

## COMMENTS

### **Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief after *Fry v Napoleon Community Schools***

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*The Individuals with Disabilities Education Act (IDEA) is a federal statute that protects the rights of students with disabilities by conferring onto them a substantive right to a free, appropriate public education (FAPE). Under the IDEA, aggrieved parents may demand a “due process hearing,” an administrative process presided over by an impartial hearing officer through which students and families may seek redress for violations of the IDEA. Due process hearings, however, allow only for certain types of relief—notably, money damages are not available under the IDEA. Students with disabilities are also protected under other statutes, including the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act. Parents may sue under these sister statutes but, in most cases, must first exhaust their administrative remedies by seeking a due process hearing pursuant to 20 USC § 1415(l).*

*This Comment addresses an unanswered question about § 1415(l) that the Supreme Court explicitly left unaddressed in its recent decision in *Fry v Napoleon Community Schools*: if a family alleges a denial of a FAPE—which *Fry* held triggered exhaustion—but sought relief that the IDEA could not provide, including money damages, is exhaustion required? With respect to this question, the lower courts are split.*

*By applying principles of statutory interpretation, examining the history of the IDEA, and considering the policy implications of exhaustion, this Comment argues that exhaustion should not be required in such a case. This conclusion is first rooted in the plain-language reading of the statute, a reading that is confirmed by comparing § 1415(l) to other federal statutes and to the ADA and § 504. Moreover, considering the kinds of cases in which this question would arise by applying the *Fry* standard reveals that waiving exhaustion in such a case creates appropriate deterrence for schools and school districts. Consistent with the core purpose of the IDEA, such a reading of the statute better vindicates the rights of students with disabilities.*

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## INTRODUCTION

Abraham is a young student with Down syndrome living in Los Angeles.<sup>1</sup> He attends a specialized school for students with unique educational needs. This placement allows Abraham to receive tailored educational services but also segregates him from nondisabled peers. That trade-off is a constant compromise for families and educators of disabled children, but things seem to be going fine for Abraham. That is, until 2014, when fourth-grade Abraham comes home from school with large bruises on his forehead. His perplexed mother does not receive any explanation from school. Even more alarming, Abraham becomes deeply fearful of going to physical education class, which, for

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<sup>1</sup> These facts are based on *Abraham P. v Los Angeles Unified School District*, 2017 WL 4839071, \*1–3 (CD Cal).

many elementary school students, is the most exciting part of the day.

For the next two school years, the problem escalates. Abraham's behavior is getting worse, and his parents hear reports of him kicking and spitting at his classmates and teachers. At the same time, Abraham remains terrified of going to school. He comes home bruised, sometimes from self-inflicted injuries, and the staff reports that he has urinated on himself. His parents are flummoxed, and their complaints to the school and to the police have yielded no action. However, their child has particularized educational needs that not every school is equipped to respond to, leaving them with few alternatives.

Abraham finally reports to his parents that the school bus aide and his teacher have both hit him on several occasions. Horrified, they refuse to send him back to school. Eventually, after several rounds of discussion with the school district, they are able to negotiate a different placement, and, thankfully, Abraham's fears of school dissipate. But his parents nonetheless turn to the justice system—there have been fundamental wrongs committed against their child, and they want justice for him. What is the proper relief for Abraham and his family? And what steps are required to obtain it?

In the United States, 6.6 million students, or 13 percent of total public-school enrollment, receive special education services.<sup>2</sup> Those children are protected under several statutes, but the primary vehicle for guaranteeing that students with disabilities are provided with a quality education is the Individuals with Disabilities Education Act<sup>3</sup> (IDEA). States that receive federal funding under the IDEA are required to provide students with disabilities with a “free appropriate public education” (FAPE).<sup>4</sup>

The notion that disabled students deserve a quality education was not always the status quo in the United States. Before the IDEA, disabled children “were excluded entirely from the public school system and from being educated with their peers,” “undiagnosed disabilities prevented the children from having a successful educational experience,” and “a lack of adequate resources within the public school system forced families to find

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<sup>2</sup> *Children and Youth with Disabilities* (National Center for Education Statistics, May 2017), archived at <http://perma.cc/T7CV-DMXC>.

<sup>3</sup> Pub L No 101-476, 104 Stat 1103 (1990), codified as amended at 20 USC § 1400 et seq.

<sup>4</sup> 20 USC § 1412(a)(1)(A).

services outside the public school system.”<sup>5</sup> The IDEA has not entirely eliminated these problems. But, at the very least, the IDEA created a special education system that better protects disabled students and, crucially, provided a mechanism by which parents can demand that their children be adequately served by their public school system. Nevertheless, schools can and do fail their most vulnerable students. Sometimes those failures are especially shocking, as in Abraham’s case. Indeed, Abraham’s case was not an apocryphal story from a time before the IDEA; his case was decided by the Central District of California in October 2017.<sup>6</sup>

The procedural safeguards of the IDEA create a roadmap for parents and families to vindicate the rights of their disabled children, but that roadmap does not lead straight to court. Before a parent may file a complaint, she must exhaust the administrative remedies available under the statute.<sup>7</sup> Although there are some exceptions to that principle, “the IDEA’s exhaustion requirement remains the general rule.”<sup>8</sup> But the IDEA is not the only statute that protects students with disabilities in school—parents may sue under the IDEA’s sister statutes as well. The question of when a parent is required to exhaust administrative remedies in these sister-statute cases was unclear until recently, when it was answered by *Fry v Napoleon Community Schools*.<sup>9</sup> In that case, the Supreme Court held that when a complaint alleges the denial of a FAPE—regardless of whether the complaint invokes the IDEA or a related statute—exhaustion is required.<sup>10</sup>

Two footnotes in *Fry* posed the question that this Comment addresses. In footnote four and footnote eight of the opinion, Justice Elena Kagan was careful to clarify that the Court was declining to decide the following: “Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?”<sup>11</sup> This Comment seeks to answer that question.

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<sup>5</sup> 20 USC § 1400(c)(2)(B)–(D).

<sup>6</sup> See generally *Abraham P.*, 2017 WL 4839071.

<sup>7</sup> See 20 USC § 1415(l).

<sup>8</sup> *M.P. v Independent School District No 721*, 326 F3d 975, 980 (8th Cir 2003).

<sup>9</sup> 137 S Ct 743 (2017).

<sup>10</sup> *Id.* at 752.

<sup>11</sup> *Id.* at 752 n 4. See also *id.* at 754 n 8 (“[W]e do not address here . . . a case in which a plaintiff, although charging the denial of a FAPE, seeks a form of remedy that

To begin, Part I outlines the legal landscape within which this question is situated, including the IDEA, the IDEA's sister statutes, and *Fry*. Part II discusses the pre-*Fry* case law and the circuit split over this lingering question. Part III suggests an answer to the question that *Fry*'s footnotes left for another day. This Comment concludes that the correct answer is no—exhaustion should be waived in cases in which the plaintiff alleges a denial of a FAPE but requests a form of relief that is unavailable under the IDEA. This solution is rooted in statutory interpretation, the purpose of the statute, and policy considerations.

## I. LEGAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

The IDEA is the primary vehicle for protecting American children with disabilities in schools, but it is not the only law that does so. Claims under the Americans with Disabilities Act<sup>12</sup> (ADA) and § 504 of the Rehabilitation Act<sup>13</sup> can proceed without recourse to the IDEA's procedural safeguards due to the addition of § 1415(*l*) to the IDEA in 1990. Importantly, the kinds of relief available under the ADA and the Rehabilitation Act differ from those forms of relief available under the IDEA. This Part details the history and protections of the IDEA, provides an overview of the related provisions and their connection to the IDEA, and discusses how *Fry* changes the landscape of evaluating IDEA complaints.

### A. The IDEA

The IDEA originated as the Education for All Handicapped Children Act<sup>14</sup> (EHA) in 1975. Congress passed this law in response to classrooms and teachers that were ill equipped to educate children with differing needs. Congress designed the EHA as a framework of federal protections to ensure that public schools invested in teaching children with disabilities. The Act conditioned the receipt of federal funds on compliance with its

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an IDEA officer cannot give—for example, as in the Frys' complaint, money damages for resulting emotional injury.”).

<sup>12</sup> Pub L No 101-336, 104 Stat 327 (1990), codified at 42 USC § 12101 et seq.

<sup>13</sup> Pub L No 93-112, 87 Stat 355 (1973), codified at 29 USC § 701 et seq.

<sup>14</sup> Pub L No 94-142, 89 Stat 773 (1975), codified at 20 USC § 1400 et seq.

provisions.<sup>15</sup> The secretary of education gives to compliant states special education assistance grants that are proportionate to the number of students receiving special education services in that state.<sup>16</sup> In 1990, the Act was renamed the Individuals with Disabilities Education Act.<sup>17</sup>

Under the IDEA, eligible children must have a disability that falls under one of the following categories: intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments (attention deficit hyperactivity disorder (ADHD) falls under this vaguely worded category), or specific learning disabilities.<sup>18</sup> A child is eligible if, by reason of such a disability, she requires “special education and related services.”<sup>19</sup>

The “centerpiece of the [IDEA’s] education delivery system for disabled children” is the individualized education program (IEP).<sup>20</sup> An IEP team, consisting of school and district officials and the child’s parents, creates a child’s IEP.<sup>21</sup> The team confers at least yearly to decide which required accommodations, modifications, and related services the individual child needs to receive an adequate public education.<sup>22</sup> Accommodations, modifications, and related services may include such services as: a paraprofessional aide; time with the school social worker, occupational therapist, physical therapist, or other service provider; preferential seating in the classroom; adaptive technology; and partial- or full-day teaching in a special education classroom.<sup>23</sup> The IEP is memorialized in a document that travels with the child from district to district; every school is bound to, at minimum, implement the IEP as written.<sup>24</sup>

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<sup>15</sup> See 20 USC §§ 1411–12. Note that except when the differences are relevant, this Comment does not distinguish between the EHA and the IDEA. “IDEA” refers to the current state of the law regardless of when the individual provision was passed.

<sup>16</sup> See 20 USC § 1411.

<sup>17</sup> IDEA § 901(a)(1)–(3), 104 Stat at 1141–42, 20 USC § 1400(a).

<sup>18</sup> 20 USC § 1401(3)(A)(i).

<sup>19</sup> 20 USC § 1401(3)(A)(ii).

<sup>20</sup> *Honig v Doe*, 484 US 305, 311 (1988).

<sup>21</sup> 20 USC § 1414(d)(1)(B).

<sup>22</sup> 20 USC § 1414(d)(4).

<sup>23</sup> See 20 USC § 1401(26)(A). For the required components of the IEP, see 20 USC § 1414(d); 34 CFR § 300.320.

<sup>24</sup> Courts differ as to the proper standard for evaluating improper-implementation claims. As a general matter, courts are more willing to forgive minor mistakes in implementation but largely require faithful adherence to an IEP’s terms. See, for example, *Houston Independent School District v Bobby R.*, 200 F3d 341, 349 (5th Cir 2000) (holding

Crucially, the IEP team structure is designed to ensure individualization, and the menu of services available to the team is broad. However, the team is bound by certain limiting principles. In particular, the IEP must ensure that each child is in his or her “least restrictive environment.”<sup>25</sup> That is, a child must be integrated into the general education setting with reasonable, appropriate support to the greatest extent possible.<sup>26</sup> This provision is designed to prevent the languishing effect noticed by Congress in 1975, wherein special education students shunted to an alternative classroom were segregated, sometimes needlessly, from their nondisabled peers.<sup>27</sup>

The IDEA promises that, thanks to their IEP, every covered student shall receive a FAPE.<sup>28</sup> Once a child is eligible under the IDEA, she acquires a “substantive right” to a FAPE.<sup>29</sup> The precise contours of the FAPE standard have been mapped out in case law. *Board of Education of Hendrick Hudson Central School District, Westchester County v Rowley*,<sup>30</sup> an early case addressing the FAPE standard, held that a child receives a FAPE when her program is “reasonably calculated to enable the child to receive educational benefits.”<sup>31</sup> This was a victory for disabled students in some sense because the school district argued that the FAPE requirement was not a substantive requirement at all; that holding would have rendered the IDEA toothless. Nonetheless, courts disagreed on the exact meanings of “reasonably calculated” and “educational benefits” for decades. *Rowley* made clear that schoolchildren with IEPs were not necessarily entitled to make progress commensurate with their nondisabled peers.<sup>32</sup>

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that the plaintiffs’ allegation of a failure to implement the IEP must show that the failure was more than de minimis); *Van Duyn v Baker School District 5J*, 502 F3d 811, 819 (9th Cir 2007) (“[O]nly material failures to implement an IEP constitute violations of the IDEA.”).

<sup>25</sup> 20 USC § 1412(a)(5).

<sup>26</sup> 20 USC § 1412(a)(5)(A).

<sup>27</sup> See *Education for All Handicapped Children Act of 1975*, HR Rep No 94-332, 94th Cong, 1st Sess 2 (1975) (“In 1966, . . . only about one-third of the approximately 5.5 million handicapped children were being provided an appropriate special education. The remaining two-thirds were either totally excluded from schools or sitting idle in regular classrooms awaiting the time when they were old enough to ‘drop out.’”).

<sup>28</sup> 20 USC § 1412(a)(1)(A).

<sup>29</sup> *Fry*, 137 S Ct at 749.

<sup>30</sup> 458 US 176 (1982).

<sup>31</sup> *Id* at 207. This standard applies if the IEP was properly constructed through the procedures of the Act. Procedural deficiencies may also be the basis for legal recourse. *Id* at 206.

<sup>32</sup> See *id* at 198.

Some courts determined that a FAPE nonetheless entitled the student to *meaningful* educational benefits, while others suggested that educational benefits had to be merely more than de minimis (some benefit as opposed to no benefits).<sup>33</sup>

The Supreme Court resolved the circuit split and defined a FAPE more precisely in the 2017 case *Endrew F. v Douglas County School District RE-1*.<sup>34</sup> Per the *Endrew F.* court, to meet the FAPE requirement, “a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”<sup>35</sup> Consistent with the IDEA’s emphasis on individualization, determining whether a district has provided a FAPE post-*Endrew F.* requires holistic consideration of a student’s circumstances and of what progress should look like for that child.<sup>36</sup> Albeit far from a bright-line rule, “this standard is markedly more demanding than the ‘merely more than *de minimis*’” standard proffered by several lower courts.<sup>37</sup>

A parent alleging that her child’s school has failed to provide a FAPE—whether by crafting a deficient IEP, failing to comprehensively implement the IEP, or failing to identify that her child needed an IEP<sup>38</sup>—may seek recourse for the school’s failures via the procedural safeguards of the IDEA.<sup>39</sup> The parent or another education rights holder may file a complaint with her state educational agency, initiating a procedure known as a “due process hearing.”<sup>40</sup> Procedural requirements are crafted by each state’s education agency and thus vary state to state.<sup>41</sup>

For a sampling of what procedural safeguards look like in some of the largest school districts in the country, consider first

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<sup>33</sup> Compare, for example, *Deal v Hamilton County Board of Education*, 392 F3d 840, 861–63 (6th Cir 2004) (“IDEA requires an IEP to confer a meaningful educational benefit gauged in relation to the potential of the child at issue.”) (quotation marks and citation omitted), with *Sytsema v Academy School District No 20*, 538 F3d 1306, 1313 (10th Cir 2008) (“This court has interpreted the *Rowley* standard to require an educational benefit that is more than *de minimis*.”).

<sup>34</sup> 137 S Ct 988 (2017).

<sup>35</sup> *Id.* at 999.

<sup>36</sup> *Id.* at 999–1000.

<sup>37</sup> *Id.* at 1000.

<sup>38</sup> Schools are required to identify children who may need special education services under the IDEA’s “Child Find” provision. 20 USC § 1412(a)(3).

<sup>39</sup> See 20 USC § 1415.

<sup>40</sup> 20 USC § 1415(f).

<sup>41</sup> See 20 USC § 1415(a) (delegating to state authorities the responsibility to “establish and maintain procedures” to ensure that students with disabilities and their families are “guaranteed procedural safeguards with respect to the provision of a free appropriate public education”).

Chicago Public Schools (CPS) (371,382 students in school year 2017–2018, 13.7 percent of whom have IEPs).<sup>42</sup> CPS students have the option of filing a complaint with the Illinois State Board of Education, which will then initiate an investigation and render a conclusion that may or may not include a recommendation for a remedy.<sup>43</sup> They may also or instead file a formal due process request, which will initiate a hearing presided over by an Impartial Hearing Officer (IHO).<sup>44</sup> Parents may alternatively or additionally request mediation.<sup>45</sup> By contrast, in New York City (more than 1,000,000 students enrolled in school year 2016–2017, of whom 221,198 students, or 19.4 percent, have disabilities),<sup>46</sup> the Department of Education first requires an initial hearing. Either the parent or the district may appeal to a state review officer from the New York State Department of Education within thirty days of the decision.<sup>47</sup> Finally, in the Los Angeles Unified School District (more than 633,000 students in school year 2016–2017, of whom 12 percent receive special education services),<sup>48</sup> mediation is generally required as a prerequisite to a hearing; after that additional step, the hearing proceeds similarly to other states.<sup>49</sup>

This overview of procedural safeguards in several large school districts across the country illustrates the steps parents must take before vindicating their rights in court. The administrative process “generally mirrors the procedural and adversarial nature of an action in civil court, resulting in an elongated trial-like process.”<sup>50</sup> Like a lawsuit, the process begins with a

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<sup>42</sup> *CPS Stats and Facts* (Chicago Public Schools), archived at <http://perma.cc/25WY-WKX4>.

<sup>43</sup> *Procedural Safeguards and Parental Supports* (Chicago Public Schools), archived at <http://perma.cc/J6ZU-NBQB>.

<sup>44</sup> *How to Address Concerns: The Dispute Process* (Chicago Public Schools), archived at <http://perma.cc/UZC3-2MJX>.

<sup>45</sup> *Id.*

<sup>46</sup> NYC Department of Education, *Annual Enrollment Snapshot*, online at <http://schools.nyc.gov/Accountability/data/default.htm> (visited Mar 25, 2018) (Perma archive unavailable) (Demographic Snapshots spreadsheet).

<sup>47</sup> NYC Department of Education, *Family Guide to Special Education Services for School-Age Children: A Shared Path to Success* \*38–39, archived at <http://perma.cc/G2NF-AUEE>.

<sup>48</sup> *Los Angeles Unified* (Ed Data), archived at <http://perma.cc/P264-KD2R>.

<sup>49</sup> California Office of Administrative Hearings, *Special Education Handbook* \*14–15 (2016), archived at <http://perma.cc/S2QU-QHRR>.

<sup>50</sup> Kent Sparks, Comment, *Requiring Administrative Exhaustion While the School Shuts Down: An Insurmountable Barrier to Seeking IDEA Enforcement*, 2014 Mich St L Rev 1161, 1173.

formal complaint, which triggers often lengthy procedural steps.<sup>51</sup> At the hearing itself, complainants have the right to representation by counsel,<sup>52</sup> the right to a transcript of the proceedings,<sup>53</sup> and “the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.”<sup>54</sup> As such, while not a civil lawsuit, a due process hearing can still be a costly and drawn-out process.

There are strong arguments in favor of the due process hearing: the impartial hearing officers have deep expertise in this area of the law, judicial efficiency is promoted by filtering out some cases, and state agencies have an interest in resolving education disputes, to name a few.<sup>55</sup> Nonetheless, there are sometimes compelling reasons to waive exhaustion, which would permit the aggrieved party to go straight to court to redress their claims. The general standard is that exhaustion can be waived when its pursuit would be “futile or inadequate.”<sup>56</sup> This standard is not unique to the IDEA; in some other administrative contexts, courts also ask whether exhaustion would be futile or inadequate to determine whether waiver is appropriate.<sup>57</sup>

If the student prevails at the due process hearing, the relief to which she is entitled may take several forms. Relief available under the IDEA is equitable in nature, and courts have “broad discretion” to craft an appropriate remedy.<sup>58</sup> IHOs commonly grant compensatory education, meaning “education services designed to

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<sup>51</sup> Andria B. Saia, *Meeting Special Needs: Special Education Due Process Hearings*, 79 Pa Bar Assoc Q 1, 3–6 (2008) (describing the steps to IDEA procedural safeguards and noting that procedural safeguards under the IDEA mandate “a process that is very much like the filing of any civil complaint” and that the timeline for a due process hearing is “rarely, if ever, met”).

<sup>52</sup> 20 USC § 1415(h)(1).

<sup>53</sup> 20 USC § 1415(h)(3).

<sup>54</sup> 20 USC § 1415(h)(2).

<sup>55</sup> For further discussion of these arguments, see Part III.C.5.

<sup>56</sup> *Honig*, 484 US at 327. Inadequacy exceptions arise when “structural, systemic reforms are sought” or when the substantive claims challenge the administrative proceedings themselves. *Hoelt v Tucson Unified School District*, 967 F2d 1298, 1309 (9th Cir 1992).

<sup>57</sup> See, for example, *Holt v Town of Stonington*, 765 F3d 127, 130 (2d Cir 2014) (stating that futility and inadequacy are exceptions to the administrative exhaustion requirement in a state zoning dispute); *Citadel Securities, LLC v Chicago Board Options Exchange, Inc.*, 808 F3d 694, 700 (7th Cir 2015) (applying the “futile or inadequate” standard to Securities and Exchange Commission administrative procedures).

<sup>58</sup> *Florence County School District Four v Carter*, 510 US 7, 16 (1993), quoting *School Committee of the Town of Burlington v Department of Education of Massachusetts*, 471 US 359, 369 (1985).

make up for past deficiencies in a child's program."<sup>59</sup> However, relief can also include tuition reimbursement for a student's private school placement after a unilateral transfer,<sup>60</sup> prospective changes to the IEP, or reimbursement for an independent educational evaluation.<sup>61</sup> One study of IHO decisions found that, of the due process hearings in which the IHO granted relief for the denial of a FAPE, 44 percent provided tuition reimbursement and 39 percent provided compensatory education (these categories are not mutually exclusive; an IHO may give both).<sup>62</sup> Crucially, however, compensatory and punitive damages are not available under the IDEA.<sup>63</sup> That is, parents may not receive a pure payout through a due process procedure, but they may receive educational services or funding earmarked specifically for educational services (both of which would fall under compensatory education).

#### B. Related Statutes: The ADA and § 504 of the Rehabilitation Act

The IDEA is not the only statute that protects children with disabilities. Title II of the ADA and § 504 of the Rehabilitation Act perform similar functions. The relevant provision of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>64</sup> Section 504 states that no individual "shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>65</sup>

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<sup>59</sup> *Boose v District of Columbia*, 786 F3d 1054, 1056 (DC Cir 2015), citing *Reid v District of Columbia*, 401 F3d 516, 522–23 (DC Cir 2005).

<sup>60</sup> See *Burlington*, 471 US at 369.

<sup>61</sup> 20 USC § 1415(b)(1).

<sup>62</sup> Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J Natl Assoc Admin L Judiciary 214, 229 (2013).

<sup>63</sup> See Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J Natl Assoc Admin L Judiciary 349, 365 (2009).

<sup>64</sup> 42 USC § 12132.

<sup>65</sup> Rehabilitation Act § 504, 87 Stat at 394, 29 USC § 794(a).

In practice, the ADA and § 504 cover more individuals with disabilities than the IDEA does. Students eligible under the IDEA must have a disability that specifically causes them to require special education services, whereas under the ADA and § 504, the disability need only interfere with a major life activity (not necessarily education).<sup>66</sup> Moreover, the ADA Amendments Act of 2008<sup>67</sup> added the expansive qualifier to the ADA that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals.”<sup>68</sup> As a result, students with IEPs may often be entitled to coverage under § 504 and the ADA. The reverse, however, is true only if the student’s needs fit under the IDEA’s more confined definition. Section 504 in particular is widely used in schools to institute accommodations for IDEA-ineligible students through the creation of “504 plans.” Not unlike an IEP, a 504 plan memorializes the accommodations that a child’s school commits to provide so that the child receives a FAPE. The requirements of a 504 plan are not as stringent as the IEP and do not necessarily need to be in writing.<sup>69</sup>

The EHA (the IDEA’s precursor) originally precluded recourse under its sister statutes. In *Smith v Robinson*,<sup>70</sup> the Supreme Court held that “Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education.”<sup>71</sup> The Court reasoned that the EHA scheme was comprehensive and holding otherwise would render the procedures of the statute superfluous.<sup>72</sup> Congress disagreed and responded by passing the Handicapped Children’s Protection Act of 1986.<sup>73</sup> That act amended the EHA by adding § 1415(*l*), which expressly permits remedies “under the Constitution, the Americans with Disabilities Act

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<sup>66</sup> Compare 20 USC § 1401(3)(A) (defining the group of people eligible under the IDEA as those children with a qualifying disability who require special education services), with 42 USC § 12102(1) (defining an individual with a disability under the ADA as a person with a physical or mental impairment for whom that disability limits a major life activity). See also 29 USC § 705(20)(B) (stating that the definition of “individual with a disability” for most provisions of § 504 of the Rehabilitation Act corresponds to the ADA’s definition of the same).

<sup>67</sup> Pub L No 110-325, 122 Stat 3553, codified at 42 USC § 12101 et seq.

<sup>68</sup> ADA Amendments Act of 2008 § 3(4)(A), 122 Stat at 3555.

<sup>69</sup> See *Protecting Students with Disabilities* (Department of Education), archived at <http://perma.cc/M49R-HRCZ>.

<sup>70</sup> 468 US 992 (1984).

<sup>71</sup> *Id.* at 1009.

<sup>72</sup> See *id.* at 1009–11.

<sup>73</sup> Pub L No 99-372, 100 Stat 796, codified at 20 USC § 1415.

of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities.”<sup>74</sup> However, IDEA procedures still must be exhausted if the plaintiff is “seeking relief that is also available” under the IDEA.<sup>75</sup>

### C. *Fry*

Because of the interplay between the ADA, § 504, and the IDEA, it remained unclear until recently whether claims brought under the related statutes required exhaustion. Courts of appeals suggested different approaches to determining when exhaustion was required, but the Supreme Court resolved the question in *Fry*. In an opinion written by Justice Kagan, the Court held that exhaustion is required “when the gravamen of a complaint seeks redress for a school’s failure to provide a FAPE.”<sup>76</sup>

In *Fry*, the student, E.F., disputed her district’s decision to bar her goldendoodle, Wonder, from accompanying her to school. The school argued that all of her educational needs were being met by a one-on-one aide, rendering the dog superfluous. Her parents filed a complaint with the US Department of Education Office of Civil Rights, which issued a decision that found that, under Title II of the ADA and § 504, the school discriminated against E.F. even if the FAPE standard was met. The Frys therefore sued under Title II and § 504, but not the IDEA.<sup>77</sup> The district court dismissed the action, citing the IDEA’s exhaustion requirement, and the Sixth Circuit affirmed.<sup>78</sup> The Supreme Court granted certiorari to resolve the question of when exhaustion was required for education-related suits under related statutes or the Constitution.<sup>79</sup>

The Court first held that exhaustion is required only when the plaintiff is seeking relief for denial of a FAPE. A hearing officer, the Court reasoned, cannot give relief for anything else.<sup>80</sup> Nonetheless, a school’s conduct toward a disabled child may still cause a cognizable injury other than denying her a FAPE; in such a case, exhaustion is unnecessary.<sup>81</sup> The Court then held

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<sup>74</sup> 20 USC § 1415(l).

<sup>75</sup> 20 USC § 1415(l).

<sup>76</sup> *Fry*, 137 S Ct at 755.

<sup>77</sup> *Id* at 751–52.

<sup>78</sup> *Id* at 752.

<sup>79</sup> *Id*.

<sup>80</sup> *Fry*, 137 S Ct at 753.

<sup>81</sup> *Id* at 754.

that in determining whether a plaintiff seeks relief for the denial of a FAPE, one must look to the gravamen of the plaintiff's complaint.<sup>82</sup> It matters not that the complaint failed to evoke the IDEA. What matters is whether the complainant "is in essence contesting the adequacy of a special education program."<sup>83</sup> One tool the Court suggested was to ask whether the plaintiff could have brought the same complaint with respect to another type of public facility. If the complaint is uniquely school related, then it probably does concern a FAPE.<sup>84</sup> The Court also suggested that if an adult at the school could bring the same claim, the plaintiff is less likely to have alleged a denial of a FAPE.<sup>85</sup>

The Court remanded E.F.'s case to the court below, but implied that the facts as alleged did not constitute a denial of a FAPE. The Frys never claimed that E.F.'s educational services or IEP were deficient; indeed, the one-on-one human aide satisfied all of her educational needs.<sup>86</sup> Instead, they alleged that "the school districts infringed E.F.'s right to equal access" even as they complied with the IDEA.<sup>87</sup> However, the possibility remained that the Frys' pursuit of IDEA remedies prior to this litigation constituted evidence that the gravamen of the complaint was a denial of a FAPE.<sup>88</sup>

The contours of what kinds of complaints allege a denial of a FAPE are not yet well defined in the lower courts.<sup>89</sup> Assuming the Fry family never sought IDEA relief, the facts of *Fry* are probably the paradigmatic non-FAPE case. By all accounts, E.F. and her parents were content with the IEP, and the school implemented the IEP completely. The problem was physical access to the facility itself, not the content of E.F.'s education. While lack of access to the school building is peripherally related to access to educational content, this case is easily decided by the questions posed by Kagan: Would this be cognizable if it occurred in a different public sphere? Yes, if a library denied entry

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<sup>82</sup> Id at 755.

<sup>83</sup> Id.

<sup>84</sup> *Fry*, 137 S Ct at 756.

<sup>85</sup> Id.

<sup>86</sup> Id at 758.

<sup>87</sup> Id.

<sup>88</sup> See *Fry*, 137 S Ct at 758.

<sup>89</sup> For further discussion of how the lower courts have treated *Fry* and the issues that have arisen with respect to delineating FAPE from non-FAPE allegations, see Part III.C.

to a person's service dog, that person could sue under the ADA.<sup>90</sup> Could an adult in the building bring the same claim? Also yes—if a teacher's service dog were denied entry, she too would have a case.<sup>91</sup>

But the question whether a complaint alleges denial of a FAPE becomes less clear if the injury is more obviously connected to the educational program. For example, if a child has restraint procedures<sup>92</sup> in his IEP, and he is injured in the course of a faulty restraint, then the injury is intertwined with his educational program. Yet, that injury could have conceivably occurred in a library or theater, as well. This ambiguity is being ironed out in lower courts, but this Comment contends that cases like the above example should be considered a denial of a FAPE.<sup>93</sup> And in some cases, even if a FAPE is implicated, exhaustion should nonetheless be waived when the relief sought cannot be granted by an IHO.<sup>94</sup>

## II. DISAGREEMENT OVER THE ROLE OF RELIEF

In two footnotes, the *Fry* Court expressly left open the following question: If a complaint alleges the denial of a FAPE, but seeks a *form* of relief unavailable under the IDEA, such as compensatory or punitive damages, does the student still need to exhaust administrative remedies? In footnote four, the Court noted that “[t]he Frys, along with the Solicitor General, say the answer is no.”<sup>95</sup> It reiterates the open question in footnote eight:

Once again, we do not address here (or anywhere else in this opinion) a case in which a plaintiff, although charging the denial of a FAPE, seeks a form of remedy that an IDEA

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<sup>90</sup> See, for example, *Spector v Norwegian Cruise Line*, 545 US 119, 128 (2005) (“Title III of the ADA prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations.”), citing 42 USC § 12182(a).

<sup>91</sup> See *Spector*, 545 US at 128.

<sup>92</sup> Under certain circumstances, a student's safety or that of others might require a school official to physically restrain a student. For a summary of all states' rules on these kinds of procedures, see generally US Department of Education, *Summary of Seclusion and Restraint Statutes, Regulations, Policies and Guidance, by State and Territory: Information as Reported to the Regional Comprehensive Centers and Gathered from Other Sources* (Feb 2010), archived at <http://perma.cc/7DF8-ALZ9>.

<sup>93</sup> See Part III.

<sup>94</sup> For more discussion of the tension between the clues in *Fry* and education-related injuries, see Part III.C.1.

<sup>95</sup> *Fry*, 137 S Ct at 752 n 4. See also generally Brief for the United States as Amicus Curiae, *Fry v Napoleon Community Schools*, Docket No 15-497 (US filed Aug 29, 2016) (available on Westlaw at 2016 WL 4524537) (“Solicitor General Brief”).

officer cannot give—for example, as in the Frys’ complaint, money damages for resulting emotional injury.<sup>96</sup>

This lingering uncertainty is the question at the heart of this Comment. This Part begins by detailing the opinions of circuit courts that have explicitly reached the question. Before and after *Fry*, most circuit courts that had ruled on the issue required exhaustion. But *Fry* explicitly left this particular question open; Parts II.A–C attempt to unfold how the circuits stand in the wake of that case.

After evaluating the appellate-court precedent, Part II.D examines a subset of cases in which exhaustion was waived for reasons unrelated to the relief sought. *Fry* calls these cases into question.

#### A. Circuits That Have Explicitly Rejected Waiving Exhaustion on the Basis of Unavailable Relief

In *Charlie F. v Board of Education of Skokie School District 68*,<sup>97</sup> the Seventh Circuit conceded that compensatory damages are not available as relief under the IDEA but nonetheless required exhaustion. The court reasoned that the due process proceedings *might* be able to provide relief.<sup>98</sup> In that case, the young Charlie F. was happy with his present education plan but sued under § 504, the Constitution, and the ADA over humiliating experiences in the prior grade.<sup>99</sup> The Seventh Circuit refused to allow the family to skip the due process hearing because the *injury* was educational in nature.<sup>100</sup> Note that this is not the approach in *Fry*, which abrogated *Charlie F.* by rejecting the injury-centered approach to exhaustion as a general matter and instead embraced an inquiry focused on whether the complaint alleged a denial of a FAPE. Nonetheless, the Seventh Circuit’s general rejection of the relevance of the prayer for relief to the question of exhaustion has been cited by many other circuits.<sup>101</sup>

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<sup>96</sup> *Fry*, 137 S Ct at 754 n 8.

<sup>97</sup> 98 F3d 989 (7th Cir 1996).

<sup>98</sup> *Id* at 993.

<sup>99</sup> *Id* at 990–91.

<sup>100</sup> *Id* at 993.

<sup>101</sup> See, for example, *Polera v Board of Education of Newburgh Enlarged City School District*, 288 F3d 478, 487 (2d Cir 2002) (“The opinion of the Seventh Circuit Court of Appeals in [*Charlie F.*] is particularly instructive.”).

The First,<sup>102</sup> Second,<sup>103</sup> Eighth,<sup>104</sup> Tenth,<sup>105</sup> and Eleventh<sup>106</sup> Circuits have also dealt squarely with the question and rejected the idea that the form of relief sought can control whether exhaustion is waived. At least one appellate court—the Eighth Circuit in *J.M. v Francis Howell School District*<sup>107</sup>—answered the question post-*Fry* and came to the same conclusion.<sup>108</sup>

One common argument permeates these cases: if courts were to allow the form of relief to dictate whether the plaintiff must exhaust, they would create a roadmap for circumvention. Courts fear that parents simply will ask for money to evade a due process hearing or wait to file a complaint until they can argue that educational benefits would no longer address their child's injury (because he has graduated, changed districts, or the like).<sup>109</sup>

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<sup>102</sup> See *Frazier v Fairhaven School Committee*, 276 F3d 52, 63 (1st Cir 2002) (“[Waiving exhaustion] would allow a plaintiff to bypass the administrative procedures merely by crafting her complaint to seek relief that educational authorities are powerless to grant.”). The First Circuit also compared the IDEA to the Prison Litigation Reform Act (PLRA), Pub L No 104-134, 110 Stat 1321 (1995), to justify mandating exhaustion. *Frazier*, 276 F3d at 61–62. For the reasons discussed in Part III.A.2, the comparison is not as apt as the court presents. Indeed, the PLRA informs a reading of § 1415(l) that waives exhaustion.

<sup>103</sup> See *Polera*, 288 F3d at 487 (determining that plaintiffs are “not permitted to evade the IDEA’s exhaustion requirement merely by tacking on a request for money damages”).

<sup>104</sup> See *J.M. v Francis Howell School District*, 850 F3d 944, 950 (8th Cir 2017) (noting that *Fry* declined to address the question, but nonetheless deciding that the family was not exempt from exhaustion because they sought compensatory and punitive damages).

<sup>105</sup> See *Cudjoe v Independent School District No 12*, 297 F3d 1058, 1066 (10th Cir 2002) (“[T]he IDEA’s exhaustion requirement will not be excused simply because a plaintiff requests damages.”).

<sup>106</sup> See *N.B. v Alachua County School Board*, 84 F3d 1376, 1379 (11th Cir 1996) (per curiam) (adopting wholesale and verbatim in a one-sentence opinion the district court’s reasoning that “if the plaintiff’s argument is to be accepted, then future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant”).

<sup>107</sup> 850 F3d 944 (8th Cir 2017).

<sup>108</sup> *Id* at 950.

<sup>109</sup> See, for example, *Polera*, 288 F3d at 490 (“[D]isabled-student plaintiffs . . . should not be permitted to ‘sit on’ live claims and spurn the administrative process that could provide the educational services they seek, then later sue for damages.”); *Fraser v Tamalpais Union High School District*, 281 Fed Appx 746, 747 (9th Cir 2008) (refusing to waive exhaustion for a then-graduated student whose injuries could have been resolved under the administrative process had they been timely raised).

## B. The Third Circuit

The Third Circuit is an outlier in that it has relied on the plain-language reading of § 1415(*l*) to waive exhaustion. In *W.B. v Matula*,<sup>110</sup> the plaintiff parents brought an action under 42 USC § 1983, Rehabilitation Act § 504, and the IDEA, seeking compensatory and punitive damages for failure to provide a FAPE.<sup>111</sup> According to W.B., the school failed to identify that her child, who had been diagnosed with ADHD, Tourette's syndrome, and obsessive-compulsive disorder, needed special education services.<sup>112</sup> When the school finally acknowledged his disability, the district refused to give him an IEP because he was performing at or above grade level.<sup>113</sup> W.B. engaged in several administrative proceedings—seeking an independent evaluation, development of an IEP, a different disability classification, and attorney's fees—which ended in a settlement between the school district and the family.<sup>114</sup>

W.B. then sued, alleging a denial of a FAPE, an issue that the previous administrative hearings did not address. But this time, happy with her child's current IEP and educational situation, she sought relief unavailable under the IDEA. The court relied on a plain-language reading of § 1415(*l*), holding that "it would be futile, perhaps even impossible, for plaintiffs to exhaust their administrative remedies because the relief sought by plaintiffs in this action was unavailable in IDEA administrative proceedings."<sup>115</sup> The Third Circuit noted that "[w]here recourse to IDEA administrative proceedings would be futile or inadequate [ ] the exhaustion requirement is excused."<sup>116</sup> *Matula* has since been abrogated on other grounds.<sup>117</sup> Nevertheless, this case stands for the proposition that the Third Circuit has waived exhaustion when the relief sought cannot be granted by an IHO.

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<sup>110</sup> 67 F3d 484 (3d Cir 1995).

<sup>111</sup> *Id* at 491.

<sup>112</sup> *Id* at 488–89.

<sup>113</sup> *Id* at 489.

<sup>114</sup> *Matula*, 67 F3d at 489–90.

<sup>115</sup> *Id* at 496.

<sup>116</sup> *Id* at 495. Inadequacy, as opposed to futility, has generally been interpreted to refer to cases in which parents ask for structural, systematic reforms or challenge the adequacy of the administrative proceedings themselves. This exception would not be applicable here. For a discussion of the scope of the inadequacy exception in IDEA cases, see *Hoelt*, 967 F2d at 1309.

<sup>117</sup> See *A.W. v Jersey City Public Schools*, 486 F3d 791, 792–93 (3d Cir 2007) (holding that a § 1983 action was not available to remedy IDEA-created rights, contrary to *Matula*).

*Batchelor v Rose Tree Media School District*<sup>118</sup> threw the Third Circuit's position into doubt. The case acknowledges that an exception for unavailable relief "exist[s] generally," consistent with *Matula*.<sup>119</sup> Yet the court seemingly sides with the majority of circuits by finding the exception inapplicable "in the instant case."<sup>120</sup> The Third Circuit curiously gives no treatment to *Matula* while still acknowledging that the case remains good law by citing it for another principle.<sup>121</sup> In ignoring that precedent, *Batchelor* implicitly recharacterizes *Matula* in a manner inconsistent with its holding. By contrast, other courts inside and outside the Third Circuit agree with the proposition that *Matula* stands for the principle that, within the Third Circuit, the plain-language reading of § 1415(l) permits waiving exhaustion when the form of relief is unavailable under the IDEA.<sup>122</sup> Because the reliance by other courts on *Matula* suggests that it is still good law, district courts in the Third Circuit grappling with the proper interpretation of § 1415(l) should rely on *Matula*.

### C. The Ninth Circuit

The Ninth Circuit has also addressed the question, but its stance post-*Fry* is unclear. In *Witte v Clark County School District*,<sup>123</sup> the court held that "under the plain words of the statute," exhaustion is not required when money damages are sought.<sup>124</sup> As in *Matula*, the *Witte* court relied on a plain-language reading of the IDEA. *Witte* has not been explicitly overruled, but a subsequent case, *Robb v Bethel School District # 403*,<sup>125</sup> distinguished *Witte* and unmoored the question of exhaustion from relief.<sup>126</sup> Yet *Robb* was overruled by another case, *Payne v Peninsula School District*,<sup>127</sup> that itself contributed to

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<sup>118</sup> 759 F3d 266 (3d Cir 2014).

<sup>119</sup> *Id* at 276.

<sup>120</sup> See *id* at 276–78.

<sup>121</sup> See *id* at 280.

<sup>122</sup> See *James S. v School District of Philadelphia*, 559 F Supp 2d 600, 618 (ED Pa 2008) (stating the holding of *Matula* and noting numerous district courts that had applied that holding). See also *Abraham P. v Los Angeles Unified School District*, 2017 WL 4839071, \*5 (CD Cal); *Shadie v Forte*, 2011 WL 607447, \*5 (MD Pa); *L.T. v Mansfield Township School District*, 2007 WL 2332308, \*7 (D NJ).

<sup>123</sup> 197 F3d 1271 (9th Cir 1999).

<sup>124</sup> *Id* at 1275.

<sup>125</sup> 308 F3d 1047 (9th Cir 2002).

<sup>126</sup> *Id* at 1049–50.

<sup>127</sup> 653 F3d 863 (9th Cir 2011) (en banc).

the circuit split resolved by *Fry*. To the extent that the case remains good law, *Payne* suggests that the Ninth Circuit would permit the waiver of exhaustion in cases that allege a denial of a FAPE but seek a form of relief that the IDEA cannot provide.

The facts of *Witte* are horrific: the plaintiff claimed that teachers at the defendant school had force-fed him oatmeal mixed with his own vomit, choked him when he failed to run fast enough, deprived him of meals, and threatened him with physical harm if he told his mother what was going on, among other violations.<sup>128</sup> The fact that the educational concerns had been remedied factored into the court's decision. The plaintiff had since changed schools and was receiving appropriate educational services at his new school, a change that had been "facilitated through the IEP process."<sup>129</sup> Although the parents had never invoked a formal due process hearing, the parents' satisfaction with the student's current educational state of affairs meant that remedies under the IDEA would be inappropriate for the harm. The court also noted that the nature of the injuries was not well suited to remedies under the IDEA.<sup>130</sup> The court permitted the suit to proceed without exhaustion.<sup>131</sup>

The Ninth Circuit stepped back from this position in *Robb* and recharacterized *Witte* without explicitly overruling it. Money damages, according to the *Robb* court, were not doing the work in *Witte*.<sup>132</sup> Rather, what mattered was that the parents had resolved the student's educational issues informally and that the injuries were physical.<sup>133</sup>

In *Payne*, the Ninth Circuit promulgated a "relief-centered" approach to determine when exhaustion was waived under § 1415(l), explicitly overruling *Robb*.<sup>134</sup> This decision diverged from the injury-centered approach of *Charlie F.* and its kin, wherein injuries that could be addressed to *any* degree by the due process hearing require exhaustion.<sup>135</sup> Both approaches are moot post-*Fry*, which resolved this very disagreement. But the *Payne* court's holding that the "exhaustion requirement applies to claims only to the extent that the relief actually sought by the

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<sup>128</sup> *Witte*, 197 F3d at 1272–73.

<sup>129</sup> *Id.* at 1273–74 & n 1.

<sup>130</sup> *Id.* at 1275–76.

<sup>131</sup> *Id.* at 1276.

<sup>132</sup> *Robb*, 308 F3d at 1051.

<sup>133</sup> *Id.* at 1051–52.

<sup>134</sup> *Payne*, 653 F3d at 874.

<sup>135</sup> See *Charlie F.*, 98 F3d at 993.

plaintiff could have been provided by the IDEA” and its affirmation that *Witte* was consistent with § 1415(l) likely places the Ninth Circuit closer to the Third Circuit’s position.<sup>136</sup>

*Payne* contains conflicting language about money damages specifically. The court wrote that “courts should start by looking at a complaint’s prayer for relief and determine whether the relief sought is also available under the IDEA” and that it is improper “for courts to assume that money damages will be directed toward forms of relief that would be available under IDEA.”<sup>137</sup> This language implies that the availability of the relief should be crucial to the analysis and that courts should not assume that IDEA relief will suffice in lieu of money damages. However, the court also asserted that exhaustion cannot be avoided “merely by limiting a prayer for relief to money damages.”<sup>138</sup> The idea that money damages alone are not dispositive is not inconsistent with the waiver of exhaustion,<sup>139</sup> but at least suggests distancing the form of relief from the exhaustion analysis. In any event, the degree to which *Payne* is controlling in the Ninth Circuit is debatable post-*Fry*, for *Fry* rejected both the injury-centered and relief-centered approaches.

In sum, the Ninth Circuit is in a state of flux post-*Fry*, but given the stated reasoning in *Witte* and *Payne*, which are still—at least in relevant part—good law in the Ninth Circuit, that court is likely open to holding that exhaustion may be waived in cases in which the plaintiff alleges a denial of a FAPE but seeks money damages. At least one district court in the Ninth Circuit has allowed a suit both alleging a denial of a FAPE and asking for money damages to move forward without exhaustion with respect to that form of relief, relying on both *Fry* and *Payne* to reach its conclusion.<sup>140</sup>

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<sup>136</sup> *Payne*, 653 F3d at 872, 874. See also *Matula*, 67 F3d at 495–96.

<sup>137</sup> *Payne*, 653 F3d at 875, 877. This language, in part, responds to the Seventh Circuit’s assertion that, without first requiring exhaustion of administrative remedies, judges cannot know whether parents are seeking money in lieu of another perfectly appropriate form of relief or whether money would truly be the right relief. *Charlie F.*, 98 F3d at 993.

<sup>138</sup> *Payne*, 653 F3d at 877, quoting *Robb*, 308 F3d at 1049.

<sup>139</sup> To be clear, this Comment does not advocate for a pleading standard. See Part III.C.5.

<sup>140</sup> See *A.M. v Fresno Unified School District*, 2017 WL 6209389, \*9–10 (ED Cal). See also *Abraham P.*, 2017 WL 4839071 at \*5 (citing *Matula*, *Payne*, and *Fry* to suggest that exhaustion should be waived, but reaching its conclusion on other grounds).

D. Other Theories under Which Courts Have Waived Exhaustion: Past Injury, Physical Injury, and Common-Law Torts

There are some cases in which courts have waived exhaustion for reasons seemingly unrelated to the plaintiff's prayer for a form of relief that the IDEA cannot provide. In those cases, courts insist that exhaustion was waived for some reason other than the request for money damages. Explanations include that the injury was entirely in the past, that the injury was wholly physical, or that the allegation amounted to a common-law tort.

These cases are worth considering and reanalyzing in the wake of *Fry*. If a similar case were to be brought now, post-*Fry*, the court's initial inquiry would have to be whether the plaintiff alleged a denial of a FAPE. There is an argument that each of these pre-*Fry* cases implicates a FAPE and thus would trigger exhaustion. And because *Fry*'s holding addressed how to determine when exhaustion applies generally, it presumably did not render irrelevant these carveouts.<sup>141</sup> But if these cases *rightly* waived exhaustion, and this Comment argues they did, a new approach is needed to justify their results in the wake of *Fry*. Said differently, if similar cases were to arise again post-*Fry*, these precedents create tension with *Fry*'s gravamen-of-the-complaint inquiry; this Comment's solution resolves that tension.

First, in *Covington v Knox County School System*,<sup>142</sup> a school left a child in a time-out room for many hours at a time.<sup>143</sup> The Sixth Circuit held that merely asking for money damages was not enough to waive exhaustion, but in "unique circumstances . . . in which the injured child has already graduated from the special education school, his injuries are wholly in the past, and therefore money damages are the only remedy that can make him whole," families need not exhaust.<sup>144</sup> Under very similar

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<sup>141</sup> For examples of courts applying the cases discussed in this Section post-*Fry*, see, for example, *Crochran v Columbus City Schools*, 278 F Supp 3d 1013, 1023 (SD Ohio 2017) (permitting a suit to proceed without exhaustion), citing *Covington v Knox County School System*, 205 F3d 912 (6th Cir 2000); *Carr v Department of Public Instruction*, 2018 WL 1033294, \*6 (WD Wis), citing *Padilla v School District No 1 in City and County of Denver*, 233 F3d 1268 (10th Cir 2000).

<sup>142</sup> 205 F3d 912 (6th Cir 2000).

<sup>143</sup> *Id* at 913.

<sup>144</sup> *Id* at 917. It is worth noting that the Second Circuit rejected an exemption for similarly situated parents in *Polera*. 288 F3d at 489–90 (distinguishing *Covington* from *Polera* on the grounds that the plaintiffs in *Polera* could have obtained relief before the student graduated).

facts, in *Padilla v School District No 1 in City and County of Denver*,<sup>145</sup> the Tenth Circuit held that exhaustion was waived, not because of the prayer for damages but because of the “severe physical, and completely non-educational, injuries” for which the plaintiff sought redress.<sup>146</sup>

The explanations in both *Covington* and *Padilla* are incoherent, especially post-*Fry*. Plenty of denials of FAPE are “wholly in the past,” as in *Covington*,<sup>147</sup> for one reason or another, even for banal reasons like “the school year ended.”<sup>148</sup> Moreover, pursuant to the *Fry* inquiry, an injury that is entirely physical per the *Padilla* court could in fact be related to the denial of a FAPE. For instance, many IEPs include behavioral intervention plans that prescribe restraint procedures.<sup>149</sup> If a school’s failure to properly implement those procedures resulted in physical injury, the nature of the injury nevertheless stemmed from the school’s failure to properly implement the IEP—a mistake that likely falls under the denial of a FAPE. In such a case, *Fry* may suggest exhaustion when *Covington* or *Padilla* would not.

Two cases illustrate that courts have waived exhaustion when they reason that the allegations amounted to state-law tort claims. In *Muskrat v Deer Creek Public Schools*,<sup>150</sup> the Muskrats brought an action against their son’s school alleging several incidents of physical abuse by his teacher and aide as well as improper use of a time-out room.<sup>151</sup> With regard to the allegations of battery, the court reasoned: “No authority holds that Congress meant to funnel isolated incidents of common law torts into the IDEA exhaustion regime.”<sup>152</sup> *Moore v Kansas City Public Schools*<sup>153</sup> held the same under an alarming set of facts. In that case, a young woman in a special education program in Missouri was raped at school while unsupervised.<sup>154</sup>

The common-law-tort explanation falls short because it creates an arbitrary, perhaps even perverse, boundary. “[R]andom

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<sup>145</sup> 233 F3d 1268 (10th Cir 2000).

<sup>146</sup> *Id* at 1274. Although the court calls the injuries “non-educational,” this characterization is questionable. The school acted in explicit contravention of her IEP, tying her injury closely to a FAPE. See *id* at 1271.

<sup>147</sup> *Covington*, 205 F3d at 917.

<sup>148</sup> *Zdrowski v Rieck*, 119 F Supp 3d 643, 668 (ED Mich 2015).

<sup>149</sup> See 34 CFR § 300.530(f).

<sup>150</sup> 715 F3d 775 (10th Cir 2013).

<sup>151</sup> *Id* at 780–81.

<sup>152</sup> *Id* at 785.

<sup>153</sup> 828 F3d 687 (8th Cir 2016).

<sup>154</sup> *Id* at 690.

violence”<sup>155</sup> and “isolated incidents of common law torts”<sup>156</sup> do not require exhaustion, and probably rightly. Yet by that logic, pervasive, repeated, nonrandom violence (which surely would still be a tort) related to or that stems from a child’s deficient education plan *would* require extra procedural steps if a court applies the *Fry* standard. Unlike the “isolated” and “arbitrary” incidents, in this latter set of cases, the child was denied a FAPE because of the injury’s educational nature. Applying *Fry*, then, in these cases, exhaustion would be required, and the plaintiffs would need to go through the due process hearing. So post-*Fry*, some torts indeed amount to a denial of a FAPE. Yet under these precedents, one class of torts proceeds straight to court, while FAPE-centric torts must hurdle an additional procedural step despite the qualitatively similar nature of the violation. Because of the unavailability of compensatory or punitive damages under the IDEA, the tortfeasor going through an administrative hearing would not pay via the appropriate form of relief through this process.<sup>157</sup> If “isolated incidents” are properly remedied by compensatory or punitive damages that a court may dole out, why not (why not *especially*) nonrandom, FAPE-related incidents of the same kind? The answer to this question might be that the IDEA scheme incentivizes families to pursue administrative remedies while the harm is ongoing and redressable; true enough, but the exhaustion process will intentionally prevent some (if not many) claims of ongoing, repeated FAPE-related educational harm from making it to court. And since civil litigation is the only means by which the right form of relief to redress the harm can be allocated, there is little discernible difference between the claims in *Moore* and *Muskrat* and FAPE-related claims of the same kind—if one agrees that both kinds of injuries are most properly redressed by relief that the IDEA cannot provide.<sup>158</sup> The logic in *Moore* and *Muskrat*, then, is untenable post-*Fry*.

In each of the cases discussed in this Section, there is a strong intuition that the aggrieved party received the right relief for the injury incurred. Indeed, all of these cases have shocking facts. Applying traditional legal principles of relief, one might

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<sup>155</sup> *Muskrat*, 715 F3d at 785.

<sup>156</sup> *Id.*

<sup>157</sup> For more discussion of why damages are the appropriate relief for the injuries in cases like these, see Part III.C.1.

<sup>158</sup> See Part III.C.

think that compensatory education or the like could not suffice to redress the wrong. Yet post-*Fry*, if the initial inquiry is whether the complaint alleges a denial of a FAPE, then these courts may well have reached a different result on the question of exhaustion. If the court's starting point was whether the plaintiff was denied a FAPE, the answer would likely be yes in most, if not all, of these cases.<sup>159</sup> Exhaustion would accordingly be required. Mandating exhaustion equates to a burdensome due process hearing; the hearing has benefits, to be sure, but one consequence is that exhaustion itself can effectively prevent cases from being litigated in court. In the aggregate, exhaustion reduces schools' exposure to compensatory and punitive damages, even if theoretically such relief could be prescribed post-hearing. Yet the nature of the injuries in these cases is such that the relief an IHO could provide is not sufficient redress for the wrong.<sup>160</sup> Sometimes, then, requiring exhaustion effectively prevents the appropriate form of relief from reaching the aggrieved party, which, this Comment concludes, leads to negative consequences beyond just the affected student.<sup>161</sup>

As such, exhaustion was rightly waived in these cases, but not because of the explanations proffered by the courts. Rather, a more cohesive, textually rooted distinction is needed to explain why waiving exhaustion was proper in these cases. This Comment suggests that the form of relief is that distinction. As the following Part describes in detail, when the form of relief demanded is appropriate yet unavailable under the IDEA, exhaustion should be waived. This is consistent with the text of the IDEA ("seeking relief that is also available")<sup>162</sup> and leads to the right outcomes in each of the above cases.

### III. INTERPRETING § 1415(L) TO WAIVE EXHAUSTION

This Comment argues that when a plaintiff alleges a denial of a FAPE and appropriately demands relief unavailable under the IDEA, such as compensatory or punitive damages, exhaustion should be waived. This argument is first and foremost

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<sup>159</sup> For further discussion of what constitutes a denial of a FAPE under *Fry*, see Part III.C.3.

<sup>160</sup> For an explanation of when compensatory or punitive damages are appropriate for denials of a FAPE, see Parts III.C.1–2.

<sup>161</sup> For a discussion of the inadequate deterrence this scheme would create, see Part III.C.4.

<sup>162</sup> 20 USC § 1415(l).

rooted in the statutory text of § 1415. Moreover, this conclusion is supported by language in *Fry*, the ADA, and the Rehabilitation Act, as well as the legislative history of the IDEA.

Finally, this Comment argues that policy considerations, which courts often cite in this context, on balance support waiving exhaustion in the small set of cases considered here. In cases in which this question arises, the facts tend to be particularly disturbing because the injuries are of the kind for which damages are the appropriate redress. At the same time, requiring exhaustion will necessarily prevent some, if not many, cases from being litigated in court—the only forum that can provide such relief. Yet these are the violations that should be deterred the most. As such, this Comment proposes that reading § 1415(*l*) to waive exhaustion when the complaint alleges a denial of a FAPE but damages are sought more adequately vindicates the rights of children with disabilities.

#### A. Statutory Interpretation

As Justice Kagan wrote in *Fry*: “We begin, as always, with the statutory language at issue.”<sup>163</sup> The text of § 1415(*l*) at issue here reads:

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].<sup>164</sup>

The pertinent phrase is “seeking relief that is also available.” If a plaintiff is “seeking relief” that is “available” under the IDEA, then exhaustion is mandated; otherwise, exhaustion is not required. From a cursory plain-language reading like that relied on by the *Matula* and *Witte* courts,<sup>165</sup> it would seem that when relief is unavailable, as in the case in which the relief sought is

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<sup>163</sup> *Fry*, 137 S Ct at 753.

<sup>164</sup> 20 USC § 1415(*l*).

<sup>165</sup> See *Matula*, 67 F3d at 496; *Witte*, 197 F3d at 1275.

something that the IDEA cannot provide, exhaustion is not required. Courts that do not allow relief to bear on exhaustion have given surprisingly short shrift to this intuitive reading of § 1415(*l*). They have instead relied on policy arguments to justify exhaustion<sup>166</sup> and characterized their conclusion as a “practical interpretation” of the statute rather than a textual one.<sup>167</sup> These approaches, all but ignoring the plain-language reading, are inconsistent with the tenets of statutory interpretation, which demand readings to be rooted in the text.<sup>168</sup>

Although they are often used interchangeably, the use of “remedy” as opposed to “relief” in this context is important to a proper reading of § 1415(*l*). According to the edition of Black’s Law Dictionary that was current at the time § 1415(*l*) was added, remedy refers to “[t]he means by which . . . the violation of a right is prevented, redressed, or compensated.”<sup>169</sup> Relief is defined as “[d]eliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hand of court.”<sup>170</sup> Under these definitions, then, remedy is the process; relief is what the complainant asks for as a result of the process.<sup>171</sup>

Comparing the language of the IDEA with other federal statutes and regulations confirms this distinction. The Administrative Procedure Act<sup>172</sup> (APA) includes similar language in relation to relief: “An action in a court of the United States seeking relief other than money damages . . . shall not be dismissed . . .”<sup>173</sup> The phrase “other than money damages” informs the proper reading of the IDEA in two ways: first, it places money damages squarely in the category of relief, and second, it implicitly defines relief as referring to the *forms* of redress that might be requested. Several federal regulations use relief similarly.<sup>174</sup>

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<sup>166</sup> See, for example, *Frazier*, 276 F3d at 61.

<sup>167</sup> *Polera*, 288 F3d at 488.

<sup>168</sup> See *Fry*, 137 S Ct at 753.

<sup>169</sup> *Black’s Law Dictionary* 1163 (West 5th ed 1979).

<sup>170</sup> *Id* at 1161.

<sup>171</sup> This distinction is certainly not unique to this Comment. See, for example, 1A *California Jurisprudence* § 3.71 at 122–23 (West 3d ed 2014) (stating that a remedy “is the means by which the action or corresponding obligation is effectuated” and relief “is the result obtained through the remedy”).

<sup>172</sup> 60 Stat 237 (1946), codified at 5 USC § 500 et seq.

<sup>173</sup> 5 USC § 702.

<sup>174</sup> See, for example, 49 CFR § 1108.8(a)–(b) (“An arbitrator may grant relief in the form of monetary damages” but “[n]o injunctive relief shall be available.”); 48 CFR § 1803.906(b)(2) (“The complainant may bring a de novo action at law or equity . . . to

Taken together, these laws and regulations demonstrate that federal rulemakers use relief in reference to those several forms of benefits or assistance that one might ask for in litigation. While this may seem obvious, Congress's consistent use of relief in this sense shapes the proper reading of the IDEA.

Despite this subtle but important distinction, relief and remedy are often conflated. But the conflation goes in only one direction. While "remedy" can be understood to refer to types of relief,<sup>175</sup> the reverse is never true. That is, relief cannot be properly understood to refer to the *process* of obtaining redress.<sup>176</sup> And § 1415(*l*) refers to relief, not remedy. Even if the distinction does not seem compelling generally, the surrounding clauses make clear that "relief" in this particular statute must refer to forms of redress. The subsequent clause refers to "procedures," thereby implicitly distinguishing IDEA *procedures* from IDEA *relief*.<sup>177</sup> The statute conditions exhaustion of one (procedures) on the availability of the other (relief).<sup>178</sup> From this, the proper reading of relief here cannot be process; it must refer to the various kinds of redress a complainant could receive from the process. In any event, even if Congress did not mean "relief" in the sense this Comment claims, courts are reluctant to correct "drafting errors."<sup>179</sup> Holding Congress to the meaning of the statute encourages precise word usage and removes the courts from acting as Congress's interpreter.<sup>180</sup>

With this interpretation of § 1415(*l*) as a backdrop, the following sections turn to other statutes and the *Fry* decision to lend support to this reading of the provision.

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seek compensatory damages and other relief available."). See also FRCP 8(a)(3) ("A pleading that states a claim for relief must contain . . . a demand for the relief sought, which may include relief in the alternative or different types of relief.").

<sup>175</sup> Even footnote eight of the *Fry* opinion refers to "remedy." *Fry*, 137 S Ct at 754 n 8. The statute, though, refers to "relief." And in the context of the IDEA, "remedies" is most frequently used in reference to "administrative remedies"—that is, the *procedures*, such as the due process hearing, generally mandated by § 1415(*l*). See, for example, *id* at 757.

<sup>176</sup> The APA and federal rules and regulations cited above confirm this. Even if Congress is not consistent with respect to "remedy," "relief" is used only with the connotation of various forms. See text accompanying notes 172–74.

<sup>177</sup> 20 USC § 1415(*l*).

<sup>178</sup> 20 USC § 1415(*l*).

<sup>179</sup> See *Lamie v United States Trustee*, 540 US 526, 542 (2004) (explaining that it is beyond the province of the courts to correct Congress's drafting mistakes).

<sup>180</sup> See Caleb Nelson, *What Is Textualism?*, 91 Va L Rev 347, 381–82 (2005).

1. The ADA, § 504, and *Fry*.

*Fry* resolved a circuit split<sup>181</sup> over when exhaustion was mandated for suits brought under the ADA or Rehabilitation Act § 504, but, of course, left this Comment's subject open. Turning to the language of those statutes and then to the *Fry* decision itself nonetheless guides the proper interpretation of § 1415(l).

Before *Fry* was decided, some argued that the proper resolution of the circuit split that *Fry* settled was that students who were double-covered by the ADA or § 504 and the IDEA who brought a claim based solely on the ADA or § 504 should not have to exhaust.<sup>182</sup> This argument was rooted in the differences between “the procedures and substantive requirements for the identification, evaluation, educational placement, and FAPE for students” under the IDEA, as compared to its sister statutes.<sup>183</sup> Of course, the relief available under these statutes is also different. These statutory differences did not play a role in the *Fry* decision,<sup>184</sup> but the reasoning still bears on this question. At the very least, statutory differences indicate that caution is warranted before uniformly mandating exhaustion without regard to the individual underlying facts.

Turning to *Fry*, although the Court did not explicitly answer this question, the reasoning of the case nonetheless supports this Comment's conclusion. Language in *Fry* implies that exhaustion is contingent on what an IHO can provide. The Court reasoned that exhaustion would be waived if “[a] hearing officer . . . would have to send [a plaintiff] away empty-handed.”<sup>185</sup> And an IHO would certainly have to turn a parent away empty handed if that parent requested the kinds of relief that an IHO

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<sup>181</sup> Compare generally *Payne*, 653 F3d 863, with *Charlie F.*, 98 F3d 989.

<sup>182</sup> See generally Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 Conn L Rev 259 (2011).

<sup>183</sup> *Id.* at 286.

<sup>184</sup> The *Frys* did not include arguments about ADA or § 504 remedies in their brief, but some amici did. See, for example, Brief Amicus Curiae for the Council of Parent Attorneys and Advocates and Advocates for Children of New York in Support of Petitioners, *Fry v Napoleon Community Schools*, Docket No 15-497, \*9–15 (US filed Aug 29, 2016) (available on Westlaw at 2016 WL 4547900) (arguing that the differences between the ADA, § 504, and the IDEA—particularly Congress's choice not to impose an exhaustion requirement for the ADA and § 504—supported waiver).

<sup>185</sup> *Fry*, 137 S Ct at 754.

was not able to give.<sup>186</sup> The *Fry* Court recognized, then, that the limits of an IHO's authority interplay with the proper reading of what "relief" is "available."

Such a reading is not in tension with the core holding in *Fry* that the only category of "relief" the IDEA makes "available" is relief for the denial of a FAPE. That holding describes only what an IHO can give relief *for*, but an IHO is also constrained by the *form* that relief will take. The Court also characterized its holding as "establish[ing] the scope of § 1415(*l*)" by identifying "the circumstances in which the IDEA enables a person to obtain redress (or, similarly, to access a benefit)."<sup>187</sup> If relief for a denial of a FAPE represents one dimension of that scope, then the kinds of relief available represent another dimension. Both define the circumstances in which a parent can access the appropriate redress for the injury of a disabled child, and both can be baked into the statutory language of "relief that is also available." To ignore the availability of a *form* of relief, the plainest reading of the statute, is to contort the IDEA in a way that is inconsistent with the principles of statutory interpretation.

Because *Fry* left footnotes four and eight open for debate, courts answering this question must turn once again to interpreting § 1415(*l*). Properly interpreting the IDEA hinges on reading relief as taking a certain *form*: for example, relief in the form of damages or relief in the form of an injunction. Courts reading § 1415(*l*), however, have often ignored the *form of relief* and focused only on *what relief is for*. For example, in *Charlie F.*, the Seventh Circuit read the statute to mean "relief for the events, condition, or consequences of which the person complains."<sup>188</sup> This is an unnatural reading of "seeking relief that is also available." As *Fry* explained, what the relief is for is only part of the picture; it is the scope of the relief, but not the relief itself.<sup>189</sup> For the statute refers directly to "relief," and the

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<sup>186</sup> As noted in footnote four of *Fry*, the solicitor general also agrees with this plain-language interpretation. *Id.* at 752 n. 4. The amicus brief argued for a holding in *Fry* that exempted the Frys from the exhaustion requirement because of their prayer for compensatory damages. Solicitor General Brief at \*16 (cited in note 95). Of course, that was not the outcome, but the argument still bears on this question.

<sup>187</sup> *Fry*, 137 S. Ct. at 753.

<sup>188</sup> *Charlie F.*, 98 F.3d at 992. Other courts on this side of the split reasoned similarly. See, for example, *Cudjoe*, 297 F.3d at 1067 ("The IDEA offers redress whose 'genesis and manifestation . . . are educational.'"), quoting *Charlie F.*, 98 F.3d at 993.

<sup>189</sup> See *Fry*, 137 S. Ct. at 753–54.

plainest reading of § 1415(l) focuses on the form of relief being sought.

The *Charlie F.* court reasoned that if the administrative process could provide *some* relief, it should be exhausted.<sup>190</sup> And though *Fry* rejected that inquiry for exhaustion generally, it would still be relevant in a case in which the relief sought was unavailable under the IDEA. Presumably courts that follow the *Charlie F.* approach would apply their in-circuit precedent for approaching the question of exhaustion after concluding that the plaintiff alleged a denial of a FAPE under *Fry*. Indeed, this was the Eighth Circuit's approach in *J.M.*, the only post-*Fry* case to confront this question.

As *J.M.* demonstrates, though, reconciling *Fry* with the reasoning of the circuits on the *Charlie F.* side of the split would result in a catch-22 for plaintiffs. In *J.M.*, the court acknowledged that *Fry* left this question open, but maintained that asking for relief that the IDEA cannot provide does not waive exhaustion.<sup>191</sup> In the court's view, that the parent had voluntarily removed the student from school, removing compensatory education as a viable option, did not "exempt her from the exhaustion requirement."<sup>192</sup> Facially, this seems sensible; plaintiffs should not manufacture situations to obtain a certain form of relief. But if parents need to pull their students from school for legitimate reasons,<sup>193</sup> they cannot immediately file a civil suit under *J.M.*, nor will any relief that an IHO can give be effective, because the child is no longer in school to receive compensatory education. The result is that the parent *must* keep the child in the problematic educational placement if they want any relief at all.

This particular result stems from the facts of *J.M.* but represents the incongruence of *Fry* with *J.M.* and its ilk. Courts that would not permit exhaustion for denials of a FAPE when unavailable relief is the appropriate relief create a situation in which the plaintiff must settle for relief that does not actually redress her injury or get no relief at all. This status quo is in

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<sup>190</sup> *Charlie F.*, 98 F3d at 992.

<sup>191</sup> *J.M.*, 850 F3d at 950 ("[T]he IDEA's exhaustion requirement remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought.") (quotation marks and citations omitted).

<sup>192</sup> *Id.*

<sup>193</sup> Legitimate reasons might include safety concerns. As Part III.C.2 discusses, violations of the sort in which damages are the appropriate remedy often involve physical injuries, as the facts of *Abraham P.* illustrate. See note 1 and accompanying text.

tension with *Fry*'s reasoning that exhaustion should not be mandated when an IHO "would have to send [a plaintiff] away empty-handed."<sup>194</sup>

2. Distinguishing the IDEA and relief from the PLRA and remedy.

The IDEA stands in contrast with the Prison Litigation Reform Act<sup>195</sup> (PLRA). Courts' interpretations of the PLRA can help inform the terms of the IDEA exhaustion requirement because the language of the statutes are facially similar. But courts have generally read the PLRA to almost always mandate exhaustion, and as such, courts sometimes invoke the PLRA to defend exhaustion under the IDEA.<sup>196</sup> The exhaustion clause of the IDEA, however, can be distinguished from the PLRA based on its precise word choice and construction. Indeed, the PLRA's language confirms that Congress could have required exhaustion under the IDEA without concern for the availability of the relief sought, but chose not to in § 1415(*l*).

The PLRA contains language unequivocally mandating exhaustion: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."<sup>197</sup> The language of the PLRA is clearly stronger than the IDEA's § 1415(*l*). While the PLRA in 41 USC § 1997e creates an affirmative mandate to exhaust, the IDEA is written conditionally: prisoners *must* first go through the administrative processes, whereas students need exhaust only *if* relief is available. This distinction, while admittedly formalistic, implies a level of flexibility baked into the IDEA.

Beyond this formal distinction, case law surrounding the last clause of 42 USC § 1997e(a)—"until such administrative remedies as are available are exhausted"—aids in the proper interpretation of the IDEA's similar use of "available." In *Ross v Blake*,<sup>198</sup> the Court reiterated that "available" means "'capable of use for the accomplishment of a purpose,' and that which 'is

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<sup>194</sup> *Fry*, 137 S Ct at 754.

<sup>195</sup> Pub L No 104-134, 110 Stat 1321-066 (1996), codified as amended at 18 USC § 3626.

<sup>196</sup> See, for example, *Frazier*, 276 F3d at 61-62 (analogizing PLRA exhaustion to IDEA exhaustion).

<sup>197</sup> 42 USC § 1997e(a).

<sup>198</sup> 136 S Ct 1850 (2016).

accessible or may be obtained.”<sup>199</sup> The Court elaborated that unavailability includes a situation in which pursuing the administrative process would be a “dead end” because officers are unable to provide the requested relief.<sup>200</sup> This analysis maps nicely onto the IDEA. For parents seeking monetary relief, pursuing a due process hearing, wherein IHOs simply cannot grant the relief they seek, would be a dead end—and thus relief is by definition unavailable.

But some cases have cited another PLRA case, *Booth v Churner*,<sup>201</sup> which mandated stringent restrictions on waiving exhaustion, to justify a reading of the IDEA that mandates exhaustion even when the requested relief is unavailable.<sup>202</sup> *Booth*, like *Ross*, interpreted the exhaustion language in the PLRA: “until such administrative remedies as are available are exhausted.”<sup>203</sup> In that case, the plaintiff requested money damages, which were not available in the administrative process. The court held that the availability of the relief sought was not relevant. Exhaustion was required notwithstanding the availability of compensatory damages or other types of relief. While this holding may seem to preclude an exception to IDEA exhaustion for compensatory relief, the PLRA and its reading in *Booth* are distinguishable from the IDEA in essential ways.

Crucially, the PLRA refers to “remedy,” not “relief.” Again, *remedy* here should be understood to refer to the process; *relief* refers to the redress that comes from that process.<sup>204</sup> The difference is subtle but important, and the construction of the PLRA confirms the distinction. The precursor to the PLRA, the Civil Rights of Institutionalized Persons Act<sup>205</sup> (CRIPA), required exhaustion only if a “plain, speedy, and effective” remedy was available.<sup>206</sup> “Plain” and “speedy” are descriptors of a process, not of a form of assistance. Moreover, *Ross* implicitly confirms this difference by referring to the prison grievance process itself as the “available remed[y]” in question—as opposed to the money or institutional change that the plaintiff hoped to get out of the

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<sup>199</sup> Id at 1858–59, quoting *Booth v Churner*, 532 US 731, 737–38 (2001).

<sup>200</sup> *Ross*, 136 S Ct at 1859.

<sup>201</sup> 532 US 731 (2001).

<sup>202</sup> See, for example, *Frazier*, 276 F3d at 61–62.

<sup>203</sup> 42 USC § 1997e(a).

<sup>204</sup> See text accompanying notes 163–80.

<sup>205</sup> Pub L No 96-247, 94 Stat 349 (1980).

<sup>206</sup> CRIPA § 7(a)(1), 94 Stat at 352.

process.<sup>207</sup> Remedy, then, is understood to refer to the “mechanism [ ] to provide relief” as distinct from the relief itself.<sup>208</sup> Other case law supports this distinction, and, by extension, a definition of relief grounded in the *type* or *form* of redress sought, as opposed to the *process* or what the relief is *for*.<sup>209</sup>

*Booth*, then, is not only reconcilable with this Comment’s reading of § 1415(*l*) but demonstrates that precise word choice can guide statutory interpretation. The logic of *Booth*’s holding rested on reading the statute as mandating exhaustion of *the available procedures*. This reading was supported by the construction of the sentence (the verb “exhausted” modified “remedy”) and by the dictionary definitions.<sup>210</sup> Applied to the IDEA, the *remedies* available would include the due process hearing as established by state education agencies. If the statute were phrased like the PLRA, a parent would *have to* engage with state procedures if the state provided an infrastructure for a due process hearing; the only applicable exceptions would be those laid out in *Ross*. But the statute is not phrased as such. The term “exhausted” does not modify “relief,” it modifies “procedures”; “available” modifies “relief.” And the relief available under the IDEA’s procedures is a different matter entirely from the procedures available; compensatory damages are decidedly not included in the former category. The PLRA demonstrates that Congress can and does deploy language creating an unequivocal exhaustion mandate. Congress did not do so in § 1415(*l*), instead linking exhaustion to the *relief* sought.

## B. Legislative History

Not only is the conclusion that exhaustion should be waived when the plaintiff alleges a denial of a FAPE but seeks unavailable relief firmly rooted in the statutory text, it is consistent

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<sup>207</sup> See *Ross*, 136 S Ct at 1858–60 (quotation marks omitted).

<sup>208</sup> *Id* at 1859. Even if one uses “remedy” as synonymous with “relief,” which, as noted in this Comment and in *Booth*, is not uncommon, the opposite is not acceptable. As explained in Part III.A, “relief” is not used to refer to procedure in the same way that “remedy” might be used to refer to the kinds of redress sought. Moreover, as this paragraph describes, the context of “remedy” in the PLRA makes clear that it is not synonymous with “relief” in the IDEA.

<sup>209</sup> See *Coleman v Wilson*, 933 F Supp 954, 957 (ED Cal 1996) (explaining that the definition of relief “focus[es] on the ultimate legal form of remedy rather than the means of achieving the remedy”). See also *Inmates of the Suffolk County Jail v Sheriff of Suffolk County*, 952 F Supp 869, 879 (D Mass 1997) (“Relief is thus defined as a type of remedy.”).

<sup>210</sup> See *Booth*, 532 US at 738–39.

with the purpose of the IDEA. In hearings for the EHA, Senator Harrison Williams emphasized that exhaustion was not an unequivocal mandate: “I want to underscore that exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter.”<sup>211</sup> Allowing relief in the form of damages in these cases promotes the goal of accountability as the lawmakers who passed EHA intended and, moreover, constitutes a case in which futility would be practically and legally futile.

A decade later, Congress explicitly enacted § 1415(*l*) as a direct response to *Smith*.<sup>212</sup> The legislative history of that amendment also points to this exception to the exhaustion rules. Representative George Miller, one of the original coauthors of the EHA, stated at the time that “there are certain situations in which it is not appropriate to require the exhaustion of EHA remedies before filing a civil law suit,” including when “the hearing officer lacks the authority to grant the relief sought.”<sup>213</sup> Note that Miller implicitly distinguished between relief and remedy here, consistent with the discussion in Part III.A.1. He then noted that “[t]oday’s bill addresses all of these concerns,” implying that § 1415(*l*) as written encapsulates those exceptions.<sup>214</sup>

Taken together, these pieces of legislative history from the EHA’s original enactment and the passage of § 1415(*l*) support an exemption for plaintiffs alleging a denial of a FAPE but requesting damages. There are no indications that Congress intended courts to deviate from the plain-language reading of the statute (the interpretation utilized by the *Matula* court), and indeed, there is evidence from Miller’s statements that Congress very much intended for the prayer for relief to have at least some controlling effect on the propriety of exhaustion.<sup>215</sup>

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<sup>211</sup> S 6, 94th Cong, 1st Sess, in 121 Cong Rec 37416 (Nov 19, 1975).

<sup>212</sup> HR 1523, 99th Cong, 1st Sess, in 131 Cong Rec 31376 (Nov 12, 1985) (“We all want to see the decision in *Smith* versus *Robinson* overturned.”).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 31377.

<sup>215</sup> Some disfavor legislative history as a tool of construction. See, for example, *District of Columbia v Heller*, 554 US 570, 589–90 & n 12 (rejecting the dissent’s legislative-history-based interpretation of the Second Amendment); *Lawson v FMR*, 134 S Ct 1158, 1176–77 (2014) (Scalia concurring in part and concurring in the judgment) (“[W]e are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.”). See also Nelson, 91 Va L Rev at 362 (cited in note 180). But it still lends support to the reading of the statute, at least corroborating the textualist approach

### C. Policy

As a matter of policy, exhaustion should be waived in the set of cases in which money damages are the appropriate form of relief but the complaint nevertheless alleges a denial of a FAPE. First, an analysis of the gravamen-of-the-complaint standard established by *Fry* is warranted in order to understand the circumstances that will give rise to such a case. Such cases are uncommon, as this Section explains, yet when they arise, the facts are such that justice is not served by mere IDEA relief. The analysis unfolds in three Sections: First, Part III.C.1 addresses when non-IDEA relief is appropriate by applying long-standing legal principles of relief. Next, Part III.C.2 applies the *Fry* standard to unpack when a set of facts alleges a denial of a FAPE. Part III.C.3 then synthesizes the first two Sections by discussing when a complaint both alleges a denial of a FAPE and when the injury calls for compensatory or punitive damages; these are the cases in which this Section's question arises.

Finally, this Comment concludes by discussing the policy implications for waiving exhaustion in this set of cases. Part III.C.4 addresses the deterrence value of waiving exhaustion in these cases, while Part III.C.5 confronts the merits of the due process hearing.

#### 1. When non-IDEA relief would be appropriate.

Cases in which compensatory damages are appropriate relief, rather than compensatory education, tuition repayment, or injunctive relief, involve harm beyond the typical denial of a FAPE. In IDEA cases, as in all civil litigation, courts are concerned with granting relief that will appropriately redress the violation.<sup>216</sup> In most cases, supplemental services or other typical IDEA remedies that an IHO is empowered to give will sufficiently redress the injury. If a school fails to provide the correct IEP-mandated accommodations in, say, math class, the resulting lack of appropriate progress is remediable by additional compensatory education services. If the parent unilaterally

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of Part III.A. See *Digital Reality Trust v Somers*, 138 S Ct 767, 782 (2018) (Sotomayor concurring) ("Legislative history is of course not the law, but that does not mean it cannot aid us in our understanding of a law.").

<sup>216</sup> *D.F. v Collingswood Borough Board of Education*, 694 F3d 488, 498–99 (3d Cir 2012) ("In each case, a court will evaluate the specific type of relief that is appropriate to ensure that a student is fully compensated for a school district's past violations of his or her rights under the IDEA.") (quotation marks omitted).

transfers the child to a private school because of a deficient public-school program, tuition reimbursement suits the injury well. Thus, the injury needs to be above and beyond the typical for this question to arise.

This assertion is rooted in the well-established legal principle that the purpose of relief for a wrong is to make the plaintiff whole, and compensatory damages in particular are well suited for injuries for which the plaintiff has suffered pain or emotional distress.<sup>217</sup> These are attendant results of all denials of a FAPE to some extent, but in most cases, the plaintiff can be made more or less whole through forms of IDEA relief that redress educational injuries.<sup>218</sup> Sometimes, though, the physical or mental pain, suffering, and emotional distress of the FAPE denial are more than de minimis, so much so as to justify compensatory damages.<sup>219</sup> Part II.D demonstrates that such cases exist, and courts have carved out exceptions that effectively allow for compensatory damages by waiving exhaustion. But as that Section discussed, those cases create tension with *Fry*.

The law of punitive damages similarly limits their application to a particular class of cases: they are appropriate only when the offending conduct rises far beyond the acceptable.<sup>220</sup>

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<sup>217</sup> See Restatement (Second) of Torts § 903, comment a (1965):

[Compensatory damages] give to the injured person some pecuniary return for what he has suffered or is likely to suffer. There is no scale by which the detriment caused by suffering can be measured and hence there can be only a very rough correspondence between the amount awarded as damages and the extent of the suffering.

See also, for example, *Albemarle Paper Company v Moody*, 422 US 405, 418 (1975) (explaining that relief for employment discrimination claims should “make the person[] whole for injuries suffered”).

<sup>218</sup> See *Burlington*, 471 US at 370–71 (concluding that tuition repayment is appropriate relief for some IDEA claims because it requires schools “to belatedly pay expenses that [they] should have paid all along”); *Boose*, 786 F3d at 1056 (describing compensatory education’s role as making up for past deficiencies in a child’s educational program and undoing damage done by prior violations).

<sup>219</sup> See *Sellers v School Board of the City of Manassas*, 141 F3d 524, 527 (4th Cir 1998) (suggesting that compensatory and punitive damages under the IDEA would amount to relief for “pain and suffering, emotional distress, and other consequential damages caused by” the denial of a FAPE). While *Sellers* denied that this kind of relief was available under the IDEA, compensatory and punitive damages *are* available under the IDEA’s sister statutes and the Constitution. The court’s language is instructive as to when such relief is appropriate: when the injury at issue prompts pain, suffering, and emotional distress.

<sup>220</sup> See *Exxon Shipping Co v Baker*, 554 US 471, 491–95 (2008) (discussing the historical justifications for punitive damages and modern standards for the degree of culpability required for their award).

Awards of punitive damages seek to deter particularly harmful and blameworthy conduct in addition to their retributive function.<sup>221</sup> Determining when to award punitive damages, then, is in some ways easier than determining when to award compensatory damages because the conduct at issue must be particularly egregious.<sup>222</sup>

Based on these legal principles, the injury must implicate more than educational benefits for compensatory and punitive damages—both of which are unavailable under the IDEA—to be the appropriate form of relief for a denial of a FAPE. The injury must result in material distress, physical or emotional, or result from the conduct of highly culpable actors.

## 2. Allegations of a denial of a FAPE under *Fry*.

In addition to alleging a pattern of facts for which the unavailable relief is appropriate, under *Fry*, the complaint must substantively allege a denial of a FAPE. In *Fry*, Justice Kagan offers several “clues” for determining whether the gravamen of the complaint alleges a denial of a FAPE.<sup>223</sup> First, could the plaintiff have brought essentially the same claim if it occurred in a different public space—“say, a public theater or library?”<sup>224</sup> Along the same lines, could an adult at the school have brought the same claim?<sup>225</sup> Although these questions are merely guideposts, if the answer to both of these questions is “yes,” then the claim likely does not allege a denial of a FAPE.<sup>226</sup> As discussed in Part I.C, in *Fry*, these questions applied neatly to the facts at hand: had E.F. been denied entry to a library with her golden-doodle, Wonder, or had a teacher in the school been denied entry,

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<sup>221</sup> Id. For a recent brief overview of when courts find that punitive damages are appropriate, see Roseanna Summers, Comment, *The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages*, 124 Yale L J 1295, 1295 (2015) (“[Punitive damages serve] two main purposes: (1) punishing outrageous conduct and (2) deterring its future occurrence.”).

<sup>222</sup> Under state law, states differ as to the precise standard required to justify punitive damages. But all agree that it is some heightened level of culpability. See, for example, *Peterson v Travelers Indemnity Co*, 867 F3d 992, 995 (8th Cir 2017) (“South Dakota allows punitive damages if malice exists.”); *Parker v Four Seasons Hotel, Ltd*, 845 F3d 807, 812–13 (7th Cir 2017) (explaining that Illinois law distinguishes between mere negligent behavior and fraudulent, malicious, or violent behavior for purposes of awarding punitive damages).

<sup>223</sup> *Fry*, 137 S Ct at 756.

<sup>224</sup> Id.

<sup>225</sup> See id.

<sup>226</sup> See id.

a discrimination claim would be equally available. And these questions might well prove useful when, as in *Fry*, an element of physical access is the problem. They prove less straightforward under other sets of facts.

Not many lower courts have grappled with applying these questions to other fact patterns as of yet. But cases that have done so make it evident that the utility of the suggested inquiries decreases as the injuries become more uniquely school related.<sup>227</sup> It can be difficult for courts to determine whether a child's injury would be cognizable had it occurred in another public sphere because public officials outside of the school setting do not possess the same level of close relation with, responsibility for, and knowledge of children with disabilities. Moreover, when cases allege a denial of a FAPE, the injury must be related to the educational benefits to which students are entitled.<sup>228</sup> An injury implicating the student's IEP (an educational benefit to which the student is entitled) at least suggests a denial of a FAPE, yet the questions *Fry* leaves lower courts to work with might point the other way. Disentangling the injury from the educational setting, then, can yield conflicting, even irrational, results.<sup>229</sup>

If past cases that waived exhaustion were to come out the same way post-*Fry*, those plaintiffs could not allege a FAPE denial. But analysis of the facts of these cases shows that a FAPE is likely implicated. For instance, applying the "clues" to the facts of *Witte*,<sup>230</sup> could the plaintiff have brought the same case if he had been force-fed oatmeal by a librarian in a public library?

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<sup>227</sup> See, for example, *J.S., III v Houston County Board of Education*, 877 F3d 979, 986 (11th Cir 2017) (explaining that the cause of action in question "does not fit neatly into *Fry*'s hypotheticals" and could conceivably fit under both a denial of a FAPE and intentional discrimination under the ADA). See also *Fry*, 137 S Ct at 759 (Alito concurring in part and concurring in the judgment) (cautioning against the use of the majority's clues because of the overlap between the relief available under the IDEA, the ADA, and § 504).

<sup>228</sup> See *Andrew F.*, 137 S Ct at 996–97, citing *Rowley*, 458 US at 207.

<sup>229</sup> For an illustration of this tension in post-*Fry* cases, compare *Abraham P. v Los Angeles Unified School District*, 2017 WL 4839071, \*4 (CD Cal) (determining that the plaintiff was not alleging a denial of a FAPE because he claimed he was placed in a segregated setting at school, and he "could theoretically raise a similar argument if he was placed in a segregated setting at a theater"), with *Parrish v Bentonville School District*, 2017 WL 1086198, \*30 (WD Ark) (conceding that a plaintiff could be "segregated" in a public space like a library or theater and have a cognizable claim, but because the segregation occurred in a special education classroom, a uniquely educational feature, the allegation amounted to a denial of a FAPE).

<sup>230</sup> See text accompanying notes 123–31.

Yes; but librarians, unlike teachers and school administrators, are not responsible for discipline or for overseeing a mealtime—such a situation would simply never arise. Similarly, could a teacher have brought the same claim as the child in *Witte*? Again, yes; but it would be absurd to imagine a principal reprimanding an adult teacher by demanding that she eat oatmeal. Just asking the suggested questions here feels bizarre given that these facts would not arise elsewhere; yet this is what *Fry* left lower courts to work with.<sup>231</sup> Because this example comes from a real case, a similar fact pattern could reoccur. Courts would have to confront facts like these in the wake of *Fry* no matter how far removed they seem from the paradigmatic examples posed in that case.<sup>232</sup> And it seems overly formalistic to assert that these claims are unrelated to a FAPE simply because, in some alternate universe in which librarians and theater tellers are responsible for the well-being of a child for eight hours (or more) a day, they could have occurred in another public sphere. Ultimately, these facts simply would never happen but for school faculty's and staff's unique positions in the child's life—as disciplinarians, protectors, educators, counselors, and monitors.

*Covington* provides another example of a case in which trying to reconcile the result of the case (waiver of exhaustion) with the *Fry* standard (whether the plaintiffs alleged a denial of a FAPE) proves incongruous. In that case, Jason Covington, a child with mental and emotional disabilities, was disciplined by his teacher in the form of a “vault-like” time-out room.<sup>233</sup> Jason was locked in the time-out room for long stretches of time and, on one occasion, had to relieve himself on the floor.<sup>234</sup> The

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<sup>231</sup> One post-*Fry* case applied these questions to a case concerning a student's toileting needs, demonstrating the bizarreness that some relatively common educational scenarios yield when applied to other public facilities or to comparably situated adults. *Sophie G. v. Wilson County Schools*, 265 F Supp 3d 765, 771 (MD Tenn 2017).

<sup>232</sup> The Court used two examples. First, it cited a wheelchair-bound student seeking access to the building; then, it compared that to a child alleging that the school failed to provide remedial math tutoring. The former example did not allege a denial of a FAPE; the latter did. *Fry*, 137 S Ct at 756–57. Clearly *Witte*, see text accompanying notes 123–31, and *Covington*, see text accompanying notes 142–46, 233–36, do not map nicely onto either set of facts, but they are also not fanciful or fictional. Courts determining whether students under similar scenarios alleged a denial of a FAPE face a challenge, then, applying *Fry* to scenarios in which the injury intertwines with the student's educational plan.

<sup>233</sup> *Covington*, 205 F3d at 913.

<sup>234</sup> *Id* at 913–14.

time-out room was a form of discipline contemplated by Jason's IEP, although obviously not as implemented.<sup>235</sup> The Sixth Circuit waived exhaustion but only because Jason had since graduated; the court reasoned that the harm was entirely retrospective and thus exhaustion was unnecessary.<sup>236</sup>

Now, applying the questions from *Fry*, what if Jason had been segregated in a similar fashion in a public theater? Would an adult in the building likewise have a claim? The answer to both must be yes. But like *Witte*, such a situation would never arise because theater attendants do not discipline patrons, nor do adults go to time-out. The uniquely educational nature of the injury must weigh toward the conclusion that Jason was denied a FAPE. And under *Fry*, that would indicate that exhaustion is mandated; yet the court pre-*Fry* waived exhaustion.<sup>237</sup>

This discussion goes to show that recharacterizing cases like *Covington* and *Witte* as non-FAPE cases based on the questions posed by *Fry* in order to reconcile their results—that is, that exhaustion was waived—is not tenable. That kind of characterization divorces the events from their uniquely educational context.<sup>238</sup> Grappling with what constitutes a denial of a FAPE under the *Fry* standard thereby reveals the ambiguities of the *Fry* standard. *Witte* and *Covington* do, at least arguably, allege a denial of a FAPE, which post-*Fry* would trigger exhaustion, a different result than those courts reached. The following Section argues that these cases are the kind in which damages were the correct, appropriate relief, and as such, both cases properly waived exhaustion when they were decided. *Fry* might seem to compel another result today, but because it left open the question, another solution—the interpretation of § 1415(l) proposed by this Comment—is possible.

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<sup>235</sup> Id at 914.

<sup>236</sup> Id at 917.

<sup>237</sup> Courts have come out differently post-*Fry* on this very issue (segregation), including in young Abraham's case. See *Abraham P.*, 2017 WL 4839071 at \*4 (determining that the plaintiff was not alleging a denial of FAPE because he claimed he was placed in a segregated setting at school, and he "could theoretically raise a similar argument if he was placed in a segregated setting at a theater").

<sup>238</sup> In any event, the cases at issue here are few and far between. The infrequency of such cases alone should go a long way to quell the fears of critics that this would create a pleading standard by which parents could circumvent exhaustion.

3. The most egregious violations: cases in which compensatory damages are appropriate and a denial of a FAPE is alleged.

Parts III.C.1–2 show that in order for the question at the heart of this Comment to arise, three conditions must be satisfied: the plaintiff alleges a denial of a FAPE, the plaintiff seeks a prayer for relief unavailable under the IDEA, and, crucially, the desired relief must be the appropriate relief. The last condition is relatively rare in FAPE cases. Damages are appropriate only for the kinds of injuries that go beyond typical educational wrongs, such as injuries involving physical harm or severe emotional distress.<sup>239</sup> But though they are rare, past cases such as *Covington* and *Witte* demonstrate that these kinds of facts do exist.

Turning back once more to *Covington*, assume that Jason had *not* graduated at the time of the lawsuit and that he was still a public-school student with the other underlying facts remaining the same. As to the question of relief, compensatory education under the IDEA can help compensate Jason for the lost learning time and maybe even help get him therapeutic services going forward; an injunction under the IDEA might prevent the misuse of the time-out room as applied to other students in the future, but can any form of relief available under the IDEA compensate for the emotional distress and physical and psychological trauma caused by Jason's time in a small, dark room? Indeed, traditional doctrine tells us that compensatory damages are the proper relief for such an injury,<sup>240</sup> and such relief is unavailable under the IDEA.<sup>241</sup> But because he has at least arguably alleged a denial of a FAPE,<sup>242</sup> *Fry* would first compel the "ponderous" exhaustion process through a forum that cannot provide the appropriate relief.<sup>243</sup>

A potentially interesting and increasingly relevant set of cases in which this might arise involves in-school arrests. When a teacher calls the police for behavior that is a manifestation of a

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<sup>239</sup> See Part III.C.1. E.F. and her family sought damages for emotional distress in *Fry* itself. See *Fry*, 137 S Ct at 752.

<sup>240</sup> See, for example, *Witte*, 197 F3d at 1276 ("The remedies available under the IDEA would not appear to be well suited to addressing past physical injuries adequately; such injuries typically are remedied through an award of monetary damages.").

<sup>241</sup> See *Charlie F.*, 98 F3d at 991 (finding that money damages are not available as relief under the IDEA).

<sup>242</sup> See Part III.C.2.

<sup>243</sup> *Burlington*, 471 US at 370.

student's disability, lifelong consequences can ensue for that student—the physical and emotional trauma of an arrest, a black mark on their educational record, and potentially even criminal proceedings.<sup>244</sup> This wrong might arguably fall outside of a denial of a FAPE (a student could surely be arrested in a library or a public theater). But there is a strong case to be made that this form of discrimination would never happen in a library or a public theater: teachers are uniquely situated to know about a student's disability, particularly when it is invisible, and uniquely responsible for implementing the de-escalation strategies mandated by the IEP—which should not include resorting to the juvenile justice system. For instance, if a child with an emotional disability has a history of throwing chairs, his IEP will almost surely mandate a particular adult response when this behavior occurs. If the child throws a chair and the teacher instead calls the police, then she has ignored the IEP, which would be a uniquely educational injury and likely a denial of a FAPE. Unlike the teacher, a librarian could not know of the child's disability nor would it be her responsibility to react differently than she would with any other person behaving similarly. In a case in which a disabled student is arrested in contravention of his IEP, compensatory education could account for the lost learning time but not for the emotional and physical trauma of being shunted into the criminal justice system because of his disability by the educators charged with helping him succeed.<sup>245</sup>

In sum, this discussion serves to highlight that there are indeed cases that are FAPE-centric under the *Fry* test for which damages are the most appropriate relief. When such a case arises, the facts tend to be appalling: they implicate pain, suffering, and

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<sup>244</sup> For a discussion of the consequences of in-school interaction with the criminal justice system, see Michelle Mbekeani-Wiley, *Handcuffs in Hallways: The State of Policing in Chicago Public Schools* \*17–18 (Sargent Shriver National Center on Poverty Law, Feb 2017), archived at <http://perma.cc/RBK7-RVS5>.

<sup>245</sup> This argument has been raised, albeit rarely. See *J.E.B. v Independent School District No. 720*, 2007 WL 1544611, \*4 (D Minn). The court did not reach the merits of whether the in-school arrests constituted a denial of a FAPE in that case because litigation occurred after a full due process hearing. Not only did the district court defer to the IHO's judgment that a FAPE was not denied without much further analysis, but because the case predated *Andrew F.*, the Eighth Circuit's FAPE standard was lower (only "some" as opposed to "no educational benefit"). *Id.* See also *Garcia v City of McAllen*, 2013 WL 6589426, \*5 (SD Tex) (determining, pre-*Fry*, that a claim for false arrest was not brought under the IDEA when the plaintiffs also did not argue that the arrest amounted to a denial of a FAPE).

emotional distress that compensatory education or the like cannot completely redress.<sup>246</sup> This question appears not in the typical IDEA cases, which are redressable with well-established IDEA forms of relief, but instead in cases in which it is clear that compensatory education or similar compensation will not suffice to right the wrong.

#### 4. Policy implications for waiving exhaustion.

The IDEA statutory scheme was designed to remedy the injustice of special education students languishing in classrooms: “3.9 million children are waiting for the fundamental equal educational opportunities on which our Nation is based. This is not right.”<sup>247</sup> Insisting on exhaustion will systematically underdeter schools from gross misconduct that is remediable in these types of cases.<sup>248</sup> Exhaustion, by design, functions as a filtration system.<sup>249</sup> Parents must endure a due process hearing—and in some states, mediation before or an appeal after—before filing in court. These steps are not merely red tape; a due process hearing, while easier and more accessible than a civil suit, still requires evidence gathering, written briefs, and witnesses. Even if the plaintiff proceeds pro se, the hearing costs time and money. All the while, the IHO lacks the authority to provide the relief sought, which in some cases will be the most appropriate relief. As a result, one can infer that many families are simply not getting their day in court.<sup>250</sup> As a coalition of disability advocates wrote in support of the Frys: “Justice is not merely delayed for those children; the spectre of months or years of costly and categorically futile proceedings before being allowed to seek the relief they plainly possess under civil rights laws deters many from seeking justice in the first place.”<sup>251</sup> While neither requiring

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<sup>246</sup> See Part III.C.1.

<sup>247</sup> *Education for All Handicapped Children Act of 1975, Hearings on S 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare*, 94th Cong, 1st Sess 1–2 (1975) (statement of Sen Randolph).

<sup>248</sup> See Guido Calabresi, *Optimal Deterrence and Accidents*, 84 Yale L J 656, 663 (1975) (describing the fault system’s reliance on, with some limitations, “deterrence . . . as to what behavior is worthwhile”).

<sup>249</sup> See Wasserman, 29 J Natl Assoc Admin L Judiciary at 360–61 (cited in note 63).

<sup>250</sup> See Enid Campbell, *Judicial Review and Appeals as Alternative Remedies*, 9 Monash U L Rev 14, 53 (1982) (“[T]he cost of litigating is [ ] a deterrent to many persons with justiciable grievances.”).

<sup>251</sup> Brief of National Disability Rights Network, Disability Rights New York, Equip for Equality, and Autistic Self Advocacy Network as Amici Curiae in Support of Petitioners,

nor waiving exhaustion changes the school's potential exposure to damages, the additional process does, in reality, prevent at least some, if not many, damages cases from making it to federal court. By extension, schools, school districts, and state education agencies are not always held accountable to the fullest extent (or at all). This gap creates underdeterrence against the kinds of extreme misconduct that led to these types of claims.<sup>252</sup>

Of course, this is fundamentally an empirical claim, and one for which the limited data provide tentative support. The available data show that some jurisdictions field several thousands of IDEA complaints each year (totaling annually, on average, more than 17,000 complaints nationwide).<sup>253</sup> Only a small portion, nearly 3,000 nationwide, lead to adjudication in a due process hearing each year.<sup>254</sup> Although that is a relatively small proportion of complaints, even fewer claims go to court. The data on judicial decisions of IDEA claims are even more limited, but suggest that only a small portion of those adjudications proceed to court—about 124 per year.<sup>255</sup> Inferences from these data are admittedly limited in many ways. For one, the data fail to count unreported cases, suggesting underinclusion; for another, they do not reflect cases that preemptively moved straight to court without exhausting, suggesting overinclusion. Moreover, they say nothing of the motivations of plaintiffs who choose to continue beyond the due process hearing, nor, for that matter, of those who choose not to. But these studies at least provide some baseline empirical data for the volume of special education complaints that do not see a forum that can provide damages.

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*Fry v Napoleon Community Schools*, Docket No 15-497, \*4 (US filed Aug 29, 2016) (available on Westlaw at 2016 WL 4524541).

<sup>252</sup> See *Developments in the Law: Section 1983 and Federalism*, 90 Harv L Rev 1133, 1218 (1977) (explaining that in the analogous—and sometimes identical, when IDEA cases arise under this statute—§ 1983 context that damage remedies can be viewed “as a means of deterring injurious conduct” and that “[d]amage remedies imposed on governmental entities could serve to prevent injuries to individuals by the system as a whole”). See also generally Calabresi, 84 Yale L J 656 (cited in note 248) (explaining how the tort system promotes optimal deterrence by making those who have committed violations pay damages).

<sup>253</sup> Perry A. Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA*, 302 Educ L Rptr 1, 10–11 (2014) (Appendix).

<sup>254</sup> *Id.* It is also worth noting that the number of hearings by jurisdiction varies significantly. Some states have fewer than ten hearings annually, on average, while some have several hundred.

<sup>255</sup> Perry A. Zirkel and Brent L. Johnson, *The “Explosion” in Education Litigation: An Updated Analysis*, 265 Ed L Rptr 1, 5 (2011) (Table 2). The data compiled by the authors counted cases from 2000 to 2009 using Westlaw's KeyCite system.

Turning to an example illustrating deterrence in practice, allowing exhaustion in a case involving an in-school arrest would have a two-fold effect. First, such a rule would deter overuse of school resource officers (uniformed police officers stationed at schools). Admittedly, such a deterrent effect would be small: not all in-school arrests are of children with IEPs nor are all in-school arrests of children with IEPs related to a denial of a FAPE. Nonetheless, many are.<sup>256</sup> Waiving exhaustion might reduce those cases to some extent and compel more faithful introduction and implementation of de-escalation techniques instead of dependence on police. In addition, waiving exhaustion may also help clear a path to justice for children who ought to have been nurtured at school but instead were arrested.

This example is particularly salient in the context of the school-to-prison pipeline and its disproportionate impact on both students of color and students with disabilities. Youth of color are both overrepresented in special education (and certain special education categories in particular) and in school discipline.<sup>257</sup> Youth in the juvenile justice system are also several times more likely to need special education services than children outside of the system.<sup>258</sup> According to the US Department of Education, students served by the IDEA “represent a quarter of students arrested and referred to law enforcement, even though they are only 12% of the overall student population.”<sup>259</sup> Moreover, and perhaps unsurprisingly, a racial disparity is also reflected in the population of students with disabilities arrested in school. In Chicago in 2013, about 40 percent of students receiving IDEA services were black, but of the 567 school-based arrests of IDEA students, nearly 70 percent were of black students.<sup>260</sup>

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<sup>256</sup> See US Department of Education Office for Civil Rights, *Civil Rights Data Collection Data Snapshot: School Discipline* (Mar 21, 2014), archived at <http://perma.cc/QWP9-Q89Z>.

<sup>257</sup> See generally Torin D. Togut, *The Gestalt of the School-to-Prison Pipeline: The Duality of Overrepresentation of Minorities in Special Education and Racial Disparity in School Discipline on Minorities*, 20 Am U J Gender Soc Pol & L 163 (2011).

<sup>258</sup> Amanda Merkwae, Note, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 Mich J Race & L 147, 152 (2016).

<sup>259</sup> *Data Snapshot: School Discipline* at \*1 (cited in note 256).

<sup>260</sup> *Civil Rights Data Collection: Discipline of Students with Disabilities—School-Related Arrest, City of Chicago SD 299* (Department of Education), archived at <http://perma.cc/PJ4P-BXTU>. This is not unique to Chicago. In Boston in 2013, black students accounted for fewer than half of students receiving special education, but more than three-quarters of in-school arrests of special education students were of black students. US Department of Education, *Civil Rights Data Collection: Discipline of Students with Disabilities—School-Related Arrest, Boston* (Department of Education), archived at

Again, not every arrest will amount to a denial of a FAPE.<sup>261</sup> But in the face of this disparate impact, deterring, even slightly, the use of school resource officers for student behavior can only help schools' most vulnerable populations.

The more common examples, albeit still rare in the scheme of special education law, are cases like Abraham's, along with *Witte* and *Covington*. In these cases, the physical and psychological harms stemming from the alleged abuse at the hands of educators are readily apparent.<sup>262</sup> Waiving exhaustion in cases like this permits swifter awards of compensatory or, when appropriate, punitive damages. In turn, those judgments deter schools and districts from committing these egregious violations. The alternative is a due process hearing, a proceeding which both cannot grant full redress for the harms incurred and which wastes time, money, and goodwill for all parties. For most IDEA cases, those faults might be forgivable because of exhaustion's merits. For these cases, in which the FAPE denial is of the nature that only compensatory damages can redress the student's injury, justice requires swift and full resolution, which can be achieved only in court.

##### 5. Addressing the merits of requiring exhaustion.

The most commonly cited—and perhaps the most compelling—concern with respect to waiving exhaustion is that allowing waiver will create a pleading standard by which parents can circumvent the due process hearing by merely asking for money.<sup>263</sup> This is not an invalid concern, but it is overblown. First, for families with claims that are redressable by IDEA relief (not those who are the subject of this Comment), due process is a more attractive procedure than civil litigation. Said differently, for

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<http://perma.cc/7W8Y-XDMD>. In Los Angeles, black students constituted nearly 11 percent of the population receiving IDEA services, but 30 percent of arrests of IDEA students. US Department of Education, *Civil Rights Data Collection: Discipline of Students with Disabilities—School-Related Arrest, Los Angeles Unified* (Department of Education), archived at <http://perma.cc/92EM-8AVT>. Where data are available, the list could go on.

<sup>261</sup> Not all arrests might amount to a denial of a FAPE, but it would be a mistake to think that students are arrested in schools for only the most serious of crimes. Many in-school arrests are for highly trivial behaviors. See Merkwae, Note, 21 Mich J Race & L at 154 (cited in note 258) (noting that “students are now being ticketed or charged with crimes for behaviors that teachers or school administrators previously addressed” and citing examples, such as an in-school arrest for doodling on a desk).

<sup>262</sup> See *Abraham P.*, 2017 WL 4839071 at \*1–3; *Witte*, 197 F3d at 1272–74; *Covington*, 205 F3d at 913–14.

<sup>263</sup> See, for example, *Polera*, 288 F3d at 489.

families that can get relief from due process, the nature of the procedure incentivizes proceeding through that route rather than attempting to demand damages in court. The due process hearing is less burdensome than litigation; it is more informal and accessible to parents proceeding pro se; disputes may be resolved in mediation; and the hearing officer, while unable to give compensatory or punitive damages as relief, nonetheless has latitude to craft many equitable remedies.<sup>264</sup> Despite the hearing officer's breadth of available relief, some injuries simply cannot be redressed by what the IHO can give. Nonetheless, for most IDEA cases, the due process hearing is likely the more attractive procedure—so long, of course, as that procedure can give meaningful relief to the aggrieved family. Waiving exhaustion is merited in the cases in which it cannot.

Even more fundamentally, the “pleading standard” complaint ignores the fact that the relief sought must still fit the injury alleged. As discussed in Parts III.C.1–3, for most IDEA cases, money damages will simply *not* be the most appropriate form of relief. The cases in which this is a relevant question are rare, and the facts involve some kind of above-and-beyond violation that merits damages over IDEA relief. This solution requires judges to sort out the types of claims for which money damages are appropriate from the run-of-the-mill cases in which compensatory education (or the like) would be adequate.<sup>265</sup> Judge Frank Easterbrook, writing for the Seventh Circuit in *Charlie F.*, doubted this was possible: “Perhaps Charlie’s adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can.”<sup>266</sup> His concerns are misguided. Determining whether the desired relief fits the facts is what judges do all the time when faced with civil litigation. It is not a stretch to say that judges are capable of weeding out those unique cases in which damages are the most

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<sup>264</sup> See *Reid*, 401 F3d at 523–24.

<sup>265</sup> This solution also trusts that judges can spot a prayer for prospective services disguised as a prayer for compensatory damages. See *Payne*, 653 F3d at 877:

If the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling—relief available under the IDEA—then the IDEA requires exhaustion. In such a case, the plaintiffs are seeking the same relief, even if they are willing to accept cash in lieu of services in kind.

<sup>266</sup> *Charlie F.*, 98 F3d at 993.

appropriate relief. Indeed, judges *should* scrutinize the complaint to determine whether the prayer for compensatory or punitive damages fits the alleged injury.<sup>267</sup>

Of course, due process hearings have other merits. As a general matter, exhaustion of administrative remedies allows for the development of a record. In addition, IHOs possess deep, relevant experience in this area of the law, which is nontrivial when dealing with the alphabet soup of education law. State education agencies have an interest in resolving the dispute locally.

These are good reasons for due process hearings, and those benefits will necessarily be sacrificed each time exhaustion is waived. However, these are reasons meriting caution, not for requiring universal exhaustion. Even post-*Fry*, these benefits apply with equal force but are nonetheless forgone by waiving exhaustion when the gravamen of the complaint does *not* allege a denial of a FAPE; yet the Court has put its imprimatur on waiver in that class of cases. The Court, then, is willing to sacrifice these benefits in favor of faithful adherence to the statute. As explained in this Part, the statute demands waiver in cases that allege a denial of a FAPE but properly demand a form of relief that the IDEA cannot provide as well.

In addition, due process hearings prevent at least some litigation from clogging judges' dockets. Nonetheless, due process hearings are patently futile for parents seeking these particular forms of relief, and futility is a well-established exception to exhaustion.<sup>268</sup> Indeed, it is deeply inefficient to force parents through a hearing that, by law, cannot grant the relief they are seeking. *Batchelor*, despite insisting on exhaustion, demonstrates the inefficient use of resources that stems from mandating exhaustion in these cases. The Third Circuit wrote that "after exhaustion, [the student] may very well file a complaint containing virtually identical claims as asserted in the" original complaint.<sup>269</sup> In essence, then, both the plaintiffs and schools must go through litigation twice, the first time with no chance of students walking away with their problem adequately solved if compensatory or punitive damages were appropriate all along.

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<sup>267</sup> See FRCP 8(a) (stating that a complaint must both specify the relief the plaintiff seeks and the reasons why the plaintiff is entitled to that relief).

<sup>268</sup> See *Hoelt*, 967 F2d at 1303 ("Excusing exhaustion in cases of futility and inadequacy is based both on general exhaustion principles and on the legislative history of the IDEA.") (citation omitted).

<sup>269</sup> *Batchelor*, 759 F3d at 278 n 15.

So while exhaustion might prevent some cases from making it to court, IHO officers will see more cases for which they cannot provide the appropriate relief. As the solicitor general pointed out in his brief for the Frys, “requiring exhaustion would force the plaintiff (and school district) to participate in a time-consuming, adversarial, and potentially costly due process hearing that will likely create unnecessary administrative burdens for all involved.”<sup>270</sup> This might prevent a case from entering the courtroom, but it also uses taxpayer dollars to fund an extraneous hearing as a sham procedural prerequisite. Moreover, prolonging the adversarial process risks eroding the relationship between the parties, reducing the chances of a mutually agreeable settlement. Such a requirement does not provide justice for these children—at best, it delays it.

#### CONCLUSION

This Comment has argued in favor of waiving the exhaustion requirement when the plaintiff seeks monetary relief for denial of a FAPE. This conclusion is rooted in statutory interpretation of § 1415(*l*) as informed by the plain-language reading of the provision, case law, and comparable statutes. Moreover, such a conclusion is both aligned with the purpose of the IDEA and sound as a matter of policy.

As explained in Part III, this Comment does not argue for a pleading standard. Parents cannot simply say the magic words “compensatory damages” and evade the due process hearing. Judges should scrutinize the plaintiff’s complaint to ensure that the relief requested is, indeed, the appropriate form of relief. Judges are free, too, to dismiss a case insofar as the relief sought is available under the IDEA while letting litigation continue to the extent that damages are the appropriate remedy.<sup>271</sup> Even so, concurrent litigation will not always be necessary—if the family is happy with the current IEP but suing for a past denial of a FAPE, for example, they may choose to only seek relief that is unavailable under the IDEA.

Moreover, the number of cases in which that is the case is likely small. Those cases distinguish themselves from run-of-the-mill IDEA cases because of their egregious fact patterns—

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<sup>270</sup> Solicitor General Brief at \*27 (cited in note 95).

<sup>271</sup> This is the approach taken in a recent post-*Fry* district-court case. See *A.M. v Fresno Unified School District*, 2017 WL 6209389, \*8–10 (ED Cal).

compensatory education or other IDEA relief is simply not commensurate with the alleged injury. As in the case of Abraham in Los Angeles, the harm underlying the prayer for relief cannot be addressed by typical IDEA remedies. Judges are well equipped to weed out these cases.

The common thread between these kinds of cases, in which a child is denied a FAPE and monetary relief is appropriate, is that helping the student catch up academically is not enough. These students deserve more justice than mere school-related services can provide, a notion rooted in sound legal principles of relief and in the purpose of the IDEA as a protection for disabled children against apathetic schools. Moreover, schools and districts are currently *not* paying for the most egregious harms they commit against disabled students, at least not fully or promptly.

When a student like Abraham—who has endured trauma at the hands of trusted adults, but is, by all accounts, now doing fine—asks for relief from the courts, we crave both justice on his behalf and assurance that children like him will not suffer going forward. Moreover, we hope that the procedures that get us to this result are swift. In response to Justice Kagan's question in footnotes four and eight of *Fry*, the solution is simple and rooted in the text of § 1415(*l*). The answer must be to waive exhaustion in cases in which the plaintiff alleges a denial of a FAPE but requests relief that is unavailable under the IDEA.