

1 JUSTICE SOTOMAYOR: Would you fit into the
2 Payne three criteria, the Ninth Circuit's three
3 criteria?

4 MR. KATYAL: That -- that --

5 JUSTICE SOTOMAYOR: The Ninth Circuit uses
6 to evaluate --

7 MR. KATYAL: Yes. So we think that if
8 there's a denial, that -- that they can't just concede
9 and say, oh, we think there is no FAPE violation, and
10 then that allows an end-run around 1415.

11 Rather, we think 1415 asks: Is the relief
12 available? And to understand whether the relief is
13 available, it's not a subjective inquiry. It can't be
14 plaintiff-centered. It's got to be: Objectively, is
15 relief available? So just --

16 JUSTICE GINSBURG: How much relief -- going
17 back to what you said before, I think you told me you're
18 not pressing any relief. So how much relief?

19 MR. KATYAL: Well, I -- I do think that if
20 the complaint seeks relief that is available under the
21 IDEA, then at least that claim can't go forward, going
22 back to the Jones v. Bock thing.

23 So, if, for example, Justice Ginsburg, you
24 had a claim like the dog one here and then you had a
25 separate claim that said something like the child was

1 being abused in the bathroom or something like that,
2 something that didn't implicate a FAPE or an IDEA,
3 certainly I think that claim could go forward. That's a
4 separate claim. It's a good claim under Jones v. Bock.

5 What can't go forward is something like
6 this, because Congress had this in mind. They had the
7 idea that you -- that a plaintiff can gut 1415 by
8 saying, oh, I don't want IDEA violation. I just want --
9 I don't want IDEA relief. I want money damages, because
10 then they could file that lawsuit on day one, evade the
11 cooperative process that Congress has set forth, get
12 relief from the district court, and then, by res
13 judicata --

14 CHIEF JUSTICE ROBERTS: The cooperative
15 process -- the cooperative process you're talking about,
16 given their position that they are not asking for any
17 relief under the FAPE, would be kind of a charade. You
18 get into the -- the meeting room, and they say, well, we
19 don't want anything that you can give us. We want money
20 that's not available.

21 MR. KATYAL: We certainly agree that if it
22 triggers that kind of futility exception, if they
23 literally can't get the relief for one reason or
24 another, absolutely, they don't have to go through it --

25 JUSTICE BREYER: Here -- here this might

1 also be peripheral. I mean, this is a dog for a child
2 who is not blind so is not subject to the regulations.
3 They have a teacher who is going around, or a person who
4 is acting as a guide within the school, and this is, to
5 that degree, a peripheral matter in respect to the plan,
6 and, perhaps, at least arguably, more like the librarian
7 in the school who -- or the person who does beat up
8 somebody or treat them badly, which could be the subject
9 but a pretty minor part of an IEP.

10 MR. KATYAL: So this is going back to
11 something I was trying to get to earlier about your
12 second half of your question. Look, we agree that if
13 there is a circumstance in which the IEP or FAPE
14 processes are not directly implicated in some way,
15 that's a different case. That's not this one.

16 In this one, you have them seeking, invoking
17 the IEP process for the very same thing they are asking
18 the Federal district court to do, which is a declaration
19 that the school erred by not --

20 JUSTICE KAGAN: I don't understand that,
21 Mr. Katyal. I mean, you yourself have an example in
22 your brief of abuse towards a handicapped disabled
23 student that would result in money damages and maybe
24 emotional distress, but maybe also the parents took the
25 kid out of school and -- and is asking for the school

1 to -- the private school tuition that they had to incur,
2 so all kinds of things. But it was -- it was -- it was
3 not because of anything that the IEP said or didn't say.
4 It was because there was discrimination on the basis of
5 disability.

6 Now, it was in a school, and it could be
7 remedied by school-type things, like stop discriminating
8 or abusing against a disabled student. But even you in
9 your briefs say that doesn't have anything to do with
10 the IDEA. And so why isn't this the same thing?

11 MR. KATYAL: Because -- because,
12 Justice Kagan, as that page, page 37, explains, a lot of
13 lower courts have said that when you have a discrete
14 instance of abuse, that doesn't violate the IDEA --

15 JUSTICE KAGAN: I don't -- discrete
16 instance. How about if you had a continuing stream of
17 abuse?

18 MR. KATYAL: If it's a continuing stream of
19 abuse, something that does implicate IDEA processes and
20 deny FAPE, absolutely it would require exhaustion in
21 that circumstance.

22 JUSTICE KAGAN: The IDEA doesn't care about
23 particular instances but cares about --

24 MR. KATYAL: There are some things, Justice
25 Kagan, that are dealt with through the IDEA process.

1 Typically those are things that would occur as opposed
2 to one-offs, yes. And so I can imagine a one-off being
3 so significant maybe that would be different. The Court
4 doesn't need to get into it here. Here you've got a
5 core situation in which they have invoked the IEP
6 process to --

7 JUSTICE KAGAN: But, Mr. Katyal, are you
8 suggesting that there is no such thing as continuing
9 discrimination that happens in a school setting that
10 actually does not have anything to do with the IEP?

11 MR. KATYAL: To an extent -- to the extent
12 that something like that exists, we're not -- our
13 position does not require exhaustion there. That is in
14 order -- there has to be -- you know, relief has to be
15 available under the IDEA. Here, relief is available
16 under the IDEA. Indeed, they invoked exactly that
17 process.

18 JUSTICE KAGAN: But as I understand it from
19 one of Amicus briefs, just to sort of put a fine point
20 on this. There are close to a million students who are
21 disabled in some way but who do not get an IEP. So if
22 there is discrimination or if there is a failure to
23 provide access to one of those students you don't have
24 to exhaust the IDEA procedure, do you?

25 MR. KATYAL: Well, I'd caution the Court

1 into saying the IEP is the only thing that's necessary.
2 But the IEP is a good template. As this Court said in
3 Honig, it's the kind of center piece of the IDEA. It's
4 a good template for whether or not there is an IDEA
5 violation. It may not always map on perfectly, but it's
6 a pretty good proxy. And so when you have a
7 circumstance like this in which they have tried -- they
8 invoked the IDEA process for the dog. They invoked --

9 JUSTICE KAGAN: I'm not sure I understood
10 the answer to the question. In that case, you would not
11 send the -- the -- the child to the IDEA officer, would
12 you?

13 MR. KATYAL: Well -- well, Justice Kagan,
14 you talked about a million different possible
15 situations --

16 JUSTICE KAGAN: 700,000, if I can read what
17 the --

18 MR. KATYAL: Or 700,000. So -- so some of
19 those may be circumstance in which for one reason or
20 another the IEP just didn't govern the situation, but
21 should. And in those circumstances, yes, we think
22 exhaustion would be required. In others which follow
23 more like the examples in our page 37, the kind of
24 discrete one-off things, those are situations when
25 absolutely they wouldn't require exhaustion in those

1 circumstances. Congress had something -- a simple in
2 mind in 1415, which is that if you can get the relief
3 through the IDEA, if that's what it's set up for, if
4 that's the scheme Congress wanted to channel that stuff
5 to, then go through that first. Here, you need no
6 better evidence that that happened and that they invoked
7 those very processes here. And if you allow their legal
8 theory to proceed -- to disclaim FAPE, disclaim seek
9 only monetary damages, then you are --

10 CHIEF JUSTICE ROBERTS: No, no, no. The --
11 the -- there will often be situations where parents will
12 seek relief under the IDEA and then be told early in the
13 process or whatever -- maybe the school will tell them
14 we can't do that and here's why. And the parents will
15 think, okay, so it isn't available. We're not going to
16 pursue that relief under the IDEA. We're instead going
17 to sue under the ADA.

18 MR. KATYAL: So certainly if it's futile, if
19 they say, look, we lack the authority to --

20 CHIEF JUSTICE ROBERTS: No, no, they say,
21 you know, we could press ahead with this. We could sit
22 down with them and say, no, you got to do this and that,
23 but it's going to be easier for us just to proceed under
24 the IDEA.

25 MR. KATYAL: Yeah, and the choice Congress

1 made in 1415, and going back to an earlier question, I
2 know it seems a little bit unusual to say -- and strange
3 to say, why are you forcing plaintiff -- parents into
4 a -- into a scheme that they don't want, but that's the
5 scheme Congress laid out. That's a consequence of an
6 exhaustion statute which is to say --

7 CHIEF JUSTICE ROBERTS: Well, it can't --
8 just not a scheme they don't want. It may be a scheme
9 that they decide, no, the relief we seek is not
10 available under this. This isn't a case. They do have
11 the -- the human who is taking care of these things, and
12 under the -- that's enough for FAPE. But, you know, we
13 still have this discrimination complaint.

14 MR. KATYAL: And, Mr. Chief Justice --

15 CHIEF JUSTICE ROBERTS: And when you do,
16 you'll agree that that's an awkward position for them to
17 go to the meeting and say, we don't want anything.

18 MR. KATYAL: It's -- it's really awkward,
19 Mr. Chief Justice, but I think what Congress said there
20 is it's not up to the individual parents subjectively to
21 say, hey, I don't want any part of this process. Rather
22 what Congress said is you got to go through the process,
23 and then at the end of the process, and then at the end
24 of the 105 days -- this is a very short statutory
25 process -- then you can come into Federal court. This

1 is about timing.

2 JUSTICE SOTOMAYOR: Mr. Katyal, my problem
3 is, what were they -- is the only argument that you're
4 making is that they are not entitled to their
5 declaratory judgment because they didn't exhaust that?
6 Are they entitled, whether they exhaust it or not, to
7 the ADA claims for monetary compensatory damages for
8 pain and suffering?

9 MR. KATYAL: Justice Sotomayor, they may be
10 at the end. They first have to exhaust -- this is all
11 about timing --

12 JUSTICE SOTOMAYOR: Well, it's now -- it's
13 now too late to exhaust, right?

14 MR. KATYAL: No, not at all. The equitable
15 tolling rules of this Court --

16 JUSTICE SOTOMAYOR: How about if they just
17 waive all of that and say I want my money?

18 MR. KATYAL: You know, so, again, I think
19 that it can't be for the reasons that the Chief Justice
20 and Justice Breyer said that just plaintiffs can kind of
21 waive things around. Congress had an object standard in
22 mind: Is relief available under the IDEA --

23 JUSTICE SOTOMAYOR: I am -- I am so confused
24 by your position. I'm -- I'm -- I'm so horribly
25 confused. What is the purpose of all of this? Throw

1 this case out now. Let them go back to school they are
2 no longer in. They are going to say to the school, give
3 me money, and what else?

4 MR. KATYAL: Justice Sotomayor, that is
5 their position in the reply brief. That is not -- you
6 told me to look at the text in the complaint. None of
7 that appears in the complaint. None of that they're
8 going to a different school, won't come back. If
9 anything, the complaint says the reverse. They want the
10 declaratory judgment that the school erred. The only
11 way they can invoke that is by saying that this is a
12 situation that is bound to occur. The purpose, why are
13 we -- why are we standing here? What are we worried
14 about?

15 JUSTICE SOTOMAYOR: The school already
16 admitted that. They let her bring the dog back in. She
17 just said I don't -- I don't feel welcomed here and
18 left. So they already got the relief they wanted. They
19 got an admission by the school that she was entitled to
20 bring the dog there.

21 MR. KATYAL: Notably --

22 JUSTICE SOTOMAYOR: They have already said
23 that.

24 MR. KATYAL: Notably, Petitioners never make
25 that argument, and it's certainly not in the complaint.

1 And the reason for that -- what is in the complaint is
2 that they felt that the dog wouldn't be able to be
3 welcomed back.

4 And so the idea that they could allow money
5 damages for this type of situation without first
6 exhausting the state processes is an end-run around the
7 expert agency statute that Congress set up, which they
8 wanted to give states and localities the first crack at
9 resolving this instead of allowing parents to abandon
10 the IDEA system and march into Federal court, which is
11 exactly what happened here. And I understand that there
12 is awkwardness here, but that's an awkwardness of the
13 statute Congress laid out.

14 JUSTICE BREYER: It's not necessarily
15 awkward. You -- you forgot the words "before filing the
16 complaint." Damages are something you get when somebody
17 didn't give you something. But go back in time before
18 they make that decision. At that point, what you want
19 is the dog, not the money. Now if that's the truth, you
20 have to go to the board. Once the board makes clear
21 they won't give you the dog, at that time you're free to
22 sue. You've met any exhaustion requirement because it's
23 futile. They have made clear they won't.

24 And this suit has been brought after that
25 was done. So I don't see how this suit is going to ever

1 get back for exhaustion, because the school has made
2 clear they won't. So say exhaustion replies to future
3 suits before anything happens, but not after the board
4 makes clear exhaustion replies, but the futility
5 exception also applies. Am I right?

6 MR. KATYAL: Justice Breyer, we agree with
7 the futility exception. On the facts of this case, as
8 the Sixth Circuit found, it's not available. And the
9 reason for that -- the reason for that is they haven't
10 gone through the independent due process hearing. You
11 can't just say, oh, I met with some administrators, and
12 they didn't like the dog. You've got to go through the
13 complicated process that IDEA says. It's a
14 time-sensitive one -- it's only 105 days, start to
15 finish -- but you've got to go through the whole thing.
16 They walked out on the process before it was over.

17 CHIEF JUSTICE ROBERTS: 105 days is a big
18 part of the school year.

19 MR. KATYAL: Correct.

20 CHIEF JUSTICE ROBERTS: I mean, so I think
21 saying, all they have to do is go through a 105-day
22 process is not particularly responsive.

23 MR. KATYAL: We don't mean to minimize that,
24 Your Honor. The statute says, you know, short
25 timelines. But again, we are only talking about money

1 damages, so this isn't about injunction or the type of
2 school year that -- all they are seeking is money, and
3 so the 105 days doesn't deal with that problem of the
4 school year.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Bagenstos, four minutes.

7 REBUTTAL ARGUMENT OF SAMUEL R. BAGENSTOS

8 ON BEHALF OF THE PETITIONERS

9 MR. BAGENSTOS: Thank you, Mr. Chief
10 Justice.

11 So let's first be clear about what the
12 statute says. Right? The statute keys exhaustion on
13 the relief that the plaintiff is seeking in the present
14 participle.

15 And what are we seeking here? I think it
16 would help to clarify a lot of what happened in the last
17 half of the argument to explain what we are and are not
18 seeking.

19 We are seeking money damages. Justice
20 Sotomayor, you're exactly correct. We are seeking money
21 damages for emotional distress. Our allegations are
22 about emotional distress. They are not about
23 out-of-pocket costs or anything compensable under the
24 IDEA.

25 We are not seeking any of the types of

1 relief that defendants say are available under the IDEA.
2 We are not seeking reimbursement of educational
3 expenses. We are not seeking compensatory education or
4 counseling. We are not seeking to change an IEP,
5 whether through a declaratory judgment or otherwise,
6 because there is no IEP between the defendants and my
7 client at this point. We do not have standing to assert
8 prospective relief or to seek prospective relief against
9 defendants.

10 JUSTICE SOTOMAYOR: How about yours is an
11 ideal situation. Conceded for the purposes you're
12 arguing. But how about the mixed complaints, because
13 that's what has been bothering my colleagues from the
14 beginning. Okay?

15 Let's assume that you had brought this case,
16 not after you had moved her, but while she was still in
17 the school.

18 MR. BAGENSTOS: Right.

19 JUSTICE SOTOMAYOR: And you didn't say, as
20 you conceded now, that you don't want the -- the FAPE
21 changed. The complaint says they haven't let the
22 service dog in. It's causing and has caused emotional
23 distress. We want damages. It's not clear, but you do
24 want the fact changed.

25 MR. BAGENSTOS: Sure.

1 JUSTICE SOTOMAYOR: What happens?

2 MR. BAGENSTOS: Okay. And I want to -- I
3 want to answer that question. Let me just say one thing
4 about the facts here.

5 Of course, standing is something we would
6 have to assert in our complaint. We would have to have
7 asserted a desire to return. We didn't do that. Okay.
8 I understand --

9 JUSTICE SOTOMAYOR: I -- I just gave you a
10 different hypothetical.

11 MR. BAGENSTOS: Yes, I understand. And --
12 and I will answer the hypothetical.

13 And so I think the answer there is the Jones
14 case, right? I mean, Jones does say that when you have
15 -- when you have one part of a complaint that is seeking
16 relief that is not barred by an exhaustion requirement
17 and another part that is barred, the thing to do is let
18 the good part of the complaint proceed and leave the bad
19 part of the complaint by the wayside.

20 And I want to respond to what my opponents
21 said about -- about Jones and what claim means in Jones.

22 In Jones itself, this Court cited, as an
23 example of a court applying the right approach, a case
24 from the Seventh Circuit, Cassidy v. Indiana Department
25 of Corrections. If you look at Cassidy, what Cassidy

1 did was it said, well, some requests for some relief are
2 allowed to proceed, and requests for other relief by the
3 same plaintiff are not allowed to proceed. So the right
4 thing to do is apply the Jones partial exhaustion rule,
5 which this Court said is the general rule in that case.

6 If this Court concludes that our complaint
7 might be read to embrace -- notwithstanding everything
8 we've said -- might be read to embrace requests for
9 anything that might be available in IDEA proceedings,
10 the proper thing to do is allow the damages claim to
11 proceed forward.

12 JUSTICE SOTOMAYOR: Does the Court have the
13 power to stay that until the IDEA claim is exhausted?

14 MR. BAGENSTOS: Well, so -- so I --

15 JUSTICE SOTOMAYOR: The government appears
16 to suggest that in their brief.

17 MR. BAGENSTOS: So I think, you know, in
18 some circumstances, the Court actually addressed
19 something similar to this in the Rhines case, which is
20 cited in Jones about habeas where a total exhaustion
21 rule applies.

22 And even Rhines said that staying is
23 something that shouldn't be done as a matter of routine;
24 it might be something done occasionally as a matter of
25 discretion, but that the ordinary process should be even

1 where total exhaustion applies to allow the plaintiffs
2 to decide do we want to proceed with these unexhausted
3 requests or not, which is what we would ask for.

4 After all, a stay in this case would be
5 meaningless. My clients have not lived in the
6 defendants' school district for a while. My minor child
7 client has not --

8 JUSTICE SOTOMAYOR: I really -- I appreciate
9 --

10 MR. BAGENSTOS: Yeah.

11 JUSTICE SOTOMAYOR: -- the nature of your
12 case.

13 MR. BAGENSTOS: Got you.

14 JUSTICE SOTOMAYOR: All right? But your
15 suggestion is likely to raise --

16 MR. BAGENSTOS: Right.

17 JUSTICE SOTOMAYOR: -- a lot of hesitation
18 in this Court, amongst some, maybe even me.

19 MR. BAGENSTOS: I'm getting that.

20 JUSTICE SOTOMAYOR: Because if what you're
21 saying is we're going to be on a dual track in every
22 case --

23 MR. BAGENSTOS: I --

24 JUSTICE SOTOMAYOR: -- it's not going to be
25 very attractive to the Court.

1 MR. BAGENSTOS: May I briefly answer, Your
2 Honor?

3 CHIEF JUSTICE ROBERTS: Briefly.

4 MR. BAGENSTOS: So -- so I -- our position
5 is you're going to be on one track, which is the things
6 that aren't barred by the exhaustion requirement
7 proceed. Everything else goes by the wayside. That's
8 Jones.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.
11 The case is submitted.

12 (Whereupon, at 11:05 a.m., the case in the
13 above-entitled matter was submitted.)

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