No. 17-16705

In The United States
Court of Appeals for the Ninth Circuit

VALERIE SOTO, as Guardian Ad Litem of Y.D., a minor
Plaintiffs-Appellants,
v.
CLARK COUNTY SCHOOL DISTRICT
Defendant-Appellee.

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE COUNCIL OF PARENT ATTORNEYS AND ADVOCATES IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Fed. R. App. P. 29, **Council of Parent Attorneys and Advocates** (**COPAA**) hereby respectfully move for leave to file the attached brief as *amicus curiae* in support of Plaintiffs-Appellants., Valerie Soto, as guardian ad litem of Y.D. who have filed this Notice of Appeal. This motion is accompanied by *Amicus*' proposed brief as required by Fed R. App. P. 29(b).

ARGUMENT

A. Interests of Proposed Amicus Curiae

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

represent children 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), 20 U.S.C. § 1400, et seq. COPAA's attorney members represent children in civil rights matters. 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 the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

COPAA brings to this Court the unique perspective of parents and advocates for children with disabilities. COPAA has previously filed as *amicus curiae* in the United States Supreme Court in *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017); *Forest Grove School District. v. T.A.*, 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

COPAA brings to the Court the unique perspective of parents and advocates for children with disabilities. Many of these children experience significant challenges. Their success depends not only on the right to secure IDEA's guarantee of a FAPE, but also on the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education. Based upon their experience, *Amicus* offer the Court a unique and important view on these issues. *Amicus* therefore respectfully request that it be granted permission to submit the attached *amicus curiae* brief. *Amicus* requested consent to file this Motion and accompanying *Amicus Curiae* brief from counsel for both parties. Plaintiffs-Appellants have consented to this brief; Defendants-Appellees, Clark County, have declined to consent.

B. Why An Amicus Curiae Brief from COPAA is Relevant and Desirable

This *amicus curiae* brief from COPAA is both relevant and desirable. *See* Fed. R. App. P. 29(b)(2). The legal issues presented in the appeal are of great importance to COPAA and its members because they work with many children who have disabilities that interfere with their education and are provided protections under the Individuals with Disabilities Education Act 20 U.S.C. § 1400, *et seq*. (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 the Civil Rights Act of 1871, ch. 22, 17 Stat. 13

(codified as amended at 42 U.S.C. § 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 offers the Court relevant information not brought to Court's attention by the parties. *See Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 133 (3d Cir. 2002). *See also Funbus Sys., Inc. v. Cal. Pub. Util. Comm'n*, 801 F.2d 1120, 1124-25 (9th Cir. 1986).

Amicus explain how the Order erred by misapplying the plain language of the statute, IDEA's statutory text explicitly allows for settlement to exhaust administrative remedies. A full-blown hearing is not necessary to exhaust when the parties are able execute a written settlement agreement to resolve their IDEA claims. The parents raised their 504/ADA claims, which were exhausted when they were dismissed by the hearing officer on the ground that Nevada (unlike the majority of jurisdictions) does not give due process hearing officers jurisdiction to determine 504 claims. Requiring the parties to exhaust remedies under IDEA to bring 504/ADA claims in court only by completing a due process hearing is a burden on both students and schools and unnecessarily delays the provision of appropriate educational services to students. It makes no sense to force the parties to try their case when they both agree the IDEA claims should be settled. Such a rule unnecessarily protracts litigation and burdens schools with trying cases they think should be settled. The district court's decision imposes obligations to exhaust that

deviate from the text of section 1415(*l*). In this case, Y.D. sought relief for violations of the ADA and Section 504, as well as IDEA.

CONCLUSION

For the foregoing reasons, COPAA respectfully requests that the Court grant their motion to file the attached brief *Amicus Curiae* in support of Plaintiffs-Appellants' Request for Reversal.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by

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EXHIBIT A

17-16705

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VALERIE SOTO, as Guardian Ad Litem of Y.D., a minor,

Plaintiff-Appellant,

—v.—

CLARK COUNTY SCHOOL DISTRICT,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF LAS VEGAS

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1, the following disclosure is made on behalf of Council of Parent Attorneys and Advocates (COPAA). COPAA is not a publicly held corporation or other publicly held entity, has no parent corporations and does not have 10% or more of stock owned by a corporation.

By: Selene Almazan-Altobelli
SELENE ALMAZAN-ALTOBELLI
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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Council of Parent Attorneys and Advocates (COPAA) is a not-for-profit organization of parents of children with disabilities, their attorneys and advocates in forty-eight states and the District of Columbia who are routinely involved in special education advocacy and due process hearings throughout the country. 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 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, 20 U.S.C. § 1400, *et seq.* (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 the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983, Section 504 of the Rehabilitation Act of

[1] Pursuant to Fed. R. App. P. 29, *Amicus* certifies 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 *Amicus* and its members and counsel contributed money intended to fund the brief's preparation or submission.

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 the Court the unique perspective of parents and advocates for children with disabilities. Many of these children experience significant challenges. Their success depends not only on the right to secure IDEA's guarantee of a FAPE, but also on the enjoyment of all rights under federal law guaranteed to students, whether or not they receive special education.

Because of its work involving education of students with disabilities, *Amicus* is intimately familiar with IDEA's exhaustion requirement and both the profound differences and similarities of the legal claims and remedies available under IDEA and ADA/504. We are greatly concerned that parents and children should not be required to waste scarce time, money, and other resources on the unnecessary hurdle of wasteful IDEA due process hearings when they could settle IDEA claims and then address their remaining ADA/504 cases. A requirement that parents litigate their IDEA claims fully rather than settling them in order to bring other legal claims under ADA/504 harms children by delaying the resolution of the IDEA claims. Every day that children lose out on a free appropriate education is harmful.

Appellants have consented to the filing of this brief and Appellees have not consented to the filing of this brief. COPAA is filing a motion seeking leave to file as *amicus curiae*.

SUMMARY OF ARGUMENT

The Handicapped Children's Protection Act, Pub. L. No. 99-372, 100 Stat. 796 (HCPA), an amendment to the Education of the Handicapped Act,[2] codified at 20 U.S.C. 1415(*l*), makes clear that nothing in IDEA restricts or limits rights available under ADA/504, except that when relief is sought under such laws for relief also available under IDEA, administrative remedies should be exhausted.

In *Fry v. Napoleon Cmty. Sch.*, 581 U.S. __, 137 S. Ct. 743 (2017), the Supreme Court interpreted the HCPA for the first time and held that "[e]xhaustion is not necessary when the gravamen of plaintiff's suit is something other than the denial of the IDEA's core guarantee—what [IDEA] calls a 'free appropriate public education[]' §1412(a)(1)(A). Id. at 748 Without citing to or considering *Fry*, the district court in this case construed the HCPA to unduly restrict a student's rights under ADA/504 for relief not available under IDEA.

The district court's overly restrictive interpretation of section 1415(*l*) undermines the 504/ADA rights of students who are eligible for an Individualized Education Program (IEP) under IDEA and misconstrues this Court's decision in

[2] Until 1990, IDEA was known as the Education of the Handicapped Act. *See* Pub. L. 101-476, §901(a), 104 Stat. 1141. This brief refers to IDEA, even when discussing the predecessor statute, to avoid confusion. *See Fry v. Napoleon Cmty. Sch.*, 581 U.S. __, 137 S. Ct. 743, 748 n.1 (2017).

Payne v. Peninsula School District, 653 F.3d 863, 871 (9th Cir. 2011) (en banc) ("IDEA's exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA"), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) (en banc). This Court specifically held that "IDEA's exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings is available under the IDEA."

Here the relief sought under ADA/504 (damages) is not available under IDEA. Moreover, the parents included their ADA/504 claims in their due process complaint, but those claims were dismissed by the hearing officer as, under Nevada law, "the Hearing Officer has no jurisdiction regarding ADA or Section 504." ER 45, ECF No. 16-2 at 13.

ARGUMENT

I. THE PLAIN LANGUAGE, STATUTORY SCHEME AND LEGISLATIVE HISTORY OF THE HCPA ALL REQUIRE REVERSAL OF THE DISTRICT COURT DECISION

A. Federal Courts Construe the HCPA Narrowly, Hewing Closely to the Text

By its plain terms, the HCPA only applies to civil actions seeking relief also available under IDEA. Specifically, the HCPA provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 *et seq*.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 *et seq*.], or other Federal laws protecting the

> rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Id. As discussed in this section, federal courts are bound by these precise statutory terms.

In all cases, the plain terms of a law control statutory interpretation. *King v. Burwell*, 576 U.S. __, __ 135 S. Ct. 2480, 2489 (2015); *Henson v. Santander Consumer USA, Inc.*, 580 U.S. __, __, 137 S. Ct. 1718 (2017) ; *Millbrook v. United States*, 569 U.S. 50, 56, 133 S. Ct. 1441, 1446 (2013) ; *I.R. v. L.A. Unified Sch. Dist.*, 805 F.3d 1164, 1167 (9th Cir. 2015). Federal courts must also interpret statutes in context, "and with a view to their place in the overall statutory scheme." *King*, 135 S. Ct. at 2492 (quoting *Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. __, 134 S. Ct. 2427, 2441 (2014)).

When construing statutory exhaustion provisions, federal courts must be particularly careful in their interpretation. *Fry* cited to *Ross v. Blake*, 578 U.S. __, 136 S. Ct. 1850 (2016) in its discussion of the appropriate interpretation of the HCPA. *See Fry*, 137 S. Ct. at 753 The Supreme Court's discussion of judicial interpretation of statutory exhaustion provisions in *Ross* is, therefore, particularly instructive.

Ross interpreted the exhaustion provision of the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. § 1997e(a). The PLRA requires that inmates exhaust "such administrative remedies as are available" prior to litigating claims related to prison conditions. 136 S. Ct. at 1855. The Fourth Circuit Court of Appeals held that the inmate satisfied the PLRA because its "exhaustion requirement is not absolute." *Id.* at 1856 (quoting *Ross v. Blake*, 787 F.3d 693, 698 (4th Cir. 2015)). The Fourth Circuit held that under "certain special circumstances," a prisoner need not exhaust. "In particular, that was true when a prisoner 'reasonably – even though mistakenly – believed that he had exhausted his remedies.'" *Id.* (quoting 787 F.3d at 695). The Supreme Court granted certiorari and vacated the judgment of the Court of Appeals because "[s]tatutory text and history alike foreclose the Fourth Circuit's adoption of a 'special circumstances' exception" to exhaustion. *Id.*

In *Ross*, the Supreme Court rejected the Court of Appeals' "extra-textual" exception to the exhaustion requirement, emphasizing that "the statute speaks in unambiguous terms opposite to what the Fourth Circuit said." *Id.*; *see also McNeil v. United States*, 508 U.S. 106, 111, 113 (1993) (courts "are not free to rewrite the statutory text" of exhaustion provisions). The PLRA contains a mandatory exhaustion provision, with one qualifier – remedies must be available to the inmate. The Court of Appeals erred in using a "special circumstances" test.

In a discussion, markedly pertinent to this case, the Supreme Court noted:

> No doubt, judge-made exhaustion doctrines, even if flatly stated at first, remain amenable to judge-made exceptions . . . But a statutory exhaustion provision stands on a different footing There, Congress sets the rules – and courts have a role in creating exceptions only if Congress wants them to. For that reason, mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion . . . Time and again, this Court has taken such statutes at face value – refusing to add unwritten limits onto their rigorous textual requirements.

at 1857 (citations omitted).

This strict statutory interpretation rule applies regardless of which party benefits. The Supreme Court has "thus overturned judicial rulings that impose extra-statutory limitations on a prisoner's capacity to sue – reversing, for example, decisions that required an inmate to demonstrate exhaustion in his complaint, permitted suit only against defendants named in the administrative grievance and dismissed an entire action because of a single unexhausted claim. *Id*. at 1856 n.1 (citing *Jones v. Bock*, 549 U.S. 199, 203 (2007)). Crafting and imposing rules not required by the PLRA "exceeds the proper limit on the judicial role." *Jones* 549 U.S. at 203.

Applying this reasoning to the HCPA, *Fry* held that Section 1415(*l*) requires exhaustion only when a suit seeks relief for a denial of FAPE under IDEA, "because that is the only 'relief' the IDEA makes 'available.'" 137 S. Ct. at 7552. The Court did not address the question addressed by this Court in *Payne*: whether exhaustion is required when the plaintiff complains of the denial of a FAPE and the specific

remedy requested, money damages, is not available from the IDEA hearing officer. 137 S. Ct. at 753 n.4.

B. The Decision Below is Inconsistent with IDEA's Statutory Scheme

Even if the HCPA were ambiguous (and it is not), examining the statutory scheme as a whole precludes the district court's interpretation, because it produces "a substantive effect" incompatible with the rest of IDEA. *King*, 135 S. Ct. at 2489 A court's "duty, after all, is 'to construe statutes, not isolated provisions.'" Id. (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

"[T]he broader context of the IDEA shows that it has a wide-ranging remedial purpose intended to protect the rights of children with disabilities and their parents." *Avila v. Spokane Sch. Dist*. 81, 852 F.3d 936, 943 (9th Cir. 2017). For this reason, in *Avila* this Court rejected a constricted reading of IDEA's statute of limitations that imposed a two-year limitation on available remedies. Likewise, this Court should reject an interpretation of Section 1415(*l*) that unduly constricts relief available under Section 504 and the ADA, a result contrary to the statutory text.

The district court's interpretation runs directly contrary to the statutory scheme and purpose of IDEA. HCPA's exhaustion requirement is in 20 U.S.C. §1415(*l*). It "is located in a section [of IDEA] detailing procedural safeguards which are largely for the benefit of the parents and the child." *School Committee of the*

Town of Burlington, Massachusetts v. Department of Education, 471 U.S. 359, 374 (1985).

The *Fry* Court summarized the HCPA as follows:

> The first half of §1415(l) (up until "except that") "reaffirm[s] the viability" of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA "for ensuring the rights of handicapped children." H.R. Rep. No. 99-296, p. 4 (1985); see id. at 6 According to that opening phrase the IDEA does not prevent a plaintiff from asserting claims under such laws even if . . . those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of §1415(l) (from "except that" onward) imposes a limit on that "anything goes" regime, in the form of an exhaustion provision. According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances – that is, when "seeking relief that is also available under" the IDEA – first exhaust the IDEA's administrative procedures.

137 S. Ct. at 750

In *Fry,* the plaintiff E.F., like Y.D., had an IEP and, potentially could have been "in essence contesting the adequacy of a special education program." 137 S. Ct. at 755 In concluding that E.F., a student eligible under IDEA as well as the anti-discrimination statutes, may not need to exhaust administrative remedies, the Court reasoned:

> If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot – even though the dispute is between a child with a disability and the school she attends. There might be good reasons, unrelated to a FAPE, for the school to make the requested

> accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might *require* the accommodation on one of those alternative grounds . . . But still, the hearing officer cannot provide the requested relief. His role, under the IDEA is to enforce the child's "substantive right to a FAPE" . . . . And that is all.

137 S. Ct. at 754

Y.D., like E.F., is asserting claims other than a substantive right to a FAPE under IDEA. Y.D. asserted her IDEA FAPE claims in the appropriate forum, and settled only those claims. She exhausted her administrative remedies with respect to her IDEA claims. Having done so, she is entitled, pursuant to the HCPA, to pursue her discrimination claims under other, distinct federal statutes. The district court's contrary conclusion not only has no statutory support; it undermines the entire purpose of the HCPA.

C. Congress Passed the HCPA to Expand, Not Contract, Civil Rights of Students with Disabilities

Legislative history is also relevant, as evidenced by the analysis in Ross, supra. The PLRA was passed in response to a "weak exhaustion provision" in the Civil Rights of Institutionalized Persons Act, § 7, 94 Stat. 352 (1980) (CRIPA). In direct response to the fact that CRIPA allowed too many complainants to bypass exhaustion, the PLRA explicitly prevented courts from exercising discretion in imposing the exhaustion requirement. The Fourth Circuit's special circumstances inquiry "resurrected CRIPA's scheme" by re-introducing judicial discretion to the

exhaustion inquiry. The Supreme Court explained why this was wrong, particularly in a case where Congress had specifically made a change to legislation addressing the precise issue under consideration:

> When Congress amends legislation, courts must "presume it intends [the change] to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995) . The Court of Appeals instead acted as though the amendment – from a largely permissive to a mandatory exhaustion regime – had not taken place.

136 S. Ct. at 1858

Like the PLRA, the HCPA was a legislative reaction to what Congress perceived to be a specific problem. Congress passed the HCPA in response to the holding in *Smith v. Robinson*, 468 U.S. 992 (1984) that IDEA provided "the exclusive avenue" for assertion of educational rights claims for students with disabilities. In *Smith*, the plaintiff was eligible for the special education services provided by IDEA. "But instead of bringing suit under the IDEA alone, [the plaintiffs] appended 'virtually identical' claims (again alleging the denial of a 'free appropriate public education') under §504 . . . and the Fourteenth Amendment's Equal Protection Clause." *Fry*, 137 S. Ct. at 750 (quoting Smith, 468 U.S. at 994). Congress responded quickly to overturn *Smith* and reaffirm the continued viability of non-IDEA claims with the HCPA.

Because Congress passed the HCPA in response to *Smith v. Robinson*, an understanding of that case is integral to interpreting the legislative history of Section

1415(l). In *Smith*, the plaintiffs initially exhausted their administrative remedies under IDEA. They subsequently filed a lawsuit in federal court and eventually amended the complaint to add claims under the United States Constitution and Section 504 that were substantively identical to the IDEA claims. 468 U.S. at 1000 The district court affirmed the IDEA victory but did not decide the other claims. IDEA did not have an attorney's fees provision, but the district court awarded fees under the non-IDEA statutes. *Smith v. Robinson* held that the *only* remedies available to an IDEA-eligible child *asserting 504 claims that were substantively identical to the IDEA claims* were those available under IDEA. *Id*. at 1019

Congress acted quickly, with the first bills to overturn *Smith* introduced in both chambers within 19 days. Brief Amicus Curiae of Honorable Lowell P. Weicker, Jr., *Fry v. Napoleon Cmty. Schs. (Weicker Amicus Br.*) at 11 (citing Myron Schreck, *Attorneys' Fees for Administrative Proceedings Under the Education of the Handicapped Act: of Carey, Crest Street and Congressional Intent*, 60 Temple L.Q. 599, 612 n.91 (1987)).[3] The HCPA was narrowly tailored to require "that certain non-EHA claims, such as the ones at issue in *Smith*, were so duplicative of EHA claims that they had to be exhausted through the EHA process in the same manner as EHA claims." *Weicker Amicus Br.* at 10. The HCPA's purpose was to

[3] "Senator Weicker took the lead in drafting, introducing and enacting the HCPA." *Weicker Amicus Br.* at 1.

require exhaustion when a child's non-IDEA claims were substantively identical to IDEA claims. *Id*. at 7-10.

The original version of both the House and Senate HCPA bills clarified that IDEA should not be construed to restrict or limit rights under other federal laws. Id. at 13. "Thus, 20 U.S.C. § 1415(*l*) was introduced in both chambers as a provision that *protects* the right of children with disabilities and their families to pursue non-[IDEA] remedies. The exhaustion language was . . . added as a proviso to those protections – a narrowly worded exception to the general rule." *Id*.; S. Rep. No. 112, 99th Cong. 1st Sess. 2, 15 (1985) (explaining goal of overruling *Smith*). To that end, the House Report on the HCPA emphasizes that exhaustion is not required when "the hearing officer lacks the authority to grant the relief sought." H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985).

II. THE DECISION BELOW ERRONEOUSLY REQUIRES EXHAUSTION WHEN ADMINISTRATIVE REMEDIES ARE UNAVAILABLE

A. This Court and Other Federal Courts Have Recognized That Students with IEPs Retain Distinct Claims Available Under Other Federal Civil Rights Laws

The ADA and Section 504 establish substantive requirements that differ from those under IDEA. *K.M. ex rel. Bright v. Tustin Unified School Dist.*, 725 F.3d 1088, 1196 (9th Cir. 2013); *see also* L. Kate Mitchell, *"We Can't Tolerate That Behavior in This School!": The Consequences of Excluding Children with Behavioral*

Disabilities, 41 N.Y.U. Rev. L. & Soc. Change 407, 449 (2017) ("Both the ADA and Section 504 offer supplemental protections to students identified with disabilities under IDEA"). Although both IDEA and Section 504 "use the locution 'free appropriate public education,' or 'FAPE,' [this Court] has concluded that the two FAPE requirements are 'overlapping but different.'" *Id*. at 1098 (citing *Mark H. v. Lemahieu*, 513 F.3d 922, 925 (9th Cir. 2008)). In addition, both Section 504 and the ADA impose requirements that are entirely independent of IDEA FAPE. *See* Mark C. Weber, *Procedures and Remedies Under* Section 504 *and the ADA for Public School Children with Disabilities*, 32-2 J. Nat'l Ass'n Admin L. Judiciary 611, 620-27 (2012); Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 Tex. J. on C.L. & C.R. 1 (2010).

For example, this Court has concluded that, based upon its "comparison of the relevant statutory and regulatory texts, . . . the IDEA FAPE requirements and the Title II communication requirements are significantly different." *K.M.*, 725 F.3d at 1100. Because ADA/504 requirements described in its "effective communication" regulations "are sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA," a school district might satisfy the requirements of IDEA FAPE but violate the more stringent ADA/504 effective

communication regulations claim. *Id*. at 1100;[4] see also *C.G. v. Pa. Dep't of Educ*., 734 F.3d 229, 235 (3d Cir. 2013) ("IDEA does not restrict a student's ability to pursue claims under the ADA and [504], and compliance with the IDEA does not automatically immunize a party from liability under the ADA or [504]"); Ruth Hocker, *More Than a Consolation Prize: Using* Section 504 *to Advance Special Education Rights*, 38 T. Jefferson L. Rev. 71, 91-92 (2015) .

Likewise, this Court has recognized that a student retained 504/ADA rights separate and independent from her IDEA rights. *A.G. v. Paradise Valley Unified Sch. Dist*., 815 F.3d 1195 (9th Cir. 2016). In that case, A.G. settled her IDEA claims. This Court held that she could, nonetheless, potentially prevail on her 504/ADA claims of denial of meaningful access "by showing there was 'a violation of one of the regulations implementing' section 504, if such violation denied the plaintiff meaningful access to a public benefit." 815 F.3d at 1204 (quoting *Mark H. v. Hamamoto*, 620 F.3d 1090, 1096 (9th Cir. 2010)). This Court held that A.G. could pursue a claim over the school district's obligation to provide her with educational opportunities that were "as adequate as" opportunities provided to her peers. Id. at 1205. Like A.G., Y.D. also asserted this claim, which is distinct from any claim under IDEA. ECF No. 1 at ¶ 26. Such a claim is not available under IDEA. *See*

[4] The effective communications regulations are at 28 C.F.R. § 35.160 (ADA) and 28 C.F.R. § 39.160 (504).

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 581 U.S. __, 137 S. Ct 988, 1001 (2017) (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 198 (1982)) (rejecting claim that IDEA FAPE requires opportunity to understand and participate in classroom that is substantially equal to that given to peers without disabilities).

Fry also cited to the distinct nature of claims under IDEA compared to 504/ADA. The plaintiff in *Fry*, E.F., invoked the "service animal" regulations under the ADA and asserted that the school district infringed her right to equal access, even if they complied with IDEA's FAPE requirements. 137 S. Ct. at 758. *Fry* recognized that this claim could be entirely distinct from a claim for denial of FAPE and remanded for consideration of that question. *Id.*

B. Exhaustion is Not Required When Relief Is Unavailable in the Administrative Proceeding

Exhaustion is not required when relief is unavailable from the administrative proceeding. IDEA, like the PLRA, requires exhaustion of *available* administrative remedies. A student with special needs suing under federal law, like an inmate pursuing relief under the PLRA "is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" *Ross*, 136 S. Ct. at 1859 (quoting *Booth v. Churner*, 532 U.S. 731, 738 (2001)). Relief is "available" under a statute when it is "accessible or may be obtained" under that law. 137 S. Ct. at 753 (quoting *Ross* , 136 S. Ct. 1858 cf.

McBride v. Lopez, 807 F.3d 982, 986 (9th Cir. 2015) (threat of retaliation renders administrative process effectively unavailable for purposes of PLRA analysis). The scope of §1415(*l*), therefore, is limited to "the circumstances in which the IDEA enables a person to obtain redress (or similarly, to access a benefit)). *Id.*; *cf. McCarthy*, 503 U.S. at 148 (administrative remedy inadequate when agency lacks authority to grant the type of relief requested).

In this case, Y.D. sought relief for violations of the ADA and Section 504, as well as IDEA. On March 17, 2016, the hearing officer issued an Order, entitled "Preparation for Pre-Hearing Conference," in which he stated:

> The [Due Process] Complaint refers several times to ADA and Section 504. Please be advised that the Hearing Officer has no jurisdiction regarding ADA or Section 504, and consequently that will not be an issue at the hearing.

ER at 45, ECF No.16-2, Page 13 of 47 [District Court ECF No. 10-1 at 2.] Nevada is among the minority of states (18%) that do not allow IDEA due process hearing officers to hear 504 claims. Perry A. Zirkel, *Impartial Hearings for Public School Students Under Section 504: A State-By-State Survey*, 279 Ed. Law Rep. 1, 7, n.75 (2012). Congress, by enacting § 1415(*l*), did not intend to create a catch-22, requiring parents to exhaust their 504/ADA claims by fully litigating those claims in a forum, the due process proceeding, that lacked jurisdiction of those claims. Rather, the parents met the exhaustion

requirement by filing their ADA/504 claims in the due process hearing complaint and obtaining an order dismissing those claims.

Here, the parties went on to settle the IDEA claims at issue in the administrative proceeding, with a contract that remained in effect until the school district complied with the agreement or one year from the date of execution. *Op.* At 5. The settlement provided Y.D. with assessments and significant additional educational services in exchange for dismissal of the pending IDEA claims with prejudice, but did not include monetary damages which are not available under IDEA. *Id.* Resolving the claims for prospective relief under IDEA meant that the student could immediately get the necessary educational services rather than having to wait until the damages claim was litigated.

Contrary to the district court's reasoning, this provision in the IDEA settlement agreement did not mean that, after expiration of a year, Y.D. could pursue her non-IDEA claims in front of the hearing officer. *See Op.* at 5 ("because over a year has passed since the agreement's execution, . . . plaintiff may act pursuant to the IDEA and refile a request for an impartial hearing"). Notwithstanding the IDEA settlement, the hearing officer still lacked jurisdiction of the 504 and ADA claims and the IDEA claims had been dismissed with prejudice.

The Tenth Circuit's decision in *A.F. v. Espanola Public Schools*, 801 F.3d 1245 (10th Cir. 2015), holding mediation of IDEA claims did not satisfy the

exhaustion requirement of § 1415(*l*) predated both *Fry* and *Ross*, and, therefore, did not have the benefit of the Supreme Court's recent teachings on exhaustion of administrative remedies. Thus, *A.F.* is no longer good law after *Fry* and *Ross*. Neither *Fry* nor *Ross* suggest that an exhaustion requirement precludes a party from early resolution of different legal claims. Further, in *A.F.*, the parents had not raised the 504/ADA claims in the administrative hearing, and the hearing officer had not dismissed the 504/ADA claims for lack of jurisdiction. Thus, *A.F.* is inapplicable to the facts in this case.

Y.D. did exactly what Section 1415(*l*) required. She exhausted available administrative remedies for IDEA claims and pursued the non-IDEA claims in federal court after accomplishing exhaustion of the claims where relief was available. The exhaustion necessary under section 1415(*l*) is limited to "the procedures under subsections (f) and (g)" and only "to the same extent as would be required had the action been brought under [IDEA]."

Section 1415(f)(1)(A) provides only for "an opportunity for an impartial due process hearing." It does not mandate the parties try each case to conclusion. This is made clear by section 1415(f)(1)(B) calling for a resolution session between the parties as an "opportunity to resolve the complaint" and section 1415(f)(1)(B)(iii) 1415(f)(1)(B)(iii) specifying requirements for settlement agreements reached under this section.

IDEA's statutory text explicitly allows for settlement to exhaust administrative remedies. A full-blown hearing is not necessary to exhaust when the parties are able execute a written settlement agreement regarding the IDEA claims. Requiring the parties to exhaust remedies only by completing a due process hearing or settling at the resolution session is a burden on both students and schools. In *Burlington,* the Supreme Court noted that IDEA due process is "ponderous," and "[a] final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." 468 U.S. at 370 And the Court noted that, in the interim, the child may be denied FAPE to the child's detriment. *Id*. It makes no sense to force the parties to try their case when they both agree the IDEA claims should be settled and that the child should immediately begin receiving needed educational services. Such a rule unnecessarily delays the delivery of FAPE to students and protracts litigation and burdens schools with trying cases they think should be settled. The district court's decision imposes obligations to exhaust that deviate from the text of section 1415(*l*).

III. THE DISTRICT COURT APPLIED AN ANALYSIS INCONSISTENT WITH *FRY* AND *PAYNE*

In this case, the district court purported to rely upon *Payne*, but in fact ignored the "crux of the complaint" and applied the injury-centered approach specifically rejected by both *Fry* and *Payne*. Harms suffered in the school setting can state a claim for violations of Section 504 and the ADA, even for a student with an IEP.

Pursuant to *Fry*, in determining whether a complaint seeks relief for the denial of FAPE under IDEA, "[w]hat matters is the crux – or, in legal-speak, the gravamen – of the plaintiff's complaint, setting aside any attempts at artful pleading." 137 S. Ct. at 755

In this case, Y.D., like K.M. in the *Tustin* case, alleged violations of her right to effective communication, as defined by the regulations. ECF No. 1 at ¶¶ 8-11. She asserted that CCSD deprived her "of a program designed to meet her individual educational needs as adequately as the needs of her peers without disabilities are met." ECF No. 1 at ¶¶ 25-26. There is no right under IDEA to have a program designed to meet a student's individual educational needs as adequately as those of her peers. *See Endrew F.*, 137 S. Ct. at 1001 (*Rowley* specifically rejected standard under IDEA that required substantially equal educational opportunity); Mark C. Weber, *Common Law Interpretation of Appropriate Education: The Road Not Taken in Rowley*, 42 J. L. & Educ. 95, 102 (2012) (*Rowley* rejected IDEA standard requiring equality of opportunity). She requested relief in the form of compensatory damages. These are claims for compensatory relief (unavailable under IDEA) for violation of a Section 504 and ADA regulations that create standards substantively different from IDEA.

Ultimately, although the opinion purports to apply the relief-centered approach in *Payne*, it actually requires exhaustion merely because the harms

occurred in the educational setting. *See Op.* at 6. The district court "made no attempt to ground its analysis in the [HCPA's] language." *Ross*, 136 S. Ct. at 1856 Instead, the court relied exclusively on policy considerations, finding that exhaustion was necessary because this was an "educational" injury. This is just the type of "extra-statutory limitation" on the capacity to sue that "exceeds the proper limits on the judicial role." *Ross*, 136 S. Ct. at 1857 n.1 For that reason, the *Fry* court explicitly rejected the district court's reasoning in this case – that the student must exhaust under IDEA because her claims were educational in nature. *See Op.* 5-6.

The Supreme Court granted certiorari in *Fry* "to address confusion in the courts of appeals as to the scope of § 1415(*l*)'s exhaustion requirement," 137 S. Ct. at 752. In *Fry*, E.F. and her parents alleged that the school districts violated the ADA and Section 504 by refusing reasonable accommodations regarding her use of a service dog and otherwise discriminated against E.F. on the basis of her disabilities. E.F. sought declaratory relief that the districts had violated Section 504 and the ADA and money damages to compensate her for emotional distress, embarrassment, and mental anguish. 137 S. Ct. at 752 (citing *Fry v. Napoleon Cmty. Sch.*, 788 F.3d 622, 627 (6th Cir. 2015)). The Sixth Circuit said that E.F. had to exhaust administrative remedies because, although E.F. did not allege that the school violated IDEA, the "genesis and manifestation" of the injury was educational. 788 F.3d at 627 (quoting

Charlie F. v. Bd. of Educ. of Skokie School District 68, 98 F.3d 989, 993 (7th Cir. 1996)).

Fry declined application of this injury-centered approach to interpretation of Section 1415(*l*), because it ignores the explicit statutory text. Specifically, "[s]Section 1415(*l*) requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when **(but only when)** her suit 'seek[s] relief that is also available' under the IDEA." 137 S. Ct. at 752 (emphasis supplied)." To meet the HCPA standard, a suit must seek relief for a denial of FAPE as defined by IDEA, "because that is the only 'relief' that IDEA makes available." Id. "The statutory language asks whether a lawsuit in fact 'seeks' relief available under the IDEA – not, as a stricter exhaustion statute might, whether the suit 'could have sought' relief available under the IDEA (or what is much the same, whether any remedies are available under that law)." Id. at 755

By relying heavily on the plain meaning of the statute, *Fry* addressed the conflict in the circuits between the "injury-centered" approach to interpreting the HCPA adopted by most courts of appeal and the "relief-centered" approach favored by the Ninth Circuit Court of Appeals in *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874-75 (9th Cir. 2011). *Compare Payne*, 653 F.3d at 875 (whether a plaintiff could have sought relief under IDEA is irrelevant, what matters is whether he actually sought such relief) and *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 861 (9th

Cir. 2014) with *Charlie F.*, 98 F.3d at 993 ("the genesis and manifestations of the problem are educational; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA") and *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 278 (3d Cir. 2014) (requiring exhaustion of retaliation claims despite plaintiffs' choice to pursue compensatory damages unavailable under IDEA because genesis of claim was educational).

Fry vacated the decision of the Court of Appeals for the Sixth Circuit precisely because it applied the incorrect "injury-centered" approach enunciated in *Charlie F.* and analyzed whether E.F. *could have* pursued claims under IDEA, rather than whether she *did* pursue claims under IDEA. 137 S. Ct. at 752 (citing (quoting *Charlie F.*, 98 F.3d at 99)); see also *J.P. v. Williamson County Educ. Serv.* No. 3:16-CV00879-NJR-DJW, 2017 U.S. Dist. LEXIS 98392 (S.D. Ill. June 21, 2017) (noting that *Fry* abrogated *Charlie F.*).

Section 1415(*l*) makes the plaintiff's own claims central to the inquiry of whether the complaint implicates IDEA rights. *Fry*, 137 S. Ct. at 755. To determine what type of relief a plaintiff seeks, courts look to the language in the complaint. *See*, e.g. *Bowen v. Massachusetts*, 487 U.S. 879, 893 (1988) (to determine whether action sought relief other than money damages, Court looked to specific forms of relief requested in the complaint); *McCarthy v. Madigan*, 503 U.S. 140, 142, 152 (1992).

In this case, Y.D. is seeking compensatory damages (a remedy unavailable under IDEA) for violations of the ADA and Section 504 (not IDEA). Indeed, as did E.F., Y.D. is seeking vindication of rights that are decidedly distinct from IDEA FAPE entitlements. Y.D. asserted violations of the ADA's effective communication provisions, as well as Section 504 regulations. *See* ECF No. 1 at ¶¶ 8-11, 25-41. Compliance with IDEA does not necessarily establish compliance with the effective communication provisions of the ADA and Section 504. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, at 1100. (9th Cir. 2013). The "gravamen" of her complaint is undeniably *not* a claim under IDEA.

Further, although the district court cites to *Payne*, that case actually supports Y.D. *Payne* stated:

> IDEA's exhaustion provision did not apply to plaintiffs who claimed that school officials had inflicted physical and emotional abuse on their child, [*Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1273 (9th Cir. 1999)], ***when their complaint sought only retrospective damages because the parties had already resolved their educational issues*** through "the remedies that are available under the IDEA," *id*. at 1276 We emphasized that because monetary damages were ordinarily unavailable under the IDEA, the plaintiffs were "not seeking relief that is also available under the IDEA." *Id.;* see also id. 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."). Accordingly, "under the plain words of the statute, exhaustion of administrative remedies is not required." *Id.* at 1275.

653 F.3d at 873 (emphasis supplied). *Payne* did not hold, as the district court stated, that IDEA's exhaustion provision applies unless the plaintiff asserts physical or emotional abuse. *See Op.* at 5. Rather *Payne* held that when a plaintiff, like Y.D., asserts damages claims for retrospective relief and has already resolved her IDEA claims, she is entitled to proceed in federal court.

IV. CONCLUSION

Based upon the foregoing, COPAA respectfully submit that *Fry* requires that the district court's decision be reversed, and the case be remanded so that Appellants may pursue their civil rights claims in federal court.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C)

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Fifth Circuit Rule 32-1, the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,304 words.

Dated: November 29, 2017

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CERTIFICATE OF SERVICE

I certify that on November 29, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF if they are registered users, or if they are not, by serving a true copy and correct copy at the addresses below.

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