No. 18-10720

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JANE DOE, Individually and as Next Friend of Minor T.W.,

Plaintiff-Appellant

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

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

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INTEREST OF THE UNITED STATES

This case presents a question involving the relationship between Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*. The Department of Education administers federal financial assistance to education programs and activities and "is authorized and directed" by Congress to implement Title IX in those programs and activities. 20 U.S.C. 1682. The Department of Education also administers the IDEA and has promulgated regulations

implementing that statute. See 20 U.S.C. 1406; 34 C.F.R. Part 300. The Department of Justice coordinates the implementation and enforcement of Title IX across all executive agencies. See Exec. Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980); 28 C.F.R. 0.51. Furthermore, the Department of Justice may bring actions to enforce the IDEA upon referral from the Department of Education and actions to enforce Title IX upon referral by the Department of Education or any other federal funding agency. See 20 U.S.C. 1416(e)(2)(B)(vi), 1416(e)(3)(D); 20 U.S.C. 1682. The United States, therefore, has a substantial interest in the resolution of this appeal. The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether the administrative exhaustion requirement in the IDEA, 20 U.S.C. 1415(*l*), applies to plaintiff's action seeking money damages under Title IX, 20 U.S.C. 1681 *et seq.*, for student-on-student sexual harassment, sexual assaults, and rape at school.

STATEMENT OF THE CASE

1. Background

This case arises from the sexual harassment, sexual assaults, and rape of T.W. by a classmate at Justin F. Kimball High School (Kimball). T.W. has severe mental, physical, and learning disabilities, and was enrolled in a special education

program due to her disability. The following background is based on allegations in plaintiff's First Amended Complaint.

T.W. was 14 years old when she started attending Kimball in the fall of 2013. That fall semester, her classmate V.A., a 20-year-old man with special needs, repeatedly sexually harassed and assaulted her. School officials did nothing each time T.W. reported the harassment even though they were aware of V.A.'s history of sexual misconduct. ROA.301-305.[1]

When the school finally acted, it actually placed T.W. in greater danger. School administrators moved V.A.'s seat away from T.W. to the back of the classroom near the restroom that the students in the class were required to use. ROA.305-307. They did not inform T.W.'s mother that V.A.'s new seat was in front of the restroom into which V.A. had previously attempted to pull T.W. ROA.307-308. In fact, V.A.'s new seat was behind a half wall that obscured the teacher's view of him. ROA.308. V.A. persisted in touching T.W.'s buttocks and genital area and attempting to force her into the restroom. ROA.308. T.W. "continued to report the sexual harassment and assaults to [her teacher] as they occurred," but to no avail. ROA.308-309.

[1] "ROA.___" refers to consecutively numbered pages of the Record on Appeal.

In January 2014, while two teacher's aides supervised the classroom, V.A. followed T.W. into the class restroom and raped her. ROA.309. T.W. told V.A. "no" and "stop," but V.A. "threatened to hurt" T.W. if she "cried out for help or tried to leave the restroom." ROA.310. Thereafter, despite the school's assurances about T.W.'s safety, T.W. still had "contact with V.A." ROA.311-312. Afraid for her safety, T.W. stayed home from school and eventually transferred to another school. ROA.312.

2. Procedural History

In 2015, Jane Doe, T.W.'s mother, commenced an action on behalf of herself and T.W., asserting claims under Title IX, 42 U.S.C. 1983, and state law relating to Kimball's inaction concerning V.A.'s sexual harassment and rape of T.W. The complaint did not raise any claims regarding special education services.

The district court granted defendant's motion to dismiss. See *Doe* v. *Dallas Indep. Sch. Dist. (Doe I)*, 194 F. Supp. 3d 551, 559-568 (N.D. Tex. 2016). The court held that the IDEA's requirement that a plaintiff exhaust administrative remedies for claims seeking relief that is also available under the IDEA, see 20 U.S.C. 1415(*l*), applied to plaintiff's Title IX claim because T.W. sought relief that was "educational in nature." 194 F. Supp. 3d at 559-560. As support, the court emphasized that the Title IX claim was "based on sexual harassment 'so severe, pervasive, and objectively offensive that it can be said to *deprive the victim[] of*

access to the educational opportunities or benefits provided by the school.'" *Id*. at 560 (quoting *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)). In doing so, the court merely quoted the legal standard for private Title IX damages claims for student-on-student sexual harassment that a plaintiff must allege to survive a motion to dismiss. See *Davis*, 526 U.S. at 650.

After the dismissal, T.W.'s mother, on behalf of T.W., requested an administrative hearing under the IDEA, asserting IDEA claims (for the first time) and non-IDEA claims, including her Title IX claim. ROA.474; see also ROA.413-440. The special education hearing officer dismissed the IDEA claims as untimely and the Title IX and other non-IDEA claims for lack of jurisdiction. ROA.474; see also ROA.387-388, 443.

T.W.'s mother thereafter filed the present action, individually and on behalf of T.W., alleging a single Title IX claim (the same claim that was dismissed without prejudice in *Doe I*). This case was assigned to the same judge as in *Doe I*. After T.W. turned 18 years old, her mother filed a First Amended Complaint to proceed as T.W.'s representative and the sole plaintiff. ROA.298. Like in *Doe I*, the complaint alleged, as required under *Davis*, that the sexual harassment and assaults that T.W. endured were so severe, pervasive, and objectively offensive as to deny her access to educational opportunities. ROA.313-314, 318. The complaint sought only compensatory damages for T.W.'s injuries. ROA.319.

The school district again moved to dismiss. Plaintiff responded that under *Fry* v. *Napoleon Community Schools*, 137 S. Ct. 743 (2017), she did not need to exhaust her IDEA administrative remedies before bringing her Title IX claim. ROA.372-373. In *Fry*, the Supreme Court held that the IDEA's exhaustion requirement, Section 1415(*l*), applies only to claims—whether under the IDEA; Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12131 *et seq.*; Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794; or "similar laws"—that "'seek[] relief that is also available' under the IDEA." 137 S. Ct. at 752 (citation omitted). The Court explained that only a suit that "seek[s] relief for the denial" of a free appropriate public education (FAPE) is subject to the exhaustion requirement "because that is the only 'relief' the IDEA makes 'available.'" *Ibid.* Plaintiff asserted that her Title IX claim was not based on the denial of a FAPE, but on a violation of T.W.'s right "to be free from harassment on the basis [of] her sex due to" defendant's "deliberate indifference." ROA.373.

The district court rejected plaintiff's arguments. It concluded that its earlier analysis in *Doe I* was "consistent with *Fry*" because plaintiff's Title IX claim was based on the denial of a FAPE, and therefore, exhaustion of IDEA procedures was required. ROA.478, 480. The court also rejected plaintiff's argument that the IDEA exhaustion requirement does not apply because she is seeking money damages under Title IX, and such relief is not available under the IDEA.

ROA.479. The court then found that, because plaintiff's IDEA claims before the hearing officer were untimely, she failed to exhaust them, thereby depriving the court of jurisdiction to consider her Title IX claim. ROA.481. Thus, the court dismissed plaintiff's action with prejudice, ROA.481, and denied her motion for reconsideration, ROA.494-496, 504-505.

SUMMARY OF THE ARGUMENT

1. The district court erred in dismissing plaintiff-appellant's Title IX claim for failure to exhaust the IDEA's administrative procedures, under 20 U.S.C. 1415(*l*). By its terms, Section 1415(*l*) applies to claims under the Constitution, the ADA, Section 504, or "other Federal laws protecting the rights of children with disabilities." 20 U.S.C. 1415(*l*). Because Title IX is not listed in Section 1415(*l*) and is not aimed at protecting the rights of children with disabilities, Section 1415(*l*) does not apply to Title IX claims, and the court erred in requiring plaintiff to exhaust the IDEA's administrative remedies before bringing her Title IX claim.

2. Alternatively, even if Section 1415(*l*) applies to some Title IX claims, the district court erred in requiring IDEA exhaustion in this case both by misapplying the Supreme Court's decision in *Fry* v. *Napoleon Community Schools*, 137 S. Ct. 743 (2017), and imposing an exhaustion requirement even though plaintiff is not "seeking relief that is also available" under the IDEA. 20 U.S.C. 1415(*l*).

a. *Fry* requires courts to determine if the complaint seeks relief for the denial of a FAPE. The district court failed to analyze the substance of plaintiff's complaint, as required by *Fry*. Instead, the court simply cited the legal standard for private Title IX damages claims for student-on-student sexual harassment, which requires a showing that the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school," and misconstrued plaintiff's allegations mirroring that standard as asserting the denial of a FAPE. ROA.478 (citing *Doe* v. *Dallas Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 560 (N.D. Tex. 2016) (quoting *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999))).

As *Fry* makes clear, the district court's analysis should not have focused on "whether [the plaintiff's] injuries were, broadly speaking, 'educational' in nature," but on whether the "substance, or gravamen, of the plaintiff's complaint" seeks relief for a denial of a FAPE. 137 S. Ct. at 752, 755-758. Here, plaintiff's suit seeks a damages remedy for sexual harassment and rape in school—not for deficiencies in T.W.'s individualized education program resulting in the denial of a FAPE. See ROA.314-319.

b. Furthermore, Section 1415(*l*), by its terms, applies to non-IDEA claims only if the action is "seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). Because plaintiff seeks only compensatory damages and such

relief, as a matter of law, cannot be awarded in IDEA administrative proceedings, plaintiff need not exhaust IDEA administrative remedies before bringing her Title IX claim in court.

* * *

At bottom, the district court's analysis creates a two-tier justice system whereby students without disabilities may immediately file Title IX actions in court, while IDEA-eligible students with disabilities must always first administratively exhaust IDEA procedures before filing their Title IX student-on-student sexual harassment claims. Neither Title IX nor the IDEA supports this result. Accordingly, this Court should reverse and remand for further proceedings.

ARGUMENT

I

THE IDEA'S EXHAUSTION REQUIREMENT DOES NOT APPLY TO CLAIMS ARISING UNDER TITLE IX

Title IX provides that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a). The discrimination prohibited by Title IX includes sexual harassment. See *Davis* v. *Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998). In *Davis*, the Supreme Court held that schools may be liable for damages in a private

suit under Title IX for student-on-student sexual harassment only if (1) it was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school"; (2) the school had actual knowledge of the harassment; (3) the school was "deliberately indifferent" to the harassment; and (4) "the harasser is under the school's disciplinary authority." 526 U.S. at 647, 650; see also *Sanches* v. *Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 165 (5th Cir. 2011).

Here, the district court did not dispute that plaintiff pleaded sufficient facts to state a plausible damages claim under the standards in *Davis*. Rather, the court dismissed the complaint by incorrectly holding that plaintiff failed to administratively exhaust IDEA procedures. ROA.477-480. But, as discussed below, the text of the IDEA's exhaustion requirement, 20 U.S.C. 1415(*l*), covers only claims arising under the Constitution and federal laws aimed at protecting individuals with disabilities. Title IX prohibits sex discrimination against all covered individuals; it is not a statute directed at protecting the rights of individuals with disabilities. Thus, the district court erred in applying the IDEA's exhaustion requirement to plaintiff's Title IX claim.

1. Congress enacted the IDEA to ensure that children with disabilities have access to a FAPE, which means "special education and related services" that meet their "unique needs" and "prepare them for further education, employment, and

independent living." 20 U.S.C. 1400(d)(1)(A); 20 U.S.C. 1401(9), (26), (29); see *Endrew F.* v. *Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017); *Fry* v. *Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748-749 (2017). As the "centerpiece" of the FAPE requirement, school districts must provide each eligible child with an "individualized education program" (IEP). *Honig* v. *Doe*, 484 U.S. 305, 311 (1988). A proper IEP must establish a program of special education and related services that is designed to meet the student's "unique needs." 20 U.S.C. 1412(a)(4); 34 C.F.R. 300.22, 300.34.

The IDEA, however, is not the exclusive mechanism for vindicating the rights of children with disabilities through litigation. The statute expressly contemplates that aggrieved parties may invoke other disability-focused statutes to secure relief for a violation of those laws' substantive standards. See 20 U.S.C. 1415(*l*). Section 1415(*l*) provides 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, except that, before the filing of a civil action under such laws seeking relief that is also available" under the IDEA, the IDEA's administrative procedures "shall be exhausted to the same extent as would be required had the action been brought under" the IDEA. 20 U.S.C. 1415(*l*).

To determine the scope of Section 1415(*l*), the Court "first looks to the language of the statute itself." *United States* v. *Hampton*, 633 F.3d 334, 337 (5th Cir.), cert. denied, 564 U.S. 1027 (2011). By its terms, the IDEA's exhaustion requirement does not apply to Title IX claims under any circumstances. Section 1415(*l*) refers only to claims under the Constitution, the ADA, Section 504, or "other Federal laws protecting the rights of children with disabilities." 20 U.S.C. 1415(*l*). Where the language of the statute is "plain," as here, the "sole function" for the Court is "to enforce it according to its terms." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989). Because Title IX is not aimed at protecting children with disabilities, Section 1415(*l*) does not apply to any Title IX claims.

Given the list of specific statutes identified in Section 1415(*l*), the "other Federal laws" clause is best read to require exhaustion only for actions raising claims under statutes similar in kind to the ADA, Section 504, or the IDEA itself—statutes focused on protecting the rights of persons with disabilities. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1625 (2018) (explaining that, under the *ejusdem generis* canon of construction, when "a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words'") (citation omitted); *Fry*, 137 S. Ct. at 750 (IDEA exhaustion requirement potentially applies to suits "under the ADA, the Rehabilitation Act, or *similar* laws")

(emphasis added); see also *Blunt* v. *Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 561 (E.D. Pa. 2008) (holding that Section 1415(*l*) does not apply to a Title VI claim because Title VI, which is predicated on race discrimination, "does not encompass discrimination based on disability"), aff'd, 767 F.3d 247 (3d Cir. 2014), cert. denied, 135 S. Ct. 1738 (2015).

Although Title IX protects the rights of children with disabilities, it does so only because it protects the rights of all persons against sex discrimination in federally funded education programs or activities. Had Congress intended to apply the exhaustion requirement to suits raising claims under any federal law, it could easily have said so, without the specific list. See *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there.'") (citation omitted). Indeed, interpreting the "other Federal laws" clause to include *any* federal law would render the specific list of statutes superfluous.

Moreover, if Congress had intended to extend the exhaustion requirement to Title IX, it could have done that explicitly as well. Title IX had been on the books for 14 years when Congress first enacted the predecessor to Section 1415(*l*).[2] Yet

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[2] Title IX was enacted on June 23, 1972, as part of the Education Amendments of 1972, Pub. L. No. 92-318, Title IX, 86 Stat. 373-375. Congress (continued...)

Congress failed to refer to Title IX when it originally enacted Section 1415(*l*) or any of the times it amended the IDEA, including when it amended Section 1415(*l*) to add the ADA to the provision.

2. Section 1415(*l*)'s legislative history is consistent with the conclusion that Congress intended to require exhaustion of IDEA administrative remedies only for claims based on federal laws aimed at protecting the rights of children with disabilities. Congress enacted the predecessor to Section 1415(*l*) in 1986 in response to the Supreme Court's decision in *Smith* v. *Robinson*, 468 U.S. 992 (1984). There, the Court held that the IDEA's predecessor statute, the Education of the Handicapped Act, was "the exclusive avenue" through which a child with a disability (or his parents) could challenge the adequacy of his education. *Id.* at 1009, 1012-1013, 1019-1021. Accordingly, the Court rejected the plaintiffs' efforts to rely on the Equal Protection Clause, Due Process Clause, and Section 504 as alternative means of vindicating a child's educational rights that were protected under the IDEA. *Id.* at 994-995, 1009-1021.

Congress responded by enacting the Handicapped Children's Protection Act of 1986, which overturned *Smith*'s preclusion of non-IDEA claims while adding

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(...continued)
enacted the predecessor to 20 U.S.C. 1415(*l*) in 1986. Pub. L. No. 99-372, 100 Stat. 796, 797, now codified at 20 U.S.C. 1415(*l*).

the exhaustion requirement. Pub. L. No. 99-372, 100 Stat. 796-797, now codified at 20 U.S.C. 1415(*l*). Congress by no means intended for the exhaustion requirement to apply to all federal laws. It expressly limited its application to claims under the Constitution, Section 504, and federal laws "protecting the rights of handicapped children." 100 Stat. 797. Although accompanying congressional committee reports state that the requirement would apply to claims brought under 42 U.S.C. 1983, a federal law, like Title IX, that is not aimed at protecting individuals with disabilities, see H.R. Rep. No. 687, 99th Cong., 2d Sess. 7 (1986) (Conf. Rep.); H.R. Rep. No. 296, 99th Cong., 1st Sess. 6 (1985), Congress's references to Section 1983 must be considered in the context of *Smith*.

As the Supreme Court emphasized in *Smith*, petitioners brought their due process and equal protection claims under Section 1983 so that the student could obtain a FAPE, and those constitutional claims did not differ from the claim for IDEA relief. 468 U.S. at 1009. Section 1983 (unlike Title IX) is a vehicle for vindicating federal rights secured elsewhere, not a source of substantive rights. See, *e.g.*, *Albright* v. *Oliver*, 510 U.S. 266, 271 (1994) (plurality). In other words, some Section 1983 claims are subject to the IDEA's exhaustion requirement not because Section 1983 *itself* is encompassed by the "other Federal laws" clause in Section 1415(*l*), but because a Section 1983 claim provides the mechanism for enforcing the Constitution or federal laws aimed at protecting children with

disabilities. Thus, the Section 1983 claims that Congress contemplated subjecting to an IDEA exhaustion requirement involve underlying federal laws that secure the rights of children with disabilities, not laws addressing other types of discrimination.

In sum, given the plain language of "other Federal laws protecting the rights of children with disabilities" in Section 1415(*l*), this Court should hold that the IDEA's exhaustion provision does not apply to Title IX claims.

II

ALTERNATIVELY, PLAINTIFF'S TITLE IX CLAIM IS NOT SUBJECT TO IDEA ADMINISTRATIVE EXHAUSTION BECAUSE IT DOES NOT SEEK RELIEF FOR THE DENIAL OF A FAPE, AND THE RELIEF SOUGHT IS NOT AVAILABLE UNDER THE IDEA

Even if the IDEA's exhaustion provision potentially applies to some Title IX claims, plaintiff's Title IX claim is not subject to exhaustion under Section 1415(*l*) because she is not "seeking relief that is also available" under the IDEA. 20 U.S.C. 1415(*l*). The First Amended Complaint is not seeking relief for the denial of a FAPE, and it seeks only compensatory damages, which are not available under the IDEA. Under the district court's reasoning, IDEA-eligible students with a disability who are subjected to sexual harassment and even rape by students or school employees must always pursue a two-step process, and administratively exhaust under the IDEA before adjudicating their Title IX claims in court, while

students without a disability can go directly to court. That is neither a tenable result nor a correct interpretation of the applicable law.

A. The District Court Misapplied The Supreme Court's Decision In Fry *v.* Napoleon Community Schools

1. In *Fry* v. *Napoleon Community Schools*, the Supreme Court addressed how the IDEA's exhaustion provision applies to non-IDEA disability rights claims, holding that the exhaustion requirement affects only those claims that seek relief for the denial of a FAPE because that is the "only 'relief' the IDEA makes 'available.'" 137 S. Ct. 743, 752 (2017) (citation omitted). Claims that do not seek relief for the denial of a FAPE, such as plaintiff's Title IX claim here, need not be exhausted because "[t]he only relief that an IDEA officer can give * * * is relief for the denial of a FAPE." *Id.* at 753.

To determine whether a plaintiff is seeking relief for a denial of a FAPE or something else, courts must look to the "substance, or gravamen, of the plaintiff's complaint." *Fry*, 137 S. Ct. at 752. In doing so, courts should also consider the "diverse means and ends of the statutes" involved. *Id*. at 755. For example, "the IDEA guarantees individually tailored educational services." *Id.* at 756. In contrast, "two principal objectives" of Title IX's prohibition against sex discrimination are to "avoid the use of federal resources to support discriminatory practices" and "provide individual citizens effective protection from those practices." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

Furthermore, courts should consider whether the plaintiff has "previously invoked the IDEA's formal procedures to handle the dispute." *Fry*, 137 S. Ct. at 757. "[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." *Ibid.*

2. The district court misapplied *Fry* in two ways. First, contrary to *Fry*, the court failed to consider the substance of plaintiff's complaint in determining whether it sought relief for the denial of a FAPE. The court repeated that it previously found that plaintiff's Title IX claim requires IDEA exhaustion "because stating a Title IX claim requires showing that the sexual harassment was 'so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.'" ROA.477-478 (quoting *Doe* v. *Dallas Indep. Sch. Dist.*, 194 F. Supp. 3d 551, 560 (N.D. Tex. 2016)). Even after *Fry*, in dismissing the instant Title IX action, the court failed to heed *Fry's* directive to examine the allegations in the complaint to ascertain the relief sought and the gravamen of the complaint. See *Fry*, 137 U.S. at 755. The court never performed this analysis, other than to pick out two references to an alleged denial of "educational opportunities" in the complaint, a standard required by *Davis*, see 526 U.S. at 650, and then declare that its prior analysis was consistent with *Fry*. ROA.479.

Second, the district court erred in applying the two hypothetical questions the Supreme Court articulated in *Fry* to assist courts in determining whether the gravamen of a non-IDEA claim concerns the denial of a FAPE. ROA.478 (citing *Fry*, 137 S. Ct. at 756). Those questions—(1) could the plaintiff have brought the same claim at a public facility that was not a school, and (2) could an adult at the school have pressed the same grievance—were designed to reveal whether the relief sought was for the denial of a FAPE, which would require exhaustion, "or instead addresse[d] disability-based discrimination," which would not. *Fry*, 137 S. Ct. at 756. According to the Court, if the answer to both questions is "yes," the complaint is "unlikely to be truly about" the denial of a FAPE because "there is no FAPE obligation" in those hypothetical situations. *Ibid*. On the other hand, when the answer to both is "no," "then the complaint probably does concern a FAPE." *Ibid*.

These hypotheticals are an imperfect fit for plaintiff's Title IX claim because they address the intersection of a FAPE and *disability-based* discrimination. Unlike ADA and Section 504 claims, however, Title IX claims do not address disability-based discrimination. Nonetheless, when applying the hypothetical questions to plaintiff's Title IX sexual harassment claims, the answer to both questions is "yes," thereby further indicating that her complaint is not seeking relief for the denial of a FAPE.

With respect to the first question, a plaintiff could have brought a sexual harassment claim in a public facility that is not a school because Title IX expressly applies to any public or private "educational program or activity" that receives federal financial assistance, even if that educational program or activity is held outside a school. 20 U.S.C. 1681(a), 1687; see, *e.g.*, *Doe* v. *Mercy Catholic Med. Ctr.*, 850 F.3d 545, 554-558 (3d Cir. 2017) (Title IX applies to a private hospital that operated a residency program); *Klinger* v. *Department of Corrs.*, 107 F.3d 609, 613-616 & n.5 (8th Cir. 1997) (Title IX applies to a state-run prison system that offered educational programs to inmates). And so the answer to the first question is "yes."

The answer to the second question is also "yes." An adult may assert a claim for student-on-student sexual harassment under Title IX. See, *e.g.*, *Simpson* v. *University of Colorado Boulder*, 500 F.3d 1170, 1173-1174 (10th Cir. 2007) (college students may bring a Title IX action relating to student-on-student rapes); *Williams* v. *Board of Regents of the Univ. Sys. of Georgia*, 477 F.3d 1282, 1288-1299 (11th Cir. 2007) (same); see also *Doe 1* v. *Baylor Univ.*, 240 F. Supp. 3d 646, 658-662 (W.D. Tex. 2017) (college students sufficiently alleged Title IX claims based on the university's response to their reports of student-on-student sexual assaults).

Thus, the district court erred in answering "no" to both questions.

B. Plaintiff Seeks Relief For Rape And Sexual Harassment In School, Not For Failure To Provide A FAPE

1. The allegations in the First Amended Complaint belie the district court's conclusion that plaintiff's Title IX claim asserts the denial of a FAPE. The complaint alleges that V.A. repeatedly grabbed T.W.'s "buttocks and genital area" and "hugged and kissed T.W." ROA.305-308. The complaint also alleges that V.A. "tried numerous times to pull [T.W.] into the bathroom." ROA.305-307, 317. T.W. informed her teacher or her case manager about V.A.'s sexual harassment after each incident, but the school did nothing. ROA.304-307, 317.

The complaint further alleges that the school put T.W. in harm's way when it moved V.A.'s seat to the back of the classroom where he was able to continue groping T.W. and trying to pull her into the restroom, with the added advantage that V.A. was hidden behind a half wall that obscured the teacher's view of him. ROA.308-309, 315, 318. The school did this even though T.W. told school administrators that V.A. had tried to pull her into "*that*" restroom. ROA.307. And T.W.'s teacher denied T.W.'s repeated requests to use another restroom. ROA.308. The complaint further alleges that V.A. followed T.W. into the restroom and "violently raped" her. ROA.309. Thereafter, the school failed to separate V.A. from T.W. or otherwise respond to the alleged rape. ROA.316.

None of the allegations in the First Amended Complaint asserts a denial of a FAPE based on the school's failure to respond to V.A.'s actions. Nor does the

complaint seek a change to T.W.'s IEP. Viewed in the light most favorable to plaintiff, see *Bowlby* v. *City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012), the essence of the complaint is that V.A. sexually harassed and assaulted T.W. repeatedly and then raped her, and although the school was on repeated notice of these incidents, the school was deliberately indifferent by failing to address the harassing conduct by V.A. or ensure T.W.'s safety, either before or after the rape. ROA.315-316.

Indeed, the relief that plaintiff seeks is for sexual harassment irrespective of the IDEA's FAPE obligation. The harm to T.W. alleged in the complaint would have existed even if the special education services the school provided T.W. were exemplary or if T.W. had no disabilities at all. Indeed, plaintiff was under no obligation to even mention in her complaint that she had a disability. Moreover, plaintiff does not allege that the peer sexual harassment posed a barrier to T.W.'s access to the specific benefits of the individually tailored services identified in her IEP. Therefore, the relief she seeks is not for the denial of a FAPE, but the denial of a nondiscriminatory environment to which *all* students are entitled.

The mere fact that the sexual harassment occurred in a school environment does not mean that the relief plaintiff seeks is for the denial of a FAPE. This situation is similar to a different hypothetical example offered in *Fry*. The Supreme Court explained that an incident in which a school teacher strikes a

student with a disability "could be said to relate, in both genesis and effect, to the child's education," but the "substance" of the student's non-IDEA claim "is unlikely to involve the adequacy of special education—and thus is unlikely to require exhaustion." *Fry*, 137 S. Ct. at 756 n.9. Likewise, the Third Circuit presented a hypothetical where a student both challenges the sufficiency of her IEP under the IDEA and brings a non-IDEA claim for relief for physical injuries sustained from an assault on a school bus. As the court explained, that student need not exhaust her non-IDEA claim based on the assault because that claim "has nothing to do with her access to a FAPE and IDEA relief." *Wellman* v. *Butler Area Sch. Dist.*, 877 F.3d 125, 133 (3d Cir. 2017). The same is true here, where the rape and preceding unaddressed sexual harassment and assaults constitute the gravamen of plaintiff's complaint.

2. This Court, and every circuit that has addressed the application of the IDEA's exhaustion rule to non-IDEA claims after *Fry*, require exhaustion of those claims only if they challenge the adequacy of the plaintiff's FAPE. For example, in *Reyes* v. *Manor Independent School District*, 850 F.3d 251 (5th Cir. 2017), this Court required exhaustion of plaintiff's Section 504 claims because they overlapped with his IDEA claims; plaintiff challenged his special education plan and asserted that the school district's "practices 'hinder[ed] honest consideration of [his] unique and individualized needs.'" *Id.* at 256. Because the complaint here

does not make such allegations, the district court's reliance on this Court's decision in *Reyes* was misplaced. ROA.479.

Similarly, the Eleventh Circuit required exhaustion of ADA and Section 504 claims where the complaint alleged that the plaintiff's "course of study was not appropriately tailored to his disability," see *Durbrow* v. *Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1191 (11th Cir. 2018), and the Eighth Circuit held that the plaintiff's ADA and Section 504 claims concerning the defendants' use of restraints must be exhausted because the complaint alleged that such restraints "were not permitted" under the student's IEP and that the school failed to implement that program, see *J.M.* v. *Francis Howell Sch. Dist.*, 850 F.3d 944, 949-950 (8th Cir. 2017). The Third Circuit likewise required exhaustion of ADA and Section 504 claims where the student sought relief based on the school district's failure to "fulfill his educational needs" and provide him with "academic accommodations." *Wellman*, 877 F.3d at 133, 135. That the plaintiffs were challenging their individualized education programs was central to the courts' determinations in these cases that those actions sought relief for a denial of FAPE and thus, that exhaustion was required.[3]

[3] Cf. *Nelson* v. *Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 591-593 (8th Cir. 2018) (requiring exhaustion of Section 504 claim even though the student did

(continued...)

By contrast, plaintiff's Title IX claim is based on allegations of sexual harassment, sexual assault, rape, and defendant's deliberate indifference that are unconnected to T.W.'s IEP, and does not allege the denial of a FAPE. Courts have found that such claims do not implicate the IDEA. For example, in *F.H.* v. *Memphis City Schools*, 764 F.3d 638, 645 (6th Cir. 2014), which involved a student with special needs who alleged abuse by school personnel over a period of time, the Sixth Circuit concluded that where "the gravamen of [the] complaint is the verbal, physical, and even sexual abuse of [the plaintiff] by his aides," the factual allegations do not concern the IDEA.

And even if the complaint refers to a plaintiff's individualized education program, such references do not convert the "gravamen" of an action seeking redress for sexual harassment, sexual assaults, and rape to one alleging a denial of a FAPE where the focus of the complaint is not the custom-designed IEP that the IDEA provides. See *Moore* v. *Kansas City Pub. Schs.*, 828 F.3d 687, 692 (8th Cir. 2016) (a student seeking redress for sexual assault under state negligence law was not seeking relief that is available under the IDEA); *Muskrat* v. *Deer Creek Pub. Schs.*, 715 F.3d 775, 785 (10th Cir. 2013) (claims that a teacher physically abused

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(...continued)
not have an IEP because the "substance" of plaintiffs' complaint concerning a denial of a reasonable accommodation was a challenge to the denial of a FAPE).

a student did not implicate the IDEA where the instances of battery were unrelated to "any legitimate disciplinary goal"). Although these court of appeals cases pre-date *Fry*, they are consistent with post-*Fry* decisions that have found that the applicability of the IDEA exhaustion requirement turns on whether the complaint's allegations are related to a student's FAPE or not.

Indeed, the Sixth Circuit recently held that the IDEA did not require exhaustion of plaintiffs' ADA and Section 504 claims arising from the school's refusal to admit a student with a disability to an after-school childcare program because the student was not toilet trained. See *Sophie G.* v. *Wilson Cty. Schs.*, No. 17-6209, 2018 WL 3409208, at *4 (6th Cir. July 12, 2018). Noting that the complaint did not allege that admission to the aftercare program was "necessary" to the child's FAPE, the court found that admission to that program was "distinct" from the student's "education," and "is, at most, tangentially related to [her] IEP." *Ibid*. Thus, the court concluded that the "gravamen of Plaintiffs' complaint seeks access to subsidized childcare on equal terms, and not redress for the denial of a FAPE." *Id*. at *6.

C. The IDEA Does Not Require Administrative Exhaustion Of Non-IDEA Claims Seeking Only Relief That Is Unavailable Under The IDEA

Finally, the district court erred in rejecting plaintiff's argument that Section 1415(*l*) does not apply because the only relief she seeks (compensatory damages) is not available under the IDEA. ROA.479.[4]

The plain language of Section 1415(*l*) makes clear that exhaustion is not required here. By its terms, Section 1415(*l*) provides that a plaintiff bringing a non-IDEA claim is required to exhaust IDEA remedies only if the action is "seeking relief that is also available under [the IDEA]." 20 U.S.C. 1415(*l*). Because compensatory damages cannot be obtained under the IDEA, see *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 254 n.1 (2009); *School Comm. of Burlington* v. *Department of Educ.*, 471 U.S. 359, 369-371 (1985), a plaintiff who seeks only such damages (as in this case) need not exhaust IDEA administrative remedies before bringing the non-IDEA claim in court.[5]

Other language in Section 1415(*l*) confirms that exhaustion is not required when the plaintiff cannot obtain the requested relief in IDEA proceedings. Section

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[4] The Court declined to reach this question in *Fry*. See 137 S. Ct. at 752 n.4, 754 n.8.

[5] Courts may award equitable relief under the IDEA, including compensatory education, but the Supreme Court has distinguished such relief from compensatory damages. See *Burlington*, 471 U.S. at 369-371.

1415(*l*) requires exhaustion of IDEA procedures for non-IDEA claims only "to the same extent as would be required" if the claim had been brought under the IDEA. 20 U.S.C. 1415(*l*). But the Supreme Court has explained that IDEA claims need not be exhausted when exhaustion would be "futile" or the relief "inadequate." *Honig* v. *Doe*, 484 U.S. 305, 326-327 (1988). A form of relief is "inadequate" when the agency "lack[s] authority to grant the type of relief requested." *McCarthy* v. *Madigan*, 503 U.S. 140, 148 (1992); *id.* at 156-157 (Rehnquist, C.J., concurring in the judgment). Because an IDEA hearing officer cannot award compensatory damages, it would always be "futile," or the relief "inadequate," for a plaintiff seeking only such damages to exhaust the IDEA administrative process. Section 1415(*l*)'s "to the same extent" language thus provides an additional textual reason that IDEA exhaustion is not required when a non-IDEA claim seeks relief that is not available in IDEA proceedings. And the provision's legislative history confirms that a plaintiff is not required to exhaust the IDEA administrative process if she seeks relief that cannot be awarded in that process. See H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985) (exhaustion not required where "the hearing officer lacks the authority to grant the relief sought").

The district court found persuasive a First Circuit decision that expressed concern that plaintiffs would evade IDEA exhaustion requirements merely by asking for compensatory damages. ROA.479 (citing *Frazier* v. *Fairhaven Sch.*

Comm., 276 F.3d 52, 63 (1st Cir. 2002)). That concern is misplaced. Under Section 1415(*l*)'s plain language, a plaintiff who seeks relief that *is* available under the IDEA cannot avoid exhaustion simply by tacking on a damages claim. The only plaintiffs who could bypass the IDEA's administrative process by filing non-IDEA claims are those who are willing to forgo any effort to obtain relief that is potentially available to them under the IDEA. As discussed above, plaintiff's complaint seeks no such relief.

CONCLUSION

This Court should reverse and remand the case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 27, 2018, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Teresa Kwong
Teresa Kwong
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLANT AND URGING REVERSAL:

(1) complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,497 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016, in 14-point Times New Roman font.

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: November 27, 2018

ADDENDUM

Text of 20 U.S.C. 1415(*l*)

20 U.S.C. 1415(*l*) provides:

(*l*) Rule of construction

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