

NOTE
EXHAUSTED AND CONFUSED:
HOW *FRY* COMPLICATED
OBTAINING RELIEF FOR
DISABLED STUDENTS

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INTRODUCTION

On November 17, 1989, Senator Tom Harkin of Iowa declared that Senate Bill 1824 “will go a long way toward ensuring that children with disabilities grow up to meet their full potential as productive citizens.”¹ The Individuals with Disabilities Education Act (IDEA) was signed into law by President George H.W. Bush on October 30, 1990.² Congress sought to grant students with disabilities equal access to a public education by increasing federal funding for specialized programs and allowing the states and local school boards to draw individualized programs to meet their specific student needs. IDEA was the successor to the Education for All Handicapped Children Act of 1975.³ One of the central tenets of the special education legislation is the guarantee of a free appropriate public education (FAPE) for disabled students.⁴ Since the 1970s, Congress has enacted numerous pieces of legislation to promote equality for the disabled, including the Rehabilitation Act⁵

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1. 135 CONG. REC. 29, 833 (1989) (statement of Sen. Harkin).
2. Pub. L. No. 101-476, 104 Stat. 1103 (1990).
3. 135 CONG. REC. 29, 832-33 (1989) (explaining that IDEA is a reauthorization and expansion of programs that date back to the Education for All Handicapped Children Act of 1975).
4. Angelika Orletsky Doeblner, *There is No Such Thing as a Free Appropriate Public Education*, 51 ARIZ. ST. L.J. 775, 776-77 (2019).
5. 29 U.S.C. § 701(b) (2018) (defining the purpose of the amendments to the Rehabilitation Act).

and the Americans with Disabilities Act (ADA).⁶ The Rehabilitation Act was passed in order to “maximize opportunities for individuals with disabilities” by providing support and economic opportunities.⁷ The ADA focuses generally on eliminating “discrimination faced day-to-day by people with disabilities.”⁸ While the ADA and Rehabilitation Act focus more generally on discrimination, IDEA is more narrowly concerned with education.

In the thirty years following the passage of IDEA, the Supreme Court has been asked to weigh in on what services schools are required to provide students with disabilities and how parents and guardians can seek relief when those services are not made available.⁹ Many of these decisions addressed procedural issues, shedding light on when certain claims can be raised in court on behalf of children with disabilities, what relief may be provided, and under what law a claim may arise. One such case is the 2017 decision *Fry v. Napoleon Community Schools*.¹⁰ In *Fry*, the Court held that when a plaintiff alleges that she has been denied educational services in violation of her statutory right to a free and appropriate public education (or FAPE), the complaint arises under IDEA, and parents¹¹ must exhaust administrative remedies before seeking relief in federal court.¹² However, if claims are not based on the denial of a FAPE, then the claim can be brought under statutes like the Rehabilitation Act or the ADA, and plaintiff’s parents may bypass any administrative proceedings.¹³ To assess whether there is a denial of a FAPE, the Court has not articulated a firm test, instead suggesting “clue[s]” that may be used to determine the gravamen, or crux, of the complaint.¹⁴

Some scholars considered *Fry* a victory for parents of disabled students, as it provided them with a clear path to bring cases of discrimination to court without being dragged through a long

6. 42 U.S.C. § 12101(b) (2018) (defining the purpose of the ADA).

7. 29 U.S.C. § 701(B)(2) (2018).

8. 42 U.S.C. § 12101(B)(4) (2018).

9. See Doebler, *supra* note 4, at 779–83 (explaining some of the Court’s precedents interpreting FAPE).

10. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

11. Throughout this note I say use the term “parents” to describe who is bringing claims on behalf of disabled students. This is done for consistency and clarity; of course, there are countless others beyond parents that care for and represent disabled children.

12. *Fry*, 137 S. Ct. at 752.

13. *Id.* at 747.

14. *Id.*

administrative process under IDEA.¹⁵ But this optimism proved shortsighted: since *Fry*, appellate courts have struggled to clearly and consistently identify the elements of a FAPE claim and whether IDEA imposes an exhaustion requirement on the plaintiff.¹⁶ Moreover, as noted in *Fry*, some cases may implicate multiple sources of law, such as IDEA, the ADA, and the Rehabilitation Act, which further complicates the question of when the exhaustion requirement applies.¹⁷ The procedural hurdles and statutory ambiguities have frustrated the very point of IDEA, thereby depriving the disabled of the services they need to become productive members of society.

This Note explores how *Fry* fits into the broader picture of special education law, how Circuit Courts have applied the *Fry* doctrine, and offers solutions to streamline the procedures to bring a claim under IDEA. Part I will explore a limited history of special education cases, highlighting the foundations and contours of the education entitled to students with disabilities. Part II will explain the *Fry* decision, and show that the Court has failed to provide clear guidance to plaintiffs in part because it has articulated a set of “clues” to be applied as a guiding framework rather than a test. Part III will then discuss how the Circuits have interpreted *Fry*. The Circuits differ on three issues: 1) whether the clues are a loose frame to follow or a firm test to apply, 2) whether the clues apply to a complaint as a whole or claim-by-claim within a complaint, and 3) whether a request for monetary damages exempts a complaint from exhaustion under IDEA. Part IV will offer solutions to resolve ambiguities in the clue framework in order to promote procedural consistency. The Court should articulate its “clue” inquiry as a firm test with a clear standard that lower courts may readily apply. It could do this by clarifying that the clues suggested are actually elements of a test and not guiding principles for lower courts to use at their discretion. Further, the Court should require lower courts to apply this new test to the complaint taken as a whole and not claim-by-claim. This would prevent parents from having to maintain separate litigation tracks simultaneously, and there would be less confusion regarding whether the complaint is addressing the denial of a FAPE and requires exhaustion. Additionally, the exhaustion requirement

15. See, e.g., Robert Garda, *Fry v. Napoleon Community Schools: Finding a Middle Ground*, 46 J.L. & EDUC. 459, 460 (2017) (“This is a significant victory for students and parents that need immediate and efficient relief from disability discrimination.”).

16. See *id.* at 467–68 (arguing that not deciding the issue of relief leaves a huge hole, allowing plaintiffs to sidestep IDEA by requesting relief unavailable under the law).

17. *Fry*, 137 S. Ct. at 756.

should not apply when the litigant is seeking relief not explicitly offered by the statutory text, which, in the case of IDEA, does not include money damages. Although parents could theoretically tack on a request for damages to avoid exhaustion, judges applying the test would be able to assess if the complaint is about the denial of a FAPE or some other statutory right.

While these concrete steps would not resolve all of the problems facing IDEA exhaustion jurisprudence, having a standardized and administrable test would provide clarity to the courts and families seeking relief for their children. Procedural clarity is essential for timely access to justice. The need for speedy resolution is particularly acute for children with disabilities seeking educational rights, who are in school for a limited time. Clarifying the procedural mechanisms in special education cases would streamline the process by which parents help their children with disabilities obtain relief.

I. SELECTED LEGAL HISTORY OF SPECIAL EDUCATION

For much of U.S. history, children with disabilities have been denied access to public education.¹⁸ In many states, schools were allowed to exclude students whose presence they felt would interfere with the educational experiences of other students.¹⁹ However, after the Court declared segregation in schools unconstitutional in *Brown v. Board of Education*,²⁰ parents of disabled children began to bring suits challenging the exclusion of their children from public school systems.²¹ *Pennsylvania Association for Retarded Children v. Pennsylvania*²² and *Mills v. Board of Education*²³ are prominent examples of district court decisions that enforced special needs students' rights to an education.

Twenty years after *Brown*,²⁴ Congress began to take action to

18. Thomas A. Jacobs, *Education: Student Rights and Responsibilities*, in CHILDREN AND THE LAW: RIGHTS AND OBLIGATIONS, 2 § 9:32, Westlaw (database updated May 2020).

19. Alessandra Perna, *Breaking the Cycle of Burdensome and Inefficient Special Education Costs Facing Local School Districts*, 49 NEW ENG. L. REV. 541, 546 (2015).

20. 74 S. Ct. 686, 692 (1954).

21. *See id.* at 547 (explaining the impact that *Brown* had in emboldening parents of disabled children to bring claims of their own against public schools for the “feeling of inferiority” it caused).

22. *See Pa. Ass’n for Retarded Child. v. Pennsylvania*, 334 F. Supp. 1257, 1258 (E.D. Pa. 1971) (holding that Pennsylvania could not deny mentally disabled children access to a free public education program).

23. *See Mills v. Bd. of Educ.*, 348 F. Supp. 866, 878 (D.D.C. 1972) (finding that the school board’s denial of public education to disabled children violated the Due Process Clause).

24. *Brown*, 74 S. Ct. 686.

ensure that disabled students had access to free public education. The Education for All Handicapped Children Act was passed in 1975 and developed much of the current framework for educating disabled children.²⁵ Congress granted to all children with disabilities a legal right to a “free appropriate public education,” funded by taxpayer dollars.²⁶ What qualified as a FAPE was determined by state educational standards.²⁷ Rather than setting a uniform standard for what each child’s education should look like, Congress instead developed the Individualized Education Program (IEP) requirement, which mandates that a team of family and educators develop an education plan tailored to the child’s particular needs.²⁸ The IEP sets individual goals and identifies the special education services designed to assist the student and realize her right to a FAPE.²⁹ Legislation does not set a standard for what education programs are necessary to constitute a FAPE and instead provides for procedural mechanisms to ensure a FAPE is provided.³⁰ Congress required the States to provide an administrative avenue for parents to bring challenges, which must include notice, due process, and an opportunity to mediate.³¹ How a parent exhausts administrative remedies is dependent on the state procedure.

Congress further addressed issues facing disabled Americans (though not in the context of education) when it passed the Rehabilitation Act in 1973, which announced that any state or federal agency receiving federal money could not discriminate in the provision of services to the disabled.³² In 1990, the Americans with Disabilities Act (ADA) banned discrimination on the basis of disability in employment and in places of public accommodation.³³

While these laws significantly advanced the interests of disabled children, large gaps remained. Much of the statutory language granting

25. Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. Davis L. Rev. 349, 350–51 (1990).

26. See Perna, *supra* note 19, at 548 (citing *Pa. Ass’n for Retarded Child.*, 343 F. Supp. at 285, and asserting that Congress acted after a wave of court decisions had affirmed the right of each child to an education).

27. 20 U.S.C. § 1401(9)(A)-(D) (2018).

28. *Id.* § 1414.

29. See *id.* (outlining generally the terms of an IEP).

30. See *id.* § 1415(A) (requiring that states maintain procedures to ensure that a free appropriate public education is guaranteed).

31. *Id.* § 1415(b).

32. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017).

33. See 42 U.S.C. § 12101(b)(1) (2018) (identifying the purpose of the ADA as demanding the elimination of discrimination against disabled persons).

rights to disabled Americans was vague and established broad goals without specifying exactly what disabled services in education should look like. Thus, when asked to determine to what educational services disabled students were entitled, the Supreme Court had little concrete instruction to work with.

Arguably, *Board of Education v. Rowley*³⁴ is the seminal case on what constitutes a FAPE. In *Rowley*, Amy Rowley sued her school for failing to provide her with a sign language interpreter.³⁵ After going through the administrative process of challenging her IEP, Rowley brought suit in federal court, claiming that she was denied a FAPE.³⁶ The Court, examining the Education for All Handicapped Children Act, determined that Congress sought only to “open the door” to education for disabled students and did not guarantee them any level of education.³⁷ Moreover, the Court rejected that the Act mandated an “equal” education for disabled students because this would be “an entirely unworkable framework.”³⁸ Lastly, the Court held that lower courts should ask whether a district complying with the Act had developed a program “reasonably calculated to enable the [disabled] child to receive educational benefits”³⁹ In 2017, the Court had the opportunity to define the level of educational progress sufficient to satisfy the *Rowley* requirements. In *Andrew F. v. Douglas County School District*, the family of a child with autism brought a suit alleging that his right to a FAPE had been violated.⁴⁰ The plaintiff argued for a new standard, one based on the likelihood of the child’s academic success and implored the Court to abandon the vague *Rowley* requirements.⁴¹ The Court rejected the proposal and reaffirmed *Rowley*’s “reasonably calculated to enable the child to receive educational benefits” standard.⁴² However, the Court also held that a mere *de minimis* amount of progress was not enough to qualify as a FAPE⁴³: If students are only expected to make *de minimis* progress each year, they “can hardly be said to have been offered an education

34. 458 U.S. 176 (1982).

35. *Id.* at 185.

36. *Id.* at 184–85.

37. *Id.* at 192.

38. *Id.* at 198.

39. *Id.* at 206–07.

40. 137 S. Ct. 988, 995 (2017).

41. *Id.* at 991, 1001.

42. *Id.* at 1001.

43. *Id.* at 1000–01.

at all.”⁴⁴

In addition to defining the substantive elements of a FAPE, the Court has also prescribed the procedural requirements of a FAPE—in other words, what *procedures* schools must comply with to fulfill their statutory obligations. In *Honig v. Doe*, two disabled students challenged the terms of their IEPs.⁴⁵ The Court noted that the IEP is the “centerpiece of the statute’s education delivery system” and is the “vehicle” by which students receive a FAPE.⁴⁶ The Court also maintained that parents may seek review in court when the administrative review process proves “unsatisfactory.”⁴⁷

Though the Court further defined what qualifies as a FAPE, questions remained as to which anti-discrimination statute parents were procedurally required to use to pursue FAPE claims. Prior to the passage of IDEA, in *Smith v. Robinson*, a student with cerebral palsy brought suit under the Education for the Handicapped Children Act (the predecessor to IDEA), alleging that his due process and FAPE rights were violated because he could no longer attend a day program at a hospital due to a lack of funding.⁴⁸ The Court rejected the due process claim, holding that Congress intended for the Education for the Handicapped Children Act to be the exclusive means of challenging the adequacy of disabled children’s education.⁴⁹ In response to questions of which statute applies in special education cases, Congress amended IDEA to add an exhaustion requirement.⁵⁰ This provided that claims may be brought in federal court under the ADA or like laws unless the claimant is seeking relief under IDEA, in which case administrative remedies must be first exhausted.⁵¹

In short, before *Fry*, it was settled that every disabled child was entitled to a FAPE.⁵² To satisfy that requirement, a school’s efforts to provide such education needed only be “reasonable”—a less than exacting standard. The primary means of receiving this FAPE was the IEP. After Congress amended IDEA, parents challenging the adequacy of their child’s education had to exhaust administrative remedies as

44. *Id.* at 1001.

45. 484 U.S. 305, 313–14 (1988).

46. *Id.* at 311.

47. *Id.* at 312.

48. 468 U.S. 992, 995 (1984).

49. *Id.* at 1009, 1013.

50. 20 U.S.C. § 1415(l) (2018).

51. *Id.*

52. 20 U.S.C. § 1400(d) (2018).

specified by the state, meeting the minimum procedural bar set by statute. But one question remained: How were courts to determine whether the claim is for the denial of a FAPE, in cases where plaintiff seeks relief under multiple anti-disability-discrimination statutes?

II. IDEA EXHAUSTION UNDER *FRY V. NAPOLEON COMMUNITY SCHOOLS*

Ehlana Fry was born with a severe form of cerebral palsy and required a service dog to assist her in all life activities.⁵³ When Ehlana was to begin kindergarten, school officials barred her from using her service dog at school.⁵⁴ Fry's parents filed a complaint with the Department of Education Office for Civil Rights, alleging that forbidding Ehlana from bringing her service dog to school violated Title II of the ADA and Section 504 of the Rehabilitation Act.⁵⁵ The Fry family then brought suit in federal district court, seeking declaratory relief and monetary damages.⁵⁶

The district court dismissed the claim on procedural grounds, holding that the Fry family must exhaust its claim administratively before bringing suit in federal court because the claim was actually governed by IDEA.⁵⁷ The Sixth Circuit Court of Appeals affirmed because "the genesis and manifestations" of the claim were "educational" in nature and thus arose from the substantive protections of IDEA as opposed to the ADA and other anti-discrimination statutes.⁵⁸

The Supreme Court first looked to the text of IDEA to determine whether the statute imposed an exhaustion requirement, finding that Section 1415(l) requires that plaintiffs must first exhaust administrative avenues before bringing suit arising from the set of facts under other statutes.⁵⁹ Moreover, the Court reiterated that IDEA codifies the right to a free appropriate public education and held that the FAPE requires "'meaningful' access to education based on [the child's] individual needs."⁶⁰ Administrative officials are limited in their remedial powers:

53. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 750–51 (2017).

54. *Id.* at 751.

55. *Id.*

56. *Id.* at 751–52.

57. *Id.*

58. *Id.*

59. 20 U.S.C. § 1415(l) (2018).

60. Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 753–54 (2017) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 192 (1982)).

They can only grant relief in furtherance of a FAPE.⁶¹ Only those claims that allege denial of a FAPE are subject to IDEA's exhaustion requirement.⁶²

Because the exhaustion requirement is only triggered by IDEA claims, the Court set out guidelines to determine if the claim alleges denial of a FAPE and thus originates under IDEA, rather than another anti-discrimination statute. Per *Fry*, the court should start by looking at the complaint.⁶³ The reviewing court should look beyond the face of the complaint and instead look to the substance of the complaint's request to determine which statute's procedural requirements control.⁶⁴ To do this, courts must focus on the "gravamen," or essence, of the complaint.⁶⁵ The Court recognized that there is some overlap in the substantive protections and remedies available under IDEA, the Rehabilitation Act, and the ADA which could complicate determining which statute applies.⁶⁶ To determine if IDEA applies, and exhaustion is required, the Court provided two "clues" to discern whether the gravamen of the complaint is the denial of a FAPE or other non-education related discrimination. First, could the plaintiff have asserted the claim against a non-school public facility?⁶⁷ And second, could an adult in the school building bring the same claim?⁶⁸ If both questions could be answered in the affirmative, then the gravamen of the complaint is not the denial of a FAPE, and thus is not an IDEA claim, which only applies to children in schools.⁶⁹ Further, the Court clarified that the history of the pleadings may be useful: If the claim was originally brought under IDEA rather than the ADA, then the claim may concern the denial of a FAPE.⁷⁰ In *Ehlana Fry's* case, the Court held that, because she could have brought a similar claim against a public library and an adult denied the use of a service animal could have brought the claim, the gravamen of the suit was not the denial of a FAPE.⁷¹

In his concurrence, Justice Alito stressed that these "clues" may be

61. *Id.* at 754.

62. *Id.* at 754–55.

63. *Id.* at 755.

64. *Id.*

65. *Id.*

66. *Id.* at 756.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 757.

71. *Id.* at 758.

confusing for lower courts to apply because they only work if there is no overlap in the relief available under the sibling statutes.⁷² Moreover, Alito argued that the procedural history of a parent’s complaint is not particularly telling, given that parents may decide to change strategy if advised by counsel that the relief they seek is available elsewhere.⁷³

For lower courts, the *Fry* decision proved downright confusing. The statute mandates that IDEA claims be exhausted administratively before they can be pursued in another forum.⁷⁴ Yet, as Justice Alito notes, there is not always a clean distinction between relief allowed under IDEA and other related statutes, like the ADA. Some remedies, like monetary relief, are available under IDEA’s sister statutes but are unavailable under IDEA—adding to the confusion. Despite the potential overlap in remedies, IDEA is unique in its exhaustion requirement.⁷⁵ But many of the underlying *substantive* claims may be pursued under IDEA, the ADA, or the Rehabilitation Act. Further complicating the inquiry is the fact that complaints may include various claims, some for the denial of a FAPE under IDEA and others for discrimination against a disabled child more generally. The *Fry* test does not make parsing these claims easy: indeed, parents litigating these claims would have to seek remedy for both claims in separate proceedings—creating duplicative suits. Furthermore, by framing these tests as mere “clues” for determining the gravamen of the complaint, the Court provided no real guidance on whether lower courts should analyze each claim separately or view the complaint as a whole.⁷⁶

For example, if a deaf student is denied the use of a translator to help communicate Sign Language in school, she may raise a number of different claims. The student may bring a claim under IDEA because the lack of an interpreter could cause the child to struggle in school, thereby denying her a FAPE. However, relief may also be available under Title II of the ADA for discrimination on the basis of disability. Applying *Fry*’s “clue” framework, the student may have the same claim against another public facility and an adult could bring the same or similar claim. One judge rigidly applying the clues may allow a claim under the ADA and not require exhaustion; yet another judge, looking

72. *Id.* at 759 (Alito, J., concurring).

73. *Id.*

74. *See* 20 U.S.C. § 1415(l) (2018) (articulating the requirement that administrative remedies must be sought before a lawsuit can be filed).

75. *Id.*

76. The Court also remained silent on the issue of monetary damages. *Fry*, 137 S. Ct. at 752 n.4.

at the same complaint, might apply the clues less stringently and determine that the complaint as a whole is seeking to restore the child's educational services, thus requiring exhaustion under IDEA. Therefore, the framework established in *Fry* may lead to inconsistent results.

Moreover, it is unclear from the Court's analysis whether seeking other relief in addition to a FAPE exempts the complaint from IDEA's exhaustion requirement. The Court has consistently provided that an IDEA hearing officer may only grant relief under IDEA, and the only relief available is the restitution of the child's FAPE.⁷⁷ If a family asks for monetary damages, as in *Fry*, they must look elsewhere—IDEA gives them no such remedy.

The clues used to determine the crux of the complaint may help a court decide whether a claimant is seeking relief for denial of an educational benefit or discrimination more broadly.⁷⁸ However, this potential benefit to courts may not be felt by families in the absence of a concrete standard. The clue framework could prove more confusing than helpful when statutes overlap and the relief being sought may be in part to provide an adequate education and in part to alleviate discrimination.

Justice Alito identified major questions regarding the approach adopted by the *Fry* Court. However, he did not go far enough in stating the potential consequences of the framework established in *Fry*. Beyond the articulated holes the Court left in both the exhaustion framework and the accompanying clues, the *Fry* opinion does little to make the reality easier for the parents bringing challenges.⁷⁹ This resulting uncertainty means that parents may have claims pending in parallel tracks, simultaneously litigating under IDEA administrative structure and in federal court under the ADA. Under the Court's current approach, there is no clarity as to which claims can proceed. Litigating in parallel tracks might be too difficult and expensive for parents to manage. Parents and guardians aim to see their student attain a good education, receive the services he needs to succeed, and

77. *Id.* at 755.

78. See Garda, *supra* note 15, at 471 (arguing that *Fry* eliminated the ability to avoid exhaustion by artful pleading).

79. Ruth Colker suggests that parents may be inclined to abandon challenges under IDEA and instead ask for services available under the Rehabilitation Act in order to access federal courts and get faster results. See Ruth Colker, *Did the Fry Decision Under the IDEA Overturn Rowley?*, 46 J.L. & EDUC. 443, 449–50 (2017) (illustrating how an approach by a family pre-*Fry* in avoiding claims based in education would be an appropriate strategy to finding relief after *Fry*).

avoid discrimination. Yet, the framework adopted by the Court may instead cause parents to abandon educational claims altogether, so that they may skirt the exhaustion process and receive faster relief.

Criticism aside, the *Fry* decision should be noted for allowing claims that do not allege a denial of a FAPE to bypass IDEA entirely. However, in the process, the Court created more confusion regarding which claims of discrimination are actually subject to exhaustion.

III. SPLINTERED APPLICATION OF *FRY* ACROSS THE CIRCUITS

Perhaps unsurprisingly, lower courts have not applied *Fry* uniformly. Judges have struggled to determine how much weight to give the “clues” in their analysis and how to characterize the relief being sought. As Justice Alito warned, the clues are clear if there is no overlap in the coverage of statutes such as IDEA, the Rehabilitation Act, and the ADA.⁸⁰ However, if a claim could be brought under any of the relevant anti-discrimination statutes, then the clues are wholly unilluminating.⁸¹

The circuits have split on how to 1) apply the clues and 2) determine what relief is being sought. On the issue of using the “clues” to determine the gravamen of the complaint, the Fourth, Fifth, Sixth, Eighth, and Tenth Circuits have applied the clues as if they were a mandatory test.⁸² The First, Third, Ninth, and Eleventh Circuits, as well as district courts in the Second and D.C. Circuits, have instead used the clues as less of a test and more of a guide.⁸³ With respect to the second inquiry, the Fifth, Sixth, Ninth, and Tenth Circuits have looked claim-by-claim to see if exhaustion is required for each claim.⁸⁴ The First, Third, Fourth, and Eighth Circuits, in contrast, examine the nature of the complaint as a whole.⁸⁵

Open questions remain as to whether a claim is governed by IDEA when plaintiffs seek relief unavailable under the statute, such as

80. *Fry*, 137 S. Ct. at 759 (Alito, J, concurring).

81. *Id.*

82. See Maureen A. MacFarlane, *In Search of the Meaning of an “Appropriate Education”*: Ponderings on the *Fry* and *Endrew* Decisions, 46 J.L. & EDUC. 539, 549–52 (exploring some of the ways in which the circuits have adopted and applied *Fry*; while not a complete identification of up to date circuit cases, it roughly provides an overview into how the issues of *Fry* have been framed).

83. *Id.*

84. *Id.*

85. *Id.*

monetary damages along with services to ensure a FAPE.⁸⁶ Due to the recency of the *Fry* decision, there is not an extensive record of circuit level decisions applying *Fry*.

A. What to make of the clues?

One split is what weight to give the clues in determining the gravamen of a complaint. The First Circuit in *Doucette v. Georgetown Public Schools*,⁸⁷ Third Circuit in *Wellman v. Butler Area School District*,⁸⁸ Ninth Circuit in *Paul G. v. Monterey Peninsula Unified School District*,⁸⁹ and Eleventh Circuit in *J.S. v. Houston County Board of Education*⁹⁰ have decided that the Court intended for the clues to be used as signposts. District courts in the Second Circuit and the D.C. Circuit have followed this path.⁹¹ The Eleventh Circuit rejected a rigid application of the *Fry* clues in *Houston County*. The case involved an appeal by a severely disabled student who had been removed from class and forced to sit in the school weight room, isolated from his classmates.⁹² The teacher who had removed the disabled student from class had allegedly abused him both verbally and physically.⁹³ Upon learning of the alleged abuse, the student's parents filed a lawsuit, alleging violations of the ADA.⁹⁴ In identifying the gravamen of his complaint, the court noted that the case did not fit neatly into the *Fry* clues, as the child's punishment removed him from his classroom for reasons unrelated to his education.⁹⁵ The student's parents did not raise a claim under IDEA.⁹⁶ The court nevertheless engaged with *Fry* and decided that the complaint *could* have been brought as the denial of a FAPE under IDEA, although such a claim was not required.⁹⁷ But the court rejected the rigid application of the *Fry* clues, and held that the lower court was wrong to suggest that the treatment of the isolated

86. *Id.* at 552–53.

87. *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 26 (1st Cir. 2019).

88. *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 132 (3d Cir. 2017).

89. *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1101 (9th Cir. 2019).

90. *J.S. III ex rel. J.S. Jr. v. Houston Cnty. Bd. of Educ.*, 877 F.3d 979, 983–84 (11th Cir. 2017).

91. *Patrick v. Success Acad. Charter Sch., Inc.*, 354 F. Supp. 3d 185, 227–28 (E.D.N.Y. 2018); *Smith v. District of Columbia*, No. 16-1386 (RDM), 2018 WL 4680208 at *9 n.1 (D.D.C. Sept. 28, 2018).

92. *Houston Cnty. Bd. of Educ.*, 877 F.3d at 983–84.

93. *Id.* at 984.

94. *Id.*

95. *Id.* at 986.

96. *Id.* 985.

97. *Id.* at 986.

student was *only* a FAPE denial, and the court made an additional finding of discrimination beyond IDEA through the stigma placed on the child in his isolation from his peers.⁹⁸ The court held that the same conduct could give rise to claims under the ADA or IDEA but did not require the parents to exhaust their claims under IDEA first. Instead, they could circumvent this requirement by seeking relief exclusively through the ADA.⁹⁹

On the other end of the spectrum, the Fourth Circuit,¹⁰⁰ Fifth Circuit,¹⁰¹ Sixth Circuit,¹⁰² and Eighth Circuit¹⁰³ have applied the clues as a rigid test. A district court in the Seventh Circuit also followed the stricter approach.¹⁰⁴ *Nelson*, an Eighth Circuit case, involved a truant student who had been absent from school for long periods of time because of depression and an ovarian condition and who, allegedly, had been the victim of bullying.¹⁰⁵ The student's family sought from the school district placement into an online program outside of the district that would be better equipped to meet the child's needs.¹⁰⁶ The school denied their request, deciding that there was an acceptable alternative within the student's home school district.¹⁰⁷ The parents believed this program was inadequate and brought suit under the Rehabilitation Act, claiming their child was denied an education because of her disability.¹⁰⁸ The court applied *Fry*, ruling that the nature of the claim was a denial of FAPE and that exhaustion was required.¹⁰⁹ In its *Fry* analysis, the court held that an adult could not have brought the same suit and that the student could not have raised this issue with a public library or other public facility.¹¹⁰ The parents argued that the student could raise claims of discriminatory conduct against a different public

98. *Id.* at 987.

99. *See id.* at 986 (holding that the district court erred in analyzing the claim as merely a FAPE violation).

100. *See Z.G. ex rel. C.G. v. Pamlico Cnty. Pub. Sch. Bd. of Educ.*, 744 F. App'x 769, 779 (4th Cir. 2018) (treating *Fry*'s two hypothetical questions as a strict test).

101. *See McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 646 (5th Cir. 2019) (same).

102. *See Sophie G. ex rel. Kelly G. v. Wilson Cnty. Sch.*, 742 F. App'x 73, 80 (6th Cir. 2018) (determining that a claim against other public childcare facilities has nothing to do with education, so it does not constitute the denial of a FAPE).

103. *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 592 (8th Cir. 2018).

104. *See J.P. v. Williamson Cnty. Bd. of Educ. Serv.*, No. 3:16-CV-879-NJR-DGW, 2018 WL 9651501 at *4-5 (S.D. Ill. Mar. 27, 2018) (treating the *Fry* hypotheticals rigidly).

105. *Nelson*, 900 F.3d at 589-90.

106. *Id.* at 589.

107. *Id.* at 590.

108. *Id.* at 590-91.

109. *Id.* at 592.

110. *Id.*

facility,¹¹¹ but the court rejected this contention, noting that *Fry* did not contemplate “a high level generality” when applying the clues to claims.¹¹² The actual relief sought was restoration of a FAPE—here, transfer of the bullied student to a new school—and the parents had the option to go through administrative procedures to obtain such relief under IDEA.¹¹³ Thus, the court ruled in favor of the school district because the family failed to exhaust its claim administratively.¹¹⁴

B. How should we view the complaint: issue by issue or as a whole?

Another issue left open by *Fry* is whether a reviewing court should look at each claim individually or at the complaint as a whole to determine if the thrust of plaintiff’s charge is the denial of a FAPE. The First,¹¹⁵ Third,¹¹⁶ Fourth,¹¹⁷ and Eighth¹¹⁸ Circuits have answered this question by examining each claim separately. For example, in *Wellman v. Butler Area School District*, a student football player suffered various head injuries which impacted his academic performance.¹¹⁹ The football player sought accommodations, such as a rest period during study hall and extra time to complete assignments, but the school repeatedly rejected his requests and the boy was forced into home schooling.¹²⁰ The player and his family sued the school district under the Rehabilitation Act and the ADA for failing to provide him an adequate IEP.¹²¹ The Third Circuit denied his claims, but first opined that *Fry* requires examining each claim in the complaint to assess if that claim was for the denial of a FAPE.¹²² Why? The Supreme Court could not have intended for lower courts to analyze the complaint as a whole because that approach would incentivize plaintiffs to pile on non-IDEA claims to evade the administrative exhaustion requirement.¹²³ In

111. *Id.*

112. *Id.*

113. *Id.* at 593.

114. *Id.* at 594.

115. *See Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24 (1st Cir. 2019) (analyzing the complaint claim-by-claim).

116. *See Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 132 (3d Cir. 2017) (endorsing a claim-by-claim approach).

117. *See Z.G. ex rel. C.G. v. Pamlico Cnty. Pub. Sch. Bd. of Educ.*, 744 F. App’x 769, 779 (4th Cir. 2018) (analyzing the complaint claim-by-claim).

118. *See Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 592 (evaluating the “claim as a whole”).

119. *Wellman*, 877 F.3d at 127–28.

120. *Id.* at 128.

121. *Id.* at 129.

122. *Id.* at 132–33.

123. *Id.* at 132.

Wellman, the court determined that each of the plaintiff's claims arose from the denial of educational accommodations.¹²⁴ The plaintiff had alleged that the school failed to protect him from further physical injury, and even though football is an extracurricular activity, this claim nevertheless involved educational services, triggering the exhaustion requirement.¹²⁵ Thus, the court evaluated each claim individually to identify those requiring exhaustion and ultimately determined that all of them did.

On the other hand, the Fifth,¹²⁶ Sixth,¹²⁷ Ninth¹²⁸ and Tenth¹²⁹ Circuits have evaluated the nature of the complaint as a whole. For example, in *Sophie G. v. Wilson County Schools*, an autistic girl who was unable to use the bathroom without assistance was denied access to a subsidized after-school program, because, according to the school, her lack of toilet training was an issue for program administrators.¹³⁰ The child's parents sued under the ADA and Rehabilitation Act, claiming that she was denied access to this program on the basis of her disability.¹³¹ The child did have an IEP that set out the services she required, which included trying to make her more toilet independent.¹³² However, the court held that exhaustion under IDEA was not required because the after-school program was at best tangential to the goals of the IEP, as it does not provide educational benefits towards a FAPE.¹³³ In making its determination, the Sixth Circuit did not look at each claim, but instead looked to the lawsuit as a whole. It noted that the complaint as alleged never mentioned that the after-school program had been important to *educating* the child—thus insulating the suit from the exhaustion requirement.¹³⁴ Working through the *Fry* analysis, the court referenced “the complaint” instead of “the claim.”¹³⁵ The court also looked to a separate due process proceeding the child's parent had brought before the instant lawsuit, in which the parents had

124. *Id.* at 133.

125. *Id.* at 133–34.

126. *See* *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 645 (5th Cir. 2019) (“substance and language of *McMillen's* *complaint*”) (emphasis added).

127. *Sophie G. ex rel. Kelly G. v. Wilson Cnty. Sch.*, 742 F. App'x 73, 74 (6th Cir. 2018).

128. *See* *Paul G. ex rel. Steve G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096 (9th Cir. 2019) (referencing the complaint to determine what was alleged).

129. *MacFarlane*, *supra* note 82, at 549–50.

130. *Sophie G.*, 742 F. App'x at 74.

131. *Id.* at 75.

132. *Id.* at 74.

133. *Id.* at 78.

134. *Id.* at 79.

135. *See id.* at 78–79 (“nothing in Plaintiffs' *complaint*”) (emphasis added).

alleged deficiencies in the educational services offered.¹³⁶ In that proceeding, they had not requested entry into the after-school program, which suggested to the court that the program was not related to the child's education and was not considered as a remedy to the denial of a FAPE.¹³⁷ Thus, the court evaluated the nature of the complaint in its totality, including arguments made in previous proceedings, finding that the gravamen of the complaint was not the denial of a FAPE.

C. When damages are sought, does exhaustion still apply?

Another issue with *Fry* is whether the relief sought determines if the exhaustion requirement applies. In *Fry*, the Court decided to “leave for another day” the question of whether exhaustion applies to suits seeking non-IDEA remedies.¹³⁸ This question arises when claims are brought under multiple statutes and the plaintiff seeks remedies available under one statute but not another.

The circuits have almost unanimously decided that exhaustion is still required even when the plaintiff is seeking non-IDEA remedies.¹³⁹ A Fifth Circuit case, *McMillen v. New Caney Independent School District*, is illustrative. In *McMillen*, a student with autism became very disruptive as he got older.¹⁴⁰ The school decided that he could not be kept in the classroom for students with disabilities and returned him to his regular classes.¹⁴¹ Once there, one of his teachers tried to “save him” with promises of herbal supplements and Christianity.¹⁴² After these efforts failed, she sought to have the child removed from the school; he was then expelled and arrested.¹⁴³ Following the child's arrest and expulsion, the parents brought suit alleging violations of IDEA, the Equal Protection Clause, and the Rehabilitation Act.¹⁴⁴ The district court dismissed the complaint for failure to exhaust administrative remedies, and the court of appeals affirmed that dismissal.¹⁴⁵ The Fifth Circuit reasoned that, according to the complaint, the student was actually looking for more than *physical* access to the school.¹⁴⁶ Instead,

136. *Id.* at 80.

137. *Id.*

138. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 752 n.4 (2017).

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

140. *Id.* at 643.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 643–44.

145. *Id.* at 648.

146. *See id.* at 646 (rejecting a claim that the complaint only involved more than physical

the plaintiff was looking for redress to the educational issues that led to the student's expulsion, such as his removal from the disabled class.¹⁴⁷ However, the parents also requested monetary damages, which are not available as a remedy under IDEA.¹⁴⁸ The court analyzed this issue, left open by *Fry*, and stated that the overwhelming majority of courts require exhaustion even when seeking remedies unavailable under IDEA.¹⁴⁹ The court noted that although a purely textual analysis cut against exhaustion, the purpose of IDEA is to allow *educators* to address educational failures.¹⁵⁰ Thus, even though damages were requested, the claims were still required to go through IDEA exhaustion in order to determine if the educational problem can be resolved administratively first.¹⁵¹

Currently, the only outlier is the Ninth Circuit. Under its application, the Ninth Circuit Court of Appeals decided that exhaustion is not required when monetary damages or other remedies unavailable under IDEA are sought. In *Payne v. Peninsula School District*, a teacher punished an autistic student in class by locking him in a closet.¹⁵² His parents brought suit under IDEA and the Rehabilitation Act, alleging negligence and a violation of the autistic student's IEP.¹⁵³ The Ninth Circuit agreed that his complaint should not be dismissed and held that on remand that he should clarify the prayer for relief for each claim.¹⁵⁴ The lower court would then decide if the relief sought was available under IDEA.¹⁵⁵ In reaching its conclusion, the court affirmed Ninth Circuit precedent that exhaustion was not required when the remedy being sought was unavailable under IDEA.¹⁵⁶ This case was decided before *Fry* and does not apply the same framework. However, the circuit has applied the same rule on damages to cases arising under IDEA after *Fry*, and in this case the autistic student was able to avoid the exhaustion requirement on some of the claims because of the relief he sought.¹⁵⁷ The court reasoned that this is

access to the school).

147. *Id.*

148. *Id.*

149. *Id.* at 647–48.

150. *Id.* at 648.

151. *Id.*

152. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 866 (9th Cir. 2011).

153. *Id.*

154. *Id.* at 882–83.

155. *Id.*

156. *Id.* at 875–76.

157. *Id.* at 883–84.

the proper interpretation of the statutory text based on legislative history, holding other anti-discrimination statutory protections were not to be dulled when relief was unavailable under IDEA.¹⁵⁸ In finding this, the court noted that there may be some possibility for artful pleading, such that litigants may add on monetary damages to avoid exhaustion.¹⁵⁹ However, it dismissed this concern, reasoning that such attempts should be obvious, such as when a plaintiff makes a claim only permissible under IDEA and simply demands monetary damages.¹⁶⁰

IV. FIXING THE PROBLEMS OF *FRY* AT MULTIPLE LEVELS

Clearly, the *Fry* doctrine has not been implemented uniformly across jurisdictions. As a general matter, the Court's opinion generated more questions than answers.¹⁶¹ The Court did not articulate a sufficiently concrete or administrable standard to determine if the gravamen of the claim is the denial of a FAPE. The Court also left unanswered whether courts should make this determination on a claim-by-claim basis or look to the complaint as a whole. Moreover, whether exhaustion applies when the relief being sought is unavailable under IDEA is still an open question. Lower courts are unable to clearly and consistently apply the doctrine.¹⁶² Furthermore, this system is onerous for children with disabilities and their parents to navigate.

As the Court itself acknowledged, "the same conduct might violate all three statutes."¹⁶³ Thus, the Court should take steps to clarify the *Fry* doctrine. First, the Court should explicitly state that the "clues" are not merely suggestions, but rather a mandatory test. This would still give judges the flexibility to make individualized judgments but would solidify exactly what must be asked in each case. Next, the Court should apply the new "clue" test to the complaint as a whole, not claim-by-claim. While some borderline cases could be wrongly forced to exhaust, this is outweighed by the value of ensuring that parents are not forced to litigate on two fronts at the same time. Lastly, the Court should adopt the Ninth Circuit's position that those seeking relief not available under IDEA are not subject to exhaustion requirements. This is the

158. *Id.* at 876.

159. *Id.* at 879.

160. *Id.* at 880.

161. See *Garda*, *supra* note 15, at 476–77 (arguing that the Court's method in *Fry* could have gone farther in answering legal questions, but largely accepting of the "middle ground" the Court found).

162. Colker, *supra* note 79, at 454.

163. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017).

most faithful reading of the text, and it allows children who have been discriminated against to seek damages—to which they are rightfully entitled—in court without administrative delay. The procedural hurdles that disabled children face to secure their rightful educational benefits are currently too high. It is imperative that the government assure user-friendly administrative procedure so families do not waste time in duplicative proceedings. After all, children are only students for a short period of time.

A. Fixing the test

The Supreme Court should articulate clearer standards on the three primary issues dividing the lower courts. First, the Court’s use of “clues” instead of a defined standard may have been motivated by a desire to give the lower courts flexibility to handle each case as it appears. Undoubtedly, adjudicating cases involving the denial of educational services and potential discrimination are fact-intensive inquiries. But flexibility has bled into uncertainty: without adequate guidance, the lower courts have been attempting to discern what test should be used for the “gravamen” question. This uncertainty has caused a schism among the circuits—one that creates confusion and duplicative litigation for claimants. Under the current formulation, it is entirely possible that courts could reach wildly different determinations as to the crux of a claim even under the same set of facts.

Thus, the Court should take the next opportunity to clarify that the clues represent a defined legal test, and not just suggestions to point courts in the right direction. Instead of using the language of “clues” or hints, it should mandate the lower courts apply these questions to determine the gravamen of a complaint. In *Fry*, the Court relied on the clues and supported them with hypothetical scenarios.¹⁶⁴ By specifying what test must be used, the lower courts would no longer need to rely on hypotheticals and instead apply the law to the facts at hand. Perhaps this would soothe Justice Alito’s concerns of lower courts wandering astray.¹⁶⁵

Of course, this would not eliminate every issue created by exhaustion. The processes set out by the states still take time, so students may still have to wait for the services they need to secure a

164. *Id.* at 756–57.

165. *Id.* at 759 (Alito, J., concurring).

FAPE. Moreover, each state imposes a different set of procedures, such that the same set of facts could lead to different results in different systems. In *Houston County*, the isolated student could sue under the ADA because the isolation went beyond simply denying education benefits.¹⁶⁶ But in *Wellman*, the removal of the football player from the class to take tests was found to be the denial of a FAPE but not *discrimination*.¹⁶⁷ Both cases arose in circuits that adopted the same “clues” analysis but reached different results based on the facts. The fact that courts reach different results in these cases is not inherently a problem; however, clarifying the legal test would make it easier for lower courts to sift through relevant facts and create more consistent and predictable results. If litigants know what steps the courts are applying to claims *ex ante*, like if the two clues of *Fry* became a test, it makes formulating strategy more routine and makes the process of determining a litigation path easier.

In addition to defining the contours of the gravamen test, the Court should also specify that this test applies to the complaint *as a whole*, and not claim-by-claim. In *Fry*, the language used is “gravamen of the plaintiff’s *complaint*” —not of the claim.¹⁶⁸ This suggests that the Court meant to apply the test to the complaint as a whole: The Court could have used the words “of the claim” if it had intended for a more detailed approach. Whether the complaint is to be read as a whole or not dictates the administrative avenue parents will use to vindicate their child’s rights.¹⁶⁹ By applying the test on a claim-by-claim basis, exhaustion requirements could force parents to bring two suits simultaneously: one in federal court for their discrimination claim and another in an administrative proceeding under IDEA for the denial of a FAPE. Most parents have limited resources so this duplicative system could be cost prohibitive, or even chill suits completely. In this system, the court would determine whether the complaint, in its entirety, is about the denial of a FAPE and thus subject to exhaustion as a whole. For example, in *Nelson*, the student with depression who was forced to attend an online program only brought one claim under the Rehabilitation Act.¹⁷⁰ However, if she had brought a claim under IDEA, the current system would require her to file separate suits

166. J.S. III *ex rel.* J.S. Jr. v. Houston Cnty. Bd. of Educ., 877 F.3d 979, 987 (11th Cir. 2017).

167. *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 134–35 (3d Cir. 2017).

168. *Fry*, 137 S. Ct. at 756 (emphasis added).

169. Garda, *supra* note 15, at 474–75.

170. *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 590–91 (8th Cir. 2018).

simultaneously. The plaintiff in *Sophie G.* would have needed to bring separate suits: one in administrative proceedings for her due process claims, and one in federal court for her ADA claim.¹⁷¹ This exemplifies how looking at claims separately can force parents to maintain multiple suits at the same time, which is not feasible for every family with disabled children. Of course, it is possible that administrative proceedings might be more efficient than federal court proceedings. But this does nothing to solve the resource strain faced by parents engaged in two parallel forums. It is financially burdensome, and also pulls their energy away from the already full plate of caring for a disabled child.

Lastly, the Court should only require exhaustion when a party is seeking relief available under IDEA. Perhaps *McMillen* provides the strongest reasoning for this approach, despite a result to the contrary. There is a strong textual argument to suggest that exhaustion would not be required when the remedy sought is unavailable under IDEA.¹⁷² Per Section 1415(l) of IDEA, exhaustion is required when a party is “seeking relief that is also available under this subchapter,” which does not include monetary damages.¹⁷³ The exhaustion requirement seems to apply to only those remedies expressly provided by IDEA. Because monetary damages are not explicitly available under IDEA, exhaustion ought not apply. Any claims that are insincere and request damages merely to avoid exhaustion can be addressed in accordance with the Ninth Circuit’s method.¹⁷⁴ That is, a court can look to previous proceedings and the history of the pleadings to determine whether a request for damages has legal merit.¹⁷⁵ Any plaintiff that tacks on monetary damages to the claim for the purpose of avoiding exhaustion will be required to exhaust administrative remedies if the gravamen of the claim is addressing the denial of a FAPE.¹⁷⁶ Thus, a plaintiff who uses money damages simply to avoid the exhaustion requirement will still be required to first pursue administrative relief. On the other hand, a plaintiff who has a valid case for damages can pursue them in federal court.

These solutions are by no means comprehensive. For one, applying

171. *Sophie G. ex rel. Kelly G. v. Wilson Cnty. Sch.*, 742 F. App’x 73, 80 (6th Cir. 2018).

172. *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 647–48 (5th Cir. 2019).

173. 20 U.S.C. § 1415(l) (2018).

174. *See supra* note 160 and accompanying text (noting that artful pleading to avoid exhaustion can be stopped by courts).

175. *Id.*

176. *Id.*

the clues as a test still presents problems when the same conduct could be remedied under IDEA, the ADA, or the Rehabilitation Act, as Justice Alito warned. And second, Congress is arguably the more appropriate institution to address these problems. But the value certainty and uniformity in litigation likely outweigh these lingering concerns.

B. Understanding the importance of procedure

When accessing legal remedies is confusing and outcomes vary dramatically across states, injured parties may be dissuaded from seeking relief altogether. In other words, when procedure is cumbersome, it unduly burdens plaintiffs' access to rightful relief. In short, procedure matters.

In the context of special education, IDEA's administrative track was meant to facilitate parents' access to relief for their children. But under the current system, parents face legal uncertainty. When the same claim could be brought under IDEA, the ADA, and the Rehabilitation Act, uncertainty as to what procedure applies makes parents' decision on how to proceed more difficult. The longer it takes for parents to navigate the courts and administrative processes, the less time students have to make use of necessary educational services, and the farther behind they may fall developmentally. Ideally, Congress would address this issue by providing for a clearer path to relief for parents of children with disabilities and increasing funding for special education. In the interim, the courts can make the process for families easier by clarifying what procedures they need to follow to obtain relief. Some may argue that this solution falls outside the scope of judicial power. But courts would be doing something they do every day: interpreting statutes.

Beyond *Fry*, one larger way for the Court to fix special education issues is to raise the standards it sets for schools to meet. In *Rowley*, the Court held that Congress had intended for IDEA to be a "basic floor of opportunity" for students with disabilities.¹⁷⁷ Moreover, the Court decided that services provided by schools must only be "reasonably" calculated to ensure that students received educational benefits.¹⁷⁸ The Court declined to extend this in *Andrew F.*¹⁷⁹ While educators are

177. Bd. of Educ. v. Rowley, 458 U.S. 176, 200 (1982).

178. *Id.* at 206–07.

179. *Andrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 1001 (2017).

usually better suited to make decisions about a child's needs, the low standard that programs are held to means that, on review, courts can intervene only if the school was *unreasonable* in ensuring that a child's needs had been met. Another pressing issue in special education is a lack of funding. When Congress first passed IDEA as an improvement to the Education for All Handicapped Children Act, it increased federal funding for the education of students with disabilities. When IDEA was reauthorized in 2004, Congress increased the share of funding it contributed to special education under the act from 17.73% to 40% by 2012.¹⁸⁰ But in 2014, funding covered only 16% of the costs, less than what was covered in 2004.¹⁸¹ Absent legislative intervention, courts should clarify the process by which relief is obtained.

CONCLUSION

When Senator Tom Harkin celebrated the passage of IDEA in the Senate in 1989, he imagined that students with disabilities would be well on their way to becoming productive citizens.¹⁸² In many cases, they have. However, when they have been denied a free appropriate public education, the Court's decision in *Fry v. Napoleon Community Schools* make it harder for them to realize their legal right.

Fry should not be seen as a completely problematic decision; in many cases, it allowed parents with non-education based discrimination claims to go straight to court and to avoid being dragged into administrative proceedings.¹⁸³ However, the clues used by the Court to decide when claims were based on the denial of a FAPE and subject to administrative exhaustion provided no clarity as to which test governed, whether it was to be applied claim-by-claim, and whether the remedy available mattered. The Court could have, and in the future should, clarify these questions with more concrete standards.

Solving problems in special education will require more attention from the Court and Congress. In *Brown v. Board of Education*, the Court proclaimed "education is perhaps the most important function of state and local governments."¹⁸⁴ Courts must do more to further the legislative goals of IDEA and reduce the barriers to relief faced by disabled children.

180. Perna, *supra* note 19, at 565.

181. *Id.* at 566.

182. 138 CONG. REC. 29, 833 (1989) (statement of Sen. Harkin).

183. Garda, *supra* note 15, at 459–60.

184. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).