12-21-2021

F. S. v. Crestwood School District

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 20-3321

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F. S., by and through her Parent, Pamela Scarano,
Appellant

v.

CRESTWOOD SCHOOL DISTRICT; KERRI FEY, individually and in her official capacity as Head Cheerleading Coach of Crestwood School District

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 3-19-cv-01593)
District Court Judge: Honorable Malachy E. Mannion

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a) on
September 24, 2021

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Before: MCKEE, RESTREPO and ROTH, *Circuit Judges*

(Opinion filed: December 21, 2021)

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OPINION*

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

McKEE, *Circuit Judge*.

F.S., by and through her mother, challenges the District Court's dismissal of her claims under § 504 of the Rehabilitation Act and § 1983 of the Civil Rights Act. The District Court dismissed for lack of subject matter jurisdiction. The District Court held F.S.'s claims were subject to § 1415(*l*) of the Individuals with Disabilities Education Act, which requires a claimant to exhaust the statute's administrative procedures before filing a civil action.[1] Although we are sympathetic to the claims F.S. brought and, if her allegations are proven, believe that she may well have been treated unfairly, we must nevertheless affirm the District Court's order for the reasons set forth below and as explained in the District Court's very well-reasoned Memorandum Opinion.

I.

The IDEA serves "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."[2] A school's obligation to provide a free appropriate public education (FAPE) includes not only academic instruction but also a variety of supportive services, including transportation, therapeutic, recreational, and social services, among many others.[3]

[1] *F. S. v. Crestwood Sch. Dist.*, No. CV 3:19-1593, 2020 WL 6445985, at *4 (M.D. Pa. Nov. 3, 2020).
[2] 20 U.S.C. § 1400(d)(1)(A).
[3] *See id.* § 1401.

Section 1415 of the IDEA outlines the required administrative procedures a child must pursue when seeking relief for a school's denial of their right to a FAPE.[4] Because a school's FAPE obligations often overlap with other laws protecting the rights of children with disabilities, § 1415(*l*) prescribes the interaction between such laws and the procedural requirements of the IDEA. Thus, before a claimant can pursue a civil action under the ADA, the Rehabilitation Act, or other laws protecting the rights of children with disabilities, they are required to exhaust § 1415's administrative procedures when relief is also available under the IDEA.[5]

Relief is available under the IDEA when the "gravamen" of a plaintiff's complaint is the denial of a FAPE.[6] *Fry v. Napoleon Community Schools* held that in discerning whether a claim concerns the denial of FAPE, courts shall evaluate the "substance, not surface" of the complaint.[7]

Fry offers two clues that courts should consider when evaluating the gravamen of a complaint. The first consists of a pair of hypothetical questions that when answered in the negative, suggest the claim concerns the denial of a FAPE: "[C]ould the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And . . . could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?"[8] The

[4] *Id.* § 1415(c)–(g).
[5] *Id.* § 1415(*l*).
[6] *Fry v. Napoleon Cmty. Sch.*, --- U.S. ----, 137 S. Ct. 743, 752, 197 L. Ed. 2d 46 (2017).
[7] *Id.* at 755.
[8] *Id.* at 756.

second clue to consider is the history of proceedings. "[P]rior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term."[9]

The Crestwood School District's "cheerleading program is 'not selective' insofar as no 'cuts' are made to those wishing to participate."[10] The task before us, therefore, is to determine whether F.S.'s claims—that Defendants' disability-based discrimination forced her to cease participating in the school's cheerleading program—essentially constitute the denial of a FAPE. We exercise plenary review of the District Court's order granting Defendant's motion to dismiss for lack of subject matter jurisdiction.[11]

II.

A.

We first conclude the gravamen of F.S.'s claims concern the denial of a FAPE and are thus subject to the IDEA's administrative requirements. Under the *Fry* framework, as well as our own analysis in *Wellman v. Butler Area School District*, claims that could "not have occurred outside the school setting and that a nonstudent could not (and would not) have 'pressed essentially the same grievance'" concern the denial of a FAPE.[12] That is the case here. A "mostly identical complaint" to the one F.S. filed in the District Court

[9] *Id.* at 757.
[10] *Crestwood Sch. Dist.*, 2020 WL 6445985, at *1.
[11] *Goldman v. Citigroup Glob. Mkts. Inc.*, 834 F.3d 242, 249 (3d Cir. 2016).
[12] *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 133 (3d Cir. 2017) (quoting *Fry*, 137 S. Ct. at 756).

could not be brought against a public facility, nor could an adult visitor or employee of the school bring such a claim.[13] Instead, Defendants' alleged conduct excluded F.S. from participation in the school's cheerleading program, thus denying her the FAPE they are required to provide under the IDEA.

Certainly, the ability to participate in extracurricular activities, such as cheerleading, is a part of a child's educational experience.[14] Indeed, a student may well believe involvement in such activities is more rewarding and fulfilling than the more doctrinal aspects of an education. We doubt that many students will value time spent reading Shakespeare or studying history more than the time they devote to extracurricular activities. This is supported by the requirement that Individualized Education Programs, schools' primary vehicles in providing a FAPE, include provisions for the "participat[ion] in extracurricular and other nonacademic activities."[15] F.S.'s exclusion from such an activity, causing her to suffer "substantial educational and development losses . . . [and] permanent decline in her future development,"[16] is the denial of educational benefits and the IDEA provides the appropriate relief.

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[13] *See Fry*, 137 S. Ct. at 756 (stating that whether the gravamen of a complaint against a school concerns the denial of a FAPE can come from answering the hypothetical questions about whether a "child could file the same basic complaint . . . . And similarly, an employee or visitor could bring a *mostly identical complaint* against the school" (emphasis added)).

[14] *See Wellman*, 877 F.3d at 134 (holding a student's participation in football was part of his educational needs).

[15] 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb).

[16] Suppl. App. at 6.

This conclusion does not mean that all involvement in extracurricular activities necessarily falls within the scope of a school's FAPE requirement. Nor do we suggest that activities not enumerated in an IEP necessarily fall outside a FAPE. Although involvement in a given extracurricular activity may not implicate a FAPE, the District Court correctly held that the allegations here do not refer to any such activity. Instead, Defendants' alleged disability-based discrimination and failure to accommodate F.S.'s participation in the cheerleading program is a denial of her educational needs under the IDEA, including participation in extracurricular activities.[17]

Furthermore, F.S.'s choice not to pursue her claims through the IDEA's administrative process is not determinative of whether they concern the denial of a FAPE.[18] F.S. argues "[t]he absence of [her] prior pursuit of the IDEA's administrative remedies bolsters the determination that [her] claim does not concern denial of a FAPE."[19] We cannot agree. *Fry* merely required courts to consider the procedural history of a suit in order to determine if a plaintiff's midstream change of course is indicative of a strategic attempt to avoid the IDEA's exhaustion requirement.

B.

[17] *See Wellman*, 877 F.3d at 134; *S.H. v. State-Operated Sch. Dist. of Newark*, 336 F.3d 260, 264 (3d Cir. 2003) (noting that the IEP, the primary vehicle for providing a FAPE, must detail how special education services and supplementary aids "will allow the child to progress in both the general curriculum and participate in extracurricular activities").
[18] *See Fry*, 137 S. Ct. at 757 (noting a plaintiff's abandoned invocation of the IDEA's administrative procedures may suggest that the claim constitutes the denial of a FAPE).
[19] Appellant Br. at 18.

We also agree with the District Court's conclusion that the inability of a hearing officer to award monetary damages does not render the administrative process futile. We realize, of course, that a claimant may avoid the IDEA's exhaustion requirement when "exhaustion would be futile or inadequate."[20] However, we have held that the mere inclusion of monetary damages in a claim for relief does not necessarily establish the futility that would avoid the IDEA's exhaustion requirement.[21] Moreover, a contrary holding would allow any plaintiff seeking relief pursuant to the IDEA to avoid the statute's exhaustion requirement merely by adding a claim for monetary relief, thus creating an exception that would eliminate the exhaustion rule.

III.

As we noted at the beginning, we are not unsympathetic to F.S.'s claims. She has alleged discriminatory conduct by the Crestwood School District that, if proven, only added to the formidable obstacles she and her parents already faced as they pursued the kind of educational experience that F.S. was clearly entitled to. However, as the District Court held, the merits of her claim simply cannot be adjudicated by a court if those claims have not first been exhausted as required by the IDEA. We therefore have no

[20] *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 275 (3d Cir. 2014).
[21] *See Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 276 (3d Cir. 2014); *see also Wellman*, 877 F.3d 132–33 n.7 ("Under our precedent . . . a plaintiff's request for remedies not available under the IDEA does not remove the claim from being subject to exhaustion. Thus, Wellman's request for damages unavailable under the IDEA or in the administrative forum does not exempt his claims from the exhaustion requirement." (citation omitted)).

alternative other than to affirm the District Court's order dismissing the complaint without prejudice to F.S.'s right to pursue her claims administratively.