SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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MIGUEL LUNA PEREZ,   )

        Petitioner,   )

           v.   ) No. 21-887

STURGIS PUBLIC SCHOOLS, ET AL.,   )

        Respondents.   )

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Pages: 1 through 99

Place: Washington, D.C.

Date: January 18, 2023

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10   Washington, D.C.

11   Wednesday, January 18, 2023

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13   The above-entitled matter came on for

14   oral argument before the Supreme Court of the

15   United States at 10:02 a.m.

16

17   APPEARANCES:

18   ROMAN MARTINEZ, ESQUIRE, Washington, D.C.; on behalf

19   of the Petitioner.

20   ANTHONY A. YANG, Assistant to the Solicitor General,

21   Department of Justice, Washington, D.C.; for the

22   United States, as amicus curiae, supporting the

23   Petitioner.

24   SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf

25   of the Respondents.

1   C O N T E N T S

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1   P R O C E E D I N G S

2   (10:02 a.m.)

3   CHIEF JUSTICE ROBERTS: We'll hear

4   argument this morning in Case 21-887, Perez

5   versus Sturgis Public Schools.

6   Mr. Martinez.

7   ORAL ARGUMENT OF ROMAN MARTINEZ

8   ON BEHALF OF THE PETITIONER

9   MR. MARTINEZ: Mr. Chief Justice, and

10   may it please the Court:

11   For 12 years, Sturgis neglected

12   Miguel, denied him an education, and lied to

13   his parents about the progress he was allegedly

14   making in school. This shameful conduct

15   permanently stunted Miguel's ability to

16   communicate with the outside world. It also

17   violated two federal statutes, the IDEA and the

18   ADA, giving different remedies to victims of

19   discrimination.

20   Miguel responded by doing everything

21   the IDEA wants him to do. He filed an IDEA

22   agency claim. He followed the IDEA settlement

23   procedures. And he accepted a favorable

24   settlement giving him full IDEA relief,

25   including an immediate FAPE.

1   Sturgis wants you to hold that this

2   settlement extinguishes Miguel's separate and

3   distinct rights to money damages under the ADA.

4   You should reject that.

5   I want to emphasize three points.

6   First, the text only requires exhaustion if a

7   non-IDEA claim seeks relief that's actually

8   available under the IDEA. Exhaustion isn't

9   required in cases like this one seeking only

10   money damages, a remedy the IDEA does not

11   authorize.

12   Second, Miguel's settlement fully

13   exhausted the IDEA procedures. Further

14   exhaustion is unnecessary and it's futile

15   because it would be pointless. Miguel has

16   already received everything he's entitled to

17   under the IDEA statute.

18   And, third, the net effect of

19   Sturgis's arguments here is to defy the IDEA's

20   clear purpose. That purpose is twofold: one,

21   getting kids a FAPE as quickly as possible,

22   and, two, preserving their legal rights under

23   other statutes and the Constitution.

24   Sturgis puts these goals on a

25   collision course with each other. In any given

1   case, its rule will either disincentivize

2   settlements and block immediate FAPE relief, or

3   it will nullify rights under other statutes.

4   That makes no sense.

5   Congress didn't punish kids for saying

6   yes to favorable IDEA settlements. One way or

7   the other, this case should proceed.

8   I welcome the Court's questions.

9   JUSTICE THOMAS: If the -- this -- if

10   this statute were written in a way that you had

11   a progression of remedies from administrative,

12   from informal to formal, and it was about the

13   very same thing, that is, the education of

14   Petitioner, then why -- then wouldn't this be

15   exhausted at some level?

16   MR. MARTINEZ: Your Honor, we have --

17   just to step back and sort of clarify, we have

18   a number of different arguments. Our second --

19   JUSTICE THOMAS: Well, I guess the

20   difference -- the difficulty I'm having is I

21   can't see where ADA fits in with IDEA.

22   MR. MARTINEZ: Right.

23   JUSTICE THOMAS: That seems to be an

24   entirely different remedy, and whether we --

25   when we have PLRA cases, et cetera, it's

1   usually about the same thing.

2   MR. MARTINEZ: A hundred percent, Your

3   Honor. I think that's exactly the right way to

4   think about the statute. And I think what

5   Congress was trying to do here was essentially

6   say we want you to have rights under both

7   statutes, we want you to be able to go into

8   court if necessary and vindicate your separate

9   rights to separate types of relief under both

10   statutes. But, in circumstances -- in certain

11   circumstances, we want you to go through the

12   IDEA administrative procedures first.

13   And the text of the statute says that

14   if your ADA claim is only seeking things that

15   you can't get under the IDEA, in the words of

16   Fry, if the consequence of your ADA claim, if

17   you brought it in the IDEA procedure, would be

18   that the IDEA hearing officer would have to

19   send you away empty-handed because that statute

20   just does not provide you that type of relief,

21   that type of relief is not available, then you

22   do not have to exhaust.

23   JUSTICE THOMAS: I guess that's why

24   I'm having trouble considering it exhaustion.

25   MR. MARTINEZ: Right.

1   JUSTICE THOMAS: Because it seems to

2   be -- normally, you would think of exhaustion

3   as being similar. The relief would be similar

4   to the exhausted claims.

5   MR. MARTINEZ: Exactly.

6   JUSTICE THOMAS: This seems to be an

7   entirely different statute. So I don't

8   understand even the use of the term

9   "exhaustion" here.

10   MR. MARTINEZ: I -- I think it's --

11   it's a -- it's a unique sort of a one-of-a-kind

12   statute, and I think that in this kind of

13   circumstance where you have a unique statute,

14   two things.

15   One, it's especially important to

16   focus on the exact text of the statute, and the

17   text of the statute, the overwhelmingly most

18   reasonable reading of the statute, the only

19   reasonable reading of the statute in our view,

20   is that if you are seeking money damages -- and

21   everyone agrees money damages are not available

22   under the IDEA -- then you just do not have to

23   exhaust. The exhaustion requirement doesn't

24   apply.

25   Even if you disagreed with us on that,

1   though, I think that in a -- in a -- in a

2   situation like this, where the exhaustion

3   requirement is saying you need to exhaust the

4   IDEA administrative procedures on your IDEA

5   claim, in a circumstance where those procedures

6   specifically say you need to engage in a

7   settlement process, presumably, in good faith,

8   and if the school comes to you in the

9   settlement process and says you're right, we

10   were wrong, we're going to give you everything

11   you're asking for, we're going to give you

12   everything you're entitled to under the IDEA,

13   of course, the statute wants you to say yes.

14   And that's exactly what happened here.

15   Miguel got an offer of full relief and he

16   accepted it. That's -- that is a success story

17   under the IDEA. It's not a success story in

18   total --

19   CHIEF JUSTICE ROBERTS: Well --

20   MR. MARTINEZ: -- in -- in -- in -- it

21   doesn't make Miguel completely whole because he

22   suffered other damages as well. But, under the

23   IDEA, he got everything he was entitled to --

24   CHIEF JUSTICE ROBERTS: Well, the --

25   the -- the two --

1   MR. MARTINEZ: -- and he sat -- he

2   exhausted.

3   CHIEF JUSTICE ROBERTS: -- the -- the

4   two are not entirely unrelated. I mean, in

5   each -- in both cases, your -- your claims are

6   going to be based on the denial of an FAPE or a

7   FAPE. And it's certainly reasonable to assume

8   that the settlement process under the IDEA

9   could well be significant in resolving the

10   other claims.

11   It seems to me that what's unusual in

12   this case is that the school board said, well,

13   don't worry about those, we're going to settle

14   this. I mean, if this were any other type of

15   litigation, the lawyers would want to say,

16   we've got a lot on the table and let's figure

17   out how to resolve it.

18   And it's not clear to me why you would

19   necessarily or artificially separate those two.

20   And, of course, your -- your friend on the

21   other side has a construction answer to your

22   notion of how the exhaustion works, that

23   relief, the relief you're seeking, is based on

24   a FAPE. That's what's going to be pertinent in

25   all those cases. Why isn't that --

1   MR. MARTINEZ: So -- so two points to

2   that, Your Honor. First of all, I think it's

3   certainly true that if you bring the IDEA

4   claim, you could have a settlement discussion

5   that encompasses not just the IDEA claims but

6   also other claims that you might have that

7   haven't yet been asserted in that process.

8   And I think the normal thing that we

9   would expect is that when bargain -- when

10   parties are bargaining and if this -- if the

11   child is going to give up those other claims,

12   they're going to get something in return.

13   In this case, that settlement

14   discussion happened, and, you know, the --

15   the -- there was a settlement discussion, and

16   Miguel would have turned down a request to give

17   up ADA rights without any compensation for

18   those ADA rights.

19   And the effect of Sturgis's rule is

20   that if he accepts the settlement on the IDEA

21   claim, it, like, automatically gets rid of --

22   it essentially gives the school a full release,

23   a get-out-of-jail-free card on the ADA

24   liability, and that's just not right.

25   And I think the second thing I was

1 going to say, Your Honor, is that this isn't

2 artificial, an artificial limit. This is a

3 limit that comes out of the text of the

4 statute. And Congress was very clear, it chose

5 words very precisely, and it said that you --

6 it made clear you don't have to exhaust if the

7 relief you're seeking in the non-IDEA claim is

8 not available under the IDEA.

9 And I think, in -- in these

10 circumstances, it makes sense to -- to read

11 that language the way you would apply -- you

12 would look at the same words elsewhere in the

13 IDEA, the -- the same word "relief" appears

14 elsewhere, and it means what we say it means.

15 That's the way the -- the word

16 "relief" is used in other legal contexts.

17 That's consistent and I think reinforced by the

18 reasoning of Fry, which says that if you have

19 to go to the hearing officer and the hearing

20 officer would necessarily turn you away

21 empty-handed, we don't want exhaustion in that

22 circumstance.

23 This Court's decision in Carr versus

24 Saul announces the very common-sense principle,

25 this is two terms ago, saying that it makes

1   little sense to require litigants to present

2   claims to adjudicators who are powerless to

3   grant the relief requested.

4   JUSTICE JACKSON: Mr. Martinez --

5   JUSTICE KAGAN: One of the --

6   JUSTICE ALITO: Mr. --

7   JUSTICE KAGAN: -- arguments that the

8   Respondents make, Mr. Martinez, is that on your

9   reading of the statute, all that a plaintiff

10   has to do is put the words "compensatory

11   damages" into a complaint and then the person

12   can head off to federal court, ignoring the

13   exhaustion procedures which Congress did think

14   were important in resolving what to do about

15   the denial of a FAPE.

16   So what is your response to that?

17   MR. MARTINEZ: I -- I -- I don't think

18   that's going to happen. And the -- the -- the

19   procedures -- if, by -- by tacking compensatory

20   damages on to the complaint, what you're

21   suggesting is that you could sort of circumvent

22   the IDEA process by going and getting all the

23   IDEA remedies along with ADA remedies for

24   compensatory damages in court, absolutely not.

25   If you go to court and you have a

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 1      claim that asks for relief that is available

 2      under the IDEA and you have not exhausted that

 3      request for that relief, the Court cannot move

 4      forward as to that request for relief.

 5                  JUSTICE KAGAN:  So the court --

 6                  JUSTICE ALITO:  What do you --

 7                  JUSTICE KAGAN:  -- would be required

 8      to -- to split it up and send you back on any

 9      other claims?

10                  MR. MARTINEZ:  Right.  It could

11      dismiss the portions of the complaint that are

12      not properly exhausted, or it could give the --

13      the plaintiff a choice to get rid of the whole

14      case and so the -- the plaintiff could come

15      back later in the whole case, but either way --

16                  JUSTICE KAGAN:  And is there something

17      a little odd, even supposing that's true, about

18      two parallel proceedings going on in that way,

19      one for damages and the other for, you know,

20      the relief that an IDEA officer can give?

21                  MR. MARTINEZ:  I -- I don't think

22      there's anything odd.  I think sometimes this

23      sort of situation comes up in the law, and I

24      think there's a very ready response to that,

25      which is that if -- if a court thinks that
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1   there's an agency considering a similar factual

2   scenario dealing with similar issues, what the

3   court can just do is -- is issue a stay.

4   We think that would be perfectly

5   appropriate if this Court wants to say that

6   in -- in the cases -- and we think there will

7   be rare cases where parallel proceedings are

8   pending, and in those cases --

9   JUSTICE KAGAN: Why -- why rare?

10   MR. MARTINEZ: I think it'll be rare

11   because most parents are going to do what

12   Miguel did here, which is not bring the

13   parallel proceeding. Rather, in -- in -- in

14   the real world, the way these cases tend to be

15   litigated, parents do not typically have a lot

16   of resources. Their lawyers are busy. They

17   are busy. And, usually, they're not going to

18   try to be litigating simultaneously similar

19   sets of facts in two different forum. They're

20   going to do one and then the other.

21   As the Chief pointed out, it's

22   possible that you could reach some sort of

23   global settlement that comes out of the IDEA

24   discussion that actually is going to resolve

25   and give you effective relief on your ADA claim

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1       as well.  I think --
2                JUSTICE JACKSON:  And even -- even if
3       it is odd, though, Mr. Martinez, isn't that
4       exactly what the statute seems to contemplate?
5                I mean, I guess I'm wondering whether
6       or not we're even in a position to question the
7       notion of dual proceedings, given that at least
8       as I read the statute, Congress is
9       contemplating that you'll have a situation in
10      which there's a civil action that's seeking
11      relief that is not available under the IDEA.
12               So I -- I take this to mean that
13      Congress thought that dual actions at least in
14      some circumstances were possible and that was
15      fine.
16               MR. MARTINEZ:  I think that's exactly
17      right under the statute.  And I think that the
18      nice thing about the statute is that it doesn't
19      take away the -- the inherent discretion of
20      district courts to manage their dockets in this
21      way.
22               And if you thought or five of you
23      thought that it was important to give some
24      guidance to lower courts and sort of remind
25      them that if they wanted to -- to stay parallel
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1   proceedings, if you were concerned about that,

2   you could do that.

3   On the other hand, Justice Jackson, I

4   think you are right that the statute does not

5   seem to say that it has to be a stay.

6   JUSTICE JACKSON: I mean, in -- in --

7   in my view -- and maybe you can just react to

8   that -- isn't -- isn't what really is going on

9   here that Congress was concerned about people

10   doing an end run around the IDEA in a certain

11   way?

12   That is, you have, you know, a set of

13   facts concerning the denial of a FAPE that

14   could give rise to claims under, let's say,

15   both of these statutes, the IDEA and the ADA,

16   and, you know, the -- the plaintiff is the

17   master of their complaint and can decide which

18   statute to bring it under.

19   And so, in a situation in which the

20   relief that is being asked for is only the kind

21   of relief that is available under the IDEA,

22   maybe Congress didn't want the person to call

23   that an ADA statute and thereby get around the

24   exhaustion.

25   But, if you're asking for something

1   else, if your claim is something else, then

2   Congress didn't have a problem with both of

3   those proceeding in tandem.

4   MR. MARTINEZ: I -- I think that's --

5   that's absolutely a fair way of looking at the

6   statute, and there's certainly no circumvention

7   concern when the only thing you need is

8   something that you can't get under the IDEA.

9   Again, if the hearing officer --

10   JUSTICE ALITO: Well, what do you --

11   Mr. Martinez, what do you make of the fact that

12   1415(f) uses the term "remedies" and then also

13   uses the term "relief"?

14   MR. MARTINEZ: Are you talking about

15   the -- the 1415(l), the exhaustion provision,

16   or -- or --

17   JUSTICE ALITO: I -- I'm sorry, yes,

18   that's what I'm talking about.

19   MR. MARTINEZ: I -- I think that -- I

20   don't make much of that, Your Honor, because I

21   think that whatever "remedies" might mean,

22   "relief" really only has one reasonable meaning

23   here, and it means the specific remedies that

24   you can get at the end of the case.

25   JUSTICE ALITO: Well, why would

1   they -- compensatory damages is a remedy. Why

2   wouldn't they use the term "remedies" there?

3   MR. MARTINEZ: I think they -- I think

4   they could have used the term "remedies" there,

5   but I don't think that they had to. And I

6   don't --

7   JUSTICE ALITO: It's just elegant

8   variation?

9   MR. MARTINEZ: Yeah. And there are

10   other places in the U.S. Code where you have

11   these terms, "remedies" and "relief," used in

12   close proximity without any reason to think

13   that they mean something different.

14   You know, two examples I'd point you

15   to, Your Honor, these aren't in the briefs, but

16   18 U.S.C. 3626(d), 28 U.S.C. 3306. Like, these

17   statutes sometimes just use these terms

18   interchangeably.

19   The other side says that "remedies"

20   actually has a different meaning as well, a

21   means of enforcement meaning, which I think got

22   a little bit of discussion yesterday, but even

23   if that were true, that wouldn't affect the

24   statutory term at issue here we do believe.

25   JUSTICE ALITO: How have the courts of

 1   appeals interpreted this provision?

 2   MR. MARTINEZ: The courts of appeals

 3   have generally not agreed with our first

 4   argument, which is that the text of the statute

 5   has to come out our way, although I would note

 6   that two of the courts of appeals have done

 7   that, although they've acknowledged that our

 8   side has the better textual argument.

 9   I think the First Circuit and the

10   Fifth Circuit have said that. Judge Bumatay's

11   dissenting opinion in the Ninth Circuit I think

12   makes the same point pretty -- pretty well.

13   They have -- the courts of appeals

14   have generally agreed with us on our futility

15   argument, which is that the settlement

16   constitutes futility. And I think that one

17   thing that's important here is we have a bunch

18   of different arguments and they're -- they're

19   kind of confusing. I actually -- it's

20   confusing to kind of distinguish them.

21   I think that one thing that's really

22   important here is to look at the net effect of

23   Sturgis's responses. And maybe you -- you

24   could think, okay, they have a fair point on

25   this argument or a fair point on that argument,

1   but if you step back from all of it, the

2   bottom-line position that -- the bottom-line

3   place that Sturgis arrives at is that a parent

4   who does everything right, Miguel's parents and

5   Miguel, they did everything right, they

6   accepted the settlement, they lose their ADA

7   claims. That just can't be right.

8   I mean, imagine -- put yourself in a

9   parent's position. They have wonderful claims

10   under both the IDEA and the ADA. Say their

11   child has been denied a FAPE, sent to a room

12   for disabled children and there has suffered

13   medical injuries. They've got claims under

14   both statutes.

15   And then the school comes to them and

16   says: Okay, we know you're desperate to get a

17   new IEP, desperate to remedy your immediate

18   on-the-ground denial of FAPE, we're going to

19   give you that. What do you want the parent to

20   do? What does Sturgis want the parent to do?

21   Apparently, Sturgis has -- there are

22   two answers. Number one, you can accept the

23   settlement, but the price of accepting the

24   settlement, even though the settlement doesn't

25   give up ADA rights, is to extinguish your ADA

21

 1   rights.

 2   JUSTICE ALITO: Well, when you have a

 3   --

 4   MR. MARTINEZ: That can't possibly --

 5   JUSTICE ALITO: -- situation like

 6   this, the -- the result, the nature of the

 7   settlement could reflect a strategic choice on

 8   the part of both parties. It could also

 9   reflect bad lawyering on the part of one or

10   both parties.

11   MR. MARTINEZ: Right. And --

12   JUSTICE ALITO: If it's the latter,

13   what -- why does this case make that much

14   difference?

15   MR. MARTINEZ: Well, I -- I think that

16   --

17   JUSTICE ALITO: I mean, the -- the

18   parents' attorneys, maybe they're -- they may

19   not be that sophisticated, but they could have

20   -- both parties could have discussed whether

21   they wanted to wrap up the whole thing in the

22   settlement. They could have done that.

23   Or they could say, well, we're not

24   going to do that and we'll take our chances

25   later in litigation.

1   MR. MARTINEZ: Well, I think -- I

2   think your point about how the settlement

3   negotiations would play out is extremely

4   important, and I think it favors us because

5   what -- our rule would allow the parties to

6   come together. If they can reach a global

7   settlement of everything, terrific.

8   But, if they can only reach a partial

9   settlement, if they can only reach a settlement

10   that addresses the IDEA claims, our rule would

11   say, yes, of course, in that case, the student

12   and the parents should accept that settlement,

13   get the on-the-ground FAPE relief immediately,

14   and then the parties can agree to go on and

15   fight about the ADA claims for relief later.

16   JUSTICE ALITO: Well, and the

17   settlement could have specifically preserved

18   the other claims too.

19   MR. MARTINEZ: Well, I -- I think,

20   under their rule, it could not because, under

21   their rule, if you accept a settlement, you

22   automatically extinguish your ADA claims.

23   So our rule allows the parties a sort

24   of freedom of contract. Their rule says, if

25   you -- if you're not willing to give up the ADA

1   claims, you get -- you can't get anything by

2   settlement because the -- the effect of the

3   settlement is to give up everything. That rule

4   doesn't make sense.

5   CHIEF JUSTICE ROBERTS: Thank you.

6   Justice Thomas?

7   JUSTICE THOMAS: Just back to my

8   original question. Can you think of another

9   area in which the -- the -- the claim that is

10   exhausted doesn't naturally fit the claim that

11   you're trying to pursue?

12   MR. MARTINEZ: I think this is a

13   one-of-a-kind statute, Your Honor, and I'm not

14   aware of any -- any statute like that.

15   JUSTICE THOMAS: And much of the

16   difficulty seems to flow from the fact that it

17   doesn't flow -- it doesn't -- it isn't a

18   natural progression of rights. Normally, you

19   have informal, administrative, and then

20   judicial, all about the very same thing,

21   pursuing a similar remedy at different stages.

22   This is a different remedy under a

23   different statute, so I'm just wondering if

24   there's anything close to it. Is there an

25   analogue?

1   MR. MARTINEZ: I -- I don't know that

2   there's an -- I don't know of any analogue. I

3   will say one thing because I think your comment

4   really emphasizes -- it underscores one thing

5   that's important about how this Court has

6   always talked about and interpreted exhaustion

7   requirements.

8   It's not like exhaustion is like some

9   sort of one-size-fits-all rule that you apply

10   mechanically in every case. What the Court has

11   said is that exhaustion means, you know, going

12   through the administrative procedures to an

13   appropriate conclusion and that that needs to

14   be looked at given the particulars of the

15   statutory and administrative scheme at issue.

16   And in this case, where you have a

17   one-of-a-kind administrative scheme that sort

18   of bizarrely requires you to exhaust procedures

19   for one claim before bringing a different

20   claim, it makes perfect sense to treat a

21   settlement agreement, which is a preferred

22   resolution, not just appropriate but preferred

23   resolution of the IDEA claim, it makes perfect

24   sense to treat that preferred resolution as an

25   appropriate conclusion of the IDEA process that

1   at that point constitutes settlement and allows

2   you to bring your ADA claim for different

3   relief.

4   CHIEF JUSTICE ROBERTS: Justice Alito?

5   JUSTICE ALITO: Under Fry, is the

6   gravamen of Petitioner's complaint the denial

7   of a FAPE?

8   MR. MARTINEZ: Your Honor, we -- we

9   challenged that and we litigated that below.

10   As the case comes to this Court, we are no

11   longer challenging that. And so, for purposes

12   of -- of your decision, we think that -- that,

13   you know, the Fry -- the gravamen is the same.

14   It is -- the gravamen of the case does involve

15   a FAPE denial, so we haven't pressed that here.

16   JUSTICE SOTOMAYOR: In answer, earlier

17   answer, to Justice Alito's question, you said

18   that according to the court below, which is

19   sort of the difficulty with it, if you win an

20   IDEA case, you then can't pursue any other

21   remedies, correct?

22   MR. MARTINEZ: That was the logic of

23   the court below, and we strongly disagree with

24   that logic.

25   JUSTICE SOTOMAYOR: Clearly. But

1   putting that aside, let's assume the parallel

2   litigation question. We know in the normal

3   course of things the agency findings under the

4   IDEA are given deference by the court reviewing

5   it, correct?

6   MR. MARTINEZ: I think it depends what

7   you mean by "deference," but, certainly,

8   respectful consideration. But I don't think

9   they're binding, and the parents are allowed to

10   bring in new evidence. So it's --

11   JUSTICE SOTOMAYOR: Yes, but there is

12   some deference. Does the same hold true under

13   an ADA claim?

14   MR. MARTINEZ: No, Your Honor.

15   Congress has not decided to -- to require ADA

16   district court judges to even respectfully

17   consider what's happened before in the agency

18   proceeding on a different statute.

19   JUSTICE SOTOMAYOR: So there are two

20   separate proceedings mandated by circumstances,

21   this odd creature, platypus, that has been

22   created?

23   MR. MARTINEZ: That's right, Your

24   Honor.

25   JUSTICE SOTOMAYOR: All right.

1   CHIEF JUSTICE ROBERTS: Justice Kagan?

2   Justice Gorsuch?

3   Justice Kavanaugh?

4   Justice Barrett?

5   JUSTICE BARRETT: Mr. Martinez, as a

6   practical matter, could your client, under your

7   friend on the other side's view, have tried to

8   proceed, where I assume no parallel litigation,

9   holding on to the ADA claim, as your client did

10   here, proceeds through, gets the settlement but

11   rejects the settlement -- is there -- is there

12   any way he could have even kept the IDEA claim

13   alive and then gone to district court and filed

14   both of them?

15   MR. MARTINEZ: I'm sorry, Your Honor.

16   Could you just clarify? That there's a

17   settlement offer on the IDEA claim --

18   JUSTICE BARRETT: Settlement offer,

19   yeah.

20   MR. MARTINEZ: -- that's accepted or

21   rejected?

22   JUSTICE BARRETT: Well, rejected

23   because your client wants to exhaust, right, so

24   rejected.

25   MR. MARTINEZ: Oh, be -- under --

1   under his rule, yes.

2   JUSTICE BARRETT: Exactly, under his

3   rule. So your client could have done that?

4   MR. MARTINEZ: If -- right. I think

5   -- I think that the net effect of their rule is

6   that we would have -- if we had wanted to

7   preserve our ADA rights, we would have been

8   required to reject the settlement --

9   JUSTICE BARRETT: And thereby --

10   MR. MARTINEZ: -- litigate to a full

11   conclusion and lose.

12   JUSTICE BARRETT: And give up

13   attorneys' fees, right? Because, if you

14   rejected a reasonable settlement offer, the

15   statute says that --

16   MR. MARTINEZ: Right.

17   JUSTICE BARRETT: -- you don't get

18   attorneys' fees for subsequent services.

19   MR. MARTINEZ: If -- if you get less

20   relief than you would have gotten in a

21   settlement, then you give up your attorneys'

22   fees, which is another reason to conclude that

23   the statute really wants you to settle --

24   JUSTICE BARRETT: Right.

25   MR. MARTINEZ: -- if you can reach a

1   reasonable settlement.

2   JUSTICE BARRETT: Right. Thank you.

3   CHIEF JUSTICE ROBERTS: Justice

4   Jackson?

5   JUSTICE JACKSON: Yes. Your brief at

6   one point references some of the legislative

7   history, and I just want to give you a chance

8   to reflect on what Congress's actual intentions

9   may have been with respect to the enactment of

10   this provision.

11   MR. MARTINEZ: So I think the

12   legislative history in two places is helpful

13   both in illustrating Congress's intentions and

14   also in confirming the original public meaning

15   of -- of the statutory text that was enacted.

16   For purposes of our first argument, I

17   think the most important thing is the House

18   report at page 7, and what it says there is

19   that -- it's interpreting the language that

20   ultimately became law, and it said that

21   exhaustion is not required when -- and I'm

22   quoting -- "the hearing officer lacks the

23   authority to grant the relief sought."

24   So that just confirms our textual

25   argument that if you're seeking relief that's

1   not available, you -- you don't have to exhaust

2   because there the hearing officer wouldn't

3   grant relief.

4   I think the legislative history is

5   also helpful on our argument that -- that the

6   best way to think about a settlement is that it

7   -- it constitutes exhaustion or supports a

8   futility argument. And there I would point you

9   to the Senate report, which says that -- and,

10   here, I'm quoting again -- "exhaustion of

11   administrative remedies would be excused where

12   they would not be required to be exhausted

13   under the IDEA such as when resort to those

14   proceedings would be futile."

15   And so that recognizes that there is a

16   futility exception that is available under this

17   statute, contrary to what --

18   JUSTICE JACKSON: Isn't that also

19   helpful with your first argument insofar as,

20   you know, again, if you're sort of

21   conceptualizing it the way that I am, which is

22   exhaustion being only required for the same

23   relief and to the same extent that it would be

24   as if you were bringing the other claim? So

25   Congress was trying, I think, to prevent the

1   end-run scenario.

2   MR. MARTINEZ: Right.

3   JUSTICE JACKSON: You can't just call

4   an IDEA claim an ADA claim and get out of

5   exhausting it to the same extent as you would

6   have to if it was labeled IDEA.

7   MR. MARTINEZ: I think you're

8   absolutely right. I think that that -- that

9   futility argument would also apply. I think,

10   you know, the fact that it's futile to go to an

11   agency officer -- official and ask for money

12   damages when they can't give you money damages,

13   I think that is an example of futility.

14   I will say that the courts of appeals

15   that have looked at this have said that there

16   is -- have generally said that there is a

17   futility exception. Eleven circuits have said

18   that, although they generally have not treated

19   a request for a different type of damages as

20   futility.

21   But I think you're right, Justice

22   Jackson, that that language in the futility

23   sort of concept here, you know, would give

24   us -- get to the same place, and I think,

25   actually, the text of the statute in many ways

 1   is intended to codify that, that general idea.

 2   CHIEF JUSTICE ROBERTS: Thank you,

 3   counsel.

 4   Mr. Yang.

 5   ORAL ARGUMENT OF ANTHONY A. YANG

 6   FOR THE UNITED STATES, AS AMICUS CURIAE,

 7   SUPPORTING THE PETITIONER

 8   MR. YANG: Mr. Chief Justice, and may

 9   it please the Court:

10   The path Petitioner took in this case

11   was exactly right. He settled his IDEA claim,

12   obtained prompt educational relief, and then

13   filed a separate ADA action for compensatory

14   damages, things he couldn't get under the IDEA.

15   But, under the Sixth Circuit's ruling,

16   Petitioner would have had to reject a favorable

17   IDEA settlement and forgo the attorneys' fees,

18   delay needed educational relief, and pursue

19   pointless administrative proceedings that

20   cannot provide remedies that the ADA provides

21   simply to pursue the remedies that he already

22   secured by settlement.

23   That makes no sense. The ruling erred

24   -- the Sixth Circuit erred in three important

25   ways. First, the exhaustion requirement does

1   not apply if Petitioner's A -- because the

2   Petitioner's ADA claim seeks relief that is not

3   also available under the IDEA.

4   The whole point of the exhaustion

5   requirement here is, if you're seeking the same

6   relief, Congress wanted to -- to have you go

7   through the IDEA first. Second, it would be

8   futile to do it. And, third, settlement in

9   this context is exhaustion.

10   I welcome the Court's questions.

11   JUSTICE SOTOMAYOR: Do you prefer the

12   second or the third if the first were bypassed?

13   MR. YANG: If the Court bypasses the

14   issue that it reserved in Fry, the seek --

15   seeking relief question, the government would

16   prefer the Court to address the futility

17   argument first, and the reason is that

18   futility -- the Sixth Circuit's decision sweeps

19   much broader than just this context.

20   It held that Honig discussion of

21   futility was dicta, notwithstanding two

22   subsequent recodifications, and that is a

23   problem both for schools and for parents. As

24   Honig itself reflects, schools can invoke the

25   futility exception in cases where they need to

1   remove a student.

2   Now, subsequently, in subsection (k),

3   Congress has made that easier for students that

4   either bring a gun or drugs to school or who

5   have already caused serious bodily harm to

6   someone else.

7   But there was -- there remains the

8   need to go to court quickly in some contexts,

9   and that is how the courts have always done it

10   is through the futility exception.

11   CHIEF JUSTICE ROBERTS: You want --

12   you say you want us to decide futility first?

13   MR. YANG: No, no, no. No. If we

14   bypass the first question about whether the

15   exhaustion requirement -- that's exactly as I

16   understood it.

17   JUSTICE SOTOMAYOR: Yes.

18   MR. YANG: In terms of the order of

19   operation, I think the Court should just decide

20   the logically antecedent question first even

21   though the futility issue is important.

22   CHIEF JUSTICE ROBERTS: Oh, okay.

23   JUSTICE ALITO: If the -- suppose

24   there were no IDEA. Could Petitioner prevail

25   on a straight ADA claim? And, if so, what

1   would be the nature of the -- of the claim?

2   MR. YANG: Well, we're not going to

3   take a position on the -- the specifics of this

4   case being adjudicated under the ADA, but he

5   certainly has a -- a -- a viable claim that can

6   be litigated, which is that he was discrim- --

7   JUSTICE ALITO: Well, what would --

8   all right. I'll rephrase it. I -- I don't --

9   I don't want to ask a question about this

10   that's specific to this case.

11   What would be the nature of an ADA

12   claim for a situation in which a student was

13   not given a -- a -- a FAPE?

14   MR. YANG: Oh.

15   JUSTICE ALITO: Without the FAPE.

16   Without the IDEA being on the books, what would

17   it be? It would be the -- the student would

18   have to argue that there was a denial of

19   reasonable accommodation? Is that what it

20   would be?

21   MR. YANG: Yes. This is on page 6 of

22   our brief. There, the ADA -- Title II of the

23   ADA's discrimination provision has been fleshed

24   out in regulations. The regulations require

25   the public entity to furnish appropriate

1   auxiliary aids and services, which include

2   qualified interpreters for the deaf, where

3   necessary to afford individuals an equal

4   opportunity to participate in and enjoy the

5   benefits of the service, program, or activity.

6   The claim would be based on that.

7   It -- it would not be based on the

8   denial of FAPE. A FAPE is not the sine qua non

9   of my -- of -- of the --

10   JUSTICE ALITO: But that regulation --

11   that regulation is based on -- on reasonable

12   accommodation, am I correct?

13   MR. YANG: It is based on the

14   antidiscrimination provision, yes.

15   JUSTICE SOTOMAYOR: The elements of an

16   ADA claim and an IDEA claim are different,

17   aren't they?

18   MR. YANG: They are. They are. In

19   order to obtain damages under the ADA, for

20   instance, you need to establish some type of

21   intentional conduct. Most courts of appeals

22   have concluded that you need to show deliberate

23   indifference.

24   Also, there are certain defenses under

25   the ADA, undue burden, fundamental alteration,

1   and also just the element of the discrimination

2   claim is itself different. You now have to

3   establish that there's a violation of a -- of a

4   FAPE.

5   JUSTICE KAGAN: When -- when you said

6   before, Mr. Yang, that the Court should decide

7   the antecedent question first, the logically

8   antecedent question, is there any other reason

9   than, oh, it's logically antecedent that you

10   would rather have us decide that question?

11   I guess what I'm asking is, what is

12   the more important question practically

13   speaking --

14   MR. YANG: Practically speaking --

15   JUSTICE KAGAN: -- in this case?

16   MR. YANG: -- it's probably futility

17   but not because of the settlement context.

18   However, I think the logically antecedent

19   question, it's useful to answer, because it

20   tells you a bit about what the whole futility

21   requirement or the exhaustion requirement means

22   in the statute. And it's worth thinking what

23   would exhaustion look like if the Sixth Circuit

24   were right here, and I think this helps to

25   inform the -- the -- the case.

1   It's even odd -- I think, Justice

2   Thomas, you were touching upon this. It's odd

3   to even contemplate exhausting a claim where

4   the -- under the IDEA, where you can't get the

5   very thing that the claim asks for, which is

6   compensatory damages.

7   The claim lacks merit, as Respondents

8   acknowledge. So what would you do? You'd go

9   to the hearing officer and say, I want

10   compensatory damages under the IDEA. The

11   hearing officer would say: Well, you can't get

12   compensatory damages under the IDEA, I dismiss

13   your claim.

14   What's the point of this? It just

15   makes no sense. I think this speaks to --

16   CHIEF JUSTICE ROBERTS: Well, but it

17   makes no sense under -- under your view because

18   you're thinking of the relief as -- as a

19   remedy. If you think of the relief as a

20   correction or fixing the -- the flaws in the

21   education, the denial of a FAPE, if you think

22   of that, then it does make sense.

23   MR. YANG: But that just can't, I

24   don't think, be fairly squared with the text

25   because "relief" has a mean -- in -- in the

 1   legal context, as Fry acknowledged, has a very

 2   specific meaning, and that is the redress or

 3   benefit that you ask the court and the court

 4   can provide. And -- and --

 5   CHIEF JUSTICE ROBERTS: Well, you

 6   might call that a remedy. I mean, their

 7   argument is that those are two different words,

 8   and you're seeing -- treating them as if they

 9   mean the same thing --

10   MR. YANG: Remedies have --

11   CHIEF JUSTICE ROBERTS: -- which they

12   might.

13   MR. YANG: "Remedy" has two different

14   meanings, again, as -- as I think you just

15   touched upon yesterday. One is the meaning

16   that we advocate and I think that Fry already

17   used.

18   The second is the process or the means

19   of obtaining relief. But that can't be the

20   case here because the statute asks if the

21   action is seeking relief. You don't seek a

22   process.

23   JUSTICE KAGAN: And -- and when you --

24   MR. YANG: You -- you --

25   JUSTICE KAGAN: -- said Fry uses this

1   understanding of relief, I mean, it does right

2   there. This is the part of the opinion that's

3   unanimous. The ordinary meaning of "relief" in

4   the context of a lawsuit is the redress or

5   benefit that attends a favorable judgment,

6   Black's Law Dictionary.

7   MR. YANG: And I think this in a legal

8   context, and this is the only reasonable

9   interpretation of relief. It's not like I'm

10   saying, it's hot outside, I'm going into the --

11   inside for relief, right? I mean, that's a

12   meaning of "relief" in a non-legal context.

13   It may be, like, that colloquial

14   meaning might have some -- you know, some

15   weight here. I -- I -- I think not. But, when

16   you're talking to lawyers and Congress is

17   talking about exhausting the procedures under a

18   statute --

19   JUSTICE JACKSON: And isn't --

20   MR. YANG: -- it's not -- it's not --

21   it's not a --

22   JUSTICE ALITO: Well, "relief" --

23   "relief" could mean relief for the denial of a

24   FAPE. And Mr. Martinez agrees that the

25   gravamen of the complaint here is the denial of

```
1      the FAPE.

2               MR. YANG:  I -- I don't think it can

3      mean that either because it is -- the whole

4      premise is that it's a non-IDEA action under

5      such laws seeking relief that's also available.

6               Now it's true that in order to be also

7      available under the IDEA, it has to be -- the

8      gravamen has to be for the denial of a FAPE.

9      But the relief that you're seeking under the

10     ADA is not for the denial of a FAPE.  It is

11     something that you're seeking, like

12     compensatory damages.  If you're --

13               JUSTICE ALITO:  Well, does the -- does

14     the ADA -- does the ADA require a school to

15     provide auxiliary aids regardless of the cost?

16               MR. YANG:  Does the ADA?

17               JUSTICE ALITO:  Yes, the --

18               MR. YANG:  No, because there is a --

19     there is an exception for substantial burden,

20     financial or administrative burden.

21               JUSTICE JACKSON:  Mr. Yang, is it --

22               JUSTICE ALITO:  And do -- just one --

23     one follow-up.

24               Does a FAPE sometimes require very --

25     very expensive expenditures by a district,
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1   expenditures that would exceed what could be

2   obtained under the ADA?

3   MR. YANG: I think, in some contexts,

4   that would be true. Again, this is all very

5   contextual, right? It depends on what we're

6   talking about, but that's certainly possible.

7   JUSTICE JACKSON: Yes. I was just

8   wondering whether part of your answer to the

9   Chief Justice's question about, I guess, a

10   total overlap in the claims is the first part

11   of 1415. In other words, the statute suggests

12   that you would have some ability to bring a

13   claim under the ADA that is different from or

14   outside of the IDEA and that Congress wanted,

15   as Mr. Martinez said, for you to be able to do

16   both. Is that right?

17   MR. YANG: I think Congress did

18   contemplate that you could do both. That's why

19   it focused on an action that's seeking relief

20   that's available. And only in that specific

21   context did Congress want you to go through --

22   through the IDEA process.

23   And that makes sense because, when

24   you're seeking the same relief that's

25   available, you're talking about educational

1   relief. And the IDEA process has a pretty

2   quick way of resolving that. Plus, it builds

3   into the front end of that getting the parties

4   together to try to resolve this collaboratively

5   --

6   JUSTICE JACKSON: And if you were --

7   MR. YANG: -- which results in

8   settlement if they --

9   JUSTICE JACKSON: -- and -- and if you

10   were forced to bring your AD -- ADA claim

11   through the exhaustive procedures of the IDEA,

12   even if you were looking for different relief,

13   wouldn't that be limiting the rights,

14   procedures, and remedies available under the

15   ADA in a way that Congress says they didn't

16   want to do?

17   MR. YANG: It -- it would. But also,

18   as I think I was discussing earlier, it just

19   makes no sense because what is a hearing

20   officer to do, right? You bring an ADA claim

21   where you're seeking relief, this ADA-type

22   relief. I'm a hearing officer -- I mean, Fry

23   says the hearing officer does not -- I mean, in

24   so many words, a hearing officer does not have

25   authority under the IDEA to decide an ADA

1   claim.

2   JUSTICE BARRETT: Mr. Yang --

3   MR. YANG: I mean, there's just

4   nothing to do. What would happen here is

5   exactly what happened here, which is that the

6   hearing officer dismisses the ADA claim --

7   JUSTICE BARRETT: Well, and it --

8   MR. YANG: -- or dismisses the claim

9   for ADA relief.

10   JUSTICE BARRETT: -- and it would be

11   would be a losing claim, as you were saying to

12   Justice Alito, that, you know, you can't

13   recover under the ADA simply because you didn't

14   get a FAPE?

15   MR. YANG: Yep.

16   JUSTICE BARRETT: It's not the same

17   thing. And if that's all you're seeking, if --

18   if your only claim -- I mean, here, there are

19   claims for emotional distress and other sorts

20   of compensatory relief, right, for damages,

21   backward-looking damages. But, if all you've

22   got is you didn't give me a FAPE and you owed

23   me a FAPE, and you can't make out the elements

24   of the ADA claim, you just lose, right? So you

25   can't just tack on compensatory damages at the

1   end of your request for IDEA relief. That's

2   just not going to work, right?

3   MR. YANG: I think that's right, and

4   if you did have a case where you were seeking

5   things that have -- could have been sought

6   under the IDEA and you haven't exhausted, and

7   then you're seeking compensatory damages or

8   something that wasn't, we think the right

9   result -- this is supported by the Court's

10   decision in Jones v. Bock, it's also analogous

11   to Article III standing, where you have to show

12   Article III standing for each form of relief

13   that you're seeking --

14   JUSTICE BARRETT: Right.

15   MR. YANG: -- you would just tie off

16   the -- the problematic type of relief and

17   proceed.

18   JUSTICE BARRETT: Right.

19   MR. YANG: So, you know, it's a little

20   difficult to understand where the Sixth Circuit

21   was going on this. I think they may have lost

22   the forest a bit for the trees. But, if you

23   answer QP-1 first and you explain that the

24   relief sought has to be relief that is actually

25   available under the IDEA, I think that solves a

 1   lot of the problems.

 2   That would leave the futility

 3   question, Justice Kagan, unresolved, but you'll

 4   take the Sixth Circuit's decision off the

 5   books. And given that every -- you've got

 6   Honig, you've got all the other courts of

 7   appeals, you've got ratification twice, I'm

 8   pretty confident we can, you know, fix that

 9   going forward, hopefully, in the Sixth Circuit.

10   But, again, you can decide how you

11   want to decide the case, whether it's the first

12   issue or -- or the second issue, which can be

13   decided in two ways.

14   CHIEF JUSTICE ROBERTS: Justice

15   Thomas?

16   Justice Alito?

17   Justice Sotomayor?

18   JUSTICE SOTOMAYOR: Is there much

19   parallel litigation now? Most of the court of

20   appeals require going through the -- through

21   the IDEA, but if you do and settle or you lose,

22   they --

23   MR. YANG: Well, I think there's --

24   there's two things that you might be talking

25   to, and I can address both.

1   First, on QP-1, whether having a

2   purely non-IDEA relief type of claim can

3   proceed, there used to be a circuit split.

4   There was at least at the time the Court

5   granted Fry. The Tenth Circuit -- I mean,

6   excuse me, the Ninth Circuit, in a case called

7   Payne in 2011, adopted the view that we

8   advocate, and that was I think probably the

9   basis for the Court granting cert in Fry.

10   However, after 10 years living with

11   that rule, the Ninth Circuit en banc has -- has

12   gone the other way. But, in those 10 years --

13   remember, the Ninth Circuit is nine states, two

14   territories, and about 20 percent of the U.S.

15   population. No one has identified a single

16   instance -- maybe there's a few -- of this

17   becoming a problem.

18   And I think that that really touches

19   upon the recognition that the Court had in

20   Rowley, which is parents have every incentive

21   to proceed IDEA relief. It's a speedy path and

22   concerns the education of their children, where

23   time is of the essence. They're realistically

24   going to go after IDEA relief and then pursue,

25   as my friend explained, ADA relief later. And

1   I think the 10 years in the Tenth Circuit

2   without the ability of the other side to

3   identify any problem speaks to that.

4   The second issue is about the

5   settlement. We've had three circuits that --

6   as we explained in our invitation brief, that

7   have our rule about futility, the Third

8   Circuit, the Ninth Circuit, and the Tenth

9   Circuit. And that's been since, in the Third

10   Circuit, 1995. Again, no untoward results.

11   Again, I think this speaks to the

12   recognition of the Court in Rowley that court

13   -- that parents are going to pursue IDEA

14   relief. It is quick, it is fast, and it is

15   important when we're talking about ongoing

16   educational relief for your own kids.

17   CHIEF JUSTICE ROBERTS: Justice Kagan?

18   JUSTICE KAGAN: I'm wondering,

19   Mr. Yang, if the SG has given any thought to

20   what kinds of compensatory relief are available

21   after Cummings? I mean, is -- is there any at

22   this point? And for what?

23   MR. YANG: We -- we've not taken a

24   position either in this case or subsequently.

25   I know there is a -- an argument that is being

1   presented or will be presented should this case

2   be litigated that Cummings forecloses ADA

3   relief for emotional damages. There's also an

4   argument that precludes the other types of

5   compensatory damages. We're just not taking a

6   position on that in this case.

7   Our position is that Petitioner

8   clearly was entitled to at least litigate those

9   questions.

10   CHIEF JUSTICE ROBERTS: Justice

11   Gorsuch?

12   Justice Kavanaugh?

13   Justice Barrett?

14   Justice Jackson?

15   Thank you, counsel.

16   MR. YANG: Thank you.

17   CHIEF JUSTICE ROBERTS: Mr. Dvoretzky.

18   ORAL ARGUMENT OF SHAY DVORETZKY

19   ON BEHALF OF THE RESPONDENTS

20   MR. DVORETZKY: Mr. Chief Justice, and

21   may it please the Court:

22   When Congress enacted Section 1415(l),

23   it channeled all FAPE denial claims through the

24   IDEA's exhaustion procedures. Congress

25   carefully crafted those procedures, and it

1   wanted parents and school districts to go

2   through them because of the primacy of a FAPE.

3   Congress's choice helps answer both

4   questions presented, plus the third that

5   Mr. Perez wants to add.

6   On the first question, Congress's

7   choice shows that the word "relief" in 1415(l)

8   means redress for harm, not a specific remedy.

9   When a plaintiff complains of a FAPE denial,

10   relief is available under the IDEA, and the

11   plaintiff must exhaust. Any other test would

12   allow plaintiffs to circumvent the exhaustion

13   requirement Congress carefully crafted by using

14   the magic word "damages" and going straight to

15   court.

16   On the futility question, Congress's

17   choice explains the unusually specific words

18   that Congress wrote. A plaintiff must exhaust

19   to the same extent as would be required had the

20   action been brought under the IDEA. That

21   directive reflects Congress's focus on

22   delivering a FAPE, and it makes two things

23   clear.

24   One, exhausting a non-IDEA claim means

25   obtaining an administrative decision from an

1   educational expert, just as an IDEA plaintiff

2   must do before going to court. That's why

3   Mr. Perez's improper new argument that

4   "settles" equals "exhaustion" is incorrect. An

5   IDEA plaintiff cannot sue after settling.

6   Thus, neither can a non-IDEA plaintiff.

7   Two, settlement doesn't excuse

8   exhaustion. Neither the unavailability of

9   damages nor settlement constitutes futility

10   under the IDEA. Futility may excuse exhaustion

11   where a court can grant relief that a hearing

12   officer can't. But neither a hearing officer

13   nor a court can award IDEA damages or

14   adjudicate a settled claim. Thus, to the same

15   extent, neither the unavailability of damages

16   nor settlement constitutes futility for an ADA

17   claim.

18   I welcome the Court's questions.

19   JUSTICE THOMAS: Couldn't you have

20   solved this problem or precluded this, obviated

21   this problem by obtaining a general release in

22   your settlement?

23   MR. DVORETZKY: I think we could have.

24   And I think we -- that going forward, whatever

25   rule the Court adopts here will ultimately

52

1   function as just a default rule.

2   If the Court -- if the Court were to

3   adopt our rule, then plaintiffs could insist on

4   either complete compensation or a waiver of the

5   exhaustion requirement as the price for a FAPE

6   settlement.

7   If the Court adopts Mr. Perez's rule,

8   then school districts could insist, if they

9   wanted to, on a global release, or, if they

10   were willing to proceed with litigation later

11   on in an ADA claim, they could do that as well.

12   At bottom, we're just talking about a

13   default rule here.

14   JUSTICE THOMAS: Is -- are there any

15   other actions that are required to be exhausted

16   before -- that -- that must be -- that you must

17   exhaust the IDEA claim before you pursue them?

18   For example, let's say there's a tort

19   action as a result of a student being injured

20   as a result of poor training. Would that be

21   exhausted -- have -- required to be exhausted?

22   MR. DVORETZKY: So, Justice Thomas, if

23   it's a state law tort action, which I

24   understand to be --

25   JUSTICE THOMAS: Yeah.

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1              MR. DVORETZKY:  -- the premise of your

2      question, then I think, no, you would not have

3      IDEA exhaustion.  And that's because of the

4      language of 1415(l), which says nothing shall

5      be construed to restrict or, et cetera, rights

6      under the Constitution, the ADA, the

7      Rehabilitation Act, or other federal laws.

8              JUSTICE THOMAS:  So the -- was

9      there -- before you had (l), this provision,

10     1415(l), did you have an exhaustion

11     requirement?

12             MR. DVORETZKY:  Before 15 -- before

13     1415(l), the 15 -- 1415(l) was a response to

14     the Court's decision in Smith.

15             JUSTICE THOMAS:  Yeah.

16             MR. DVORETZKY:  And under the Court's

17     understanding in Smith, all FAPE-related claims

18     had to proceed through the IDEA exclusively.

19     So an exhaustion requirement wasn't really

20     relevant because you simply couldn't bring

21     non-IDEA FAPE claims --

22             JUSTICE JACKSON:  But isn't that --

23     isn't that --

24             MR. DVORETZKY:  -- at all.

25             JUSTICE JACKSON:  -- isn't that what's
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 1   happening here with your interpretation of the

 2   statute? I mean, that's sort of what concerns

 3   me, that it was clear that you -- you're right

 4   that there was a -- an attempt on the part of

 5   Congress to respond to Smith, and it would seem

 6   as though Congress was trying to make clear

 7   with the statutory language that we're

 8   interpreting that they did not want all claims

 9   arising out of these circumstances to have to

10   go through the process.

11   So how do you square that, the kind of

12   abrogation piece of this, with -- with your

13   argument?

14   MR. DVORETZKY: Justice Jackson, two

15   points, one about the history and context and

16   the other about the language of the statute

17   that -- that Congress actually enacted.

18   With respect to the -- the history and

19   context, Smith really did three things, and

20   Congress's response was not to overturn all of

21   them.

22   One, Smith said no attorneys' fees

23   under the IDEA. Congress changed that.

24   Two, Smith said no non-IDEA FAPE

25   claims. And Smith did -- and -- and 1415(l)

1   did overturn that.

2   But the third thing Smith said was

3   that it had a concern with circumventing the

4   IDEA's procedures. And Congress, in fact,

5   reaffirmed that concern by, on the one hand,

6   allowing non-IDEA FAPE claims to be brought

7   but, on the other hand, channeling them first

8   through the IDEA's exhaustion procedure.

9   JUSTICE JACKSON: But only --

10   MR. DVORETZKY: And that's the second

11   --

12   JUSTICE JACKSON: -- but that's not

13   what the language says. The language says to

14   the extent or if they are seeking the same

15   relief, number one, and if we read it the way

16   that you want to read it, doesn't -- don't we

17   end up going back to the part of Smith that you

18   even agree Congress overturned, which is the

19   part about whether or not we can have non-IDA

20   -- IDEA FAPE claims because, as Justice Barrett

21   pointed out earlier, you know, through your

22   analysis, it would seem as though you wouldn't

23   have any ability to bring an ADA claim if

24   someone, you know, is successful on the IDEA

25   claim.

1   MR. DVORETZKY: Justice Jackson, I

2   don't think that that is the result of our

3   analysis, and I also don't think that is the

4   correct textual reading of the statute.

5   The result of our analysis does allow

6   for non-IDEA FAPE claims to be brought once the

7   IDEA's exhaustion procedures have been -- have

8   been followed.

9   So all we're talking about here is

10   that if you have a FAPE claim, you bring that

11   to the IDEA hearing officer first. You get a

12   FAPE, which is the primary relief that the IDEA

13   is concerned with. And once you have that, if

14   you think you have an ADA claim to pursue, you

15   can pursue that some number of months later.

16   But Congress's focus first and foremost was on

17   making sure that the -- that the child gets a

18   FAPE.

19   With respect to the statutory text, I

20   think all of this comes down to how we

21   interpret or how you interpret the word

22   "relief" in 1415(l), and the word "relief" read

23   in isolation can mean one of two things. It

24   can either mean redress for a harm, or it can

25   mean a specific remedy.

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1              The better reading here is that it

2    means redress for a harm.  That is consistent

3    with how Fry understood the term "relief."

4              CHIEF JUSTICE ROBERTS:  And -- and

5    your --

6              MR. DVORETZKY:  Fry said --

7              CHIEF JUSTICE ROBERTS:  I'm sorry.

8    And your -- your point is that the denial of a

9    FAPE is the same harm in both cases?

10             MR. DVORETZKY:  Yes.

11             CHIEF JUSTICE ROBERTS:  In the ADA and

12   under the IDEA?

13             MR. DVORETZKY:  If you have a case, as

14   I think is stipulated at this point in this --

15   in this Court, where the gravamen of the

16   complaint is the denial of a FAPE, then that is

17   the harm that is being redressed.

18             It is being --

19             CHIEF JUSTICE ROBERTS:  But you can

20   have an AD -- you could have litigated this as

21   a straight ADA claim and gone through the whole

22   process without using the acronyms for a FAPE,

23   right?  There's no necessity to prove or focus

24   on or whatever under the ADA claim.  Nothing

25   under the ADA says you have to have a FAPE,
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1   right?

2   MR. DVORETZKY: Well, Mr. Chief

3   Justice, I think Fry is -- is trying to address

4   this question by saying that whatever label the

5   plaintiff puts on the complaint, we -- or on

6   the claim, the Court looks to see what the

7   gravamen of the complaint is.

8   And is the gravamen of the complaint

9   the denial of a FAPE, whatever you might call

10   it in your complaint, or is it something else?

11   And -- and, in this case, I think using the two

12   guideposts that Fry provides, one, could an

13   adult at a school have brought the same claim?

14   No, because the claim is about the denial of an

15   education. Could a child at another public

16   facility like a library have brought the same

17   claim? No, for the same reason, because, at

18   bottom, what's alleged here is the denial of a

19   proper education.

20   And so that under the Fry analysis --

21   I don't think it's a question presented here --

22   makes -- makes that the gravamen of the

23   complaint there.

24   JUSTICE KAGAN: I mean, Mr. Dvoretzky,

25   just going back to this question of what

 1   "relief" means and whether you're seeking

 2   relief that's also available under the IDEA

 3   when you're seeking damages, I would have

 4   thought that the first blush and maybe also the

 5   second blush and third blush reading of that

 6   is, well, no, if you're seeking damages, then

 7   you're not seeking relief that's also available

 8   under the IDEA.

 9   And that's exactly how the rest of

10   1415 uses "relief." So that there are a couple

11   of different provisions in the same statutory

12   section. One says it directs the court to

13   grant such relief as it determines as

14   appropriate. So, you know, it's like, are you

15   granting an injunction? Are you granting

16   damages?

17   Another prohibits attorneys' fees if

18   the court finds that the relief obtained isn't

19   more favorable to the parents than the offer of

20   settlement. Again, it's relief in the normal

21   sense. You know, what did you get? Did you --

22   how much money did -- was put on the table?

23   It's just a normal wording of the word

24   "relief," the one that comes out of Black's Law

25   Dictionary, that Fry quotes, which is like I'm

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 1    seeking damages.  That's not relief that's

 2    available under the IDEA.

 3              MR. DVORETZKY:  Justice Kagan, I think

 4    that "redress" can also bear a different

 5    meaning, which is not just the specific remedy

 6    that you're asking for but redress for a harm.

 7    It's the -- it's the kind of situation where

 8    you may not get what you ask for, but you get

 9    what you need.

10              And if you bring a FAPE denial claim

11    seeking damages to an IDEA hearing officer,

12    you're not going to get damages because the

13    IDEA doesn't give you that, but you will get a

14    FAPE, and that is redress for the harm of

15    denial of a FAPE.

16              With respect to how Fry used the term,

17    Fry said "relief" is the redress or benefit

18    that attends a favorable judgment.  It didn't

19    say redress -- the specific redress or benefit

20    demanded by the plaintiff that attends a

21    favorable judgment.

22              With respect to the other uses of

23    "relief" in the IDEA, again, I think "relief"

24    in isolation can bear different meanings.

25              JUSTICE KAGAN:  Well, these are --
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 1              MR. DVORETZKY:  Other --
 2              JUSTICE KAGAN:  -- provisions that are
 3      surrounding the very provision that we're
 4      supposed to interpret, which are clearly using
 5      the term "relief" to mean something very
 6      different from what you're saying.
 7              MR. DVORETZKY:  Justice Kagan, I
 8      respectfully disagree with that reading of the
 9      word "relief" in the other provisions as well.
10      If you look at those two provisions, one talks
11      about how the court shall grant such relief as
12      the court determines is appropriate.  That's my
13      "you get what you need, not necessarily what
14      you want" understanding of relief.  The court
15      will grant whatever relief is appropriate,
16      regardless of what relief you have specifically
17      asked for.
18              The other example is in the settlement
19      context.  No fees if the relief finally
20      obtained is less favorable than the settlement
21      offer.
22              Under Mr. Perez's understanding of
23      relief, what "relief" really means is a type of
24      relief.  That doesn't plug in -- that
25      understanding doesn't plug in to that
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 1   settlement provision. How do you compare

 2   different types of relief as being more or less

 3   favorable? It's apples and oranges.

 4   And so I -- I don't actually think

 5   that playing the isolated definition game of

 6   looking at "relief" in different contexts gets

 7   you very far here. I think the real question

 8   is, what did Congress mean when it used the

 9   word "relief" in 1415(l) and which of the two

10   plausible understandings of that term did

11   Congress mean to adopt?

12   Our understanding makes more sense

13   here for a few reasons. One --

14   JUSTICE JACKSON: Can you, before you

15   go into those reasons, if the question is what

16   did Congress intend, as you started out, how --

17   how do you respond to opposing counsel's

18   reference to the legislative history and in

19   particular the statement in the House report

20   where Congress says it's not appropriate to

21   require the use of the exhaustion process if an

22   IDEA hearing officer lacks the authority to

23   grant the relief sought?

24   MR. DVORETZKY: Justice Jackson, this

25   was a compromise bill that went through a

1   number of different iterations, and I just

2   don't think that there is much, if any, weight

3   that can be placed on the legislative history

4   to shed light on that.

5   I think, if we -- if we look at the

6   purposes that Congress was more broadly trying

7   to achieve here, the main purpose of the IDEA

8   -- and it says this in its first declaration of

9   purpose -- is to ensure that all children with

10   disabilities have available to them a FAPE.

11   The exhaustion requirement is designed

12   to address that FAPE requirement right away.

13   Rather than --

14   JUSTICE JACKSON: For IDEA claims.

15   But what about the purposes of the other

16   non-IDEA statutes which Congress is clearly

17   preserving here?

18   MR. DVORETZKY: Congress is preserving

19   them, but the second half of 1415(l) channels

20   those through the IDEA's exhaustion procedures.

21   And the reason for that is because of the

22   primacy of getting a FAPE under the IDEA.

23   The exhaustion requirement is designed

24   to say, you can pursue your other claims later,

25   but, first and foremost, you have to try to get

1   a FAPE because that's what's in the best

2   interests of the child. And you have to go

3   through the IDEA's procedures in order to do

4   that, rather than allowing parents to choose a

5   particular remedy that they might prefer under

6   other statutes by going straight to court.

7   Fry, I think, also reflects that

8   insight in that it recognizes the primacy of

9   the FAPE in asking whether the gravamen of a

10   complaint is the denial of the FAPE.

11   Reading "relief" to mean the redress

12   that the IDEA provides also avoids a

13   circumvention problem because circumvention and

14   going straight to court may, first of all,

15   deprive the child of a FAPE by focusing on

16   damages and not requiring parents to go

17   through -- through the FAPE process.

18   Second, it deprives both parents and

19   schools of help from educational experts, which

20   Article III judges are not. I think Congress

21   recognized that there are educational experts

22   in the agencies who ought to address these

23   sorts of issues first.

24   And, third, by putting -- it would --

25   the circumvention and going straight to court

1   would put the FAPE question before inexpert

2   Article III judges without the benefit of

3   getting findings in a decision, which is what

4   the IDEA's exhaustion procedures require, from

5   an educational expert.

6   JUSTICE ALITO: Which of the two

7   default rules better serves the objectives of

8   the IDEA?

9   MR. DVORETZKY: So -- so it -- it

10   depends which question we're talking about. I

11   think what we have been talking about --

12   JUSTICE ALITO: Well, you said earlier

13   that there -- what we're talking about is the

14   default rule, and the default rule could either

15   be the one you'd like or the one that Mr.

16   Martinez likes. Which one better serves the

17   objectives of --

18   MR. DVORETZKY: To --

19   JUSTICE ALITO: -- the IDEA?

20   MR. DVORETZKY: -- to clarify, Justice

21   Alito, I think that the -- the notion of a

22   default rule only comes into play on the second

23   and third questions presented here about --

24   about what happens after a settlement.

25   The question that we have, I think,

 1   mostly been talking about here is the first

 2   question presented, which goes beyond the

 3   context of a settlement. And -- and I think

 4   Mr. -- Mr. Martinez is asking for a rule where,

 5   whenever a plaintiff seeks monetary damages,

 6   that gets you out of the exhaustion requirement

 7   in 1415(l).

 8   As to that rule, that's not a default

 9   rule principle at play there. That would be an

10   absolute rule outside the context of

11   settlement.

12   With respect to the default rule, I

13   think that only comes up in a situation which

14   will probably be rare after this case where you

15   have a settlement that doesn't speak one way or

16   another to -- to what happens to -- to future

17   ADA claims.

18   And on that --

19   JUSTICE GORSUCH: On that, I -- I -- I

20   just want to press you on that assertion

21   because your friend on the other side says, no,

22   if we were to adopt your rule, the parties

23   couldn't contract to allow an ADA claim to be

24   brought later, that a settlement would itself

25   extinguish the potential for an ADA claim. You

1   have to exhaust -- your theory of exhaustion

2   requires proceeding through the administrative

3   process altogether.

4   Do you want to respond to that?

5   MR. DVORETZKY: Yes. I don't think

6   that's right, Justice Gorsuch. I think that

7   the exhaustion requirement under the IDEA, in

8   light of this Court's clear statement rule,

9   although it's not a fourth question presented

10   here, I don't think the Court would likely find

11   that the exhaustion requirement is a

12   jurisdictional one.

13   And so it is something that, either

14   way, whether you adopt our rule or --

15   JUSTICE GORSUCH: Well, absent waiver

16   by the other side, it would operate in the way

17   Mr. Martinez suggests, wouldn't it?

18   MR. DVORETZKY: Absent a waiver, it

19   would, and that, I think, takes us to the

20   default rule point.

21   JUSTICE GORSUCH: Okay.

22   MR. DVORETZKY: But either way --

23   JUSTICE GORSUCH: Okay. And on -- on

24   that, with respect to futility, it seems like

25   most of the courts of appeals have gravitated

 1   around a rule that there -- a futility

 2   exception does exist here. And what's wrong

 3   with that rule, and how has it operated in a

 4   way that's problematic in your view?

 5   MR. DVORETZKY: Justice Gorsuch, I

 6   think it depends precisely what futility rule

 7   we are talking about and futility with respect

 8   to what. 1415(l) is setting up -- and I think

 9   your -- your opinion in the A.F. case in the

10   Tenth Circuit set this out --

11   JUSTICE GORSUCH: Oh, do not invoke my

12   opinions below. That's dangerous, counsel.

13   (Laughter.)

14   JUSTICE GORSUCH: Every lawyer knows

15   that's dangerous. I'm bound by circuit

16   precedent and arguments that weren't made to

17   me, okay? Here we are with all sorts of

18   excellently lawyered arguments on both sides

19   and no circuit precedent. Proceed with

20   caution.

21   (Laughter.)

22   MR. DVORETZKY: Giving no deference to

23   the Tenth Circuit, I think the Tenth -- the

24   Tenth Circuit had it right.

25   (Laughter.)

1   JUSTICE GORSUCH: Touché.

2   MR. DVORETZKY: The -- the Tenth

3   Circuit had it right in setting up that the

4   critical question that Congress instructed

5   courts to answer here is whether a plaintiff

6   bringing a non-IDEA claim could invoke futility

7   when bringing that same claim as an IDEA claim.

8   JUSTICE GORSUCH: Well, as I recall,

9   the Tenth Circuit has held that the futility

10   exception does exist. It just wasn't present

11   in the particular case you mentioned because

12   the party didn't argue it. So, again, what's

13   wrong with the futility exception as

14   interpreted by most circuits, including my

15   former circuit?

16   MR. DVORETZKY: I -- there is no

17   futility exception that applies in this

18   situation because of how 1415(l) operates. The

19   -- the rule -- what the Court needs to look at

20   is whether an IDEA claim would be subject to a

21   futilities -- futility exception. In other

22   words, if this FAPE-related ADA claim or FAPE

23   denial ADA claim had been brought as an IDEA

24   claim, would there be a futility exception to

25   that IDEA claim? And the answer to that

1   question is no.

2   The relevant principle of exhaustion,

3   exhaustion is excused as futile when the agency

4   can't grant you some relief that a court could

5   grant you. That's the circumstance in which it

6   makes sense to say we're going to excuse

7   exhaustion, we're going to allow you to skip

8   over the first-level decisionmaker and go

9   straight to a second-level decisionmaker who

10   can help you.

11   That principle doesn't apply either as

12   to a damages request or in the settlement

13   context for an IDEA claim. A damages request

14   can't excuse exhaustion as futile because

15   neither a hearing officer nor a court can award

16   damages under the IDEA. The problem is that

17   the IDEA doesn't authorize damages in the first

18   place, not that the hearing officer is somehow

19   uniquely powerless to grant them.

20   Settlement also can't excuse

21   exhaustion as futile. Futility and exhaustion

22   are concepts that really only make sense as

23   preparation for a lawsuit. But, when a

24   plaintiff settles his IDEA claim, he

25   extinguishes it. Futility excuses exhaustion

1   so someone can go to court. When the case has

2   been settled, no one's going to court.

3   So whatever futility exceptions there

4   might be in other contexts in the IDEA, those

5   futility exceptions don't logically apply when

6   you have a request for damages or a settlement.

7   JUSTICE BARRETT: But it sounds like

8   you're assuming that the request for damages --

9   that the damages aren't available under the ADA

10   either, right? Like --

11   MR. DVORETZKY: No.

12   JUSTICE BARRETT: -- clearly,

13   everybody is in agreement here that

14   compensatory damages aren't available under the

15   IDEA. But, when you said futility wouldn't

16   apply because compensatory damages aren't

17   available, I take that to be that compensatory

18   damages aren't available under the IDEA?

19   MR. DVORETZKY: I think that the

20   hypothetical inquiry that 1415(l) requires the

21   court to engage in is, what would have happened

22   if the same claim had been brought under the

23   IDEA? We're not talking about exhausting the

24   ADA claim before the hearing officer. We're

25   talking about bringing the FAPE denial claim

1   before the hearing officer as an IDEA claim.

2   And if you were --

3   JUSTICE BARRETT: So you're not taking

4   the position that they couldn't later or --

5   let's see. You're not -- are you taking the

6   position -- I guess it's just hard for me to

7   see how the ADA claim ever gets asserted then.

8   MR. DVORETZKY: I think, if you bring

9   an IDEA claim to a hearing officer --

10   JUSTICE BARRETT: Mm-hmm.

11   MR. DVORETZKY: -- win or lose,

12   whatever happens, you get findings and a

13   decision, at that point, you have satisfied

14   1415(l) because you -- the exhaustion -- the

15   procedures of (f) and (g) have been exhausted

16   to the same extent as if a claim were -- as if

17   the claim were brought under the IDEA, which,

18   in fact, it was.

19   At that point, you go to court having

20   satisfied 1415 --

21   JUSTICE SOTOMAYOR: So you're --

22   you're breaking with the Sixth Circuit?

23   MR. DVORETZKY: I'm --

24   JUSTICE SOTOMAYOR: Because the Sixth

25   Circuit said, if you win the IDEA claim, you're

1   not an aggrieved party, so you can't go and get

2   compensation for your damages. I thought

3   that's what it said.

4   MR. DVORETZKY: So I -- I think that

5   aggrievement is really not a relevant concept

6   here. If you --

7   JUSTICE SOTOMAYOR: Oh, I agree with

8   you. So you're disagreeing with the Sixth

9   Circuit's analysis?

10   MR. DVORETZKY: Well, on that

11   particular --

12   JUSTICE SOTOMAYOR: Just answer the

13   question.

14   MR. DVORETZKY: On that point, yes,

15   because I think aggrievement isn't really the

16   relevant concept. What is relevant under

17   1415(i), which, as this Court has said --

18   JUSTICE SOTOMAYOR: Continue answering

19   Justice Barrett. I just wanted to make sure we

20   were on the same page.

21   (Laughter.)

22   MR. DVORETZKY: And what page was

23   that?

24   JUSTICE BARRETT: I think you've

25   mostly answered. I mean, I -- I guess you're

 1   -- you are envisioning a world, it seems maybe

 2   a very narrow world, in which an ADA claim

 3   could be pursued after your vision of

 4   exhaustion occurs.

 5   MR. DVORETZKY: I think it could.

 6   Whether it is -- whether it's narrow or not may

 7   depend on what remedies are ultimately

 8   available under the ADA, which I think, in

 9   light of Cummings --

10   JUSTICE BARRETT: Cummings.

11   MR. DVORETZKY: -- and in light of the

12   same contract analysis that would apply to a

13   lost income claim, under state law, you

14   generally can't have a breach of contract claim

15   for educational malpractice. And so whether

16   it's an emotional distress claim, whether it's

17   a lost income claim, I don't think that there

18   are meaningful damages that would be available

19   under the ADA given the state of the law right

20   now.

21   But, yes, that sort of claim could be

22   brought after exhaustion of the -- the ID -- of

23   -- of -- of the procedures in (f) and (g).

24   JUSTICE JACKSON: Can I ask you the

25   same -- maybe the same question as the

 1   hypothetical just so that I understand because

 2   I think I'm a little confused?

 3   So suppose we have a student who has

 4   both a viable IDEA claim and a viable ADA claim

 5   arising out of the same facts, which is the

 6   school is not giving her what she needs to get

 7   an appropriate education. But, for whatever

 8   reason, she only wants to bring the claim for

 9   money damages. Maybe she's going into her

10   senior year, she's given up on education and

11   she wants to go to work, so she doesn't want

12   any of the, you know, adjust my education, give

13   me the actual accommodations. She just wants

14   to drop out and go to work and get compensatory

15   damages for the harm that's been caused, she

16   says, by the school's neglect under the ADA.

17   Does she have to exhaust using the

18   procedures in this statute or not?

19   MR. DVORETZKY: I think she does, but,

20   in order to answer that question, I also have

21   to just challenge one premise of it, which is I

22   think that in -- generally speaking, even after

23   you have graduated, you can still get redress

24   for the denial of a FAPE through the IDEA in --

25   JUSTICE JACKSON: But not compensatory

 1   damages. She doesn't want any of the

 2   injunctive relief related to the circumstances

 3   of education. So whatever the relief is that

 4   she could have gotten from the hearing officer

 5   about the state or status of her educational

 6   circumstances she disclaims. All she wants is

 7   to be compensated for what she says occurred to

 8   her during the period of her education. And so

 9   she says: I don't want to bring an IDEA claim,

10   I have an ADA claim.

11   Does she have to sit in front of the

12   hearing officer and talk about ways in which

13   her education could be changed, et cetera?

14   MR. DVORETZKY: Yes. And I think what

15   she could get under the IDEA in that situation

16   is compensatory education. She can have

17   additional, even after she's graduated,

18   additional forward --

19   JUSTICE JACKSON: But she doesn't want

20   that. She doesn't want that. She doesn't --

21   she's saying: I'm 18, I don't have to go to

22   school anymore, I don't want to go to school

23   anymore, I'm dropping out, I just want

24   compensatory damages under the ADA.

25   What I'm trying to understand is why

 1   do we have a statute in your view that would

 2   make her exhaust under the IDA -- the IDEA, as

 3   if she was asking for that other form of

 4   relief?

 5   MR. DVORETZKY: Because whatever her

 6   preference is as to damages, Congress's

 7   priority in enacting the ADA and in -- as

 8   reflected in 1415(l) was first and foremost to

 9   make sure that people get a FAPE.

10   And so the remedy that she would get

11   for the denial of a FAPE may not be immediately

12   her first choice. She might --

13   JUSTICE JACKSON: And you don't see

14   yourself as reading out the first part of the

15   statute that says nothing about this limits the

16   person's remedies or rights under the non-IDEA

17   statute?

18   MR. DVORETZKY: I don't, because the

19   second part of 1415(l) starts out by saying

20   except that, before the filing of a civil

21   action. So the first half is preserving some

22   remedies, but the second half is by its terms

23   creating a carveout, and that carveout requires

24   FAPE-related claims to be channeled through the

25   IDEA. That may result in a situation, as I

1   say, where the plaintiff doesn't get right off

2   the bat whatever their first-choice specific

3   remedy is. They get what the IDEA provides.

4   They have to wait six months or

5   however long it takes to then go to court and

6   seek damages, but Congress's goal in passing

7   the IDEA was to make sure that people get

8   FAPEs, and Congress's prioritization and

9   sequencing of IDEA and non-IDEA claims in

10   1415(l) reflect that.

11   With respect to -- if I can go back to

12   Justice Alito's earlier question, which I think

13   was, if we are in the world of default rules as

14   to the settlement issue, why is our default

15   rule preferable for that situation?

16   I think a couple of points. One, our

17   default rule leads to global settlement.

18   Global settlement is generally preferred. It

19   is generally preferred because, once the

20   parties have agreed on a FAPE, the parents and

21   the school still have to continue to cooperate

22   and working together in that -- work together

23   in that situation. And so having global peace

24   rather than having separate litigation, if

25   you're looking for a default rule, is the

 1   better default rule.

 2   Second, if you are going to have

 3   subsequent litigation, Congress's preference

 4   was for that to be informed by an

 5   administrative finding -- by administrative

 6   findings and decision and the expertise of the

 7   educational experts who are involved in the

 8   IDEA process. And so, if we have to have a

 9   default rule, the default rule ought to be

10   against subsequent litigation without that

11   expertise.

12   Third, this is just how the text

13   operates with the somewhat peculiar language of

14   1415(l). To Justice Thomas's point earlier,

15   I'm not aware of another statute that subjects

16   one -- that subjects a claim under one statute

17   to exhaustion procedures under another, but

18   that by its plain terms is what 1415(l) is

19   doing. So our default rule honors that text.

20   If you were to create an exception to

21   that, it would potentially open the flood gates

22   to other sorts of exceptions to futility or

23   exhaustion that one might seek, and that's

24   going to lead to uncertainty and further

25   litigation in the lower courts.

 1   And, lastly, on the equities, as I was

 2   saying to Justice Barrett, in light of the

 3   state of the law right now, it's not clear that

 4   there even are compensatory damages available

 5   under the ADA. And so there is no great

 6   inequity in holding as a default rule that once

 7   you have gotten the FAPE, which was Congress's,

 8   again, primary purpose in enacting the IDEA,

 9   once you've gotten that, at that point, you

10   have gotten --

11   JUSTICE KAGAN: Well, no, no one's

12   decided that question yet, Mr. Dvoretzky. So,

13   while those damages remain open and potentially

14   available, the question is, you know, what

15   should Miguel have done?

16   I think Mr. Martinez stood up and the

17   first words out of his mouth were Miguel did

18   everything right. And it's hard for me to see

19   how that's not true.

20   What should Miguel have done

21   differently from what he did do in this case?

22   MR. DVORETZKY: I think a plaintiff in

23   that situation has several options. One is, as

24   part of the settlement, to negotiate whatever

25   compensation he thinks he's entitled to for his

1   non-IDEA claims.

2   Another is to negotiate as part of the

3   settlement a waiver from the school of the

4   exhaustion requirement and then proceed to

5   court. So there were options as part of that

6   global settlement to get --

7   JUSTICE KAGAN: But, you know --

8   MR. DVORETZKY: -- the full relief he

9   was asking for.

10   JUSTICE KAGAN: -- Sturgis was not,

11   for all we know, offering any of those things.

12   So what's he supposed to do?

13   MR. DVORETZKY: Negotiate, I mean, as

14   in all settlements.

15   JUSTICE KAGAN: Better -- negotiate

16   better. Just pound his fist on the table with

17   your legal rule such that Sturgis doesn't have

18   to offer any of those things because he can't

19   -- he has two choices. He can either reject a

20   good settlement which is enabling him to

21   receive educational services or give up on the

22   potential, which this statute clearly gives

23   him, of getting compensatory damages as well

24   under the ADA.

25   MR. DVORETZKY: Justice Kagan, I think

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1   that takes us back to the default rule point,

2   which is whichever rule this Court adopts,

3   either side could, if it wanted, pound its fist

4   on the table and insist on one outcome or

5   another.

6   Either you can -- either a plaintiff

7   can insist on getting full recovery or a waiver

8   or a school district could insist if it wanted

9   to on no deal unless it gets a waiver. I mean,

10   I'm sorry, unless it gets a full release.

11   The other point that I'll make as a

12   practical matter, though, and I think it's also

13   true in this case, although these facts haven't

14   been developed because the case hasn't been

15   litigated, school districts have an interest in

16   starting to provide the FAPE as soon as they

17   are aware and as soon as their lawyers make

18   their aware -- make them aware that there has

19   been some deficiency. It's not in a school

20   district's interests to say we're going to hold

21   the FAPE hostage.

22   JUSTICE KAGAN: But parents also have

23   an interest in that, and that suggests why your

24   sort of the sky is falling isn't going to

25   happen, because, of course, parents are not

1   going to bypass the process that gives them

2   most speedily, most inexpensively, the

3   opportunity to get the education fixed.

4   So, yes, they're going to go and --

5   and try to get that, but, at -- you know, at

6   the same time, they may also want, you know,

7   I'm entitled under the ADA for damages.

8   MR. DVORETZKY: Justice Kagan, I don't

9   know that as a practical matter that that view

10   of how parents will operate is always going to

11   be true. Having spoken --

12   JUSTICE KAGAN: Well, I don't know

13   that your view of how school districts are

14   going to operate is always going to be true.

15   As between the two, it strikes me that actually

16   it's the parents that have the greater

17   incentive to get the education fixed for their

18   child.

19   MR. DVORETZKY: I think that sometimes

20   that --

21   JUSTICE KAGAN: This isn't litigation

22   being run by a lot of rapacious lawyers, you

23   know. This is litigation being run by parents

24   who are trying to do right by their kids.

25   MR. DVORETZKY: And -- and I certainly

1   think that most parents and most school

2   districts are trying to do right by the kids.

3   I absolutely -- absolutely think that that's

4   right.

5   I think part of the reason that we

6   have not seen a rush to the courthouse seeking

7   just damages claims, bypassing the IDEA, is

8   that the circuits have been aligned, that

9   there's been a circuit consensus in favor of

10   our rule on the first question presented that

11   you can't do that if you're going to court and

12   you're seeking damages for what is

13   fundamentally a denial of FAPE claim.

14   And so, when we talk about whether the

15   sky is falling in the real world, the reason

16   that it hasn't been is that the lower courts

17   have aligned around the rule that we're asking

18   this Court to adopt in the first question.

19   JUSTICE BARRETT: But what about

20   Mr. Yang's point that the majority rule in the

21   circuits is that the futility exception

22   applies? And he pointed out that the sky

23   hasn't fallen, even though, as a practical

24   matter, the futility exception essentially, you

25   know, cuts in favor of Mr. Martinez's position

1   on the antecedent question?

2   MR. DVORETZKY: I don't think that the

3   circuits have adopted a futility -- that an

4   overwhelming number of circuits have adopted a

5   futility rule in this context. Lower courts

6   have recognized some futility exceptions to the

7   IDEA, yes, but not futility exceptions for

8   either damages or settlement. The overwhelming

9   weight of authority has been about situations

10   like the ones this Court addressed in -- in

11   Smith and Honig, for example, where you are

12   challenging the -- the procedures themselves,

13   you might have futility.

14   Where a school district wants to

15   challenge the stay put provision because of a

16   dangerous child, you might have futility that

17   lets you go straight to court. But it's not

18   this kind of a situation where you're invoking

19   futility in order to avoid exhaustion of a

20   damages claim where you could get relief for

21   denial of a FAPE through the IDEA.

22   CHIEF JUSTICE ROBERTS: Thank you,

23   counsel.

24   Justice Thomas?

25   JUSTICE THOMAS: Can you think of any

1   claim in the context of this case that could

2   have been brought under ADA that need not have

3   been exhausted?

4   MR. DVORETZKY: Hypothetically -- and

5   this is not what was alleged here -- but if you

6   had a situation where the plaintiffs wanted to

7   say Mr. Perez was -- was denied educational

8   services -- well, this would -- I guess this

9   wouldn't be an ADA claim. It could be an equal

10   protection claim, for example, saying he was

11   denied educational services because of his race

12   and compare his treatment to that of this other

13   kid over there.

14   That's a FAPE-related claim, but I

15   think, in that situation, the gravamen of the

16   complaint isn't really the denial of the FAPE;

17   it's the equal protection claim. So there are

18   some -- some FAPE-related claims that could

19   still be brought, and I think, again, that's

20   the Fry question about what is really the

21   gravamen of what is being complained about

22   here.

23   CHIEF JUSTICE ROBERTS: Justice Alito?

24   Justice Sotomayor?

25   Justice Kagan?

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 1             Justice Gorsuch?
 2             JUSTICE GORSUCH:  I do want to just
 3    ask you one more question about the relief
 4    point because it seems like you spent most of
 5    your time elsewhere, understandably.  The text
 6    says "relief that is also available under this
 7    subchapter."  I mean, just focus with me for a
 8    second on just those words.
 9             MR. DVORETZKY:  Sure.
10             JUSTICE GORSUCH:  What about that
11    speaks of gravamen?  I -- I would have -- you
12    know, the natural reading for me at least would
13    have been to suggest that I look at what relief
14    is -- is legally available or permissible under
15    that subchapter.  I don't see gravamen hiding
16    in there.
17             MR. DVORETZKY:  I think the -- the way
18    I would read those words is "relief" can either
19    mean -- in the ordinary sense, if I say I got
20    relief from something, that doesn't necessarily
21    mean that I got the relief that I wanted.  It
22    just means that my injury was redressed.
23             JUSTICE GORSUCH:  I understand that as
24    a potential reading.  I -- I will spot you
25    that, that sometimes the law uses the word in
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1   that sense.

2   What about these words suggest that

3   sense?

4   MR. DVORETZKY: I think -- I think, if

5   you look at "relief that is also available,"

6   those words in isolation don't suggest either

7   sense. I think you -- you need to under --

8   JUSTICE GORSUCH: Why don't they

9   suggest to a judge that he or she should go

10   look and see what remedies or reliefs, forms of

11   relief, are legally available under this

12   subchapter?

13   MR. DVORETZKY: I don't think it

14   suggests what forms of relief. It doesn't say

15   what forms of relief. It doesn't say such laws

16   seeking particular types of relief that are

17   also available under this subchapter.

18   JUSTICE GORSUCH: Seeking relief that

19   is also available under this subchapter.

20   You're right. It doesn't say "particular." It

21   doesn't say "forms." But it does say

22   "available under this subchapter."

23   MR. DVORETZKY: But -- but -- but I

24   think that the -- the lack of saying

25   "particular" or "forms" is exactly what allows

 1   this phrase to mean -- to be understood in

 2   either sense. I don't think that just looking

 3   at those five words in isolation tells you one

 4   way or another.

 5   I think that the context of what

 6   Congress was trying to achieve in the IDEA,

 7   which, as Fry recognized, was primarily to

 8   ensure that students get a -- get a FAPE first

 9   and foremost, that does suggest our reading

10   because, otherwise, parents could circumvent

11   that by going straight to court without the

12   benefit of the educational experts that

13   Congress wanted to put in place and without

14   potentially even getting --

15   JUSTICE GORSUCH: I understand your

16   purposivist arguments. I was just curious

17   about your textualist ones.

18   MR. DVORETZKY: So I -- I think, on

19   the textual point, again, I think the text can

20   be read either way, and so, at that point, I

21   wouldn't think of it as a purposivist argument

22   as much as I would about a contextual -- as a

23   contextual argument which actually derives from

24   elsewhere in the IDEA's text, including the --

25   the IDEA's statement that it seeks to ensure

1   the availability of a FAPE first and foremost.

2   JUSTICE GORSUCH: Thank you.

3   CHIEF JUSTICE ROBERTS: Justice

4   Barrett?

5   JUSTICE BARRETT: No.

6   CHIEF JUSTICE ROBERTS: No?

7   Justice Jackson?

8   JUSTICE JACKSON: So just going back

9   to what Justice Gorsuch just explored with you,

10   I guess I'm wondering why the word "seeking" in

11   the statute doesn't undermine your view.

12   I mean, you -- you suggest that you,

13   you know, come to the hearing officer and you

14   get what you get and you don't get upset and

15   you don't get to choose.

16   (Laughter.)

17   JUSTICE JACKSON: That's what my

18   daughters sometimes say.

19   So -- but -- but don't we have

20   language in the statute just before the five

21   words that you focused on that we have to take

22   into account with respect to what it is that

23   the person is actually seeking? Help -- help

24   me to understand whether you're cutting that

25   out of the -- of -- of your scenario or how it

1   squares with your view that it doesn't matter

2   what it is that you -- you really want in terms

3   of your relief.

4   MR. DVORETZKY: I think it really all

5   comes back, Justice Jackson, to the word

6   "relief." When we talk about seeking relief,

7   if I have some injury, somebody broke my arm,

8   I'm seeking -- I'm seeking medical care for

9   that arm. It doesn't matter whether I think I

10   should have a cast or a sling or what. Like,

11   that might be the specific relief that I'm

12   seeking, but, actually, I just go to the doctor

13   and I get redress for my broken arm.

14   JUSTICE JACKSON: And going back --

15   MR. DVORETZKY: And I'm -- that's what

16   I'm seeking.

17   JUSTICE JACKSON: -- to my hypo, if

18   I'm seeking money and -- and compensation for

19   the school's failure to accommodate me when I

20   asked for it all those years, is -- is that a

21   separate claim? Is it not? Is it covered? Do

22   I have to exhaust that?

23   MR. DVORETZKY: I think that takes us

24   back to the Fry gravamen question. The way to

25   think about that is that regardless of whether

1   you are seeking money or further education or

2   anything else, what you are seeking at bottom

3   is redress for a FAPE denial. That's what

4   you're seeking. And the IDEA --

5   JUSTICE JACKSON: So there's no ADA

6   claim that's preserved? Justice Thomas asked

7   you about, like, what other claims could go on

8   without being exhausted. There's no ADA

9   reasonable accommodations claim that is -- that

10   you can bring directly in court in -- under

11   your view?

12   MR. DVORETZKY: It -- not -- not --

13   JUSTICE JACKSON: You -- you talked

14   about the equal protection claim. I'm just

15   trying to --

16   MR. DVORETZKY: Well --

17   JUSTICE JACKSON: -- understand if

18   there's an ADA claim that could be brought.

19   MR. DVORETZKY: -- not if the gravamen

20   of your complaint is seeking a FAPE denial.

21   But, again, I think that's just what follows

22   from Fry, that however you frame your

23   complaint, whether you call it a FAPE denial

24   claim or not, we ask, what at bottom are you

25   actually seeking?

 1   And that's where the two questions of

 2   Fry are helpful because they ask, could a

 3   student at the school -- I'm sorry, could an

 4   adult at the school have brought the same

 5   claim? Could a student at another public

 6   facility have brought the same claim?

 7   If the answer is yes -- if the answer

 8   is yes, then, in that situation, you are not

 9   actually seeking a FAPE denial. But, if the

10   answer to those questions is no, then whatever

11   you call it, the relief that you're seeking is

12   relief for the denial of a FAPE. It's my

13   broken arm example.

14   JUSTICE JACKSON: Thank you.

15   CHIEF JUSTICE ROBERTS: Thank you.

16   Justice Kagan?

17   JUSTICE KAGAN: I mean, I just wanted

18   to ask a question because you've been invoking

19   Fry repeatedly. And, of course, it's true that

20   Fry specifically reserved the question that

21   we're talking about.

22   MR. DVORETZKY: Yeah.

23   JUSTICE KAGAN: It could not have been

24   clearer. It -- it -- it --

25   MR. DVORETZKY: That's true.

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1              JUSTICE KAGAN:  -- specifically
2     reserved it twice.  And it's -- it's -- it's
3     just kind of not right logic to argue from Fry
4     to your gravamen position.
5              I mean, what Fry said was, look, if
6     you're not objecting to the denial of a FAPE at
7     all, then you're obviously outside the sphere
8     of the exhaustion requirement.  And then it
9     said:  And then there's another question, which
10    is, if you're seeking relief for that denial of
11    a FAPE that's not available under the IDEA,
12    i.e., if you're seeking compensatory damages,
13    which everybody understood not to be available
14    under the IDEA.  And that's the question that
15    Fry says nothing about.  Is that correct?
16             MR. DVORETZKY:  Justice Kagan, it is,
17    of course, absolutely correct that Fry did not
18    decide this question and reserved that
19    question.
20             I think Fry recognized --
21             JUSTICE KAGAN:  It didn't even
22    indicate -- I mean, it didn't hint, it didn't
23    provide evidence of.  All that -- you're --
24    you're -- Fry said there's a necessary
25    condition, which is, are you objecting to the
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 1   denial of a FAPE? That's a really different

 2   question from is that a sufficient condition,

 3   which is the -- the position that you're

 4   taking.

 5   MR. DVORETZKY: Justice Kagan, my only

 6   point is that there are certain key principles

 7   about the IDEA, including the primacy of a FAPE

 8   and the importance of the IDEA's procedures,

 9   that drive the analysis to the question -- to

10   the question that's before the Court today and

11   that I think Fry also recognized. That's all.

12   CHIEF JUSTICE ROBERTS: Thank --

13   MR. DVORETZKY: Fry recognized those

14   principles.

15   CHIEF JUSTICE ROBERTS: Thank you,

16   counsel.

17   Rebuttal, Mr. Martinez?

18   REBUTTAL ARGUMENT OF ROMAN MARTINEZ

19   ON BEHALF OF THE PETITIONER

20   MR. MARTINEZ: Your Honors, I think

21   Sturgis's answer to Justice Kagan's question

22   about Miguel's dilemma really gives away the

23   game here. Their answer is that if Sturgis had

24   refused to cave in, had refused to give Miguel

25   more than it had already negotiated, Miguel

1   would have had to reject the settlement, turn

2   down the immediate FAPE relief, and roll the

3   dice in an IDEA proceeding that might risk not

4   only his recovery but also his attorneys' fees.

5   No way. That's not what the statute is about.

6   And I think what that answer shows is

7   what Sturgis is really seeking here is a rule

8   that's going to nullify ADA rights and it's

9   going to resurrect the regime of Smith versus

10   Robinson that Congress expressly rejected.

11   A couple of additional points.

12   With respect to the text, their

13   interpretation of "relief" means that if I go

14   and I file an ADA claim and a complaint and it

15   says in the complaint that I do not want

16   injunctive relief or any other relief that's

17   available under the IDEA, in their view, my

18   complaint is still seeking relief that is

19   available under the ADA.

20   That can't possibly be right. It's

21   inconsistent with the dictionaries,

22   inconsistent with Fry, inconsistent with the

23   legislative history, and it's inconsistent with

24   common sense.

25   So they don't have a good textual

1   argument, so they fall back to policy. But

2   policy can't beat text, and it certainly can't

3   beat text here when their circumvention

4   argument doesn't work. Miguel settled and

5   received full FAPE relief. He did not

6   circumvent anything, number one.

7   Number two, in other cases, parents

8   are not going to have an incentive to

9   circumvent because they're going to have to

10   give up all the IDEA relief that they would

11   otherwise be -- have available to them. The

12   ADA claim is going to be harder to prove.

13   They're just not going to do that. They're

14   going to try to maintain and preserve their

15   rights under both statutes.

16   With respect to policy, our rule makes

17   much more sense than their rule. It avoids a

18   pointless exercise in which you have to go to

19   an IDEA hearing officer and ask for relief that

20   the IDEA hearing officer has no authority to

21   give, and it avoids the result in this case

22   where, as we've said repeatedly, Miguel did

23   everything right. He settled, he got the FAPE,

24   and he nonetheless, on their view, has to give

25   up his ADA claims.

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 1              With respect to the default rule
 2    point, Mr. Dvoretzky for the first time says
 3    that oh, what -- what everyone knows you should
 4    have had to do is negotiate a waiver of the
 5    exhaustion requirement.  Well, that's asking a
 6    lot for parents who are struggling with kids
 7    with disabilities to -- to have to negotiate
 8    that fine-tuned a waiver, and it's also not
 9    clear that it's even available.
10              There's a circuit split right now on
11    the question of whether exhaustion is, in fact,
12    jurisdictional.  So, if that rule is in effect,
13    I don't know what parents are supposed to do in
14    circuits that say you can't make such a waiver.
15    At a minimum, it's going to mean that this
16    Court is going to have to decide another case
17    involving this provision.  I don't think that
18    makes any sense.
19              Finally, with respect to purpose, Mr.
20    Dvoretzky says this is all about the primacy of
21    a FAPE.  Of course, the IDEA is about the
22    primacy of a FAPE.  That's exactly what Miguel
23    did when he invoked his IDEA rights, went to
24    the IDEA process, and convinced the -- the
25    Sturgis, after having discriminated against him
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1   for 12 years, finally convinced the school to

2   give him a FAPE.

3   That was the settlement that he

4   reached. The IDEA is also intended, though, to

5   protect other legal rights, and Congress did

6   not intend to force the parents of Miguel and

7   other victims of discrimination to give up

8   those rights in order to reach settlements.

9   We ask this Court to reverse. Thank

10   you, Your Honors.

11   CHIEF JUSTICE ROBERTS: Thank you,

12   counsel. The case is submitted.

13   (Whereupon, at 11:31 a.m., the case

14   was submitted.)

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