking review of a FAPE issue can invoke futility to bring suit *before* the agency issues its decision, Congress could not have adopted that rule by reenactment.

Perez's reliance on legislative history is also misplaced. "Legislation is," as the Court knows, "the art of compromise." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). That is especially true for § 1415(*l*). Those who passed the 1986 Amendment called it a "compromise bill" reflecting "months of intensive work and negotiation among Senators and Representatives of the administration." 131 Cong. Rec. S10396-01 (1985). The Judicial Power does not allow courts to upend that compromise based on a statement made in a Senate report. *See* Perez Br. 45.

d. Perez says that failing to recognize a futility exception for settlements will harm children with disabilities, but it's actually his rule that will do so. With damages in sight, plaintiffs are likely to drag schools into court rather than meet schools at the negotiating table, or to file parallel damages actions in federal court to exert unwarranted leverage during negotiations over the best interest of the child. That would

make money damages, rather than the need for a FAPE, the driving force. But § 1415(*l*), and especially Congress' response to *Smith*, make clear that providing a FAPE—the point of the IDEA—is the priority. Honoring Congress' decision not to put a futility exception in § 1415(*l*) would keep the FAPE at the fore and allow the administrative process to play out exactly as Congress intended. If parents follow those procedures, then they can still get money damages—after the child has obtained the much-needed, and time-sensitive, FAPE.

C. This case, and particularly the third question Perez and the government try to add, underscores the risks of adopting an atextual futility exception.

Perez cannot win on the two questions presented. So he adds a third—whether settlement *is* exhaustion under the IDEA. But Perez did not petition for, and the Court did not grant, review of that question. And it does not help him anyway. What's more, the consequences of ruling for Perez on this new question would lead to uncertainty in the lower courts about what futility means under the IDEA and how it should be applied. There is no practical reason to sow such confusion, especially here. Cases like Perez's are rare and, besides, school districts and students simply contract around whatever rules this Court announces.

1. Perez and the government's new (and not presented) argument that settlement equals exhaustion fails.

As the government acknowledges (U.S. Br. 32), Perez tries adding a third question: whether settlement is exhaustion under the IDEA. *See* Perez Br. 30-41. A petitioner cannot obtain review on one question

and argue a different one on the merits. *See Visa Inc. v. Osborn*, 137 S. Ct. 289, 290 (2016) (mem.).

Regardless, Perez's "vision of exhaustion just isn't the one embodied in the plain text of the statute." *A.F.*, 801 F.3d at 1248. Section 1415(*l*) says that non-IDEA FAPE plaintiffs must exhaust "the *procedures* under subsections (f) and (g) … to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added). The text forecloses Perez's settlement-equals-exhaustion theory. *First*, settling doesn't exhaust the procedures under subsections (f) and (g). *Second*, as Perez's own porting theory shows, the court must look at the action as an IDEA action. But the premise of a settlement is that the IDEA action is *resolved*, and without completing the administrative process—there is nothing left to do. *See supra* p. 40. Thus, the non-IDEA action is over, too.

Perez also argues (Br. 38-41) that § 1415(*l*) does not include an aggrievement requirement, as the decision below held. *See also* U.S. Br. 29-30. But Perez is wrong on that point, too. The statute says that parties "aggrieved by" agency decisions have a cause of action. 20 U.S.C. § 1415(i)(2)(A). It thus makes sense to read § 1415(*l*) as mandating aggrievement, as then-Judge Gorsuch explained in *A.F.*, 801 F.3d at 1247. Again, Perez's own porting theory requires exhaustion "to the same extent" as a hypothetical IDEA action. And had Perez exhausted the procedures for obtaining a state agency decision, he would not have received the damages he now seeks. He thus would be "aggrieved" because the agency denied him damages.

2. Adopting a futility exception in this case likely would lead to confusion in the lower courts in many IDEA cases while producing little benefit in the rare IDEA case like this one.

Perez's inability to find a futility exception that he can invoke reveals the administrability problems with his rule. Perez would drag courts into a dizzying debate over whether and when certain futility exceptions apply to § 1415(i), whether and when those exceptions can be ported into § 1415(*l*), and whether and when the facts actually trigger those exceptions "to the same extent." Nothing in the text places these burdens on courts.

This Court need not wade into that thicket. Cases like Perez's are rare. Congress enacted § 1415(*l*) thirty-six years ago, but Perez can point to only three other appellate cases that he claims resemble his. Opp. 26. And no matter what this Court decides on either question presented, it would merely change a default rule that parties are free to contract around. *Supra* p. 42. The consequence of Perez's preferred outcome is that school districts would have even more incentive to condition settlement offers during IDEA administrative procedures on the release of non-IDEA FAPE claims—something that school districts already typically do, Opp. 26. In the end, Perez's rule would tip the scales *against* settlement of IDEA claims. And all that is to say nothing of the fact that the remedy Perez now says he wants—damages for lost income—is not even available under the ADA. *Supra* pp. 29-30.

CONCLUSION

The Court should affirm the dismissal of Perez's complaint.

Respectfully submitted.

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