NO. _____

In the Supreme Court of the United States

STACY FRY, BRENT FRY, AND EF, A MINOR, BY HER NEXT FRIENDS STACY FRY AND BRENT FRY,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, AND PAMELA BARNES, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

SAMUEL R. BAGENSTOS
Counsel of Record
COOPERATING ATTORNEY
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

Counsel for Petitioners

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street
Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. The question presented, on which the circuits have persistently disagreed, is:

> Whether the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages—a remedy that is not available under the IDEA.

PARTIES TO THE PROCEEDING

Stacy Fry and Brent Fry, as next friends of minor E.F., were plaintiffs-appellants in the proceedings below.

Napoleon Community Schools, the Jackson County Intermediate School District, and Pamela Barnes were defendants-appellees in the proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals is reported at 788 F.3d 622 and is reprinted in the appendix (App.) at 1. The opinion of the district court is reported at 2014 WL 106624. It is reprinted at App. 7.

JURISDICTION

The court of appeals entered judgment on June 12, 2015, and denied rehearing en banc on August 5, 2015. App. 53. The petition is filed within 90 days of the latter date. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant provisions of the Rehabilitation Act of 1973, the Handicapped Children's Protection Act of 1986, the Individuals with Disabilities Education Act, and the Americans with Disabilities Act of 1990, as well as of the Americans with Disabilities Act's implementing regulations, are reprinted at App. 55.

STATEMENT OF THE CASE

This case involves interpretation of the Handicapped Children's Protection Act of 1986 (HCPA), 20 U.S.C. § 1415(*l*), which requires exhaustion of state administrative remedies under the Individuals with Disabilities Education Act (IDEA) for non-IDEA actions "seeking relief that is also available under" the IDEA. Petitioners brought this case under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, to seek damages for the social and

emotional harm caused by the Defendant school district's refusal to permit E.F.'s trained service dog to accompany her to school.

A. The Facts

E.F. was born with cerebral palsy; her condition significantly limits her motor skills and mobility, but it imposes no cognitive impairment. Cplt. ¶ 2.[1] In 2009, when she was five years old, E.F. obtained a service dog prescribed by her pediatrician to help her live as independently as possible. *Id.* ¶ 3. The dog, a Goldendoodle named "Wonder," was certified and trained to help E.F. with mobility and to assist her in daily activities, such as retrieving dropped items, opening and closing doors, turning on and off lights, and taking her coat off. *Id*. E.F.'s pediatrician and family intended to have Wonder accompany E.F. at all times to facilitate her independence and to ensure that she and Wonder would bond after training. *Id*. ¶ 4.

Respondents Napoleon Community Schools and Jackson County Intermediate School District (collectively, the School District) refused to permit E.F. to attend school with her service dog. *Id.* ¶¶ 4-5. The School District reasoned that E.F.'s Individualized Education Program (IEP) already provided for a human aide to provide one-on-one support, and "Wonder would not be able to provide any support the human aide could not provide." App. 4. As a result, E.F. was forced to attend school without her prescribed service dog

---

[1] Because the lower courts resolved this case on a motion to dismiss, all factual allegations in the complaint must be taken as true. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

from October 2009 to April 2010. Cplt. ¶ 5. After her attorneys met with the School District's counsel, E.F. was permitted to bring the dog to school on a "trial" basis until the end of the school year. *Id.* During that trial period, however, the school required the dog to remain in the back of the room during classes, forbade the dog from assisting E.F. with many tasks he had been specifically trained to do, and banned the dog from accompanying and assisting her during recess, lunch, computer lab, library time and other activities. *Id*. After the trial period, the School District refused to permit Wonder to accompany E.F. to school. *Id*. ¶ 6.

B. Statutory Background

Congress enacted the HCPA in response to *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court held that the Education for the Handicapped Act (the prior name for the IDEA) provided "the exclusive avenue" for students with disabilities to assert an educational-rights claim—even if that claim arose under some other federal statute or even the Constitution itself. See *id.* at 1012-1013. Congress responded swiftly to "reaffirm[] the viability of section 504 and other federal statutes such as 42 U.S.C. § 1983 as separate from but equally viable with EHA as vehicles for securing the rights of handicapped children and youth." H.R. Rep. No. 99-296, 99th Cong., 1st Sess. 6 (1985).

In service of that goal, the HCPA amended the IDEA specifically to preserve educational-rights claims under the Constitution and other federal laws. In its current form, the relevant section of the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 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 subchapter**, 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 subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). This provision expressly preserves non-IDEA claims for the educational rights of children with disabilities, but it requires that, where a plaintiff "seek[s] relief that is also available under" the IDEA, that plaintiff must first exhaust state administrative remedies under that statute. See 20 U.S.C. § 1415(f) (requiring state to establish process for impartial due process hearing); *id.* § 1415(g) (providing for appeal to state educational agency if due process hearing is held by the local educational agency).

Preserving non-IDEA claims serves an important role, because the IDEA itself provides only limited substantive protection and authorizes only limited relief. Substantively, the IDEA's requirement of a "free appropriate public education [FAPE]," 20 U.S.C. § 1412(a)(1), implemented through an IEP, 20 U.S.C. § 1414(d), guarantees only a "basic floor of opportunity" for children with disabilities. *Board of Education v.*

Rowley, 458 U.S. 176, 201 (1982). It does not guarantee "'equal' educational opportunities." *Id.* at 198. Had E.F. challenged the denial of her service dog under the IDEA, then, she would have had to show not that the service dog was necessary to provide her equal access to the school facilities, but instead that the service dog was necessary for her to achieve the basic floor of *educational* opportunity that the IDEA guarantees. And although the IDEA authorizes an order of "reimbursement of the costs of private special-education services in appropriate circumstances," *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 246 (2009), it does not authorize the recovery of money damages. See *Burlington School Comm. v. Massachusetts Dept. of Educ.*, 471 U.S. 359, 370-371 (1985) (holding that tuition reimbursement is available specifically because that remedy is restitutionary and does *not* constitute damages).

The ADA, by contrast, is an antidiscrimination statute that substantively requires equal opportunity. In particular, Title II of the ADA prohibits any state or local government entity from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The statute specifically contemplates that, to avoid discrimination, such a public entity will be required to make "reasonable modifications to rules, policies, or practices." 42 U.S.C. § 12131(2). See *Tennessee v. Lane*, 541 U.S. 509, 517 (2004). Congress authorized the Department of Justice to issue regulations implementing Title II of the ADA. 42 U.S.C. § 12134. Because of the importance of service animals to ensuring equal access for many people with disabilities, the Department has interpreted the statute's "reasonable modifications" language to

require that, with certain exceptions not applicable here, "[i]ndividuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go," 28 C.F.R. § 35.136(g) (2011).[2] This rule applies to all state and local government entities, and it does not require a showing of a particular *educational* need before an individual may invoke its protections. Unlike the IDEA, the ADA also provides for damages liability. See *Lane*, 541 U.S. at 517.[3]

C. Prior Proceedings

In 2010, following the School District's refusal to permit Wonder to accompany E.F. to school, her parents began homeschooling her. App. 4. They also filed a complaint with the Office of Civil Rights of the United States Department of Education (OCR); their complaint alleged that the School District had violated the ADA and the Rehabilitation Act by refusing to permit E.F. to use her service dog at school. *Id.* In

---

[2] The service animal regulation reflects the Department's longstanding interpretation of Title II's reasonable-modifications requirement. See Statement of Interest of United States at 4-5 & n.5, *Alboniga v. School Bd. of Broward County*, No. 0:14-CV-60085-BB (S.D. Fla., filed Jan. 26, 2015), available at http://www.ada.gov/briefs/broward_county_school_board_soi.pdf.

[3] Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, applies essentially the same substantive standards as ADA Title II, and it authorizes identical remedies. See 29 U.S.C. § 794a; 42 U.S.C § 12133. But instead of applying to all public entities, it applies only to entities that "receiv[e] Federal financial assistance." 29 U.S.C. § 794(a).

2012, after an investigation, OCR issued a 14-page decision, which concluded that the School District had violated the ADA and the Rehabilitation Act. Cplt. Exh. A. at 11. The agency noted the School District's argument that E.F. "was receiving a FAPE" even without being allowed to use her dog. *Id.* But OCR determined that a "FAPE analysis" was inappropriate, because it "fail[ed] to take into account one of the fundamental purposes of Title II: to increase the independence of individuals with disabilities." *Id.* The agency also concluded that the School District's argument ignored the Rehabilitation Act's "provisions relating to equal opportunity." *Id.*

In response to OCR's findings, the School District "agreed to permit [E.F.] to attend school with Wonder starting in fall 2012." App. 4. But it continued to deny liability. Cplt. Exh. A. at 11. E.F.'s parents "had serious concerns that the administration would resent [E.F.] and make her return to school difficult." Cplt ¶ 8. Accordingly, they decided to enroll her "in a school in a different district where they encountered no opposition to Wonder's attending school with" her. App. 4.

In December 2012, E.F., by and though her parents as next friends, filed this suit "seeking damages for the school's refusal to accommodate Wonder between fall 2009 and spring 2012." *Id.* The lawsuit claimed that the School District's actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, and it sought damages for the social and emotional harm those actions caused E.F. Cplt. ¶ 51.

The district court dismissed the suit for failure to exhaust state administrative remedies under the

IDEA. App. 37. A divided panel of the Sixth Circuit affirmed. The majority specifically recognized that "the Frys seek money damages, a remedy unavailable under the IDEA." App. 17. But despite the HCPA's text, which limits exhaustion to cases "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*), the majority held that "this does not in itself excuse the exhaustion requirement," because otherwise plaintiffs could "evade" that requirement "simply by 'appending a claim for damages.'" App. 17 (quoting *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000)). The panel held that exhaustion is required "when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA." App. 6. Because it concluded that the "core harms" alleged by E.F. "relate to the specific educational purpose of the IDEA," and that she "could have used IDEA procedures to remedy these harms," the panel concluded that the complaint was properly dismissed for failure to exhaust. App. 6.

Judge Daughtrey dissented. She specifically noted a conflict between the majority's decision and the Ninth Circuit's decision in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-875 (9th Cir. 2011) (*en banc*), cert. denied, 132 S. Ct. 1540 (2012), which "held [that] '[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (quoting *Payne*, 653 F.3d at 871 (emphasis in Judge Daughtrey's dissent)).

The court denied *en banc* review, though Judge Daughtrey stated that she would have granted rehearing. App. 53-54.

REASONS FOR GRANTING THE PETITION

The HCPA explicitly provides that the IDEA is not the exclusive remedy available to children with disabilities who allege a violation of their rights. 20 U.S.C. § 1415(*l*). The plain text further provides that children who file suit under other statutes must first exhaust state administrative proceedings under the IDEA only when those children "*seek[] relief* that is also available under" the IDEA. *Id.* (emphasis added). The courts of appeals have persistently disagreed about the proper interpretation of this statutory language. Although damages are not available under the IDEA, the Sixth Circuit held that a disabled child who brings a damages claim under the ADA and the Rehabilitation Act must first exhaust IDEA proceedings "when the *injuries* alleged can be remedied through IDEA procedures, or when the *injuries* relate to the specific substantive protections of the IDEA." App. 6 (emphasis added). At least six other circuits have adopted substantially the same rule.

But the Ninth Circuit, in an *en banc* opinion by Judge Bybee, has specifically rejected that "'injury-centered' approach" as conflicting with the HCPA's plain language. *Payne*, 653 F.3d at 874-875.[4] Rather,

---

[4] In *Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir.), cert. denied, 135 S. Ct. 403 (2014), the Ninth Circuit overruled *Payne* (and earlier Ninth Circuit cases) to the extent that they allowed courts (in and out of the IDEA context) to consider exhaustion through the vehicle of "unenumerated Rule 12(b) motions" rather than

the Ninth Circuit has held that a "relief-centered approach" better accords with the text: "[W]hether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.* at 875. Had Petitioners brought this suit in the Ninth Circuit, their case would not have been dismissed on exhaustion grounds, because the damages relief they actually sought is not available under the IDEA.

This Court denied a petition for *certiorari* in *Payne*, even though the Ninth Circuit acknowledged that its decision conflicted with the rulings of several other courts of appeals. See *id.* at 873-874 & n.3. In opposing the petition in *Payne*, the successful plaintiff argued that this Court should "allow *Payne*'s 'relief-centered' approach to play-out in the federal circuits," before taking on the issue. Br. in Opp., *Peninsula School Dist. v. Payne*, 2011 WL 6859439 at *9. Since that time, the Second and Sixth Circuits have refused to budge from their prior "injury-centered" approach even after specifically considering the analysis in *Payne*. The Third and Tenth Circuits, too, have applied the "injury-centered" approach post-*Payne*, though without explicitly addressing that case. It should now be clear that the conflict created by *Payne* will not be resolved without review by this Court.

---

motions for summary judgment. But the Ninth Circuit has reaffirmed *Payne*'s HCPA holding "that the IDEA's exhaustion provision applies only in cases where the relief sought is available under the IDEA." *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th Cir. 2014). That, of course, is the holding relevant here.

The fact pattern presented by this case is a recurring one. As here, school districts have repeatedly denied children with disabilities their rights, guaranteed by the ADA and the Rehabilitation Act, to bring service dogs to school. And they have done so on the ground that the service animals were unnecessary to satisfy the districts' educational obligations under the IDEA.[5] These children with disabilities, and their

---

[5] See *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 244 (2d Cir. 2008) (district refused to allow child with hearing impairment to bring his service dog, based on its determination that he "enjoyed full access to the district's special education programs and facilities and that he currently did not need a service dog at school, because he was functioning satisfactorily under the approved IEP"); *Alboniga v. Sch. Bd. of Broward County Fla.*, No. 14-CIV-60085, 2015 WL 541751, at *8 (S.D. Fla. Feb. 10, 2015) (district refused to allow child with multiple disabilities to bring his service dog, based on its view that "the service animal is not necessary for or relevant to A.M.'s educational experience—that the services provided by the animal are performed through other means by school staff in order to provide A.M. a FAPE in accordance with his IEP"); Settlement Agreement Between United States & Delran Township Sch. Dist., June 2014, available at http://www.ada.gov/delran-sa.htm (Department of Justice found that district refused to allow child with autism to bring his service dog to school, based at least in part on the district's uncertainty whether the child would be "able to benefit from instruction without the service animal"); Statement of Interest of United States at 5, *C.C. v. Cypress Sch. Dist.*, No. CV 11-00352 AG (RNBx) (C.D. Cal., filed June 10, 2011), available at http://www.ada.gov/briefs/cc_interest.pdf (district refused to allow child with autism to bring his service dog to school because of doubts that the dog was necessary to enable him to achieve the educational goals of his IEP, without "consider[ing] how a service dog might benefit C.C. in other settings, supported by use at school, and whether C.C. might have a civil right to use a service dog").

parents, have been forced to file complaints in court and with the United States Department of Justice to enforce their ADA and Rehabilitation Act rights. The position of the Sixth Circuit would require them first to exhaust state administrative proceedings under the IDEA—a statute that does not form the basis for their claims and does not offer them a damages remedy—before going to court to enforce their rights. Imposing this burdensome step flies in the face of the plain statutory text. The Court should grant the petition for *certiorari*.

A. There is a Persistent Conflict in the Circuits

The Sixth Circuit held that, before filing a damages lawsuit under the ADA and the Rehabilitation Act, a child with a disability must first exhaust state administrative proceedings under the IDEA if those proceedings could possibly have provided a remedy—though not a *damages* remedy—for the injuries the child alleges. App. 6. That holding accords with the rulings of at least six other courts of appeals. But it squarely conflicts with the Ninth Circuit's *en banc* holding in *Payne*, *supra*.

The Sixth Circuit's holding is but the latest in a line of cases that derives from the Seventh Circuit's decision in *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996).[6] In *Charlie F.*, a fourth grader sued his school under the ADA, the Rehabilitation Act, and the Constitution for disability-

[6] The Sixth Circuit relied (App. 17) on its earlier decision in *Covington*, 205 F.3d at 916-917, which itself specifically relied on *Charlie F.*

based harassment that his teacher allegedly orchestrated; he sought damages for emotional distress. See *id.* at 990-991. Although it recognized that compensatory damages are not available under the IDEA, see *id.* at 991, the Seventh Circuit nonetheless held that the district court properly dismissed the suit for failure to exhaust IDEA administrative remedies, see *id.* at 991-993. The court reasoned that IDEA proceedings might conceivably result in non-damages relief that could address the harms of which the plaintiff complained, and that the plaintiff therefore first had an obligation to pursue those proceedings before seeking damages under other legal regimes. "Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm," the court explained. *Id.* at 993. "But," it concluded, "parents cannot know that without asking, any more than we can." *Id.* Because "at least in principle relief [was] available under the IDEA," *id.*, even if the lawsuit did not "seek[]" that relief (cf. 20 U.S.C. § 1415(*l*)), the Seventh Circuit held that exhaustion was required: "the theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply." *Id.* at 992.

In addition to the Sixth Circuit here, the First, Second, Third, Tenth, and Eleventh Circuits have specifically relied on *Charlie F.* to hold that a plaintiff who seeks compensatory damages must still exhaust IDEA remedies if administrative proceedings under that statute could theoretically provide any relief for his or her injuries. See *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 61-63 (1st Cir. 2002); *Cave*, 514

F.3d at 246-247 (Second Circuit); *Batchelor v. Rose Tree Media School District*, 759 F.3d 266, 276-278 (3d Cir. 2014); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1063-1068 (10th Cir. 2002); *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1422 & n.10 (11th Cir.), cert. denied, 525 U.S. 816 (1998). Several of these decisions highlight the breadth of the pro-exhaustion doctrine applied by the circuits that follow *Charlie F.*

In *Cave*, the Second Circuit required exhaustion in a case brought under the ADA, the Rehabilitation Act, and Section 1983 to challenge a district's refusal to permit a child with a disability to attend school with his service dog. The court reached that result even though the plaintiffs sought "pecuniary damages, a remedy unavailable under the IDEA." *Id.*, 514 F.3d at 247. In so holding, the court specifically relied on *Charlie F.*'s "theory behind the grievance" language. *Id.* at 246. The Second Circuit has specifically refused to reconsider that ruling in light of the Ninth Circuit's decision in *Payne*. See *Baldessarre ex rel. Baldessarre v. Monroe-Woodbury Cent. Sch. Dist.*, 496 F. App'x 131, 134 (2d Cir. 2012) (summary order). See also *Stropkay v. Garden City Union Free Sch. Dist.*, 593 Fed. Appx. 37 (2d Cir. 2014) (summary order) (reaffirming these cases).

The Third Circuit applied the same principle in *Batchelor*, *supra*. A child with a disability and his mother alleged that the school district had retaliated against them in violation of, *inter alia*, the ADA and the Rehabilitation Act; they filed a federal-court complaint seeking compensatory damages. See *Batchelor*, 759 F.3d at 270-271. Although it

acknowledged that compensatory damages are not available under the IDEA, see *id.* at 277 n.13, the Third Circuit held that the plaintiffs' case was properly dismissed for failure to exhaust remedies under that statute, see *id.* at 278. Like the Second Circuit, the court relied on *Charlie F.*'s "theory behind the grievance" language. *Id.* at 276.

In *Cudjoe*, 297 F.3d at 1068, the Tenth Circuit held that a student with a disability was required to exhaust IDEA administrative remedies before bringing suit against his school district under the Rehabilitation Act—even though the student sought damages and had never even been identified as eligible for services under the IDEA. The court relied on *Charlie F.* to hold that "the IDEA's exhaustion requirement will not be excused simply because a plaintiff requests damages, which are ordinarily unavailable in administrative hearings held pursuant to the statute." *Id.* at 1066. Rather, the court held, exhaustion is required if "the plaintiff has alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Id.* (internal quotation marks omitted). The Tenth Circuit recently reaffirmed that principle. See *A.F. ex rel. Christine B. v. Espanola Public Schools*, ___ F.3d ___, 2015 WL 5333491 at *2 (10th Cir., Sept. 15, 2015).

In its *en banc* decision in *Payne*, by contrast, the Ninth Circuit explicitly rejected the position of circuits like these that apply an "injury-centered" approach to exhaustion under the HCPA. *Payne*, 653 F.3d at 874. In a comprehensive opinion by Judge Bybee, the Ninth Circuit explained that a focus on whether the plaintiff "alleg[ed] misconduct that *in theory* could have been

redressed by resorting to administrative remedies under the IDEA" improperly "treat[s] § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of educating disabled students." *Id.* at 875. The statutory text, the court concluded, establishes that "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." *Id.*

Applying the plain text of the HCPA, the Ninth Circuit held that the statute "requires exhaustion in three situations": (1) "when a plaintiff seeks an IDEA remedy or its functional equivalent," *id.*[7]; (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student" (really just a subset of the first category), see *Payne*, 653 F.3d at 875; and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action," *id.*[8]

---

[7] *Payne*'s example of a "functional equivalent" involved a plaintiff "seek[ing] damages for the cost of a private school education." *Payne*, 653 F.3d at 875. Although the IDEA does not provide for damages, it does require school districts to reimburse the cost of a private school education in some circumstances. See p. 5, *supra*.

[8] As an example of this sort of case, *Payne* listed a Rehabilitation Act claim "premised on a denial of a FAPE." *Id.* The Department of Education's Rehabilitation Act regulations require schools to provide all qualified children with disabilities "a free appropriate public education." 34 C.F.R. § 104.33(a). The Ninth Circuit was evidently referring to cases brought under this regulation, in which

In so holding, the court largely adopted the position urged by the United States Departments of Education and Justice in a jointly-signed *amicus* brief. See *id.*

Had E.F. brought this case in the Ninth Circuit, the court would not have dismissed it for failure to exhaust. E.F. did not seek an IDEA remedy or its functional equivalent, seek prospective relief to alter her IEP or educational placement, or raise any claim that relied on the denial of a FAPE. To the contrary, *none* of the relief she specifically requested was available under the IDEA. See pp. 19-20, *infra*. She sought damages for emotional distress—a form of relief that is not available in IDEA proceedings. And her claim relies entirely on the ADA and Rehabilitation Act's guarantee that people with disabilities can generally use service animals in public buildings (whether those buildings are schools, courthouses, or hockey rinks). It is in no way premised on the denial of a free appropriate public education. Because the remedies E.F. actually sought—as opposed to those she might conceivably have sought in a hypothetical alternate universe—were not available under the IDEA, the Ninth Circuit would not have dismissed her case. The conflict in the circuits thus determined the outcome.

---

the plaintiff seeks to prove the substance of an IDEA violation in order to establish a violation of the Rehabilitation Act. But the ADA and Rehabilitation Act also impose an array of requirements, like the requirement of reasonable modification of policies and its specific application to permit people with disabilities to use service dogs, that are not premised on the denial of a FAPE. See pp. 5-6, *supra*.

That conflict is not likely to resolve itself without this Court's intervention. The Sixth Circuit made its ruling with *Payne* in full view. The dissenting judge specifically called attention to the Ninth Circuit's holding that "'[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*.'" App. 28 (Daughtrey, J., dissenting) (quoting *Payne*, 653 F.3d at 871) (emphasis in opinion below). But the majority persisted in following prior Sixth Circuit precedent that held that exhaustion is required even when plaintiffs "seek money damages, a remedy unavailable under the IDEA." *Id.* at 17 (citing cases). The Second Circuit, too, has specifically refused to reconsider its prior precedent in light of *Payne*. See *Baldessarre*, 496 F. App'x at 134. And although the Third Circuit did not specifically address *Payne*, it has nonetheless continued, as recently as 2014, to apply the "injury-centered" approach the Ninth Circuit explicitly rejected. See *Batchelor*, 759 F.3d at 276-278. The Tenth Circuit did the same in September 2015. See *A.F.*, 2015 WL 5333491 at *2. This Court should grant *certiorari* to resolve the conflict.

B. The Sixth Circuit's Decision is Wrong

Petitioners' complaint sought one principal form of relief: "damages in an amount to be determined at trial." Cplt. 16 (prayer for relief). It also sought two ancillary forms of relief on Petitioners' federal claims: (1) "a declaration stating that Defendants violated Plaintiff's rights under Section 504 of the Rehabilitation Act, [and] Title II of the Americans with Disabilities Act"; and (2) "attorneys' fees pursuant to

the Rehabilitation Act, the Americans with Disabilities Act, [and] 42 U.S.C. § 1988." *Id.*[9]

None of these forms of relief was available under the IDEA. The IDEA does not provide for damages. See p. 5, *supra*. Nor does the IDEA specifically provide for declaratory relief—and the IDEA provisions empowering state administrative adjudicators certainly grant them no authority to issue a declaration that a school district violated some *other* statute like the ADA or the Rehabilitation Act. See 20 U.S.C. § 1415(f)(3)(E) (hearing officer may decide whether child received a free appropriate public education and was accorded certain related procedural protections under the IDEA), § 1415(k)(3) (hearing officer may decide whether child's misconduct was a manifestation of a disability and

---

[9] The complaint also contained a boilerplate request for "any other relief this Court deems appropriate." *Id.* In its response to the *en banc* petition below, Respondent argued that, because Petitioners sought "*any* other relief," and IDEA administrative proceedings could grant *some* other relief, Petitioners' complaint necessarily sought relief that is also available under the IDEA. Resp. to Pet. for Rhg. 6. That argument is too clever by half. At the time Petitioners filed their complaint E.F.'s parents had moved her to a different school district and had no intention of returning her to Respondent's schools. See p. 7, *supra*. Thus, they could seek only retrospective damages that were not available under the IDEA—and the complaint *never* specifically asked for forward-looking relief of a type that was available under the IDEA in any event. Even if it had, when a plaintiff brings a case that contains some claims that should have been exhausted and others that need not have, the proper procedure is to dismiss only the claims for which exhaustion was required. See *Jones v. Bock*, 549 U.S. 199, 221-222 (2007). But the lower courts dismissed this case *in its entirety*—including the claims for damages that are concededly not available under the IDEA.

whether maintaining the child's current placement is substantially likely to lead to injury). And although the IDEA provides for attorneys' fees, it provides only for fees "[i]n any action or proceeding brought under" the IDEA itself. 20 U.S.C. § 1415(*i*)(3)(B)(i). Here, the complaint seeks attorneys' fees, not for IDEA proceedings, but for the effort to enforce E.F.'s distinct rights under the ADA and the Rehabilitation Act.

Because the complaint sought relief that was *not* available under the IDEA, and the HCPA specifically limits its exhaustion requirement to cases "seeking relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*), the lower courts erred in dismissing the case for failure to exhaust. This Court has long held that any requirement of administrative exhaustion depends on congressional intent in constructing the particular statutory scheme. See *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992) ("Of paramount importance to any exhaustion inquiry is congressional intent.") (internal quotation marks omitted); *McKart v. United States*, 395 U.S. 185, 193 (1969) ("Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved."). Cf. *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000) (stating that "requirements of administrative issue exhaustion are largely creatures of statute").

In particular, the Court has repeatedly stated that "'a court should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent.'" *Coit Independence Joint Venture v. Fed. Sav. & Loan Ins. Corp.*, 489 U.S. 561, 580 (1989) (quoting *Patsy v. Florida Board of Regents,* 457 U.S. 496, 501-502 (1982)). And the legislative intent is best

determined by the statutory text. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (internal quotation marks omitted). Here, the text could not be more clear: Administrative exhaustion is required only where the plaintiff "seek[s] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). By requiring exhaustion of E.F.'s claims, though the relief she sought was not available under the IDEA, the Sixth Circuit disregarded that plain text.

Rather than follow the text of the statute, the Sixth Circuit applied a test under which a court must ask whether the "core harms" alleged by the plaintiff "relate to the specific educational purpose of the IDEA," and whether the plaintiff "could have used IDEA procedures to remedy these harms"—even if those procedures could not have provided the relief actually requested in the lawsuit. App. 6. But, as the United States has explained, a test that focuses "not [on] what relief the plaintiff actually seeks, but rather [on] what relief the plaintiff *could have* sought based on the injuries alleged" is one that "amounts to a rewriting of the statutory text." Brief for the United States as *Amicus Curiae* at 14, *Payne v. Peninsula Sch. Dist.*, No. 07-35115 (9th Cir., filed Nov. 9, 2010), available at http://www.justice.gov/sites/default/files/crt/legacy/2010/12/28/paynebr.pdf.[10] The HCPA requires exhaustion

[10] The *Payne* brief was signed both by the General Counsel of the Department of Education and the Assistant Attorney General for Civil Rights. Because the Department of Education administers and enforces the IDEA, and the Department of Justice enforces the

for an action "seeking relief that is also available under" the IDEA, 20 U.S.C. § 1415(*l*)—not for an action that *might, hypothetically, have sought* such relief.

In justifying its ruling, the Sixth Circuit did not look to text but to policy considerations. In particular, the court sought to prevent children with disabilities and their families from "evad[ing]" the exhaustion requirement simply by seeking damages. App. 17. The Sixth Circuit's holding derives from the Seventh Circuit's *Charlie F.* decision, which also aimed to prevent parents from "opt[ing] out of the IDEA." *Charlie F.*, 98 F.3d at 992. But it is not the job of a court "to rewrite the statute" simply to avoid what seems like an objectionable policy result. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2169 (2015).

In any event, the objective of avoiding evasion of the IDEA's exhaustion requirement and channeling educational-rights claims into the IDEA administrative processes does not reflect "a fair understanding of the legislative plan" of the HCPA. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). To the contrary, those goals better fit with *Smith v. Robinson*, *supra*—the case that Congress specifically *overturned* in the HCPA. See *Smith*, 468 U.S. at 1012-1013 (stating that "[a]llowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme" and therefore concluding that "the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim" to educational rights). Congress sought in the

---

ADA and the Rehabilitation Act, the views in that brief are entitled to particular respect.

HCPA to preserve the right to go to court to pursue non-IDEA educational-rights claims—and to eschew *Smith*'s channeling of those claims into IDEA administrative fora. See pp. 3-4, *supra*. In place of *Smith*, the HCPA adopted a simple regime, in which plaintiffs filing educational-rights actions need not exhaust unless they "seek[] relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). To require exhaustion for cases that do *not* seek relief available under the IDEA directly conflicts with the HCPA's text and purpose.

In both its text and its purpose, the HCPA is decisively unlike the exhaustion provision of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA). In *Booth v. Churner*, 532 U.S. 731 (2001), this Court read the PLRA to require prisoners seeking money damages in federal court first to exhaust prison administrative proceedings—even if damages were not available in those proceedings. The *Booth* Court relied on the PLRA's text, which provides that "[n]o action shall be brought with respect to prison conditions * * * until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The Court noted that this text simply refers generally to "such administrative remedies as are available," rather than requiring the availability of any particular form of relief as a prerequisite for exhaustion. See *Booth*, 532 U.S. at 738-739. Moreover, the PLRA's exhaustion provision seemed specifically crafted as a response to this Court's decision in *McCarthy v. Madigan*, 503 U.S. 140 (1992). *McCarthy* had read an earlier version of Section 1997e(a) as not requiring exhaustion where a prisoner sought only money damages and the prison's administrative remedies could not provide such

damages. See *id.* at 150. In broadening Section 1997e(a)'s exhaustion requirement in the PLRA, the Court concluded, "the fair inference to be drawn is that Congress meant to preclude the *McCarthy* result." *Booth*, 532 U.S. at 740.

Unlike the PLRA, the HCPA *does* specifically refer to the particular relief the plaintiff seeks. It requires, as a prerequisite for exhaustion, that such relief have been "available under" the IDEA. 20 U.S.C. § 1415(*l*). And unlike the PLRA, the HCPA was not designed to *broaden* the exhaustion requirement or otherwise to reduce federal litigation. Cf. *Porter v. Nussle*, 534 U.S. 516, 524 (2002) (PLRA aimed "to reduce the quantity and improve the quality of prisoner suits"). Rather, the HCPA was designed to expand access to federal courts for children with disabilities asserting violations of their rights—and to overturn this Court's *Smith* decision that channeled all such cases into the IDEA process. The Sixth Circuit's holding thus conflicts with both the text and the purpose of the HCPA. This Court should grant certiorari to reaffirm the primacy of the framework Congress constructed, and to resolve the conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SAMUEL R. BAGENSTOS
Counsel of Record
Cooperating Attorney
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
625 South State Street
Ann Arbor, Michigan 48109
(734) 647-7584
sbagen@gmail.com

JILL M. WHEATON
JAMES F. HERMON
DYKEMA GOSSETT PLLC
2723 South State Street, Suite 400
Ann Arbor, Michigan 48104
(734) 214-7629

MICHAEL J. STEINBERG
AMERICAN CIVIL LIBERTIES UNION
FUND OF MICHIGAN
2966 Woodward Avenue
Detroit, Michigan 48201
(313) 578-6814

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street
New York, New York 10004
(212) 549-2500

SUSAN P. MIZNER
CLAUDIA CENTER
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762

Counsel for Petitioners

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 15a0121p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed June 12, 2015]

STACY FRY and BRENT FRY, as next friends of minor E.F., *Plaintiffs-Appellants*,	)
v.	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, *Defendants-Appellees*.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:12-cv-15507—Lawrence P. Zatkoff,
District Judge.

Argued: October 1, 2014

Decided and Filed: June 12, 2015

Before: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

COUNSEL

ARGUED: James F. Hermon, DYKEMA GOSSETT PLLC, Detroit, Michigan, for Appellants. Timothy J. Mullins, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees. **ON BRIEF:** James F. Hermon, DYKEMA GOSSETT PLLC, Detroit, Michigan, for Appellants. Timothy J. Mullins, Kenneth B. Chapie, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellees.

ROGERS, J., delivered the opinion of the court in which DONALD, J., joined. DAUGHTREY, J. (pp. 14–23), delivered a separate dissenting opinion.

OPINION

ROGERS, Circuit Judge. The administrative exhaustion requirements of the Individuals with Disabilities Education Act (IDEA) must, under that act, be met even with respect to some claims under the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The question on this appeal is whether the ADA and Rehabilitation Act claims in this case are such claims requiring IDEA exhaustion.

The Frys' daughter, E.F., suffers from cerebral palsy and was prescribed a service dog to assist her with everyday tasks. Her school, which provided her with a human aide as part of her Individualized Education Program (IEP) under the IDEA, refused to permit her to bring her service dog to school. The Frys sued the

school, its principal, and the school district, alleging violations of the ADA and the Rehabilitation Act and state disability law. The district court granted the defendants' motion to dismiss under Fed. R. Civ. P. 12(c) on the grounds that because the Frys' claims necessarily implicated E.F.'s IEP, the IDEA's exhaustion provision required the Frys to exhaust IDEA administrative procedures prior to bringing suit under the ADA and Rehabilitation Act. The Frys appeal, arguing that the IDEA exhaustion provision does not apply because they do not seek relief provided by IDEA procedures. But because the specific injuries the Frys allege are essentially educational, they are exactly the sort of injuries the IDEA aims to prevent, and therefore the IDEA's exhaustion requirement applies to the Frys' claims.

Because this is an appeal from a grant of a motion to dismiss based on the pleadings, we take as true the facts alleged in the Frys' complaint. *See S. Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir. 1973).

E.F., the daughter of Stacy and Brent Fry, was born with spastic quadriplegic cerebral palsy, which significantly impairs her motor skills and mobility. In 2008, E.F. was prescribed a service dog. Over the course of the next year, E.F. obtained and trained with a specially trained service dog, a hybrid goldendoodle named Wonder. Wonder assists E.F. by increasing her mobility and assisting with physical tasks such as using the toilet and retrieving dropped items. At the time this dispute arose, E.F. could not handle Wonder on her own, but at some point in the future she would be able to. In October 2009, when Wonder's training

was complete, her school, Ezra Eby Elementary School, refused permission for Wonder to accompany E.F. at school. There was already an IEP in place for E.F. for the 2009–2010 school year that included a human aide providing one-on-one support. In a specially convened IEP meeting in January 2010, school administrators confirmed the decision to prohibit Wonder, reasoning in part that Wonder would not be able to provide any support the human aide could not provide. In April 2010, the school agreed to a trial period, to last until the end of the school year, during which E.F. could bring Wonder to school. During this trial period, however, Wonder was not at all times permitted to be with E.F. or to perform some functions for which he had been trained. At the end of the trial period, the school informed the Frys that Wonder would not be permitted to attend school with E.F. in the coming school year.

The Frys then began homeschooling E.F. and filed a complaint with the Office of Civil Rights at the Department of Education under the ADA and § 504 of the Rehabilitation Act. Two years later, in May 2012, the Office of Civil Rights found that the school's refusal to permit Wonder to attend with E.F. was a violation of the ADA. At that time, without accepting the factual or legal conclusions of the Office of Civil Rights, the school agreed to permit E.F. to attend school with Wonder starting in fall 2012. However, the Frys decided to enroll E.F. in a school in a different district where they encountered no opposition to Wonder's attending school with E.F.

The Frys filed suit on December 17, 2012, seeking damages for the school's refusal to accommodate

Wonder between fall 2009 and spring 2012. The Frys alleged the following particular injuries: denial of equal access to school facilities, denial of the use of Wonder as a service dog, interference with E.F.'s ability to form a bond with Wonder, denial of the opportunity to interact with other students at Ezra Eby Elementary School, and psychological harm caused by the defendants' refusal to accommodate E.F. as a disabled person. The Frys sought relief under Title II of the ADA, § 504 of the Rehabilitation Act (which prohibits discrimination based on disability in "any program or activity receiving Federal financial assistance"), and the Michigan Persons with Disabilities Civil Rights Act. The district court declined to exercise supplemental jurisdiction over the state law claim.

On January 10, 2014, the district court granted the defendants' motion to dismiss pursuant to Rule 12(c), finding that the IDEA's exhaustion requirements applied to the Frys' claims and dismissing them without prejudice. The court noted that although the Frys did not specifically allege any flaw in E.F.'s IEP, if she were permitted to attend school with Wonder, that document would almost certainly have to be modified in order to articulate the policies and practices that would apply to the dog. *EF ex rel. Fry v. Napoleon Community Schools*, No. 12-15507, 2014 WL 106624, at *5 (E.D. Mich. Jan. 10, 2014). Therefore, the Frys' request for permission for E.F. to attend school with Wonder "would be best dealt with through the administrative process," and exhaustion was required. *Id.* Because the Frys had not exhausted IDEA administrative remedies, the district court dismissed their suit without prejudice. *Id.* The Frys timely appealed.

The IDEA exhaustion requirement applies to the Frys' claims. Under that statute, plaintiffs must exhaust IDEA procedures if they seek "relief that is also available" under IDEA, even if they do not include IDEA claims in their complaint. 20 U.S.C. § 1415(*l*). This language requires exhaustion when the injuries alleged can be remedied through IDEA procedures, or when the injuries relate to the specific substantive protections of the IDEA. *See S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 642 (6th Cir. 2008). The core harms that the Frys allege arise from the school's refusal to permit E.F. to attend school with Wonder relate to the specific educational purpose of the IDEA. The Frys could have used IDEA procedures to remedy these harms. Therefore, the nature of the Frys' claims required them to exhaust IDEA procedures before filing suit under the ADA and the Rehabilitation Act.

The IDEA's exhaustion requirement ensures that complex factual disputes over the education of disabled children are resolved, or at least analyzed, through specialized local administrative procedures. The IDEA outlines standards and procedures for accommodations and services provided to disabled children whose disabilities cause them to need "special education and related services." 20 U.S.C. § 1401(3)(A). One of its primary purposes is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A). To this end, the IDEA requires that schools and school districts develop an IEP for each such child. *Id.* § 1414(d)(2)(A). The IEP outlines "the child's present levels of academic

achievement and functional performance[,] . . . measurable annual . . . academic and functional goals," measurement criteria for meeting those goals, and the "special education and related services and supplementary aids and services . . . and . . . the program modifications or supports for school personnel that will be provided for the child" to make progress in achieving the goals. *Id.* § 1414(d)(1)(A)(i).

The IDEA's procedures for creating and amending a child's IEP encourage participation by those directly involved in the child's care in education, application of expert analysis, and swift dispute resolution. There must be an IEP in effect for each disabled child by the start of each school year. *Id.* § 1414(d)(2)(A). The IEP is created by an IEP team, which includes the child's parents, at least one of the child's regular education teachers, at least one of the child's special education teachers, and a representative of the "local education agency" who is qualified in special education, knowledgeable about the general curriculum, and knowledgeable about the local education agency's resources. *Id.* § 1414(d)(1)(B). Any party can present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," including disputes over the content of the child's IEP. *Id.* § 1415(b)(6)(A); *see id.* § 1401(9)(D) (defining a free appropriate public education as an education "provided in conformity with the individualized education program"). Within 15 days of receiving notice of a child's parents' complaint, the local educational agency must hold a "preliminary meeting" with the parents and other members of the IEP team to give the local educational agency "the

opportunity to resolve the complaint." *Id.* § 1415(f)(1)(B)(i). If the local educational agency has not resolved the dispute within 30 days of receiving the complaint, the timeline for a "due process hearing" begins. *Id.* § 1415(f)(1)(B)(ii). This process must conclude—with the local or state educational agency issuing a written decision to the parties—within 45 days. 34 C.F.R. § 300.515(a). If the local agency conducted the hearing, the decision can be appealed to the state educational agency, which conducts an impartial review and issues a decision within 30 days. 20 U.S.C. § 1415(g); 34 C.F.R. § 300.515(b). These deadlines are of course not entirely set in stone, but in the abstract a dispute about an IEP should go through a resolution meeting, a local agency determination, and a state agency determination within 105 days of the initial complaint. Only at this point may either party take the dispute to court, and the court then receives "the records of the administrative proceedings." 20 U.S.C. § 1415(i)(2). The statute and implementing regulations ensure that the parties have a chance to resolve the dispute without going to court and that local and state educational agencies have a chance to analyze and study it.

Requiring exhaustion of administrative procedures prior to filing suit under the IDEA has clear policy justifications: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the Act. Federal courts—generalists with no expertise in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose." *Crocker v. Tenn.*

Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989) (analyzing substantially similar provisions of the IDEA's predecessor statute). The IDEA calls for highly fact-intensive analysis of a child's disability and her school's ability to accommodate her. The procedures outlined above ensure that the child's parents and educators, as well as local experts, are first in line to conduct this analysis.

The IDEA's substantive protections overlap significantly with other federal legislation and constitutional protections, and so this policy justification would be threatened if parties could evade IDEA procedures by bringing suit contesting educational accommodations under other causes of action. The IDEA contemplates and explicitly precludes this possibility:

> [B]efore the filing of a civil action under [the ADA, the Rehabilitation Act, or other Federal laws protecting the rights of children with disabilities] *seeking relief that is also available under this subchapter*, 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 subchapter.

20 U.S.C. § 1415(*l*) (emphasis added). The exhaustion requirement was intended "to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students." *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 876 (9th Cir. 2011) (en banc), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc). Accordingly, it makes sense to require IDEA exhaustion in order to preserve

the primacy the IDEA gives to the expertise of state and local agencies.

We have held that exhaustion is not required when the injuries alleged by the plaintiffs do not "relate to the provision of a FAPE [free appropriate public education]" as defined by the IDEA, and when they cannot "be remedied through the administrative process" created by that statute. *F.H. ex rel. Hall v. Memphis City Sch.*, 764 F.3d 638, 644 (6th Cir. 2014); *see S.E.*, 544 F.3d at 642. When they do relate to the provision of the child's education and can be remedied through IDEA procedures, waiving the exhaustion requirement would prevent state and local educational agencies from addressing problems they specialize in addressing and require courts to evaluate claims about educational harms that may be difficult for them to analyze without the benefit of an administrative record. Under *S.E.* and *F.H.*, exhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP. Similarly, the Seventh Circuit required exhaustion when "[b]oth the genesis and the manifestations of the problem [were] educational." *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996). In such a situation, the participants in IDEA procedures will answer the same questions a court would ask, and they have a chance of solving the child's and the child's parents' problem before the parents and their child become plaintiffs.

The exhaustion requirement applies to the Frys' suit because the suit turns on the same questions that

would have determined the outcome of IDEA procedures, had they been used to resolve the dispute. The Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free appropriate public education. In particular, they allege explicitly that the school hindered E.F. from learning how to work independently with Wonder, and implicitly that Wonder's absence hurt her sense of independence and social confidence at school. The suit depends on factual questions that the IDEA requires IEP team members and other participants in IDEA procedures to consider. This is thus the sort of dispute Congress, in enacting the IDEA, decided was best addressed at the first instance by local experts, educators, and parents.

In the context of the accommodations the school already provided to E.F., the additional value of allowing Wonder to attend with E.F. was educational—the sort of interest the IDEA protects. E.F.'s IEP already included a human aide who, it appears, assisted E.F. with the tasks Wonder could perform. Thus the Frys' claim is not that the school failed to accommodate E.F.'s disability at all, but that the accommodation provided was not sufficient. Whether this claim amounts to alleging a denial of a free appropriate public education, or whether it could be resolved through IDEA procedures, depends on why the existing accommodation was not sufficient relative to what Wonder could provide.

If the human aide was not a sufficient accommodation, it was because he or she did not help E.F. learn to function independently as effectively as Wonder would have and perhaps because he or she was

not as conducive to E.F.'s participating confidently in school activities as Wonder would have been. The complaint does not allege that the human aide was less effective than Wonder would have been in providing immediate physical assistance; thus the Frys do not appear to suggest that E.F. was directly denied physical access to public school facilities. Instead, having Wonder at school was important for E.F. to "form a bond" with the dog, a bond that would make Wonder a more effective service animal "outside of school." The Frys characterize Wonder's independent value to E.F. as assistance with specific physical tasks, enabling her "to develop independence and confidence," and helping her "to bridge social barriers." Thus if the human aide was not a sufficient accommodation relative to Wonder, that was because he or she did not increase E.F.'s ability to perform physical tasks and function confidently and independently outside of school. One might also infer, though the Frys do not allege it directly, that relying on only a human aide without the additional presence of a service dog would inhibit E.F.'s sense of confidence and independence, as well as her ability to overcome social barriers, *in* school.

The other harms that the Frys specifically identify—denial of access to school facilities, denial of the use of Wonder as a service dog at school, harms caused by having to leave the school, and emotional distress caused by the school's refusal to accommodate her—all depend on the assumption that the school's refusal to permit Wonder's attendance harmed E.F. in the ways identified above. For example, E.F. was denied access to school facilities in the sense that school facilities did not provide her with an

accommodation (i.e., permission to use Wonder) she reasonably needed, but she needed Wonder in school only (it appears on the face of the complaint) to form a stronger bond with the dog and, perhaps, to feel more confident and independent. In sum, each of these secondary injuries exists only to the extent that Wonder's absence is harmful, or else (in the case of injuries resulting from switching schools, for instance) would be entirely avoidable if Wonder's absence were not harmful.

The primary harms of not permitting Wonder to attend school with E.F.—inhibiting the development of E.F.'s bond with the dog and, perhaps, hurting her confidence and social experience at school—fall under the scope of factors considered under IDEA procedures. Developing a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal, just as learning to read braille or learning to operate an automated wheelchair would be. The goal falls squarely under the IDEA's purpose of "ensur[ing] that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Thus developing a working relationship with a service dog should have been one of the "educational needs that result from the child's disability" used to set goals in E.F.'s IEP. *Id.* § 1414(d)(1)(A)(i)(II). "Educational needs" is not limited to learning within a standard curriculum; the statute instructs the IEP team to take into account E.F.'s "academic, developmental, and functional needs," which means that the IEP should include what a

student actually needs to learn in order to function effectively. *Id.* § 1414(d)(3)(A). "A request for a service dog to be permitted to escort a disabled student at school as an 'independent life tool' is hence not entirely beyond the bounds of the IDEA's educational scheme." *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008). The Frys' stated argument for why E.F. needed Wonder at school would have provided justification under the IDEA for allowing Wonder to accompany E.F.

To the extent that the Frys also allege that Wonder would have provided specific psychological and social assistance to E.F. *at* school, the value of this assistance is also crucially linked to E.F.'s education. Accommodations that help make a student feel more comfortable and confident at school should be included in an IEP, which lists "the program modifications or supports for school personnel that will be provided for the child . . . to be educated and participate with other children with disabilities and nondisabled children in [educational activities]." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Thus an IEP should take into account any potential accommodations that will make a disabled child feel more comfortable in the school environment, since such accommodations will help the child participate actively in school activities. The IDEA is designed to address precisely the sorts of harms the Frys allege in their complaint; assuming their claims are correct, they should have been able to obtain relief under IDEA procedures, if followed properly.

In fact, the school did use IDEA procedures to attempt to resolve its dispute, and the injuries alleged by the Frys here could have been raised then. In a

January 2010 IEP team meeting requested by the school, E.F.'s IEP team considered, among other questions, "[w]hat disability-related educational need . . . the service animal [is] intended to address" and whether "the service animal [will] enhance or hinder [E.F.'s] ability to progress in the general curriculum[.]" The IEP team reached conclusions that pertain directly to the Frys' complaint: "[E.F.] was being successful in [the] school environment without the service animal, . . . all of her needs were being met by the program and services in place, and . . . adding the service animal would not be beneficial to [E.F.]." These statements either directly contradict the injuries alleged in the Frys' complaint or reflect an excessively narrow conception of educational success contradicted by the text of the IDEA. Either way, the Frys could have relied on the injuries alleged in the complaint here (or on the likelihood of those injuries arising in the future) to challenge the IEP team's conclusion under IDEA procedures.

Had the Frys pursued IDEA procedures at this point, they would have achieved one of two outcomes. Either they would have prevailed and effectively resolved their dispute without litigation, making it possible for E.F. to attend school with Wonder, or else they would have failed but in the process generated an administrative record that would have aided the district court in evaluating their complaint. The IDEA's purposes of giving state educational agencies the opportunity to ensure compliance with federal law and ensuring that local experts are able to analyze disputes before litigation begins are well served by requiring exhaustion here.

First, IDEA procedures would in fact have been capable of resolving the Frys' dispute. E.F.'s IEP already provided for a human aide to accompany her while at school; it could just as well have provided for her service animal. Further, as the Second Circuit in *Cave* has noted in similar circumstances, measures and policies designed to minimize the disruption caused by a service animal at school (a concern raised by school officials in refusing to permit Wonder to accompany E.F.) would also best be addressed through changes to an IEP. 514 F.3d at 247–48. The Frys' complaint alleges a basis under the IDEA for E.F. to attend school with Wonder, and IDEA procedures would have allowed the Frys and school officials to work out exactly how the school should adapt to Wonder's presence.

Second, the record IDEA procedures would have created in this dispute would have been directly relevant to analysis of the Frys' complaint under the ADA and the Rehabilitation Act. In order to prevail in their ADA claim, the Frys would have to show that permitting Wonder at school is "necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7). Under the allegations in their complaint, this can be the case only because of Wonder's contribution to and role in E.F.'s education—an issue that would be extensively analyzed in IDEA procedures. The Frys would have to make a similar showing under the Rehabilitation Act. 20 U.S.C. § 794(a); 34 C.F.R. § 104.4. Thus the IDEA exhaustion requirement's purpose of allowing courts to benefit from the development of an administrative record also suggests that exhaustion should be required.

Although the Frys seek money damages, a remedy unavailable under the IDEA, rather than an injunction, this does not in itself excuse the exhaustion requirement. *F.H.*, 764 F.3d at 643; *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916 (6th Cir. 2000). Otherwise, plaintiffs could evade the exhaustion requirement simply by "appending a claim for damages." 205 F.3d at 917.

It is true that IDEA procedures, which could at best require Ezra Eby Elementary to permit Wonder to accompany E.F. at school, would not at present be effective in resolving the Frys' dispute. First, E.F. no longer attends Ezra Eby Elementary, and her current school and school district permit Wonder to accompany her. Second, before the Frys decided to transfer E.F., the defendants settled the Frys' ADA complaint before the Department of Education's Office of Civil Rights and agreed to permit Wonder to accompany E.F. at school; IDEA procedures could not have produced a substantially better outcome.

On appeal, the Frys do not argue that, under *Covington*, the above circumstances render exhaustion of IDEA procedures futile. *See* 205 F.3d at 917–18. Indeed, their argument does not rely on the procedural posture of their dispute at all. We therefore cannot decide whether the exhaustion requirement should be excused as futile. However, it is far from clear that the Frys' circumstances satisfy the requirements for futility under *Covington*. In the "unique circumstances" of that case, we distinguished precedent that required exhaustion when relief under IDEA was unavailable due to the plaintiff parents' "unilateral act" of removing their child from the defendant school. *Id.* at 917, 918

(quoting *Doe v. Smith,* 879 F. 2d 1340, 1343 (6th Cir. 1989)). That is, plaintiffs cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. While that is not exactly the case here, the Frys' failed to use IDEA procedures at any point during the almost two-and-a-half year period in which the school refused permission for Wonder to accompany E.F. The plaintiff in *Covington*, in contrast, participated, albeit imperfectly, in the IDEA's appellate procedures prior to her son's graduating from the school where the dispute arose. *Id.* at 914. The Frys may thus bear some responsibility for the present inapplicability of IDEA procedures, and the futility doctrine may be inapplicable.

In arguing that the exhaustion requirement does not apply to their claim, the Frys rely chiefly on a federal district court decision in California in which the court refused to require exhaustion for a wheelchair-bound student's request for a service dog at school. *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947 (E.D. Cal. 1990). But applying that case's logic to this complaint would allow any ADA or Rehabilitation Act lawsuit to avoid the IDEA exhaustion requirement by not explicitly alleging a denial of a FAPE. The decision in *Sullivan* viewed a Rehabilitation Act claim as, in effect, asking questions distinct from those considered by IDEA procedures:

> [O]nce plaintiff has made a threshold showing that her decision to use the service dog is reasonably related to her disability, the sole issue to be decided under section 504 [of the Rehabilitation Act] is whether defendants are

> capable of accommodating plaintiff's choice to use a service dog. The issue of whether the service dog enhances plaintiff's educational opportunities, which is central to the EHA [the IDEA's predecessor] inquiry, is completely irrelevant under section 504.

Id. at 951. This logic does not hold, because, as explained above, having Wonder at school, in addition to a human aide, is "reasonably related" to E.F.'s disability only because Wonder "enhances [E.F.]'s educational opportunities." The analysis that would be necessary under the IDEA thus must be incorporated into the ADA and Rehabilitation Act analysis for the Frys to prevail under the latter statutes. The Frys do not in so many words state that Wonder enhances E.F.'s educational opportunities, but if this is enough to avoid the exhaustion requirement, then any carefully pleaded claim under the ADA or Rehabilitation Act could evade the exhaustion requirement.[1] But the text

---

[1] At oral argument, the Frys proposed a somewhat more nuanced standard based on whether a disabled parent visiting the school would be entitled to the same accommodation as that sought by the student. This test was not articulated in the Frys' briefs, and it does not appear to be fully consistent with *F.H.* and *S.E.* Under those cases, whether a disabled student must exhaust IDEA procedures prior to bringing an ADA or Rehabilitation Act claim for a certain accommodation at school depends on whether the student's allegations relate to the denial of a FAPE or could be resolved through IDEA procedures. That a parent might justifiably claim a similar accommodation when visiting a school does not guarantee that the result of either of those inquiries will be negative, because the parent receives the accommodations in a different context (as an adult visitor, not as an everyday child attendee) and with different consequences.

of the IDEA exhaustion requirement clearly anticipates that the requirement will apply to some ADA and Rehabilitation Act claims. 20 U.S.C. § 1415(*l*). Instead, at minimum, the exhaustion requirement must apply when the cause of action "arise[s] as a result of a denial of a [FAPE]"—that is, when the legal injury alleged is in essence a violation of IDEA standards. *Payne*, 653 F.3d at 875.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

DISSENT

MARTHA CRAIG DAUGHTREY, Circuit Judge, dissenting. The majority proposes to affirm the district court's order dismissing this civil rights action alleging violation of Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), based on its conclusion that "the specific injuries the [plaintiffs] allege are essentially educational" and, therefore, subject to administrative exhaustion under an entirely separate statute, the Individuals with Disabilities Act (IDEA). Because I conclude to the contrary that the claim here is non-educational in nature and that the IDEA's exhaustion provision was improperly invoked by the district court, I respectfully dissent. Moreover, even if the accommodation sought could be considered "educational," the fact that school policy would permit a "guide dog" on campus, but not a certified "service dog," suggests why an attempt at exhaustion of administrative remedies would be futile in this case and should be excused.

The disability discrimination at issue is a text-book example of the harms that Section 504 and the ADA were designed to prevent, and the claims should not have been dismissed essentially because the victim of the discrimination was a school-aged child. Stacy and Brent Fry's daughter Ehlena, five years old when this dispute first arose in 2009, suffers from a severe form of cerebral palsy that is sufficiently disabling to qualify her under the IDEA for a "free appropriate public education" (FAPE) based on an individualized educational program (IEP)— one specifically "designed

to meet [her] unique needs." *Burilovich v. Bd. of Educ. of Lincoln Consol. Sch.*, 208 F.3d 560, 565 (6th Cir. 2000). Parents dissatisfied with a child's IEP are guaranteed "[a]n opportunity . . . to present a complaint . . . with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). If the complaint cannot be resolved, the parents are entitled to a due-process hearing and, if necessary, an appeal to the state's educational agency. 20 U.S.C. §§ 1415(f)(1)(A), 1415(f)(1)(B)(ii), 20 U.S.C. § 1415(g)(1). Failing that, suit against the school district may be filed in federal district court pursuant to 20 U.S.C. § 1415(i)(2).

In this case, the Frys did not attempt to exhaust their administrative remedies under the IDEA because they were not dissatisfied with Ehlena's educational program. Instead, their complaint stemmed from the school district's refusal to allow Ehlena's certified service dog, Wonder, to accompany her to school. Armed with a prescription from Ehlena's physician, the Frys had secured the dog at considerable expense through various community fund-raising efforts even before she started kindergarten, with the understanding that Ehlena would be able to have the service dog accompany her to school in the fall of 2009. In addition, the family had undergone ten days of specialized training at a service-animal training facility in Ohio. The ultimate objective was to form the child and the dog into a "team of two," with Wonder assisting Ehlena in myriad ways, including—but not limited to—"retrieving dropped items, helping her balance when she uses her walker, opening and closing doors,

turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet." In short, the goal was to help Ehlena develop more independent motor skills, which is not the function of an academic program—put bluntly, basic mobility is not a subject taught in elementary school. After the Frys completed training, what remained was the task of getting Ehlena and Wonder to become closely attached to one another in order to make the dog a valuable resource for the child, especially during non-school hours. Based on the advice of experts, her parents maintained that for Ehlena to develop the confidence necessary to achieve independent mobility, she and Wonder needed to be together around the clock, including during school hours.

School district officials contended that Ehlena already had an aide provided under her IEP and, therefore, did not need the additional assistance of a service animal. Indeed, they threatened to eliminate the human aide from the child's IEP if her parents insisted on having Wonder accompany Ehlena in school. Even more astounding, the school district refused to recognize Wonder as a service dog despite his official certification, possibly because school policy explicitly allowed "guide dogs"—but not "service dogs"—on school premises, giving lie to the claim that Wonder was objectionable because he might cause allergic reactions in staff members and students or become a distraction to others.

When officials at Ehlena's school repeatedly refused to accommodate the dog's presence, the Frys filed suit as her next friends, alleging that the school district had violated the child's civil rights under Section 504 of the

Rehabilitation Act, 29 U.S.C. § 791 *et seq*.; Title II of the ADA, 42 U.S.C. § 12101 *et seq.*; and the Michigan Persons with Disabilities Civil Rights Act, Mich. Comp. Laws § 37.1101 *et seq*.[1] Title II applies to public entities and their programs, prohibiting exclusion from participation by and discrimination against qualified individuals with a disability "by reason of such disability." 42 U.S.C. § 12132. Moreover, ADA regulations require that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally* alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7) (emphasis added). Similarly, the Rehabilitation Act prohibits discrimination against the disabled by recipients of federal funding and requires reasonable accommodations to permit access to such recipient facilities and programs by disabled persons. *See* 29 U.S.C. § 794(a); 28 C.F.R. § 41.53.

Depending upon a disabled child's circumstances, the two anti-discrimination laws and the IDEA could function as complements, but their focus and the obligations that they impose are independent of one another. The ADA and the Rehabilitation Act guard Ehlena's civil rights, ensuring that she, like her fellow citizens, has equal access to public facilities and publicly-funded programs. By contrast, the IDEA guarantees that her education will be appropriate for her individual situation. If, for example, the school

---

[1] The state claim was dismissed in the district court and is not involved in this appeal.

district declined to permit Ehlena to come to school altogether, that action would violate both the ADA and the Rehabilitation Act, by denying her access to a public facility and its publicly-funded program, and it would also violate the IDEA, by depriving her of a "free appropriate public education." On the other hand, if the school lacked ramps providing access to the building by someone using a wheelchair or walker, rectification of such an ADA violation would not likely be accomplished by modification of an IEP. In short, the ADA's focus is on ensuring *access*; the IDEA's focus is on providing *individualized* education. The point missed by both the district court and the majority is that for Ehlena, Wonder functions as an access *ramp*—not just in terms of the school building but, more significantly, in all aspects of her life.

This point was missed because the test applied below was impossibly broad. In granting the school district's motion to dismiss, the district court observed that "[it] fail[ed] to see how Wonder's presence would not—at least partially—implicate issues relating to E.F.'s IEP." But, this conclusion was based on nothing more than speculation, because the Frys' complaint was dismissed on the pleadings before any discovery could occur. Moreover, in terms of a school-age child, virtually any aspect of growth and development could be said to "partially implicate" issues relating to education. If flimsy, however, the district court's "implication" analysis was at least a test. On appeal, the majority offers no useful yardstick at all. My colleagues appear to formulate something approaching a loose standard, observing that "having Wonder at school, in addition to a human aide, is 'reasonably related' to E.F.'s disability only because Wonder

'enhances [E.F.]'s educational opportunities.'" But the majority then quickly concedes that her parents "do not in so many words state that Wonder enhances E.F.'s educational opportunities."

Indeed, the Frys' complaint does not tie use of the service dog to Ehlena's academic program or seek to modify her IEP in any way. For this reason, the majority is also incorrect in asserting that "[t]he Frys allege in effect that E.F.'s school's decision regarding whether her service animal would be permitted at school denied her a free and appropriate public education." The Frys did not allege the denial of a FAPE, only Ehlena's access to it. Moreover, given the total absence of discovery in this case, the contention that further accommodation through the service dog is unnecessary because Ehlena already has a "human aide" simply cannot be taken seriously. The aide provided under the IEP is *not* there to help Ehlena develop and maintain balance and mobility, but to ensure her ability to progress in her academic program. To equate that assistance with the function of the service dog, as the school district did and the majority appears to approve, is ludicrous, and it completely misconceives the purpose of providing an aide under an IEP. Such an aide, after all, would be equally available to assist a special-needs child with no mobility problems at all.

If "implication" and "relatedness" are vague and unhelpful as standards for determining whether a Section 504 claim under the Rehabilitation Act or a Title II claim under the ADA must first be exhausted under the IDEA's administrative procedures, what test should apply? Although the majority quotes statutes at

length and cites very little case law, it does invoke the Ninth Circuit's opinion in *Payne v. Peninsula School District*, 653 F.3d 863, 875 (9th Cir. 2011) (*en banc*), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (*en banc*), for the proposition that "at minimum, the exhaustion requirement must apply when the cause of action 'arise(s) as the result of the denial of a FAPE'—that is, when the legal injury alleged is in essence a violation of the IDEA standards." This proposition is, obviously, true. But it is immaterial, because the Frys neither alleged that Ehlena was denied a FAPE nor asked for a modification of her IEP. Moreover, there is no proof in the record that what the Frys seek to redress is the functional equivalent of a deprivation under the IDEA.

Indeed, what *is* clear from the record—the complaint and attached exhibits—is that the request for a service dog would not require a modification of Ehlena's IEP, because that request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs*. That wholly reasonable accommodation—accomplished by a few keystrokes of a computer—would have saved months of wrangling between Ehlena's parents and school district officials; it would have prevented her absence from public school during the two years she was home-schooled following the school's decision; it would have avoided the disruption of relocating the child and her service dog to another school district; and it would have mooted the question of exhaustion and eliminated the necessity of litigation that has ensued since this action was filed.

On the other hand, if litigation was inevitable, then perhaps the majority in this case should look to the

Ninth Circuit's *en banc* opinion in *Payne* for more guidance than merely a restatement of the exhaustion provision found in 20 U.S.C. § 1415(*l*):

> [T]he exhaustion requirement in § 1415(*l*) is not a check-the-box kind of exercise. As our cases demonstrate, determining what has and what has not been exhausted under the IDEA's procedures may prove an inexact science. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302–03 (9th Cir.1992) (noting that the IDEA's exhaustion requirement "is not a rigid one, and is subject to certain exceptions," determined by "the general purposes of exhaustion and the congressional intent behind the administrative scheme"). In other words, the exhaustion requirement appears more flexible than a rigid jurisdictional limitation—questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the "general purposes" of exhaustion, are better addressed through a fact-specific assessment of the affirmative defense than through an inquiry about whether the court has the power to decide the case at all.

Payne, 653 F.3d at 870. In summary, the Ninth Circuit held, "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, *even if they allege injuries that could conceivably have been redressed by the IDEA*." *Id.* at 871 (emphasis added). In this vein, the court focused on Congress's intent as explicitly set out in the IDEA itself: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies

available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities . . . .” 20 U.S.C. § 1415(*l*). This deliberate carve-out would have no meaning if any and every aspect of a child's development could be said to be “educational” and, therefore, related to a FAPE, requiring inclusion in an IEP, and imposing an extra impediment to the remediation of a disabled child's civil rights. As the *Payne* court noted, “§ 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed—and perhaps could only be addressed—through a suit under § 1983 or other federal laws.” *Payne*, 653 F.3d at 872.

The majority here has told us that “[d]eveloping a bond with Wonder that allows E.F. to function more independently outside the classroom is an educational goal” but has failed to tell us how it reached this conclusion. The omission is not entirely surprising, given that the *Payne* court identified the Sixth Circuit as one of the “courts [that] have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies.” *Id.* at 874. In developing such a standard for itself, the Ninth Circuit abandoned an injury-centered approach, in which IDEA's exhaustion requirement would apply to any case in which the injuries alleged could be redressed to any degree by the IDEA's administrative procedures, in favor of a relief-centered approach requiring exhaustion in three situations: (1) “when a plaintiff seeks an IDEA remedy or its functional equivalent”—for example, when “a disabled student

files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education;" (2) "where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student;" and (3) "where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action . . . ." *Id.* at 875. Because the Frys do not seek to "alter an IEP" or to rectify "the denial of a FAPE," a court adopting the *Payne* approach would be left with this question: is their request for the service dog under the circumstances of this case "the functional equivalent of an IDEA remedy"?

The answer to this question involves the very purpose of the IDEA's exhaustion requirement, which "is designed to allow for the exercise of discretion and educational expertise by state and local agencies, [to] afford full exploration of *technical educational issues*, [to] further development of a complete factual record, and [to] promote judicial efficiency by giving agencies the first opportunity to correct shortcomings in their *educational programs* for disabled children." *Id.* at 875-76 (internal quotation marks, grammatical alterations, and citation omitted; emphasis added). In short, the exhaustion provision in Section 1415(*l*) is intended to insure that education experts make the "expert determinations about the best way to educate disabled students." *Id.* at 876 (emphasis added).

Clearly, an "expert determination" about "technical educational issues" might well concern whether a

handicapped student could be mainstreamed or would fare better in a special-education classroom. It might also concern whether speech therapy would help a child struggling with autism to communicate. And, it might concern whether an intellectually-challenged student could learn to read with the assistance of a reading specialist. But it would *not* concern whether a deaf child should be equipped with a cochlear implant or relegated to learning sign language; whether a blind child should be furnished with a guide dog or outfitted with a white cane; or whether a crippled child should be confined to a wheelchair or encouraged to use a walker *assisted in balance and navigation by a service dog*. The experts qualified to make the "technical decisions" for children in the latter group are obviously *not* trained educators but their physicians and physical therapists. In fact, it was Ehlena's pediatrician who originally assessed her need for a service dog and wrote a prescription that allowed the Frys to provide Ehlena with Wonder. The school district's failure to allow Wonder to accompany Ehlena in school was no different from denying her the use of a wheelchair, if one were needed to enable her to achieve mobility.

Rather than ask a state agency to make that call, the Frys submitted their claim to federal authorities in July 2010, by filing a complaint with the United States Department of Education's Office for Civil Rights (OCR), the federal agency responsible for enforcing Section 504 of the Rehabilitation Act and Title II of the ADA. The complaint was based on the school district's interference with Ehlena's access to its publicly-funded school program by refusing to allow her "trained service animal" to accompany her in school. In a report dated May 3, 2012, the Director of the Office for Civil

Rights indicated that current Title II regulations require that *"public entities must modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability*." Moreover, the regulations in effect at the time defined "service animals" to include "any guide dog or other animal individually trained to do work or perform tasks for the benefit of an individual with a disability, including, but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items." The report also notes that a "public entity is required to permit an individual with a disability to be accompanied by the individual's service animal in all areas of a public entity's facilities where members of the public, participants in services, programs, or activities; or invitees, as relevant, are allowed to go."

Addressing Ehlena's situation specifically, the OCR Director summarized a letter from Ehlena's physical therapists:

> [T]he therapists explained how the service animal [Wonder] had accompanied the Student to therapy since November of 2009 and had been incorporated into therapy in a number of ways. For example, the service animal assisted the Student with directional control of her walker, with ambulation, and with stabilizing herself while transitioning into and out of her walker from the floor. The Student used the service animal as a bridge for transitioning from her walker to a standing or seated position at a table. She also consistently used the service

> animal safely to improve her sitting balance by having the service animal provide posterior support as needed. The letter also described how the service animal was directed behind or to the side of the Student when she was standing at a supportive surface for improved safety. Additionally, the Therapists explained that the Student used the service animal to safely pick up dropped items. The letter stated that, although the Student still needed adult stand-by assistance for added safety, her independence with transitioning was improving.

Nevertheless, the OCR Director noted, Ehlena's school district "assert[ed] that the Student does not need her service animal for school, because they will provide her a human aide," but if they do, "it will violate the antidiscrimination provisions of Section 504 and Title II." The Director added:

> [T]he decision to deny the Student the service animal in the school setting would have wider implications for the Student outside of the school day. Activities that the service animal performs for the Student during school, such as providing assistance with balance and support, retrieving dropped items, and taking off her coat, are the same types of activities for which the Student uses the service animal outside of the school . . . . Th[e] evidence suggests that refusing to allow the service animal to assist the Student at school, which she is required to attend for nine months a year, would result in a more prolonged and complete separation that would likely cause

> the Student's working relationship with the service animal to deteriorate.

When the school district refused to accept the factual findings and the legal conclusions in the OCR report, the Frys filed this action in district court.

It is difficult to fathom what could have been gained by requiring the Frys to undergo additional "exhaustion" before filing suit. The stupefying fact, as noted previously, is that the school district's policy would explicitly have permitted Ehlena to have a guide dog at school if she were blind, but was not interpreted to allow the use of a service dog as a reasonable accommodation for her mobility handicap—even in the face of federal regulations establishing that any distinction between a guide dog and a service dog is purely semantic. Moreover, the school district's recalcitrance suggests a possible reason for the Frys' decision to pass up the bureaucratic process involved in pursuing Section 1415(*l*) exhaustion as futile, given their repeated efforts to reach a favorable accommodation with the school district officials and their lack of success, even with the OCR report in hand. Of course, we cannot know why the Frys decided to file suit rather than seek a due-process hearing, because the district court dismissed the action on the pleadings, thereby short-circuiting the case before the complaint was answered and discovery could occur.

In my judgment, the district court's dismissal was inappropriately premature. When the court granted the school district's motion for judgment on the pleadings, the pleadings were closed, as required by Federal Rule of Civil Procedure 12(c), but discovery had not been undertaken. And yet, Sixth Circuit case law recognizes

that "exhaustion is not required under the IDEA in certain circumstances . . . [for example, where] it would be futile or inadequate to protect the plaintiff's rights." *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) (citing *Honig v. Doe*, 484 U.S. 305, 326-27 (1988)). Although "the burden of demonstrating futility or inadequacy rests on the party seeking to bypass the administrative procedures," *id.*, the necessity of making such a showing presumes that a plaintiff's civil-rights action setting out Section 504 and ADA claims will proceed at least to the summary judgment stage, as it did in *Covington*. It follows that the district court's order dismissing the Frys' complaint was inappropriate at best, arguably erroneous, and not worthy of affirmance.

At the very least, this case should be remanded to the district court to permit the Frys to attempt a showing that Section 1415(*l*) exhaustion was inapplicable to their case or that it would have been "futile or inadequate." From the majority's decision to affirm, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed June 12, 2015]

STACY FRY and BRENT FRY, as next friends of minor E.F., Plaintiffs - Appellants,	)
v.	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, Defendants - Appellees.	)

Before: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.12-15507
Hon. Lawrence P. Zatkoff

[Filed January 10, 2014]

EF, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiffs,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Port Huron, State of Michigan, on January 10, 2014

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss [dkt 17]. The parties have fully briefed the Motion. The Court finds that the facts and legal arguments are adequately presented in the parties' papers such that the decision process would not be significantly aided by oral argument. Therefore, pursuant to E.D. Mich. L.R. 7.1(f)(2), it is hereby ORDERED that the Motion be resolved on the briefs submitted, without oral argument. For the following reasons, Defendants' Motion is GRANTED.

II. BACKGROUND

A. FACTUAL BACKGROUND

EF, an eight-year-old girl, was born with spastic quadriplegic cerebral palsy, the most severe form of that disorder. Spastic quadriplegic cerebral palsy affects EF's legs, arms, and body, and significantly limits her motor skills and mobility. She is not cognitive impaired, however, but requires physical assistance in her daily activities.

On or about May 2008, EF's pediatrician wrote a prescription for a service dog to assist her in everyday activities. Before EF enrolled in Ezra Eby Elementary School's kindergarten program for the 2009–10 school year, Plaintiffs (EF's parents) informed Defendants[1] Napoleon Community Schools and Jackson County

---

[1] Plaintiffs only brought one claim (Count III) against Defendant Pamela Barnes. The Court, however, dismissed that claim on January 18, 2013. Accordingly, Defendant Pamela Barnes is no longer a party to this suit.

Intermediate School District ("Defendants") that they intended to obtain a service dog for EF. Defendants allegedly "led [Plaintiffs] to believe that the service dog could attend school with [EF]." With the success of a local community fundraiser, EF and Plaintiffs were able to pay for the training of a service dog named "Wonder."[2] In the fall of 2009, EF and her family trained with Wonder at service animal training facility in Ohio.

According to Plaintiffs, Wonder "is a specially trained and certified service dog and assists [EF] in a number of ways, including, but not limited to, retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, helping her transfer to and from the toilet." Dkt. # 1, ¶ 27. Wonder also "enables [EF] to develop independence and confidence and helps her bridge social barriers." *Id.* at ¶ 28.

In October 2009, Defendants informed Plaintiffs that Wonder could not accompany EF to school. On January 7, 2010, Defendants convened a meeting wherein the Individual Educational Program ("IEP") team considered whether Wonder was necessary to provide EF with a free appropriate public education ("FAPE").[3] The IEP team concluded that EF was

---

[2] Wonder is a Goldendoodle, a cross between a Golden Retriever and a Poodle. Most Goldendoodles have a low or non-shedding coat, which generally makes the breed tolerable for people with allergies.

[3] Under the Individuals with Disabilities Act, the means by which a state provides special education services is through the

successful in the school environment without Wonder, and that all of her "physical and academic" needs were being met by the IEP program and services in place. *Id.* at ¶¶ 32–33. Subsequent to that decision, Plaintiffs and Defendants negotiated an agreement whereby EF was allowed to bring Wonder to school for a 30-day trial period that commenced on April 12, 2010, and was ultimately extended through the end of the school year. Although Wonder was permitted in school, Plaintiffs allege that Defendants required Wonder "to remain in the back of the room during classes," "forbade [him] from assisting [EF] with many tasks he had been specifically trained to do," "refused to allow [him] to accompany and assist [EF] during recess, lunch, computer lab and library," and "prohibited [EF] from participating in other activities with Wonder such as walking the track during 'Relay for Life,' a school play and 'field day.'" *Id.* at ¶¶ 35–37. Following the trial period, Defendants not only refused to modify the school's policies, but also refused to recognize Wonder as a service dog.

Plaintiffs filed a complaint with the United States Department of Education Office of Civil Rights ("OCR") on July 30, 2010. On May 3, 2012, the OCR issued a disposition letter finding that EF's school district and intermediate school district (*i.e.*, Defendants) violated her rights under Title II of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the federal regulations implementing those laws. Attempting to find an amicable resolution to the OCR complaint, Defendants entered into a resolution

---

development of IEP's that are individually tailored to the unique needs of each student.

agreement wherein EF could return to the elementary school with Wonder and could utilize the dog to assist her throughout the school.

Plaintiff Brent Fry conversed with Defendant Pamela Barnes during the summer of 2012 to discuss EF's return with Wonder. According to Plaintiffs, that conversation evoked "serious concerns that the administration would resent" EF. Plaintiffs located a different public school in Washtenaw County for EF to attend with Wonder.[4]

B. PROCEDURAL BACKGROUND

Plaintiffs filed their three-count complaint on December 17, 2012, alleging the following causes of action: violation of Section 504 of the Rehabilitation Act against Defendants Napoleon Community Schools and Jackson County Intermediate School District (Count I); violation of Title II of the Americans with Disabilities Act against Defendants Napoleon Community Schools and Jackson County Intermediate School District (Count II); and violation of the Michigan Persons with Disabilities Civil Rights Act against all Defendants (Count III). On January 18, 2013, the Court dismissed Plaintiffs' state-law claim (Count III).

Pending before the Court is Defendants' motion seeking dismissal of Plaintiffs' remaining federal claims.

---

[4] While awaiting a ruling from the OCR, Plaintiffs homeschooled EF.

III. LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(c), "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The Court's review under Fed. R. Civ. P. 12(c) is the same as the review under Fed. R. Civ. P. 12(b)(6). *Jelovsek v. Bredesen*, 545 F.3d 431, 434 (6th Cir. 2008). Under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all factual allegations in the pleadings, and any ambiguities must be resolved in that plaintiff's favor. *See Jackson v. Richards Med. Co.*, 961 F.2d 575, 577–78 (6th Cir. 1992). While this standard is decidedly liberal, it requires more than a bare assertion of legal conclusions. *See Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315, 319 (6th Cir. 1999). Thus, the plaintiff must make "a showing, rather than a blanket assertion of entitlement to relief" and "[f]actual allegations must be enough to raise a right to relief above the speculative level" so that the claim is "plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). *See also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

IV. ANALYSIS

The crux of the parties' dispute is narrow and relatively straightforward. Defendants argue Plaintiffs failed to exhaust their administrative remedies with the Michigan Department of Education before filing this federal suit and, as a result, their federal claims should be dismissed. Plaintiffs, on the other hand, dispute that they were required to adhere to the exhaustion requirement. The Court finds Defendants' position meritorious as further explained below.

A. INDIVIDUALS WITH DISABILITIES ACT

The Individuals with Disabilities Act ("IDEA") conditions a state's receipt of federal funding upon the state's development and implementation of policies and procedures ensuring that "[a] free appropriate public education is available to all children with disabilities." 20 U.S.C. § 1412(a)(1)(A). The central means by which a state provides this education is through the development of an IEP that is tailored to the unique needs of a particular child. *Id.* at § 1412(a)(4); *Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982).

The IDEA requires a parent, dissatisfied with an education decision regarding her child, to exhaust state administrative remedies before proceeding to federal court. *Id.* at § 1415(l);[5] *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989)

---

[5] 20 U.S.C. § 1415(l) provides as follows:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, 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 subchapter.

Subsection (f) provides for an "impartial due process hearing" and subsection (g) provides for an appeal to the state educational agency "[i]f the hearing required by subsection (f) of this section is conducted by a local education agency." 20 U.S.C. §§ 1415(f) & 1415(g)(1).

("Every court that has considered the question has read this statutory scheme as a requirement for the exhaustion of administrative remedies."). Exhaustion is an affirmative defense that must be raised by the defendant. *See, e.g.*, *B.H. v. Portage Pub. Sch. Bd. of Educ.*, No. 08-293, 2009 WL 277051, at *3 (W.D. Mich. Feb. 2, 2009).

The IDEA's exhaustion requirement is not limited to claims brought under the IDEA. Section 1415(l) of the IDEA states:

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

20 U.S.C. § 1415(l) (emphasis added). "[T]he IDEA exhaustion requirement applies to claims brought under the Rehabilitation Act or other federal statutes to the extent those claims seek relief that is also available under the IDEA." *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008). As summarized by one court, exhaustion is required in three IDEA-related contexts:

First, exhaustion is clearly required when a plaintiff seeks an IDEA remedy or its functional equivalent. For example, if a disabled student files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education, the IDEA requires exhaustion regardless of whether such a remedy is available under the ADA, or whether the IDEA is mentioned in the prayer for relief.

* * *

Second, the IDEA requires exhaustion in cases where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student.

* * *

Third, exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a [free appropriate public education] to provide the basis for the cause of action (for instance, a claim for damages under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, premised on a denial of a [free appropriate public education]). Such claims arise under either the IDEA (if the IDEA violation is alleged directly) or its substantive standards (if a § 504 claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is

> therefore "available under this subchapter." 20 U.S.C. § 1415(l).

Payne, 653 F.3d at 875.

Thus it is irrelevant that Plaintiffs did not expressly plead an IDEA claim. In order to determine if Plaintiffs were required to exhaust their federal claims before filing suit, this Court must first examine the relief requested in Plaintiffs' complaint. If the relief sought by Plaintiffs could have been provided by the IDEA, then exhaustion was necessary and Plaintiffs' complaint must be dismissed.

In the current matter, Plaintiffs allege two federal claims: (1) a violation of Section 504 of the Rehabilitation Act; and (2) a violation of Title II of the ADA. Plaintiffs' complaint, though, does not explicitly link each claim to a separate form of requested relief. Rather, the complaint contains a general "Request for Relief," which includes issuance of a declaration that Defendants violated Plaintiffs' rights under the above-mentioned statutes, an award of damages in an amount to be determined at trial and attorney's fees.

First, Plaintiffs' request for attorney's fees is indeed available under the IDEA. *See* 20 U.S.C. § 1415(i)(3)(B). Moreover, the inclusion of compensatory damages likewise provides no safe harbor from the IDEA's exhaustion mandate. The Sixth Circuit—in conformity with the majority of other circuits—has held that plaintiffs cannot evade the exhaustion requirement simply by limiting their prayer for relief to a request for damages. *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) ("[W]e agree with those courts that have decided that

a mere claim for money damages is not sufficient to render exhaustion of administrative remedies unnecessary . . . ."). Accordingly, this Court must look beyond the "damages" and "attorney's fees" request and carefully discern the theory or underpinnings behind Plaintiffs' allegations in order to determine if exhaustion under the IDEA is required. *See Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 246 (2nd Cir. 2008) ("[T]he theory behind the grievance may activate the IDEA's process, even if the plaintiff wants a form of relief that the IDEA does not supply . . . .") (quotations and citation omitted).

Instructive is the Second Circuit's decision in *Cave*, *supra*, a case involving a hearing-impaired student's request to allow a service dog to accompany him to school. The student's request was denied by school officials because the student's class schedule and overall education program would have required modification. Much like the instant case, the appellants in *Cave* argued that their claim was not one of violation of the IDEA's mandate for the provision of a FAPE, but was rather a claim for unlawful discrimination under the ADA and Rehabilitation Act, among others statutes. There, the school officials' decision was upheld because the court was not convinced that the student's claims were materially distinguishable from claims falling within the ambit of the IDEA:

> The high school principal and the school district's director of special education testified before the district court that John, Jr.'s class schedule under his existing IEP would have to be changed to accommodate the concerns of allergic students and teachers and to diminish

> the distractions that Simba's [*i.e.*, the service dog] presence would engender. (citation omitted). School authorities would also have to make certain practical arrangements to maintain the smooth functioning of the school and to ensure both that Simba was receiving proper care and that John, Jr. continued to receive necessary and appropriate educational and support services. (citation omitted). It is hard to imagine, for example, how John, Jr. could still attend the physical education class while at the same time attending to the dog's needs; or how he could bring Simba to a class where another student with a certified allergic reaction to dogs would be present. (citation omitted). These issues implicate John, Jr.'s IEP and would be best dealt with through the administrative process.
>
> We thus agree with the district court here that 'at least in part, the plaintiffs are challenging the adequacy of John, Jr.'s IEP because it does not include a service dog.' (citation omitted). The relief appellants seek, 'namely permission to bring the service dog to school, is in substance a modification of John, Jr.'s IEP . . . [and] is available under the IDEA.' (citation omitted).

Cave, 514 F.3d at 247–48.

Here, Plaintiffs' response brief strongly disclaims any challenge to the efficacy of EF's IEP. As Plaintiffs would have it, they are instead arguing that Defendants' failure to accommodate a disabled individual (*i.e.*, EF) in a place of public accommodation (*i.e.*, EF's school) violates the ADA and Rehabilitation

Act. Put another way, Defendants' obligation to satisfy those statutes "was entirely separate from the Defendants' obligation to provide a [FAPE] under the IDEA." *See* Dkt. # 18, p. 15–16 ("The education program created by the Defendants with input from [EF's] family and medical providers did provide the educational opportunity that is required as a matter of law."); ("The IDEA addresses only the Defendants' obligation to formulate a plan to provide a student with a [FAPE].").

The Court concludes that the IDEA's exhaustion requirement was triggered here. Despite the light in which Plaintiffs cast their position, the Court fails to see how Wonder's presence would not—at least partially—implicate issues relating to EF's IEP. Borrowing from the discussion in *Cave*, it appears conceivable that EF's IEP would undergo some modification, for example, to accommodate the "concerns of allergic students and teachers and to diminish the distractions [Wonder's] presence would engender." Moreover, having Wonder accompany EF to recess, lunch, the computer lab and the library would likewise require changes to the IEP. Again, by way of example, the IEP would need to include plans for handling Wonder on the playground or in the lunchroom. Defendants (*i.e.*, the school and school district) would also have to make certain practical arrangements—such as developing a plan for Wonder's care, including supervision, feeding, and toileting—so that the school continued to maintain functionality. All of these things undoubtedly implicate EF's IEP and would be best dealt with through the administrative process.

As one panel from within the Sixth Circuit has aptly commented: "States are given the power to place themselves in compliance with the law, and the incentive to develop a regular system for fairly resolving conflicts under the [IDEA]. Federal courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose." *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). In brief, the Court finds that Plaintiffs were obliged to exhaust the administrative remedies available under the IDEA before filing the current lawsuit. Accordingly, because Plaintiffs' do not contest that they failed to exhaust the IDEA's administrative remedies, Plaintiff's complaint will be dismissed without prejudice.

V. CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss [dkt 17] is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's complaint [dkt 1] is DISMISSED WITHOUT PREJUDICE.

IT IS SO ORDERED.

Date: January 10, 2014 s/Lawrence P. Zatkoff
Hon. Lawrence P. Zatkoff
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No.12-15507
Hon. Lawrence P. Zatkoff

[Filed January 10, 2014]

EF, a minor, by her next friends, STACY FRY and BRENT FRY,

Plaintiffs,

v.

NAPOLEON COMMUNITY SCHOOLS, JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT, and PAMELA BARNES, in her individual capacity,

Defendants.

JUDGMENT

IT IS ORDERED AND ADJUDGED that pursuant to this Court's Opinion and Order dated January 10, 2014, this cause of action is DISMISSED WITHOUT PREJUDICE.

Dated at Port Huron, Michigan, this 10th day of January, 2014.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Marie Verlinde
MARIE VERLINDE

APPROVED:

s/Lawrence P. Zatkoff
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-1137

[Filed August 5, 2015]

STACY FRY AND BRENT FRY, AS NEXT FRIENDS OF MINOR E.F.,	)
Plaintiffs-Appellants,	)
v.	)
NAPOLEON COMMUNITY SCHOOLS; PAMELA BARNES; JACKSON COUNTY INTERMEDIATE SCHOOL DISTRICT,	)
Defendants-Appellees.	)

O R D E R

BEFORE: DAUGHTREY, ROGERS, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then

was circulated to the full[*] court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Daughtrey would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

[*] Judge White recused herself from participation in this ruling.

APPENDIX D

STATUTES AND REGULATION

20 U.S.C. § 1415. Procedural safeguards

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational

agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include—

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by

which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall

provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

(A) independent educational evaluation;

(B) prior written notice;

(C) parental consent;

(D) access to educational records;

(E) the opportunity to present and resolve complaints, including—

(i) the time period in which to make a complaint;

(ii) the opportunity for the agency to resolve the complaint; and

(iii) the availability of mediation;

(F) the child's placement during pendency of due process proceedings;

(G) procedures for students who are subject to placement in an interim alternative educational setting;

(H) requirements for unilateral placement by parents of children in private schools at public expense;

(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;

(J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) OPPORTUNITY TO MEET WITH A DISINTERESTED PARTY.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) LIST OF QUALIFIED MEDIATORS.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and

regulations relating to the provision of special education and related services.

(D) COSTS.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) SCHEDULING AND LOCATION.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) WRITTEN AGREEMENT.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) MEDIATION DISCUSSIONS.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local

educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void

such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing

may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause

of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may

be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall

review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that

resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child—

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless

the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child,

that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to

children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

(*l*) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 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 subchapter, 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 subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(*o*) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

29 U.S.C. § 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 705(20) of this title, 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.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of—

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is

extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other post-secondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 7801 of title 20), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Significant structural alterations by small providers

Small providers are not required by subsection (a) of this section to make significant structural

alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on March 22, 1988.

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510,[1] of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201–12204 and 12210), as such sections relate to employment.

42 U.S.C. § 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

---

[1] See References in Text note below.

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this subchapter, 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 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

---

[1] See References in Text note below.

42 U.S.C. § 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and

requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

28 C.F.R. § 35.136 Service animals.

(a) *General.* Generally, a public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.

(b) *Exceptions.* A public entity may ask an individual with a disability to remove a service animal from the premises if—

(1) The animal is out of control and the animal's handler does not take effective action to control it; or

(2) The animal is not housebroken.

(c) *If an animal is properly excluded.* If a public entity properly excludes a service animal under § 35.136(b), it shall give the individual with a disability the opportunity to participate in the service, program, or activity without having the service animal on the premises.

(d) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).

(e) *Care or supervision.* A public entity is not responsible for the care or supervision of a service animal.

(f) *Inquiries.* A public entity shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public entity shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public entity may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

(g) *Access to areas of a public entity.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.

(h) *Surcharges.* A public entity shall not ask or require an individual with a disability to pay a surcharge, even if people accompanied by pets are required to pay fees, or to comply with other requirements generally not applicable to people without pets. If a public entity normally charges individuals for the damage they cause, an individual with a disability may be charged for damage caused by his or her service animal.

(i) *Miniature horses.* (1) *Reasonable modifications.* A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a

miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with a disability.

(2) *Assessment factors.* In determining whether reasonable modifications in policies, practices, or procedures can be made to allow a miniature horse into a specific facility, a public entity shall consider—

(i) The type, size, and weight of the miniature horse and whether the facility can accommodate these features;

(ii) Whether the handler has sufficient control of the miniature horse;

(iii) Whether the miniature horse is housebroken; and

(iv) Whether the miniature horse's presence in a specific facility compromises legitimate safety requirements that are necessary for safe operation.

(3) *Other requirements.* Paragraphs 35.136(c) through (h) of this section, which apply to service animals, shall also apply to miniature horses.