

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PAMELA MCCORMICK, next friend of ERON MCCORMICK, a minor
Plaintiff-Appellant,

v.

WAUKEGAN SCHOOL DISTRICT #60,
THOMAS O'ROUKE, individually and in his capacity as Head of the Special
Education Department, OLIVER RUFF, individually and in his official
capacity as Associate Principal, and JAN NETERER, individually and in her
capacity as Physical Education Instructor
Defendants-Appellees.

Appeal From The United States District Court
For The Northern District Of Illinois, Eastern Division
Case No. 01CV3598
The Honorable Harry D. Leinenweber

Reply Brief of Plaintiff-Appellant Eron McCormick

Oral Argument Requested

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ARGUMENT

Section 1415(l) of the IDEA requires a disabled student to exhaust administrative procedures before bringing a civil lawsuit if he or she is seeking relief that is “available under” the IDEA. In *Charlie F.*, this Court held that a disabled student may not escape that requirement by artfully phrasing his or her complaint to request only a specific type of relief that is not available under the IDEA, when relief that *is* available under the statute could provide a remedy for the harm they have alleged. *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 992 (7th Cir. 1996). Instead, a plaintiff is required to exhaust administrative procedures when the IDEA can provide “relief for the events, condition, or consequences of which the person complains [even if it is not] relief of the kind the person prefers.” *Ibid.* In *Charlie F.*, the only injuries complained of were emotional in nature, and this Court held that the IDEA could provide a remedy for those injuries. *Ibid.*

This case is fundamentally different from *Charlie F.* because Eron McCormick has suffered permanent physical damage to his muscles and kidneys as a result of Defendants’ conduct. There is no remedy for Eron’s injuries under the IDEA — a fact that Defendants do not dispute. Instead, they suggest that Eron’s case was appropriately dismissed because he included a state-law claim for intentional infliction of emotional distress in his complaint and because his injury is somehow “educational

in nature.” Neither of these arguments justifies the district court’s dismissal of Eron’s case.

I. Eron Is Not Required To Exhaust Administrative Remedies Because He Is Seeking Relief That Is Not Available Under The IDEA.

A. The IDEA provides no relief for Eron’s permanent physical injuries.

The entire focus of Eron’s lawsuit is the serious physical injuries that he suffered at Defendants’ hands. His complaint describes how defendant Neterer forced him to perform exercises that were contrary to his IEP and that were extremely dangerous for someone suffering from his particular form of muscular dystrophy. (App. 11). It alleges that Neterer knew that these exercises were dangerous but forced Eron to do them anyway, even after he complained of pain and reminded her of the terms of his individualized educational program (“IEP”). (*Ibid*). Finally, it relates how these exercises caused permanent damage to Eron’s muscles and kidneys. (*Ibid*).

There is nothing in the IDEA that could remedy these “events, condition, or consequences of which [Eron] complains.” Damages are not available under the IDEA (*see Charlie F.*, 98 F.3d at 991), and the statute specifically excludes medical treatment for other than diagnostic purposes from its list of available remedies (20 U.S.C. § 1401(22)). Medical services could not provide an adequate remedy for Eron’s injuries in any event due to the degenerative and irreversible nature of his condition. *See* Plf. Br. at 15.

Indeed, Defendants do not dispute this fact. Their brief does not attempt to identify any relief under the IDEA for Eron's physical injuries. Defendants quote the entire text of the relevant statutory provisions, underline those sections that they believe may provide relief for *emotional* injuries, and discuss the availability of such relief at length. Defs. Br. at 9-12. However, they do not devote even a single sentence to arguing that the IDEA provides a remedy for the damage to Eron's muscles and kidneys.

By failing to identify "relief for the events, conditions, or consequences of which [Eron] complains," defendants have conceded that even if Eron had exhausted administrative procedures, he would still be required to bring his claims to this Court in order to receive a remedy. The undisputed lack of any remedy for Eron's physical injuries resolves the only real issue in this appeal: The IDEA does not require a plaintiff to pursue administrative procedures when it is obvious that those procedures can provide no remedy for the condition giving rise to his or her claims.

B. Other courts interpreting *Charlie F.* have held that administrative exhaustion is not required for disabled students alleging physical injuries.

Eron accepts the holding of *Charlie F.*, and argues that it was wrong to dismiss his complaint because the IDEA cannot provide "relief for the events, condition, or consequences of which [he] complains." 98 F.3d at 992. Courts applying this standard

to similar situations have consistently held that there is no remedy for physical injuries under the IDEA. Plf. Br. at 16-18. Defendants have not identified a single case holding that the IDEA *could* provide a remedy for past physical injuries or that a plaintiff alleging such injuries *was* required to exhaust administrative procedures. Instead, Defendants focus on one Supreme Court decision with no application here and attempt, in vain, to distinguish all of the relevant cases. Defs. Br. at 18-25.

As an initial matter, Defendants' discussion of *Booth v. Churner*, 532 U.S. 731 (2001), is irrelevant. Defs. Br. at 18-21. *Booth* held that a prison inmate is not excused from pursuing administrative procedures simply because he or she has requested money damages, a remedy not available through the prison's administrative procedure. 532 U.S. at 741. That proposition, analogous to the holding of *Charlie F.*, is not at issue here. *Booth* also went further, however, and held that, under the Prison Litigation Reform Act, "Congress has mandated exhaustion clearly enough, *regardless of the relief offered through administrative procedures.*"¹ *Ibid.* (emphasis added). That proposition is irrelevant here because this Court has held — and

¹ The statute in question, 42 U.S.C. § 1997e(a) (1994 ed., Supp. V), provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Thus, unlike the IDEA, this statute does not condition the exhaustion requirement on whether the plaintiff is seeking relief that is "also available" through the administrative procedures.

Defendants do not dispute — that exhaustion under the IDEA is required *only* where the administrative procedures *do* offer relief for the plaintiff’s complaints. *See Charlie F.*, 98 F.3d at 992.

Defendants’ attempts to distinguish those decisions applying the holding of *Charlie F.* but finding that exhaustion was not required are similarly flawed. First, Defendants do not even challenge the opinion in *Padilla v. School District No. 1*, 233 F.3d 1268, 1276 (10th Cir. 2000), holding that “the IDEA’s administrative remedies, oriented as they are to providing prospective educational benefits, could [not] possibly begin to assuage * * * severe physical, and completely non-educational injuries.” Defendants’ only comment on this case is their suggestion that *Padilla* should be ignored because Eron’s complaint included a claim for emotional distress. *See* Defs. Br. at 24-25. As we argue below, Eron’s state-law claim for intentional infliction of emotional distress should not be dismissed. *See* Section I.C., *infra*. But regardless of any other claims that Eron has brought in this case, the holding in *Padilla* is precisely on point — and compels reversal of the district court’s order — with respect to Eron’s claims based on his “severe physical, and completely non-educational injuries.”

Second, *Witte v. Clark County School District*, 197 F.3d 1271, 1275-76 (9th Cir. 1999), held that the plaintiff was not required to exhaust administrative procedures because (i) he had resolved all educational issues through the IEP process, (ii) his

“claim for damages is retrospective only,” and (iii) his claims centered on “physical abuse and injury.” Defendants argue that *Witte* was somehow undermined by *Robb v. Bethel School District #403*, 308 F.3d 1047 (9th Cir. 2002). Defs. Br. at 21-23. In fact, *Robb* did not disagree with *Witte* at all, but fully adopted its holding and reasoning. 308 F.3d at 1051-54. The court did, however, distinguish *Witte* on its facts:

Before filing suit, the plaintiff in *Witte* already agreed with the defendant school district * * * to new educational plans and services that would address the educational component of his injuries * * * the plaintiff was seeking only retrospective damages, not damages to be measure by the cost of remedial services (such as those offered under the IDEA) [and] the plaintiff’s allegations centered around physical abuse and injuries.

Id. at 1051-52. The plaintiff in *Robb*, on the other hand, did not modify her IEP to resolve educational issues, and “[did] not claim physical injury,” but sought “compensat[ion] [solely] for psychological and educational injuries [that] the IDEA may remedy.” *Id.* at 1052. The distinction between *Witte* and *Robb* mirrors almost exactly the distinction between this case and *Charlie F.* The opinion in *Robb* — that Defendants cite as authoritative — thus demonstrates precisely why it was wrong, under *Charlie F.*, to dismiss Eron’s claims.²

² Defendants’ interpretation of *Witte*, however, was explicitly rejected by the Ninth Circuit in *Robb*. Defendants claim that in *Witte* “[t]he Court based its opinion that exhaustion would have been futile on the argument, rejected by this Court in *Charlie F.*, * * * that exhaustion would have been futile because money damages are not ‘available’ under the IDEA.” Defs. Br. at 22. In *Robb* the Ninth Circuit rejected this interpretation, stating: “The context makes it clear that in *Witte* we did not rely merely on the fact that the plaintiff had requested money damages.” 308 F.3d at 1051.

Finally, in *Covington v. Knox County School System*, 205 F.3d 912, 916 (6th Cir. 2000), the Sixth Circuit held that the plaintiff was not required to exhaust administrative remedies because “the condition creating the damage has ceased, and there is no equitable relief that would make [him] whole * * * the administrative process would be incapable of imparting appropriate relief due to the nature of [Covington’s] alleged injuries and the fact that he has already graduated.” *Id.* at 918. Defendants urge the Court to reject this decision because it relies on the fact that the plaintiff had graduated — a factor that they claim other courts have rejected.³ Defs. Br. at 23; *see also id.* at 14-15.

Defendants are correct to state that graduating does not, by itself, automatically excuse a plaintiff from the need to exhaust administrative procedures in every case. However, the fact that a plaintiff has graduated can be a relevant consideration in determining whether he or she could receive a remedy under the IDEA. And where, as here, there is no indication that the plaintiff intentionally delayed bringing his or her claims in an effort to render IDEA remedies unavailable (*see p.19 n.5, infra*), there is no reason to ignore the factual impact that graduation will have on the effectiveness

³ Defendants also argue that this opinion is “irreconcilable” with *Charlie F.* because both cases involve claims for emotional distress but reach opposite results. Defs. Br. at 24. As we discuss below, however, the psychological counseling available under the IDEA may provide relief for some types of emotional distress but cannot provide relief for others. *See Section II.B, infra.*

of remedies under the IDEA. Here, Eron's graduation immediately after his injury rendered the IDEA's ability to address and alter the individual defendants' future conduct irrelevant.

In sum, there is no authority to support the district court's dismissal of Eron's claims for damages to compensate for his physical injuries.

C. The fact that Eron's complaint includes a state-law claim for intentional infliction of emotional distress provides no basis for dismissing his case.

Rather than arguing that the IDEA can provide relief for Eron's primary claims of physical injury, Defendants' brief focuses almost exclusively on the fact that Eron's complaint included a state-law claim for intentional infliction of emotional distress. They argue that the IDEA may have been able to provide counseling for the emotional distress that Eron has alleged and thus, that he should have exhausted administrative procedures before bringing this lawsuit. That argument is wrong, first, because the IDEA's administrative exhaustion requirement simply does not apply to state-law claims. Second, even if the administrative exhaustion requirement applied, Defendants are wrong that the IDEA could provide a remedy for the type of emotional distress that Eron alleges. Third, even if this claim would have been appropriately dismissed if brought alone, the fact that Eron's primary claims for physical injuries will go forward justifies allowing Eron to litigate all of his claims in this proceeding. Finally, even if Eron's claim for intentional infliction of emotional distress must be dismissed,

that does not justify dismissing his claims based on physical injuries, and those claims should be allowed to proceed.

1. The IDEA’s administrative exhaustion requirement does not apply to Eron’s state-law claim for intentional infliction of emotional distress.

Count III of Eron’s complaint alleges intentional infliction of emotional distress, a state-law cause of action. The IDEA’s administrative exhaustion requirement simply does not apply to this claim. The statute provides:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the rehabilitation Act of 1973, *or other Federal laws* protecting the rights of children with disabilities, except that before the filing of a civil action *under such laws* seeking relief that is also available under [the IDEA] the procedures under [the IDEA] shall be exhausted
* * *

20 U.S.C. § 1415(l) (emphasis added). Eron’s claims for physical injury *are* claims under the Constitution and various federal laws and thus would be within the ambit of section 1415(l) but for the fact that there is no “relief available” for them under the IDEA. However, his claim for intentional infliction of emotional distress is *not* a claim under the Constitution, under any of the enumerated federal statutes, or under any other “Federal laws” — it is a state common-law cause of action. *See, e.g., Dunn v. City of Elgin*, 347 F.3d 641, 651 (7th Cir. 2003). Therefore, it does not matter whether

this claim is “seeking relief that is also available under [the IDEA],” because it is not a claim covered by section 1415(*I*).

The IDEA’s statutory language could not be clearer. Section 1415(*I*) has no application to Eron’s state-law cause of action and thus his claim for intentional infliction of emotional distress cannot be dismissed for failure to exhaust administrative remedies and certainly cannot form the basis for dismissing his entire case.

Defendants might argue that disabled students’ legal characterization of their claims in the complaint should not be taken at face value. They may suggest that just as *Charlie F.* requires courts to look behind the relief that disabled students are seeking, this Court should look behind the laws “under which” claims are brought.

That argument should be rejected for at least three reasons. First, it is directly contrary to unambiguous language in the statute. *See, e.g., Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, ... judicial inquiry is complete.”) (internal quotation marks omitted). Second, the laws under which plaintiffs chose to bring claims often represent strategic decisions regarding what elements they believe can be proved, what primary and ancillary relief is available under certain claims, and how the lawsuit is portrayed to the jury — all decisions that courts are bound to respect. *See, e.g., The Fair v. Kohler Die &*

Specialty Co., 228 U.S. 22, 25 (1913) (“Of course, the party who brings a suit is master to decide what law he will rely upon”).

Finally, if failure to plead emotional distress under a federal cause of action is not dispositive, then exhaustion of administrative procedures will be required in every case because any plaintiff alleging physical injuries also could have sought emotional distress damages associated with those injuries. If courts are allowed to read an implied claim for emotional distress into the claims under federal law, then section 1415(*l*) will no longer circumscribe a limited set of cases where disabled students are required to exhaust administrative remedies, but will require exhaustion in all cases. This would render the language in section 1415(*l*) meaningless. Because courts should “avoid rendering [words in statutes] meaningless, redundant, or superfluous [and] avoid rendering statutory provisions ambiguous, extraneous, or redundant” (*In re Merchants Grain, Inc.*, 93 F.3d 1347, 1353-54 (7th Cir. 1996)), this argument should be rejected.

2. There is no remedy “available under” the IDEA for the type of emotional distress that Eron suffered.

Even if section 1415(*l*) did apply to Eron’s state-law claim, however, Eron still would not be required to exhaust administrative procedures. That is because the type of past emotional distress that Eron has alleged could not be remedied by the counseling and psychological services available under the IDEA.

In Count III of his complaint, Eron alleges that “Defendants knew that excessive physical behavior would cause ERON severe emotional distress and despair” and that “[a]s a direct and proximate result of the defendants’ acts, [he did] suffer[] serious injuries of a personal and pecuniary nature, including severe emotional injuries.” (App. 16). In other words, Eron was traumatized while being forced to run laps and do push-ups that he knew could destroy his own muscles and kidneys, and which were causing him pain and cramping, all the while being berated and threatened by defendant Neterer. (App. 11).

Eron has not alleged any ongoing psychological repercussions from those events: He does not claim to suffer from depression, anxiety, low self-esteem, fear, worry or any other emotional difficulties. Nor has he alleged any ongoing educational repercussions such as falling behind in school. Eron’s only psychological claim is for the emotional distress that he suffered on June 9, 2000, and the days immediately thereafter.

Counseling or therapy cannot undo or alleviate the emotional distress that Eron experienced; it is a past injury for which Eron deserves compensation, not a current condition in need of treatment. Claims for intentional infliction of emotional distress associated with past physical harm are compensable under Illinois law (*see, e.g., McGrath v. Fahey*, 533 N.E.2d 806 (Ill. 1988)) (allowing claim for intentional

infliction of emotional distress that accompanied a heart attack)), but do not present the type of injury that can be remedied by counseling or other psychological services under the IDEA (*see, e.g., Covington*, 205 F.3d at 917-18 (plaintiff's "[emotional] injuries are wholly in the past, and therefore money damages are the only remedy").

Eron's claim for past emotional distress associated with his physical injuries is thus much different than Charlie F.'s claim for ongoing "humiliation, * * * mistrust, loss of confidence and self-esteem, and disruption of [his] educational progress." *Charlie F.*, 98 F.3d at 990. There, the Court said that "Charlie's parents want money * * * at least in part to pay for services (such as counseling) that will assist his recovery of self-esteem and promote his progress in school." 98 F.3d at 992. Here, Eron does not want money to pay for services, or damages measured by the value of such services, but seeks only compensation for the trauma that he has already endured. In Charlie F.'s case, it may have been correct that counseling and therapy under the IDEA could provide "relief for the events, condition, or consequences of which [he] complain[ed]" because he complained of ongoing psychological injuries. *Ibid.* Here, it is obvious that such forward looking, remedial measures cannot provide relief for the emotional distress that Eron has suffered in the past. Therefore, even if the administrative exhaustion requirement applied to state-law claims, it would not bar Eron's particular claim and the district court's order dismissing his case should be reversed.

3. **Even if section 1415(*l*) applied to state-law claims and the IDEA could provide a remedy for the type of emotional distress that Eron has alleged, Eron nevertheless should be allowed to bring his claim for intentional infliction of emotional distress at this time because it is joined with his claims for physical injury.**

Eron's state-law cause of action complains of emotional distress that accompanied his physical injuries and was another consequence of the events of June 9, 2000. Even if the Court decides that section 1415(*l*) applies to state-law claims *and* that the IDEA could provide a remedy for Eron's past emotional distress, he should still be allowed to bring his emotional distress claim in this lawsuit, because the gravamen of his complaint — his claims for physical injuries — will be adjudicated in this proceeding.

It clearly is in the interest of judicial economy and fairness to allow disabled students who must resort to the courts in order to receive a remedy for their primary claims to bring all of their related claims in one proceeding. A rule preventing disabled students from bringing a unified set of claims would require multiple proceedings and lawsuits over essentially the same events and would implicate the rule against claim-splitting.

In the instant case, for example, Eron would put on evidence of Defendants' practices and conduct, the events of June 9, 2000, and his medical injuries. However, he would be prevented from testifying about how he suffered emotionally while enduring those injuries. Instead, a new proceeding in which he once again put on

evidence of Defendants' practices and conduct and the events of June 9, 2000, would be required to hear that testimony. Furthermore, such splitting of a disabled student's claims is unfair because it affects even those claims for which the student has no obligation to pursue administrative remedies. In the instant case, for example, it would obviously prejudice Eron's entire case if he was prohibited from putting on the evidence of how he suffered emotionally while being forced to perform the prohibited exercises.

Moreover, if a disabled student alleging primarily physical injuries cannot also bring a claim for intentional infliction of emotional distress associated with those injuries, then, by the same reasoning, he or she cannot also seek emotional distress damages as an element of his or her claims based on physical injuries. Such a rule would force disabled students who have suffered physical injuries to either forsake the emotional distress damages arising out of those injuries or delay bringing their primary claims while pursuing administrative procedures that can, at best, provide relief for only a secondary aspect of their claims. The exhaustion requirement of the IDEA cannot have been intended to impose such a Hobbesian choice on disabled students.⁴

⁴ It is worth remembering that the purpose of section 1415(*l*) is primarily to preserve disabled students' right to bring traditional causes of action. The section begins: "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available [to disabled students]." 20 U.S.C. § 1415(*l*). It is

4. Even if Eron’s emotional distress claim must be dismissed for failure to exhaust administrative remedies, his claims based on physical injuries should be allowed to proceed.

Finally, even if the Court decides that Eron cannot be allowed to pursue his state-law claim for emotional distress because he was required to exhaust administrative procedures, it should still reverse the district court’s order with respect to Eron’s other claims. There is no question that the IDEA does not offer relief for Eron’s physical injuries and that Eron was therefore not required to exhaust administrative procedures before bringing those claims. *See* Section I.A, *supra*. Furthermore, it is clear that Eron’s claim for intentional infliction of emotional distress could easily be severed from the remainder of his case without prejudice to the Defendants — though it would obviously prejudice Eron. Indeed, emotional distress is not even mentioned in the “Facts Giving Rise to the Complaint” section of Eron’s complaint. (App. 9-12). Therefore, even if the district court was correct in dismissing Eron’s claims for emotional distress, it committed error by throwing the baby out with the bath-water and dismissing his entire case. The appropriate course of action, at minimum, is for this Court to reverse with respect to the improperly dismissed claims and remand those claims for trial. *See, e.g., Brokaw v. Mercer County*, 235 F.3d 1000, 1026 (7th

an “*except[ion]* that before the filing of a civil action under [federal] law[] seeking relief that is also available under [the IDEA], the procedures under [the IDEA] shall be exhausted.” *Id* (emphasis added).

Cir. 2000). Eron should be allowed to seek a remedy for the physical injuries to his muscles and kidneys even if his claim for emotional distress was appropriately dismissed.

II. Defendants' Argument That Eron's Claims Should Be Dismissed Because They Are "Educational In Nature" Is Both Wrong As A Matter Of Fact And Irrelevant As A Matter Of Law.

Defendants suggest that Eron's claims were appropriately dismissed because his injuries were "educational in nature." Defs. Br. at 12. They argue that Eron's claims are "educational in nature" because they necessarily implicate Defendants' educational practices and policies. *Ibid.* Defendants are right that Eron has alleged, and will prove at trial, that "O'Rourke and Ruff * * * violated duties arising pursuant to the IDEA by failing to ensure the proper execution of [Eron's] IEP." *Id.* at 13. However, the fact that Defendants' *violations* were educational in nature does not mean the Eron's *injuries* are. Eron's allegation that the defendants violated the IDEA has nothing to do with the question whether there are adequate remedies for his injuries available under the IDEA — the appropriate test for determining whether exhaustion was required.

The IDEA's administrative exhaustion requirement applies only when the plaintiff is "seeking relief that is also available under [the IDEA]" (20 U.S.C. § 1415(*I*)), not whenever he or she alleges a violation of educational duties. Indeed, Defendants'

proposed interpretation would render meaningless the language in section 1415(*l*) that circumscribes the IDEA’s administrative exhaustion requirement. Every defendant who brings suit under the IDEA, presumably, argues that someone has “violat[ed] duties that arose under the IDEA.” Defs. Br. at 12. Therefore, Defendants’ theory would require every person bringing an IDEA claim to exhaust administrative procedures — eviscerating the limiting language in 20 U.S.C. § 1415(*l*). Because courts should “avoid rendering [words in statutes] meaningless, redundant, or superfluous [and] avoid rendering statutory provisions ambiguous, extraneous, or redundant” (*In re Merchants Grain*, 93 F.3d at 1353-54), the Defendants’ over-broad application of the administrative exhaustion requirement should be rejected.

Moreover, Defendants’ interpretation is contrary to the remedy-focused test that this Court adopted in *Charlie F.* Applying that standard, it is clear that the IDEA does not provide “relief for the events, conditions, or consequences of which [Eron] complains.” All of Eron’s complaints arise out of and are centered on one event, on June 9, 2000, when defendant Neterer forced him to perform exercises that were contrary to his IEP. Of course, Eron also complains of the consequences of those exercises, including permanent damage to his muscles and kidneys. And as Defendants note, Eron complains of any other circumstances or events leading up to

his injury on June 9, 2000, that both contributed to its occurrence and violated his rights under the IDEA.

Defendants have not challenged the fact that there is no remedy for Eron’s physical injuries under the IDEA — and that is enough to require reversal of the order dismissing Eron’s case. It should be equally uncontroversial, however, that there is no “educational” remedy under the IDEA for the other events and conditions of which Eron complains. That is because these events and circumstances are wholly in the past — Eron does not complain of any ongoing educational policies or practices. *See, e.g., Covington*, 205 F.3d at 917 (because “[plaintiff’s] injuries are wholly in the past, and therefore money damages are the only remedy that can make him whole — proceeding through the state’s administrative process would be futile and is not required”).

Eron has specifically alleged that after June 9, 2000, he never returned to the Freshman Campus or to defendant Neterer’s class because he graduated before recovering from the immediate effects of his injuries.⁵ (App. 11, 12). Furthermore,

⁵ Defendants’ concern over whether Eron actually “graduated” or simply finished the educational program at one school and moved on to another school in the same district is mere obfuscation. Whatever this transition should be called, the fact is that Eron never returned to the Freshman Campus and thus was never again subjected to the individual defendants’ authority. For this same reason, the cases cited by Defendants (Defs. Br. at 14-15) are irrelevant. Those cases involve plaintiffs who “could have obtained complete relief at the time,” but intentionally waited until after graduation to bring their claims in an attempt to render the IDEA’s services useless.

after he graduated from the Freshman Campus Eron successfully modified his IEP to exclude all physical education.⁶ *Ibid.* Whatever policies and practices may have lead up to Eron’s injuries on June 9 — of which he rightfully complains — those policies and practices never posed a risk to Eron after that day. In other words, there was no time after June 9, 2000, that Eron could have received a remedy by addressing these policies and practices through the IDEA’s administrative procedures. Because the events and circumstances of which Eron complains are completely in the past, with

Polera v. Bd. of Educ., 288 F.3d 478, 490 (2d Cir. 2002); *see also Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 63 (1st Cir. 2002). Here, the IDEA *never* offered Eron a remedy for his injuries.

Furthermore, Defendants have no basis for suggesting that Eron “s[a]t on’ his claim and ‘opt[ed] out’ of the administrative process by waiting to ‘graduate.’” Defs. Br. at 15. Eron was injured on June 9, days before his graduation, and was unable to return to school before he graduated due to the injuries that Defendants caused him. Following his graduation from the Freshman Center he used the administrative process to ensure that he would never face the same risk in another physical education class. There is no sense in which Eron intentionally delayed bringing his claims until after graduation in order to avoid the administrative process.

⁶ For some reason Defendants take issue with this fact. Defs. Br. at 15 (“Mr. McCormick does not plead or argue the timing of the modification of his IEP.”). However, paragraphs 18 to 21 of the complaint (App. 11-12) allege that Eron successfully modified his IEP to exclude all physical education “at the completion of his freshman year” (App. 11-12). In any case, when reviewing a motion to dismiss, the Court must “take all of the well-pleaded factual allegations contained in the amended complaint as true and draw all inferences therefrom in the light most favorable to the non-moving party.” *Wilczynski v. Lumbermens Mut. Cas. Co.*, 93 F.3d 397, 401 (7th Cir. 1996).

no ongoing effects (other than his physical injuries), there is no remedy for them under the IDEA.

CONCLUSION

For all of these reasons, Eron McCormick respectfully requests that this Court reverse the district court's judgment dismissing his claims and remand his case for further proceedings.

Alternatively, if the Court determines that the claim for intentional infliction of emotional distress must be dismissed for failure to exhaust administrative remedies, then Eron McCormick respectfully requests that the Court reverse the district court's judgment dismissing his claims based on physical injuries and remand for further proceedings on those claims.

Respectfully submitted,

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Dated: March 9, 2004

RULE 32(a)(7)(C) CERTIFICATION

The undersigned, counsel of record for Plaintiff-Appellant Eron McCormick, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7)(C):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 5,198 words.

Carl J. Summers

Dated: March 9, 2004

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned, counsel of record for Plaintiff-Appellant Eron McCormick, hereby certifies that I have filed an electronic version of this brief, pursuant to Circuit Rule 31(e).

Carl J. Summers

Dated: March 9, 2004

PROOF OF SERVICE

I hereby certify that on this 9th day of March, 2004, I caused the original and fifteen (15) copies of the Reply Brief for Plaintiff-Appellant Eron McCormick, as well as a digital version of the brief, to be delivered by third-party commercial carrier for overnight delivery to:

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I further certify that on this 9th day of March, 2004, I caused two copies of the same to be served by third-party commercial carrier for overnight delivery on:

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