20-1076

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MIGUEL LUNA PEREZ,

Plaintiff-Appellant,

—v.—

STURGIS PUBLIC SCHOOLS;
STURGIS PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR *AMICI CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, THE DISABILITY RIGHTS EDUCATION & DEFENSE FUND, EDUCATION LAW CENTER, THE MINNESOTA DISABILITY LAW CENTER, THE NATIONAL DISABILITY RIGHTS NETWORK, THE NATIONAL FEDERATION OF THE BLIND, AND NEW JERSEY SPECIAL EDUCATION PRACTITIONERS IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

CATHERINE M. REISMAN
REISMAN CAROLLA GRAN
& ZUBA LLP
19 Chestnut Street
Haddonfield, New Jersey 08033
(856) 354-0071

SELENE ALMAZAN-ALTOBELLI
COUNCIL OF PARENT ATTORNEYS
AND ADVOCATES, INC.
PO Box 6767
Towson, Maryland 21285
(844) 426-7224

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 the following disclosure is made on behalf of these entities:

COUNCIL OF PARENT ATTORNEYS AND ADVOCATES (COPAA),
THE DISABILITY RIGHTS EDUCATION & DEFENSE FUND (DREDF),
EDUCATION LAW CENTER (ELC),
THE MINNESOTA DISABILITY LAW CENTER (MDLC),
THE NATIONAL DISABILITY RIGHTS NETWORK (NDRN),
THE NATIONAL FEDERATION OF THE BLIND (NFB), AND
NEW JERSEY SPECIAL EDUCATION PRACTITIONERS (NJSEP)

1. No amicus is a publicly held corporation or other publicly held entity;
2. No amicus has parent corporations; and
3. No amicus has 10% or more of stock owned by a corporation.

s/ Catherine Merino Reisman
Catherine Merino Reisman

Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Federal Rules

Other Authorities

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 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*. Our 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).

The Disability Rights Education & Defense Fund (DREDF), based in Berkeley, California, is a national nonprofit law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF was

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amici* state that: (A) there is no party, or counsel for a party in the pending appeal who authored the amici brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amici* and their members.

founded by people with disabilities and parents of children with disabilities and remains board- and staff-led by members of the communities for whom we advocate. Recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF pursues its mission through education, advocacy and law reform efforts. Consistent with its civil rights mission, DREDF supports legal protections for all diversity and minority communities, including the intersectional interests of people within those communities who also have disabilities.

Education Law Center (ELC), a non-profit organization founded in 1973, advocates on behalf of public school children for education equity, school improvement, and protection of student rights under state and federal laws in New Jersey and across the country. ELC has served as counsel and co-counsel in special education cases in the Third Circuit Court of Appeals, the District of New Jersey and Eastern District of Michigan, and has participated as *amicus curiae* in special education cases before the United States Supreme Court and the Third Circuit Court of Appeals. Over the past twenty-five years, ELC has developed substantial interest and expertise in the legal rights of students with disabilities and in ensuring that those rights are protected.

The Minnesota Disability Law Center (MDLC) is a project of Mid-Minnesota Legal Aid (MMLA), which is designated by the Governor of Minnesota pursuant to federal statutes to serve as the Protection and Advocacy System for

persons with disabilities in Minnesota. MMLA performs this function through the MDLC and works to advance the dignity, self-determination and equality of individuals with disabilities through direct legal representation, advocacy, education and policy analysis. As part of its Protection and Advocacy work, MDLC advocates for the rights of children with identified disabilities to receive special education services pursuant to federal and state law. MDLC provides comprehensive representation for these children, including individual and policy advocacy on special education issues.

The National Disability Rights Network (NDRN) is a nonprofit membership association of protection and advocacy (P&A) agencies in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a P&A agency affiliated with the Native American Consortium, the Native American Disability Law Center. The P&A system is the nation's largest provider of legal-based advocacy services for people with disabilities. Education cases make up a significant percentage of P&A networks' casework. P&A agencies handled over 10,000 education matters in the most recent year for which data is available. These education matters include claims under IDEA, Section 504, and the ADA.

The National Federation of the Blind (NFB) is the oldest, largest and most influential membership organization of blind people in the United States. With tens

of thousands of members, and affiliates in all fifty states, the District of Columbia, and Puerto Rico, the ultimate purpose of the NFB is the complete integration of the blind into society on an equal basis. Since its founding in 1940, the NFB has devoted significant resources toward advocacy, education, research, and development of programs to ensure that blind individuals enjoy the same opportunities enjoyed by others. Over the decades, the Federation has represented countless blind students under IDEA and other laws and strongly believes that the courts should not unreasonably restrict the rights Congress has expressly granted them.

New Jersey Special Education Practitioners (NJSEP) is a statewide association of over 100 attorneys and professional advocates from private law firms and public interest advocacy organizations who represent parents and their students with disabilities in special education matters. NJSEP provides a forum through which its members regularly exchange information, support high-quality representation, and discuss issues of importance to the practice of special education law, and, collectively, NJSEP's members have extensive experience in special education law. NJSEP engages in systemic advocacy on behalf of students with disabilities and has appeared as *amicus curiae* in a number of special education cases. NJSEP's primary interest is in protecting and advancing the legal rights of

students with disabilities, under both IDEA and all applicable civil rights and non-discrimination laws.

Amici submit the proposed brief and Motion for Leave to File.

SUMMARY OF ARGUMENT

Congress passed the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 (HCPA), now codified in IDEA at 20 U.S.C. § 1415(*l*), to *protect* students with disabilities who want to assert claims under 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). HCPA, now IDEA, ensures that students entering the schoolhouse doors do not lose their ability to bring non-IDEA civil rights claims. The majority opinion's ruling ignores this plain meaning, and undermines the purpose, of 20 U.S.C. § 1415(*l*). *Amici* agree that this case satisfies the standard in *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017), for an ADA case, as discussed in the dissent, but we write separately to focus on the IDEA exhaustion issue in the panel decision.

ARGUMENT

A. The Majority Opinion is Inconsistent with the Plain Meaning of Section 1415(*l*)

When interpreting legislation, federal courts must "ascertain and follow the original meaning of the law." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020)

(citing *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019)); *see also Jiminez v. Quarterman*, 555 U.S. 113, 118 (2009) (courts must enforce plain statutory language according to its terms). Section 1415(*l*) restricts non-IDEA litigation in a specific and singular manner: it requires that litigants exhaust IDEA's administrative procedures before filing civil actions under other civil rights laws to seek relief *that is also available* under IDEA. 20 U.S.C. § 1415(*l*) (emphasis added). Nothing in the statute requires exhaustion when the administrative process cannot provide the relief sought under non-IDEA actions. Because IDEA does not authorize compensatory damages, plaintiffs seeking such damages under a different statute are not seeking relief that is also available under IDEA.

Section 1415(*l*) only requires exhaustion "*to the same extent* as would be required had the action been brought under" IDEA. 20 U.S.C. § 1415(*l*). By including the "to the same extent" limitation, Congress acknowledged that exceptions to exhaustion previously recognized for IDEA claims applied to non-IDEA claims as well. IDEA does not require exhaustion when it would be futile or the relief inadequate. *Honig v. Doe*, 484 U.S. 305, 326-27 (1988).); *see also* Senate Report 1986 U.S.C.C.A.N. at 1805.

Further, IDEA "asks whether a lawsuit in fact 'seeks' relief available under 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 the law)." *Fry*, 137 S. Ct. at 755. For that reason, *Fry* recognized that Section 1415(*l*) differs fundamentally from the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a) (PLRA), the statute on which the majority opinion relied heavily in interpreting Section 1415(*l*) to deny Miguel Perez (Miguel) his day in court. *Id.*

In *Ross v. Blake*, 136 S. Ct. 1850 (2016), the Court explained that the PLRA required exhaustion regardless of the particular form of relief sought and offered. 136 S. Ct. 1857. As *Fry* recognized, the PLRA is a much stricter exhaustion provision than Section 1415(*l*). Unlike the PLRA, the IDEA "treats the plaintiff as the 'master of the claim': She identifies its remedial basis – and is subject to exhaustion or not based on that choice." 137 S. Ct. at 755.

Miguel sought compensatory damages. IDEA only authorizes equitable relief and does not provide for an award of compensatory damages. *Board of Education v. L.M.,* 478 F.3d 307, 316 (6th Cir. 2007) (award of compensatory education is an equitable remedy that a court can grant as it finds appropriate). 20 U.S.C. § 1415(i) (2) (C) (iii)); *see also Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 12 (1993) (IDEA grants courts equitable authority); *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-71 (1985) (only relief available through IDEA administrative process is future special education services and reimbursement for education-related expenditures). Because the statute does not

authorize the particular remedy sought by a plaintiff, such relief is plainly not available under IDEA.

B. The Majority Opinion Undermines the Statutory Purpose of Section 1415(*l*) and Creates Unsound Policy in Contravention of Congressional Intent By Requiring Exhaustion When it Amounts to an Empty Formality

The majority disrupts Congress' sound policy judgment in eliminating the exhaustion requirement for claims seeking relief unavailable under IDEA. Congress understood an exhaustion requirement would force parties to engage in a burdensome and expensive administrative process that could not resolve their actual dispute. To this end, IDEA encourages resolution of disputes regarding the provision of a FAPE through settlement and other informal dispute resolution procedures. *See* 20 U.S.C. §§ 1415(e) & (f)(1)(B). The majority opinion demands that a plaintiff with other civil rights claims litigate FAPE-based claims that could otherwise be settled.

In cases where an IDEA claim is settled, there is no policy reason to require development of an IDEA record, which would be of limited (or no) value in a non-IDEA action. The administrative record would focus on facts relevant to whether a denial of FAPE occurred, which is of limited relevance to non-IDEA claims based on distinct statutory obligations. More importantly, Congress, in enacting Section 1415(*l*), made the policy determination that the costs of requiring administrative exhaustion of non-IDEA claims when the relief requested is not available under

IDEA outweighed any potential benefits. *See Florida Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 52 (2008) (federal courts may not substitute their policy views for those of Congress).

Accordingly, other courts of appeal considering this question have concluded that exhaustion is not required when no viable IDEA claims remain. In *W.B. v. Matula*, the Third Circuit held that no exhaustion was required after an IDEA-settlement agreement resolved all "classification and placement" issues, and only non-IDEA claims for damages remained. 67 F.3d 484, 496 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007)). In the context of explaining the futility of exhaustion in such a scenario, the court even expressed "reservations about whether the administrative tribunal would even be competent to hear [the] IDEA claim since any rights that can be had ha[d]already been settled." *Id.*

In *Muskrat v. Deer Creek Public Schools,* the family worked through administrative channels to obtain the IDEA relief they sought – cessation of use of seclusion in school. 715 F.3d 775, 786 (10th Cir. 2013). At that point, "given the steps the Muskrats took and the relief they obtained, it would have been futile to then force them to request a formal due process hearing – which in any event cannot award damages – simply to preserve their damages claim." *Id.*

The First Circuit reached a similar conclusion in *Doucette v. Georgetown Public Schools*, 936 F.3d 16 (1st Cir. 2019). There, the family "engaged in the administrative process until they received the relief that they sought (and the only relief available to them through the IDEA's administrative process) – an alternative placement for B.D. and compensatory educational services." *Id.* at 29. The family then sought damages for the harm caused by the delays in securing administrative relief, bringing their damages claim only after they had no further remedies available under IDEA. *Id.*

The First Circuit began by noting that the "legislative history shows a special concern with futility," as the principal author of IDEA's predecessor statute indicated that exhaustion should not be required where "exhaustion would be futile either as a legal or practical matter." *Id.* at 31 (quoting *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52 n.12 (1st Cir. 2000) (quoting 121 Cong. Rec. 37416 (1975)). Further, the family sought, under 42 U.S.C. § 1983, money damages for medical expenses and the physical, emotional, and psychological harm that B.D. experienced because of the District's pervasive disregard for her safety and well-being. The court noted such were damages not provided for under IDEA. *Id.* at 32.

Finally, the court explained that adjudicating the FAPE-based claims would be of limited utility to resolving the damages claims. "The damages aspect of the claim concerns medical causation – not educational issues that are the

administrative body's area of expertise." *Id.* Since federal courts and juries routinely consider medical causation questions, assisted by the testimony of medical experts, without the benefit of an administrative record, "no educational expertise [wa]s needed for a court to adjudicate the damages aspect of the § 1983 claim." *Id.* at 33. In light of all this, the court ruled that "requiring the Doucettes to take further administrative action would be an 'empty formality.'" *Id.* (citation omitted).

Likewise, forcing Miguel to commence an administrative proceeding that could afford him none of the relief he seeks through a body that was not designed to address the relevant issues in his non-IDEA claims is inconsistent with Congressional policy as embodied in 20 U.S.C. § 1415(*l*). The dissent correctly concluded that the majority opinion ignores governing precedent of the Supreme Court and this Circuit and places the Sixth Circuit at odds with its sister circuits.

CONCLUSION

For all the reasons set forth in the dissent, and discussed above, the majority opinion should be vacated, the case re-heard *en banc*, and the decision of the district court reversed.

Dated: July 15, 2021

Respectfully submitted,

s/ Catherine Merino Reisman

Catherine Merino Reisman
REISMAN CAROLLA GRAN & ZUBA LLP
19 Chestnut Street
Haddonfield, NJ 08033
856.354.0021
catherine@rcglawoffices.com

On the brief:
Selene A. Almazan-Altobelli
Legal Director
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES
P.O. Box 6767
Towson, MD 21285

CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 29(b)(4) AND FED. R. APP. P. 32

This document complies with the word limit of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,507 words. This document 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 document has been prepared in a proportionately spaced typeface of 14 point font.

Dated: July 15, 2021

s/ Catherine Merino Reisman
Catherine Merino Reisman

CERTIFICATE OF SERVICE

I certify that on July 15, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF

s/ Catherine Merino Reisman
Catherine Merino Reisman

Attorney for *Amici Curiae*