CASE NO. 13-6323

In the United States Court of Appeals for the Sixth Circuit

F.H., by his next friend, SANDRA FAY HALL and SANDRA FAY HALL,

Plaintiffs – Appellants

v.

MEMPHIS CITY SCHOOL, VINCENT HUNTER, WALTER BANKS, MALICA JOHNSON, PATRICIA A. TAORMINA, and PAT BEANE,

Defendants – Appellees

On Appeal from the United States District Court for the Western District of Tennessee at Memphis, No. 2:12-cv-12312 The Honorable John Thomas Fowlkes

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, DISABILITY LAW AND ADVOCACY CENTER OF TENNESSEE, TENNESSEE ALLIANCE FOR LEGAL SERVICES, THE ARC TENNESSEE, SUPPORT AND TRAINING FOR EXCEPTIONAL PARENTS, TENNESSEE VOICES FOR CHILDREN, INC. and PEOPLE FIRST OF TENNESSEE IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Dated: December 19, 2013

Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Council of Parent Attorneys and Advocates ("COPAA"), Disability Law and Advocacy Center of Tennessee ("DLAC"), The Arc Tennessee ("The Arc TN"), Tennessee Alliance for Legal Services ("TALS"), Support and Training for Exceptional Parents ("STEP"), Tennessee Voices for Children, Inc. ("TVC") and People First of Tennessee ("Amici") hereby respectfully move for leave to file the attached brief as *amici curiae* in support of Plaintiff-Appellant. This motion is accompanied by *Amici*'s proposed brief as required by Rule 29(b).

ARGUMENT

A. Interests of *Amici*

Amici are national and regional advocates for individuals with disabilities. Amici provide resources, training, and information for individuals with disabilities and to assist in obtaining the free appropriate public education ("FAPE") required by the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* In addition, *Amici* are dedicated to the protection of constitutional and statutory rights of individuals with disabilities pursuant to 42 U.S.C. Section 1983, as well as enforcement of the non-discrimination provisions in Section 504 of the

Rehabilitation Act of 1973 ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. ("ADA").

This appeal presents significant issues regarding the proper interpretation and scope of the provisions of the IDEA and their interplay with other federal civil rights laws. *Amici* offer the Court their unique and important views on the legislative purposes behind the limited exhaustion provision found in the IDEA, 20 U.S.C. § 1415(*l*).

COPAA is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the FAPE under the IDEA. COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including 42 U.S.C. § 1983 ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq*. ("ADA"). COPAA brings to

this Court a unique perspective of parents and advocates for children with disabilities and their experiences with the challenges faced by such children, whose success depends not only on the right to secure the FAPE promised by the IDEA, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

DLAC, a non-profit federally funded and authorized Protection and Advocacy organization, has provided advocacy services to people with disabilities in Tennessee since 1978. DLAC advocates for the educational rights of students and their parents under the IDEA and Section 504 through legal representation for due process hearings, Office for Civil Rights complaints, and administrative complaints and through advocacy services at meetings to develop Individualized Educational Programs. DLAC also provides training and support to families, agencies, and attorneys representing students with disabilities.

The Arc TN is a statewide, grassroots, non-profit disability advocacy organization committed to protecting and promoting the human rights of people with intellectual and developmental disabilities (I/DD). Through its family-based network of members and chapters, The Arc TN supports, empowers, connects and informs individuals and families;

improves support and service systems; influences public policy; increases public awareness and inspires inclusive communities. The Arc TN's network of advocates provides support for individuals with I/DD and their families as they navigate the complex systems of education, health care, housing, and long-term supports and services to ensure that their rights are being protected and their needs are being met. The Arc TN's public policy work has resulted in increased protections around the use of restraint and seclusion for students receiving special education services, brought attention to the waiting list for long-term services and supports, and updated offensive language in the Tennessee code.

TALS is a non-profit organization that supports the statewide system of legal aid programs in Tennessee and works to unite and strengthen the equal justice network in Tennessee. TALS develops high-quality continuing legal education for public interest and *pro bono* attorneys throughout the state, and works to reinforce the advocacy that legal aid programs provide by coordinating statewide substantive law task forces in civil legal issues including the Special Education & Juvenile Justice Law Task Force. In addition to the direct support for legal aid programs and issues, TALS administers three programs that provide free legal resources and information to low-income citizens who might

otherwise fall through the cracks of receiving legal assistance. Those programs include an attorney-staffed help line that gives free legal information and referrals (1-888-aLEGALz), a web-based pro bono clinic for low-income Tennesseans (www.onlinetnjustice.org) and a comprehensive legal information and resources web portal (www.legalinfotn.org).

STEP has, for 24 years, housed the only cross-disability parent training and information center (PTI) in Tennessee. As a 501(c)(3) non-profit corporation, STEP has had a significant impact on the disability service delivery system throughout Tennessee. The majority of the STEP staff and board of directors are parents of individuals with disabilities or are individuals with disabilities. Many staff members have students who are receiving special education services in the Tennessee public school system. Others have family members who are either in transition to adult life from high school or have successfully navigated the process and are contributing members in their communities. STEP staff's professional and personal experience, knowledge and connection to other disability organizations and resources are the springboard for the framework of our work with families and students. STEP has provided substantial assistance and training to parents of children with disabilities across Tennessee,

including parents from a range of socio-economic backgrounds, parents of limited English proficient children, parents who are traditionally underserved, and parents with disabilities. STEP has strong partnerships with other disability organizations and state agencies who serve families who have students with disabilities and focus on issues related to the field of special education and are committed to ensuring that families have the information, training, and support they need to navigate the process for their children and family members from birth through age twenty-six.

TVC is a non-profit statewide organization, formally established in 1990, with the mission to provide support and advocacy for families of children and youth with emotional, behavioral and mental health disorders. TVC is the statewide chapter for both the National Federation of Families for Children's Mental Health and National Youth M.O.V.E. (Motivating Others through Voices of Experience), and is the state's family organization having at least 51% board membership of caregivers of children with mental health issues. TVC realizes its mission - to speak out as active advocates for children and families - through diverse activities that promote family voice and choice, encourage policy making that includes family involvement at all levels, and educate/inform youth, caregivers, professionals, policy makers and community members

about the importance of collaboration, early intervention and children's mental health. To this end, TVC staff work within the school systems in nearly all 95 counties of Tennessee, supporting caregivers in navigating the complex special education system and ensuring that families are aware of their rights and responsibilities regarding education. TVC provides individual advocacy and support in school meetings (s-teams to manifestation hearings) for youth with emotional and behavioral issues (including learning disabilities), training for both parents and educators, and consultation to school systems on parental involvement and engagement.

B. Why An *Amicus* Brief is Desirable and Relevant

Amici's brief is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in this appeal are of great importance to these *Amici*, their members and constituents and to the Court. Congress enacted 20 U.S.C. § 1415(*l*) specifically to safeguard the rights of IDEA-eligible children under other federal laws.

Amici offer the Court relevant matter not brought to Court's attention by the parties or other amici. *See Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986). *Amici* provide information regarding the prevalence of the type of neglect and abuse

alleged here, address the legislative goals behind the passage of the exhaustion provision at 20 U.S.C. § 1415(*l*), and describe how the district court's reading of that provision is inconsistent with the plain meaning of the law and will impede coherent enforcement of the IDEA. *Amici* will therefore supply a distinct and relevant analysis of the issues presented on appeal.

III. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court grant their motion to file the attached brief in support of Plaintiffs-Appellants.

Respectfully Submitted,

Dated: December 19, 2013

s/ Judith A. Gran

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RULE 26.1 CERTIFICATION

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* Council of Parent Attorneys and Advocates, Disability Law and Advocacy Center of Tennessee, The Arc Tennessee, the Tennessee Alliance for Legal Services, Support and Training for Exceptional Parents, Tennessee Voices for Children, Inc., and People First of Tennessee make the following disclosure statement:

Each of the above-named *amici* is a non-profit association. None has a publicly owned parent corporation, subsidiary, or affiliate, and none has issued shares or debt securities to the public. As a result no publicly held company owns 10 percent or more of the stock of any of the above-named *amici*.

s/ Judith A. Gran
Judith A. Gran

Dated: December 19, 2013

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Council of Parent Attorneys and Advocates ("COPAA") is a not-for-profit organization for parents of children with disabilities, their attorneys and advocates. COPAA believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties. COPAA does not undertake individual representation for children with disabilities, but provides resources, training, and information for parents, advocates and attorneys to assist in obtaining the free appropriate public education ("FAPE") such children are entitled to under the Individuals with Disabilities Education Act ("IDEA" or "Act"), 20 U.S.C. § 1400, *et seq*. COPAA also supports individuals with disabilities, their parents and advocates, in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983) ("Section 1983"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and Title II of the Americans with Disabilities Act, 42 U.S.C. §

[1] Pursuant to Federal Rule of Appellate Procedure 29, *Amici* certify that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *Amici* and their members and counsel contributed money intended to fund the brief's preparation or submission.

12131, *et seq*. ("ADA"). COPAA brings to this Court a unique perspective of parents and advocates for children with disabilities and their experiences with the challenges faced by such children, whose success depends not only on the right to secure the FAPE promised by the IDEA and Section 504, but also upon the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

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People First of Tennessee ("People First") is a state-wide advocacy organization governed entirely by persons with disabilities. It was founded in 1981 and incorporated in 1984 as a non-profit corporation under the laws of the state of Tennessee. One of the organization's central purposes is to promote the philosophy that everyone, no matter what his or her disability, has the same basic civil rights and responsibilities. To fulfill that purpose, People First and its members advocate for legislation, teach persons with disabilities across the state how to exercise their legal rights and responsibilities, organize and host conferences, negotiate with state officials, and inspect and monitor programs serving persons with disabilities to ensure

quality. Members of People First have been placed in special education classes and schools and have lived in institutions and other congregate settings. They have experienced at first hand the helplessness, shame and distress of being dependent on staff who are abusive or deliberately indifferent to their needs.

People First serves as class representative for the certified class in *People First of Tennessee v. Clover Bottom Developmental Center,* No, 95-1227 (M.D. Tenn.), consisting of the remaining residents and former residents of four Tennessee state institutions for persons with intellectual disabilities and related conditions, including cerebral palsy. People First also served as class representative for the certified class in *United States and People First of Tennessee v. State of Tennessee*, No. 92-2062 (W.D. Tenn.), from 1995 until the district court relinquished jurisdiction in December, 2013. In both cases, which collectively have been before this Court many times on appeal from orders of the District Court, People First advocated zealously for, and obtained, significant remedies for class members who had experienced abuse and deliberate indifference. School-age children were members of the class in both cases, particularly the Arlington class, which included many students in the Memphis City and Shelby County Schools.

INTRODUCTION AND SUMMARY OF ARGUMENT

The crabbed interpretation of 20 U.S.C. § 1415(*l*) in the Report and Recommendation adopted by the district court in this case directly conflicts with the statutory language and undermines the purpose and intent of the IDEA, as well as federal civil rights laws generally. Although the IDEA is a broad, remedial statute designed to safeguard the rights of students with disabilities, it was never designed provide retrospective compensation for the type of abuse and neglect alleged here. Because the most likely victims of abuse in the school setting are students with disabilities, the district court's unwarranted narrow reading of 20 U.S.C. 1415(*l*) is particularly problematic.

Further, the holding that IDEA requires exhaustion of administrative remedies prior to enforcement of an agreement reached during a resolution session conflicts with the plain text of the statute and undermines the purposes of IDEA's alternative dispute resolution provisions. The court's holding that student with an IEP is not entitled to the protections of other federal civil rights laws such as Section 1983 without first exhausting administrative procedures is inconsistent with the statutory text. The holding also has the effect of diminishing the rights of IDEA-eligible students. Under the district court's reading of the statute, a student with an IEP is in a

less favorable position than students without IEPs when it comes to enforcing the civil rights protections created by federal laws other than the IDEA. This results in an incoherent and unsupportable interpretation of the Act.

FACTUAL BACKGROUND

Amici adopts fully by reference herein the Statement of Facts in the Brief for Plaintiff-Appellant F.H., at pp. 6-11.

ARGUMENT

A. Notwithstanding the IDEA's Broad Remedial Purpose, Abuse and Neglect in Schools Does Exist, and the IDEA Does Not Provide Any Retrospective Remedy

Congress enacted the precursor statute to IDEA "in 1970 to ensure that all children with disabilities are provided 'a free appropriate public education' [FAPE] which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Forest Grove v. T.A.*, 557 U.S. 230, 239 (2009) (quoting *School Comm. of Burlington v. Department of Educ. of Mass.,* 471 U.S. 359, 367 (1985)). IDEA "embodies a strong federal policy to provide an appropriate education" for every child with disabilities. "[I]nterrelated purposes underlay its passage. First, Congress sought to secure by legislation the right to a publicly-supported

equal educational opportunity which it perceived to be mandated by *Brown v Board of Educ.*, [347 U.S. 483 (1954)] and explicitly guaranteed with respect to the handicapped by two seminal federal cases, *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, [334 F. Supp. 1257 (E.D. Pa. 1971), modified 343 F. Supp. 279 (1972)] and *Mills v. Board of Educ.,* [348 F. Supp. 866 (D.D.C. 1972)]. Second, Congress intended the provision of education services to increase the personal independence and enhance the productive capacities of handicapped citizens." *Kruelle v. New Castle County Bd. of Educ.*, 642 F.2d 687, 690-691 (3d Cir. 1981).

To that end, the IDEA requires that states provide eligible students with "special education and related services that – (A) have been provided at public expense, under public supervision, direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of [IDEA]." 20 U.S.C. § 1401(9).

States provide these required services through an IEP. The IEP outlines an individual student's present levels of achievement and identifies individualized goals. The annual goals are designed to allow the student to

progress in the general education curriculum, as defined by the state's curriculum content standards for all students. 34 C.F.R. § 300.39. Ultimately, an IEP is intended to provide a student with a disability with "meaningful educational progress," as defined in the case law interpreting the IDEA. *See Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206-207 (1982). The IDEA does not restrict a student's ability to pursue claims under other federal civil rights laws, and "compliance with the IDEA does not automatically immunize a party from liability under" other federal laws. *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) (discussing application of the IDEA, Section 504 and the ADA); *cf. K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2012) (ADA imposes less elaborate procedural requirements but establishes different substantive requirements on public entities); *Hornstine v. Township of Moorestown Bd. of Educ.*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (plaintiff provided with FAPE under IDEA but also subjected to unlawful discrimination).

When a school district abridges a student's rights under the IDEA, the statute provides the parents procedures to redress that deprivation. Parental invocation of the IDEA's procedural safeguards to protect their children's rights is integral to the realization of the statutory goals, because of parents'

"particular and personal interest" in fulfilling the national policy embodied in the IDEA. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007). The available processes include the dispute resolution procedure which resulted in the settlement agreement in this matter.

Unfortunately, notwithstanding the IDEA and federal and state laws outlawing disability-related discrimination, a "surprisingly large number of cases involve physical abuse of people with disabilities, even in seemingly unlike settings such as . . . schools." Mark C. Weber, *The Common Law of Disability Discrimination*, 2012 Utah L. Rev. 429, 460. In 2009, the Government Accounting Office issued a report documenting allegations of abuse (in the form of seclusion, restraint and aversive interventions) and death at public and private schools throughout the United States. *See* Government Accounting Office, "Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers" (available at http://www.gao.gov/new.items/d09719t.pdf) ("GAO Report"; National Disability Rights Network, School Is Not Supposed to Hurt: Investigative Report on Abusive Restraint and Seclusion in Schools, (http://www.napas.org/images/Documents/Resources/Publications/Reports/SR-Report2009.pdf (Jan. 2009). Almost all of the hundreds of allegations investigated involved children with disabilities. GAO Report at 5. Indeed,

one commentator has argued that, notwithstanding the IDEA's worthwhile intent and purpose, the classroom has become an "unsafe environment for children with disabilities." Laura C. Hoffman, *A Federal Solution that Falls Short: Why the Keeping All Students Safe Act Fails Children with Disabilities*, 37 J. Legis. 39, 56 (2011) (discussing prevalence of abuse of children with disabilities and analyzing proposed federal legislation to address abuse and neglect in schools); *see also A.B. v. Seminole County Sch. Bd.*, 2005 U.S. Dist. LEXIS 36722 (M.D. Fla. Aug. 31, 2005) (where teacher slapped, struck, grabbed and choked, yelled at, intimidated, ridiculed and cursed at and student with an IEP, declining to dismiss Section 1983 claim for compensatory damages).

There is no question that abuse and neglect of students with disabilities occurs in our schools. The IDEA, with its focus on educational planning and no available retrospective damages relief, cannot, to any degree, remedy this problem. *See, e.g.*, *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275-1276 (9th Cir. 1999). The district court erred in concluding otherwise.

B. The District Court's Decision Conflicts with Explicit Statutory Language Establishing and Encouraging Alternative Dispute Resolution Procedures for Parents Who Invoke the IDEA's Administrative Process

This is not a case where the parents are trying to evade the administrative process established by the IDEA. Rather, the parents invoked the administrative process, completed the first step by participating in a resolution session, and, as contemplated by the statute, and reached an agreement. The clear terms of the statute establish that that such an agreement is enforceable in court without further resort to administrative procedures.

"When . . . statutory 'language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'" *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296-297 (2006) (quoting *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (citations omitted). Thus, federal courts proceed with the understanding that, unless otherwise defined, statutory terms should be interpreted in accordance with their ordinary meaning. *Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013). At the same time, courts construe federal laws by not only reading the text but also "considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Kasten v. Saint-Gobain Performance Plastics Corp*., 131 S. Ct. 1325, 1330 (2011) (quoting *Dolan* v. *Postal Service*, 546 U.S. 481, 486 (2006)). This approach makes "statutes into more coherent schemes for the accomplishment of specified goals than they might otherwise be." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 128 (2013).

As Professor Driesen notes:

> Coherence in turn helps legitimate law. To the extent we treat statutes as coherent schemes for accomplishing public ends, the law commands respect and obedience. Hence, when judges create rationales for statutory construction tying particular results to public objectives motivating congressional enactment, they increase the likelihood of faithful administration of the law, public acceptance of the law, and compliance with the law.

48 Wake Forest L. Rev. at 128. When the statutory language is unambiguous and the statutory scheme coherent and consistent, judicial inquiry ceases. *Sebelius*, 133 S. Ct. at 1895.

The reasoning in *Sebelius* is instructive. In that case, involving the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. 300aa-1, *et seq.* ("NCVIA") the federal government argued for a definition of the term "filed" that would have precluded an award of attorney's fees, and was inconsistent with the plain meaning of the word "filed." The Court rejected

that argument, because it is commonly understood that a claim is "filed" when it is delivered to and accepted by the appropriate court. 133 S. Ct. at 1893. Further, the Court observed, the government's position would undermine the goals of the fee provision in the NCVIA. A stated purpose of the fee provision was to enhance the opportunity for individuals to present claims by making fee awards available for "non-prevailing good faith claims." *Id.* at 1893 (citation omitted). The government's interpretation would have discouraged counsel from representing NCVIA petitioners, which would undermine the statutory purpose.

Likewise, coherent interpretation of the IDEA, relying upon the plain meaning of the Act's text as well as the purpose behind the resolution session provision, requires rejection of the district court's conclusion that plaintiffs had to exhaust claims related to the settlement agreement in this case. The extensive procedural safeguards designed to effectuate the IDEA's statutory purpose include the right to seek administrative and judicial review of a school district's decision relating to the education, program or placement of a student with disabilities. The 2004 re-authorization created a mandatory "resolution session," *which is part and parcel of the administrative process*, to be held whenever parents file a complaint for a due process hearing. *See* 20 U.S.C. §1415 (f)(1)(B)(i).

A resolution session is a meeting between the parents who have filed a due process complaint and the respondent school district. The session must take place within fifteen (15) days of a parental request for a due process hearing. Resolution sessions have become "a core feature of the due process protocol." Andrea F. Blau, *Available Dispute Resolution Processes Within the Reauthorized Individuals with Disabilities Education Improvement Act (IDEIA) of 2004: Where do Mediation Principles Fit In?*, 7 Pepp. Disp. Resol. L.J. 65 (2007); *see also* Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up is Hard to Do,* 43 Loy. L.A. L. Rev. 641, 647 (2010) (noting that 2004 re-authorization "refined and expanded provisions introduced in 1997 to promote alternative dispute resolution"). IDEA explicitly provides that agreements reached during a resolution session are enforceable in federal court. 20 U.S.C. § 1415(f)(1)(B)(iii)(II). As in *Sebelius*, the statute manifests a clear and plain meaning that supports plaintiffs' position here – that they should be able to enforce the settlement agreement without further resort to administrative procedures.

In addition, as in *Sebelius,* the alternative reading, that such a claim is subject to exhaustion, results in an incoherent interpretation of the statute. The legislative history of the 2004 Amendments to the IDEA reflect

Congressional intent to encourage settlement of cases without resort to further litigation after parents have invoked the administrative dispute resolution procedures in the Act. The Senate Report states that the resolution session is designed to provide the parties "to resolve matters in a more informal way before moving to a more adversarial process." S. REP. NO. 185, 108th Cong. 1st Sess. 38 (2003) ("S. REP. NO. 108-185"). The House Report notes the "Committee's strong preference that the resolution session, mediation and voluntary binding arbitration become the typical methods for resolving disputes under the Act." H.R. REP. NO. 77, 108th Cong., 1st Sess. 114 (2003) ("H.R. REP. NO. 108-77"). Congress required that parties who reach a settlement during this first step in the administrative process "memorialize any resolution agreement in a written document that is enforceable in court, as is any other written settlement agreement." S. REP. NO. 108-185 at 38. The resolution session is designed "to help foster greater efforts to resolve disputes in a timely manner so that the child's interests are best served." H.R. REP. NO. 108-77 at 114; *see also* S. REP. NO. 108-185 at 39 (goal of resolution session is settlement of dispute before parties have to spend time and resources for a due process hearing).

Professor Weber observes that jurisdiction "undeniably" exists for settlements reached at mediation or during a resolution session. He goes on

to succinctly explain why it would undermine federal policy to apply an exhaustion requirement to enforce such agreements:

> If jurisdiction exists for settlement enforcement claims, as it undeniably does for settlements reached at mediation and the resolution session, there is no justification to impose an exhaustion requirement. An exhaustion requirement puts the aggrieved party literally back at square one, having to litigate the case that was supposed to have been resolved; that remains true even if the hearing officer is willing to transform the claim into one over the breach of the agreement itself, something that not all hearing officers are willing to do nor all courts willing to require. Actions to enforce special education settlement agreements need not be burdensome to the courts. By and large, they will hinge on the straightforward question whether the parties have or have not complied with the letter of the agreement. *Far more costly in terms of judicial and administrative economy is the uncertainty surrounding the enforceability of settlements*.

Weber, *supra,* 43 Loy. L.A. L. Rev. at 664 (emphasis supplied); *see also* Driesen, *supra*, at 128 ("sensitive appreciation of the law's objectives and how its provisions may contribute to that objective" enhance predictability).

In this case, the district court, by imposing an exhaustion requirement upon enforcement of the agreement reached in the resolution session, penalized F.H. and his parent for participating in voluntary dispute resolution procedures. This is not only inconsistent with the plain statutory language, which vests in courts jurisdiction over enforcement of agreements

reached at resolution sessions, but also completely undermines the statutory purpose of encouraging parties to pursue settlement rather than litigation.

C. The Decision Requiring Exhaustion Penalizes IDEA-Eligible Students by Circumscribing their Rights under Other Federal Laws, is Inconsistent with the Statutory Language, and Relies Upon an Overruled Precedent

"Statutory goals, especially those set out in the legislative text or frequently proclaimed in public, tend to reflect public values to a greater extent than other statutory provisions." *Driesen*, *supra*, 48 Wake Forest L. Rev. at 98. The IDEA reflects "our national policy of ensuring equality of opportunity [and] full participation . . . for individuals with disabilities." *Winkelman*, 550 U.S. at 529 (2007) (quoting 20 U.S.C. § 1400(c)(1)). It is completely inconsistent with that statutory goal to impose heightened obstacles upon a student who has an IEP who seeks to enforce his civil right to be free from discrimination and abuse under Section 1983.

As a policy matter, Congress has recognized that disability-related discrimination in public education presents a problem that we, as a nation, must address. *See, e.g.*, 42 U.S.C. § 12101(a)(3) (listing "education" in the ADA congressional findings section as one of "critical areas" in which disability discrimination exists); *Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (listing "public education" among the sites of discrimination that Congress intended to reach with Title II). Section 1983, like other federal

civil rights laws, provides an avenue to redress unconstitutional treatment, including irrational disability discrimination and abusive practices. *See, e.g.,* The Amended Complaint seeks retrospective relief (compensatory damages and punitive damages) for disability-related harassment, an acknowledged public policy priority, that violates 42 U.S.C. § 1983.

The IDEA does not focus on such retrospective relief. "Problems such as harassment of children with disabilities subvert the appropriate education guaranteed by the Act, but the Act's focus is on getting the appropriate services in the first place, not on the proper remedies to impose when peers or teachers engage in discrimination and effectively undermine the program." Mark C. Weber, *Disability Harassment in the Public Schools*, 43 Wm. & Mary L. Rev. 1079, 1111 (2002). By contrast, Congress did not design the IDEA to "serve as a tort-like mechanism for compensating personal injury." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003). Indeed, the compensatory education remedy is completely ill-suited to redress damages from intentional disability discrimination. "Compensatory services, are, in a word, undercompensatory. They do nothing to pay for the humiliation that the child has suffered, and do little to deter school districts from engaging in similar conduct." Weber, *supra*, at 1108.

In reaching the conclusion that plaintiffs had to exhaust administrative remedies, the court below not only ignored the distinctions between the IDEA and federal anti-discrimination statutes, it also relied heavily upon overruled precedent. Specifically, the court cited to *S.E. v. Grant County Bd. of Educ.*, 544 F.3d 633 (6th Cir. 2008), *cert. denied*, 556 U.S. 1208 (2009). The *S.E* court, in concluding that exhaustion is required whenever the IDEA could redress the alleged injuries "to any degree," relied heavily upon *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047 (9th Cir. 2002). However, in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (*en banc*), *cert. denied*, 132 S. Ct. 1540 (2012), the Court of Appeals for the Ninth Circuit expressly overruled the reasoning in *Robb* relied upon by the *S.E.* court.

Squarely rejecting *Robb*'s holding that "IDEA's exhaustion requirement applied to any case in which 'a plaintiff had alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies," *Payne* states:

> IDEA's exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA. We overrule our previous cases to the extent that they state otherwise and conclude that . . . [the district

> court] should not have dismissed [Payne's] non-IDEA claims on exhaustion grounds.

Payne, 653 F.3d at 865 (quoting *Robb*, 308 F.3d at 1048)).

In reaching this conclusion, the *Payne* court began by quoting the full text of the exhaustion requirement found in 20 U.S.C. § 1415(*l*):

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

The *Payne* court then made the following observations:

- "First, this provision is titled 'Rule of construction.' . . . It thus provides us with a rule for harmonizing the IDEA with overlapping 'rights, procedures and remedies' found in other laws." 653 F.3d at 872.
- "Second, the rule of construction tells us in very plain terms that the IDEA must be construed to coexist with other remedies, including remedies available under the Constitution . . . and 'other federal laws.' The principal remedy available for violations of the

Constitution is 42 U.S.C. § 1983, which creates an action in law or suit in equity against any person who, acting under the color of state law, deprives the plaintiff of 'any rights, privileges, or immunities secured by the Constitution and laws.'"

- "Third, the exhaustion provision in § 1415(*l*) is framed as an exception to the general rule of construction that '[n]othing in [the IDEA] shall be construed to restrict' the rights, procedures, and remedies available under § 1983 . . . . In other words, remedies available under the IDEA, by rule, are in addition to the remedies parents and students have under other laws. Indeed, § 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed – perhaps that could only be addressed – through a suit under § 1983 or other federal laws."
- "Finally, we observe that § 1415(*l*) requires exhaustion of IDEA remedies only when the civil action brought under § 1983 . . . or other federal laws "seek[s] *relief* that is also available" under the IDEA. Thus the 'except' clause requires that parents and students exhaust the remedies available to them under the IDEA before they seek *the same relief* under other laws."

653 F.3d at 872.

The *Payne* court acknowledged that *Robb*, relied upon by the district court in this case and the this Court in *S.E.* took "a more muscular view of § 1415(*l*) by holding exhaustion is necessary whenever "a plaintiff has alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Robb*, 308 F.3d at 1048 (emphasis supplied) (quoted in *Payne*, 653 F.3d at 873). However, the Ninth Circuit then proceeded to overrule *Robb* to the extent that it is inconsistent with the following rule of exhaustion established by *Payne*:

> The IDEA's exhaustion requirement applies to claims only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA. In other words, we reject the "injury-centered" approach developed by *Robb* and hold that the "relief-centered" approach more aptly reflects the meaning of the IDEA's exhaustion requirement.

653 F.3d at 874; *see also J.G. v. Douglas County Sch. Dist.* 552 F.3d 786, 803 (9th Cir. 2008) (IDEA not "exclusive remedy for children with disabilities who complain of failures in their education"); *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988) (1415(*l*) reaffirms "the viability of . . . other statues as separate vehicles for ensuring the rights of" children with disabilities); *E.H. v. Brentwood Union Sch. Dist.*, 2013 U.S. Dist. LEXIS 158482, at *14 - *15 (N.D. Cal. Nov. 4, 2013

(allegations that of "discrimination in the form of school staff scratching Plaintiff, grabbing him, and dragging him in direct response to the manifestations of his disability" stated a claim under Section 504 claim for damages, with no exhaustion required); *Cherry v. Clark County Sch. Dist.*, 2013 U.S. Dist. LEXIS 140792, at 10 (D. Nev. Sept. 30, 2013) ("various claims that do not seek relief available under the IDEA. . . not subject to the IDEA's exhaustion requirement"); *Stephen L. v. Lemahieu*, 2000 U.S. Dist. LEXIS 22305 at *10 (D. Haw. Oct. 18, 2000).

Further, courts have consistently found that allegations of physical and mental abuse fall outside of general disciplinary and pedagogical practices as well as outside of the scope of the IDEA and its administrative procedures. See *Sagan v. Sumner County Bd. of Ed.*, 726 F. Supp. 2d 868, 882-83 (M.D. Tenn. 2010) (″Plaintiffs' claims concern the alleged unlawful and un-reasonable use of force… The Court construes these claims as arising from non-educational injuries, irrespective of the fact they occurred in an educational setting and were allegedly perpetrated by educators against a student. If Jane Doe were not a disabled student, there would be no administrative barrier to her pursuit of these claims. . .") (emphasis added); *Dowler v. Clover Park Sch. Dist. No. 400*, 258 P.3d 676 (Wash. 2011) (civil actions for tort and unlawful discrimination based on state law do not relate

to "identification, evaluation or educational placement" and therefore no not require exhaustion under 1415(*l*)); *Meers v. Medley*, 168 S.W.3d 406, 410 (Ky. App. 2004) ("We do not view Meers' and Rogers' allegations as encompassing 'general disciplinary practices.' Rather, we think the allegations asserted by Meers and Rogers are best described as allegations of physical and mental assault and/or abuse, which are not within the scope of the IDEA"); *Sabaski v. Wilson County Bd. of Ed.*, 2010 Tenn. App. LEXIS 784, *13-14 (Tenn. Ct. App. Dec. 17, 2010) ("With respect to the plaintiffs' claims for assault and battery and false imprisonment, which are intentional torts, we do not consider the IDEA preclusive… If Emily were not a disabled child entitled to services under the IDEA, her parents would not be precluded from bringing actions for these intentional torts.")

The decisions rejecting an exhaustion requirement in cases such as this one are consistent not only with the plain language of the statute, but also with the legislative history. Congress enacted Section 1415(*l*) in direct response to the Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). In *Smith*, the Court held that the Education for the Handicapped Act ("EHA"), a predecessor to the IDEA, provided the exclusive avenue of relief for appropriate education claims. *Id.* at 1008-1009. Thus, the plaintiff in

Smith could not assert a Rehabilitation Act claim for damages and attorney's fees not available under the EHA.

Congress swiftly responded with the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372. Congress enacted the provision now codified at 20 U.S.C. § 1415(*l*) "to reaffirm . . . the viability of Section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. REP. NO. 296, 99th Cong., 1st Sess. 4 (1985) ("H.R. REP. NO. 99-296"). Section 1415(*l*) was designed to address manipulation of proceedings wherein a family could have brought suit under the IDEA but invoked a different statute solely to obtain additional relief or to avoid the IDEA administrative process. *See* S. REP. NO. 112, 99th Cong., 1st Sess. 12, 15 (1985) ("S. REP. NO. 99-112"). Congress further intended that exhaustion not be required when resort to administrative procedures would be futile or the administrative hearing officer lacked authority to grant the requested relief. H.R. REP. NO. 99-296 at 7.

In addition, the district court's interpretation of the IDEA undermines the purposes of federal civil rights laws. The decision below circumscribes the remedies available to plaintiffs in this case *because* they also enjoy separate and distinct protections under the IDEA. The public policy behind

the IDEA is to provide appropriate education, but the policy behind Section 1983 is to, *additionally*, ensure that individuals with disabilities receive treatment similar to that received by their peers without disabilities. The decision below undermines both the IDEA and federal civil rights laws by imposing greater burdens upon children with IEPs who seek access to court to redress civil rights violations.

CONCLUSION

In this case, the complaint alleges that, due to the deliberate indifference of staff in his school, F.H. endured physical and verbal abuse that was directly related to his disability. In spite of notice of the abuse, Memphis City Schools ignored or refused to take action to remedy the increasingly intolerable situation. It is inconsistent with Section 1983 to adopt a rule of law holding that a child who exercises his rights under the IDEA is not entitled to the same protections from disability-related discrimination as students without an IEP. The decision below, which ignores the plain language of the Act and subverts federal civil rights laws, should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,017 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2011 for Mac in 14-point Times New Roman font.

s/ Judith A. Gran
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 19, 2013, an electronic copy of the Motion for Leave to File Brief of *Amici Curiae* and accompanying Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

The undersigned also certifies and that the following participants are registered CM/ECF users and will be served via the CM/ECF system.

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