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THE MEANING OF *PEREZ v. STURGIS PUBLIC SCHOOLS*: NEITHER EXHAUSTING NOR EXHAUSTIVE[a1]

> On March 21, 2023, the Supreme Court issued its decision in *Perez v. Sturgis Public Schools*,[1] which ruled that the requirement in the exhaustion provision of the Individuals with Disabilities Education Act (IDEA)[2] does not apply to a claim on behalf of an IDEA-covered student for money damages under the Americans with Disabilities Act (ADA).
>
> Nevertheless, in the immediate wake of the Court's decision in *Perez*, confused and confusing misinterpretations arose. For example, a press release from the Council of Administrators of Special Education not only acknowledged misunderstandings about the decision but also offered the following problematic interpretation:
>
> When families believe their child has been denied a free appropriate public education, they have a procedure that allows them to dispute the school district's decision. That administrative process must be exhausted before they turn to the courts for final adjudication. This decision has not changed that longstanding understanding of the law.[3]

The purpose of this article is to provide litigators and other interested parties with a concise and compact checklist of when this IDEA exhaustion provision applies in light of *Perez* and its direct predecessor, *Fry v. Napoleon Community Schools,*[4] based on an impartial perspective. Its limited scope does not extend to recounting the specific facts and history of the case or the likely effects of the Court's ruling on either litigation or education practice, which other sources will presumably address.

***607** The checklist consists of three sections: (a) "threshold considerations" setting forth the boundaries of the applicable context for applicable cases; (b) "central considerations" showing the relationship of the holdings in *Fry* and *Perez*; and (c) "unanswered questions" providing a sampling of related exhaustion issues that neither *Fry* nor *Perez* addressed.

A. Threshold Considerations

1. Is the student eligible under the Individuals with Disabilities Education Act (IDEA)?

- AND -

2. Is the parent's claim under Section 504 or other federal sources of law for which (a) the student also qualifies and (b) money damages is an available remedy?

These threshold boundaries distinguish two other situations for which *Perez* is inapplicable: (a) claims of so-called "504-only" students,[5] referring to those who meet the broader eligibility criteria under Section 504 of the Rehabilitation Act but not the eligibility criteria under the IDEA;[6] and (b) claims under the IDEA, which does not provide for money damages[7] and which has a separate line of judicial authority requiring exhaustion.[8] At the same time, this threshold pair of questions serve as a reminder of the specific contours of the relevant IDEA provision, which concerns the availability and also exhaustion of non-IDEA federal claims.[9] Finally, this threshold framework also serves as a reminder that Section 504 and its sister statute, the ADA, unlike the IDEA, are the basis for the remedy of money damages.[10]

If the answer is YES to this threshold pair of questions, the following central and key questions apply.

B. Central Considerations

1. Is the gist of the parent's claim under this other federal law, regardless of how the parent characterizes it, anything other than the IDEA requirement for a free appropriate public education (FAPE)?

- OR -

***608** *2. Is money damages the relief that the parent expressly seeks?*

This pair of questions represent the successive scope of *Fry* and *Perez*.[11] This dual coverage clarifies the relationship between these two decisions that underlies the significant connector OR rather than AND.

In *Fry*, the Court held that "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee--what the Act calls a [FAPE]."[12] In addition to explaining that "gravamen" refers to the substance, crux, or essentials of the plaintiff's complaint[13] and providing a set of clues for this determination,[14] the *Fry* Court expressly declined to address the separate question of whether the parents' requested remedy of money damages excused the exhaustion requirement.[15] The Court explained that answering the money-damages question was not necessary at that time, because if the lower court determined that the crux of the parents' case was not FAPE, it would resolve the exhaustion question without further consideration.[16]

In *Perez*, the Court agreed to answer this residual question from *Fry*, explaining that Perez's case met the FAPE test for requiring exhaustion and, thus, put to the forefront the potential money-damages exception.[17] Adhering to a textualist approach, the *Perez* Court unanimously answered that the IDEA's exhaustion provision does not apply "where a plaintiff brings a suit under another federal law for compensatory damages--a form of relief everyone agrees IDEA does not provide."[18]

If the answer to either of this central pair of questions is YES, then the exhaustion requirement does not apply. Conversely, exhaustion applies only if the gist of the parent's non-IDEA federal claim is FAPE, and the parent seeks a remedy available under the IDEA. Thus, the aforementioned[19] interpretation of the *Perez* holding illustrates rather than corrects current misunderstandings.

C. Unanswered Questions

Finally, as in *Fry*, the *Perez* Court expressly declined to answer other related questions.[20] Here are examples of various common questions that neither *Perez* nor *Fry* addressed and that are not at all clearly settled in the wake of a YES answer to the threshold pair of questions:

***609** ☐ In a case that meets the *Fry* FAPE test, is exhaustion required when the parent seeks not just money damages but also remedies available under the IDEA?[21]

Does a settlement agreement fulfill the exhaustion requirement[22] or, if not, does it fit in the futility exception to exhaustion?[23]

Alternatively, does dismissal for lack of jurisdiction fulfill the exhaustion requirement?[24]

If instead, exhaustion requires a fully adjudicated hearing under the IDEA,[25] is the full adjudication specific to the IDEA or, whether additionally or alternatively, the other federal law?[26]

Footnotes

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1 Perez v. Sturgis Pub. Schs., ___ S. Ct. ___ (2023).

2 20 U.S.C. § 1415(*l*):

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], 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 [for

due process hearings and, in two-tier states, for review officer decisions] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].

3 Council of Administrators of Special Education, Press Release (Mar. 22, 2023), https://drive.google.com/file/d/12HHFn_BPYsEt_2QDQeIg3*I*PGrSDTj4qu/vie.

4 Fry v. Napoleon Cmty. Schs., 580 U.S. 154, 340 Educ. L. Rep. 19 (2017). For the holding in this case, see *infra* text accompanying note 12.

5 *See, e.g.*, Perry A. Zirkel, *Identification of 504-Only Students: An Alternate Eligibility Form*, 357 Educ. L. Rep. 39 (2018); Perry A. Zirkel & Gina L. Gullo, *State Rates of 504-Only Students in K-12 Public Schools: The Next Update*, 385 Educ. L. Rep. 14, 20 (2021).

6 Due to the lack of concurrent coverage of the IDEA, the exhaustion provision of the IDEA does not apply. *See, e.g.*, Peter J. Maher, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA But Not by the IDEA,* 44 Conn. L. Rev. 259 (2011).

7 *See, e.g.,* Perry A. Zirkel, *Monetary Liability of Public School Employees under the IDEA or Section 504/ADA*, 2019 BYU Educ. & L.J. 1, 7-15 (identifying the uniform unavailability of money damages under the IDEA directly and, with very limited exceptions, under the IDEA via § 1983).

8 *See, e.g.*, Louis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction under the Individuals with Disabilities Education Act*, 29 J. Nat'l Admin. L. Judiciary 49 (2009) (canvassing the applicable case law that requires exhaustion for claims directly under the IDEA, including the narrow exceptions).

9 *Supra* note 2.

10 *See, e.g.*, S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 297 Educ. L. Rep. 58 (3d Cir. 2013) (collected cases, although all additionally required an intent standard). Nevertheless, the uphill slope for obtaining damages under § 504 and the ADA includes not only a proxy for intentional discrimination but also a nexus requirement. *E.g.*, Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?,* 47 J.L. & Educ. 109 (2018). Moreover, the scope of damages under § 504 and the ADA is subject to limitations. *E.g.*, Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022) (plurality opinion that compensatory damages recoverable under § 504 do not extend to emotional distress); Barnes v. Gorman, 536 U.S. 181 (2002) (ruling that punitive damages are not recoverable under § 504).

11 Fry v. Napoleon Cmty. Schs., 580 U.S. at 157.

12 *Id.* at 158. In the obverse, the Court clarified that the IDEA requires exhaustion "when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way." *Id.* at 170.

13 *Id.* at 152, 169.

14 *Id.* at 171-73.

15 *Id.* at 165 n.4: "In reaching these conclusions, we leave for another day a further question about the meaning of § 1415(*l*): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests--here, money damages for emotional distress--is not one that an IDEA hearing officer may award?"

16 *Id.*: "Only if [the lower court upon remand] rejects the Frys' view of their lawsuit, using the analysis we set out below, will the question about the effect of their request for money damages arise."

17 Perez v. Sturgis Pub. Schs., ___ S. Ct. ___, ___ (2023): "This case presents an analogous but different question--whether a suit admittedly premised on the past denial of a [FAPE] may nonetheless proceed without exhausting IDEA's administrative processes if the remedy a plaintiff seeks is not one IDEA provides."

18 *Id.* at ___.

19 *Supra* note 3 and accompanying text.

20 Perez v. Sturgis Pub. Schs., ___ S. Ct. at ___. The two examples that the Court identified were "whether IDEA's exhaustion requirement is susceptible to a judge-made futility exception and whether the compensatory damages Mr. Perez seeks in his ADA suit are in fact available under that statute." *Id.*

21 Neither Fry nor Perez addressed this hybrid question, because (a) the Fry family moved their residence to a different school district, which responsively accommodated their ADA request, and sought only money damages from the defendant district, and (b) the Perez family entered into a settlement agreement that addressed the relief available under the IDEA, thus leaving only at issue the ADA claim for money damages. Although the Perez Court did not specifically address this question, its likely inferable answer would be to require exhaustion because the Court agreed with Perez's view, which was that exhaustion applies "to the extent that he pursues a suit under another federal law for *remedies* IDEA also provides." *Id.* at ___.

22 Before the Perez case reached the Supreme Court, the Sixth Circuit ruled that a settlement does not suffice as exhaustion because "an administrative officer has conducted no hearings, made no findings, and issued no decisions." Perez v. Sturgis Pub. Schs., 3 F.4th 236, 242, 391 Educ. L. Rep. 580 (6th Cir. 2021); *see also*Albright v. Mountain Home Sch. Dist., 926 F.3d 942, 952, 367 Educ. L. Rep. 13 (8th Cir. 2019).

23 *Cf.* Muskrat v. Deer Creek Pub. Schs., 715 F.3d 775, 786, 293 Educ. L. Rep. 229 (10th Cir. 2013) (concluding that the parents met the futility exception for their damages claim by "work[ing] through administrative channels to obtain the relief they sought" even though they did not file for a due process hearing or enter into a formal settlement agreement). For an alternate and potentially superseding version of this question, see *supra* note 20. The first example of that pair corresponds to the first of the two questions presented to the Perez Court, which were:

1. Whether, and in what circumstances, courts should excuse further exhaustion of the IDEA's administrative proceedings under Section 1415(l) when such proceedings would be futile.

2. Whether Section 1415(*l*) requires exhaustion of a non-IDEA claim seeking money damages that are not available under the IDEA.

U.S. Supreme Court, Docket No. 21-887, Questions Presented, https://www.supremecourt.gov/qp/21-00887qp.pdf.

24 *E.g.,*Heston v. Austin Indep. Sch. Dist., 816 F. App'x 977, 979-80, 380 Educ. L. Rep. 206 (5th Cir. 2020) (ruling that dismissal does not fulfill the exhaustion requirement).

25 "Fully adjudicated hearing" in the IDEA context here refers to a hearing, which includes an evidentiary hearing and a final written decision that includes factual findings and legal conclusions. *See, e.g.*, Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed ...*, 73 Admin. L. Rev. 833, 849-51 (2021).

26 *See, e.g.*, Perry A. Zirkel, *Exhaustion of Section 504 and ADA Claims under the IDEA: Resolving the Confusion*, 74 Rutgers L. Rev. 123 (2021) (proposing that exhaustion means a fully adjudicated hearing limited to the IDEA).

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