No. _____

In the Supreme Court of the United States

PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; JANE DOES 1-10; and JOHN DOES 1-10,
Petitioners,

v.

D.P., by and through his parent and natural guardian, W.P., and W.P. as an individual,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

A plaintiff must exhaust the administrative remedies of the Individuals with Disabilities Education Act (IDEA) before filing suit "seeking relief that is also available under [IDEA]." 20 U.S.C. § 1415(*l*).

(1) Under the IDEA, what is the test for determining whether a plaintiff is "seeking relief that is also available under [IDEA]," thereby triggering the Act's requirement that the plaintiff exhaust administrative remedies before filing suit?

(2) When a plaintiff is in part "seeking relief also available under [IDEA]," must that plaintiff first exhaust the administrative remedies available under IDEA before pursuing any federal claim?

(3) May a court reject a properly supported summary judgment motion and allow the non-moving party to amend its complaint to assert facts that contradict sworn deposition testimony?

Statement of Parties

Petitioners are Peninsula School District, a political subdivision of the State of Washington; Artondale Elementary School, which is not a separate entity but is a school within the Peninsula School District; special education teacher Jodi Coy, in her individual and official capacity; and former Superintendent James Coolican, in his individual and official capacity.

Respondent is Windy Payne, individually and as guardian on behalf of D.P., a minor child.

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Opinions Below

There are three opinions and an order leading up to this Petition.[1]

The en banc decision by the U.S. Court of Appeals for the Ninth Circuit is reported at *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc). (App. 1a.) The order vacating the previous decision by a panel of the Court of Appeals is reported at 621 F.3d 1001 (9th Cir. 2010). (App. 73a.) The panel decision is reported at 598 F.3d 1123 (9th Cir. 2010). (App. 75a.) The opinion by the U.S. District Court for the Western District of Washington is not reported and is available at 2007 WL 128884 (W.D. Wash. 2007). (App. 88a.)

Jurisdiction

The en banc decision of the court of appeals was entered on July 29, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Statutory Provision Involved

The relevant provision of IDEA, 20 U.S.C. § 1415(*l*), was originally enacted in 1986 and currently provides as follows:

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[1] These decisions and orders all referred to this case under a different caption. On January 19, 2011, the U.S. District Court for the Western District of Washington issued an order allowing the parties to amend the caption of the case in accordance with Fed. R. Civ. Proc. 5.2. Petitioners accordingly file this petition under the new caption.

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], 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 this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 1415(*l*) (emphasis added).

Statement of the Case

A. Statutory Framework

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides funding to the states to "ensure that all children with disabilities have available to them a free appropriate public education ['FAPE'] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1415(f). Those funds are then re-allocated to local school districts to provide special education for qualifying students. Special education is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B)

instruction in physical education." 20 U.S.C. § 1409(21). Using the IDEA process, schools and parents identify disabled students who qualify for special education through evaluation of a student's areas of suspected disability. 20 U.S.C. § 1414(a)-(c). If the student qualifies for special education, an Individualized Education Program (IEP) is developed by a team of people, including the parent, who are most knowledgeable about the student's educational needs and understand how the student's disabilities can be addressed through specially tailored education. 20 U.S.C. § 1414(d). That specially tailored education for the particular student is set forth in the written IEP. *Id.*

When IDEA was originally enacted in 1975 as the Education of All Handicapped Children's Act (EHA), it contained no explicit requirement for exhaustion of its administrative remedies. In 1984, this Court held that "[a]llowing a plaintiff to circumvent the EHA administrative remedies [to pursue a constitutional claim] would be inconsistent with Congress' carefully tailored scheme [of relief under the EHA]." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). In response to *Smith*, Congress enacted the Handicapped Children's Protection Act of 1986 (HCPA), Pub. L. No. 99-372, § 3, 100 Stat. 796 (1986). The HCPA includes what is now codified as 20 U.S.C. § 1415(*l*), which requires plaintiffs to exhaust administrative remedies before bringing suit "seeking relief that is also available under [IDEA]." The reason Congress enacted § 1415*(l)* was to clarify that EHA "does not limit the applicability of other laws which protect handicapped children and youth, except that *when a parent brings suit under another law when that suit could have been brought under the EHA*, the parent will be required to

exhaust EHA administrative remedies to the same degree as would have been required had the suit been brought under the EHA." S. REP. NO. 99-112, at 1-2 (1985) (emphasis added). (App. 97a, 100a-101a.)

At all times relevant to this dispute, Washington special education regulations allowed schools to use "safe rooms" as a behavior modification tool to deal with difficult, problem behaviors of special education students. WASH. ADMIN. CODE § 392-172-394(2) (2003) *renumbered as* WASH. ADMIN. CODE 392-172A-03130(2) (2008) (setting forth detailed requirements for use of isolation as form of aversive therapy in special education). (App. 103a-107a.) Safe rooms are also called isolation rooms or time-out rooms. When a special education student's disruptive behavior interferes with his education or the education of others, and where other means of behavior management have not worked, safe rooms can be effective in helping the student control his behavior so that he is able to learn.

B. Factual and Procedural Background

During the 2003-2004 school year, Respondent Windy Payne's son, D.P., was a seven-year-old autistic and developmentally delayed child who received special education services from Petitioner Peninsula School District (District). Pls' Compl. ¶2.1.1. (App. 108a, 109a.) Unfortunately, D.P. experienced severe behavior problems which interfered significantly with his education. (App. 120a.) These problems included his unwillingness to take part in work tasks, limited time on task, a desire for frequent changes in activities, and various oppositional behaviors including

refusal, yelling, scratching, spitting, biting, and head-butting. (App. 120a.)

Positive reinforcement and a token system of rewards had not been effective in helping D.P. manage these disruptive behaviors. (App. 125a). The behaviors were "pervasive and his patterns of response [were] resistant to change." (App. 125a). They were addressed at a September 24, 2003 IEP meeting, in which D.P.'s mother, Windy Payne, participated. At this meeting, the IEP team, including Mrs. Payne, agreed that a "safe room" would be used as a behavior modification tool when D.P.'s behavior escalated so as to obstruct his learning. W. Payne Dep. 101:5-102:3, July 21, 2006. (App. 140a-142a.) Two of D.P.'s IEP goals and objectives were aimed at dealing with behavioral problems. (App. 132a.) The IEP team agreed upon an Aversive Interaction Plan that called for the following use of aversive therapy: "Time out, removal from group activity, loss of activity, containment in safe room." (App. 124a-127a.) This use of a safe room for time out was authorized by the Washington special education regulations noted above. WASH. ADMIN. CODE § 392-172-394(2) (2003) *renumbered as* WASH. ADMIN. CODE 392-172A-03130(2) (2008) (App. 103a-107a.)

At deposition, Mrs. Payne described her agreeing to the safe room with certain conditions, as follows:

> Q: Did you authorize Jodi Coy [D.P's teacher] to use the safe room at all?
>
> A: She requested to utilize the safe room indicating to us that she relies on that room for all the students within her classroom. We expressed to her that we did not want [D.P]

> placed in that room, especially for punishment, which is how she represented the use of it. And she again said that she utilizes the room for all the students. So we said if [D.P.'s] behavior gets so extreme that you need to place him in a time-out and you want to utilize that room as your time-out space you may utilize that room as a time-out space, but the door must remain open and we would like someone placed in the room with him. And she agreed to that.

W. Payne Dep. 101:14-102:3. (App. 140a-142a.)

D.P.'s behavioral problems were significant enough that nine days after the IEP meeting, on October 3, 2003, a Behavior Intervention Plan also was developed for him. (App. 120a-123a.) The District used the safe room when D.P.'s behavior escalated out of control, until around January 2004. W. Payne Dep. 154:19-21. (App. 151a.) During that time, teacher Jodi Coy routinely sent notes home to Mrs. Payne in a "home-to-school journal," reporting on use of the safe room and how things were going in class. W. Payne Dep. 100:17-23; 102:10-14; 106:8-25; 110:1-111:3. (App. 139a-140a, 142a-143a, 144a-145a, 146a-148a.) In January 2004, Mrs. Payne asked that use of the safe room be discontinued, and the District complied. W. Payne Dep. 154:19-21. (App. 151a.) D.P. remained a student in the District for another year and a half, through the end of his fourth grade year and the 2004-2005 school year, at which time his mother removed him from school and began teaching him at home. W. Payne Dep. 193:11-13. (App. 164a.)

On December 2, 2005, Respondent filed suit without exhausting administrative remedies. *Payne v.*

Peninsula School District, 2007 WL 128884 at *1 (W.D. Wash. 2007). (App. 89a.) Respondent alleged three causes of action: (1) claims under 42 U.S.C. § 1983 based on alleged violations of D.P.'s rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution and "[D.P.'s] statutory rights under the IDEA;" (2) negligence; and (3) outrage. Pls' Compl. (114a, 116a, and 117a.) The basis of all Respondents' claims was the District's use of the safe room with D.P. Pls' Compl. ¶¶1.1, 5.3-5.11, 6.1.7, 6.2.4, 6.3.1. (App. 108a-109a, 112a-114a, 115a-117a.)

To remedy D.P.'s alleged injuries, Respondents pleaded, and Mrs. Payne testified, that Respondents were in part seeking relief that was also available under IDEA. In their complaint, Respondents alleged injuries which could be addressed through special education related services, including speech and language therapy, compensatory education, and psychological services. The complaint alleged:

> 5.11. [D.P.] was profoundly damaged by Defendants' actions. Defendants' punishment and use of the locking closet caused [D.P.] to suffer *significant regression in communicative and sensory functions*. In addition, his *academic prowess and abilities were diminished*. As a result of Defendants' actions, [D.P] continues to *display signs of emotional trauma*. By way of example, [D.P.] did not want to return to Artondale Elementary School, became easily agitated and needy, and he began to act out and bite holes in his clothing.

(App. 114a.)

Compensatory education, psychological counseling, and even reimbursement for psychological counseling services for dealing with the emotional trauma allegedly arising out of damage suffered from a teacher's educational strategy all are remedies available under IDEA. *See* 20 U.S.C. § 1415(i)(2)(C)(iii) (authorizing a court to grant such relief under IDEA as it deems appropriate); *Lester H. by Octavia P. v. Gilhool*, 916 F.2d 865 (3d Cir. 1990), *certiorari denied* 499 U.S. 923 (district court did not abuse its discretion by awarding compensatory education); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 993 (7th Cir. 1996) (citing 34 C.F.R. § 300.16(b)(8)(r) (noting that IDEA makes psychological counseling services available to a student where the student suffered psychological damage from a teacher's educational strategy)).

In her deposition, Mrs. Payne testified that she wanted damages for D.P's "lack of education," which she argued resulted from the District's failure to provide D.P. with the education she felt he required. W. Payne Dep. 168:20-173:18; 48:1-20. (App. 153a-163a, 137a-138a.) Mrs. Payne also wanted reimbursement for the specialized services of a private occupational therapist and behavior modification expert for which she had paid. W. Payne Dep. 16:18-17:6; 172:7-10; 173:15-18. (App. 134a-135a, 160a, 163a.)

The District Court Decision

In 2007, the U.S. District Court for the Western District of Washington granted summary judgment to Petitioners on the grounds that Plaintiffs/Respondents had failed to exhaust the administrative remedies

available to them under IDEA before filing suit. *Payne v. Peninsula Sch. Dist.*, 2007 WL 128884 (W.D. Wash. 2007). (App. 89a.) The District Court noted that Plaintiffs/Respondents alleged "'general damages for extreme mental suffering and emotional distress' and claim[ed] [the school district's] actions caused [D.P.]'s academic prowess and abilities to be diminished." *Id.* at *3. (App. 94a.) Since the injuries alleged by Plaintiffs/Respondents could be redressed to some degree by IDEA's administrative procedures and remedies, the District Court concluded that exhaustion of those remedies was required. *Id*. In reaching this decision, the District Court followed then-existing Ninth Circuit precedent in *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047, 1050 (9th Cir. 2002), *overruled by Payne*, 653 F.3d 863. The District Court reasoned: "It would be inappropriate for a federal court to short-circuit the local school district's administrative process based on the possibility that some residue of the harm [plaintiff] allegedly suffered may not be fully remedied by the services Congress specified in the IDEA." *Id*. Plaintiffs appealed the District Court decision to the Ninth Circuit.

The Ninth Circuit Panel Decision

In 2010, the Ninth Circuit affirmed the District Court's granting of summary judgment, also following *Robb*. *Payne v. Peninsula Sch. Dist.,* 598 F.3d 1123, 1127-28 (9th Cir. 2010). (App. 85a.) The Ninth Circuit panel found that "as an educational strategy (even if a misguided or misapplied one)," the teacher's use of the safe room "was better addressed initially by the administrative process . . . ." *Id.* at 1128. (App. 83a.) Both the District Court and Ninth Circuit panel decisions ruled that the Plaintiffs'/Respondents' failure

to exhaust IDEA's administrative remedies deprived the District Court of subject matter jurisdiction over the case. *Id. at* 1124-25. (App. 77a.)

The Ninth Circuit En Banc Decision

In 2010, the majority of nonrecused judges of the Ninth Circuit vacated the panel opinion and agreed to rehear the case en banc. *Payne v. Peninsula Sch. Dist.,* 621 F.3d 1001 (9th Cir. 2010). (App. 73a-74a.) In 2011, the Ninth Circuit held en banc that: (1) the requirement for exhaustion of administrative remedies under § 1415(*l*) is not a condition for subject matter jurisdiction but is instead a claims processing statute, *Payne v. Peninsula School District,* 653 F.3d 863, 870 (9th Cir. 2011) (App. 14a-15a); (2) in contrast to the decisions of its sister circuits, *see infra*, a "relief-centered" approach should be used in determining whether a plaintiff is "seeking relief that is also available" under IDEA and is therefore required to exhaust IDEA's administrative remedies before filing suit, *Payne,* 653 F.3d at 874-75 (App. 23a-24a); and (3) only a claim expressly brought under IDEA should be dismissed until such exhaustion, and not the remaining federal and state claims in the case, *Payne,* 653 F.3d at 882-83 & 882 n.7. (App. 39a-41a.) In addition, even though the appeal concerned whether summary judgment had been properly granted, *i.e.*, whether there was a genuine dispute of material fact over whether Respondent was "seeking relief also available under [IDEA]," the Ninth Circuit took the unconventional step of remanding the case to the District Court to allow Respondent to amend her complaint and raise allegations that either would contradict her sworn testimony or would attempt to

sidestep that testimony. *Payne*, 653 F.3d at 881. (App. 37a.)

This Petition seeks review of the second and third holdings, as well as the en banc court's singular remand. The "injury-centered" approach used by other circuits and previously employed by the Ninth Circuit more accurately and faithfully carries out the plain language of, and Congressional intent behind, § 1415(*l*) than does the Ninth Circuit's judicially crafted "relief-centered" approach. The plain language of § 1415(*l*) requires administrative remedies be exhausted before any federal claim based in any part on IDEA relief may go forward. In addition, Petitioners respectfully ask this Court to use its Rule 10(a) supervisory power to correct the Ninth Circuit's departure from the accepted and usual course of judicial proceedings in unorthodox conversion of a Fed. R. Civ. Proc. 56 remand to a Fed. R. Civ. Proc. 12(b)(6) remand, which allows Respondents retroactively to attempt to trim away portions of their lawsuits that might require administrative exhaustion.

The best way to resolve these difficulties is for this Court to grant certiorari and provide an authoritative answer to the questions raised.

Reasons for Granting Writ

This case presents two important and recurring questions relating to § 1415(*l*) on which the circuits are divided: (1) What is the test for deciding whether a plaintiff is "seeking relief that is also available under [IDEA]"? and (2) Must a plaintiff who seeks some relief that is available under IDEA exhaust IDEA administrative remedies before filing suit under other

federal laws? If parents and their attorneys are allowed an easy way around IDEA administrative remedies, many will take that route and erode the viability of IDEA's administrative review process. Strategically they may see a lawsuit as extra financial leverage against the school district to obtain what they want in their educational dispute. Allowing plaintiffs to carve out portions of claims from an IDEA dispute and pursue those claims separately in civil litigation will result in greater expense to school districts and longer timelines to resolve educational problems.

These § 1415(*l*) questions are of vital importance to the smooth implementation of IDEA as Congress intended for the approximately 6.5 million special education children and the school districts they attend.[2] As the volume of IDEA exhaustion cases cited in footnotes 5 and 6 below illustrates, the issue of exhaustion arises frequently. The answer to this threshold issue determines whether there will be an opportunity to resolve the problem promptly by educational means, or whether protracted litigation will be allowed to interfere with that education. Only this Court can provide the guidance which district courts require so that every special education student nationwide seeking to obtain remedies from a school district is treated the same under § 1415(*l*).

In addition, this Petition raises the question of whether the Ninth Circuit deviated so far from normal

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[2] This is the approximate number of children aged 3 to 21 years served under the IDEA during the 2008-2009 school year, the most recent year for which the data are available. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS: 2010 82 (2011).

judicial practices in remanding this case for Respondent to amend their answer as to trigger the oversight function under Rule 10(a) of this Court's Rules. Rather than merely reversing the grant of summary judgment and remanding the case to the trial court, the Ninth Circuit essentially treated the summary judgment motion as a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, remanding with leave to amend. This unusual approach creates a situation where the Respondent knows that maintaining her case will require her to plead in a fashion that contradicts, or at least ignores, her sworn deposition testimony.

I. The Decision Below Creates a Major New Division with the Other Circuits and Exacerbates an Existing Division Among the Circuits.

A. With the Exception of the Ninth Circuit, All Other Circuits Use the "Injury-Centered Approach" to Determine Whether IDEA's Exhaustion Requirement Applies.

Before a special education student files a civil lawsuit against a school district under the Constitution, the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. §§ 12101 *et seq.*), § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), or other federal laws, the student must first exhaust IDEA administrative remedies if the student is "seeking relief that is also available under [IDEA]." 20 U.S.C. § 1415(e).

Before *Payne,* the Ninth Circuit and other circuits decided whether the plaintiff was "seeking relief also available under the [IDEA]" by determining whether the gravamen of the claim was an educational dispute or allegedly tortious conduct outside of IDEA. Over the years, this "injury-centered approach," as the *Payne* majority described it (*Payne,* 653 F.3d at 871-72 (App. 15a.)) has rarely been discussed in detail in court opinions. Ten circuits have required exhaustion of administrative remedies before the plaintiff goes forward with a civil action if the injury is educational and can be addressed by IDEA.[3] However, if the injury

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[3] **First Circuit:** *Rose v. Yeaw*, 214 F.3d 206, 210 (1st Cir. 2000) (exhaustion required because dispute related to provision of Free Appropriate Public Education (FAPE)); *Frazier v. Fairhaven Sch. Comm.,* 276 F.3d 52, 56, 63 (1st Cir. 2002) (exhaustion required where plaintiff alleged that her FAPE rights were frustrated); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 44 (1st Cir. 2000) (exhaustion required in dispute alleging retaliation relating to educational matters); **Second Circuit:** *Polera v. Bd. of Ed. of Newburgh Enlarged City Sch. Dist.,* 288 F.3d 478, 487-88, 490 (2d Cir. 2002) (exhaustion required where real problem in dispute was in specificity of IEP); *Coleman v. Newburgh Enlarged City Sch. Dist.,* 503 F.3d 198, 206-07 (2d Cir. 2007) (exhaustion required where harm claimed by plaintiffs related to his education); *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d 240, 248 (2d Cir. 2008) (exhaustion required because adequacy of IEP was being challenged); **Third Circuit:** *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 793, 803 (3d Cir. 2007) (en banc) (exhaustion required where dispute centered on appropriateness of assessment and deprivation of FAPE); **Fourth Circuit:** *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002) (exhaustion required because issue related to provision of FAPE through extended school year services); **Fifth Circuit:** *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 293 (5th Cir. 2003) (en banc) (exhaustion not analyzed but required because facilities access for wheelchair-bound student was something that could be addressed in IEP); *D.A. v. Houston Indep. Sch. Dist.,* 629 F.3d 450,

is strictly in tort for personal injuries or concerns

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452 (5th Cir. 2010) (exhaustion required where basis of suit was timely assessment under IDEA); **Seventh Circuit:** *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 993 (7th Cir. 1996) (exhaustion required because dispute related to "acts that have both an educational source and an adverse educational consequence"); **Eighth Circuit:** *M.P. ex rel. K. and D.P. v. Indep. Sch. Dist., New Prague, Minn.*, 439 F.3d 865, 868 (8th Cir. 2006) (exhaustion not required where district failed to protect student from harassment from other students, something not addressed under IDEA); *C.N. v. Willmar Pub. Sch.*, 591 F.3d 624, 632 (8th Cir. 2010) (though exhaustion was not analyzed, it was not required, presumably because restraint and seclusion were matters addressed under IDEA); **Tenth Circuit:** *Hayes v. Unified Sch. Dist. No. 377*, 877 F.2d 809, 812 (10th Cir. 1989) (exhaustion required because disciplinary use of time-out room fell under IDEA); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1271, 1274-75 (10th Cir. 2000) (exhaustion not required for ADA claim where use of seclusion closet without supervision, resulting in fall and fractured skull exacerbating seizure disorder, sounded in tort and was not educational dispute); *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1067 (10th Cir. 2002) (exhaustion required where relief sought was "available" under IDEA); *Urban by Urban v. Jefferson Cnty. Sch. Dist.,* 89 F.3d 720 (10th Cir. 1996) (exhaustion required in dispute over which school student would attend for special education); **Eleventh Circuit:** *M.T.V., et al. v. DeKalb Cnty. Sch. Dist.,* 446 F.3d 1153 (11th Cir. 2006) (exhaustion required where student sought injunctive relief under IDEA, ADA, and §504); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.,* 84 F.3d 1376 (11th Cir. 1996) (exhaustion required for student alleging IDEA violations); and **D.C. Circuit:** *Cox v. Jenkins*, 878 F.2d. 414 (D.C. Cir. 1989) (exhaustion required in dispute relating to FAPE). *Accord* **Ninth Circuit pre-*Payne*:** *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047, 1050-51 (9th Cir. 2002); (exhaustion required because whether a student should be tutored in a hallway by another student was an educational concern) and *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123 (9th Cir. 2010) (panel decision affirming dismissal based in part on injury-based analysis of facts) *vacated Payne*, 653 F.3d 853.

Constitutional violations, arising outside of the special education context, then these same circuits have allowed lawsuits to go forward without requiring such exhaustion.[4] Without always specifically identifying their approach as "injury-based" or one that looks to the gravamen of the case (effectively the same approach), these courts have nonetheless based their determination of whether exhaustion would be required on the gravamen of the controversy. Where the controversy is educational in nature, IDEA administrative remedies must be exhausted. If the gravamen of the dispute is in tort, the civil action is allowed to go forward without exhausting IDEA administrative remedies.[5]

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[4] *E.g.*, *Coleman v. Newburgh Enlarged City Sch. Dist.,* 503 F.3d 198, 206 (2d Cir. 2007) (looking to "harm" alleged to student's education); *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 914 (6th Cir. 2000) (exhaustion not required where time-out room was used in a manner that would constitute child abuse, thus sounding in tort rather than under IDEA); *McCormick v. Waukegan Sch. Dist.*, 374 F.3d 564, 565-66 (7th Cir. 2004) (exhaustion not required where acts alleged were tortious acts of P.E. teacher requiring a student to do what his doctors had said he should not be doing and allegedly caused permanent muscle and kidney damage); *Witte v. Clark Cnty. Sch. Dist.,* 197 F.3d 1271, 1276 (9th Cir. 1999) (exhaustion not required because forcing student to eat oatmeal which he was allergic to and into which he had vomited was tantamount to child abuse and sounded in tort).

[5] *Frazier v. Fairhaven Sch. Comm.,* 276 F.3d 52, 56, 63 (1st Cir. 2002) (examining kind of injury alleged); *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 916 (6th Cir. 2000) (impliedly examining gravamen of claim to conclude that exhaustion would be futile); (*Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 993 (7th Cir. 1996) (finding that acts at issue had "both an educational source and an adverse educational consequence"); *McCormick v.*

In *Payne* the Ninth Circuit has created a "claims processing" procedure that deviates from this widespread and longstanding approach, opening the back door to immediate litigation not intended by Congress. Petitioners do not appeal the en banc court's conclusion that § 1415(*l*) is a "claims processing" rule rather than subject matter jurisdiction rule. However, the process the new *Payne* rule sets in place for resolving § 1415(*l*) questions undermines Congress' intent of allowing the parties an opportunity to resolve educational issues before any lawsuit is filed. Rather than looking at whether the dispute centers on a question of education, the *Payne* court asks what relief the plaintiff is "actually" seeking, and ends its analysis there. *Payne,* 653 F.3d at 874. (App. 23a.) Now, if the

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Waukegan Sch. Dist., 374 F.3d 564, 567, 569 (7th Cir. 2004) (looking to "theory behind the grievance"); and *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000) (looking at "the source and the nature of the alleged injuries").

Other courts tacitly have applied the same approach without specifying whether they are looking at the nature of the injury, the gravamen of the claim, or whether the claim sounds in education or in tort. *See also Weber*, 212 F.3d at 44 (1st Cir. 2000) (implementation of IEP); *Polera*, 288 F.3d at 480-81 (2d Cir. 2002) (provision of FAPE); *A.W.*, 486 F.3d at 797 (3d Cir. 2007) (deprivation of FAPE); *MM,* 303 F.3d at 536 (4th Cir. 2002) (extended year instruction); *D.A.,* 629 F.3d at 452 (5th Cir. 2010) (exhaustion required where basis of suit was timely assessment under IDEA); *Urban by Urban v. Jefferson Cnty. Sch. Dist*., 89 F.3d 720, 722 (10th Cir. 1996) (exhaustion required where dispute concerned which school student should attend); *N.B. by D.G. v. Alachua Cnty. Sch. Bd*., 84 F.3d 1376, 1378-79 (11th Cir. 1996) (exhaustion required in FAPE dispute, even though student no longer attended school in district); and *Cox v. Jenkins*, 878 F.2d. 414 (D.C. Cir. 1989) (exhaustion required in dispute relating to FAPE).

plaintiff does not explicitly seek a remedy available through special education, the civil lawsuit may go forward immediately, even where the gravamen of the claim is educational.

The *Payne* court calls its new approach "relief-centered," echoing part of § 1415(*l*)'s language about "seeking relief that is also available under [IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added). However, *Payne* ignores the "also available" language of § 1415(*l*) and adds a concept not expressed in § 1415(*l*). *Payne* focuses purely on the "relief *actually* sought" by the plaintiff in pleading, discovery, and possibly at trial. *Payne,* 653 F.3d at 874, 877, 882 (emphasis added). (App. 23a, 28a, and 39a.) The decision fails to consider whether the plaintiff is seeking relief that is "also available" under IDEA which would allow for a faster educational remedy than years of litigation would provide. *See Payne,* 653 F.3d at 891-92 (Bea, J., concurring in part and dissenting in part) (App. 58a-61a.). This new approach is contrary to § 1415(*l*)'s plain language.[6]

Additionally, as a number of circuits point out, what relief is "available" under § 1415(*l*) does not

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[6] The "relief actually sought" approach also ignores Congressional intent behind § 1415(*l*) that "when a parent brings suit under another law when that suit could have been brought under the EHA, the parent will be required to exhaust EHA administrative remedies to the same degree as would have been required had the suit been brought under the EHA." S. REP. NO. 99-112, at 2 (1985). Congress did not want special education parents and turning their backs on swift and effective educational remedies under IDEA in favor of lengthy litigation which leaves special education students far behind.

depend on what the plaintiff prefers or actually seeks. The Second, Seventh, and Tenth Circuits take an approach to § 1415(*l*) that is more in harmony with solving educational problems with educational approach. As the Seventh Circuit has observed:

> The statute speaks of available relief, and what relief is "available" does not necessarily depend on what the aggrieved party wants. Certainly not in litigation. "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, *even if the party has not demanded such relief in the party's pleadings*." Fed.R.Civ.P. 54(c). The nature of the claim and the governing law determine the relief no matter what the plaintiff demands.

Charlie F., 98 F.3d at 992-93 (7th Cir. 1996) (emphasis added). *Accord Polera,* 288 F.3d at 487-88, 490 (2d Cir. 2002); *Cudjoe*, 297 F.3d at 1066 (10th Cir. 2002); *Padilla*, 233 F.3d at 1271, 1274 (10th Cir. 2000).

Thus, *Payne* creates a clear split among the circuits over a significant question of federal law—whether the "injury-centered" or the "relief actually sought" approach should be used when interpreting § 1415(*l*). This Court should grant review and provide uniformity as to how § 1415(*l*) is to be applied.

B. At Least Five Other Circuits Use the "Total Exhaustion" Approach.

When a plaintiff files suit that in part seeks relief also available under IDEA, must that plaintiff exhaust

IDEA administrative remedies before pursuing claims under other the Constitution or other federal laws? *See Payne,* 653 F.3d at 882-83, 882 n.7. (App. 40a.) Such "total exhaustion" would mean that no claim would move forward in litigation until the available administrative remedies initially were exhausted. Again, the circuits are strongly divided on this question. The answer will determine the continued utility of IDEA administrative procedures for dispute resolution.

Payne allows the plaintiff to separate out § 504, § 1983, and ADA claims and pursue those claims without initially attempting an administrative resolution, even if those claims arise out of an educational dispute. *Payne*, 653 F.3d at 881-83, 882 n.7. (App. 40a.) The *Payne* court stated, "We see no reason to adopt . . . a 'total exhaustion rule' similar to the one we apply in habeas corpus." *Payne*, 653 F.3d at 883, n.7. (App. 40a.) In this, the Ninth Circuit joins the Eighth and Tenth.[7]

The First, Third, Fifth, Seventh, and Eleventh Circuits disagree and require that IDEA's administrative remedies be exhausted before any federal lawsuit may be brought, even when the claims

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[7] **Eighth Circuit:** *C.N. v. Willmar Pub. Sch.*, 591 F.3d 624, 632 (8th Cir. 2010) (although the case was dismissed, the Constitutional claims were analyzed separately after IDEA exhaustion had been ordered); **Ninth Circuit**: *Payne*, 653 F.3d at 883, n.7; **Tenth Circuit**: *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1271, 1274-75 (10th Cir. 2000) (exhaustion not required for an ADA claim where use of a seclusion closet without supervision, resulting a fall and fractured skull exacerbating a seizure disorder, sounded in tort and was not an educational dispute).

are brought under § 1983, § 504, or the ADA.[8] These circuits follow the plain language of § 1415(*l*), giving full meaning to each word of that statute. The text of § 1415(*l*) requires exhaustion "*before* the filing *of a civil action* under such laws seeking relief that is also available under [IDEA]." (emphasis added). Section 1415(*l*) therefore requires "full exhaustion" of administrative remedies before pursuing civil actions under § 504, ADA, or the Constitution. Allowing these claims to go forward, carved out of the special education controversy, ignores the plain language of § 1415(*l*) requiring that administrative remedies be exhausted "before the filing of a civil action."

Only this Court may resolve the conflict over whether "total exhaustion" is required and provide a uniform rule to the benefit of all parties to special education disputes.

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[8] **First Circuit**: *Frazier v. Fairhaven Sch. Comm.,* 276 F.3d 52, 56, 69 (1st Cir. 2002) (§1983, §504, the ADA, and Constitutional claims dismissed for failure to exhaust); **Third Circuit**: *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 793 (3d Cir. 2007) (en banc) (§1983 and §504 claims dismissed along with IDEA claims for failure to exhaust); **Fifth Circuit**: *Pace v. Bogalusa City Sch. Bd*., 403 F.3d 272, 293 (5th Cir. 2003) (en banc) (ADA and §504 claims dismissed along with IDEA claims for failure to exhaust); **Seventh Circuit**: *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 993 (7th Cir. 1996) (§1983, §504, ADA, and state claims dismissed for failure to exhaust); **Eleventh Circuit:** *M.T.V., et al. v. DeKalb Cnty. Sch. Dist.,* 446 F.3d 1153, 154-55 (11th Cir. 2006) (ADA, §504, and §1983 retaliation claims dismissed for failure to exhaust); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.,* 84 F.3d 1376 (11th Cir. 1996) (exhaustion required for student alleging IDEA violations).

II. *Payne* Threatens to Undermine the Purposes Behind IDEA's System of Administrative Remedies.

A. IDEA Administrative Remedies Do Not Preclude Litigation and Are More Expeditious.

The two issues already addressed in this Petition have widespread practical implications for special education students, school districts, and educators. The practical question is whether disputes over the implementation of special education will be resolved through IDEA procedures first, or separated out as § 504, ADA, or § 1983 claims in civil litigation to be pursued immediately without recourse to administrative remedies. When combined together, the Ninth Circuit's "relief actually sought" test and its "partial exhaustion" approach allow for gamesmanship on the part of plaintiff's attorneys who may attempt to avoid the administrative exhaustion requirement and use the threat of monetary damages as leverage against individual defendants to obtain what they want from the school district. Such litigation approaches overlook the immediate educational needs of the children involved.

As sadly illustrated by the present case, litigation over educational issues may last for years, long past the time when a child's educational needs should have been served. Teacher Jodi Coy implemented the safe room in 2003 when D.P. was seven years old and in elementary school. He is now 15 and of high school age.

IDEA administrative procedures offer a faster and less costly option for students and parents. Presently, a parent may file a special education complaint and have the hearing officer's decision within 75 days. The due process hearing may occur within 30 days of the district receiving the complaint under 34 C.F.R. § 510(b) and the hearing officer's decision may be given within 45 days after the resolution process in § 300.510(b). 34 C.F.R. § 300.515(a). This does not happen in civil litigation where 75 days after the complaint is filed, the parties would not even have begun discovery.

IDEA's administrative remedies are intended to benefit children and their parents. They do not "preempt" federal claims of disabled children as the Ninth Circuit misapprehended in *Payne*. 653 F.3d at 881. (36a-37a.) Like all administrative exhaustion requirements, they either avoid the need for litigation or merely add an additional step on the road to litigation. Where administrative resolution proves unsuccessful, claims still can be brought in court, after only minimal delay.

However, where federal claims which should have been brought under IDEA are allowed to go forward immediately without attempting administrative resolution, more children will be harmed by the delays litigation will entail for the educational solutions they seek.

B. *Payne* Undermines Congressional Intent Behind § 1415(*l*) as Expressed by the Circuits.

Over the years, circuit courts have frequently stated the rationale behind exhausting IDEA administrative remedies. The Ninth Circuit's approach does nothing to advance these rationales. According the other circuits, the rationale behind § 1415(*l*) is generally recognized as (1) making parties take administrative proceedings seriously; (2) allowing schools (rather than courts) to apply educational expertise to educational problems and correct their own mistakes, if any; (3) potentially avoiding the need for judicial review altogether; (4) and facilitating the development of a factual record that will help inform the district court if administrative resolution of the dispute is unsuccessful. *E.g., D.A.,* 629 F.3d at 456 (5th Cir. 2010); *Frazier,* 276 F.3d at 60 (1st Cir. 2002); *Polera,* 288 F.3d at 487 (2d Cir. 2002); *Covington,* 205 F.3d at 917 (6th Cir. 2000); *Urban by Urban,* 89 F.3d at 724 (10th Cir. 1996); *Cox,* 878 F.2d. at 419 (D.C. Cir. 1989).

This case shows the importance of each of these rationales. By forgoing procedures for administrative remedies, and removing D.P. from school, Respondent missed out in receiving a written decision from a hearing officer experienced in special education issues. This could have provided her with an objective viewpoint on her case, one which may have caused her to challenge her way of looking at the issues. *See* 34 C.F.R. § 300.511 and § 300.515(a)(1). The process itself could have sharpened everyone's understanding of what D.P. needed educationally, making it more likely that he would have received whatever services he

needed in 2004 or 2005. If the process did not resolve the issues, the District Court would have been well served with a detailed record from the proceedings below where educational experts would have offered their views for the court to consider.

In a situation where the controversy focuses on the school's implementation of a lawful educational tool (a safe room approved by the parent), the dispute is educational. Before courts become involved in such a dispute, behavior experts can shed light on important technical questions. For instance, behavior experts could have addressed the possibility that D.P.'s defecating in the safe room really was caused by trauma or, alternatively, was entirely consistent with the frequent scenario whereby a student "accelerates" disruptive behavior shortly before the behavior is successfully "extinguished," as psychologists describe it.

In dissenting from the *Payne* majority, Judge Bea succinctly pointed out that the majority had ignored why Congress requires exhaustion of administrative remedies:

> [T]he majority's curtailment of the exhaustion requirement promotes none of these goals. On the contrary, the weakened exhaustion requirement will bode to flood federal courts with IDEA cases, before a local agency has had an opportunity to resolve the dispute. Federal judges and juries—not education experts—will be asked to serve as "ersatz school administrators," Maj. Op. at 9752, and make determinations about what money damage awards are necessary to prevent or alleviate

> academic, psychological, or emotional harm. And disabled children whose academic and psychological injuries might have been quickly cured or mitigated by in-kind services supplied by a school district under the IDEA may have to wait until the resolution of a potentially lengthy civil lawsuit to receive a monetary balm.

653 F.3d at 892 (Bea, J., concurring in part and dissenting in part). (App. 61a.)

III. The Ninth Circuit's Expansion of the Ability of a Party Opposing Summary Judgment to Avoid Dismissal by Amending a Pleading Calls for an Exercise of This Court's Supervisory Power.

This Court's review is also necessary to correct the Ninth Circuit's wholly unorthodox action of denying a properly supported summary judgment motion by allowing the plaintiff to amend her complaint. This is tantamount to converting a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure into a motion to dismiss under Rule 12(b), as the latter can in some circumstances be granted with leave given to the plaintiff to amend the operative pleading. *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878, 883 (9th Cir. 2008). *See also Payne,* 653 F.3d at 892 (Bea, J., concurring in part and dissenting in part) ("This is an appeal from an order under Rule 56 of the Federal Rules of Civil Procedure, not an appeal from a 12(b)(6) order."). (App. 50a.)

Motions to dismiss for failure to state a claim may be converted into summary judgment motions. Fed. R.

Civ. Proc. 12(d). However, there is no provision of law whereby a motion for summary judgment may be converted into a motion to dismiss. When a circuit court reverses a district court's granting of summary judgment, the case is remanded to the district court and proceeds on to trial as if the summary judgment motion never happened. Sometimes when the circuit court reverses the district court's dismissal of a case pursuant to a motion to dismiss for failure to state a claim, the remand is in combination with granting the plaintiff permission to file an amended complaint. Fed. R. Civ. Proc. 12(b)(6); *Lopez v. Smith,* 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc). When circuit courts reverse summary judgment, they do not do so allowing the plaintiffs to amend their complaint, especially when such an amendment would allow the plaintiff to attempt to circumvent an administrative exhaustion requirement that they failed to circumvent in their original pleading. *See* Pls' Compl. ¶5.11. (App. 114a.)

The Ninth Circuit exceeded its authority in remanding the case and allowing Respondent to amend her complaint ostensibly "to flesh out her specific claims and enable the court to determine which claims require IDEA exhaustion and which do not." *Payne,* 653 F.3d at 881. (App. 37a.) She had already pleaded her case quite specifically. She had also testified just as explicitly in her deposition. Both times she alleged a special education controversy about a safe room where she wanted reimbursement which amounted to special education and related services. Pls' Compl. ¶¶1.1, 5.3-5.11, 6.1.7, 6.2.4, 6.3.1 (App. 108a-109a, 112a-114a, 115a-117a); W. Payne Dep. 101:14-102:3 (App. 141a-142a); W. Payne Dep. 168:20-173:18; 48:1-20 (App. 153a-163a, 137a-138a);

W. Payne Dep. 16:18-17:6; 172:7-10; 173:15-18 (App. 134a-135a, 160a, 163a).

The *Payne* court did not acknowledge that its remand is an invitation to Respondent to deny her former sworn testimony with what amounts to a sham pleading. If the Ninth Circuit's decision is allowed to stand, Respondent and other parties facing summary judgment will be permitted to negate sworn deposition testimony with a pleading. Such a result is wholly inconsistent with the scheme established by Rule 56. This Court should correct the Ninth Circuit's self-described "unconventional" and "anomalous" result. *Payne,* 653 F.3d at 882. (App. 39a.)

Conclusion

Payne creates one significant split among the circuit courts over how courts decide whether plaintiffs are "seeking relief also available under [IDEA]." It also exacerbates a second split over whether "total exhaustion" of administrative remedies is required. The decision undermines the Congressional intent behind § 1415(*l*) and threatens the effective delivery of special education to disabled children by interfering with the efficient resolution of educational disputes. The case thus presents significant questions relating to a key provision of a federal statute.

In addition, the Ninth Circuit's highly unusual approach to remanding the case departs from the accepted and usual course of judicial proceedings and raises serious procedural problems. These are proper bases for granting a writ of certiorari. SUP. CT. R. 10(a). In order to resolve these issues, this Court should grant this Petition.

Respectfully submitted,

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October 26, 2011

APPENDIX

APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35115
D.C. No. CV-05-05780-RBL
OPINION

[Filed July 29, 2011]

WINDY PAYNE, individually and as guardian on behalf of D.P., a minor child, *Plaintiff-Appellant,*	)
v.	)
PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL, a municipal corporation; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official Capacity; JANE DOES 1-10; and JOHN DOES 1-10, *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
December 15, 2010—Pasadena, California

Filed July 29, 2011

Before: Alex Kozinski, Chief Judge,
Diarmuid F. O'Scannlain, Barry G. Silverman,
Susan P. Graber, M. Margaret McKeown,
Raymond C. Fisher, Johnnie B. Rawlinson,
Jay S. Bybee, Consuelo M. Callahan,
Carlos T. Bea, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Bybee;
Concurrence by Judge Callahan;
Partial Concurrence and Partial Dissent by Judge Bea

COUNSEL

Thomas B. Vertetis, Pfau Cochran Vertetis Kosnoff, PLLC, Tacoma, Washington, for the plaintiff-appellant.

Michael A. Patterson, Patterson Buchanan Fobes Leitch & Kalzer, Inc., P.S., Seattle, Washington, for the defendants-appellees.

Sasha Samberg-Champion, United States Department of Justice, Civil Rights Division, Washington, D.C.; and Lenore Silverman, Fagen Friedman & Fulfrost, LLP, Oakland, California, for amici curiae.

OPINION

BYBEE, Circuit Judge:

We agreed to rehear this case en banc to clarify under what circumstances the IDEA's exhaustion requirement bars non-IDEA federal or state law claims.

Appellant Windy Payne, on behalf of herself and her son, D.P., appeals the district court's grant of summary judgment to the defendants. The district court dismissed her claim for lack of subject matter jurisdiction because Payne did not initially seek relief in a due process hearing and therefore failed to comply with one of the exhaustion-of-remedies requirement of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(*l*). We hold that (1) the IDEA's exhaustion requirement is not jurisdictional, and (2) Payne's non-IDEA federal and state-law claims are not subject to the IDEA's exhaustion requirement. We therefore reverse.

I

The facts in this case, and the inferences to be drawn from them, are vigorously contested by the parties. Because Payne is appealing an adverse grant of summary judgment, we review this case de novo and state the facts in the light most favorable to her case, *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004), although we outline only the facts material to our decision.

D.P. is a minor who was diagnosed with oral motor apraxia and autism when he was five years old. During the 2003-04 school year, when D.P. was seven, he was placed in a contained special education classroom within Artondale Elementary School, part of the Peninsula School District. Defendant Jodi Coy was his teacher that year. Coy employed a small room about the size of a closet as a time-out room or "safe room" for students who became "overly stimulated."

At a meeting to discuss D.P.'s Individual Education Program ("IEP")[1] and Behavior Assessment Plan, Coy requested permission to use the time-out room while the IEP paperwork was pending. The Paynes initially objected, claiming that their son was unable to perceive a difference between positive and negative reinforcement. They eventually gave limited consent to the time-out room, specifying that they would agree to allow Coy to use the room for time-out periods only (and not punishment), but that the door had to remain open and that D.P. was not to be left alone inside the room. According to Payne, Coy nonetheless used the room to punish D.P. and locked him in the closet a number of times without supervision. In some instances, D.P. responded by removing his clothing and urinating or defecating on himself. Although the Paynes repeatedly requested that Coy stop using her "aversive therapy" techniques, Coy continued. Eventually, in January 2004, Coy refused to allow the

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[1] States participating in the IDEA are required to provide students with disabilities with an IEP in furtherance of the statute's goal of providing each such student with a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A), (a)(4). The IEP must meet a number of requirements, articulated in 20 U.S.C. § 1436(d).

Paynes to visit her classroom or pick up their son directly from the classroom, insisting that the Paynes might misinterpret what they observed.

The Paynes and the school district underwent mediation, and they agreed that D.P. would transfer to another school in the district. Later, the Paynes removed D.P. from the public school system and began home schooling him. They never underwent a formal due process hearing with the school district.

In 2005, Windy Payne filed the current complaint on behalf of herself and her son, seeking relief under 42 U.S.C. § 1983 by alleging violations of the Fourth, Eighth, and Fourteenth Amendments, and the IDEA. The complaint also advanced negligence and outrage claims under Washington law. The defendants moved for summary judgment, claiming that Payne had failed to exhaust her remedies as required by 20 U.S.C. § 1415(*l*) by failing to go through the informal due process hearing and appeal process established by 20 U.S.C. § 1415(f), (g). The district court dismissed Payne's entire case, citing our decision in *Robb v. Bethel School District # 403*, 308 F.3d 1047 (9th Cir. 2002), where we held that the IDEA's exhaustion requirement applied to any case in which "a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies." *Id.* at 1048.

Payne timely appealed. In a divided decision, a panel of this court affirmed the district court's grant of summary judgment. *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123 (9th Cir. 2010), *reh'g en banc granted*, 621 F.3d 1001 (9th Cir. 2010). The majority began by noting that the applicability of § 1415(*l*) depended on

whether each claim more closely resembled the one in *Robb*, in which we held that exhaustion was required, or the one in *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999), in which we held that exhaustion was not required. *Payne*, 598 F.3d at 1126-27. The panel concluded that "this case is more akin to *Robb*" because Payne had failed to seek an impartial due process hearing after mediation failed, was seeking redress for academic injuries "for which IDEA provides some relief," and was "not claiming physical injuries for D.P. within the meaning of *Witte*." *Payne*, 598 F.3d at 1127-28. Accordingly, the panel concluded that "as an educational strategy (even if a misguided or misapplied one), [Coy's use of the safe room] was better addressed initially by the administrative process" and affirmed the district court. *Id.* at 1128. Judge Noonan dissented on the ground that "[t]he facts in this case are closer to those in [*Witte*] than in [*Robb*]" and that "full exhaustion of the IDEA administrative processes [was not] required." *Id.* at 1128-29 (Noonan, J., dissenting).

On a vote of the majority of nonrecused active judges on our court, we vacated the panel opinion and agreed to rehear this case en banc. *Payne v. Peninsula Sch. Dist.*, 621 F.3d 1001 (9th Cir. 2010) (order granting rehearing en banc).

II

We begin by clarifying the nature of the IDEA's exhaustion requirement. Adhering to this circuit's precedent, the original panel treated the requirement as a jurisdictional one, but questioned the soundness of this conclusion. *See Payne*, 598 F.3d at 1124-25 & n.2. Indeed, the conclusion it reached was consistent

with our precedent. *See, e.g.*, *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 920-21 (9th Cir. 2005) ("If a plaintiff is required to exhaust administrative remedies but fails to do so, the federal courts do not have jurisdiction to hear the plaintiff's claim."); *Witte*, 197 F.3d at 1274 (same). In light of a spate of Supreme Court cases clarifying the difference between provisions limiting our subject matter jurisdiction, which cannot be waived and must be pled in the complaint, and "claims processing provisions," which must be pled as an affirmative defense or forfeited, *see, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1202-07 (2011); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243-48 (2010); *see also United States v. Jacobo Castillo*, 496 F.3d 947 (9th Cir. 2007) (en banc), we now overrule our previous treatment of § 1415(*l*) and hold that the IDEA's exhaustion requirement is a claims processing provision that IDEA defendants may offer as an affirmative defense.

Federal courts may only decide cases over which they have both constitutional and statutory jurisdiction. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-02 (1982). The Constitution grants federal courts jurisdiction over "all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. CONST. art. III, § 2, cl. 1. Here, Payne raised federal claims under 42 U.S.C. § 1983 in addition to a number of state-law claims. In cases such as this one, district courts have statutory jurisdiction over federal claims, 28 U.S.C. § 1331, and supplemental jurisdiction over related state-law claims, 28 U.S.C. § 1367. Additionally, Congress has given us statutory authorization to hear "appeals from

all final decisions of the district courts of the United States." 28 U.S.C. § 1291. It is clear, then, that unless Congress has limited this jurisdiction further, the federal courts have jurisdiction over IDEA-related matters.

[1] The IDEA's exhaustion requirement provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], 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 this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*

20 U.S.C. § 1415(*l*) (emphasis added). The Fourth and Eighth Circuits share our earlier assumption that this language creates a jurisdictional limitation. *See, e.g.*, *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002) ("The failure of the Parents to exhaust their administrative remedies . . . deprives us of subject matter jurisdiction over those claims . . . ."); *Urban by Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 725 (10th Cir. 1996) ("We conclude that the district court correctly dismissed the [unexhausted] claims for lack of jurisdiction."). By contrast, the Seventh and Eleventh Circuits have treated the exhaustion requirement as an affirmative

defense, rather than a jurisdictional requirement. *See, e.g.*, *Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006) ("A failure to exhaust is normally considered to be an affirmative defense, and we see no reason to treat it differently here." (citation omitted)); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (per curiam) ("The exhaustion requirement . . . is not jurisdictional . . . .").

Last Term, the Supreme Court reminded us that "the word 'jurisdiction' has been used by courts . . . to convey 'many, too many, meanings' " and "cautioned . . . against profligate use of the term." *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 130 S. Ct. 584, 596 (2009) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). "Accordingly, the term 'jurisdictional' properly applies only to 'prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction)' implicating [the court's adjudicatory] authority." *Reed Elsevier*, 130 S. Ct. at 1243 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)). The Court confessed that "[w]hile perhaps clear in theory, the distinction between jurisdictional conditions and claim-processing rules can be confusing in practice," that we should "us[e] the term 'jurisdictional' only when it is apposite," and that we should "curtail . . . 'drive-by jurisdictional rulings.' " *Id.* at 1243-44 (quoting *Steel Co.*, 523 U.S. at 91); *see also Henderson*, 131 S. Ct. at 1202-07 (holding that a veteran's failure to file a notice of appeal within the required 120-day period did not deprive the Court of Veterans Appeals of jurisdiction over his claim); *Reed Elsevier*, 130 S. Ct. at 1249 (holding that a copyright-registration requirement was not jurisdictional); *Union Pac. R.R.*, 130 S. Ct. at 598-

99 (holding that a settlement-conference requirement was not jurisdictional); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514-15 (2006) (holding that a Title VII provision exempting employers with fewer than 15 employees was not jurisdictional); *Kontrick*, 540 U.S. at 452-56 (holding that a bankruptcy rule governing timely amendments was not jurisdictional); *United States v. Cotton*, 535 U.S. 625, 630-31 (2002) (holding that sentencing in excess of a statutory maximum did not deprive the sentencing court of jurisdiction). *But see Bowles v. Russell*, 551 U.S. 205, 209-10 (2007) (holding that the statutory time for the taking of an appeal from a district court decision is jurisdictional).

Two cases recently decided by the Court are instructive. In *Reed Elsevier*, the Court examined a provision of the Copyright Act providing that copyright holders must register their works before bringing suit for copyright infringement. Section 41(a) of the Copyright Act provides that "no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title." 17 U.S.C. § 411(a). Holding that § 411(a) is not jurisdictional, the Court pointed to three factors. First, the Court pointed out that § 411(a) does not " 'clearly state[ ]' that its registration requirement is 'jurisdictional.' " *Reed Elsevier*, 130 S. Ct. at 1245 (quoting *Arbaugh*, 546 U.S. at 515). Second, the Court noted that § 411(a) was separate from other statutes that grant subject matter jurisdiction and that neither 28 U.S.C. § 1331 nor 28 U.S.C. § 1338 — which is specific to copyright — mentions the registration requirement. *Id.* at 1245-46. Finally, the Court could not find "any other factor [that] suggest[s] that 17 U.S.C. § 411(a)'s registration

requirement can be read to 'speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.' " *Id.* at 1246 (quoting *Arbaugh*, 546 U.S. at 515); *see also Henderson*, 131 S. Ct. at 1202-07 (reaffirming and applying *Reed Elsevier*'s methodology).

In *Jones v. Bock*, 549 U.S. 199 (2007), the Court addressed whether the Prison Litigation Reform Act's ("PLRA") exhaustion requirement[2] was a pleading requirement that the prisoner must include in his complaint or an affirmative defense that the defendant must raise. The Court held that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Id.* at 216. Although the Court did not treat a heightened pleading requirement as going to the jurisdiction of the federal courts, the Court's conclusion — that PLRA defendants have the burden of pleading non-exhaustion, and that PLRA plaintiffs need not specifically plead exhaustion in their initial complaints — is consonant with our discussion of jurisdictional versus claim-processing requirements. If a requirement is jurisdictional, then a federal plaintiff has the burden of pleading in her initial complaint

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[2] The PLRA exhaustion provision reads:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a).

(however briefly) how that requirement has been met. *See* Fed. R. Civ. P. 8(a)(1). In other words, even though the Court did not state its result in such terms, it follows from *Jones* that the PLRA's exhaustion requirement is nonjurisdictional. *See Reed Elsevier*, 130 S. Ct. at 1246-47 & n.6 (citing *Jones* as an example of where the Court has "treated as nonjurisdictional other types of threshold requirements").

[2] With that background we return to the IDEA's exhaustion requirement in § 1415(*l*) and to our prior statement that "[i]f a plaintiff is required to exhaust administrative remedies, but fails to, federal courts are without jurisdiction to hear the plaintiff's claim." *Witte*, 197 F.3d at 1274; *see also Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 231 (9th Cir. 1994) (suggesting, but not holding, that exhaustion was jurisdictional under the IDEA). First, we observe that nothing in § 1415 mentions the jurisdiction of the federal courts. In fact, neither the word "courts" nor the word "jurisdication" appears in § 1415(*l*). Section 1415 is written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of the federal courts to hear the suit. That textual choice strongly suggests that the restriction may be enforced by defendants but that the exhaustion requirement may be waived or forfeited. *See, e.g.*, *Kontrick*, 540 U.S. at 456 ("Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point."); *Jacobo Castillo*, 496 F.3d at 952 ("Defects in procedural rules may be waived or forfeited by parties who fail to object properly, whereas

defects in our subject-matter jurisdiction go to the inherent power of the court and cannot be waived or forfeited." (footnote omitted)).

[3] Second, nothing in the relevant jurisdictional statutes requires exhaustion under the IDEA. Section 1415(*l*) provides that if the plaintiff is "seeking relief that is also available under [the IDEA], the procedures under [20 U.S.C. § 1415(f), (g)] shall be exhausted to the same extent as would be required had the action been brought under this subchapter." Section 1415(I) describes the actions that can be brought under the IDEA. A party who is "aggrieved by the findings and decision" made under the IDEA's procedures has "the right to bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy." 20 U.S.C. § 1415(i)(2)(A). There is no restriction in this section on the subject matter jurisdiction of the federal courts. The only provision that arguably affects federal subject matter jurisdiction is the provision specifying that there is no amount-in-controversy requirement, and it appears to expand, rather than contract, federal jurisdiction. More to the point, the section expressly provides that suit may be brought in state or federal courts. As state courts are courts of general subject matter jurisdiction, it is hard to think that Congress would permit IDEA suits to be brought in state court but at the same time restrict the subject matter jurisdiction of the federal courts. Without clearer instruction from Congress, we are reluctant to infer such a restriction where Congress has not made it explicit. *See Henderson*, 131 S. Ct. at 1203 ("[Courts should] look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.' ").

Finally, we can find no reason why § 1415(*l*) should be read to make exhaustion a prerequisite to the exercise of federal subject matter jurisdiction. We can think of many good reasons why it should not. As we discuss in the next section, the exhaustion requirement in § 1415(*l*) is not a check-the-box kind of exercise. As our cases demonstrate, determining what has and what has not been exhausted under the IDEA's procedures may prove an inexact science. *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302-03 (9th Cir. 1992) (noting that the IDEA's exhaustion requirement "is not a rigid one, and is subject to certain exceptions," determined by "the general purposes of exhaustion and the congressional intent behind the administrative scheme"). In other words, the exhaustion requirement appears more flexible than a rigid jurisdictional limitation — questions about whether administrative proceedings would be futile, or whether dismissal of a suit would be consistent with the "general purposes" of exhaustion, are better addressed through a fact-specific assessment of the affirmative defense than through an inquiry about whether the court has the power to decide the case at all. If we were to hold that exhaustion was jurisdictional, the question of exhaustion *vel non* would haunt the entire proceeding, including any appeals. We would have the obligation to raise the issue *sua sponte*, a particularly frustrating exercise for parties and courts when Congress has authorized the parties to file suit in state court in the first place. Congress may, of course, override our concerns and make the IDEA's exhaustion requirement jurisdictional, but we would need a clearer statement of its intent before we will impose such a requirement.

[4] In sum, we hold that the exhaustion requirement in § 1415(*l*) is not jurisdictional. It "is not clearly labeled jurisdictional, is not located in a jurisdiction-granting provision, and admits of congressionally authorized exceptions." *Reed Elsevier*, 130 S. Ct. at 1247. We overrule our statements to the contrary in *Blanchard*, 420 F.3d at 920-21; *Witte*, 197 F.3d at 1274; and *Dreher*, 22 F.3d at 231, and join the Seventh and Eleventh Circuits. *Mosely*, 434 F.3d at 533; *N.B. by D.G.*, 84 F.3d at 1379; *see also Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198, 203 (2d Cir. 2007) (noting that the Second Circuit "ha[s] been equivocal in [its] discussion of the IDEA's exhaustion requirement, acknowledging [its] statement in [*Polera v. Board of Education*, 288 F.3d 478, 483, 488-90 (2d Cir. 2002),] that the failure to exhaust IDEA administrative remedies deprives a court of subject matter jurisdiction but also referring to the IDEA's exhaustion requirements as the defendants' 'non-exhaustion defense.' " (internal quotation marks and alterations omitted)). Our prior statements were well-intentioned even if not fully considered. We think our misstep well illustrates the Supreme Court's observation that "[c]ourts — including this Court — have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations, particularly when that characterization was not central to the case, and thus did not require close analysis." *Reed Elsevier*, 130 S. Ct. at 1243-44.

III

We now turn to the merits. We hold that the IDEA's exhaustion provision applies only in cases where the relief sought by a plaintiff in the pleadings

is available under the IDEA. Non-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA. We overrule our previous cases to the extent that they state otherwise and conclude that, although the district court properly dismissed Payne's IDEA-based § 1983 claim, it should not have dismissed her non-IDEA claims on exhaustion grounds.

A

The IDEA was enacted to protect children with disabilities and their parents by requiring participating states to provide "a free appropriate public education [('FAPE')] that emphasizes special education and related services designed to meet [disabled students'] unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Participating states must provide eligible students with a "free appropriate public education," *id.* § 1412(a)(1)(A), that, among other things, conforms to a proper IEP, *see id.* §§ 1412(a)(4), 1436(d), and ensures that disabled students "[t]o the maximum extent appropriate, . . . are educated with children who are not disabled," *id.* § 1412(a)(5)(A). Children with disabilities and their parents are provided with the extensive procedural protections set out in 20 U.S.C. § 1415. In particular, the statute requires states to provide aggrieved parties with the opportunity to mediate their disputes, *id.* § 1415(e), to secure an impartial due process hearing to resolve certain differences with state agencies, *id.* § 1415(f), and to appeal any decision and findings to the state educational agency, *id.* § 1415(g). As we have

stated above, the exhaustion provision requires parties to avail themselves of these procedures (and the corresponding local appeals process) before resorting to the courts whenever they "seek[ ] relief that is also available under [the IDEA]." *Id.* § 1415(*l*).

The exhaustion requirement is found in § 1415(*l*). This provision is worth quoting again, in full:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], 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 this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*) (alterations in original). We begin with a few observations. First, this provision is titled "Rule of construction." *Id.* It thus provides us with a rule for harmonizing the IDEA with overlapping "rights, procedures, and remedies" found in other laws. Second, the rule of construction tells us in very plain terms that the IDEA must be construed to coexist with other remedies, including remedies available under the Constitution, the Americans with Disabilities Act ("ADA"), the Rehabilitation Act, and "other Federal laws." The principal remedy available for violations of the Constitution is 42 U.S.C. § 1983, which creates an

action in law or suit in equity against any person who, acting under color of state law, deprives the plaintiff of "any rights, privileges, or immunities secured by the Constitution and laws." Like the IDEA, the ADA and the Rehabilitation Act create their own private causes of action to enforce those acts, *see* 42 U.S.C. § 12117; 29 U.S.C. § 794a, although all three acts have been enforced under § 1983 as well. *See, e.g.*, *Marie O. v. Edgar*, 131 F.3d 610, 622 (7th Cir. 1997); *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343, 361-63 (S.D.N.Y. 2005); *BD v. DeBuono*, 130 F. Supp. 2d 401, 427-29 (S.D.N.Y. 2000). *But see Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) (holding that § 1983 does not authorize actions predicated on violations of the IDEA). Third, the exhaustion provision in § 1415(*l*) is framed as an exception to the general rule of construction that "[n]othing in [the IDEA] shall be construed to restrict" the rights, procedures, and remedies available under § 1983, the ADA, or the Rehabilitation Act. In other words, remedies available under the IDEA, by rule, are in addition to the remedies parents and students have under other laws. Indeed, § 1415 makes it clear that Congress understood that parents and students affected by the IDEA would likely have issues with schools and school personnel that could be addressed — and perhaps could only be addressed — through a suit under § 1983 or other federal laws. Finally, we observe that § 1415(*l*) requires exhaustion of IDEA remedies only when the civil action brought under § 1983, the ADA, the Rehabilitation Act, or other federal laws "seek[s] *relief* that is also available" under the IDEA. Thus, the "except" clause requires that parents and students exhaust the remedies available to them under the IDEA before they seek *the same relief* under other laws.

Our decision in *Witte* is consistent with these principles. There, we recognized that the IDEA's exhaustion provision does not encompass every challenge concerning a school's treatment of a disabled student. The Wittes complained that school officials forced their disabled child to eat oatmeal (to which he was allergic) occasionally mixed with his own vomit, choked him, and subjected him to "take-downs" and other physical abuses. *Witte*, 197 F.3d at 1273. These actions were punitive responses to the child's bodily tics that resulted from Tourette's Syndrome. *Id.* The Wittes eventually agreed with the school district to transfer their son to another school in the same district and then sued for compensatory and punitive damages under 42 U.S.C. § 1983, the Rehabilitation Act, the ADA, and state tort law. *Id.* at 1273-74. The district court granted the defendants summary judgment on the ground that the Wittes had failed to exhaust their administrative remedies under the IDEA. *Id.* at 1274.

We reversed. We held that the IDEA's exhaustion provision did not apply to plaintiffs who claimed that school officials had inflicted physical and emotional abuse on their child, *id.* at 1273, when their complaint sought only retrospective damages because the parties had already resolved their educational issues through "the remedies that are available under the IDEA," *id.* at 1276. We emphasized that because monetary damages were ordinarily unavailable under the IDEA, the plaintiffs were "not seeking relief that is also available under the IDEA." *Id.*; *see also id.* at 1276 ("The remedies available under the IDEA would not appear to be well-suited to addressing past physical injuries adequately; such injuries typically are remedied through an award of monetary damages.").

Accordingly, "under the plain words of the statute, exhaustion of administrative remedies is not required." *Id.* at 1275.

We subsequently took a more muscular view of § 1415(*l*) in *Robb*, holding "that when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required." *Robb*, 308 F.3d at 1048. *Robb* involved a student who was diagnosed with cerebral palsy and was regularly removed from her classroom "for extended 'peer-tutoring' by junior high school and high school students without the supervision of a certified teacher." *Id.* This tutoring took place on the floor of a dim hallway without a chair or desk. *Id.* No additional abuse was alleged. Taking guidance from *Witte*, the Robbs limited their prayer for relief to money damages, but specified that they were for "lost educational opportunities and emotional distress, humiliation, embarrassment, and psychological injury." *Robb*, 308 F.3d at 1048 (internal quotation marks omitted). The district court held that the Robbs had not exhausted their administrative remedies. *Id.*

We affirmed in a divided decision. The panel majority expressed concern that parents might "be permitted to opt out of the IDEA simply by making a demand for money or services the IDEA does not provide." *Id.* at 1050. Noting that there appeared to be a division of authority among the circuits — the Third Circuit took the position that exhaustion was unnecessary in a suit seeking only damages, while the First, Sixth, Seventh, Tenth, and Eleventh Circuits held that limiting requested relief to damages alone was not enough to avoid the exhaustion requirement

of the IDEA[3] — we held "that a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages." *Id.* at 1049. We then adopted the rule that the IDEA's exhaustion requirement applied to any case in which a plaintiff "alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies." *Id.* at 1050 (emphasis added).[4] In a number of subsequent cases, we have reaffirmed Robb's "injury-centered" approach. *See, e.g.*, *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 952 (9th Cir. 2010); *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163-64 (9th Cir. 2007); *Blanchard*, 420 F.3d at 921.

Furthermore, the Seventh and Tenth Circuits have adopted "injury-centered" tests similar to the one we

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[3] Notably, it is no longer clear that there is a circuit split on this issue. In *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir. 2007) (en banc), the Third Circuit did not merely backtrack from its position that an IDEA claim need not be exhausted if the plaintiff only sought money damages; it went further and concluded that IDEA rights could not be vindicated through a § 1983 suit at all. *Id.* at 798-99. In doing so, it overruled *W.B. v. Matula*, 67 F.3d 484 (3d Cir. 1995), which we cited in *Robb* to demonstrate the circuit split.

[4] Judge Berzon dissented to emphasize that "the issue is whether the *relief* plaintiffs *seek* is available" under the IDEA. *Robb*, 308 F.3d at 1056 (Berzon, J., dissenting). She expressed the view that "[i]nsofar as the plaintiffs here are seeking relief that is not educationally-oriented (here, compensation for past emotional harms) and is not present- or future-focused, they are not seeking relief available under this statute. As this court and others have made clear, damages to compensate for past pain and suffering do not fit into the model of relief available under the IDEA's administrative remedies." *Id*.

adopted in *Robb*. *See, e.g.*, *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 568-69 (7th Cir. 2004) (citing *Robb*, 308 F.3d at 1054, and holding that exhaustion can only be avoided "if the plaintiff has alleged injuries that cannot be redressed to any degree by the IDEA's administrative procedures and remedies" (internal quotation marks omitted)); *Cudjoe v. Indep. Sch. Dist. # 12*, 297 F.3d 1058, 1066 (10th Cir. 2002) ("[T]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed *to any degree* by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required." (alteration in original) (internal quotation marks omitted)).

Other circuits have generally agreed that plaintiffs cannot evade the exhaustion requirement simply by limiting their prayer for relief to a request for damages. *See, e.g.*, *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002) ("[W]e hold that plaintiffs who bring an IDEA-based claim under 42 U.S.C. § 1983, in which they seek only money damages, must exhaust the administrative process available under the IDEA as a condition precedent to entering a state or federal court."); *Covington v. Knox Cnty. Sch. Sys.*, 205 F.3d 912, 917 (6th Cir. 2000) ("[W]e agree with those courts that have decided that a mere claim for money damages is not sufficient to render exhaustion of administrative remedies unnecessary . . . ."); *N.B. by D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (holding that plaintiffs cannot avoid the exhaustion requirement by limiting their requested relief to money damages because otherwise, "future litigants could avoid the exhaustion requirement simply by asking for relief that administrative authorities could not grant").

However, these courts have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies.

B

We now clarify and restate the proper method for resolving IDEA exhaustion cases, and we overrule *Robb* to the extent it is inconsistent with our decision. The IDEA's exhaustion requirement applies to claims only to the extent that the relief actually sought by the plaintiff could have been provided by the IDEA. In other words, we reject the "injury-centered" approach developed by *Robb* and hold that a "relief-centered" approach more aptly reflects the meaning of the IDEA's exhaustion requirement.

1

Relying on *Robb*, the panel majority focused its analysis on the question of whether the *injuries* suffered by D.P. more closely resembled the force-feeding and take-downs alleged in *Witte* or the isolated peer tutoring alleged in *Robb*. *Payne*, 598 F.3d at 1127. In other words, the panel majority employed an injury-centered approach and concluded that because Payne was alleging misconduct that *in theory* could have been redressed by resorting to administrative remedies under the IDEA, she could not seek *any* redress for that misconduct in the courts until she had exhausted those administrative remedies. In a way, our approach in *Robb* treated § 1415(*l*) as a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general "field" of educating disabled students.

[5] For reasons we have explained, this approach is inconsistent with the IDEA's exhaustion provision. The statute specifies that exhaustion is required "before the filing of a civil action . . . seeking *relief* that is also available under [the IDEA]." 20 U.S.C. § 1415(*l*) (emphasis added). This suggests that whether a plaintiff *could have* sought relief available under the IDEA is irrelevant — what matters is whether the plaintiff *actually* sought relief available under the IDEA. In other words, when determining whether the IDEA requires a plaintiff to exhaust, courts should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it is likely that § 1415(*l*) does not require exhaustion in that case.

[6] We agree with much of the approach proposed by amicus United States Department of Justice. Under a relief-centered approach, § 1415(*l*) requires exhaustion in three situations. First, exhaustion is clearly required when a plaintiff seeks an IDEA remedy or its functional equivalent. For example, if a disabled student files suit under the ADA and challenges the school district's failure to accommodate his special needs and seeks damages for the costs of a private school education, the IDEA requires exhaustion regardless of whether such a remedy is available under the ADA, or whether the IDEA is mentioned in the prayer for relief. Again, in that case the "relief . . . is also available" under the IDEA, *see* 20 U.S.C. § 1412(a)(10), and the student must exhaust his IDEA remedies before seeking parallel relief under the ADA. Second, the IDEA requires exhaustion in cases where a plaintiff seeks prospective injunctive relief to alter an IEP or the educational placement of a disabled student. As with the previous point, § 1415(*l*) bars

plaintiffs from seeking relief that is available to them under the IDEA, even if the plaintiffs have urged the court to craft the remedy from a different federal statute. Third, exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action (for instance, a claim for damages under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, premised on a denial of a FAPE). Such claims arise under either the IDEA (if the IDEA violation is alleged directly) or its substantive standards (if a § 504 claim is premised on a violation of the IDEA), so the relief follows directly from the IDEA and is therefore "available under this subchapter." 20 U.S.C. § 1415(*l*). We think that these situations encompass cases in which "[b]oth the genesis and the manifestations of the problem are educational." *Blanchard*, 420 F.3d at 921 (quoting *Charlie F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996)) (alteration in original).

This approach is consistent with our understanding that the exhaustion provision is designed to "allow[ ] for the exercise of discretion and educational expertise by state and local agencies, afford[ ] full exploration of technical educational issues, further[ ] development of a complete factual record, and promote[ ] judicial efficiency by giving . . . agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Hoeft*, 967 F.2d at 1303. The exhaustion requirement is intended to prevent courts from acting as ersatz school administrators and making what should be expert determinations about the best way to educate disabled students. At the same

time, it is not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist *independent* of the IDEA and entitles a plaintiff to relief *different* from what is available under the IDEA. Our decision reflects this limited purpose of the IDEA's exhaustion requirement.

2

The legislative history of 20 U.S.C. § 1415(*l*) supports our understanding of its meaning. The exhaustion provision was included as part of the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, and followed the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *See* S. Rep. No. 99-112, at 2 (1985). In *Smith*, the Court held that the Education of the Handicapped Act ("EHA") — the IDEA's predecessor statute — served as "the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." 468 U.S. at 1009. In doing so, the Court held that Congress intended to eliminate a plaintiff's ability to seek relief for that injury under 42 U.S.C. § 1983. *Id.* at 1012-13. The language now codified in § 1415(*l*) was enacted in response to that decision. *See* Pub. L. No. 99-372, § 3 (1986). Congress specifically sought to "make[ ] it clear that when parents choose to file suit under another law that protects the rights of handicapped children . . . , *if that suit could have been filed under the EHA*, then parents are required to exhaust EHA administrative remedies." S. Rep. No. 99-112, at 15 (1985) (emphasis added). Indeed, a number of cases decided shortly after § 1415(*l*) was enacted understood it to implement Congress's will that the provision "reaffirm . . . the

viability of . . . other statutes as separate vehicles for ensuring the rights of handicapped children." *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988); *see also Mrs. W. v. Tirozzi*, 832 F.2d 748, 754 (2d Cir. 1987) (characterizing § 1415(*l*) as a "nonexclusivity provision").

3

[7] The approach we have adopted yields a number of implications. First, because our approach emphasizes the relief sought rather than the types of injuries alleged, we find no merit to the distinction we have previously drawn between physical and non-physical injuries. *See Robb*, 308 F.3d at 1052. Although physical injuries might bolster a plaintiff's likelihood of success in a case, there is no reason to treat constitutional violations that do not result in physical injuries differently under the exhaustion provision. *See Blanchard*, 420 F.3d at 922 (holding that the IDEA does not require exhaustion when the plaintiff's "emotional distress injuries . . . could not be remedied through the educational remedies available under the IDEA").

[8] We also hold that in cases where a plaintiff is seeking money damages, courts should not engage in the depth of speculation we conducted in *Robb*. In that case, we inferred that the Robbs sought money "[p]resumably at least in part to pay for services (such as counseling and tutoring) that will assist their daughter's recovery of self-esteem and promote her progress in school. Damages could be measured by the cost of these services. Yet the school district may be able . . . to provide these services *in kind* under the IDEA." *Robb*, 308 F.3d at 1050. We no longer think

that such speculation is appropriate. Although we agree with the proposition that "a plaintiff cannot avoid the IDEA's exhaustion requirement merely by limiting a prayer for relief to money damages," *id.* at 1049, we do not think, especially in the context of motions to dismiss or summary judgment motions, that it is proper for courts to assume that money damages will be directed toward forms of relief that would be available under the IDEA.

[9] At the same time, plaintiffs cannot avoid exhaustion through artful pleading. If the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling — relief available under the IDEA — then the IDEA requires exhaustion. In such a case, the plaintiffs are seeking the same relief, even if they are willing to accept cash in lieu of services in kind. Accordingly, the exhaustion requirement would also apply in cases where a plaintiff is arguing that a state's failure to provide specialized programs for disabled students violates the Equal Protection Clause of the Fourteenth Amendment and seeks damages to fund a private education (without mentioning the IDEA). It would also apply to cases in which the plaintiff requests damages to compensate for costs associated with unilaterally altering a disabled student's educational placement, since such a request would also be "seeking relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). In other words, to the extent that a request for money damages functions as a substitute for relief under the IDEA, a plaintiff cannot escape the exhaustion requirement simply by limiting her prayer for relief to such damages. However, to the extent that a plaintiff has laid out a plausible claim for damages unrelated to the deprivation of a FAPE, the IDEA does not require her

to exhaust administrative remedies before seeking them in court.

Finally, we do not believe that the exhaustion requirement is triggered simply because the challenged conduct constitutes "at least . . . an attempt at an educational program." *See Payne*, 598 F.3d at 1127 (quoting *Robb*, 308 F.3d at 1052 n.3). As amicus Department of Justice points out, whether a school official's action is a reasonable "attempt at an educational program" may comprise the very heart of a dispute about the constitutionality of that action. Thus, for example, if a student alleges a Fourth Amendment violation, the school may answer that any search or seizure was reasonably related to the school's educational programs; but the student is not deprived of a § 1983 remedy merely because the conduct took place in the context of educating the disabled. Particularly in contexts where courts are expected to draw inferences in favor of plaintiffs, we do not think it is appropriate to make what are essentially merits determinations in the context of evaluating the need for exhaustion. Nothing in the IDEA protects a school from non-IDEA liability simply because it was making a good-faith attempt to educate its disabled students. If the school's conduct constituted a violation of laws other than the IDEA, a plaintiff is entitled to hold the school responsible under those other laws.

4

The National School Boards Association ("NSBA"), as amicus, suggests that our conclusion is at odds with the Supreme Court's decision in *Booth v. Churner*, 532 U.S. 731 (2001), a case in which the Court construed the exhaustion requirement in the PLRA, 42 U.S.C.

§ 1997e(a). Indeed, *Booth*'s language factored "strongly" in *Robb*'s conclusion, since we noted in that case that "[t]he PLRA's exhaustion requirement is framed in language similar to the IDEA's." *Robb*, 308 F.3d at 1050-51 (comparing "administrative remedies . . . available" under the PLRA, 42 U.S.C. § 1997e(a), to "relief that is also available" under the IDEA, 20 U.S.C. § 1415(*l*)). In *Booth*, the Court concluded that the PLRA "mandate[s] exhaustion . . . regardless of the relief offered through administrative procedures." 532 U.S. at 741. We held in *Robb* that, applied to the IDEA, this language meant that "a plaintiff must exhaust a mandatory administrative process even if the precise form of relief sought is not available in the administrative venue." 308 F.3d at 1051. This wording suggests that even if a plaintiff has available non-IDEA forms of relief in addition to potential relief under the IDEA, the plaintiff must exhaust administrative remedies before pursuing any of them. While this conclusion was correct in *Booth*, there are important differences between the PLRA and the IDEA, and *Robb* incorrectly applied the same conclusion to the IDEA. The PLRA's exhaustion requirement specifies that "[n]o *action* shall be brought . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The language is unequivocal and makes no reference to parallel forms of relief. *Booth* sensibly interpreted the prohibition on bringing an action to mean that the PLRA restricted unexhausted prisoner litigation altogether. By contrast, the IDEA's exhaustion provision applies only to "the filing of a civil action . . . seeking *relief* that is also available under [the IDEA]"; otherwise, the IDEA does not "restrict or limit the rights, procedures, and remedies" available under § 1983, the ADA, the Rehabilitation Act, or other

federal laws. 20 U.S.C. § 1415(*l*). The difference between these two statutes is critical — unlike the PLRA, the IDEA requires exhaustion only from plaintiffs who are pursuing non-IDEA claims *that compel the same forms of relief* as the IDEA.

The NSBA also appeals to the inevitability of parent-school disputes and argues that "[r]elaxing the IDEA's administrative exhaustion requirement does violence" to Congress's goal of expediting the resolution of these disputes. We are mindful of "the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts." *McCarthy v. Madigan*, 503 U.S. 140, 144-45 (1992). The general rule is a salutary one allowing agencies to exercise their expertise, to correct their own errors, and to provide relief that may be both swifter and more satisfactory than relief available through more formal litigation. Even where the parties ultimately file suit in federal court after exhausting their administrative remedies, we may benefit from a process that has developed the factual record and narrowed the issues contested by the parties.

The reasons for administrative exhaustion do not change the fact that the IDEA's exhaustion requirement is not as broad as the NSBA urges. Moreover, the NSBA's reading would actually place disabled students in a disadvantaged position relative to students without special needs. As Payne accurately notes, a student who had no disability — and therefore had no need for an IEP — would be able to challenge the constitutionality of his teacher's confinement procedures without first resorting to administrative procedures. The student could simply advance a § 1983 claim alleging violations of his constitutional rights.

No exhaustion would be required. If a disabled student would be able to make out a similarly meritorious constitutional claim — one that need not reference his disability at all — it is odd to suggest that the IDEA would impose additional qualifications to sue, simply because he had a disability.

C

We have carefully examined the criticism raised by the dissent and, with respect, do not think such criticism alters our views.

1

The dissent argues that our approach "largely nullifies § 1415(*l*) by providing plaintiffs with an easy end-run around the exhaustion requirement," because exhaustion would not be required "[s]o long as a complaint which seeks monetary damages does not mention a specific provision of the IDEA, or demand a remedy specifically provided by it." Dissenting Op. at 890. Nothing in our analysis "nullifies" § 1415(*l*). If a plaintiff does not seek relief based on an IDEA right, and does not seek a remedy provided by the IDEA, then she is not bound by the IDEA's prerequisites for litigation. This does not "nullif[y] § 1415(*l*)" — it simply limits the provision to its intended scope.

Indeed, the dissent seems particularly concerned with the fact that our approach "elevates the form of plaintiffs' pleadings over their substance," Dissenting

Op. at 9777,[5] and facilitates "gamesmanship," Dissenting Op. at 9772. But this worry is misplaced. In each case where a defendant raises § 1415(*l*) as a complete or partial defense, two possibilities arise. First, a court might decide that a complaint states a facially meritorious claim that does not either rely on rights created by the IDEA or seek remedies available under the IDEA. If a complaint can stand on its own without reference to the IDEA, it is difficult to see why the IDEA should compel its dismissal. It is hardly an "nullification of the congressionally mandated exhaustion requirement," Dissenting Op. at 9771, to say that a complaint that presents sound claims wholly apart from the IDEA need not comport with the IDEA's requirements. Even though such a case might "subject school districts to civil liability for money damages, without first giving school districts the opportunity to remedy the plaintiff's injuries under the IDEA," Dissenting Op. at 9772, this will only be because some other governing law *authorizes* such liability. The dissent's suggestion that this constitutes "gamesmanship" is puzzling. The fact that the plaintiff *could have* added IDEA claims to an otherwise sound complaint (and thus subjected themselves to the

[5] The dissent contends that we improperly focus on the pleadings because this appeal reaches us from a grant of summary judgment, in which the district court considered the evidence presented by the parties. Dissenting Op. at 9777-78 n.5. However, we focus on the pleadings because initially they determine whether the plaintiff is actually "seeking relief" available under the IDEA. Whether Payne can provide evidence supporting her claim of entitlement to such relief is a separate question — one that the district court did not address (because it had no need to) in its order granting summary judgment.

exhaustion requirement), but chose not to, should not detract from the viability of that complaint.

Of course, a plaintiff might try to evade the exhaustion requirement by relying on "artful" allegations. This is the situation the dissent appears to worry most about. But our approach still requires exhaustion in these cases. For example, the dissent provides the example of "a disabled child who seeks monetary damages because a school district's implementation of some educational program resulted in a claimed failure to adequately instruct him in reading." Dissenting Op. at 9777-78. The dissent interprets our opinion as allowing such a claim to proceed without exhaustion so long as the complaint "does not mention a specific provision of the IDEA." Dissenting Op. at 9779. But where the claim arises only as a result of a denial of a FAPE, whether under the IDEA or the Rehabilitation Act, exhaustion is clearly required no matter how the claim is pled. To use the dissent's example, a claim for failure to adequately instruct a student in reading can arise only under the IDEA because there is no other federal cause of action for such a claim. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (finding no enforceable federal constitutional right to a public education); *cf. Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) (holding that § 1983 does not authorize suits for IDEA violations). The claim asserted here — for knowing and intentional infliction of excessive force — is cognizable under the Fourth Amendment and exists separate and apart from the denial of a FAPE, irrespective of the fact that the alleged excessive punishment took place in a special education classroom. *See, e.g.*, *Preschooler II v. Clark Cnty. Sch. Bd. of Trs.*, 479 F.3d 1175, 1181-82 (9th Cir. 2007)

(holding that clearly established law under the Fourth Amendment prohibits "excessive physical abuse of schoolchildren"); *Doe ex rel. Doe v. Haw. Dept. of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003). Although we would not doubt, for example, that an unconstitutional beating might interfere with a student enjoying the fruits of a FAPE, the resulting excessive force claim is not, for that reason alone, a claim that must be brought under the IDEA.

2

The dissent nonetheless contends that § 1415(*l*) requires exhaustion whenever the IDEA's administrative procedures "may lead to the provision of curative or palliative 'related services.' " Dissenting Op. at 9774. Here, for example, the dissent suggests that the school district could have provided "intensive individualized tutoring" or "[p]sychological counseling" to correct both the past and ongoing aftereffects suffered by D.P. as a result of Coy's use of the isolation room. Dissenting Op. at 9775. The dissent therefore concludes that because Payne is seeking damages "for the past and ongoing academic and psychological aftereffects of D.P.'s claimed mistreatment of the school district," exhaustion is required. Dissenting Op. at 9776 (emphasis omitted).

This approach misreads § 1415(*l*) and is at odds with *Witte*. First, it is not clear that the IDEA actually authorizes relief designed to correct the effects of misconduct by the school. The dissent suggests that "the 'related services' provided under the IDEA — academic services, psychological counseling and therapy — may cure, alleviate, or mitigate [injuries caused by a school district's wrongful act or omission]."

Dissenting Op. at 9774. But the IDEA defines "related services" to include "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability *to benefit from special education*, and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26)(A) (emphasis added). In other words, it is far from clear that the IDEA authorizes the provision of services designed to correct injuries caused by the school's past violation of other laws.

Furthermore, even if such services *are* available under the IDEA, the dissent's proposal is plainly too broad. For example, the student in *Witte* could plausibly have received *some* psychological counseling and therapy that *might* have corrected or mitigated some of the harms resulting from the abuse he suffered at school. *See Witte*, 197 F.3d 1272-73. Under the dissent's view, the fact that Witte sought remedies only for physical injuries without seeking relief under the IDEA could easily be characterized as "gamesmanship" that should be set aside in favor of the exhaustion requirement. The dissent's approach would necessarily require such speculation, even in fact patterns identical to the one in *Witte*. The dissent would hold that if psychological counseling *could* correct a student's injuries, then exhaustion is required even if the injuries were caused by a non-IDEA violation for which federal law authorizes remedies apart from the IDEA.

We think such an approach would be mistaken. If a plaintiff can identify a school district's violation of federal laws other than the IDEA and can point to an authorized remedy for that violation unavailable under

the IDEA, then there is no reason to require exhaustion under § 1415(*l*). The dissent's approach would effectively refashion § 1415(*l*) from a provision designed to facilitate the coexistence of the IDEA with other forms of relief into one designed to preempt all cases involving the mistreatment of disabled students by a school. We do not think that the IDEA's exhaustion requirement was intended to penalize disabled students for their disability. This is not what § 1415(*l*) says, and we think it is not what Congress intended.

IV

A

[10] We now apply our approach to Payne's case and supply instructions for the district court. Payne alleged several § 1983 claims, as well as Washington state tort actions for negligence and outrage. The district court did not specifically address each claim and explain why exhaustion was required for each. Relying on *Robb*, it simply stated that "because plaintiffs' injuries could be remedie[d] to some degree by the IDEA's administrative procedures and remedies, the plaintiffs must exhaust those administrative remedies before filing suit." However, in light of the new standards announced in this decision, the district court on remand should permit Payne to amend her complaint in order to flesh out her specific claims and enable the court to determine which claims require IDEA exhaustion and which do not.

[11] The district court should then provide the defendants with an opportunity to seek dismissal of

some or all of Payne's claims on the ground that they require administrative exhaustion. The district court need not wait to consider the applicability of the exhaustion requirement until the record is complete and a motion for summary judgment has been filed. We have previously held that a non-jurisdictional exhaustion requirement can be cited defensively "as a matter in abatement, . . . subject to an unenumerated Rule 12(b) motion rather than a motion for summary judgment." *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003) (collecting cases). This is because, as a general matter, "summary judgment is on the merits, whereas dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits." *Id.* Unlike a judgment on the merits, a plaintiff's failure to exhaust administrative remedies should result in a dismissal without prejudice. *See City of Oakland, Cal. v. Hotels.com LP*, 572 F.3d 958, 962 (9th Cir. 2009). Generally, in entertaining an unenumerated motion to dismiss, "the court may look beyond the pleadings and decide disputed issues of fact." *Wyatt*, 315 F.3d at 1120. We see little reason to depart from this rationale in the context of the IDEA. The defendants should be permitted to challenge Payne's claims under the exhaustion provision in an unenumerated motion to dismiss, in the context of which the court may decide disputed issues of fact to the extent they are necessary to deciding whether her claims require exhaustion and, if so, whether she has adequately exhausted available administrative remedies.

[12] Because § 1415(*l*) focuses on the "relief" sought in an action,[6] it is conceivable that a district court, in entertaining a motion to dismiss, might not *initially* conclude that exhaustion is required for certain claims, but might recognize subsequently that, in fact, the remedies being sought by a plaintiff could have been provided by the IDEA. In such a case, we think the defendants should be permitted to provide evidence showing that the relief being sought by that plaintiff was, in fact, available under the IDEA. Because the line between damages available under other remedial sources and relief available under the IDEA is less than clear, the finder of fact should, in assessing remedies, be permitted to assess the evidence and withhold those that are unexhausted and available under the IDEA.

We recognize that this approach to exhaustion is somewhat unconventional — it is anomalous to permit a party to raise failure to exhaust as a defense in both a motion to dismiss and at the fact-finding stage of a

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[6] Section 1415(*l*)'s emphasis on the relief sought by a plaintiff makes it different from the provisions we have previously addressed. For example, in *Wyatt*, we interpreted the exhaustion requirement of the PLRA, which, as we have discussed, differs from § 1415(*l*) in that it restricts the filing of *all* pre-exhaustion actions — regardless of the relief sought — by prisoners. *See* 42 U.S.C. § 1997e(a). Likewise, *Wyatt*'s predicate cases typically involved arbitration requirements in private contracts, which, again, restricted the filing of entire actions, regardless of the relief sought. *See, e.g.*, *Inlandboatmens Union of Pac. v. Dutra Grp.*, 279 F.3d 1075, 1077 (9th Cir. 2002) (interpreting an agreement that required arbitration over "[*a*]*ny* dispute concerning . . . wages, working conditions, or any other matters referred to in this [contract]" (emphasis added)); *Ritza v. Int'l Longshoremen's & Warehousemen's Union*, 837 F.2d 365, 367 (9th Cir. 1988).

proceeding. But as we have noted, § 1415(*l*) is itself an anomalous provision, since it does not categorically preclude claims and instead requires a court to examine the relief being sought by those claims and to compare it to the relief available under the IDEA. Ultimately, § 1415(*l*) is designed to channel requests for a FAPE (and its incidents) through IDEA-prescribed procedures. The procedure we have outlined, while somewhat unusual, faithfully executes Congress's design.

B

After Payne is given the opportunity to amend her complaint, the district court should examine each of Payne's requests for relief and determine whether the exhaustion requirement applies to each. It may then dismiss any claims that are governed by the exhaustion requirement, but it should not dismiss any remaining claims.[7] To provide additional guidance

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[7] The dissent contends that we should nonetheless affirm the district court's grant of summary judgment (perhaps after deciding to construe it as an unenumerated motion to dismiss) because "*all* of the facts presented to the district court indicated the Paynes *were* seeking at least some relief that was 'also available' under the IDEA." Dissenting Op. at 9784. Although we agree that "at least some" of the relief being sought by Payne does require exhaustion, we do not think this requires the court to dismiss Payne's entire case. We see no reason to adopt such a "total exhaustion rule" similar to the one we apply in the context of habeas corpus. *See Rose v. Lundy*, 455 U.S. 509, 522 (1982). The Supreme Court has observed that "total exhaustion" is the exception rather than the rule. *See Jones*, 549 U.S. at 221 (holding that the PLRA's exhaustion requirement did not create a total exhaustion rule and noting that "[a]s a general matter, if a complaint contains both good and bad claims, the court proceeds

concerning the new approach we have adopted, we briefly discuss some of Payne's federal claims in her current complaint and the relief sought. We reiterate, of course, that the district court should permit Payne to amend her complaint before determining which aspects are barred by the exhaustion requirement.

[13] The easiest claim to address is Payne's claim that the defendants violated D.P.'s "statutory rights under the IDEA." This claim is plainly barred by § 1415(l) because any relief that Payne could obtain for violations of the IDEA is "relief that is also available under [the IDEA]" itself. Section 1415(*l*) is explicit that Payne must exhaust her IDEA remedies "to the same extent as would be required had the action been brought under [the IDEA]."

[14] With respect to the remaining § 1983 claims — alleged violations of the Fourth, Eighth, and Fourteenth Amendments — the complaint does not explicitly link each constitutional claim to a form of requested relief. Rather, the complaint seeks declaratory relief and general, special, and punitive damages. Accordingly, it will be the task of the district

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with the good and leaves the bad. [O]nly the bad claims are dismissed; the complaint as a whole is not. If Congress meant to depart from this norm, we would expect some indication of that, and we find none." (alteration in original) (internal quotation marks omitted)).

Additionally, because we articulate a new standard today, it is appropriate to remand the case to the district court to apply that standard. On remand, the district court should allow the parties to amend their pleadings and take any other steps necessary to apply this new approach.

court on remand to determine whether the relief being sought is "also available under" the IDEA. For example, Payne's request for "general damages for extreme mental suffering and emotional distress" would not fall within the purview of § 1415(*l*) if such damages are intended to compensate Payne for injuries resulting from Fourth or Eighth Amendment violations committed by school officials. *Cf. Blanchard*, 420 F.3d at 922 (holding that a request for damages for "emotional distress injuries" did not require exhaustion because they "could not be remedied through the educational remedies available under the IDEA"). If, however, the "emotional distress" stems from Payne's concern that D.P. was not receiving an adequate education, then exhaustion is required.

To take a second example, the complaint alleges violations of "procedural and substantive due process" under the Fourteenth Amendment. If Payne seeks damages for the school district's failure to provide procedural due process for rights conferred by the IDEA, the claims must be exhausted because the IDEA provides procedural due process rights, 20 U.S.C. § 1415(f)-(g), and Payne cannot simply claim damages in place of the process available to her. Similarly, we cannot discern the contours of Payne's current substantive due process claim, but if, for example, the claim is for deprivation of a "free and appropriate education," *see* 20 U.S.C. § 1412(a)(1)(A), then Payne seeks relief that is also available under the IDEA, and she must exhaust her statutory remedies.[8]

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[8] We have no occasion here to opine on the existence or scope of such a right, but even if there is such a right, Congress may require administrative exhaustion of constitutional claims. *See*

Finally, we emphasize that our holding only removes certain procedural barriers preventing Payne from litigating her non-IDEA claims. We have not been asked to, and do not, decide whether any of these claims are meritorious.

V

[15] We hold that 20 U.S.C. § 1415(*l*) gives IDEA defendants an opportunity to plead non-exhaustion as an affirmative defense without limiting federal jurisdiction. We affirm the district court's dismissal of Payne's IDEA-based claim under 42 U.S.C. § 1983. We reverse its dismissal of her other § 1983 claims and remand for reconsideration under the standards we have articulated.

Costs on appeal are awarded to Payne.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

CALLAHAN, Circuit Judge, concurring:

I concur in the opinion, but write separately because I share the concern expressed by Judge Bea in his separate concurrence and dissent that our clarification of IDEA's exhaustion requirement, 20 U.S.C. § 1415(l), may be used to circumvent the requirement. Even under the "relief-centered"

United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1, 9 (2008); *Aircraft & Diesel Equip. Corp. v. Hirsch*, 331 U.S. 752, 773-74 (1947).

approach we adopt, it is not always possible to determine whether the alleged damages are separate and distinct from those covered by the IDEA. The solution to this dilemma may not lie solely in the dismissal of an ambiguous complaint or cause of action for failure to exhaust, but may be complemented by allowing a defendant school district to assert, even at trial, that an aspect of plaintiff's claim of damages would have been addressed in the administrative proceedings. Then, to the extent that the defendant meets its burden of demonstrating that the administrative processes would have addressed an aspect of the alleged damages, plaintiff would be denied any recovery for that aspect because that portion of his claim is unexhausted.

This approach differs in its critical aspects from the concept of mitigation. Although the statute states that an action may not be filed until administrative proceedings have been exhausted, it may not always be possible to determine, either at the pleadings stage or on a motion for summary judgment, whether some aspect of the alleged damages would have been addressed, in whole or in part, in administrative proceedings. Accordingly, lest the purpose of the exhaustion requirement be evaded, we should recognize that the scope of the unexhausted administrative proceedings may only become clear at trial. Of course, at that point in time it is impossible to literally enforce the exhaustion requirement. The lawsuit has been filed and presumably some aspects of the alleged damages would not have been addressed in the available administrative proceedings (otherwise the court would have already dismissed the action). In such a situation, the intent of the statute is best served by denying the plaintiff any recovery for any

aspect of the alleged damages that the defendant school district shows would have been addressed in the administrative proceedings.

The school district has the burden of making the requisite factual showing that an aspect of a damage claim would have been addressed in the administrative proceedings, but it need not show that the administrative proceedings would have produced a solution. Rather, if the school district shows, to the requisite degree of certainty, that the administrative proceedings would have addressed an aspect of the plaintiff's alleged damages, the plaintiff may not recover for that aspect. In essence, if the factfinder determines that an aspect of plaintiff's claim for damages would have been addressed by the administrative proceedings, the plaintiff has failed to exhaust the administrative procedures for that aspect. Accordingly, to enforce the exhaustion provision, the plaintiff should be barred from seeking damages for that aspect of his or her claim. This is not mitigation in the sense of reducing damages based on a plaintiff's failure to prevent the harm, rather it enforces a statutory prerequisite to the entitlement to collect the damages — engaging in the requisite pre-suit administrative proceedings.

The allegations in this case allow for an illustration of this approach. D.P.'s confinement to the "safe room" arose out of the parties relationship based on the IDEA. However, his confinement was also arguably a violation of D.P.'s constitutional rights irrespective of the parties' relationship under the IDEA. Our focus, however, is not on whether the alleged injury resulted from a violation of the IDEA or of the child's constitutional rights, but whether the "relief sought is

also available under the IDEA." Maj. Op. 9751; *see also* Maj. Op. 9747-48.

The difficulty in measuring damages, is implicitly admitted in our direction to the district court to allow Payne "to amend her complaint in order to flesh out her specific claims and enable the court to determine which claims require IDEA exhaustion and which do not." Maj. Op. 9762. For example, we recognize that Payne's request for "general damages for extreme mental suffering and emotional distress" might not fall "within the purview of § 1415(*l*)," but will if "the 'emotional distress' stems from Payne's concern that D.P. was not receiving an adequate education." Maj. Op. 9766. It is not clear to what extent long term academic, psychological or emotional harms, must be addressed in the administrative proceedings. The majority holds that "[t]he IDEA's exhaustion requirement applies to claims only to the extent that the relief actually sought could have been provided by the IDEA." Maj. Op. p. 9750. It further holds that "exhaustion is required in cases where a plaintiff is seeking to enforce rights that arise as a result of a denial of a free appropriate public education." Maj. Op. p. 9752. Thus, although it may be "far from clear that the IDEA authorizes the provision of services designed to correct injuries caused by the school's past violation of other laws," (Maj. Op. p. 9761, *but see* Bea Con. p. 9774-75), the line between those aspects of damages which would have been addressed in administrative proceedings, and those which would not, may be a factual issue that will have to be determined on a case by case basis.

Here, as noted by Judge Bea, much of the relief or damages Payne sought was arguably available under

the IDEA. On the other hand, as all admit, to the extent that plaintiffs seek monetary damages for compensation for past pain and suffering, such relief is not available under the IDEA. *See* Maj. Op. 9765; Bea Con. pp. 9780-81 n.8. Furthermore, as the majority notes, the complaint "does not explicitly link each constitutional claim to a form of requested relief." Maj. Op. 9765. Although we direct the district court to scrutinize the complaint, we implicitly admit that the line between damages that are and are not addressable in IDEA administrative proceedings may not be clear. *See* Maj. Op. 9765-66. It follows that the district court may be able to use the IDEA's exhaustion requirement to narrow the complaint at the pleading stage, but may not be able to dispose of the case.

The danger is, as Judge Bea notes, that artful pleading may enable plaintiffs to circumvent the exhaustion requirement. *See* Bea Con. 9778-79. However, much of the incentive to do so will be dissipated if, at trial, the defendant may present evidence showing that the administrative proceedings under the IDEA, if utilized, would have addressed certain aspects of the claimed damages. This also recognizes the exhaustion requirement is akin to an affirmative defense, rather than a jurisdictional bar to the lawsuit.

Such an approach is consistent with the intent of the IDEA to encourage the parties to take advantage of the administrative proceedings. At the same time, it recognizes that just because a student is subject to the IDEA, he or she does not forfeit his or her other constitutional and statutory rights. Nonetheless, where (1) the alleged damages arise in the context of a relationship under the IDEA, (2) plaintiff did not

exhaust the administrative proceedings under the IDEA, and (3) the measure of damages includes aspects that would have been addressed in the administrative proceedings, then the exhaustion requirement should be construed as denying plaintiff any recovery for those aspects of the claim that it is determined — under the applicable standard of proof and by the appropriate factfinder — would have been addressed by the administrative proceedings.

BEA, Circuit Judge, joined by SILVERMAN and RAWLINSON, Circuit Judges, concurring in part and dissenting in part:

I respectfully dissent from what the majority calls its "clarification" of the "proper method for resolving IDEA exhaustion cases."[1] Maj. Op. at 9750. Rather than a clarification, I see it as a nullification of the congressionally mandated exhaustion requirement. The majority opinion clashes with the clear language of the IDEA, which requires administrative exhaustion "*before* the filing of a civil action . . . seeking relief that is *also available* under [the IDEA]." 20 U.S.C. § 1415(l)

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[1] In light of *Jones v. Bock*, 549 U.S. 199 (2007), and *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010), I concur in the majority's determination that the IDEA's exhaustion requirement is non-jurisdictional. I note, however, that it was unnecessary to reach the jurisdictional issue in this case. Here, defendants raised Payne's failure to exhaust administrative remedies as an affirmative defense in the district court. Therefore—regardless whether the IDEA's exhaustion requirement is jurisdictional or must be raised as an affirmative defense—it is clear that the exhaustion issue in this case was properly before the district court. Because this court did reach the jurisdictional question, however, I concur in its analysis of the issue.

(emphasis added). The majority's approach is also inconsistent with the core purposes of IDEA exhaustion: allowing state and local agencies "the exercise of discretion and education expertise," giving agencies "the first opportunity to correct shortcomings in their educational programs for disabled children," and allowing "full exploration of technical educational issues." *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992). Finally, the newly-restricted exhaustion requirement will allow plaintiffs—through gamesmanship and cleverly-crafted pleadings—to subject school districts to civil liability for money damages, without first giving school districts the opportunity to remedy the plaintiff's injuries under the IDEA.

Moreover, in remanding this case to the district court to parse the Paynes' complaint, the majority ignores the procedural posture of this case. This case comes to us on appeal of the district court's grant of summary judgment to the school district. The school district presented evidence, in the form of deposition testimony from plaintiff Windy Payne, which proved the Paynes sought relief which was "also available" under the IDEA—thus triggering the IDEA's exhaustion requirement. 20 U.S.C. § 1415(l). In contrast, the Paynes presented no evidence *at all* to raise a triable issue of material fact as to whether the relief they sought was not "also available" under the IDEA, nor any evidence *at all* that recourse to the remedies provided in the IDEA would be futile. A moving party is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324

(1986). I would not remand to the district court to parse Paynes' complaint for allegations of facts, evidence of which facts the Paynes themselves did not present in their opposition to summary judgment. This is an appeal from an order under Rule 56 of the Federal Rules of Civil Procedure, not an appeal from a 12(b)(6) order. I would affirm. For these reasons, I dissent.

I.

With respect, the majority opinion begins by misreading the IDEA's exhaustion provision, codified at 20 U.S.C. § 1415(l). The majority reads § 1415(l)—which requires a plaintiff to exhaust administrative remedies if the plaintiff is "seeking relief that is also available under" the IDEA—to mean that exhaustion is required only if a plaintiff *specifically* alleges violations of substantive IDEA rights, or their "functional equivalent." According to the majority, "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." Maj. Op. at 9751 (emphasis in original). Therefore, according to the majority, courts charged with "determining whether the IDEA requires a plaintiff to exhaust . . . should start by looking at a complaint's prayer for relief and determine whether the relief sought is also available under the IDEA. If it is not, then it is likely that § 1415(l) does not require exhaustion." Maj. Op. at 9751. The majority sees "relief that is available" under the IDEA as restricted to three situations: 1) when a claim is based upon alleged violations of a plaintiff's substantive IDEA right to a Free Appropriate Public Education (FAPE); 2) when a plaintiff seeks an IDEA

remedy, or the "functional equivalent of an IDEA remedy under a different law" (for example, when a plaintiff seeks recompense for a private school education under the Americans with Disabilities Act, or explicitly measures its calculation of damages as the cost of academic tutoring or psychological counseling); and 3) when a plaintiff seeks injunctive relief to alter a child's individualized education program (IEP) or educational placement.[2] Maj. Op. at 9751-52.

As an initial matter, the majority's limited exhaustion requirement is inconsistent with the plain text of § 1415(l). Section 1415(l) does not state that exhaustion is required only for relief that is premised upon an alleged violation of the plaintiff's substantive IDEA rights, seeks the functional equivalent of an IDEA remedy, or seeks injunctive relief after IDEA remedies have been effected. Rather, § 1415(l) simply and broadly states that exhaustion is required if a plaintiff seeks relief that is "also available" under the IDEA. The IDEA requires public schools to provide disabled students with a "free appropriate public education." A "free appropriate public education" includes not just "an appropriate preschool, elementary school, or secondary school education," but also "related services" which include counseling and psychological services. *See* 20 USC § 1401(26). Thus, if a disabled student brings suit seeking monetary damages to compensate him for his academic regression or psychological injuries which he claims persist after the completion of a school district's

[2] An IEP is a document which sets educational goals and specifies an instructional plan for disabled students. 34 C.F.R. § 300.320. An IEP must be reviewed and renewed at least annually. *Id*.

claimed wrongful act or omission, relief for those injuries is "also available" *in kind* under the IDEA, because the "related services" provided under the IDEA—academic services, psychological counseling and therapy—may cure, alleviate, or mitigate such injuries. In such a case, the plain text of § 1415(l) requires a plaintiff to exhaust the IDEA's administrative procedures which may lead to the provision of curative or palliative "related services" *before* filing a civil suit.

The majority's skepticism that the "IDEA actually authorizes relief designed to correct the effects of misconduct by the school" is misplaced. Maj. Op. at 9760-61. The majority notes that the IDEA defines "related services" as services which "may be required to assist a child with a disability *to benefit from special education*" *id.* (quoting 20 U.S.C. § 1401(26)(A)), and posits that the IDEA does not require schools to alleviate academic and psychological damage *to a child which is caused* by the school. *Id*. But this reading of the IDEA makes little sense. The statute plainly holds that if a child requires "related services" to benefit from special education, those services must be provided. Nothing in the statute requires any inquiry as to *why* those services are required. Thus, if a child suffers from crippling anxiety at school, and that anxiety must be alleviated before he can learn (or, in the words of the statute, "benefit from special education"), the IDEA plainly requires psychological services be provided. It makes no difference whether that anxiety was caused by the school or whether it was caused by some external factor.

Of course, § 1415(l) does not require IDEA exhaustion for *all* lawsuits brought by disabled

students who allege academic or psychological injuries—only for those lawsuits seeking relief for those injuries which may be cured or alleviated by the "related services" provided through IDEA's administrative process. As we held in *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999), plaintiffs need not exhaust IDEA remedies if they seek damages for "retrospective" psychological injuries. *Id.* at 1276. For example, had the Paynes sought monetary damages for the claimed past and temporary emotional and psychological trauma D.P. suffered while locked in the isolation room, IDEA exhaustion would not have been required. This is so because when the damages sought are for purely retrospective injuries, relief is not "also available" under the IDEA: no amount of academic or counseling services could possibly alleviate the past, but temporary, fright D.P. might claim he felt inside the isolation room. Neither could IDEA's "related services" cure or alleviate the pain and suffering D.P. might have suffered in the "isolation room" and for a few days thereafter, had he sprained his ankle while locked inside. As this court held in *Witte*, the "remedies available under the IDEA would not appear to be well suited to addressing past physical injuries adequately." *Id.* at 1276.

On the other hand, when a plaintiff seeks monetary damages to compensate for the academic and psychological *aftereffects* of a school district's wrongful act or omission in the provision of education, relief is necessarily available under the IDEA. Here, for example, intensive individualized tutoring might well have alleviated D.P.'s claimed academic regression. Psychological counseling might also have eliminated the nightmares from which the Paynes contend D.P. suffered as a result of the district's use of the "isolation

room" in which it placed D.P. And relief for such academic regression and nightmares is "also available" under the IDEA if the regression and nightmares are likely to continue.[3] Here—as discussed in further detail below—the Paynes sought damages for the past and ongoing academic and psychological *aftereffects* of D.P.'s claimed mistreatement by the school district. In such cases, the plain text of § 1415(l) requires a plaintiff to exhaust the IDEA's administrative procedures before filing a civil suit.[4]

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[3] Plaintiffs can also avoid the IDEA's exhaustion requirement if they can prove that recourse to the IDEA's administrative procedures would have been futile or inadequate. For example, parents who seek monetary damages as compensation for the out-of-pocket expenses they paid for a specialized form of private tutoring or private psychological counseling could avoid the IDEA's exhaustion requirement if they prove that such tutoring or counseling was 1) necessary, and 2) could not have been provided by the school district. The party alleging futility of IDEA procedures bears the burden of proving its futility. *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997). This exception to the exhaustion requirement does not apply to the Paynes, as they presented no evidence of futility; of course, neither did the school district. *See infra* at pages 9783-84.

[4] The majority contends this plain reading of § 1415(l) is somehow inconsistent with *Witte*, because the court in *Witte* could have *speculated* that the child—who alleged only retrospective physical injuries—*also* could have alleged ongoing psychological harm. *See* Maj. Op. at 9760-61. This is wrong: § 1415(l) requires exhaustion only when a plaintiff is "*seeking* relief that is also available under [the IDEA]." 20 U.S.C. § 1415(l) (emphasis added). If, as in *Witte*, a plaintiff does not allege academic or psychological injuries—and thus is not *seeking* academic or psychological relief—§ 1415(l) obviously does not permit a court to *invent* such injuries for the plaintiff. Here, per the plaintiff's own complaint and deposition testimony, the *only* relief sought was academic and psychological relief which is "also available under the IDEA." I would hold that

The majority expresses concern that this "muscular" view of § 1415(l) "penalize[s] disabled students for their disability," Maj. Op. at 9762, "preempt[s] all cases involving the mistreatment of disabled students by a school," *id.*, and "temporarily shield*[s]*" school officials from liability for violations of constitutional and statutory rights. *Id.* at 9752. Not at all. First, my reading of § 1415(l) does not preempt all cases involving disabled students harmed by a school. Contrary to the majority's assertion, I embrace *Witte*, which eschews preemption in cases where plaintiffs seek compensation only for physical or retrospective injuries. *See Witte*, 197 F.3d at 1276. Moreover, any shield imposed by the exhaustion requirement is of very limited duration. Due process complaints under the IDEA must be heard and decided within 45 days. 34 C.F.R. § 300.515(a). And so long as plaintiffs exhaust their IDEA remedies, nothing prevents them from subsequently bringing civil claims based upon violations of constitutional or statutory rights. Thus, § 1415(l) does not absolve school districts of civil liability for injuries which could not be remedied or palliated by IDEA's "related services." Instead, it codifies a recognition that the education of disabled children is a complex endeavor, calling for much individual attention, and that a misjudgment in a child's IEP—or a mistake in execution of that plan—can result in unexpected academic and psychological injuries. For that reason, in cases where "both the genesis and the manifestations of the problem are educational," *Blanchard v. Morton Sch.*

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exhaustion is required only where academic or "related services" could correct the injuries *claimed* by the plaintiff, not where such services could also correct injuries which are purely conjectural.

Dist., 420 F.3d 918, 921 (9th Cir. 2005), § 1415(l) requires potential plaintiffs first to give school districts the opportunity to correct the effects of their claimed educational mistakes under the IDEA's administrative process, before recasting claims arising from acts or omissions related to educational efforts as violations of constitutional and statutory rights, with compensation sought in money damages. Far from *penalizing* disabled students, § 1415(l) provides a fast, efficient way to redress such students' academic and psychological injuries, as an alternative to civil litigation which may drag on for years.

In contrast, the eviscerated exhaustion requirement articulated by the majority elevates the form of plaintiffs' pleadings over their substance.[5] Consider, for example, a disabled child who seeks monetary damages because a school district's implementation of some educational program resulted in a claimed failure adequately to instruct him in reading.[6] Such a child could allege either: 1) the school

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[5] As discussed in greater detail below at pages 9773-74, for the majority to thus frame the issue was especially incorrect here, since the issue here does not involve the adequacy of the plaintiffs' pleadings, but the adequacy of the *evidence* adduced by the parties to establish or eliminate triable issues of material fact. The district court entertained and ruled on a Rule 56 motion, not a Rule 12(b)(6) motion.

[6] The majority contends that "a claim for failure to adequately instruct a student in reading can arise only under the IDEA because there is no other federal cause of action for such a claim." Maj. Op. at 9759-60. With respect, the majority underestimates the potential creativity of plaintiffs' attorneys. Consider, for example, a child whose IEP provides that he should spend 30 minutes each school day reading independently in a quiet room by

district failed to provide a "free appropriate public education" as required by the IDEA, 20 U.S.C. § 1401(9), or, as the plaintiffs here claim, 2) the school district's actions caused the child's "academic prowess and abilities" to be diminished, entitling the child to general and special damages for his emotional and psychological pain and suffering. Although the facts underlying both of these claims would be identical, the majority holds that the IDEA requires exhaustion of administrative remedies *only* if the plaintiff styles his complaint as a failure to provide a "free appropriate public education" under the IDEA, or explicitly measures damages as the cost of counseling, tutoring, or private schooling. Only *then*, according to the majority, is the claim based upon "either the IDEA . . . or its substantive standards." *See* Maj. Op. at 9752. The majority opinion thus effectively serves as a roadmap for plaintiffs who wish to avoid § 1415(l)'s exhaustion requirement and any curative or palliative services the school district could offer to eliminate or reduce damages, but would rather obtain a money

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himself. If that child were to suffer anxiety and claustrophobia while in the quiet room—leading to a regression in his reading scores—he might sue the school district under § 1983 for improper detention in violation of the Fourth Amendment and seek compensation for his *academic* injuries. Indeed, such a case would be largely analogous to the facts in *Robb v. Bethel School District #403*, 308 F.3d 1047 (9th Cir. 2002), in which the plaintiff sought monetary damages for academic injuries which resulted from a child's participation in "peer tutoring" sessions which took place on the floor of a dimly-lit hallway. As I read the majority, so long as an alleged violation is *cast* as a federal Constitutional or statutory claim, the plaintiffs are not required to exhaust their administrative remedies—regardless whether the claim is actually based upon the school district's failure adequately to instruct the child.

award in a federal court. So long as a complaint which seeks monetary damages does not mention a specific provision of the IDEA, demand a remedy specifically provided by it, or seek injunctive relief to modify an implemented IEP, the majority holds there is no need to exhaust administrative remedies which could remedy the harm done to a disabled child through the school's mistakes in implementing the child's education. Thus, the majority largely nullifies § 1415(l) by providing plaintiffs with an easy end-run around the exhaustion requirement. It does not take a crystal ball to foresee the result. Would a plaintiff's attorney rather 1) state a claim for the provision of in-kind services under the IDEA, and if successful, be paid in court-supervised attorney' fees, *see* 20 U.S.C. § 1415(i)(3)(B), or 2) seek monetary damages under a contingent fee contract with the parents?

The majority incorrectly insists that our previous "injury-centered" approach to exhaustion was inconsistent with § 1415(l)'s requirement that plaintiffs exhaust administrative remedies if a plaintiff is "*seeking* relief that is also available under [the IDEA]." 20 U.S.C. § 1415(l) (emphasis added). According to the majority, the phrase "seeking relief" suggests that "whether a plaintiff *could have* sought relief available under the IDEA is irrelevant—what matters is whether the plaintiff *actually* sought relief available under the IDEA." Maj. Op. at 9751 (emphasis in original). But this interpretation of the phrase "seeking relief" is inconsistent with this court's prior determination that a plaintiff cannot circumvent the IDEA's exhaustion requirement by seeking only monetary damages. *Robb*, 308 F.3d 1047 at 1050. Although monetary damages are not ordinarily available under the IDEA, we have joined at least five

sister circuits to hold that a prayer for monetary damages does not automatically excuse the IDEA's exhaustion requirement. *Id.*; *see also Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 64 (1st Cir. 2002); *Covington v. Knox County Sch. Sys.*, 205 F.3d 912, 916 (6th Cir. 2000); *Padilla v. Sch. Dist. No. 1 in the City and County of Denver, Colo.*, 233 F.3d 1268, 1274 (10th Cir. 2000); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996); *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996). Thus—because a plaintiff who includes an education-related prayer for monetary damages necessarily does not "actually" seek relief available under the IDEA—we, and our sister circuits, have held that what "matters" for exhaustion purposes is *precisely* whether a plaintiff "could have" sought relief for the claimed injuries, which relief is also available under the IDEA through in-kind services. The majority opinion does not overturn this aspect of our IDEA jurisprudence;[7] this leaves us with a puzzling inconsistency. On the one hand, as the majority holds today, the phrase "seeking relief" requires courts to look *solely* at what form of relief the plaintiff "actually sought." On the other hand, courts will look

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[7] The majority holds that a plaintiff's prayer for monetary damages does not *automatically* excuse the IDEA's exhaustion requirement. For example, if "the measure of a plaintiff's [monetary] damages is the cost of counseling, tutoring, or private schooling — relief available under the IDEA — then the IDEA requires exhaustion." Maj. Op. at 9754. The majority holds the exhaustion requirement also applies if a plaintiff "seeks damages to fund a private education (without mentioning the IDEA)." *Id.* Because such claims explicitly seek the "functional equivalent" of an IDEA remedy, the majority holds relief is "also available" under the IDEA. I agree the exhaustion requirement applies in such cases; I do not, however, read § 1415(l) so narrowly.

necessarily to what sort of relief a plaintiff "could have" sought in complaints which seek damages measured in the cost of services available in-kind under the IDEA, or which seek monetary damages for claims which are explicitly based upon alleged violations of a plaintiff's substantive IDEA rights,[8] Maj. Op. at 9751-52, 9754-55.

Finally, the majority opinion undermines the sound principles behind the exhaustion requirement. We have previously held that the IDEA's exhaustion requirement "recognizes the traditionally strong state and local interest in education, allows for the exercise of discretion and educational expertise by state agencies, affords full exploration of technical

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[8] Consider, for example, one situation in which the majority holds that "exhaustion is clearly required": where a plaintiff files a claim for damages under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, premised on a denial of a plaintiff's IDEA rights. *See* Maj. Op. at 9751-52. If such a claim seeks only monetary damages, the plaintiff has not "actually sought relief available under the IDEA," because the IDEA does not provide for monetary damages. But in such a case, the majority (rightly) requires exhaustion, because the substantive rights at issue are clearly premised on the IDEA—and *could have* been resolved using the IDEA's administrative procedures. In that situation, the phrase "seeking relief" does not bar courts from looking to whether the plaintiff "could have" sought relief available under the IDEA. I am puzzled as to how the majority concludes that the same phrase bars courts from looking to whether a plaintiff "could have" sought in-kind relief under the IDEA where, as here, the plaintiffs claim only academic and psychological injuries which, at least as to future academic and psychological injuries, could be eliminated, attenuated, or mitigated by IDEA-provided "related services." Such "related services" are indeed similar to those which plaintiff Windy Payne testified had been effective to return her son to being a "happy boy." *See infra* at 9781-82 for further discussion.

educational issues, furthers development of a factual record and promotes judicial efficiency by giving state and local agencies the first opportunity to correct shortcomings." *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1167 (9th Cir. 2007). In addition, because due process complaints under the IDEA must be heard and decided within 45 days, 34 C.F.R. § 300.515(a), the IDEA's expedited timetable encourages quick and efficient resolution of disputes. Yet the majority's curtailment of the exhaustion requirement promotes none of these goals. On the contrary, the weakened exhaustion requirement will bode to flood federal courts with IDEA cases, before a local agency has had an opportunity to resolve the dispute. Federal judges and juries—not education experts—will be asked to serve as "ersatz school administrators," Maj. Op. at 9752, and make determinations about what money damage awards are necessary to prevent or alleviate academic, psychological, or emotional harm. And disabled children whose academic and psychological injuries might have been quickly cured or mitigated by in-kind services supplied by a school district under the IDEA may have to wait until the resolution of a potentially lengthy civil lawsuit to receive a monetary balm.

II.

Recognizing, perhaps, that its reading § 1415(l) could financially burden school districts by requiring them to reimburse plaintiffs for palliative services the school districts could have cost-effectively provided in-kind, the majority rewrites § 1415(l)—an exhaustion statute—as a mitigation statute. The majority concludes that after a court determines exhaustion was not required, a defendant subsequently should "be

permitted to provide evidence showing that the relief being sought by that plaintiff was, in fact, available under the IDEA" and "withhold [remedies] that are unexhausted and available under the IDEA."[9] Maj. Op. at 9764. I am puzzled as to how the majority can so interpret § 1415(l). Section 1415(l) is not a "collateral source" doctrine which would permit defendant school districts to submit evidence proving a plaintiff's monetary damages would have been reduced had plaintiffs availed themselves of remedies also available under the IDEA. It is thus distinguishable from, for example, the collateral source provision of California's Medical Injury Compensation Reform Act (MICRA), Cal. Civ. Code § 3333.1. MICRA permits health care providers who are sued for personal injuries allegedly caused by medical malpractice to mitigate damages by "introduc[ing] evidence of any amount payable to the plaintiff as a result of the personal injury" from outside sources, including the Social Security Act, worker's compensation schemes, and private insurance plans. Cal. Civ. Code § 3333.1(a). In contrast, § 1415(l) does not provide for the introduction of mitigating evidence at a hearing to assess damages. To the contrary, § 1415(l) very clearly states:

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[9] Judge Callahan makes a nearly identical point in her concurrence, concluding that "the dismissal of an ambiguous complaint or cause of action for failure to exhaust . . . may be complemented by allowing a defendant school district to assert, even at trial, that an aspect of plaintiff's claim of damages would have been addressed in the administrative proceedings. Then, to the extent that the defendant meets its burden of demonstrating that the administrative processes would have addressed an aspect of the alleged damages, plaintiff would be denied any recovery for that aspect because that portion of his claim is unexhausted." Callahan Concurrence at 9767.

> "*before the filing of a civil action* under such laws seeking relief that is also available under [the IDEA]," the [administrative] procedures . . . *shall be exhausted* to the same extent as would be required had the action been brought under [the IDEA]."

20 U.S.C. § 1415(l) (emphasis added).

The majority's attempt to turn § 1415(l) into a mitigation statute is thus belied by the plain text of the law. If the defendant is permitted *at trial* to "provide evidence showing that the relief being sought by that plaintiff was, in fact, available under the IDEA," Maj. Op. at 9764-64, then such evidence was "also available" before the action was filed. After all, evidence that the school district could have provided palliative academic or psychological services under the IDEA is relevant—for mitigation purposes—only if those services could have reduced plaintiffs' damages. To reduce plaintiffs' damages, such services must have been "also available" to the plaintiff. And *if* relief is "also available" to a plaintiff under the IDEA, § 1415(l) requires a plaintiff to *exhaust* his remedies under the IDEA *"before the filing of a civil action."* 20 U.S.C. § 1415(l) (emphasis added). There is not a word in § 1415(l) about mitigation, nor anything which permits a school district to introduce evidence that relief was "also available" under the IDEA at trial for the purpose of reducing a monetary award to plaintiffs at trial.

Indeed, contrary to the majority's conclusions, Section 1415(l) creates a system quite different from a common-law system of mitigation. Were common-law mitigation to apply, the trier-of fact would determine

what palliative academic or psychological expenses—if any—could have been avoided by using the school district's "also available" services, and reduce damages accordingly. But § 1415(l) does *not* leave that determination to the trier-of-fact at trial. Instead, § 1415(l) requires those "also available" services to have been solicited, attempted, and used *before* any reimbursement is sought. The purpose of § 1415(l) is to have the "also available" public services *actually* used, outside the courtroom, to produce their practical effect on the disabled child. Section 1415(l) does *not* provide for the monetary value of unused services to be determined as a hypothetical, debated in the courtroom.

Thus, contrary to the majority's conclusion, § 1415(l) does not require a defendant school district to introduce evidence of how the in-kind services plaintiffs chose not to pursue *could* have mitigated a plaintiff's injuries. Instead, in enacting § 1415(l), Congress was exceedingly clear: plaintiffs must *actually* exhaust IDEA remedies *before* bringing a suit for which relief is "also available" under the IDEA.

III.

In light of its newly-articulated, restricted exhaustion requirement, the majority remands this case for the district court to determine which "constitutional" claims in the Paynes' complaint need not be exhausted. But the majority's narrow focus on the Paynes' complaint overlooks the fact that this case is an appeal from a grant of summary judgment, and that *all* of the facts presented to the district court indicated the Paynes *were* seeking at least some relief that was "also available" under the IDEA—even under

the majority's narrow reading of the phrase. Because the school district presented evidence (mainly in the form of plaintiff adverse-party Windy Payne's deposition) that the Paynes sought relief that was "also available" under the IDEA—and because the Paynes presented no evidence to the contrary—the school district was entitled to summary judgment as a matter of law. *See Celotex*, 477 U.S. at 324 (on a motion for summary judgment, nonmoving party must "designate specific facts showing that there is a genuine issue for trial" (quoting Fed. R. Civ. P. 56(e)).

In its motion for summary judgment, the school district properly raised an affirmative defense which contended the Paynes' lawsuit should be dismissed because the Paynes sought relief that was "also available" under the IDEA and had not exhausted their administrative remedies.[10] In support of its motion for summary judgment, the school district produced a July 21, 2006 deposition of D.P.'s mother, Windy Payne, in which she testified the Paynes were seeking monetary relief for D.P. not for the retrospective *temporary* emotional trauma D.P. experienced while in the isolation room, but for 1) the

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[10] The school district's motion for summary judgment conceded that had the Paynes sought *retrospective* relief for the school district's alleged Constitutional violations, the Paynes' failure to exhaust "would not be fatal" under *Witte v. Clark County School District*, 197 F.3d 1271, 1276 (9th Cir. 1999). For example, had the Paynes sought monetary damages to recompense D.P. for the past and temporary emotional trauma he experienced *while* locked inside the safe room, exhaustion would not have been required, because the academic and psychological in-kind services provided for by the IDEA cannot remedy such past injuries, any more than they could remedy the pain and suffering from the hypothetical now-cured sprained ankle earlier mentioned.

expenses of private doctors and therapists who had treated D.P. to right the wrongs done him by use of the isolation room, and 2) for treatment and cure of past and ongoing academic, psychological, and emotional difficulties caused by use of the isolation room. Windy Payne testified that she sought damages for the "lack of [D.P.'s] education," the "emotional trauma that [D.P.] and I have suffered, and the impact that it has had on our lives and *continues to have*." (emphasis added). She stated that the damages sought were for everything D.P.'s parents had done—including provision of private doctors and therapists to make him a "happy boy again." Part of the measure for those damages, according to Windy Payne, was the out-of-pocket expenses the Paynes had paid "for lots of doctors and lots of therapy."

In other words, Windy Payne's deposition established that the Paynes sought money damages for the past and ongoing academic and psychological *aftereffects* of the school district's use of the isolation room. Windy Payne testified the Paynes sought damages: 1) to compensate D.P. and his parents for the emotional trauma that required the Paynes to seek professional psychological services (the private doctors and therapists) and, 2) to provide treatment and services for D.P.'s *ongoing* academic, emotional, and psychological injuries, and the parents' continued emotional trauma which derived from those injuries. Relief from the academic and psychological aftereffects of the school district's use of the isolation room was "also available" under the IDEA. The school district could have provided—under the "related services" provision of the IDEA, 20 U.S.C. § 1401(26)—the *past* psychological counseling the Paynes purchased for D.P. on the private market. And the school district can

now provide *ongoing* academic and psychological services to alleviate the damage done to D.P. in the isolation room. Thus, unlike the plaintiffs in *Witte*, 197 F.3d at 1276, Windy Payne's testimony establishes that the Paynes were *not* seeking only *retrospective* damages for injuries that the IDEA could not palliate. Windy Payne did not, for example, testify that she sought monetary compensation for the fright D.P. felt *while* locked in the isolation room—a completed retrospective injury no in-kind academic or psychological services could have remedied. Nor did Windy Payne testify that she sought compensation for some physical injuries which resulted from the school district's use of the isolation room. Instead, Windy Payne's testimony establishes the Paynes sought monetary compensation for the academic and psychological aftereffects of the school district's use of the isolation room—which aftereffects could have been remediated or palliated by the in-kind services specified in the IDEA.

Moreover, the Paynes' complaint *itself* supports the school district's contention—and the district court's determination on summary judgment—that the Paynes sought *only* relief which had been and is "also available" in-kind, under the IDEA.[11] The Paynes'

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[11] In its motion for summary judgment, the school district did not quote the portions of the Paynes' complaint which dealt with D.P.'s injuries or which put forward a prayer for relief. However, the district court explicitly considered the language of the complaint in its order granting the school district's motion for summary judgment. The district court was within its discretion to do so: Federal Rule of Civil Procedure 56(c)(1)(3) provides that in considering a motion for summary judgment, a district court "need consider only the cited materials, but it may consider other

complaint specifically alleged the following injuries were sustained by their son as a result of his mistreatment: "significant regression in communicative and sensory functions," diminished "*academic* prowess and abilities," and "*continue[d]* . . . signs of emotional trauma." (emphasis added). The complaint further sought "general damages for extreme mental suffering and emotional distress and special damages in an amount to be proven at trial." There was nothing in the complaint to indicate the Paynes sought damages for anything other than the past and ongoing academic and psychological aftereffects of D.P.'s time in the isolation room, and the derivative trauma his parents experienced as a result.[12]

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materials in the record." The Paynes' complaint was admissible in evidence as the admission of a party litigant. Fed. R. Evid. 801(d)(2). Its allegations of fact supported the school district's motion for summary judgment, because the Paynes' complaint supported the school district's contention that the Paynes sought only relief which was also available under the IDEA.

[12] Moreover, even *had* the allegations in the complaint stated that the Paynes sought relief for something other than the academic and psychological aftereffects of D.P.'s time in the isolation room, those allegations would be trumped by Windy Payne's deposition testimony to the contrary. On a motion for summary judgment, depositions of a party trump the allegations of his or her complaint. *See* Fed. R. Civ. P. 56(c)(1)(A); *Taylor v. List,* 800 F.3d 1040, 1045 (9th Cir. 1989) (nonmoving party cannot avoid summary judgment by relying solely on allegations that are unsupported by factual data); *Dismore v. Aetna Casualty & Surety Co.*, 338 F.2d 568, 571 (7th Cir. 1964) ("allegations of the complaint are not controlling where controverted by depositions"). Thus, on motion for summary judgment, the unverified complaint can provide only factual evidence—admissions—*against* plaintiffs; never *for* plaintiffs.

In opposition to the school district's motion for summary judgment—and the evidence adduced by the school district in its moving papers—the Paynes produced no declarations, affidavits, depositions, or other discovery material to attempt to prove they sought relief for anything other than the past and ongoing aftereffects of D.P.'s academic, emotional, and psychological injuries arising from the claimed education-related mistreatment. Indeed, the Paynes did not even *contend* they sought damages for injuries that could not be redressed in kind under the IDEA. Instead, the Paynes relied solely on a since-overruled Third Circuit case which held that an IDEA claim need not be exhausted if it seeks monetary damages,[13] *see W.B. v. Matula*, 67 F.3d 484, 496 (3d Cir. 1995)—a theory this court has squarely rejected, and continues (at least in form) to reject. *Robb*, 308 F.3d 1047 at 1050; *see* Maj. Op. at 9754-55.

In addition, the Paynes contended IDEA exhaustion would be futile, because they were not seeking any changes to D.P.'s IEP, and because they did not raise any claim which sounded specifically in the IDEA. But the Paynes had the burden of proof to prove the futility or inadequacy of IDEA procedures, *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997), and the Paynes presented no evidence to prove it would have been futile for them to pursue the academic and counseling services the school district was required to

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[13] The majority correctly notes that the Third Circuit case on which the Paynes relied has been overruled by *A.W. v. Jersey City Public Schools*, 486 F.3d 791 (3d Cir. 2007), and that every other circuit to address the issue has held that limiting requested relief to damages alone is not enough to avoid the exhaustion requirement of the IDEA. *See* Maj. Op. at 9748 n. 3.

provide, or that such services would have been useless to D.P. Indeed, Windy Payne's own deposition testimony—in which she stated that the family had taken D.P. to therapists to alleviate his psychological injuries—suggests that D.P.'s injuries *were* at least partially remedied by in-kind counseling services; counseling services which, for aught that appears, the district was perfectly capable of providing through IDEA, had the Paynes pursued the administrative remedies provided under Sec. 1415(f) and (g).

Thus, all of the evidence before the district court on the motion for summary judgment showed that relief for what the record evidence proved were D.P.'s injuries was "also available" in kind under the IDEA, and there was no proof—none at all—that seeking relief through the administrative process would have been futile. The school district could have remedied or mitigated D.P.'s injuries through tutoring, counseling, or other educational or psychological remedies, much as Windy Payne testified her doctors and therapists did in returning D.P. to being "a happy boy again." And if D.P.'s underlying *injuries*—at least some of them—could have been remedied or mitigated through the IDEA's administrative process's provision of services, so too could the pain and suffering arising from those injuries for which his parents now seek recompense.[14]

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[14] The majority opaquely suggests that exhaustion in this case would be required if the Paynes' "emotional distress stem[med] from Payne's concern that D.P. was not receiving an adequate education." Maj. Op. at 9766. However, the majority further holds that exhaustion is *not* required if the Paynes' "emotional distress" stemmed from "injuries resulting from Fourth or Eighth Amendment violations committed by school officials." *Id*. Here,

IV.

Before bringing this suit in federal court—and sparking this protracted litigation which has now dragged on for six years —the Paynes should first have exhausted their administrative remedies and sought relief that was "also available" under the IDEA, as required by the plain text of § 1415(l). Indeed, even under the majority's narrow reading of § 1415(l), the evidence submitted by the parties supported the district court's grant of summary judgment to the school district. The majority holds that "[i]f the measure of a plaintiff's damages is the cost of counseling, tutoring, or private schooling — relief available under the IDEA — then the IDEA requires exhaustion." Maj. Op. at 9754. Here, Windy Payne has explicitly stated in her deposition that she sought reimbursement for the cost of the counseling and psychological services needed to make D.P. a "happy boy again." The Paynes submitted no evidence to suggest this was not *a* measure of the damages they sought. Thus, even under the majority's newly-

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the *only* injuries alleged with reference to *facts*—which factual allegations are proof against the plaintiff per Federal Rule of Evidence 801(d)(2)—by D.P. resulting from Fourth or Eighth Amendment violations *were* academic and psychological injuries, which could have been redressed under the IDEA. The difficulty—if not impossibility—of distinguishing between "concern that a child was not receiving an adequate education" on the one hand, and concern over academic "injuries resulting from Fourth or Eighth Amendment violations" on the other, is a further reason I favor our previous exhaustion approach to the one articulated by the majority. The concrete claims of injury carry greater weight, in making decisions, than do abstract claims of constitutional violations.

articulated exhaustion requirement, the district court's grant of summary judgment should be affirmed.[15]

Therefore, I would affirm the district court's grant of summary judgment to the school district in its entirety.

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[15] Under § 1415(l), the district court could not simply hold that *some* measures of damages must be exhausted and some measures need not be, such that any final award of damages would be reduced by the unexhausted amount. Section 1415(l) specifically provides that IDEA exhaustion is required "*before the filing of a civil action*." Thus, § 1415(l) serves as an absolute bar to lawsuits which seek *any* relief that is "also available" under the IDEA. Section 1415(l) is not a cap on damages, and does not, by its terms, permit a court selectively to exclude recovery for any injury or harm that would have been covered by the administrative proceedings under the IDEA. If there are *any* claims for relief made as to which no triable issue of fact exists but that the relief is "also available" under the IDEA, the complaint must be dismissed as having been prematurely filed before the required administrative exhaustion.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35115
D.C. No. CV-05-05780-RBL

[Filed September 7, 2010]

WINDY PAYNE, individually and as guardian on behalf of; D.P., a minor child,	)
Plaintiffs - Appellants,	)
v.	)
PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL, a municipal corporation; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; JANE DOES 1-10; JOHN DOES 1-10,	)
Defendants - Appellees.	)

ORDER

KOZINSKI, Chief Judge:

Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35115
D.C. No. CV-05-05780-RBL

[Filed March 18, 2010]

WINDY PAYNE, individually and as guardian on behalf of; D.P., a minor child, *Plaintiffs-Appellants,*	)
v.	)
PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL, a municipal corporation; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; JANE DOES 1-10; JOHN DOES 1-10, *Defendants-Appellees.*	)

Appeal from the United States District Court
for the Western District of Washington
Ronald B. Leighton, District Judge, Presiding

Argued and Submitted
August 8, 2008—Seattle, Washington

Filed March 18, 2010

Before: Harry Pregerson, Cynthia Holcomb Hall and John T. Noonan, Circuit Judges.

Opinion by Judge Hall;
Dissent by Judge Noonan

COUNSEL

Thomas B. Vertetis, Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, Tacoma, Washington, for the appellant.

Michael A. Patterson and Donald F. Austin, Patterson Buchanan Fobes Leitch & Kalzer P.S., Seattle, Washington, for the appellees.

OPINION

HALL, Senior Circuit Judge:

Windy Payne ("Payne"), the mother of D.P., an autistic student, appeals from the district court's dismissal without prejudice of the suit she brought on D.P.'s behalf for negligence, outrage, and § 1983

violations.[1] Her claims were predicated on D.P.'s constitutional rights and statutory rights under the Individuals with Disabilities Education Act ("IDEA"). The district court found that it lacked subject matter jurisdiction over Payne's federal claims because Payne failed to exhaust her administrative remedies before coming into federal court.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291 and agree.

I.

Because this appeal arises from a grant of summary judgment, we present the facts in the light most favorable to Payne. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 922 (9th Cir. 2004).

D.P. suffers from moderate autism, which has delayed his academic progress and caused his

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[1] Payne also asserted her own emotional distress claim under a negligence cause of action. Because this cause of action arises under state law, however, the district court's jurisdiction over it was only supplemental, and that court could properly decline to exercise jurisdiction on an independent basis after the federal claims had been dismissed.

[2] The treatment of this issue as jurisdictional was consistent with this circuit's precedent at the time of the district court's opinion. *See Robb v.*Bethel School District, 308 F.3d 1047 (9th Cir. 2002) It is unclear whether the failure to exhaust is still a jurisdictional matter after the Supreme Court's decision in *Jones v. Bock*. *See* 549 U.S. 199, 216 (2007) (finding failure to exhaust to be an affirmative defense under the Prison Litigation Reform Act ("PLRA")); *Robb*, 308 F.3d at 1051 (describing the PLRA's exhaustion requirement as similar to the IDEA's). However, the parties have not raised this issue and we decline to reach it, though we note that Appellees did include the failure to exhaust as an affirmative defense in their answer to Payne's complaint.

resistance to work, his difficulties staying on task, and his impulsive, "inappropriate or aggressive" responses to his environment. In September 2003, as is required under the IDEA, *see* 20 U.S.C. § 1414 (2006), an Individualized Education Plan ("IEP") was developed for D.P. to address these limitations and provide appropriate education. That plan placed him in a transition classroom at Artondale Elementary School, set out instructional goals, and, most relevant to this case, sought to address his behavioral issues through various intervention methods, including the use of time-out in a "safe room."

This case concerns that safe room, a roughly 5 x 6 room located within the special education classroom. It is the teacher's use of that room with D.P., rather than the room itself, that is at issue here. The parties dispute the details as to what Payne consented to (i.e. a locked, closed door, with no adult inside), the duration of D.P.'s periods of confinement, and whether the window was covered. However, they agree that D.P. was locked in the room on multiple occasions in response to his classroom behavior. On several occasions, he removed his clothes in there, and urinated and defecated on himself. He helped his teacher, Jodi Coy, clean up his excrement. He began to exhibit anxious behaviors and experience emotional and scholastic setbacks

Payne was wary of the safe room's use from the beginning. The Paynes consulted with Coy and other District administrators regarding its use during the IEP's development and after the defecating incident, expressing concerns over having D.P. in there with a closed door and no adult inside. Coy defended her use of the safe room as an appropriate response to D.P.'s

attempts to gain attention through his misbehavior. The Paynes continued to have disagreements with Coy and administrators regarding access to the classroom and D.P.'s outside tutoring, which led them to request repeatedly that D.P. be moved from Coy's classroom. When those requests were denied, the Paynes requested mediation. Though that mediation resulted in an agreement that D.P. would be transferred to another school in the district, the record suggests that the Paynes did not attempt to address D.P.'s emotional problems there and that they were later unhappy with the District's provision of the services to which it had agreed. Despite the mediation agreement's failure to resolve all of Payne's issues with the District's provision of services, Payne never sought an impartial due process hearing. D.P. is currently being home-schooled.

In December 2005, Payne filed a complaint in the district court. Payne claims the teacher's use of the room caused her son's "significant regression in communicative and sensory functions," the diminishment of his "academic prowess and abilities," and the continuing "signs of emotional trauma." She sought general damages for "extreme mental suffering and emotional distress and special damages," as well as punitive damages for the violation of D.P.'s civil rights, and declaratory relief stating that the District's safe room policy was tortious and unconstitutional.

Appellees Peninsula School District, Artondale Elementary School, Coy, and James Coolican (collectively "Appellees") filed a motion for summary judgment. The district court found that it lacked subject matter jurisdiction over Payne's federal claims because Payne failed to exhaust her administrative

remedies before coming into federal court. It then declined to exercise supplemental jurisdiction over her state law claims, finding no independent basis for jurisdiction over them.

II.

We review *de novo* both a district court's decision to grant summary judgment, *Univ. Health Servs., Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004), and its determination of whether it has subject matter jurisdiction, *see Schnabel v. Lui*, 302 F.3d 1023, 1028-29 (9th Cir. 2002).

To ensure "appropriate public education that emphasizes special education and related services designed to meet [the] unique needs" of children with disabilities, the IDEA requires school districts to develop IEPs outlining the educational services to be provided for those children. 20 U.S.C. § 1400(d)(1)(A); *id.* § 1414(d). Those services include "developmental, corrective, and other supportive services" that address a wide range of academic, emotional, and physical issues "as may be required to assist a child with a disability to benefit from special education." *Id.* § 1401(26).

[1] In order to carry out these objectives and permit parental involvement, the IDEA created procedural safeguards. *See Robb v. Bethel School District*, 308 F.3d 1047, 1049 (9th Cir. 2002). If parents are not satisfied with decisions regarding their child's educational program or with the services provided, they are guaranteed an "impartial due process hearing." *Id.* § 1415(f). They must exhaust this procedure prior to filing a civil action. *Id.* § 1415(l).

This exhaustion requirement recognizes the traditionally strong state and local interest in education, allows for the exercise of discretion and educational expertise by state agencies, affords full exploration of technical educational issues, furthers development of the factual record and promotes judicial efficiency by giving state and local agencies the first opportunity to correct shortcomings. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1167 (9th Cir. 2007). Plaintiffs "seeking relief that is also available under" the IDEA must exhaust procedures "to the same extent as would be required had the action been brought under" the IDEA. 20 U.S.C. § 1415(l).

We have two cases controlling our analysis: *Witte v. Clark County School District*, 197 F.3d 1271, 1275 (9th Cir. 1999) (where exhaustion was not required), and *Robb v. Bethel School District*, 308 F.3d 1047, 1049 (9th Cir. 2002) (where it was). In *Witte*, a student with Tourette's Syndrome filed a civil action seeking damages for past physical and emotional abuse after he was allegedly force-fed food to which he was allergic, strangled, subjected to physical "take downs," forced to walk and run despite hindering deformities, and deprived of food. *See* 197 F.3d 1271. In *Robb*, a student with cerebral palsy filed an action seeking damages for emotional trauma and lost educational opportunities after she was removed from the classroom for peer tutoring. *See* 308 F.3d 1047.

[2] The *Witte* court decided exhaustion was not necessary because the parties (1) had resolved all educational issues through the IEP process, (2) sought only retrospective damages, and (3) had claims centering around physical abuse and injuries. *Witte*,

197 F.3d at 1275-76. *Robb* found that exhaustion was required and distinguished itself from *Witte* because its plaintiffs (1) had not taken full advantage of IDEA administrative procedures, (2) requested money damages to compensate for "psychological and educational injuries the IDEA may remedy," and (3) did not claim physical injury. *Robb*, 308 F.3d at 1052. In both cases, the inquiry may be boiled down to one central question: whether the plaintiffs "seek relief for injuries that could be redressed to any degree by the IDEA's administrative procedures." *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1163-64 (9th Cir. 2007). If the answer to that question is either yes or unclear, exhaustion is required. *See id.* at 1168 (citing *Robb*, 308 F.3d at 1050).

Our analysis depends primarily on whether this case is more like *Witte* or *Robb*. Factually, we are somewhere in between. This case does not involve actions equivalent to forcing-feeding, strangulation, "take downs," or food deprivation, actions which were part of no IEP and "served no legitimate educational purpose." *Witte*, 197 F.3d at 1273. However, this case likewise is not so purely educational as *Robb*, where a child was taken out of class and given peer tutoring on a hallway floor instead. *See* 308 F.3d at 1048. Instead, we are in a middle ground involving disciplinary measures employed as a part of a larger educational strategy.

[3] Payne would have us draw a hard line between discipline and education, and place this case on the side of *Witte*, where the child was punished for actions related to his disabilities. That would oversimplify the issue. *Witte* concerned abuses which served "no legitimate educational purpose," and, indeed, it is hard

to fathom the pedagogy behind feeding a child a food to which he was allergic or choking him to make him run faster, to take two examples. *See Witte*, 197 F.3d at 1273. But we have also recognized that "[p]roper conduct and education are inextricably intertwined" in the context of special education. *Doe by Gonzales v. Maher*, 793 F.2d 1470, 1491 (9th Cir. 1986). The two are connected here, where D.P.'s IEP includes aversive and behavioral intervention plans to address his tendency to bite, scratch, yell, and refuse to stay on task, and where Washington law includes isolation rooms among the disciplinary measures schools may employ to enforce their rules. *See* Wash. Admin. Code § 180-40-235; *id.* § 392-172-394. Thus, this case is unlike *Witte*, where "neither the genesis nor the manifestations of the abuse were educational." *Robb*, 308 F.3d at 1052. Instead, like the conduct at issue in *Robb*, the use of the safe room here was "at least . . . an attempt at an educational program." *Id.* at 1052 n.3 (internal quotation marks omitted).

[4] Because we are persuaded that this case is more akin to *Robb*, we believe that exhaustion was required. As in *Robb*, Payne has not taken full advantage of the IDEA administrative procedure because she did not seek an impartial due process hearing, even though the mediation failed to resolve all issues regarding the District's provision of educational services and even though her complaint reflects an ongoing concern with safe rooms as they were used with D.P. *See* 20 U.S.C. § 1415(f), (l). Like the *Robb* plaintiffs, Payne also claims injuries—"significant repression in communicative and sensory functions," diminished "academic prowess and abilities," and continued emotional trauma in D.P.—for which IDEA provides some relief. *See id.* § 1401(26) (outlining academic,

psychological, and therapeutic corrective and supportive services provided). Finally, Payne is also not claiming physical injuries for D.P. within the meaning of *Witte*. *See* 197 F.3d 1271, 1273, 1276 (9th Cir. 1999) (describing forced feeding and walking, strangulation, and "take downs" as physical abuse and injuries).

Payne's arguments to the contrary are unavailing. Even though monetary damages are not ordinarily available under the IDEA, *see id.* at 1275, she may not avoid the exhaustion requirements by requesting only monetary damages, *see Robb*, 308 F.3d at 1049. Neither may she avoid those requirements by attempting on appeal to recast her damages as retrospective only when her complaint clearly alleges ongoing injuries. *See id.* at 1053 n.4 (declining to permit the plaintiffs to reframe their claims as retrospective only on appeal when they had not attempted to limit their damage claim in the district court).

[5] Finally, the fact that D.P. is currently home-schooled does not automatically make any administrative remedies futile. *See N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996) (holding that parents' removal of a child from the school district does not excuse the failure to exhaust administrative remedies), *cited with approval in Robb*, 308 F.3d at 1049. The fact that services may not be the remedy Payne *wants* does not decide the question. *See Robb*, 308 F.3d at 1049 ("We understand 'available' relief to mean relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the precise form the plaintiff prefers."). Instead, she must prove futility. *Id.* at 1050 n.2. Her conclusory

statements that D.P. would not benefit from services do not meet that burden.

[6] Simply put, Payne is contesting one part of the comprehensive educational strategy used to address D.P.'s unique situation. The safe room was included in his IEP, is a recognized educational tool under Washington statutes, *see, e.g.*, Wash. Admin. Code § 392-172-394, and its use allegedly led to injuries that the services provided under the IDEA are meant to address. This is not to say we condemn or endorse the manner in which the safe room was used here. Rather we believe that, as an educational strategy (even if a misguided or misapplied one), it was better addressed initially by the administrative process. Therefore, we uphold the district court's dismissal of the claims made on D.P.'s behalf.

For these reasons, the district court's decision is **AFFIRMED**.

NOONAN, Circuit Judge, dissenting:

My colleagues, struggling to find a way between *Robb* and *Witte* find at least "an attempt at an educational program" in a teacher repeatedly locking D.P., a seven-year old autistic child, into an unventilated, dark space the size of a closet for indeterminate amounts of time, causing D.P. to become so fearful that he routinely urinated and defecated on himself. I disagree with the majority's characterization of Coy's conduct as part of an "educational strategy," the resolution of which would require exhaustion under the IDEA. I respectfully dissent.

Viewing the facts as we must, in the light most favorable to the Paynes, it is clear that Ms. Coy's misuse of the isolation room serves no legitimate educational purpose, is prohibited by state administrative regulations, and was imposed as punishment. The facts in this case are closer to those in *Witte v. Clark County School District*, 197 F.3d 1271 (9th Cir. 1999) than in *Robb v. Bethel School District*, 308 F.3d 1047 (9th Cir. 2002). As in *Witte*, D.P. was subjected to mistreatment that was part of no IEP and "served no legitimate educational purpose." 197 F.3d at 1273. While D.P.'s proposed "behavior intervention plan" included "containment in [a] safe room," it did not authorize the misuse at issue here.

The Washington Administrative Code requires extensive procedural and substantive safeguards for the use of an isolation room as an aversive intervention. *See* Wash. Admin. Code 392-172A-03130(2). Among the requirements are that the student's IEP must provide for the isolation and "duration of its use," and the enclosure must be "ventilated," "lighted," and "permit continuous visual monitoring of the student from outside the enclosure." *Id*. The regulations also require that "either the student shall be capable of releasing himself or herself from the enclosure or the student shall continuously remain within view of an adult responsible for supervising the student." *Id.* The regulations prohibit isolation without the requisite safeguards, listing such isolation along with other interventions that are "manifestly inappropriate by reason of their offensive nature or their potential negative physical consequences, or their legality." *Id.* at 392-172A-03125. These practices include: stimulating a student with electric current; throwing, kicking, burning, or cutting

a student; striking a student with a closed fist; threatening a student with a deadly weapon; denying or delaying medication or common hygiene care; and submerging a student's head in water. *See id.* If a student were subject to any of these prohibited practices, one presumes that full exhaustion of the IDEA administrative processes would not be required.

If we see the facts in the light most favorable to the Paynes, Ms. Coy mistreated D.P. by using the isolation room in a manner explicitly prohibited by the state regulations: covering up the window, locking the door, forcing D.P. to stay locked inside for prolonged and indeterminate periods of time, and failing to place a teacher or aide in the room or at least outside the room with the door open. The alleged conduct *goes far beyond that in Robb*, in which a student was removed from her class for peer tutoring that occurred on the floor of a dim hallway with no chair or desk for her to use. 308 F.3d at 1048. Here was neither education nor attempt at education. Here was a return to the bleak black days of Dickensian England. *See C. Dickens, Oliver Twist*, chapters 2 and 3.

Accordingly, I would hold under *Witte* that, exhaustion under the IDEA is not required.

APPENDIX D

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

Case No. COS-5780 RBL

[Filed January 12, 2007]

WINDY PAYNE, individually and as Guardian on behalf of DYLAN PAYNE, a minor child,	)
Plaintiffs,	)
v.	)
PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL, a municipal corporation; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; and JANE and JOHN DOES 1-10,	)
Defendants.	)

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on Defendants Peninsula School District, Jodi Coy, and James Coolican's motion for summary judgment. [Dkt. #20]. Defendants seek a ruling as a matter of law that: 1) Plaintiffs failed to exhaust their administrative remedies under the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.;* 2) the Eighth Amendment is inapplicable to punishments in school settings; 3) plaintiffs' Fourteenth Amendment claim is more properly viewed as a Fourth Amendment claim; and 4) there is insufficient evidence that James Coolican, Peninsula School District's Superintendent, violated plaintiffs' constitutional rights. Because the failure to exhaust administrative remedies deprives the Court of subject matter jurisdiction, the case must be dismissed without prejudice.

II. BACKGROUND

The following facts are set forth in a light most favorable to plaintiffs:

Dylan Payne is a seven-year old developmentally disabled child who attended Artondale Elementary during the 2003-2004 school year. Peninsula School District placed Dylan in the Transition Program, a class designed to educate children with low cognitive skills and behavioral difficulties. Peninsula School District hired Jodi Coy to teach the Transition Program even though she possessed no teaching experience or valid teaching certificate with special education endorsement.

Included within Ms. Coy's classroom is a "safe room," a 63-inch by 68-inch area enclosed by carpeted walls extending eight feet high. The Paynes authorized Ms. Coy to place Dylan in the safe room, but only as a time-out space, not a place for punishment. The Paynes did not authorize the safe room door to be shut while Dylan was inside.

Ms. Coy began locking Dylan inside the safe room. Dylan became fearful and routinely urinated and defecated upon himself. Dylan experienced emotional and scholastic setbacks due to his experiences in the safe room. He verbally protested going to school, he suffered nightmares, and began to wet his bed and chew holes through his clothes.

During the fall of 2003, Mrs. Payne sat in on Dylan's classes to ensure his safety and attempt to have Ms. Coy understand Dylan's behavior and ways of communication. Peninsula School District reacted negatively to Mrs. Payne's involvement. Dylan was routinely not allowed to participate in activities outside the classroom with his peers. Ms. Coy also made it more difficult for Mrs. Payne to observe Dylan's classroom. Finally, the Peninsula School District arranged to terminate Phil Blackledge, Dylan's after-school tutor, after he provided opinions regarding the appropriateness of Dylan's curriculum and activities.

In January 2004, the Paynes complained about Ms. Coy's actions to Peninsula School District's administration. While the Paynes went through mediation with Peninsula School District to resolve issues with Dylan's behavioral problems and the school's response, they never went through an

impartial due process hearing. The Paynes filed their complaint in District Court on December 2, 2005.

III. STANDARD OF REVIEW

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. SquareD Co.,* 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy,* 68 F.3d at 1220.

IV. DISCUSSION

A. The IDEA Background

The IDEA is a comprehensive educational scheme enacted to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and

related services designed to meet their unique needs." *See Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992); 20 U.S.C. § 1400(d)(l)(A). Under the IDEA, state or local educational agencies can receive federal funding to assist them in educating disabled children. To receive this funding, state and local educational agencies must ensure that children with disabilities - and their parents - are guaranteed specified procedural safeguards with regard to the provision of free appropriate public education by the agencies. 20 U.S.C. § 1415(a).

These safeguards include the right to have complaints resolved at a full adversary hearing before an impartial hearing officer, under the auspices of the relevant state or local educational agency, in connection with the "identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(1). The IDEA permits aggrieved parties who are dissatisfied with the outcome of the administrative process to "bring a civil action with respect to the complaint presented [to the agency], either in state court or in federal district court." 20 U.S.C. § 1415(i((2)(A).

Although the IDEA does not "restrict or limit the rights, procedures, and remedies available under the Constitution ... [or] title V of the Rehabilitation Act of 1973 ... or other Federal laws protecting the rights of children with disabilities," exhaustion of administrative remedies under the IDEA is required "before the filing of a civil action under such laws seeking relief that is also available under" the IDEA. *See* 20 U.S.C. § 1415(1),

The purpose of the exhaustion requirement under the IDEA is to permit educational agencies to have "primary responsibility for the educational programs that Congress has charged them to administer," to ensure that federal courts "are given the benefit of expert fact-finding by a state agency devoted to this very purpose," and to promote "judicial efficiency by giving those agencies the first opportunity to correct shortcomings in their educations programs for disabled students." *See Robb v. Bethel Sch. Dist.,* 308 F.3d 1047, 1051 (9th Cir. 2002). If a plaintiff fails to exhaust administrative remedies under the IDEA, federal courts are without jurisdiction to hear the plaintiff's claim. *See Witte v. Clark County Sch. Dist.,* 197 F.3d 1271, 1274 (9th Cir. 1999).

B. Exhaustion

Defendants argue plaintiffs' claims should be dismissed because they failed to exhaust their administrative remedies under IDEA. [Dkt. #20 at 5]. Plaintiffs respond that they are not required to exhaust their administrative remedies because the monetary damages and injunctive relief they seek are not available under the IDEA. [Dkt. #29 at 10].

A plaintiff cannot avoid the IDEA's exhaustion requirement simply by limiting a prayer for relief to money or services that are not provided under the IDEA. *See Robb,* 308 F.3d at 1049. The dispositive question therefore is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. *See id.* at 1050. "If so, exhaustion of those remedies is required." *Id.* "If not, the claim necessarily falls outside the IDEA's scope, and exhaustion is

unnecessary." *Id.* "Where the IDEA's ability to remedy a particular injury is unclear, exhaustion should be required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem." *Id.* Exhaustion of administrative remedies under IDEA is not required "where resort to the administrative process would be either futile or inadequate." *See Hoeft,* 967 F.2d at 1303.

Here, plaintiffs seek monetary damages and injunctive relief. They also seek "general damages for extreme mental suffering and emotional distress" and claim defendants' actions caused Dylan's academic prowess and abilities to be diminished. [Dkt. #1 at 6, 9]. The Ninth Circuit has expressly rejected the contention that a claim for damages for "emotional distress, humiliation, embarrassment, and psychological injury" is not subject to the IDEA's exhaustion requirement. *See Robb,* 308 F.3d at 1050. "The IDEA requires a school district to provide not only education but also 'related services,' including ... 'psychological counseling for children and parents.'" *See id.* (quoting 20 U.S.C. § 1041(22) and 34 C.F.R. § 300.24(b)(9)(v)). "This battery of educational, psychological, and counseling services could go a long way to correct past wrongdoing by helping [a plaintiff] to heal psychologically and to catch up with [his] peers academically." *Id.* "It would be inappropriate for a federal court to short-circuit the local school district's administrative process based on the possibility that some residue of the harm [plaintiff] allegedly suffered may not be fully remedied by the services Congress specified in the IDEA." *Id.*

Plaintiffs argue that *Witte v. Clark County Sch. Dist.* excuses the need to exhaust administrative

remedies. This Court disagrees. In *Witte,* a plaintiff seeking monetary relief for alleged past physical and emotional abuse by school staff was not required to exhaust administrative remedies under the IDEA because "all educational issues already have been resolved to the parties' mutual satisfaction through the [administrative] process." 197 F.3d at 1275. Here, not only did Mrs. Payne testify that the situation never resolved itself after mediation, but also plaintiffs never went through an impartial due process hearing to resolve their issues.

As defendants correctly point out, the present facts more strongly resemble *Robb v. Bethel School District.* In *Robb,* a student with cerebral palsy and her parents sought damages for lost educational opportunities, emotional distress, humiliation, embarrassment, and psychological injury after the student was removed from the classroom for extending tutoring. 308 F.3d at 1048. The Ninth Circuit stated that *Robb*

> is a good example of why parents should not be permitted to opt out of the IDEA simply by making a demand for money or services the IDEA does not provide .... Why do they want this money? Presumably at least in part to pay for services (such as counseling and tutoring) that will assist their daughter's recovery of self-esteem and promote her progress in school. Damages could be measured by the cost of these services. Yet the school district maybe able (indeed, maybe obliged) to provide these services *in kind* under the IDEA.

Id. at 1050. The Ninth Circuit held that, because plaintiffs' injuries could be remedies to some degree by

the IDEA's administrative procedures and remedies, the plaintiffs must exhaust those administrative remedies before filing suit. *Id.* at 1054.

Given plaintiffs' failure to exhaust their administrative remedies under the IDEA, the Court finds it lacks subject matter jurisdiction over federal claims that should be exhausted under the IDEA and will dismiss said claims without prejudice. As there is no independent basis for jurisdiction over plaintiffs' state law claims, the Court declines to exercise supplemental jurisdiction and will dismiss the state law claims without prejudice as well.

All other pending motions are **DENIED AS MOOT** [Dkt. Nos. 34, 58 and 70].

IT IS SO ORDERED.

DATED this 12th day of January, 2007.

/s/ Ronald B. Leighton
RONALD B. LEIGHTON
UNITED STATES DISTRICT COURT JUDGE

APPENDIX E

P.L. 99–372, HANDICAPPED CHILDREN'S PROTECTION ACT OF 1986
DATES OF CONSIDERATION AND PASSAGE
Senate July 30, 1985; 17, 1986
House November 12, 1985; July 24, 1986
Senate Report (Labor and Human Resources Committee) No. 99–112,
July 25, 1985 [To accompany S. 415]
House Report (Education and Labor Committee) No. 99–296,
Oct. 2, 1985 [To accompany H.R. 1523]
House Conference Report No. 99–687,
July 16, 1986 [To accompany S. 415]
Cong. Record Vol. 131 (1985)
Cong. Record Vol. 132 (1986)
The Senate bill was passed in lieu of the House bill. The Senate Report is set out below and the House Conference Report and the Signing Statement by the President follows.

SENATE REPORT NO. 99–112
July 25, 1985

together with

ADDITIONAL VIEWS

The Committee on Labor and Human Resources, to which was referred the bill (S. 415) to amend the Education of the Handicapped Act to authorize the award of reasonable attorneys' fees to certain

prevailing parties, and to clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws relating to the prohibition of discrimination, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

I. BACKGROUND OF S. 415

In passing the Education of All Handicapped Children Act of 1975 (Public Law 94–142) Congress indicated that 'it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.' In those States which accept funds under Part B of the Education of the Handicapped Act [EHA], as amended by Public Law 94–142, the act established an enforceable right to a free appropriate public education for all handicapped children and established due process procedures, including the right to judicial review, to protect those rights.

Congress' original intent was that due process procedures, including the right to litigation if that became necessary, be available to all parents. On July 5, 1984, the Supreme Court, in *Smith* v. *Robinson*, 468 U.S. 2, 104 S. Ct. 3457[1] (1984), determined that Congress intended that the EHA provide the exclusive source of rights and remedies in special education cases covered by that act. The effect of this decision was to preclude parents from bringing special education cases under section 504 of the Rehabilitation Act of 1973, and recovering attorney's fees available

under section 505 of that act, where relief was available under the EHA.

Specifically, in *Smith* v. *Robinson*, the Court ruled that when a remedy 'provided under section 504 is provided with more clarity and precision under EHA, a plaintiff may not circumvent or enlarge on the remedies available under EHA by resort to section 504.' The Court reasoned that the comprehensiveness and detail with which EHA addresses the provision of special education for handicapped children implies that Congress intended to limit remedies to those explicitly provided for in the EHA.

The situation which has resulted from the *Smith* v. *Robinson* decision was summarized by Justices Brennan, Marshall, and Stevens in their dissenting opinion: 'Congress will now have to take the time to revisit the matter.' Seeking to clarify the intent of Congress with respect to the **educational** rights of **handicapped** children guaranteed by the EHA, the **Handicapped Children's** Protection **Act** of 1985 was introduced on February 6, 1985. The Subcommittee on the **handicapped** held a hearing on May 16, 1985, to receive testimony from parents of **handicapped** children, attorneys who have represented parents of handicapped children in EHA litigation (including the *Smith* v. *Robinson* case), and Edwin Martin, former Assistant Secretary of **Education** for Special **Education** and Rehabilitative Services. Written testimony was also received from the National School Boards Association and various parent, advocacy, and professional education groups. On June 11, 1985, the Subcommittee unanimously reported S. 415 with amendment to the full Committee. On July 10, 1985,

the full Committee unanimouly moved to order the bill, as amended, reported to the Senate.

II. SECTION-BY-SECTION ANALYSIS

S. 415 as reported by the full Committee consists of six sections. Throughout the remainder of this report the word 'school' should be interpreted to include State or local educational agencies or intermediate educational units, as appropriate; the phase 'parent or legal representative' includes a person acting as a parent of a child or a surrogate parent who has been appointed in accordance with section 615(b)(1) of the EHA; and the words 'reasonable attorney's fees' simply mean fees appropriate in the circumstances of each case as determined by court.

Section 1 provides that this Act be cited as the Handicapped Children's Protection Act of 1985.

Section 2 provides for the award of reasonable attorney's fees to prevailing parents in EHA civil actions and in administrative proceedings to parents in certain specified circumstances.

Section 3 provides that the court cases will be heard de novo if attorneys are not used at the due process hearing level.

Section 4 provides that the EHA does not limit the applicability of other laws which protect handicapped children and youth, except that when a parent brings suit under another law when that suit could have been brought under the EHA, the parent will be required to exhaust EHA administrative remedies to the same

degree as would have been required had the suit been brought under the EHA.

Section 5 authorizes parent training centers under section 631 of the EHA to train parents better to understand and participate in due process proceedings and requires the establishment of at least one parent training center in each State.

Section 6 established a general effective date as the date of enactment and also authorizes courts retroactively to award attorney's fees for civil court actions to parents who prevailed in EHA cases pending on or brought after the date of the *Smith* v. *Robinson* decision.

III. BUDGET ESTIMATE

On July 17, 1985, the Congressional Budget Office sent the following letter to the Chairman, which concludes that S. 415, as reported, would result in no increase in Federal costs.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 17, 1985.

Hon. ORRIN G. HATCH,

Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has examined the federal cost impact of S. 415, the **Handicapped Children's** Protection **Act** of 1985, as ordered reported from the Senate

Committee on Labor and Human Resources, July 10, 1985. This bill amends the **Education** of All **Handicapped** Children **Act**, (EAHCA) to allow for the award of reasonable attorneys' fees to certain prevailing parties in law suits and to clarify the effect of the * * *

* * *

APPENDIX F

392-172-350. Right to initiate--Purposes.

(1) Hearings conducted in accordance with WAC 392-172-350 through 392-172-360 may be initiated in the following cases for the purposes stated:

(a) The parent(s) of a student (or an adult student) or a school district or other public agency may initiate a hearing to challenge or to show the appropriateness of a proposal or refusal by the school district or other public agency to initiate or change:

(i) The identification of the student;

(ii) The evaluation of the student;

(iii) The educational placement of the student; or

(iv) The provision of FAPE to the student pursuant to this chapter;

(b) A school district or other public agency may initiate a hearing to show that its evaluation of a student is appropriate if the student's parent(s) or adult student disagrees with the evaluation results and requests an independent educational evaluation, pursuant to WAC 392-172-150.

(2) A request by a student's parent(s) or adult student for a hearing pursuant to this section shall:

(a) Be in writing, specify the district or other public agency and the school the student attends, explain the concerns of the parent(s) or adult student in general or specific terms, and provide other information regarding the request for hearing described in WAC 392-172-351; and

(b) Be mailed or provided directly to the Office of Superintendent of Public Instruction, Office of Legal Services, Old Capitol Building, P.O. Box 47200, Olympia, Washington 98504. A copy of the request for hearing should also be given to the district or other public agency, consistent with WAC 392-172-351.

(3) A request by a school district or other public agency for a hearing pursuant to this section shall:

(a) Be in writing;

(b) Be mailed or provided directly to Office of Superintendent of Public Instruction, Office of Legal Services, Old Capitol Building, P.O. Box 47200, Olympia, Washington 98504. A copy of such request, including attachments shall be mailed to the student's parent(s) or adult student;

(c) Include a copy of the notice to parent(s) or adult student as required by WAC 392-172-302. If the hearing request by the district or other public agency is in response to a request for an independent educational evaluation pursuant to WAC 3 92-172-150, the school district or other public agency shall attach documentation of the parent's request.

(4) A notice of a hearing requested by a student's parent(s) or adult student or initiated by a school

district or other public agency pursuant to this section shall be provided by the hearing officer and shall include, but not necessarily be limited to:

(a) The date, time, and place of the hearing;

(b) The issues to be addressed at the hearing to the extent the issues have been identified at the time of the notice;

(c) The rights, procedures, and other matters set forth in WAC 392-172-352 through 392-172- 364; and

(d) The right of the parent(s) or adult student to seek an independent evaluation at public expense pursuant to WAC 392-172-150.

(5) The forty-five day time line for completing the hearing process shall begin on the day the superintendent receives the written request for a due process hearing.

(6) When a hearing is initiated under this section, the office of superintendent of public instruction shall inform the parents of the availability of mediation described in WAC 392-172- 310 et seq.

392-172-394. Aversive interventions--Other forms--Conditions.

Use of various forms of aversive interventions which are not prohibited by WAC 392-172-392 warrant close scrutiny. Accordingly, the use of aversive interventions involving bodily contact, isolation, or physical restraint not prohibited by WAC 392-172-392 is conditioned

upon compliance with certain procedural and substantive safeguards, as follows:

(1) Bodily contact. The use of any form of aversive interventions not prohibited by WAC 392-172-392 which involves contacting the body of a special education student shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172-396.

(2) Isolation. The use of aversive interventions which involves excluding a special education student from his or her general instructional area and isolation of the student within a room or any other form of enclosure is subject to each of the following conditions:

(a) The isolation, including the duration of its use, shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172-396.

(b) The enclosure shall be ventilated, lighted, and temperature controlled from inside or outside for purposes of human occupancy.

(c) The enclosure shall permit continuous visual monitoring of the student from outside the enclosure.

(d) An adult responsible for supervising the student shall remain in visual or auditory range of the student.

(e) Either the student shall be capable of releasing himself or herself from the enclosure or the student

shall continuously remain within view of an adult responsible for supervising the student.

(3) Physical restraint. The use of aversive interventions which involves physically restraining or immobilizing a special education student by binding or otherwise attaching the student's limbs together or by binding or otherwise attaching any part of the student's body to an object is subject to each of the following conditions:

(a) The restraint shall only be used when and to the extent it is reasonably necessary to protect the student, other persons, or property from serious harm.

(b) The restraint, including the duration of its use, shall be provided for by the terms of the student's individualized education program established in accordance with the requirements of WAC 392-172-396.

(c) The restraint shall not interfere with the student's breathing.

(d) An adult responsible for supervising the student shall remain in visual or auditory range of the student.

(e) Either the student shall be capable of releasing himself or herself from the restraint or the student shall continuously remain within view of an adult responsible for supervising the student.

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

No. C05 5780 JKA

[Filed December 2, 2005]

WINDY PAYNE, individually, and as Guardian on Behalf of DYLAN PAYNE, a minor child,	)
Plaintiffs,	)
PENINSULA SCHOOL DISTRICT, a municipal corporation; ARTONDALE ELEMENTARY SCHOOL, a municipal corporation; JODI COY, in her individual and official capacity; JAMES COOLICAN, in his individual and official capacity; and JANE and JOHN DOES 1 - 10,	)
Defendants.	)

COMPLAINT

I. INTRODUCTION

1.1. This claim arises out of the unconscionable treatment that was suffered by Dylan Payne, a minor child who was diagnosed with oral motor apraxia and

autism when he was five (5) years old, at the hands of Defendants. Contrary to modern practice, and in a clear derogation of Dylan's constitutional rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, Defendants engaged in an ongoing practice of locking Dylan in a small closet for extended periods of time and without supervision while he was a student in the Peninsula School District. This harmful, unconscionable practice proximately caused Plaintiffs to suffer damages.

1.2. Plaintiffs bring this claim for damages, as a result of Defendants' negligence and violations of Dylan's civil rights. Plaintiffs also seek declaratory relief.

II. PARTIES

A. Plaintiffs

2.1.1. MICHAEL AND WINDY PAYNE are the natural parents or DYLAN PAYNE. Dylan Payne is a minor child, who was placed at Artondale Elementary School when he was seven (7) years old. The Paynes reside at 1365 11th Laue, Fox Island, Washington 98333.

B. Defendants

2.2.1. The PENINSULA SCHOOL DISTRICT is a municipal corporation who placed Dylan Payne in the special education curriculum. At all relevant times, the Peninsula School District had authority over the placement, curriculum, and disciplinary measures taken at the Artondale Elementary School. The Peninsula School District also had, at all relevant

times, supervisory authority over Artondale Elementary School and Jodi Coy.

2.2.2. The ARTONDALE ELEMENTARY SCHOOL is a municipal corporation who had, at all relevant times, supervisory authority over Jodi Coy, and was responsible for enacting, maintaining, and improving the policies, procedures, and practices with regard to the education and student discipline of Dylan Payne.

2.2.3. JAMES COOLICAN was, at all relevant times, the superintendent of the Peninsula School District. Mr. Coolican had, at all relevant times, supervisory authority over Jodi Coy, and was responsible for enacting, maintaining, and improving the policies, procedures, and practices with regard to student discipline and education at the Artondale Elementary School.

2.2.4. JODI COY was, from 2003–2004, Dylan Payne's elementary school teacher. Ms. Coy had authority under the Peninsula School District and the Artondale Elementary School for enacting, maintaining, and improving classroom policies, procedures, and practices relating to the education and discipline of Dylan Payne.

2.2.5. JANE and JOHN DOES 1–10 are various individuals and entities who will he identified through discovery and were at all relevant times teachers, officials, and other agents of the Peninsula School District and its related entities and agents.

III. JURISDICTION

3.1. Plaintiffs bring this action against the Peninsula School District, the Artondale Elementary School, James Coolican, and Jodi Coy, in accordance with federal and state law. Plaintiff has served a tort claim form, by written letter, in accordance with RCW § 4.91.100. Sixty days have elapsed before commencing this cause of action.

3.2. This Court has jurisdiction over this matter under 28 U.S.C. § 1331 because of the federal claims involved, *inter alia*, 42 U.S.C. § 1983. This Court has supplemental jurisdiction over the slate law claims under 28 U.S.C. § 1367.

IV. VENUE

4.1. The events giving rise to this lawsuit occurred in Pierce County, Washington. Venue is proper in this district under 28 U.S.C. § 1391(b).

V. FACTS

Plaintiffs reallege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

5.1. During the 2003–2004 school year, the Peninsula School District elected to place Dylan Payne, who was then seven (7) years old, in a contained special education classroom, within the Artondale Elementary School.

5.2. Dylan's teacher was Jodi Coy. The Peninsula School District and Ms. Coy represented to Michael

and Windy Payne that Ms. Coy was certified to administer the special education program.

5.3. Before the start of the 2003–2004 school year, Michael and Windy Payne met with Ms. Coy to discuss Dylan Payne's education and transition to Ms. Coy's classroom. During this conversation, the Paynes observed a small room that appeared to be the size of a closet. The closet had an elaborate locking system.

5.4. During the above-referenced meeting, the Paynes inquired into the nature and purpose of the room. Ms. Coy represented that the room was used as a time-out room or "safe room" for students, and that it was to be used for a child who became overly stimulated. Ms. Coy further represented that the door was going to be removed and pillows and beanbags would be placed in the room, for the comfort and tranquility of the child placed in the room.

5.5. After the initial meeting, the Paynes met with Ms. Coy, to follow up on Dylan Payne's Individual Educational Program and Behavior Assessment Plan. During this meeting, Ms. Coy requested permission to use the closet while awaiting Dylan's IEP review and Behavioral Modification Plan. It was represented to the Paynes that the paperwork for the IEP review and BMP would take approximately two weeks. The Panes objected to the use of the closet, stating that their son could not perceive a difference between positive and negative reinforcement. The Paynes clearly requested that Dylan Payne's BMP be completed prior to use of the closet and that, if the closet was to be used, the door had to remain open. Further, the Paynes indicated Dylan Payne was not to be left alone in the closet for an undisclosed period of time. Based on Ms.

Coy's representations about the closet and her expressed professional need to use the closet, the Paynes reluctantly agreed, provided that an aide would be present with Dylan Payne and the door would be left open while the closet was used as a time-out location. The Paynes further indicated to Ms. Coy that the closet could only be used for time-out periods, not for punishment. The Paynes' limited and conditional consent, if there was any, was obtained through coercion and undue influence.

5.6. Contrary to the Paynes' objections and conditions, Ms. Coy repeatedly punished Dylan Payne by confining him within the locking closet. Dylan Payne was confined to the closet on multiple occasions, without a completed IEP or BMP, and despite the Paynes' objections and conditions. When Dylan Payne was locked in the closet for long periods of time, he removed his clothing, and he urinated and defecated on himself. As further punishment, Ms. Coy forced Dylan Payne to clean up his own excrement.

5.7. The Paynes made repeated requests that Ms. Coy cease her "aversive therapy" techniques, but Ms. Coy continued to attempt to justify her actions, citing standards within the special education community.

5.8. The windowless door to the locking closet was removed in the latter part of January 2004. To Plaintiffs' knowledge, following this time, no other children were subjected to Defendants' bizarre and unconscionable form of punishment.

5.9 Following January 2004, Ms. Coy refused to allow Michael and Windy Payne to visit the classroom or pick Dylan Payne up directly from the classroom.

Ms. Coy attempted to justify this exclusion, claiming that the Paynes could misinterpret what they observed in the classroom. Subsequently, the Paynes learned that Ms. Coy did not possess a valid special education teaching certificate from the State of Washington. Similarly, Ms. Coy did not possess an endorsement waiver.

5.10. Defendants retaliated against the Paynes for the Paynes' resistance to the actions of Ms. Coy and the Peninsula School District.

5.11. Dylan Payne was profoundly damaged by Defendants' actions. Defendants' punishment and use of the locking closet caused Dylan to suffer significant regression in communicative and sensory functions. In addition, his academic prowess and abilities were diminished. As a result of Defendants' actions, Dylan continues to display signs of emotional trauma. By way of example, Dylan Payne did not want to return to Artondale Elementary School, became easily agitated and needy, and he began to act out and bite holes in his clothing.

VI. CAUSES OF ACTION

A. Violations of Civil Rights Under 42 U.S.C. § 1983.

Plaintiffs reallege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

6.1.1. At all material limes, Defendants were acting under color of law.

6.1.2. Dylan Payne, like all citizens of the United States of America, has a constitutional right to be free from excessive force under the Fourth Amendment to the United States Constitution.

6.1.3. Dylan Payne, like all citizens of the United States of America, has a constitutional right to be free from cruel and unusual punishment under the Eighth Amendment to the United Stales Constitution and Article I, § 14 of the Washington Constitution.

6.1.4. Dylan Payne, like all citizens of the United States of America, has a constitutional right to procedural and substantive due process under the Fourteenth Amendment to the United States Constitution.

6.1.5. Dylan Payne had statutory rights under the individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*

6.1.6. Defendants violated Dylan Payne's civil rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Dylan Payne's statutory rights under the IDEA.

6.1.7. Defendants were deliberately indifferent to Dylan Payne's civil rights by repeatedly confining him within a locking and windowless closet for indeterminate periods of time, or by enacting a policy, procedure, or practice that resulted in repeatedly confining him within the locking and windowless closet for indeterminate periods of time. In addition, Defendants' deliberate indifference is also manifest in Defendants' failure to promulgate a policy, procedure,

or practice to prevent the tortious and unconscionable mistreatment that occurred in this case.

B. Negligence

Plaintiffs reallege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

6.2.1. Defendants failed to exercise professional judgment in administering discipline to Dylan Payne. Defendants had a duty to use reasonable care in administering discipline to Dylan Payne, a student with whom Defendants had a special relationship.

6.2.2. Defendants have a duty to exercise reasonable care to avoid from harming all foreseeable plaintiffs.

6.2.3. Defendants have a duty to exercise reasonable care in the hiring, training, and supervision of their employees and agents.

6.2.4. Defendants' act of repeatedly confining, and/or allowing others to confine, Dylan Payne to the windowless and locking closet was unreasonable, breaching the standard of care.

6.2.5. Defendants' acts of hiring, retaining, failing to supervise, or failing to train Jodi Coy was unreasonable, breaching the standard of care.

6.2.6. Defendants' negligence proximately caused Dylan Payne to suffer significant mental, emotional, and cognitive distress, as well as special damages.

6.2.7. As a proximate result of Defendants' negligence, co-Plaintiff Windy Payne suffered severe emotional distress.

C. Outrage

Plaintiffs reallege and incorporate herein the preceding paragraphs of this Complaint as though set forth in full.

6.3.1. Defendants knew of Dylan Payne's vulnerability and cognitive challenges, as well as his need for special care and treatment. Nevertheless, Defendants chose to make Dylan Payne suffer in a windowless, locking closet, in an attempt to "break" him.

6.3.2. Defendants' acts and omissions were so outrageous us to shock the conscience of a reasonable person in society. Defendants' actions were so unreasonable, cruel, and unusual as to amount to actionable outrage. These acts proximately caused Dylan Payne to suffer significant mental, emotional, and cognitive distress, as well as special damages.

VII. PRAYER FOR RELIEF

7.1. Plaintiffs seek, on behalf of their minor child, Dylan Payne, general damages for extreme mental suffering and emotional distress and special damages, in an amount to be proven at trial, all of which were directly and proximately caused by Defendants' acts and omissions.

7.2. Plaintiffs seek punitive damages under 42 U.S.C. §1983 for violations of Dylan Payne's civil rights.

7.3. Plaintiffs seek reasonable costs and attorneys' fees incurred in prosecuting this matter.

7.4. Plaintiffs seek declaratory relief and ask for a ruling declaring that the policy, procedure, or practice of placing Dylan Payne, and other similarly situated students, in a locked "safe" room for a long period of time, without supervision or communication, constituted a tortious and unconstitutional act, depriving Dylan Payne of his rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

7.5. Plaintiffs pray for such other equitable or legal relief as the Court deems just.

VIII. RESERVATION OF RIGHTS

8.1. Plaintiffs reserve the right to assert additional claims as may be appropriate following further investigation and discovery.

IX. JURY DEMAND

9.1. Pursuant to Federal Rules of Civil Procedure, Plaintiffs demand that this action be tried before a jury.

Dated this 7 day of November, 2005.

GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM LLP

By /s/ Thomas B. Vertetis
Thomas B. Vertetis, WSBA No. 29805
Attorneys or Plaintiff

APPENDIX H

Peninsula School District
14015 — 62nd Avenue NW, Gig Harbor, WA 98332
Telephone: (253) 857-8186

BEHAVIOR INTERVENTION PLAN

Today's Date: 10/03/2003
School: Arondale Elementary School
Student's Name: DYLAN PAYNE
Birthdate: 04/18/1996
Grade: 01
IEP Case Manager: Coy, Jodi- Art Trans.

Identify student's interests, abilities, and strengths:

Dylan enjoys music, puzzles, snack time, stories, self-directed play, and socially-engaging activities. Dylan is very social and engaging.

Description of behaviors or concerns from Functional Behavioral Assessment dated 09/24/2003:

Unwilling to take part in work tasks. Demonstrates oppositional behaviors (e.g., refusal, yelling, scratching, spitting, biting, and head butting). Limited time on task. Desire to frequently change activities.

Hypothesis Statement:
(Consider the basic needs the student is trying to satisfy, such as the need for relationships, caring, to

belong, to nurture, feel worthwhile, for power, or to be unique.)
Dylan has a desire to control his environment and be in charge of decision making with respect to school activities.

List additional modifications that cap be made to the student's program which will provide more positive ways of getting this basic need met.
Offer choices, define clear expectations, use of picture support, build in incentive activities to be utilized after work is completed, prompt with cues to stay on task, re-focus and correct behavior.

Replacement behavior:

(These are the behavioral goals and objectives stated on the IEP.)

Dylan will demonstrate a readiness for work by coming to his desk, taking out work materials and items from work box and beginning his work independently.

Dylan will demonstrate on task behavior for 10 minutes.

Instructional procedures to teach replacement behavior:

- **Direct Teaching:** How will the social skills deficit be remediated? Who will do this and when?

  Desired behavior will be explained and demonstrated. Appropriate behavior will be shaped by positive reinforcement.

- **Practice of Social Skills:** How will opportunities for practice be provided in the classroom? . . . during unstructured time? . . . building wide? Who will do this and when?

  Structured work opportunities will be presented daily in his classroom, motor room, and specialist times. Opportunities will be monitored during recess and free time.

- **Reinforcers:** What positive reinforcers will be used for appropriate behaviors in each of these areas?

  Acknowledgement of appropriate behavior and praise. Use of token reward system.

- **Self-Control:** What types of self-management strategies will the student be taught to monitor his/her own behavior? Who will do this and when?

  Ability to ask for help as needed, ask for a break as needed, and use of alternate behaviors to communicate his reactions to activities through more acceptable behavior.

Response to inappropriate behavior:

- While the student is learning the new skill, what interventions will be used if inappropriate behavior occurs?

  Student will a receive a reminder of expectation, a prompt/cue to stay on task, removal from work area until student regains control of his behavior, time-

out on a chair or in the safe room if behavior escalates.

Monitoring the Behavior Intervention Plan:

- What data will be collected and how?

  Frequency of time outs will be recorded for comparison.

- Who will do this and when?

  Members of Transition team.

Review date for the Behavior Intervention Plan; 10/03/2004

Peninsula School District
14015 – 62nd Avenue NW, Gig Harbor, WA 98332
Telephone: (253) 857-8186

AVERSIVE INTERVENTION PLAN
IEP ATTACHMENT

Student: DYLAN PAYNE
Birthdate: 04/18/1996
Student ID#: 02004574

- A behavior plan and behavior goals/objectives *must* accompany the aversive plan.

- An aversive therapy plan is present for any program containing the use of isolation, physical restraint, and/or bodily contact.

Definition: For the purpose of WAC 392-172-388 through 392-172-398, the term "aversive therapy" means the systematic use of stimuli or other treatment which a student is known to find painful or unpleasant for the purpose of discouraging undesirable behavior on the part of the student. The term does not include the use of reasonable force, restraint, or other treatment to control unpredicted spontaneous behavior which poses one of the following dangers:

1. A clear and present danger of serious harm to the student or another person.

2. A clear and present danger of serious harm to property.

3. A clear and present danger of seriously disrupting the educational process.

The IEP Team, consisting of the following members,

Name	**Position**
Michael and Windy Payne	Parents
Jodi Coy	Special Education Teacher
Denise Tremblay	Occupational Therapist
Joyce Sears	General Education Teacher
Janessa Thornton	Speech Language Pathologist

met on (date) 09/24/2003 and made the following recommendations for use of Aversive Therapy:

1. List the positive interventions that have been attempted prior to the decision to use aversive therapy, and the reasons these interventions failed:

Intervention	Reason failed
Positive reinforcement & token system:	Behaviors are pervasive and his patterns of response are resistant to change.

2. Specify the type of aversive therapy to be used:

   Time out, removal from group activity, loss of activity, containment in safe room.

3. Reason the aversive therapy is judged to be appropriate:

   Natural consequence for misbehavior.

4. Behavioral objective sought to be achieved by the use of aversive therapy:

   Elimination of problem behaviors.

5. Description of the circumstances under which the aversive therapy may be used:

   During any school activity or school location where targeted behaviors are exhibited.

6. Maximum duration of any isolation or restraint;

   Dylan will be removed from the group or isolated in the safe room until he is calm and then a 3 minute time out will be implemented.

7. Special precautions that must be taken in connection with use of the aversive therapy technique:

   Removal of other students or equipment which may impaired student's movement, escort as needed to safe room.

8. Person or persons permitted to use aversive therapy or the qualifications of the personnel permitted to use the aversive therapy:

   Jodi Coy, Lisa Bowers (Para educator), Dina Wohlman (Para educator), Lee Ann Dove (Para

educator), all have been qualified through SECURE training.

9. The means of evaluating the effects of the use of the aversive therapy, and a schedule for periodically conducting the evaluation are:

   Classroom observation and periodic assessment of readiness to work. Comparison of data related to frequency of time out.

Peninsula School District
14015 — 62nd Avenue NW, Gig Harbor, WA 98332
Telephone: (253) 857-8186

INDIVIDUALIZED EDUCATION PROGRAM

[*Fold-out Exhibit, see next page*]

Peninsula School District
14015 – 62nd Avenue NW, Gig Harbor, WA 98332
Telephone: (253) 857-8186

INDIVIDUALIZED EDUCATION PROGRAM

IDENTIFYING INFORMATION				
Dylan Payne Student's Name	Voyager Home School	Arondale Elementary School Placement School	Purpose of IEP meeting: ☐ Initial *or* ☒ Review	Student needs transition services: ☐ Yes ☒ No Surrogate parent needed: ☐ Yes ☒ No
02004574 Identification Number	01 Grade		7:5 Age:	
04/18/1996 Date of Birth	01 Developmental Delays Eligibility Category		Age of Majority: (Informed of transfer of rights prior to age 17.) Yes ☐ N/A ☐	____ Date of most recent evaluation
WINDY & MICHAEL PAYNE Parent/Guardian/Adult Student/ Adult Acting in the Role	09/24/2003 Date of Meeting		10/03/2003 Projected date of review/revision of IEP	
1365 11TH LN Guardian Address	FOX ISLAND WA 98333 City State Zip		(360) 876-0955 Guardian Phone	

COMMITTEE MEMBERS PARTICIPATION (Signature is utilized only to document individuals present at the meeting.)	
	If parent did not attend, what method was used to insure their participation ☐ Phone ☐ Mail/Email ☐ Other:
Parent/Guardian/Surrogate ⇧	
Special Education Teacher or Service Provider ⇧	Student, if applicable ⇧ Denise Bowman, OTR/L
General Education Teacher ⇧	Other: (SLP, OT, PT, Vision, Psychologist, General Education Teacher) ⇧
District Representative ⇧	Other: (SLP, OT, PT, Vision, Psychologist, General Education Teacher) ⇧
Other: (SLP, OT, PT, Vision, Psychologist, General Education Teacher) ⇧	Other: (SLP, OT, PT, Vision, Psychologist, General Education Teacher) ⇧
	Other: (SLP, OT, PT, Vision, Psychologist, General Education Teacher) ⇧

Peninsula School District

Student Name: Dylan Payne ID # 02004574

Adjustment: (social/emotional status)
Dylan appears to be developing with respect to social/emotional issues, at times he lacks consideration for the needs of others. This sometimes triggers behavioral issues and is a concern in his learning environment.

Other: (assistive technology)
Assistive technology: The following AT supports are currently in place: picture supports to transition between activities and computer based academic programs (targeting math/counting, reading readiness, early science, and reasoning skills). The team would like to explore other assistive tech options. We would like to use AT to support written. language. This may include a program that sets up "writing environments," which are a collection of grids that are arranged so that Dylan can make selections from the symbols (pictures paired with words) in the grids to form written communication that can be printed. Writing with Symbols 2000 is an example of a program that can create writing environments. The team will also explore expanding picture supports to activity specific language boards to increase expressive language skills.

Functional Vocational Evaluation: (occupational interests, aptitudes, availability of classes or programs)
NA

Consideration of Special Factors:

This student's behavior impedes his or her learning or that of others. . . ☒Yes ☐ No
(If yes, describe strategies, including behavioral interventions, and supports to address behavior in appropriate sections of the IEP.)

This student has limited English proficiency . . . . . ☐ Yes ☒ No
(If yes, determine primary language proficiency and describe any appropriate language needs of the child related to the IEP.)

This student is blind or visually impaired . . . . . ☐ Yes ☒ No
(If yes, provide justification in the present levels of performance if Braille instruction and the use of Braille are not being provided.)

This student has communication needs . . . . . ☒Yes ☐ No
(If yes, describe in the present levels of performance any communication needs of the child; and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level; and full range of needs,

including opportunities for direct instruction in the child's language and communication mode.)

This student has assistive technology needs . . . . . ☒Yes ☐ No
(If yes, describe assistive technology supports, strategies, and materials in the present levels of performance.)

Peninsula School District
INDIVIDUALIZED EDUCATION PROGRAM

SPECIAL EDUCATION SERVICE GOALS

[*Fold-out Exhibits, see next 2 pages*]

Peninsula School District
INDIVIDUALIZED EDUCATION PROGRAM

Student: DYLAN PAYNE

SPECIAL EDUCATION SERVICE GOALS

AREA(S) OF NEED (from present levels of performance): Social Skills

SPECIAL EDUCATION SERVICE GOALS

MEASURABLE ANNUAL GOAL(S): Dylan will interact with staff and peers in a consistently kind and respectful way as measured by absence of disrespectful gestures by 10-3-04.

SHORT-TERM INSTRUCTIONAL OBJECTIVES	START DATE	CRITERIA	EVALUATION		REPORT OF PROGRESS (Date and include appropriate code)			
			Type	Frequency	1ST	2ND	3RD	4TH
Dylan will reduce the frequency of walking/turning away plugging ears or other signs of disregard when being talked to.	10-03-2003	<5 per week	1 6	Weekly				
Dylan will show no signs of disrespect when peers and staff initiate interactions.	10-03-2003	<2x/week	1 6	Weekly				
Progress toward annual goal:								
Reason(s) for not meeting goal:								

Peninsula School District
INDIVIDUALIZED EDUCATION PROGRAM

Student: DYLAN PAYNE

SPECIAL EDUCATION SERVICE GOALS

AREA(S) OF NEED (from present levels of performance): Behavior

SPECIAL EDUCATION SERVICE GOALS

MEASURABLE ANNUAL GOAL(S): Dylan will learn effective and appropriate ways to express feelings of disapproval and frustration as measured by the absence of targeted behaviors from the functional behavior analysis (attached to IEP) by 10-3-04

SHORT-TERM INSTRUCTIONAL OBJECTIVES	START DATE	CRITERIA	EVALUATION		REPORT OF PROGRESS (Date and include appropriate code)			
			Type	Frequency	1ST	2ND	3RD	4TH
Dylan will reduce incidence of refusals, aggression, and acting out and learn a variety of acceptable alternative behaviors by 4-3-04	10-03-2003	<5 incidences/ week	6 1	Weekly				
Dylan will illiminate all incidences of undesirable behavior and replace it with acceptable alternative behaviors selected from a choice menu by 10-3-04.	04-03-2004	O/week for 2 consecutive weeks	1 6	Weeks				
Progress toward annual goal:								
Reason(s) for not meeting goal:								

APPENDIX I

WINDY PAYNE; July 21, 2006

* * *

[p.16]

floor.

Q. You said hit himself on the head?

A. With his hand.

Q. And you mentioned something about the floor.

Can you repeat that?

A. He would bang his head on the floor, and

sometimes on windows.

Q. How long did these self-injurious activities,

for lack of a better word, how long did they continue?

A. Do you mean how many years did they continue

or do you mean in duration of each incident occurring?

Q. That's a good point. Duration of each incident.

A. It would usually happen instantaneous and last maybe four or five seconds.

Q. And how many years did it continue, years, months, whatever?

A. When he was three and a half, four, we hired Project Pace to come into our home and help us with a behavioral modification plan. Eric Hamblin from Project Pace came into our home and evaluated Dylan and set us up with a behavior modification plan which we implemented which stopped these behaviors from occurring.

25 Q. What was Eric's last name?

[p.17]

1 **A. H-a-m-b-l-i-n, or e-n, I'm not sure.**

2 Q. And you mentioned Project Pace; what is

3 Project Pace?

4 **A. Project Pace is a facility down in Beaverton,**

5 **Oregon that works primarily with children in the autism**

6 **spectrum.**

7 Q. Can you elaborate what you mean by autism

8 spectrum? How far does that reach? I don't

9 understand.

10 **A. Children that are diagnosed with autism. You**

11 **can have -- the spectrum is from severe to very high**

12 **functioning, depending on where the child falls, so**

they call it a spectrum.

Q. So autism spectrum can refer to any person with any degree of autism no matter how severe?

A. That's correct.

Q. Is that a fair statement?

A. That's a fair statement.

Q. Okay. When did you first suspect that Dylan might be autistic?

A. We suspected he might be autistic early on, probably when he was 18 months old.

Q. And what clued you in that he may be autistic?

A. He didn't progress typically as typical children do. He didn't -- he wouldn't look at us when

* * *

[p.48]

Q. And another time with Project Pace was when back in '04/05 doing the RDI training; is that right?

A. That's correct.

Q. How much did that cost?

A. That was $2,400.

Q. Other than the $800 fee for Mr. Hamblin to come to your home and other than the RDI training, did you pay Project Pace for any other service?

A. Yes. We drove down to Beaverton, Oregon after our initial meeting for a follow-up meeting, and I don't recall the date, the exact date.

Q. Was that back when Dylan was three and a half?

A. He was actually four, but yes.

Q. At that time frame?

15 **A. Yes.**

16 Q. And how much did that cost?

17 **A. It was either 4- or $600, I'm not sure.**

18 Q. So somewhere between 4- or 600, that's a rough

19 estimate?

20 **A. It was between those figures, yes.**

21 Q. So besides the trip from Beaverton to your

22 home, besides the follow-up meeting down in Beaverton,

23 and besides the RDI training, have you paid Project

24 Pace for any other service?

25 **A. No.**

* * *

[p.100]

1 MR. LLOYD: That's all I'm looking for. Let's

2 go ahead and break for lunch.

3 (Deposition adjourned at 12:15 p.m., to be

reconvened at 1:00 p.m.)

AFTERNOON SESSION

1:20 p.m.

--oOo--

(Deposition Exhibit No. 8 was marked for identification.)

CONTINUING EXAMINATION

BY MR. LLOYD:

Q. I've handed you what has been marked as Exhibit 8 to your deposition. And is that a copy of the home-to-school journal that you kept with Jodi Coy?

A. To the best of my knowledge.

Q. I'm holding in my hand a red book that's – okay, a red-bound book. Is the book in my hand the actual Home to School journal with Jodi Coy?

A. Yes.

Q. Exhibit 8 which is in front of you, to the best of your knowledge is that a true and correct copy of the book I'm holding in my hand?

A. Yes. I haven't examined every page but it does appear to be.

Q. Now, the decision to use the safe room happened in September 2003; is that right?

A. That's incorrect.

Q. How is that wrong?

A. We never authorized Jodi Coy to utilize the

safe room with the door closed.

Q. You never authorized Jodi Coy to use the safe

room with the door closed?

A. That's correct.

Q. Did you authorize Jodi Coy to use the safe

room at all?

A. She requested to utilize the safe room

indicating to us that she relies on that room for all

the students within her classroom. We expressed to her

that we did not want Dylan placed in that room,

especially for punishment, which is how she represented

the use of it. And she again said that she utilizes

the room for all the students. So we said if Dylan's

behavior gets so extreme that you need to place him in

a time-out and you want to utilize that room as

your time-out space you may utilize that room as a

[p.102]

time-out space, but the door must remain open and we

would like someone placed in the room with him. And

she agreed to that.

Q. And you expressed that right up front; right?

A. Yes.

Q. The home-to-school journal in Exhibit 8 that

you have in front of you, those contain writings by you

and Jodi Coy; right?

A. Correct.

Q. And explain to me how the home-to-school

journal would work.

A. It was basically since Dylan doesn't have

communication, it was our way of being able to

communicate about Dylan's day.

Q. This meeting where you and Jodi supposedly

came to this agreement where the door would remain

open, use the safe room in the most extreme

circumstances, was that in September of 2003?

A. Yes.

Q. That was the September 24th meeting with you,

Janessa Thornton, Michael and Jodi?

A. It was expressed to Ms. Coy. Ms. Coy again

had told us that she didn't have access to the new

system, that's why we didn't have an IEP to look at on

25 **that day. And she said that within two weeks she was**

* * *

[p.106]

1 **contributing to behavior. Hope you have a better day.**

2 **Dylan will ride the bus home today, Windy.**

3 Q. I notice that you had your signature with a

4 smiley face?

5 **A. Yes.**

6 Q. Were you angry when you wrote this note?

7 **A. No.**

8 Q. Can you read the next entry on October 2nd.

9 And I know this is in Jodi Coy's handwriting; is that

10 right?

11 **A. Yes.**

12 Q. So do the best you can.

A. A better day. Not -- I don't know what that says. Not blank something, rough spots but overall much better. Dylan was eager to test out the limits and safe room. Came into the class and with great intention hit me. I don't know what that says. Gloved and refused to do his work, then took himself to safe room. Was surprised when the door was closed behind him but didn't take too long to get the idea that calm classroom behavior is what was requested. Today he made progress. Have a good evening.

Q. And your response was the next note on October 3rd.

A. Thanks for the note, yes.

* * *

[p.110]

Q. (BY MR. LLOYD) Where in the journal, if anywhere, before October 3rd do you express that you don't want Dylan -- you don't want that door shut?

MR. VERTETIS: Object to the form of the question. It mischaracterizes her testimony, lacks foundation.

MR. LLOYD: Yeah, that's a good point.

Q. (BY MR. LLOYD) Anywhere prior to October 3rd did you express in the journal that Dylan was not to be put in the safe room with the door shut?

A. This is a home-to-school journal where we talk to each other about the day, it wasn't something that

we write our wants and not wants in, so to speak. This

was simply a communication journal.

When I would have an issue with Jodi I would

come into the classroom and I would speak directly with

her most of the time, or I would call her on the

telephone.

Q. So you're saying in this journal there aren't any passages where you expressed to Jodi what you want or don't want in the classroom?

A. I didn't say that. I said primarily this

journal is a home-to-school journal, that was how it

was initially represented. This was a home-to-school

journal to discuss the day, not to discuss IEP issues

[p.111]

and whatnot. So in the beginning of the year when we first started, it was simply a back-and-forth communication.

Q. You testified before we went to lunch that it was sometime in October that you actually witnessed Dylan in the safe room?

A. Yes.

Q. In the journal, when is the first time you express concern over the use of the safe room?

MR. VERTETIS: To the best of your knowledge.

A. I don't know the exact time. It would have been in October once I realized she was actually placing him in there.

Q. (BY MR. LLOYD) I want you to turn to your note on October 22, 2003. Are we there?

A. Yep.

Q. Can you read your note on October 22nd.

A. Thank you for all the info and the lovely cards. As you know, we are quite willing to help out in any way. I am available to work the 6 to 7 or 7 to 8 slot. I would prefer the earlier time. Dylan may attend the play at the high school. He really loves going on outings. Dylan's behavior at home has really improved. He seems to be following directions more often and trying to maintain his temper. I can't say

* * *

[p.154]

Q. And when you said your, you're referring to Jodi; right?

A. Yes.

Q. And in fact, you asked her for her advice when you write, What do you think can be done; is that right?

A. That's right.

Q. And I'll have you look at the next journal entry on January 13, 2004. And if you go to the second page, and it says here right at the top, first complete sentence, We also do not want Dylan placed in the safe room anymore. I expressed my concerns about the room at the IEP and again after you informed me Dylan was

urinating in the safe room. We would like to meet with you, the team and Sarah Drinkwater to discuss other options for behavior and intervention.

Now, that was your writing to Jodi Coy; right?

A. Yes.

Q. And in January 2004 use of the safe room with Dylan stopped?

A. Yes.

MR. LLOYD: Tom, I assume you guys are going to reserve signature so you'll have 30 days after the transcript comes in to review your testimony.

Q. (BY MR. LLOYD) And I know you don't know now,

* * *

[p.168]

case?

MR. VERTETIS: I'm going to object to the form of the question. I think it's outlined in the Complaint. But she can go ahead and try to answer the question.

MR. LLOYD: Well, I mean, with all due respect, Tom, you're supposed to break this number down, and I still haven't seen it.

MR. VERTETIS: Okay, and today is the first deposition, so I told you I would do that and I will, so I'm objecting to the form of the question. You can ask Windy if you want, I'm just saying that it is a figure that I have calculated due to experience with

jury verdicts and what I think Windy and her family has been through. But you can feel free to ask her other questions you want with it, I'm just placing an objection on the record.

MR. LLOYD: Fine, okay.

A. Could you repeat the questions, please?

Q. (BY MR. LLOYD) What damages are you looking to obtain in this case?

A. Damages?

Q. Money. What are you trying to get out of this case?

A. What I'm trying to get out of this case

[p.169]

primarily is the prevention of this School District and

other school districts from subjecting innocent children to this type of punishment, this type of abuse. I find it sickening, disturbing on multiple levels. It has emotionally scarred -- I'm answering your question.

Q. I know, but I want to know what you mean by "this kind of abuse."

A. This kind of abuse, locking children in a room for who knows how long and leaving them there at your whim.

Q. So the safe room?

A. That's what I'm talking about.

Q. You can continue on, I just wanted to clarify it.

A. I think it's heinous.

Q. Um --

A. I'm going to finish, please.

Q. Okay.

A. The emotional stress this entire thing has put on us, the attacks from the school. The attacks from Sarah Drinkwater going outside to our private therapist, our private tutor for Dylan and preventing him from receiving that benefit, was nothing but of ill intent. Trying to force us to take Dylan in to have an

[p.170]

unnecessary blood draw when they could have accessed those records very easily, we would have been quite

willing to produce those records, was inexcusable.

Our requests to have Dylan removed from that

environment repeatedly --

Q. Define "that environment."

A. From Mrs. Coy's classroom. We requested not

only to Coolican but to Sarah Drinkwater and the entire

IEP on multiple occasions that Dylan go to a new

environment, that that environment was doing nothing

but harm for him, and that the relationship was so far

damaged that nothing good could come out of it. And

again we were repeatedly denied, denied, denied.

We were forced into mediation, which was an

extremely stressful event. We were there by ourselves,

we had no counsel, we had to prepare ourselves, we had

to go through that ordeal. We had to address all these

issues in front of the mediator, in front of the entire

team, in front of Sarah Drinkwater. It was Michael and

I against all of them. It was a very stressful,

stressful year.

When we finally got through the mediation and

we thought that we were going to be moving into a

better environment, the things that we were promised in

mediation were not delivered. We had to again

[p.171]

continually contact the District and try to work with them to get things moving along, and it just was a very difficult time.

When we finally did get Dylan out of that environment and got him into a new environment, when we would request things, like, for instance, we requested that Dylan have transportation, which according -- you know, he was supposed to have transportation to his summer school, that was denied. We had to go and have a whole long month ordeal about just trying to get transportation for Dylan to summer school.

When he finally did get into Harbor Heights,

they were supposed to again provide training and staff

for him, and again that training and staff was not

provided. And the hardship was placed on us, the

responsibility was placed on us to provide Dylan his

education because they still did not have the proper

supports.

All of the behavioral issues and emotional

issues that Dylan had suffered, the financial burden of

that, the stress of that, the day in and day out of

trying to help him recover from that was all placed on

Michael and myself to help him through that. And

finally, we thank God, finally he's coming out of it

25 **and he's back to being -- he's started to become a**

[p.172]

1 **happy boy again. And that took a long, long time.**

2 **That is what our damages are for.**

3 Q. Are you trying to recover out-of-pocket

4 expenses?

5 **A. I don't know. If that's considered part of**

6 **that.**

7 Q. Have you paid anyone any money that you think

8 the District owes you?

9 **A. Well, we've had to pay for lots of doctors and**

10 **lots of therapy.**

11 Q. It's my understanding, please correct me if

12 I'm wrong, I know you mentioned the mediation. Did you

ever go through a due process hearing with the School District?

A. No.

Q. I want you to elaborate on what you mean by the word "forced" in the mediation, that was your testimony.

A. It was my testimony.

Q. What do you mean by forced? Like how were you forced?

A. We were forced into mediation because the District would not work with us. The team wouldn't work with us. Sarah Drinkwater refused our multiple requests to have him placed into a new environment.

[p.173]

When we asked the IEP Team and Sarah Drinkwater where

Dylan should be placed, she said that she felt that he

should remain in Mrs. Coy's environment.

Q. So basically you and the District couldn't

agree to the terms for Dylan's education so you had to

take it to a mediator; is that right?

A. That is correct. We requested mediation.

Q. Okay, so it was yours and Michael's request?

A. It was our request.

Q. Okay.

A. We had exhausted all of the avenues that we

could find within the school and within the District

itself, and we felt we had no other choice. And we

chose mediation.

Q. When you said you had to pay for lots of doctors and lots of therapy --

A. I had to pay for my therapist, we had to pay for Eric Hamblin.

Q. What was her name again?

A. Susan Sporl.

Q. So as far as the money side of this case, doctor's bills and the emotional trauma, is that what you're getting at in this case?

A. Yes, we've had extensive emotional trauma over this.

* * *

[p.193]

behavioralist and got her in, and then he started full days at the end of October.

Q. Was he on full days at Harbor Heights from

October through the end of the year?

A. Yes.

Q. Who was the behavioralist that the District

hired?

A. Lindy O'Keafe.

Q. Is that L-i-n-d-y?

A. Yes.

Q. When did you make the decision to take Dylan

and home school him full time?

A. At the end of the 2004/2005 school year. Mrs.

Tollefson and Tom -- I can't remember his last name

right this second, it's in the record, though -- both

notified Mike and I that they were leaving their

positions. We just didn't have the strength to try and

go through another IEP Team and another process again.

We'd also requested extended school year

services for Dylan, which he was granted, but the

location was at Artondale and we requested that he have

his extended school year services at Harbor Heights.

The IEP Team concurred that that would be a better

placement for Dylan, and the District said no.

Q. Did the District tell you why?

* * *