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POST-FRY IDEA AND SECTION 504: NEW INTERSECTIONS AND DETOURS

Amy J. Goetz[†] and Andrea L. Jepsen^{††}

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I. INTRODUCTION

The United States Supreme Court recently issued an opinion, *Fry v. Napoleon Community Schools*, on the interplay between special education and disability discrimination law.¹ The decision determines when claims under Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act

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1. 137 S. Ct. 743 (2017).

(Section 504) must be exhausted in special education administrative hearings before filing suit in federal court under the Individuals with Disabilities Education Act (IDEA).² This decision provides some much needed clarification to an evolving understanding of how, and in what manner, federal special education and non-discrimination laws overlap but maintain separate, distinct, and significant viability as tools to protect students with disabilities.³

This article first provides an overview of three special education and disability discrimination laws—the IDEA, Section 504, and the ADA.⁴ It next discusses the confusion administrative bodies and courts have had in applying these laws.⁵ The article then analyzes the *Fry* decision.⁶ Finally, the article discusses *Fry*'s apparent limitations.⁷

II. SPECIAL EDUCATION & DISABILITY DISCRIMINATION LAWS

A. *The Individuals with Disabilities Education Act*

The IDEA offers federal funds to states in exchange for a commitment: to furnish a “free appropriate public education” (FAPE) to all eligible children, which includes special education and related services.⁸ A FAPE under the IDEA confers a substantive right to education tailored to meet a child’s unique needs and confers sufficient supportive services to permit the child to benefit from that education.⁹ Parents and a group of school officials together must craft an individualized education program (IEP) to document a personalized plan to meet the child’s educational needs.¹⁰

Anticipating that parents and school representatives cannot always agree, the IDEA established administrative procedures to resolve disputes about any matter concerning the provision of a

2. *Id.* at 746–48.

3. *See id.* at 755–58.

4. *See infra* Part II.A–B.

5. *See infra* Part II.C.

6. *See infra* Part III.

7. *See infra* Part IV.

8. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 748 (2017) (citing 20 U.S.C. § 1412(a)(1)(A) (2016)).

9. *Id.* at 748–49 (citing 20 U.S.C. § 1401(9), (26), (29)); *Smith v. Robinson*, 468 U.S. 992, 1010 (1984); *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 203 (1982).

10. *Fry*, 137 S. Ct. at 749 (first citing 20 U.S.C. § 1414(d)(1)(A)(i)(II)(bb), (d)(1)(B); then citing *Honig v. Doe*, 484 U.S. 305, 311 (1988)).

FAPE.¹¹ Complaints must first be channeled into an administrative hearing process.¹² This hearing is followed by an opportunity for judicial review.¹³

B. Section 504 & the Americans with Disabilities Act

“Important as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests.”¹⁴ Two federal antidiscrimination laws also cover both adults and children with disabilities in public schools and other settings.¹⁵ First, Title II of the ADA forbids any “public entity” from discriminating based on disability.¹⁶ Second, Section 504 of the Rehabilitation Act¹⁷ applies the same prohibition to any federally funded “program or activity.”¹⁸ Section 504 specifically requires public elementary and secondary schools to provide a FAPE to each qualified student with a disability, regardless of the nature or severity of the student’s disability.¹⁹ The Section 504 FAPE is accomplished by providing regular or special education and related aids and services to students with disabilities.²⁰ The aids and services must be designed to meet the individual educational needs of such students as adequately as the needs of students without disabilities are met.²¹

The cornerstone of both Section 504 and the ADA is the guarantee of equality in participation, benefit, and opportunity for people with disabilities.²² Section 504 and the ADA demand reasonable accommodations and modifications to policies, practices, or procedures when necessary to avoid inequality and, by extension,

11. 20 U.S.C. § 1415(e)(1).

12. *Fry*, 137 S. Ct. at 749 (citing 20 U.S.C. § 1415(b)(6), (f)). The right to an administrative hearing is broad, encompassing claims for violations of additional rights enumerated in the IDEA that are ultimately in service of the provision of a FAPE, including the rights to “the identification, evaluation, or educational placement of the child.” 20 U.S.C. § 1415(b)(6).

13. *Fry*, 137 S. Ct. at 749 (citing 20 U.S.C. § 1415(i)(2)(A)).

14. *Id.*

15. *Id.*

16. 42 U.S.C. § 12131 (2016); *id.*

17. 29 U.S.C. § 794 (2016); *Fry*, 137 S. Ct. at 749.

18. 29 U.S.C. § 794(a); 42 U.S.C. §§ 12131–32; *Fry*, 137 S. Ct. at 749.

19. 34 C.F.R. § 104.33(a) (2016).

20. *Id.* § 104.33(b).

21. *Id.*

22. 29 U.S.C. § 701(a)(6); MARGARET C. JASPER, LEGAL ALMANAC: THE AMERICANS WITH DISABILITIES ACT § 1:1, Westlaw (database updated Oct. 2012).

disability discrimination.²³ Both statutes authorize individual redress for violations, including injunctive relief or monetary damages.²⁴

C. Confusion in Administrative Bodies & the Courts

Section 504, passed in 1973, was almost immediately eclipsed by passage of the IDEA in 1975 (known at the time as the Education for All Handicapped Children Act of 1975 (EHA)).²⁵ The United States Supreme Court considered the EHA's special education protections and Section 504's disability discrimination protections as two sides of the same coin of protection for students with disabilities,²⁶ despite the statutes' obvious differences in objectives and language.²⁷ Congress corrected that misperception by passing the Handicapped Children's Protection Act of 1986, which resulted in the enactment of a provision in the EHA to allow for preservation of claims and administrative exhaustion.²⁸ The preservation of claims and administrative exhaustion provision, codified at 20 U.S.C. § 1415(l) ("Section 1415(l)"), reads:

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including Section 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].²⁹

23. 28 C.F.R. § 35.130(b)(7) (2016); *Fry*, 137 S. Ct. at 749; *Alexander v. Choate*, 469 U.S. 287, 299–300 (1985).

24. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133 (2016); *Fry*, 137 S. Ct. at 750.

25. See Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 358–59 (1990). In 1990, Congress changed the EHA's name to the IDEA. See *id.* at 350 n.3.

26. See *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

27. See *id.* at 1013 ("We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.").

28. The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796.

29. 20 U.S.C. § 1415(l) (2016).

Despite its plain language, this provision has been the source of significant confusion in the body of administrative decisions and the courts.³⁰ Specifically, the provision has caused confusion over when, and for what claims, the IDEA's administrative proceedings must first be exhausted. This issue was not directly raised or clarified until the United States Supreme Court's 2017 decision in *Fry*.³¹

For example, after the passage of Section 1415(l), courts continued to incorrectly apply the view that special education laws were the exclusive avenue through which children could challenge the adequacy of their education.³² As a result, protection for students with disabilities through the ADA and Section 504 remained unused for decades.³³ In addition, some courts applied an almost impossible burden of pleading and proof as a prerequisite to bringing and maintaining claims of disability discrimination for school-aged

30. See Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259, 275 (2011) (describing the confusion over interpreting IDEA: "Although § 1415(l) grants parents the right to file civil actions based on other federal laws, such as Section 504/ADA, it requires that they must first exhaust the remedies available under IDEA's administrative due process system if they are seeking relief that is also available under the IDEA. It is this qualification that courts have misinterpreted and misapplied.").

31. *Fry v. Napoleon Cmty. Sch.*, 37 S. Ct. 743, 754–55 (2017).

32. Compare *Polera v. Bd. Of Ed. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 (2d Cir. 2002) ("The fact that . . . [the plaintiff] seeks damages, in addition to relief that is available under the IDEA, does not enable her to sidestep the exhaustion requirements of the IDEA."), and *Charlie F. by Neil F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996) (reasoning that the plaintiff cannot avoid the IDEA exhaustion requirement by seeking monetary damages), *abrogated by Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017), with *W.B. v. Matula*, 67 F.3d 484, 494–96 (3d Cir. 1995) (holding that since the plaintiff sought monetary damages, the IDEA exhaustion requirement was unnecessary), *abrogated on other grounds by A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802 (3d Cir. 2007), and *Padilla ex rel. Padilla v. Sch. Dist. No. 1 in City and Cty. of Denver, Colo.*, 233 F.3d 1268, 1274–75 (10th Cir. 2000) (holding the plaintiff sought monetary damages to redress past physical injuries, and had "no complaints regarding her current educational situation," so the IDEA exhaustion requirement was unnecessary).

33. See Maher, *supra* note 30, at 275 (explaining that the Handicapped Children's Protection Act of 1985, which "grants parents the right to file civil actions based on other federal laws, such as 504/ADA, [and] requires that they must first exhaust the remedies available under IDEA's administrative due process system if they are seeking relief that is also available under the IDEA[,] has been "misinterpreted and misapplied").

students.³⁴ This included requiring plaintiffs to demonstrate educators acted with “bad faith” or “gross misjudgment” in order to correct or hold schools accountable for ADA and Section 504 violations “based on educational services for disabled children.”³⁵ Other circuits have applied the same claim-raising standard to discrimination complaints regarding the education of disabled students.³⁶

This interpretation has allowed the courts to effectively tamp down fulfillment of the objectives of federal non-discrimination protections. Even though the United States Supreme Court questioned, but did not answer, whether Section 504 was intended to “reach only intentional discrimination,”³⁷ other courts have continued to enforce this unreasonable standard of “bad faith and gross misjudgment.”³⁸

Over the past decade, disability discrimination claims under Section 504 and the ADA, which have maintained strong viability in housing, employment, and other settings, have slowly emerged from under the shadows of the IDEA’s special education jurisprudence. These claims have begun to reflect an appreciation for their unique and important role in civil rights protections for students with disabilities.³⁹ Concurrent with this evolution, courts and hearing

34. See *id.* at 283 (explaining how districts’ pleading requirements were “forcing parents of IDEA students to repackage their Section 504/ADA claims solely as IDEA claims”).

35. *B.M. ex rel. Miller v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882, 887 (8th Cir. 2013) (citing *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850, 856 (8th Cir. 2000)). The Eighth Circuit Court of Appeals has consistently held that “[w]here alleged ADA and Section 504 violations are based on educational services for disabled children, the plaintiff must prove that school officials acted in bad faith or with gross misjudgment.” *Id.* (quoting *Birmingham*, 220 F.3d at 856).

36. See, e.g., *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 841 (2d Cir. 2014); *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Sellers v. Sch. Bd. of City of Mannassas*, 141 F.3d 524, 529 (4th Cir. 1998).

37. *Alexander v. Choate*, 469 U.S. 287, 295–97 (1985) (holding unequivocally that Section 504 reached unintentional discrimination).

38. See *supra* note 36. It is the authors’ hope that as the understanding that special education protections do not subsume disability nondiscrimination protections continues to evolve, courts will reject a “bad faith and gross misjudgment” standard of proof in favor of a more rational standard.

39. See *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008) (demonstrating that courts have begun to recognize the protections of the IDEA must not consume the protections of Section 504 and the ADA). The court in *Mark H.* concluded that the

officers have experienced a renewed confusion in determining when, and to what extent, the administrative hearing procedures of the IDEA must first be exhausted before pursuing non-IDEA claims, specifically ADA and Section 504 claims.⁴⁰

The Supreme Court's recent decisions⁴¹ have provided some clarity to these questions. In short, this clarity will permit a greater appreciation of the gravity and distinction between the various disability discrimination protections for students. It will also reduce the cost, delays, and frequent errors of the IDEA administrative hearing process that present insurmountable barriers to justice for students with disabilities.

III. THE *FRY* DECISION

Stacy and Brent Fry sued their local and regional school districts and school principal for violating the ADA and Section 504 by refusing to allow their daughter, E.F., to bring her trained service dog to kindergarten.⁴² E.F.'s service dog, Wonder, provided E.F. the

IDEA provides clear congressional intent to preserve all remedies and rights under Section 504 and the requirements to provide a free appropriate public education in each law are "overlapping but different." *Id.* at 925. More recently, in cases strongly supported by the United States Department of Justice, courts have strengthened the distinct viability of disability discrimination protections for special education students. *See* *B.C. v. Mt. Vernon Unified Sch. Dist.*, 837 F.3d 152, 160 (2d Cir. 2016) ("Plaintiffs' statistical evidence, therefore, shows disparate impact under the ADA and Section 504 only if, as a matter of law, a child with a disability under the IDEA necessarily qualifies as an individual with a disability under the ADA and Section 504, such that Plaintiffs' data on children with a disability under the IDEA suffice as data on individuals with a disability under the ADA and Section 504. We conclude that this is not the case."); *see also* *CG v. Pa. Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) ("[C]ompliance with the IDEA does not automatically immunize a party from liability under the ADA"); *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100–01 (9th Cir. 2013) (determining that compliance with the IDEA does not necessarily establish compliance with the ADA); *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 42 (1st Cir. 2012) ("Compliance with the IDEA does not necessarily disprove a claim under the Rehabilitation Act or the ADA.").

40. *See, e.g.*, *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. 2011) ("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."), *invalidated by Albino v. Baca*, 747 F.3d 1162, 1173 (9th Cir. 2014).

41. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

42. *Fry*, 137 S. Ct. at 750–51.

assistance E.F. required in daily activities due to her severe form of cerebral palsy.⁴³ For example, Wonder was trained to perform such tasks as retrieving dropped items, helping E.F. balance when she used her walker, opening and closing doors, turning on and off lights, helping E.F. take off her coat, and helping E.F. transfer to and from the toilet so that her independence (and one assumes, her privacy and dignity) could be maximized.⁴⁴ School officials refused to allow Wonder into school because a human aide was provided as part of E.F.'s IEP, and the school concluded this rendered Wonder's services superfluous.⁴⁵

The Department of Education's Office for Civil Rights (OCR) determined that the school district's exclusion of Wonder violated E.F.'s rights under Title II of the ADA and Section 504.⁴⁶ The OCR compared the school officials' determination that Wonder's services were superfluous to a student in a wheelchair who wished to independently enter a school building using a ramp over being carried into the building by assistants, or a blind student who preferred to use a cane over being led around by others.⁴⁷

The Frys then filed suit seeking declaratory relief and money damages to compensate for E.F.'s injuries, which included emotional distress and pain, embarrassment, and mental anguish.⁴⁸ The district court granted the school district's motion to dismiss the suit.⁴⁹ It held that Section 1415(1) required the Frys to first exhaust the IDEA's administrative procedures.⁵⁰ A divided panel of the Sixth Circuit affirmed, reasoning that Section 1415(1) applies whenever a plaintiff's alleged harms are "educational" in nature.⁵¹

The United States Supreme Court vacated and remanded the Sixth Circuit's decision.⁵² The Court held that: (1) if, in a suit brought under a statute other than the IDEA, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is unnecessary; and (2) courts should examine the

43. *Id.* at 751.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 751–52.

49. *See id.* at 752.

50. *Id.*

51. *Id.*

52. *Id.*

gravamen of the complaint to determine whether it seeks relief for the denial of a FAPE.⁵³ In other words, when the crux of the complaint reveals that the remedy sought is for the denial of a FAPE, the IDEA administrative procedures must be exhausted before lawsuits are filed on ADA and Section 504 claims.⁵⁴

In coming to this conclusion, the Court in *Fry* re-traced the historical treatment by the Supreme Court and Congress of the interaction between the IDEA and the ADA and Section 504, beginning with *Smith v. Robinson*.⁵⁵ The parents in *Smith* sought to secure a FAPE for their child under the IDEA as well as Section 504 and the Fourteenth Amendment's Equal Protection Clause.⁵⁶ The Court in *Smith* held "that the IDEA altogether foreclosed additional claims . . . [because] its 'comprehensive' and 'carefully tailored' provisions . . . [created] 'the exclusive avenue' through which a child with a disability (or his parents) could challenge the adequacy of his education."⁵⁷ The *Fry* Court noted that Congress quickly responded with the Handicapped Children's Protection Act of 1986, now codified at Section 1415(l), which "overturned *Smith's* preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement."⁵⁸

The Court in *Fry* recognized that Section 1415(l) preserves the distinct viability of non-IDEA claims such as the ADA and Section 504, yet first funnels all claims for relief available under the IDEA through its administrative hearing process.⁵⁹ To distinguish between claims that must be exhausted initially in an IDEA administrative hearing from claims that may be brought initially in the courts, the Court first identified that the IDEA's primary purpose is the guarantee of a FAPE.⁶⁰ As such, the Court held that Section 1415's "exhaustion rule hinges on whether" the relief sought is an enforcement of the child's right to a FAPE.⁶¹ If the relief sought is not redress for the failure to provide a FAPE, even though the actions that give rise to the student's claims are related to the

53. *Id.* at 746–47.

54. *Id.* at 747.

55. *Id.* at 746 (citing *Smith v. Robinson*, 468 U.S. 992 (1984)).

56. *Id.* at 750 (citing *Smith*, 468 U.S. at 992).

57. *Id.* (quoting *Smith*, 468 U.S. at 1009).

58. *Id.*

59. *Id.*

60. *Id.* at 753.

61. *Id.* at 754.

student's education, the student need not exhaust the administrative procedures of the IDEA before bringing suit under separate and distinct laws such as Section 504 and the ADA.⁶²

The Court rightly observed that there are many reasons that a child might require an accommodation of her disability in an educational setting that have nothing to do with the provision of a FAPE.⁶³ This includes where the ADA or Section 504 otherwise require the provision of a requested accommodation.⁶⁴ Under both the ADA or Section 504, the school has an obligation to provide the requested accommodation.⁶⁵ However, unless the accommodation is required in order to provide a FAPE under the IDEA, an administrative hearing officer has no authority to require the school to provide the requested accommodation.⁶⁶ This is because the officer is only empowered to enforce the child's substantive right to a FAPE.⁶⁷

Of course, the plaintiff is the master of her own claim.⁶⁸ However, the Court cautioned that a plaintiff's artful pleading will not permit her to escape the administrative exhaustion requirement of the IDEA if she effectively seeks relief for the denial of a FAPE.⁶⁹ What matters is the *essence* of the relief sought, though notably, not the relief she "could have sought."⁷⁰ The plaintiff identifies the relief she seeks, and her claims are subject to exhaustion, or not, based on that choice.⁷¹ To identify whether a plaintiff seeks relief available under the IDEA, the Court urged lower courts to consider the "diverse means and ends" of the statutes that protect the rights of people with disabilities.⁷² In particular, the Court suggested considering the IDEA on the one hand, and the ADA and Section 504 on the other.⁷³

The Court then explored a set of hypothetical questions intended to assist lower courts in identifying when a plaintiff seeks

62. *Id.*

63. *Id.*

64. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.* at 755.

70. *Id.*

71. *See id.*

72. *Id.* at 755.

73. *Id.*

relief for the denial of a FAPE.⁷⁴ These hypotheticals form a two-part test.⁷⁵ First, could the plaintiff have brought the same claim if she was seeking access to a different kind of public facility?⁷⁶ For example, what if E.F. had sought to bring Wonder with her to a public library?⁷⁷ And second, could an adult in the school building bring essentially the same claim?⁷⁸ Could a teacher, for example, complain that his rights under the law were violated because he was barred from bringing his service animal to his place of employment?⁷⁹ If the answers to both questions are “yes,” then it is very unlikely that the student seeks relief for the failure to provide a FAPE.⁸⁰ Therefore, the student need not first exhaust the administrative hearing requirements of the IDEA before her claims can be heard in court.⁸¹

The Court acknowledged that the distinction between a claim that seeks redress for the failure to provide a FAPE and an equal-access claim may not always be obvious.⁸² For example, a wheelchair-bound student cannot receive a FAPE if she cannot enter a school building because it lacks a ramp.⁸³ The core of this complaint would involve access rather than the denial of a FAPE.⁸⁴ The same type of complaint could stem from the student’s inability to enter a public library that lacked a ramp.⁸⁵ Conversely, a student seeking remedial tutoring in order to gain equal access to a school’s regular education math curriculum could legally claim that the failure to provide such tutoring amounts to disability discrimination.⁸⁶ However, an adult visiting the school could not bring such a claim.⁸⁷ As such, the second student’s claim is one that is more like the denial of a FAPE.⁸⁸ The second student would thus

74. *See id.* at 756.

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *Id.*

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 756–57.

87. *See id.* at 757.

88. *Id.*

be required to first exhaust the administrative procedures made available under the IDEA before bringing suit under disability discrimination statutes.⁸⁹ These examples show that despite the helpful clarification in the *Fry* decision, the tools the Court has provided by way of these hypothetical questions may cause as much confusion as clarification.

The Court suggested another tool that lower courts can use to establish the gravamen of the plaintiff's complaint and the plaintiff's corresponding obligation to first make use of the IDEA's administrative hearing procedures: prior pursuit of the IDEA's administrative remedies.⁹⁰ The Court said this "will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term."⁹¹ In his concurrence in part and concurrence in the judgment, Justice Alito, joined by Justice Thomas, refers to this additional standard as a "another false clue," stating that it is "easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide."⁹² These circumstances could include where parents might be "advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another."⁹³ Or, "parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute."⁹⁴ The authors agree with Justices Alito and Thomas that this "clue" involving prior pursuit of the IDEA's administrative remedies, in particular, is likely to confuse lower courts and lead them astray.⁹⁵

IV. FUTURE UNCERTAINTY

Fry left unanswered two important questions that are likely to cause future confusion. First, because a FAPE under Section 504 differs from a FAPE under the IDEA, *Fry*'s reach is unclear. A student

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 759 (Alito, J., concurring in part and concurring in the judgment).

93. *Id.*

94. *Id.*

95. *See id.*

receives a Section 504 FAPE when the student is provided with regular or special education, and related aids and services, that are designed to meet his or her individual educational needs as adequately as the needs of students without disabilities are met.⁹⁶ A student's rights under Section 504 are violated when a school does not provide an education that affords a student equal opportunity to obtain the same level of academic achievement when the student is in the most integrated setting appropriate to the student's needs.⁹⁷

A student receives a FAPE under the IDEA when the student receives specially designed instruction and support services that are reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances.⁹⁸ The IEP for a child who is fully integrated in the regular classroom should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."⁹⁹ Regardless of the student's particular circumstances, the student's educational program must be appropriately ambitious in light of those circumstances.¹⁰⁰ However, in *Board of Education of the Hendrick Hudson Central School District v. Rowley*,¹⁰¹ and in *Endrew F.*,¹⁰² the Court specifically rejected the idea that a FAPE under the IDEA is an education that aims to provide disabled children substantially equal opportunities as non-disabled children to achieve academic success, attain self-sufficiency, and contribute to society.

The differing FAPE definitions and *Fry*'s holding leave unclear the answer to the following scenario. Assume a school district provides a student with an education that allows him or her to advance from grade to grade, and the school also provides that student with academic opportunities that are not equal to those provided to his or her peers without disabilities. That student's claim will fail the *Fry* two-part test.¹⁰³ If the student seeks relief under

96. 34 C.F.R. § 104.33(b) (2016) (noting that in addition, schools must also satisfy the requirements of 34 C.F.R. §§ 104.34, 104.35, and 104.36).

97. 34 C.F.R. § 104.4(b)(vii)(2).

98. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

99. *Id.* at 991.

100. *Id.* at 1000.

101. 458 U.S. 176, 211 (1982).

102. 137 S. Ct. at 999.

103. *See Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 746, 754 (2017) (holding that (1) "[I]f, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required;")

Section 504 or the ADA, what is the student's obligation to exhaust the administrative remedies? Under the plain language of Section 1415(l) and the Court's analysis thereof, the student should not be subject to the IDEA's administrative exhaustion requirement because the student does not seek relief available from a hearing officer.¹⁰⁴ But, despite clear statutory language, *Fry*'s imperfect test leaves room for one to argue that administrative exhaustion remains appropriate.¹⁰⁵

Second, the Court left for another day the question of whether exhaustion of IDEA's administrative hearing procedures is required when the plaintiff complains of the denial of a FAPE under the IDEA, but seeks only monetary damages, a remedy not within a hearing officer's ability to award in an IDEA due process hearing.¹⁰⁶ The *Frys* and the Solicitor General said the answer to that question is "no."¹⁰⁷ These authors agree. A plain language analysis of Section 1415(l), as endorsed by the Supreme Court in *Fry*, makes any other conclusion unlikely. A plaintiff, as master of her claim, chooses monetary damages as the remedy she seeks. She is under no obligation to choose different relief that a hearing officer has the power to award in an administrative hearing under the IDEA, and no hearing officer may award her the damages she seeks. As such, under the plain language of Section 1415(l) and the plain language analysis employed by the Court in *Fry*, she should be free to bring her claims to the courts without first exhausting them administratively.

and (2) "[E]xhaustion of the IDEA's administrative procedures is unnecessary where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE").

104. *See id.* at 754 ("[I]f, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: A hearing officer . . . would have to send her away empty-handed.").

105. *Id.* at 750 ("[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." (internal quotations omitted)).

106. *Id.* at 752 n.4.

107. *Id.*

V. CONCLUSION

Until the Supreme Court's decision in *Fry*, there was significant confusion in administrative bodies and courts on the application and interaction of the special education and disability discrimination laws.¹⁰⁸ *Fry* provided much-needed guidance on these laws and fashioned a two-part test for determining their interplay.¹⁰⁹ Despite the test's apparent limitations, students with disabilities, their parents, and their advocates have much to appreciate in the Court's decision. The Court clarified the manner in which federal special education and non-discrimination laws overlap but maintain their separate and distinct viability.¹¹⁰ This clarification spares students who neither seek nor can obtain relief from a hearing officer under the IDEA from exhausting the IDEA's administrative remedies.¹¹¹ While imperfect, *Fry* removes significant barriers for students with disabilities seeking to enforce their rights and therefore represents an important victory for students with disabilities.¹¹²

108. *See supra* Part II.

109. *See supra* Part III.

110. *See id.*

111. *See id.*

112. *See id.*

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