No. 01-55032

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DASHIEL PORTER, by and through his Guardian ad Litem Deborah Blair Porter; JOHN PORTER, an individual; DEBORAH BLAIR PORTER, an individual,

Plaintiffs-Appellants

v.

BOARD OF TRUSTEES OF MANHATTAN BEACH UNIFIED SCHOOL DISTRICT; MANHATTAN BEACH UNIFIED SCHOOL DISTRICT; GERALD F. DAVIS, in his Official Capacity as Superintendent of Manhattan Beach Unified School District; LINDA M. JONES, individually; LINDA M. JONES, in her Official Capacity as Director of Pupil Personnel Services of Manhattan Unified School District; BOARD OF EDUCATION OF THE STATE OF CALIFORNIA; CALIFORNIA DEPARTMENT OF EDUCATION ; DELAINE EASTIN, in her Official Capacity as State Superintendent of Public Instruction for the State of California; GERALD F. DAVIS, individually,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANTS AND URGING REVERSAL

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TABLE OF CONTENTS

PAGE

STATEMENT OF THE ISSUES 1

INTEREST OF THE UNITED STATES 2

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 12

1. IN LIGHT OF *WYNER*, PARENTS ARE EXCUSED FROM EXHAUSTING THE DUE PROCESS PROCEDURES NORMALLY REQUIRED BEFORE RESORTING TO FEDERAL COURT 12

2. PARENTS ARE NOT REQUIRED TO EXHAUST THE CRP PROCEDURES BEFORE INVOKING THE JURISDICTION OF THE FEDERAL COURT 17

A. *The Plain Language Of The IDEA Does Not Require Exhaustion Of CRP Procedures Before Filing Suit* 17

B. *The U.S. Department Of Education Has Consistently Taken The Position That Exhaustion Of CRP Procedures Is Not Mandatory* 18

C. *The Courts Of Appeals Agree That Exhaustion Of CRP Procedures Is Not Mandatory* 19

D. *This Court's Discussion Of The CRP Procedures Does Not Support An Exhaustion Requirement* 21

TABLE OF CONTENTS (continued): **PAGE**

E. *There Are Serious Practical Difficulties With Requiring Exhaustion Of The CRP Procedures In Some Or All Actions Under The IDEA* 23

CONCLUSION 28

CERTIFICATE OF COMPLIANCE

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES: **PAGE**

Association for Cmty. Living in Colo. v. *Romer*, 992 F.2d 1040 (10th Cir. 1993) 20

Auer v. *Robbins*, 519 U.S. 452 (1997) 19

Beth V. v. *Carroll*, 87 F.3d 80 (3d Cir. 1996) 27

Board of Educ. v. *Rowley*, 458 U.S. 176 (1982) 4

Capistrano Unified Sch. Dist. v. *Wartenberg*, 59 F.3d 884 (9th Cir. 1995) 19

Cedar Rapids Cmty. Sch. Dist. v. *Garrett F.*, 526 U.S. 66 (1999) 2

Christopher W. v. *Portsmouth Sch. Comm.*, 877 F.2d 1089 (1st Cir. 1989) 20

Cocores v. *Portsmouth Sch. Dist.*, 779 F. Supp. 203 (D.N.H. 1991) 14

CASES (continued):

PAGE

Conley v. *International Bhd. of Elec. Workers*, 810 F.2d 913 (9th Cir. 1987) 26

Darby v. *Cisneros*, 509 U.S. 137 (1993) 18

Dodd v. *Hood River County*, 59 F.3d 852 (9th Cir. 1995) 28

Dreher v. *Amphitheater Unified Sch. Dist.*, 22 F.3d 228 (9th Cir. 1994) 26

El Paso Natural Gas Co. v. *Neztsosie*, 526 U.S. 473 (1999) 28

Elton Orchards, Inc. v. *Brennan*, 508 F.2d 493 (1st Cir. 1974) 25

F.E. Trotter, Inc. v. *Watkins*, 869 F.2d 1312 (9th Cir. 1989) 28

Federated Dep't Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 27

Hacienda La Puente Unified Sch. Dist. v. *Honig*, 976 F.2d 487 (9th Cir. 1992) 15

Hoeft v. *Tucson Unified Sch. Dist.*, 967 F.2d 1298 (9th Cir. 1992) . . . . *passim*

Honig v. *Doe*, 484 U.S. 305 (1988) 15, 16, 19

Jeremy H. v. *Mount Lebanon Sch. Dist.*, 95 F.3d 272 (3d Cir. 1996) 5, 16, 20

Laughlin v. *School Dist. No. 1*, 686 P.2d 385 (Or. Ct. App. 1984) 27

Lucht v. *Molla River Sch. Dist.*, 225 F.3d 1023 (9th Cir. 2000) 5, 22, 23

McCarthy v. *Madigan*, 503 U.S. 140 (1992) 15

Mrs. W. v. *Tirozzi*, 832 F.2d 748 (2d Cir. 1987) 20

CASES (continued): **PAGE**

Quackenbush v. *Allstate Ins. Co.*, 517 U.S. 706 (1996) 24

Richards v. *Fairfax County Sch. Bd.*, 798 F. Supp. 338
(E.D. Va. 1992) 27

School Comm. of Burlington v. *Department of Educ.*,
471 U.S. 359 (1985) 14

Weber v. *Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000) 20

Wyner v. *Manhattan Beach Unified School District*,
223 F.3d 1026 (9th Cir. 2000) . . . . *passim*

Zobrest v. *Catalina Foothills Sch. Dist.*, 963 F.2d 1190 (9th Cir. 1992),
rev'd, 509 U.S. 1 (1993) 16

STATUTES:

20 U.S.C. 1221e-3. 5

Individuals with Disabilities Education Act (IDEA),
20 U.S.C. 1400 *et seq*. . . . . *passim*
20 U.S.C. 1403 16
20 U.S.C. 1406(d)-(f) 2, 18
20 U.S.C. 1412(a)(1) 2
20 U.S.C. 1412(a)(5) 2
20 U.S.C. 1412(d) 2
20 U.S.C. 1414 2
20 U.S.C. 1414(d)(1)(A) 3
20 U.S.C. 1414(d)(1)(B) 3
20 U.S.C. 1414(d)(2)(A) 3
20 U.S.C. 1415 2
20 U.S.C. 1415(b)(6) 3, 13, 23
20 U.S.C. 1415(d)(1)(C) 3, 25

STATUTES (continued) **PAGE**

20 U.S.C. 1415(d)(2)(K)-(L). 3, 25
20 U.S.C. 1415(f) . . . . *passim*
20 U.S.C. 1415(f)(1) 3, 13
20 U.S.C. 1415(g) . . . . *passim*
20 U.S.C. 1415(i) . . . . *passim*
20 U.S.C. 1415(i)(1)(A) 3, 23
20 U.S.C. 1415(i)(2) . . . . *passim*
20 U.S.C. 1415(i)(2)(A) . . . . *passim*
20 U.S.C. 1415(i)(2)(B) 4
20 U.S.C. 1415(i)(3)(B) 22
20 U.S.C. 1415(i)(3)(D)(ii) 22
20 U.S.C. 1415(l) 17, 20
20 U.S.C. 1416(a) 2
20 U.S.C. 1416(a)(1) 2
20 U.S.C. 1417(b) 2, 18

42 U.S.C. 1983 . . . . *passim*

Cal. Educ. Code § 56000 4
Cal. Educ. Code § 56501(a) 4
Cal. Educ. Code § 56501(b)(4) 4
Cal. Educ. Code § 56505(g) 4
Cal. Educ. Code § 56505(i) 4

REGULATIONS:

34 C.F.R. Pt. 300:
300.660-662 4-5
300.660(b) 6
300.661(a) 6
300.661(b)(1) 6
300.661(c)(1) & (2) 6
300.661(c)(2) 6
300.661(c)(3) 6

REGULATIONS (continued): **PAGE**

45 Fed. Reg. 22,528 (1980) 5

57 Fed. Reg. 30,328 (1992) 5

64 Fed. Reg. 12,646 (1999) 5

Calif. Code Regs. tit. 5,
§ 4610 6
§ 4621 6
§ 4650(a)(i)-(viii) 7
§ 4652 6
§ 4660 7
§ 4662 7
§ 4664 7
§ 4665 7
§ 4670 7

MISCELLANEOUS: **PAGE**

121 Cong. Rec. 37,415 (1975) 13

Letter from Office of Special Education Programs to Johnson,
18 Ind. Disab. Educ. L. Rep. 589 (Dec. 4, 1991) 19

Letter from Office of Special Education Programs to Kohn,
17 Educ. for the Handicap. L. Rep. 522 (Feb. 13, 1991) 14

Letter from Office of Special Education and Rehab. Servs. to Van Buiten,
Educ. for the Handicap. L. Rep. 211:429A (June 17, 1987) 14

Office of Special Education Programs Memorandum 00-20
(July 17, 2000) 19, 26

MISCELLANEOUS (continued): **PAGE**

Office of Special Education Programs Memorandum 94-16,
21 Ind. Disab. Educ. L. Rep. 85 (Mar. 22, 1994) 19

Wright & Miller, *Federal Practice & Procedure: Jurisdiction & Related Matters* (2d ed. 1992 & Supp.) 27

STATEMENT OF THE ISSUES

The Individuals with Disabilities Education Act (IDEA) authorizes parents of children with disabilities to file a civil action in federal court after exhausting administrative "due process" procedures identified in the statute. The United States will address the following questions:

1. Whether a district court has jurisdiction over a civil action alleging violations of the IDEA when the complaining party has not exhausted the "due process" procedures identified in the statute as a precondition to filing suit because it would be futile to do so in light of binding case law determining that those procedures have no jurisdiction to address the violations.

2. Whether a district court has jurisdiction over a civil action alleging violations of the IDEA when the complaining party has not exhausted an administrative complaint process offered by the State that is not identified in the statute as a precondition to filing suit but may provide some relief.

INTEREST OF THE UNITED STATES

The Department of Education has responsibility for the federal administration and enforcement of the IDEA. See 20 U.S.C. 1412(d) (approval of state eligibility documents), 1416(a) (withholding federal funds), 1417(b) (issuing regulations), 1406(d)-(f) (issuing policy letters and other interpretive guidance). The Department of Justice may, on referral from the Department of Education, bring actions to enforce the IDEA. See 20 U.S.C. 1416(a)(1). Because of our interest in the proper interpretation of the statute, the United States has participated in a number of IDEA cases. See, *e.g.*, *Cedar Rapids Cmty. Sch. Dist.* v. *Garrett F.*, 526 U.S. 66 (1999). This brief is filed pursuant to Fed. R. App. P. 29(a).

STATEMENT

1. The IDEA, 20 U.S.C. 1400 *et seq*., requires States that receive IDEA funding to assure that children with disabilities are provided a free appropriate public education designed to meet their unique needs in the least restrictive environment. *Id*. at 1412(a)(1) & (5). The IDEA also requires States to establish procedural mechanisms to resolve disputes between parents and school districts regarding what special education and related services are appropriate for any eligible individual child. *Id*. at 1414-1415.

The first forum for addressing the educational needs of a child with a disability is the individualized education program (IEP) team, composed of the child's parents along with various teachers, other school personnel, and

educational experts. *Id*. at 1414(d)(1)(B). That team develops a written IEP that includes a statement of the special education and related services to be provided to the child. *Id*. at 1414(d)(1)(A). The school must put an agreed-upon IEP into effect. *Id*. at 1414(d)(2)(A).

Parents who cannot reach agreement with the school system on an IEP or believe that the school district is not complying with the agreed-upon IEP may seek a "due process hearing." The IDEA requires each State to provide parents or guardians "an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id*. at 1415(b)(6). "Whenever a complaint has been received under subsection (b)(6) * * * of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing * * *." *Id*. at 1415(f)(1). States are free to create either a one- or two-tier hearing system. *Id*. at 1415(f)(1), (g). If a State creates a one-tier hearing system, the "due process hearing" is conducted by the state education agency, which issues a "final" decision. *Id*. at 1415(i)(1)(A). If a State creates a two-tier hearing system, then the initial hearing is conducted by the local education agency, the decision of which either party may appeal to the state education agency. *Id*. at 1415(g). The IDEA requires that this process, including available appeals, be explained to parents in writing upon the filing of an administrative complaint. *Id*. at 1415(d)(1)(C) & (d)(2)(K)-(L).

The IDEA provides that any party aggrieved by a "final" decision of the state education agency "shall have the right to bring a civil action with respect to the complaint presented 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 without regard to the amount in controversy." *Id.* at 1415(i)(2)(A). While the court must receive the records of the proceeding and give "due weight" to the hearing officer's decision, it is required to hear additional evidence at the request of a party and must base its decision on the preponderance of the evidence. See *Board of Educ.* v. *Rowley*, 458 U.S. 176, 206 (1982); 20 U.S.C. 1415(i)(2)(B).

California has enacted legislation to comply with the IDEA. See Cal. Educ. Code § 56000. State law provides that a parent may initiate a "due process hearing" regarding the provision of a free appropriate public education for a child with a disability and that such a hearing will be conducted "at the state level." *Id.* § 56501(a), (b)(4). The decision of the hearing officer "shall be the final administrative determination and binding on all parties" unless a party "exercis[es] the right to appeal the decision to a court of competent jurisdiction * * * within 90 days of receipt of the hearing decision." *Id.* § 56505(g), (i).

2. Distinct from the "due process hearings" required by the IDEA, the U.S. Department of Education requires state education agencies to establish a separate State-administered "complaint resolution procedure" (CRP). These procedures are not required by the IDEA. Instead, the U.S. Department of Education requires the CRP procedures pursuant to its general rulemaking authority. See 34 C.F.R.

300.660-662 (citing 20 U.S.C. 1221e-3 as authority for rules); *Lucht* v. *Molla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th Cir. 2000). They originated as part of a general requirement under the Education Department General Administrative Regulations (EDGAR) that state education agencies adopt procedures for resolving complaints that the State or a subgrantee was violating *any* federal statute. See 45 Fed. Reg. 22,528 (1980); E.R. 211.[1]

In 1992, the Department of Education removed the requirement that States have such procedures from EDGAR and placed it in regulations for specific programs that the Department believed appropriate. See 57 Fed. Reg. 30,328 (1992) (E.R. 219) (noting that CRP procedures would be required in regulations for the IDEA as well as various programs designed to assist disadvantaged children, including the Migrant Education Program and the Program for Neglected or Delinquent Children); *Jeremy H.* v. *Mount Lebanon Sch. Dist.*, 95 F.3d 272, 283 n.19 (3d Cir. 1996) (describing regulatory history). While earlier versions of the CRP regulations authorized an aggrieved parent to seek review of a final state CRP decision from the U.S. Secretary of Education, see *Hoeft* v. *Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992), this avenue for appealing CRP determinations was repealed in 1999, see 64 Fed. Reg. 12,646 (1999).

Under the CRP procedure, as currently written, the state education agency must accept complaints from individuals that a public agency is violating the

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[1] "E.R. __" refers to the pages of plaintiffs-appellants' Excerpts of Record. "Add. __" refers to the pages of the Addendum attached to with this brief.

IDEA and must investigate and issue a written decision regarding the complaint within 60 days (absent "exceptional circumstances"). 34 C.F.R. 300.661(a) & (b)(1). The regulations specifically exclude from this procedure any complaint "that is also the subject of a [pending] due process hearing" or "that has previously been decided in a due process hearing." *Id.* at 300.661(c)(1) & (2). However, if a complainant chooses to use the CRP mechanism, "[a] complaint alleging a public agency's failure to implement a due process decision must be resolved by" the state education agency, *id.* at 300.661(c)(3), and the agency must address "[h]ow to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child." *Id.* at 300.660(b).

The California Department of Education has adopted regulations in an effort to comply with the federal CRP regulations. These state regulations provide a "uniform system of complaint processing" regarding local agencies' compliance with various programs that receive state or federal funding, including the IDEA. Cal. Code Regs. tit. 5, § 4610. The state regulations provide that, as a general matter, local agencies are required to establish their own complaint mechanisms for programs receiving state or federal funding; adverse local decisions can be appealed by the complainant to the state Superintendent of Public Instruction. *Id.* §§ 4621, 4652. But apart from its appellate role, the state Superintendent has original jurisdiction (described as a requirement to "directly intervene") when the complaint involves one of a subset of these programs, including the IDEA.

Id. § 4650(a)(i)-(viii). Under state regulations, when a complaint involves one of these programs, the state Department of Education must attempt to mediate or, if that fails, investigate and submit a report to the state Superintendent within 60 days containing findings and required corrective actions, if necessary. *Id.* §§ 4660, 4662, 4664. Either party may appeal the decision to the state Superintendent. *Id.* § 4665. The Superintendent may enforce her decision by withholding funds or going to state court to obtain an order compelling the local school district to comply with the Superintendent's decision. *Id.* § 4670. There is no provision in the state regulations stating that a parent may seek judicial review of an adverse determination by the Superintendent or may enforce the Superintendent's order in any forum.

3. Dashiell "Dash" Porter is a child with autism enrolled in the Manhattan Beach Unified School District. After being unable to resolve their disagreements with the school district regarding Dash's IEP, the Porters requested a due process hearing in January 1999. After a hearing by the California Special Education Hearing Office, the hearing officer concluded on June 30, 1999, that the school district failed to provide Dash with appropriate special education during the 1997-1998 school year and the summer of 1998. The hearing officer found that "[t]hese failures constituted significant denials of [Dash's federal right to a free appropriate public education] which impeded Dash's progress in academics and socialization." E.R. 129, 131, 147.

As a remedy, the hearing officer determined that "compensatory education shall be provided over the course of the 1999-2000 school year" and that it "shall include social skills instruction and/or modeling, and remedial instruction in areas of academic deficit." But the hearing officer, citing an inadequate record, left it to the IEP team to determine the appropriate form of instruction "necessary to effectuate the purpose of compensating Dash for the previous denials of" a free appropriate public education. The hearing officer thus ordered the IEP team to convene within 30 days "to determine the appropriate form of compensatory education to which Dash is entitled." The hearing officer's decision informed the parties that the hearing decision could be appealed through a civil action in court within 90 days. No appeal was made by either party. E.R. 147-149.

According to the complaint filed in federal court, the school district violated the hearing officer's order in a number of ways: the IEP team did not convene until 71 days after the hearing officer's decision; the school district did not provide any compensatory education for Dash's academic deficits during the 1999-2000 school year; and the school district provided compensatory education only for Dash's socialization deficits starting in January 2000. In June 2000, the Porters began sending Dash to an outside program to address his academic deficits. E.R. 114 ¶ 29, 113 ¶¶ 26 & 28, 119 ¶¶ 48-50.

4. In August 2000, the Porters filed suit in federal district court against the school district, various state agencies, and several officials sued in their official and individual capacities. The complaint alleged that defendants had violated the

IDEA (asserting jurisdiction both through the IDEA's express cause of action and 42 U.S.C. 1983), the Due Process and Equal Protection Clauses of the Fourteenth Amendment (through Section 1983), and state law. Plaintiffs sought an injunction ordering the local school district to comply with the state hearing officer's decision, reimbursement for instructional services the Porters had paid for due to the district's failure to comply with the decision, additional compensatory services for his socialization deficits to make up for the belated compliance, and court involvement (through a special master) in future IEPs. Plaintiffs also requested compensatory damages from the officials in their individual capacities. E.R. 109-110 ¶¶ 9-13, 120-124 ¶¶ 61-88, 124-127.

Defendants moved to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction, arguing (1) that the Porters had failed to exhaust their administrative remedies and (2) that the Section 1983 and state law claims were barred by Eleventh Amendment immunity. They also moved to dismiss the federal claims under Fed. R. Civ. P. 12(b)(6), arguing that (1) the IDEA cannot be enforced through Section 1983; (2) the complaint failed to allege acts or omissions by the named officials that caused the harm; and (3) the officials in their individual capacities are entitled to qualified immunity. E.R. 186-187.

The district court granted defendants' motion to dismiss for lack of subject-matter jurisdiction. It held that the "proper avenue by which to enforce [hearing officer] orders" is for parents to file a CRP complaint with the California Department of Education. The court reasoned that "viewed in light of the purpose

of the exhaustion requirement, this avenue of administrative relief is preferable" to a suit in court. The court also dismissed the Section 1983 claims against the state agencies and school district because they were barred by the Eleventh Amendment. While holding that Section 1983 claims against the officials in their individual capacities were not barred by the Eleventh Amendment, the court dismissed them for failure to exhaust. Thus, except for the claims barred by the Eleventh Amendment, the court dismissed the complaint without prejudice, noting that plaintiffs could re-file after exhausting the CRP. E.R. 194-195, 198-199, 204.

SUMMARY OF ARGUMENT

The Individuals with Disabilities Education Act (IDEA) requires States that accept federal IDEA funds to provide each child with a disability a "free appropriate public education," composed of special education and related services, both provided in the least restrictive environment. To promptly resolve disputes between parents and a school district regarding the school district's obligations under the IDEA, the statute requires States to provide parents of children with disabilities an "impartial due process hearing" before a hearing officer empowered to provide all appropriate relief. The IDEA provides that a party "aggrieved" by the decision of the hearing officer can seek review in federal court. This option, invoked in only a small fraction of cases, assures either party the right to have a federal court determine whether federal rights guaranteed by the IDEA have been violated and what constitutes appropriate relief.

It is settled tenet of IDEA law (as well as administrative law more generally) that if recourse to a due process hearing would be futile because the hearing officer cannot provide any relief, a party may proceed directly to federal court to challenge the action or inaction of the local school district. This Court held in *Wyner* v. *Manhattan Beach Unified School District*, 223 F.3d 1026 (2000), that California law does not grant hearing officers jurisdiction over claims that prior hearing officer decisions are not being implemented. As this was the gravamen of plaintiffs' complaint, plaintiffs did not need to exhaust the due process hearing the IDEA normally requires before filing their federal action.

The district court erroneously dismissed the complaint for failure to exhaust a separate administrative mechanism not referred to in the IDEA. The plain language of the statute does not require such exhaustion; the U.S. Department of Education, which is charged with administering the IDEA, has consistently interpreted the IDEA not to require such exhaustion; and the other courts of appeals to address the issue have held that such exhaustion is not required. The district court's contrary holding will lead to a host of practical problems for parents and for the courts. The judgment should thus be reversed and the case remanded for further proceedings on the merits.

ARGUMENT

The ability of parents to obtain prompt redress for violations of rights created by the Individuals with Disabilities Education Act (IDEA) is critical. Delay in providing children with disabilities the individualized educational services federal law requires can cause substantial, if not irreparable, harm. The administrative exhaustion provisions of the IDEA reflect Congress's judgment regarding the appropriate timing for judicial involvement. Their proper interpretation is crucial to assuring that the IDEA's substantive rights are vindicated.

I

IN LIGHT OF *WYNER*, PARENTS ARE EXCUSED FROM EXHAUSTING THE DUE PROCESS PROCEDURES NORMALLY REQUIRED BEFORE RESORTING TO FEDERAL COURT

In the district court, defendants argued that the Porters were required to exhaust the "impartial due process hearing" authorized under Section 1415(f) of the IDEA before filing this action to enforce the hearing officer's previous decision (E.R. 187). The district court did not address this argument. But because it is important to understand how the IDEA is supposed to function in such situations, and because defendants may raise this argument as an alternative grounds for affirmance of the judgment, we first explain why demanding exhaustion of due process hearings in this case cannot be reconciled with this Court's decision in *Wyner* v. *Manhattan Beach Unified School District*, 223 F.3d 1026 (2000).

The IDEA creates a federal cause of action for "[a]ny party aggrieved by the [final] findings and decision" of a hearing officer in a due process proceeding. 20 U.S.C. 1415(i)(2)(A). In this case, the Porters were not aggrieved by the hearing officer's initial unappealed decision awarding them relief. To the contrary, they were satisfied by the relief awarded. But that is not the end of the inquiry. For the school district's subsequent failure to fully comply with a hearing officer's decision is itself a matter that triggers the right to another due process hearing.

A hearing officer's determination regarding what education services the IDEA requires by necessity relates to the provision of a "free appropriate public education" for the child. Thus, the failure of the school district to comply with the hearing officer's decision is a failure to provide the child the "free appropriate public education" to which he or she has been determined entitled under the IDEA. That failure constitutes an independent wrong that itself can be the basis of a complaint and "due process hearing" because it involves a "matter relating to * * * the provision of a free appropriate public education to such child." 20 U.S.C. 1415(b)(6) & (f)(1); see 121 Cong. Rec. 37,415 (1975) (Sen. Williams) ("it should be clear [from the words 'free appropriate public education'] that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled"). To assure that the right to a hearing is not illusory, the IDEA requires that the hearing officer possess all authority necessary to grant appropriate relief for complaints over which it has jurisdiction. See, *e.g.*, *Cocores* v. *Portsmouth Sch. Dist.*, 779 F.

Supp. 203, 205-206 (D.N.H. 1991); Letter from Office of Special Education and Rehabilitative Services to Van Buiten, Educ. for the Handicap. L. Rep. 211:429A (June 17, 1987) (Add. 44); Letter from Office of Special Education Programs to Kohn, 17 Educ. for the Handicap. L. Rep. 522 (Feb. 13, 1991) (Add. 42); cf. *School Comm.* v. *Department of Educ.*, 471 U.S. 359, 369 (1985).

If the hearing officer resolves the claim on the merits and has the authority to compel compliance, the due process hearing may fully resolve the problem. If, however, the hearing officer holds that the school district is in compliance, or finds non-compliance but does not provide an appropriate remedy (either because he does not have sufficient authority or does not use that authority appropriately), the parents clearly would be "aggrieved" by the "decision" of the hearing officer and could then immediately file suit in federal court under Section 1415(i)(2)(A).

In this case, the Porters claimed that the school district failed to comply with the hearing officer's previous decision (E.R. 113-114 ¶¶ 25-29, 120 ¶¶ 57-58). For the reasons discussed above, it is our view that the IDEA requires the hearing officer to have jurisdiction over such a complaint and to be empowered to award relief.[2] However, this Court held to the contrary in *Wyner,* 223 F.3d at 1028-1029, finding that a California hearing officer has no jurisdiction to review compliance with such orders.

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[2] To the extent state law limits the authority of the hearing officer to enforce previous hearing officer decisions, it would be "void[ed]" by the IDEA. *Hacienda La Puente Unified Sch. Dist.* v. *Honig*, 976 F.2d 487, 492-493 (9th Cir. 1992).

In these circumstances, where resort to the due process hearing would be futile because, as a matter of law, it could not provide the parents with any relief, it is settled that the parents may proceed directly to court under Section 1415(i)(2) without seeking relief from the hearing officer. See generally *McCarthy* v. *Madigan*, 503 U.S. 140, 148, 155 (1992) (stating general rule of administrative law that no exhaustion required when agency was not empowered to grant relief sought); *id*. at 156 (Rehnquist, C.J., concurring in judgment) (same); *Hoeft* v. *Tucson Unified Sch. Dist*., 967 F.2d 1298, 1303 (9th Cir. 1992) (IDEA incorporates general exceptions to exhaustion requirements).

For example, in *Honig* v. *Doe*, 484 U.S. 305, 327 (1988), the Court held that the IDEA limited a hearing officer's authority unilaterally to modify the placement of a child with a disability once administrative proceedings are pending, but that the statute did not so limit a court's authority. Under these circumstances, the Court explained, a school district that wished to remove the child from his current placement could proceed directly to court under Section 1415(i) of the IDEA – then codified at Section 1415(e) – without exhausting due process procedures because parties "may bypass the administrative process where exhaustion would be futile or inadequate." *Ibid*; see also *Zobrest* v. *Catalina Foothills Sch. Dist*., 963 F.2d 1190, 1192 & n.2 (9th Cir. 1992) (parents could proceed to court under Section 1415(e) – now codified at Section 1415(i) – without exhaustion of the IDEA's due process proceedings when State has taken definitive position that

would make proceedings futile), rev'd on other grounds, 509 U.S. 1 (1993).[3]

Although we respectfully disagree with *Wyner*, it is of course controlling precedent. Under *Wyner*, at the time the Porters filed their complaint, recourse to due process proceedings to require the local school district to comply with an order of the hearing officer was futile as a matter of law. Thus, exhaustion of due process procedures was not necessary before the Porters brought suit alleging violations of the prior decision and the district court's order of dismissal for failure to exhaust cannot be sustained on that ground.

II

PARENTS ARE NOT REQUIRED TO EXHAUST THE CRP PROCEDURES BEFORE INVOKING THE JURISDICTION OF THE FEDERAL COURT

The Porters also were not required to exhaust the complaint resolution procedure (CRP) offered by the California Department of Education before bringing a lawsuit in federal court alleging a violation of the IDEA. The clear statutory text of the IDEA, consistent administrative interpretation, and established

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[3] Courts have held that 42 U.S.C. 1983 may also be used to enforce the final decision of the hearing officer. See *Jeremy H.* v. *Mount Lebanon Sch. Dist.*, 95 F.3d 272, 279 (3d Cir. 1996) (so holding and collecting cases). Some courts have suggested that Section 1983 is the *only* means of enforcing the hearing officer's decision. Those decisions are incorrect as they fail to take into account the interpretation of Section 1415(i)(2) established by *Honig*. These different bases for action could have significant remedial consequences in States (such as California and Hawaii) where the local school districts have been found to be entitled to the States' Eleventh Amendment immunity. Compare 20 U.S.C. 1403 (removing Eleventh Amendment immunity for suits under the IDEA).

case law all compel the conclusion that the district court erred in imposing such an exhaustion requirement.

A. *The Plain Language Of The IDEA Does Not Require Exhaustion Of CRP Procedures Before Filing Suit*

Subsection 1415(f) of the IDEA requires the State to provide parents an "impartial due process hearing." Subsection 1415(g) of the IDEA permits the State to provide a second-tier due process hearing (an option California has not elected). The IDEA states that "[a]ny party aggrieved by the findings and decision made under subsection (f) * * * who does not have the right to an appeal under subsection (g) of this section * * * shall have the right to bring a civil action * * * in any State court of competent jurisdiction or in a district court of the United States." 20 U.S.C. 1415(i)(2)(A). The plain language of Section 1415(i)(2)(A) thus makes clear that the "due process hearing" required by subsections (f) and (g) is the *only* exhaustion requirement the IDEA imposes before a party may file a civil action in federal court.

This reading is confirmed by Section 1415(l), which provides that claims under other statutes that protect the rights of children with disabilities (such as the Americans with Disabilities Act and Section 504 of the Rehabilitation Act) are not precluded by the IDEA, but "that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." In both

these provisions, then, Congress specifically required that only the procedures of (f) and (g) need be exhausted before suits may be brought in federal court under any statute that provides the federal cause of action, and then only if the hearing officer can provide relief.

When Congress identifies with specificity the exhaustion requirements that must be met before a court obtains jurisdiction, courts are not permitted to impose additional requirements. See *Darby* v. *Cisneros*, 509 U.S. 137, 146-147 (1993). On its face, recourse to the state regulatory procedure administered by the California Department of Education to comply with the CRP regulations is not a procedure under subsections (f) or (g) of Section 1415 of the IDEA. Thus, the plain language of the IDEA makes unambiguous that the CRP procedures need not be exhausted before suit is filed to enforce the IDEA.

B. *The U.S. Department Of Education Has Consistently Taken The Position That Exhaustion Of CRP Procedures Is Not Mandatory*

The U.S. Department of Education is the federal agency responsible for the administration of the IDEA and is charged with issuing regulations and other interpretive guidance to state recipients. See 20 U.S.C. 1417(b), 1406(d)-(f). The requirement of each State that accepts IDEA funds to have a CRP procedure is also a product of the Department's regulations. See pp. 4-6, *supra*. Because it is the author of these regulations, the Department's interpretation of them is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); see also *Honig* v. *Doe*, 484 U.S. 305, 325

n.8 (1988) (deferring to Department of Education's interpretation of the IDEA); *Capistrano Unified Sch. Dist.* v. *Wartenberg*, 59 F.3d 884, 894 (9th Cir. 1995).

The U.S. Department of Education has consistently explained that the CRP and due process procedures are distinct and that "[p]arents may use (*but are not required to use*) the [CRP] procedures – in addition to the due process hearing system" established by the IDEA. Office of Special Education Programs Memorandum 00-20 (July 17, 2000) (Add. 4) (emphasis added); see also Letter from Office of Special Education Programs to Johnson, 18 Ind. Disab. Educ. L. Rep. 589 (Dec. 4, 1991) (Add. 39) (CRP is a "separate, distinct, [and] independent" procedure from the due process hearing); Office of Special Education Programs Memorandum 94-16, 21 Ind. Disab. Educ. L. Rep. 85 (Mar. 22, 1994) (Add. 36) (similar).

C. *The Courts Of Appeals Agree That Exhaustion Of CRP Procedures Is Not Mandatory*

The plain meaning of the IDEA and the interpretation of the agency charged with its administration are consistent with the holdings of the other circuits that have addressed the issue. In *Jeremy H.* v. *Mount Lebanon School District*, 95 F.3d 272 (3d Cir. 1996), the court rejected a claim that plaintiff must exhaust CRP procedures before filing suit in federal court. It held that "the text of [the federal regulations requiring the CRP procedures] and the various statements made in the Federal Register as they took their present shape, both evince an expectation that invocation of the complaint procedures they establish will be elective, not

mandatory." *Id*. at 283. Similarly, in *Mrs. W.* v. *Tirozzi*, 832 F.2d 748, 758 (2d Cir. 1987), the court held that "[i]n light of the complete absence of a statutory directive or decisional law requiring CRP exhaustion prior to commencing an action under § 1415(e) [now codified at § 1415(i)]," no such exhaustion was required. "Significantly, § 1415(f) [now codified at § 1415(l)] does not specify, directly or by incorporating its legislative history, exhaustion of possible CRP remedies. In fact, research has unearthed no statute or regulation that requires exhaustion of CRP remedies prior to commencing a [federal] action based on alleged [IDEA] violations." *Ibid*.

This understanding of the statute and regulations is also consistent with the holdings of courts of appeals in the converse situation, in which plaintiffs have unsuccessfully claimed that filing a complaint through the CRP met their general obligation to exhaust the IDEA's "due process" requirements. See *Weber* v. *Cranston Sch. Comm.*, 212 F.3d 41, 54 (1st Cir. 2000); *Association for Cmty. Living in Colo.* v. *Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993); *Christopher W.* v. *Portsmouth Sch. Comm.*, 877 F.2d 1089, 1095 n.4 (1st Cir. 1989).

Thus, there is a consensus in the other courts of appeals that CRP procedures are not interchangeable with the "due process" hearings required by the IDEA and need not be exhausted in order for parents to seek judicial relief.

D. *This Court's Discussion Of The CRP Procedures Does Not Support An Exhaustion Requirement*

This Court's previous discussions of the CRP procedures support the understanding that utilization of these procedures is optional and is not a pre-condition to filing a civil action in federal court. In *Hoeft* v. *Tucson Unified School District*, 967 F.2d 1298 (1992), this Court noted that the CRP (then called EDGAR) procedure was one way that "parents *may* bring complaints to the state education agency" but that it was "*not* a substitute for the administrative [due] process prescribed by the IDEA," and simply served "a complementary function." *Id*. at 1308 (emphases added). It suggested in dictum that there might be cases in which exhaustion of the CRP procedures could substitute for exhausting the due process remedies, but declined to address the issue because plaintiffs had abandoned their CRP complaint. *Ibid*. There is nothing in the case that suggests that a plaintiff *must* exhaust CRP procedures.

In *Wyner* v. *Manhattan Beach Unified School District*, 223 F.3d 1026 (2000), this Court held that a California special education hearing officer did not have "jurisdiction" to hear a complaint that a school district was not complying with a hearing officer's prior order. In doing so, the Court noted that state regulations, consistent with CRP, provided a means for the state agency to enforce the hearing officer's orders apart from the due process hearing and stated that the state regulations "were promulgated to ensure compliance with the IDEA." *Id*. at 1029. Whatever the merits of the panel's ultimate holding regarding the hearing

officer's lack of jurisdiction (see pp. 13-15, *supra*), *Wyner* cannot be read to hold that CRP was a due process proceeding identified in Subsections 1415(f) or (g) of the IDEA or that parents must utilize the CRP before filing a suit. Instead, it simply held that, under California law, due process procedures were not available to enforce a prior hearing officer's ruling.

Finally, in *Lucht* v. *Molalla River School District*, 225 F.3d 1023 (2000), this Court held that a plaintiff could recover attorneys fees for an IEP meeting convened as a result of a CRP decision. The IDEA authorizes attorneys fees for any administrative proceeding "brought under this section," 20 U.S.C. 1415(i)(3)(B), and for an IEP meeting "convened as a result of an administrative proceeding or judicial action," *id.* at 1415(i)(3)(D)(ii). The Court held that "to the extent that a CRP complaint addresses a dispute that is subject to resolution in a § 1415 due process hearing, the CRP is a proceeding 'brought under' § 1415." 225 F.3d at 1029.

But this Court made clear that its limited holding was based on Congress's failure to make specific which types of proceedings fell within the attorneys fees provision and stated that if Congress referenced specific subsections (as it did in the exhaustion provisions) instead of the whole section (as it did in the attorneys fees provision), then only those specific provisions would govern. Contrasting the attorneys fees provision with the exhaustion requirements of Section 1415(i), this Court explained that "in the same subsection of § 1415 that includes the attorney fees provision, Congress exhibited its ability to refer expressly to the impartial due

process hearing procedures that are contained in §1415(f)" and that "[i]f Congress had wanted to provide for the recovery of attorney fees only in those cases in which a due process hearing was conducted, it could have worded § 1415(i)(3)(B) in the same fashion as § 1415(i)(1)(A) and (i)(2)(A)." *Id.* at 1027. Thus, this Court acknowledged that Congress had specifically limited the exhaustion requirement of Sections 1415(i) to the due process hearings of Section 1415(f) and did not include the CRP proceedings.

More generally, this Court acknowledged the distinctions between the CRP and due process proceedings, noting that "[u]nlike the impartial due process hearing that is expressly provided in § 1415 and is detailed in the regulations promulgated to it, the CRP is described only in the regulations." *Id.* at 1026 (citation omitted). It also noted that CRP and due process procedures were "alternative (or even serial) means of addressing a § 1415(b)(6) complaint." *Id.* at 1028. At no point did this Court suggest the CRP procedures were mandatory.

E. *There Are Serious Practical Difficulties With Requiring Exhaustion Of The CRP Procedures In Some Or All Actions Under The IDEA*

However efficacious CRP procedures may be in a given case, they are not ones the IDEA itself identified as needing to be exhausted before a civil suit can be filed; thus, failure to utilize them cannot be the basis for a dismissal.

We do not disparage the district court's desire to avoid ruling on questions involving educational issues for a child with a disability when there appeared to be an available state process that was apparently able to provide plaintiffs with some

timely relief.[4] But courts cannot dismiss an action, even temporarily, simply because alternative fora are available that might lift the burden of decision from the court. Cf. *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress"). This should be especially true in situations involving education of children, in which delay can often lead to substantial, if not irreparable, injury to a child's development. Cf. *Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493, 498 (1st Cir. 1974).

Permitting the imposition of an additional exhaustion requirement would also undermine the notice of procedural rights Congress required the State to provide parents when they file a complaint. States are required to provide clear

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[4] We say "appeared" and "apparently" in the preceding sentence because it has been the experience of the U.S. Department of Education that the existence of the CRP procedures on paper does not guarantee that a complaint system in fact functions in a timely and effective manner. For example, the Department found in 1999 (consistent with earlier findings in 1988, 1992, and 1996) that California failed to resolve CRP complaints in a timely manner (82% of complaints were not resolved within the 60 days mandated by federal and state regulations) and that California "does not have effective methods to ensure that [school districts] correct all noncompliance that [it] finds in resolving complaints" and that "in many cases corrective action had not been completed several months, and in some instances even years, after" the time ordered by the State (Add. 16, 17). While there have been improvements since that time, the California Department of Education remains a "high-risk grantee" because of "long-standing noncompliance with the requirements of" the IDEA (Add. 28). These real-life data (unknown to the district court) point to the problem inherent in permitting courts to impose additional exhaustion requirements on parties in order to further the "purposes" of the statute.

notice about what avenues of relief are available to parents, including appeals. See 20 U.S.C. 1415(d)(1)(C) & (d)(2)(K)-(L). The notice of procedural rights distributed by California, for example, informs parents that "[t]he hearing decision is final and binding on both parties. Either party can appeal the hearing decision by filing a civil action in state or federal court within 90 days of the final decision" (E.R. 25). The notice does not mention the CRP procedures as a condition precedent to filing suit in any situation. Similarly, a brochure describing the CRP procedures issued by California explains that "[y]ou have the right to present a complaint relating to the provision of a free appropriate public education" at a due process hearing; in contrast, it states that "[i]f you believe your child's school district has violated the law, you *may* file a complaint with the California Department of Education" (E.R. 82-83 (emphasis added)).

Moreover, even if a district court had some measure of discretion to require the exhaustion of certain additional administrative remedies, there are strong policy reasons against sanctioning such extra-textual exhaustion requirements for suits involving alleged violations of the IDEA. This is an area of law where speed and clarity are important. Because this Court appears to view exhaustion as a question of subject-matter jurisdiction, see *Dreher* v. *Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 235 (9th Cir. 1994); *Hoeft*, 967 F.2d at 1302, apparently the question of exhaustion cannot be waived by the parties and would have to be raised by the district court and this Court *sua sponte*. Significant time and litigation resources may be wasted by filing a lawsuit which later turns out to be

barred because of a failure to go through a CRP process previously regarded as permissive.

Permitting the district courts to require exhaustion of the CRP procedures could also leave parents without a judicial remedy. It is an open question whether a decision of a state agency made in a CRP proceeding can be judicially reviewed at all, much less challenged in an IDEA civil action. See Add. 7 (U.S. Department of Education memorandum noting that federal regulations "are silent as to whether a state complaint decision may be appealed"). Congress provided in the IDEA that an aggrieved person "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section." 20 U.S.C. 1415(i)(2)(A). The few courts to address the issue have reached divergent results whether a complaint filed under CRP is "presented pursuant to" Section 1415. Compare *Beth V.* v. *Carroll*, 87 F.3d 80 (3d Cir. 1996), with *Laughlin* v. *School Dist. No. 1*, 686 P.2d 385 (Or. Ct. App. 1984); *Richards* v. *Fairfax County Sch. Bd.*, 798 F. Supp. 338 (E.D. Va. 1992).

Nor is it clear that California law provides a means for parents to challenge an adverse CRP decision or, if they prevail in the CRP proceeding, to enforce the decision if the school district continues not to comply and the State does nothing. Even assuming that parents could rely on California's "administrative mandamus" action (akin to a suit under the Administrative Procedures Act) in at least some circumstances, that would still defeat Congress's intent to make a *federal* forum available for resolving parents' complaints of noncompliance with the IDEA. And

even if parents found a court with jurisdiction to hear their claims that a school district failed to comply with the hearing officer's decision after a CRP decision (either through the IDEA's cause of action, Section 1983, or under state law), difficult questions regarding the appropriate statute of limitations (and related accrual and tolling issues) would leave parents uncertain about the deadlines for filing such a suit.

For all these reasons, the district court erred in dismissing this suit for failing to exhaust the CRP procedure.[5]

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[5] The district court dismissed plaintiffs' claims (save for those barred by the Eleventh Amendment) *without* prejudice (E.R. 205). The merits-related grounds for dismissal raised below would result in a judgment of dismissal *with* prejudice for defendants. See Fed. R. Civ. P. 41(b); *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 399 n.3 (1981); *F.E. Trotter, Inc.* v. *Watkins*, 869 F.2d 1312, 1318 (9th Cir. 1989). Since defendants did not file a cross-appeal, this Court is not free to address those arguments in the first instance, as it would expand the judgment in their favor. See 15A Wright & Miller, *Federal Practice & Procedure: Jurisdiction & Related Matters* § 3904, at 196-198 & n.7 (2d ed. 1992 & Supp.); *Dodd* v. *Hood River County*, 59 F.3d 852, 864 (9th Cir. 1995). See generally *El Paso Natural Gas Co.* v. *Neztsosie*, 526 U.S. 473, 479-480 (1999) (noting "firmly entrenched rule" that "[a]bsent a cross-appeal" an appellee "may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary'" and reversing contrary Ninth Circuit decision).

CONCLUSION

The judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and Ninth Circuit Rule 32-1, the attached Brief for the United States as Amicus Curiae is proportionally spaced, has a typeface of 14 points, and contains 6,998 words.

October 1, 2001

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2001, two copies of the foregoing Brief for the United States As Amicus Curiae were mailed first-class, postage prepaid, to the following counsel of record:

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