No. 25-

IN THE

# Supreme Court of the United States

DEREK S. AND ASHLEY T.S., DO., INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILD, J.S.,

*Petitioners,*

*v.*

BALLSTON SPA CENTRAL SCHOOL DISTRICT AND BALLSTON SPA BOARD OF EDUCATION,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

In *Fry v Napoleon*, 580 U.S. 154 (2017) this Court stated that the Individuals with Disabilities in Education Act (IDEA) exhaustion requirement does not apply to claims under Title II of the Americans with Disabilities Act (Title II of the ADA) or Section 504 of the Rehabilitation Act (Section 504) requesting accommodation or changes to a special education program merely because the claim could relate in some way to education.

The Ninth and Fourth Circuits found that claims under Title II of the ADA and Section 504 for the provision of Applied Behavior Analysis (ABA) services to students with autism in school are not claims for educational services and not subject to the IDEA administrative exhaustion requirement. The Second Circuit found that claims under the ADA and Section 504 for the provision of ABA in school are claims for educational services that are subject to the IDEA exhaustion requirement.

The question presented is:

Whether claims under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act for the provision of ABA therapy to students with autism in school are standalone claims of discrimination not subject to the IDEA exhaustion requirement, as the Ninth and Fourth circuits held, applying *Fry v. Napoleon*, 580 U.S. 154 (2017), or are they claims for educational services that are subject to the IDEA exhaustion requirement, as the Second Circuit held.

## LIST OF PARTIES

Derek S., and Ashley, T.S., D.O. were, on behalf of their minor son, J.S., the appellants in the court below. The Ballston Spa Central School District and Ballston Spa Board of Education were the appellees in the court below.

## RELATED CASES STATEMENT

*Derek S. v. Ballston Spa Cent. Sch. Dist.*, Case No. 25-668, U.S. Court of Appeals for the Second Circuit. Judgment entered Jan. 14, 2026.

*Derek S. v. Ballston Spa Cent. Sch. Dist.*, Case No. 25-668, U.S. Court of Appeals for the Second Circuit. Judgment entered Dec. 11, 2025.

*Derek S. v. Ballston Spa Cent. Sch. Dist.*, Case No. 1:24-cv-767, U.S. District Court for the Northern District of New York. Judgment entered May 13, 2025.

*Derek S. v. Ballston Spa Cent. Sch. Dist.*, Case No. 1:24-cv-767, U.S. District Court for the Northern District of New York. Judgment entered Mar. 6, 2025.

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## DECISION OF THE COURT BELOW

1. *Derek S. v. Ballston Spa Cent. Sch. Dist.* The Second Circuit's decision has not yet been published in the Federal Reporter, but it is reprinted in the Appendix ("App.") at 51a-52a.

2. *Derek S. v. Ballston Spa Cent. Sch. Dist.* The Second Circuit's decision has not yet been published in the Federal Reporter, but it is reported at 2025 U.S. App. LEXIS 32395 and reprinted in the Appendix at 1a-9a.

3. *Derek S. v. Ballston Spa Cent. Sch. Dist.* The opinion of the United States District Court for the Northern District of New York has not yet been published in the Federal Reporter, but it is reported at 2025 U.S. Dist. LEXIS 90453 and reprinted in the Appendix at 10a-29a.

4. *Derek S. v. Ballston Spa Cent. Sch. Dist.* The opinion of the United States District Court for the Northern District of New York has not yet been published in the Federal Reporter, but it is reported at 2025 U.S. Dist. LEXIS 90453 and reprinted in the Appendix at 30a-50a.

## JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on December 11, 2025. [App. 1a-9a] A petition for rehearing and *en banc* review was denied on January 14, 2026. [App. 51a-52a]. The Supreme Court has jurisdiction over this matter pursuant to 28 U.S.C. 1254(1).

## PROVISIONS INVOLVED

Title II of the Americans with Disabilities Amendments Act of 2008 ("ADA")
(42 U.S.C. §§12131 et seq).

§ 12132. Discrimination

§ 12133. Enforcement

[App. 53a]

Section 504 of the Rehabilitation Act of 1973 ("Section 504")
§ 794. Nondiscrimination under Federal grants and programs.

[App. 54a]

§ 794a. Remedies and attorney fees

[App. 55a]

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)
§ 2000d-7. Civil rights remedies equalization

[App. 56a]

Individuals with Disability Education Act (20 U.S.C. §1415(l))

[App. 57a]

## STATEMENT OF THE CASE

Petitioners are the parents of a student diagnosed with autism who was denied Applied Behavior Analysis ("ABA") therapy services by his school district. His pediatrician recommended ABA services in school. The parents paid for ABA therapy services while their autistic son was in pre-school. When the child started kindergarten, the school district declined to provide ABA in school and he regressed [R. 76-77].[1]

Petitioners filed a complaint in the United States District Court for the Northern District of New York under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act asserting claims of discrimination on the grounds that the denial of ABA therapy in school deprived him of access to education. The school continued to deny ABA therapy to the student after the Complaint was filed. The parties agreed upon an independent education evaluator (IEE) who concurred in the recommendation that the child required ABA therapy in school to make progress. Nonetheless, the school district persisted in its refusal to provide ABA services. [App. 30a-31a; R. 83]

After receiving the school district's refusal to adopt the IEE's recommendation, petitioners moved for injunctive relief to compel the school to comply with the recommendations of the IEE to provide ABA therapy to the child in school. [App. 35a; 43a] The complaint did not include a claim for the denial of free and appropriate public education ("FAPE") under the IDEA.

1. Citations to "R." are citations to the lower court record (Dkt. No. 23.1).

The complaint only alleged failure to accommodate and disparate treatment disability discrimination claims based on the denial of reasonable accommodation for Petitioners' son because of his diagnosis of autism. [App. 36a]

The district court denied the motion for an injunction holding that, even though Petitioners asserted ADA and Section 504 claims, the family was required to exhaust IDEA administrative remedies because Petitioners' claims were related to the child's education, and injunctive relief is a remedy available under the IDEA. The district court's ruling was based on a pure issue of law; it never reached the factual merits of Petitioners' motion for injunctive relief. [App. 38a]

Petitioners' pursuit of injunctive relief was prompted by the school district's disregard for the recommendations of medical experts, including the agreed upon IEE, and the irreparable harm that the school district's conduct continues to cause Petitioners' son as a result of his being denied ABA therapy in school. [R. 68-69; 86-88] It is well accepted by experts, and courts, that ABA therapy is most effective when it is provided at the earliest possible time in the child's development. [R. 83-88] Delay only increases the harm to the child's development as the child's brain's window of opportunity for learning closes; accordingly, injunctive relief to compel ABA therapy at an earlier age mitigates his damages.

In a Summary Order, which it described as "non-precedential," the Second Circuit affirmed the district court's decision, ruling that the request for ABA therapy is equivalent to a claim for educational support services,

which could have been asserted as part of an IDEA claim, and thus required IDEA exhaustion. [App. 8a] However, the Second Circuit's summary order is in conflict with decisions from the Fourth and Ninth Circuits holding that a claim for the denial of ABA therapy is not equivalent to a claim for the denial of FAPE and, therefore, is not subject to the IDEA exhaustion requirement.

ABA therapy is not part of the special education curriculum; rather, it is a medical therapy that is necessary to correct certain behaviors often manifest in autistic children that interfere with their ability to learn and may disrupt the classroom thus impeding the ability of other children to learn. [R. 84-85] Allowing an ABA therapist to provide services on-site is a necessary accommodation to the disabled autistic child that facilitates his or her access to the educational services offered by the school district. The therapists are able to modify the child's behavior so that the child can both concentrate on learning and not disrupt other students. In short, without ABA the child cannot access the curricula offered by the school and meaningful access to education is impossible.

## ARGUMENT

### I. THE SECOND CIRCUIT'S POSITION IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THE IDENTICAL ISSUE WHEN APPLYING THIS COURT'S DECISION IN *FRY V. NAPOLEAN COMMUNITY SCHOOLS*, 580 U.S. 154 (2017), TO AUTISTIC CHILDREN.

The well-known Seventh Circuit Judge Richard Posner once said: "When you have a Supreme Court case

or something similar, they're often extremely easy to get around." "Exit Interview with Richard Posner, Judicial Provocateur," *The New York Times*, September 11, 2017. The Second Circuit panel that summarily decided this case appears to have been of like mind. Fortunately, the other circuits that have addressed the issue presented in this case were faithful to Supreme Court precedent.

The conflict is direct and stark. The Ninth and Fourth Circuits applied *Fry*, holding that claims for the denial of ABA services in school for autistic children under the ADA and Section 504 of the Rehabilitation Act were not subject to the IDEA exhaustion requirement; the Second Circuit reached the complete opposite conclusion on identical facts. In doing so, the Second Circuit deprived the Petitioners of a remedy available to them under Title II and Section 504 (i.e., injunctive relief) for failure to reasonably accommodate their son's autism and to provide him with an equal opportunity to participate in the services offered by the school.

### A. The Ninth and Fourth Circuits applied *Fry v. Napoleon Community Schools*, 580 U.S. 154, 157 (2017) so that claims under Section 504 and the ADA were not subject to the IDEA exhaustion requirement, whereas the Second Circuit reached the opposite conclusion on identical facts.

The Ninth and Fourth Circuits disagree with the Second Circuit that a request for ABA therapy in school for an autistic child is subject to the IDEA exhaustion requirement. *Hawai'i Disability Rights Ctr. v. Kishimoto*, 122 F.4th 353 (9th Cir. 2024), and *Z.W. v. Horry Cnty.*

*Sch. Dist.*, 68 F.4th 915 (4th Cir. 2023) applied *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017) to exempt from the IDEA exhaustion requirement claims under ADA and Section 504 seeking a school district to provide ABA therapy services to an autistic student. Both the Ninth and Fourth Circuits concluded that the denial of ABA services is not equivalent to the denial of educational services using the very same tests set forth in *Fry* for distinguishing disability discrimination claims from IDEA claims. Those two Circuits concluded that the request to a school to provide on-site ABA therapy to an autistic student is a non-IDEA claim that is different from a claim for inadequate educational services in an individual education plan (IEP). Both the Ninth and Fourth Circuits concluded that ABA therapy is a medical service that is a prerequisite to educational services (i.e., which makes educational services possible, and, thus, not subject to the IDEA exhaustion requirement). The following quotation contains the reasoning of the Ninth Circuit applying the criteria enunciated via the hypotheticals used in *Fry* to test whether the claim arose under the disability statutes or under the IDEA.

> These claims could have been filed if a different public facility—a public hospital, for example, or a library—refused to allow ABA therapists to provide services on-site to autistic children. Although ABA services are predominately provided to children, making it unlikely that an adult at the school would file a complaint concerning whether their ABA support provider must be allowed entry to the school, one aspect of the answer to Fry's "visitor" hypothetical indicates that HDRC's claims do

> not concern the denial of an adequate education. As the Fourth Circuit explained in a similar case, "a non-student visitor [to the school] (say, a friend, sibling, or other relative) could make a largely identical claim against [DOE and DHS] if it refused to permit an ABA therapist to accompany the visitor" into the school. Z.W. ex rel. Warner v. Horry Cnty. Sch. Dist., 68 F.4th 915, 920 (4th Cir. 2023).

*Kishimoto*, 122 F.4th at 370.

Likewise, the Fourth Circuit in *Z.W.* answered the *Fry* hypotheticals as follows:

> The Court also identified two "hypothetical questions" that provide a "clue" on which side of the line a given case falls. *Id.* at 171. "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?" *Id.* "[S]econd, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.*
>
> When, as here, the answer to both questions is "yes," it is "unlikely" a complaint "that does not expressly allege the denial of a FAPE is . . . truly about that subject." *Fry*, 580 U.S. 171. The "essence" (*id.* at 172) of Z.W.'s beef with the school district is its refusal to permit him to bring his privately supplied and funded ABA therapist to school with him. Z.W. could

> file essentially the same claim against a library, a museum, or a summer camp. What is more, a non-student visitor (say, a friend, sibling, or other relative) could make a largely identical claim against the school district if it refused to permit an ABA therapist to accompany the visitor to Z.W.'s school.

*Z.W.*, 68 F.4th at 920

Applying those tests, the Ninth and Fourth Circuits likened the refusal in *Fry* to allow a service dog to accompany a student with cerebral palsy to the refusal to allow an ABA therapist to accompany an autistic child in school. The Court in *Kishimoto* further pointed out that, since plaintiffs never invoked formal IDEA administrative proceedings, such fact supported the claim that the denial of ABA did not concern the provision of educational services or the denial of FAPE. *Kishimoto*, 122 F.4th at 370. That is because a disabled student can pursue an ADA and Section 504 claim independent of any FAPE denial. *Fry*, 580 U.S. at 168-169; *Luna Perez v. Sturgis Public Schools*, 598 U.S. 142, 148-50 (2023) (the exhaustion requirement only applies to requests for relief from the denial of FAPE, which is not the relief sought under the disability statutes).

*Fry* instructs that the exhaustion requirement is not applicable when the request for relief sought in the complaint, as in this case, is for reasonable accommodation of a person's disability. *Fry*, 580 U.S. at 166 ("The ordinary meaning of 'relief' in the context of a lawsuit is the 'redress[] or benefit' that attends a favorable judgment."); *Luna Perez*, 598 U.S. at 147-150 (whether IDEA applies

focuses on the relief sought not the means of enforcing that right or benefit such as money damages, an injunction, or a declaratory judgment). *Accord*, *Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510, 521 (5th Cir. 2024) ("[E]ven if plaintiffs conceded that the School District fully satisfied its IDEA obligations . . . they could [still] pursue claims under the ADA and the §504 on the grounds that the student was [prevented] from receiving a state benefit . . . provided to her non-disabled peers. That is so because the "yardstick in an ADA claim is not adherence to an IEP plan, but instead whether the public entity 'failed to make reasonable accommodations,' specifically, accommodations that give a disabled student equal access as her non-disabled peers.").[2]

In this case, the relief sought by the Petitioners did not involve the denial of FAPE, such as a request for special education services or reimbursements for education-related expenditures. [App. 30a-32a] Rather, Petitioners requested relief for disability discrimination consisting of the denial of ABA therapy as a reasonable accommodation, which was necessary for the Petitioners' son to access the services and programs offered by the school district. [App. 30a-31a] The child's pediatricians, like the medical professionals in *Kishimoto* and *Z.W.*, recommended that the severely autistic child have ABA therapy in school. [R. 70] He made considerable progress with ABA therapy in preschool but regressed when that therapy was taken

2. The reasoning of *Lartigue* also directly conflicts with the reasoning of the Second Circuit, but the case involved a child with a hearing impairment, not an autistic child. The District Court employed the same reasoning as the Second Circuit in ruling that IDEA exhaustion was required, but the Fifth Circuit reversed it applying *Fry*.

away. [R. 76-77] After Petitioners, for four years, trusted the recommendations of school officials for eclectic special education services without ABA [R.78; 93-94], the parties then agreed upon an independent neuropsychologist who ultimately opined that ABA therapy was necessary for the child's progress. The school district still did not budge, even after Petitioners offered to pay for the services. [R. 83; 169] ["when asked about the possibility of [J.S.]'s parents hiring and paying for an RBT, the administrator noted that there are complications to having a person in the school working directly with a student who would not be an employee of the school or subject to their oversight."]. This reasoning was akin to the stubbornness of the school district in *Fry* in denying access to a service dog. Plaintiffs then moved for a preliminary injunction.

The Second Circuit affirmed the District Court's denial of Plaintiffs' motion for injunctive relief concluding that the Plaintiffs' complaint sought "IDEA-style relief," and, as a result, Plaintiffs' Title II and Section 504 claims were subject to the IDEA exhaustion requirement. [App. 8a] The Second Circuit characterized Petitioners' request for relief as a request for a "'1:1 aide' to 'help J.S. make progress." [App. 7a-8a] However, Petitioners' request was for a Registered Behavior Technician, who is trained to provide ABA therapy prescribed by a Board Certified Behavior Analyst ("BCBA"), to accompany their son to school. [R. 76-77] A request for an RBT is different from a request for a 1:1 aide usually offered to students as part of an IEP. An RBT is a certified behavioral technician trained in ABA and supervised by a Board-Certified Behavior Analyst ("BCBA"). *Kishimoto*, 122 F.4th at 359 ("it is critical that a child receiving ABA therapy work with a licensed behavior analyst."). The record shows that

the school rejected Petitioners' offer to pay for a 1:1 aide trained to perform ABA therapy. [R. 83; 169]

The Second Circuit classified the request for ABA therapy as a claim "for educational supportive services 'that are also available under the IDEA,'" [App. 5a-6a], and concluded that "the only reason that Plaintiffs *could* plausibly expect such services from the School is that their complaint clearly concerns J.S.'s educational needs." [R. 8a] In contrast to the Ninth and Fourth Circuits in the quotations cited above, the Second Circuit found that ABA services had no application to adults visiting the school, nor could plaintiff have expected a library or theater to allow ABA therapists to accompany a child.

The conflict between the Circuits presents issues of exceptional importance. The decision subjects disabled students asserting a non-IDEA claim to a time-consuming administrative process that is not required in other disability discrimination contexts. *See e.g. A.J.T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279*, 605 U.S. 335, 337 (2025) (disapproving interpretations of the law that create additional barriers to schoolchildren with disabilities to enforce their rights under Title II and Section 504 which are not present in the non-school context). The Second Circuit, contrary to this Court's holding in *Fry*, and the holdings of the Fourth and Ninth Circuits, interpreted Petitioners' claim to be subject to the IDEA exhaustion requirement merely because the claims were connected to their son's education. In *Fry*, 580 U.S. at 166, this Court explicitly stated that the IDEA exhaustion does not apply to claims that "merely [have] some articulable connection to the education of a child with a disability." Further, this Court in *Osseo* devoted a large part of its decision

to highlighting the Eighth Circuit's frustration with decisions misinterpreting the law based on "speculation" that Congress intended to limit the protections afforded to schoolchildren with disabilities, expressing its need to intervene lest such incorrect decisions "spread like wildfire" in the lower courts. *Osseo*, 605 U.S. at 343.[3]

Notwithstanding the best efforts of this Court, the plague continues to spread. The Second Circuit's reference to its decision as "non-precedential" will not deter the lower courts from following it. This Court accords summary dispositions, such as summary orders, less precedential value than dispositions by opinion. *Colorado Springs Amusements, Ltd. v. Rizzo*, 428 U.S. 913, 916-917 (1976) ("the same reasons that lead us to deny conclusive precedential value in this Court to our summary dispositions require that we allow the same latitude to state and lower federal courts."). However, the Second Circuit, and district courts, may still consider a Summary Order as guidance in future cases. *Losonczi v. Garland*, 2023 U.S. App. LEXIS 18038, *5, 2023 WL 4552578 (2d Cir. 2023). Despite precedential opinions from other Circuit Courts to the contrary, the Petitioners' son and similar autistic students recommended for ABA therapy services will be required to exhaust administrative procedures that similar students in the Ninth and Fourth Circuits are not

3. The principle that the District Court is entitled discretion in deciding whether to grant injunctive relief does not apply to a pure issue of law. This case presents a pure issue of law. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990)." *Highmark Inc. v. Allcare Health Mgt. Sys., Inc.*, 572 U.S. 559, 563 (2014).

required to undergo to secure their rights and remedies under the ADA and Section 504.[4]

### B. The Ninth and Fourth Circuits delved more extensively into the nature of ABA therapy.

Applied Behavior Analysis is the most well-researched and validated general approach to treatment for autism spectrum disorder designed to address skill development and challenging behavior for school-aged children, adolescents, and adults. [R. 2][5] ; *see Kishimoto*, 122 F.4th at 358-329. ABA therapy is a behavioral and developmental intervention that is most effective when provided to young children with autism in an early age. [https://www.health.ny.gov/publications/20152.pdf, p. 68]. A Report from the Surgeon General dated 1999 states: "Thirty years of research demonstrates the efficacy of ABA methods in reducing inappropriate behavior and increasing communication, learning, and appropriate

4. The Supreme Court has granted certiorari, reviewed, and remanded Second Circuit summary orders on many occasions in the recent years. *McIntosh v. United States*, 601 U.S. 330, 336, 144 S. Ct. 980, 986, 218 L. Ed. 2d 307, 315 (2024); *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197, 201 (2016); *FCC v. Fox TV Stations, Inc.*, 567 U.S. 239, 252 (2012); *CIGNA Corp. v. Amara*, 563 U.S. 421, 434-435 (2011); *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009); *see also D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043, 1068 (9th Cir. 2021) (Paez, J., dissenting), *vacated and remanded*, 143 S. Ct. 1081 (2013).

5. New York State Department of Health's Clinical Practice Guideline on Assessment and Intervention Services for Young Children with Autism Spectrum Disorder (ASD) 2017 Update (https://www.health.ny.gov/publications/20152.pdf, p. 64) ("NYSDOH Guideline")

social behavior." [https://collections.nlm.nih.gov/ext/document/101584932X120/PDF/101584932X120.pdf, p. 178]

Based on the scientific evidence proving the effectiveness of ABA in the development of young children with autism, the New York State Department of Health Clinical Guidelines on Assessment and Intervention Services for Young Children with Autism Spectrum Disorder ("NYSDOH ASD Guideline") recommended that principles of ABA be included as an important element of any intervention program for young children with autism. [https://www.health.ny.gov/publications/20152.pdf, p. 64]. Children with autism receiving early interventions based on ABA demonstrate improvements in cognitive, language, adaptive, and Autism Spectrum Disorder impairments compared with children receiving low-intensity interventions and eclectic non-ABA-based intervention approaches usually provided to them through an IEP. *Id*., p. 65

Despite the scientific evidence supporting the effectiveness of ABA therapy to the development of young children with autism, ABA therapy is not generally provided to students with autism in school. *Kishimoto*, 122 F. 4th at 358. IDEA regulations do not mention ABA therapy as a therapeutic service required for the disabled child to benefit from special education. 20 U.S.C. §1401. New York State Education Regulations related to educational programs for students with autism state that "[i]nstructional services shall be provided to meet the individual language needs of a student with autism," and "[a]ll school districts are required to furnish appropriate educational programs for students with

autism." 8 N.Y.C.R.R. §200.13(a)(4) and (c). However, there is no regulation of the New York State Commissioner of Education that mentions ABA therapy as being part of a special education curriculum, in comparison with many other aspects of a special education curriculum. For that reason, ABA is considered outside the realm of ordinary special education programs, in contrast to all the other special education services ordinarily provided to disabled students through an IEP required under IDEA.

Nor do public schools generally have professionals qualified to provide ABA therapy to disabled students in school. New York Education law defines "ABA" as "the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior." N.Y. Educ. Law § 8801. This part of the Education Law deals with professional licensure for ABA practitioners and includes many professions such as doctors, nurses, dentists, etc. It requires that ABA practitioners have appropriate qualifications required for the delivery of ABA therapy. *Kishimoto*, 122 F.4th at 359 n.2 ("ABA therapy is described by various *amici curiae* as a clearly defined medical treatment, 'delivered by credentialed behavior health professionals, following a rigorous ethics code, and in accordance with generally accepted standards of care.'"). However, New York Education Law does not mandate that public schools retain professionals certified to provide ABA therapy to students in school, like it does when it comes to speech pathologists, occupational therapists, or school counselors. Thus, contrary to the Second Circuit

finding, ABA therapy is not an educational service, but a medical therapy recommended to address functional impairments, including adaptive, cognitive, and language skills, and inappropriate behaviors.

#### i. A proper understanding of ABA is necessary to apply the Fry hypotheticals to ABA.

Without a thorough understanding of ABA, application of the *Fry* hypotheticals is not possible. Here, Petitioners, on behalf of their autistic child, seek to have an RBT to accompany their son to school. [R. 76-77] The RBT is not a special education professional like a special education teacher, speech pathologist, or occupational therapist; nor is an RBT equivalent to a school aide. Rather the RBT is a certified behavior professional, who manages the child's behavior, under the supervision of a licensed behavior analyst, so that the child can function in the classroom. 18 N.Y.C.R.R. §505.39(a)(3). Otherwise, the particular manifestations of the child's autism adversely affect the child's ability to learn and will likely disrupt the class to the detriment of all students. A teacher aide, on the other hand, is assigned to assist teachers to supervise and perform non-teaching duties and other "support teaching duties when such services are determined and supervised by teacher." *See* 8 N.Y.C.R.R. §80-5.6(b).

While an RBT is a human being, for a child with severe autism, the RBT's function is equivalent to the service dog in *Fry*, not as the Second Circuit would have it, a 1:1 aide like any other the school provides to students in their IEPs. The school district's offer of a 1:1 aide to J.S., in lieu of an RBT, failed to accommodate his need for a trained

behavior professional. This Court in *Fry* recognized that a 1:1 aide may satisfy the IDEA, but it will not satisfy the school's obligation to provide reasonable accommodation for the child's disability. 580 U.S. at 163 ("A school could offer a FAPE to a child with a disability but still run afoul of the laws' ban on discrimination," analogizing to a school that offered an aide to carry a student who customarily uses a wheelchair). Likewise, a school aide may satisfy the IDEA, but will not provide reasonable accommodation to a student who requires an RBT to assist with his proper functioning in school. For students with severe autism, ABA is the wheelchair ramp that will give them access to an education.

Using the Second Circuit's own analogy in *Disabled in Action v. Bd. of Elections*, ABA therapy is the ramp necessary for this autistic child to have any access to the educational services offered by the school. 752 F.3d 189, 200 (2d Cir. 2014) ("It is not enough to open the door for the handicapped . . . ; a ramp must be built so that door can be reached.") (citation omitted). Unlike their counterparts in the Fourth and Ninth Circuits, the Second Circuit's analysis of Petitioners' claims through the *Fry* hypotheticals improperly considered the request for ABA therapy (a request for reasonable accommodation) as a request for educational services, whereas Petitioners' claim is that their child could not access educational services without ABA.

ABA therapy is equivalent to the service dog E.F. needed in *Fry*. E.F. needed a service dog to accompany her while in school as recommended by her pediatrician to assist her with daily life functions that were limited by her disabilty. This autistic child needs a trained ABA

technician to accompany him in school so that his behaviors will not interfere with his (or other students') ability to learn. [R. 83 ("parents asked for a paraprofessional [trained Behavior Analyst Technician])]; [R. 177 ("he would require 1:1 aide who has training and supervision in ABA therapy to help him make progress.")] Denying a disabled child a service dog in school, as in *Fry*, is no different than denying an autistic child an ABA therapist in school.

The Second Circuit's analogy to adult services is confusing and out of context. An adult's claim against a school district, say for access to the building, cannot be compared to a *child's* access to education. Adult access is not for educational purposes. In *D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043 (9th Cir. 2021) (Paez, J.,2021), this Court vacated and remanded, 143 S. Ct. 1081 (2013), based on a dissenting opinion which explained that "the first *Fry* clue is helpful in determining whether D.D.'s ADA claim is a disguised FAPE claim, *as long as we recognize that the analogy between other locations or other plaintiffs and the child seeking to assure school access need not be exact.*" (emphasis added).

Under *Fry*, and its progreny in the Courts of Appeals, the mere fact that education is involved cannot be used to place a disability case in the IDEA box. The Ninth Circuit correctly noted that ABA services "are predominantely provided to children, making it unlikely that an adult at the school would file a complaint concerning whether their ABA support provider must be allowed entry to the school." *Kishimoto*, 133 F.4th at 370. According to the NYSDOH ASD Guideline, ABA therapy is most effective when provided to young chidlren with autism at an early age. [https://www.health.ny.gov/publications/20152.pdf, p.

68] Thus, an adult cannot benefit from early ABA therapy in the same way that a young child can. However, it is plausible that an autistic adult in an ABA program who was utilizing an ABA therapist to accompany him in his daily life's activities, could file the same complaint as was filed here by J.S. for failure to reasonably accommodate his disability if the denial of an ABA therapist deprived him of access to education, use of a library, or the ability to see a film in a theater.

Conversely, an adult employed by or seeking employment with a school may file a failure to accommodate claim, whereas a student cannot. Adults and children necessarily have different roles in school. Equal employment opportunity is the benefit that a disabled adult is entitled to receive by law from a school-employer; a disabled student is entitled to equal access to education. *Fry* counsels that the mere fact that education is involved does not resolve the question whether there is disability discrimination.

**ii. To determine the gravamen of the complaint, the Ninth Circuit was correct in looking to see whether the parents invoked IDEA procedures or not.**

Contrary to the instructions in *Fry*, and unlike the Ninth Circuit in *Kishimoto*, the Second Circuit failed to consider the history of the proceeding to determine the gravamen of Petitioners' complaint. Petitioners never used IDEA administrative proceedings, which is evidence that the gravamen of his complaint is not the denial of FAPE guaranteed by the IDEA. *See Kishimoto*, 122 F.4th at 370 ("The 'history of the proceedings' also demonstrates that

HDRC's non-IDEA claims do not challenge the denial of a FAPE.") Petitioners did not assert claims under the IDEA, [App. 31a], and Respondents' Director of Special Education admitted that Petitioners never commenced an administrative proceeding before seeking an injunction. [R. p.88] [CSE Chair: "there is currently no administrative proceeding."] *See Fry*, 580 U.S. 174 n. 11 [for gravamen of suit to be denial of FAPE, commencement of the IDEA's formal administrative procedures is required]. The Second Circuit overlooked this important evidence that the gravamen of Plaintiffs' complaint is the failure of the school to change its practices to accommodate petitioners' son with the ABA therapy necessary for him to have access to education not for the denial of educational services. Thus, the Second Circuit's decision conflicts with the Supreme Court's decision in *Fry*, as well as authoritative decisions from other United States Courts of Appeals interpreting *Fry*.

Petitioners request for an independent psychological evaluation of their son to determine whether ABA therapy should be provided to him in school is not an IDEA administrative procedure. *Id*. Requesting an independent evaluation was simply a very practical effort to bridge the gap between the parties by subjecting the plaintiffs' request for ABA therapy to independent analysis by a third party in the hopes that the parties might then agree, but the school district refused to yield notwithstanding the independent evaluator's report. The Declaration of Doctor Ashley T.S. provides the chronology of the efforts petitioners made since their son started Kindergarten to have the school accept the medical recommendations that he be offered ABA therapy in school. [R. 72-96] [chronology of events leading to motion for injunctive

relief]. The timing of Plaintiffs' motion for an injunction was directly related to the school's refusal to accept even the recommendation of an independent neuropsychologist paid for by the School. The record shows that none of what Petitioners did involved IDEA procedures.

### C. The Fourth and Ninth Circuits, consistent with *Fry*, correctly held that this case is about access to education not denial of FAPE.

The main difference between the IDEA and the ADA is that "the IDEA guarantees individually tailored educational services, while Title II [of the ADA] . . . promise[s] non-discriminatory access to public institutions." *Fry*, 580 U.S. at 170-71. The IDEA guarantees students a free and appropriate public education ("FAPE") and provides for an administrative hearing for students and parents to pursue equitable relief to address a school district's *denial of a FAPE*. *Fry*, 580 U.S. 157. The remedy provided by the IDEA is limited to future special education services and reimbursements for education-related expenditures. *Sch. Comm. Of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-71 (1985). In comparison, Title II of the ADA and § 504 guarantee non-discriminatory access to all public activities and programs. Regulations implementing the ADA also require reasonable accommodations to enable access to public institutions. *Fry*, 580 U.S. at 159-60 (citing 28 C.F.R. §§ 35.130(b)(7) (2016)). "[B]oth statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages." *Id.* at 160 (citing 29 U.S.C. §794a(a)(2); 42 U.S.C. §12133).

Both the Ninth and Fourth circuits agreed that a claim for the denial of ABA therapy in school is about reasonable accommodation and access to education. It is not equivalent to the denial of FAPE. *Kishimoto*, 122 F.4th at 370; *Z.W.*, 68 F.4th at 920. A disability discrimination claim does not morph into a denial of FAPE claim simply because it relates to the education of a disabled student. *Fry*, 580 U.S. at 166. The denial of ABA therapy to a student with autism is equivalent to the denial of a ramp to a wheelchair using student. *Z.W.*, 68 F.4th at 920 *citing Fry*, 580 U.S. at 171-72. It is a device for ensuring access to education. While a disabled student's request for accommodation will always relate to education, his or her request is for accommodation, not the denial of FAPE. The Second Circuit's decision that a disabled student with autism, who needs ABA therapy (a ramp) to gain access to education services and programs, needs to exhaust IDEA procedures conflicts with *Fry*, and precedent from the Ninth and Fourth Circuits applying *Fry*, because Petitioners' claim does not involve the denial of a FAPE, even if it requests changes to a school district's practices.

### i. A request for accommodation in the school setting does not turn a discrimination claim into an educational claim.

All public entities, including school districts, are required to make reasonable modifications (changes) to their rules, policies, or practices to remove barriers so that a person with a disability can access the services and programs they provide pursuant to Title II of the ADA and Section 504 of the Rehabilitation Act. *Fry*, 580 U.S. at 159-160 (*citing* 42 U.S.C. §12131-12132 and

29 U.S.C. §794a(a)(2)). Requesting changes to an education program to include accommodations required for the disabled student to access education does not turn a non-IDEA claim into an IDEA-like claim. *Kishimoto*, 122 F4th at 369; *Z.W.*, 68 F.4th at 920. Indeed, a suit brought under Title II or Section 504 does not seek relief for the denial of FAPE even "when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education." *Fry*, 580 U.S. at 168-169. Congressional intent concerning the implementation of the ADA and Section 504 did not change simply because the claim arises in a school setting. This Court in *Fry* emphasized that requests "*for accommodations* or *changes* to a special education program" is not evidence that "the substance of a plaintiff's claims concerns the denial of a FAPE." *Fry*, 580 U.S. at 173-174, fn. 11 (emphasis added).

This is not to say that ADA or 504 claims could not concern or implicate principles of FAPE, but here FAPE is unchallenged. The only issue raised by Petitioners is access. That ABA therapy could be part of an IEP is immaterial to the question whether the lawsuit seeks relief for the denial of FAPE. *Z.W.*, 68 F.4th at 920. ABA is not part of FAPE. As Plaintiffs do not contest FAPE but only their access to school curriculum, this is not an IDEA case. *See Kishimoto*, 122 F4th at 369; *Z.W.*, 68 F.4th at 920. The denial of FAPE is the only relief the IDEA can provide. *Fry*, 580 U.S. at 165. The purpose of the IDEA is to provide "needed special education services" to children with disabilities, not required medical assistance (i.e., like ABA therapy or a service dog), that they may need to function effectively in the school environment.

### ii. As the Fourth and Ninth Circuits recognized, Fry does not restrict remedies available for discrimination to the IDEA.

The Second Circuit misapplied *Fry* in concluding that, because a request for ABA therapy is a claim *that could have* been made pursuant to the IDEA, then Petitioners are subejct to ADA exhaustion. [App. 8a] *Fry* does not restrict a Petitioners' right to seek redress for discrimination unless he or she exhausts the IDEA administrative process. In *Fry*, this Court pointed out that §1415(l) "asks whether a lawsuit ***in fact*** 'seeks' relief available under the IDEA—***not . . . whether*** suit 'could have sought' relief available under the IDEA." 580 U.S. at 169. (Emphasis added). If the gravamen of the complaint did not invoke the denial of FAPE, then exhaustion is not required even if somehow the complaint could have been formulated to invoke the IDEA. This Court recognized that overlap between the statutes may be inevitable, *id.*, at 168-69, but that did not detract from the conclusion that the ADA and Section 504 provide independent relief from the denial of FAPE. While this Court offered clues to help determine whether the gravamen of the complaint against a school concerns the denial of FAPE or disability-based discrimination, *id.*, at 171, it is unlikely that the Court "intended to exclude students with behavioral—as opposed to physical—disabilities from recourse under Title II of the ADA because children's needs at school may require accommodations somewhat different from—but analogous to—those appropriate for adults or in other public buildings." *See D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043, 1068, (9th Cir. 2021) (Paez, J., dissenting), vacated and remanded, 143 S. Ct. 1081 (2013).

Thus, requesting a school district to change its practices of not providing ABA therapy to students with autism, when such therapy is necessary for the student to participate in and benefit from the services and programs offered, is consistent with the students' rights and remedies under Title II and Section 504. "Nothing in [the IDEA] shall be construed to restrict or limit the rights . . . and remedies available under . . . the [ADA and Section 504] . . . protecting the rights of children with disabilities." *Fry*, 580 U.S. at 161 *citing* 20 U.S.C. §1415(l).

Because facts relevant to a claim of disability discrimination and denial of a FAPE may sometimes overlap, a child with disabilities may experience both a denial of a FAPE in violation of the IDEA and exclusion from school in violation of the ADA and §504. However, as this Court has observed, the expected overlap in the facts relevant to each statute does not turn a disability-based discrimination claim into a FAPE-based claim simply because it occurs at school. *Id.*, at 168-69 ("A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA.") A school's conduct in denying a student with a wheelchair a ramp to enter the school building "may violate all three statutes," but a complaint can "seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Id.*, at 171-172. The plaintiff is the master of his or her own claim. *Id.*, at 169.

This Court in *Fry* warned about the danger that the close connection between claims that a student has been denied a "free appropriate public education" ("FAPE")

and claims of exclusion from educational opportunity could cause courts improperly to demand exhaustion of non-IDEA claims. *Fry*, 580 U.S. 171-74. By subjecting standalone discrimination claims in a school setting to the exhaustion requirements of the IDEA, the Second Circuit, contrary to the rulings of other Courts of Appeals, has restricted and limited disabled schoolchildren's rights to remedies (e.g.: injunctive relief) available under the ADA and Section 504.

The Fourth and Ninth Circuits did not characterize an autistic child's claim for ABA services as "artful pleading," but instead simply followed the analytical approach utilized by this Court in *Fry*. Counsel formulating cases in the lower courts should be able to rely on decisions of the Supreme Court and not fear that every case will arise *sui generis* where an appellate court feels free via summary order to contradict prior precedent so long as the decision is deemed non-precedential. Unless this court intervenes and upholds the rulings of the Ninth and Fourth Circuits, the District Courts in the Second Circuit will incorrectly deny disabled children with autism the remedies available under the ADA and Section 504. *Losonczi*, 2023 U.S. App. LEXIS 18038 at *5 (non-precedential decisions may still serve as guidance in the Second Circuit).

### D. This Court's intervention is needed so that autistic children will not be deprived of remedies available under the ABA and Section 504 and blocked from benefiting from ABA services, which is necessary for their proper functioning in schools.

ABA services are not offered as part of New York State's special education program. The Education Department does not consider ABA to be educational in nature. However, students who are denied this therapy in school are unable to access the panoply of educational services the State's school districts offer. This undermines their ability both to become educated and be independent in their life skills. Without ABA, they are almost certain to become wards of the State at great expense to the taxpayers. Medical principles apply to ABA: an ounce of prevention is worth a pound of cure.

The question at hand is one of exceptional importance, namely whether a schoolchild asserting a particular type of claim for disability discrimination (denial of access to education due to a disability) under Title II and Section 504, should have the remedies available under these statutes limited by the exhaustion requirements set forth in the IDEA. Congress did not intend to limit the rights of schoolchildren to seek injunctive relief for violations of Title II and Section 504 when FAPE is not at issue. Access to education is at issue, not the particular components of a special education curriculum.

The Second Circuit acknowledged that "J.S. might urgently need ABA therapy." [App. 8a] The record shows that J.S.'s family sought to have the school provide services

prescribed by J.S.'s pediatrician that are essential for his development for four years before seeking an injunction. [R. 68] Petitioners, acting reasonably and hardly seeking to jump into litigation, attended meetings to discuss the special education curricula included in their son's IEPs, discussed how J.S. was unable to make progress since ABA was taken away, and discussed how he regressed without it. [R. 70-74] They pursued litigation only when the school rejected the findings of a neuropsychologist mutually agreed upon by the parties.

Experts in the field of autism and behavior interventions agree that when there is a missed opportunity to provide an autistic child with appropriate treatment, he or she will lose the ability to develop essential skills for the rest of their lives. In *Re: Fall River Public Schools*, 11 MSER 242, 2005 MSE LEXIS 39, **49-50 (BSEA, Dec. 21, 2005), Dr. Nina Pinnock testified that when services to an autistic child are not provided sufficiently early in a child's life, then there is a good chance that the child will be dependent for the remainder of his/her life and that there is no known spontaneous recovery at a later time in life. Dr. Jeannine Audet testified that "[t]he longer inappropriate behaviors are used by a child, the more difficult it is for the child to unlearn these inappropriate behaviors and to utilize appropriate behaviors in their stead." *Id.*, at **33; *accord, W.C. ex rel. R.C. v. Summit Bd. of Educ.*, 2007 U.S. Dist. LEXIS 95021, *15, 2007 WL 4591316 (D.N.J. 2007) ("Judge McGill observed that experts recognize 'there is a window of opportunity approximately from ages three to six to make significant gains. Once this period comes to a close, the opportunity ceases to exist.'"); *County Sch. Bd. v. R.T.*, 433 F. Supp. 2d 657, 667, (E.D. Va. 2006) ("Dr. Carlson and Dr. Oswald both testified that there is

a window of opportunity during which an autistic child's mind is open to learning language. This window generally closes sometime between age six and eight. If autistic children do not develop language capabilities by that time, they are likely to remain without those skills for the rest of their lives."); *TH v. Board of Education of Palatine*, 55 F.Supp.2d 830, 843 (N.D. Ill 1999) ("Without sufficient adult intervention now to help reprogram [a student's] young brain, his opportunity for 'meaningful access to education' may be permanently foreclosed."). Thus, this child's development has been harmed and will continue to be harmed in ways that are irreparable. Invoking the IDEA administrative process in a non-IDEA case will not most efficiently provide the relief J.S. needs. Injunctive relief under ADA and 504 stops the harm and reduces the child's damages.[6]

The Second Circuit's decision has, in effect, created another barrier for disabled schoolchildren seeking remedies available to them under Title II and Section 504. In the Second Circuit, in contrast to the other Circuits, when a disabled schoolchild is seeking an accommodation that relates to the student's educational needs, that child must undergo an administrative process that is not required for claims of discrimination outside the school setting. This Court's decisions in *Fry*, *Perez*, and *Osseo*, and the decisions of the Fourth and Ninth Circuits, do not endorse such a limitation; neither did Congress. 42 U.S.C. §12101 (statement of Congressional purposes in enacting the Americans with Disabilities Act).

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6. The District Court failed to see the benefit in this approach. It accused the plaintiff of gamesmanship in invoking his rights under the discrimination statutes rather than IDEA.

A plaintiff may be limited to IDEA remedies, but only when the gravamen of the complaint involves FAPE. The Ninth and Fourth Circuits agree with Petitioners that ABA therapy is not an educational service, does not implicate FAPE, and that the denial of ABA therapy in school gives rise to standalone discrimination claims, including a request for injunctive relief, that are not limited by the IDEA exhaustion requirements.

As the Supreme Court in *Osseo* stressed, families with disabled children already face daunting challenges on a daily basis. For years, schoolchildren with disabilities were denied the equal opportunity to secure their rights under Title II and Section 504 compared with individuals claiming discrimination outside the school setting. *Osseo*, 605 U.S. at 351. Courts, which create heightened legal standards without any statutory support based on their speculative view that Congress intended to subject schoolchildren's discrimination claims to the IDEA, were implicated in perpetuating such injustice, as this Court recognized and ruled against.

We pray that this Court intervene, as it has previously in this area of law, to avoid the same mistake being repeated. Families of disabled students, particularly in this day and age with rising autism rates, deserve this Court's consideration of this question of exceptional importance that will affect families beyond J.S.'s family. So does the public at large.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 3, 2026
Albany, New York

# APPENDIX

## TABLE OF APPENDICES

**APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 11, 2025**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

25-668

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of December, two thousand twenty-five.

PRESENT:

DENNY CHIN,
RICHARD J. SULLIVAN,
MARIA ARAUJO KAHN,
*Circuit Judges.*

*Appendix A*

DEREK S. AND ASHLEY T.S.,
INDIVIDUALLY AND AS GUARDIANS
*AD LITEM* OF THEIR MINOR CHILD, J.S.,

*Plaintiffs-Appellants,*

v.

THE BALLSTON SPA CENTRAL SCHOOL DISTRICT,
BALLSTON SPA BOARD OF EDUCATION,

*Defendants-Appellees.**

Appeal from a judgment of the United States District Court for the Northern District of New York (Anne M. Nardacci, *Judge*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the March 6, 2025 judgment of the district court is **AFFIRMED**.

Derek S. and Ashley T.S., the parents of an autistic child ("J.S."), appeal from the district court's order denying their motion for a preliminary injunction. That motion sought to compel their school district and local board of education (the "School") to provide J.S. with Applied Behavior Analysis ("ABA"), which is a form of therapy that aids early cognitive and behavioral development. Plaintiffs

* The Clerk of Court is respectfully directed to amend the caption as set forth above.

initially sued the School for compensatory damages under Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. §§ 12101 *et seq.,* and section 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 794. They later moved for a preliminary injunction, which the district court denied because Plaintiffs had failed to exhaust the administrative remedies required by the Individuals with Disabilities Education Act (the "IDEA"). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as needed to explain our decision.[1]

"[A] district court's decision to grant or deny a preliminary injunction is generally reviewed for abuse of discretion." *Zervos v. Verizon N.* Y., *Inc.,* 252 F.3d 163, 166 (2d Cir. 2001). As relevant here, "[a] district court abuses . . . the discretion accorded to it when . . . its decision rests on an error of law (such as application of the wrong legal principle)." *Id.* at 169 (internal quotation marks omitted); *see also JTH Tax, LLC v. Agnant,* 62 F.4th 658, 666 (2d Cir. 2023).

To determine whether the district court erred, we must first sketch the relationship between the several statutes at issue. The first of these are Title II of the ADA

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1. We have appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(l), which vests courts of appeals with "jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts . . . refusing . . . injunctions." *See Frutiger v. Hamilton Cent. Sch. Dist.,* 928 F.2d 68, 71 (2d Cir. 1991) (noting that denial of a "motion for a preliminary injunction . . . is appealable under 28 U.S.C. § 1292(a)(l)).

and section 504 of the Rehabilitation Act – the general "antidiscrimination laws" applicable to disability claims, *Fry v. Napoleon Cmty. Schs.,* 580 U.S. 154, 159 (2017), that Plaintiffs invoked in their complaint. While "Title II forbids any 'public entity' from discriminating based on disability[,] section 504 applies the same prohibition to any federally funded 'program or activity.'" *Id.* (quoting 42 U.S.C. §§ 12131-32; 29 U.S.C. § 794(a)). Both statutes – which we "consider . . . together" because their "standards . . . are nearly identical" – require a plaintiff to "demonstrate that . . . he was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant because of his disability." *McElwee v. County of Orange,* 700 F.3d 635, 640 (2d Cir. 2012).

Title II and section 504 sometimes run parallel to the IDEA, which is more narrowly "designed to 'ensure that all children with disabilities have available to them a free appropriate public education [a "FAPE"] that emphasizes special education and related services designed to meet their unique needs.'" *A.R. v. Conn. State Bd. of Educ.,* 5 F.4th 155, 157 (2d Cir. 2021) (quoting 20 U.S.C. § 1400(d)(l)(A)). A FAPE must include both "'instruction' tailored to meet a child's 'unique needs'" and "sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry,* 580 U.S. at 158 (quoting 20 U.S.C. § 1401(26), (29)). Schools implement FAPEs through so-called "individualized education program[s]" ("IEPs"), which are "personalized plan[s]" that school officials, teachers, and parents use to track students' progress,

articulate goals, and come up with strategies to help achieve those goals. *Id.* at 158-59 (citing 20 U.S.C. § 1414(d)).

In the event that New York parents object to an IEP's proposed plan, they must first seek relief from neutral state officials. *See* 20 U.S.C. §1415(f), (g), (i); *accord* N.Y. Educ. Law § 4404(1)(a), (2). It is only after they have exhausted this administrative remedy that they may demand judicial review. *See* 20 U.S.C. §§ 1415(g), (i); *accord* N.Y. Educ. Law § 4404(3)(a). This requirement comes directly from the IDEA, which mandates "that any available administrative remedies be exhausted before a lawsuit is filed in federal court." *Ventura de Paulino v. N.Y.C. Dep't of Educ.*, 959 F.3d 519,530 (2d Cir. 2020) (citing 20 U.S.C. § 1415(i)(2)(A)).

The same rule applies to ADA and Rehabilitation Act claims that overlap with the IDEA. Section 1415(*l*) of the IDEA provides that "a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances – that is, when 'seeking relief that is also available under' the IDEA – first exhaust the IDEA's administrative procedures." *Fry,* 580 U.S. at 161 (quoting 20 U.S.C. § 1415(*l*). All in all, this lattice of statutes (and acronyms) leaves us with a single issue: whether we should treat Plaintiffs' request for ABA therapy as a claim for educational supportive services "that [are] also available under [the IDEA]," 20 U.S.C. § 1415(*l*), or as a "standalone discrimination claim[]," Reply Br. at 2.

To answer that question, we must determine "whether a lawsuit seeks relief for the denial of a FAPE." *Fry,* 580

U.S. at 168. If so, "[P]laintiff[s] cannot escape [section] 1415(*l*) merely by bringing [their] suit under a statute other than the IDEA." *Id.* But "[t]he [IDEA's] administrative exhaustion requirement applies *only* to suits that 'see[k] relief . . . also available under' the IDEA." *Luna Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 147 (2023) (quoting 20 U.S.C. § 1415(*l*)). Where plaintiffs are seeking a "remedy . . . [that the] IDEA cannot supply," such as compensatory damages, *id.* at 147, then section 1415(*l*) will not stand in their way.

Here, Plaintiffs indisputably failed to exhaust their administrative remedies even though they seek relief – implementing ABA therapy as part of J.S.'s educational routine – that the IDEA can supply.[2] They nevertheless contend that they are not barred by section 1415(*l*)'s exhaustion requirement because they are not challenging the denial of a FAPE. Plaintiffs insist that their complaint focuses on general disability discrimination, and that it alleges violations of the ADA and Rehabilitation Act, not the IDEA. But section 1415(*l*)'s very "premise is that the plaintiff is suing under a statute *other than* the IDEA, like the Rehabilitation Act" and "a 'magic words' approach would make [its] exhaustion rule too easy to bypass." *Fry,*

2. In their complaint, Plaintiffs focus on compensatory damages, which are not available under the IDEA. For this reason, the district court correctly separated Plaintiffs' damages claim – which remains live – from its motion for injunctive relief, which, as discussed below, cannot clear section 1415(*l*)'s exhaustion bar. *See* Sp. App'x at 21; *Doe v. Franklin Square Union Free Sch. Dist.,* 100 F.4th 86, 102 n.9 (2d Cir. 2024) (citing *Luna Perez,* 598 U.S. at 150).

580 U.S. at 170. Instead of deferring to the "particular labels and terms" used in a complaint and the "artful pleading" of plaintiffs, courts "look to the substance, or gravamen, of the plaintiff's complaint" to determine whether it is asserting the denial of a FAPE. *Id.* at 169, 165.

Applying that approach here, we agree with the district court that Plaintiffs are indeed challenging the School's FAPE determination. Plaintiffs contend that their complaint survives this substantive analysis because ABA therapy is "not an educational service," but is instead an "accommodation[]" under the ADA and Rehabilitation Act. Reply Br. at 4. Recognizing the potential "overlap in coverage" of the three statutes at issue here, the Supreme Court has listed "clue[s]" that canguide courts when assessing "whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination." *Fry,* 580 U.S. at 171. These clues "come from asking a pair of hypothetical questions": (1) "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school – say, a public theater or library?"; and (2) "could an *adult* at the school – say, an employee or visitor – have pressed essentially the same grievance?" *Id.* "[W]hen the answer [to those questions] is no, then the complaint probably does concern a FAPE . . . for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." *Id.*

Here, Plaintiffs seek a "structured ABA program" with a "1:1 aide" to "help J.S. make progress" while he

is in school. App'x at 60. But *adults* visiting the school could not have complained of the lack of such a program for themselves; nor could Plaintiffs have expected such support from a library or theater. Indeed, the only reason that Plaintiffs *could* plausibly expect such services from the School is that their complaint clearly concerns J.S.'s educational needs. It follows that Plaintiffs are seeking IDEA-style relief and that they must exhaust their administrative remedies under section 1415(*l*).

Finally, Plaintiffs argue that the Fifth Circuit's decision in *Lartigue v. Northside Independent School District,* 100 F.4th 510 (5th. Cir. 2024), "distinguishes claims under the IDEA for denial of FAPE . . . from an ADA claim for failure to provide reasonable accommodation to a disabled student necessary for him to access education." Pls. Br. at 6. But *Lartigue* turned on the *second* prong of the two-part test described above; as the Fifth Circuit explained, "[t]he district court determined the gravamen of Lartigue's complaint was the denial of a FAPE, a finding no party disputes on appeal." *Lartigue,* 100 F.4th at 518. The court nevertheless found that "Lartigue was not required to exhaust her claims before the administrative agency" because she "s[ought] compensatory damages unavailable under the IDEA." *Id.* at 519. *Lartigue* thus accords with the district court's order here, which explained that only "the requested preliminary injunction [was] barred," and that "the claims . . . [that] seek only compensatory damages not provided for in the IDEA[] remain live." Sp. App'x at 21.

To be clear, J.S. might urgently need ABA therapy. But the way to get that relief is to follow the well-worn

path of the IDEA – which enlists specialized officials who are "experienced in addressing exactly the issues [J.S.] raises," *Fry,* 580 U.S. at 168 – not by seeking damages in an ADA and Rehabilitation Act suit, waiting seven months, and then tacking on a motion for an injunction that would entangle a federal district court in delicate and difficult decisions regarding the education of a disabled child.

We have considered Plaintiffs' remaining arguments and conclude that they are without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court.

/s/ Catherine Hagan Wolfe

**APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, FILED MAY 13, 2025**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:24-cv-767 (AMN/PJE)

DEREK S. AND ASHLEY T.S., D.O., INDIVIDUALLY AND AS GUARDIANS *AD LITEM* OF THEIR MINOR CHILD, J.S.,

*Plaintiffs,*

v.

THE BALLSTON SPA CENTRAL SCHOOL DISTRICT AND BALLSTON SPA BOARD OF EDUCATION,

*Defendants.*

**Hon. Anne M. Nardacci, United States District Judge**:

**MEMORANDUM-DECISION AND ORDER**

## I. INTRODUCTION

Presently before the Court is Plaintiffs Derek S. and Ashley T.S.'s motion for reconsideration of this Court's March 6, 2025 Memorandum Decision and Order, Dkt. No. 26, denying their motion for a preliminary injunction. Dkt.

No. 27 (the "Motion"). Defendants Ballston Spa Central School District and the Ballston Spa Board of Education filed their opposition on March 31, 2025, Dkt. No. 31, and Plaintiffs filed a reply on April 2, 2025, Dkt. No. 34.

For the reasons set forth below, Plaintiffs' Motion is denied.

## II. BACKGROUND

Plaintiffs seek preliminary injunctive relief based on Defendants' alleged failure to provide J.S., a student with autism spectrum disorder, access to a structured Applied Behavior Therapy ("ABA therapy") program in school since 2021. *See generally* Dkt. No. 18.[1] In particular, Plaintiffs seek an order requiring that Defendants "change the educational program offered to J.S. to include a structured ABA program that is closely supervised by a Board-Certified Behavior Analyst [], including a 1:1 aide who is trained and supervised in ABA therapy to help J.S. make progress while this action is pending." *Id.* at 2. On March 6, 2025, the Court denied Plaintiffs' request for a preliminary injunction, finding that while the claims asserted in Plaintiffs' pleadings under Title II of the Americans with Disabilities Amendments Act of 2008 ("Title II") and Section 504 of the Rehabilitation Act of 1973 ("Section 504") are properly before this Court, their request for preliminary injunctive relief is barred by the

1. The parties' familiarity with the background of this matter is assumed, and only those facts relevant to resolving the Motion are discussed here.

administrative exhaustion requirement of the Individuals with Disabilities Act ("IDEA"). Dkt. No. 26. Plaintiffs now seek reconsideration of that denial, arguing that the Court erred in applying the exhaustion requirement and failing to consider exceptions to exhaustion. *See* Dkt. Nos. 27, 34.

## III. STANDARD OF REVIEW

As a general matter, "reconsideration is warranted where the moving party can show the court 'overlooked' facts or controlling law that 'might reasonably be expected to alter the conclusion reached by the court.'" *Zhang v. Ichiban Grp., LLC*, No. 17-cv-00148, 2022 U.S. Dist. LEXIS 47969, 2022 WL 813956, at *1 (N.D.N.Y. Mar. 17, 2022) (quoting *Hum. Elecs., Inc. v. Emerson Radio Corp.*, 375 F. Supp. 2d 102, 114 (N.D.N.Y. 2004)); *see also Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Furthermore, "[i]n this district, there are only three circumstances under which a court will grant a motion for reconsideration: '(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) a need to correct a clear error of law or prevent manifest injustice.'" *Wright v. Martin Harding & Mazzotti, LLP*, No. 1:22-CV-515 (MAD/ML), 2024 U.S. Dist. LEXIS 92110, 2024 WL 2399906, at *2 (N.D.N.Y. May 23, 2024) (citing *Lewis v. Martinez*, No. 9:15-cv-55, 2019 U.S. Dist. LEXIS 80933, 2019 WL 2105562, *1 (N.D.N.Y. May 14, 2019)).[2]

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2. The parties proceed pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 60(b). However, given that the Court had not yet entered final judgment at the time Plaintiffs filed the Motion, "the Court believes that [the] request for reconsideration is

## IV. DISCUSSION

Given the lack of an intervening change in controlling law or new evidence identified in Plaintiff's Motion, the Court construes Plaintiffs' request for reconsideration to assert that there is "a need to correct a clear error of law or prevent manifest injustice." *Wright*, 2024 U.S. Dist. LEXIS 92110, 2024 WL 2399906, at *2 (quoting *Lewis*, 2019 U.S. Dist. LEXIS 80933, 2019 WL 2105562, at *1); *see also* Dkt. No. 27-2 at 4. As discussed below, however, Plaintiffs have not identified a clear error or a manifest injustice, and therefore, reconsideration is denied.

### A. New Arguments

Plaintiffs argue that the Court erred in concluding that the IDEA exhaustion requirement barred their

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[] properly analyzed under [F.R.C.P.] 54(b), which permits federal district courts to reconsider an interlocutory order 'at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.'" *Bradshaw v. Fletcher*, No. 19-cv-0428, 2022 U.S. Dist. LEXIS 254278, 2022 WL 22889197, at *3 (N.D.N.Y. Feb. 7, 2022) (first quoting F.R.C.P. 54(b); and then citing *Harris v. Millington*, 613 F. App'x 56, 58 (2d Cir. 2015)). Indeed, the Second Circuit has recently noted that a motion for reconsideration of a preliminary injunction order made under Rule 60(b) is "procedurally defective" because such an order is "not a final order." *New Falls Corp. v. Soni Holdings LLC*, No. 21-865-cv, 2022 U.S. App. LEXIS 19423, 2022 WL 2720517, at *1 n.2 (2d Cir. 2022); *see also Inkel v. Conn.*, No. 3:14-CV-01303 (MPS), 2015 U.S. Dist. LEXIS 86092, 2015 WL 4067038, at *6 (D. Conn. 2015) (reconsidering an order denying a motion for preliminary injunction pursuant to Rule 54(b)). Regardless, the Court would reach the same result and deny the motion for reconsideration under both Rule 54(b) and 60(b).

claim for injunctive relief because Plaintiffs' claims fall under certain exceptions to exhaustion. *See* Dkt. No. 27-2 at 8. Fatally, Plaintiffs did not raise any exception to the exhaustion requirement in its initial briefing. *See* Dkt. No. 23-4 at 7-8.

Generally, a motion for reconsideration is not intended to afford a "losing party an opportunity to . . . introduce arguments . . . that could have been presented, but were not, in opposing the original motion." *Nyppex LLC, et al., v. Fin. Indus. Regul. Auth. Inc.*, No. 22-CV-01528 (PMH), 2022 U.S. Dist. LEXIS 36808, 2022 WL 624951, at *1 (S.D.N.Y. Mar. 2, 2022) (quoting *Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petrol. Corp.*, 948 F.2d 111, 115 (2d Cir. 1991)). Indeed, where a motion for reconsideration "raise[s] new arguments that could have been raised" with the original motion, a district court acts within its discretion in denying reconsideration. *Williams v. Romarm*, 751 Fed. Appx. 20, 24 (2d. Cir. 2018) (summary order); *see also Infa Salim v. Patnode*, 9:18-cv-57 (MAD/ATB), 2019 U.S. Dist. LEXIS 149950, 2019 WL 4195175, at *2 (N.D.N.Y. Sept. 4, 2019) ("'The purpose of reconsideration is not for 'advanc[ing] new facts, issues or arguments not previously presented to the Court.'" (citation omitted))

Here, Plaintiffs had the opportunity to raise the exceptions to the exhaustion requirement in the initial briefing. *Contra* Dkt. No. 34 at 7. In response to Plaintiffs' request for a preliminary injunction, Defendants argued that Plaintiffs had not satisfied the exhaustion requirement set out in the IDEA. *See* Dkt. No. 22 at

11-20. Plaintiffs responded by claiming that they were "not required to exhaust IDEA administrative remedies to assert claims for disability discrimination under the ADA and Section 504." Dkt. No. 23-4 at 7. Plaintiffs did not include any mention of exceptions to the exhaustion requirement, but instead, argued that exhaustion was generally inapplicable. *Id.* This Court disagreed. *See generally*, Dkt. No. 26 at 13. Subsequently, in their motion for reconsideration, Plaintiffs pivoted, arguing that they were afforded exemptions from the exhaustion requirement. Dkt. No. 27-2. But Plaintiffs had the opportunity to raise exceptions to the exhaustion bar in response to Defendant's opposition to their motion for a preliminary injunction, and therefore, the Court denies the motion for reconsideration. *See Williams*, 751 Fed. Appx. at 24.

Plaintiffs' attempt to avoid this conclusion are meritless. First, Plaintiffs argue that they "could not have anticipated" that the Court would find that the IDEA exhaustion bar applies, and therefore, they should be excused for not arguing that the exceptions apply. Dkt. No. 34 at 7. But the record demonstrates that this argument is incorrect. Defendants spent a large portion of their opposition to Plaintiff's motion for a preliminary injunction arguing that the exhaustion requirement bars such relief. *See* Dkt. No. 22 at 11-20. At that point, Plaintiffs were on notice that the exhaustion requirement was at issue, and therefore, the Court's decision could not have come as a surprise.

Second, Plaintiffs seem to argue that their citation of cases which, in portions not relied upon by Plaintiffs,

discussed the exceptions to the exhaustion bar adequately raised the issue with the Court for purposes of pressing it on a motion for reconsideration. *See* Dkt. No. 34 at 7. But a mere citation to authority for a separate purpose, without more, is not enough to preserve all other legal arguments which the parties could draw from that authority. *See, e.g.*, *Schoolcraft v. City of New York*, 248 F. Supp. 3d 506, 509 (S.D.N.Y. 2017) (recognizing a new argument was rooted in previously cited authority but denying reconsideration because "Plaintiff did not urge" the new argument in previous briefing). Regardless, the Court did consider the cited authorities, including the discussion of potential exceptions to the exhaustion requirement. In its review of applicable precedent, the Court determined that, in this Circuit, exhaustion applies "unless the plaintiff can allege that an exception should apply." *Levine v. Greece Cent. Sch. Dist.*, 353 Fed. Appx. 461, 463 (2d Cir. 2009) (summary order). In other words, in response to an invocation of the exhaustion requirement, "Plaintiffs bear the burden of establishing that the [applicable] exception[s] appl[y]." *Piazza v. Florida Union Free Sch. Dist.*, 777 F. Supp. 2d 669, 682 (S.D.N.Y. 2009). Thus, in light of Plaintiffs' failure to press the issue, the Court did not have grounds to consider the applicability of the exceptions. *See A.S. v. Bd. Of Educ. Shenendehowa Cent. Sch. Dist.*, 1:17-CV-0501 (LEK/CFH), 2019 U.S. Dist. LEXIS 26349, 2019 WL 719833, at *13 (N.D.N.Y. Feb. 20, 2019) (finding that the Court must apply the exhaustion requirement and preclude claims where "Plaintiffs have not argued that any exceptions to the exhaustion requirement apply").

Third, Plaintiffs state that the issue, "even if characterized as a new argument, should be considered

because it is a purely legal argument that requires no additional fact finding." Dkt. No. 34 at 7-8. Plaintiffs present two inapplicable cases in support of this argument, both of which exclusively discuss the ability to raise new arguments on *appeal*, rather than the ability to raise new arguments on a motion for reconsideration. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) (quoting *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time *on appeal*." (emphasis added))); *see also Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (quoting *Baker v. Dorfman*, 239 F.3d 415, 420 (2d Cir. 2000)) ("Normally, we will not consider a claim raised for the first time *on appeal*, . . . , unless otherwise directed to do so." (emphasis added)). Seeing as a "motion for reconsideration is not a substitute for an appeal," these cases are inapplicable to the Plaintiffs' motion, and this argument is rejected. *Shaughnessy v. Garrett*, No. 5:06-CV-103 FJS GHL, 2011 U.S. Dist. LEXIS 35270, 2011 WL 1213167, at *1 (N.D.N.Y. Mar. 31, 2011).

Again, reconsideration is not a place for "relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a 'second bite at the apple.'" *Wilson v. Hilton*, No. 5:20-CV-1489, 2024 U.S. Dist. LEXIS 21996, 2024 WL 510286, at *3 (N.D.N.Y. Feb. 8, 2024) (citing *Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998)). Thus, to the extent that Plaintiffs' motion relies upon the application of exceptions to the exhaustion requirement, an argument which was not previously pressed, the motion is denied. However,

even if Plaintiffs had properly raised the argument, it is meritless.

**B. Exceptions to IDEA Exhaustion**

As explained in this Court's initial order, "[t]he Individuals with Disabilities Education Act (IDEA), . . . seeks to ensure children with disabilities receive a free and appropriate public education." *Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 144, 143 S. Ct. 859, 215 L. Ed. 2d 95 (2023). Usually, claims which fall under the purview of the IDEA, even if formally brought under other statutes, may only be brought in federal court if a plaintiff has exhausted the administrative remedies available. But exhaustion is not required if the form of relief sought in federal court is not available under the IDEA. *See Luna Perez*, 598 U.S. at 150; *See also Simmons v. Murphy*, No. 23-288-CV, 2024 U.S. App. LEXIS 13588, 2024 WL 2837625, at *3 (2d Cir. June 5, 2024).

However, "[e]xhaustion of IDEA claims is not required if (1) it would be futile to resort to the IDEA's due process procedures; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies." *Walsh v. King*, No. 1:14-CV-1078 (LEK/RFT), 2014 U.S. Dist. LEXIS 128190, 2014 WL 4630691, at *3 (N.D.N.Y. Sep. 12, 2014) (internal quotation marks omitted). Within this framework, the Second Circuit has excused the failure to exhaust administrative remedies where, "(i) the state agency was itself acting contrary to law; (ii) the case

involves systemic violations that could not be remedied by local or state administrative agencies; (iii) an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health); or (iv) the complaint alleges that the defendant school district had failed to implement the clearly-stated requirements of the IEPs." *Frank v. Sachem Sch. Dist.*, 84 F. Supp. 3d 172, 191 (E.D.N.Y. 2015) (citations and internal quotation marks omitted).

Plaintiffs' Motion argues that this case implicates the exceptions for "(i) emergency situations . . . , (ii) clear violation[s] of the law . . . , [and] (iii) when [] exhaustion would be futile either as a legal or practical matter. . . ." Dkt. No. 27-2 at 8. Plaintiffs are wrong in relation to all three exceptions, and thus, even if the exceptions were properly raised prior to the instant motion for reconsideration, the Court would nonetheless apply the exhaustion requirement.

**i. Emergency Situations**

First, Plaintiffs argue that they should be excused from the exhaustion requirement because this case involves an "emergency situation." Dkt. No. 27-2 at 9. In the IDEA context, an "emergency situation" is a situation wherein "'failure to take immediate action will adversely affect a child's mental or physical health.'" *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 206 (2d Cir. 2007) (citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). Such an exception is to be "sparingly invoked," as to avoid "undermin[ing] the IDEA's statutory mandate for exhaustion." *Coleman*, 503 F.3d at 206.

*Appendix B*

Plaintiffs argue that this case presents an emergency situation because "J.S. will be irreparably harmed in the absence of immediate court intervention." Dkt. No. 27-2 at 5. Plaintiffs allege that "every day that J.S. goes without receiving the recommended treatment for his disability, the less likely it is that he will be able to learn important skills necessary for his development." *Id.* at 9. Indeed, as Plaintiffs point out, several courts have recognized that young students with autism spectrum disorder face a narrow "window of opportunity" for learning, which if ignored, can result in critical issues in the child's long-term development. Dkt. No. 18-8 at 22; *see also* Dkt. No. 27-2 at 14. Plaintiffs also argue that there is "no evidence in the record to support a finding that denying ABA services to an autistic child is not an emergency situation because of the proven harm that will result to the autistic child who does not receive such services at an early age." *Id.* at 11.

The Court acknowledges Plaintiffs' strong desire for immediate relief. Nevertheless, the emergency situation exception does not apply because, even accepting Plaintiffs' assertion of irreparable harm as true, the emergency is, at least in part, "a problem of their own making." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 937 (6th Cir. 1989) (finding "no exception will be made where plaintiffs assert an emergency that is in fact 'a problem of their own making.'" (citation omitted)); *see also Pelosi o/b/o A.P. v. Ctr. Moriches Union Free Sch. Dist.*, CV 07-91 (FB) (AKT), 2007 WL 9710991, at *17 (E.D.N.Y. June 13, 2007) (finding parents "cannot complain of 'emergency' circumstances as the basis for preliminary injunctive relief when the record demonstrates that the

circumstances are in large part of their own making"). Here, Plaintiffs filed the instant motion for a preliminary injunction following a December 10, 2024 Committee on Special Education ("CSE") meeting wherein Defendants yet again denied the provision of ABA services to J.S. in his Individualized Education Program ("IEP"). Dkt. No. 18-8 at 12-13. However, Plaintiffs allege that Defendants have denied J.S. ABA services since he started kindergarten in 2021. *Id.* at 8. Thus, while the December 2024 meeting represents the latest alleged deprivation, Plaintiffs could have challenged the exclusion of ABA services from J.S.'s IEP for approximately three years prior to seeking the instant preliminary injunction. This delay undermines Plaintiffs' reliance on the emergency exception.

Even had Plaintiffs acted more promptly, the Court finds they have failed to meet their evidentiary burden to establish an emergency situation. *Piazza*, 777 F. Supp. 2d at 682 (noting it is Plaintiffs' burden to establish the applicability of exceptions). In order to establish an emergency situation, other Circuits have required plaintiffs to "provide affidavits from competent professionals along with other hard evidence that the child faces irreversible damage if the relief is not granted." *Komninos by Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 778-79 (3d Cir. 1994); *Rose v. Yeaw*, 214 F.3d 206, 212 (1st Cir. 2000) (applying the same standard). For its part, the Second Circuit has recognized that plaintiffs must "provide a sufficient preliminary showing" of irreversible harm to invoke the emergency situation exception. *Coleman*, 503 F.3d at 206 (quoting *Komninos*). Here, despite attaching as exhibits various

scientific, medical, and administrative documents and an independent educational neuropsychological evaluation supporting their requests for ABA services, Plaintiffs have failed to provide any sworn affidavits or other hard evidence attesting to irreversible harm to J.S. in the absence of ABA therapy. *See, e.g.*, Dkt. No. 18-3 at 97.

### ii. Clear Violation of the Law

Second, Plaintiffs argue that "IDEA exhaustion is not required when the school district acted in violation of the law[.]" Dkt. No. 27-2 at 4 (alterations in original). However, Plaintiffs interpret the applicable exception far too broadly. To succeed under this exception, courts assess whether "an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law." *A.S.*, 2019 U.S. Dist. LEXIS 26349, 2019 WL 719833, at *12 (citing *Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 199 (2d Cir. 2002)). The "general applicability" language requires that individuals seeking to avoid exhaustion make a claim that is not specific to one child but is instead systemic in nature. *See Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 820 F. Supp. 2d 490, 508 (S.D.N.Y. 2011) (noting that "specifically alleging that Defendants' actions discriminated against and interfered specifically with [a student]'s education alone" was not sufficient to excuse exhaustion under the contrary to law exception); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 250 (2d Cir. 2008) ("[t]here is no allegation of a system-wide violation of the IDEA's mandates or of a district-wide policy of discrimination against hearing-impaired students"), *abrogated on other*

*grounds by Doe v. Franklin Square Union Free Sch. Dist.*, 100 F.4th 86, 102 (2d Cir. 2024).

Here, Plaintiffs state that "[t]he violation of law here is Defendants' deliberate indifference *to J.S.'s rights* by ignoring *medical* (not *educational*) recommendations for services." Dkt. No. 27-2 at 4 (emphasis on "to J.S.'s rights" added). As such, Plaintiffs have not made any allegations against the Defendants on a broader, system-wide scale, but are instead pleading discrimination against J.S. exclusively. As discussed, when faced with similar arguments, courts in this Circuit have recognized that the "acting in violation of the law" exception to exhaustion "clearly refers to a much narrower category of violations than [P]laintiffs apparently believe, namely to legal violations that render the administrative review process ineffective." *M.A. v. New York City Dep't of Educ.*, 1 F. Supp. 3d 125, 147 (S.D.N.Y. 2014). Were the Court to apply the exception to all cases in which defendants are alleged to have acted unlawfully against the individual plaintiffs in a given case, such an approach "would, in effect, gut the exhaustion requirement entirely, and would allow every plaintiff to proceed directly to state or federal court on any IDEA-related claim, whether or not that claim had been exhausted." *Id.* Therefore, the exception for unlawful conduct does not apply.

**iii. Futility**

Finally, Plaintiffs argue that the exhaustion bar should not apply because "exhaustion would be futile or should otherwise be excused." Dkt. No. 27-2 at 8 (citing *Simmons*

*v. Murphy*, No. 23-288-CV, 2024 U.S. App. LEXIS 13588, 2024 WL 2837625, at *5 (2d Cir. June 5, 2024)). The Second Circuit has defined futility as a situation where "the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process." *Coleman*, 503 F.3d at 204-05. Typically, this exception is applied where "(1) the very procedures for assessing and placing students in educational programs were in issue, or (2) the nature and volume of the complaints made the administrative process an insufficient avenue of redress." *Dallas v. Roosevelt Union Free Sch. Dist.*, 644 F. Supp. 2d 287, 294 (E.D.N.Y. 2009) (citing *Cave*, 514 F.3d at 249); *see also S.G. v. Success Acad. Charter Schs.*, 18 Civ. 2484 (KPF), 2019 U.S. Dist. LEXIS 45866, 2019 WL 1284280, at *10 (S.D.N.Y. Mar. 20, 2019) (quoting *J.S. ex rel. N.S. v. Attica Cent. Schools*, 386 F.3d 107, 114 (2d Cir. 2004)).

In support of their argument, Plaintiffs assert that exhaustion would be futile because "seeking injunctive relief after an administrative hearing does not realistically protects [sic] J.S.'s rights[,]" due to the urgency of the requested services. Dkt. No. 27-2 at 9. As discussed above, Plaintiffs do not allege that the "very procedures" involved in J.S.'s IEP or any other system for assessing educational services are at issue. To the extent that Plaintiffs argue the urgent and allegedly irreparable "nature" of J.S.'s need for ABA services "ma[k]e[s] the administrative process an insufficient avenue of redress," the Court has already addressed this claim under the "emergency" exception and found that the basis for the argument does not support waiver.

Therefore, even if the Court could consider the exceptions to exhaustion laid out in Plaintiffs' motion for reconsideration, none of the exceptions would apply.

### C. Other Alleged Clear Errors of Law

Beyond the exceptions to the exhaustion requirement, Plaintiffs seemingly argue that the Court has made other clear errors of law.

First, Plaintiffs argue that because of its focus on IDEA, "the Court failed to appreciate the merits of Plaintiffs' claims under Title II of the Americans with Disabilities Act . . . and Section 504 of the Rehabilitation Act of 1973." Dkt. No. 27-2 at 4. But the purported strength of Plaintiffs' underlying claims has nothing to do with whether the IDEA exhaustion requirement bars their request for injunctive relief. Indeed, the Court explicitly noted that in denying the preliminary injunction, it did not bar Plaintiffs' underlying claims for damages under Title II and Section 504. *See* Dkt. No. 26 at 16. Plaintiffs' argument amounts to no more than frustration with the application of the IDEA exhaustion requirement.

Second, Plaintiffs argue that they "seek to have the Defendants follow experts' medical recommendations for services necessary to accommodate his disability, not education services." Dkt. No. 27-2 at 14. Put differently, Plaintiffs argue that the Court was mistaken in characterizing the provision of ABA services as education services, not medical care, which would fall outside of the IDEA's scope. *See id.* at 4 (characterizing ABA therapy

services as "*medical* (not *educational*)" (emphasis in original)). However, as articulated in their motion for a preliminary injunction, Plaintiffs' goals are to have the district "follow the medical recommendations that a structured ABA program be incorporated *as part of J.S.'s educational program*." Dkt. No. 18-3 at ¶ 64 (emphasis added); *see also id.* at ¶ 50 (requesting ABA therapy to "ensur[e] our son the student can fully participate in class while managing his autism effectively"). Moreover, when faced with similar complaints related to the provision of ABA services in schools, several courts have found that such claims are subject to the exhaustion requirement of the IDEA. *See L.A. v. New York City Dep't of Educ.*, 1:20-cv-05616-PAC, 2021 U.S. Dist. LEXIS 65700, 2021 WL 1254342, at *5 (S.D.N.Y. Apr. 5, 2021) (finding "insofar as Plaintiffs seek additional services—e.g., ABA therapy" such a request is subject to exhaustion); *H.G. v. Orcutt Union Sch. Dist.*, No. CV 21-4267-DMG (JCX), 2022 U.S. Dist. LEXIS 235736, 2022 WL 18277271, at *5 (C.D. Cal. Nov. 30, 2022) (noting that "Plaintiff further tries to avoid the IDEA's exhaustion requirement by artfully pleading that his ABA therapy constitutes medical services exempt from the IDEA's coverage" and finding that ABA therapy "falls under the 'related services' requirement of the IDEA, and thus requires exhaustion" (citation omitted)); *S.S.V., by & through his father Anthony Vos v. Gresham-Barlow Sch. Dist. No. 10J*, No. 3:19-CV-341-JR, 2019 U.S. Dist. LEXIS 241481, 2019 WL 13133863, at *3-4 (D. Or. July 17, 2019) (finding ABA services are not exempt from the IDEA exhaustion requirements because they are not provided by a licensed physician); *see also M.G. v. New*

*York City Dep't of Educ.*, 19 Civ. 3092 (PAE), 2020 U.S. Dist. LEXIS 153422, 2020 WL 4905390, at *1 (S.D.N.Y. Aug. 7, 2020) (illustrating a failure to provide ABA therapy is actionable under the IDEA where claimants have exhausted their administrative remedies). Therefore, Plaintiffs' assertion that ABA services fall outside the ambit of the IDEA and its exhaustion requirement fails to identify a clear error of law.

Third, Plaintiffs argue that the Court overlooked a slew of cases, including *B.D. v. Debuono*, 130 F. Supp. 2d 401, 439 (S.D.N.Y. 2000), *Robert F. v. N. Syracuse Cent. Sch. Dist.*, 5:18-CV-594 (LEK/ATB), 2019 U.S. Dist. LEXIS 241300, 2019 WL 13120328 (N.D.N.Y. July 24, 2019), *Robert F. v. N. Syracuse Cent. Sch. Dist.*, 5:18-CV-594 (LEK/ATB), 2021 U.S. Dist. LEXIS 151648, 2021 WL 3569108 (N.D.N.Y. Aug. 12, 2021), and *Gabel ex rel. L. G. v Bd. of Educ.*, 368 F. Supp. 2d 313, 336 (S.D.N.Y. 2005). *See* Dkt. No. 27-2 at 13. Plaintiffs generally assert that these cases support the notion that Defendants acted unlawfully and with reckless indifference. *Id.* However, these cases deal with whether plaintiffs have stated and/or proven discrimination claims under Section 504, and thus, are irrelevant to the application of the exhaustion requirement, the sole basis for this Court's denial of the preliminary injunction. Indeed, in relation to Plaintiffs' claims for damages asserted in the Complaint, such authority may prove useful. But the Court's denial of the preliminary injunction was not premised on the strength of Plaintiffs' underlying claims.

Finally, in their reply in support of their motion for reconsideration, Plaintiffs argue that the Court erred in not heeding the Fifth Circuit case *Lartigue v. Northside Indep. Sch. Dist.*, 100 F.4th 510 (5th Cir. 2024). *See* Dkt. No. 34 at 3. In particular, Plaintiffs argue that, pursuant to *Lartigue*, their claims should not be barred because they are discrimination claims. *Id.* at 3-6. The Court has already addressed Plaintiffs' argument that *Lartigue* controls, and regardless, this Court is not bound by its holdings. *See* Dkt. No. 26 at 13 n.9. In any event, Plaintiffs' argument represents a fundamental misunderstanding of *Lartigue* and this Court's prior determination. In *Lartigue*, the Fifth Circuit found that the plaintiff's individual ADA claim could proceed despite the fact that the gravamen of the complaint was a denial of a FAPE. 100 F.4th at 518-19, 23. The court based this holding on the fact that the plaintiff's ADA claim sought "compensatory damages unavailable under the IDEA." *Id.* at 519. Just as in *Lartigue*, this Court made clear that the IDEA exhaustion bar does not prohibit Plaintiffs' claims to the extent Plaintiffs seek compensatory damages. Dkt. No. 26 at 16 ("To be clear, the Court merely finds that the requested preliminary injunction is barred; the claims set forth in the Complaint itself, which seek only compensatory damages not provided for in the IDEA, remain live."). Thus, Plaintiffs have identified no clear error of law, as this Court's decision is in accord with that of the Fifth Circuit in *Lartigue*.

## V. CONCLUSION

Accordingly, the Court hereby

**ORDERS** that Plaintiffs' motion to reconsider, Dkt. No. 27, is **DENIED**.

**ORDERS** that the Clerk serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

**IT IS SO ORDERED**.

Dated: May 13, 2025
Albany, New York

/s/ Anne M. Nardacci
Anne M. Nardacci
U.S. District Judge

**APPENDIX C — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, FILED MARCH 6, 2025**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:24-cv-00767 (AMN/PJE)

DEREK S. AND ASHLEY T.S., D.O., INDIVIDUALLY AND AS GUARDIANS *AD LITEM* OF THEIR MINOR CHILD, J.S.,

*Plaintiffs,*

v.

THE BALLSTON SPA CENTRAL SCHOOL DISTRICT and BALLSTON SPA BOARD OF EDUCATION,

*Defendants.*

**Hon. Anne M. Nardacci, United States District Judge.**

Filed March 6, 2025

**MEMORANDUM-DECISION AND ORDER**

## I. INTRODUCTION

On June 12, 2024, Plaintiffs Derek S. and Ashley T.S., individually and as Guardians *Ad Litem* of their minor child, J.S., commenced this action pursuant to Title II of the Americans with Disabilities Amendments Act of 2008

("Title II")[1] and Section 504 of the Rehabilitation Act of 1973 ("Section 504") against Defendants the Ballston Spa Central School District and the Ballston Spa Board of Education seeking damages based on Defendants' alleged failure to provide J.S. meaningful access to public education by reason of his disability. *See* Dkt. No. 1 ("Complaint").[2] Defendants answered on August 29, 2024. Dkt. No. 8. Several months later, on January 17, 2025, Plaintiffs filed a motion for a preliminary injunction seeking an order that requires Defendants to change the educational services provided to J.S. Dkt. No. 18 at 2 ("Motion"). For the reasons set forth herein, the Court denies Plaintiffs' Motion.

## II. BACKGROUND[3]

### A. Individuals with Disabilities Act ("IDEA")

Though Plaintiffs do not assert claims under the IDEA, this case necessitates a thorough understanding of

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1. Plaintiffs also include a single reference to Title V of Americans with Disabilities Amendments Act of 2008, which covers retaliation. Dkt. No. 1 at 1.

2. The Court need not address Plaintiffs' motion to amend the Complaint, Dkt. No. 16, in conjunction with the request for a preliminary injunction because the requested amendments to the Complaint would not alter the Court's determination here.

3. The following facts are taken from the Complaint, as well as the affidavits and other materials submitted in support of Plaintiffs' Motion and are assumed true for the limited purpose of deciding Plaintiffs' Motion. *See, e.g.*, *Sullivan v. Cossette*, No. 3:13-cv-621, 2013 U.S. Dist. LEXIS 108413, 2013 WL 3965125, at *1 (D. Conn. Aug. 2, 2013).

its protections, entitlements, and obligations. The IDEA establishes that as a condition of accepting federal funding, schools must provide a free and appropriate public education ("FAPE") to all children with disabilities. The statute defines a FAPE as "*inter alia*, 'special education and related services that . . . have been provided at public expense, under public supervision and direction, and without charge'; that 'meet the standards of the State educational agency'; and that 'include an appropriate preschool, elementary school, or secondary school education in the State involved.'" *A.R. v. Conn. State Bd. of Educ.*, 5 F.4th 155, 157 (2d Cir. 2021) (quoting 20 U.S.C. § 1401(9)). A FAPE also involves an education "tailored to meet a child's 'unique needs[,]'" and it must provide "sufficient 'supportive services' to permit the child to benefit from that instruction." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158, 137 S. Ct. 743, 197 L. Ed. 2d 46 (2017) (quoting 20 U.S.C. § 1401(9), (26), (29)). Eligible students have a substantive right to a FAPE. *Id.*

When a student in New York is eligible for special education services under the IDEA, the statute calls for the creation of an IEP, which "function[s] as the 'primary vehicle' for providing each child with the promised FAPE." *Harden v. Buffalo Pub. Sch. Dist.*, 15-cv-646-FPG, 2018 U.S. Dist. LEXIS 123134, 2018 WL 3537070, at *2 (W.D.N.Y. July 23, 2018) (quoting *Fry*, 580 U.S. at 158). The IEP "spells out a personalized plan to meet all of the child's 'educational needs.'" *Id.* (citation omitted). An IEP is a "written statement that 'sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and

describes the specially designed instruction and services that will enable the child to meet those objectives.'" *D.D. ex rel. V.D. v. N.Y.C. Bd. of Educ.*, 465 F.3d 503, 507–08 (2d Cir. 2006) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)), *amended on other grounds*, 480 F.3d 138 (2d Cir. 2007).

### B. Factual Background

On or about June 14, 2018, Dr. Micaela Nordhauser diagnosed J.S. with autism spectrum disorder. Dkt. No. 18-3 at ¶ 5.[4] At the time, Dr. Nordhauser recommended "enhanced early intervention services as well as early behavioral and development interventions based on principles of [Applied Behavior Therapy ("ABA")] as part of J.S.'s treatment plan." *Id.* These recommendations, including the incorporation of ABA, align with recommendations found in the New York Department of Health Clinical Practice Guideline on Assessment and Intervention Services for Young Children with Autism Spectrum Disorder. Dkt. No. 18-8 at 6 (citing https://www.health.ny.gov/publications/20152.pdf).[5]

On February 14, 2019, J.S.'s parents enrolled him at Newmeadow preschool. Dkt. No. 18-3 at ¶¶ 9–10. While attending Newmeadow during the 2019-2020 and

4. Citations to court documents utilize the pagination generated by CM/ECF, the Court's electronic filing system.

5. The Court takes judicial notice of the cited online government publication. *See Dark Storm Industries LLC v. Cuomo*, 471 F. Supp. 3d 482, 488 n.1 (N.D.N.Y. 2020).

2020-2021 school years, J.S. received instruction and support through the school's ABA program. *Id.* During this time, J.S.'s pediatrician noted that J.S. continued to advance cognitively, that he was presenting no behavioral issues, and that the pediatrician "believe[d] his current programming [was] appropriate and meeting his needs." *Id.* at ¶ 10. Indeed, several documents prepared by Defendants during this time, pursuant to their obligations under the IDEA, also note the apparent benefits of ABA therapy for J.S. *See* Dkt. No. 18-7 at 10-21, 22-33, 36-47, 48-61.

J.S. left Newmeadow preschool and transitioned to kindergarten at Defendants' Malta Avenue Elementary School in September 2021. Dkt. No. 18-3 at ¶ 17. Despite noting J.S.'s progress under ABA therapy, the relevant Committee on Preschool Special Education ("CPSE"), which was empowered to make recommendations regarding J.S.'s IEP, did not recommend that J.S. continue ABA therapy in kindergarten. Dkt. No. 18-7 at 48-61. As a result, J.S. did not participate in an ABA program while in kindergarten. At the end of kindergarten, J.S. failed to achieve eight of the nine the goals set forth in his IEP. Dkt. No. 18-3 at ¶ 17.

On April 11, 2022, the relevant Committee on Special Education ("CSE"), a successor group to the CPSE which is similarly empowered to make recommendations for J.S.'s IEP post-preschool, met to discuss J.S.'s progress and to make recommendations for J.S.'s next IEP. The CSE acknowledged a lack of progress and recommended moving J.S. from a 15:1 program to a 12:1 self-contained

classroom. Dkt. No. 18-7 at 62-76. However, the CSE did not recommend ABA therapy as part of J.S.'s IEP for the 2022-2023 school year. *Id.* Again, J.S. failed to meet the majority of his IEP goals for the first grade, Dkt. No. 18-3 at ¶ 18, and again, the CSE did not recommend ABA therapy as a part of J.S.'s IEP for the 2023-2024 school year. Dkt. No. 18-7 at 77-91.

Prior to making recommendations for J.S.'s IEP for the 2024-2025 school year, Defendants requested that Gina Cosgrove, Psy.D., conduct a Psychological Evaluation of J.S. In the resulting report, Dr. Cosgrove noted J.S.'s previous progress while using ABA therapies, recommended "engaging [] in predictable social routines" to assist in building his joint attention, and ultimately opined that J.S. is a student who "requires a more specialized and well paced delivery of instruction to gain new skills." *Id.* at 92-101. After considering Dr. Cosgrove's recommendations, the CSE again did not recommend ABA therapy for J.S.'s IEP for the 2024-2025 school year. *Id.* at 102-19. However, the CSE did recommend that a 1:1 aide be assigned to J.S. *Id.* at 120-132. Plaintiffs requested that a trained Registered Behavior Technician ("RBT") be assigned to J.S., but their request was rejected by the CSE. *Id.*

Due to the CSE's failure to include ABA therapies and an RBT in the updated IEP after the report by Dr. Cosgrove, Plaintiffs requested an Independent Educational Evaluation and enlisted Dr. Jodie Cohen, PhD, and Dr. Bryant Sigler, PsyD. On November 7, 2024, Drs. Cohen and Sigler issued the resulting report

and recommended, in part, a structured ABA program using a trained 1:1 aide. *Id.* at. 151-62. Dr. Cohen also participated in a later CSE meeting where she reiterated the recommendations made in her report and further recommended that an RBT be assigned to J.S. in school. Dkt. No. 18-3 at ¶¶ 34-35, 55. The CSE again rejected these recommendations and refused to incorporate them into J.S.'s IEP. *Id.* at ¶ 56. Defendants assert that adding ABA therapy and the requested 1:1 aide to J.S.'s IEP would require it "to create, staff, and implement a highly specialized, in-District [ABA] program, just for [J.S.]." Dkt. No. 22-2 at 1.

This lawsuit and subsequent motion for a preliminary injunction followed. In the Complaint, Plaintiffs seek to "recover damages from Defendants . . . plus interest, attorneys' fees and costs" based on alleged violations of J.S.'s rights against discrimination and exclusion from public services due to disability pursuant to Title II and Section 504. Dkt. No. 1 at 13-17. In the Motion, Plaintiffs seek an affirmative order requiring Defendants to "change the education program offered to J.S. to include a structured ABA program that is closely supervised by a Board-Certified Behavior Analyst [], including a 1:1 aide who is trained and supervised in ABA therapy to help J.S. make progress while this action is pending." Dkt. No. 18 at 2.

## III. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless

the movant, *by a clear showing*, carries the burden of persuasion." *Sussman v. Crawford*, 488 F.3d 136, 139-40 (2d Cir. 2007) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997)) (emphasis in original). "Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances." *Moore v. Consol. Edison Co. of N.Y., Inc.*, 409 F.3d 506, 510 (2d Cir. 2005). Further, a preliminary injunction is "never awarded as of right," *Ayco Co., L.P. v. Frisch*, 795 F. Supp. 2d 193, 200 (N.D.N.Y. 2011) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008)), and the decision to grant such relief "rests in the sound discretion of the district court[.]" *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990).

A party seeking preliminary injunctive relief must establish: "(1) a likelihood of success on the merits or . . . sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the plaintiff's favor; (2) a likelihood of irreparable injury in the absence of an injunction; (3) that the balance of hardships tips in the plaintiff[s]'[] favor; and (4) that the public interest would not be disserved by the issuance of an injunction." *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015) (internal quotation marks and citation omitted). While a "[p] rohibitory injunction[] [that] maintain[s] the status quo pending resolution of the case" requires an applicant to show "a likelihood of success on the merits," *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 36-37

(2d Cir. 2018), a "mandatory injunction" that "alter[s] the status quo by commanding some positive act," requires an applicant to show "a clear or substantial likelihood of success on the merits" rather than simply a likelihood of success on the merits. *N.Y. Civil Liberties Union v. N.Y.C. Trans. Auth.*, 684 F.3d 286, 294 (2d Cir. 2012).

## IV. DISCUSSION

The Court finds, after ample review of the Complaint, Plaintiffs' Motion, and the related submissions, that Plaintiffs' Motion must be denied.

### A. Exhaustion

The Court does not reach the question of whether Plaintiffs have carried their burden in showing that a preliminary injunction is warranted because it finds that the Motion is precluded by the exhaustion requirement of the IDEA. Defendants argue that Plaintiffs have failed to pursue the administrative remedies available under the IDEA, and therefore, Plaintiffs may not seek injunctive relief. Dkt. No. 22 at 11-20. In response, Plaintiffs do not argue that they have pursued the relevant administrative remedies, but instead, contend that there is no exhaustion requirement for the sole causes of action asserted in the Complaint: discrimination claims under Title II and Section 504. *See* Dkt. No. 23 at 7-8. Because they did not bring claims under the IDEA, Plaintiffs assert they need not exhaust the IDEA's administrative remedies. *Id.* For the reasons set forth below, the Court agrees with Defendants.

*Appendix C*

If a parent wishes to challenge or modify an IEP, the IDEA provides that, in New York, they must do so by initiating a challenge before an Independent Hearing Office ("IHO"). *See* 20 U.S.C. § 1415(f); N.Y. Educ. Law § 4404(1)(a). The decision of an IHO may be appealed to the State Review Officer ("SRO"). *See* 20 U.S.C. § 1415(g)(1); N.Y. Educ. Law § 4404(2). Finally, the decision of an SRO may be challenged in state or federal court. *See* 20 U.S.C. § 1415(g), (i); N.Y. Educ. Law § 4404(3)(a); *see, e.g.*, *E.H. v. New York City Dep't of Educ.*, 164 F. Supp. 3d 539 (S.D.N.Y. 2016) (reviewing the decisions of an IHO and SRO and detailing the administrative process for challenging an IEP). The IDEA generally requires that these administrative remedies be exhausted before a lawsuit under the IDEA is filed in federal court. *See Ventura de Paulino v. New York City Dep't of Educ.*, 959 F.3d 519, 530 (2d Cir. 2020) (citing 20 U.S.C. § 1415(i)(2)(A)); *see also Handberry v. Thompson*, 436 F.3d 52, 60 (2d Cir. 2006) ("'It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court. . . .'") (quoting *J.S. v. Attica Cent. Sch.*, 386 F.3d 107, 112 (2d Cir.2004)).

Crucially, recognizing overlap in the statutes, the IDEA also dictates that plaintiffs seeking relief under Title II and Section 504 which "is also available under" the IDEA must also exhaust the IDEA's administrative remedies. *See* 20 U.S.C. § 1415(l) ("§ 1415(l)"). Here, Plaintiffs seek relief under Title II and Section 504 which seemingly implicates J.S.'s rights under the IDEA, and thus, the Court must determine whether the exhaustion bar in § 1415(l) applies.

*Appendix C*

The Supreme Court has provided guidance on this question. First, in *Fry*, the Supreme Court clarified that the application of the exhaustion bar "hinges on whether a lawsuit seeks relief for the denial of a FAPE. If a lawsuit charges such a denial, the plaintiff cannot escape [the exhaustion requirement] merely by bringing the suit under a statute other than the IDEA." 580 U.S. at 168. More recently, in *Luna Perez v. Sturgis Public Schools*, the Supreme Court reiterated its findings in *Fry* and separately held that the exhaustion bar of § 1415(l) only applies to claims that seek a *remedy* available under the IDEA. 598 U.S. 142, 146-48, 143 S. Ct. 859, 215 L. Ed. 2d 95 (2023).[6] The IDEA does not provide for backward-looking compensatory and punitive damages, and thus, so long as a plaintiff solely seeks such remedies, *Luna Perez* dictates that the exhaustion bar does not preclude suit. *Id.* at 148. Therefore, pursuant to *Fry* and *Luna Perez*, in order to determine whether the exhaustion bar of the IDEA precludes the injunctive relief sought by the Motion, this Court must assess 1) whether the gravamen of Plaintiffs' claims is the denial of a FAPE, and 2) whether the remedies sought by Plaintiffs are provided for by the IDEA. *See generally Simmons v. Murphy*, No. 23-288-cv, 2024 U.S. App. LEXIS 13588, 2024 WL 2837625, at *3 (2d

6. In doing so, the Supreme Court recognized that its interpretation of § 1415(l) "treats 'remedies' (the key term in the first clause [of § 1415(l)]) as synonymous with the 'relief' a plaintiff 'seek[s]' (the critical phrase in the second clause)." *Id.* at 148. Here, for reasons discussed below, that "relief means remedy" provides a basis for precluding Plaintiffs' Motion for a preliminary injunction, but not the claims asserted in their Complaint which seek only money damages.

Cir. June 5, 2024). If both questions are answered in the affirmative, then the exhaustion bar applies.

First, the Court finds that Plaintiffs' suit ultimately seeks relief for the denial of a FAPE. To make such a determination, the Court must "look to the substance, or gravamen, of the plaintiff's complaint." *Fry*, 580 U.S. at 165. In doing so, the Court must "set[] aside any attempts at artful pleading[,]" and must value "substance, not surface." *Id.* at 169. "The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words[] 'FAPE' or 'IEP.'" *Id.* at 169-70. Indeed, the Supreme Court explicitly noted that in suits brought under statutes other than the IDEA, like this one, "the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program." *Id.* at 170. Ultimately, when faced with claims under Section 504 and Title II, *Fry* demands that this Court assess whether the lawsuit most directly implicates the IDEA's guaranty of "individually tailored education services" or Title II and Section 504's "promise of non-discriminatory access to public institutions." *Id.*

To do so, *Fry* provides several tools. First, the Court must consider the overall purpose and scope of the statutes at issue. "[T]he IDEA, of course, protects only 'children' . . . and concerns only their schooling." *Id.* (citing § 1412(a)(1)(A)). The IDEA is also designed to ensure individuals' "unique needs" are met. *Id.* (citing § 1401(29)). In contrast, "Title II of the ADA and § 504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both

inside and outside schools. And those statutes aim to root out disability-based discrimination[.]" *Id.* Second, the Supreme Court has instructed that courts should consider "a pair of hypothetical questions[:] . . . . [C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And . . . could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* at 171. Third, and relatedly, the Supreme Court analyzed whether the relevant claims more closely resemble a "child su[ing] his school for discrimination . . . because the building lacks access ramps" or "a student with a learning disability su[ing] his school . . . for failing to provide remedial tutoring in mathematics." *Id.* at 171-72. The former, though it implicates the child's right to a FAPE to a certain extent, is better understood as a suit to substantively protect the child's rights against discrimination. After all, the child could file "the same basic complaint if a municipal library or theater had no ramps[,] [a]nd similarly[,] an employee or visitor could bring a mostly identical complaint against the school." *Id.* at 172. The gravamen of the latter scenario, the Supreme Court noted, is better understood as the vindication of the student's right to a FAPE because it is difficult to "imagine the student making the same claim against a public theater or library[,] [o]r similarly, [to] imagine an adult visitor or employee suing the school to obtain a math tutorial[.]" *Id.* at 172-73. Fourth, and finally, the Supreme Court instructed courts to consider "the history of the proceedings" and whether "a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute—thus starting to exhaust the Act's remedies before switching midstream." *Id.* at 173.

Here, using these guideposts, the Court has no trouble finding that Plaintiffs' claims, though brought under Title II and Section 504, directly implicate the right to a FAPE provided under the IDEA. First, the nature of the claims strongly implicates the IDEA's purpose in protecting a student's right to a FAPE. Despite lacking a direct reference to a FAPE, even a passing review of the Complaint and the Motion reveals that the Plaintiffs' central concern is the adequacy of the educational services provided through J.S.'s IEP. *See Ambrister v. New York Dep't of Educ.*, 22-cv-5516 (JGLC), 2024 U.S. Dist. LEXIS 149235, 2024 WL 3888743, at *8 (S.D.N.Y. Aug. 20, 2024) ("A challenge to the adequacy of a student's IEP or special education program is a textbook example of the types of cases justifying administrative exhaustion") (internal quotation marks omitted). J.S. is, of course, a child, and Plaintiffs' claims implicate the specific rights he is afforded in the school setting. Indeed, in seeking the present injunctive relief, Plaintiffs seek to satisfy what they deem to be J.S.'s "unique needs": an education which incorporates ABA therapies and involves 1:1 instruction with an RBT. *Id.* (citing § 1401(29)). Further, Plaintiffs admit that this Motion was brought "right after" Defendants' rejection of the independent evaluator's recommendations in the most recent IEP, s*ee* Dkt. No. 23 at 7 n.1, and Plaintiffs rely heavily on J.S.'s previous IEPs as evidence of Defendants' alleged culpability, s*ee generally*, Dkt. No. 18-7. Second, it is difficult to imagine J.S. making the same claim against another public institution. J.S.'s alleged right to ABA therapy in the classroom and other educational services simply would not arise in other settings. Third, Plaintiffs' claims are

substantially similar to *Fry*'s hypothetical student suing over the failure to provide remedial tutoring, a scenario which the Supreme Court posed would implicate the right to a FAPE. Finally, though Plaintiffs did not begin to seek review through the procedures outlined in the IDEA, the other indicators outlined in *Fry* strongly suggest that they should have. In total, these conclusions unmistakably indicate that the gravamen of the Complaint and the Motion seeks to vindicate J.S.'s right to a FAPE.[7] Thus, the Court moves on to assess whether the remedy sought is available under the IDEA.[8]

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7. These findings distinguish this case from *Doe v. Franklin Square Union Free School Dist.*, 100 F. 4th 86 (2d Cir. 2024). There, the Second Circuit refused to apply the exhaustion requirement where the plaintiff sued over the school district's refusal to allow her to go to school without a facemask. Though the complaint mentioned the school district's refusal "deprived [the student] of her right to an education as a person with a disability[,]" the Second Circuit found that the gravamen of the complaint was disability-based discrimination because the plaintiff "could file the same basic complaint" against another public institution. *Id.* at 101. Here, unlike in *Doe*, the Complaint's central concern is the content of J.S.'s IEP and the educational services provided by Defendants, and thus, the claims invoke his right to a FAPE.

8. The decisions of other circuits reaffirm this Court's finding that the gravamen of the Complaint and the Motion is the denial of a FAPE. Courts generally "require parents to exhaust their claims when they seek the 'special education' at the IDEA's core." *Doe by K.M. v. Knox County Board of Education*, 56 F.4th 1076, 1083 (6th Cir. 2023) (citing *Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1190–91 (11th Cir. 2018) and *S.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119, 126 (3d Cir. 2018)). Courts also generally require exhaustion where "[p]arents might seek a tutor

Second, the Court easily finds that the relief sought by the Motion, if not the relief set forth in the Complaint, is provided for in the IDEA. Again, the IDEA's exhaustion requirement applies equally to claims brought pursuant to Title II and Section 504 if those claims both center on the denial of a FAPE and "see[k] relief . . . also available under IDEA[.]" *Luna Perez*, 598 U.S. at 147 (internal quotation marks omitted). Here, the Complaint itself seeks compensatory damages, a remedy which is not provided for in the IDEA. *See, e.g., Doe*, 100 F.4th at 102; *Vasquez ex rel. J.V. v. New York City Dep't of Educ.*, 22-cv-03360-PAC, 2024 U.S. Dist. LEXIS 58145, 2024 WL 1332822, at *4 (S.D.N.Y. Mar. 28, 2024) ("[p]laintiff seeks only backwards-looking compensatory damages, which is a form of relief . . . IDEA does not provide.") (internal quotation marks omitted). Thus, if the Court were solely examining the remedies set forth in the Complaint, the inquiry would end there. However, months after filing the Complaint, Plaintiffs filed the present Motion which seeks preliminary injunctive relief, a remedy that *is* provided for in the IDEA.[9] *See, e.g., Hope v. Cortines*, 872 F. Supp.

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or one-on-one aide." *Id.* (citing *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 133 (3d Cir. 2017), *D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043, 1054 (9th Cir. 2021) (en banc), and *Heston ex rel. A.H. v. Austin Indep. Sch. Dist.*, 816 F. App'x 977, 981–82 (5th Cir. 2020)). Of course, these cases predate *Luna Perez*'s limitation on the exhaustion bar to cases seeking remedies available under the IDEA. Nevertheless, their holdings support the notion that a denial of FAPE is the gravamen of Plaintiffs' claims under *Fry*.

9. That Plaintiffs later sought injunctive relief distinguishes this case from the Fifth Circuit's holding in *Lartigue v. Northside Independent School District*, which Plaintiffs cite. 100 F.4th 510,

14, 15 (E.D.N.Y. 1995) (finding request for injunctive relief seeking to impose a "more expansive IEP" was "precisely the type of remedy best fashioned by the educational experts" and was available under the IDEA). Thus, this case presents an apparently novel question: where a complaint challenging the adequacy of a student's IEP is brought under Title II and/or Section 504 and seeks only compensatory damages, should the IDEA's exhaustion bar apply to preclude the relief requested in a later motion for a preliminary injunction? The Court answers in the affirmative for three reasons.

First, the Second Circuit's holding in *Doe*, which interprets and applies *Luna Perez*, weighs in favor the application of the exhaustion requirement. There, in clarifying its decision finding that the exhaustion requirement did not apply,[10] the Second Circuit noted that in cases involving the denial of a FAPE, "where . . . a plaintiff seeks both damages and equitable relief, the failure to exhaust remedies under the IDEA bars (or defers) only the equitable relief portion of the suit, not

514–19 (5th Cir. 2024). There, the Court found that because the plaintiff "s[ought] compensatory damages unavailable under the IDEA[,]" the exhaustion requirement did not bar suit. The plaintiff in *Lartigue* did not file a motion for a preliminary injunction. In fact, *Lartigue* supports the exact interpretation of the exhaustion bar upon which this Court relies. *Id.* at 515.

10. In *Doe*, the Second Circuit did not need to apply the exhaustion requirement bar to the portion of the suit which involved equitable claims because "the equitable claims ha[d] become moot[.]" *Id.* Here, that is not the case.

the damages portion as well." *Doe*, 100 F. 4th at 102 n.9.[11] Thus, the Second Circuit has endorsed an approach which considers each "portion of the suit" independently for purposes of applying the IDEA's exhaustion requirement.[12]

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11. Despite Plaintiffs' arguments to the contrary, *Doe* does not permit the pursuit of the requested injunctive relief. Plaintiffs point to a portion of *Doe* which noted that, "in light of the inconsistency between [*Luna Perez*] and our precedent holding that suits seeking damages may be subject to the IDEA exhaustion requirements, we must conclude that such precedent is 'no longer good law.'" *Id.* at 102 (citations omitted). Plaintiffs then baselessly assert that based on this finding, "[t]here is nothing in the *Doe* decision that prevents plaintiffs from seeking injunctive relief under Section 504 or the ADA." Dkt. No. 23 at 8. But the Second Circuit was noting that its prior law which precluded even those claims seeking only compensatory damages (a form of relief not provided for in the IDEA) was overturned by *Luna Perez*'s narrowing of the exhaustion requirement to only remedies which are covered by the IDEA. Both *Doe* and *Luna Perez* recognize that relief which is provided for in the IDEA, even when sought through Title II or Section 504 claims, is precluded by the exhaustion requirement where the gravamen of the claims is a denial of a FAPE.

12. Though the Court was unable to identify cases facing an identical procedural posture, cases which are strongly analogous to the question before this Court also instruct that the preliminary injunction should be denied. *See Brave and Free Santa Cruz v. Aragon*, 2:24-cv-02312-DAD-JDP, 2025 U.S. Dist. LEXIS 14037, 2025 WL 306594, at *10 (E.D. Cal. Jan. 27, 2025) (denying a motion for a preliminary injunction in a case proceeding under different legal theories where plaintiffs did not exhaust under the IDEA because the injunctive relief requested was provided for by the IDEA, and therefore, the exhaustion requirement applied); *George v. Davis Sch. Dist.*, 2:23-cv-139-JNP-DBP, 2023 U.S. Dist. LEXIS

It follows that the requested preliminary injunction is barred while the claims asserted in the Complaint itself may move forward.

Second, to find that the exhaustion bar does not apply would undermine its purpose. Similar plaintiffs would be encouraged to "game the system" by forgoing their administrative remedies in favor of a direct suit, excluding equitable relief from their complaints, but later seeking that same otherwise-barred relief through a motion for a preliminary injunction. In the end, such plaintiffs would be able to achieve the desired result, injunctive relief, without the burden of satisfying the statute's administrative remedies. Such a result defies the purpose of the statute and would create a system where federal courts, rather than education experts, are tasked with evaluating the sufficiency of IEPs. *See Hope*, 872 F. Supp. at 15. Ultimately, the Court's decision follows the lead of *Fry*, which itself sought to foreclose the ability of plaintiffs to artfully plead around the IDEA's exhaustion requirement. 580 U.S. at 169-70. Had injunctive relief been requested in the Complaint, there would no debate that such a request would be unavailable. *See Doe*, 100 F.4th at 102. The Court sees no reason to deviate from that outcome simply because the relief was only later requested through a motion for a preliminary injunction.

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137409, 2023 WL 5000989, at *1 (D. Utah Aug. 4, 2023) (denying plaintiff's request for a temporary restraining order based on a failure to exhaust under the IDEA in a case involving claims under Section 504 and Title II).

Third, as a more general matter, a plaintiff is prohibited from seeking preliminary injunctive relief that does not flow from the underlying claims in the case. "A preliminary injunction is always appropriate to grant intermediate relief of the *same character as that which may be granted finally*." *De Beers Consol. Mines v. U.S.*, 325 U.S. 212, 220 (1945), 65 S. Ct. 1130, 89 L. Ed. 1566 (emphasis added). In contrast, an injunction which "deals with a matter lying wholly outside the issues in the suit" is inappropriate. *Id.* In other words, "to seek an injunction, a plaintiff must seek relief that flows from the underlying claims at bar against the named defendants." *Weston v. Bayne*, 9:22-CV-621 (LEK/ATB), 2023 U.S. Dist. LEXIS 209984, 2023 WL 8183219, at *3 (N.D.N.Y. Nov. 27, 2023); *see also Stewart v. U.S. I.N.S.*, 762 F.2d 193, 198-99 (2d Cir. 1985) (affirming denial of injunctive relief because the plaintiff sought a preliminary injunction by "present[ing] issues which are entirely different from those which were alleged in his original complaint"). Here, by virtue of the IDEA exhaustion bar, the Complaint solely asserts (and could only permissibly assert) claims seeking relief for backward-looking harms caused by the alleged insufficiency of J.S.'s education services. In contrast, the present Motion seeks a remedy which is necessarily premised on allegations of ongoing, forward-looking harm. Though the Motion broadly speaks to the same topic as the Complaint (the sufficiency of J.S.'s education), it seeks relief which could not be awarded based solely on the permissible scope of the Complaint. As such, the requested preliminary injunction "deals with a matter lying wholly outside the [permissible] issues in the suit[,]" and must therefore be denied. *De Beers Consol. Mines*, 325 U.S. at 220.

In short, while trying to work around the exhaustion requirement, Plaintiffs have found themselves at a dead end. To be clear, the Court merely finds that the requested preliminary injunction is barred; the claims set forth in the Complaint itself, which seek only compensatory damages not provided for in the IDEA, remain live. If Plaintiffs were to exhaust their administrative remedies, assert new claims seeking equitable relief, and then seek a similar preliminary injunction, nothing in this decision should be read to preclude such relief. The Court appreciates the importance of the issues raised in the Motion to Plaintiffs and J.S., but to entertain the Motion would run afoul of clearly established law and endorse a shortcut around the considered purpose of § 1415(l).

## V. CONCLUSION

Accordingly, the Court hereby

**ORDERS** that Plaintiffs' Motion for a Preliminary Injunction, Dkt. No. 18, is **DENIED**; and the Court further

**ORDERS** that the Clerk serve a copy of this Memorandum-Decision and Order on the Parties in accordance with the Local Rules.

**IT IS SO ORDERED**.

Dated: March 6, 2025
Albany, New York

/s/ Anne M. Nardacci
Anne M. Nardacci
U.S. District Judge

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JANUARY 14, 2026**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 25-668

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of January, two thousand twenty-six.

DEREK S., INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR MINOR CHILD, J.S., ASHLEY T.S., D.O., INDIVIDUALLY AND AS GUARDIANS AD LITEM OF THEIR MINOR CHILD, J.S.,

*Plaintiffs-Appellants,*

v.

THE BALLSTON SPA CENTRAL SCHOOL DISTRICT, BALLSTON SPA BOARD OF EDUCATION,

*Defendants-Appellees.*

*Appendix D*

**ORDER**

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

## APPENDIX E — RELEVANT STATUTES

### Title II of the Americans with Disabilities Amendments Act of 2008 ("ADA")

**(42 U.S.C. §§12131 et seq)**

**§ 12132. Discrimination**

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 USCS § 12132

**§ 12133. Enforcement**

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

42 USCS § 12133

*Appendix E*

**Section 504 of the Rehabilitation Act of 1973 ("Section 504")**

**(29 U.S.C. §794(a))**

**§ 794. Nondiscrimination under Federal grants and programs**

(a) Promulgation of rules and regulations. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 USCS § 794

*Appendix E*

§ **794a. Remedies and attorney fees**

(a)

[* * *]

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 USCS § 794a

*Appendix E*

## Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

### § 2000d-7. Civil rights remedies equalization

**(a) General provision.**

**(1)** A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 USCS § 794], title IX of the Education Amendments of 1972 [20 USCS §§ 1681 et seq.], the Age Discrimination Act of 1975 [42 USCS §§ 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

**(2)** In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 USCS § 2000d-7

*Appendix E*

## Individuals with Disability Education Act

**(20 U.S.C. §1415(l))**

**§ 1415. Procedural safeguards**

**[* * *]**

**(l) Rule of construction.** Nothing in this title [20 USCS §§ 1400 et seq.] 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 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

20 USCS § 1415