

## EDUCATION LAW INTO PRACTICE

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### POST-FRY EXHAUSTION UNDER THE IDEA\*

by

PERRY A. ZIRKEL, OH.D., J.D., LL.M.\*\*

The Individuals with Disabilities Education Act (IDEA) is the primary federal law for P-12 students with disabilities,<sup>1</sup> although Section 504 of the Rehabilitation Act (§ 504)<sup>2</sup> and its sister statute, the Americans with Disabilities Act (ADA)<sup>3</sup> provide broader and overlapping coverage.<sup>4</sup> The core obligation of school districts under the IDEA is to provide each eligible student with a “free appropriate public education” (FAPE).<sup>5</sup>

In early 2017, the Supreme Court unusually visited the IDEA twice.<sup>6</sup> Although the substantive and central IDEA decision in *Endrew F. v. Douglas County School District RE-1*<sup>7</sup> continues to attract major attention in the professional literature,<sup>8</sup> the seemingly technical-adjudicative and peripheral

\* *Education Law Into Practice* is a special section of the EDUCATION LAW REPORTER sponsored by the Education Law Association. The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 381 Ed.Law Rep. [1] (November 12, 2020).

\*\* Dr. Zirkel is University Professor Emeritus of Education and Law at Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

1. 20 U.S.C. §§ 1401–1419 (2017). Although not the focus here, the IDEA also has a separate part for children ages 0–3 and for special projects. *Id.* §§ 1431–1444 (infants and toddlers) and 1451–82 (grants).
2. 29 U.S.C. §§ 705(20) and 794 (2017).
3. 42 U.S.C. §§ 12101–12103 and 12131–12134 (2017) (Title II, which applies directly to public school students).
4. For a systematic synthesis of the similarities and differences among these statutory frameworks, including relevant regulations and case law, see Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Educ. L. Rep. 886 (2017).
5. 20 U.S.C. § 1412(a)(1). This state obligation applies to school districts via *id.* § 1413(a)(1).
6. The previous Supreme Court decisions under the IDEA averaged approximately one for each four-year interval. *See, e.g.*, Perry

A. Zirkel, *An Updated Primer of Special Education Law*, 52 TEACHING EXCEPTIONAL CHILD 261 (2019) (identifying ten Supreme Court IDEA decisions pre-2017).

7. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017) (ruling that the substantive standard for the core IDEA obligation of FAPE is that the IEP must be reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances). The previous circuit split was between “some” and “meaningful” benefit. *See, e.g.*, Ronald D. Wenkart, *The Rowley Standard: A Circuit by Circuit Review of How Rowley Has Been Interpreted*, 247 Ed. Law Rep. 1 (2009).

8. For successive samplings of the continuing line of professional literature addressing *Endrew F.*, see Perry A. Zirkel, *The Aftermath of Endrew F.: An Outcomes Analysis after Two Years*, 363 Ed. Law Rep. 1, 1 n.2 (2019) [hereinafter “*Endrew F. Aftermath II*”]; Perry A. Zirkel, *The Aftermath of Endrew F. One Year Later: An Updated Outcomes Analysis*, 352 Ed. Law Rep. 448, 453 nn.36–37 (2018). For more recent analyses, see, for example, Terrie Conroy & Mitchell L. Yell, *Free Appropriate Public Education after Endrew F. v. Douglas County School District*, 35 Touro L. Rev. 101 (2019); Michael A. Couvillon et al., *Endrew F. v. Douglas County School District and Special Education Law*, 62 PREVENTING SCH. FAILURE 289

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IDEA decision in *Fry v. Napoleon Community Schools*<sup>9</sup> has received scant scholarly consideration.<sup>10</sup> The focus of *Fry* was whether plaintiffs must exhaust the available administrative remedy under the IDEA, which is primarily a due process hearing,<sup>11</sup> as a prerequisite to bringing alternate federal claims in court on behalf of an IDEA-eligible student. Despite the frequent application of *Fry* during the recent almost three-year period,<sup>12</sup> none of the relatively few articles published on this topic has examined its effect on the outcomes of the post-*Fry* exhaustion claims.

This brief article provides an exploratory empirical analysis of the effect of *Fry* on the subsequent exhaustion cases. Prior to this initial empirical analysis, the article provides an overview of the pre-*Fry* period and the *Fry* decision.

### I. Pre-*Fry* Overview

The foundational provision in the IDEA first appeared in the 1986 amendments<sup>13</sup> as an effective prospective reversal<sup>14</sup> of the Supreme Court's 1984 ruling in *Smith v. Robinson* that the IDEA was the exclusive avenue for litigation within its purview.<sup>15</sup> As a general matter, the provision provided for

(2018); Randy Lee, *Endrew F.'s Journey to a Free Appropriate Public Education: What Can We Learn from Love?*, 35 TOURO L. REV. 379 (2019); Mark C. Weber, *Endrew F. Clairvoyance*, 35 TOURO L. REV. 591 (2019); Payton Aldridge, Note, *Endrew F. v. Douglas County School District: How the Supreme Court's Groundbreaking Case Has Impacted Maryland Special Education Law*, 50 U. BALT. L.F. 117 (2020); Catherine A. Bell, *Endrew's Impact on Twice-Exceptional Students*, 61 WM. & MARY L. REV. 845 (2020); Josh Cowin, Note, *Is That Appropriate? Clarifying the IDEA's Free Appropriate Public Education Standard Post Endrew F.*, 113 NW. U. L. REV. 587 (2018); Alyssa Iuliano, Note, *Endrew F. v. Douglas County School District: The Supreme Court's Elusive Attempt to Close the Gap between Some Educational Benefit and Meaningful Educational Benefit*, 35 TOURO L. REV. 261 (2019); Hedali M. Lodaya, Note, *Making a Reasonable Calculation: A Strategic Amendment to the IDEA*, 53 U. MICH. J.L. REFORM 45 (2019); William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after Endrew F.*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 495 (2020); Michael S. Morgan, Note, *Paved with Good Intentions: How Endrew F. Could Affects Struggling School Districts*, 49 SETON HALL L. REV. 777 (2019); Allison Zimmer, Note, *Solving the IDEA Puzzle: Building a Better Special Education Development Process through Endrew F.*, 93 N.Y.U. L. REV. 1014 (2018).

9. 137 S. Ct. 743, 340 Ed.Law Rep. 19 (2017) [hereinafter *Fry*].

10. See, e.g., Robert Garda, *Fry v. Napoleon Community Schools: Finding a Middle Ground*, 46 J.L. & EDUC. 459 (2017); Martha McCarthy, *Fry v. Napoleon Community Schools: Could This Supreme Court Decision Open a Pandora's Box?* 344 Ed. Law Rep. 18 (2017); Katherine Bruce, Note, *Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief after Fry v. Napoleon Community Schools*, 86 U. CHI. L. REV. 987 (2018).

11. The IDEA provides states with the option of adding a review-officer level, thus providing for a two-tier rather than one-tier system administrative adjudication. 20 U.S.C. §§ 1412(a) and 1415(f)-(g) (2017).

12. For example, on a gross level, the history feature of Westlaw revealed that as of September 22, 2020, *Fry* had been cited more often (n=367 cases) than *Endrew F.* (n=314 cases).

13. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98.

14. See, e.g., *Fontenot v. La. Bd. of Elementary & Secondary Educ.*, 805 F.2d 1222, 1223, 36 Ed.Law Rep. 61 (5th Cir. 1986) ("Congress read the Supreme Court's decision in *Smith* and acted swiftly, decisively, and with uncharacteristic clarity to correct what it viewed as a judicial misinterpretation of its intent.").

15. *Smith v. Robinson*, 468 U.S. 992 (1984). More specifically, the *Smith* Court rejected

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non-exclusivity subject to the condition precedent of exhaustion, with the specific language as follows:

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, [Section 504] of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under [the IDEA's provisions for administrative adjudication] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].<sup>16</sup>

Thus, the non-exclusivity is specific to other federal claims on behalf of students within the purview of the IDEA, whether in addition or alternative to IDEA claims, subject to exhaustion of the Act's provisions for a due process hearing and, in states that opt for a second administrative tier, the review officer level.<sup>17</sup>

In his 2009 comprehensive analysis of the case law prior to *Fry*,<sup>18</sup> Wasserman found that exhaustion was at issue in 21% of the IDEA cases during the previous ten-year period.<sup>19</sup> His analysis reveals not only the complexity of the interpretation and application of this provision and the exceptions to exhaustion that have continued to evolve since before the 1986 amendments,<sup>20</sup> but also the significant practical effect on the plaintiffs of potentially slowing or stopping their litigation.<sup>21</sup> Leading up to the Supreme

the availability of alternative claims under the Fourteenth Amendment and Section 504, which in this case served as the basis for an attorneys' fees award. Its rejection of the Section 504 basis was narrow, but the 1986 exhaustion provision made clarification of its specific boundary superfluous. The separate but interrelated attorneys' fees provision of the 1986 amendments effectively nullified the denial of attorneys' fees in the companion case of *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984).

16. 20 U.S.C. § 1415(l) (2018).

17. *Id.* § 1415(f)–(g). The number of states opting for a review officer tier has decreased from twenty-six in 1991 to eight in 2019. Jennifer F. Connolly et al., *State Due Process Hearing Systems under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156, 157–58 (2019) (identifying Kansas, Kentucky, Nevada, New York, North Carolina, Ohio, and South Carolina); *see also* Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 735, 745 n.38 (2016) (identifying Oklahoma as an additional state with a review officer tier).

18. Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the*

*Individuals with Disabilities Education Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349 (2009).

19. *Id.* at 353 n.7.

20. The two basic exceptions under the IDEA have long been futility and inadequacy. *E.g.*, *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1101, 369 Ed.Law Rep. 11 (9th Cir. 2019); *Nelson v. Charles City Cnty. Sch. Dist.*, 900 F.3d 587, 593, 357 Ed.Law Rep. 605 (8th Cir. 2018) (identifying the addition of practice or policies of general applicability); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275, 308 Ed.Law Rep. 664 (3d Cir. 2014) (identifying the additions of purely legal questions and emergency situations).

21. Exhaustion serves as a defense for the school district and as a hurdle for the parents (with the limited exception of the occasional school district IDEA lawsuit). Where required, this step means more transactions costs, including time and attorneys' fees, to both parties. The result may be that the parents abandon or settle the case rather than proceed with the administrative adjudication process, which in the most active jurisdictions often takes far more than the 75-day timeline that the IDEA regulations

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Court's consideration of *Fry*, the two competing approaches for applying the IDEA's exhaustion provision<sup>22</sup> were the injury-centered test, which the majority of the circuits had adopted,<sup>23</sup> and the relief-centered approach, which the Ninth Circuit had finally chosen.<sup>24</sup>

### II. The Supreme Court's *Fry* Decision

Not electing either of the two competing approaches,<sup>25</sup> similar to the Roberts' Court third choice in *Endrew F.*,<sup>26</sup> the *Fry* Court adopted a gravamen test, specifically requiring exhaustion when the parents' claim "hinges on . . . the denial of a FAPE."<sup>27</sup> Discussing this test in relation to the

provide for due process hearings. Although the average length of these hearings from filing to decision is not nationally available, the data that the U.S. Department of Education collects annually show that the vast majority of decisions were not within said timeline. E-mail from Diana Cruz, Data Analyst, National Center for Appropriate Dispute Resolution in Special Education, to Perry A. Zirkel (Dec. 21, 2017 9:40 EST) (67% in 2004–05, 78% in 2005–06, 76% in 2006–07, 73% in 2007–08, 76% in 2008–09, 71% in 2009–10, 76% in 2010–11, 79% in 2011–12, 80% in 2012–13, 82% in–14, 74% in 2014–15, 74% in 2015–16). The jurisdictions with two tiers (*supra* note 17) add to the transaction's costs. These jurisdictions include New York, which is first in filings and second only to Puerto Rico in fully adjudicated decisions. *E.g.*, Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 Ed. Law Rep. 870, 873 (2020) (analyzing data for the most recent available six-year period, 2012–13 to 2017–18). Finally, the effect is probably the most off-putting for plaintiff-parents solely seeking money damages, which is unavailable at the hearing and review officer levels.

22. *Supra* note 16 and accompanying text.

23. *E.g.*, *Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 308 Ed.Law Rep. 27 (3d Cir. 2014); *McCormick v. Waukegan Sch. Dist. #60*, 374 F.3d 564, 189 Ed.Law Rep. 518 (7th Cir. 2004); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 167 Ed.Law Rep. 606 (10th Cir. 2002); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 164 Ed.Law Rep. 573 (2d Cir. 2002); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 160 Ed.Law Rep. 336 (1st Cir. 2002); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 113 Ed.Law Rep. 559 (7th Cir. 1996); *N.B. ex rel. D.G. v. Alachua Cty. Sch. Bd.*, 84 F.3d 1376 (11th Cir. 1996) (requiring exhaustion for "edu-

cation" injury). The Sixth Circuit's decision in *Fry* had applied this approach. *Fry v. Napoleon Cnty. Sch.*, 788 F.3d 622, 625, 319 Ed.Law Rep. 43 (6th Cir. 2015) (requiring exhaustion because the plaintiff's alleged "core harms . . . relate to the specific educational purpose of the IDEA").

24. *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 272 Ed.Law Rep. 119 (9th Cir. 2011) (en banc) (requiring exhaustion for IDEA-available relief, thereby overruling its 2002 decision in *Robb v. Bethel School District No. 403*).

25. *Supra* notes 23–24 and accompanying text. However, the *Fry* Court's approach aligns with one of the identified three "situations" of the Ninth Circuit's relief-centered approach. *Id.* at 875 ("Third, exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a [FAPE], whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE."). The *Fry* reasoning (*infra* note 27) also echoes the Ninth Circuit's admonition against artful pleading. *Id.* at 877 ("plaintiffs cannot avoid exhaustion through artful pleading").

26. *Supra* note 7. As the Tenth Circuit's preceding decision in *Endrew F.* made clear, the two competing approaches for the substantive standard for FAPE under the IDEA were "some" benefit and "meaningful" benefit. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338–39, 321 Ed.Law Rep. 639 (10th Cir. 2015).

27. 137 S. Ct. at 754. Focusing on underlying substance rather than surface labels, the Court clarified: "What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Id.* at 755. However, as a counterbalance, the Court acknowledged that the IDEA exhaustion

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Frys' claim, which sought money damages for the district's initial refusal to provide their IDEA-covered child with access to a service animal under § 504 and the IDEA, the Court explained that exhaustion is not required if it is determined that they seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation.<sup>28</sup>

In an effort to clarify the application of its gravamen test, the *Fry* Court then provided three "clues"<sup>29</sup>

- (1) [C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?
- (2) [C]ould an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?
- (3) [Did the] plaintiff . . . previously invoke[] the IDEA's formal procedures to handle the dispute—thus starting to exhaust the Act's remedies before switching midstream [to court proceedings]?<sup>30</sup>

Avoiding the exclusive and definitive application of these questions, the Court suggested that a yes answer to the first pair would likely excuse exhaustion.<sup>31</sup>

Instead, the Court remanded the case for application of its new test, based on predicate facts omitted upon the Sixth Circuit's use of the injury-centered approach.<sup>32</sup> However, in explaining the missing factual link, the Court traced, as a matter of dicta, likely yes answers to the first two clues and to the overall nature of the claim. Identifying the missing information as the third consideration, which is whether the Frys had initially invoked the formal administrative procedures of the IDEA, the Court clarified, "we do not foreclose the possibility that the history of these proceedings might suggest something different."<sup>33</sup> The odds, however, appeared to favor the Frys,

provision treats the plaintiff as "the master of the claim," thus requiring determination of "whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of [FAPE]." *Id.*

28. *Id.* at 756.

29. The Court posed the first two clues as "hypothetical questions," providing contrasting examples for further clarification. *Id.* at 756–57. The Court then added the third clue as a "further sign" but characterized it as "the history of the proceedings" rather than as a question. *Id.* at 757. For parallel style of this list, I have taken the Court's "particular" example and posed it in question form.

30. *Id.* at 756–57. The Court explained that this third factor was limited to the formal administrative procedures of the IDEA, explaining that parents were likely to resort to available channels within the district for resolution of their complaints, whether their

gravamen was denial of FAPE. *Id.* at 757 n.11.

31. *Id.* at 756. Conversely, for a no answer to the first pair of questions, the Court suggested that exhaustion "probably" applies. *Id.* For a yes answer to the third, separate clue, the Court was similarly not absolute, identifying a possible alternate explanation but generally commenting that "prior pursuit of the IDEA's [formal] administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term." *Id.* at 757.

32. *Id.* at 758 ("[the] difference in standard may have led to a difference in result in this case. Understood correctly, § 1415(l) might not require exhaustion of the Frys' claim. We lack some important information on that score, however, and so we remand the issue to the court below.").

33. *Id.*

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because the instructions to the lower court appeared to focus only on the third question, which was subject to negation or rebuttal.<sup>34</sup>

Finally, the Court emphasized that it “left for another day” the question of whether exhaustion is required when the gravamen of the claim is FAPE but the relief sought is money damages.<sup>35</sup> The two concurring Justices only took issue with the three “clues,” concluding that they were ill-advised for the purpose of generally applicable clarification.<sup>36</sup>

### III. Post-Fry Analysis

#### Purpose

The purpose of this exploratory empirical analysis was to examine the effect of the *Fry* decision on subsequent IDEA exhaustion rulings in the federal appellate courts. This judicial sampling for this exploratory purpose was limited to the circuit courts of appeal because the overall number of decisions was already so large<sup>37</sup> and these rulings are the most influential in their precedential weight.<sup>38</sup>

#### Method

The data collection procedure was a Boolean search of the overlapping Westlaw SpecialEdConnection® databases, using the terms “Fry,” “Individuals with Disabilities Education Act,” and “exhaust” in various combinations. The selection was limited to federal appellate decision that provided a *Fry* ruling under the IDEA exhaustion provision. The resulting exclusions were federal appeals court decisions that (a) identified but did not address the issue,<sup>39</sup> and (b) ruled on the exhaustion issue without considering *Fry*.<sup>40</sup> The

34. *Id.* at 758–59.

[O]n remand, the court below should establish whether (or to what extent) the Frys invoked the IDEA’s dispute resolution process before bringing this suit. And if the Frys started down that road, the court should decide whether their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion.

35. *Id.* at 752 n.4; *see also id.* at 754 n.8. The Court’s reason for not addressing this question seems to reinforce the inference of the odds in favor of not requiring exhaustion for them: “Only if that court rejects the Frys’ view of their lawsuit, using the [gravamen] analysis . . . , will the question about the effect of their request for money damages arise.” *Id.*

36. *Id.* at 759 (Alito, J., concurring) (“Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray.”).

37. *Supra* note 12.

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38. *See, e.g.*, Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460–63 (2010) (explaining the binding vertical dimension and the horizontal persuasive dimension of judicial precedent).

39. *E.g.*, *F.C. v. Tenn. Dep’t of Educ.*, 745 F. App’x 605, 361 Ed.Law Rep. 75 (6th Cir. 2018); *A.P. v. Lewis Palmer Sch. Dist. No. 38*, 728 F. App’x 835, 356 Ed.Law Rep. 80 (10th Cir. 2018) (concluding that the defendant waived the issue by not preserving it in the prior proceedings); *C.G. v. Waller Indep. Sch. Dist.*, 697 F. App’x 816, 348 Ed.Law Rep. 82 (5th Cir. 2017) (dismissing the issue based on the adverse rulings on the merits of the interrelated IDEA claim); *E.R. v. Stroudsburg Area Sch. Dist.*, 755 F. App’x 166, 363 Ed.Law Rep. 579 (3d Cir. 2018) (ruled the plaintiffs had fulfilled the exhaustion requirement, thus making *Fry* superfluous).

40. *E.g.*, *Ventura de Paulino v. N.Y.C. Dep’t of Educ.*, 959 F.3d 519, 377 Ed.Law Rep. 53 (2d Cir. 2020); *Marlboro Bd. of Educ. v. H.L.*, 793 F. App’x 101, 374 Ed.Law Rep. 447 (3d Cir. 2019); *Parish v. Bentonville Sch. Dist.*, 896 F.3d 889, 356 Ed.Law Rep. 900

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time period searched was from February 22, 2017, which is the date of the Supreme Court’s decision in *Fry*, to September 22, 2020, which was the final date of the data collection.<sup>41</sup>

### Results

The resulting 24 federal appeals court decisions are compiled in Table 1. The successive columns in the table, which have capital letters as headings for ease of referencing, include the following: C = claims, referring to the principal thrust of the plaintiff’s case on the merits;<sup>42</sup> D–F = questions 1–3, referring to the three hypothetical “clues” in *Fry*,<sup>43</sup> with the entry being “Y” for a yes answer and “N” for a no answer each question the court addressed;<sup>44</sup> G = other criteria, including but not limited to the evolving exceptions to exhaustion separate from the *Fry* gravamen approach,<sup>45</sup> with a “Y” entry if the court ruled that the exception applied and an “N” entry if the court ruled it did not apply; H = outcome, referring to the court’s ruling specific to exhaustion,<sup>46</sup> with the respective “Y” or “N” entries indicating that the court ruled that the plaintiff did or did not have to exhaust their claims; and I = comments, which start with a capital letter to reference the column being clarified.<sup>47</sup>

(8th Cir. 2019); *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 308 Ed.Law Rep. 664 (3d Cir. 2014) (basing the exhaustion ruling exclusively on continuing exceptions beyond *Fry*); *Johnson v. Boston Pub. Sch.*, 906 F.3d 182, 359 Ed.Law Rep. 1 (1st Cir. 2018) (relying on pre-*Fry* criterion).

41. Thus, the length of the time period was 3.5 years.

42. The entries for “spaghetti” strategy refer to claims that cite a wide variety of legal bases, such as Fourteenth Amendment equal protection, § 504/ADA, state civil rights legislation, and state common law, with the inferable intent that “something sticks.” *See, e.g.*, Perry A. Zirkel & Caitlin A. Lyons, *Restraining the Use of Restraints for Students with Disabilities: An Empirical Analysis of the Case Law*, 10 CONN. PUB. INT. L.J. 323, 346 n.104 (2011) (“spaghetti strategy of throwing everything against the wall and hoping something sticks,” which is also referred to with the metaphors of “kitchen

sink” or “shotgun” pleadings); *In re Butte Sch. Dist. No. 1*, 73 IDELR ¶ 198, at \*4 (D. Mont. 2019) (“Petitioners have adopted a ‘see what sticks’ approach to the case”).

43. *Supra* notes 30–31 and accompanying text.

44. According to *Fry*, the answers that likely lead to requiring exhaustion are “N” for the first two questions and “Y” for the third. *Supra* note 31.

45. *Supra* note 20 and accompanying text.

46. Any rulings for other issues in the case are not included herein. *E.g.*, *L.G. v. Bd. of Educ. of Fayette Cty.*, 775 F. App’x 227, 232–33, 369 Ed.Law Rep. 128 (6th Cir. 2019) (addressing separate retaliation claim).

47. The abbreviations used in the Comments column due to limited space are: DPH=due process hearing; IHO=impartial hearing officer; LEA=local education agency; P=plaintiff; SDP=substantive due process; and SEA=state education agency.

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Table 1: Post-Fry Appellate Case Law until September 2020

A CASE NAME	B CITATION	C CLAIM(S)	D Q1	E Q2	F Q3	G OTH- ER	H OUT- COME	COLUMN COMMENTS
J.M. v. Francis Howell Sch. Dist.	850 F.3d 944 (8th Cir. 2017)	spaghetti strategy including §504/ADA challenging restraints and seclusion			(Y)	N	Y	F-applied to lower court rather than to DPH (contrary to <i>Fry</i> ); G-money damages issue + futility exception (1 of 3)
Reyes v. Manor Indep. Sch. Dist.	850 F.3d 251 (5th Cir. 2017)	§504/ADA physical abuse claim	N	N			Y	H-alternative to waiver (forfeit)
J.S. v. Houston Cty. Bd. of Educ.	877 F.3d 979 (11th Cir. 2017)	§504/ADA claim for exclusion/isolation (to weight rm.) and verbal abuse				Y	N	G-hypotheticals do not fit "neatly" (p. 986) - <i>Olmstead</i> analogy
Wellman v. Butler Area Sch. Dist.	877 F.3d 125 (3d Cir. 2017)	§1983/§504/ADA/ claim for failure to accommodate after concussion	N	N	Y	N	Y	D,E,F-claim by claim and entire complaint; F,G-DPH resulted in settlement that released liability (nothing to exhaust)
S.D. v. Haddon Heights Bd. of Educ.	722 F. App'x 119 (3d Cir. 2018)	§504/ADA challenge to implementation and appropriateness of 504 plan	N	N		N	Y	D-FAPE claim (but directed at 504 plan); E-retaliation claim; G-stretched for "potential" IDEA eligibility (p. 127)
J.L. v. Wyoming Valley W. Sch. Dist.	722 F. App'x 190 (3d Cir. 2018)	spaghetti strategy claim against mechanical restraint on school bus	N	N		N	Y	D,E,F-totality and each claim per <i>Wellman</i> ; G-money damages issue

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CASE NAME	CITATION	CLAIM(S)	Q1	Q2	Q3	OTH-ER	OUT-COME	COLUMN COMMENTS
Durbrow v. Cobb Cty. Sch. Dist.	887 F.3d 1182 (11th Cir. 2018)	§504/ADA claim of child find/eligibility (after DPH specific to overlapping IDEA claim)	N	N		N	Y	G- "plainly .... the essence" (pp. 1190-91) + rejected futility/ inadequacy exceptions because P created them
Prunty v. DeSoto Cty. Sch. Bd.	738 F. App'x 648 (11th Cir. 2018)	spaghetti variety of claims in addition to IDEA parental participation claim	N	N			Y	F-mentioned withdrawal of DPH as dicta (non-exhaustion) rather than as third factor
Smith v. Rockwood R-VI Sch. Dist.	895 F.3d 566 (8th Cir. 2018)	§1983/504 claim against disciplinary change in placement			Y	N	Y	F-prior DPH that resulted in settlement; G- rejected money damages issue (citing <i>J.M.</i> ) + asserted new exception
Sophie G. v. Wilson Cty. Sch.	742 F. App'x 73 (6th Cir. 2018)	§504/ADA claim for admission to after-school childcare program				Y	N	G-hypothetical "clues" do not fit, citing <i>J.S.</i> - "Neither <i>Fry</i> 's clues nor the administrative proceedings suggest otherwise." (p. 80) – access claim analogous to child care facilities
Z.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.	744 F. App'x 769 (4th Cir. 2018)	spaghetti strategy, including §504/ADA claim, against various rather flagrant FAPE failures	N	N	Y	N	Y	G-overarching plain conclusion for the alternative §504/ADA claim, which was for retaliation
Nelson v. Charles City Sch. Dist.	900 F.3d 587 (8th Cir. 2018)	§504/ADA failure-to-accommodate claim in accessing open enrollment program	N	N	(N)	N	Y	F-not converse effect; G- rejected futility exception (1 of 3), including money damages issue separately

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CASE NAME	CITATION	CLAIM(S)	Q1	Q2	Q3	OTH-ER	OUT-COME	COLUMN COMMENTS
F.C. v. Tenn. Dep't of Educ.	745 F. App'x 605 (6th Cir. 2018)	§504/ADA and Title VI claims incl. eligibility against SEA (after DPH dismissal of LEA)				N	Y	G-no claims against SEA at DPH (not exhausted) + waiver (w. dicta that unlikely systemic exception here)
E.D. v. Palmyra R-1 Sch. Dist.	911 F.3d 938 (8th Cir. 2019)	§504/ADA failure-to-accommodate claim after refusing IEP	N	N		N	Y	G-no exception for refusal of IEP services
L.G. v. Bd. of Educ. of Fayette Cty.	775 F. App'x 227 (6th Cir. 2019)	§504/ADA FAPE claim (+ retaliation claim) for child with E-coli infection	N	N			Y	D,E-cursory version
Albright v. Mountain Home Sch. Dist.	926 F.3d 942 (8th Cir. 2019)	spaghetti strategy bifurcated from IDEA claim				N	Y	G-uncontested FAPE gravamen - settlement of DPH (prior to decision) does not fulfill exhaustion requirement (though unclear which claims here)
Parent/Prof'l Advocacy League v. Springfield	934 F.3d 13 (1st Cir. 2019)	ADA integration claim against separate district school for SWDs with behavioral problems	N		Y	N	Y	D-rejected <i>Olmstead</i> interpretation; F-stretched; G-gravamen analysis (including LRE) + rejected futility exception (1 of 2 in <i>Homig</i> ) because this claim was not "truly systemic" (but failed to consider IHO's jurisdictional dismissal)
Paul G. v. Monterey Peninsula Unified Sch. Dist.	933 F.3d 1096 (9th Cir. 2019)	§504/ADA lack of residential placement claim against SEA, including damages (+ dismissal sit.)	N	N	Y	N	Y	F-DPH settlement with LEA; G-rejected futility (systemic) exception (1 of 3) (w/o specifically or separately addressing damages)

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CASE NAME	CITATION	CLAIM(S)	Q1	Q2	Q3	OTH-ER	OUT-COME	COLUMN COMMENTS
Doucette v. Georgetown Pub. Sch.	936 F.3d 16 (1st Cir. 2019)	§504 and §1983 SDP claim re access of child's service animal	Y/N	Y/N		N/Y	Y/N	D,E-service animal claim, placement claim; F-unrelated DPH here; G-"simple discrimination" + discussion overriding proposed IEP amendment + separate analysis for §1983 SDP money damages claim - alternatives of de facto exhaustion and futility exception – but see rather blistering dissent
McMillen v. New Caney Indep. Sch. Dist.	939 F.3d 640 (5th Cir. 2019)	§504/ADA exclusion claim	N			N	Y	D-contributing-factor analysis; G-essence + 2 signals at dist. ct. partially analogous to F + money damages issue in detail
Doe v. Dallas Indep. Sch. Dist.	941 F.3d 224 (5th Cir. 2019)	Title IX suit from rape by special ed classmate			Y	Y	N	F-only after district court required exhaustion (distinguishable "history"); G-gravamen analysis-different hypothetical Q
A.L. v. Clovis Unified Sch. Dist.	798 F. App'x 163 (9th Cir. 2020)	§504/ADA claim re aide-parent communications and LRE	N	N	(Y)		Y	D,E-cryptic; F-filed DPH resulting in settlement (indirectly via reference to lower ct.)
Heston v. Austin Indep. Sch. Dist.	816 F. App'x 977 (5th Cir. 2020)	§504/ADA claim against training and conduct of aide	N	N	Y	N	Y	G-facial obviousness + rejected money damages issue, citing <i>McMillen</i> (DPH dismissal - good discussion)
K.D. v. L.A. Unified Sch. Dist.	816 F. App'x 222 (9th Cir. 2020)	§504/ADA claim for meaningful access (student w. Prader Willi Syndrome)	N	N	Y	N	Y	F-filed DPH resulting in settlement; G-rejected \$ damages as futility exception, citing <i>Paul G.</i>

Review of Table 1 yields several findings identified here on a column-by-column basis starting with the “Claims” column. For column C, although a few plaintiffs used the so-called spaghetti strategy,<sup>48</sup> the vast majority of the

48. *Supra* note 42.

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claims were based on § 504/ADA. For columns D–F, the most frequently addressed *Fry* “clues” were questions #1 (n=16) and #2 (n=14), and the answers to all three questions favored exhaustion with very limited exception.<sup>49</sup> For column G, an additional or alternative factor arose in most (n=20) of the 24 cases, with a slight majority (n=11) including consideration of asserted exceptions to exhaustion.<sup>50</sup> By far the most frequently addressed exception (n=8) was for money damages, and the courts almost entirely rejected it.<sup>51</sup> Conversely, the other additional or alternative considerations varied widely, including the express lack-of-fit exclusion of the *Fry* clues (n=3)<sup>52</sup> and an overall content analysis (n=3).<sup>53</sup> Finally, for column H, the courts in these cases required exhaustion in 21.5 (90%) of the 24 cases,<sup>54</sup> with the fraction attributable to the split outcomes for the two claims in one case.<sup>55</sup>

### IV. Discussion

First, as an overall matter, the Court’s *Fry* decision has been similar to its *Endrew F.* decision during the same year in not only its FAPE-based and ultimately third-approach solution<sup>56</sup> nature but also in its potentially varying but thus far anticlimactic interpretations. More specifically, just as the initial period after *Endrew F.* has not resulted in a major pro-plaintiff shift<sup>57</sup> despite

49. *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24–30 (1st Cir. 2019) (reaching the opposite answers for the § 504/ADA and § 1983 substantive due process claims); *Nelson v. Charles City Sch. Dist.*, 900 F.3d 587, 593, 357 Ed.Law Rep. 605 (8th Cir. 2019) (explaining that the no answer to this question is not converse to the strong exhaustion evidence of a yes answer).

50. Money damages was a contributing factor to the court’s futility excusal of exhaustion in part of one of these cases. *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 32–34 (1st Cir. 2019) (reasoning that the damages claim for the second, § 1983 claim in this case was for medical causation issues, which are within the customary expertise of courts).

51. The limited exception was the ruling for the § 1983 claim in *Doucette*, although the § 504/ADA claim likely also included this relief. *Id.*

52. *Sophie G. v. Wilson Cty. Sch.*, 742 F. App’x 73, 80, 360 Ed.Law Rep. 7 (6th Cir. 2018); *J.S. v. Houston Cty. Bd. of Educ.*, 877 F.3d 979, 986, 350 Ed.Law Rep. 37 (11th Cir. 2017); *cf. Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 229, 370 Ed.Law Rep. 537 (5th Cir. 2019) (formulating and applying a different question, which is “Could a student without disabilities bring this same claim?”).

53. *Z.G. v. Pamlico Cty. Pub. Sch. Bd. of Educ.*, 744 F. App’x 769, 779, 361 Ed.Law Rep. 59 (4th Cir. 2018); *cf. Heston v. Austin Indep. Sch. Dist.*, 816 F. App’x 977, 981–82 (5th Cir. 2020); *Durbrow v. Cobb Cty. Sch. Dist.*, 887 F.3d 1182, 1190–91, 353 Ed.Law Rep. 33 (11th Cir. 2018) (using global analysis as an initial approach for clue-based supplementation or verification).

54. Although the IDEA exhaustion provision only applies to federal claims, the typical result for state claims is dismissal without prejudice upon a pro-exhaustion ruling. Claims based on state special education laws, which are generally considered as in the IDEA, will follow the federal claims. In contrast, those based on other state law and common law are subject to the federal courts’ discretionary authority to decline supplemental jurisdiction for ancillary state claims. See, e.g., *Albright v. Mountain Home Sch. Dist.*, 926 F.3d 942, 945, 367 Ed.Law Rep. 13 (8th Cir. 2019).

55. *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 24–34 (1st Cir. 2019) (requiring exhaustion for the § 504/ADA claim but not the § 1983 substantive due process claim).

56. *Supra* notes 25–26 and accompanying text.

57. See *Endrew F. Aftermath II*, *supra* note 8; *Moran*, *supra* note 8 (finding insignificant outcome change in comparing the initial *Endrew F.* progeny to the corresponding pre-*Endrew F.* lower court decisions).

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various vaunted interpretations,<sup>58</sup> this systematic analysis of post-*Fry* exhaustion rulings suggests that, at least at the federal level for the almost three years to date, *Fry* has not resulted in the predicted pro-plaintiff shift in outcomes.<sup>59</sup> Viewed in comparison to a pre-*Fry* baseline of federal appellate outcomes,<sup>60</sup> the shift, if any, may have been in the defendants' direction.

58. *Supra* note 8; *see also* Perry A. Zirkel, *Professional Misconceptions of the Supreme Court's Decision in Endrew F.* 47 COMMUNIQUE 12 (June 2019) (critiquing published interpretations that overstated the holding and skewed the dicta in *Endrew F.*).

59. Garda, *supra* note 10, at 465 ("[The *Fry*] holding properly, and dramatically, liberalizes access to courts for students with disabilities"); McCarthy, *supra* note 10, at 18 ("[*Fry*] could ... have significant implications for future challenges to school practices initiated by parents of children with disabilities. Using the Court's reasoning in *Fry*, parents may feel that they can obtain more timely remedies ... from school districts for alleged discrimination"). Both commentators provided qualified, rather than unreserved and unbounded, predictions.

60. Using as an approximate basis of comparison the comprehensive canvassing of the case law as of 2009 in Wasserman, *supra* note 18, the outcomes distribution of the federal appellate decisions that applied the IDEA's exhaustion provision, excluding the two rulings with mixed outcomes, found 26.7 (58%) requiring exhaustion and 19.3 (42%) excusing it. Compare *Fraser v. Tamalpais Union High Sch. Dist.*, 281 F. App'x 746, 235 Ed.Law Rep. 867 (9th Cir. 2008); *S.E. v. Grant Cty. Bd. of Educ.*, 544 F.3d 633, 238 Ed.Law Rep. 28 (6th Cir. 2008); *Papania-Jones v. Dupree*, 275 F. App'x 301, 234 Ed.Law Rep. 60 (5th Cir. 2008); *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 229 Ed.Law Rep. 349 (2d Cir. 2008); *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 225 Ed.Law Rep. 168 (2d Cir. 2007); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 223 Ed.Law 117 (9th Cir. 2007); *McQueen v. Colo. Springs Sch. Dist.*, 488 F.3d 868, 221 Ed.Law Rep. 535 (10th Cir. 2008); *M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 208 Ed.Law Rep. 758 (11th Cir. 2006); *Fliess v. Washoe Cty. Sch. Dist.*, 90 F. App'x 240 (9th Cir. 2004); *Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 170 Ed.Law Rep. 492 (9th Cir. 2002); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 167 Ed.Law Rep. 606 (10th Cir. 2002); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 164 Ed.Law Rep. 573 (2d Cir. 2002); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 160 Ed.Law Rep. 336 (1st Cir. 2002); *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148, 74 Ed.Law Rep. 1042 (2d Cir. 2002); *Rose v. Yeaw*, 214 F.3d 206, 145 Ed.Law Rep. 140 (1st Cir. 2000); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 144 Ed.Law Rep. 808 (1st Cir. 1999); *Waters v. S. Bend Cnty. Sch. Corp.*, 191 F.3d 457 (7th Cir. 1999); *Babicz v. Sch. Bd. of Broward Cty.*, 135 F.3d 1420, 123 Ed.Law Rep. 1133 (11th Cir. 1998); *Doe v. Ariz. Dep't of Educ.*, 111 F.3d 678 (9th Cir. 1997); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 113 Ed.Law Rep. 559 (7th Cir. 1996); *Ass'n for Cnty. Living in Colo. v. Romer*, 992 F.2d 1040, 82 Ed.Law Rep. 764 (10th Cir. 1993); *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 76 Ed.Law Rep. 47 (9th Cir. 1992); *Gardner v. Sch. Bd. Caddo Parish*, 958 F.2d 108, 73 Ed.Law Rep. 439 (5th Cir. 1992); *Doe v. Smith*, 879 F.2d 1340, 55 Ed.Law Rep. 50 (6th Cir. 1989); *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 54 Ed.Law Rep. 797 (1st Cir. 1989); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 873 F.2d 933, 53 Ed.Law Rep. 440 (6th Cir. 1989) (exhaustion required), with *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 272 Ed.Law Rep. 119 (9th Cir. 2011); *M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 238 Ed.Law Rep. 38 (8th Cir. 2008); *Ellenburg v. N.M. Mil. Inst.*, 478 F.3d 1162, 216 Ed.Law Rep. 858 (10th Cir. 2007); *Handberry v. Thompson*, 436 F.3d 52 (2d Cir. 2006); *Mosely v. Bd. of Educ. of Chicago*, 434 F.3d 527 (7th Cir. 2006); *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 201 Ed.Law Rep. 106 (9th Cir. 2005); *J.S. ex rel. S.E. v. Attica Cent. Sch.*, 386 F.3d 107, 192 Ed.Law Rep. 632 (2d Cir. 2004); *Christopher S. ex rel. Rita S. v. Stanislaus Cty. Office of Educ.*, 384 F.3d 1205, 192 Ed.Law Rep. 303 (9th Cir. 2004); *McCormick v. Waukegan Sch. Dist. #60*, 374 F.3d 564, 189 Ed.Law Rep. 518 (7th Cir. 2004); *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 172 Ed.Law Rep. 87 (2d Cir. 2002); *Murphy v. Arlington Cent. Sch. Dist.*, 297 F.3d 195, 167 Ed.Law Rep. 591 (2d Cir. 2002); *Weixel v. Bd. of Educ. of*

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Although a wider sampling of judicial rulings that extends to federal district courts and a longer period of time<sup>61</sup> or empirical evidence of a differentiating selective skew of cases presenting the exhaustion issue<sup>62</sup> may disprove these exploratory findings, the approximate 9:1 outcomes distribution in favor of exhaustion<sup>63</sup> is sobering for characterizations of *Fry* that raise fears of floodgates or claim vindication for plaintiffs.

Second, the more specific results have similar tempering effects. For example, moderating interpretations of *Fry* as indirectly indicating an exhaustion-excepting answer for the open question<sup>64</sup> for money damages claims,<sup>65</sup> the post-*Fry* rulings in these appellate cases suggest a similar pro-defense direction.<sup>66</sup> Moreover, partially validating the observation of the *Fry* concurrence,<sup>67</sup> a minority of the cases either made limited or no use of the clue questions, including three cases the which the court expressly rejected or reformulated them.<sup>68</sup>

Third, *Fry* and its appellate progeny leave several more nuanced but potentially significant questions unsettled. For example, is exhaustion a jurisdictional issue or an affirmative defense?<sup>69</sup> Similarly, how do the purposes of exhaustion, such as providing a factual record via specialized expertise and resolving cases without the ponderous and congested judicial process,<sup>70</sup> square with the nonavailability of the IDEA administrative adjudications?

*N.Y.C.*, 287 F.3d 138, 163 Ed.Law Rep. 640 (2d Cir. 2002); *Padilla v. Sch. Dist. No. 1 of Denver*, 233 F.3d 1268, 149 Ed.Law Rep. 368 (10th Cir. 2000); *Covington v. Knox Cty. Sch. Sys.*, 205 F.3d 912, 142 Ed.Law Rep. 682 (6th Cir. 2000); *Witte v. Clark Cty. Sch. Dist.*, 197 F.3d 1271, 140 Ed.Law Rep. 468 (9th Cir. 2000); *Campbell v. Nye Cty. Sch. Dist.*, 68 F.3d 480 (9th Cir. 1995); *W.B. v. Matula*, 67 F.3d 484, 104 Ed.Law Rep. 28 (3d Cir. 1995); *Kerr Ctr. Parents Ass'n v. Charles*, 897 F.2d 1463, 59 Ed.Law Rep. 22 (9th Cir. 1990); *Mrs. W. v. Tirozzi*, 832 F.2d 748, 42 Ed.Law Rep. 727 (2d Cir. 1987) (exhaustion not required). For the mixed-outcome decision, which accounted for the fraction in the total distribution, see *MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 169 Ed.Law Rep. 59 (4th Cir. 2007) (requiring exhaustion for two IEPs but not the third).

**61.** Here, not only has the post-*Fry* period been limited to the initial 3.5 years (*supra* note 41), but also the pre-*Fry* sampling ended eight years before *Fry* (*supra* note 59).

**62.** A possible hypothesis is that districts are raising the exhaustion defense less extensively as a result of *Fry*'s gravamen test, thus selectively skewing those for judicial determination to FAPE-based claims. Yet, the pre-*Fry* cases may have had a corresponding skew to the approach applicable in their circuit.

**63.** *Supra* text accompanying note 54.

**64.** *Supra* text accompanying note 35.

**65.** Bruce, *supra* note 10, at 1012 and 1015. *But cf.* Garda, *supra* note 10, at 468 ("But the Court left plenty of clues that it probably would be unwilling to accept a remedy-centered approach.").

**66.** *Supra* text accompanying note 51.

**67.** *Supra* note 36 and accompanying text.

**68.** *Supra* notes 49, 52 and accompanying text. *But cf.* *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 35 (1st Cir. 2019) (concluding that these clues can be useful in applying the gravamen test "though they do not serve as on/off switches") (Selya, J., dissenting).

**69.** *E.g., Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 130–31 & n.6, 349 Ed.Law Rep. 927 (3d Cir. 2017) (discussing the issue, including the nuances of jurisdictional and "prudential" exhaustion, without finding it necessary to revisit Third Circuit precedent). For the pre-*Fry* split of authority, see *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 867–68, 272 Ed.Law Rep. 119 (9th Cir. 2011); *Mosely v. Bd. of Educ. of City of Chi.*, 434 F.3d 527, 532–33 (7th Cir. 2006).

**70.** *E.g., Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 878, 272 Ed.Law Rep. 119 (9th Cir. 2011).

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cation system in most states for § 504/ADA and other non-IDEA claims.<sup>71</sup> More specifically, in the several states without such jurisdiction, if the gravamen of plaintiffs' claims is FAPE, should not the futility exception apply?<sup>72</sup> Other potential problems are most specific to *Fry*'s gravamen test, including its application to IDEA issues that are not directly FAPE, such as child find, eligibility, least restrictive environment, and discipline. Most problematic, its application to a child who is eligible under § 504 but not the IDEA is clearly questionable.<sup>73</sup>

Finally, even within its addressed scope, the *Fry* Court's gravamen test is not entirely novel<sup>74</sup> or unambiguous.<sup>75</sup> Indeed, contrary to any inference that the Court's decision was straightforward for the Frys to clear this hurdle,<sup>76</sup> the remand resulted, a year and a half later, in an inconclusive result at the district court level.<sup>77</sup> Thus, exhaustion can be exhausting, and this analysis is inevitably not exhaustive.

**71.** See, e.g., Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135, 167–68 (2012) (finding that only a small minority of states provide unrestricted IDEA hearing officer jurisdiction for non-IDEA claims).

**72.** The other alternative would be to force the plaintiff to go through the empty formality of obtaining a dismissal, which does not fulfill the purposes of dismissal. This alternative is particularly pernicious in jurisdictions where dismissal does not meet the exhaustion requirement. E.g., *Heston v Austin Indep. Sch. Dist.*, 816 F. App'x 977, 983 (5th Cir. 2020) (concluding, as a matter of hornbook law, that dismissal does not suffice as exhaustion). For a sampling of the limited and varied earlier judicial authority addressing this issue, see Zirkel, *supra* note 70, at 172 n.189.

**73.** See generally Peter Maher, Note, *Caution on Exhaustion*, 44 CONN. L. REV. 259 (2011). For an example, within this post-*Fry* appellate case law, of seemingly inappropriate gravamen application of the IDEA exhaustion provision to a “pure” 504 student with claims specific to a 504 plan, without any child find or other IDEA coverage, see *S.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119, 354 Ed.Law Rep. 658 (3d Cir. 2020).

**74.** See *supra* note 25; see also *Hayes v. Unified Sch. Dist.* No. 377, 877 F.2d 809, 811, 54 Ed.Law Rep. 450 (10th Cir. 1989) (concluding that IDEA exhaustion “turns on whether the disciplinary measures giving rise to their action are encompassed within the provision of a [FAPE]”); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 241 n.1, 287 Ed.Law Rep. 289 (W.D.N.Y. 2012) (rejecting exhaustion based on conclusion that “the gravamen of the plaintiffs' claims is not the denial of a FAPE”); *Gardner v. Uniondale Pub. Sch. Dist.*, 2008 WL 4682442 (E.D.N.Y. Oct. 21, 2008) (requiring exhaustion “[a]s the gravamen of plaintiffs' action here relates to the deprivation of [FAPE]”); *Franklin v. Frid*, 7 F. Supp. 2d 920, 925 (W.D. Mich. 1998) (requiring exhaustion based on the conclusion that “the gravamen of the claim is that [the district] deprived [the student] of his right to [a FAPE] under the IDEA”).

**75.** *Doucette v. Georgetown Pub. Sch.*, 936 F.3d 16, 35 (1st Cir. 2019) (“the Fry Court's instructions . . . are not a model of clarity”) (Selya, J., dissenting).

**76.** *Supra* notes 34–35 and accompanying text.

**77.** *Fry v. Napoleon Cnty. Sch.*, 2018 WL 4030757 (E.D. Mich. Aug. 23, 2018) (denying both parties' motions for summary judgment based on remaining genuine issues of material fact).