In March of 2023, the Supreme Court clarified the exhaustion requirement set out in the Individuals with Disabilities Education Act (IDEA), holding that plaintiffs do not need to exhaust administrative procedures if the type of relief that they are seeking is unavailable under the IDEA. In doing so, the Court left unanswered the question of whether the exhaustion requirement is susceptible to the futility exception—an exception that is currently recognized by eleven courts of appeals. This Comment provides an overview of the IDEA and its exhaustion requirement, including an analysis of exceptions to the requirement. I address the inconsistencies in the interpretation and application of these exceptions and the effect of the Court’s restraint in deciding the issue. I argue that the futility exception fits in line with Congressional intentions and heeds judicial precedent. The Court’s discretion furthers confusion in lower courts and impedes students’ paths to relief. Finally, I analyze whether the Court’s decision in Luna Perez could be utilized to expand the scope of exceptions to exhaustion, specifically exceptions for systemic violations.

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INTRODUCTION

The Individuals with Disabilities Education Act (IDEA) ensures that all eligible children with disabilities are provided a free appropriate public education (FAPE) and guaranteed procedural safeguards regarding the provision of such an education. The procedural safeguards include prescribed administrative procedures for resolving complaints which must be exhausted before a civil action can be brought under the statute. Because students with disabilities have several avenues for relief when faced with violations of their educational rights, including not only the IDEA but also the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973, and other federal disability statutes, the IDEA also includes a requirement that, if a plaintiff seeks relief that is available under the IDEA, the plaintiff must first exhaust administrative due process hearings under the statute before

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2 20 U.S.C. § 1415(i)(2)(A); Honig v. Doe, 484 U.S. 305, 326-27 (1988) ("[J]udicial review is normally not available . . . until all administrative proceedings are completed . . . ").
bringing a claim under additional statutes. Courts, however, have historically applied the IDEA’s exhaustion requirement inconsistently.

In March of 2023, the Supreme Court in *Luna Perez v. Sturgis Public Schools* clarified the meaning of “relief” in the statute’s exhaustion provision, concluding that if a plaintiff does not request any form of relief (i.e., damages) available under the IDEA, then they do not need to exhaust administrative remedies, even if the IDEA could address the underlying harm. The Court thus held that the exhaustion requirement would not apply when the IDEA could not provide the remedy sought. However, the Court avoided addressing a circuit split questioning whether a futility exception to the requirement applies—an exception that was previously recognized by the Supreme Court in *Honig v. Doe*. *Honig*, the quintessential education due process case concerning the IDEA’s “stay-put” provision, held that “unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, ‘the child shall remain in the then current educational placement.’” When the petitioner school district expressed concern over “time-consuming administrative remedies,” which would hinder the district’s ability to remove dangerous children from classrooms, the Court in *Honig* noted that both parents and school districts “may bypass the administrative process where exhaustion would be futile or inadequate.”

I argue that, although the Supreme Court in *Luna Perez* did not explicitly recognize a futility exception, its reasoning and interpretation of “relief” in Section 1415(l) of the IDEA support not only the application of a futility exception to the exhaustion requirement but also its expansion. In Part I, I provide a brief overview of the IDEA and its interconnection with the ADA and Section 504 of the Rehabilitation Act. Part II outlines the IDEA’s exhaustion requirement, including its history, benefits, exceptions, and scope. Part III discusses *Luna Perez*, the latest Supreme Court case to address the IDEA’s exhaustion requirement. While the recognition that a plaintiff does not need to exhaust administrative proceedings when the relief sought is unavailable under the IDEA is promising, I analyze the uncertainties that

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5 See infra Part III; see also Rosemary Queenan, *Delay & Irreparable Harm: A Study of Exhaustion Through the Lens of the IDEA*, 99 N.C. L. REV. 985, 1008 (2021) (“[C]ourts seem to be divided as to whether exhaustion is required when the claimant seeks monetary damages.”).
6 *Luna Perez v. Sturgis Pub. Schs.*, 143 S. Ct. 859, 863-64 (2023) (noting that compensatory damages are not a form of relief available under the IDEA).
7 Id.
8 Id. at 865 (“[W]e have no occasion to address any of those things.”).
9 *See Honig v. Doe*, 484 U.S. 305, 327 (1988) (“[P]arents may bypass the administrative process where exhaustion would be futile or inadequate.”).
10 Id. at 323 (emphasis omitted).
11 Id. at 326-27.
remain after the Court’s decision, specifically related to the futility exception. I argue that the futility exception fits squarely in line with congressional intentions, and failing to recognize such an exception only furthers confusion among lower courts and impedes students’ paths to relief. Finally, in Part IV, I analyze a specific exception to exhaustion frequently categorized within the futility exception—the systemic violation exception. Courts have historically recognized a systemic violation when there is system-wide failure to comply with the basic goals of the IDEA, enabling plaintiffs to bypass the exhaustion requirement. I argue that the scope of the systemic violation exception and, at a more basic level, its existence must be clarified given the Court’s decision in *Luna Perez*. Although the Court did not provide clarification regarding the application of the futility exception to the IDEA’s exhaustion requirement, I explore whether the Court’s reasoning behind its interpretation of the IDEA exhaustion requirement in *Luna Perez* could regardless be utilized to expand the systemic violation exception so that plaintiffs who seek relief unavailable under administrative processes, such as injunctive relief to alter an agency’s inadequate policies of even a limited component of the IDEA, can avoid the exhaustion requirement. Bypassing exhaustion in such a scenario would enable parents to pool together resources to bring class actions to address the source of the widespread issue rather than inefficiently bring individual administrative claims to merely band-aid the inadequate services their children receive because of insufficient policies.

I. OVERVIEW OF THE IDEA

The IDEA provides federal funds to states “to ensure that all children with disabilities have available to them a [FAPE] that emphasizes special education and related services designed to meet their unique needs.” A “child with a disability” is one who has a disability or impairment classified under one of the statute’s listed disabilities which causes the child to require special education and related services. Ensuring a FAPE for a child with a disability involves providing special education and related services that are

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12 See Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1305 (9th Cir. 1992) (“The alleged violations do not rise to a truly systemic level in the sense that the IDEA’s basic goals are threatened on a system-wide basis.”).

13 See Erin B. Stein, Comment, *The Individuals with Disabilities Education Act (IDEA): Judicial Remedies for Systemic Noncompliance*, 2009 WIS. L. REV. 801, 814 (“It would not be efficient to expect the large number of students affected to procure [administrative] remedies because the systemic noncompliance will continue . . . if the educational agency’s policies and procedures are not changed.”).


15 See 20 U.S.C. § 1401 (3)(A) (enumerating disabilities including intellectual disabilities, hearing impairment, and speech or language impairments, among others).
publicly funded, supervised, and directed, meet state educational agency standards, include appropriate preschool through secondary school education, and conform to a child’s individualized education program (IEP). An IEP is a written statement, reviewed at least annually, which “documents the child’s current ‘levels of academic achievement,’ specifies ‘measurable annual goals’ for how she can ‘make progress in the general education curriculum,’ and lists the ‘special education and related services’ to be provided so that she can ‘advance appropriately toward [those] goals.’” The IDEA, however, does not impose an explicit substantive standard for what constitutes a FAPE, leaving courts to decipher its implicit requirements. In Board of Education of Hendrick Hudson Central School District v. Rowley, the Court noted that the IEP must not only be developed through processes that satisfy IDEA’s procedural requirements but also must satisfy substantive requirements, which mandate the IEP be “reasonably calculated to enable the child to receive educational benefits.” In 2017, the Court further clarified the Rowley standard in Endrew F. v. Douglas County School District RE-1, holding that the IDEA “requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court held that a program that provides “merely more than de minimis” progress is not a program that provides “appropriate” progress. However, the Court did “not attempt to elaborate on what ‘appropriate’ progress” means. Rather, courts lend deference to the expertise of school authorities so long as they offer a “cogent” explanation for providing such a program.

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18 See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 188 (1982) (“Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive . . . .”). The Tenth Amendment reserves powers not delegated to the federal government to the states. U.S. CONST. amend. X. Among those powers reserved for the states is education. See, e.g., N.J. Stat. § 18A:4-10 (“[C]ontrol of public education in this state . . . shall be vested in the state board, which shall formulate plans and make recommendations for the unified, continuous and efficient development of public education . . . .”). While the IDEA was enacted under congressional spending authority to provide states with federal funds to help in the education of children with disabilities, it “does not ‘displace the primacy of States in the field of education’ and gives them leeway in determining the content of a free appropriate public education.” Bradley v. Jefferson Cnty. Pub. Schs., 88 F.4th 1190, 1193 (6th Cir. 2023).
19 458 U.S. at 206-07.
21 Id. at 1000-01.
22 Id. at 1001.
23 Id. at 1001-02.
The IDEA contains procedural safeguards to protect the rights of children with disabilities and their parents, including providing parents with the right to dispute “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child.”24 Under the IDEA, parents may resolve such issues through mediation, filing a complaint with a state educational agency (SEA), or filing a complaint to initiate an impartial due process hearing.25 Within fifteen days of receiving notice of a complaint to initiate a hearing, the local educational agency (LEA) must first try to resolve the complaint by organizing a meeting with the student’s parents and their IEP team.26 If the dispute persists, or the meeting is waived, a due process hearing is conducted by either the LEA or SEA, depending on the state’s hearing system.27 If a state has a two-tier system in place and a disagreement between parents and the school district continues after the initial hearing with the LEA, parents may appeal the LEA’s decision to the SEA.28 Only after exhaustion of due process hearings—either with just the SEA or, upon appeal, both the LEA and SEA—the aggrieved party may bring a civil action in any state or district court seeking relief for the FAPE violation.29

In addition to the IDEA, individuals with disabilities may seek remedies under the Constitution, the ADA, Section 504 of the Rehabilitation Act, or other laws protecting the rights of children with disabilities.30 Title II of the ADA prohibits any “public entity” from excluding an individual with a disability from the public entity, denying them the benefits of the entity, or discriminating against an individual based on their disability.31 Section 504 of the Rehabilitation Act applies to federally funded programs or activities and

25 See 20 U.S.C. § 1415(e), (f)(1)(A) (requiring the opportunity for mediation and a due process hearing); 34 C.F.R. §§ 300.151-153 (2018) (requiring each SEA to provide a complaint resolution process).
27 See id. (providing for voluntary waiver); 20 U.S.C. § 1415(f)(1)(A) (“[A]n impartial due process hearing . . . shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.”).
28 20 U.S.C. § 1415(g) (providing a right to appeal).
29 20 U.S.C. § 1415(i)(2)(A) (providing a right to bring a civil action).
30 20 U.S.C. § 1415(l) (allowing other “rights, procedures, and remedies” to rectify the violation).
31 42 U.S.C. § 12132. A “public entity” includes, among other entities, any state government, local government, and department or agency of such state or local government. 42 U.S.C. § 12131. A disability under the ADA is considered “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment . . . .” 42 U.S.C. § 12102.
similarly prohibits such exclusion from or denial of benefits of the program as well as discrimination on the basis of one's disability.\textsuperscript{32}

There is certainly overlap between the IDEA, the ADA, and Section 504, as agencies that receive funds under the IDEA are both public entities and federally funded.\textsuperscript{33} However, the IDEA serves a more narrow population of students with disabilities while providing more procedural protections.\textsuperscript{34} Unlike the IDEA, the ADA and Section 504 apply to both children and adults with disabilities in not only school environments but also all other public and federally funded entities, respectively.\textsuperscript{35} Given that the IDEA is limited to ensuring that all children with disabilities are provided with a FAPE, there are situations—most obviously when discrimination occurs outside of a school setting, but also when the school violation does not involve the denial of a FAPE—in which Title II and Section 504 may apply when the IDEA does not.\textsuperscript{36} Both Title II and Section 504 also provide additional remedies not granted under the IDEA. The IDEA provides broadly that “the court . . . shall grant such relief as the court determines is appropriate.”\textsuperscript{37} Thus, relief under the IDEA includes remedies such as compensatory education, injunctive relief, reimbursement for private education, attorneys’ fees, and other equitable relief a court finds appropriate.\textsuperscript{38} However, the statute is interpreted to be “inconsistent with monetary awards” other than

\begin{thebibliography}{9}
\bibitem{32} 29 U.S.C. § 794(a). The definition of disability under Section 504 is the same as that of the ADA. 29 U.S.C. § 705(20)(B) (noting that, for purposes of subchapter V of the Rehabilitation Act, “individual with a disability” shall mean “any person who has a disability as defined in [the ADA]”).
\bibitem{33} JAMES A. RAPP, 4 EDUCATION LAW § 10C.13(1),(2) (2023) (noting the overlap between these laws).
\bibitem{34} See Peter J. Maher, Comment, Caution on Exhaustion: The Courts’ Misinterpretation of the IDEA’s Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA, 44 CONN. L. REV. 259, 285-86 (2021) (noting the difference in identification, evaluation, educational placement, and FAPE requirements set out in the IDEA compared with the ADA and Section 504).
\bibitem{35} 42 U.S.C. § 12131 (covering public entities); 29 U.S.C § 794(a) (covering federally funded entities).
\bibitem{36} See Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 753 (2017) (finding that an IDEA officer can only provide relief for a FAPE violation).
\bibitem{38} See JAMES A. RAPP, 4 EDUCATION LAW § 10C.13(4)(b) (2023) (“Courts have ‘broad discretion’ and may provide appropriate relief consistent with the purposes of [the IDEA, ADA, and Rehabilitation Act].”); see, e.g., 20 U.S.C. § 1412(a)(10)(C)(ii) (stating that a public agency may be required to reimburse the cost of a private education if it denied a child a FAPE); Sch. Comm. of Burlington v. Dept’ of Educ. of Mass., 471 U.S. 359, 370 (1985) (“[W]e are confident that by empowering the court to grant ‘appropriate’ relief Congress meant to include retroactive reimbursement to parents as an available remedy . . . .”); 20 U.S.C. § 1415(i)(3)(B) (allowing the payment of attorneys’ fees). Although hearing officers lack the authority to award attorneys’ fees, a party may be considered a ‘prevailing party’ and entitled to attorneys’ fees if they prevailed in either court or in an administrative hearing. El Paso Indep. Sch. Dist. v. Richard R. ex rel. R.R., 591 F.3d 417, 422 n.4 (5th Cir. 2009).
\end{thebibliography}
reimbursements. On the other hand, under the ADA and Section 504 plaintiffs can bring suits seeking monetary damages. There are situations, therefore, in which a plaintiff may desire to bring a claim under the ADA or Section 504, rather than the IDEA, in order to receive monetary relief.

II. IDEA’S EXHAUSTION REQUIREMENT

Before an aggrieved party brings a civil action under the IDEA, the statute requires that the party first present a complaint and participate in an impartial due process hearing. If the dispute persists following exhaustion of a due process hearing, and after an appeal if the hearing was first conducted by an LEA, the aggrieved party may bring a claim in a state or federal court for relief of the FAPE violation. Given the many statutes under which students with disabilities may seek relief, the IDEA in Section 1415(l) sets forth procedural requirements for a plaintiff bringing suit under other statutes. While the IDEA does not “restrict or limit the rights, procedures, and remedies” available under other federal laws, the statute requires that, if a claim is brought that “seek[s] relief that is also available under” the IDEA, the plaintiff must first exhaust the procedures set out in the IDEA “to the

40 See 29 U.S.C. § 794a(a)(2) (“The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of [the Rehabilitation] Act.”); 42 U.S.C. § 12133 (providing “remedies, procedures, and rights” under the ADA to be the same as the “remedies, procedures, and rights” set forth in the Rehabilitation Act); see also Fry, 137 S. Ct. at 750 (“Both statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages.”). However, the Supreme Court recently reduced the available damages under Section 504 of the Rehabilitation Act, holding that emotional distress damages are not available for private discrimination claims under the Act. Cummings v. Premier Rehab Keller PLLC, 142 S. Ct. 1562, 1576 (2022). Unlike the Rehabilitation Act, the ADA is not enacted under the Spending Clause. See Lartigue v. Northside Indep. Sch. Dist., 86 F.4th 689, 698 (5th Cir. 2023) (noting that Section 504 of the Rehabilitation Act was enacted under the Spending Clause while Title II of the ADA was not). However, because the ADA adopts the Rehabilitation Act’s damages provision, the availability of emotional distress damages under the ADA is presently unclear. See Oral Argument at 40:26, Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 81 (No. 21-887), https://www.supremecourt.gov/oral_arguments/audio/2022/21-887 [https://perma.cc/NN5S-88RL] [hereinafter Luna Perez Oral Argument] (“[W]hat kinds of compensatory relief are available after Cummings? . . . [i]s there any at this point? And for what?”). Further, neither statute provides for punitive damages. James A. Rapp, 4 Education Law § 10C.13(4)(e)(i) (2023).
42 Id.; 20 U.S.C. § 1415(g) (providing for the right to appeal an LEA decision).
same extent as would have been required had the action been brought under [the IDEA] before bringing a civil action seeking relief under additional statutes.44

The administrative exhaustion requirement is a “long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”45 This Part examines the legislative and judicial history of the exhaustion requirement, benefits to exhaustion, exceptions to the requirement, and its scope.

A. History of the Exhaustion Requirement

The Education for All Handicapped Children Act of 1975 (EHA), later retitled the IDEA, included a provision that “[a]ny party aggrieved by the findings and decision [of a due process hearing] who does not have the right to an appeal . . . and any party aggrieved by the findings and decision [in an appeal to the state educational agency] shall have the right to bring a civil action with respect to the complaint presented. . . .”46 Although the statute included an exhaustion provision for claims under the EHA, the statute did not address the procedure for claims brought under other federal provisions. The Supreme Court first discussed the interplay of the EHA and other statutory and constitutional provisions in Smith v. Robinson in 1984.47 The Court decided that “Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education.”48 Heavily weighing what it believed to be Congress’s intentions, the Court reasoned that the needs of students with disabilities would best be met by requiring that the students’ parents and the educational agency work together rather than by allowing parents to sue in federal court.49 Thus, when a student’s claim relating to the denial of a FAPE

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45 Queenan, supra note 5, at 992 (quoting Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)).
47 See 468 U.S. 992, 1019-20 (1984) (holding that, although Section 504 would allow a plaintiff to bring a claim directly to court and receive awards for damages and attorney’s fees, when Section 504 does not guarantee any greater substantive rights than the EHA and the EHA is available, the EHA is the sole avenue for relief).
48 Id. at 1009.
49 Id. at 1012.
fell under the EHA, the Act was the sole method of relief on which the plaintiff could rely.\textsuperscript{50}

In 1986, following the decision in \textit{Smith}, Congress passed the Handicapped Children's Protection Act of 1986 (HCPA), which amended the EHA and superseded the decision in \textit{Smith}, authorizing an award of attorneys' fees and prohibiting the restriction or limitation of remedies available under other federal laws.\textsuperscript{51} When the EHA was reauthorized in 1990 under a new title, the IDEA, the provision barring the limitation of "rights, procedures, and remedies" was codified in Section 1415(l) of the IDEA.\textsuperscript{52} However, while Section 1415(l) does not restrict the pursuit of remedies available under federal law, it does prescribe a set order of relief—plaintiffs who seek relief that is available under the IDEA must exhaust administrative due process hearings under the IDEA before pursuing a civil action under other federal statutes.\textsuperscript{53}

\textbf{B. Benefits of the Exhaustion Requirement}

The administrative exhaustion requirement is intended to provide many benefits. First, "[a] primary purpose [of administrative exhaustion] is the avoidance of premature interruption of the administrative process."\textsuperscript{54} Second, the exhaustion requirement ensures that authority over education is delegated to the state and local agencies that have expertise in the subject matter.\textsuperscript{55} The exhaustion requirement thus provides the agencies with autonomy to make decisions and "correct [their] own mistakes."\textsuperscript{56} Third, the exhaustion

\begin{itemize}
  \item \textsuperscript{50} Id. at 1013.
  \item \textsuperscript{51} Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, §§ 2-3, 100 Stat. 796, 796-97; see also H.R. REP. No. 99-296, at 4 (1985) ("Congressional intent was ignored by the U.S. Supreme Court when . . . it handed down its decision in Smith v. Robinson . . . ").
  \item \textsuperscript{53} 20 U.S.C. § 1415(l).
  \item \textsuperscript{54} McKart v. United States, 395 U.S. 185, 193 (1969); see also Ass'n for Cmty. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) (noting the exhaustion requirement "prevent[s] deliberate disregard and circumvention of agency procedures established by Congress").
  \item \textsuperscript{55} Queenan, supra note 5, at 992 (explaining that exhaustion enables agencies to regulate programs with which Congress has empowered them and in which they have expertise). The IDEA is "frequently described as a model of 'cooperative federalism.'" Schaffer v. Weast, 546 U.S. 49, 52 (2005) (quoting Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 830 (8th Cir. 1999)).
  \item \textsuperscript{56} JAMES A. RAPP, 4 EDUCATION LAW § 10C.13(3)(a)(i) (2023) (quoting Gibson v. Forest Hills Loc. Sch. Dist. Bd. of Educ., 655 F. App'x 423, 432 (6th Cir. 2016)); see also McKart, 395 U.S. at 194 ("[S]ince agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.").
\end{itemize}
requirement is intended to provide prompt relief for students.\textsuperscript{57} Fourth, by requiring that proceedings first begin with administrative agencies, exhaustion ensures that a record of relevant facts is developed prior to judicial review.\textsuperscript{58} And fifth, exhaustion preserves judicial efficiency “by avoiding needless repetition of administrative and judicial fact finding and avoiding judicial intervention if the parties successfully resolve their claims administratively.”\textsuperscript{59} When presented with a case, courts assess these benefits and determine “whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme.”\textsuperscript{60}

C. Exceptions to the Exhaustion Requirement

While exhaustion certainly has benefits, Congress recognized that exhaustion should not be required in all situations. The House Report of the HCPA, the statute which provided the provision on which Section 1415(l) of the IDEA is based, noted that exhaustion should be excused when:

(1) it would be futile to use the due process procedures (e.g., an agency has failed to provide services specified in the child’s individualized educational program . . . or an agency has abridged a handicapped child’s procedural rights . . .); (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought); and (4) an emergency

\textsuperscript{57} See Polera v. Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 487 (2d Cir. 2002) (“The IDEA’s exhaustion requirement was intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators’ expertise in the area and promptly resolve grievances.”); 121 CONG. REC. 37416 (1975) (“In view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable . . .”); cf. infra notes 137–46 for a discussion of delays in administrative hearings and their “judicialization.”

\textsuperscript{58} See Queenan, supra note 5, at 992-93; McKart, 395 U.S. at 194 (“[I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based.”); see also, e.g., Perez v. Sturgis Pub. Schs., 3 F.4th 236, 244 (6th Cir. 2021), rev’d sub nom. Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (“The development of an administrative record would have improved the accuracy and efficiency of judicial proceedings, especially because the ALJs have experience with special-education cases.”); Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1305 (9th Cir. 1992) (“Eligibility criteria and methodology are classic examples of the kind of technical questions of educational policy best resolved with the benefit of agency expertise and a fully developed administrative record.”).

\textsuperscript{59} Queenan, supra note 5, at 993; see McKart, 395 U.S. at 194 (“[I]t is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate states.”).

\textsuperscript{60} Hoeft, 967 F.2d at 1303.
situation exists (e.g., the failure to take immediate action will adversely affect a child’s mental or physical health).\(^6\)

In the Senate Report of the HCPA, Congress similarly noted that exhaustion would not be required when proceedings would be futile.\(^6\) Senator Paul Simon, a cosponsor of the HCPA, noted that exhaustion would not be appropriate when complaints allege that: (1) an agency did not provide a child with services required by their IEP; (2) an agency has failed to provide a child with their procedural rights under the Act; (3) “an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use due process procedures—for example, where the hearing officer lacks the authority to grant the relief sought;” and (4) there is an emergency situation, such as an issue with summer services that would not be resolved before the end of the summer.\(^6\)

Despite these many exceptions discussed by Congress, the IDEA does not explicitly set out exceptions to the exhaustion requirement in the statute.\(^6\)

Nevertheless, the Supreme Court in 1988 recognized exceptions to IDEA’s exhaustion requirement in *Honig v. Doe*, noting that “parents may bypass the administrative process where exhaustion would be futile or inadequate.”\(^6\) Since *Honig*, every Circuit Court—up until recently, as I will discuss in Part III—had interpreted the Court’s decision to have found for the existence of futility and inadequacy exceptions.\(^6\)

As in *Honig*, inadequate relief and futility exceptions are often discussed together when addressing exceptions to the exhaustion requirement.\(^6\) At other times, futility and inadequate relief are categorized as two different

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\(^6\) S. REP. NO. 99-112, at 15 (1985); see also 121 CONG. REC. 37416 (1975) (“I want to underscore that exhaustion of the administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter.”).

\(^6\) 131 CONG. REC. 21392-93 (1985).


\(^6\) See Perez v. Sturgis Pub. Schs., 3 F.4th 236, 252 (6th Cir. 2021), rev’d sub nom. Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (Stranch, J., dissenting) (“[E]very single one of our sister circuits has subsequently acknowledged the existence of the futility and inadequacy exceptions to exhaustion of the IDEA’s administrative procedures.”). However, while courts recognize the exceptions, they are often hesitant to apply them. See, e.g., J.M. ex rel. McCauley v. Francis Howell Sch. Dist. 850 F.3d 944, 951 (8th Cir. 2017) (recognizing the futility and inadequacy exceptions but holding “exhaustion is not futile because it would allow the agency to develop the record for judicial review and apply its expertise” and that a claim for inadequate relief is without merit “regardless of whether the administrative process offers the particular type of relief that is being sought”).

\(^6\) See Honig v. Doe, 484 U.S. 305, 327 (1988) (“[P]arents may bypass the administrative process where exhaustion would be futile or inadequate.”).
situations in which exhaustion would not be appropriate.68 In such cases, the inadequacy exception applies when adequate relief is not available from administrative proceedings.69 The futility exception, which most obviously applies when administrative proceedings would be “futile,” is much more difficult to define and has been utilized as an umbrella exception “for a variety of situations in which administrative relief is more or less unlikely.”70 Some courts confound the two exceptions, considering inadequate relief to be a situation that may warrant the futility exception.71 Thus, the futility exception, much like that for inadequate relief, has been applied when administrative proceedings could not provide adequate remedies.72 However, the futility exception has also been applied, albeit inconsistently, in many more situations, including systemic violations, bad faith of an agency, certainty of an adverse decision, and matters that are solely legal and which would not benefit from a factual record.73

68 See supra note 61 and accompanying text; J.M., 850 F.3d at 950 (distinguishing between an exception for futility and an exception for the “inability of the administrative remedies to provide adequate relief” when listing three exceptions to exhaustion).

69 See, e.g., N.M. Ass’n for Retarded Citizens v. New Mexico, 678 F.2d 847, 850 (10th Cir. 1982) (noting an exception for exhaustion when there is an “[i]mprobability[] of obtaining adequate relief by pursuing administrative remedies” (citation omitted)); J.M., 850 F.3d at 920 (noting an exception for the “inability of the administrative remedies to provide adequate relief”). The House Report of the EHA specifically noted the exception would apply when the particular remedy that a plaintiff seeks is unavailable through administrative procedures. H.R. REP. NO. 99-296, at 7 (1985). Contra J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 595 (8th Cir. 2013) (noting the court had previously, in dicta, stated that “the IDEA’s exhaustion requirement remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought.”).


71 See Queenan, supra note 5, at 1008 (noting courts’ recognition of the futility exception where “administrative procedures do not provide [an] adequate remed[y]” (alteration in original)).

72 See, e.g., Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205 (2d Cir. 2007) (noting that to demonstrate futility “a plaintiff must demonstrate that ‘adequate remedies are not reasonably available’”); Jenkins v. Bd. of Educ., 463 F. Supp. 2d 747, 755 (S.D. Ohio 2006) (holding that, because plaintiff is no longer a student at defendant school, exhaustion would be futile, as no administrative remedy could redress the injuries); W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (“[W]e have held that, where the relief sought in a civil action is not available in an IDEA administrative proceeding, recourse to such proceedings would be futile and the exhaustion requirement is excused.”); Covington v. Knox Cnty. Sch. Sys., 205 F.3d 912, 917 (6th Cir. 2000) (“[W]here there is no administrative remedy for a wrong that the plaintiff has suffered, exhaustion is futile and may be waived.” (citing Plasencia v. California, 29 F. Supp. 2d 1145, 1150 (C.D. Cal. 1998))). The advocates and defendants in Luna Perez similarly conflated the inadequacy and futility exceptions during Supreme Court Oral Argument. See Luna Perez Oral Argument, supra note 40, at 24:20 (noting that asking an administrative agency officer for money damages when the IDEA is unable to provide for such relief is an example of futility); id. at 1:01:04 (“Exhaustion is excused as futile when the agency can’t grant you some relief that a court could grant you.”).

73 See Queenan, supra note 5, at 1008-09 (noting these additional applications of the futility exception). The United States, supporting petitioners in Luna Perez, also made this observation. See
Notably, even when a court generally recognizes an exception, proving that the exception applies to a plaintiff’s claim is difficult; the burden of proof falls on the party seeking to avoid exhaustion, which may prove challenging for parents with less knowledge of and access to educational documents and evidence.\footnote{74}{Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 488 n.8 (2d Cir. 2002) (citing Honig v. Doe, 484 U.S. 305, 327 (1988)). Although the IDEA requires parties to disclose all evaluations that have been completed at least five days prior to a hearing, consequences for failure to disclose are limited to the inability to present the undisclosed evaluation at a hearing. 20 U.S.C. § 1415(f)(2).}

D. Scope of the Exhaustion Requirement

While the enactment of Section 1415(l) of the IDEA provided clarification on the relationship between the IDEA and other federal statutes, it also left much uncertainty. Courts have grappled with understanding the nature and scope of the IDEA administrative exhaustion requirement.\footnote{75}{Circuit courts are split about whether the IDEA exhaustion requirement is a jurisdictional or claims-processing issue. A jurisdictional issue would prohibit a court from having the authority to hear a case, whereas a claims-processing rule would only require judicial enforcement if a party raised the issue and may allow courts to fashion equitable remedies. See, e.g., K.I. v. Durham Pub. Schs. Bd. of Educ., 54 F.4th 779, 792-93 n.7 (4th Cir. 2022) (comparing approaches to the IDEA exhaustion requirement across several circuits). Compare Polera, 288 F.3d at 491 (instructing dismissal of plaintiff’s complaint because failing to exhaust one’s administrative proceedings resulted in the court’s lack of subject matter jurisdiction) and T.R. v. Sch. Dist. of Phila., 4 F.4th 179, 190 (3d Cir. 2021) (“We have held that exhaustion of administrative remedies is a requirement for a district court to exercise subject matter jurisdiction over an IDEA claim.”), with K.I., 54 F.4th at 792 (“[T]he IDEA’s exhaustion requirement is not a jurisdictional requirement but a claims-processing rule.”) and Payne v. Peninsula Sch. Dist., 653 F.3d 863, 870 (9th Cir. 2011) (“[W]e can find no reason why §1415(l) should be read to make exhaustion a prerequisite to the exercise of federal subject matter jurisdiction.”) and Mosely v. Bd. of Educ. of Chi., 434 F.3d 527, 533 (7th Cir. 2006) (reading the IDEA exhaustion requirement as a claims-processing rule, where failing to meet the exhaustion requirement is a waivable issue) and N.B. ex rel. D.G. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) (“The exhaustion requirement . . . is not jurisdictional and therefore ‘is not to be applied inflexibly.’”). While the Supreme Court has yet to weigh in on the issue, the Court “has clearly and consistently cautioned lower courts about the overuse of the term ‘jurisdiction.’” K.I., 54 F.4th at 791.}

The Supreme Court clarified the exhaustion requirement in 2017 in Fry v. Napoleon Community Schools, narrowing its scope to only claims in which the plaintiff seeks “relief for the denial of a FAPE.”\footnote{76}{Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 753 (2017).} If a claim hinges on the denial of a FAPE, a plaintiff cannot avoid exhaustion merely by filing a suit under another statute, such as the ADA or Section 504 of the Rehabilitation Act.\footnote{77}{Id. at 754.} Rather, in such a case the plaintiff must first initiate a due process

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Luna Perez Oral Argument, supra note 40, at 26:33 (noting that the futility exception applies to more broad contexts, not just in contexts when an administrative hearing would not be able to grant the type of relief sought).

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hearing conducted by the state or local educational agency as set out in Section 1415. On the other hand, if a plaintiff brings a claim under the ADA or Section 504 and is not seeking remedy for the violation of a FAPE, they would not need to exhaust administrative procedures under the IDEA, as “after all, the plaintiff could not get any relief from those procedures,” because “the only ‘relief’ the IDEA makes ‘available’ is relief for the denial of a FAPE.” The Court further clarified that a plaintiff may seek relief from an injury related to one’s education but unrelated to the denial of a FAPE, so not all educational claims are subject to the IDEA’s exhaustion requirement.

To determine whether one’s claim relates to the denial of a FAPE, courts must focus not on the particular words used in a complaint but on the “gravamen” of the complaint. However, while Fry clarified that the gravamen of the complaint must relate to the denial of a FAPE to require exhaustion under the IDEA, it explicitly avoided the question of whether a plaintiff, who asserts the denial of a FAPE but does not seek a remedy that could be awarded by a hearing officer under the IDEA, such as money damages, must still exhaust administrative procedures under the IDEA.

III. Exhaustion Today: Luna Perez v. Sturgis Public Schools

In March of 2023, the Supreme Court clarified the question of whether claimants seeking relief for the denial of a FAPE must exhaust administrative procedures if they seek relief not available under the IDEA. In Luna Perez v.
Sturgis Public Schools, plaintiff Miguel Luna Perez sued his school district under the ADA for monetary damages after being denied a FAPE from age nine until he graduated at age twenty.83 Perez is deaf, and to accommodate his hearing impairment the school provided him with teaching assistants.84 However, some assistants were unqualified to work with deaf students and others did not aid Perez for hours throughout the school day.85 Despite the school’s assurances that Perez was performing well, such as including him in the honor roll each year, the school notified Perez’s family before graduation that he was only eligible for a “certificate of completion,” not a diploma.86

Perez, asserting claims under the IDEA, ADA, Rehabilitation Act, and two state disability laws, filed a complaint with his state’s Department of Education.87 Before a hearing, however, Perez settled with his school district, which agreed to pay for post-secondary compensatory education, sign language instruction, and attorney’s fees.88 After settling, Perez then sued the school district in federal court under the ADA and a state disability statute, claiming that “the school discriminated against him by not providing the resources necessary for him to fully participate in class,” and seeking declaratory relief and compensatory damages for his emotional distress.89

As discussed above, the Fry Court concluded that a plaintiff is not subject to the IDEA’s exhaustion requirement when they seek relief for something other than the denial of a FAPE.90 However, if a plaintiff does seek relief for the denial of a FAPE, they cannot forgo exhaustion under the IDEA by merely bringing suit under another statute.91 Perez did not forgo his IDEA claim but rather settled it, and the monetary relief for emotional damages that he sought was only available under the ADA, not the IDEA.92 Thus, the Sixth Circuit set out to determine whether Perez’s claim was subject to the IDEA exhaustion requirement when the relief that he sought was unavailable under the statute.93

To do so, the court interpreted the statutory text of the IDEA. Section 1415(l) states that “before the filing of a civil action under [federal laws protecting the rights of individuals with disabilities] seeking relief that is also available under [the IDEA],” administrative due process hearings must first

84 Id.
85 Id.
86 Perez, 3 F.4th at 238-39.
87 Id. at 239.
88 Id.
89 Id.
91 Id.
92 Perez, 3 F.4th at 240.
93 Id.
“be exhausted to the same extent as would be required had the action been brought under [the IDEA].” The court concluded that “relief available’ under the IDEA [means] relief for the events, conditions, or consequences of which the person complains, not necessarily relief of the kind the person prefers.” In other words, “[t]he focus of the analysis is not the kind of relief the plaintiff wants, but the kind of harm he wants relief from.” Harm from the denial of a FAPE, no matter the damages sought, would require exhaustion of IDEA administrative procedures. Thus, the court held that the relief that Perez sought was in fact available under the IDEA.

The Sixth Circuit further held Perez’s settlement did not constitute exhaustion and that no exceptions applied to Perez’s requirement to exhaust IDEA administrative procedures, as the statutory text of “[s]ection 1415(l) does not come with a ‘futility’ exception, and the Supreme Court has instructed [courts] not to create exceptions to statutory exhaustion requirements.” Instead, the Circuit Court claimed that Honig’s recognition that exhaustion may be bypassed when “futile or inadequate” was mere dictum. Further, even if there were a futility exception for IDEA claims, the court held that it did not apply, as administrative proceedings could have provided Perez with some relief, even if not the specific type of relief requested, and even though he settled his claim and could not have continued administrative proceedings.

Perez appealed the Sixth Circuit’s decision, and the Supreme Court granted certiorari. The Court unanimously held that the prohibition on individuals “seeking relief” under other federal statutes without exhausting administrative proceedings when such relief is available under the IDEA referred to the specific remedies that the plaintiff sought and not, as the Sixth Circuit had held, the underlying harm that the plaintiff faced. While the

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95. Perez, 3 F.4th at 241 (quoting McMillen v. New Caney Indep. Sch. Dist., 939 F.3d 640, 648 (5th Cir. 2019)).
96. Id.
97. Id.
98. Id. at 242.
99. Id. (citing Ross v. Blake, 136 S. Ct. 1850, 1857 (2016)).
100. Id. at 243.
101. Id. at 244.
holding required the Court to read “remedies” and “relief” in the text of the statute synonymously, the Court noted that other provisions of the IDEA (and specifically Section 1415), as well as other provisions of the U.S. Code, also use the terms interchangeably. Further, the Court reasoned that its conclusion is consistent with that of Fry, as again the Court found that exhaustion is not required when administrative processes under the IDEA cannot provide a plaintiff with relief sought. The Court noted, however, that when a plaintiff brings a claim under another federal disability statute seeking both monetary damages and equitable relief that is available under the IDEA, the request for equitable relief may be barred or deferred until the plaintiff exhausts administrative due process hearings.

The Court’s recognition that the exhaustion requirement does not apply when a claim seeks relief that the IDEA cannot provide is significant for several reasons. First, it removes a major hindrance to students seeking relief for claims that the IDEA cannot remedy. Forcing students to bring a claim from which they could not benefit in an administrative hearing just so that they are able to bring the claim in a judicial hearing wastes students’ valuable time and money as well as agency resources. The Supreme Court’s decision crucially allows plaintiffs seeking damages who could not recover in an administrative hearing to recover sooner by bringing claims directly to judicial hearings.

Second, Luna Perez is beneficial because it encourages settlements. Had the Supreme Court held that Perez had to exhaust administrative proceedings instead of agreeing to a settlement of all claims for which the IDEA could have provided relief, plaintiffs would be hesitant to settle their claims in the future. Luna Perez thus furthers the goals of the IDEA by allowing students, if they have the option, to find immediate relief through settlements and then, if necessary, bring suit for additional remedies unavailable under the IDEA in court. Finally, Luna Perez clarifies the law 'seek relief that is also available' under the IDEA if the plaintiff cannot seek the same remedy under the IDEA but nevertheless holding that exhaustion is required when a plaintiff seeks damages for a FAPE violation.

103 Luna Perez, 143 S. Ct. at 863.
104 Id. at 865.
105 Id.
106 See, e.g., J.W. v. Paley, No. 21-20671, 2023 U.S. App. LEXIS 22672, at *10–11 (5th Cir. Aug. 28, 2023) (holding that, following Luna Perez, the plaintiff student seeking compensatory and punitive damages could proceed with judicial hearings and bypass the IDEA’s exhaustion requirement, as the IDEA could not provide such remedies); see also infra notes 137–46 and accompanying text (noting delays in administrative hearings).
107 See Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 487 (2d Cir. 2002) (noting that the procedural requirements of the IDEA were intended to "promptly resolve grievances"); Luna Perez Oral Argument, supra note 40, at 22:03 (arguing, on behalf of petitioners, that the IDEA encourages settlements because a parent who prevails on a claim but receives less relief than they would have received in a settlement cannot recover attorneys’ fees); 20
for the lower courts previously uncertain about the exhaustion requirement in not only situations like that in Luna Perez, in which the plaintiff settled on his IDEA claims, but also situations in which the plaintiff only seeks monetary damages, such as when a plaintiff has graduated. However, following Cummings v. Premier Rehab Keller PLLC, in which the Supreme Court held that emotional distress damages are no longer available under Section 504 of the Rehabilitation Act, the availability of such damages under the ADA is uncertain. The long-term impact of Luna Perez is therefore not yet clear. And while the Supreme Court decided in favor of Perez, it left open a question regarding the applicability of the futility exception to the IDEA’s exhaustion requirement. Thus, the clarity that practitioners sought, and that which lower courts need, was not achieved.

A. The Futility Exception

The futility exception, recommended in legislative hearings and explicitly discussed in Honig, was previously thought to be settled law. Nevertheless,
the Sixth Circuit refused to recognize the exception, and on review the
Supreme Court stated that it had no reason to address “whether IDEA's
exhaustion requirement is susceptible to a judge-made futility exception.”
By leaving open the question that had already been decided in Honig—that a
futility exception applies to the IDEA’s exhaustion requirement—the Court
leaves open the possibility that the Sixth Circuit’s view, that Honig’s
recognition of the exception as applied to the IDEA was dictum, could be
accurate. Thus, the decision may open the door for additional circuits to
roll back procedural protections granted to students with disabilities.
The Sixth Circuit concluded that a futility exception did not apply to the
IDEA’s exhaustion requirement, as courts should not “create exceptions to
statutory exhaustion requirements.” The court had relied on Ross v. Blake,
in which the Supreme Court held that the Prison Litigation Reform Act
(PLRA) did not include a “special circumstances” doctrine and that the Court
should respect Congress’s statutory requirements. The Sixth Circuit’s
analysis is unconvincing. The Court in Ross noted that the application of a
judge-made exhaustion exception depends on the text and history of the
specific statute. The Sixth Circuit failed to explain how the IDEA’s
exhaustion requirement is similar to that of the PLRA other than that both
exhaustion requirements were established by Congress.
Meanwhile, the text of the IDEA, which states that “a party ‘aggrieved by
the findings and decision’ of the state agency has ‘the right to bring a civil
action with respect to the complaint’ he or she presented to the agency” and
that non-IDEA claims “shall be exhausted to the same extent as would be
required had the action been brought under [the IDEA],” is “meaningfully
different from the much stronger, mandatory phrasing used in the PLRA:
‘[n]o action shall be brought.’” The IDEA’s exhaustion provision is also
unique in its ability to subject claims under other federal statutes to the

113 Luna Perez, 143 S. Ct. at 865; Perez v. Sturgis Pub. Schs., 3 F.4th 236, 242 (6th Cir. 2021),
114 See Honig v. Doe, 484 U.S. 305, 327 (1988) (“[P]arents may bypass the administrative
process when exhaustion would be futile or inadequate.”).
115 This is consistent with the roll back of additional protections outside of the disability
context as well. See infra note 219 and accompanying text.
116 Perez, 3 F.4th at 242 (citing Ross v. Blake, 578 U.S. 632, 640 (2016)).
117 578 U.S. at 640.
118 See id. at 642, n.2 (“[A]n exhaustion provision with a different text and history . . . might
be best read to give judges the leeway to create exceptions . . . ”).
119 20 U.S.C. § 1415(f); see Perez, 3 F.4th at 242 (“[J]udge-made exhaustion doctrines . . . remain
amenable to judge-made exceptions.” (quoting Ross, 578 U.S. at 639)).
120 Perez, 3 F.4th at 253 (Stranch, J., dissenting) (alteration in original) (quoting 20 U.S.C.
§ 1415(f)(2)(A), (f); 42 U.S.C. § 1997e(a)).
IDEA’s exhaustion requirement. The Supreme Court had previously contrasted the IDEA with the PLRA, noting in Fry that the PLRA has a stricter exhaustion requirement than the IDEA (which may now be even less strict after the Supreme Court’s decision in Luna Perez). Further, looking at the history of the statute, as Ross advised, unlike the PLRA, which was enacted to replace a “statutory scheme [that had] made exhaustion ‘in large part discretionary,’” Section 1415(l) of the IDEA originated from congressional intent to reverse Smith v. Robinson’s restriction of remedies available under other federal laws. While Congress intended for parents to participate in decisions related to their children’s education, the legislative history of the IDEA is also clear in Congress’s intention to apply exceptions for futility and inadequacy.

Additionally, the Supreme Court has recognized the futility exception in the past. The Court in Honig not only explicitly recognized the futility and inadequacy exceptions but also relied on them to explain its holding in the case. In Honig, the Court held that the stay-put provision, which bars schools from unilaterally removing a student from their current educational placement during the pendency of administrative proceedings, applied even if the student would be dangerous to other students. The Court reasoned that schools could still bring a civil action in court, and although parties must usually exhaust administrative proceedings first, such proceedings may be bypassed “where exhaustion would be futile or inadequate.” Without such reliance on the futility and inadequacy exceptions, the Court’s holding would have had harmful consequences, as schools would be forced to keep a “truly

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121 Luna Perez Oral Argument, supra note 40, at 17:19, 1:10:31 (noting, when Justice Thomas asked whether there is “another area in which . . . the claim that is exhausted doesn’t naturally fit the claim that you’re trying to pursue,” that the IDEA “is a one-of-a-kind statute”).

122 See Fry v. Napoleon Cnty. Schs., 137 S. Ct. 743, 755 (2017) (“The [IDEA] statutory language asks whether a lawsuit in fact ‘seeks’ relief available under the IDEA—not, as a stricter exhaustion statute might, whether the statute ‘could have sought’ relief available under the IDEA (or, as the PLRA states) whether any remedies ‘are’ available under that law.”); see also Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (stating that the IDEA’s “exhaustion requirement is not a rigid one, and is subject to certain exceptions”).

123 Ross, 578 U.S. at 641; Fry, 137 S. Ct. at 750; See Brief for Petitioner at 48, Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (No. 21-887), 2022 U.S. S. CT. BRIEFS LEXIS 3649, at *67 (“As for the IDEA’s history, Congress enacted Section 1415(l) to reaffirm that anti-discrimination laws like the ADA remain fully available to students with disabilities.” (citing Fry, 137 S. Ct. at 750)).

124 See 131 CONG. REC. 21392-93 (1985); Section II.C.

125 Perez, 3 F.4th at 251-52 (Stranch, J., dissenting) (arguing that the recognition of the futility exception was not dictum in Honig because it was essential to the court’s holding, as “it explained why the Court’s interpretation of [the IDEA] would not lead to absurd results”).


127 Id. at 327.
dangerous” student in the classroom during the pendency of administrative proceedings.\textsuperscript{128}

In addition to relying on the exceptions, the Honig Court also seemed to recognize that the exceptions were in line with Congress’s intentions. Reasoning that the stay-put provision did not contain an emergency exception for dangerous students, the Court noted that it was “not at liberty to engraft onto the statute an exception Congress chose not to create.”\textsuperscript{129} Thus, by concluding that the futility and inadequate relief exceptions could apply, the Court suggests that Congress did intend to create such exceptions.

Further, less than two years prior to the Luna Perez decision and after the decision in Ross, the Court reiterated its recognition of exceptions to administrative exhaustion requirements.\textsuperscript{130} When considering whether plaintiffs who were denied social security disability benefits had to exhaust administrative procedures under the Appointments Clause to challenge the appointment of administrative law judges who heard their benefits cases, the Supreme Court noted that “this Court has consistently recognized a futility exception to exhaustion requirements,” as “[i]t makes little sense to require litigants to present claims to adjudicators who are powerless to grant the relief requested.”\textsuperscript{131}

While the futility exception did not make it into the text of the statute, the IDEA’s judicial history clearly proposes an exception to exhaustion when administrative proceedings would be futile.\textsuperscript{132} The Supreme Court has held that “when [Congress] re-enacts a statute without change,” it is “presumed to be aware” of the “judicial interpretation of [the] statute and to adopt that interpretation” upon reenactment.\textsuperscript{133} Congress has reenacted the IDEA two times—in 1997 and 2004—since the Supreme Court first recognized the futility exception, and both times it chose not to disclaim the exception.\textsuperscript{134}

Thus, although Congress did not address the existence of the futility exception in the IDEA’s statutory language and the Supreme Court left open

\textsuperscript{128} Id. at 326.
\textsuperscript{129} Id. at 323, 325.
\textsuperscript{130} See Carr v. Saul, 141 S. Ct. 1352, 1361 (2021); Brief for Petitioner at 43, Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (No. 21-887), 2022 U.S. S. CT. BRIEFS LEXIS 3649, at *60 (“Less than two years ago, the Court reaffirmed that it ‘has consistently recognized a futility exception to exhaustion requirements.’” (quoting Carr, 141 S. Ct. at 1361)).
\textsuperscript{131} Carr, 141 S. Ct. at 1361. The Court in Carr proceeded to hold that an exhaustion requirement did not apply to the petitioners’ Appointments Clause claims. Id. at 1362.
\textsuperscript{132} See supra Section II.C.
\textsuperscript{133} Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239-40 (2009); see, e.g., supra note 51 (noting that Congress passed the HCPA to clarify its intent following the decision in Smith v. Robinson).
\textsuperscript{134} See Brief for Petitioner at 44, Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (No. 21-887), 2022 U.S. S. CT. BRIEFS LEXIS 3649, at *62-63 (arguing that, in light of Forest Grove, Congress could have precluded the futility exception when re-enacting or amending the IDEA if it wished to).
the question in *Luna Perez*, it is clear that the exception should apply to the statute’s exhaustion requirement.

**B. Effects of the Unanswered Question of Futility**

By leaving open the question regarding the application of the futility exception, the Supreme Court has enabled the Sixth Circuit to continue to hold that a futility exception does not apply to the exhaustion requirement, leaving a circuit split. The implications that this decision will have on students are significant. Administrative hearings are intended to serve many benefits, such as providing students with prompt relief. However, such benefits may not always exist in practice. Scholars have noted that there has been a trend of “creeping judicialization” of due process hearings categorized by “time-consuming proceduralism.” A study of due process hearings in one state revealed that parents’ success in hearings is highly variable depending on whether the parents hired representation and which hearing officer presided over the case. There is generally a sense that due process hearings are more efficient because they are ideally completed within forty-five days of filing. However, parties often need to request additional time to pursue expert testimony and evaluations or adequately gather evidence to prepare for their case, given that the district may be in possession of most of

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136 See Diane M. Holben & Perry A. Zirkel, *Due Process Hearings Under the Individuals with Disabilities Education Act*: *Justice Delayed...*, 73 ADMIN. L. REV. 833, 834 (2021) (“A primary purpose of the [due process hearing] is to ensure prompt dispute resolution.”).


138 In a study analyzing the results of due process hearings across 5 years, from 1997 – 2002, in Illinois, parents’ success in a hearing that they requested increased from 23.2% to 55.8% when represented by a lawyer. The study further found that 15% of the 20 hearing officers who issued 4 or more decisions decided 100% of their cases in favor of school districts. MELANIE ARCHER, ACCESS AND EQUITY IN THE DUE PROCESS SYSTEM: ATTORNEY REPRESENTATION AND HEARING OUTCOMES IN ILLINOIS, 1997-2002, at 14, 20 (2022), https://www.dueprocessillinois.org/Access.pdf [https://perma.cc/VS8U-QYE2].

139 See 34 C.F.R. § 300.515(a) (2018) (“The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—(1) A final decision is reached in the hearing[.]”). Section 300.510(c) states additional parameters for when the 45-day timeline begins. 34 C.F.R. § 300.510(c).
the relevant documents. Once a party requests such additional time, the regulatory time requirements are waived, meaning that due process hearings do not need to be completed within any specific length of time. Consequently, decisions are rarely rendered within the expected time, and when judicial review is also required, a decision will often “come[] a year or more after the school term covered by [the] IEP has passed.”

In fact, an analysis of fully adjudicated standard hearings from 2013 to 2018 revealed an average of 200.1 days from the date of filing to the date of a decision. Over 75% of decisions had a major delay of over 100 days. That same study found that Tennessee had the highest average duration of time from the date of filing to the date of a decision for standard due process hearings with an average of 391 days. In fact, although a small sample size, 100% of the adjudicated hearings in Tennessee and Kentucky were delayed more than 100 days.

Significantly, both Tennessee and Kentucky are within the jurisdiction of the Sixth Circuit, which after Perez no longer recognizes the futility exception to the IDEA exhaustion requirement. Thus, for a child who brings an action that would fall under the futility exception but attends school in Tennessee or Kentucky, appropriate remedies may be delayed for over a year because they must first exhaust administrative due process hearings that would not even be able to provide them with appropriate remedies. The IDEA was

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140 Queenan, supra note 5, at 1016; see also Mary A. Lynch, Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York’s Special Education System, 55 ALB. L. REV. 179, 184-85 (1991) ("[A]torney[s] need[] time to collect the typically voluminous but critically important documentation concerning the child’s disability and needs, as well as every piece of paper in the child’s school files for use in cross-examining the district’s witnesses."). There may also be a delay when hearings are lengthy, as parties and hearing officers must manage busy schedules. Id. at 185.

141 Queenan, supra note 5, at 1016; 34 C.F.R. § 300.515(c) ("A hearing or reviewing officer may grant specific extensions of time . . . .").

142 Queenan, supra note 5, at 1017 (quoting Sch. Comm. of Burlington v. Dep’t of Educ. of Mass., 471 U.S. 359, 370 (1985)); see also Lynch, supra note 140, at 184 (noting that hearing officers almost never grant decisions within the 45-day timeline); New York Legal Assistance Group Brings Lawsuit to Protect Rights of Special Education Students: JSM v. New York City Department of Education, N.Y. LEGAL ASSISTANCE GRP., https://nylag.org/jsm/ [https://perma.cc/P2W5-XRPC] (last visited Mar. 10, 2024) ("[F]or years, New York City schoolchildren with disabilities and their families have had to wait . . . nearly a full year to get decisions on their special education due process complaints.").

143 Holben & Zirkel, supra note 136, at 853 (analyzing 2,512 fully adjudicated standard hearings).

144 Id. at 854.

145 Id. at 856 tbl.1.

146 Id. at 853, 856 tbl.1. The study consisted of just 11 decisions in Tennessee. In Kentucky, the study consisted of 15 decisions averaging 311 days from filing to decision. Id. Out of the 36 decisions in Michigan and 38 in Ohio, only 14% and 5%, respectively, of decisions were made within the regulatory timeline. Id. at 866.
intended to provide “prompt resolution” of educational issues for children with special needs because Congress recognized the detrimental effects that improper educational programs could have on a child.147 The Sixth Circuit’s dismissal of a futility exception, especially given the delay in resolution of administrative hearings, disregards Congress’s intent when it enacted the IDEA, as students who cannot receive sought after relief from an administrative hearing will nevertheless be forced to exhaust their claim before filing suit.

Notwithstanding these concerns, there is a possible benefit from the Court’s silence on the issue of futility. In recent years, there has been “a variety of doctrinal changes that have made it more difficult for rights-holders to secure meaningful redress in federal court.”148 In advocating that the Court clarify the doctrine, there is an inherent risk that the Court may answer the question regarding the existence of the futility exception in the negative. However, disability advocates are often intentional, strategically “control[ling] which legal arguments the Court has an opportunity to consider.”149 By nevertheless posing the question to the Court, advocates may have believed the benefit of clarification from the Court outweighed the risk of an undesirable outcome.150

The Supreme Court’s decision is beneficial for plaintiffs like Perez who only seek monetary damages. However, many questions still remain. Following Luna Perez, there is no additional guidance about whether a futility exception applies nor, assuming it does apply, how broadly it applies. The decision enables the Sixth Circuit to continue to hold that the futility exception does not apply and has left uncertainty surrounding the scope of the exception among courts that do recognize one.151 The futility exception, as I will discuss in Part IV, often comprises the systemic violations exception;

147 Id. at 835 (quoting 121 CONG. REC. 37416 (1975)); see also Lynch, supra note 140, at 186 (”The developmental years of children are fleeting and critical. Inappropriate classifications or programs can lead to regression or to opportunities lost forever. This . . . is particularly dramatic for children with disabilities.”).
148 Jasmine E. Harris, Karen M. Tani & Shira Wakschlag, The Disability Docket, 72 AM. U. L. REV. 1709, 1724 (2023); see also Cummings v. Premier Rehab Keller PLLC, 142 S. Ct. 1562, 1576 (2022) (holding that emotional distress damages are not recoverable under Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act).
149 Harris, Tani & Wakschlag, supra note 148, at 1755.
150 Otherwise, plaintiffs may not have presented the question of futility to the Court. See id. at 1762-66 (noting a case in which advocates altered the legal questions presented to the Court to avoid an unfavorable outcome); see also, e.g., Luna Perez Oral Argument, supra note 40 at 27:29 (asking the Court to answer the antecedent question—what constitutes “relief”—before addressing exceptions).
151 See supra note 135 and accompanying text (citing lower courts’ decisions within the Sixth Circuit following Perez); supra Section II.C. (noting situations in which courts have recognized a futility exception).
uncertainty surrounding the exception can therefore significantly affect efforts to alter districts’ and states’ policies and practices that negatively affect students with disabilities. However, not only should the exception apply, but also the scope of recognized exceptions to the exhaustion requirement should be expanded. The systemic violation exception is currently narrow with a rather opaque definition; however, the Court’s reasoning in _Luna Perez_ could be utilized to further expand the exception.

IV. EXPLORING THE REACH OF _LUNA PEREZ_: SYSTEMIC VIOLATIONS

A systemic violation occurs when violations of the IDEA challenge the statute’s “basic goals . . . on a system-wide basis.” 152 The systemic violation exception stems from the legislative history of the IDEA, which noted that exhaustion would not be appropriate when “it would be futile to use the due process procedures” and when “an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.” 153 Administrative proceedings would not be appropriate—or rather, would be futile—as “[a]dministrative remedies are generally inadequate where structural, systemic reforms are sought.” 154 Hearings are designed to solve IDEA violations of individual students, and hearing officers lack the authority to require a school district to alter its system-wide policies and procedures. 155 Suits claiming systemic violations often take the form of class actions. 156

152 See _Hoeft v. Tucson Unified Sch. Dist._, 967 F.2d 1298, 1305 (9th Cir. 1992) (“The alleged violations do not rise to a truly systemic level in the sense that IDEA’s basic goals are threatened on a system-wide basis.”).

153 H.R. REP. NO. 99-296, at 7 (1985); see also _Hoeft_, 967 F.2d at 1304-05 (analyzing whether alleged violations rose to a systemic level and therefore fit under the “policy or practice of generalized applicability” exception); infra note 190 (listing cases that have classified the systemic violation exception under the futility exception).

154 _Hoeft_, 967 F.2d at 1309; see also _McQueen ex rel. McQueen v. Colo. Springs Sch. Dist._ No. 11, 488 F.3d 868, 874 (10th Cir. 2007) (“The role of the § 1415 process is to resolve a complaint about the education of a specific child.”).

155 Stein, _supra_ note 13, at 814; see also _Hoeft_, 967 F.2d at 1305-07 (“[I]n many [systemic violation] cases, the challenged policies or practices are enforced at the highest administrative level, so that the only meaningful remedy is through the courts.”); N.M. _Ass’n for Retarded Citizens v. New Mexico_, 678 F.2d 847, 851 (10th Cir. 1982) (noting that hearing officers generally work within existing programs and remedies they provide “do not include a restructuring of the State’s system to comply with Section 504”); 34 C.F.R. § 300.507 (noting that due process complaints related to identification, evaluation, educational placement, or a FAPE of a child with a disability can be filed).

156 See _J.S. ex rel. N.S. v. Attica Cent. Schs._, 386 F.3d 107, 114 (2d Cir. 2004) (“[T]he futility exception has been applied in cases of alleged systemic violations, and . . . such cases are often class actions.”); see also _J.G. ex rel. Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist._, 830 F.2d 444, 447 (2d Cir. 1987) (“[C]laims of generalized violations . . . lend themselves well to class action treatment.”); T.R. _v. Sch. Dist. of Phila._, 458 F. Supp. 3d 274, 286 (E.D. Pa. 2020) (“Repeatedly, courts facing putative class actions claiming a systemic deficiency under IDEA have found that the
Thus, the exception is especially important for under-resourced students with disabilities, who may not have resources to bring their own suit but may be able to take advantage of judicial class actions.157

However, the types of violations that fall under the systemic violation exception are narrow, and courts differ in their definition. Courts have previously held that “a class action seeking injunctive relief, without more, does not excuse exhaustion.”158 Rather, some courts have recognized systemic violations when “problems could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints were incapable of correction by the administrative hearing process.”159 Some courts have also held that a “substantive claim having to do with limited components of a program” is not enough to constitute a systemic violation “if the administrative process is capable of correcting the problem.”160 Rather, a claim is systemic if it alleges violations of the “integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act.”161 When a complaint alleges procedural violations of the IDEA, those violations must “effectively deprive[] plaintiffs of an administrative forum.”162 Further, the allegations must describe “unlawful policies or practices” and not simply be “of bad results.”163 Thus, a claim alleging unlawful policies or practices would fall under the exception, but a claim requesting better adherence to policies would be insufficient.164

For example, courts did not require exhaustion due to claims of systemic violations when a complaint challenged a state’s regulations for hiring

157 See Daniel J. Losen & Kevin G. Welner, Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children, 36 HARV. C.R.—C.L. REV. 407, 430-31 (2001) (explaining difficulties for individual remedy seekers, especially for poor and minority students, and the significance of class action lawsuits). Class actions allow plaintiffs to pool resources together and “enabl[e] one or a few class members who are aware of their rights to step forward and represent the class as a whole.” WILLIAM B. RUBENSTEIN, 1 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 1:7 (6th ed. 2023).
158 Hoeft, 967 F.2d at 1308.
159 J.S., 386 F.3d at 114.
160 Doe ex rel. Brockhuis v. Ariz. Dep’t of Educ., 111 F.3d 678, 682 (9th Cir. 1997).
161 Id.
162 Hoeft, 967 F.2d at 1305.
163 Martinez v. Newsom, 46 F.4th 965, 974 (9th Cir. 2022) (quoting Student A ex rel. Parent A v. S.F. Unified Sch. Dist., 9 F.4th 1079, 1086 (9th Cir. 2021)).
164 See id. (“A plaintiff cannot rely on the systemic exception simply by reframing an act of inadvertence or negligence as a policy or practice of not complying with the IDEA.” (citing Student A, 9 F.4th at 1085)).
administrative hearing officers,\textsuperscript{165} when a class alleged that a school district’s policy of not providing related services for the first two weeks of school denied students of a FAPE,\textsuperscript{166} when a class of plaintiffs contended that a state’s policy of funding a limited number of private placements was flawed,\textsuperscript{167} and when a class of students claimed “the entire special education system offered by the State [was] infirm.”\textsuperscript{168} Similarly, an action brought against a school for failure to prepare and implement IEPs, failure to notify parents of IEP meetings, failure to provide parents with progress reports, failure to appropriately train school staff, and many other system-wide problems fell under the exception.\textsuperscript{169} However, not all cases are as clear cut, and “it is not always clear where the line should be drawn between a systemic problem . . . and a merely common problem.”\textsuperscript{170}

\textbf{A. Clarification of the Systemic Violation Exception}

The distinction between a systemic problem and a “common” problem is difficult to assess. In \textit{Hoeft v. Tucson Unified School District}, parents of four disabled children brought a class action against their children’s school district and state superintendent challenging the criteria used to determine eligibility for extended year services, the scope of such services that eligible students were granted, and the district’s failure to comply with statutory notification requirements.\textsuperscript{171} Plaintiffs sought declaratory and injunctive relief requiring the district and state superintendent to develop appropriate criteria to evaluate each student’s need for extended year programming, to fund the

\begin{itemize}
\item \textsuperscript{165} See Heldman \textit{ex rel. T.H. v. Sobol}, 962 F.2d 148, 159 (2d Cir. 1992) (granting relief to a plaintiff who challenged a systemwide IDEA violation with allegations of inherent bias in the state hearing officer selection system).
\item \textsuperscript{166} See R. A-G \textit{ex rel. R.B. v. Buffalo City Sch. Dist. Bd. of Educ.}, No. 12-CV-960S, 2013 WL 3354424, at *8 (W.D.N.Y. July 3, 2013) (noting that “the impartial hearing officer . . . believed that the issue of a District-wide policy was outside the scope of a hearing” and “[t]hus, the record supports the assertion that it would have been futile for Plaintiffs to have pursued their systemic claims in [an] administrative proceeding”).
\item \textsuperscript{167} See Cordero \textit{ex rel. Bates v. Dep’t of Educ.}, 795 F. Supp. 1352, 1364 (M.D. Pa. 1992) (finding that the Commonwealth did not provide sufficient special education services nor adequate supervision).
\item \textsuperscript{168} N.M. Ass’n for Retarded Citizens v. New Mexico, 678 F.2d 847, 851 (10th Cir. 1982); see J.G. \textit{ex rel. Mrs. G. v. Bd. of Educ. of Rochester City Sch. Dist.}, 830 F.2d 444, 446 (2d Cir. 1987) (noting that wrongdoing was “inherent in the program,” as the school district, among many failures, did not properly evaluate students or develop IEPs and did not provide parents with adequate notice of testing or procedural rights).
\item \textsuperscript{169} J.S. \textit{ex rel. N.S. v. Attica Cent. Schs.}, 386 F.3d 107, 115 (2d Cir. 2004).
\item \textsuperscript{171} Hoeft \textit{v. Tucson Unified Sch. Dist.}, 967 F.2d 1298, 1302 (9th Cir. 1992).
\end{itemize}
programming adequately, and to provide parents with all procedural safeguards granted by the IDEA.\textsuperscript{172}

The court, noting that extended school year services were merely a component of the district’s special education program, found that the policies did not threaten the “IDEA’s basic goals . . . on a system-wide basis,” and therefore the violation did not fall under the systemic violation exception.\textsuperscript{173} The court further reasoned that procedural violations did not “deprive[] plaintiffs of an administrative forum” and noted that some policies, such as the eligibility criteria for the programming, would benefit from agency expertise and a developed administrative record.\textsuperscript{174} The court, however, did ultimately find that the district’s informal policies of providing a uniform amount of extended school year programming and providing inadequate parental notice were “on their face ‘contrary to the law’” and violated the IDEA.\textsuperscript{175} Nevertheless, because plaintiffs challenged school district policies, the court held that exhaustion was necessary to give the state the “opportunity to investigate and correct such policies.”\textsuperscript{176}

Similarly, in \textit{T.R. v. School District of Philadelphia}, the Third Circuit found that plaintiffs’ class action lawsuit fell short of alleging a systemic violation.\textsuperscript{177} Plaintiffs alleged that the translation and interpretation services provided by the school district to parents with limited English proficiency were inadequate based on “the quantity, quality, and consistency of those services,” including the failure to provide translated “[w]ritten prior notice” when the agency proposed or refused to change a child’s IEP and the failure to translate draft IEPs.\textsuperscript{178} While there is no regulation that requires the translation of IEPs or draft IEPs, regulatory provisions require educational agencies take “‘whatever action is necessary’ to allow parents to understand IEP Team meetings, ‘including arranging for an interpreter.’”\textsuperscript{179} The plaintiffs requested that the school district adopt and implement a new policy to provide sufficient translation services and requested that the school district provide translated IEP process documents prior to the IEP meetings of all class members.\textsuperscript{180}

The district court had previously noted that the plaintiffs did not “challenge a centralized policy enforced by a single decision-maker, but rather target[ed] individualized decisions . . . as to what services are required in each

\[\text{References}\]

\textsuperscript{172} Id.
\textsuperscript{173} Id. at 1305.
\textsuperscript{174} Id.
\textsuperscript{175} Id. at 1307.
\textsuperscript{176} Id.
\textsuperscript{177} 4 F.4th 179, 194 (3d Cir. 2021).
\textsuperscript{178} Id. at 183, 193.
\textsuperscript{179} Id. at 183-84.
\textsuperscript{180} Id. at 188.
particular case,” and as a result, found that the plaintiffs did not meet the exhaustion requirement nor the numerosity and commonality requirement for class certification.\textsuperscript{181} The Court of Appeals, although recognizing that “the parental right of meaningful participation could rightly be called a ‘basic goal’ of the IDEA,” noted that translation and interpretation services are just one part of the IDEA’s procedures and concluded that the systemic violation exception did not apply.\textsuperscript{182} Further, the court noted that the plaintiffs’ claim did not affect the administrative hearing process itself, leaving the plaintiffs free to seek relief through administrative procedures.\textsuperscript{183} It added that investigating the services that parents need “requires an individualized inquiry,” so, rather than allow plaintiffs to proceed with a judicial action, the court held that the plaintiffs must “bring the same IDEA claim from their complaint before a hearing officer who could then order that the School District provide each parent with translated IEPs, more qualified or consistent interpretation services, or whatever process would ensure meaningful participation for that parent.”\textsuperscript{184}

\textit{Hoeft} and \textit{T.R.} highlight the need for clarification regarding the definition of a systemic violation. The court in \textit{Hoeft} found that two of the district’s policies were contrary to law, falling under an exception recognized by legislative history—exhaustion would not be appropriate when “an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law.”\textsuperscript{185} Plaintiffs in \textit{Hoeft} challenged specific formal and informal policies; yet, the court still did not find a systemic violation exception.\textsuperscript{186} In \textit{T.R.}, the court noted that the translation services provided to each parent were individualized decisions rather than a centralized policy.\textsuperscript{187} However, multiple decisions that fail to provide translated draft IEPs and “[w]ritten prior notice” of changes to a child’s IEP deprives parents of meaningful

\begin{itemize}
\item \textsuperscript{181} Id. at 189 (changes made in original). The Circuit Court, however, noted that “the systemic exception is not met every time a plaintiff challenges centralized uniform policies that affect all students within a school or school district.” \textit{Id.} at 192.
\item \textsuperscript{182} \textit{Id.} at 193. The District Court had previously noted that, because the school had a policy to provide translation services to parents and complied with the policy, a systemic change to its policies was not necessary. \textit{T.R. v. Sch. Dist. of Phila.}, 458 F. Supp. 3d 274, 290 (E.D. Pa. 2020).
\item \textsuperscript{183} \textit{T.R.}, 4 F.4th at 193.
\item \textsuperscript{184} \textit{Id.} at 193-94.
\item \textsuperscript{185} \textit{Hoeft v. Tucson Unified Sch. Dist.}, 967 F.2d 1298, 1302-04, 1307 (9th Cir. 1992) (quoting H.R. REP. NO. 99-296, at 7 (1985)).
\item \textsuperscript{186} \textit{Id.} at 1307 (holding that, although district policies were contrary to law, plaintiffs were required to exhaust their claims).
\item \textsuperscript{187} \textit{T.R.}, 4 F.4th at 189.
\end{itemize}
participation in the process of IEP development, which is a “basic goal” of the IDEA, even if translation services are just one component. 188

Not only do courts vary in the scope of the systemic violation exception, but also there is a discrepancy regarding the classification of the exception itself. Some courts generally recognize that the exception “flows implicitly from, or is . . . subsumed by, the futility and no-administrative-relief exceptions.” 189 Others have more specifically classified the systemic violation exception as falling under the futility exception. 190 On the other hand, other courts categorize systemic violations as a separate and distinct exception from the futility and inadequate relief exceptions. 191 Finally, some courts have not yet formally recognized a systemic violation exception at all. 192 Legislative history similarly does not provide clarification regarding the classification. Senator Simon, a cosponsor of the HCPA, seemingly intended to include an exception for systemic violation within the futility exception, calling for an exception when “an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures.” 193 However, the 1985 House Report of the HCPA included two different exceptions for futility and policy or practice contrary to the law. 194

188 Id. at 183, 193 (“Although the parental right of meaningful participation could rightly be called a ‘basic goal’ of the IDEA, the provision of translation and interpretation services is only one component of ensuring meaningful participation.”).

189 Beth V. ex rel. Yvonne V. v. Carroll, 87 F.3d 80, 89 (3d Cir. 1996); see also Ass’n for Cmty. Living v. Romer, 992 F.2d 1040, 1044 (10th Cir. 1993) (“Administrative remedies are generally inadequate or futile where plaintiffs allege structural or systemic failure and seek systemwide reforms.”).

190 See, e.g., Heldman ex rel. T.H. v. Sobol, 962 F.2d 148, 158-59 (2d Cir. 1992) (“The futility exception is particularly relevant in actions . . . that allege systemic violations of the procedural rights accorded by IDEA.”); J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir. 2004) (“[E]xhaustion was futile because the plaintiff was challenging a regulation implementing a state statute that neither the hearing officer nor the Commissioner of Education had the authority to alter.”); Papania-Jones v. Dupree, 275 Fed. App’x 301, 304 (5th Cir. 2008) (finding no futility exception where plaintiff failed to produce any evidence showing that they experienced a systemic violation); see also Queenan, supra note 5, at 1008 (noting that courts have found futility exceptions in cases that alleged systemic violations).

191 See, e.g., Martinez v. Newsom, 46 F.4th 965, 973-74 (9th Cir. 2022) (listing three circumstances in which an IDEA plaintiff does not have to exhaust administrative remedies: (1) when they seek systemic relief; (2) when administrative remedies would be inadequate; and (3) when exhaustion would be futile).

192 See, e.g., Roe v. Healey, 78 F.4th 11, 25 (1st Cir. 2023) (choosing not to address whether to recognize a systemic violation exception).

193 131 CONG. REC. 21392-93 (1985). To complicate the doctrine further, Senator Simon provided an example of such a situation, noting that exhaustion should be excused for futility “where the hearing officer lacks the authority to grant the relief sought,” which sounds like the inadequacy exception. Id.

District Courts within the Sixth Circuit had previously recognized the systemic violation exception as falling under the futility or inadequacy exceptions, utilizing the same verbiage as in Honig.\textsuperscript{195} The Sixth Circuit’s assertion that Honig’s recognition of the futility exception was dictum, and its broader assertion that judge-made exceptions should not apply to statutory exhaustion requirements,\textsuperscript{196} makes it unlikely that the courts within the circuit will recognize the systemic violation exception going forward. Without a clear answer regarding the application nor scope of the futility exception, the Supreme Court’s decision may open the door for other circuits to narrow the futility exception, and thus the systemic violation exception, or disregard it entirely.

B. Expansion of the Systemic Violation Exception

The Ninth Circuit noted in 2021 that, despite having previously recognized the systemic exception, “no published opinion in [the Ninth Circuit] has ever found that a challenge was ‘systemic’ and exhaustion not required.”\textsuperscript{197} Failure to find a situation that fits under a recognized exception may indicate that the systemic violation exception is too narrow. However, the decision in Luna Perez may provide a path forward for its expansion.

The Court’s reasoning in Luna Perez not only comports with the futility exception but also its expansion. Relating its holding to that of Fry, the Court noted “[i]n both cases, the question is whether a plaintiff must exhaust administrative processes under IDEA that cannot supply what he seeks. And here, as in Fry, we answer in the negative.”\textsuperscript{198} While the Court limited its holding to situations in which the relief requested is unavailable under the IDEA, the same reasoning applies to when the relief requested is unavailable from administrative due process hearings. A plaintiff should be able to bypass the exhaustion requirement when a hearing officer cannot provide sought-after relief.

\textsuperscript{195} Compare, e.g., C.P. v. Tenn. Dep’t of Educ., No. 2:16-cv-02938, 2018 U.S. Dist. LEXIS 55034, at *4 (M.D. Tenn. Mar. 30, 2018) ("Administrative remedies may . . . be futile or inadequate when relief is sought on the basis of systemic IDEA violations."); with Honig v. Doe, 484 U.S. 305, 327 (1988) ("[P]arents may bypass the administrative process where exhaustion would be futile or inadequate.").

\textsuperscript{196} See Perez v. Sturgis Pub. Schs., 3 F.4th 236, 242-43 (6th Cir. 2021), rev’d sub nom. Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (asserting that “judge-made exhaustion doctrines . . . remain amenable to judge-made exceptions” (quoting Ross v. Blake, 578 U.S. 632, 639 (2016)) and noting as dictum the Supreme Court’s acknowledgment that “parents may bypass the administrative process where exhaustion would be futile or inadequate” (quoting Honig, 484 U.S. at 327)).

\textsuperscript{197} Martinez v. Newsom, 46 F.4th 965, 974 (9th Cir. 2022) (quoting Student A ex rel. Parent A v. S.F. Unified Sch. Dist., 9 F.4th 1079, 1084 (9th Cir. 2021)).

The Court in *Honig* recognized that exceptions to exhaustion should apply when exhaustion would be futile or inadequate.\(^{199}\) The IDEA’s legislative history provided examples of the futility and inadequacy exceptions, applying when, for example, “the hearing officer lacks the authority to grant the relief sought.”\(^{200}\) Although outside of the context of the IDEA, the Supreme Court has also recognized an inadequacy exception to exhaustion that applies when an agency is “competent to adjudicate the issue presented, but still lack[s] authority to grant the type of relief requested.”\(^{201}\)

Based on the Court’s interpretation of “relief” in Section 1415, which it noted was in line with the IDEA’s other terms, “relief” in such an exception should not be read to refer to merely any relief to the underlying harm but rather to the specific remedy requested.\(^{202}\) While injunctive relief itself may not be available in an administrative hearing,\(^{203}\) courts can more narrowly look to the object of the relief sought to determine if a hearing officer could order the specific request of the plaintiff.

While eleven circuits recognize a futility exception to the IDEA, they often have not considered a claim to be futile when it requests remedies that administrative procedures cannot grant.\(^{204}\) Some lower courts, prior to *Luna Perez*, had found futility or inadequate relief exceptions to apply when compensatory damages were the *only* remedy that could redress a plaintiff’s injuries;\(^{205}\) however, just as the Court focused on the remedy that a plaintiff requested when interpreting Section 1415(1), courts should do the same when interpreting the futility and inadequacy exceptions, specifically when “the hearing officer lacks the authority to grant the relief sought.”\(^{206}\)

\(^{199}\) *Honig*, 484 U.S. at 327.


\(^{202}\) See *Luna Perez*, 143 S. Ct. at 863-64 (“Often enough the phrase ‘seeking relief’ or some variant of it is used in the law to refer to the remedies a plaintiff requests.”).

\(^{203}\) Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1307 (9th Cir. 1992) (“[T]he mere unavailability of injunctive relief does not render the IDEA’s administrative process inadequate.”).

\(^{204}\) *Luna Perez* Oral Argument, *supra* note 40, at 24:24; compare J.B. ex rel. Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 595 (8th Cir. 2013) (noting the court had previously, in dicta, stated that “the IDEA’s exhaustion requirement remains the general rule, regardless of whether the administrative process offers the particular type of relief that is being sought”), with W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (“[W]e have held that, where the relief sought in a civil action is not available in an IDEA administrative proceeding, recourse to such proceedings would be futile and the exhaustion requirement is excused.”).

\(^{205}\) See, e.g., Covington v. Knox Cnty. Sch. Sys., 205 F.3d 912, 917 (6th Cir. 2000) (“[A]lthough exhaustion cannot be waived whenever a plaintiff seeks monetary damages rather than relief that is available under the administrative scheme, where there is no administrative remedy for a wrong that the plaintiff has suffered, exhaustion is futile and may be waived.” (quoting Plasencia v. California, 29 F. Supp. 2d 1145, 1150 (C.D. Cal. 1998))).

\(^{206}\) See *supra* note 200.
holding therefore leaves open the possibility for plaintiffs to bypass exhaustion where, although they could seek some form of relief available from a hearing officer, they instead seek a form of relief that is unavailable in the administrative process. 

Administrative proceedings can only remedy individual violations of the IDEA, and hearing officers lack the ability to require an agency to change system-wide policies. While courts had previously held that a complaint alleging a systemic violation must challenge a policy that threatens the IDEA’s basic goals, the exception could be expanded to include policies of even a limited component of the IDEA. In *Hoeft*, after the court found that there was no systemic violation, it analyzed whether an inadequate relief exception would nevertheless apply. The court noted that “the mere fact the complaint is structured as a class action seeking injunctive relief, without more, does not excuse exhaustion” and held that “even though injunctive relief is unavailable, the administrative process has the potential for producing the very result plaintiffs seek, namely, statutory compliance.”

However, waiting for what could require multiple “individual administrative determinations [to] alert the state to local compliance problems” may be time consuming and inefficient; just as Perez could bypass exhaustion because the remedy he sought was unavailable under the IDEA and thus unable to be granted by a hearing officer, a plaintiff should not need to exhaust administrative processes to the extent they seek to change a district or state’s policies—a remedy that an administrative officer could not provide. Thus,

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207 See Luna Perez, 143 S. Ct. at 865 ("[T]he question is whether a plaintiff must exhaust administrative processes under IDEA that cannot supply what he seeks." (emphasis added)).

208 See Stein, supra note 13, at 814 ("[A]dministrative-hearing officers cannot make a finding that the entire system is flawed based on the experience of one special-education student."); *Hoeft*, 967 F.2d at 1307 ("Although hearing officers lack power to adjudicate questions of statutory compliance, they are empowered to order the provision of an appropriate education program for an individual child, as guaranteed by the IDEA.").

209 *Hoeft*, 967 F.2d at 1305.

210 Id. at 1308-09.

211 Id. The court also noted that although plaintiffs challenged specific formal and informal policies, “[s]tructuring a complaint as a challenge to policies, rather than as a challenge to an individualized education program formulated pursuant to these policies . . . does not suffice to establish entitlement to a waiver of the IDEA’s exhaustion requirement.” Id. at 1304.

212 Id. at 1309; see supra notes 137–46 and accompanying text (noting delays in administrative hearings). Although the Ninth Circuit has noted they may “require or . . . accept exhaustion of the [state complaint] procedure as a substitute for exhausting IDEA procedures in challenges to facially invalid policies,” a student who falls under an exception to exhaustion should be entitled to a judicial hearing regardless of whether they filed a state complaint, as the IDEA limits its exhaustion requirement to that of due process hearings, not complaint procedures. *Hoeft*, 967 F.2d at 1308; See Mrs. W. v. Tirozzi, 832 F.2d 748, 758 (2d Cir. 1987) (“[W]e note that the Supreme Court has never suggested that the [state complaint procedure] need to be invoked or exhausted prior to seeking federal court involvement . . . .”).

213 Luna Perez, 143 S. Ct. at 863.
such a request for injunctive relief, even if centered around “a particular component of . . . special education,” should no longer require exhaustion if the only relief that plaintiffs seek is not available.\textsuperscript{214} Whether the exception would be classified as futility, inadequacy, or systemic violation is unclear; regardless, this interpretation could expand exceptions for the type of cases that traditionally fall under the systemic violation exception.

Suits claiming systemic violations are often framed as class actions.\textsuperscript{215} As the court in \textit{T.R.} noted, “the commonality requirement of Fed. Rule Civ. P. 23(a) and the systemic exception to the exhaustion requirement often go hand in hand.”\textsuperscript{216} Just as courts have rejected systemic violation claims due to the individualized nature of inquiries, courts have applied a similar rationale to deny class certification.\textsuperscript{217} Thus, even if exhaustion could possibly be bypassed under an expanded exception because a claim requests a district or state alter its policies, class actions may still be limited by class certification requirements. Courts have been hesitant to certify class actions for disability claims,\textsuperscript{218} and class certification has generally been made more difficult following \textit{Wal-Mart Stores v. Dukes}.\textsuperscript{219} Yet, following the enactment of Title VII of the Civil Rights Act of 1964, courts had been “receptive to group-based discrimination theories.”\textsuperscript{220} In fact, “certifying a class of people with diverse disabilities that has been affected by a common set of attitudes and

\textsuperscript{214} See Hoeft, 967 F.2d at 1305 (finding that alleged violations were not systemic because they “focuse[d] on the shortcomings of a particular component of [the district’s] special education program”).

\textsuperscript{215} See supra note 156.


\textsuperscript{217} See id. at 189 (denying class certification because plaintiffs had not established commonality as required by Rule 23(a)); Jamie S. v. Milwaukee Pub. Schs., 668 F.3d 481, 493-94 (7th Cir. 2012) (noting that the district court rightfully denied class certification for “all Milwaukee-area disabled students, regardless of differences in their disabilities or educational situations, whose procedural or substantive rights under the IDEA were violated” but should have denied class certification not only because administrative remedies were not exhausted but also because the class was “fatally indefinite and lacks the commonality required by Rule 23(a)(2)”).

\textsuperscript{218} In the context of disability employment-related class actions, denials of class certification substantially outnumber grants. Michael Ashley Stein & Michael E. Waterstone, \textit{Disability, Disparate Impact, and Class Actions}, 56 DUKE L.J. 861, 883 (2006). Courts have reasoned that disability claims are “highly fact-specific and as such defeat the requirements of FRCP 23(a) such as commonality or typicality and, when seeking damages, FRCP 23(b)(3)’s predominance requirement.” Jasmine Harris, \textit{Disability Employment Class Actions, in A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES} 75, 76 (Brooke Coleman, Suzette Malveaux, Portia Pedro & Elizabeth Porter eds., 2022). However, unlike under Title I ADA claims, in which courts have barred class actions as a result of the individualized inquiry regarding whether an individual is disabled, courts have not historically “use[d] the individualized inquiry as a threshold bar prohibiting class actions targeting discrimination by state and local governments or in public accommodations.” Nathaniel Garrett, Comment, Hendricks-Robinson as Crowbar: Removing the Certification Bar to Disability-Based Employment-Discrimination Class Actions, 58 STAN. L. REV. 859, 868 (2005).

\textsuperscript{219} 564 U.S. 338 (2011).

\textsuperscript{220} Stein & Waterstone, \textit{supra} note 218, at 867.
discriminatory behaviors is consistent with the history underlying the class action device.”

Although the IDEA is distinct from Title VII and class action litigation has historically been prominent in IDEA enforcement, courts have applied Wal-Mart to IDEA class actions, making it more difficult to satisfy certification requirements. Nevertheless, a systemic violation applies when there is a structural failure, one that would affect multiple students and thus cause common injury, requiring relief that would be appropriate to the class as a whole.

Expanding the systemic violation exception is supported by congressional intent. Congress enacted the IDEA in “response to a series of class actions brought in the federal courts claiming that children with disabilities had the constitutional right to obtain appropriate educational services.” The IDEA’s principal author, Senator Harrison Williams, was clear that the IDEA was not intended for “the availability of these administrative procedures [to] be construed so as to require each member of the class to exhaust such procedures in any class action brought to redress an alleged violation of the statute.” Further, Congress was aware of the prominence of class action litigation in special education law not only when it enacted the IDEA but also during various rewritings; yet, Congress has never altered the IDEA to make

221 Id. at 909.

222 See Mark C. Weber, IDEA Class Actions After Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471, 477, 481-85 (2014); Jamie. S., 668 F.3d at 493 (“[T]he class is both fatally indefinite and lacks the commonality required by Rule 23(a)(2).”).

223 See FED. R. CIV. P. 23(b)(2) (“Final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole.”); see also Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 29 (1st Cir. 2019) (“[P]laintiffs can satisfy Rule 23(a)'s commonality requirement by identifying a uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation.”); Weber, supra note 222, at 496 (“If a policy is adequately identified, plaintiffs should have no difficulty satisfying the Rule 23(b)(2) requirement that injunctive relief be appropriate regarding the class as a whole . . . .


225 121 CONG. REC. 37416 (1975). However, Senator Williams’s remarks have been interpreted in varying ways. Compare Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1309 (9th Cir. 1992) (“We do not read this legislative history to suggest that exhaustion is excused for every class member . . . .”); and Weber, supra note 222, at 476 (“[I]n class actions brought under the federal statute, unnamed class members would not be expected to exhaust their administrative remedies.”), with Parent/Pro. Advoc. League v. City of Springfield, 934 F.3d 13, 32 (1st Cir. 2019) (noting that in some cases exhausting some number of representative claims would enable a class action to proceed, while in other cases all class members would have to exhaust IDEAs administrative remedies), with Ass’n for Cmty. Living v. Romer, 992 F.2d 1040, 1045 (10th Cir. 1993) (“There may be cases where the purposes of the exhaustion doctrine would not be furthered by having even one plaintiff exhaust the IDEAs administrative remedies.”).
class action litigation more demanding. Further, Congress hoped to promote efficiency when it developed IDEA’s exhaustion requirement. It is simply inefficient to require each plaintiff to bring an administrative proceeding for individual relief when plaintiffs could instead bring a class action to seek injunctive relief to alter inadequate policies, addressing the problem at its inception.

Failing to recognize a systemic violation exception of even a limited component of the IDEA exacerbates existing inequities. It allows violations to continue unless each parent takes on the burden of bringing their own claim, which is onerous for families of children with disabilities and especially low-income families. Further, low income parents may be discouraged from bringing an IDEA claim because of the substantial cost of hiring an attorney or expert. While a benefit of due process hearings when compared to judicial hearings may be that parents do not need to hire attorneys, their likelihood of success significantly increases if they do have an attorney. Low income and racial minority parents are also less likely to accumulate the "cultural capital" to learn about available services and adequately utilize the IDEA's procedural protections. Thus, preventing a suit seeking an order to implement a new policy that could provide widespread relief for students with disabilities furthers already existing inequities.

Courts have expressed concern that recognizing an exception to the exhaustion requirement simply because a complaint is structured as a class action that seeks injunctive relief that is unavailable in an administrative

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226 Weber, supra note 222, at 477 (“None of [Congress’s] revisions of [IDEA] ever placed any obstacles in the way of class action litigation.”).

227 See Queenan, supra note 5, at 992-93 (“[Exhaustion] promotes judicial economy by avoiding needless repetition of administrative and judicial fact finding and avoiding judicial intervention if the parties successfully resolve their claims administratively.”); 121 CONG. REC. 37416 (1975) (noting Senator Harrison’s expectation that hearings and reviews related to the education of individuals with disabilities be handled “as quickly as practicable”).

228 See Stein, supra note 13, at 814 (“It would not be efficient to expect the large number of students affected to procure [administrative] remedies because the systemic noncompliance will continue . . . if the educational agency’s policies and procedures are not changed.”).

229 See Mark Weber, In Defense of IDEA Due Process, 29 OHIO ST. J. ON DISP. RESOL. 495, 495, 501-03 (2014) (“A major professional group and several academic commentators complain that the hearings system unfairly advantages middle class parents [and] that it is unduly expensive . . . .”).

230 See Claire S. Raj, Rights to Nowhere: The IDEA’s Inadequacy in High-Poverty Schools, 53 COLUM. HUM. RTS. L. REV. 409, 415 (2022) (“The high cost of attorneys and experts, unequal bargaining power between parents and schools, and a hesitancy to disrupt a child’s school-based relationships all undermine low-income families’ ability to leverage the IDEA.”).

231 See Archer, supra note 138, at 20.

forum “would render the IDEA’s exhaustion requirement meaningless because it could be bypassed merely by styling the challenge a class action for injunctive relief.” 233 This is a fair concern, and I recognize that there may need to be a limit. For example, courts can limit claims to just those that allege that a district’s or state’s centralized policy violates the IDEA. While repeated individualized decisions, such as decisions not to provide translated draft IEPs in T.R., may deny multiple students of a FAPE, limiting claims to those that challenge centralized policies would ensure that “a plaintiff cannot rely on the systemic exception simply by reframing an act of inadvertence or negligence as a policy or practice of not complying with the IDEA.” 234 Just as Fry instructed courts to look beyond artful pleadings, 235 courts can do the same to determine if there is a legitimate centralized policy or practice in violation of the IDEA at issue. The Supreme Court in Luna Perez also faced a similar concern—that plaintiffs could just request monetary damages to bypass exhaustion—and yet it still held that plaintiffs are excused from the exhaustion requirement when plaintiffs seek damages that are unavailable under the IDEA. 236 If a plaintiff seeks relief that is available through administrative procedures while also challenging a policy for which relief is unavailable, their claim for relief that is available will require exhaustion, just as the Court held in Luna Perez. 237 If a plaintiff or class does not have a viable complaint to alter a district or state’s policies, they are better off seeking relief through administrative procedures, in a venue that is cheaper, faster, and one in which they are likely to be successful. 238 And as discussed, obtaining class action

234 See J.S. ex rel. N.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir. 2004) (“The court concluded that, because the complaint is aimed at ‘wrongdoing that is inherent in the program itself and not directed at any individual child,’ the allegations of systemic violations entitled them to exemption from the exhaustion requirement.”).
236 See Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023); see also Perez v. Sturgis Pub. Schs. 3 F.4th 236, 244 (6th Cir. 2021), rev’d sub nom. Luna Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023) (“[I]f a request for damages could excuse the failure to exhaust, then any student seeking money damages could skip the administrative process.”). Note, however, that to receive monetary damages, plaintiffs generally must prove “deliberate indifference” or a higher standard of intentional discrimination. JAMES A. RAPP, 4 EDUCATION LAW § 10C.13(4)(e)(i) (2023) (quoting S.H. ex rel. Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 263 (3d Cir. 2013)).
237 Luna Perez, 143 S. Ct. at 865 (“Under our view, for example, a plaintiff who files an ADA action seeking both damages and the sort of equitable relief IDEA provides may find his request for equitable relief barred or deferred if he has yet to exhaust [due process hearings].”).
238 See Katherine Bruce, Comment, Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief after Fry v Napoleon Community Schools, 85 U. CHI. L. REV. 987, 1033-35 (2018) (recognizing the concern “that allowing waiver [of exhaustion] will create a pleading standard by which parents can circumvent the due process hearing by merely asking for money” but
certification would only be possible in circumstances in which all requirements set out in Federal Rules of Civil Procedure Rule 23 are fulfilled. If those requirements exist, a lawsuit would be more efficient at addressing the policy that is the root cause of the problem than multiple individual administrative hearings. If there is still concern, some scholars have suggested not to narrow exceptions to exhaustion but rather to amend Section 1415 to contain a heightened pleading requirement, similar to that which is required under the Federal Rules of Civil Procedure Rule 9, such that a plaintiff would have to specifically provide the facts giving rise to the claim so that courts can better determine whether a stated claim falls under the exception.

Although exhaustion has many benefits, and it is important to be careful not to create an exception that swallows the rule, expanding exceptions will improve due process for students. While administrative procedures play an important role in developing a factual record and obtaining agency expertise, such benefits may not outweigh the delay in or lack of relief for students. It is also important to address states' interests in exhaustion. States have an interest in providing the state department of education with an opportunity to be the first to investigate and remedy the violations of its school district. Courts have argued that “states bear ‘ultimate responsibility...
for ensuring . . . compliance with the IDEA;” and “allowing plaintiffs to ‘circumvent this scheme’ when challenging local policies would ‘undermine the IDEA's enforcement structure.’” However, exceptions to exhaustion are just that—exceptions to the general rule of exhaustion, applied when exhaustion could not be of benefit for students and when bringing a claim directly to court would further the goals of the IDEA better than exhaustion itself would. Thus, while states’ interests should be taken into account, there is a compelling reason to expand exceptions in the case of systemic violations.

CONCLUSION

The exhaustion requirement has clear, undeniable benefits, but there are situations in which the benefits may not outweigh the harms. While Congress had intended for exceptions to exhaustion to exist and the Supreme Court previously recognized them in *Honig*, lower courts have inconsistently applied such exceptions, leaving students with disabilities to expend valuable time proceeding with administrative hearings that cannot grant the relief they seek. The Supreme Court’s holding in *Luna Perez* was a win not only for Perez but for all students who seek only monetary damages and no longer need to exhaust administrative proceedings to recover such relief in court. However, by failing to affirmatively recognize the futility exception, as the Court had done in the past, there remains a circuit split regarding the applicability of the exception to the IDEA and, among courts that recognize the exception, confusion about its scope. Yet, *Luna Perez’s* reasoning supports the conclusion that exceptions to the exhaustion requirement must be expanded, not narrowed. The Court’s reasoning should be instructive: If plaintiffs seek a remedy that administrative hearing officers cannot provide, such as injunctive relief to remedy system-wide policies, they should not have to exhaust administrative procedures. While the Supreme Court did not clarify the existence of the futility exception, the exception is far from futile; rather, it is a crucial tool to the expedition of widespread relief for students.

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Student A *ex rel.* Parent A v. S.F. Unified Sch. Dist., 9 F.3d 1079, 1085 (9th Cir. 2021) (noting that exhaustion serves a significant interest by providing the state with “a reasonable opportunity to investigate and correct the district’s failures prior to judicial intervention”); see also *supra* Section II.B (explaining that exhaustion enables states to “correct its own mistakes”).

245 Student A, 9 F.3d at 1085 (cleaned up) (quoting *Hoeft*, 967 F.2d at 1307).

246 See McCarthy v. Madigan, 503 U.S. 140, 149 (1992) (holding that petitioner did not need to exhaust his claim because his individual interests outweighed the institutional interests that favor exhaustion).

247 See supra Section II.C.