

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 STACY FRY, ET VIR, AS NEXT :

4 FRIENDS OF MINOR E.F., :

5 Petitioners : No. 15-497

6 v. :

7 NAPOLEON COMMUNITY SCHOOLS, :

8 ET AL., :

9 Respondents. :

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11 Washington, D.C.

12 Monday, October 31, 2016

13

14 The above-entitled matter came on for oral  
15 argument before the Supreme Court of the United States  
16 at 10:04 a.m.

17 APPEARANCES:

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19 of the Petitioners.

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21 General, Department of Justice, Washington, D.C.; for  
22 United States, as amicus curiae, supporting the  
23 Petitioners.

24 NEAL K. KATYAL, ESQ., Washington, D.C.; on behalf of the  
25 Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-497, Fry v. Napoleon Community Schools.

Mr. Bagenstos.

ORAL ARGUMENT OF SAMUEL R. BAGENSTOS

ON BEHALF OF THE PETITIONERS

MR. BAGENSTOS: Mr. Chief Justice, and may it please the Court:

Congress adopted the Handicapped Children's Protection Act to make clear that the IDEA is not the exclusive vehicle for protecting the rights of children with disabilities, and Congress also sought to make clear that cases brought under other Federal statutes, like the ADA and the Rehabilitation Act, may proceed directly to court so long as they are not actually seeking relief that is also available under the IDEA.

Under that statutory text, it is irrelevant whether the plaintiff could have sought some other form of relief that would have been available under the IDEA.

JUSTICE KENNEDY: Suppose -- suppose that there is a school district and two surrounding school districts within the same Federal court jurisdiction and same circuit. Have each been ordered to make

1 accommodations under FAPE -- under FAPE for a dog? And  
2 then the person in the third school district just sues  
3 under the ADA. Is there an exhaustion problem?

4 MR. BAGENSTOS: Well, I think the question  
5 would be: What is the relief that the plaintiff is  
6 seeking in that third lawsuit?

7 JUSTICE KENNEDY: So it just depends on what  
8 the complaint says?

9 MR. BAGENSTOS: I think it depends on the  
10 relief the Plaintiff is seeking, because that's what the  
11 statutory language says. So the --

12 JUSTICE KENNEDY: But then you're saying  
13 that the artful form of the complaint suffices to  
14 subject the district court to damages that it might  
15 not -- the school district to damages that it might not  
16 otherwise have had to pay.

17 MR. BAGENSTOS: Well, a couple of points  
18 about that. First, I don't think it's the artful form  
19 of the complaint; I think it is the relief the Plaintiff  
20 is seeking. But, secondly, remember, this is damages  
21 being sought under a separate Federal statute that would  
22 fully apply even if exhaustion existed. The question  
23 isn't whether the school district is going to be  
24 subjected to damages under the ADA or not. That is  
25 something that might exist anyway.

1           The question is whether IDEA proceedings  
2 have to first be exhausted and what Congress said about  
3 that in this statute, unlike in other Federal statutes  
4 where it said exhaustion is required whenever any remedy  
5 is available.

6           Here, what Congress said is when the  
7 plaintiff is seeking relief that is also available under  
8 the IDEA --

9           JUSTICE GINSBURG: But you could -- you  
10 could have -- you could have, as Justice Kennedy  
11 suggested, gone the IDEA route. You could have asked to  
12 accommodate the dog, and -- and if you had done that,  
13 and you were turned down, could you then switch to the  
14 ADA track, or would you have to, having started under  
15 IDEA, continue on that route?

16           MR. BAGENSTOS: Well, under Respondent's  
17 position here, I think we would have -- and under the  
18 Sixth Circuit's position certainly, we would have to  
19 follow all of the IDEA procedures through to their  
20 conclusion before filing a lawsuit under the ADA. I --  
21 I don't think -- I think we still would be able to file  
22 the ADA lawsuit.

23           Now, the -- there's a difference not just in  
24 terms of relief in the lawsuit that would be filed under  
25 the ADA versus the one that would be filed under the

1 IDEA, which is, under the IDEA, in order to get any  
2 relief, the plaintiff would have to show not just that  
3 there is a denial of a dog, but that that actually  
4 deprived the plaintiff of a free appropriate public  
5 education.

6 Under the ADA, the -- the rights that  
7 individuals with disabilities have to bring their  
8 service dogs to public facilities are the same in all  
9 public facilities. You have a service dog; you can  
10 bring it.

11 CHIEF JUSTICE ROBERTS: I -- I understand  
12 you'd be making two arguments. One is that you don't  
13 have to exhaust because you're asking for damages, and  
14 those aren't available under the IDEA.

15 MR. BAGENSTOS: Yes.

16 CHIEF JUSTICE ROBERTS: And the second one  
17 is, you don't have to exhaust because you're not  
18 complaining about the fair and appropriate public  
19 education provision. Are those separate arguments or do  
20 you have to satisfy both of them?

21 MR. BAGENSTOS: No. I think they're  
22 independent arguments, Mr. Chief Justice, so I think the  
23 fact that we are seeking emotional distress damages, and  
24 those damages, as the Sixth Circuit recognized, are not  
25 available under the IDEA, is fully sufficient for us to

1 prevail here to say that exhaustion was not required.

2 CHIEF JUSTICE ROBERTS: So if that's the  
3 case, why -- I would suspect that the denial of what is  
4 sought under the IDEA for a fair and appropriate public  
5 education is something that could well cause emotional  
6 distress in -- in most cases. And so is all you're  
7 saying is that you have to tack on to an IDEA claim, the  
8 claim for damages for emotional distress and then you  
9 don't have to exhaust, and so whenever a school district  
10 denies an element of an FAPE or a proposed element, they  
11 will always face two-track litigation?

12 MR. BAGENSTOS: I don't think that that's  
13 right, Your Honor, because -- because it's not the case  
14 that every time there is a denial of a free appropriate  
15 public education under the IDEA there is also going to  
16 be a violation of the ADA. Right, these -- these are  
17 overlapping --

18 JUSTICE BREYER: That's true, but --

19 MR. BAGENSTOS: Yes.

20 JUSTICE BREYER: -- you could find -- I  
21 mean, in -- I have exactly the same question, in a very  
22 large number of suits, you know, in a very large number  
23 of suits brought -- or controversies -- where a child is  
24 seeking a special plan, there is a statute that gives  
25 him that right, and it rests -- rests heavily on his

1 getting together or his parents getting together with  
2 the school board and trying to work something out that  
3 makes sense.

4 Now, it seems to me, as the Chief Justice  
5 just said, that if we accept your first argument, not in  
6 all cases, but in many cases, where their lawyer wishes  
7 to avoid this exhaustion requirement, all he would have  
8 to do is wait and then sue, not for putting the child in  
9 a private school but rather for emotional suffering.

10 Now, if that argument-- if what I have just  
11 said is right, which I think is what was just said by  
12 the Chief Justice, that would seem to gut the carefully  
13 written procedural system that the IDEA sets up. And  
14 that's what is concerning me, and I don't think the word  
15 "relief" has to be read in the technical way in which  
16 you're reading it.

17 MR. BAGENSTOS: Well, so -- so I think this  
18 goes not just to what the word "relief" actually says.  
19 I think, you know, this is a highly carefully crafted  
20 procedural regime as Your Honor says, Justice Breyer.

21 But part of the careful crafting of the  
22 regime is the Handicapped Children's Protection Act  
23 which, remember, overruled a decision of this Court or  
24 overturned a decision of this Court that had sought to  
25 channel all disability education claims into IDEA



1 proceedings.

2           What Congress said in the HCPA was there are  
3 other statutes that may provide independent remedies  
4 under -- at that point it was the Rehabilitation Act  
5 Section 1983. Congress later added the ADA to that  
6 list, and those cases may be pursued independently, said  
7 Congress, so long as the plaintiffs are not actually  
8 seeking anything they can get in IDEA proceedings.

9           JUSTICE BREYER: The answer to me, and I  
10 think to the Chief, so far is, so what? Because that's  
11 what Congress wanted. Is there any answer other than  
12 that?

13           MR. BAGENSTOS: Well, so I -- I mean, I  
14 think there are a couple of answers other than that. I  
15 do think -- I do think it's what Congress wanted, and I  
16 think if you look at both the text and the legislative  
17 history, Senator Weicker's brief goes through this,  
18 shows that it's what Congress wanted.

19           But, in addition to that, yes, I think  
20 there -- there is -- there's a lot of reason to believe,  
21 and we have an amicus brief here from former special  
22 education administrators Thomas Hehir, Melody Musgrove,  
23 and -- and -- and Madeline Will, who specifically say,  
24 look, we think that what parents are going to do based  
25 on our experience is go through IDEA procedures, because

1 what they want is to get the relief that's available in  
2 IDEA proceedings.

3 There are some cases, like this case, like  
4 the Fry case -- or I'm sorry -- like the Payne case in  
5 the Ninth Circuit, where you have a case of abuse, where  
6 the principal injuries are not injuries to education,  
7 they are emotional injuries. Those are the cases that  
8 are going to proceed to court. So I think it's --

9 CHIEF JUSTICE ROBERTS: I guess that's  
10 why -- but even if what you say is right, and it makes a  
11 lot of sense, a lawyer advising a client might advise  
12 that, look, this is what you want the school to do so  
13 that you can have a free and appropriate education for  
14 your child. You will have a lot more leverage getting  
15 the school to do that if you also sue them under the ADA  
16 and Section 504, and the school board is sitting there  
17 looking at it and say, gosh, we are not only exposed to  
18 what relief is under the IDEA, but we are going to have  
19 to pay damages. You understand my point?

20 MR. BAGENSTOS: I do.

21 CHIEF JUSTICE ROBERTS: As a practical  
22 matter, it would be -- could well be in the child's and  
23 parents' interest to proceed along two tracks because it  
24 makes it much more likely, even if what all they really  
25 want, they don't care about the money. They really care

1 about education for their child.

2 MR. BAGENSTOS: But I think the point about  
3 that -- I think that is right about a lot of practical  
4 issues here. The crucial point there is that exhaustion  
5 does not change the leverage that the plaintiffs have  
6 here, right? So even under the Sixth Circuit's rule,  
7 the plaintiffs, our clients, could have exhausted IDEA  
8 proceedings, said at the time we filed an IDEA  
9 administrative complaint, by the way, school district,  
10 we are also going to sue you under the ADA and  
11 Rehabilitation Act for damages.

12 CHIEF JUSTICE ROBERTS: Later on, once we  
13 are done with this.

14 MR. BAGENSTOS: Once we are done with this.  
15 And --

16 CHIEF JUSTICE ROBERTS: I think one of the  
17 important things in this type of proceeding is timing,  
18 right? I mean, we are talking about a school year, and  
19 all this takes time. So the idea that well, when all  
20 this ends, you know, who knows, I mean, it gathers a  
21 debate about how quickly these things are resolved, then  
22 we might bring this. But if you do it at the same time,  
23 that gives you the leverage when you need it to get the  
24 accomodation in place that you want for the child.

25 MR. BAGENSTOS: Well, Your Honor, I think

1 there are obviously a lot of variables. I think a lot  
2 of defense lawyers would certainly say being threatened  
3 with long, drawn-out proceedings at the end of which is  
4 a damages award is pretty significant leverage as well.  
5 And I think the point is that time also works both ways  
6 here, right? One of the things that Congress was trying  
7 to do in the HCPA was recognize that the ADA and  
8 Rehabilitation Act in 1983 are independent, and  
9 requiring parents to first proceed through what are  
10 likely to be time-consuming proceedings under a separate  
11 statute, the IDEA, that can't give them the relief that  
12 they are seeking under those independent statutes.

13 JUSTICE KENNEDY: But your whole point again  
14 is it depends on what's in the complaint. And the  
15 statute says that before a filing of a civil action, you  
16 have to exhaust. If the statute were written your way,  
17 it would have said at the time you filed a complaint,  
18 the complaint must ask "only for." That's what you're  
19 saying, but that's not what the statute says.

20 MR. BAGENSTOS: So -- so I'd say a couple of  
21 things about that, Your Honor. I mean, first of all, I  
22 think seeking relief might naturally be read to look at  
23 what's in the complaint. But in any event, I don't  
24 think our argument turns on what we asked for in the  
25 complaint, particularly. We have made clear throughout

1 these proceedings, not just in the complaint but as the  
2 proceedings have gone on, that what we are asking for is  
3 compensatory damages for emotional distress.

4 JUSTICE KAGAN: Could -- could I ask about  
5 that, Mr. Bagenstos?

6 MR. BAGENSTOS: Yes.

7 JUSTICE KAGAN: And this takes you back to  
8 the first part of the Chief Justice's question, just so  
9 I can understand the argument, is you're really making  
10 two arguments.

11 One argument is initially when we filed the  
12 complaint and ever since, we've really only sought  
13 emotional distress damages, and emotional distress  
14 damages are something that can't be given under the  
15 IDEA.

16 MR. BAGENSTOS: Yes.

17 JUSTICE KAGAN: And that's one argument.

18 But there is a second argument which says,  
19 you know, putting that aside, the reason why we don't  
20 need to exhaust is because we are not alleging that  
21 we've been denied a fair and appropriate public  
22 education. You know, we are alleging some other denial  
23 or -- or deprivation, but we are not alleging that. We  
24 agree that the school has given us a free appropriate  
25 public education. And that, in itself, as I understand

1 it, would also mean that you don't have to exhaust,  
2 right?

3 So it can be one or the other. Is that what  
4 you're saying.

5 MR. BAGENSTOS: Yes. So -- yes. So I  
6 tried -- I -- to say -- yeah.

7 JUSTICE KAGAN: Now, this -- this case is  
8 actually the combination of the two, is what you're  
9 saying. So in some ways, you're saying this is the  
10 easiest case where both are true. You're neither  
11 alleging the denial of a FAPE, nor are you seeking the  
12 kinds of damages that an IDEA officer could provide. So  
13 it's the intersection of the two theories. But -- but  
14 if I understand your argument, either one of those  
15 things would mean that you don't have to exhaust. Is  
16 that right?

17 MR. BAGENSTOS: I agree with that, Justice  
18 Kagan. Yes. I think this -- I think under either  
19 theory we wouldn't have to exhaust, and because --  
20 because this is a case where both what we are seeking is  
21 something that categorically is unavailable in IDEA  
22 proceedings. And --

23 JUSTICE GINSBURG: And what --  
24 Mr. Bagenstos, could you clarify what you are giving up  
25 by taking this route, by suing under the ADA and not

1 under the IDEA?

2 MR. BAGENSTOS: So -- so what -- what we are  
3 giving up and what parents are giving up generally by  
4 pursuing this route is anything you can get under the  
5 IDEA. So that is reimbursement of educational expenses.  
6 That is compensatory education. That is changing an  
7 IEP.

8 Now, we are seeking none of that. We are  
9 seeking none of that in this lawsuit. What we are  
10 seeking --

11 JUSTICE KAGAN: But you might be. I mean,  
12 and this goes to -- I mean, suppose -- suppose that you  
13 weren't alleging a denial of a FAPE, but you were  
14 seeking damages that included, you know, I sent my kid  
15 to private school. I had to hire a tutor. Damages that  
16 you could get from an IDEA officer, but for some reason  
17 that didn't have to do with the denial of a FAPE.  
18 You're saying that you don't have to exhaust in that  
19 context either.

20 MR. BAGENSTOS: Right. And so -- so that is  
21 the second argument, and I agree that the Court does not  
22 have to reach that argument in order to rule in our  
23 favor here, but yes.

24 CHIEF JUSTICE ROBERTS: But if we did, I  
25 mean, it seems to me that that might address many of the

1 concerns that have been raised about the impact of the  
2 two-track proceeding. In other words, if, in fact -- if  
3 your argument were to be that no, you need both, it  
4 seems to me that would address a lot of the practical  
5 problems. Now, I appreciate the fact that you think, in  
6 this case, both are present --

7 MR. BAGENSTOS: Right.

8 CHIEF JUSTICE ROBERTS: -- but yet you want  
9 to make a more aggressive argument that you only need  
10 one.

11 MR. BAGENSTOS: Right. And I think we -- I  
12 think we would certainly prevail under the "you need  
13 both" theory, and that's why we alleged and we have  
14 argued throughout this case --

15 JUSTICE KAGAN: And I suppose one  
16 understanding of this is we don't have to really deal  
17 with what happens if you only have one, because you're  
18 saying you have both. Is that right?

19 MR. BAGENSTOS: That is entirely right.  
20 So -- so let's be clear about the second point here. So  
21 the defendants have said all along that because they  
22 gave my client a one-on-one aid, that all of her  
23 physical and educational needs were satisfied. And we  
24 have not challenged that, and it would be difficult for  
25 us to challenge that. I know this Court has a different



1 free appropriate public education in front of it later  
2 this term that may clarify what FAPE means, but under  
3 current Sixth Circuit law it would be difficult for us  
4 to challenge it. What we have said is the injury my  
5 client experienced is not a denial of education, but,  
6 for example, the humiliation that she experienced when  
7 she was forced to go to the toilet with the stall door  
8 open and four adults watching her because defendants did  
9 not trust her to use her dog to transfer to the toilet  
10 bowl. That is not a free appropriate public education  
11 claim, Your Honor.

12 And, Mr. Chief Justice --

13 JUSTICE GINSBURG: And that claim could be  
14 made by someone who doesn't qualify, who is disabled but  
15 doesn't qualify for ADA because she doesn't have any  
16 learning disability.

17 MR. BAGENSTOS: Absolutely. A person that  
18 has a disability that does not require special education  
19 so is not covered by the IDEA would still be covered by  
20 the ADA and be able to make exactly the same claim in a  
21 school here, yes. That's right, Justice Ginsburg.

22 JUSTICE ALITO: What would happen if the  
23 claim was that the child suffered emotional damages  
24 because of the denial of educational benefits?

25 MR. BAGENSTOS: So -- so I think that would

1 be a harder case because that would present only the  
2 first -- the first of our two theories, that would be we  
3 would be seeking damages that are not available under  
4 the IDEA. And remember, the statute says seeking relief  
5 that is also available, not alleges in injury that might  
6 be addressed in IDEA proceedings. Now, under that plain  
7 text, I think exhaustion wouldn't be required, but our  
8 case is stronger because we have both here.

9 And if I may reserve the balance of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.

11 MR. BAGENSTOS: Thank you.

12 CHIEF JUSTICE ROBERTS: Mr. Martinez.

13 ORAL ARGUMENT OF ROMAN MARTINEZ

14 FOR UNITED STATES, AS AMICUS CURIAE,

15 SUPPORTING THE PETITIONERS

16 MR. MARTINEZ: Mr. Chief Justice, and may it  
17 please the Court:

18 The parties, both parties, and the  
19 government now all agree that the rule under which the  
20 Sixth Circuit decided this case is wrong, and that  
21 exhaustion is required only if the relief that the  
22 plaintiff actually seeks in the case is available under  
23 the IDEA. In light of that agreement, we think the most  
24 sensible way to resolve the case is simply to reverse  
25 the decision below and let the claims go forward.

1           As the Sixth Circuit pointed out, the relief  
2 actually sought in this case is money damages, not a  
3 change to the IEP, and that relief is not available  
4 under the IDEA.

5           JUSTICE SOTOMAYOR: Mr. Martinez, that begs  
6 the last question that was asked, which is the Payne --  
7 you know the Ninth Circuit Payne decision.

8           MR. MARTINEZ: Sure.

9           JUSTICE SOTOMAYOR: It doesn't do just that.  
10 It doesn't just look just at the relief. It looks at  
11 the nature of the claims and decides whether they are a  
12 fact claim or not, whether it is seeking a change in a  
13 FAPE or not, in essence in substance. So it's not  
14 looking at it technically as we are asking for relief.  
15 But it's -- it's looking at whether or not a FAPE claim  
16 is the substance of the allegation. You're disagreeing  
17 with the Ninth Circuit approach, presumably.

18           MR. MARTINEZ: Justice Sotomayor, I just  
19 want to be clear, I -- we understand the Ninth Circuit's  
20 approach. We understand the Ninth Circuit, and we  
21 explained this in our -- our brief at the petition  
22 stage, to be departing from the other circuits, and  
23 actually saying that what matters is what the plaintiff  
24 actually asks for.

25           JUSTICE SOTOMAYOR: No. What they -- what

1 they are saying is, is the nature of the relief that  
2 they are asking for, would it require or necessitate a  
3 change in the fact? That's one of the three prongs that  
4 they look at.

5 MR. MARTINEZ: Are you talking about the  
6 third prong in --

7 JUSTICE SOTOMAYOR: Yes, exactly.

8 MR. MARTINEZ: We do disagree with that  
9 third prong, Your Honor. But I think that third prong  
10 is addressed to circumstances in which the -- the  
11 elements of the non-IDEA claim that's being brought  
12 overlap entirely with the -- the provision of FAPE. So  
13 just --

14 JUSTICE SOTOMAYOR: So let's go to the last  
15 argument -- the last question directly, then. Complaint  
16 says the FAPE was all wrong; it's hurt my child. And  
17 that's the nature of the complaint.

18 MR. MARTINEZ: Yes.

19 JUSTICE SOTOMAYOR: The -- and it seeks  
20 injunctive relief for the future --

21 MR. MARTINEZ: Yes.

22 JUSTICE SOTOMAYOR: -- not to be hurt.

23 MR. MARTINEZ: Yes.

24 JUSTICE SOTOMAYOR: All right.

25 MR. MARTINEZ: You have exhausted --

1 JUSTICE SOTOMAYOR: With no change of  
2 FAPE -- when -- no other thing is said? It's just, I  
3 want compensatory damages?

4 MR. MARTINEZ: Yes. We think that if you're  
5 seeking injunctive relief in a circumstance in which you  
6 think that the FAPE --

7 JUSTICE SOTOMAYOR: How about no injunctive  
8 relief? Past and future damages for emotional distress?

9 MR. MARTINEZ: I -- I think if there's -- if  
10 the only relief sought in the complaint -- and that's  
11 what the statute says you look for is money damages --  
12 we think that the text of the statute says that you have  
13 to figure out whether that relief sought is available  
14 under the IDEA. And I think there's common agreement  
15 that that relief sought is not available under the IDEA,  
16 so you would not need to exhaust.

17 Now I want to address --

18 JUSTICE BREYER: That's -- if it's that  
19 simple, if it's that simple, why are we in this  
20 argument? You apply ordinary exhaustion principles.  
21 Under ordinary exhaustion principles, you never have to  
22 exhaust and exhaustion would be futile. Okay? So you  
23 say exhaustion applies, it would be futile, I can't get  
24 what I want, end of the matter. That's -- what is all  
25 this complexity? I had thought that it might be because

1 -- well, you tell me.

2 MR. MARTINEZ: I -- I agree with that,  
3 Justice Breyer. And we think that what Congress did  
4 here was adopt a rule that essentially embodies that  
5 principle.

6 JUSTICE BREYER: So could I say that? Could  
7 I say, very well. What they did here was adopt --  
8 well-known, for a hundred years or more -- exception to  
9 the exhaustion requirement where exhaustion would be  
10 futile?

11 MR. MARTINEZ: You can --

12 JUSTICE BREYER: Judge, you go back and  
13 apply that to this case, end of case. No reason for  
14 special law, for prisons, for IDEA, for other things.

15 MR. MARTINEZ: I think you could adopt the  
16 rule. And it's set out in the McCarthy decision. It's  
17 set out in the House report on page 7 --

18 JUSTICE BREYER: Well, I haven't memorized  
19 that. Are they essentially --

20 MR. MARTINEZ: Yes.

21 JUSTICE BREYER: -- what I am saying? If I  
22 go to Pierce on administrative law, I look up Davis, I  
23 will find some words --

24 MR. MARTINEZ: What --

25 JUSTICE BREYER: -- and those are the words?

1           MR. MARTINEZ: The words I would suggest are  
2 the words that -- that you use are as follows: That if  
3 the hearing officer lacks authority to grant the relief  
4 sought -- those are the words of the House report --  
5 then exhaustion is not required. Those are also --

6           JUSTICE KENNEDY: I just want to make sure  
7 of the government's position. Is the position of the  
8 United States that a FAPE cannot include relief for this  
9 sort of problem: Personal assistance during the school  
10 day to accommodate the particular disabilities?

11           MR. MARTINEZ: In some circumstances, a FAPE  
12 can accommodate that, but we don't think that that's the  
13 relevant question for purposes of applying the statute,  
14 because the statute turns -- says that the exhaustion  
15 question turns on whether the relief that the plaintiff  
16 is actually seeking -- those are the terms that the  
17 statute uses -- the relief that the civil action is  
18 seeking is available under the IDEA. Now --

19           JUSTICE KENNEDY: Well, but it talks about  
20 before filing the complaint.

21           MR. MARTINEZ: It says before filing the  
22 complaint after the loss --

23           JUSTICE KENNEDY: Suppose it was -- suppose  
24 it was very clear that most FAPE plans cover precisely  
25 this kind of problem. Same case?

1                   MR. MARTINEZ: I think that if -- if -- the  
2 facts of whether a FAPE would -- would allow for the  
3 school to take account of the service dog really isn't  
4 the question because the question under the statute  
5 turns on what the -- what the person is asking for; what  
6 the relief that he seeks. And if the statute says that  
7 the civil action has to be seeking particular form of  
8 relief, and if that --

9                   JUSTICE KENNEDY: All you're talking  
10 about -- all you're talking about is artful pleading  
11 then.

12                   MR. MARTINEZ: No, not at all, Your Honor.  
13 And I want to address your question and the -- and the  
14 concerns that came up, the practical concerns about the  
15 parents who actually do want -- what they really want is  
16 a change to the IEP.

17                   If the parent files the lawsuit, the ADA  
18 lawsuit, and says I want an injunction that's going to  
19 require the service dog, that is the kind of relief that  
20 would have to be exhausted. I want to be --

21                   JUSTICE BREYER: So would he have to get a  
22 service dog if in fact it's going to cost him \$5 million  
23 in damages? And they are talking about before filing  
24 the complaint. All right?

25                   Before filing the complaint, you're already



1 in negotiation with the board. And you think I'm also  
2 entitled to this under this ADA statute, let's file a  
3 complaint and asked for damages. It will be res  
4 judicata or something when I win, and then they'll have  
5 to give me the dog.

6 And if that is the theory, then -- while it  
7 might work in this case, there are thousands of cases  
8 where parents don't have the money to litigate, where  
9 some do or some don't, where boards are in difficult  
10 problems, and all these very great difficulties in such  
11 cases which are worked out through negotiation won't be.

12 MR. MARTINEZ: No, I don't think that's  
13 right, Your Honor, because I think it's a practical  
14 matter. I'm -- I'm a parent. If one of my children  
15 were being harmed in a school, I would try -- and I  
16 thought that this was -- this was wrong, I would  
17 immediately be looking to -- to find the most -- the  
18 quickest form of relief that the law could provide me.  
19 And the quickest form of relief for a parent who  
20 actually wants a change on the ground to the situation  
21 is to follow the IDEA procedures.

22 CHIEF JUSTICE ROBERTS: No. No. But the  
23 point is you're likely -- they are going to listen to  
24 you a lot more carefully if you say, by the way, I'm  
25 also filing a suit under Section 504, and the ADA --

1 MR. MARTINEZ: Right.

2 CHIEF JUSTICE ROBERTS: That's a lot more  
3 leverage.

4 MR. MARTINEZ: Well, with respect, Mr. Chief  
5 Justice, I think what I would do in that circumstance is  
6 pursue the IDEA process and say up front, you know, if I  
7 lose in this IDEA process, I'm going to bring the ADA  
8 claim with all the damages involved. So I can make that  
9 threat at the beginning because everyone agrees here  
10 that at the end of the day, regardless of whether or not  
11 I exhaust, I can ultimately go to the ADA process and --  
12 or file a suit under the ADA or --

13 CHIEF JUSTICE ROBERTS: Well, I don't -- I  
14 don't think that's what you would do, but I guess you're  
15 the better judge of that than I am.

16 (Laughter.)

17 CHIEF JUSTICE ROBERTS: Where -- what is  
18 your position on the question I asked earlier about the  
19 two-track proceeding? Is it enough that they're seeking  
20 damages, or -- and is it enough that the --

21 MR. MARTINEZ: We think --

22 CHIEF JUSTICE ROBERTS: -- they're fine with  
23 the FAPE or the IEP, or does it have to be both?

24 MR. MARTINEZ: No. We think that these are  
25 two different, independent reasons why exhaustion is not

1 required here.

2           The plaintiffs in this case are seeking  
3 money damages. Money damages is not available under the  
4 IDEA; therefore, they don't have to exhaust. That's  
5 argument one.

6           Argument two is every one on both sides of  
7 this case agrees that a FAPE was provided and that the  
8 IDEA was not violated. It therefore makes very little  
9 sense for the Court to say that you need to go to an  
10 administrative process so that the question of whether a  
11 FAPE was provided in the IDEA process -- the IDEA was  
12 violated can be resolved, because both parties already  
13 agree on that.

14           Our legal system does not require parties to  
15 go into any proceeding in court, in an agency and make  
16 arguments that they do not believe are true.

17           CHIEF JUSTICE ROBERTS: So is the parties'  
18 concession sufficient to answer that question?

19           MR. MARTINEZ: I think the parties'  
20 concession is sufficient to answer that question.

21           JUSTICE KAGAN: What if you had a complaint  
22 where the parties did concede that IDEA was not  
23 violated, that a FAPE had been provided, but as you  
24 looked in the allegations in the complaint, it really  
25 seems that there is grounds to think that a FAPE was not

1 provided and that the IDEA was violated? What do you do  
2 with a complaint that looks like that?

3 MR. MARTINEZ: I think if the parties agree  
4 that the FAPE was provided, that should be enough. And  
5 I don't think -- because I don't think that the statute  
6 has in mind a sort of process by which either a Federal  
7 court or an IDEA hearing officer is given some sort of  
8 roving commission to go sniff out FAPE and IDEA  
9 violations.

10 The IDEA hearing process is an adversarial  
11 process. It depends on the parties to come together,  
12 bring their disagreements forward, bring evidence, and  
13 then a decision is made. It's not some of process where  
14 the hearing officer is supposed to say, well, I know the  
15 parties agree that there is no legal violation, but  
16 we're going to go ahead and maybe there is one anyway.

17 And I think that -- that the rule that  
18 Respondents advocate here, which would require people to  
19 bring claims that they do not believe has merit, not  
20 only is it unheard of in American law, but it actually  
21 is inconsistent with the IDEA itself, which would allow  
22 for an award of attorney's fees against a parent who  
23 brings a claim that's frivolous, unreasonable, or  
24 without foundation.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Mr. Katyal.

2 ORAL ARGUMENT OF NEAL K. KATYAL

3 ON BEHALF OF THE RESPONDENTS

4 MR. KATYAL: Thank you, Mr. Chief Justice,  
5 and may it please the Court:

6 The complaint that was actually filed in  
7 this case, in response to Justice Kagan, illustrates the  
8 point -- the type of dispute Congress chose to channel  
9 through local education experts. They don't have both.  
10 They got neither.

11 The brief in opposition, Appendix page 21,  
12 has the complaint's prayer for relief, and it contains  
13 three forms of relief that we believe are available  
14 under the IDEA.

15 First, a declaration that E.F. was entitled  
16 to attend school with her dog.

17 Second, money to pay for the cost  
18 Petitioners incurred in home schooling E.F., and for  
19 counseling.

20 JUSTICE SOTOMAYOR: Can you tell us what  
21 page that's on?

22 MR. KATYAL: That's page 21 of the -- of the  
23 orange brief in opposition.

24 JUSTICE SOTOMAYOR: No, I know. The  
25 Respondents -- appellants --

1 MR. KATYAL: Yeah, the orange one. The --

2 JUSTICE SOTOMAYOR: What -- what allegation  
3 says they want reimbursement --

4 MR. KATYAL: So --

5 JUSTICE SOTOMAYOR: -- for her schooling, et  
6 cetera?

7 MR. KATYAL: So first they want a  
8 declaration, okay, and that's -- that's number B. And  
9 then C is --

10 JUSTICE KAGAN: But the declaration was that  
11 the ADA had been violated.

12 MR. MARTINEZ: Correct. And our point is  
13 that the statute requires you to look at, is this relief  
14 available under the IDEA? Here, the relief --

15 JUSTICE KAGAN: Well, it's not available;  
16 you don't get a declaration that the ADA has been  
17 violated or the Rehabilitation Act has been violated  
18 from IDEA officer.

19 MR. KATYAL: Absolutely, Justice Kagan.  
20 That's -- you know, we couldn't read the statute to --  
21 the second half of Section 1415, the exhaustion  
22 requirement, to say you've got to show a -- you know,  
23 that the IDEA gives that form of relief. Really, I  
24 think what 1415 does is it has two parts.

25 The first, as Mr. Bagenstos started his

1 argument with, was it's about the what. It's about what  
2 can -- it's about -- it's saying that Smith v. Robinson  
3 was wrong; that, basically, you know, there was rights  
4 above and beyond the IDEA.

5           The second part, though, is the timing. And  
6 it says if you're choosing to bring one of those  
7 lawsuits, you got to first exhaust the IDEA procedures  
8 if the relief available is one that you could get from  
9 the -- from the IDEA. If you read it to say, oh, you've  
10 got to show in -- an IDEA violation, that they've got to  
11 ask for an IDEA declaration, then you're essentially  
12 gutting the statute.

13           JUSTICE GINSBURG: Mr. Katyal, any relief?  
14 I mean, that -- the -- again, your furthest argument is  
15 that if any relief is available under the IDEA, you must  
16 pursue that route first. But that's exactly what  
17 Congress declined to adopt when it was proposed by the  
18 National School Board Association. So -- so you must be  
19 saying something short of if any relief is available.

20           MR. KATYAL: We'd certainly caution the  
21 Court about failed legislation, trying to read too much  
22 into that. But, you know, you're right, Justice  
23 Ginsburg. That's our broadest argument.

24           And the argument works like this: The  
25 complaint has invoked the idea that they're seeking any

1 appropriate relief. And here, any appropriate relief  
2 means anything that is available that could be granted  
3 by a Federal court. If you do --

4 CHIEF JUSTICE ROBERTS: That's boilerplate.  
5 That may or may not be significant. But I -- do you  
6 concede -- and I couldn't quite tell from your brief --  
7 that they will be able to get money damages for  
8 everything they're seeking under the ADA in Section 504  
9 under the IDEA?

10 MR. KATYAL: We don't concede everything,  
11 but we do think that they can -- that they get a part.  
12 And our red brief at pages 44 to 50 explains here the  
13 only thing the complaint seeks is the word "damages."  
14 That's at the brief in appendix at page 21. And to  
15 understand the damages, you have to look to the  
16 complaint.

17 The complaint isolates, as our red brief  
18 goes through in quoting chapter and verse of the  
19 complaint --

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. KATYAL: -- things like compensatory  
22 education, things like home schooling.

23 CHIEF JUSTICE ROBERTS: They're asking --  
24 they're asking for other things; right? I know  
25 basically -- all right.



1                   So are you saying they'll get some of the  
2 damages they're seeking, but not all of them?

3                   MR. KATYAL: Correct. That is --

4                   CHIEF JUSTICE ROBERTS: Well, then under  
5 Jones case, isn't the rule, well, then, you know, they  
6 get to proceed with the things that they're not going to  
7 be able to get under the IDEA?

8                   MR. KATYAL: Absolutely not, Your Honor, for  
9 a few reasons.

10                   First, the Jones case itself is -- your --  
11 your opinion is about letting good claims go forward  
12 versus bad claims. Here, there are only two claims.  
13 One is a violation of the ADA; the second is a violation  
14 of the Rehabilitation Act.

15                   Now, it is true that one of their prayers  
16 for relief is damages. Not, by the way, emotional  
17 damages, which is what their reply brief paints it out  
18 and says it 27 times. It just says "damages." And so  
19 in order to -- Jones does not permit, and, indeed, no  
20 decision of this Court has ever permitted a plaintiff to  
21 try and slice and dice a prayer for relief in one way or  
22 another. Rather, the question is: Is this claim under  
23 your opinion a good claim or a bad claim?

24                   Liberty Mutual, your decision in Liberty  
25 Mutual says a claim is a cause of action. And here the

1 question, then, under 1415 is, is the cause of action  
2 something that requires exhaustion? Here --

3 JUSTICE SOTOMAYOR: When I look at the  
4 claimed harms, which the only allegations besides the  
5 prayer for relief at the end is in response --  
6 Respondent's Appellate 11, 51A through F, every one of  
7 those harms alleged is a component of emotional harm.  
8 Nowhere are they saying she was harmed by having to pay  
9 for -- to pay for a tutoring program, or harmed by her  
10 mother losing her job, which is what your brief was  
11 talking about.

12 Here, all of the harms alleged are  
13 essentially compensatory emotional harms: A, the denial  
14 of equal access; B, the denial of the use of Wonder; C,  
15 interference to form bonds with other kids; D, denial of  
16 an opportunity to interact with other children. And F  
17 says it very directly: emotional distress and pain,  
18 embarrassment, mental anguish, inconvenience, and loss  
19 of enjoyment.

20 Those are -- every one of these are the  
21 classic damage harms that are compensatory.

22 MR. MARTINEZ: So --

23 JUSTICE SOTOMAYOR: So how does the IDEA  
24 provide compensatory damages for these injuries?

25 MR. MARTINEZ: Our brief goes into this in

1 detail at those pages.

2 JUSTICE SOTOMAYOR: I know, but I was trying  
3 to look for it in the complaint, and I couldn't.

4 MR. KATYAL: Well, I do think that the only  
5 place in which emotional is isolated is F. This is, of  
6 course, a non-exhaustive list in paragraph 51. And the  
7 things like interference and denial of the opportunity  
8 to interact are exactly the kinds of things IDEA relief  
9 officers provide in the form of counseling.

10 JUSTICE KAGAN: Well, Mr. Katyal, think of  
11 it this way: Suppose this girl wanted to go into a  
12 public library a couple of times a week and the library  
13 said, you can't take your dog here; we're going to just  
14 provide you with a librarian who will help you do all  
15 the things that your dog otherwise helps you with, and  
16 the girl brings a suit.

17 Isn't that suit exactly the suit that she  
18 brought, except that instead of a library, it's a  
19 school? But that's her -- that's her claim and those  
20 are her damages, that she was deprived of access to a  
21 public facility in a way that caused her distress and  
22 emotional harm.

23 MR. KATYAL: Justice Kagan, that may work in  
24 that case, as opposed to this one. That's because 1415  
25 is a unique exhaustion statute geared to the school

1 setting. It's a carefully calibrated situation where  
2 the IDEA -- Congress --

3 JUSTICE KAGAN: But this goes back to  
4 Justice Ginsburg's point. I mean, the entire point of  
5 the statute and the overruling of our prior case was  
6 Congress saying the fact that the IDEA exists for  
7 schools does not mean that you don't have separate ADA  
8 and Rehabilitation Act claims. And if you bring those  
9 separate kind of claims, which are essentially denial of  
10 access claims to public facilities, and then you're  
11 asking in addition to that for a form of damages that  
12 has nothing to do with what any IDEA officer can  
13 provide, then you can go forward without exhaustion.

14 MR. KATYAL: That's exactly right in terms  
15 of explaining the first half of 1415. It doesn't  
16 explain the second half, the timing provisions of 1415.  
17 And to understand this, one nice way of doing it is to  
18 just look at the government's brief that they filed in  
19 Payne, and this is going back to your question about  
20 Jones and Bock.

21 The money damages suit, the government told  
22 the Ninth Circuit that a money damages suit would not go  
23 forward because implicit in it is a declaration that  
24 there is an IDEA violation.

25 So if you -- Mr. Martinez said in response

1 before, if the complaint only sought emotional distress  
2 money damages, could that suit go forward? In Payne,  
3 the government said the reverse. And the reason for  
4 that is that when a Federal court awards money damages,  
5 the first thing it is doing is issuing a declaration  
6 that the underlying problem was a violation in some way  
7 or another.

8           So if you accept it, E.F.'s complaint here,  
9 what you'd be doing is accepting the idea -- ordering a  
10 declaratory judgment that the school --

11           JUSTICE BREYER: I see that. I see this is  
12 what -- where -- where I am. I want a quick reaction  
13 from you, if you can give it.

14           The problem of deciding against you is not  
15 necessarily in this case, but in other cases where, in  
16 fact, it would be fairly easy by how you write the word  
17 "damages" in your complaint to have judges deciding IEPs  
18 without the preliminary negotiation and views of the  
19 school board, which would seriously undercut and hurt  
20 the -- this statute, which is designed to get the  
21 educational plan.

22           The trouble with deciding it your way is, I  
23 think, exactly what Justice Kagan said: Almost anything  
24 can be written into an educational plan having to do  
25 with the child's day at school. And, therefore, when

1 there is nothing more to it than a claim that the  
2 librarian wrongly kept the dog out of the library -- the  
3 school librarian, you wouldn't be able to bring the suit  
4 because, after all, you could have written such a  
5 thing -- don't keep the dog out of the library -- in the  
6 plan. So what to do?

7 Now, I'm here thinking in the back of my  
8 mind of words that have come up in other cases, like  
9 "gravamen" of the complaint or -- which we've had in  
10 many cases involving sovereign immunity or all kinds of  
11 things, which Holmes and, you know, Frankfurter talked  
12 about. What is the gravamen of the complaint?

13 And were we to say, let us look to the  
14 gravamen of the complaint, the heart of the complaint,  
15 what it's really about. If what it's really about is a  
16 significant matter in respect to the IEP, then you do  
17 have to exhaust, unless, of course, it's futile. If it  
18 is not, you don't; and then let the lower courts decide  
19 this one.

20 MR. KATYAL: So three points.

21 First, in response to the first half  
22 about -- about whether or not this would gut the  
23 exhaustion provision, we absolutely agree. And I found  
24 the answer Mr. Bagenstos gave to the Chief Justice in  
25 your question about leverage and destroying the kind of

1 carefully wrought system astonishing. He said that's  
2 right, in that he admitted that this would destroy the  
3 carefully wrought system.

4 Now, second, would ours do that, going to  
5 your other point. Is this going to --

6 JUSTICE GINSBURG: I thought he simply said  
7 that if you're going the IDEA route, you must pursue it  
8 to the end. But he said, we're not going the ADA route.  
9 We're asking the same thing that we would ask if this  
10 child didn't have an IEP. We are asking for access to  
11 the facilities.

12 MR. KATYAL: As I understood his answer,  
13 Justice Ginsburg, to the question is that, yes, a lawyer  
14 could walk in on day one and sue for money damages, and  
15 then -- and then extort or possibly leverage that into a  
16 better situation in terms of money. The amicus brief  
17 from the school board explains that this actually  
18 happens in real life.

19 Now, with respect to the concern that you  
20 had, I think this case is an easy one because in this  
21 case the IEP, the complaint itself says the IEP denied  
22 the dog. If a Federal district court, going back to  
23 Justice Kagan's first question, orders a declaratory  
24 judgment, which is what they sought expressly, then  
25 you'd be calling the IEP into question. That's why the

1 district court at petition appendix page 49 --

2 JUSTICE GINSBURG: But what does that say  
3 other than it's a recitation of fact? There was an IEP,  
4 and it didn't include the dog.

5 MR. KATYAL: And what that means is, if the  
6 Federal district court said, here are money damages,  
7 because you denied the dog, implicit in that -- and this  
8 is the government's brief in Payne as well as this  
9 Court's own decision in Fair v. McNary, which I'll  
10 explain in a moment. That means that there is a  
11 declaratory judgment that the government -- that the  
12 school erred and that itself called the IEP into  
13 question.

14 JUSTICE KAGAN: But the Plaintiffs here are  
15 not suggesting that the IEP was deficient. They are  
16 saying the IEP was perfectly efficient. If all you look  
17 at are the kinds of educational criteria that IEPs  
18 usually look at, then the dog isn't necessary. What the  
19 dog is necessary for is things that don't have anything  
20 to do with the IEP, is what the plaintiffs say. And  
21 after all, that's what they are saying, and that's what  
22 they are seeking. And that's what this statute suggests  
23 that we ought to look to.

24 MR. KATYAL: Justice Kagan, I think that's  
25 wrong on the facts on the law. On the facts, I don't



1 think you can affirm on that theory. This is a new  
2 theory that they have put through this Court that  
3 somehow they've conceded there's no FAPE violation. The  
4 complaint itself --

5 JUSTICE SOTOMAYOR: Mr. Katyal, you're --  
6 you're supposed to look at a complaint as a whole, okay,  
7 at the moment it's filed.

8 What's clear in this complaint, because the  
9 allegations say it, this is what happened. It didn't  
10 have it in the IDEA. We asked them to do it; they  
11 didn't do it. They finally agreed to do it, and then  
12 we've placed our child in another school. They have a  
13 paragraph that says, She is now happily in another  
14 school that welcomes her and her dog. Okay?

15 MR. KATYAL: Correct.

16 JUSTICE SOTOMAYOR: They then talk about all  
17 the emotional distress. At that moment, either because  
18 of futility, because she can't change the IDEA at a  
19 school she no longer attends, the school she is in is  
20 already giving her her dog, there is no declaratory  
21 relief being sought that her current IDEA is  
22 deficient -- forget about the past one -- is deficient.  
23 Why in the world, at the moment she filed the complaint,  
24 would she have to go back or should have gone to the  
25 school earlier? She no longer is seeking anything

1 related to the IDEA facet.

2 MR. KATYAL: So, Justice Sotomayor, two  
3 answers, and we agree with you, absolutely. Read the  
4 text of the complaint as we were having that interchange  
5 earlier. The text of the complaint, including the  
6 paragraphs you read, talk about how the denial of the  
7 dog undermined her independence. And part of the IDEA,  
8 one of the three statutory goals, and this is in 20  
9 U.S.C. 1400(d)(1), is independence. That's why your  
10 former colleagues on the Second Circuit --

11 JUSTICE SOTOMAYOR: We are now getting -- we  
12 are now going past where I am, okay, or you're going  
13 behind what I'm saying but not getting to the point,  
14 Mr. Katyal.

15 Maybe, before she changed schools, she might  
16 have been entitled to something related to her IDEA, but  
17 at the moment this complaint was filed, on its own face,  
18 where is it asking for any change, potentially or  
19 otherwise, to the IDEA that is no longer in effect?

20 MR. KATYAL: And that is my second answer to  
21 you.

22 So the second answer is the complaint asks  
23 for a declaratory judgment, and that's what we were  
24 talking about at the beginning, to ask for declaratory  
25 judgment under this Court's decision in Golden v.

1 Zwickler and City of Lyons, the only way they can invoke  
2 Article III jurisdiction is by saying there is a  
3 reasonable prospect that the situation would occur.  
4 There is not a word in the complaint that says she won't  
5 return to the school, and indeed, the Sixth Circuit  
6 grapples with this all the time, when children leave the  
7 school and file these lawsuits.

8           There is a case called Woods, which is at  
9 487 Federal Appendix 979, and what that case says is,  
10 even if you leave the school, the school has an ongoing  
11 obligation to keep an IEP current in case the person  
12 comes back to the school.

13           If you adopted, if the Federal district  
14 court granted their declaratory judgment, the only way  
15 they can do so, and the only way they can invoke Article  
16 III processes is by saying, look, there is a chance E.F.  
17 might come back.

18           And that happens all the time. That  
19 happens, you know, in the Payne case itself. People  
20 file lawsuits. They leave the school, and then they  
21 come back. That's what they asked for, Justice  
22 Sotomayor. They didn't ask -- and, indeed, the Sixth  
23 Circuit briefing is very clear on this point. They  
24 never asked for emotional damages, or even the word  
25 "damages" doesn't appear --

1 JUSTICE SOTOMAYOR: Would you fit into the  
2 Payne three criteria, the Ninth Circuit's three  
3 criteria?

4 MR. KATYAL: That -- that --

5 JUSTICE SOTOMAYOR: The Ninth Circuit uses  
6 to evaluate --

7 MR. KATYAL: Yes. So we think that if  
8 there's a denial, that -- that they can't just concede  
9 and say, oh, we think there is no FAPE violation, and  
10 then that allows an end-run around 1415.

11 Rather, we think 1415 asks: Is the relief  
12 available? And to understand whether the relief is  
13 available, it's not a subjective inquiry. It can't be  
14 plaintiff-centered. It's got to be: Objectively, is  
15 relief available? So just --

16 JUSTICE GINSBURG: How much relief -- going  
17 back to what you said before, I think you told me you're  
18 not pressing any relief. So how much relief?

19 MR. KATYAL: Well, I -- I do think that if  
20 the complaint seeks relief that is available under the  
21 IDEA, then at least that claim can't go forward, going  
22 back to the Jones v. Bock thing.

23 So, if, for example, Justice Ginsburg, you  
24 had a claim like the dog one here and then you had a  
25 separate claim that said something like the child was

1 being abused in the bathroom or something like that,  
2 something that didn't implicate a FAPE or an IDEA,  
3 certainly I think that claim could go forward. That's a  
4 separate claim. It's a good claim under Jones v. Bock.

5 What can't go forward is something like  
6 this, because Congress had this in mind. They had the  
7 idea that you -- that a plaintiff can gut 1415 by  
8 saying, oh, I don't want IDEA violation. I just want --  
9 I don't want IDEA relief. I want money damages, because  
10 then they could file that lawsuit on day one, evade the  
11 cooperative process that Congress has set forth, get  
12 relief from the district court, and then, by res  
13 judicata --

14 CHIEF JUSTICE ROBERTS: The cooperative  
15 process -- the cooperative process you're talking about,  
16 given their position that they are not asking for any  
17 relief under the FAPE, would be kind of a charade. You  
18 get into the -- the meeting room, and they say, well, we  
19 don't want anything that you can give us. We want money  
20 that's not available.

21 MR. KATYAL: We certainly agree that if it  
22 triggers that kind of futility exception, if they  
23 literally can't get the relief for one reason or  
24 another, absolutely, they don't have to go through it --

25 JUSTICE BREYER: Here -- here this might

1 also be peripheral. I mean, this is a dog for a child  
2 who is not blind so is not subject to the regulations.  
3 They have a teacher who is going around, or a person who  
4 is acting as a guide within the school, and this is, to  
5 that degree, a peripheral matter in respect to the plan,  
6 and, perhaps, at least arguably, more like the librarian  
7 in the school who -- or the person who does beat up  
8 somebody or treat them badly, which could be the subject  
9 but a pretty minor part of an IEP.

10 MR. KATYAL: So this is going back to  
11 something I was trying to get to earlier about your  
12 second half of your question. Look, we agree that if  
13 there is a circumstance in which the IEP or FAPE  
14 processes are not directly implicated in some way,  
15 that's a different case. That's not this one.

16 In this one, you have them seeking, invoking  
17 the IEP process for the very same thing they are asking  
18 the Federal district court to do, which is a declaration  
19 that the school erred by not --

20 JUSTICE KAGAN: I don't understand that,  
21 Mr. Katyal. I mean, you yourself have an example in  
22 your brief of abuse towards a handicapped disabled  
23 student that would result in money damages and maybe  
24 emotional distress, but maybe also the parents took the  
25 kid out of school and -- and is asking for the school

1 to -- the private school tuition that they had to incur,  
2 so all kinds of things. But it was -- it was -- it was  
3 not because of anything that the IEP said or didn't say.  
4 It was because there was discrimination on the basis of  
5 disability.

6 Now, it was in a school, and it could be  
7 remedied by school-type things, like stop discriminating  
8 or abusing against a disabled student. But even you in  
9 your briefs say that doesn't have anything to do with  
10 the IDEA. And so why isn't this the same thing?

11 MR. KATYAL: Because -- because,  
12 Justice Kagan, as that page, page 37, explains, a lot of  
13 lower courts have said that when you have a discrete  
14 instance of abuse, that doesn't violate the IDEA --

15 JUSTICE KAGAN: I don't -- discrete  
16 instance. How about if you had a continuing stream of  
17 abuse?

18 MR. KATYAL: If it's a continuing stream of  
19 abuse, something that does implicate IDEA processes and  
20 deny FAPE, absolutely it would require exhaustion in  
21 that circumstance.

22 JUSTICE KAGAN: The IDEA doesn't care about  
23 particular instances but cares about --

24 MR. KATYAL: There are some things, Justice  
25 Kagan, that are dealt with through the IDEA process.

1 Typically those are things that would occur as opposed  
2 to one-offs, yes. And so I can imagine a one-off being  
3 so significant maybe that would be different. The Court  
4 doesn't need to get into it here. Here you've got a  
5 core situation in which they have invoked the IEP  
6 process to --

7 JUSTICE KAGAN: But, Mr. Katyal, are you  
8 suggesting that there is no such thing as continuing  
9 discrimination that happens in a school setting that  
10 actually does not have anything to do with the IEP?

11 MR. KATYAL: To an extent -- to the extent  
12 that something like that exists, we're not -- our  
13 position does not require exhaustion there. That is in  
14 order -- there has to be -- you know, relief has to be  
15 available under the IDEA. Here, relief is available  
16 under the IDEA. Indeed, they invoked exactly that  
17 process.

18 JUSTICE KAGAN: But as I understand it from  
19 one of Amicus briefs, just to sort of put a fine point  
20 on this. There are close to a million students who are  
21 disabled in some way but who do not get an IEP. So if  
22 there is discrimination or if there is a failure to  
23 provide access to one of those students you don't have  
24 to exhaust the IDEA procedure, do you?

25 MR. KATYAL: Well, I'd caution the Court



1 into saying the IEP is the only thing that's necessary.  
2 But the IEP is a good template. As this Court said in  
3 Honig, it's the kind of center piece of the IDEA. It's  
4 a good template for whether or not there is an IDEA  
5 violation. It may not always map on perfectly, but it's  
6 a pretty good proxy. And so when you have a  
7 circumstance like this in which they have tried -- they  
8 invoked the IDEA process for the dog. They invoked --

9 JUSTICE KAGAN: I'm not sure I understood  
10 the answer to the question. In that case, you would not  
11 send the -- the -- the child to the IDEA officer, would  
12 you?

13 MR. KATYAL: Well -- well, Justice Kagan,  
14 you talked about a million different possible  
15 situations --

16 JUSTICE KAGAN: 700,000, if I can read what  
17 the --

18 MR. KATYAL: Or 700,000. So -- so some of  
19 those may be circumstance in which for one reason or  
20 another the IEP just didn't govern the situation, but  
21 should. And in those circumstances, yes, we think  
22 exhaustion would be required. In others which follow  
23 more like the examples in our page 37, the kind of  
24 discrete one-off things, those are situations when  
25 absolutely they wouldn't require exhaustion in those

1 circumstances. Congress had something -- a simple in  
2 mind in 1415, which is that if you can get the relief  
3 through the IDEA, if that's what it's set up for, if  
4 that's the scheme Congress wanted to channel that stuff  
5 to, then go through that first. Here, you need no  
6 better evidence that that happened and that they invoked  
7 those very processes here. And if you allow their legal  
8 theory to proceed -- to disclaim FAPE, disclaim seek  
9 only monetary damages, then you are --

10 CHIEF JUSTICE ROBERTS: No, no, no. The --  
11 the -- there will often be situations where parents will  
12 seek relief under the IDEA and then be told early in the  
13 process or whatever -- maybe the school will tell them  
14 we can't do that and here's why. And the parents will  
15 think, okay, so it isn't available. We're not going to  
16 pursue that relief under the IDEA. We're instead going  
17 to sue under the ADA.

18 MR. KATYAL: So certainly if it's futile, if  
19 they say, look, we lack the authority to --

20 CHIEF JUSTICE ROBERTS: No, no, they say,  
21 you know, we could press ahead with this. We could sit  
22 down with them and say, no, you got to do this and that,  
23 but it's going to be easier for us just to proceed under  
24 the IDEA.

25 MR. KATYAL: Yeah, and the choice Congress

1 made in 1415, and going back to an earlier question, I  
2 know it seems a little bit unusual to say -- and strange  
3 to say, why are you forcing plaintiff -- parents into  
4 a -- into a scheme that they don't want, but that's the  
5 scheme Congress laid out. That's a consequence of an  
6 exhaustion statute which is to say --

7 CHIEF JUSTICE ROBERTS: Well, it can't --  
8 just not a scheme they don't want. It may be a scheme  
9 that they decide, no, the relief we seek is not  
10 available under this. This isn't a case. They do have  
11 the -- the human who is taking care of these things, and  
12 under the -- that's enough for FAPE. But, you know, we  
13 still have this discrimination complaint.

14 MR. KATYAL: And, Mr. Chief Justice --

15 CHIEF JUSTICE ROBERTS: And when you do,  
16 you'll agree that that's an awkward position for them to  
17 go to the meeting and say, we don't want anything.

18 MR. KATYAL: It's -- it's really awkward,  
19 Mr. Chief Justice, but I think what Congress said there  
20 is it's not up to the individual parents subjectively to  
21 say, hey, I don't want any part of this process. Rather  
22 what Congress said is you got to go through the process,  
23 and then at the end of the process, and then at the end  
24 of the 105 days -- this is a very short statutory  
25 process -- then you can come into Federal court. This

1 is about timing.

2 JUSTICE SOTOMAYOR: Mr. Katyal, my problem  
3 is, what were they -- is the only argument that you're  
4 making is that they are not entitled to their  
5 declaratory judgment because they didn't exhaust that?  
6 Are they entitled, whether they exhaust it or not, to  
7 the ADA claims for monetary compensatory damages for  
8 pain and suffering?

9 MR. KATYAL: Justice Sotomayor, they may be  
10 at the end. They first have to exhaust -- this is all  
11 about timing --

12 JUSTICE SOTOMAYOR: Well, it's now -- it's  
13 now too late to exhaust, right?

14 MR. KATYAL: No, not at all. The equitable  
15 tolling rules of this Court --

16 JUSTICE SOTOMAYOR: How about if they just  
17 waive all of that and say I want my money?

18 MR. KATYAL: You know, so, again, I think  
19 that it can't be for the reasons that the Chief Justice  
20 and Justice Breyer said that just plaintiffs can kind of  
21 waive things around. Congress had an object standard in  
22 mind: Is relief available under the IDEA --

23 JUSTICE SOTOMAYOR: I am -- I am so confused  
24 by your position. I'm -- I'm -- I'm so horribly  
25 confused. What is the purpose of all of this? Throw

1 this case out now. Let them go back to school they are  
2 no longer in. They are going to say to the school, give  
3 me money, and what else?

4 MR. KATYAL: Justice Sotomayor, that is  
5 their position in the reply brief. That is not -- you  
6 told me to look at the text in the complaint. None of  
7 that appears in the complaint. None of that they're  
8 going to a different school, won't come back. If  
9 anything, the complaint says the reverse. They want the  
10 declaratory judgment that the school erred. The only  
11 way they can invoke that is by saying that this is a  
12 situation that is bound to occur. The purpose, why are  
13 we -- why are we standing here? What are we worried  
14 about?

15 JUSTICE SOTOMAYOR: The school already  
16 admitted that. They let her bring the dog back in. She  
17 just said I don't -- I don't feel welcomed here and  
18 left. So they already got the relief they wanted. They  
19 got an admission by the school that she was entitled to  
20 bring the dog there.

21 MR. KATYAL: Notably --

22 JUSTICE SOTOMAYOR: They have already said  
23 that.

24 MR. KATYAL: Notably, Petitioners never make  
25 that argument, and it's certainly not in the complaint.

1 And the reason for that -- what is in the complaint is  
2 that they felt that the dog wouldn't be able to be  
3 welcomed back.

4 And so the idea that they could allow money  
5 damages for this type of situation without first  
6 exhausting the state processes is an end-run around the  
7 expert agency statute that Congress set up, which they  
8 wanted to give states and localities the first crack at  
9 resolving this instead of allowing parents to abandon  
10 the IDEA system and march into Federal court, which is  
11 exactly what happened here. And I understand that there  
12 is awkwardness here, but that's an awkwardness of the  
13 statute Congress laid out.

14 JUSTICE BREYER: It's not necessarily  
15 awkward. You -- you forgot the words "before filing the  
16 complaint." Damages are something you get when somebody  
17 didn't give you something. But go back in time before  
18 they make that decision. At that point, what you want  
19 is the dog, not the money. Now if that's the truth, you  
20 have to go to the board. Once the board makes clear  
21 they won't give you the dog, at that time you're free to  
22 sue. You've met any exhaustion requirement because it's  
23 futile. They have made clear they won't.

24 And this suit has been brought after that  
25 was done. So I don't see how this suit is going to ever

1 get back for exhaustion, because the school has made  
2 clear they won't. So say exhaustion replies to future  
3 suits before anything happens, but not after the board  
4 makes clear exhaustion replies, but the futility  
5 exception also applies. Am I right?

6 MR. KATYAL: Justice Breyer, we agree with  
7 the futility exception. On the facts of this case, as  
8 the Sixth Circuit found, it's not available. And the  
9 reason for that -- the reason for that is they haven't  
10 gone through the independent due process hearing. You  
11 can't just say, oh, I met with some administrators, and  
12 they didn't like the dog. You've got to go through the  
13 complicated process that IDEA says. It's a  
14 time-sensitive one -- it's only 105 days, start to  
15 finish -- but you've got to go through the whole thing.  
16 They walked out on the process before it was over.

17 CHIEF JUSTICE ROBERTS: 105 days is a big  
18 part of the school year.

19 MR. KATYAL: Correct.

20 CHIEF JUSTICE ROBERTS: I mean, so I think  
21 saying, all they have to do is go through a 105-day  
22 process is not particularly responsive.

23 MR. KATYAL: We don't mean to minimize that,  
24 Your Honor. The statute says, you know, short  
25 timelines. But again, we are only talking about money

1 damages, so this isn't about injunction or the type of  
2 school year that -- all they are seeking is money, and  
3 so the 105 days doesn't deal with that problem of the  
4 school year.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Bagenstos, four minutes.

7 REBUTTAL ARGUMENT OF SAMUEL R. BAGENSTOS

8 ON BEHALF OF THE PETITIONERS

9 MR. BAGENSTOS: Thank you, Mr. Chief  
10 Justice.

11 So let's first be clear about what the  
12 statute says. Right? The statute keys exhaustion on  
13 the relief that the plaintiff is seeking in the present  
14 participle.

15 And what are we seeking here? I think it  
16 would help to clarify a lot of what happened in the last  
17 half of the argument to explain what we are and are not  
18 seeking.

19 We are seeking money damages. Justice  
20 Sotomayor, you're exactly correct. We are seeking money  
21 damages for emotional distress. Our allegations are  
22 about emotional distress. They are not about  
23 out-of-pocket costs or anything compensable under the  
24 IDEA.

25 We are not seeking any of the types of



1 relief that defendants say are available under the IDEA.  
2 We are not seeking reimbursement of educational  
3 expenses. We are not seeking compensatory education or  
4 counseling. We are not seeking to change an IEP,  
5 whether through a declaratory judgment or otherwise,  
6 because there is no IEP between the defendants and my  
7 client at this point. We do not have standing to assert  
8 prospective relief or to seek prospective relief against  
9 defendants.

10 JUSTICE SOTOMAYOR: How about yours is an  
11 ideal situation. Conceded for the purposes you're  
12 arguing. But how about the mixed complaints, because  
13 that's what has been bothering my colleagues from the  
14 beginning. Okay?

15 Let's assume that you had brought this case,  
16 not after you had moved her, but while she was still in  
17 the school.

18 MR. BAGENSTOS: Right.

19 JUSTICE SOTOMAYOR: And you didn't say, as  
20 you conceded now, that you don't want the -- the FAPE  
21 changed. The complaint says they haven't let the  
22 service dog in. It's causing and has caused emotional  
23 distress. We want damages. It's not clear, but you do  
24 want the fact changed.

25 MR. BAGENSTOS: Sure.

1 JUSTICE SOTOMAYOR: What happens?

2 MR. BAGENSTOS: Okay. And I want to -- I  
3 want to answer that question. Let me just say one thing  
4 about the facts here.

5 Of course, standing is something we would  
6 have to assert in our complaint. We would have to have  
7 asserted a desire to return. We didn't do that. Okay.  
8 I understand --

9 JUSTICE SOTOMAYOR: I -- I just gave you a  
10 different hypothetical.

11 MR. BAGENSTOS: Yes, I understand. And --  
12 and I will answer the hypothetical.

13 And so I think the answer there is the Jones  
14 case, right? I mean, Jones does say that when you have  
15 -- when you have one part of a complaint that is seeking  
16 relief that is not barred by an exhaustion requirement  
17 and another part that is barred, the thing to do is let  
18 the good part of the complaint proceed and leave the bad  
19 part of the complaint by the wayside.

20 And I want to respond to what my opponents  
21 said about -- about Jones and what claim means in Jones.

22 In Jones itself, this Court cited, as an  
23 example of a court applying the right approach, a case  
24 from the Seventh Circuit, Cassidy v. Indiana Department  
25 of Corrections. If you look at Cassidy, what Cassidy

1 did was it said, well, some requests for some relief are  
2 allowed to proceed, and requests for other relief by the  
3 same plaintiff are not allowed to proceed. So the right  
4 thing to do is apply the Jones partial exhaustion rule,  
5 which this Court said is the general rule in that case.

6 If this Court concludes that our complaint  
7 might be read to embrace -- notwithstanding everything  
8 we've said -- might be read to embrace requests for  
9 anything that might be available in IDEA proceedings,  
10 the proper thing to do is allow the damages claim to  
11 proceed forward.

12 JUSTICE SOTOMAYOR: Does the Court have the  
13 power to stay that until the IDEA claim is exhausted?

14 MR. BAGENSTOS: Well, so -- so I --

15 JUSTICE SOTOMAYOR: The government appears  
16 to suggest that in their brief.

17 MR. BAGENSTOS: So I think, you know, in  
18 some circumstances, the Court actually addressed  
19 something similar to this in the Rhines case, which is  
20 cited in Jones about habeas where a total exhaustion  
21 rule applies.

22 And even Rhines said that staying is  
23 something that shouldn't be done as a matter of routine;  
24 it might be something done occasionally as a matter of  
25 discretion, but that the ordinary process should be even

1 where total exhaustion applies to allow the plaintiffs  
2 to decide do we want to proceed with these unexhausted  
3 requests or not, which is what we would ask for.

4 After all, a stay in this case would be  
5 meaningless. My clients have not lived in the  
6 defendants' school district for a while. My minor child  
7 client has not --

8 JUSTICE SOTOMAYOR: I really -- I appreciate  
9 --

10 MR. BAGENSTOS: Yeah.

11 JUSTICE SOTOMAYOR: -- the nature of your  
12 case.

13 MR. BAGENSTOS: Got you.

14 JUSTICE SOTOMAYOR: All right? But your  
15 suggestion is likely to raise --

16 MR. BAGENSTOS: Right.

17 JUSTICE SOTOMAYOR: -- a lot of hesitation  
18 in this Court, amongst some, maybe even me.

19 MR. BAGENSTOS: I'm getting that.

20 JUSTICE SOTOMAYOR: Because if what you're  
21 saying is we're going to be on a dual track in every  
22 case --

23 MR. BAGENSTOS: I --

24 JUSTICE SOTOMAYOR: -- it's not going to be  
25 very attractive to the Court.

1 MR. BAGENSTOS: May I briefly answer, Your  
2 Honor?

3 CHIEF JUSTICE ROBERTS: Briefly.

4 MR. BAGENSTOS: So -- so I -- our position  
5 is you're going to be on one track, which is the things  
6 that aren't barred by the exhaustion requirement  
7 proceed. Everything else goes by the wayside. That's  
8 Jones.

9 Thank you, Your Honor.

10 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
11 The case is submitted.

12 (Whereupon, at 11:05 a.m., the case in the  
13 above-entitled matter was submitted.)

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