

# A NEW HOPE: *PEREZ V. STURGIS PUBLIC SCHOOLS* OPENS THE COURTHOUSE DOORS TO CHILDREN WITH DISABILITIES

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## INTRODUCTION

In *Perez v. Sturgis Public Schools*,<sup>1</sup> the United States Supreme Court ruled that parents of children with disabilities who allege that their child’s school discriminated against them because of their disabilities can seek compensatory monetary damages pursuant to federal laws that prohibit such discrimination without exhausting the administrative process of the Individuals with Disabilities Education Act (“IDEA”).<sup>2</sup> This seemingly innocuous decision, based on two obscure procedural provisions of the IDEA, overturned decades of circuit court decisions that ruled otherwise<sup>3</sup> and has already had a positive impact on efforts to bring justice to children with disabilities and their families.

The IDEA’s exhaustion requirement applies in two circumstances. The first, referred to here as “the exhaustion requirement for IDEA claims,” involves claims that a school district violated the IDEA and is based on four interconnected rules: 1) states that receive federal IDEA funds must, through their local school districts, provide a free appropriate public education (“FAPE”) to children with disabilities;<sup>4</sup> 2) parents may file a complaint with their local school district alleging that it denied their child a FAPE;<sup>5</sup> 3) the school district must arrange for an impartial hearing to resolve the complaint;<sup>6</sup> and 4) parents may file a claim in federal court alleging that their school district denied their child a FAPE, but only after they exhaust this process.<sup>7</sup>

The second circumstance, referred to here as the “exhaustion requirement for related federal laws,” applies to lawsuits pursuant to federal laws other than the IDEA that protect the rights of children with disabilities.<sup>8</sup> These include the Americans with Disabilities Act of 1990

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1. *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859 (2023).

2. *Id.* at 863.

3. *See, e.g.*, *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647 (5th Cir. 2019).

4. 20 U.S.C. § 1412(a)(1) (2024).

5. *Id.* § 1415(b)(6).

6. *Id.* § 1415(f). The IDEA’s provisions for filing and resolving complaints is referred to in this article as the “IDEA administrative process.”

7. *Id.* § 1415(i)(2)(a).

8. *Id.* § 1415(l). As the Fifth Circuit has recognized, “[A]s these . . . statutes deal with the substantive rights of individuals with disabilities, there is a natural overlap in coverage.” *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 692 (5th Cir. 2023). The court continued, “[t]his statutory overlap has led to some confusion in the courts—namely, when is a claim more properly brought under the IDEA versus another anti-discrimination statute, like the ADA?” *Id.*

(“ADA”),<sup>9</sup> Section 504 of the Rehabilitation Act (“Section 504”),<sup>10</sup> Title VI of the Civil Rights Act of 1964 (“Title VI”),<sup>11</sup> and the Civil Right Act of 1871 (“Section 1983”)<sup>12</sup> which provides a cause of action for plaintiffs alleging violations of federal law, including the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution (hereinafter referred to collectively as the “related federal laws”).<sup>13</sup> Plaintiffs seeking relief under these laws that is also available under the IDEA must exhaust the IDEA’s administrative process before they may proceed in court.<sup>14</sup>

This article addresses what happens when the exhaustion requirement for IDEA claims intersects with the exhaustion requirement for related federal laws.<sup>15</sup> Specifically, compensatory monetary damages are not available for IDEA violations<sup>16</sup> but are available for violations of related federal laws.<sup>17</sup> This raises a question: if a plaintiff wants to file a complaint pursuant only to the related federal laws alleging disability discrimination and seeking monetary damages for actions that also arguably violate the IDEA, must the plaintiff exhaust the IDEA administrative process first?

The Supreme Court first attempted to answer this question in *Fry v. Napoleon Public Schools*.<sup>18</sup> There, the Court ruled that plaintiffs seeking monetary damages under related federal laws must exhaust the IDEA’s administrative process if the “gravamen” of their case is a FAPE denial.<sup>19</sup> The Court reserved decision on whether plaintiffs bringing claims under related federal laws must exhaust the IDEA’s administrative process if the relief they seek is not available under the IDEA and the gravamen of their case is a FAPE denial.<sup>20</sup>

The Court granted certiorari in *Perez* in light of concerns it had with how the circuits were applying *Fry*.<sup>21</sup> In *Perez*, the Court ruled that

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9. 42 U.S.C. § 12132.

10. 29 U.S.C. § 794(a) (2024).

11. 42 U.S.C. § 2000(d).

12. *Id.* § 1983.

13. U.S. CONST. amend. XIV.

14. 20 U.S.C. § 1415(f).

15. In statutory terms, the question is: what happens when 20 U.S.C. § 1415(i)(2)(A) intersects with 20 U.S.C. § 1415(l)?

16. *See, e.g.,* *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 528 (4th Cir. 1998); DEBORAH N. ARCHER & RICHARD D. MARSICO, *SPECIAL EDUCATION LAW AND PRACTICE: CASES AND MATERIALS* 647–49 (2017).

17. Tracing the remedies provisions of the ADA, Section 504, and Title VI is like following the map for a treasure hunt. The process begins with the ADA, moves to Section 504, Title VI, and eventually to another federal anti-discrimination law, 42 U.S.C. § 1981. *See* 42 U.S.C. § 12133 (ADA); 29 U.S.C. § 794a(a)(2) (Section 504); 42 U.S.C. § 2000e–5(e)(3)(B) (Title VI); 42 U.S.C. § 1981a(a)(1)–(2) (Section 1981). Section 1983 itself allows for suits in law and equity, thus allowing compensatory and equitable relief.

18. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017).

19. *Id.* at 168–69.

20. *Id.* at 165 n.4, 168 n.8.

21. *See Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 862 (2023).

plaintiffs filing complaints under related federal laws are not required to exhaust the IDEA's administrative process if they seek relief that is not available under the IDEA even if the gravamen of their complaint is an IDEA violation.<sup>22</sup> Although the Court did not acknowledge it, *Perez* essentially overrules *Fry*, because it no longer matters whether the gravamen of a claim under a related federal law is an IDEA violation in determining whether the plaintiff must exhaust; all that matters now is whether the plaintiff is seeking relief not available under the IDEA.

*Perez* has already had a profound effect, opening the courthouse doors for children with disabilities. In all twenty-five post-*Perez* decisions in which courts have considered motions to dismiss ADA or Section 504 (hereinafter referred to as "ADA/504") complaints for failing to exhaust the IDEA's administrative process, courts have, with one exception, ruled in favor of the plaintiffs.<sup>23</sup> In doing so, they vacated pre-*Perez* decisions that dismissed ADA/504 claims for failure to exhaust, changed how they would have ruled because *Perez* was issued while motions to dismiss were pending, and recognized that *Perez* changed the law in their jurisdictions.<sup>24</sup>

Ripples from *Perez* are likely to open more doors. The exhaustion requirement for related federal laws is frequently an obstacle to plaintiffs who bring claims alleging race discrimination against children with disabilities under Title VI or the Equal Protection Clause (hereinafter referred to as "Title VI/EP").<sup>25</sup> The logic of *Perez* should eliminate this obstacle. Courts also frequently dismiss for failure to exhaust class action lawsuits seeking to address systemic IDEA violations.<sup>26</sup> *Perez* might have already changed this trend; citing *Perez*, one court allowed a class action alleging disability discrimination to proceed, denying a motion to dismiss for failure to exhaust.<sup>27</sup>

Part I of this Article describes the IDEA and the exhaustion requirement for IDEA claims. Part II describes the related federal laws that protect children with disabilities and the exhaustion requirement that applies to them. Part III describes and analyzes *Fry* and *Perez*, and Part IV examines the impact of *Perez*.

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22. *Id.* at 863.

23. *See infra* Part IV.

24. *Id.*

25. *Id.*

26. *Id.* Getting access to court is not the only benefit that *Perez* offers; avoiding the IDEA's administrative process saves precious resources as it is time-consuming, adversarial, and costly. *See Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 372 (1985) (finding that the IDEA's administrative and judicial review process can last for more than a year).

27. *Powell v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (11th Cir. 2023) (denying motion to dismiss for failure to exhaust a class action lawsuit alleging that the school district violated the ADA/504) (citing *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 965 (2023)).

## I. THE EXHAUSTION REQUIREMENT FOR IDEA CLAIMS

The following sections offer a brief description of the IDEA to provide context for the exhaustion requirement for IDEA claims, a description of the exhaustion requirement, and a list of its exceptions.

### A. IDEA Basics

The IDEA requires school districts to provide a FAPE to children with disabilities from the age of three through twenty-one or until the child graduates from high school, whichever comes first.<sup>28</sup> A FAPE consists of special education and related services provided to children with disabilities at public expense and under public supervision.<sup>29</sup> “[S]pecial education means specially designed instruction . . . to meet the unique needs of a child with a disability . . . .”<sup>30</sup> Related services are “transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education.”<sup>31</sup>

School districts must provide a FAPE in the least restrictive environment (“LRE”).<sup>32</sup> This ensures that a school district will not remove children with disabilities from the general education classroom and place them in separate educational settings unless, with the use of supplementary services and aids, it cannot educate the child satisfactorily in the general education setting.<sup>33</sup>

The IDEA includes extensive procedural requirements that school districts must follow in order to provide a FAPE.<sup>34</sup> They must identify children they reasonably suspect have a disability,<sup>35</sup> evaluate the child,<sup>36</sup>

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28. 20 U.S.C. § 1412(a)(1).

29. *Id.* § 1401(9).

30. *Id.* § 1401(29).

31. *Id.* § 1401(26)(a). Related services include “speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation . . . , social work services, school nurse services . . . , counseling services . . . , and medical services . . . for diagnostic and evaluation purposes only.” *Id.*

32. *Id.* § 1412(a)(5).

33. *Id.*; *see, e.g., P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 119 (2d Cir. 2008).

34. 20 U.S.C. § 1415; *see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982). *Rowley* established a two-step test to determine whether a school district provided a FAPE: “[f]irst, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefit?” In *Endrew F. v. Douglas Cnty. Sch. Dist. Re-1*, 580 U.S. 386 (2017), the Court replaced the second step of this test with the following: “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.* at 399.

35. 20 U.S.C. § 1412(a)(3)(A); *see D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012) (holding that a school district’s obligation to identify a child for evaluation is

and determine whether the child is eligible for special education and related services.<sup>37</sup> If a school district determines that a child is eligible for special education, it must prepare an individualized educational plan (“IEP”)<sup>38</sup> for the child and deliver the special education and related services that the child’s IEP requires.<sup>39</sup>

The IDEA provides an administrative complaint resolution process followed by limited judicial review. The IDEA allows “any party” to submit a complaint to the school district “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.”<sup>40</sup>

Once a party files a complaint, the school district must provide the complainant with “an opportunity for an impartial due process hearing.”<sup>41</sup> The school district must appoint an impartial hearing officer (IHO) to preside over the case<sup>42</sup> and the IHO must issue a decision within a limited time.<sup>43</sup> An impartial hearing is less formal than a trial but is nonetheless adversarial.<sup>44</sup> The parties must exchange relevant documents prior to the hearing.<sup>45</sup> At the hearing, they have the right to be accompanied and advised by counsel or other individuals, to present evidence, and to confront, cross-examine, and compel the attendance of witnesses.<sup>46</sup> Finally, they have the right to a verbatim record of the proceedings.<sup>47</sup>

## B. The Exhaustion Requirement for IDEA Claims

The IDEA provides a judicial remedy for IDEA violations.<sup>48</sup> However, prior to going to court, a parent must exhaust the IDEA’s administrative process. The IDEA’s exhaustion requirement provides that “any party aggrieved by the findings and decision” of an IHO “shall have the right to bring a civil action with respect to the complaint presented

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triggered when the district “reasonably suspected” that the child has a disability) (emphasis omitted).

36. 20 U.S.C. § 1414(a)(1)(A).

37. *Id.* § 1414(b)(4)(A). To be eligible for special education, a child must have one of thirteen disabilities, the disability must adversely affect the child’s education, and the child must need special education as a result. *Id.* § 1401(3)(a); 34 C.F.R. § 300.8(c) (2023).

38. 20 U.S.C. § 1414(d)(2).

39. *Id.* § 1412(a)(4).

40. *Id.* § 1415(b)(6)(A). The statute of limitations for filing an administrative complaint is two years unless a state has an explicit statute of limitations. *Id.* § 1415(b)(6)(B).

41. *Id.* § 1415(f)(1).

42. *Id.* § 1415(f)(1)(A), (f)(3)(A).

43. 34 C.F.R. § 300.515(a) (2023).

44. *See generally* 20 U.S.C. § 1415(f) (describing the impartial hearing process).

45. *Id.* § 1415(f)(2); *see also* 34 C.F.R. § 300.512(b)(1) (2023).

46. 20 U.S.C. § 1415(h)(1)–(2).

47. *Id.* § 1415(h)(3).

48. *Id.* § 1415(i)(2)(A).

pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States.”<sup>49</sup>

The scope of judicial review and remedies is limited. The court receives the record of the impartial hearing, “hears additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.”<sup>50</sup>

The courts have ruled, with a few minor exceptions, that compensatory monetary damages are not available for IDEA violations.<sup>51</sup> They have created, however, two forms of equitable relief for IDEA violations that have significant monetary value: compensatory educational services and reimbursement for private school tuition parents incurred when they removed their child from public school to ensure their child receives an appropriate education. Compensatory educational services, usually in the form of additional instructional time or related services, are available to put the child in the educational position in which they would have been had the school district provided a FAPE.<sup>52</sup> Parents are eligible for tuition reimbursement if the school district denied their child a FAPE, the private school provided an appropriate education, and the equities favor the parents.<sup>53</sup>

### C. Exceptions to the Exhaustion Requirement for IDEA Claims

Courts have recognized several exceptions to the exhaustion requirement for IDEA claims. While the courts differ in their enumeration of the exceptions, the following five exceptions have emerged: (1) the plaintiff is challenging a statute, practice, or procedure that the plaintiff alleges is contrary to law; (2) the relief plaintiff seeks is not available through the IDEA’s administrative process; (3) the administrative process is inadequate to provide a forum to adjudicate the plaintiff’s claims; (4) resort to the administrative process would cause the child severe or irreparable harm; and (5) the school district did not give notice of the availability of the IDEA’s administrative process.<sup>54</sup>

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49. *Id.*

50. *Id.* § 1415(i)(2)(C).

51. *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 528 (4th Cir. 1998); *ARCHER & MARSICO*, *supra* note 16.

52. *Miener v. Missouri*, 800 F.2d 749, 751 (8th Cir. 1986); *see also* *ARCHER & MARSICO*, *supra* note 16, at 671 n.1 (listing the cases from the courts of appeals that awarded compensatory educational services).

53. *See* *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 232–33 (2009); *Florence Cnty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 9–10 (1993); *Sch. Comm. of Burlington v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369–70 (1985); 20 U.S.C. § 1412(a)(10)(C).

54. *ARCHER & MARSICO*, *supra* note 16, at 541.

## II. THE EXHAUSTION REQUIREMENT FOR CLAIMS PURSUANT TO RELATED LAWS THAT PROTECT THE RIGHTS OF CHILDREN WITH DISABILITIES

The following sections briefly describe the other federal laws that protect the rights of children with disabilities and the requirement that plaintiffs with claims under these laws exhaust the IDEA's administrative process before filing a lawsuit.

### A. The Related Federal Laws that Protect Children with Disabilities

This section describes the related federal laws that protect children with disabilities, including their substantive terms and the relief they offer.

#### 1. *The ADA and Section 504*

The ADA and Section 504 prohibit discrimination against people with disabilities, including children.<sup>55</sup> Title II of the ADA prohibits public entities, including schools, from excluding participation in or denying the benefits of their “services, programs, or activities” to a qualified person with a disability.<sup>56</sup> Section 504 contains a similar prohibition, but applies only to programs or activities that receive federal financial assistance.<sup>57</sup> Both laws require public entities to make “reasonable modifications” to their programs and services to accommodate people with disabilities.<sup>58</sup> Monetary damages and injunctive relief are available under both the ADA<sup>59</sup> and Section 504.<sup>60</sup>

#### 2. *Title VI*

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of “race, color, or national origin” in connection with participation in or receiving the benefits of, “any program or activity receiving federal financial assistance.”<sup>61</sup> Although Title VI does not prohibit disability discrimination, it protects children with disabilities from race

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55. Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 945 (2021) (Congress largely modeled the ADA after Section 504, and thus “the two laws are often read in concert”).

56. 42 U.S.C. § 12132; *see* Lartigue v. Northside Indep. Sch. Dist., 86 F.4th 689, 692 (5th Cir. 2023); *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 18 (1st Cir. 2019).

57. 29 U.S.C. § 794(a).

58. 28 C.F.R. § 35.170(a) (2023); *see, e.g.*, *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 23 (1st Cir. 2019).

59. 42 U.S.C. § 12133.

60. 29 U.S.C. § 794a(a)(2).

61. 42 U.S.C. § 2000d.

discrimination in schools that receive federal funds, and Title VI claims often overlap with ADA/504 claims.<sup>62</sup> Private parties filing Title VI claims must prove that the defendant intended to discriminate.<sup>63</sup> Monetary damages and injunctive relief are available under Title VI.<sup>64</sup>

### 3. *The Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution guarantees equal protection of the law to all persons.<sup>65</sup> The Supreme Court applies heightened scrutiny to legislative classifications relating to disability and classifications that affect a child's education.<sup>66</sup> Plaintiffs with equal protection claims must show that the government intended to discriminate.<sup>67</sup> Monetary damages and injunctive relief are available for Equal Protection Clause violations.<sup>68</sup>

### 4. *Section 1983*

Finally, the Civil Rights Act of 1871 plays an important role in enforcing the rights of children with disabilities.<sup>69</sup> Section 1983, as it is commonly called, does not create additional substantive rights. Rather, it provides a cause of action against state officials who violate federal statutory or constitutional rights, including the laws that protect the rights of people with disabilities and the Fourteenth Amendment.<sup>70</sup> Compensatory monetary damages and equitable relief are available under Section 1983.<sup>71</sup>

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62. *See infra* Section IV.C.

63. *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001); *see also, e.g., Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 562 (3d Cir. 2002); *D.C. v. Pittsburgh Pub. Schs.*, 415 F. Supp. 3d 636, 658 (W.D. Pa. 2019).

64. 42 U.S.C. § 2000e-5(e)(3)(b).

65. U.S. CONST. amend. XIV, § 1.

66. In *City of Cleburne v. Cleburne Living Center*, the Court ruled that rational basis scrutiny applies to classifications based on intellectual disability. 473 U.S. 432, 442 (1985). Nevertheless, the Court subjected the City's purported reasons for denying the Living Center's permit to build a group home for people with intellectual disabilities to exacting scrutiny and ultimately invalidated the City's zoning rules as applied to the Living Center's proposal. *Id.* at 448-50.

67. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

68. *See infra* note 72.

69. 42 U.S.C. § 1983; *see, e.g., Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 31 (1st Cir. 2019).

70. *See supra* note 69.

71. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 2000e-5(e)(3)(B); 42 U.S.C. § 1981a(a)(1)-(2); *see also, e.g., Doucette*, 936 F.3d at 31.

## B. The Exhaustion Requirement for Related Federal Laws

The catalyst for the creation of the exhaustion requirement for related federal laws was *Smith v. Robinson*.<sup>72</sup> Tommy Smith's parents alleged that Tommy's school district denied him a FAPE in violation of the IDEA, Section 504, Section 1983, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>73</sup> His parents prevailed, and by the time the dispute reached the Supreme Court, the only remaining issue was whether they could recover attorneys fees. This depended on whether the IDEA exclusively covered the rights in question. If so, the parents were not eligible to recover fees because the IDEA did not provide attorneys fees to prevailing parties. If not, the parents could recover fees pursuant to the Section 504 and Section 1983, which award attorneys fees to prevailing parties. The Court ruled that the IDEA was the exclusive remedy and thus Tommy's parents could not recover attorneys fees.<sup>74</sup>

Two years later, Congress passed the Handicapped Children's Protection Act of 1986 (HCPA), which amended the IDEA.<sup>75</sup> The HCPA has two key clauses. The first overruled *Smith* and states that the IDEA does not "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."<sup>76</sup>

The second clause qualifies the right to file claims under these and other related federal laws. It reads, "except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA]," the plaintiff must exhaust the IDEA's administrative process.<sup>77</sup> The first clause thus makes clear that parents can file claims on behalf of

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72. *Smith v. Robinson*, 468 U.S. 992, 1019–20 (1984); see *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 692 (5th Cir. 2023) (recognizing that Congress passed the exhaustion requirement).

73. *Smith*, 468 U.S. at 994.

74. *Id.* at 1009, 1021. The Court stated that the EHA (reauthorized as the IDEA):

is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children. Both the provisions of the statute and its legislative history indicate that Congress intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in the statute.

*Id.* at 1009.

75. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797; see *Lartigue*, 86 F.4th at 693 (recognizing that Congress passed the HCPA to address and overturn *Smith*); *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 20 (1st Cir. 2019).

76. 20 U.S.C. § 1415(l).

77. *Id.*

children with disabilities under related federal laws, and the second clause created a limited exhaustion requirement for claims pursuant to these laws.

In the years following Congress' passage of the HCPA the federal circuit courts developed different approaches to enforcing the exhaustion requirement for related federal laws.<sup>78</sup> The Ninth Circuit developed a "relief-centered" approach to exhaustion, according to which exhaustion applied only to the extent that the relief the plaintiff "actually sought" could not have been provided by the IDEA.<sup>79</sup> In contrast, the First, Sixth, Seventh, Tenth, and Eleventh Circuits took an "injury-centered" approach, pursuant to which exhaustion applied even if the plaintiff requested relief the IDEA could not provide if the IDEA could redress the harm in any way.<sup>80</sup>

### III. *FRY AND PEREZ*

The sections that follow compare and contrast the Supreme Court's decisions in *Fry* and *Perez*, focusing on how they defined and applied the exhaustion requirement for the related federal laws that protect children with disabilities.

#### A. *Fry v. Napoleon Public Schools*<sup>81</sup>

In *Fry*, the Court considered the case of E.F., a child with cerebral palsy who used a service dog named Wonder to assist her with daily living activities.<sup>82</sup> When E.F. began kindergarten, her parents asked the school to allow E.F. to bring Wonder to school, but school officials refused.<sup>83</sup> E.F.'s IEP provided her with a one-to-one aide which in their view made Wonder unnecessary.<sup>84</sup>

The Frys filed a lawsuit alleging that the school district violated the ADA and Section 504 by failing to accommodate E.F. and discriminating against her on the basis of her disability.<sup>85</sup> They alleged that this caused E.F. to suffer mental distress and embarrassment<sup>86</sup> and sought monetary damages to compensate E.F. for her emotional distress.<sup>87</sup>

The school district moved to dismiss on the grounds that the Frys failed to exhaust the IDEA's administrative process.<sup>88</sup> The district court

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78. *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 165, 165 n.4 (2017).

79. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 874 (9th Cir. 2011) (en banc) (cataloging the different circuits' approaches to enforcing the exhaustion requirement).

80. *Id.* at 873–74.

81. *See generally Fry*, 580 U.S. at 154. For a comprehensive and incisive critique of the Court's decision in *Fry*, see Raj, *supra* note 55.

82. *Fry*, 580 U.S. at 161–162.

83. *Id.* at 162.

84. *Id.*

85. *Id.* at 163.

86. *Id.* at 163–64.

87. *Id.* at 164.

88. *Id.*

granted the motion, and the Sixth Circuit affirmed.<sup>89</sup> The Court granted certiorari to resolve the confusion among the circuit courts over the scope of the exhaustion requirement.<sup>90</sup> It vacated the Sixth Circuit's decision and remanded for further proceedings consistent with its opinion.<sup>91</sup>

In reaching its decision, the Court first quoted the language from § 1415(l) that exhaustion is required only when a plaintiff “‘seeks relief that is also available’ under the IDEA.”<sup>92</sup> It concluded that the relief available under the IDEA is for a FAPE denial.<sup>93</sup> Thus, a plaintiff must exhaust the IDEA's administrative process if they seek relief for a FAPE denial.<sup>94</sup> Even if a plaintiff brings a lawsuit under a related federal law only, the plaintiff must exhaust the IDEA's administrative process if the nature of the plaintiff's claim is a FAPE denial.<sup>95</sup>

The Court ruled that in order to determine the nature of a claim, a court must determine its essence, or “gravamen.”<sup>96</sup> If the gravamen is a FAPE denial, plaintiff must exhaust. If it is disability discrimination, plaintiff is not required to exhaust. The Court offered two “clues” to determine whether the gravamen of a complaint is a FAPE denial or disability discrimination. The first is to ask two hypothetical questions:

First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theater or library? And second, could an adult at the school—say, an employee or visitor—have pressed essentially the same grievance?<sup>97</sup>

If the answer to both questions is yes, the gravamen of the case is likely disability discrimination.<sup>98</sup> If the answer is no, the gravamen is likely a FAPE denial.<sup>99</sup>

The Court offered two examples. In the first, a student using a wheelchair sued his school district under the ADA for failing to provide access ramps.<sup>100</sup> The student could file the same complaint against a public library and an adult could file the same complaint against the school. Thus,

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89. *Id.*

90. *Id.*

91. *Id.* at 165, 176.

92. *Id.* at 165 (alteration in original) (quoting 20 U.S.C. § 1415(l)).

93. *Id.*

94. *Id.* at 168.

95. *Id.*

96. *Id.* at 165.

97. *Id.* at 171.

98. *Id.*

99. *Id.*

100. *Id.*

the gravamen of the complaint is disability discrimination.<sup>101</sup> In the second example, a student with a learning disability sued the school under the ADA for failing to provide a math tutor.<sup>102</sup> The student could not file such a complaint against a public library, and an adult could not sue the school for math tutoring.<sup>103</sup> These answers suggest that the gravamen of the student's complaint is a FAPE denial.<sup>104</sup>

The second clue is the history of the proceedings. "In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute—thus starting to exhaust the Act's remedies before switching midstream."<sup>105</sup> The Court speculated that a shift from an IDEA administrative complaint to an anti-discrimination lawsuit might indicate a strategic calculation, or it might be based on a realization that the school district fulfilled its IDEA obligations. "[P]rior pursuit of the IDEA's administrative remedies 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."<sup>106</sup>

On remand, the Sixth Circuit reversed the district court's original decision and remanded.<sup>107</sup> The district court denied opposing summary judgment motions,<sup>108</sup> and the parties ultimately settled.<sup>109</sup>

### B. *Perez v. Sturgis Public Schools*<sup>110</sup>

Plaintiff Miguel Luna Perez attended schools in the Sturgis Public School District from ages nine through twenty.<sup>111</sup> Mr. Perez is deaf, and he alleged that although the District assigned him sign language interpreters, they were either unqualified or frequently absent.<sup>112</sup> He also alleged that the District inflated his grades, advanced him from grade to grade, and informed him he was on track to graduate, yet ultimately denied him a diploma.<sup>113</sup>

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101. *Id.* at 171–72.

102. *Id.* at 172.

103. *Id.* at 172–73.

104. *Id.* at 173.

105. *Id.*

106. *Id.* at 173–74. In his concurring opinion, Justice Alito asserted that relying on the prior pursuit of the IDEA's remedies as evidence that the claim concerns the denial of a FAPE is "ill-advised." *Id.* at 176–77.

107. *Fry v. Napoleon Cmty. Schs.*, No. 14-1137, 2017 WL 10129249, at \*1 (6th Cir. July 21, 2017).

108. *Fry v. Napoleon Cmty. Schs.*, No. 12-15507, 2018 WL 4030757, at \*15 (E.D. Mich. Aug. 23, 2018).

109. *See Fry v. Napoleon Cmty. Schs.*, 371 F. Supp. 3d 387, 388–89 (E.D. Mich. 2019).

110. *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859 (2023).

111. *Id.* at 862.

112. *Id.*

113. *Id.*

Mr. Perez filed a complaint with the state education department, alleging that the District violated the IDEA and other related statutes.<sup>114</sup> The parties settled; Mr. Perez received all the relief he sought under the IDEA.<sup>115</sup>

Mr. Perez subsequently filed a lawsuit in federal district court seeking compensatory damages pursuant to the ADA.<sup>116</sup> The District moved to dismiss for failure to exhaust the IDEA's administrative process; the district court agreed, and the Sixth Circuit affirmed.<sup>117</sup> The Supreme Court granted certiorari to address the disagreements among the circuit courts over interpreting the IDEA's exhaustion requirement for related federal laws in light of *Fry*.<sup>118</sup>

The Court began by analyzing the language and plain meaning of the exhaustion requirement for the related federal laws. The Court first examined the first clause of § 1415(l), focusing on the word “remedies.”<sup>119</sup> The Court paraphrased the first clause: “[n]othing in [IDEA] shall be construed to restrict the ability of individuals to seek ‘remedies’ under the ADA or ‘other [f]ederal laws protecting the rights of children with disabilities.’”<sup>120</sup> Citing Black’s Law Dictionary, the Court stated that “[a] ‘remedy’ denotes ‘the means of enforcing a right,’ and may come in the form of, say, money damages, an injunction, or a declaratory judgment.”<sup>121</sup> The Court then restated the rule in the first clause as follows: the IDEA does not restrict or limit the availability of any of these remedies under related federal laws “like the ADA.”<sup>122</sup>

Next, the Court analyzed the second clause of § 1415(l), which “carves out an exception” to the rule stated by the first clause.<sup>123</sup> The Court paraphrased this exception: it “bars individuals from ‘seeking relief’ under other federal laws unless they first exhaust [the IDEA’s administrative remedies].”<sup>124</sup> The Court recognized that this clause does not apply to all lawsuits seeking relief under other federal laws, but, “only to suits that

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114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 862–63.

118. *Id.* at 863 (first citing *Perez v. Sturgis Pub. Schs.*, 3 F.4th 236, 241–42 (6th Cir. 2021); then *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647–48 (5th Cir. 2019); then citing *D.D. v. L.A. Unified Sch. Dist.*, 18 F.4th 1043, 1059–61 (9th Cir. 2021); and then citing *Doucette v. Georgetown Pub. Schs.*, 936 F.3d 16, 31 (1st Cir. 2019)). *Fry* caused more than disagreement among the circuit courts. Professor Claire Raj has demonstrated that lower courts interpreted *Fry* to inappropriately restrict access to courts to children with disabilities to enforce their rights. Raj, *supra* note 55, at 960–70.

119. *Perez*, 143 S. Ct. at 863.

120. *Id.* (alteration in original) (quoting 20 U.S.C. § 1415(a)).

121. *Id.* at 864 (quoting *Remedy*, BLACK’S LAW DICTIONARY (8th ed. 2004)) (citing *Remedy*, OXFORD ENGLISH DICTIONARY (2d ed. 1991) (defining “remedy” as “[l]egal redress”)).

122. *Id.*

123. *Id.*

124. *Id.*

‘see[k] relief . . . also available under’ IDEA. And that condition simply is not met in situations like ours, where a plaintiff brings a suit under another federal law for compensatory damages—a form of relief everyone agrees IDEA does not provide.’<sup>125</sup>

Thus, a plaintiff is not required to exhaust the IDEA’s administrative process if the relief they seek is not available under the IDEA. The Court admitted that its conclusion depended on finding that “remedies” in the first clause of § 1415(l) was synonymous with “relief” in the second clause. In support of this conclusion, the Court noted that § 1415(l) refers to claims that are “seeking relief” that is available under the IDEA.<sup>126</sup> Citing the Oxford English Dictionary, the Court found that “[t]o ‘seek’ is ‘[t]o ask for’ or ‘request,’” and that in the legal system, “seeking relief” generally means requesting a remedy.<sup>127</sup> The Court reversed and remanded, finding that the IDEA’s exhaustion requirement did not bar Mr. Perez’s lawsuit.<sup>128</sup>

#### IV. THE EARLY IMPACT OF *PEREZ*: OPENING THE DOORS OF THE COURTHOUSE TO CHILDREN WITH DISABILITIES

*Perez* has had a significant impact in the federal courts, as they have carefully followed its logic and holding and relied on it to reject motions to dismiss ADA/504 claims for failure to exhaust the IDEA’s administrative process. Prior to *Perez*, many of these same courts would have granted motions to dismiss, but *Perez* changed the course of their decisions, allowing plaintiffs alleging disability discrimination to proceed with their claims. Section A examines several indicators to evaluate the impact *Perez* has had. Section B suggests that *Perez* might make it easier for parents to go directly to court to challenge intersectional claims of race discrimination against children with disabilities, and Section C suggests that *Perez* will make it easier to bring law reform litigation challenging alleged systematic IDEA violations.

##### A. Rulings on Exhaustion in Cases Raising Claims Under the ADA and Section 504<sup>129</sup>

The first indicator is the number of lower federal court decisions that cited *Perez* and in turn the number of these decisions that ruled on the merits of motions to dismiss for failure to exhaust. The second is the results of these decisions. The third indicator identifies the cases in which the court

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125. *Id.* at 864 (alterations in original) (emphasis in original).

126. *Id.*

127. *Id.* (second alteration in original) (citing *Seek*, OXFORD ENGLISH DICTIONARY (2d ed. 2001)).

128. *Id.* at 65.

129. As a reminder, this article refers to the ADA and Section 504 in tandem as “ADA/504.”

changed its decision because of *Perez* and whether *Perez* changed the law in the court's jurisdiction. The fourth shows the types of cases that courts have allowed to proceed because of *Perez*. Overall, these indicators show that the impact of *Perez* has been extensive, decisive, and meaningful. It has opened the courthouse door to children with disabilities and their families.

### 1. Total Citations and Substantive Decisions

As of January 7, 2024, the courts of appeals and district courts and one state appellate court cited *Perez* approximately forty-seven times.<sup>130</sup> Courts decided twenty-five motions to dismiss ADA/504 cases for failure to exhaust.<sup>131</sup> The Fourth,<sup>132</sup> Fifth,<sup>133</sup> Sixth,<sup>134</sup> Eighth,<sup>135</sup> Ninth,<sup>136</sup> and

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130. This is based on a Westlaw search on January 7, 2024, as well as the results of automatic case search updates generated by Westlaw and Lexis as of January 7, 2024.

131. *Powell v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (11th Cir. 2023) (denying motion to dismiss for failure to exhaust class action claim alleging violations of ADA/504); *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 695 (5th Cir. 2023) (reversing district court decision dismissing ADA claim for failure to exhaust); *J.W. v. Paley*, 81 F.4th 440, 448 (5th Cir. 2023) (holding that the exhaustion requirement for related federal laws does not apply when the plaintiff seeks a remedy that the IDEA cannot provide and rejecting the exhaustion defense because plaintiffs sought compensatory and punitive damages which are not available under the IDEA); *F.B. v. Francis Howell Sch. Dist.*, No. 23-1073, 2023 WL 7899323, at \*1 (8th Cir. Nov. 16, 2023) (reversing district court decision granting motion to dismiss ADA/504 claim for failure to exhaust); *Chollet v. Brabrand*, No. 22-1005, 2023 WL 5317961, at \*1 (4th Cir. Aug. 18, 2023) (reversing and remanding for reconsideration in light of *Perez* district court's decision to dismiss); *Heston v. Austin Indep. Sch. Dist.*, 71 F.4th 355, 357 (5th Cir. 2023) (reversing and remanding district court decision dismissing claim for failure to exhaust in light of *Perez*); *Chavez v. Brownsville Indep. Sch. Dist.*, No. 22-40085, 2023 WL 3918987, at \*2 (5th Cir. June 9, 2023) (vacating the district court's dismissal for failure to exhaust compensatory damages claim but not claim for equitable relief in light of *Perez*); *D.D. v. L.A. Unified Sch. Dist.*, No. 19-55810, 2023 WL 3831811, at \*1 (9th Cir. June 2, 2023) (vacating the judgment and remanding to the district court in light of *Perez*); *Shefker v. Macomb Intermediate Sch. Dist.*, No. 22-1283, 2023 WL 3698219, at \*2 (6th Cir. May 23, 2023) (regardless of whether plaintiff alleged a denial of FAPE, denying motion to dismiss for failure to exhaust on grounds that plaintiff is seeking compensatory damages); *Farley v. Fairfax Cnty. Sch. Bd.*, No. 21-1183, 2023 WL 3092979, at \*1 (4th Cir. Apr. 26, 2023) (vacating the district court's order dismissing the case for failing to exhaust on the grounds that *Perez* decided that plaintiffs seeking damages under ADA/504 are not required to exhaust the IDEA's administrative process); *Stevens v. Berryhill Bd. of Educ.*, No. 19-cv-637, 2024 WL 23352, at \*10 (N.D. Okla. Jan. 2, 2024) (denying motion to dismiss ADA/504 claim for failure to exhaust); *J.I. v. Jefferson Par. Sch. Bd.*, No. 23-1532, 2023 WL 8563034, at \*5, \*7 n.2, (E.D. La. Dec. 11, 2023) (denying motion to dismiss ADA/504 claims for failure to exhaust); *Svochak v. Grapevine-Colleyville ISD*, No. 34-CV-270-BJ, 2023 WL 8437054, at \*3 (N.D. Tex. Dec. 5, 2023) (granting summary judgment on ADA/504 claim for failure to exhaust because the gravamen of the complaint was an IDEA violation and plaintiff sought relief that is available under the IDEA); *Larsen v. Papillon La Vista Cmty. Sch. Dist.*, No. 23CV190, 2023 WL 7183795, at \*2-3 (D. Neb. Nov. 1, 2023) (ruling that although plaintiff's alleged ADA/504 violation is "premised on denial of a free appropriate public education, the [monetary damages] sought cannot be supplied under IDEA"); *Dale v. Suffern Cent. Sch. Dist.*, No. 18 Civ. 4432, 2023

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WL 6386808, at \*11 (S.D.N.Y. Sept. 28, 2023) (applying *Fry*, the court ruled that the gravamen of the complaint was not the denial of FAPE but deliberate indifference to disability-based bullying); *Doe v. Gavins*, No. 22-cv-10702, 2023 WL 6296398, at \*13 (D. Mass. Sept. 27, 2023) (citing *Perez*, ruling that a claim for monetary damages only is not subject to the IDEA's exhaustion requirement); *C.A. v. Bd. of Dirs. of Corvian Cmty. Sch.*, No. 22-cv-00035, 2023 WL 5747149, at \*6-7 (W.D.N.C. Sept. 6, 2023) (applying both *Fry* and *Perez*, holding that although the gravamen of plaintiff's case was the denial of a FAPE, plaintiffs sought only compensatory damages and thus exhaustion did not apply); *Cease v. Henry*, No. 22-CV-05015, 2023 WL 5333211, at \*6 (D.S.D. Aug. 18, 2023) (denying the defendants' motion to dismiss for failure to exhaust because the plaintiffs sought only compensatory damages); *Farshid v. Allen Indep. Sch. Dist.*, No. 22-CV-00821, 2023 WL 5336845, at \*5-6 (E.D. Tex. Aug. 18, 2023) (applying *Fry*'s gravamen analysis, the court ruled that the gravamen of the plaintiff's complaint was not an IDEA violation and denied defendant's exhaustion defense); *Sanders v. Shelby Cnty. Bd. of Educ.*, No. 19-cv-02056, 2023 WL 5690291, at \*4 (W.D. Tenn. July 28, 2023) (confirming earlier pre-*Perez* decision that plaintiff's ADA/504 damages claim did not require exhaustion); *Cox v. Lewis*, No. 20-CV-1792, 2023 WL 3816873, at \*10 (D. Nev. June 5, 2023) ("As plaintiff's claim is a backwards-looking claim for compensatory damages, the Court's holding [in *Perez*] applies, and exhaustion is not required."); *Pitta v. Medeiros*, No. 22-11641, 2023 WL 3572391, at \*6 (D. Mass. May 19, 2023) (applying *Fry*'s gravamen rule only, the court denied the defendant's motion to dismiss because the gravamen was not a denial of FAPE but a First Amendment violation), *aff'd*, 90 F.4th 11 (1st Cir. 2024); *Doe v. Wentzville R-IV Sch. Dist.*, No. 22-cv-00461, 2023 WL 2951619, at \*6 (E.D. Mo. Apr. 14, 2023) (citing *Perez*, the court ruled that the IDEA does not require plaintiff "to have exhausted her claims for compensatory damages"); *Piotrowski v. Rocky Point Union Free Sch. Dist.*, No. 18-CV-6262, 2023 WL 2710341, at \*8 (E.D.N.Y. Mar. 30, 2023) ("The Supreme Court recently clarified the application of this provision to damages claims, by holding—contrary to suggestions in earlier Second Circuit law—that because monetary damages are not available under the IDEA, claims for money damages alone are not subject to IDEA exhaustion."); *G.P. v. Huntington Beach City Sch. Dist.*, No. G060503, 2023 WL 8230522, at \*5-6 (Cal. Ct. App. Nov. 28, 2023) (dismissing negligence claim for failing to exhaust the IDEA's administrative remedies but denying motion to dismiss ADA/504 claim).

132. *Chollet*, 2023 WL 5317961, at \*1 (reversing and remanding for reconsideration district court's decision to dismiss in light of *Perez*); *Farley*, 2023 WL 3092979, at \*1 (vacating the district court's order dismissing the case for failing to exhaust on the grounds that *Perez* decided that plaintiffs seeking damages under ADA/504 are not required to exhaust the IDEA's administrative process).

133. *Lartigue*, 86 F.4th at 695 (reversing district court decision dismissing ADA claim for failure to exhaust); *Paley*, 81 F.4th at 448 (applying *Perez*, the court held that the IDEA's exhaustion requirement does not apply when the plaintiff seeks a remedy that the IDEA cannot provide and denying the exhaustion defense because plaintiffs sought compensatory and punitive damages which are not available under the IDEA); *Heston*, 71 F.4th at 357 (reversing and remanding the district court's decision to dismiss for failure to exhaust in light of *Perez*); *Chavez*, 2023 WL 3918987, at \*2 (vacating the district court's dismissal for failure to exhaust compensatory damages claim but not claim for equitable relief in light of *Perez*).

134. *Shefke*, 2023 WL 3698219, at \*2 (denying motion to dismiss for failure to exhaust on grounds that plaintiff is seeking compensatory damages regardless whether plaintiff alleged a denial of FAPE).

135. *F.B.*, 2023 WL 7899323, at \*1 (reversing district court decision granting motion to dismiss ADA/504 claim for failure to exhaust).

136. *D.D.*, 2023 WL 3831811, at \*1 (vacating the judgment and remanding to the district court in light of *Perez*).

Eleventh Circuits<sup>137</sup> as well as district courts in the First,<sup>138</sup> Second,<sup>139</sup> Fifth,<sup>140</sup> Eighth,<sup>141</sup> and Tenth<sup>142</sup> Circuits and one California Appellate Court<sup>143</sup> have issued decisions applying *Perez*.

## 2. Results

The Fifth Circuit aptly described *Perez* as providing “unmistakable” new guidance that the exhaustion requirement for related laws that protect the rights of children with disabilities does not apply when plaintiffs seek remedies that are not available under the IDEA:

Interpreting the word “relief” in the IDEA’s exhaustion provision as synonymous with “remedies,” the Court held

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137. *Powell v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (4th Cir. 2023) (denying motion to dismiss class action claim alleging ADA/504 violations for failure to exhaust).

138. *Doe v. Gavins*, No. 22-cv-10702, 2023 WL 6296398, at \*13 (D. Mass. Sept. 27, 2023) (citing *Perez*, ruling that a claim for monetary damages only is not subject to the IDEA’s exhaustion requirement); *Pitta v. Medeiros*, No. 22-11641-FDS, 2023 WL 3572391, at \*6 (D. Mass. May 19, 2023) (applying *Fry*’s gravamen rule only, the court denied the defendant’s motion to dismiss because the gravamen was not a denial of FAPE but a First Amendment violation), *aff’d*, 90 F.4th. 11 (1st Cir 2024).

139. *Dale v. Suffern Cent. Sch. Dist.*, No. 18-CV-04432, 2023 WL 6386808, at \*11 (S.D.N.Y. Sept. 28, 2023) (applying *Fry*, the court ruled that the gravamen of the complaint was not the denial of FAPE but deliberate indifference to disability-based bullying); *Piotrowski v. Rocky Point Union Free Sch. Dist.*, No. 18-CV-6262-RPK-SIL, 2023 WL 2710341, at \*8 (E.D.N.Y. Mar. 30, 2023) (noting that “[t]he Supreme Court recently clarified the application of this provision to damages claims, by holding—contrary to suggestions in earlier Second Circuit case law—that because monetary damages are not available under the IDEA, claims for money damages alone are not subject to IDEA exhaustion”).

140. *J.I. v. Jefferson Par. Sch. Bd.*, No. 23-1532, 2023 WL 8563034, at \*5, \*7 n.2 (E.D. La. Dec. 11, 2023) (denying motion to dismiss ADA/504 claims for failure to exhaust); *Svochak v. Grapevine-Colleyville ISD*, No. 23-CV-270-BJ, 2023 WL 8437054, at \*3 (N.D. Tex. Dec. 5, 2023) (granting summary judgment on the ADA/504 claim for failure to exhaust because the gravamen of the complaint was an IDEA violation and plaintiff sought relief that is available under the IDEA).

141. *Larsen v. Papillon La Vista Cmty. Sch., Dist.*, No. 23CV190, 2023 WL 7183795, at \*2–3 (D. Neb. Nov. 1, 2023) (ruling that although plaintiff’s alleged violation of Section 504 and the ADA is “premised on denial of a free appropriate public education, the [monetary damages] sought cannot be supplied under IDEA”); *Cease v. Henry*, No. 22-CV-05015, 2023 WL 5333211, at \*6 (D.S.D. Aug. 18, 2023) (denying the defendants’ motion to dismiss for failure to exhaust because plaintiffs sought only compensatory damages); *Doe v. Wentzville R-IV Sch. Dist.*, No. 22-cv-00461, 2023 WL 2951619, at \*6 (E.D. Mo. Apr. 14, 2023) (citing *Perez*, the court ruled that the IDEA does not require plaintiff “to have exhausted her claims for compensatory damages”).

142. *Stevens v. Berryhill Bd. of Educ.*, No. 19-cv-637, 2024 WL 23353 at \*10 (N.D. Okla. Jan. 2, 2024) (denying motion to dismiss ADA/504 claim for failure to exhaust); *Cox v. Lewis*, No. 20-CV-1792-JCM-BNW, 2023 WL 3816873, at \*10 (D. Nev. June 5, 2023).

143. *G.P. v. Huntington Beach City Sch. Dist.*, No. G060503, 2023 WL 8230522, at \*5–6 (Cal. Ct. App. Nov. 28, 2023) (dismissing negligence claim for failing to exhaust the IDEA’s administrative remedies but denying summary judgment on ADA/504 claim).

that because the IDEA's exhaustion requirement applies only to suits that "seek [ ] relief . . . also available under" the IDEA, it does not apply "when a plaintiff seeks a remedy IDEA cannot provide." As the plaintiff in *Perez* sought compensatory damages, a remedy both sides agreed was unavailable under the IDEA, his claim was not subject to the IDEA's exhaustion requirement.<sup>144</sup>

Given *Perez's* "unmistakable guidance," the lower courts in all but one of the twenty-five cases in which they issued decisions on motions to dismiss ADA/504 claims for failure to exhaust denied the motions, and the one case that granted the motion applied both *Fry* and *Perez* correctly.<sup>145</sup>

### 3. *A Game-Changer?*

This indicator identifies cases in which the court was clear that it would have dismissed an ADA/504 complaint for failure to exhaust but for *Perez*. It also identifies cases in which the court acknowledged that *Perez* changed the law regarding exhaustion in its jurisdiction.

Of the twenty-four decisions in which the lower courts allowed ADA/504 cases to proceed, *Perez* clearly caused a change in the result from

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144. *J.W. v. Paley*, 81 F.4th 440, 448 (5th Cir. 2023) (alterations omitted) (footnotes omitted) (citations omitted).

145. *Powell v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (11th Cir. 2023); *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 695 (5th Cir. 2023); *F.B. v. Francis Howell Sch. Dist.*, No. 23-1073, 2023 WL 7899323, at \*1 (8th Cir. Nov. 16, 2023); *Paley*, 81 F.4th at 448; *Chollet v. Brabrand*, No. 22-1005, 2023 WL 5317961, at \*1 (4th Cir. Aug. 18, 2023); *Heston v. Austin Indep. Sch. Dist.*, 71 F.4th 355, 357 (5th Cir. 2023); *Chavez v. Brownsville Indep. Sch. Dist.*, No. 22-40085, 2023 WL 3918987, at \*2 (5th Cir. June 9, 2023); *D.D. v. L.A. Unified Sch. Dist.*, No. 19-55810, 2023 WL 3831811, at \*1 (9th Cir. June 2, 2023); *Shefke v. Macomb Intermediate Sch. Dist.*, No. 22-1283, 2023 WL 3698219, at \*2 (6th Cir. May 23, 2023); *Farley v. Fairfax Cnty. Sch. Bd.*, No. 21-1183, 2023 WL 3092979, at \*1 (4th Cir. Apr. 26, 2023); *Stevens*, 2024 WL 233523 at \*10; *Svochak*, 2023 WL 8437054, at \*3 (N.D. Tex. Dec. 5, 2023); *Larsen*, 2023 WL 7183795, at \*2-3; *Dale v. Suffern Cent. Sch. Dist.*, No. 18-CV-4432-AEK, 2023 WL 6386808, at \*11 (S.D.N.Y. Sept. 28, 2023); *Doe v. Gavins*, No. 22-CV-10702, 2023 WL 6296398, at \*13 (D. Mass. Sept. 27, 2023); *C.A. v. Bd. of Dirs. of Corvian Cmty. Sch.*, No. 22-CV-00035, 2023 WL 5747149, at \*6-7 (W.D.N.C. Sept. 6, 2023); *Cease*, 2023 WL 5333211, at \*6; *Farshid v. Allen Indep. Sch. Dist.*, No. 22-CV-00821, 2023 WL 5336845, at \*5-6 (E.D. Tex. Aug. 18, 2023); *Sanders v. Shelby Cnty. Bd. of Educ.*, 19-CV-02056, 2023 WL 5690291, at \*4 (W.D. Tenn. July 29, 2023); *Cox*, 2023 WL 3816873, at \*10; *Pitta v. Medeiros*, No. CV 22-11641-FDS, 2023 WL 3572391, at \*6 (D. Mass. May 19, 2023), *aff'd*, 90 F.4th 11 (1st Cir. 2024); *Doe*, 2023 WL 2951619, at \*6; *Piotrowski v. Rocky Point Union Free Sch. Dist.*, No. 18-CV-6262-RPK-SIL, 2023 WL 2710341, at \*8 (E.D.N.Y. Mar. 30, 2023); *G.P.*, 2023 WL 8230522, at \*5-6. The one decision that did not deny a motion to dismiss was *Svochak*. In *Svochak*, the court found that the gravamen of the plaintiff's ADA/504 claim was an IDEA violation and the plaintiff sought relief that is available under the IDEA. *Svochak*, 2023 WL 8437054, at \*3. This ruling applied *Fry* and *Perez* correctly.

requiring exhaustion to excusing it in fifteen.<sup>146</sup> *Farley v. Fairfax County School Board* is a good example.<sup>147</sup> Before the Court issued *Perez*, the district court dismissed the plaintiffs' ADA/504 claims for failure to exhaust.<sup>148</sup> While the plaintiffs' appeal was pending, the Supreme Court issued *Perez*, abrogating the Fourth Circuit's precedent relating to exhaustion. As a result, the court vacated and remanded the district's court decision.

*Perez* caused changes to the exhaustion rules in three circuits and possibly two others.<sup>149</sup> The Eleventh Circuit reversed the district court's dismissal of plaintiff's ADA/504 claims for failing to exhaust because *Perez* changed the Eleventh Circuit's exhaustion rules.<sup>150</sup> Similarly, the Fifth Circuit, recognizing that its "precedent applied this . . . exhaustion requirement even to suits seeking remedies not provided by the IDEA, such as compensatory damage" held an appeal in abeyance pending the outcome

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146. See *Lartigue*, 86 F.4th at 695, 697 (reversing district court decision dismissing ADA claim for failure to exhaust); *F.B.*, 2023 WL 7899323, at \*1 (reversing district court decision granting motion to dismiss ADA/504 claim for failure to exhaust); *Paley*, 81 F.4th at 448–49 (reversing the district court's dismissal of plaintiff's ADA/504 claim based on *Perez*); *Chollet*, 2023 WL 5317961, at \*1 (reversing and remanding for reconsideration the district court's dismissal based on *Fry* in light of *Perez*); *Heston*, 71 F.4th at 357 (reversing and remanding the district court decision dismissing the claim for failure to exhaust in light of *Perez*); *Chavez*, 2023 WL 3918987, at \*2 (noting that the district court's decision dismissing the case conflicted with *Perez*, the court reversed and remanded); *D.D.*, 2023 WL 3831811, at \*1 (vacating the judgment and remanding it to district court in light of *Perez*); *Shefke*, 2023 WL 3698219, at \*2 (vacating and remanding the district court's dismissal in light of *Perez*); *Farley*, 2023 WL 3092979, at \*1 (vacating the district court's order dismissing the case for failing to exhaust on the grounds that *Perez* decided that plaintiffs seeking damages pursuant to the ADA/504 are not required to exhaust the IDEA's administrative process); *Larsen*, 2023 WL 7183795, at \*2–3 (acknowledging that *Perez* caused a change in the result because *Fry* analysis would have led to different result); *C.A.*, 2023 WL 5747149, at \*6–7 (applying both *Fry* and *Perez*, holding that although the gravamen of plaintiff's case was the denial of a FAPE, plaintiffs sought only compensatory damages and thus exhaustion did not apply); *Cease*, 2023 WL 5333211, at \*6 (rescinding its reconsideration and previous order dismissing plaintiffs' ADA/504 claims in light of how *Perez* changed the analysis under *Fry*); *Cox*, 2023 WL 3816873, at \*10 (noting that the Court issued *Perez* while the motion to dismiss for failure to exhaust was pending and consequently applying *Perez*); *Doe*, 2023 WL 2951619, at \*6 (noting that the Supreme Court issued *Perez* while briefing on motion to dismiss was pending, and citing *Perez*, ruling that the IDEA does not require plaintiff "to have exhausted her claims for compensatory damages"); *Piotrowski*, 2023 WL 2710341, at \*8 (noting that *Perez* likely changed Second Circuit's rule on exhaustion).

147. *Farley*, 2023 WL 3092979, at \*1; see also *Stevens*, 2024 WL 23352 at \*6 (ruling that *Perez* contradicts Tenth Circuit law on exhaustion).

148. *Farley v. Fairfax*, No. 20cv1249, 2021 WL 10883251, at \*1 (E.D. Va. Jan. 19, 2021) (granting motion to dismiss).

149. See *Powell v. Sch. Bd. of Volusia Cnty.*, 86 F.4th 881, 883–84 (11th Cir. 2023) (stating the prior to *Perez*, the Eleventh Circuit applied the exhaustion requirement even to lawsuits seeking remedies that were not available under the IDEA); *Paley*, 81 F.4th at 448 (ruling that *Perez* contradicted its precedent on exhaustion); *Farley*, 2023 WL 3092979, at \*1 (recognizing that *Perez* abrogated its governing precedent relating to exhaustion).

150. *Powell*, 86 F.4th at 883–84 (11th Cir. 2023).

in *Perez* and ultimately reversed and remanded the district court's dismissal of the ADA/504 claims for failing to exhaust.<sup>151</sup> Finally, as described above, in *Farley*, the Fourth Circuit recognized that *Perez* abrogated the Fourth Circuit's precedent relating to exhaustion and vacated and remanded the district's court decision.<sup>152</sup>

Although not speaking for the Second Circuit, the court in *Piotrowski v. Rocky Point Union Free School District* indicated that *Perez* contradicts Second Circuit law.<sup>153</sup> Similarly, in *Stevens v. Berryhill Board of Education*, the district court stated that *Perez* contradicts Tenth Circuit precedent on exhaustion.<sup>154</sup>

Opening the courthouse door, of course, does not guarantee that the plaintiff will prevail on the merits. It is difficult to prevail in ADA/504 cases because the burden is on the plaintiff to prove the defendant intended to discriminate. Thus, in three of the cases where the courts denied motions to dismiss for failure to exhaust in light of *Perez*, the courts nonetheless dismissed the cases on the merits pursuant to summary judgment motions.<sup>155</sup>

#### 4. Examples

This section examines some of the decisions where *Perez* changed the outcome and allowed plaintiffs to proceed to court, providing a tableau of the sorts of cases that would have been dismissed for failure to exhaust but now, because of *Perez*, will be permitted to proceed to court.

Tasing: In *J.W. v. Paley*, following a struggle, the defendant, school resource officer Paley, fired his taser at plaintiff, Jevon Washington, as he was leaving school:

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151. See *Paley*, 81 F.4th at 448; *Piotrowski*, 2023 WL 2710341, at \*8.

152. *Farley*, 2023 WL 3092979, at \*1.

153. *Piotrowski v. Rocky Point Union Free Sch. Dist.*, No. 18-CV-6262-RPK-SIL, 2023 WL 2710341, at \*8 (E.D.N.Y. Mar. 30, 2023).

154. *Stevens v. Berryhill Bd. of Educ.*, No. 19-cv-637-WPJ-JFJ, 2024 WL 23353, at \*6 (N.D. Okla. Jan. 2, 2024) (stating that the Tenth Circuit's rule regarding exhaustion was that if the gravamen of a complaint was the denial of a FAPE the plaintiff was required to exhaust, even if the plaintiff sought relief that was not available under the IDEA).

155. See *Svochak v. Grapevine-Colleyville ISD*, No. 23-CV-270-BJ, 2023 WL 8437054, at \*2-3 (N.D. Tex. Dec. 5, 2023) (dismissing ADA/504 claim because there was no evidence that the defendant's knowledge about peer bullying was sufficient to rise to the level of deliberate indifference); *Paley*, 81 F.4th at 449 (dismissing ADA/504 claims because the plaintiff failed to present evidence of intentional discrimination); *C.A. v. Bd. of Dirs. of Corvian Cmty. Sch.*, No. 22-CV-00035, 2023 WL 5747149, at \*6-7 (W.D.N.C. Sept. 6, 2023) (dismissing ADA/504 claim because plaintiffs failed to allege bad faith or gross misjudgment, a standard that is "extremely difficult" to meet). *But see Dale v. Suffern Cent. Sch. Dist.*, No. 18-CV-04432-AEK, 2023 WL 6386808, at \*12 (S.D.N.Y. Sept. 28, 2023) (denying defendant's summary judgment motion). Thank you to Deusdedi Merced of Special Education Solutions for pointing out the difficulty of prevailing in an ADA/504 claim even if the plaintiff survived a motion to dismiss for failure to exhaust.

Jevon screamed and fell to his knees. With Jevon on his knees, Officer Paley continued to tase Jevon, using a “drive stunning” method. Officer Paley used the taser for approximately 15 seconds total, continuing to tase Jevon in the back, even after he was lying face down on the ground and not struggling.

As a result of the tasing, Jevon urinated, defecated, and vomited on himself. . . .

Quite understandably, the family struggled in the aftermath, with Ms. Washington keeping Jevon home from school for several months because she feared for his safety at school and the tasing caused him intense anxiety and PTSD.<sup>156</sup>

Physical and verbal abuse: In *Heston v. Austin Independent School District*, the plaintiffs alleged that the individual whom the district hired to assist their son with his accommodations verbally harassed him and threw a garbage can at him, injuring him.<sup>157</sup>

Traumatic brain injury: The plaintiff in *Shefke v. Macomb Intermediate School District* alleged that the district failed to implement an appropriate emergency intervention plan with restraint techniques for her non-verbal son with autism which led to him “suffering from a seizure and traumatic brain injury . . . after he engaged in severe self-injurious behavior.”<sup>158</sup>

Elopement and subsequent disappearance: *Larsen v. Papillon La Vista Community School District* arose out of the elopement from school and subsequent disappearance of Ryan Larsen, a student with multiple disabilities.<sup>159</sup> According to the complaint:

The School District and the staff at Ryan’s elementary school knew about his disabilities and special needs, and they knew Ryan needed constant supervision because of his documented history of running away from school.

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156. *Paley*, 81 F.4th at 445–46 (footnotes omitted).

157. *Heston v. Austin Indep. Sch. Dist.*, 71 F.4th 355, 356 (5th Cir. 2023).

158. *Shefke v. Macomb Intermediate Sch. Dist.*, No. 22-1283, 2023 WL 3698219, at \*1 (6th Cir. May 23, 2023) (citations omitted).

159. *Larsen v. Papillon La Vista Cmty. Sch. Dist.*, No. 23CV190, 2023 WL 7183795, at \*1 (D. Neb. Nov. 1, 2023).

Ryan ran away from school on or about January 16, 2021, April 28, 2021, and May 10, 2021. On [or about] May 17, 2021, Ryan was left alone and unsupervised in a classroom at his elementary school. Ryan walked, unattended, out of the front doors of the school in the middle of the day. No one at the school made any immediate attempt to prevent Ryan from leaving the building or school grounds, and no one made any immediate attempt to retrieve Ryan and return him to school. Ryan has not been located, and no evidence has been found to indicate his whereabouts.<sup>160</sup>

Ongoing abuse: According to the complaint in *Cease v. Henry*, the school district subjected J.C. to regular abuse, including “leaving J.C. in soiled pull-ups, forcing J.C. to eat ‘unsafe’ sensory foods, and disciplining J.C. through spanking and seclusion.”<sup>161</sup>

Rape: In *Doe v. Wentzville R-IV School District*, the parents alleged that their daughter with autism and other developmental disabilities engaged in sexual relations on two occasions when she was at or should have been at school.<sup>162</sup>

##### 5. *The Interplay Between Fry and Perez*

Because *Perez* did not explicitly overrule *Fry*, there are now two rules regarding the exhaustion of claims under the related federal laws that protect children with disabilities. First, according to *Fry*, a plaintiff seeking relief under these laws is excused from exhaustion if the gravamen of their complaint is not the denial of a FAPE.<sup>163</sup> Second, according to *Perez*, even if the gravamen of the complaint is a FAPE denial, the plaintiff may proceed if they seek a remedy the IDEA does not provide.<sup>164</sup>

This suggests the following test for evaluating a motion to dismiss a case under a related federal law for failure to exhaust:<sup>165</sup>

- 1) Is the gravamen of the complaint a FAPE violation?
- 2) If no, the case may proceed.<sup>166</sup>

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160. *Id.*

161. *Cease v. Henry*, No. 22-CV-05015, 2023 WL 5333211, at \*1 (D.S.D. Aug. 18, 2023).

162. *Doe v. Wentzville R-IV Sch. Dist.*, No. 22-CV-00461, 2023 WL 2951619, at \*6 (E.D. Mo. Apr. 14, 2023).

163. *Id.*

164. *Id.*

165. *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 695 (5th Cir. 2023).

- 3) If yes, does the plaintiff seek a remedy that is available under the IDEA?
- 4) If no, the plaintiff may proceed.<sup>167</sup>
- 5) If yes, the court should dismiss the case for failure to exhaust.<sup>168</sup>

## B. Race Discrimination Claims<sup>169</sup>

Several studies have indicated that the race of a child has a negative impact on the provision of special education.<sup>170</sup> The IDEA does not prohibit race discrimination in the provision of special education, and thus parents cannot receive relief for it in an impartial hearing. However, both the Equal Protection Clause<sup>171</sup> and Title VI<sup>172</sup> prohibit race discrimination.<sup>173</sup> Even

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166. Dale v. Suffern Cent. Sch. Dist., No. 18-CV-04432, 2023 WL 6386808, at \*11 (S.D.N.Y. Sept. 28, 2023) (applying *Fry*, the court ruled that the gravamen of the complaint was not the denial of FAPE but deliberate indifference to disability-based bullying); Farshid v. Allen Indep. Sch. Dist., No. 22-CV-00821, 2023 WL 5336845, at \*6 (E.D. Tex. Aug. 18, 2023) (ruling that the gravamen of the plaintiff's complaint was disability discrimination and rejecting defendant's exhaustion defense); Pitta v. Medeiros, No. 22-11641, 2023 WL 3572391, at \*6 (D. Mass. May 19, 2023) (denying motion to dismiss because the gravamen of the complaint was not a denial of FAPE but a First Amendment violation), *aff'd*, 90 F.4th 11 (1st Cir. 2024).

167. See Stevens v. Berryhill Bd. of Educ., No. 19-cv-637, 2024 WL 233523, at \*7 (N.D. Okla. Jan. 2, 2024) (denying motion to dismiss ADA/504 claim for failure to exhaust because even though the gravamen of the complaint was a FAPE denial, plaintiff sought relief that was not available under the IDEA); Shefke v. Macomb Intermediate Sch. Dist., No. 22-1283, 2023 WL 3698219, at \*1–2 (6th Cir. May 23, 2023) (denying motion to dismiss for failure to exhaust on grounds that plaintiff is seeking compensatory damages regardless of whether plaintiff alleged a denial of FAPE); C.A. v. Bd. of Dir. of Corvian Cmty. Schs., No. 22-CV-00035, 2023 WL 57747149, at \*6–8 (W.D.N.C. Sept. 6, 2023) (holding that although the gravamen of the plaintiffs' complaint was a FAPE denial, plaintiffs sought only compensatory damages).

168. Svochak v. Grapevine-Colleyville ISD, No. 23-CV-270-BJ, 2023 WL 8437054, at \*3 (N.D. Tex. Dec. 5, 2023) (granting motion to dismiss ADA/504 claim for failure to exhaust because the gravamen of the complaint was an IDEA violation and plaintiff sought relief that is available under the IDEA).

169. This section builds on my previous work in this area. See generally Richard D. Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y. L. SCH. L. REV. 207 (2021).

170. *Id.* at 216–34.

171. U.S. CONST. amend. XIV, § 1, cl. 2. The Equal Protection Clause prohibits race discrimination against children in public schools. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954). The Office for Civil Rights of the United States Department of Education (OCR) interprets Title VI to require that “students of all races, colors, and national origins have equitable access to general education interventions and to a timely referral for an evaluation under the IDEA.” See Dep’t of Educ., Dear Colleague Letter: Preventing Racial Discrimination in Special Education (Dec. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-racedisc-special-education.pdf> [<https://perma.cc/6XYB-NG39>]. According to the OCR, “Title VI requires students of all

though it is not possible to receive relief for race discrimination in special education in an impartial hearing, the prevailing judicial authority is that plaintiffs claiming Title VI/EP violations against children with disabilities must exhaust the IDEA's administrative process before filing their claims in court.<sup>174</sup>

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racess and national origins to be treated equitably in the evaluation process, in the quality of special education services and supports they receive, and in the degree of restrictiveness of their educational environment." *Id.*

172. 42 U.S.C. §§ 2000d–2000d-4. Title VI provides that, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.* § 2000d.

173. In addition to these provisions, 42 U.S.C. § 1981 gives all persons the same rights “to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .” 42 U.S.C. § 1981(a). Parents do not frequently use Section 1981 in intersectional claims of race and disability decision. *But see* *Waters v. South Bend Cmty. Sch. Corp.*, 191 F.3d 457 (7th Cir. 1999) (table decision) (dismissing Section 1981 and 1983 claims alleging that the defendant failed to provide plaintiff’s son with a disability an adequate education on the basis of race).

174. *See, e.g.*, *Waters v. South Bend Cmty. Sch. Corp.*, 191 F.3d 457 (7th Cir. 1999) (dismissing Section 1981 and 1983 claims); *A.W.S. v. Southampton Union Free Sch. Dist.*, No. 19-CV-889, 2023 WL 2463820, at \*2–3 (E.D.N.Y. Mar. 10, 2023) (dismissing for failure to exhaust a Title VI claim alleging that the school district failed to provide the plaintiff with special education services and discriminated against him because he is a Shinnecock Indian); *Lemus ex rel. O.C.L. v. D.C. Int’l Charter Sch.*, No. 20-cv-3839, 2022 WL 407151, at \*7 (D.D.C. Feb. 10, 2022) (holding that plaintiff was required to exhaust Title VI claim that the district violated FAPE by failing to provide the child with Spanish translations or ESL courses but not dismissing the claim because the plaintiff exhausted); *Henry v. Sch. Dist. of Phila.*, No. 19-1115, 2019 WL 4247914, at \*10 (E.D. Pa. Sept. 6, 2019) (dismissing Title VI claim regarding race-based bullying for failure to exhaust administrative remedies); *Mixon ex rel. A.M. v. Fresno Unified Sch. Dist.*, No. 16-cv-00725, 2017 WL 6209389, at \*9, \*11 (E.D. Cal. Dec. 8, 2017) (dismissing for failure to exhaust administrative remedies when gravamen of complaint sought redress for a FAPE denial); *Reyes v. Bedford Cent. Sch. Dist.*, No. 16-CV-2768, 2017 WL 4326115, at \*7, \*9–10 (S.D.N.Y. Sept. 27, 2017) (dismissing for failure to exhaust Title VI/EP claim that the school district failed to evaluate the child for special education because they classified her as an English language learner because the plaintiff’s discrimination claim was “plainly focused on the deprivation of educational services owed to her under the IDEA and accordingly are subject to exhaustion”); *Barnett v. Baldwin Cnty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1229–30 (S.D. Ala. 2014) (dismissing for failure to exhaust Title VI/EP claim that the school district discriminated against children of color in connection with disciplinary practices because the claims were “inextricably intertwined” with the development of their IEPs); *Wang ex rel. KG v. Williamsville Cent. Sch. Dist.*, No. 08-CV-575S, 2010 WL 1630466, at \*7 (W.D.N.Y. Apr. 21, 2010) (dismissing race discrimination claim against the district on the basis that the gravamen of the plaintiff’s complaint was a denial of FAPE; “Allegations that a district was motivated by discrimination to violate the IDEA do not excuse exhaustion.”); *Karlen ex rel. J.K. v. Westport Bd. of Educ.*, 638 F. Supp. 2d 293, 299–300 (D. Conn. 2009) (dismissing Title VI/EP claim of race discrimination in providing special education services because the court lacked “subject matter jurisdiction to consider any claims seeking relief available under IDEA prior to the exhaustion of administrative remedies”); *DiStiso v. Town of Wolcott*, No. 05cv01910, 2006 WL 3355174, at \*3–4 (D. Conn. Nov. 16, 2006) (dismissing race discrimination claim for failure to exhaust); *Mrs. M.*

The most recent example of a decision requiring exhaustion of a race discrimination claim, issued a few days before *Perez*, is *A.W.S. v. Southhampton Union Free School District*.<sup>175</sup> Plaintiff claimed that the district violated Title VI by failing to provide him with special education services, discriminating against him because he is a Shinnecock Indian, arbitrarily denying him Section 504 services, treating Native American students differently, and failing to investigate and remedy his race discrimination claims. The court dismissed the case for failure to exhaust, finding that the plaintiff's claim was essentially for failing to provide services tailored to his needs. The court ruled that "[p]laintiffs' discrimination claim under Title VI amounts to a reframing of their IDEA claim as one of racial discrimination, and therefore also fails for failure to exhaust administrative remedies available under IDEA."<sup>176</sup>

The logic of *Perez* should apply to Title VI/EP claims: plaintiffs who file such claims should not be required to exhaust the IDEA's administrative remedies because the relief they seek is not available under the IDEA.

### C. Law Reform Litigation

This article uses "law reform litigation" to describe litigation that a plaintiff uses as a tool to address and correct systemic violations of the law. The paradigmatic example of such litigation is the effort the NAACP undertook to desegregate public schools, culminating in the landmark decision in *Brown v. Board of Education of Topeka*, which ruled that race-based segregation of children in public schools on the basis of race violated the Fifth and Fourteenth Amendments to the U.S. Constitution of the United States.<sup>177</sup> A good example of special education law reform litigation is *Jose P. v. Ambach*, which led to the reform of the impartial hearing process in New York State.<sup>178</sup> Although the gravamen of IDEA law reform litigation is, by definition, a FAPE denial, IDEA law reform litigation falls within the first two exceptions to the exhaustion requirement for IDEA claims as delineated in Section I.C.<sup>179</sup> It implicates the first because plaintiffs cannot secure systemic relief through the IDEA's administrative

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v. Bridgeport Bd. of Educ., 96 F. Supp. 2d 124, 127, 129, 135 (D. Conn. 2000) (dismissing claims for failure to exhaust Equal Protection claim that the district misidentified Black children as having intellectual disabilities); *Hope v. Cortines*, 872 F. Supp. 14, 23 (E.D.N.Y. 1995) (dismissing for failure to exhaust Title VI claim alleging discriminatory provision of educational services). One court allowed a Title VI claim to proceed even though the plaintiffs did not exhaust the IDEA's administrative remedies. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 271 (3d Cir. 2014) (delineating exceptions to the "strong" exhaustion policy in the IDEA context).

175. *A.W.S.*, 2023 WL 2463820, at \*3.

176. *Id.*

177. *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 298 (1955).

178. *Jose P. v. Ambach*, 669 F.2d 865, 869 (2d Cir. 1982).

179. *See supra* Section I.C.

process<sup>180</sup> and the second because law reform litigation involves “challenging a statute, practice, or procedure that the plaintiff alleges is contrary to law.”<sup>181</sup>

Even though two exceptions to the exhaustion requirement seem to protect law reform litigation from the IDEA’s exhaustion requirement, courts generally have not applied these exceptions to special education law reform litigation. Instead, they frequently dismiss special education law reform litigation for failure to exhaust,<sup>182</sup> although there are exceptions.<sup>183</sup>

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180. *J.A. v. Monroe Twp. Bd. of Educ.*, No. 18-cv-09580, 2019 WL 1760583, at \*7 (D.N.J. Apr. 19, 2019).

181. *See supra* Section I.C.

182. *Carmona v. N.J. Dep’t of Educ.*, No. 22-2874, 2023 WL 5814677, at \*3–4 (3d Cir. Sept. 8, 2023) (rejecting plaintiffs’ claim that the “systemic relief” exception applied); *Student A. v. S.F. Unified Sch. Dist.*, 9 F.4th 1079, 1081, 1085 (9th Cir. 2021) (dismissing for failure to exhaust class action lawsuit alleging systemic violations of the IDEA); *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 17–18, 24–25 (1st Cir. 2019) (dismissing class action claim challenging the district’s alleged separation of children with mental health disabilities into separate schools as violative of the ADA because relief was also available under the IDEA); *Waters v. South Bend Cmty. Sch. Corp.*, 191 F.3d 457 (7th Cir. 1999) (table decision) (dismissing claim pursuant to 42 U.S.C. §§ 1981 and 1983 alleging that the district engages in systemic race discrimination because these cases could be resolved on an individual basis); *Farrell ex rel. E.F. v. N.Y.C. Dep’t of Educ.*, No. 21-cv-419, 2022 WL 4644633, at \*5, \*9 (E.D.N.Y. Sept. 30, 2022) (dismissing class action alleging that the school district violated ADA/Section 504 and the IDEA by placing a child in a separate school because the gravamen of the complaint was a FAPE denial); *Z.Q. v. N.Y.C. Dep’t of Educ.*, No. 20-CV-9866, 2022 WL 903003, at \*3–4, \*7 (S.D.N.Y. Mar. 28, 2022) (dismissing for failure to exhaust class action claim against the district challenging the district’s alleged failure to provide appropriate educational services during and after the pandemic in violation of the IDEA); *D.C. v. Pittsburgh Pub. Schs.*, 415 F. Supp. 3d 636, 645, 651 (W.D. Pa. 2019) (dismissing class claim that the school district improperly used involuntary restraints in violation of the ADA/504, and Title VI for failure to exhaust because plaintiffs did not properly plead a systemic violation); *H.P. v. Bd. of Educ. of Chi.*, 385 F. Supp. 3d 623, 627, 633, 636 (N.D. Ill. 2019) (dismissing for failure to exhaust class action alleging that the district violated the IDEA by failing to provide translated documents for parents with limited English proficiency to use in IEP meetings or interpreters in violation of the IDEA, Title VI, and the ADA); *Barnett v. Baldwin Cnty. Bd. of Educ.*, 60 F. Supp. 3d 1216, 1229–30 (S.D. Ala. 2014) (dismissing claim by children with disabilities that the district engaged in systemic race discrimination regarding disciplinary practices on the grounds that their claims were “inextricably intertwined” with their IEPs); *Mrs. M v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 124, 127, 129–30, 135 (D. Conn. 2000) (dismissing claim that the district misidentified Black children as having intellectual disabilities for failure to exhaust).

183. *Ga. Advoc. Off. v. Georgia*, 447 F. Supp. 3d 1311, 1315, 1325–26, 1328 (N.D. Ga. 2020) (declining to dismiss for failure to exhaust ADA/504 and Fourteenth Amendment challenge to Georgia’s practice of separating children with disabilities into different schools because the gravamen of the complaint was stigmatization which the IDEA does not cover); *Derrick v. Glen Mills Schs.*, No. 19-1541, 2019 U.S. Dist. LEXIS 220610, at \*4–5, \*42–43, \*45 (E.D. Pa. Dec. 19, 2019) (declining to dismiss claim on behalf of students adjudicated as delinquents and placed in defendants’ schools pursuant to the Fourteenth Amendment, IDEA, and ADA/504 on the ground that the claims were so vast in scope that resort to the administrative process would have been futile); *J.A.*, 2019 WL 1760583, at \*2, \*9 (refusing to dismiss for failure to exhaust class action lawsuit alleging that New Jersey violated the

Three decisions show the consequences of limiting law reform litigation as a tool to correct alleged systemic IDEA violations. The first was a class action challenging New York City's alleged failure to provide necessary technology and translation services to children with disabilities during the pandemic, failure to provide the in-person component of IEPs once on-site learning returned, and delay in providing compensatory education services following the pandemic.<sup>184</sup> The court dismissed the case for failure to exhaust, finding that the gravamen of the claims was a FAPE denial. The next case involved a claim of systemic racism in discipline.<sup>185</sup> Plaintiffs sought a declaratory judgment, injunctive relief, and compensatory and punitive damages.<sup>186</sup> The court dismissed the claims of the children with disabilities for failure to exhaust because their claims regarding discipline were "inextricably intertwined" with the development of their IEPs.<sup>187</sup> Finally, the third case represents another example of a short-circuited effort to challenge alleged systemic race discrimination in special education. In *Mrs. M. v. Bridgeport Board of Education*, the plaintiffs filed a class action alleging that the school district engaged in a "pattern and practice of over-identifying minority children as [having intellectual disabilities.]"<sup>188</sup> The court rejected the claim, finding that each purported class member could resolve the issue of misidentification in an impartial hearings.<sup>189</sup>

The logic of *Perez* should also open the courthouse doors for special education law reform litigation because damages and class-wide injunctive relief are not available in the IDEA administrative process. At least one court agrees. In *Powell v. School Board of Volusia County*, citing *Perez*, the court denied a motion to dismiss a class-action lawsuit challenging the school district's alleged discrimination against children with disabilities in violation of the ADA/Section 504.<sup>190</sup> Finding that because the plaintiffs' request for relief included a request for monetary damages, the court ruled that they could proceed.<sup>191</sup>

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time limit for issuing decisions in IDEA cases and that hearing officers are not qualified because plaintiffs alleged systemic violations of the IDEA); *N.S. v. Tenn. Dep't of Educ.*, No. 16-cv-0610, 2017 WL 1347753, at \*11 (M.D. Tenn. Apr. 12, 2017) (ruling that exhaustion applied to class action by children alleging they were injured by the defendants' misuse and overuse of isolation of restraints).

184. *Z.Q.*, 2022 WL 903003, at \*1, \*3.

185. *Barnett*, 60 F. Supp. 3d at 1221.

186. *Id.* at 1128–29.

187. *Id.* at 1129.

188. *Mrs. M. v. Bridgeport Bd. of Educ.*, 96 F. Supp. 2d 124, 127 (D. Conn. 2000).

189. *Id.* at 132.

190. *Powell v. School Bd. of Volusia Cnty.*, 86 F.4th 881, 883 (11th Cir. 2023) (citing *Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 865 (2023)).

191. *Id.*

### CONCLUSION

A complex tapestry of federal laws protects the rights of children with disabilities. Initially, children with disabilities could find protection of their rights through only one of these laws, the IDEA. However, subsequent federal legislation allowed children with disabilities to seek protection for their rights through related federal laws, including Section 504 and the U.S. Constitution, provided that if they were seeking relief that is available under the IDEA, they exhaust the IDEA's administrative process prior to filing suit in federal court. The federal courts enforced this exhaustion requirement very strictly, closing the doors to federal courts to children with disabilities and their families who sought relief pursuant to the ADA, Section 504, Title VI, and the Equal Protection Clause, or for systemic relief through law reform litigation.

In *Perez v. Sturgis Public Schools*, the Supreme Court addressed this by ruling that plaintiffs in ADA/504 cases are not required to exhaust the IDEA's administrative relief if they were seeking relief—specifically monetary damages—not available under the IDEA. This decision has opened the doors of the courthouse for children with disabilities and their families to bring ADA/504 claims for monetary damages, and the logic of *Perez* should also open the courthouse doors for claims of race discrimination in special education and law reform litigation to address allegations of systemic IDEA violations.