No. 15-2573

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC.,

Plaintiff-Appellee

v.

FLINT COMMUNITY SCHOOLS, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE* AND THE SOURCE OF ITS AUTHORITY TO FILE THIS BRIEF

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

This case raises important questions about the ability of Protection and Advocacy (P&A) systems to effectively discharge their responsibilities under the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI), 42 U.S.C. 10801 *et seq.*, the Developmental Disabilities Assistance and Bill of Rights

Act of 2000 (DD Act), 42 U.S.C. 15001 *et seq*., and the Protection and Advocacy of Individual Rights Act (PAIR Act), 29 U.S.C. 794e (collectively, P&A Acts), on behalf of children with disabilities attending non-residential schools. P&A systems protect and advocate for the rights of individuals with disabilities under several federal laws, including Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq*., Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. 794, and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq*. Given the United States' limited resources, partnerships with effective P&A systems further the United States' enforcement programs on behalf of individuals with disabilities in many arenas.

The Department of Health and Human Services (HHS) has promulgated regulations implementing the PAIMI Act and the DD Act. See 42 C.F.R. Pt. 51 (PAIMI regulations); 45 C.F.R. Pts. 1385-1388 (DD Act regulations). The Department of Education has promulgated regulations implementing the PAIR Act. See 34 C.F.R. Pt. 381.

ISSUES PRESENTED

The United States will address only the following issues:

1. Whether the records-access provisions of the P&A Acts apply to non-residential schools.

2. Whether a P&A system requesting the education records of students with disabilities from a school district must exhaust administrative remedies under the IDEA before bringing a federal action to enforce its own rights under the P&A Acts.

STATEMENT OF THE CASE

1. MPAS's Efforts To Obtain Records

P&A systems are federally mandated, state-designated organizations designed to protect and advocate for individuals with disabilities wherever they receive care or treatment. Together, the P&A Acts authorize P&A systems to train, refer, monitor, investigate, advocate, and litigate for individuals with disabilities who receive care and treatment in a variety of community-based and institutional settings. A P&A system may bring a lawsuit on behalf of an individual with mental illness, or alternatively, may file a lawsuit in its own right. 42 U.S.C. 15043(a)(2)(A)(i); 42 U.S.C. 10805(a)(1)(B); see also *Virginia Office for Prot. & Advocacy* v. *Stewart*, 563 U.S. 247, 251 (2011) (recognizing a P&A system's authority to "press[] its own rights" under the DD and PAIMI Acts); 42

C.F.R. 51.6(f) (permitting allotments to be used to pay "allowable costs incurred by a P&A system in bringing lawsuits *in its own right* to redress incidents of abuse or neglect, discrimination, and other rights violations impacting on individuals with mental illness") (emphasis added).

Plaintiff-appellee Michigan Protection and Advocacy System (MPAS) is the P&A system for the State of Michigan. MPAS provides a broad range of services to people with disabilities in Michigan, including information and referral, training and public education outreach, and legal advice and representation. MPAS states that it receives approximately 1500 to 2000 calls per year from parents concerned about their children's educational rights. (Complaint, R. 1, Page ID # 7).

In late 2014 and early 2015, several families of children with disabilities enrolled in Flint Community Schools contacted MPAS, raising concerns that the school district was not providing their children with rights and benefits to which they were entitled under the IDEA, Section 504, the ADA, and various state laws. (Complaint, R. 1, Page ID # 2).

MPAS attempted to obtain education records on behalf of the families of eight of these children, all of whom MPAS asserts are covered under the DD Act, and one of whom it asserts is also covered under PAIMI. (Complaint, R. 1, Page ID # 10-31). MPAS requested the students' records under IDEA regulations, which give parents the right to inspect their children's education records within 45

days. (Exhibit, R. 5-2, Page ID # 62, 66, 70, 74, 82, 87-88, 91, 96, 104, 111, 113, 118-119 (citing 34 C.F.R. 300.613)). Each request was accompanied by a consent form signed by the student's parent. (Exhibit, R. 5-2, Page ID # 65, 69, 73, 76, 86, 94-95, 98-99, 106-107, 117). For four of the eight students, MPAS also explained in its requests that it had its own right under the P&A Acts to obtain the documents within three business days. (Complaint, R. 1, Page ID # 11, 13, 15, 17; Exhibit, R. 5-2, Page ID # 63, 67, 71, 78, 81).

In each case, the school district failed to respond to MPAS's requests. MPAS sent multiple follow-up requests for several of the students and in some cases received a few incomplete or outdated documents in response to its requests. MPAS eventually filed administrative due process complaints under the IDEA on behalf of four of the eight students and, as a result, obtained most of the records it sought for those students, months after it first requested the documents. MPAS did not receive documents for the remaining four students until after it filed its federal complaint. (See generally Complaint, R. 1, Page ID # 10-31; Opinion, R. 23, Page ID # 338).

2. MPAS's Lawsuit And Motion For A Preliminary Injunction

On July 10, 2015, MPAS filed suit under 42 U.S.C. 1983 in the United States District Court for the Eastern District of Michigan, alleging that Flint Community Schools' failure to provide MPAS with the requested education

records interfered with MPAS's responsibilities under the P&A Acts to protect and advocate for persons with disabilities. (See Complaint, R. 1, Page ID # 3).

On July 13, 2015, MPAS moved for a preliminary injunction, asking the court to order the school district to (1) provide MPAS with the records requested in each of its outstanding requests; (2) provide copies of any education records requested during the pendency of the litigation within three days; and (3) cease and desist from violating MPAS's rights under the P&A Acts. (Motion for Preliminary Injunction, R. 5, Page ID # 41-42). The school district opposed the motion, arguing, among other things, that (1) MPAS had no right to the records under the P&A Acts; and (2) MPAS's claims were not ripe because it had failed to exhaust administrative remedies under the IDEA. (Appellants' Opening Br. 26-36; Response to Motion for Preliminary Injunction, R. 14, Page ID # 226-232; Supplemental Brief in Opposition to Motion for Preliminary Injunction, R. 21, Page ID # 324-326).

3. The District Court's Opinion

The district court granted MPAS's motion for a preliminary injunction. The court held that the P&A Acts "indisputably" created a right for MPAS to access the education records and that the DD Act mandated that the school district provide the records to MPAS within three business days of the request. (Opinion, R. 23, Page ID # 339, 341). The court stated that it was "evident that the school district

repeatedly and persistently has failed or refused to disclose records requested by [MPAS] within the time required under the applicable statutes and regulations." (Opinion, R. 23, Page ID # 342).

The court rejected the school district's argument that MPAS had failed to exhaust the IDEA's administrative remedies. First, the court pointed out that MPAS had not filed its claim under the IDEA, but rather had sued to enforce only its own rights under the P&A Acts. The court further held that MPAS was not required to exhaust the IDEA's due process procedures because the relief that MPAS sought, an order requiring the school district to comply with the P&A Acts, was not available through those procedures. (Opinion, R. 23, Page ID # 348-349).

The court also rejected the school district's argument that a non-residential school is not a "facility" under the P&A Acts and was therefore not obligated to produce student records to MPAS absent an allegation of abuse or neglect of a child. (Opinion, R. 23, Page ID # 349-350). The court relied on the Second Circuit's 2006 decision in *Connecticut Office of Protection & Advocacy for Persons with Disabilities* v. *Hartford Board of Education*, 464 F.3d 229, which held that non-residential schools are facilities under PAIMI. (Opinion, R. 23, Page ID # 349-350). The court also held that such schools are covered under the records-access provisions of the DD and PAIR Acts. The court cited to recent amendments to the DD Act regulations that replaced the term "facility" with

"service provider" and further relied on opinions of other courts determining that non-residential schools qualify as "facilities" under the P&A Acts. (Opinion, R. 23, Page ID # 349-350).

SUMMARY OF ARGUMENT

The district court was correct in concluding that MPAS is likely to succeed on the merits. The records-access provisions of the P&A Acts and their implementing regulations are sufficiently broad to encompass non-residential schools that provide services to students with mental illness or other disabilities, and courts that have considered the issue have held that these statutes apply to non-residential schools.

In addition, the district court was correct to reject Flint Community Schools' argument that MPAS's claim was unripe due to a failure to exhaust administrative remedies under the IDEA. MPAS filed its federal claim in its own right under the P&A Acts and not on behalf of any particular student. The IDEA's exhaustion requirement applies only to claims that could have been brought under the IDEA's due process procedures. Because a P&A system acting on its own behalf is not authorized to file administrative claims under the IDEA's due process hearing procedures, the exhaustion requirement does not apply.

ARGUMENT

I

THE RECORDS-ACCESS PROVISIONS OF THE P&A ACTS APPLY TO NON-RESIDENTIAL SCHOOLS

A. The Records-Access Provisions Of The DD And PAIR Acts Apply To Non-Residential Schools

The Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. 15001 *et seq*., provides P&A systems the authority to protect and advocate for individuals with developmental disabilities. 42 U.S.C. 15041. The DD Act seeks to ensure that publicly funded programs, "*including educational programs*" serving individuals with developmental disabilities, "provide treatment, services, and habilitation that are appropriate to the needs of such individuals" and meet minimum care standards. 42 U.S.C. 15009(a)(3) (emphasis added). The DD Act vests P&A systems with a wide range of authority, including the authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights" of individuals with developmental disabilities who are or may be eligible for treatment or services and to "provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities." 42 U.S.C. 15043(a)(2)(A)(i)-(ii).

The Protection and Advocacy of Individual Rights Act, 29 U.S.C. 794e, seeks to protect the rights of individuals with disabilities who are not otherwise covered by PAIMI or the DD Act. 29 U.S.C. 794e(a)(1). The PAIR Act authorizes a P&A system to pursue legal, administrative, or other appropriate remedies to ensure the protection of individual rights of people with disabilities. 29 U.S.C. 794e(f)(3). P&A systems are also given "the same general authorities, including the authority to access records," granted under the DD Act. 29 U.S.C. 794e(f)(2); see also 34 C.F.R. 381.10(a)(2).[1]

The DD and PAIR Acts grant MPAS the right to access student records from a non-residential school. The DD Act gives P&A systems access to "all records of" an individual with a developmental disability under several circumstances, including where the individual's parent or guardian has consented to access. 42 U.S.C. 15043(a)(2)(I). Absent certain exigent circumstances not at issue here, P&A systems must be granted access to records within three business days after the P&A system makes a written request. 42 U.S.C. 15043(a)(2)(J); 45 C.F.R. 1386.25(c).

The DD Act defines a "record" as "a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to

[1] Unlike the PAIMI and DD Acts, which are administered by HHS, the PAIR Act is administered by the Department of Education.

individuals with developmental disabilities." 42 U.S.C. 15043(c)(1).[2] The statutory language in no way limits a P&A system's records-access authority to residential facilities only, and the school district does not argue that it does. Rather, the school district focuses on the language of a former DD Act regulation that has now been superseded and, in any case, was broad enough to encompass non-residential schools.

Current HHS regulations give P&A systems access to records from a "service provider" that were "prepared or received in the course of providing intake, assessment, evaluation, *education*, training and other services." 45 C.F.R. 1386.25(b)(1) (emphasis added). HHS expressly declined to define the term "service provider" in the current regulations "due to the rapidly changing nature of who provides services, and the tremendous variation in the delivery of supports in a broad range of settings." 80 Fed. Reg. 44,800 (July 27, 2015). It also declined to provide examples of service providers because doing so "would not allow for the broad range of entities currently providing services to be inclusively represented."

[2] The DD Act was reauthorized in 2000, and its language was made even clearer to ensure coverage of a broad array of institutions and service providers that provide services to individuals with disabilities. Previously, the DD Act defined "records" as "reports prepared or received by any staff of a facility rendering care or treatment." 42 U.S.C. 6042(f) (1997). Repealed and replaced in 2000, see Pub. L. No. 106-402, Tit. IV, § 401(a), 114 Stat. 1737, the DD Act now defines the records which P&A systems may access even more broadly. 42 U.S.C. 15043(c)(1).

Ibid. Because a non-residential school is a "service provider" with records that were "prepared or received in the course of providing * * * education," 45 C.F.R. 1386.25(b)(1), the DD and PAIR Acts plainly apply.

The school district argues that the current DD Act regulations, which became effective in August 2015, do not apply here because MPAS's records requests for the eight students used as examples in MPAS's complaint were made before August 2015. The school district argues that the former regulations, which defined a "record" somewhat more narrowly, should apply. (Appellants' Opening Br. 43-44; Response to Motion for Preliminary Injunction, R. 14, Page ID # 222, 230). But this argument overlooks the prospective nature of the relief sought. The primary relief that MPAS seeks here is an injunction requiring the school district to comply with the P&A Acts going forward, (Reply to Response to Motion for Preliminary Injunction, R. 16, Page ID # 276), and the 2015 regulatory amendments undoubtedly apply to all of MPAS's future requests for education records. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994) ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive."); *St. Louis Effort for AIDS* v. *Huff*, 782 F.3d 1016, 1023 (8th Cir. 2015) ("Because the appellees seek only forward-looking injunctive relief, we consider the [intervening] regulations in rendering our decision.").

But even if the former DD Act regulations do apply, they too were broad enough to encompass non-residential schools. The former regulations granted P&A systems access to records "prepared or received in the course of providing intake, assessment, evaluation, *education*, training and other supportive services * * * and other reports prepared or received by a member of the staff of a facility that is providing care or treatment." 45 C.F.R. 1386.22(b)(1) (1996) (emphasis added). The regulations defined a "facility" as "any setting that provides care, treatment, services and habilitation, even if only 'as needed' or under a contractual arrangement." 45 C.F.R. 1386.19 (1996). Under those regulations, "facilities" explicitly included "[c]ommunity living arrangements (e.g., group homes, board and care homes, individual residences and apartments), *day programs*, juvenile detention centers, hospitals, nursing homes, homeless shelters, jails and prisons." *Ibid.* (emphasis added). The inclusion of "day programs" illustrates that the "facilities" to which the DD Act's records-access requirement applied were not exclusively residential. Indeed, courts applied the requirement to non-residential schools even before the 2015 amendments. See *Disability Law Ctr. of Alaska, Inc.* v. *Anchorage Sch. Dist.*, 581 F.3d 936, 939-940 (9th Cir. 2009); *Disability Rights Wis., Inc.* v. *Wisconsin Dep't of Pub. Instruction*, 463 F.3d 719, 726 (7th Cir.

2006) (non-residential school "easily meets the definition of a facility" under the DD Act).[3]

B. The Records-Access Provisions Of The PAIMI Act Apply To Non-Residential Schools

The Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. 10801 *et seq.*, charges P&A systems with protecting and advocating for the rights of individuals with mental illness and with investigating incidents of alleged abuse and neglect of such individuals. 42 U.S.C. 10803. PAIMI seeks to protect individuals with mental illness who "live[] in a community setting, including their own home." 42 U.S.C. 10802(4)(B)(ii). PAIMI authorizes a P&A system to "pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State." 42 U.S.C. 10805(a)(1)(B).

PAIMI grants P&A systems the right to access records of individuals with mental illness in several circumstances, including where, as here, the individual's parent or guardian has consented to access. 42 U.S.C. 10805(a)(4); 42 C.F.R. 51.41(b). PAIMI defines "records" in relevant part as "reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency

[3] In any case, even if the previous regulatory language could be construed to limit a P&A system's access to records to residential facilities, that language—which was promulgated in 1996—would conflict with the broad records-access language in the DD Act's 2000 amendments.

charged with investigating reports of incidents of abuse, neglect, and injury occurring at such facility." 42 U.S.C. 10806(b)(3)(A).[4] The regulations dictate that access to records must be "extended promptly to all authorized agents of a P&A system." 42 C.F.R. 51.41(a).

The Act provides that the "facilities" from which P&A systems may obtain records "*may include, but need not be limited to*, hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. 10802(3) (emphasis added). In addition, PAIMI's implementing regulations provide that a "[f]acility *includes* any public or private residential setting that provides overnight care accompanied by treatment services." 42 C.F.R. 51.2 (emphasis added). The regulations further provide that "[f]acilities *include, but are not limited to* * * * general and psychiatric hospitals, nursing homes, board and care homes, community housing, juvenile detention facilities, homeless shelters, and jails and prisons." *Ibid*. (emphasis added). As explained below, HHS has interpreted PAIMI as covering any facility that provides care and treatment to mentally ill individuals, regardless of whether the facility is residential.

[4] HHS regulations describe the various types of records that P&A systems may access under PAIMI. Such records may pertain to intake, assessment, evaluation, supportive and other services, and may include medical records, financial records, and other reports. 42 C.F.R. 51.41(c)(1).

Flint Community Schools argues that it is not a "facility or program rendering care or treatment" under Section 10806(b)(3)(A), because it does not operate residential programs or mental health facilities and because it does not offer treatment for disabilities. Accordingly, the school district argues, PAIMI's records-access provisions do not apply. (Appellants' Opening Br. 22, 41-42; Response to Motion for Preliminary Injunction, R. 14, Page ID # 229-230). Because PAIMI's statutory and regulatory language is broad enough to encompass non-residential schools that provide care and treatment to students with disabilities, the school district's argument fails.

1. The Non-Residential Schools Operated By Flint Community Schools Are Facilities Under PAIMI's Records-Access Provisions

As explained above, PAIMI defines "records" in relevant part as "reports prepared by any staff of a facility rendering care and treatment," 42 U.S.C. 10806(b)(3)(A), and provides that the "facilities" from which P&A systems may obtain records "*may include, but need not be limited to,* hospitals, nursing homes, community facilities for individuals with mental illness, board and care homes, homeless shelters, and jails and prisons." 42 U.S.C. 10802(3) (emphasis added). The statutory language does not limit a P&A's access rights to residential facilities only.

Nor do PAIMI's implementing regulations foreclose the application of the statute to non-residential schools. Section 51.2 does not expressly define the term

"facility."[5] Rather, it merely states that the term "*includes* any public or private residential setting that provides overnight care accompanied by treatment services." 42 C.F.R. 51.2. Interpreting PAIMI to reach non-residential schools is not at odds with this regulatory language, and it accords with Congress's intent that P&A systems have "broad investigatory authority to carry out their responsibility to protect individuals with mental illness and to advocate on their behalf." *Disability Rights Wis., Inc.*, 463 F.3d at 725. Indeed, the same regulation specifically includes "special education" as one type of "[c]are or [t]reatment" covered by PAIMI. 42 C.F.R. 51.2.

PAIMI's legislative history further supports interpreting "facility" as encompassing non-residential schools. As originally enacted in 1986, PAIMI applied only to individuals with mental illness who were inpatients or residents of facilities rendering care or treatment. See Pub. L. No. 99-319, Tit. I, § 102(3), 100 Stat. 479. However, as part of the Children's Health Act of 2000, Congress broadened PAIMI's reach to include individuals with mental illness living in a community setting, including in their own homes. See Pub. L. No. 106-310, Div. B, Tit. XXXII, § 3206(b)(1)(B), 114 Stat. 1194.

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[5] The ordinary meaning of "facility" is "something designed, built, installed, etc., to serve a specific function affording a convenience or service" and unambiguously encompasses "educational facilities." *Random House Webster's Unabridged Dictionary* 690 (2d ed. 2001).

In *Connecticut Office of Protection & Advocacy for Persons with Disabilities* v. *Hartford Board of Education* (*Hartford Bd. of Educ.*), the Second Circuit squarely rejected a school district's argument that PAIMI's records-access provisions were limited to residential facilities. 464 F.3d 229 (2006). In that case, the defendant advanced an argument similar to the one Flint Community Schools makes here—that the PAIMI regulations limit the statute's reach to residential facilities. *Id*. at 238. As in this case, the United States filed an *amicus* brief explaining that HHS, the agency charged with issuing regulations implementing PAIMI, "interprets the investigatory authority of a P&A [system] pursuant to the PAIMI Act as extending to any facility providing care and treatment to the mentally ill, regardless of whether the facility is residential." *Id*. at 239 (quoting Govt. Br. at 10, *Hartford Bd. of Educ.* (No. 05-1240-CV)).

In an opinion written by then-Judge Sotomayor, the court explained that HHS's reasonable interpretation as advanced in the United States' *amicus* brief that PAIMI extends to non-residential facilities was entitled to deference. *Hartford Bd. of Educ.*, 464 F.3d at 239. PAIMI's definition of "facilities" does not distinguish between residential and day facilities, and although many of the examples provided in the statute and the regulation are residential, PAIMI also lists "community facilities," a term which, on its face, is not limited to residential facilities. *Id*. at 240 (citing 42 U.S.C. 10802(3)). Relying on this statutory text and legislative

history, the court held that limiting PAIMI's records-access provisions to residential facilities would be "contrary to Congress's clearly expressed intent [in the 2000 amendments] to provide protection and advocacy services for individuals with mental illness living in their own homes." *Ibid*. The court held that, to the extent the text of 42 C.F.R. 51.2 was not consistent with that interpretation, HHS's interpretation as set forth in its *amicus* brief—that PAIMI reaches non-residential facilities that provide care or treatment to individuals with mental illness—was entitled to deference. *Id.* at 239-240 (citing *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997), and *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-140 (1944)).

2. The School District Provides Care And Treatment To Students With Mental Illness

Contrary to Flint Community Schools' argument (Appellants' Opening Br. 41), the school district is subject to PAIMI's records-access requirements because it provides "care and treatment" to students with mental illness. PAIMI regulations define "[c]are or [t]reatment" to include "special education." 42 C.F.R. 51.2. MPAS has alleged that at least one student, J.J., is covered under PAIMI and has an "education plan." (Complaint, R. 1, Page ID # 12; see also Affidavit, R. 5-4, Page ID # 125 (affidavit signed by J.J.'s mother stating that J.J. has been diagnosed with ADHD, Oppositional Defiant Disorder, and Bipolar Disorder); Opinion, R. 23, Page ID # 342 (stating that the facts presented in MPAS's complaint "appear to be undisputed")). If true, then the school district provides care or treatment in the

form of "special education services" to at least one individual with mental illness and is subject to the PAIMI's records-access requirements.

C. The P&A Acts' Records-Access Provisions Apply To Non-Residential Schools Even Absent Allegations Of Abuse Or Neglect

Even while arguing that it does not operate "facilities" under the P&A Acts, Flint Community Schools concedes that the P&A Acts do reach non-residential schools under certain circumstances—namely, where there are allegations of abuse and neglect. (Appellants' Opening Br. 46-49; Response to Motion for Preliminary Injunction, R. 14, Page ID # 230). The school district urges that *Hartford Bd. of Educ.* and other cases applying the P&A Acts to non-residential schools are distinguishable on this basis. (Appellants' Opening Br. 46-49; Response to Motion for Preliminary Injunction, R. 14, Page ID # 230-232).[6] But as the district court correctly recognized, this argument "disregards the plain language of the record disclosure provisions" of the P&A Acts. (Opinion, R. 23, Page ID # 350-351). Under the P&A Acts, a P&A system's authority to "investigate incidents of abuse and neglect of individuals with" mental illness or other disabilities, 42 U.S.C. 10805(a)(1)(A) (PAIMI), 42 U.S.C. 15043(a)(2)(B) (DD Act), is *separate from,*

[6] Appellants also note that all students who attended the school at issue in *Hartford Bd. of Educ.* required special education or related services, whereas the Flint school district serves students both with and without disabilities. (Appellants' Opening Br. 48 n.9). The school district fails to point to any language in the P&A Acts or their regulations that suggest this distinction matters.

and in addition to, its authority to "have access to all records of" individuals with mental illness or other disabilities who have authorized the P&A to have such access, 42 U.S.C. 10805(a)(4)(A) (PAIMI), 42 U.S.C. 15043(a)(2)(I)(ii) (DD Act). As the district court correctly held, the records-access provisions of the P&A Acts "are not cabined by the 'abuse or neglect' provisions, and the right to access records therefore is not restricted in scope to the records only of clients of the plaintiff who have allegedly been abused or neglected." (Opinion, R. 23, Page ID # 351); see also *Hartford Bd. of Educ.*, 464 F.3d at 240-241 (rejecting a similar argument regarding a P&A system's access to individuals under the DD Act).[7]

II

MPAS WAS NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES UNDER THE IDEA

A. The Individuals With Disabilities Education Act

The IDEA, 20 U.S.C. 1400 *et seq*., requires that States receiving IDEA funding make a free appropriate public education (FAPE) available to eligible children with disabilities. 20 U.S.C. 1412(a)(1). For each child with a disability,

[7] In its opening brief (at 46-49), Flint Community Schools appears to argue that, notwithstanding the language of the P&A Acts, the IDEA is simply a more appropriate vehicle for addressing MPAS's concerns than are the P&A Acts. This is a policy argument that finds no support in the P&A Acts themselves or in relevant case law.

the IDEA requires that parents, teachers, and other school officials work together to develop an individualized education program (IEP). See 20 U.S.C. 1414(d)(1)(B); 34 C.F.R. 300.321. The IEP must include a statement of the special education and related services, as well as supplementary aids and services, to be provided to the child. 20 U.S.C. 1414(d)(1)(A)(i).

The IDEA also requires that States establish a procedure by which parents of a child with a disability may examine all records relating to the child and participate in meetings regarding the child's identification, evaluation, educational placement, and the provision of a FAPE. 20 U.S.C. 1415(b)(1). Participating school districts must comply with a records request from a parent "without unnecessary delay * * * and in no case more than 45 days after the request has been made." 34 C.F.R. 300.613.

The IDEA also requires that States establish administrative procedures to resolve any disputes regarding identification, evaluation, placement, and provision of a FAPE. 20 U.S.C. 1414-1415. A party to the dispute may present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." 20 U.S.C. 1415(b)(6)(A). If the complaint cannot be resolved through the procedures set forth in Section 1415(f)(1)(B), the IDEA requires that the State provide the parents of the child or the local educational agency with the opportunity for an impartial

due process hearing. 20 U.S.C. 1415(f)(1)(A). In States that operate a two-tier system, any party aggrieved by the findings and decision rendered in the due process hearing may then appeal to a state educational agency. 20 U.S.C. 1415(g). A P&A system is not listed among the entities that can file for a due process hearing under Sections 1415(f) and (g).

Section 1415(*l*) of the IDEA states that the statute should not be construed to "restrict or limit the rights, procedures, and remedies available under the Constitution" or "other Federal laws protecting the rights of children with disabilities." 20 U.S.C. 1415(*l*). However, where a litigant seeks to bring an action under another law and seeks "relief that is also available under" the IDEA, the due process procedures set forth in Sections 1415(f) and (g) "shall be exhausted to the same extent as would be required had the action been brought under" the IDEA. *Ibid*.

The school district argues that MPAS's claim is not ripe because MPAS failed to exhaust IDEA's administrative procedures before filing suit. (Appellants' Opening Br. 26-36; Response to Motion for Preliminary Injunction, R. 14, Page ID # 226-229; Supplemental Brief in Opposition to Motion for Preliminary Injunction, R. 21, Page ID # 324-326). But as explained below, the IDEA's exhaustion requirement does not apply here because P&A systems acting in their own right are not authorized to file complaints under the IDEA's due process procedures.

B. The IDEA's Exhaustion Requirement Does Not Apply Because P&A Systems May Not Invoke The IDEA's Due Process Procedures

The IDEA does not restrict the filing of a lawsuit under the Constitution, the ADA, Section 504, or other federal laws protecting the rights of children with disabilities, unless the relief sought by such party is also available under the IDEA. See 20 U.S.C. 1415(*l*). In that case, the party must first exhaust the administrative due process procedures set forth in Sections 1415(f) and (g) "*to the same extent as would be required"* if the action had been brought under the IDEA. *Ibid*. (emphasis added). In other words, exhaustion is required *only* if the dispute could have been addressed under Sections 1415(f) and (g).

The IDEA is clear that the only parties that may avail themselves of the due process procedures described in Sections 1415(f) and (g) are "the parents or the local educational agency involved." 20 U.S.C. 1415(f)(1)(A); see also 34 C.F.R. 300.507. Where a P&A system is acting as the representative of a parent and advocates on behalf of a specific child, it undoubtedly must exhaust the procedures set forth in Sections 1415(f) and (g). But as the district court found in this case, MPAS is acting "on its own behalf" and not as a representative of any particular student. (Opinion, R. 23, Page ID # 347). Thus, even if it were seeking relief that is available under the IDEA (which the parties dispute), not only is MPAS not *required* to file an administrative due process complaint under Sections 1415(f) and (g), it is actually not *permitted* to do so. As such, no relief is available to

MPAS under the IDEA's due process procedures, and the IDEA's exhaustion provision does not apply.

The school district relies on *Fry* v. *Napoleon Community Schools*, 788 F.3d 622 (6th Cir. 2015) (*Fry*), petition for cert. pending, No. 15-497 (filed Oct. 19, 2015), to argue that exhaustion of IDEA procedures is required. (Appellants' Opening Br. 29-31, 38; Response to Motion for Preliminary Injunction, R. 14, Page ID # 228-229; Supplemental Brief in Opposition to Motion for Preliminary Injunction, R. 21, Page ID # 326). But that case is distinguishable. In *Fry*, a school district denied a request by the parents of a student with disabilities to have the assistance of a service dog during the school day. 788 F.3d at 623. The parents sued in federal court, alleging violations of the ADA and Section 504. *Ibid*. The court held that IDEA exhaustion was required because the plaintiffs "allege[d] in effect that [the] school's decision regarding whether [the student's] service animal would be permitted at school denied her a [FAPE]." *Id*. at 627. But in *Fry*, it was the student's *parents* who brought the claim. *Id*. at 623. Parents of students with disabilities are expressly included among the parties who may use the due process procedures set forth in Sections 1415(f) and (g). 20 U.S.C. 1415(f)(1)(A); 34 C.F.R. 300.507. On the other hand, MPAS, acting in a non-representative capacity, had no statutory authority to file a claim under those procedures, which are available only to parents and local educational agencies.

Because MPAS had no right to avail itself of the IDEA's due process procedures, 1415(*l*) does not apply.

In its opening brief, the school district argues that even if the relief that MPAS seeks was not available under the IDEA's due process procedures, MPAS could have filed a complaint under Michigan's IDEA state complaint procedures. (See Appellants' Opening Br. 33-34); see also 34 C.F.R. 300.151-300.153 (IDEA Subpt. B State Complaint Procedures); Mich. Admin. Code R. 340.1851-340.1855 (2016). Even if this is true, the IDEA does not require exhaustion of state complaint procedures before a lawsuit may be filed. Rather, IDEA requires exhaustion *only* for disputes that could have been resolved under Sections 1415(f) and (g), which are the procedures relating to a due process hearing. See 20 U.S.C. 1415(*l*). As described above, MPAS could not have brought its claim under the IDEA's due process procedures.

There is no authority for the proposition that a litigant must exhaust state complaint procedures if the relief it is seeking is unavailable under Sections 1415(f) and (g). On the contrary, courts that have examined the issue have concluded that litigants need not exhaust state complaint procedures before filing suit under the IDEA in such circumstances. See *Porter* v. *Board of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002), cert. denied, 537 U.S. 1194 (2003). In *Porter*, the plaintiff's complaint alleged an IDEA

violation for which exhaustion of due process procedures would have been futile. *Id.* at 1070. The defendant, a school district, argued that even if the relief the plaintiff sought was unavailable under the IDEA's due process procedures, the plaintiff was still required to exhaust under California's state complaint procedures, which were capable of providing the relief sought by the plaintiff. *Ibid*.

After an examination of the text and purposes of the IDEA and its implementing regulations, the court concluded that, even where state complaint procedures are available, a party need not exhaust those procedures before filing suit to enforce rights under the IDEA. See *Porter*, 307 F.3d at 1070-1073. The court found it "highly relevant" that the United States Department of Education, which filed an *amicus* brief in the case, "has never interpreted its [state complaint resolution procedure] regulations as creating a mandatory step before suit alleging an IDEA violation." *Id*. at 1072; see also *Atlanta Cmty. Schs*. v. *Alpena-Montmorency-Alcona Educ. Serv. Dist.*, No. 11-14361, 2012 U.S. Dist. LEXIS 133004, at *22-26, 29 (E.D. Mich. Sept. 18, 2012) (relying on *Porter* to hold that, where due process procedures could not provide the requested relief, "the state complaint procedure does not need to be utilized in Michigan before a civil action is pursued").

It is true that MPAS ultimately received some of the documents it sought for some of the students after filing due process complaints on behalf of those students and their parents. The school district urges that this shows that the remedy sought by MPAS was available under the IDEA's due process procedures. (Appellants' Opening Br. 30-31). This argument misses the point. MPAS does not claim here that it cannot seek the records of a particular student through an IDEA due process hearing on behalf of that student or family. (See Reply to Response to Motion for Preliminary Injunction, R. 16, Page ID # 272 ("[MPAS] is not representing individual students with disabilities or their families in the present action.")). Instead, it claims that the school district has generally failed to produce student records in violation of MPAS's own rights under the P&A Acts. The P&A system itself is the party in interest.

A P&A system could act as a student's attorney and use IDEA due process procedures every time it seeks to obtain documents for a particular student. But this would require it to act in an official representative capacity each and every time it needs to obtain such documents. Such a requirement would negate the authority granted to P&A systems by the P&A Acts, which allow P&A systems to act in their own right.

CONCLUSION

This Court should affirm the district court's holdings that the P&A Acts' record-access provisions apply to non-residential schools, and that a P&A system need not exhaust IDEA administrative procedures before filing suit in federal court to enforce its own right under the P&A Acts to access student education records.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains no more than 6,318 words of proportionally spaced text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Symantec Endpoint Protection (version 12.1.6) and is virus-free.

s/ Elizabeth P. Hecker
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Date: April 14, 2016

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Sixth 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.

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RECORD ENTRY NUMBER	DOCUMENT DESCRIPTION	PAGE ID# RANGE
1	Complaint	2-3, 7, 10-31
5	Motion for Preliminary Injunction and Memorandum in Support of its Motion for Preliminary Injunction by all plaintiffs	41-42
5-2	Exhibit A – Plaintiff's 18 Records Request Letters	62-63, 65-67, 69-71, 73-74, 76, 78, 81-82, 86-88, 91, 94-96, 98-99, 104, 106-107, 111, 113, 117-119
5-4	Exhibit C – Affidavit of Marisa Sand, Parent of JJ	125
14	Response to Motion for Preliminary Injunction	222, 226-232
16	Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Preliminary Injunction	272, 276
21	Supplemental Brief in Opposition to Motion for Preliminary Injunction	324-326
23	Opinion and Order Granting Plaintiff's Motion for Preliminary Injunction	338-339, 341-342, 347-351