

No. 25-1051

---

---

IN THE  
**Supreme Court of the United States**

---

DEREK S., INDIVIDUALLY AND AS GUARDIAN  
AD LITEM OF HIS MINOR CHILD, J. S., *et ux.*,

*Petitioners,*

*v.*

BALLSTON SPA CENTRAL SCHOOL DISTRICT, *et al.*,

*Respondents.*

---

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

---

---

**PETITIONERS' REPLY BRIEF**

---

---

CARLO A.C. DE OLIVEIRA  
*Counsel of Record*  
PHILLIP G. STECK  
COOPER ERVING & SAVAGE LLP  
20 Corporate Woods Boulevard,  
Suite 501  
Albany, NY 12211  
(518) 449-3900  
cdeoliveira@coopererving.com

*Attorneys for Petitioners*

---

---

392118



COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

**TABLE OF CONTENTS**

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES .....	ii
I. Respondent’s Attempt to Distinguish <i>Z.W.</i> and <i>KISHIMOTO</i> from this Case is Contradicted by the Record and Unsupported by the Law .....	1
II. <i>Fry</i> makes no distinction between “Permit/ Allow” Claims and “Provide” Claims.....	5
A. <i>Fry</i> does not support Respondent’s Proposed Rule .....	5
B. Respondent’s Proposed Rule Conflicts with Congressional Intent .....	6
III. <i>Fry</i> does not bar standalone discrimination claims under the ADA or Section 504 simply because an accommodation can be part of an Individualized Education Program (IEP) .....	7
IV. Petitioner’s do not rely on a futility argument in this Petition .....	9
V. This Court’s Intervention is Necessary to Reconcile the Confusion Created by Lower Court’s Application of <i>Fry</i> and <i>Luna Perez</i> .....	9
CONCLUSION .....	14

TABLE OF CITED AUTHORITIES

	<i>Page</i>
<b>Cases</b>	
<i>A.J.T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279</i> , 605 U.S. 335 (2025) . . . . .	7, 8
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974) . . . . .	7
<i>Butler v. South Glens Falls Cent. Sch. Dist.</i> , 106 F. Supp. 2d 414 (N.D.N.Y. 2000) . . . . .	8
<i>EEOC v. Indiana Bell Telephone Co.</i> , 256 F.3d 516 (7th Cir. 2001) . . . . .	6, 7
<i>Fry v. Napoleon</i> , 580 U.S. 154 (2017) . . . . .	3, 5, 7-10, 13
<i>Hawai'i Disability Rights Ctr. v. Kishimoto</i> , 122 F.4th 353 (9th Cir. 2024) . . . . .	1
<i>J.L. v. N.Y. City Dept. of Educ.</i> , 324 F. Supp. 3d 455 (S.D.N.Y. 2018) . . . . .	8
<i>Luna Perez v. Sturgis Public Schools</i> , 598 U.S. 142 (2023) . . . . .	9, 10, 13
<i>Robert F. v. North Syracuse Cent. Sch. Dist.</i> , 2021 U.S. Dist. LEXIS 151648, 2021 WL 3569108 (N.D.N.Y. 2021) . . . . .	8

*Cited Authorities*

	<i>Page</i>
<i>Wright v. Universal Maritime Service Corp.</i> , 525 U.S. 70 (1998).....	7
<i>Z.W. v. Horry Cnty. Sch. Dist.</i> , 68 F.4th 915 (4th Cir. 2023).....	1, 9
<b>Statutes and Other Authorities</b>	
29 U.S.C. §794(c) .....	6
42 U.S.C. §12131(2) .....	6
42 U.S.C. §12201(h) .....	6
Americans with Disability Act .....	1, 5-7, 9, 13, 14
Rehabilitation Act, Section 504 .....	1, 5-8, 13, 14
28 C.F.R. §35.150(a)(3) .....	6
Audio Files, United States Court of Appeals for the Second Circuit, available at <a href="https://ww3.ca2.uscourts.gov/decisions/isysquery/078d31f1-ed99-457b-af4c-2d5163b0e233/41-50/list/">https://ww3.ca2.uscourts.gov/decisions/ isysquery/078d31f1-ed99-457b-af4c-2d5163 b0e233/41-50/list/</a> .....	4, 12

**I. Respondent’s Attempt to Distinguish *Z.W.* and *KISHIMOTO* from this Case is Contradicted by the Record and Unsupported by the Law.**

Respondent urges this Court to reject the petition on the grounds that *Z.W. v. Horry Cnty. Sch. Dist.*, 68 F.4th 915 (4<sup>th</sup> Cir. 2023) and *Hawai’i Disability Rights Ctr. v. Kishimoto*, 122 F.4th 353 (9<sup>th</sup> Cir. 2024) are factually distinguishable from this case. Respondent contends that Petitioner’s request “to provide” ABA therapy in school should be treated differently from a request to “to permit or to allow” ABA therapy in school. However, neither *Z.W.’s* and *Kishimoto’s* holdings nor the facts of the present case support such an outcome.

The Ninth Circuit in *Kishimoto* made no distinction between privately provided or publicly funded ABA therapy in school. Rather, the *Kishimoto* Court held that limiting access to medically prescribed ABA services in school to students with autism violates the Americans with Disability Act and Section 504 of the Rehabilitation Act. *Id.*, at 358; 370. The Fourth Circuit in *Z.W.* rejected the school district’s argument that exhaustion was required because ABA therapy services can be available under the IDEA. *Z.W.*, 68 F.4th at 920. The Court held that the school district’s refusal to permit *Z.W.* to bring his privately supplied and funded ABA therapist to school is not an IDEA claim, but a valid claim under the ADA and Section 504. *Id.*, at 921.

Like the plaintiffs in *Z.W.*, Petitioners offered to pay for the ABA therapy services to J.S. in school, but Respondent denied their request. Pet. 11-12. J.S.’s mother stated in her declaration in support of Petitioners’ motion for preliminary injunction as follows:

4. [...] Despite doctors' recommendations, the well-researched body of scientific evidence proving the effectiveness of ABA in the development of students with autism, *and my family's offer to pay for such services*, the Ballston Spa Central School District continues to deny J.S. the one treatment that is effective for him. R. 68 (emphasis added)<sup>1</sup> (emphasis added).

[\*\*\*]

26. [...] They acknowledged gaps in their expertise related to autism, that they “could do better” yet committed only to “providing additional education” to staff, which they consistently did not quantify, blaming the denial of our request on “a tough budget year” and [employee] “turnover already bad” therefor did not want to place any additional educational demands on aides or assistants. *Even when we offered to pay, they stated “that’s just not an option.”* R. 76. (emphasis added).

[\*\*\*]

55. We then sought an Independent Educational Evaluation (IEE), which was conducted by Dr. Jodie Cohen, a pediatric neuropsychologist. In her report, Cohen documented her interviews

---

1. “R.” citations are to the Record on Appeal before the United States Court of Appeals for the Second Circuit (Dkt. No. 23.1).

with school professionals, who confirmed that there are no Autism education experts housed in [J.S.]’s school and that one BCBA serves every student in the district. When asked about the possibility of a 1:1 RBT, the administrator explained to Dr. Cohen that it is challenging to hire a qualified aide at all, let alone one with a certification. Even if the aide were to be trained, they stated there would be a high risk of that this individual would turn over, leaving J.S. under supported. *When Dr. Cohen asked about the possibility of us as 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.”* R. 89-90 (emphasis added).

Dr. Cohen’s report confirmed that Petitioners offered to pay for an RBT “*but the district declined.*” R. 354; 358. Thus, even if this Court in *Fry* required the disabled student to pay for the accommodation requested to be exempt from IDEA exhaustion, Petitioners did offer to pay for ABA therapy services for J.S. in school.

Contrary to Respondent’s statements, Petitioners did not make any admissions that are contrary to their position. Resp. 19.<sup>2</sup> Such argument is an attempt to divert the Court’s attention from the legal issues presented in this Petition. In spite of the Second Circuit Panel’s

---

2. “Resp.” citations are to the Respondent’s Opposition to Petition for a Writ of Certiorari.

strong-willed convictions, the undersigned respectfully addressed the Panel's questions with references to this Court's precedent, which the Panel was uninterested in hearing. The following is an excerpt from the oral argument before the Second Circuit.

01:39 Applied behavior analysis is the way that this child can have a meaningful access to an education.

01:46 [The Court] But that's, I mean, that is really related to the IDEA, right? That's about education.

01:53 [The Court]: It's not like a ramp. An adult couldn't bring a claim seeking ABA services from a theater or a library or a school, right?

02:02 Well, I disagree, Your Honor.<sup>3</sup>

In their Petition for Panel Rehearing and for Rehearing *En Banc*, Petitioners further explained that the Panel's analogy to adult services was confusing and out of context because adults cannot sue a school district for lack of access to education. *See* Dkt. No. 47, p. 8. However, Petitioners noted that "it is plausible that an autistic adult in an ABA program utilizing ABA therapists to accompany him in his daily life's activities could file the same complaint as J.S. if the denial of an ABA therapist deprived him of access to education, a library, or a theater."

---

3. <https://ww3.ca2.uscourts.gov/decisions/isysquery/078d31f1-ed99-457b-af4c-2d5163b0e233/41-50/list/>

**II. *Fry* makes no distinction between “Permit/Allow” Claims and “Provide” Claims.**

**A. *Fry* does not support Respondent’s Proposed Rule.**

Under Respondent’s proposed rule, a disabled student seeking relief for failure to accommodate a disability would have to exhaust IDEA administrative remedies if the student asked the school to “to provide” the accommodation. The same student, however, would not have to exhaust if the student offered to pay for the same accommodation.

*Fry* did not condition the right of disabled students to seek relief for standalone discrimination claims upon their family’s agreement to pay for the services in school. On the contrary, this Court noted that regulations implementing Title II and Section 504 require “a public entity to make ‘reasonable modifications’ to its ‘policies, practices, or procedures’ when necessary to avoid” discrimination based on disability. *Fry*, 580 U.S. at 159-160. To determine the gravamen of the complaint under *Fry*, it is immaterial who pays for the accommodation requested in school.

As a matter of policy, Respondent’s proposed rule would create a financial burden on disadvantaged families who are unable to pay for services in school by subjecting them to costly IDEA administrative remedies not imposed on families who are able to pay for ABA services in school out of pocket.

### **B. Respondent's Proposed Rule Conflicts with Congressional Intent.**

Respondent's proposed rule is also in conflict with Congressional intent requiring public entities to provide reasonable accommodations under Title II of the ADA and Section 504. 42 U.S.C. §12131(2); 29 U.S.C. §794(c). In the absence of certain exceptions, which the public entity carries the burden of proof to establish, public entities must provide reasonable accommodations to disabled students. 42 U.S.C. §12201(h); 28 CFR 35.150(a)(3). Congress made no distinction concerning who pays for the services. Under Respondent's proposed rule, a wheel-chair bound student requesting a ramp for access to the school would have to exhaust administrative remedies if the student requested the school to pay for the ramp, irrespective of whether the school met the statutory exceptions. That same student would not be subjected to IDEA exhaustion if the student offered to pay for the ramp himself.

Here, Petitioners offered to pay for the services, but Respondent's reason for not providing ABA in school to J.S. does not meet the statutory exceptions. Respondent's Director of Elementary Education justified the denial of Petitioners' request for ABA on the district's "*need to secure cooperation and agreement with the Ballston Spa Teachers Association.*" R. 377, ¶5. "*If the District were to hire an outside LBA, [...], it would be a violation of the prohibition on contracts for instruction.*" R. 378, ¶7.

However, a collective bargaining agreement does not insulate the Respondent from its obligations not to discriminate on the basis of disability under federal law. *EEOC v. Indiana Bell Telephone Co.*, 256 F.3d 516, 522

(7th Cir. en banc 2001) (holding that labor agreements do not exculpate conduct that would violate Title VII) citing *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 75-76 (1998) (general arbitration clause in a collective-bargaining agreement did not waive the employee’s right to pursue an ADA claim in federal court); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (rights under Title VII not waived by collective bargaining agreement).

**III. *Fry* does not bar standalone discrimination claims under the ADA or Section 504 simply because an accommodation can be part of an Individualized Education Program (IEP).**

Respondent argues that because the IDEA provides the exclusive mechanism for modifying a student’s IEP, Petitioners’ claims under the ADA and Section 504 are subject to the IDEA exhaustion requirement. Resp. 11-13. First, as Respondent admitted, Petitioners never sought to change the IEP. Resp. 2. Furthermore, even if a change to the IEP was necessary to accommodate J.S., requests to change an IEP are not evidence that “the substance of a plaintiff’s claims concerns the denial of a FAPE.” *Fry*, 580 U.S. at 173-174 (emphasis added).

It is important to note that the Complaint in this action was filed before this Court’s decision in *A.J.T. v. Osseo Area Sch., Indep. Sch. Dist. No. 279*, 605 U.S. 335, 336 (2025), which eliminated the bad faith and gross misjudgment heightened standard of proof that Respondent relies on in Section 2(H) of its brief. Resp. 25-26. Before *Osseo*, Plaintiffs were required to plead evidence of bad faith or gross misjudgment to prove discrimination under Section

504. Bad faith or gross misjudgment could be shown by the school's failure to implement a student's IEP. See *Butler v. South Glens Falls Cent. Sch. Dist.*, 106 F. Supp. 2d 414, 421-22 (N.D.N.Y. 2000) ("it was not objectively reasonable for the defendants to believe that failing to develop IEPs which contained the required information . . . did not violate his statutory rights."); *J.L. v. N.Y. City Dept. of Educ.*, 324 F. Supp. 3d 455, 468 (S.D.N.Y. 2018) ("While bureaucratic incompetence may have triggered DOE's failure to implement IEP services, it eventually morphed into a reckless disregard for J.P., M.C., and O.A.'s educational needs."). It may also be shown where the school provided the student with fewer services than it knew was necessary for him to have meaningful access to education. *Robert F. v. North Syracuse Cent. Sch. Dist.*, 2021 U.S. Dist. LEXIS 151648, \*22, 2021 WL 3569108 (N.D.N.Y. 2021) (granting summary judgment to Plaintiff on claim that Defendants failed to provide G.F. with appropriate speech therapy).

Thus, to the extent the Complaint or Petitioners' proof references IEP violations or failure to provide services necessary to J.S., such evidence was necessary to meet outmoded pleading requirements that unfairly imposed a heightened standard on schoolchildren's claims of discrimination before this Court's *Osseo* decision. However, courts should look to the substance of the complaint, and not the "use (or non-use) of particular labels and terms." *Fry*, 580 U.S. at 169-170. Thus, Petitioners' references to IEPs in their Complaint does not mean that the substance of the Complaint sought relief for the denial of FAPE.

**IV. Petitioner's do not rely on a futility argument in this Petition.**

Respondent urges this Court to reject the petition on the grounds that some litigants used the IDEA to challenge the denial of ABA therapy, and, as a result, IDEA should be the exclusive way under which an autistic child can challenge the denial of ABA therapy. But whether ABA services can be available under the IDEA or part of an IEP is not the relevant question. *Z.W.*, 68 *F.4th* at 920 citing *Fry* 580 U.S. at 171-72.

The Plaintiff is the master of the claim and the plaintiff can choose, based on the remedy sought, whether the claim is subject to exhaustion or not. *Fry* 580 U.S. at 169. For example, a wheelchair-using student whose school lacks ramps might sue under either the ADA or the IDEA. The fact that some students may obtain success under one statute does not preclude others from choosing a different or better path.

**V. This Court's Intervention is Necessary to Reconcile the Confusion Created by Lower Court's Application of *Fry* and *Luna Perez*.**

Lower courts have struggled to reconcile the gravamen-based framework of *Fry* and the remedy-focused holding of *Luna-Perez*. *Luna Perez* is only relevant when the complaint seeks relief under both the IDEA and another Federal statute, which is not the case here. If the complaint does not seek relief for the denial of FAPE, the IDEA exhaustion drops out and the availability of the same remedies under the ADA and the IDEA is irrelevant to determine the gravamen of the complaint.

The lower courts struggle to reconcile *Fry* and *Luna Perez* is illustrated by the Second Circuit Panel's questions to Petitioners' counsel in this case. During oral argument, while Petitioners' counsel tried to focus on the gravamen of the Complaint as instructed in *Fry*, the Panel focused on the availability of the remedy (injunction) under the IDEA.

01:39 Applied behavior analysis is the way that this child can have a meaningful access to an education.

01:46 [Court] But that's, I mean, that is really related to the IDEA, right? That's about education.

01:53 [Court] It's not like a ramp. An adult couldn't bring a claim seeking ABA services from a theater or a library or a school, right?

02:02 Well, I disagree, Your Honor.

02:03 [Court] Really? So an employee who worked at the school could be entitled to this kind of relief?

02:12 No, but I want to focus on what the IDEA provides. The IDEA provides relief for the denial of FAPE.

02:19 FAPE, the definition of FAPE, Your Honor, is special education and related services.

02:25 [Court] No, no, I understand all that, but I think the point is if this is about a FAPE, then you've got to exhaust, which you didn't do, right?

02:32 [Court] And that's what the district court found.

02:34 If the relief being sought in the complaint was for the denial of FAPE, which we submit it was not, then I would agree with Your Honor.

02:41 [Court] Then in terms of the preliminary injunction, wasn't the relief sought precisely the kind of relief that you get through the IDEA?

02:51 Yes, Your Honor, but I want to...

02:53 [Court] If the answer is yes, then doesn't the exhaustion requirement apply?

02:58 Yes, but I think we're missing one step, Your Honor, and the step is the Supreme Court in Fry stated that if you have a stand-alone claim of disability discrimination,

03:09 you do not have to exhaust. If you're not...

03:11 [Court] You don't have to exhaust with respect to the damages claim because you can't get damages under the IDEA, but the question is the injunction.

03:20 [Court] The injunction sought to require the school system to include the ABA therapy, right?

03:28 Correct.

03:29 [Court] That's what the injunction sought?

03:30 Correct.

03:30 [Court] And isn't that in essence asking for the plan to be revised, the IEP to be revised?

03:39 No, Your Honor, that's what I'm trying to explain because if you read the complaint, there is never an allegation that the IEP has to be revised.

03:46 The complaint specifically says...

03:47 [Court] But in essence, isn't that what you're asking? . . .

03:51 No, that's not what I'm asking, Your Honor.

03:53 What we are asking is that this child be provided reasonable accommodation so that the child can have access to the FAPE.<sup>4 5</sup>

---

4. Counsel used the word "FAPE" in this colloquy to illustrate that without ABA, J.S. cannot have access to education. The word "FAPE" was not used as part of claims that FAPE was being denied.

5. <https://ww3.ca2.uscourts.gov/decisions/isysquery/078d31f1-ed99-457b-af4c-2d5163b0e233/41-50/list/>

As the above exchange shows, the Panel focused on the availability of the same remedy (i.e., injunction) under the IDEA and ADA/Section 504 to conclude that Petitioners needed to exhaust the IDEA administrative remedies since the IDEA also allows for injunctive relief. Such reasoning is inconsistent with this Court's decision in *Fry* instructing that the question is governed by the gravamen of the complaint. The Panel also concluded that, to provide ABA therapy to the child in school, his IEP would have to be modified, thus converting Petitioners' claim into a demand to change educational services subject to the IDEA. The Panel's reasoning is contrary to this Court's unambiguous statement in *Fry* that requests "for accommodations or changes to a special education program" are not evidence that "the substance of a plaintiff's claims concerns the denial of a FAPE." *Fry*, 580 U.S. at 173-174 (emphasis added).

The approach taken by the Second Circuit embodies a misunderstanding that is pervasive in lower courts around the country, giving rise to a split with some lower courts taking a gravamen focus and others taking a remedy focus. As a result, many courts have incorrectly dismissed standalone failure to accommodate discrimination claims simply because the IDEA may provide a similar remedy or the accommodation implicates education like the lower court did in the present case. R. 17.

The present case is an excellent vehicle for this Court to address the confusion created by lower courts' failure to apply *Fry* and *Luna Perez*. Without this Court's intervention to provide further guidance to lower courts, disabled schoolchildren will continue to be held to a heightened standard when seeking remedies such as

injunctive relief to stop discrimination that is unlawful under the Title II and Section 504.

**CONCLUSION**

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

Dated: April 15, 2026  
Albany, New York

Respectfully submitted,

CARLO A.C. DE OLIVEIRA  
*Counsel of Record*  
PHILLIP G. STECK  
COOPER ERVING & SAVAGE LLP  
20 Corporate Woods Boulevard,  
Suite 501  
Albany, NY 12211  
(518) 449-3900  
cdeoliveira@coopererving.com

*Attorneys for Petitioners*