

AUG 23 2012

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

<p>H. W. et al.,</p> <p style="text-align: center;">Plaintiffs - Appellants,</p> <p style="text-align: center;">v.</p> <p>LONG BEACH UNIFIED SCHOOL DISTRICT,</p> <p style="text-align: center;">Defendant - Appellee.</p>
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No. 11-55595

D.C. No. 2:10-cv-07015-SJO-E  
Central District of California,  
Los Angeles

ORDER

Appeal from the United States District Court  
for the Central District of California  
S. James Otero, District Judge, Presiding

Argued and Submitted August 7, 2012  
Pasadena, California

Before: REINHARDT, SILVERMAN, and WARDLAW, Circuit Judges.

We remand this case to the district court in light of *Payne v. Peninsula School District*, 653 F.3d 863 (9th Cir. 2011), a decision issued after the district court entered its order. We held in *Payne* that the Individuals with Disabilities Education Act’s exhaustion requirement, 20 U.S.C. § 1415(l), is not jurisdictional and set forth a new relief-based approach, as opposed to an injury-based approach, for determining whether a claim is subject to the exhaustion requirement. In conformity with *Payne*, the Defendant may file an unenumerated Rule 12(b)

motion for failure to exhaust in place of its motion to dismiss for lack of jurisdiction. Plaintiffs shall be afforded the opportunity to respond to Defendant's motion.

**REMANDED.**

**IT IS SO ORDERED.**