No. 07-35115

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDY PAYNE, individually and as guardian on behalf of; D.P., a minor child,

Plaintiffs-Appellants

v.

PENINSULA SCHOOL DISTRICT, a municipal corporation, *et al.*,

Defendants-Appellees

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

CHARLES P. ROSE
General Counsel

FRANCISCO LOPEZ
Attorney
Department of Education
Office of the General Counsel
400 Maryland Avenue, S.W.
Washington, DC 20202
(202) 401-6000

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

MARK L. GROSS
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

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QUESTION PRESENTED

Whether a child covered by the Individuals with Disabilities Education Act must seek an IDEA due process hearing before filing a lawsuit that (1) challenges past misconduct rather than the child's current educational plan; (2) alleges only that school officials have violated the Constitution and state law; and (3) seeks only compensatory damages.

INTEREST OF THE UNITED STATES

The Department of Education has responsibility for the federal administration and enforcement of the IDEA. In particular, it is charged with issuing regulations implementing the IDEA's procedural protections and issuing policy letters and other interpretive guidance. Additionally, it must determine whether States comply with the IDEA and take action against States not in compliance, see 20 U.S.C. 1412(d), 1416(e).

The Department of Justice may, on referral from the Department of Education, bring actions to enforce the IDEA. See 20 U.S.C. 1416(e). Additionally, it may file suit to enforce the rights of individuals with disabilities pursuant to other statutes, including the Americans with Disabilities Act, 42 U.S.C. 12134, and Section 504 of the Rehabilitation Act of 1974, 29 U.S.C. 794. Accordingly, the United States has an interest in ensuring that the IDEA is not construed so as to diminish the substantive and procedural rights of students with disabilities.

STATEMENT OF THE CASE

1. The IDEA, 20 U.S.C. 1400 *et seq.*, requires States that receive federal IDEA funds to assure that children with disabilities get a free appropriate public education that meets their unique needs in the least restrictive environment. 20 U.S.C. 1412(a)(1) & (5). For each child, the IDEA requires the development of an

individualized education program (IEP) by parents, teachers, other school personnel, and educational experts. *Id.* 1414(d)(1)(B). The IEP includes a statement of the special education and related services to be provided to the child. *Id.* 1414(d)(1)(A). The school must put an agreed-upon IEP into effect. *Id.* 1414(d)(2)(A).

The IDEA also requires States to establish procedures to resolve IEP-related disputes between parents and school districts. 20 U.S.C. 1414-1415. Parents or guardians may present complaints "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* 1415(b)(6)(A). If such a complaint cannot be resolved to the parents' satisfaction, the State provides "an opportunity for an impartial due process hearing," *id.* 1415(f)(1)(A), at which a hearing officer determines "whether the child received a free appropriate public education." *Id.* 1415(f)(3)(E).

After parents have exhausted these administrative procedures, any party aggrieved by the final decision may bring a civil action in state or federal court. 20 U.S.C. 1415(i)(2)(A). While the court must receive the administrative records and give that proceeding "due weight," it must also hear any additional evidence the parties present. *Id.* 1415(i)(2)(C); *Board of Educ.* v. *Rowley*, 458 U.S. 176, 206 (1982). The court "shall grant such relief as the court determines is appropriate."

20 U.S.C. 1415(i)(2)(C)(iii), which ordinarily does not include "retrospective damages" such as the compensatory and punitive damages sought here. *Witte* v. *Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999).

The IDEA specifically provides that the availability of its administrative and judicial remedies to children with disabilities and their parents does not "restrict or limit the rights, procedures, and remedies available under the Constitution" or "Federal laws protecting the rights of children with disabilities." 20 U.S.C. 1415(*l*). However, before the filing of a suit under another law "seeking relief that is also available under" the IDEA, the statute requires that the IDEA's hearing procedures "be exhausted to the same extent as would be required had the action been brought under" the IDEA. *Ibid.*

2. Plaintiff D.P. has autism, which delays his academic progress and causes behavioral problems, including resistance to work, difficulty staying on task, and aggression. Slip Op. 4385. Pursuant to his IEP, he was placed in a "transition classroom" taught by Jodi Coy at Artondale Elementary School in Fall 2003, when he was seven years old. *Ibid.*

During Fall 2003, Coy regularly responded to D.P.'s inappropriate behavior by locking him, alone, in what she called the "safe room," a five-foot-by-six-foot fully enclosed space in the classroom. Slip Op. 4385. The room's small window was completely covered with construction paper, rendering the room dark and

making it impossible to see in or out. On several occasions while in the "safe room," D.P. removed his clothes and urinated and defecated on himself. *Id.* 4385-4386. When he defecated in the room, Coy made him clean it up. *Id.* 4386.

Such use of the "safe room" was not part of D.P.'s agreed-upon IEP.[1] D.P.'s parents learned of the space at an August 2003 meeting with Coy. Coy assured them that the door would be removed and replaced with a curtain, that the space would be filled with beanbags, pillows, and other soft items, and that the space "would be a place for the kids to go when they were overstimulated to relax and calm down, like a little quaint cubby." Excerpt of Record [ER] 204.

D.P.'s parents met with Coy to formulate an IEP on September 24, 2003, by which time D.P. had been isolated in the room for disciplinary reasons at least three times. ER 202, 370. Coy requested authorization to use the room in this manner, and D.P.'s parents refused. They asked her to use the room only when D.P.'s behavior was "extreme," to keep the door open, and to have an aide in the room with him. ER 206-207. Coy agreed to these conditions, but did not follow

[1] The safe room was mentioned in an "aversive intervention plan" attached to D.P.'s IEP, which was not distributed to D.P.'s parents until January 2004. ER 204. This document permits D.P. to be "removed from the group or isolated in the safe room until he is calm and then a 3 minute time out will be implemented." ER 424. Not only was it never seen by D.P.'s parents during the room's use, it does not speak to the actual controversies in this case, e.g., the room was to be fully enclosed and locked, the duration of time D.P. was to be left in the room unattended, and the room's use despite consequences (such as D.P.'s defecating on himself) that were never explained to D.P.'s parents.

them. When Windy Payne, D.P.'s mother, complained that Coy was not putting an aide in the room with D.P., Coy told her having an aide there "would only give [D.P.] a reinforcement for his behavior." Coy said she "needed to break" D.P., at which time "we would see a new child emerge, and he would be cured." ER 210.

Coy continued to use the safe room to discipline D.P. despite the Paynes' objections, until the Paynes objected in writing in January 2004, asking that the IEP team be convened. ER 220. The door to the safe room immediately was removed, over Coy's objection. ER 217. However, Coy reconfigured the classroom to create another, less enclosed, "safe room" space, in which she continued to isolate students, including D.P. ER 218. Additionally, she put a desk in the former "safe room" and began having D.P. do school work there.

Meanwhile, Coy informed Windy Payne that Payne no longer could visit the classroom; to see D.P., she was to report to the school office, and D.P. would be brought to her. This arrangement was made ostensibly so that Payne would not "misconstrue what was going on in [Coy's] classroom." ER 217.

The Paynes complained several times to the school district's superintendent, stating that Coy and her supervisors "lack knowledge in the area of autism" and that D.P. as a result "has been vilely treated." ER 150. They asked, among other things, that the district permit D.P.'s placement in an autism program in a nearby district. ER 152. They also asked that D.P. be moved from Coy's classroom. The

district denied their requests. Slip Op. 4386.

In Spring 2004, the Paynes and school officials, after mediation, agreed to transfer D.P. to a different school for the 2004-2005 school year. The district also agreed to, among other things, provide D.P. with a personal aide and transportation to his new placement. ER 441-442. Following the 2004-2005 school year, the Paynes removed D.P. from the school district entirely, and they now home-school him. They have not requested further educational services from the school district.

3. In November 2005, Windy Payne and D.P. filed this suit against the Peninsula School District, Artondale Elementary School, Coy, and several other individuals. They brought no claims under the IDEA, but rather alleged that school officials violated D.P.'s Fourteenth Amendment liberty rights and Washington state law. Plaintiffs sought compensatory and punitive damages for D.P.'s "extreme mental suffering and emotional distress." The district court granted the school officials summary judgment and dismissed the case, concluding that plaintiffs failed to exhaust required IDEA administrative remedies.

4. A divided panel of this Court affirmed. The majority stated that "the inquiry may be boiled down to one central question: whether the plaintiffs 'seek relief for injuries that could be redressed to any degree by the IDEA's administrative procedures.'" Slip Op. 4388 (quoting *Kutasi* v. *Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163-1164 (9th Cir. 2007)). "If the answer to

that question is either yes or unclear," the majority continued, "exhaustion is required." *Id.* 4389. Here, the plaintiffs claimed injuries, such as "continued emotional trauma," for which "IDEA provides some relief" in the form of "academic, psychological, and therapeutic corrective and supportive services." *Id.* 4390. The majority acknowledged that the plaintiffs did not seek such prospective remedies, but rather sought monetary damages, which "are not ordinarily available under the IDEA." *Ibid.* However, it found that Windy Payne could not "avoid the exhaustion requirements by requesting only monetary damages" or by "recast[ing] her damages as retrospective only when her complaint clearly alleges ongoing injuries." *Ibid.* It was immaterial, the majority reasoned, that prospective IDEA services "may not be the remedy Payne *wants*," as long as the IDEA process could provide some form of "relief suitable to remedy the wrong done the plaintiff." *Id.* 4391 (quoting *Robb* v. *Bethel Sch. Dist. No. 403*, 308 F.3d 1047, 1049 (9th Cir. 2002)).

The majority acknowledged that this Court had not required exhaustion where a student suffered physical abuse that "served no legitimate educational purpose." Slip Op. 4389 (quoting *Witte*, 197 F.3d at 1273). By contrast, it had required exhaustion where a plaintiff complained about a school's "purely educational" choices, such as taking a child out of class and providing "peer tutoring on a hallway floor instead." *Ibid.* (citing *Robb*, 308 F.3d at 1048). This

case, the majority observed, was "in a middle ground involving disciplinary measures employed as a part of a larger educational strategy." *Ibid.* The majority found that *Robb* controlled this case because the conduct alleged to be unlawful was "at least. . . an attempt at an educational program." *Id.* 4390 (internal quotations marks omitted) (ellipses in original). Moreover, unlike in *Witte*, the plaintiffs did not claim "physical injuries for D.P." *Id.* 4390.

Accordingly, the majority found, the plaintiffs were required to exhaust all available IDEA remedies but did not do so. In particular, Payne "did not seek an impartial due process hearing, even though the mediation failed to resolve all issues regarding the District's provision of educational services and even though her complaint reflects an ongoing concern with safe rooms as they were used with D.P." Slip Op. 4390. That D.P. is now home schooled "does not automatically make any administrative remedies futile," the majority reasoned, *ibid.*, and the plaintiffs had not met what the majority found was their burden to prove "that D.P. would not benefit from services" available through the IDEA administrative process. *Id.* 4391.

In dissent, Judge Noonan questioned how the majority could find "an attempt at an educational program" in "a teacher repeatedly locking D.P., a seven-year-old autistic child, into an unventilated, dark space the size of a closet for indeterminate amounts of time, causing D.P. to become so fearful that he routinely

urinated and defecated on himself." Slip Op. 4391. In his view, "Ms. Coy's misuse of the isolation room serves no legitimate educational purpose, is prohibited by state administrative regulations, and was imposed as punishment." *Id.* 4392. Judge Noonan observed that Washington law bans "isolation without the requisite safeguards," listing this practice among those that are "'manifestly inappropriate,'" along with electric shock, burning or cutting a student, denying or delaying medication, and submerging a student's head in water. *Id.* 4392-4393 (quoting Wash. Admin. Code 392-172A-03125). "Here was neither education nor attempt at education," he concluded, but rather "a return to the bleak black days of Dickensian England." *Id.* 4393.

SUMMARY OF ARGUMENT

The IDEA, by its terms, requires that its administrative processes be exhausted before the filing of suits that do not explicitly allege IDEA violations but nonetheless "seek[] relief that is also available under" the IDEA. 20 U.S.C. 1415(*l*). This provision serves the important purpose of preventing plaintiffs from using clever pleading to litigate IDEA issues without first availing themselves of the IDEA's administrative processes. Because this suit attempts no such end-run around IDEA processes, the IDEA's exhaustion requirement is not implicated.

The plaintiffs here do not allege any violation of the IDEA, but rather claim that the defendants committed unconstitutional abuse. They seek only monetary

damages for alleged past trauma, and do not challenge the appropriateness of an ongoing or past IEP. Moreover, plaintiffs worked with school officials, including extensive participation in IDEA mediation, to resolve all prospective IDEA issues regarding D.P.'s education before filing this suit, and so further resort to the IDEA administrative process could not benefit them. In short, this suit could not have been brought under the IDEA itself, and so applying the exhaustion provision here does not serve that provision's purposes.

The majority required exhaustion because it applied the wrong test. Following an earlier panel of this Court, the majority held that IDEA exhaustion is required, regardless of what relief the plaintiff seeks or under what law the claim arises, whenever the plaintiff's injuries "*could be* redressed to any degree by the IDEA's administrative procedures." Slip Op. 4388 (emphasis added). This test cannot be reconciled with the language of 20 U.S.C. 1415(*l*), which is phrased in terms of the relief actually sought.

Compounding that error, this Court has held that trauma caused by the school's allegedly unconstitutional conduct should be addressed in the first instance by counseling services available under IDEA. Accordingly, the panel ruled, students with disabilities who suffer such trauma must seek future counseling from the school system through the IDEA process before suing school officials. This holding distorts the functioning and purpose of the IDEA hearing

process, which presupposes an ongoing educational dispute between student and school district and is designed to address a student's current and future educational needs rather than adjudicate tort liability for past misconduct. While counseling is available under IDEA as a related service, a student's eligibility for counseling turns on whether it will help the student benefit from special education and other related services going forward, not on whether the student has suffered trauma or whether any school official inflicted it. This requirement that a student seek counseling before suing also transforms the IDEA – a statute meant to advance the rights of students with disabilities – into a limitation on those students' rights as compared with those of students without disabilities, who may allege the same unconstitutional conduct in court without pursuing unnecessary administrative process.

Because this unsound doctrine otherwise would prevent even the most severely traumatized children with disabilities from readily exercising their constitutional rights, this Court has resorted to creating exceptions. It has excused its administrative exhaustion requirements for those plaintiffs whose injuries were inflicted by physical as opposed to psychological abuse, as well as where the challenged practices cannot, in the Court's view, be characterized as an "attempt" at legitimate pedagogy. These exceptions have no basis in the statute, defy evenhanded administration, and properly go to the merits of a constitutional claim

rather than the exhaustion of administrative remedies. And they are unnecessary provided that this Court properly construes 20 U.S.C. 1415(*l*) as not applying under the circumstances of this case.

ARGUMENT

THE IDEA DOES NOT REQUIRE A PLAINTIFF WHO SEEKS ONLY COMPENSATORY DAMAGES FOR PAST UNCONSTITUTIONAL CONDUCT AND HAS RESOLVED ALL PROSPECTIVE EDUCATIONAL ISSUES TO REQUEST A DUE PROCESS HEARING BEFORE SUING

1. The majority's erroneous conclusion stems from this Court's overly broad construction of the IDEA's requirement that IDEA administrative procedures be exhausted before the filing of some suits filed under other laws. With respect to the IDEA, like any other statute, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 296 (2006) (citation omitted). This Court has construed the provision at issue here well beyond what its plain language can support.

In relevant part, the IDEA provides:

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

20 U.S.C. 1415(*l*) (citations omitted and emphasis added). Thus, IDEA exhaustion is required before alleging violations of other laws only for those suits "seeking relief that is also available under" the IDEA itself. Where a plaintiff has no ongoing educational dispute with the defendant school system and neither sues under the IDEA nor seeks relief available under the IDEA, nothing in this provision requires exhaustion of IDEA procedures. To the contrary, this provision forbids courts from construing the IDEA to restrict the rights and remedies available under other laws under any other circumstances.

Nonetheless, the majority stated that a plaintiff must exhaust IDEA procedures before filing suits arising under other laws or even the Constitution whenever that plaintiff's injuries "*could be* redressed to any degree by the IDEA's administrative procedures." Slip Op. 4388 (emphasis added). In applying that test, the panel followed an earlier panel decision, which held that the question is not what relief the plaintiff actually seeks, but rather what relief the plaintiff *could have* sought based on the injuries alleged. See *Robb* v. *Bethel Sch. Dist. No. 403*, 308 F.3d 1047, 1050 (9th Cir. 2002) ("Our primary concern in determining whether a plaintiff must use the IDEA's administrative procedures relates to the source and nature of the alleged injuries for which he or she seeks a remedy, not the specific remedy requested."). This amounts to a rewriting of the statutory text.

Under this Court's construction, the IDEA's exhaustion requirement

functions like that of the Prisoner Litigation Reform Act, notwithstanding the PLRA's quite different wording. See *Robb*, 308 F.3d at 1050-1051. The PLRA provides: "No action shall be brought with respect to prison conditions under [42 U.S.C. 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until *such administrative remedies as are available* are exhausted." 42 U.S.C. 1997e(a) (emphasis added). It thus requires any prisoner challenging prisoner conditions to exhaust "such administrative remedies as are available" before instituting any suit, regardless of whether the lawsuit seeks relief that the administrative proceedings could provide. See *Booth* v. *Churner*, 532 U.S. 731, 733-734 (2001). As the Supreme Court held, Congress phrased the PLRA's exhaustion requirement in terms of "the procedural means" available to a prisoner, not the "particular relief" available through such process. *Id.* at 738-739. Congress could have imposed a similar exhaustion requirement with respect to the IDEA, but it did not. Instead, it required exhaustion only for those suits "seeking relief that is also available" under the IDEA, regardless of (1) what administrative procedures may be available or (2) what other relief might be available under the IDEA.

Robb ignored the distinction the Supreme Court thought critical between an exhaustion requirement (such as the PLRA's) that refers to available *process* and one that refers to available *relief*. It ignored entirely the word "seeking," thereby

turning the exhaustion requirement from one triggered by the plaintiff's choice to seek an IDEA remedy to one triggered by the remedy's availability. And it drew an unjustifiably broad conclusion about general exhaustion principles from a Supreme Court opinion that carefully parsed a statute with an unusually onerous exhaustion requirement. See 308 F.3d at 1051 (*Booth* "strongly suggests" that, "*whatever the statutory context*, a plaintiff must exhaust a mandatory administrative process even if the precise form of relief is not available in the administrative venue") (emphasis added). In short, *Robb* failed to justify its equation of two very different statutory provisions. Nor did it reconcile the language of 20 U.S.C. 1415(*l*), which is phrased in terms of the remedies actually sought, with its conclusion that "the specific remedy requested" is irrelevant to the exhaustion analysis. The language of the IDEA makes clear that "the relief being sought *does* matter, even if there is other relief available under IDEA that would aid the plaintiffs." See *Robb*, 308 F.3d at 1054 (Berzon, J., dissenting).

Seeking a textual hook for interpreting the exhaustion requirement so expansively, *Robb* and other courts have reasoned that, where a plaintiff seeks monetary damages for educational or psychological injury that can be ameliorated by the provision of future IDEA services, a claim for damages is equivalent to a claim for such services. Thus, the plaintiff does, in fact, "seek" IDEA services such as psychological counseling, under the name of monetary damages. See

Robb, 308 F.3d at 1050 ("Damages could be measured by the cost of these services."); accord *Charlie F.* v. *Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996).

There is merit to this reasoning as applied to a suit that alleges a failure to offer a free appropriate public education or otherwise challenges some aspect of an ongoing educational relationship between a school and a student, because IDEA remedies are designed to directly address such injuries.[2] But IDEA remedies are not designed to redress the damage alleged in this case, i.e., psychological trauma from unconstitutional treatment. Even assuming that IDEA services could assist a child who has suffered such trauma in moving forward with his life productively, their availability hardly compensates for the pain inflicted. As Judge Berzon aptly put it, "damages for emotional distress are not necessarily related to the costs of future therapy, nor are they quantifiable in terms of those costs." *Robb*, 308 F.3d at 1055 (Berzon, J., dissenting). The bottom line is that, whereas prospective IDEA services may help "undo" an educational injury, no prospective services can undo the sort of trauma alleged here. See *Polera* v. *Board of Educ.*, 288 F.3d 478, 490 (2d Cir. 2002).

Nor is the IDEA scheme – which, at its core, is about ensuring educational

[2] However, a plaintiff seeking emergency relief under the IDEA's stay-put provision need not exhaust administrative remedies first. *N. D.* v. *State Dep't of Educ.*, 600 F.3d 1104, 1111 (9th Cir. 2010).

opportunities rather than overall psychological well-being – well suited for the redress of past psychological trauma caused by school officials with whom the student has no ongoing educational dispute. "IDEA's primary purpose is to ensure [a free and adequate public education], not to serve as a tort-like mechanism for compensating personal injury." *Nieves-Marquez* v. *Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003); accord *M.Y.* v. *Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008). It is true that a child with a disability can receive counseling or other psychological services under IDEA, but only to the extent that such "related services" help the child to "benefit from special education." See 34 C.F.R. 300.34(a). A child's entitlement to such services – from his current school district – depends entirely on his ongoing educational needs. It does not turn on whether the child has suffered trauma, let alone on whether any school official has committed unconstitutional acts. Accordingly, whether school officials are liable for traumatic harm caused by past unlawful conduct has little to do with whether they have a prospective obligation to provide psychological services under the IDEA so that a student can benefit from special education. That a plaintiff seeks the former cannot be equated with an improper attempt to obtain the latter without following required administrative procedures.

Additionally, it is unfair and contrary to the IDEA's purpose to require a child with a disability who claims to have been traumatized to seek counseling –

often from the very school district allegedly at fault – before pursuing a claim for damages. A student without a disability who suffers unconstitutional abuse may sue a school or district for damages without first asking the school for counseling. Requiring a student with a disability to pursue such counseling first not only contravenes the IDEA's plain language, it also turns the IDEA – a statute designed to advance the rights of students with disabilities – into a severe limitation on those students' rights. Properly read, the IDEA provides additional rights and remedies prospectively to children with disabilities; it does not diminish the rights of those children, nor does it force those who have suffered unconstitutional treatment to follow administrative procedures required of no other children before seeking entirely retrospective compensation.

2. The legislative history of the IDEA's exhaustion requirement confirms what is apparent from the statute's plain language: Congress had no intent to require a litigant suing under another law, and not seeking any remedy available under the IDEA, to go through the IDEA administrative process. The provision at issue here, 20 U.S.C. 1415(*l*), was intended to clarify that the IDEA is *not* the exclusive remedy for a person who may have IDEA rights arising out of the same facts. Forcing that person to go through the IDEA process, even if he or she does not intend to assert his or her IDEA rights or seek any IDEA remedies, turns the provision's purpose on its head.

The statutory language at issue here was added in response to the Supreme Court's decision in *Smith* v. *Robinson*, 468 U.S. 992 (1984). In that case, plaintiffs prevailed under the IDEA's predecessor statute, the Education for the Handicapped Act (EHA), which did not authorize the recovery of attorney's fees. The plaintiffs sought to recover fees under 42 U.S.C. 1988 on the ground that school officials' violations of the EHA also violated students' constitutional right to an appropriate education. See *id.* at 1008-1009. The Court ruled that they could not, because Congress intended the EHA to be "the exclusive avenue through which" appropriate-education claims could be asserted. *Id.* at 1009. Allowing a plaintiff to bring a constitutional claim asserting the same rights would permit the plaintiff to "circumvent the EHA administrative remedies" and would be "inconsistent with Congress' carefully tailored scheme." *Id.* at 1012. The Court similarly held that a plaintiff suing under the EHA could not add a Rehabilitation Act claim that did not "add[] anything to [the plaintiff's] substantive right to a free appropriate public education," but rather added only the ability to avoid EHA administrative procedures and collect damages and attorney's fees not available under the EHA. *Id.* at 1019.

In response, Congress enacted the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372. The Act provided attorney's fees under the EHA. See *id.* § 2. And Congress went further, adding the language now codified at 20 U.S.C.

1415(*l*) to reject the Court's interpretation of the EHA as restricting the rights and remedies available under other federal law. *Id.* § 3. Far from shoehorning all complaints about any mistreatment of a child with a disability into the EHA process, Congress intended 20 U.S.C. 1415(*l*) to "reaffirm * * * the viability of Section 504 [of the Rehabilitation Act], 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. Rep. No. 296, 99th Cong., 1st Sess. 4 (1985) (House Report).

Congress added the exhaustion proviso at issue here for the limited purpose of avoiding blatant gamesmanship, whereby a suit that could have been brought under the IDEA instead is pleaded under a different statute solely to obtain additional relief or to avoid the IDEA administrative process. See S. Rep. No. 112, 99th Cong., 1st Sess. 12 (1985) (Senate Report) (additional views of Sens. Hatch, Weicker, Stafford, Dole, Pell, Matsunaga, Simon, Kerry, Kennedy, Metzenbaum, Dodd, and Grassley) (exhaustion of administrative procedures required only "when a parent brings suit under another law when that suit could have been brought under the EHA"); *id.* at 15 ("[I]f that suit could have been filed under the EHA, then parents are required to exhaust EHA administrative remedies to the same extent as would have been necessary if the suit had been filed under the EHA."). Congress sought to require IDEA exhaustion only "where complaints involve the identification, evaluation, education placement, or the provision of a free

appropriate public education." House Report 7. And even then, Congress intended that exhaustion not be required in certain circumstances, such as where "it would be futile to use the due process procedures" or "the hearing officer lacks the authority to grant the relief sought." *Ibid.*

3. a. The exhaustion requirement serves an important purpose in appropriate cases. For example, exhaustion is required for suits seeking prospective changes in a student's IEP – including any proposed aversive intervention plan – or otherwise challenging the adequacy of a student's ongoing education, no matter what legal theory is used. Such suits "seek[] relief that is also available under" the IDEA, 20 U.S.C. 1415(*l*), and so "could have been brought under" the IDEA itself, Senate Report 12. Nor can such a lawsuit challenge an ongoing IDEA-related practice without proper exhaustion simply by requesting only compensatory damages. Obtaining such damages requires a judicial declaration that the ongoing practice is improper. Because such a declaration is available under the IDEA, it cannot be obtained judicially without administrative exhaustion.

Requiring exhaustion for challenges to ongoing educational practices ensures that plaintiffs cannot short-circuit the IDEA process by going to court prematurely. For example, the plaintiffs here could not have filed suit to challenge Coy's ongoing practices in October 2003, when they first became aware of the manner in which Coy was using the isolation room, regardless of whether they

sought compensatory damages or an injunction.

In addition to a suit seeking prospective changes, administrative exhaustion is required for any claim alleging a failure to provide a free appropriate public education or other IDEA violation, regardless of whether the claim is pleaded under another law. See, *e.g.*, *S.E.* v. *Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 642-643 (6th Cir. 2008), cert. denied, 129 S. Ct. 2075 (2009); *Rose* v. *Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000). Congress clearly intended such a claim, which also "could have been brought under the [IDEA]," to be subject to IDEA exhaustion. See Senate Report 12, 15; accord House Report 7 (exhaustion required "where complaints involve the identification, evaluation, education placement, or the provision of a free appropriate public education"). Moreover, such claims easily can be handled by the IDEA's hearing process, which can adjudicate complaints regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6)(A). For example, a due process hearing can consider the wrongfulness of conduct that occurred in the past where a student complains of being deprived of an appropriate education and seeks "compensatory education" beyond the age of 21. See, *e.g.*, *Mrs. C.* v. *Wheaton*, 916 F.2d 69, 75 (2d Cir. 1990) (compensatory education appropriate where IDEA rights were "grossly violated"). A hearing officer explicitly is empowered to decide "whether

the child received a free appropriate public education" or suffered "a deprivation of educational benefits," 20 U.S.C. 1415(f)(3)(E), and so any attempt to have a court decide such questions seeks relief available under the IDEA. Accordingly, a student claiming to have been deprived of a free appropriate public education, and seeking compensation for that deprivation, must pursue such a claim through the IDEA hearing process before filing suit. See, *e.g.*, *Robb*, 308 F.3d at 1052-1054 & n.4.

b. Once a student's prospective IEP and educational placement no longer are at issue, on the other hand, further resort to administrative processes is not required before filing a suit, such as this one, that alleges only past unconstitutional abuse rather than a failure to educate. Any further recourse to the administrative process would have been futile, and thus was not required regardless of how expansively the exhaustion requirement of 20 U.S.C. 1415(*l*) is interpreted. See *Honig* v. *Doe*, 484 U.S. 305, 327 (1988). The plaintiffs did not "opt out of the IDEA" by bringing this lawsuit when they did, see *Robb*, 308 F.3d at 1051. The Paynes resolved all issues regarding D.P.'s educational placement for the 2004-2005 school year through IDEA mediation with Peninsula School District, agreeing to transfer D.P. to a new school and for the district to provide certain services. They had no ongoing dispute with the school or the district that required

an IDEA hearing to resolve, and thus they had no further remedies to exhaust.[3] See *Witte* v. *Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1276 (9th Cir. 1999) (no further exhaustion required where "Plaintiff in fact has used administrative procedures to secure the remedies that are available under the IDEA").

Moreover, requiring further administrative exhaustion devoted solely to whether school officials acted constitutionally in the past distorts the IDEA dispute resolution procedures, "oriented as they are to providing prospective educational benefits." *Padilla* v. *School Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000). Not only are damages unavailable through the administrative process, but nothing in the statute permits a hearing officer to decide whether the defendant's past conduct was unconstitutional. Indeed, had the Paynes requested a due process hearing, their request may very well have been deemed improper on the ground that they had no live dispute to adjudicate. See *C.N.* v. *Willmar Pub. Schs.*, 591 F.3d 624, 631 (8th Cir. 2010) (due process hearing request and subsequent IDEA claim dismissed for lack of jurisdiction, where child no longer attended school in the district that family contended acted improperly).

Several courts, including this one, have suggested that the IDEA requires a plaintiff to seek an IDEA due process hearing before filing suit even where that

[3] Should the Paynes seek further IDEA services, for example after re-enrolling D.P. in school, they must begin the IEP process anew.

hearing could not resolve the plaintiff's claim, on the ground that it is beneficial for federal courts to get "the benefit of expert fact-finding by a state agency devoted to this very purpose." *Robb*, 308 F.3d at 1051 (quoting *Hoeft* v. *Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992)). While this is a benefit of the IDEA administrative process in a proper case, the goal of that process is not merely to find facts for later judicial proceedings, but more fundamentally to resolve actual disputes about prospective educational needs, cooperatively if possible. See, *e.g.*, *Thompson by & through Buckhanon* v. *Board of the Special Sch. Dist. No. 1*, 144 F.3d 574, 579 (8th Cir. 1998) ("The purpose of requesting a due process hearing is to challenge an aspect of a child's education and to put the school district on notice of a perceived problem" so that it has "the opportunity to address the alleged problem."). Where, as here, parents and school officials have extensively discussed, mediated, and resolved all prospective IDEA issues, IDEA does not require a plaintiff to request an unnecessary due process hearing before filing a lawsuit challenging only past unconstitutional behavior.

c. While holding that the plaintiffs here were required to request a due process hearing that could not have resolved their claim, the majority acknowledged that this Court has not required *every* child with a disability who seeks damages for past unconstitutional conduct in school to do so. Because this Court has adopted an overbroad test for IDEA exhaustion, it has been forced to

create exceptions that have no foundation in the statutory language and defy evenhanded administration. At bottom, these exceptions amount to a test whereby those constitutional claims that are strongest on the merits do not require exhaustion.

For example, there is no basis for this Court's distinction, for the purpose of whether a due process hearing must be requested, between plaintiffs who claim physical injuries and those who do not. See *Robb*, 308 F.3d at 1052. Allegations of physical abuse or injury might strengthen a plaintiff's claim of unconstitutional conduct, but they have nothing to do with what administrative remedies must be exhausted.

Nor can an exhaustion line sensibly be drawn between behavior that was "an attempt at an educational program" and behavior that was not. See Slip Op. 4390. As Judge Noonan pointed out, whether the conduct here was a reasonable attempt at special education is very much in dispute. See Slip Op. 4391-4393 (Noonan, J., dissenting). And it is unsurprising that the reasonableness of the school officials' behavior is in dispute, because that also goes directly to the merits of a constitutional claim. Plaintiffs' claim ultimately will rise or fall on whether Coy's conduct was such a departure from reasonable behavior as to be unconstitutional,[4] but exhaustion requirements should not turn on a court's assessment of her

[4] We take no position on this question.

behavior. As this case illustrates, allowing a question that really goes to the merits to leak into the exhaustion inquiry only invites a court inappropriately to resolve disputed questions at the summary judgment or, worse yet, at the pleading stage.

4. This Court need not worry that permitting a student who has suffered unconstitutional abuse to sue for damages without first requesting a due process hearing will open a floodgate of unexhausted claims concerning school officials' provision of a free appropriate public education or compliance with IDEA procedural requirements. At issue here are only those claims alleging misconduct so egregious as to violate rights independent of the IDEA, such as those provided by the Fourteenth Amendment's protection of students' liberty interests. See, *e.g.*, *Witte*, 197 F.3d at 1272-1273 (severe verbal and physical abuse); see also *M.P.* v. *Independent Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (school failed to protect student from harassment); *McCormick* v. *Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 565-566 (7th Cir. 2004) (physical education teacher required student with muscle dystrophy to engage in strenuous exercise that caused physical damage); *Covington* v. *Knox Cnty. Sch. Sys.*, 205 F.3d 912, 913-914 (6th Cir. 2000) (abusive discipline); cf. *Rost* v. *Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008) (considering claim that school district was deliberately indifferent to sexual abuse against girl with mental disability, without suggestion that she needed to exhaust claim under the IDEA). While sometimes brought by

students with disabilities, such claims do not rely on any rights guaranteed by the IDEA.

In this case, the plaintiffs allege that officials at a school district that D.P. no longer attends unconstitutionally abused seclusion and restraint techniques. The harm caused by the misuse of such techniques in schools, particularly when applied to children with disabilities, has attracted growing attention.

For example, in a report to Congress, the Government Accountability Office documented extensive use of seclusion and restraint techniques in schools. See Government Accountability Office, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers* (May 19, 2009), available at http://www.gao.gov/new.items/d09719t.pdf. It observed that many of these practices are physically dangerous and can result in serious injury or death; even if they do not result in physical harm, they can leave children "severely traumatized." *Id.* at 1. In a policy letter to chief state school officers, the Secretary of Education stated that he was "deeply troubled" by this report. See *Policy Letter of July 31, 2009*, available at http://www2.ed.gov/policy/elsec/guid/secletter/090731.html. He encouraged each State to review its policies and guidelines "regarding the use of restraints and seclusion in schools to ensure that each student is safe and protected." *Ibid.*

Some States already have taken important steps to regulate such practices.

See, *e.g.*, 8 N.Y.C.R.R. 200.22 (limiting the use of "time out rooms" and requiring procedural safeguards to be followed). In particular, as Judge Noonan pointed out, state law already bans the conduct alleged in this case. Slip. Op. 4392 (citing Wash. Admin. Code 392-172A-03130(2)). However, that ban is toothless if students and their parents have no real recourse against those who violate it. Students with disabilities who have suffered from unlawful abuse should have the same access to judicial redress that is available to all other students.

The IDEA was not intended to be, and should not be construed as, a shield from liability for those school districts and their employees who unconstitutionally abuse seclusion and restraint techniques when dealing with children with disabilities. Schools certainly should provide counseling and other support through the IDEA process for those children with disabilities who would benefit from it, including those who have been the victims of inappropriate seclusion and restraint. The availability of such services, however, is no substitute for the right to sue those who have engaged in such conduct.

CONCLUSION

This court should reverse the district court's order granting summary judgment.

Respectfully submitted,

THOMAS E. PEREZ
Assistant Attorney General

SAMUEL R. BAGENSTOS
Principal Deputy Assistant
Attorney General

s/ Sasha Samberg-Champion
MARK L. GROSS
SASHA SAMBERG-CHAMPION
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 307-0714

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief does not exceed the type-volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d) and Ninth Circuit Rule 29-2(c)(3). The brief was prepared using Microsoft Word 2007 and contains 6,962 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

s/ Sasha Samberg-Champion
Sasha Samberg-Champion
Attorney

Dated: November 4, 2010

CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2010, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

Francisco Maria Negron Jr.
National School Board Association
Room 523
1680 Duke Street
Alexandria, VA 22314

Lenore A. Silverman
Fagen Friedman & Fulfrost, LLP
Suite 205
70 Washington St.
Oakland, CA 94607

Michael A. Patterson
Patterson Law
Suite 500
2112 Third Avenue
Seattle, WA 98121

I further certify that on November 9, 2010, I served a copy of the foregoing document on the following parties or their counsel of record by First Class Mail:

Thomas Brian Vertetis
Pfau Cochran Vertetis Kosnoff, PLLC
Suite 200
911 Pacific Avenue
Tacoma, WA 98402

Dated: November 9, 2010

s/Sasha Samberg-Champion
SASHA SAMBERG-CHAMPION
Attorney