UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; and A.M., by and through her parents and next friends.
Plaintiffs,
v.
MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; the TEXAS EDUCATION AGENCY; and ATTORNEY GENERAL KENNETH PAXTON, in his official capacity as ATTORNEY GENERAL OF TEXAS,
Defendants.

Civil Action No. 1:21-CV-00717-LY

AMICUS CURIAE BRIEF OF COUNCIL OF PARENT ATTORNEYS & ADVOCATES ON THE SUBECT OF ADMINISTRATIVE EXHAUSTION

COMES THE AMICUS, COUNCIL OF PARENT ATTORNEYS & ADVOCATES, filing this Amicus Curiae brief for the Court's respectful consideration.

1.0 Background of Amicus

COUNCIL OF PARENT ATTORNEYS & ADVOCATES (COPAA) is a not-for-profit national organization for parents of children with disabilities, their attorneys and advocates. COPAA has 210 members within the state of Texas. While COPAA does not represent children with disabilities directly, it does provide resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. COPAA's attorney

members do represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA).

COPAA's interest in this case is its deep commitment to ensuring that all children with disabilities have equal access to attend their public schools and obtain an education alongside their non-disabled peers without being subjected to an increased threat of injury or illness from Covid-19 and its variants.

Because of COPAA's concern for the rights of students with disabilities and their parents and the experience of its members in advocating for their rights, COPAA offers a unique perspective on exhaustion of administrative remedies. In fact, COPAA has extensive experience with the exhaustion of administrative remedies requirement, including filing an amicus curiae brief in *Fry v. Napoleon Community School*, 137 S. Ct. 743 (2017). COPAA has also previously filed as *amici curiae* in the United States Supreme Court in *Endrew F. v. Douglas County School. District RE-1*, 137 S. Ct. 988 (2017); *Forest Grove School District. v. T.A.*, 557 U.S. 230 (2009); *Board of Education of New York v. Tom F.*, 552 U.S. 1 (2007); *Arlington Central School District Board. of Education v. Murphy*, 548 U.S. 291 (2006); *Schaffer v. Weast*, 546 U.S. 49 (2005); and *Winkelman v. Parma City School District*, 550 U.S. 516 (2006), and in numerous cases in the United States Courts of Appeal.

COPAA respectfully submits this *amicus curiae* brief to address the limited issue of whether administrative exhaustion under the Individuals with Disabilities Education Act (IDEA) is required for the gravamen of Plaintiffs' Complaint.

2.0 EXHAUSTION AFTER *FRY*

Plaintiffs seek equal access to an in-person education no different from their non-disabled peers. In their Complaint, they allege the Governor's Executive Order GA-38 prohibiting governmental entities, including school districts, from imposing a mask requirement, excludes them from participating in equal educational opportunities under Title II of the ADA and Section 504 by, *inter alia*, denying them reasonable modifications. 42 U.S.C. § 12132; 29 U.S.C. § 794; 28 C.F.R. § 35.130(b)(7).

In the *Fry* case, the Supreme Court observed that "[a] school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 754 (2017). Thus, a complaint seeking redress for the refusal to make an accommodation that might injure the student in ways unrelated to a FAPE, is not subject to IDEA's exhaustion rule. Here, the plaintiffs seek redress for the Executive Order that prohibits school districts from mandating facial coverings in public schools in Texas; plaintiffs contend that universal facial covering mandates are required in their public schools to prevent them from physical injury, hospitalization, perhaps even death, conditions o*bviously* unrelated to the IDEA.

The Supreme Court was clear in *Fry* that exhaustion is required only for claims concerning the denial of a FAPE and not for disability-based discrimination. 137 S. Ct. at 756. The Court noted that, when determining the "gravamen" of the complaint, a plaintiff

need *not* use the words "FAPE" or "IEP" on the face of the Complaint to allege a denial of FAPE. The *"substance,"* not "surface," of the Complaint matters, not labels:

> The use (or non-use) of particular labels and terms is not what matters. The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words(?) "FAPE" or "IEP." After all, §1415(*l*)'s premise is that the plaintiff is suing under a statute *other than* the IDEA, like the Rehabilitation Act; in such a suit, the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program. And still more critically, a "magic words" approach would make §1415(*l*)'s exhaustion rule too easy to bypass.

Id. at 755 .

Defendants here confuse what is the *gravamen* under *Fry*: the important distinction between an access case under Title II of the ADA and one for FAPE under IDEA.[1] *Fry* itself explains how, even where FAPE claims may "overlap" with non-FAPE claims, the Court's task is to determine the *gravamen,* or "crux," of the case.

Consider *Fry* itself. The child's need for a service dog at school, while delivered in the public-school setting, set forth an *access* case under Section 504 and Title II of the ADA. It was not dispositive that the district happened to propose a "human aide ...as part of [the child's] individualized education program." *Id.* at 746.

On remand from the Supreme Court to determine the gravamen, the District Court in *Fry* found that exhaustion was *not* required because the student was not seeking "an amendment to an IEP..., a declaration that the student was denied a FAPE under an existing IEP, [or] an award of additional educational services to be provided." *E.F. v.*

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[1] The confusion is perhaps understandable. *See, e.g., Exhausted and Confused: How Fry Complicated Obtaining Relief for Disabled Students*, 16 Duke J. Const. Law & PP Sidebar 34 (2021).

Napoleon Cmty. Sch., 371 F. Supp. 3d 387, 407 (E.D. Mich. 2019). Rather, the service dog was to allow the child *access to* her education, like a ramp allows access to a school. Similarly, in *Sophie G. v. Wilson County Schools*, 742 F. App'x 73, 80 (6th Cir. 2018), the child was denied admission to an after-school program. The after-school program may have assisted her educationally, but FAPE was not the *gravamen*. Instead, as the Sixth Circuit explained, "The gravamen of Plaintiffs' complaint seeks access to subsidized childcare on equal terms, and not redress for the denial of a FAPE. Neither *Fry*'s clues nor the administrative proceedings suggest otherwise." *Id.*

In its trial brief, Defendants assert that the complaint is grounded in relief that is available through the IDEA. "Plaintiffs complain of inadequate instruction and insufficient support services as students with disabilities. But they cannot show they have exhausted the dispute-resolution procedure required under IDEA." (Doc. 48, p. 31) Nowhere in Plaintiffs' Second Amended Complaint do the Plaintiffs allege "inadequate instruction and insufficient support services as students with disabilities." Further, the Governor's Executive Order at issue here is not limited to students in the state's public schools; it applies to most county, city, and local government agencies.[2] The Defendants' policies, and Defendant Paxton's zealous enforcement, deprive Plaintiffs from access to the same programs and services that students without disabilities are able to access. The denial of access is because these Plaintiffs have a disability that precludes their access to instruction based on a discriminatory policy.

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[2] The Executive Order's prohibition on masking requirements does not apply to state-supported living centers, government-owned or -operated hospitals, the Texas Department of Criminal Justice, the Texas Juvenile Justice Department, "and any county and municipal jails acting consistent with guidance by the Texas Commission on Jail Standards." Exec. Order GA-38, 4a, at 4.

By reading FAPE *so broadly*, the Defendants commit the same error the Sixth Circuit originally committed in *Fry*: the Sixth Circuit had asked whether the claims were "generally educational," *Id.* at 752, which the Supreme Court said is where it "went wrong in answering that question." *Id.* at 753.

The request for facial coverings is one that allows these children, due to their disabilities, to attend school with their non-disabled peers. It helps them avoid physical suffering or injury. It is akin to a request for a service dog, a ramp, or other modifications that allow children safe access to the school. In other words, at the core of their Complaint, the Plaintiffs are not seeking FAPE.

Although not dispositive, the two "clues" fashioned by Justice Kagan in *Fry* bear this out. "[C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school;" and second, "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id.* at 756. A refusal to allow a modification in the form of facial coverings in a public facility would also run afoul of the ADA, just as an adult teacher might similarly need a modification of facial coverings. In fact, as noted above, the Executive Order applies to numerous public facilities that are not schools and to adults as well as children.

Defendants' reliance on *McMillen v. New Caney Indep. Sch. Dist.*, 939 F.3d 640, 646-47 (5th Cir. 2019), *cert. denied,* 140 S. Ct. 2803 (2020), is misplaced because that case did not involve an access claim; the parents in that case contended that exhaustion was not required because they sought money damages.

Further, there are many students with disabilities who are not eligible for IDEA because they do not require "special education and related services" by reason of their disabilities. See 20 U.S.C. § 1401(3)(A)(2). According to the complaint, both E.S. and

J.R. have moderate to severe asthma. There is nothing in the Complaint to suggest that either E.S. or J.R. have IEPs or are eligible for services under IDEA and are therefore entitled to FAPE under IDEA. In *McIntyre v. Eugene School District 4J,* 976 F.3d 902, 915-16 (9th Cir. 2020), the Ninth Circuit held that a student who had a 504 plan and not an IEP did not seek special education but sought instead specific accommodations, including compliance with an emergency health protocols, and therefore was not subject to IDEA's exhaustion requirement.

The first federal district court to address the issue of whether claims regarding universal facial coverings in public schools requires exhaustion, the Southern District of Iowa, found that exhaustion was not required. *ARC of Iowa v. Reynolds*, No. 4:21-CV-00264, at *27 (S.D. Iowa Sept. 13, 2021). The court found that the plaintiffs could bring their claims seeking to require a universal facial covering mandate at another public facility such as a library, and that an adult such as a teacher or other school staff member could bring the same claims. *Id.*

Since then, two additional federal courts have held that exhaustion was inapplicable to access cases regarding universal facial covering policies. A district court in the Eastern District of Texas said, "The crux of Plaintiffs' allegations is safe access to public, brick-and-mortar government buildings, and not the denial of a FAPE." *Id.* at *18. *S.B. v. Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 U.S. Dist. LEXIS 182674 (E.D. Tenn. Sept. 24, 2021). The court noted, "A medically compromised teacher, custodian, parent, grandparent, or visitor could bring an identical grievance in this case, whether based on safe and equal access to Knox County Schools or to another public, government building like a library or post office." *Id.* at *19. The court found that the plaintiffs' claim was a

failure-to-accommodate claim under the ADA so that the students "can safely access their school buildings." *Id.* at 20.

Similarly, a federal district court in the Western District of Tennessee found that the gravamen of the Plaintiffs' claim was "not to seek a FAPE, but rather to seek 'non-discriminatory access to their public schools by way of a reasonable accommodation." *G.S. v. Lee,* No. 21-cv-2552-SHL-atc, 2021 U.S. Dist. Lexis 182934, at *35 (W.D. Tenn. Sept. 17, 2021). Only where a case raised FAPE issues, seeking reinstatement of live synchronous and asynchronous instruction and to ensure that each child received FAPE in the least restrictive environment did a Florida federal district court find that exhaustion was required. *Hayes v. Desantis*, No: 1:21-cv-22863-KMM, 2021 U.S. Dist. LEXIS 178707, at *31 (S.D. Fla. Sept. 2021). The court in *Hayes* distinguished the Iowa case, *ARC v. Reynolds*, in two respects: first, the gravamen in *ARC* was not FAPE, and second, the policy banned mask mandates generally and extended to teachers and school staff. *Id.* at *29, n.4. Here, as in *ARC*, the gravamen is not FAPE, and the policy banned mask mandates generally, applying both to teachers and school staff and to agencies other than schools.

For all these reasons, IDEA exhaustion is not required, and the Court should proceed to address this matter under the ADA and Section 504.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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