No. 11-539

IN THE
Supreme Court of the United States

PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; JANE DOES 1-10; and JOHN DOES 1-10,

Petitioners,

v.

D.P., by and through his parent and natural guardian, W.P., and W.P. as an individual,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The National School Boards Association ("NSBA"), founded in 1940, is a not-for-profit organization representing state associations of school boards from across the United States. Through its state associations, NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 14,000 school districts. These local public school districts serve the nearly 50 million public school students in elementary and secondary schools.

NSBA is committed to supporting and advocating on behalf of school boards and local administrators to promote safe learning environments, maintain local control by schools and parents over the educational programs of students, and ensure the efficient and effective operation of school districts. NSBA strongly believes that schools must be afforded the opportunity to resolve disputes over a student's educational program informally and through administrative mechanisms to ensure speedy and efficient outcomes for students and maintain the collaborative relationships between schools and the families of students they educate. School boards have a crucial interest in maintaining

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[1]Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief and have consented. Letters of consent are on file with this Court. No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amicus curiae* and its members and counsel made any monetary contribution to this brief's preparation or submission.

the ability to formulate and implement a student's educational program without the specter of costly litigation, knowing instead that the parties will take part in a more predictable and expedient administrative dispute resolution process should disagreements arise.

SUMMARY OF ARGUMENT

In *Payne v. Peninsula Sch. Dist.*, 653 F.3d 868 (9th Cir. 2011), the majority, sitting *en banc*, broke with its sister circuits and announced a new test for determining when exhaustion of administrative remedies is required under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (2005) ("IDEA"). The majority's action is of significant concern to the *amicus curiae*, its members and the school districts they represent. If left undisturbed, the majority's ruling will harm disabled students, school districts, and the courts.

Prior to the majority's decision in *Payne*, all of the circuit courts approached the issue of exhaustion by looking at the facts giving rise to the complaint, and the nature of the injury suffered. If the injury and its cause were educational, and the plaintiff could have sought relief available under the IDEA, exhaustion was required. The majority eschewed this "injury-centered approach" and in its place adopted a "relief-centered approach" that looks exclusively at the relief actually requested by the plaintiff. The majority's approach so narrows the application of the exhaustion requirement as to render it nearly moot. Judge Bea, writing in dissent, noted correctly that the relief-centered test places form over substance. When a court can look only at

the prayer for relief, plaintiffs can escape the exhaustion requirement simply by omitting reference to the IDEA or the denial of a free appropriate public education ("FAPE"). Dissent at 9777-78. The relief-centered test will allow more complaints into court, to the detriment of all involved.

The IDEA dispute resolution procedures can provide a student with services to address educational injuries within weeks, ameliorating harms almost as they arise. In contrast, disabled students who skip the administrative process in favor of civil litigation will be denied any relief until their case is resolved, a wait that could last years. School districts, denied the opportunity for expedited resolution, will face a manifold increase in costs. In place of the relatively lower cost of due process hearings, school districts will be required to pay for expensive and protracted litigation. Finally, the court system will be taxed by the curtailed exhaustion requirement. Courts will see an increase not only in their caseloads, but also in the length and complexity of each case, as they are forced to take on the role of fact-finder, previously held by state level hearing officers with educational expertise. Each of these ends is contrary to what Congress intended in enacting the elaborate procedural framework of the IDEA.

The validity of the relief-centered approach is a question of vital importance to disabled students, school districts, and the courts. Only this Court can address the majority's departure from the established approach of the other circuits and ensure that Congressional intent in enacting the IDEA is effected.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION ESSENTIALLY NULLIFIES THE EXHAUSTION REQUIREMENT AND IS CONTRARY TO CONGRESSIONAL INTENT.

The cornerstone of the IDEA is collaboration between school districts and parents. School districts furnish their educational expertise, through staff members knowledgeable in the education of children with disabilities. Parents, in turn, contribute their unique knowledge of their child's strengths and needs. The procedural framework set forth in the IDEA is designed to ensure that parents and school districts cooperate in the identification, evaluation, and placement of children with exceptional needs. This cooperative approach extends even into the IDEA's dispute resolution procedures.

The exhaustion requirement, 20 U.S.C. § 1415(*l*), is essential to maintaining the collaborative process envisioned under the IDEA. It ensures not only that the needs of the child are addressed in an expedited manner, but also that the partnership between parents and school districts is preserved to the extent possible by affording opportunities to resolve the conflict through early resolution and mediation procedures. 20 U.S.C. § 1415(f); *Thompson by & through Buckhanon v. Board of the Special Sch. Dist. No. 1*, 144 F.3d 574, 579 (8th Cir. 1998); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1308 (9th Cir. 1992).

A. Congress included the exhaustion requirement to encourage parents and schools to work together to resolve educational issues concerning children with disabilities.

Congress enacted what is now 20 U.S.C. § 1415(*l*) in response to the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which found that the IDEA was "the exclusive avenue through which" claims related to special education could be asserted. The *Smith* Court foreclosed the right to seek damages and other remedies, which are available under 42 U.S.C. § 1983, but not under the IDEA. The Court reasoned that litigation to obtain § 1983 damages would disturb the "elaborate procedural mechanism" created by the IDEA:

> These procedures . . . effect Congress' intent that each child's individual educational needs be worked out through a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review.

468 U.S. at 1011. Put another way, *Smith* recognized that the elaborate IDEA procedural framework would have little meaning if plaintiffs could circumvent it simply by seeking damages available under another statute. *Smith's* response was to close permanently the door on all claims that could have been raised as IDEA claims. *Id.* at 1011-12.

When Congress enacted § 1415(*l*), its intent was to open the door that *Smith* closed, specifically allowing claims under "other Federal laws protecting the rights of children with disabilities." However, while § 1415(*l*) permits other federal claims, it limits those claims as follows:

> before the filing of a civil action under such laws seeking relief that is also available under this subchapter, *the procedures under sections (f) and (g) [administrative dispute resolution procedures] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

By requiring the exhaustion of administrative remedies prior to seeking relief under other federal laws, Congress preserved "the rationale of *Smith* which had used the primacy of the IDEA process as a reason for precluding plaintiffs from resorting to other theories to get into court." Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 492-93 (2002). *See also* S. Rep. No. 99-112 at 6 ("nothing in S. 415 should be interpreted to allow parents to circumvent the due process procedures and protections created under [IDEA].") Thus, Congress continues to recognize that "the needs of handicapped children are best accommodated by having the parents and the local education agency work together," and that "[n]o federal district court presented with a constitutional

claim to a public education can duplicate this process." *Smith*, 468 U.S. 992, 1012.

B. Interpreting "seeking relief" to depend exclusively on the relief specified in the plaintiff's pleading subverts the exhaustion requirement's plain language and intended purpose.

The Ninth Circuit majority concluded that, because § 1415(*l*) requires exhaustion when plaintiffs are "seeking relief" available under the IDEA, courts must look exclusively at the relief actually sought in the complaint. (Majority at 9751.) This conclusion is untenable because in order to enforce IDEA's exhaustion requirement, courts must necessarily look to the relief the plaintiff *could have* sought.

The majority suggests that no further inquiry is required "to the extent that a plaintiff has laid out a plausible claim for damages unrelated to the deprivation of a FAPE." *Id.* at 9755. However, the only way to determine whether a plaintiff's claim meets this test in each case is to look to the harm alleged and then determine whether the plaintiff *could have* sought relief under the IDEA. This latter approach is consistent with the language and intent of the IDEA, and is the approach adopted by the First, Second, Seventh, and Tenth Circuits.

The plain language of § 1415(*l*) requires exhaustion when relief "is also available" under IDEA. The statutory scheme, not the individual plaintiff through his pleadings, determines what relief "is also available." In *Charlie F. v. Board of*

Educ. of Skokie Sch. Dist., 98 F.3d 989, 991-92 (7th Cir. 1996), the Seventh Circuit looked to the requirements of federal civil procedure, which provide that courts must "grant the relief to which the party in whose favor [judgment] is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." *Id.* (*citing* Fed. R. Civ. P. 54(c).) The court concluded that the exhaustion analysis is complete only after the court examines the plaintiff's underlying claims; "[t]he nature of the claim and the governing law determine the relief no matter what the plaintiff demands." *Id.* at 991-92. The First, Second, Tenth, and—until recently—Ninth Circuits have all joined with the Seventh Circuit's determination that "relief available" means "relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Charlie F.*, 98 F.3d at 991-92; *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002); *Polera v. Board of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 488 (2nd Cir. 2002); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1168 (9th Cir. 2007); *Cudjoe v. Independent Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002).

II. THE NINTH CIRCUIT'S RULING REWARDS ARTFUL PLEADING TO ESCAPE EXHAUSTION AND CREATES AN APPROACH TO EXHAUSTION THAT WILL PROLONG SPECIAL EDUCATION LITIGATION.

The purposes of the IDEA's exhaustion requirement are many: it "enables the [educational]

agency to develop a factual record, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency . . . and judicial economy." *Frazier*, 276 F.3d at 60 (*quoting Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989)). When plaintiffs are given a "back door," allowing them to circumvent the exhaustion requirement, the underlying purposes of the IDEA are spurned.[2] *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996).

There is ample support for the idea that courts should reject attempts by plaintiffs to engage in artful pleading to evade the exhaustion requirement. In *Charlie F.*, 98 F.3d at 993, the Seventh Circuit discounted the plaintiff's assertion that he was not interested in services *in kind* to address his educational injuries, holding "[w]e are unwilling to allow parents to opt out of the IDEA by proclaiming that it does not offer them anything they value." Even the majority recognized that artful pleading should not be rewarded, noting that many circuits have foreclosed the possibility of artful pleading by finding that plaintiffs may not escape

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[2] Gamesmanship in an effort to avoid the exhaustion requirement is disfavored. For example, several circuits have refused to excuse plaintiffs from exhaustion when the plaintiffs wait to bring suit for damages until administrative relief is no longer available. *See Frazier*, 276 F.3d at 63 ("It would be a hollow gesture to say that exhaustion is required—and then to say that plaintiffs, by holding back until the affected child graduates, can evade the requirement."); *accord Cudjoe*, 297 F.3d at 1067; *Polera*, 288 F.3d at 490 ("Were we to condone such conduct, we would frustrate the IDEA's carefully crafted process for the prompt resolution of grievances through interaction between parents of disabled children and the agencies responsible for educating these children".)

exhaustion merely by requesting money damages. Maj. at 9749-50 (*citing Frazier*, 276 F.3d at 64; *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 916 (6th Cir. 2000); *Padilla v. School Dist. No. 1 in City and County of Denver*, 233 F.3d 1268, 1274 (10th Cir. 2000); *N.B.*, 84 F.3d at 1379). Refusing to reward plaintiffs for the gamesmanship inherent in artful pleading makes sound judicial policy: "such a measured approach to exhaustion appears appropriate to ensure that the IDEA process is not . . . short-circuited by a rush to court seeking damages." Seligmann, 36 GA. L. REV. at 525-26.

Despite its own recognition that artful pleading should not be rewarded, the majority's relief-centered approach, as Judge Bea said, "elevates the forms of plaintiffs' pleadings over their substance." Dissent at 9777. First, the majority directs courts to look first and primarily at the prayer for relief in determining whether exhaustion of IDEA claims is required. Maj. at 9751. If the relief requested is not available under the IDEA, the majority holds, "then it is likely that § 1415(*l*) does not require exhaustion in that case." *Id.* Second, the majority directs courts not to speculate about the purposes of money damages sought by plaintiffs or whether those damages will be used to provide the type of relief that is available under the IDEA. *Id.* at 9754. Courts following this analysis are given no opportunity to discern whether a plaintiff is attempting an end-run around exhaustion. Courts cannot evaluate the facts which gave rise to the injury, or the harms suffered, nor can they examine whether the IDEA offers even partial relief. Instead, courts must focus narrowly on the prayer for relief in

a manner that creates no barrier at all to artful pleading.

The Ninth Circuit's exhaustion test exposes a conflict within the majority's own reasoning. On one hand, the test gives no means to prohibit artful pleading. On the other hand, it asserts that plaintiffs should not be allowed to escape exhaustion merely by limiting their claims to a request for money damages. To resolve this conflict, the majority was forced to adopt a multi-step approach to exhaustion that is far removed from the expedited and collaborative process intended by the IDEA. In this framework, the need for exhaustion may be raised at least three times: (1) as an affirmative defense; (2) as part of a motion for summary judgment; and (3) during the course of proceedings. Maj. at 9762-64.

The majority reasoned that the additional third step may be required because "a district court, in entertaining a motion to dismiss, might not *initially* conclude that exhaustion is required for certain claims, but might recognize subsequently that, in fact, the remedies being sought by a plaintiff could have been provided by the IDEA." *Id.* at 9763. A failure to recognize the need for exhaustion prior to fact-finding, however, could result only from the majority's limited exhaustion test, which looks no further than the prayer for relief. The *Payne* dissent correctly noted that, when the IDEA's exhaustion requirement is applied properly—by examining whether the plaintiff could have sought relief under the IDEA—there is no need for the additional step: "[i]f the defendant is permitted *at trial* to 'provide evidence showing that the relief being sought by that plaintiff was, in fact, available under the IDEA,'

then such evidence was 'also available' before the action was filed." Dissent at 9783.

In addition to being unnecessary, the majority's multi-step approach to exhaustion is contrary to the language and purpose of the IDEA. The plain language of § 1415(*l*) requires plaintiffs to exhaust administrative remedies "before the filing of a civil action." Rather than adhering to this requirement, the majority would allow plaintiffs into court without exhausting administrative remedies. School districts would then be given the opportunity during fact-finding to show that the relief being sought was available under the IDEA, in order to reduce any final judgment in favor of the plaintiff. Maj. at 9764. This backward approach nullifies the exhaustion requirement by removing the statutory burden on plaintiffs to seek administrative remedies prior to going into court. Further, it subverts "the overall scheme that Congress intended for dealing with educational disabilities." *Frazier*, 276 F.3d at 63.

III. THE NINTH CIRCUIT'S RULING IGNORES THE PRACTICAL REALITY THAT IDEA DUE PROCESS HEARING PROCEDURES ENHANCE THE RIGHTS OF DISABLED STUDENTS AND PROMOTE JUDICIAL EFFICIENCY.

The majority's view of exhaustion is premised, in part, on its determination that the exhaustion requirement effectively "penalize[s] disabled students" by preempting claims that they could otherwise assert were they not disabled. In fact, the opposite is true. The rights of disabled students are

enhanced in the process of exhausting administrative remedies. Expedited timeframes provide relief for injuries as they occur, and do not prohibit students from later seeking relief in court. Further, any later civil litigation is both informed and streamlined by the fact-finding that takes place at the administrative level.

A. IDEA's administrative procedures expedite resolution of special education grievances.

Through the IDEA, Congress established a system designed to ensure that the needs of disabled children are addressed in the most expedited fashion possible. *See Polera*, 288 F.3d at 490 (recognizing "the IDEA's carefully crafted process for the prompt resolution of grievances through interaction between parents of disabled children and the agencies responsible for educating those children"). Pursuant to this administrative framework, due process complaints must be resolved within 45 days of submission. 34 C.F.R. § 300.515(a). In practical application, the vast majority of due process proceedings—98% by one measure—are resolved in less than 12 months. Jay G. Chambers *et al.*, Special Educ. Expenditure Project, Report 04, *What are We Spending on Procedural Safeguards in Special Education, 1999-2000?* 1, 20 (May 20, 2003). Further, as administrative hearing bodies gain experience, the timeline for resolution improves even further. Commentators have noted that despite some indicia that due process hearings are becoming more adversarial and legally complex, the actual time to resolve disputes has decreased. For example,

in one study, investigators found that from 1978 to 1983, the first six years after Congress enacted what has become the IDEA, the average duration of proceedings, was 169 days. Perry Zirkel et al., *Creeping Judicialization in Special Education Hearings? An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 39 (Spring 2007). In contrast, when the same study looked at hearing requests filed between 2000 and 2006, the average duration was reduced by more than two-thirds, to 52 days—a time frame that is approaching the 45 days prescribed by 34 C.F.R. § 300.515(a). *Id.*

B. Claims are not preempted.

Contrary to what the Ninth Circuit majority suggests, the IDEA's exhaustion requirement neither preempts the claims of disabled students nor "shield[s] school officials from all liability for conduct that violates constitutional and statutory rights that exist *independent* of the IDEA." Maj. at 9753. In reality, there is nothing to prohibit disabled students from asserting constitutional and statutory rights independent from the IDEA in court, provided that they first exhaust administrative remedies.

> [Section] 1415(*l*) does not absolve school districts of civil liability for injuries which could not be remedied or palliated by IDEA's "related services." Instead, it codifies a recognition that the education of disabled children is a complex endeavor, calling for much individual attention, and that a misjudgment in a child's IEP—or a

> mistake in execution of that plan—can result in unexpected academic and psychological injuries.

Dissent at 9777.

Just as the exhaustion requirement does not prevent disabled children from instituting a civil action to protect their constitutional rights, it does not create a substantial delay in their ability to initiate such an action. As described above, the prescribed timeline for resolving due process proceedings is 45 days. In practice, while this timeline may be extended, it will rarely exceed a year, and will likely be far shorter. Such a brief delay is relatively minor, when viewed in the context of federal litigation, which may continue for years before a final resolution is reached. In addition, the administrative proceedings may afford the student relief to address, in whole or in part, the root cause of the injury suffered by the student. *Kutasi*, 494 F.3d at 1169.

C. Administrative findings streamline later proceedings.

A central benefit of exhaustion is that it promotes judicial economy. *See Christopher W.*, 877 F.2d at 1094; *Crocker v. Tennessee Secondary Sch. Athletic Ass'n*, 873 F.2d 933 (6th Cir. 1989). Rather than burdening the federal courts with the task of fact-finding in an area of law that demands a particular and unique expertise, beyond that of most federal courts, exhaustion places that task in the hands of administrative decision makers on whose findings the courts can later rely.

The IDEA recognizes that the courts are ill-equipped to act as fact-finders in matters relating to special education. *See Doe v. Alfred*, 906 F.Supp. 1092, 1100 (S.D. W.Va. 1995); *Zasslow v. Menlow Park City Sch. Dist.*, 2001 WL 1488617 at 7 (N.D. Cal. Nov. 19, 2001). *See also Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1305 (9th Cir. 1992) (recognizing that "[e]ligibility criteria and methodology are classic examples of the kind of technical questions of educational policy best resolved with the benefit of agency expertise and a fully developed administrative record"). Rather than burden the courts with the task of determining how to remedy missteps in the education of disabled children, the IDEA gives state and local educational agencies the first opportunity to remedy any injuries. *Charlie F.*, 98 F.3d at 992. As the First Circuit recognized in *Frazier*, 276 F.3d at 61, "[t]his [approach] makes sense because the problems attendant to the evaluation and education of those with special needs are highly ramified and demand the best available expertise." Further, those with the greatest expertise are also in the best position to ensure that any necessary relief is crafted and implemented quickly. Seligmann, 36 GA. L. REV. at 521 & n. 282.

Even when disputes move beyond the local agency and into due process proceedings, the IDEA requires that the administrative fact-finder be knowledgeable about special education law. 20 U.S.C. § 1415(f)(3)(A). The knowledge and expertise of an administrative hearing officer allows him or her to develop a careful factual record, which will, in turn, inform his or her final administrative decision. Any subsequent review of the administrative

decision by the courts is intended to build upon this hearing officer's expertise and conclusions, not to re-create the fact-finding process a second time. The IDEA ensures that the courts do not attempt to "substitute their own notions of sound educational policy for those of the [administrative] authorities which they review" by requiring a reviewing court to "receive the records of the administrative proceedings" and accord them due weight. 20 U.S.C. § 1415(i)(2)(B)(i); *see Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). The expertise that an administrative hearing officer brings to bear on due process proceedings is therefore beneficial to both the parties and the courts, even if administrative proceedings cannot address all of the harms suffered by the plaintiff:

> [T]he administrative process facilitates the compilation of a fully developed record by a factfinder versed in the educational needs of disabled children—and that record is an invaluable resource for a state or federal court required to adjudicate a subsequent civil action covering the same terrain. Fidelity to the IDEA's exhaustion requirement ensures such an outcome.

Frazier, 276 F.3d at 61.

D. Relaxing the exhaustion requirement will drive up costs for both districts and the judicial system.

By placing the onus of fact-finding on the administrative hearing officer, the IDEA eliminates the need for the courts to engage in extensive fact-finding procedures in many cases. Relieved of this burden, it is possible for the courts to reach a resolution in a much shorter time-frame than would be possible in civil actions generally. Exhaustion is thus beneficial not only to the parties, but to the courts as well. In contrast, "[a]llowing plaintiffs to bypass the administrative process en route to state or federal court shifts the burden of factfinding from the educational specialists to the judiciary, thereby disrupting the IDEA's carefully calibrated balance of providing judicial review only after administrative remedies have been exhausted." *Cudjoe*, 297 F.3d at 1065 (internal quotations omitted).

The majority's ruling in *Payne*, by taking the teeth out of § 1415(*l*), will allow far more plaintiffs into court and render the exhaustion requirement nugatory. Not only will the courts see an increased caseload, the duration of those cases and the cost to the judicial system will increase significantly as the courts will be required to take over the task of fact-finding.

The federal courts are unlikely to be prepared for a substantial increase in the number of cases filed relating to the education of children with disabilities. If the Ninth Circuit's decision remains the law in that jurisdiction and is subsequently followed by other circuits, the effect of the increased

caseload will be especially dramatic in California, Maryland, New Jersey, New York, Pennsylvania, and the District of Columbia. The due process hearings held in these states account for approximately 80% of all hearings nationwide. Perry Zirkel, et al. *Due Process Hearings Under the IDEA, A Longitudinal Frequency Analysis*, J. OF SPECIAL EDUC. LEADERSHIP 21(1) (March 2008). In California, for example, the number of due process filings received each year routinely approaches 3000, with 2693 filings in 2009-2010 and 2945 filings in 2010-2011. Cal. Office of Admin. Hearings, Special Education Division Quarterly Data Report 2 (July 27, 2011). In just the first quarter of the 2011-2012 school year, the Office of Administrative Hearings, the state agency responsible for conducting due process hearings, reported 907 due process filings. *Id.* at 3. Pennsylvania, although less active than California, has received between 750 and 1036 due process requests each year between 2003-2004 and 2010-2011. Pennsylvania Office of Dispute Resolution, Annual Report 2010-2011. As a result, even if only a small percentage of due process filings are brought instead as civil actions, some courts will see a substantial increase in their caseload.

Costs to school districts will also increase dramatically if plaintiffs are allowed to go into court without first exhausting administrative remedies. During the 1999-2000 school year, the Special Education Expenditure Project, a national study conducted by the American Institutes for Research for the U.S. Department of Education, Office of Special Education, estimated that the cost per mediation or due process hearing ranged from $8,160 to $12,200. By comparison, the yearly cost of

an ongoing litigation case was $94,600, nearly seven times as much. Moreover, this cost, which already reflects a high price for a public agency, accounts only for what was spent during a single year. It does not account for the total cost of the case from filing to resolution, a period which could stretch over multiple years. Chambers, *supra,* at 15. In today's dollars, the average due process hearing now costs a school district between $20,000 and $40,000. Mitchell Yell et al., *The Costs of Due Process Hearings*, Leadership Insider (November 2011). Extrapolating those costs to litigation matters, school districts could face a cost of a quarter of a million dollars each year, for each case that is in litigation.[3] With cases that stretch over multiple years, that cost could easily reach or exceed the million-dollar mark, an extortionate amount for a local public school district.

IV. THE NINTH CIRCUIT'S DECISION IGNORES THE AVAILABILITY OF COMPENSATORY SERVICES, AND MINIMIZES THE POTENTIAL FOR RELATED SERVICES TO OFFER IMMEDIATE RELIEF.

To effect Congress' intent to ensure that disabled children are provided with the necessary

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[3] Costs to school districts could quickly become excessive, even if only a small percentage—say 10%—of cases are filed not as due process hearing requests, but as civil complaints. In California, for example, an additional 300 new cases each year could mean statewide costs to school districts of $84 million dollars. These costs would only continue to grow as new cases are filed and old cases continue in litigation.

services to address their educational needs as they arise, the IDEA authorizes a wide array of educational remedies. In the three and half decades of litigation under the IDEA and its predecessors, courts have recognized these remedies to include both injunctive and compensatory relief. Perry A. Zirkel, *Compensatory Education Under the Individuals with Disabilities Education Act: The Third Circuit's Partially Misleading Position*, 110 PENN. ST. L. REV. 879, 880 (Spring 2006). In justifying its decision to weaken the IDEA's exhaustion mandate, the Ninth Circuit majority appears to discount or ignore the availability of these remedies to cure the effects of misconduct by a school district. Maj. at 9760-61.

Compensatory education as a remedy was born out of the Supreme Court's decision in *School Comm. of Town of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985), finding that the IDEA "confers broad [judicial] discretion" to fashion appropriate relief. The majority of the circuit courts of appeal—including the Ninth Circuit—have since expanded on the Supreme Court's ruling in *Burlington* to find that the IDEA authorizes an award of compensatory services, defined as "educational services ordered by the court [or administrative hearing officer] to be provided prospectively to compensate for a past deficient program." *G. ex rel. R.G. v. Fort Bragg Dependent Schs.*, 343 F.3d 295, 308 (4th Cir. 2003). *See also, e.g., P. ex rel. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 123 (2nd Cir. 2008); *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005); *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 249 (3d Cir. 1999); *Board of Educ. of Oak Park*

& River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ., 79 F.3d 654, 656 (7th Cir. 1996); *Parents of Student W. v Puyallup Sch. Dist., No. 3,* 31 F.3d 1489, 1496 (9th Cir. 1994); *Pihl v. Massachusetts Dep't of Educ.,* 9 F.3d 184, 188-89 (1st Cir. 1993); *Miener v. Missouri,* 800 F.2d 749, 753 (8th Cir. 1986).

Although *Burlington* specifically authorized an award of reimbursement to parents who paid for services and placement that the school district denied, in the view of many courts, compensatory education is not so limited:

> In our view, [courts may extend] *Burlington* to cover services as well as payments . . . Given the availability of reimbursement for compensatory instruction, were it impossible to obtain an award of the instruction itself, children's access to appropriate education could depend on their parents' capacity to front its costs—a result manifestly incompatible with IDEA's purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education."

Reid, 401 F.3d at 523 (*citing* 20 U.S.C. § 1400(d)(1)(A)). Using this rationale, courts have awarded programs of specialized services to compensate students for a failure to provide a free appropriate public education and to ameliorate the injuries that resulted from that failure. *See Diatta v. District of Columbia*, 319 F.Supp.2d 57, 65 (D.D.C.

2004). Courts have also awarded students aggrieved by the denial of FAPE with compensatory services after the age of twenty-one, when the IDEA would generally no longer require services as part of an on-going educational program. *See Pihl*, 9 F.3d at 188-89.

Recognizing the broad discretion to formulate appropriate relief, the courts have established the availability of compensatory education as a robust remedy capable of addressing past harms resulting from misconduct by the school district or its staff. Even though compensatory services are commonly requested by parents, and their appropriateness in individual cases is frequently evaluated by the courts, the Ninth Circuit's opinion makes no mention of compensatory education. Instead, the majority focuses on its perception that related services, as required by the IDEA, are not available to remedy past harms. The court, however, miscalculates the ability of ongoing services to remedy past harms.

The IDEA requires school districts to provide "related services" to disabled children who qualify for special education programs. These services, which are required in addition to the child's special education placement, are defined as services which "may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). As the dissent correctly noted, there is nothing to prohibit related services from being used to repair an injury caused by a school district:

> [The majority's] reading of the IDEA makes little sense. The statute plainly holds that if a child requires "related services" to benefit from special

> education, those services must be provided. Nothing in the statute requires any inquiry as to *why* those services are required. Thus, if a child suffers from crippling anxiety at school, and that anxiety must be alleviated before he can learn (or, in the words of the statute, "benefit from special education"), the IDEA plainly requires psychological services to be provided. It makes no difference whether that anxiety was caused by the school or whether it was caused by some external factor.

Dissent at 9774-75. This was essentially the holding in *Charlie F.*, 98 F.3d at 993, in which the Seventh Circuit found that related services, specifically psychological counseling, may be available under the IDEA to cure, in whole or in part, injury caused by a teacher's conduct. *Id.* As alleged by the parents, the injury was educational in origin and resulted in educational harm. The Seventh Circuit required the parents to first exhaust their administrative remedies prior to seeking monetary damages in court for educational injuries. The court reasoned that students should not be entitled to pursue monetary relief, when a school district stands ready to provide "comprehensive educational solutions" promptly and without the need for costly litigation.

Although compensatory education and related services differ slightly in their scope and purpose, both remedies constitute "relief available" under the IDEA, which may be used to cure or ameliorate the injuries caused by a school district in the education

of children with disabilities. Further, when injured students and their parents avail themselves of the administrative process, these remedies can be fashioned and delivered in a prompt and efficient manner, addressing harms as they arise and limiting or eliminating the need for litigation.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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