No. 19-972

In The
Supreme Court of the United States

CHRISTOPHER EDWARD MCMILLEN,
AN INCAPACITATED PERSON,

Petitioner,

v.

NEW CANEY INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether exhaustion of the administrative procedures provided by the Individuals with Disabilities in Education Act, as stated in 20 U.S.C. § 1415(l), is required when a plaintiff seeks damages premised on the alleged denial of a free appropriate public education.

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INTRODUCTION

The Petitioner Christopher McMillen, by and through his parents, proffers that this case presents an opportunity for this Court to answer the question previously left for "another day" in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 & n.4, 654 & n.8 (2017). That question is, may students and parents excuse themselves from exhausting the administrative remedies provided by the Individuals with Disabilities in Education Act (IDEA) by merely crafting a complaint seeking monetary damages not available under the IDEA, even when the claimed damages indisputably arise from the alleged denial of a free appropriate public education (FAPE)?

The Court of Appeals' decision correctly answered the question *Fry* left open, holding that the IDEA's exhaustion requirements apply to plaintiffs seeking damages, regardless of labels and clever pleading tactics, when the damages sought result from the denial of FAPE. App. 14a-15a. In so holding, the Fifth Circuit joined the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits in requiring plaintiffs to exhaust the IDEA's administrative remedies when claiming damages resulting from the alleged denial of FAPE.

Petitioner, nevertheless, implores this Court to grant his petition and ultimately side with what he labels a minority opinion from the Ninth Circuit's pre-*Fry* decision in *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011). Petitioner contends that the

Fifth Circuit would have allowed his lawsuit to proceed if the test articulated in *Payne* had been followed, despite his pre-suit abandonment of the IDEA administrative process and despite initially bringing an IDEA claim in this lawsuit, because he sought mental anguish damages that are not available under the IDEA (and punitive damages, which are not available under the IDEA or any other pled statute against a school district like New Caney ISD).

But the Ninth Circuit held no such thing in *Payne* and for good reason—that is, allowing plaintiffs to ignore the IDEA's administrative exhaustion requirement through creative pleading would drain that statutory prerequisite to suit of any practical application. Moreover, in post-*Fry* decisions citing to *Payne*, the Ninth Circuit and district courts within that circuit have uniformly ruled in precisely the same way as the Fifth Circuit in the underlying opinion, signaling that despite Petitioner's distorted analysis of *Payne*, there is no split of circuit court authority on this point at all. To the contrary, uniformity among the courts of appeals exists in the well-reasoned conclusion that a plaintiff cannot evade the IDEA's exhaustion requirements through artful pleading if the gravamen of his complaint is the denial of FAPE. *See Fry*, 137 S. Ct. at 755 ("What matters is the cru—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempt at artful pleading."); *see also*, *e.g.*, *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1101 (9th Cir. 2019) ("Here, like our sister circuits, we conclude Paul was required to exhaust the

IDEA procedural process because his § 504 and ADA claims concern whether he was provided appropriate educational services.").

The petition should, therefore, be denied.

COUNTER-STATEMENT OF THE CASE[1]

A. Relevant facts as asserted in Petitioner's Third Amended Complaint.

The relevant facts as alleged in Petitioner's Third Amended Complaint (TAC), supplemented by judicially noticed facts where appropriate, are as follows:

Petitioner was enrolled in Respondent New Caney Independent School District (New Caney ISD) from prekindergarten until early in his junior year of high school. App. 2a-4a, 33a. During those years, the district developed and implemented an individualized education program (IEP) for Petitioner, who had been diagnosed with autism spectrum disorder, emotional disturbance, and central-auditory-processing disorder. App. 2a-3a. The program successfully managed Petitioner's behavior for several years. *Id*.

Petitioner's behavior worsened during the 2014-2015 school year, to the point that he caused harm to himself (leading to his hospitalization in May 2015) and threatened harm to others daily. App. 48a-49a.

[1] References to "Record" are to the Clerk's Record at the court of appeals.

Petitioner's parents, as quoted in the TAC, likened Petitioner to a "gas can," whose behavior was "quite explosive and without the proper qualified supervision, the can will explode without warning." App. 50a.

The ARD Committee overseeing Petitioner's IEP met three times during the 2014-2015 school year. App. 48a. By the middle of the year, Petitioner was placed in New Caney ISD's Pass Program, which is for students who "have demonstrated either serious emotional disturbance or behavior disorders" and have "not responded to less intrusive interventions." *Id.*

For the 2015-2016 school year, New Caney ISD returned Petitioner to the regular school setting for his junior year. App. 48a-49a. Petitioner's junior year IEP abandoned measures that Petitioner's parents believed had previously proven successful. *Id.* Petitioner's parents initiated an administrative complaint about the changes for Petitioner's junior year, but New Caney ISD did not amend his IEP. App. 36a.

Margaret Hudman became Petitioner's English teacher at the start of the 2015-2016 school year. App. 36a. Petitioner claims that Hudman tried to physically and spiritually "save" him. App. 36a. Hudman purportedly encouraged Petitioner to take herbal supplements that she thought could cure his autism, and she also allegedly attempted to convert Petitioner to Christianity, believing that if he converted, his disabilities would be cured. App. 36a.

Early in the 2015-2016 school year, Hudman began her efforts to have Petitioner expelled. App. 37a.

Hudman purportedly collected material that Petitioner wrote during class and their informal sessions that made Petitioner appear dangerous. App. 37a-39a. Hudman emailed these materials to school administrators, who referred the matter to the New Caney ISD's police department. App. 39a-41a. The police arrested and charged Petitioner with the felony of making a terroristic threat. App. 41a. Following his arrest, New Caney ISD notified Petitioner's parents of the intention to remove Petitioner to the Disciplinary Alternative Education Program. App. 41a.

Petitioner's parents eventually accepted an offer from the Montgomery County, Texas prosecutor to drop the felony charge in exchange for their agreement to never return Petitioner to New Caney ISD. App. 43a. Petitioner's parents, believing that accepting the prosecutor's deal was the only option, ceased all efforts to return him to New Caney ISD and abandoned the previously-invoked administrative process under the IDEA. App. 43a.

B. The district court dismisses Petitioner's claims, after four pleading attempts, because he failed to exhaust the IDEA's administrative remedies.

Nearly two years later, the Petitioner's parents brought suit against New Caney ISD and several New Caney ISD employees, both on their own behalves and on behalf of Petitioner. Record 9-28. The original lawsuit alleged violations of Texas and federal laws,

including, but not limited to claims arising under the IDEA, the Texas and the United States Constitutions, and Section 504. Record 9-28.

In response to New Caney ISD's and the individual defendants' motions to dismiss, Petitioner and his parents responded by filing a First and Second Amended Complaint on November 10, 2017. Record 132-75. By doing so, they nonsuited the parents' individual claims, dismissed all claims against the individual defendants, and dropped all claims against New Caney ISD, with the exception of Petitioner's claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. (Section 504), and the United States Constitution. Record at 150-75. The constitutional claims were raised without invoking 42 U.S.C. § 1983 (Section 1983) and included the alleged deprivation of Petitioner's "rights to Freedom of Expression, Freedom of Assembly, Freedom of Religion, Separation of Church and State, Equal Protection, and Due Process." Record 150-51.

New Caney ISD filed another Motion to Dismiss the Second Amended Complaint because Petitioner did not comply with the IDEA's administrative exhaustion requirement, 20 U.S.C. § 1415(l). Record 188-92. Further, because Petitioner did not invoke Section 1983, New Caney ISD also sought dismissal of McMillen's constitutional claims under Rule 12(b)(6). Record 192-93.

The district court agreed with New Caney ISD. Record 366-87. The court dismissed Petitioner's Section 504 claims on exhaustion grounds and dismissed

his constitutional claims for failing to invoke Section 1983. Record 216, 366-87. The district court granted Petitioner ten days leave to amend his complaint and properly raise his constitutional claims pursuant to Section 1983. Record 387.

Following the additional leeway from the court, Petitioner filed his TAC on February 2, 2018, which was his fourth opportunity to plead a viable claim and the first time he invoked Section 1983. App. 30a-72a. Although the underlying facts and alleged constitutional deprivations remained largely unchanged, Petitioner attached a report dated January 11, 2018 from the United States Department of Education (DOE), attempting to create a viable Section 1983 claim premised on this document being New Caney ISD's purported policy. App. 62a-72a; Record 248-67.[2] The report detailed an investigation into IDEA violations by the Texas Education Agency (TEA) and the declining numbers of IDEA-eligible students in Texas statewide. Record 266. The DOE did not visit New Caney ISD during its investigation, and the report did not mention New Caney ISD. Record 217-67.

New Caney ISD then moved to dismiss Petitioner's TAC because he failed to exhaust his administrative remedies under the IDEA and otherwise failed to viably plead municipal liability. Record 269-08. At the conclusion of the oral hearing on the motion to

[2] Petitioner failed to include the entirety of the DOE report in Petitioner's Appendix, despite the entire document being appended as an exhibit to his TAC.

dismiss, the district court dismissed Petitioner's TAC and issued a final judgment order dismissing Petitioner's Sections 504 and 1983 claims with prejudice. App. 4a, 16a-17a; Record 328-29.

C. The Fifth Circuit affirms.

The Fifth Circuit affirmed the district court's dismissal of Petitioner's claims under Sections 504 and 1983. App. 1a-15a.[3] The court framed the issue as deciding, for the first time in the Fifth Circuit, "whether the IDEA's exhaustion requirement applies when the plaintiff seeks a remedy that the IDEA does not supply." App. 2a. Due to Petitioner's admitted abandonment of the IDEA administrative process prior to filing suit, the court reasoned that "his suit asserting other federal claims must be dismissed if it 'seek[s] relief that is also available under' the IDEA." App. 6a (quoting 20 U.S.C. § 1415(l) (insertion in original)).

From the outset, the Fifth Circuit had little trouble determining that Petitioner "blamed what happened" to him on New Caney ISD's purported "failures to comply with the IDEA." App. 6a-8a. The court particularly noted that nearly the entirety of the harms alleged in Petitioner's TAC arose from the adoption and implementation of Petitioner's IEP during his

[3] Petitioner bemoans that the Fifth Circuit "seemed to overlook" his claims under the First Amendment; however, Petitioner appeared to abandon his First Amendment claims because he did not assert them in his briefing to the Fifth Circuit. Brief for Appellant 10 (¶ 1(b)(2)).

junior year, and the transgressions were tied to the alleged actions of Petitioner's ARD Committee "that Texas schools use to develop and approve IEPs." App. 7a (citing 10 Tex. Admin. Code § 89.1050). The court also found it notable that not only did Petitioner allege New Caney ISD's failures to comply with the IDEA in the formulation of his August 2016 IEP, but that the school district harmed him by failing to hold a Manifestation Determination Review (MDR), which is yet another IDEA-specific mechanism for determining whether a student's conduct was a manifestation of the student's disability and, if so, whether the student should receive additional behavioral support. App. 7a-8a (citing 34 C.F.R. § 300.530(e), (f)). As the court noted, Petitioner's TAC contained even more allegations centering on the alleged denial of FAPE, "but these examples provide a strong flavor of the allegations that are laden with IDEA terminology." App. 8a.

The Fifth Circuit next turned to *Fry*'s two suggested questions for determining whether the gravamen of Petitioner's claims was the denial of FAPE rather than a violation of another law (*e.g.*, Section 504) and, therefore, required exhaustion prior to filing suit. App. 8a-9a. The court found that the answer to both of *Fry*'s questions in this case was a resounding "no." *Id.* Most notably, the Fifth Circuit reasoned that Petitioner's initiation and abandonment of the IDEA process prior to filing suit, coupled with Petitioner filing an IDEA claim when he originally filed his lawsuit, eliminated "any doubt" that Petitioner was still seeking to enforce the IDEA despite "switching midstream" by amending his

complaint to eliminate specific references to that statute. App. 9a-10a. Indeed, the Fifth Circuit reasoned that Petitioner's attempt to "fix" the exhaustion problem with his original complaint in adding a Section 1983 claim merely illuminated that "this case is really about failures to comply with the IDEA" because, to try and establish municipal liability, Petitioner attached the DOE's report to his TAC, which concluded "that Texas public schools 'suppress' the number of students eligible for special education services and the IDEA services they receive." *Id.*

After holding that Petitioner's lawsuit clearly challenged New Caney ISD's alleged failure to provide him with a FAPE, the Fifth Circuit turned to the question left unanswered in *Fry*: whether the IDEA's exhaustion requirement applies when a plaintiff is seeking remedies that the IDEA does not provide (*e.g.*, mental anguish damages). App. 11a-15a.[4] After surveying the mostly pre-*Fry* cases from other circuit's addressing the question and explaining the textualist approach to interpreting the meaning of "relief" as it is used in the IDEA, the Fifth Circuit joined the courts that read "relief available under the IDEA 'to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers.' " App. 13a-14a (citing *Charlie F. ex*

[4] Petitioner also sought punitive damages against New Caney ISD, which the court of appeals correctly noted are not available under Section 504 or Section 1983. App. 11a.

rel. Neil F. v. Bd. of Educ. of Skokie Sch. Dist. 68, 98 F.3d 989, 991-92 (7th Cir. 1996)).

The court reasoned that plaintiffs should not be encouraged to engage in "clever pleading" aimed at circumventing the IDEA process merely by seeking non-IDEA damages when the crux of the complaint is the denial of a FAPE. App. 14a. Indeed, the Fifth Circuit found that this reading of "relief" comports with the IDEA's preference to resolve special education disputes as early as possible and aligns with *Fry*'s central analysis and holding that exhaustion of administrative remedies is required when the plaintiff is complaining of the alleged denial of a FAPE. *Id.* (citing *Fry*, 137 S. Ct. at 755; quoting *Polera v. Bd. of Educ. of Neburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 48-88 (2d Cir. 2002); *Charlie F.*, 98 F. 3d at 991-92; *N.B. ex rel. D.G. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996)).

Accordingly, the Fifth Circuit held "that the IDEA's exhaustion requirement applies to plaintiffs who seek damages for the denial of a [FAPE]," and because "Petitioner did not first seek relief through the IDEA administrative process, this lawsuit was properly dismissed." App. 14a-15a.

REASONS FOR DENYING THE PETITION

A. No circuit split exists post-*Fry* on the issue of whether exhaustion is required when a plaintiff seeks monetary damages arising from the alleged denial of a FAPE.

The IDEA provides federal funding to states in exchange for the guarantee that schools within the state provide a FAPE to students with certain physical or intellectual disabilities, based on an IEP, in the least restrictive environment. *Fry*, 137 S. Ct. at 748 (quoting 20 U.S.C. §§ 1401(3)(A)(i), 1412(a)(1)(A)); 20 U.S.C. § 1401(9), (29), 1412(a)(5)(A), 1414(d). The IDEA tasks states to develop systems to provide special education services through local education agencies, which in Texas is the TEA. 20 U.S.C. § 1401(19); Tex. Educ. Code § 29.001.

In circumstances where disagreements arise regarding the special education programming for a student in Texas, a parent may file a request for a due process hearing. 34 C.F.R. § 300.511(e); 19 Tex. Admin. Code § 89.1150(b)(7). TEA then assigns an impartial hearing officer to conduct an evidentiary due process hearing. 19 Tex. Admin. Code §§ 89.1170, .1185. The hearing officer determines if there has been a denial of a FAPE. 20 U.S.C. § 1415(f)(3)(E). The hearing officer's decision is a final administrative decision. 20 U.S.C. § 1415(i)(1)(A). Full exhaustion of this process is accomplished when either the parent or the school district, if "aggrieved" by the hearing officer's final administrative decision, seeks judicial review. 20 U.S.C. §§ 1415(i)(2)(A), 1415(l).

This Court recently interpreted the scope of Section 1415(l)'s exhaustion requirement in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). *Fry* identified two questions to assist courts in analyzing whether the gravamen of a plaintiff's complaint alleged the denial of a FAPE: (1) could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at another facility other than a school; and (2) could an adult at the school (*i.e.*, an employee or visitor) have pursued the same claim? *Fry*, 137 S. Ct. at 756. When the answer to both questions is "no," the complaint likely concerns the denial of a FAPE, and exhaustion of the IDEA's administrative scheme is required prior to filing suit regardless of the statutory label a plaintiff attaches to the claim. *Id.*

Fry, however, left for another day the question of whether exhaustion is required when a plaintiff alleges the denial of a FAPE but seeks damages or other remedies that an IDEA hearing officer cannot award in the administrative process. *Fry*, 137 S. Ct. at 1752. Every circuit court that has directly considered this question, both before and after *Fry*, has stated that exhaustion is required when a plaintiff seeks to enforce rights that arise from the denial of a FAPE, whether pleaded as an IDEA claim or under another statute where the cause of action is premised on the denial of a FAPE (*e.g.*, a Section 504 or Section 1983 claim). *See Paul G.*, 933 F.3d at 1101 ("Here, like our sister circuits, we conclude Paul was required to exhaust the IDEA procedural process because his § 504 and ADA claims concern whether he was provided appropriate

educational services."); *Z.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, 744 F. App'x. 769, 777 n.14 (4th Cir. 2018); *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276 (3d Cir. 2014); *J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 595 (8th Cir. 2013); *Payne*, 653 F.3d at 875; *Polera*, 288 F.3d at 487-88; *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1068 (10th Cir. 2002); *Charlie F.*, 98 F.3d at 991-92; *N.B.*, 84 F.3d at 1379).

Of particular note in the litany of cases cited above is the Ninth Circuit's *Payne* decision, which Petitioner claims presents the "minority opinion" in the purported circuit split. In *Payne*, the Ninth Circuit adopted a "relief-centered" approach to determine whether exhaustion of the IDEA's administrative procedures is required before a plaintiff can seek monetary damages under a different statute, such as Section 504 or Section 1983. *See Payne*, 653 F.3d at 874, *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc). Under this approach, the Ninth Circuit instructs that exhaustion is required "only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA." *Id.* The court further explained its approach as follows:

> In other words, when determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA.

> If it is not, then it is likely that § 1415(l) does not require exhaustion in that case.

While Petitioner proffers the Ninth Circuit's *Payne* decision as permitting a plaintiff to assert claims for monetary damages that indisputably arise from the alleged denial of a FAPE under statutes such as Section 504 or Section 1983, the court's relief-centered approach does no such thing. The *Payne* decision stresses, much like this Court did in *Fry*, that "plaintiff's cannot avoid exhaustion through artful pleading." *Payne*, 653 F.3d at 877; *accord Fry*, 137 S. Ct. at 755. Indeed, the Ninth Circuit specifically explained that "exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action (for instance, a claim for damages under [Section 504], premised on a denial of a FAPE)." *Id.* at 875 (alteration added). "Such claims arise under either the IDEA (if the IDEA violation is alleged directly) or its substantive standards (if a § 504 claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is therefore 'available under this subchapter.'" *Id.* (quoting 20 U.S.C. § 1415(l)).

Additionally, the Ninth Circuit more recently (post-*Fry*) applied *Payne* to affirm a district court's holding that a plaintiff, who sought emotional distress damages under Section 504, was required to exhaust the IDEA's administrative remedies prior to filing suit because the emotional distress flowed from the alleged

denial of a FAPE. *See Paul G.*, 933 F.3d at 1102. In *Paul G.*, a student, who had previously invoked the IDEA administrative process before settling, brought disability discrimination claims under other statutes seeking emotional distress damages stemming from the alleged denial of a FAPE without asserting an IDEA claim. *Id.* at 1099-1100. The court of appeals considered the "crucial issue" as "whether the relief sought would be available under the IDEA." *Id.* at 1100. The court answered both of *Fry*'s guidepost questions in the negative and found that "the fact that Paul previously pursued an IDEA administrative proceeding based on identical or similar allegations supports the conclusion that his claims are premised on a denial of a FAPE." *Id.* at 1101 (internal quotations omitted). In sum, the Ninth Circuit concluded that "if a plaintiff is claiming a violation of the IDEA, the plaintiff must take that claim through the administrative process," and the court explained that *Fry* "reiterated this principle in clear terms." *Id.*

The Ninth Circuit's conclusion in *Payne* and its progeny that exhaustion is required even under its relief-centered approach if the cause of action is premised on the denial of a FAPE fully comports with every other circuit court's injury-centered approach on this issue, including the Fifth Circuit's approach in the underlying decision. No court of appeals has embraced Petitioner's position that a plaintiff can escape administrative exhaustion under the IDEA merely by praying for monetary damages (including punitive damages that are not available under any relevant

statute against a school district) when the gravamen of the complaint is the alleged denial of a FAPE; rather, as explained above, circuit courts are uniform in their rejection of that wayward notion. *See*, *e.g.*, *Polera*, 288 F.3d at 488 ("Where, as here, a full remedy is available at the time of injury, a disabled student claiming deficiencies in his or her education may not ignore the administrative process, then later sue for damages."). And, in any event, this Court's review would benefit from permitting lower courts more time to consider the issue *Fry* left unanswered in 2017 to test if the circuit uniformity continues to hold.

B. Petitioner would not have prevailed had the Fifth Circuit applied the "relief-centered" approach.

This case is a poor vehicle to resolve the question presented because Petitioner's requested "relief" all arises as the result of an alleged denial of a FAPE. Petitioner argues that his lawsuit would have had a different fate had the Fifth Circuit adopted and applied the "relief-centered" approach developed in *Payne*, but Petitioner is plainly incorrect. As noted above, the "relief-centered" approach does not instruct courts to look at a plaintiff's prayer for relief, see that the plaintiff has requested monetary damages (*e.g.*, mental anguish damages), and look no further before concluding that administrative exhaustion under the IDEA is not required; rather, *Payne* explained that exhaustion is required in three circumstances: (1) when a plaintiff seeks an IDEA remedy or its functional equivalent;

(2) where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student; and (3) where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether asserted as an IDEA claim or another claim that relies on the denial of a FAPE to provide the basis for the claim. *Payne*, 653 F.3d at 875.

Petitioner, when he originally filed suit against New Caney ISD, asserted an IDEA claim and sought IDEA-equivalent remedies (including seeking a declaration of his right to return to New Caney ISD's educational programming). Record 16-17. Thus, in the original iteration of Petitioner's lawsuit, the first two circumstances mandating exhaustion from *Payne's* "relief-centered" approach would have required dismissal of the lawsuit due to Petitioner's undisputed failure to exhaust the IDEA's administrative remedies. *See Payne*, 653 F.3d at 875; *see also Paul G.*, 933 F.3d at 1100 ("The Court also said that one good indication that the plaintiff is seeking relief for denial of a FAPE is whether the plaintiff previously invoked administrative remedies.") (citing *Fry*, 137 S. Ct. at 757).

Petitioner's TAC, the live pleading when the district court dismissed Petitioner's lawsuit, would fare no better under *Payne* due to the third circumstance for which exhaustion is required—when the claim for monetary damages, regardless of the statutory label, is premised on the alleged denial of FAPE. *See Payne*, 653 F.3d at 875. Even a cursory reading of Petitioner's TAC reveals that all of his alleged emotional harm and

resulting monetary damages "follow from" a purported denial of a FAPE. App. 35a-59a. Petitioner specifically pleads that it was his removal from New Caney ISD's PASS Program, which was accomplished *via* the August 2015 IEP, that was the spark that led to all of his claimed emotional injuries. App. 51a-52a. When Petitioner "[p]redictably . . . erupted with inappropriate and threatening words" in response to his teacher's alleged deviations from his IEP and Behavioral Intervention Plan (BIP), Petitioner contends that New Caney ISD failed to conduct an MDR prior to taking any disciplinary action in violation of the IDEA. App. 52a.[5] By allowing the expulsion to proceed without conducting an MDR, Petitioner pled that the District caused him irreparable harm for which he sought damages. App. 53a-55a, 58a-59a.

Distilling Petitioner's allegations to their core, therefore, makes it beyond dispute that all of Petitioner's claimed monetary damages are premised on the alleged denial of a FAPE by virtue of implementing an ineffective IEP, and exhaustion would have been required under *Payne* despite Petitioner's attempt to masquerade his claims under Section 504 and Section

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[5] While Petitioner dropped his IDEA claim from his TAC, he specifically defined the "Laws Protecting Chris" to include the IDEA. App. 48a ("With a focus on actions by Defendant New Caney ISD that were violations of Plaintiff Chris's rights under the IDEA (which is now herein deemed to be included in the previously defined term of *Laws Protecting Chris*). . . ."). Petitioner claimed in his TAC that the federal regulations under the so-called "Laws Protecting Chris" require an MDR prior to taking disciplinary action. App. 52a.

1983. *See Payne*, 653 F.3d at 875, 882; *see also Paul G.*, 933 F.3d at 110. This is especially true where, as here (although Petitioner fails to mention this in his Petition), a plaintiff invokes the IDEA administrative procedure, abandons the process, files suit under the IDEA, and only drops the IDEA claim in response to a school district's exhaustion defense. *See Paul G.*, 933 F.3d at 1100-01 ("As the Court explained, an initial decision to pursue the administrative process and a later shift to judicial proceedings prior to full exhaustion is a strong indication that the plaintiff is making 'strategic calculations about how to maximize the prospects of such a remedy.'") (quoting *Fry*, 137 S. Ct. 757). In short, even if the Fifth Circuit had employed the "relief-centered" approach in this case, Petitioner's creatively-pled Section 504 and Section 1983 claim would still have been barred due to his undisputed abandonment of the IDEA's administrative process.

C. The Fifth Circuit correctly held that Petitioner was required (and failed) to exhaust the IDEA's administrative remedies prior to filing suit.

The Fifth Circuit properly ruled that Petitioner was required to exhaust the IDEA's administrative remedies prior to filing suit when all of his requested relief arose from the alleged denial of a FAPE. While Petitioner argues that the Fifth Circuit's analysis of Section 1415(l)'s "seeking relief that is also available under" the IDEA is undermined if a textualist approach is employed, this Court's decision in *Fry* fully

supports the Fifth Circuit's (and every other circuit court's) interpretation of that statute's administrative exhaustion requirement.

The primary focus in *Fry* was on the meaning of the word "relief," as it is used in Section 1415(l). The only "relief" that is "available" under the IDEA, and "hence the thing a plaintiff must seek in order to trigger §1415(l)'s exhaustion rule—is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. "The ordinary meaning of 'relief' in the context of a lawsuit is the 'redress[] or benefit' that attends a favorable judgment.'" *Id.* (quoting Black's Law Dictionary 1161 (5th ed. 1979) (alteration in original)). As this Court explained in *Fry*, it is only a complaint "seeking redress for those other harms, independent of any FAPE denial," that is not subject to the IDEA's exhaustion requirement. *Id.* at 754-55. If, however, a complaint is seeking relief for the denial of a FAPE, then exhaustion of the IDEA's administrative remedies is required. *Id.*

As the Fifth Circuit aptly noted in its underlying decision, most courts read "'relief available' under the IDEA 'to mean relief for the events, condition, or consequences of which the person complains, not necessarily the kind the person prefers,'" and this reading is "necessary to enforce the statutory scheme" of the IDEA. App. 13a-14a (quoting *Charlie F.*, 98 F.3d at 991-92). To take the opposite position and allow a plaintiff to bypass the IDEA's administrative process to seek monetary damages arising exclusively from the denial of a FAPE under the moniker of another statute would render Section 1415(l) (and thereby this Court's recent

decision in *Fry*) completely devoid of meaning and purpose. This is perhaps why no circuit court (not even *Payne*) has ruled in the way proposed by Petitioner.

CONCLUSION

The petition for writ of certiorari should be denied.

April 17, 2020 Respectfully submitted,

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