No. 15-497

In The
Supreme Court of the United States

STACY FRY, BRENT FRY, E.F., a minor,
by her next friends, Stacy Fry and Brent Fry,

Petitioners,

v.

NAPOLEON COMMUNITY SCHOOLS,
PAMELA BARNES, AND JACKSON COUNTY
INTERMEDIATE SCHOOL DISTRICT,

Respondents.

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

BRIEF IN OPPOSITION

TIMOTHY J. MULLINS
Counsel of Record
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
kchapie@gmhlaw.com

Counsel for Respondents

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED FOR REVIEW

The Individuals with Disabilities Education Act ("IDEA") requires a party to exhaust the IDEA's administrative procedures before filing a civil action under a different statutory scheme, if relief is "also available under [the IDEA]." Petitioners have filed suit under the Americans with Disabilities Act and Rehabilitation Act relating to an educational accommodation they requested as part of their daughter's special education program. The issue presented is:

> Whether Petitioners were required to exhaust Individuals with Disabilities Education Act administrative procedures regarding a dispute over the accommodation requested during an IEP team meeting, where the requested accommodation is educational in nature, and can be remedied to some degree by IDEA procedures.

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RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant portions of the Individuals with Disabilities Education Act and Title 34. Education of the Code of Federal Regulations are reprinted in the appendix to this brief. Petitioners reprinted the Handicapped Children's Protection Act of 1986 in their Petition at App. 55.

STATEMENT OF THE CASE

The Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §1415(l), expressly requires families to exhaust IDEA administrative remedies before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. Petitioners brought suit under the Americans with Disabilities Act and Section 504 of the Rehabilitation Act relating to dispute over an educational accommodation they requested during a meeting to amend their daughter's Individualized Education Program.

FACTS

E.F. is a 12-year-old, former student at Napoleon Community Schools and Jackson County Intermediate School District.[1] Record Entry 1, Page ID 1, ¶2.

[1] E.F. attended Napoleon Community Schools. Napoleon Community Schools is one of twelve constituent public school

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E.F. is diagnosed with multiple medical conditions. As a result, while attending Respondents' schools, E.F. was eligible for and received special education services under the IDEA, 20 U.S.C. §1400, et seq. *Id*. at Page ID 4, ¶19. E.F. received special education services through her Individualized Education Program ("IEP").[2] *Id*. at Page ID, ¶33.

In the fall of 2009, Petitioners requested that the Respondents allow a service animal named "Wonder" to accompany E.F. at school. *Id*. at Page ID 6, ¶¶32-33. Petitioners "'requested a service dog for their daughter to enhance her independence.'" *Id*. at ¶33. Enhancing independence is a stated goal of special education under the IDEA. 20 U.S.C. §1400(d)(1)(A). A request for a disabled student "[t]o use . . . a service animal" is also a specifically identified IDEA "related service," 34 C.F.R. §300.34(7)(ii), and a form of "travel training" under the IDEA. 34 C.F.R. §300.39(b)(4)(ii).

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districts of Jackson County Intermediate School District ("The JCISD"). The JCISD provides special education support for all schools in Jackson County.

[2] Under the IDEA, the IEP is the central means by which a school district provides special education services to disabled students. 20 U.S.C. §1412(a)(4). The IEP is, in brief, a comprehensive statement of the educational needs of a handicapped child, and the specially designed instruction and related services to be employed to meet those needs. 20 U.S.C. §1401(19). IEPs are created by IEP teams, which include teachers, administrators, parents, and medical professionals. 20 U.S.C. §1414(d)(1)(B). IEP teams convene to discuss the disabled student's individual needs, and based on these discussions, develop an IEP that is individually tailored to the unique needs of the particular student.

In January 2010, the School convened an IEP team meeting to consider E.F.'s need for a service animal. *Id*. at Page ID 6, ¶32. Petitioners claim that the purpose for requesting the dog was examined during the IEP meeting, but "the request was denied because the IEP team determined that E.F.'s 'physical and academic needs are being met through the services/ programs/accommodations of the IEP.'" *Id*. at Page ID 6, ¶33. Members of the IEP team believed that the human aide the school provided as part of her IEP satisfied E.F.'s needs. Petitioners claim that the denial of this IDEA service resulted in E.F.'s home-schooling. *Id*. at Page ID 2, 6, ¶¶6, 34-35. This is, in essence, an allegation that E.F. was prevented from receiving a free appropriate public education ("FAPE"). *See* 20 U.S.C. §1401(9). Respondent Jackson Intermediate School District remained responsible for providing special education services to E.F. while she was homeschooled. *See* MCL 388.1709; Michigan Administrative Rule 340.5.

Petitioners, who were represented by legal counsel at the time, concede that they never exhausted their IDEA procedures by requesting an impartial due process hearing relating to their request. *See* 20 U.S.C. §1415(f)-(g). Petitioners instead filed a complaint with the Office of Civil Rights ("OCR").[3]

[3] Filing a complaint with OCR does not satisfy IDEA exhaustion requirements. *See* 20 U.S.C. §1415(f)-(g). It is not the state or local *educational* agency identified in the IDEA. The purpose of an OCR investigation is different than that of the

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Ultimately, OCR took more than two years to complete its investigation.

The dispute whether Wonder could accompany E.F. to school continued for nearly three years without Petitioners utilizing IDEA procedures. Had they done so, the dispute could have been resolved in less than 105 days. 20 U.S.C. §1415(g); 34 C.F.R. §300.515(b). Most, if not all, of the alleged harm could have been avoided during that timeframe.

Ultimately, Petitioners enrolled E.F. in a different school district for the 2012/2013 school year.

PROCEDURAL HISTORY

On December 17, 2012, Petitioners filed suit relating to accommodations specifically requested during E.F.'s specially convened January 2010 IEP. The lawsuit claimed that E.F. was denied the accommodation requested during the IEP meeting. Record Entry 1, Page ID 6, ¶¶32,33. Petitioners filed suit "seeking damages for the school's refusal to accommodate Wonder between Fall 2009 and Spring 2012," the entire period of time Respondent Jackson County Intermediate School District was responsible for

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impartial due process hearing procedure under the IDEA. OCR also does not provide "special education experts" to preside over disputes. 20 U.S.C. §1415(f)(3). Thus, the Court would not receive the same benefit of expert fact-finding from OCR as it would from the state agency.

providing special education services to EF. In their lawsuit, and contrary to Petitioners' current claim, Petitioners specifically requested "***any***" relief the Court determines appropriate. *Id.* at Page ID 16, ¶E.

On January 10, 2014, the District Court dismissed Petitioners' lawsuit for failing to exhaust IDEA procedures before filing suit. On June 12, 2015, the Sixth Circuit affirmed the dismissal in a split decision. The Majority Opinion found that §1415(l) 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. The Majority then held that the IDEA exhaustion requirement applies to Petitioners' claim because the core harms in their lawsuit alleged relate to the specific educational purpose of the IDEA, and therefore could be redressed by some degree by the IDEA's procedures.

On June 26, 2015, Petitioners requested *en banc* review. Petitioners claimed that the Majority Opinion was incorrect because Petitioners sought "only compensatory damages for the social and emotional harm caused by the School" that were not available under the IDEA. Petitioners' Complaint, however, clearly requested "any" relief the Court determines appropriate, which includes injunctive relief available under the IDEA. On August 5, 2015, the request for rehearing *en banc* was denied.

REASONS TO DENY THE PETITION

The IDEA expressly requires families to exhaust administrative remedies under the IDEA before filing suit under other laws, such as the ADA or Rehabilitation Act, if they could also obtain relief under the IDEA. 20 U.S.C. §1415(l).

Every circuit interpreting §1415(l) has held that families raising grievances relating to the education of disabled children are required to exhaust administrative remedies before filing suit in federal court if the IDEA can provide some remedy. This is true even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. To determine whether relief is available, these circuit courts have consistently looked to the nature of the plaintiff's factual complaints and injuries; not just the wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. These circuits have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages.

Petitioners' request for review is based on the false premise that a single decision from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011), establishes a circuit split when

exhaustion is required. There is no circuit split. Contrary to Petitioner's assertion, this single decision is no different in substance than the other circuits. *Payne* still requires families to exhaust administrative remedies under the IDEA, even if they bring suit under a different statute, such as the ADA or the Rehabilitation Act. 653 F.3d at 875. *Payne* also calls for an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued. *Id.* at 880. *Payne*, in fact, found that lawsuits arising from the denial of a free appropriate public education must be exhausted, no matter how they are pled, and no matter what relief was expressly requested. *Id.* And like every circuit to address the issue, *Payne* finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages, as Petitioners have advocated. *Id.* at 877.

Petitioners were required to exhaust IDEA administrative procedures in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training," and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Petitioners claim that the implementation of this educational program for E.F. absent the dog resulted

in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building. These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum of a "related service" to foster independent living.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, also claiming that *Payne* created a circuit split. This Court denied the Petition. Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the substance of the plaintiffs' claim to determine whether exhaustion was required, as held by the First, Second, Third, Sixth Seventh, Tenth, and Eleventh Circuits – and *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no circuit court cases have relied on *Payne* in the manner Petitioner interprets this decision.

I. The Individuals With Disabilities Education Act

Petitioners argue that exhaustion of IDEA administrative procedures is not required in this case because "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 free appropriate public education." *See* Page 17 of Petition. Petitioners appear to concede that exhaustion would have been required had E.F. raised one of the above claims. E.F. had in fact raised all three claims.[4] Petitioners' assertion that such relief was not requested is based on a misunderstanding of the IDEA, and what remedies are available under the IDEA.

A. The IDEA

The IDEA is the federal statutory scheme that governs the education of disabled students. 20 U.S.C. §1400, et seq.; 34 C.F.R. §300.1, et seq. The core purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education." 20 U.S.C. §1400(d)(1)(A). The term free appropriate public education ("FAPE") is comprised of two elements, 1) special education,

[4] Contrary to Petitioner's assertion, this lawsuit arises from their request to alter E.F.'s IEP on January 10, 2010, seeks "any" relief the court determines is appropriate, and alleges she was denied an element of a FAPE.

and 2) related services. 20 U.S.C. §1401(9). Needless to say, a disabled student has been denied a FAPE if a school fails to provide either an appropriate education, or a needed related service. Disabled students receive their special education curriculum and related services through their IEP. 20 U.S.C. §14012(a)(4).

It is important to note that FAPE (and, thus, "special education" and "related services") encompasses more than simply academics. The IDEA's goal is that disabled students receive a special education curriculum and related services that are "designed to meet their unique needs and prepare them for further education, employment, **and independent living**." 20 U.S.C. §1400(d)(1)(A) (emphasis added).

"Special education" is defined, in part, as a specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. 34 C.F.R. §300.39(a). In light of the above goal, special education is also defined as pathology services, vocational training, and "travel training." *Id.* at §300.39(a)(2). "Travel training" is "instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community)." 34 C.F.R. §300.39(b)(4)(ii). Therefore, a request for a service

animal to assist E.F. to travel within the school building, to gain independence, is by definition part of her special education curriculum.

"Related services" is defined by the IDEA as an accommodation that allows a disabled student to benefit from special education. 20 U.S.C. §1401(26); 34 C.F.R. §300.34. Related services help children with disabilities benefit from their special education by providing extra help and support in needed areas, such as speaking or moving.

The scope of "related services" is expansive. The IDEA expressly states that related services can include, but are not limited to, any of the following: speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; medical services for diagnostic or evaluation purposes; school health services and school nurse services; social work services in schools; parent counseling and training; and transportation.

Of particular importance to Petitioners' claim, the IDEA also defines "related services" as "orientation and mobility services." 20 U.S.C. §1401(26). Orientation and mobility services are used to "attain systemic orientation to and safe movement with [the student's] environments in school, home, and community." 34 C.F.R. §300.34(7)(i). The IDEA expressly

provides that teaching a disabled child to use a "service animal" is an IDEA orientation and mobility related service. *Id.* at §300.34(7)(ii)(B). "Transportation" related services is defined as assistance with "travel in and around school buildings." *Id.* at §300.34(16). Thus, Petitioners' request for a service animal to assist E.F. with travel around the school is within the scope of the definition of a FAPE. This fact warrants the denial of Petitioners' claim.

The IDEA also requires schools to provide disabled students "transition services," which is a curriculum or related service to prepare them for "post-school activities" and "independent living." 20 U.S.C. §1401(34); 34 C.F.R. §300.39, §300.43, §300.320(b) (requiring transition planning begin at the earliest age appropriate, and no later than age 14). For each student with a disability, the IEP must include a statement of the student's transition service needs that focuses on the student's particular needs. *Id.* Thus, the IEP team must determine what instruction, related services, and educational experiences will help the student prepare for the transition from school to adult life. For example, if a student's transition goal is to secure a job, a transition service need might be enrolling in a career development class to explore career options and specific jobs related to that career. As another example, the Second Circuit found that, under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme." *Cave v. East Meadow Union Free School District*, 514 F.3d 240 (2d Cir. 2008).

Therefore, under the IDEA, a request for a service animal to assist a disabled student is: part of a special education curriculum related to "travel training"; a "related service," to help a disabled student benefit from a special education curriculum while in school; a related service to promote independence at home and in the community; and a transition service to prepare a disabled student for "post-school activities" and "independent living." Thus, Petitioners' request in this case directly relates to E.F.'s access to a FAPE.

B. Remedies Available Under IDEA

Another stated purpose of the IDEA is to ensure "that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. §1400(d)(1)(B). The IDEA provides recourse to disabled students who are denied an education or related service.

To ensure that children with disabilities are being afforded all of the educational benefits of the statute, the IDEA provides parents with an opportunity to lodge formal complaints "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." *Id.* at §1415(b)(6). A complaining parent has recourse to an impartial due process hearing conducted by either the local or state educational agency, *Id.* at §1415(f), and the right to appeal any finding or decision reached in the hearing. *Id.* at §1415(g).

The IDEA administrative procedure requires that each due process proceeding is administered by an expert in special education laws and issues. 20 U.S.C. §1415(f)(3)(A). During a due process hearing, the special education expert is charged with developing a detailed factual record using the hearing officer's expertise in special education. 20 U.S.C. §1415(f)(3)(D). This is in contrast to the Office of Civil Rights investigation, which does not require the involvement of special education experts.

If it is determined that a school has failed to meet its obligations to a disabled student, the IDEA permits wide ranging remedies. This Court has found that the statutory scheme allows such relief as is "appropriate" for violations. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370 (1985). This Court also determined that the IDEA requires the exercise of "broad discretion" to order an appropriate remedy. *Id.* at 369. As a result, Courts have approved and ordered wide ranging remedies for denials of FAPE under the IDEA. Such IDEA remedies have included: (1) tuition reimbursement to attend a different school; (2) compensatory education; (3) prospective revisions of the IEP; (4) prospective placement; (5) evaluations; and (6) travel expenses to a new school. This Court has also affirmed a due process hearing officer's order requiring a school to provide compensatory services to one of its *former* students. *Id.*

II. The IDEA Requires Petitioners To Exhaust Administrative Remedies If The Relief Sought Can Be Redressed By Any Degree, Even If The Petitioners Are Only Seeking Monetary Damages.

Petitioners' claim relates to whether E.F. was required to exhaust the administrative procedures in §1415(f)-(g) before filing suit in federal court. In 1986, Congress addressed the IDEA's exhaustion requirement by amending 20 U.S.C. §1415(l). The Amendment was in response to the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* found that the IDEA was "the exclusive avenue through which" claims related to special education could be asserted.

When Congress enacted §1415(l), its intent was to confirm that the IDEA did not preempt all claims involving disabled children. Under the Amendment, aggrieved families could still maintain claims under "other Federal laws protecting the rights of children with disabilities." But contrary to Petitioner's claim, Congress did **not** propose to eliminate the IDEA exhaustion requirement when families bring suit under a different legal theory.

To the contrary, when drafting §1415(l), Congress reaffirmed the importance of the exhaustion requirement. Congress clarified that it still intended for families to exhaust IDEA administrative procedures before filing suit on behalf of a disabled child if the claim was educational in nature, no matter the legal

theory. This intent is confirmed in the House Committee notes to the Amendment, which state: "a parent is required to exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985).

Ultimately, while §1415(l) permits other federal claims, the Amendment requires families to exhaust IDEA administrative remedies before filing suit under other laws if they could also obtain relief under the IDEA:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA] . . . , [§504] . . . , or other Federal laws protecting the rights of children with disabilities, **except before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]**, the [administrative appeal] procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

Thus, if the IDEA can provide relief regarding a disabled student's claim, the student must use the IDEA's administrative procedures first, even if the student invokes a different statute.

Section 1415(l) does not absolve school districts of civil liability for injuries which could not be remedied or palliated by IDEA's related services. Instead, it codifies a recognition that the education of disabled children is a complex endeavor, calling for much individual attention, and that a misjudgment in a child's IEP – or a mistake in execution of that plan – can result in unexpected academic and psychological injuries. For that reason, in cases where both the genesis and the manifestations of the problem are educational, §1415(l) requires potential plaintiffs first to give school districts the opportunity to correct the effects of their claimed educational mistakes under the IDEA's administrative process, before recasting claims arising from acts or omissions related to educational efforts as violations of constitutional and statutory rights, with compensation sought in money damages.

A. Exhaustion Of Administrative Remedies Serves Important Policy Purposes

Over the years, circuit courts have found that the policies underlying this exhaustion requirement are both sound and important. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Crocker v. Tennessee Secondary School Athletic Ass'n*, 873 F.2d 933, 935 (6th Cir. 1989). Exhaustion meets Congress' view "that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's

education." *Crocker*, 873 F.2d at 935, citing *Smith v. Robinson*, 468 U.S. at 1012.

Exhaustion also provides an enormous benefit to the Court. *Crocker*, *supra*. The IDEA recognizes that federal courts are generalists with no expertise in special education matters. *Crocker*, 873 F.2d at 935. Therefore, courts are ill-equipped to act as fact-finders in the first instance in matters relating to special education. *Id.* In contrast, the IDEA administrative procedure provides courts with expert fact-finding by a specialist in special education laws and issues. 20 U.S.C. §1415(f)(3)(A); §1415(f)(3)(D). This expert fact-finding provides courts with an enormous benefit. *Crocker*, 873 F.2d at 935. As the First Circuit recognized in *Frazier*, "[t]his [approach] makes sense because the problems attendant to the evaluation and education of those with special needs are highly ramified and demand the best available expertise." 276 F.3d at 61.

IDEA administrative procedures also provide aggrieved students and their families with an enormous benefit, namely an expedited and cheaper manner to resolve injuries arising from educational disputes. Disputes regarding an IEP accommodation could be resolved within 105 days of the initial complaint, with a fully developed factual record. 34 C.F.R. §300.510(b). According to one study, the average duration of due process proceedings filed between 2000 and 2006 lasted only 52 days. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings?*

An Exploratory Study, 27 J. Nat'l Ass'n Admin. L. Judiciary 27, 39 (Spring 2007).

Far from penalizing disabled students, §1415(l) provides a fast, efficient way to redress such injuries as an alternative to civil litigation, which may drag on for years. So long as plaintiffs exhaust their IDEA remedies, nothing prevents them from subsequently bringing civil claims based upon violations of constitutional or statutory rights. This case perfectly embodies the benefit the IDEA administrative process provides. Had Petitioners filed a due process hearing request early on, the issue regarding the service dog could have been resolved before the start of the 2010/2011 school year. Instead, they chose to file a federal lawsuit that has now languished for six years since the accommodation request.

III. There Is No Conflict Among The Circuits.

The Sixth Circuit found that Petitioners had to exhaust these procedures before filing suit, no matter the relief artfully requested, or the legal theory pursued, because Petitioners' claims are educational in nature. Petitioners claim that the Sixth Circuit's holding is in accord with nearly every circuit to address the exhaustion issue under §1415(l). Petitioners assert, however, that the circuits conflict with an outlier opinion from the Ninth Circuit, *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011). When comparing the substance of these circuits' opinions with *Payne*, there is no conflict.

A. The Circuits Uniformly Prevent Plaintiffs From Avoiding The IDEA's Exhaustion Requirement Merely By Limiting A Prayer For Relief To Money Damages.

Indeed, the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits agree when exhaustion under §1415(l) is required. These circuits are unanimous that families raising grievances relating to the education of disabled children are required to exhaust their administrative remedies before filing suit in federal court, even if their claims are formulated under a statute other than the IDEA, such as the ADA or the Rehabilitation Act. *See, e.g.*, *J.S. ex rel. N.S. v. Attica Cent. Schs*., 386 F.3d 107, 112 (2d Cir. 2004).

These circuit courts have all held that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by artfully limiting a prayer for relief to money damages. This is true even though the IDEA does not allow for an award of general money damages. *See, e.g.*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002) (holding families "who bring an IDEA-based claim under 42 U.S.C. § 1983, in which they seek ***only*** money damages, must exhaust the administrative process available under the IDEA as a condition precedent to entering a state or federal court."); *A.W. v. Jersey City Pub. Schs*., 486 F.3d 791 (3d Cir. 2007); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) ("The plaintiff argues there is no point pursuing administrative remedies because the defendant school districts lack

authority to grant the relief requested, namely money damages. Again, if the plaintiff's argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant. This goes against the very reason that we have the exhaustion requirement, which is '[to prevent] deliberate disregard and circumvention of agency procedures established by Congress.' ").

IDEA administrative procedures must be exhausted if some form of relief is available under the IDEA. To determine whether relief is available, these circuit courts have consistently looked to the gravamen of the plaintiff's factual complaints and injuries; not just the careful wording of the relief requested. If the core harms alleged relate to the specific educational purpose of the IDEA, then relief is available under the IDEA, and the family must exhaust the administrative remedies before filing a lawsuit. Some circuits have used different language to describe the test, whether it is "theory of the grievance," "core harm alleged," or "genesis and manifestation of the injury." Regardless of the nomenclature, each circuit requires plaintiffs to pursue IDEA administrative procedures if the substance of the disabled student's claims is educational in nature, no matter the express relief sought. *See, e.g.*, *Fry v. Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015); *Cudjoe v. Indep. Sch. Dist. # 12*, 297 F.3d 1058, 1066 (10th Cir. 2002) ("[T]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed

to any degree by the IDEA's administrative procedures and remedies."); *Cave v. East Meadow Union Free School District*, 514 F.3d 240, 248 (2d Cir. 2008) (requiring exhaustion because under the IDEA, access to an "independent life tool" such as a service dog "is not entirely beyond the bounds of the IDEA's educational scheme"); *Charlie F. v. Board of Educ. of Skokie*, 98 F.3d 989, 993 (7th Cir. 1996) ("Both **the genesis and the manifestations of the problem are educational**; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.").

These circuit courts' holdings are consistent with the Legislative intent behind §1415(l), which required parents to "exhaust administrative remedies where complaints ***involve*** the identification, evaluation, education placement, or the provision of a free appropriate public education to their handicapped child." H.R.Rep. No. 99-296, 99th Cong., 1st Sess. at 7 (1985). Requiring exhaustion when complaints "involve" FAPE confirms the drafter's intention to examine the nature of the claim, not just superficially examining the specific relief requested in the pleadings.

These decisions are also consistent with the plain language of §1415(l). The relevant portion of this statute reads:

> before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [administrative appeal]

> procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

The statute does not require that "*the* relief requested" must also be available, where "the" would refer to a specific form of relief. Nor does the statute require that "*all* relief requested" must also be available under the IDEA. And as the Tenth Circuit acknowledged, "the word 'available' appears in the statute unqualified with other conditions, such as that the relief must be 'immediately' or 'currently' available." *Cudjoe*, 297 F.3d at 1067. The statute only states exhaustion is required when families are "seeking relief that is also available," without any modifiers preceding "relief" or "available." Without the modifiers such as "the" or "all," §1415(l) requires exhaustion if *some form* of relief is also available under the IDEA.

Had Congress intended to limit the exhaustion requirement in the manner Petitioners request, certainly Congress would have added additional language to the statute. The additional language would expressly restrict exhaustion only to circumstances when *all of the relief a plaintiff expressly requests* is also available under the IDEA. Absent such express language, the only reasonable interpretation of §1415(l) is to require families to utilize IDEA administrative procedures if some form of remedy can also be provided by the IDEA, regardless of the type of relief specifically sought. And the only way to

determine whether "some form of relief" is available under the IDEA is by examining the nature of the claim; the "core harms alleged," the "theory of the grievance," the "genesis and manifestation" of the claim.

B. The Ninth Circuit's Decision In *Payne v. Peninsula School District* Also Prohibits Plaintiffs From Avoiding Exhaustion Through Artful Pleading.

The Ninth Circuit's decision in *Payne v. Peninsula School Dist.*, 653 F.3d 863 (9th Cir. 2011) is no different in substance than the other circuits. *Payne* involved claims of mental and physical abuse of a disabled student caused by being physically restrained in a small closet.[5] This case, by contrast, relates to Petitioners' request made during an IEP conference for their daughter to have a type of

[5] *Payne* would have been decided in the same manner in circuits interpreting the "core harms alleged" language. *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002); *F.H. ex rel. Hall v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014) (no exhaustion required for claim related to "non-educational injury" resulting from alleged abuse and neglect of disabled student while enrolled in district's schools); *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013) (exhaustion not required for physical abuse of disabled student because injury was not educational in nature). Contrary to Petitioners' argument, the "core harms" standard does not require disabled students to exhaust administrative remedies based solely on the coincidental facts that the student is disabled and injured in a school.

"related service" specifically identified in the IDEA to help E.F. develop independence. Record Entry 1, Page ID 6, ¶33; 20 U.S.C. §1400(d)(1)(A); 34 C.F.R. §300.34(7).

Consistent with the other circuits, the Ninth Circuit in *Payne* held that when a plaintiff seeks an IDEA remedy, administrative remedies must be exhausted. This is true even if the plaintiff's lawsuit is pled only as a Constitutional claim. *Payne* held:

> where a plaintiff is seeking to enforce rights that arise as a result of a denial of 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 of the cause of action. . . . Such claims arise under either the IDEA . . . or its substantive standards (if a [Rehabilitation Act] 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. *Payne* found that 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*, 653 F.3d at 876.

Relying on the language, "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,"

Petitioners argue that *Payne*'s approach focuses solely on the express relief requested in the complaint, while ignoring the nature of the injury alleged. Petitioners' interpretation of *Payne* is too narrow.

The *Payne* Court stated, "when determining whether the IDEA requires a plaintiff to exhaust, courts ***should start*** by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it ***is likely*** that § 1415(l) does not require exhaustion in that case." *Id.* at 876 (emphasis added). *Payne* does not end the inquiry with a mere review of the relief requested, as Petitioners have repeatedly suggested. In fact, *Payne* expressly rejected such an interpretation of its holding. *Id.* at 877.

As every circuit to address the issue, *Payne* requires an examination of the nature of the claims to determine whether IDEA administrative procedures must be pursued:

> where the claim arises only as a result of a denial of a FAPE, whether under the IDEA or the Rehabilitation Act, exhaustion is clearly required no matter how the claim is pled.

Id. at 880. As an example, *Payne* stated that "a disabled student's claim arising from a school district's implementation of an educational program that resulted in a claimed failure to adequately instruct in reading" must be exhausted using IDEA procedures, even if the disabled student is requesting monetary

damages in his lawsuit that are not available under the IDEA. *Id.* at 879-880. Under such a scenario, "the plaintiff *actually* sought relief available under the IDEA" by factually alleging the student was denied access to reading instruction, regardless of the relief expressly requested. *Id.* at 875. Based on *Payne*'s willingness to also examine the nature of the claims alleged to determine the need for exhaustion, there is no distinction between the circuits.

And consistent with every circuit, *Payne* also finds that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages as Petitioners have advocated:

> plaintiffs cannot avoid exhaustion through artful pleading. If the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling – relief available under the IDEA – then the IDEA requires exhaustion. . . . In other words, to the extent that a request for money damages functions as a substitute for relief under the IDEA, a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.

Id. at 877. Based on this language, it does not matter under *Payne* what relief the plaintiff actually requested in their complaint. Consistent with every other circuit, claims that are educational in nature must first be exhausted using IDEA administrative procedures. *Id.* at 879-880. Underscoring the fact that

Payne stands in concert with the circuits in this regard, the Sixth Circuit in *Fry* cited to *Payne* in support of its majority holding. *Fry*, 788 F.3d at 631 ("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.").

C. This Case Would Not Be Decided Differently Under Petitioners' Reading Of *Payne v. Peninsula School District*.

Payne still requires Petitioners to exhaust in this case because their "claim arises only as a result of a denial of a FAPE." *Payne*, 653 F.3d at 877. The dispute here relates to Petitioners' request to amend E.F.'s IEP, allowing her access to a special education "travel training" curriculum, and a "related service" expressly identified in the IDEA. 34 C.F.R. §300.39(a), (b)(4)(ii), §300.34(7)(ii)(B). Petitioners also claim this "travel training" and "related service" was requested to help E.F. develop independent living skills, a stated goal of the IDEA. 20 U.S.C. §1400(d)(1)(A). Here, a special IEP meeting was convened for the purpose of determining whether E.F.'s IEP should be amended to include the service animal. Respondents determined during the IEP meeting that those educational needs were already adequately served by her current "'services/programs/accommodations of E.F.'s IEP.'" Record Entry 1, Page ID 6, ¶33. Petitioners claim that the implementation

of this educational program for E.F. absent the dog resulted in impeding E.F.'s educational goal of developing independence, and ultimately denied her an education in that school building.

An allegation that a disabled student was denied a related service specifically identified in the IDEA is by definition a claim that the student was denied a FAPE. Petitioners' lawsuit is nearly identical to *Payne*'s example of an injury resulting from the failure to provide a reading accommodation. *Payne* found that such a case must be exhausted, even if the plaintiffs sought money damages not available under the IDEA. *Payne*, 653 F.3d at 879-880.

These are the exact situations the IDEA administrative procedures are designed to address: disputes over requests for related services or for a specific curriculum made during an IEP conference, and determinations whether a disabled student should have access to a specific special education curriculum or "related service" to foster independent living. Had Petitioners requested a due process hearing, the dispute over this accommodation would have likely been resolved before the start of the next school year. If it was resolved in Petitioner's favor, most if not all of the harm alleged would have been avoided. If Respondents had prevailed, Petitioners still could have sought its legal remedies in federal court.

In an effort to avoid exhaustion, Petitioners claim they were "principally" seeking money in their lawsuit, and were not concerned with correcting the

potential educational injury to E.F. p. 18. Relying on an incorrect interpretation of *Payne*, Petitioners claim they were not required to exhaust IDEA administrative procedures because some of the forms of relief they requested are not available under the IDEA. Under *Payne*, that argument does not avoid exhaustion. *Id.* at 877 ("a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages.").

Petitioners, in fact, actually sought forms of relief in their Complaint that were available under the IDEA. Petitioners expressly requested "***any***" relief the Court determines appropriate. Record Entry 1 Page ID 16, ¶E. This request compels Petitioners to exhaust under *Payne*, as the Ninth Circuit also stated that exhaustion applies in cases "where the relief sought by the plaintiff in the pleadings is available under the IDEA." 653 F.3d at 871. Petitioners' request necessarily encompasses all available relief under the IDEA. The IDEA would allow a number of potential remedies, including "prospective injunctive relief" should E.F. return to Respondents' schools, ordering Respondents to accept the dog; an order requiring the Schools to pay for compensatory/education services; reimbursement of past expenses, attorney fees and costs; all IDEA remedies. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-370, 105 (1985).

D. Relief Is Still Available Under IDEA Although Petitioners Voluntarily Left The School District To Avoid Exhaustion.

Petitioners also claim that relief is not available under the IDEA because E.F. chose to leave Napoleon Community Schools. The Supreme Court, however, has established that IDEA relief is still available to E.F., even though she now attends a different school. *See Sch. Comm. of Town of Burlington*, 471 U.S. at 369-370.

In *Burlington*, the respondent father of a handicapped child rejected the petitioner school's proposed IEP calling for placement of the child in a certain public school. 471 U.S. at 362. The father disagreed with the IEP and, at his own expense, enrolled the child in a private school. Meanwhile, the father sought review by Massachusetts Department of Education's Bureau of Special Education Appeals (BSEA). 471 U.S. at 362-363. After conducting multiple impartial due process hearings, BSEA ordered the school to pay the child's tuition and transportation to his new school. The *Burlington* Court determined whether these "belated" reimbursement costs were available remedies under the IDEA.

This Court affirmed the BSEA's order, and held that the respondent father was entitled to reimbursement of expenses, such as private school tuition and transportation costs, as a remedy under the IDEA. This IDEA remedy was available even though

his son no longer attended the respondent's school. The *Burlington* Court recognized that the EHCA – now IDEA – allows "such relief as [it] determines is appropriate," which requires the exercise of "broad discretion" to order an appropriate remedy. 471 U.S. at 369. With that guidepost, and germane to Petitioners' argument here, the Court held that appropriate remedies under the IDEA include the "belated" reimbursement of expenses after the student has already left the school district. *Id.* at 370-371. This Court reasoned that "[s]uch a *post hoc* determination of financial responsibility was contemplated in the legislative history" of the IDEA. *Id.* at 371.

Indeed, students may receive a wide range of remedies under the IDEA from a school the student formerly attended. This Court has found that common remedies that can be "belatedly" ordered include awards of compensatory education and services, reimbursement of costs, and attorney fees. *Burlington*, 471 U.S. at 369-370; *see also Long v. Dawson Springs Ind. Sch. Distr.*, 197 Fed. Appx. 427 (6th Cir. 2006) (holding that "[i]t is clear that the IDEA authorizes the award of funds to parents to reimburse them for expenses on special education that a school board should have, but did not, provide."). Directly related to Petitioners' claim, as a remedy available under the IDEA, Respondents could also be required to pay for E.F. to attend a different school district. *Id.* Such a remedy has included payment of tuition and travel costs. *Id.*

If Petitioners paid costs and attorney's fees for the two-and-a-half years from the time the accommodation was requested and E.F. moved schools, Petitioners could still recover those costs and fees. Since Respondent Jackson Intermediate School District remains E.F.'s home school district, conceivably Petitioners could seek the travel costs to attend a different school under the IDEA. In sum, Petitioners may still seek multiple "appropriate" remedies under the IDEA even though E.F. attends a different school.

Moreover, circuits addressing Petitioner's argument have unanimously held that a plaintiff cannot evade the exhaustion requirement by singlehandedly rendering the dispute moot for purposes of IDEA relief. *Fry*, 788 F.3d at 630; *see also Frazier*, 276 F.3d at 63; *Polera v. Board of Ed. of Newburgh*, 288 F.3d 478, 490 (2d Cir. 2002) ("Plaintiffs should not be permitted to 'sit on' live claims and spurn the administrative process that could provide the educational services they seek, then later sue for damages. Were we to condone such conduct, we would frustrate the IDEA's carefully crafted process for the prompt resolution of grievances through interaction between parents of [children with disabilities] and the agencies responsible for educating those children."); *Cudjoe*, 297 F.3d at 1067 ("[W]e reject the argument that exhaustion will be excused because relief is no longer 'available' at the time the plaintiff seeks to file a civil suit if relief was available at the time the alleged injuries occurred. To hold otherwise would transform the IDEA's exhaustion requirement into a

'hollow gesture.'"); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d at 1379 ("[P]laintiff argues that exhaustion of administrative remedies is not required in this case because she no longer attends any of the defendant school districts. . . . If parents can bypass the exhaustion requirement of the IDEA by merely moving their child out of the defendant school district, the whole administrative scheme established by the IDEA would be rendered nugatory. Permitting parents to avoid the requirements of the IDEA through such a 'back door' would not be consistent with the legislative intent of the IDEA."). Similarly, Petitioners' decision to leave Respondents' schools does not make IDEA remedies unavailable. IDEA relief was available to Petitioners for the entire two and a half years that E.F. attended Respondents' schools while the dispute persisted. Petitioners simply chose not to pursue such relief.

IV. This Case Does Not Warrant Review.

The alleged "conflict" among circuits does not warrant review by this Court. The defendant school district in *Payne* sought certiorari in 2011, claiming that the Ninth Circuit's decision marked a departure from every circuit that decided the issue, thereby by creating a circuit split. This Court presumably was not convinced that *Payne* created a circuit split, or that a significant enough legal issue was presented, and the Petition was denied.

Since that 2011 Petition was denied, only a few circuits have been confronted with the issue of exhaustion under the IDEA. Every circuit since *Payne* has examined the gravamen of the plaintiffs' claim to determine whether exhaustion was required, as required by the First, Second, Third, Sixth, Seventh, Tenth, and Eleventh Circuits – and the Ninth Circuit's decision in *Payne*. No circuit since *Payne* has relied exclusively on the relief requested in the pleadings to determine whether exhaustion was required. Nor has any circuit allowed a plaintiff to artfully plead money damages only to avoid the IDEA's exhaustion requirement. In sum, no Circuit Court cases have relied on *Payne* in the manner Petitioner interprets this decision. This confirms that Petitioner's interpretation of *Payne* makes it an outlier, and not a legal trend dividing the circuits.

Any alleged conflict *Payne* causes is likely to be resolved by the Ninth Circuit. In 2014, the Ninth Circuit acknowledged that fundamentally important portions of the *Payne* decision were improperly decided, overruling the case in substantial part. *See Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 403 (2014). Part of the *Payne* opinion included a ruling by the Ninth Circuit that IDEA exhaustion under §1415(l) was not jurisdictional. Like the so-called "relief centered" approach, the *Payne* decision appeared to be the only Circuit Court decision to hold that IDEA exhaustion was not jurisdictional. *Muskrat v. Deer Creek Public Schools*, 715 F.3d 775, 784 (10th Cir. 2013). In 2014, the Ninth

Circuit found that it had wrongly decided *Payne*, and overruled that portion of the decision. *See Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014). It is only a matter of time before the Ninth Circuit corrects this interpretation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

TIMOTHY J. MULLINS
Counsel of Record
KENNETH B. CHAPIE
GIARMARCO, MULLINS & HORTON, P.C.
101 W. Big Beaver Road, 10th Floor
Troy, MI 48084-5280
(248) 457-7020
tmullins@gmhlaw.com
kchapie@gmhlaw.com

Counsel for Respondents