

CONNECTICUT LAW REVIEW

VOLUME 44

NOVEMBER 2011

NUMBER 1

Note

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

PETER J. MAHER

The Individuals with Disabilities Education Act ("IDEA") expressly allows students with disabilities eligible under the IDEA to bring civil actions against their school districts not only for violations of the IDEA but also for violations of civil rights under Section 504 of the Rehabilitation Act ("Section 504") and the Americans with Disabilities Act ("ADA") provided the students first exhaust their IDEA remedies before filing their civil actions in court. However, many courts apply this exhaustion requirement to students who are covered only by Section 504 and the ADA who are ineligible or not identified under the IDEA. This Note argues that the courts' extension of the IDEA's exhaustion requirement to students covered only by Section 504 and the ADA misinterprets and misapplies the provision. The Note provides the proper interpretation of the IDEA's exhaustion requirement with the bright line rule that the exhaustion requirement only applies to students covered by Section 504 and the ADA who are also covered by, or seeking coverage from, the IDEA. Otherwise, students who are covered only by Section 504 and ADA—but not by the IDEA—are not subject to the exhaustion requirement. This interpretation is supported by a discussion of IDEA hearings officers' jurisdiction over purely Section 504 and ADA claims, the differences between the procedural and substantive rights of the IDEA and those of Section 504 and the ADA, and the legislative history of the IDEA's exhaustion provision. This Note also discusses the policy arguments relating to administrative exhaustion of claims by students with disabilities and contains recommendations for clarifying this muddled issue.

NOTE CONTENTS

I. INTRODUCTION.....	261
II. FEDERAL LAWS PROTECTING STUDENTS WITH DISABILITIES	264
A. THE IDEA	264
B. SECTION 504 OF THE REHABILITATION ACT OF 1973 AND THE AMERICANS WITH DISABILITIES ACT OF 1990	266
III. PREEMPTION AND EXHAUSTION.....	271
A. <i>SMITH V. ROBINSON</i>	271
B. THE HANDICAPPED CHILDREN’S PROTECTION ACT OF 1986	274
IV. STUDENTS’ COVERAGE UNDER THE IDEA AND SECTION 504/ADA.....	275
A. STUDENTS ELIGIBLE UNDER BOTH THE IDEA AND SECTION 504/ADA.....	275
B. STUDENTS ELIGIBLE ONLY UNDER SECTION 504/ADA.....	276
V. THE APPLICABILITY AND INAPPLICABILITY OF § 1415(<i>l</i>) OF THE IDEA TO SECTION 504/ADA	277
A. STUDENTS COVERED BY THE IDEA AND SECTION 504/ADA	277
B. STUDENTS ELIGIBLE ONLY UNDER SECTION 504/ADA.....	281
C. THE PROPER INTERPRETATION OF § 1415(<i>l</i>) OF THE IDEA	292
VI. POLICY IMPLICATIONS AND RECOMMENDATIONS.....	295
VII. CONCLUSION.....	299



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

PETER J. MAHER*

I. INTRODUCTION

Three separate statutes provide protection and afford rights to public school students with disabilities: the Individuals with Disabilities Education Act ("IDEA"),¹ Section 504 of the Rehabilitation Act of 1973 ("Section 504"),² and Title II of the Americans with Disabilities Act of 1990 ("ADA").³ All three statutes ensure that students with disabilities receive an appropriate education and provide procedural safeguards to their parents.⁴ Section 504 and the ADA share the same eligibility criteria to qualify as disabled and afford those students with disabilities the same protections against discrimination.⁵ However, the eligibility criteria and substantive and procedural protections of Section 504 and the ADA differ from those of the IDEA.⁶

In 1986, Congress overturned the Supreme Court's decision in *Smith v. Robinson*, which had held that the Education of the Handicapped Act (now the IDEA), precluded parents from bringing claims under Section 504 if they could have brought them under the IDEA.⁷ In the new statutory provision, now codified at 20 U.S.C. § 1415(*l*), Congress expressly stated that parents of students with disabilities may bring claims under Section 504, but if remedies under the IDEA are available, then the parents must exhaust the IDEA's administrative procedures first.⁸

Parents generally must exhaust the IDEA's administrative procedures for IDEA claims,⁹ and the exhaustion requirement of § 1415(*l*) applies to

* Lehigh University, M.Ed. 2007, B.A. 2005; University of Connecticut School of Law, J.D. expected 2012. I wish to thank Professor Deborah Calloway, University of Connecticut School of Law, for her feedback on drafts of this Note and Professor Perry Zirkel, Lehigh University, for his guidance on this topic and mentorship in general.

¹ 20 U.S.C. §§ 1400–1482 (2006).

² 29 U.S.C. § 794 (2006).

³ 42 U.S.C. §§ 12131–12134 (2006).

⁴ See *infra* Part II.

⁵ See *infra* Section II.B.

⁶ See *infra* Section V.B.2.

⁷ *Smith v. Robinson*, 468 U.S. 992, 1021 (1984); see also *infra* Part III.

⁸ 20 U.S.C. § 1415(*l*) (2006).

⁹ *Honig v. Doe*, 484 U.S. 305, 326–27 (1988).

the claims of parents of students protected by the IDEA who bring claims under Section 504 or the ADA.¹⁰ However, courts erroneously extend the exhaustion requirements of § 1415(l) to Section 504 and ADA claims by parents of students covered solely by Section 504 and the ADA, thereby compelling these parents to exhaust the IDEA administrative hearing process.¹¹ This misapplication results not only in the likely increase in the length of time and cost spent reaching a resolution, but also in the possibility that once these parents attempt to utilize the IDEA's hearing procedures, the IDEA hearing officers may dismiss the Section 504 or ADA claims because they do not have jurisdiction to hear purely Section 504 or ADA claims. As a result, some parents seeking relief for alleged disability discrimination on behalf of their children must use an administrative process not designed or intended to resolve their disputes before they proceed to court. These inefficiencies waste public tax money in the form of school district, administrative, and judicial resources and, more importantly, force students with disabilities with legitimate claims of discrimination to wait needlessly for redress.

This Note shows how the courts have misapplied the exhaustion requirements of § 1415(l) to Section 504 and ADA claims made by parents of students not covered by the IDEA. Courts have overlooked the differences in the eligibility criteria, provision of educational services, and procedural safeguards as provided in Section 504 and the ADA as compared to those provided in the IDEA and generally have insisted that a party with any claims relating to a student with a disability must first exhaust the IDEA's administrative procedures. This Note will show that this misinterpretation of § 1415(l) misapplies the overlapping, but independent, procedural safeguards of the IDEA to Section 504 and the ADA and subsequently compels parents to comply with the IDEA's more formal procedures even if their children are not eligible under the IDEA. While two other commentators briefly have observed the courts' expansive application of exhaustion to Section 504 or ADA claims by students covered solely by Section 504 or the ADA,¹² this Note provides the only comprehensive treatment of this topic and thus fills a gap in the literature.

Part II of this Note gives an overview of the IDEA, Section 504 and the ADA, including how they overlap and differ in terms of eligibility,

¹⁰ 20 U.S.C. § 1415(l); *see also infra* Section V.A.

¹¹ *See infra* Section V.B.2.

¹² *See* Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1, 25 (2010) (“[T]o say that relief is available under IDEA [and therefore requiring exhaustion of the IDEA's procedures] for a child who is concededly not eligible under IDEA has an Alice-in-Wonderland quality.”); Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 WEST'S EDUC. L. REP. 761, 762 (2000) (describing the courts' expansive application of the exhaustion requirement in cases of students covered by Section 504 and the ADA but not by the IDEA).

services, and procedural safeguards. Part III analyzes the U.S. Supreme Court's decision in *Smith v. Robinson*¹³ and Congress's response with the Handicapped Children's Protection Act of 1986.¹⁴ Part IV describes the relationship between eligibility under the IDEA and eligibility under Section 504 and the ADA. Part V examines the applicability and inapplicability of the IDEA's administrative exhaustion requirement for Section 504 and ADA claims. It begins by providing an illustrative sample of relevant case law.¹⁵ It next discusses the jurisdiction of IDEA hearing officers over purely Section 504 and ADA claims and then provides an analysis of the procedural and substantive differences between the IDEA, Section 504, and the ADA. Part V also proposes the proper interpretation of the IDEA's exhaustion requirement in relation to Section 504 and ADA claims and concludes with a discussion of the legislative history of the IDEA's exhaustion requirement to support the proposed interpretation. Part VI discusses policy implications and makes recommendations for clarifying this muddled issue.

The purpose of this Note is to examine the application of the IDEA's exhaustion requirement to Section 504 or ADA claims brought on behalf of students who are eligible only under Section 504 and the ADA. As a result, the scope of this Note warrants careful demarcation. First, while this Note discusses a sample of case law addressing Section 504 or ADA claims brought by students who are also covered by the IDEA to illustrate the application of the IDEA's exhaustion requirement, it does not discuss whether the IDEA provides adequate relief in those cases—a threshold question which triggers the exhaustion requirement—for certain categories of claims¹⁶ or for claims seeking particular remedies.¹⁷ Second, this Note

¹³ 468 U.S. 992 (1984).

¹⁴ Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796-98.

¹⁵ For comprehensive annotations of case law involving exhaustion issues for student claims under Section 504 and the ADA, see 1 PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS Two:11, Two:13, Two:15-16, Two:19; Two: 21, Two: 23-25; Two:27-31, Two:35, Four:4-6, Four:36-37, Four:40, Four:45, Four:49, Four:79 (2d ed. Supp. 6 2007).

¹⁶ See, e.g., *M.P. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (holding exhaustion not required for claim alleging discrimination); *Padilla v. Sch. Dist. No. 1 Denver, Colo.*, 233 F.3d 1268, 1274-75 (10th Cir. 2000) (holding exhaustion not required for claim seeking relief for physical injuries); *O'Hayre v. Bd. of Educ. for Jefferson Cnty. Sch. Dist. R-1*, 109 F. Supp. 2d 1284, 1294 (D. Colo. 2000) (holding exhaustion not required for claims alleging discrimination); see also Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ADMIN. L. JUDICIARY 349, 420-21 (2009) (arguing for excusal of exhaustion requirements under certain circumstances); Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1138-39 (2002) (arguing that claims for disability harassment under Section 504/ADA should not be subject to exhaustion).

¹⁷ See, e.g., *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc) (holding

is limited to the applicability of the IDEA's exhaustion requirement to claims brought under Section 504 or the ADA and does not extend to claims based on other laws such as 42 U.S.C. § 1983 or the Constitution. Third, this Note does not discuss the implications of interpreting the IDEA's exhaustion requirement as jurisdictional or as an affirmative defense subject to waiver.¹⁸

II. FEDERAL LAWS PROTECTING STUDENTS WITH DISABILITIES

A. *The IDEA*

Originally enacted as the Education for All Handicapped Children Act ("EAHCA") in 1975,¹⁹ the IDEA is a federal funding statute that entitles eligible students to a free appropriate public education ("FAPE")²⁰ in the least restrictive environment.²¹ The IDEA includes a "child find" provision, which requires the state education agency ("SEA") or local education agency ("LEA") to "identif[y], locat[e], and evaluat[e]" each child with a disability residing in the State.²² For a student to be eligible for services under the IDEA, the LEA first must evaluate the student,²³ and

exhaustion not required for claims seeking money damages); *Jeffery Y. v. St. Mary's Area Sch. Dist.*, 967 F. Supp. 852, 855 (W.D. Pa. 1997) (same).

¹⁸ Compare *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc) (overruling its precedent and holding that the IDEA's exhaustion requirement is a claims processing provision that defendants may assert as an affirmative defense), and *Mosley v. Bd. of Educ. of Chicago*, 434 F.3d 527, 532–33 (7th Cir. 2006) (citing *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 68, 98 F.3d 989, 991 (7th Cir. 1996)) (holding that the IDEA's exhaustion requirement is a claims-processing rule subject to waiver, not jurisdictional), with *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002) (citing *Hope v. Cortines*, 69 F.3d 687, 688 (2d Cir. 1995)) (holding that failure to exhaust the IDEA's administrative remedies deprives courts of subject matter jurisdiction); see also Wasserman, *supra* note 16, at 411–18 (discussing recent U.S. Supreme Court administrative exhaustion jurisprudence and suggesting that courts should interpret the exhaustion of administrative remedies requirement under the IDEA as an affirmative defense, subject to waiver). This Note's analysis is applicable regardless of whether the IDEA's exhaustion requirement is jurisdictional or an affirmative defense.

¹⁹ Education of All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The EAHCA amended the Education of the Handicapped Act ("EHA"), *id.* at 773, which provided a system of federal funding to states for special education services, but did not contain procedural and substantive rights for students with disabilities, see Education of the Handicapped Act, Pub. L. No. 91-230, §§ 601–62, 84 Stat. 175, 175–88 (1970). The 1990 amendments renamed the act "the Individuals with Disabilities Education Act." Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, 104 Stat. 1103, 1141–42. This Note uses the terms EHA, EAHCA, and IDEA interchangeably but attempts to retain the cited authority's terminology.

²⁰ 20 U.S.C. § 1412(a)(1) (2006). The IDEA defines FAPE as "special education and related services" that are free of charge, meet state education standards, include an appropriate school, and conform with a student's individualized education program. *Id.* § 1401(9).

²¹ *Id.* § 1412(a)(5).

²² *Id.* § 1412(a)(3) (stating the child find requirement for SEAs); *id.* § 1413(a)(1) (stating that LEAs must have policies, procedures, and programs consistent with the requirements of §1412).

²³ *Id.* § 1414(a)(1)(A).

then a team, which includes the parents, must determine whether the student has a disability²⁴ that falls into one or more of the enumerated categories.²⁵ To qualify for one of these disabilities, the IDEA regulations require the impairment to adversely affect the student's educational performance or to cause educational need.²⁶ If the child meets that criterion, the team must determine whether, as a result of that disability, the child requires special education and related services.²⁷ Thus, eligibility under the IDEA requires a two-part analysis: (1) whether the student has one of the enumerated disabilities under IDEA, and (2) if so, whether the student needs special education and related services.

If a student is eligible under the IDEA, the LEA must implement an individualized education program ("IEP") that includes, among other things, annual goals based on the student's needs; an explanation of the student's special education, related services, and accommodations; and postsecondary goals for older students.²⁸ The student's educational program, embodied in the IEP,²⁹ is a central component of a student's FAPE.³⁰ In *Board of Education of the Hendrick Hudson Central School District v. Rowley*,³¹ the Supreme Court held that the IDEA's standard of FAPE requires that an IEP must be "reasonably calculated to enable the child to receive educational benefits" (the "Rowley standard").³² In reaching this conclusion, the Court rejected an interpretation that the IDEA requires the provision of services "sufficient to maximize each child's potential 'commensurate with the opportunity provided other children' . . . to achieve strict equality of opportunity or services" (the "commensurate opportunity standard").³³

The IDEA also contains a system of procedural safeguards that establish parental rights to notice of and participation in educational

²⁴ *Id.* § 1414(b)(4)(A).

²⁵ *Id.* § 1401(3)(A). The ten disability categories contained in the IDEA statute are "intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, [and] specific learning disabilities." *Id.*; Rosa's Law, Pub. L. No. 111-256, § 2(b)(2)(A), 124 Stat. 2643 (2010) (amending the IDEA to replace the term "mental retardation" with "intellectual disability"). The IDEA regulations further split the qualifying disabilities into thirteen categories. 34 C.F.R. § 300.8(c) (2010).

²⁶ 34 C.F.R. 300.8(c). Only the definition for "specific learning disability" does not expressly require the impairment to adversely affect educational performance or cause educational need, *id.* § 300.8(c)(10), though such a negative effect on learning and education is implicit in the disability itself.

²⁷ 20 U.S.C. § 1401(3)(A).

²⁸ *Id.* § 1414(d)(1)(A), (2)(A).

²⁹ *See id.* § 1414(d) (describing the required components of the IEP).

³⁰ *See id.* § 1401(9)(D) (stating that FAPE includes conformity with a student's IEP).

³¹ 458 U.S. 176 (1982).

³² *Id.* at 206-07.

³³ *Id.* at 198.

decisions affecting their children with disabilities.³⁴ Parents are entitled to participate in the decisions involving the identification, evaluation, educational placement, or the provision of FAPE for their child³⁵ and are required members of the IEP team, which develops the child's educational program.³⁶ An LEA must notify the parents if it proposes to change or refuses to change any of these components.³⁷

Another element of the IDEA's procedural safeguards is a dispute resolution mechanism.³⁸ If the parents of a child with a disability disagree with an LEA's decision about anything involving their child's identification, evaluation, educational placement, FAPE, or, under certain circumstances, discipline, they may request an impartial due process hearing.³⁹ States may elect to have either a one-tier administrative hearing system in which the SEA conducts the initial hearing or a two-tier system in which the LEA conducts the hearing, the decision of which is appealable to a review officer at the SEA level.⁴⁰ After a hearing officer in a one-tier system, or a review officer in a two-tier system, has issued a final decision, the aggrieved party may file a civil action relating to their due process complaint in state or federal court.⁴¹ Thus, as the Supreme Court has explained, the IDEA generally requires a party to exhaust administrative remedies before the party may bring a claim to court alleging violations of the IDEA unless "exhaustion would be futile or inadequate."⁴²

B. *Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990*

Congress enacted Section 504 and the ADA to protect the civil rights of individuals with disabilities by prohibiting disability discrimination.⁴³ Section 504 prohibits recipients of federal funding, including LEAs, from

³⁴ 20 U.S.C. § 1415(b)(1), (3), (c)(1), (d).

³⁵ *Id.* § 1415(b)(1).

³⁶ *Id.* § 1414(d)(1)(A), (B)(i), (3)(A).

³⁷ *Id.* § 1415(b)(3), (c)(1).

³⁸ *Id.* § 1415(b)(6), (f).

³⁹ *Id.* § 1415(b)(6), (f), (k)(3). The parents of a child with a disability also have the option to file a complaint alleging violations of the IDEA directly with the SEA under a complaint resolution process ("CRP") where the SEA independently reviews relevant information, makes findings and conclusions, and may require corrective action and remedies. 34 C.F.R. §§ 300.151–153 (2010). However, if the subject of a CRP complaint overlaps with the subject of a due process hearing, the SEA must defer to the due process hearing. *Id.* § 300.152(c). The IDEA's due process exhaustion requirements do not apply to the CRP, *see, e.g.*, Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 WEST'S EDUC. L. REP. 565, 567, 570 (2008) (discussing the relationship between the state complaint resolution process and impartial due process hearings), and therefore discussion and analysis of the CRP is beyond the scope of this Note.

⁴⁰ 20 U.S.C. § 1415(f)(1)(A), (g).

⁴¹ *Id.* at § 1415(i).

⁴² *Honig v. Doe*, 484 U.S. 305, 326–27 (1988).

⁴³ 29 U.S.C. § 794 (2006); 42 U.S.C. § 12132 (2006).

engaging in disability discrimination,⁴⁴ and Title II of the ADA prohibits all public entities from discriminating against individuals with disabilities.⁴⁵ Both statutes define an individual with a disability as one whom “(A) [has] a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) [has] a record of such impairment; or (C) [is] regarded as having such an impairment”⁴⁶ If a student meets any of these eligibility criteria, both Section 504 and the ADA protect him or her.⁴⁷ As a result, this Note will use the term “Section 504/ADA” when discussing eligibility, accommodations, or discrimination based on these statutes.

The eligibility criteria under Section 504/ADA is much broader than that of the IDEA.⁴⁸ Unlike the IDEA, Section 504/ADA does not include enumerated categories of impairments as a requisite for eligibility. In addition, a student may qualify under Section 504/ADA if his or her impairment substantially limits a major life activity even if he or she does not require special education and related services.⁴⁹ In contrast, to qualify under the IDEA, a student must require special education and related services as a result of his or her disability.⁵⁰ Moreover, the United States Department of Education’s Office for Civil Rights (“OCR”), the agency charged with enforcing the requirements of Section 504 and the ADA as they apply to students, has opined that Section 504 also protects students who are eligible under the IDEA.⁵¹

⁴⁴ 29 U.S.C. § 794(a), (b)(2)(B).

⁴⁵ 42 U.S.C. § 12132.

⁴⁶ 29 U.S.C. §§ 705(20)(B), 794 (cross-referencing Section 504’s definition of “individual with a disability” as an individual who has a disability as defined by the ADA, 42 U.S.C. § 12102(1) (Supp. III 2010)); 42 U.S.C. § 12102(1) (Supp. III 2010) (defining “disability” under the ADA).

⁴⁷ See, e.g., *Miller v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (stating that, because Section 504 and Title II of the ADA have the same substantive standards, the court will analyze them together); *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138, 146 n.6 (2d Cir. 2002) (noting that, aside from Section 504 prohibiting discrimination based “solely” on disability and its application to federal funding recipients, as opposed to the ADA’s application to public entities generally, “the reach and requirements of both statutes are precisely the same[.]”). For a discussion about student eligibility under Section 504 and the ADA and the implications of the ADA Amendments Act, see generally Perry A. Zirkel, *Step-by-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 WEST’S EDUC. L. REP. 333 (2009).

⁴⁸ E.g., *Muller v. Comm. on Special Educ., of E. Islip Union Free Sch. Dist.*, 145 F.3d 95, 99 n.2 (2d Cir. 1998) (noting that Section 504 “is broader in scope” than the IDEA); MARK C. WEBER ET AL., *SPECIAL EDUCATION LAW: CASES AND MATERIALS* 57 (3d ed. 2010) (“Students who are not found to be eligible under IDEA . . . may nevertheless fall within the purview of section 504 . . . or . . . the ADA.”); MARK C. WEBER, *SPECIAL EDUCATION LAW AND LITIGATION TREATISE* 1:7 (2d ed. 2002) (“[Section 504] covers an even broader population than IDEA does”); 1 ZIRKEL, *supra* note 15, at One:3 (“[T]he coverage of Section 504 extends well beyond that of the IDEA.”).

⁴⁹ 34 C.F.R. § 104.3(j) (2011).

⁵⁰ 20 U.S.C. § 1401(3)(A) (2006).

⁵¹ See, e.g., Letter from Gerald A. Reynolds, Assistant Sec’y for Civil Rights, to Mary L. Landrieu, U.S. Senator (July 12, 2002), available at <http://www2.ed.gov/policy/speced/>

In 2008, Congress passed the ADA Amendments Act (“ADAAA”), partly in response to Supreme Court decisions that narrowly interpreted the definition of “disability” under the ADA.⁵² In *Sutton v. United Airlines, Inc.*,⁵³ the Supreme Court held that determinations of whether an individual’s physical or mental impairment substantially limits a major life activity must include corrective or mitigating measures.⁵⁴ Later, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁵⁵ the Court concluded that the terms “substantially” and “major” “need to be interpreted strictly to create a demanding standard for qualifying as disabled,” and held that for an individual’s impairment to substantially limit a major life activity, the impairment must “prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people’s daily lives.”⁵⁶ Expressly rejecting those Supreme Court interpretations,⁵⁷ the ADAAA added a rule of construction provision stating that “[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of [the ADA].”⁵⁸ The ADAAA also includes a non-exhaustive list of major life activities that expands upon the smaller list of examples contained in the regulations implementing the ADA and includes within the definition “major bodily functions.”⁵⁹ Additionally, the ADAAA states that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”⁶⁰ As a result, the ADAAA’s expansion of the definition of “disability” and “major life activity” likely will result in Section 504/ADA covering even more students.⁶¹

guid/idea/letters/2002-3/landrieu0712023q2002.pdf (“Students eligible for services under IDEA are also protected by Section 504.”); Response to Veir, 20 IDELR ¶ 864, 867 (OCR 1993) (“[OCR] cannot conceive of any situation in which [students eligible under the IDEA] would not also be entitled to the protection extended by Section 504.”). *But see* *Ellenberg v. N.M. Military Inst.*, 572 F.3d 815, 822–24 (10th Cir. 2009) (holding that a student’s eligibility under the IDEA does not automatically establish that the student’s impairment substantially limits a major life activity under Section 504 or the ADA where the plaintiff failed to establish such facts).

⁵² ADA Amendment Acts of 2008, Pub. L. No. 110-325, 122 Stat. 3553, 3553.

⁵³ 527 U.S. 471 (1999).

⁵⁴ *Id.* at 482.

⁵⁵ 534 U.S. 184 (2002).

⁵⁶ *Id.* at 196–98.

⁵⁷ ADA Amendment Acts of 2008 § 2, 122 Stat. at 3554.

⁵⁸ *Id.* § 4(a) at 3555 (codified at 42 U.S.C. § 12102(4)(A) (Supp. III 2010)).

⁵⁹ *Id.* (codified at 42 U.S.C. § 12102(2) (Supp. III 2010)).

⁶⁰ *Id.* at 3556 (codified at 42 U.S.C. § 12102(4)(D) (Supp. III 2010)).

⁶¹ *See, e.g.*, *Nyrop v. Indep. Sch. Dist. No. 11*, 616 F.3d 728, 734 n.4 (8th Cir. 2010) (noting that the ADAAA broadened the definition of disability under the ADA); *cf. Kania v. Potter*, 358 F. App’x 338, 341 (3d Cir. 2009) (noting that, in the employment discrimination context, the broadened definition of disability under the ADAAA “expands the class of employees entitled to protection under the Rehabilitation Act”).

The regulations implementing Section 504 include a child find provision, which requires an LEA to attempt to “identify and locate” all students with a disability in their district and provide them and their parents with notice of the LEA’s responsibilities.⁶² The regulations also require that an LEA provide FAPE to students with disabilities.⁶³ To comply with the FAPE mandate, the regulations require that an LEA must provide “regular or special education and related aids and services . . . designed to meet [the] individual educational needs of [students with disabilities] as adequately as the needs of [students without disabilities] are met”⁶⁴ The inclusion of services within the context of regular education in addition to special education and related aids and services differs from the definition of FAPE under the IDEA, which provides only for special education and related services.⁶⁵

The question of what constitutes FAPE under Section 504 is unsettled.⁶⁶ Some courts have suggested a reasonable accommodation standard under which the cost of accommodation is a relevant factor; however, OCR has rejected that method in favor of a needs-based approach that does not consider cost.⁶⁷

As a third alternative, the language of the regulation may provide a commensurate opportunity FAPE standard, which often will be a lesser standard than FAPE under the IDEA.⁶⁸ The United States Court of Appeals for the Ninth Circuit appeared to endorse the commensurate opportunity standard, explaining that, unlike FAPE under IDEA, FAPE under Section 504 “require[s] a comparison between the manner in which the needs of disabled and non-disabled children are met”⁶⁹ The court recognized that FAPE under the IDEA and Section 504 are similar but emphasized that they are not identical.⁷⁰ Notwithstanding this unsettled issue of the standard of FAPE under Section 504 generally, the regulations specify that the implementation of an IEP under the IDEA is one way to satisfy Section 504’s FAPE requirement.⁷¹ As a result, the standard of FAPE for students who are also eligible under the IDEA remains the *Rowley* standard of reasonable calculation to confer educational benefit.⁷²

⁶² 34 C.F.R. § 104.32 (2011).

⁶³ *Id.* § 104.33(a).

⁶⁴ *Id.* § 104.33(b).

⁶⁵ See 20 U.S.C. 1401(9) (2006) (stating the IDEA’s definition of FAPE); 34 C.F.R. § 104.33(b) (stating Section 504’s definition of FAPE).

⁶⁶ Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?*, 106 WEST’S EDUC. L. REP. 471, 471 (1996).

⁶⁷ *Id.* at 471–73.

⁶⁸ *Id.* at 476–77.

⁶⁹ Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008).

⁷⁰ *Id.*

⁷¹ 34 C.F.R. § 104.33(b)(2) (2011).

⁷² See *supra* text accompanying note 32 (describing the *Rowley* standard).

In addition, Section 504 regulations also require that in both academic and nonacademic/extracurricular settings, the LEA must provide the student with disabilities education and opportunities for participation with nondisabled peers “to the maximum extent appropriate.”⁷³ Furthermore, the regulations require that the LEA must base the student’s FAPE and placement upon the results of an evaluation or reevaluation.⁷⁴

Section 504’s regulations also contain procedural safeguards. The regulations establish three separate dispute resolution mechanisms to address possible violations of Section 504’s mandates. First, an LEA must establish procedural safeguards with respect to the “identification, evaluation, or educational placement” of students with disabilities who “need or are believed to need special instruction or related services.”⁷⁵ The procedural safeguards must include “notice, an opportunity for the parents or guardian of the [student] to examine relevant records, an impartial hearing with opportunity for participation by the [student’s] parents or guardian and representation by counsel, and a review procedure.”⁷⁶ The regulations state that an LEA’s compliance with the IDEA’s procedural safeguards is one way in which it can meet Section 504’s procedural safeguards requirement.⁷⁷ In its analysis of the final Section 504 regulations, OCR clarifies that the procedural safeguards requirement in the regulations set forth “minimum necessary procedures” and, although OCR recommends that LEAs use the IDEA’s due process procedures as a model to comply with Section 504’s requirements, it does not require such a practice.⁷⁸ Thus, the Section 504 regulations do not afford parties the same procedural safeguards as those under the IDEA. For example, OCR has opined that Section 504 does not require LEAs to allow cross-examination during a Section 504 hearing⁷⁹ in contrast to the IDEA, which expressly provides for that right.⁸⁰

As a second alternative, the Section 504 regulations allow a party alleging discrimination to file a complaint with the U.S. Department of Education under the same procedures as Title VI of the Civil Rights Act of 1964.⁸¹

⁷³ 34 C.F.R. § 104.34(a), (b).

⁷⁴ *Id.* § 104.33(b)(1)(ii), § 104.35.

⁷⁵ *Id.* § 104.36.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Analysis of Final Regulations, 34 C.F.R. § 104 App. A ¶ 25.

⁷⁹ Houston (TX) Indep. Sch. Dist., 25 IDELR 163, 164 (OCR 1996).

⁸⁰ See 20 U.S.C. § 1415(h)(2) (2006) (providing that hearings under the IDEA must allow parties to cross examine witnesses).

⁸¹ 34 C.F.R. § 104.61 (cross-referencing the implementing regulations for Title VI of the Civil Rights Act of 1964, which establish a procedure allowing a party alleging discrimination to file a complaint with the U.S. Department of Education, *id.* § 100.7). Title VI of the Civil Rights Act of

Finally, as the third alternative for dispute resolution, the regulations require that an LEA establish a grievance procedure to resolve complaints regarding possible violations.⁸² In its analysis of the final regulations, OCR explained that the regulations do not require parties to exhaust this grievance procedure before filing a complaint with OCR for a violation of Section 504, although it encourages parties to use the grievance procedure and resolve disputes at the local level.⁸³

The regulations implementing Title II of the ADA do not contain additional substantive requirements pertaining to students with disabilities but state that the regulations “shall not be construed to apply a lesser standard than the standards” under Section 504 and its regulations.⁸⁴ The ADA regulations also provide for a complaint investigation procedure where a party alleging discrimination may file a complaint with the U.S. Department of Education.⁸⁵ Notwithstanding the administrative complaint procedures, the regulations allow complainants to file an action at any time.⁸⁶ Title II of the ADA adopts the procedures and remedies available under Section 504,⁸⁷ which in turn adopts the procedures and remedies under Title VI of the Civil Rights Act of 1964.⁸⁸

III. PREEMPTION AND EXHAUSTION

A. *Smith v. Robinson*

In *Smith v. Robinson*,⁸⁹ the Supreme Court addressed disagreement among the United States Courts of Appeals as to the relationship between claims under the EHA and under other federal provisions, including the Constitution, § 1983, and Section 504.⁹⁰ In *Smith*, the superintendent of an LEA informed the parents of a child with cerebral palsy and other physical and emotional disabilities that the LEA would no longer fund their child’s placement in a special day program based on its belief that state law provided that a state agency was responsible for the education of students

1964 prohibits discrimination based on race, color, or national origin in programs that receive federal assistance. 42 U.S.C. §§ 2000d to 2000d-7 (2006).

⁸² 34 C.F.R. § 104.7.

⁸³ Analysis of Final Regulations, 34 C.F.R. § 104 App. A ¶ 12.

⁸⁴ 28 C.F.R. § 35.103(a) (2011).

⁸⁵ *Id.* §§ 35.170–174, 35.190 (designating the U.S. Department of Education as the agency responsible for implementing the complaint procedure for alleged disability discrimination in schools under Title II of the ADA).

⁸⁶ *Id.* § 35.172(b).

⁸⁷ 42 U.S.C. § 12133 (2006) (adopting the “remedies, procedures, and rights set forth” in 29 U.S.C. § 794a (2006)).

⁸⁸ 29 U.S.C. § 794a(a)(2) (adopting the “remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964,” 42 U.S.C. §§ 2000d to 2000d-7 (2006)).

⁸⁹ 468 U.S. 992 (1984).

⁹⁰ *Id.* at 1004 & n.8.

with emotional disturbance.⁹¹ The parents appealed the superintendent's decision to the local school board and also filed a complaint in federal court under § 1983 for violation of due process.⁹² The parents' complaint alleged that state regulations required the school district to provide for the education of their child and that his placement in the special day program should continue pending their appeal to the school board.⁹³ The district court issued injunctive relief requiring the LEA to continue to educate the child in his current placement and concluded that its failure to do so would deprive the parents and student of due process.⁹⁴

After losing their administrative appeals at the local and state levels, the parents amended their federal complaint to allege that the LEA denied their child FAPE under the EHA.⁹⁵ They also alleged that the state-level administrative appeal process denied them due process under the Fourteenth Amendment and violated the EHA because the review officer was biased as an employee of the SEA.⁹⁶ In addition, the parents sought attorneys' fees.⁹⁷ The parents subsequently amended their complaint a second time to include violations of the Equal Protection Clause and Section 504 and sought attorneys' fees under both provisions.⁹⁸

The district court, in granting the parents declaratory and injunctive relief, held that the LEA was responsible for paying for the student's special education based on state law and therefore did not reach the federal statutory and constitutional claims.⁹⁹ The First Circuit affirmed.¹⁰⁰ The district court then awarded the parents' attorneys' fees based on their Equal Protection and Section 504 claims.¹⁰¹ The First Circuit reversed, holding that, given the comprehensiveness of the EHA and its lack of fee shifting provision, Congress had not intended to allow plaintiffs to seek attorneys fees via § 1983 or Section 504.¹⁰²

⁹¹ *Id.* at 995.

⁹² *Id.*

⁹³ *Id.* at 995–96.

⁹⁴ *Id.* at 996.

⁹⁵ *Id.* at 997.

⁹⁶ *Id.* at 998.

⁹⁷ *Id.* The parents' amended complaint also claimed that the local administrative due process system in effect during their administrative proceedings violated due process under both the Fourteenth Amendment and the EHA because the school board members heard the appeal in violation of the newest amendments of the EHA, which Congress had enacted prior to the commencement of the parents' case but were not yet in effect. *Id.* at 997 n.4, 998. The district court granted partial summary judgment for the LEA on these claims and, on appeal, the First Circuit found the claims moot. *Id.* at 999, 1001. The Supreme Court addressed only the due process claim against the state review officer. *See id.* at 1013–16 (discussing due process challenge to the partiality of the state review officer).

⁹⁸ *Id.* at 1000.

⁹⁹ *Id.* at 1001.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1001–02.

¹⁰² *Id.* at 1002–04.

The Supreme Court first addressed the parents' § 1983 claims and clarified that the parents based those claims on independent constitutional deprivations and not on violations of the EHA but noted that their constitutional claims were "virtually identical" to their claims under the EHA.¹⁰³ The Court concluded that Congress intended for disabled students to bring any constitutionally based FAPE claims through the EHA's administrative process.¹⁰⁴ The Court reasoned that the EHA "establishe[d] an elaborate procedural mechanism" to give LEAs and SEAs the primary responsibility for developing plans to meet the needs of students with disabilities and therefore Congress did not intend to allow students with disabilities to proceed directly to court with equal protection claims for FAPE.¹⁰⁵ As a result, the Court held that:

[W]here the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.¹⁰⁶

Addressing the parents' due process claims, the Court first concluded that the parents' initial due process claim—which resulted in the injunctive relief requiring the LEA to maintain the student's placement during the proceedings—was not sufficiently related to the parents' ultimate success on their substantive claims.¹⁰⁷ Next, the Court concluded that the parents' due process claim alleging bias of the state review officer was "distinctly different" from their substantive claim regarding which agency should fund their child's education.¹⁰⁸ As a result, the Court concluded that the parents' prevailing, non-fee claim did not entitle the parents to attorneys' fees under 42 U.S.C. § 1988 simply because they asserted a due process claim through § 1983.¹⁰⁹

Turning to the parents' Section 504 claims, the Court opined that it was clear "that the remedies, rights, and procedures Congress set out in the EHA are the ones it intended to apply to a handicapped child's claim to [FAPE]" and that "Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by

¹⁰³ *Id.* at 1008–09.

¹⁰⁴ *Id.* at 1009.

¹⁰⁵ *Id.* at 1010–11.

¹⁰⁶ *Id.* at 1013.

¹⁰⁷ *Id.* at 1008.

¹⁰⁸ *Id.* at 1015.

¹⁰⁹ *Id.*

resort to the general antidiscrimination provision of § 504.”¹¹⁰ The Court explained that a Section 504 claim added nothing to the parents’ EHA FAPE claim and that the only benefit of bringing a Section 504 claim would be the possibility of circumventing the EHA by proceeding straight to court, where there would be the possibility of money damages and attorneys’ fees, which were unavailable under the EHA.¹¹¹ In conclusion, the Court held that when a remedy that “might be provided under § 504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to § 504.”¹¹²

In dissent, Justice Brennan, joined by Justices Marshall and Stevens, rejected the majority’s conclusion that Congress intended to repeal remedies available under § 1983 and Section 504 for claims that overlap with the EHA.¹¹³ The dissent found that the majority’s conclusion conflicted with principles of statutory construction and had no basis in the legislative history of the EHA.¹¹⁴ It acknowledged the conflict among § 1983, Section 504, and the EHA but concluded that the proper resolution was to require a plaintiff who brought a claim covered by the EHA to seek relief through the EHA’s administrative mechanism before pursuing relief under § 1983 or Section 504 in the courts.¹¹⁵

B. *The Handicapped Children’s Protection Act of 1986*

In response to the Supreme Court’s holding in *Smith v. Robinson*, Congress passed the Handicapped Children’s Protection Act of 1986 (“HCPA”) to amend the EHA.¹¹⁶ In addition to adding a provision to the EHA that allowed courts to award reasonable attorney fees to prevailing parents or guardians,¹¹⁷ the HCPA expressly allowed parents to bring claims under other federal laws protecting the rights of students with disabilities.¹¹⁸ The current version of this provision in the IDEA, codified at 20 U.S.C. § 1415(I), states:

¹¹⁰ *Id.* at 1019.

¹¹¹ *Id.* at 1019–20.

¹¹² *Id.* at 1021. In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), decided the same day as *Smith*, the Court rejected parents’ attempt to obtain attorneys’ fees through Section 504 for a claim that they could have brought under the EHA. *Id.* at 895. Relying on *Smith*, the court explained that “§ 504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services.” *Id.*

¹¹³ *Smith*, 468 U.S. at 1025–26, 1030 (Brennan, J., dissenting).

¹¹⁴ *Id.* at 1024–25, 1030.

¹¹⁵ *Id.* at 1023–24.

¹¹⁶ Handicapped Children’s Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796; S. REP. NO. 99-112, at 2 (1985); H.R. REP. NO. 99-296, at 4, 15 (1985).

¹¹⁷ Handicapped Children’s Protection Act of 1986 § 2, 100 Stat. at 796 (codified as amended at 20 U.S.C. § 1415(i)(3)(B) (2006)).

¹¹⁸ *Id.* § 3, 100 Stat. at 797 (codified as amended at 20 U.S.C. § 1415(I)).

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, [Section 504], 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's impartial due process hearing and appeals provisions] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].¹¹⁹

Thus, the HCPA rejected the holding in *Smith v. Robinson* that the EHA preempted other laws affording rights to students with disabilities.¹²⁰ Although § 1415(l) grants parents the right to file civil actions based on other federal laws, such as Section 504/ADA, it requires that they must first exhaust the remedies available under IDEA's administrative due process system if they are seeking relief that is also available under the IDEA.¹²¹ It is this qualification that courts have misinterpreted and misapplied.

IV. STUDENTS' COVERAGE UNDER THE IDEA AND SECTION 504/ADA

A. *Students Eligible Under Both the IDEA and Section 504/ADA*

Students with a disability who meet the eligibility criteria of the IDEA generally also meet the eligibility criteria of Section 504/ADA.¹²² As a result, these "double covered" students have rights under both the IDEA and Section 504/ADA. Since the enactment of the HCPA, which overturned *Smith v. Robinson* and declared that the IDEA does not preempt claims based on Section 504/ADA,¹²³ parents of double covered students may bring claims based on violations of the IDEA or Section 504/ADA.¹²⁴

¹¹⁹ 20 U.S.C. § 1415(l).

¹²⁰ S. REP. NO. 99-112, at 2 (stating that Congress intended the HCPA to overturn *Smith v. Robinson's* holding that the EHA preempted other federal laws protecting the rights of individuals with disabilities); H.R. REP. NO. 99-296, at 4, 15 (same).

¹²¹ 20 U.S.C. § 1415(l).

¹²² See, e.g., Letter from Gerald A. Reynolds, Assistant Sec'y for Civil Rights, to Mary L. Landrieu, U.S. Senator (July 12, 2002) (on file with author), available at <http://www2.ed.gov/policy/speced/guid/idea/letters/2002-3/landrieu0712023q2002.pdf> ("Students eligible for services under IDEA are also protected by Section 504."); Response to Veir, 20 IDELR ¶ 864, 867 (OCR 1993) ("[OCR] cannot conceive of any situation in which [students eligible under the IDEA] would not also be entitled to the protection extended by Section 504.").

¹²³ See *supra* Section III.B.

¹²⁴ See, e.g., *Miller v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1246 (10th Cir. 2009) (explaining that a violation of the IDEA is not per se discrimination under Section 504/ADA);

For example, in *Weixel v. Board of Education of the City of New York*,¹²⁵ the parent of a student with chronic fatigue syndrome and fibromyalgia sought accommodations for her daughter who, due to her illness, was unable to attend school.¹²⁶ The student's LEA met the parent's request for accommodations for her daughter with hostility. A school administrator threatened to, and eventually did, report the parent to the state's child welfare agency due to the child's absences from school—despite having medical diagnoses and recommendations for the student to stay home—and refused to place the student in advanced classes despite her outstanding academic performance.¹²⁷ In reversing the district court's dismissal of the parent's complaint, the United States Court of Appeals for the Second Circuit held the parent sufficiently pled facts to state claims for violations of both Section 504/ADA and the IDEA.¹²⁸

In addition, certain violations of a student's IDEA rights could also be violations of Section 504/ADA. For example, in *Ridgewood Board of Education v. N.E.*,¹²⁹ a parent of an IDEA-eligible student alleged a denial of FAPE under the IDEA and discrimination for violations of Section 504 for the LEA's failures to identify the student as learning disabled, inform the parents of its duties under IDEA, and provide FAPE.¹³⁰ The Third Circuit vacated the district court's grant of summary judgment for the LEA on the student's Section 504 claims and noted that an LEA's failure to inform parents of its IDEA responsibilities and to identify a student with a disability could amount to violations of Section 504 and that a denial of FAPE “violates IDEA and therefore could violate Section 504.”¹³¹

B. Students Eligible Only Under Section 504/ADA

Given the broader definition of “disability” under Section 504/ADA, students with physical or mental impairments who do not meet the eligibility criteria under the IDEA still may be eligible under Section 504/ADA.¹³² For example, some students with attention

Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 1319–20 (11th Cir. 2003) (holding that the trial court erred by rejecting a parent's Section 504 claim based on its rejection of the IDEA claim); *Piedmont Behavioral Health Ctr. v. Stewart*, 413 F. Supp. 2d 746, 751–57 (S.D. W. Va. 2006) (discussing both claims of IDEA violations and discrimination claims under Section 504/ADA).

¹²⁵ 287 F.3d 138 (2d Cir. 2002).

¹²⁶ *Id.* at 142.

¹²⁷ *Id.* at 142–44.

¹²⁸ *Id.* at 152.

¹²⁹ 172 F.3d 238 (3d Cir. 1999).

¹³⁰ *Id.* at 253.

¹³¹ *Id.* (citing *W.B. v. Matula*, 67 F.3d 484, 492–93, 500–01 & n.13 (3d Cir. 1995), *overruled on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 799 (3d Cir. 2007) (en banc)).

¹³² See, e.g., *Northshore (WA) Sch. Dist. No. 417*, 20 IDELR 1266, 1267–68 (OCR 1993) (finding LEA complied with Section 504/ADA by offering a program of services to meet a student's needs who had a disability but who did not qualify for IDEA services); *Response to Veir*, 20 IDELR ¶

deficit/hyperactivity disorder (“ADHD”) might not meet the eligibility standards under the IDEA because their impairment does not adversely affect their educational performance. However, if those students’ ADHD substantially limited a major life activity, they would qualify for protection under Section 504/ADA.¹³³ Similarly, students with medical conditions such as asthma,¹³⁴ asthmatic bronchitis,¹³⁵ diabetes,¹³⁶ encopresis,¹³⁷ and juvenile rheumatoid arthritis¹³⁸ may qualify as disabled under Section 504/ADA but might be ineligible under the IDEA if the impairments do not adversely affect their educational performance or they do not need special education. Thus, a class of students with disabilities exists who are entitled to the protection of Section 504/ADA but not to the protection of the IDEA.¹³⁹

V. THE APPLICABILITY AND INAPPLICABILITY OF § 1415(l) OF THE IDEA TO SECTION 504/ADA

A. *Students Covered by the IDEA and Section 504/ADA*

Section 1415(l) of the IDEA¹⁴⁰ clearly applies to students who are

864, 867 (OCR 1993) (stating that students who do not meet the eligibility criteria under the IDEA may or may not meet the eligibility under Section 504); Response to Anonymous, 18 IDELR 229, 229–30 (OCR 1991) (explaining that a student who is not eligible under the IDEA may require special education under Section 504 if he or she meets Section 504’s eligibility requirements); U.S. Dep’t of Educ. Joint Policy Memorandum, 18 IDELR 116, 117 (OSERS/OCR/OSEP 1991) (“[T]he protections of Section 504 extend to some children who do not fall within the disability categories specified in [the IDEA].”).

¹³³ *E.g.*, Response to Williams, 21 IDELR 73, 76 (OCR 1994); Response to Rahall, 21 IDELR 575, 577 (OCR 1994); U.S. Dep’t of Educ. Joint Policy Memorandum, 18 IDELR 116, 117 (OSERS/OCR/OSEP 1991); Pembina (ND) Pub. Sch. Dist. #1, 18 IDELR 225, 226 (OCR 1991); Ventura (CA) Unified Sch. Dist., 17 EHLR 854, 857 (OCR 1991); *see also* Maine Sch. Admin. Dist. #70, 51 IDELR 83, at 459–60 (OCR 2008) (finding that an LEA violated Section 504 when it considered a student with ADHD only for eligibility under the IDEA but did not consider the student’s eligibility under Section 504/ADA).

¹³⁴ *E.g.*, Culver City (CA) Unified Sch. Dist., 16 EHLR 673, 674 (OCR 1990); *cf.* Yorktown (NY) Cent. Sch. Dist., 16 EHLR 108, 109 (OCR 1989) (determining that a student with a record of asthma qualifies as a student with a disability under Section 504).

¹³⁵ *E.g.*, Burbank (IL) Sch. Dist. #111, 18 IDELR 284, 284 (OCR 1991).

¹³⁶ *E.g.*, Gasconade Cnty. (MO) R-I Sch. Dist., 18 IDELR 313, 314 (OCR 1991); N.Y. City Bd. of Educ., 16 EHLR 455, 455 (OCR 1989); Bement (IL) Cmty. Unit Sch. Dist. #5, EHLR 353:383, 384 (OCR 1989).

¹³⁷ *See, e.g.*, Great Valley (PA) Sch. Dist., 16 EHLR 101, 103–04 (OCR 1989) (finding that an LEA violated Section 504 by failing to evaluate a student with encopresis).

¹³⁸ Linden (CA) Unified Sch. Dist., EHLR 352:617, 617–19 (OCR 1988) (finding that an LEA violated Section 504 when it did not conduct a physical therapy evaluation for a student with juvenile rheumatoid arthritis based on the LEA’s policy that prohibited physical therapy evaluations for students not eligible under the IDEA).

¹³⁹ Indeed this class of students likely will expand with the passage of the ADA. *See supra* note 58 and accompanying text.

¹⁴⁰ 20 U.S.C. § 1415(l) (2006).

double covered by both the IDEA and Section 504/ADA or who are seeking the protections of both the IDEA and Section 504/ADA. A parent of a student eligible under the IDEA has a right to request a due process hearing to challenge certain disciplinary decisions or the identification, evaluation, educational placement, or the provision of FAPE under the IDEA.¹⁴¹ If a parent believes that an LEA also has discriminated against his or her child based on the child's disability, § 1415(*l*) provides that the parent also may file a complaint alleging violations of Section 504/ADA.¹⁴² However, § 1415(*l*) qualifies that, if a parent is seeking relief under Section 504/ADA that is also available under the IDEA, then the parent must exhaust the IDEA's administrative due process procedures before filing a civil action in court.¹⁴³ The IDEA permits parents to file a due process complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE]."¹⁴⁴ As a result, in applying § 1415(*l*) to Section 504/ADA claims by parents of double covered students, courts inquire whether the relief the parents are seeking under Section 504/ADA would also be available under the IDEA and therefore often look to whether the parent's Section 504/ADA claim relates to the student's identification, evaluation, placement, or provision of FAPE. However, courts' analyses are not always consistent.

This inconsistency is apparent in courts' conclusions as to whether parents of double covered students must exhaust IDEA's procedures for Section 504/ADA claims seeking money damages. Some courts have held that parents seeking money damages under Section 504/ADA must exhaust their remedies under the IDEA. For example, in *Charlie F. v. Board of Education of Skokie School District 68*,¹⁴⁵ the parents of a double covered student sued their LEA for money damages under Section 504/ADA after the student's teacher invited her other students to vent their feelings and complaints about the student, alleging psychological harm to the child.¹⁴⁶ The Seventh Circuit held that, although money damages are not available under the IDEA, the parents should have exhausted the IDEA's administrative remedies.¹⁴⁷ The court concluded "the genesis and manifestations of the problem [were] educational" and "that at least in

¹⁴¹ 20 U.S.C. § 1415(b)(6), (f), (k)(3).

¹⁴² See 20 U.S.C. § 1415(*l*) (stating that the IDEA does not limit the rights, procedures, and remedies under, *inter alia*, Section 504/ADA).

¹⁴³ See *id.* (requiring a party to exhaust the IDEA's administrative procedures before filing a claim under other laws protecting individuals with disabilities).

¹⁴⁴ *Id.* § 1415(b)(6).

¹⁴⁵ 98 F.3d 989 (7th Cir. 1996).

¹⁴⁶ *Id.* at 990–91.

¹⁴⁷ *Id.* at 991, 993.

principle relief [was] available under the IDEA.”¹⁴⁸ Similarly, the Second Circuit held that a double covered student should have used the IDEA’s procedures to exhaust her Section 504/ADA claim for money damages based on allegations that the LEA denied the student FAPE by failing to provide study materials, compensation for tutoring, and recognition of academic achievements.¹⁴⁹ The court reasoned that the IDEA could have provided other forms of relief that the student sought based on a denial of FAPE, even though money damages are not available under the IDEA.¹⁵⁰ In addition, the Ninth Circuit has held that, although monetary relief is not available under the IDEA, the parents of a double covered student should have exhausted their remedies for their Section 504/ADA claims seeking money damages.¹⁵¹ The court found that the parents based their claims on underlying educational issues that were unresolved and, as a result, the IDEA’s administrative remedies might have provided adequate relief.¹⁵²

On the other hand, other courts have held that Section 504/ADA claims for money damages do not require exhaustion of the IDEA’s administrative procedures. For example, a different Ninth Circuit panel held that parents of a double covered student did not have to exhaust IDEA remedies for their Section 504/ADA claims seeking money damages for alleged physical, psychological, and verbal abuse.¹⁵³ The court based its conclusion on the fact that money damages are not available under the IDEA, and that the parents and the LEA had already resolved the educational issues through the IEP process and therefore the requested relief was not “also available” under the IDEA.¹⁵⁴ The Tenth Circuit also held that exhaustion was unnecessary for a Section 504/ADA claim seeking money damages filed by parents of a double covered student.¹⁵⁵ The court determined that relief was not available under the IDEA because the money damages the parents sought were for physical injuries and the parents asserted that the student’s current LEA met her educational needs.¹⁵⁶

Courts have also been inconsistent in determining whether Section 504/ADA claims of discrimination are subject to the IDEA’s exhaustion requirement. For example, the Second Circuit held that parents who

¹⁴⁸ *Id.* at 993.

¹⁴⁹ *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 480–81, 491 (2d Cir. 2002).

¹⁵⁰ *Id.* at 486, 488.

¹⁵¹ *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1164, 1169 (9th Cir. 2007).

¹⁵² *Id.* at 1169.

¹⁵³ *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1272–75 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc).

¹⁵⁴ *Id.* at 1275 (quoting 20 U.S.C. § 1415(l) (2006)).

¹⁵⁵ *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1270, 1275 (10th Cir. 2000).

¹⁵⁶ *Id.* at 1274.

brought a Section 504/ADA claim for discrimination should have exhausted their remedies under the IDEA's procedures.¹⁵⁷ The parents based their claims on discrimination because the LEA refused to allow the student to use a service dog at school, but they did not allege that the IEP was inadequate or that the LEA denied the student FAPE.¹⁵⁸ However, the court recast their claim as one challenging the IEP and therefore concluded relief was available under the IDEA.¹⁵⁹

In contrast, the Eighth Circuit held that the parents of a double covered student were not required to exhaust their Section 504/ADA discrimination claim before filing in court.¹⁶⁰ In that case, the parents alleged discrimination based on the school nurse's disclosure that the student had schizophrenia, resulting in harassment by students.¹⁶¹ The court concluded that the LEA's alleged failure to protect the student from unlawful disability discrimination was "wholly unrelated to the IEP process" and to the identification, evaluation, placement, and provision of FAPE under the IDEA.¹⁶²

The foregoing cases in this subsection involved students who received IDEA services and, therefore, are not directly applicable to the issue of exhaustion for students covered only by Section 504/ADA. Nonetheless, the cases highlight the courts' inconsistencies and likely confusion in attempting to distinguish and reconcile IDEA and Section 504/ADA claims. Despite the courts' inconsistent results, it is clear that § 1415(*l*) applies to Section 504/ADA claims by parents whose children receive or are seeking services under the IDEA. Students protected by, or seeking the protection of, the IDEA are subject to its provisions, including § 1415(*l*). To determine whether a parent of a double covered student must exhaust the IDEA's administrative procedures for a claim based on Section 504/ADA pursuant to § 1415(*l*), the threshold question is whether the IDEA could provide relief for those claims. For those cases, whether requested relief for certain Section 504/ADA claims is also available under the IDEA or whether the IDEA's administrative process would be futile or its relief inadequate are separate questions.¹⁶³ While courts' answers to those questions are inconsistent, the application of § 1415(*l*) is proper.

¹⁵⁷ *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 244, 247, 250 (2d Cir. 2008).

¹⁵⁸ *Id.* at 243–44, 247.

¹⁵⁹ *Id.* at 247–48.

¹⁶⁰ *M.P. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 867–68 (8th Cir. 2006).

¹⁶¹ *Id.* at 866.

¹⁶² *Id.* at 868.

¹⁶³ *See, e.g., Weber, supra* note 16, at 1138–39 (arguing that claims for disability harassment under Section 504/ADA should not be subject to exhaustion); *Wasserman, supra* note 16, at 420–21, 425 (arguing for excusal of exhaustion requirements under certain circumstances).

B. *Students Eligible Only Under Section 504/ADA*

1. *IDEA Hearing Officers' Jurisdiction to Hear Section 504/ADA Claims by Students Eligible Solely Under Section 504/ADA*

While students protected by the IDEA are subject to its provisions, including § 1415(*l*), the same is not true for students whom the IDEA does not reach—specifically students who are eligible for services under Section 504/ADA, but who are not covered by the IDEA. If a party is seeking relief that is also available under the IDEA, Section 1415(*l*) requires the parties to exhaust the IDEA's due process hearing procedures before filing a civil action in court based on Section 504/ADA claims.¹⁶⁴ Parties may bring a complaint pursuant to the IDEA's administrative procedures based on matters involving the identification, evaluation, educational placement, FAPE, or, under certain circumstances, discipline of a student.¹⁶⁵ A hearing officer's jurisdiction to hear a case under the IDEA's due process provisions arises from complaints based on these issues.¹⁶⁶ Nothing in the IDEA, Section 504, or ADA statutes, nor their regulations, provide that IDEA hearing officers have jurisdiction to hear claims based solely on Section 504/ADA violations filed by the parents of students eligible only under Section 504/ADA.¹⁶⁷ Furthermore, most states do not separately grant IDEA hearing officers jurisdiction to hear Section 504/ADA claims.¹⁶⁸ Thus, requiring a party to exhaust the IDEA's administrative procedures in those jurisdictions would be futile.

For example, in one case in Nevada, a guardian filed a suit against an LEA for failure to develop a Section 504 accommodation plan and the lack of notice of procedural safeguards.¹⁶⁹ A federal district court dismissed the suit for failure to exhaust administrative remedies under § 1415(*l*).¹⁷⁰ Subsequently, the guardian requested a hearing under Section 504 but later clarified that she was requesting a hearing under both Section 504 and the IDEA,¹⁷¹ presumably in an attempt to satisfy the § 1415(*l*) requirement.

¹⁶⁴ 20 U.S.C. § 1415(*l*) (2006).

¹⁶⁵ *Id.* § 1415(b)(6)(A), (f)(1)(A), (k)(3).

¹⁶⁶ *See id.* § 1415(f)(1)(A) (providing for the opportunity for a hearing based on complaints involving identification, evaluations, placement, FAPE, and discipline).

¹⁶⁷ *See id.* § 1415(b)(6), (f), (k) (making no reference to IDEA hearing officers hearing claims of Section 504/ADA violations); 29 U.S.C. § 794 (2006) (same); 42 U.S.C. § 12133 (2006) (same); 28 C.F.R. §§ 35.170–72 (2011) (same); 34 C.F.R. § 104.36 (2011) (same); *id.* § 300.507, 300.511–14 (2010) (same).

¹⁶⁸ *See* Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. OF SPECIAL EDUC. LEADERSHIP 100, 106 (2010) (“[R]elatively few states . . . have opened their IDEA [impartial due process hearing] systems to claims under § 504 that are alternative to or instead of those under the IDEA.”).

¹⁶⁹ Clark Cnty. Sch. Dist., 37 IDELR ¶ 169, 719 (SEA Nev. 2002).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

The IDEA hearing officer determined that she had jurisdiction to hear claims alleging discrimination under Section 504, framing the guardian's claim as one involving the LEA's duty to evaluate the student and determining that sufficient evidence existed to justify an IDEA evaluation.¹⁷² On appeal, a state review officer found that the IDEA hearing officer erred in exercising jurisdiction over purely Section 504 issues.¹⁷³ The review officer held that "[i]n order for an IDEA hearing officer to have Jurisdiction [sic] the child must be identified as a student with disabilities under the [IDEA] or seeking such identification through the hearing process" and recognized that "the hearing processes provided under Section 504 and IDEA respectively are separate."¹⁷⁴ The review officer further explained that,

[f]or an IDEA hearing officer to have jurisdiction over a claim, it must involve a "matter" "related" to the "identification, evaluation, or educational placement" of the subject child or "the provision of a free appropriate public education to the child[?]" If a Section 504 issue is part of an issue raised under IDEA, it is no longer a Section 504 issue, but rather an IDEA issue.¹⁷⁵

In rejecting the IDEA hearing officer's justification for her exercise of jurisdiction over the Section 504 issues, the review officer suggested that "[p]erhaps the Hearing Officer confused . . . Section 504 . . . procedures with those required under IDEA."¹⁷⁶ Thus, in attempting to fulfill § 1415(l)'s requirement that she exhaust IDEA's hearing procedures—as interpreted by the district court, which originally dismissed her complaint for lack of exhaustion—the child's guardian found that the IDEA hearing officer did not have jurisdiction over her claims.

In another case, in Texas, parents of a student who received services under the IDEA requested an IDEA due process hearing for violations of the IDEA and other laws, including Section 504/ADA.¹⁷⁷ The LEA objected to the parents' Section 504/ADA claims because, in Texas, IDEA hearing officers lacked jurisdiction to hear non-IDEA claims, and, as a result, the hearing officer dismissed the non-IDEA claims.¹⁷⁸ The IDEA hearing occurred, but the parents subsequently filed a civil action in court

¹⁷² *Id.* at 719–20.

¹⁷³ *Id.* at 720–21.

¹⁷⁴ *Id.* at 720.

¹⁷⁵ *Id.* at 720–21.

¹⁷⁶ *Id.* at 721.

¹⁷⁷ *Wood v. Katy Indep. Sch. Dist.*, 53 IDELR ¶ 10, 34, 35 (S.D. Tex. 2009).

¹⁷⁸ *Id.*

based on Section 504/ADA claims.¹⁷⁹ Although the hearing officer had refused to hear the Section 504/ADA claims for lack of jurisdiction, the federal district court found that “the theory behind” Section 504/ADA claims fell within the IDEA and could be resolved under the IDEA’s administrative procedures.¹⁸⁰ The court therefore held that the parents should have exhausted the IDEA’s administrative remedies before filing a civil action in court.¹⁸¹

While forcing parents of IDEA students to repackage their Section 504/ADA claims solely as IDEA claims clearly contradicts the plain language of § 1415(*l*),¹⁸² parents of students eligible solely under Section 504/ADA do not have the option to repackage their Section 504/ADA as IDEA claims because those students are not covered by the IDEA. If a court subjects parents of students eligible solely under Section 504/ADA to the exhaustion requirement of § 1415(*l*), thus requiring them to utilize an IDEA due process hearing for their Section 504/ADA claims, the potential of an IDEA hearing officer’s lack of jurisdiction over Section 504/ADA issues may result in the parents finding both the doors of the hearing room and courtroom closed.

As another example, the Connecticut State Department of Education has issued guidance regarding the jurisdiction of IDEA hearing officers. In a circular to Connecticut LEAs addressing Section 504 procedural safeguards, the Connecticut Commissioner of Education noted that some LEAs had been confusing Section 504’s hearing requirements with those of the IDEA.¹⁸³ The circular explained the differences between the procedural safeguards of the two laws and clarified that IDEA hearing officers have jurisdiction over Section 504 claims “only as necessary to resolve the claims made under the IDEA.”¹⁸⁴ Citing the previous version of the circular, a Connecticut hearing officer explained that generally, IDEA hearing officers “will not hear what is commonly referred to as ‘Section 504 only cases’”¹⁸⁵

Despite the position of the Connecticut State Department of Education,¹⁸⁶ courts in Connecticut continue to confuse the issues. In one case, a mother first sought IDEA services for her two sons, and when the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 36.

¹⁸¹ *Id.*

¹⁸² 20 U.S.C. § 1415(*l*) (2006) (“Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under . . . the [ADA or Section 504] . . .”).

¹⁸³ Circular Letter C-13, Series 2008–2009, Reissue of Circular Letter C-9, Series 2000–2001, Mark K. McQuillan, Comm’r of Educ., Conn. State Dep’t of Educ., at 1 (May 20, 2009) [hereinafter *Circular C-13*].

¹⁸⁴ *Id.* at 2 & n.2, n.2a.

¹⁸⁵ *Student v. Dist. Bd. of Educ.*, No. 09-0537, at 3 (SEA CT Aug. 31, 2009), http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Hearing_Decisions/2009/09_0537.pdf.

¹⁸⁶ *Circular C-13*, *supra* note 183, at 2 & n.2.

LEA found them ineligible under the IDEA, at the direction of the LEA, the mother then sought services under Section 504.¹⁸⁷ The LEA found one son eligible under Section 504 and the other son ineligible under Section 504.¹⁸⁸ For the latter, the mother filed for a due process hearing under Section 504, and then filed complaints with OCR and in district court on behalf of both sons for, among other things, violations of the IDEA and Section 504/ADA.¹⁸⁹ The court held that the mother failed to exhaust the IDEA's administrative procedures because she failed to request due process hearings under the IDEA.¹⁹⁰ The court further held that the mother's participation in a Section 504 due process hearing did not satisfy or excuse § 1415(l)'s exhaustion requirement.¹⁹¹ Citing § 1415(l), the court explained that "[i]t is the exhaustion of the IDEA's administrative procedures, not procedures under Section 504, that is the prerequisite for bringing an action in federal or state court alleging the denial of a FAPE under the IDEA, Section 504, the ADA, Section 1983, or any other cause of action."¹⁹² The court's holding seemed to require the exhaustion of the IDEA's administrative procedures before filing any action in court based on Section 504/ADA.¹⁹³ One then wonders how, in Connecticut, the parents of a student eligible under Section 504/ADA, but ineligible under the IDEA, can exhaust their administrative remedies through the IDEA's procedures if Connecticut hearing officers do not have jurisdiction over Section 504 claims unrelated to IDEA claims.¹⁹⁴

2. *The Differences in Procedural Requirements and Substantive Rights Between the IDEA and Section 504/ADA*

In addition to the potential limitation of IDEA hearing officers not having jurisdiction to hear Section 504/ADA claims of students who are eligible only under Section 504/ADA, § 1415(l)'s exhaustion requirements cannot apply to these students because the administrative procedures that § 1415(l) requires parties to exhaust refer to procedures based on IDEA services and requirements. Parties may invoke the IDEA's administrative due process procedures, to which § 1415(l) refers, based on "any matter

¹⁸⁷ *Avoletta v. City of Torrington*, No. 3:07CV841 (AHN), 2008 WL 905882, at *2 (D. Conn. Mar. 31, 2008).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at *1, *3.

¹⁹⁰ *Id.* at *6–7.

¹⁹¹ *Id.* at *6.

¹⁹² *Id.* at *6 (citing 20 U.S.C. § 1415(l) (2006); *Myslow v. New Milford Sch. Dist.*, No. 3:03CV496 (MRK), 2006 WL 473735, at *10 n.2 (D. Conn. Feb. 28, 2006)).

¹⁹³ *Id.*

¹⁹⁴ See *Circular C-13*, *supra* note 183 at 2 n.2 (stating that Connecticut IDEA hearing officers do not have jurisdiction over Section 504 claims unless those claims relate to IDEA claims); *Student v. Dist. Bd. of Educ.*, No. 09-0537, http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Hearing_Decisions/2009/09_0537.pdf, at 3 (SEA CT Aug. 31, 2009) (same).

relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education”¹⁹⁵ Identification, evaluation, educational placement, and the provision of FAPE have specific meanings under the IDEA, which differ from their meanings under Section 504.

First, the identification requirements under the IDEA and Section 504/ADA are different. For a student to be identified as a “child with a disability” under the IDEA, he or she must fall within one of the enumerated disability categories and, as a result of that disability, require special education and related services.¹⁹⁶ In contrast, for a student to be an individual with a disability under Section 504/ADA, he or she must have a physical or mental impairment that substantially limits a major life activity or have a record of such an impairment, or an LEA must regard the student as having such an impairment.¹⁹⁷

Second, the evaluation requirements under the IDEA and Section 504/ADA differ. The IDEA contains specific provisions regarding who may request an evaluation, the timeframe within which an LEA must conduct an evaluation, the requirements for parental consent and parental notice, and the procedures for administering assessments and determining IDEA eligibility.¹⁹⁸ Section 504 regulations provide only that an LEA must conduct an evaluation before the initial placement of a student with a disability who needs, or is believed to need, special education and additionally contain several requirements for the tests used for evaluations.¹⁹⁹ Furthermore, the Section 504 regulations only require that an LEA periodically reevaluate students who receive *special education and related services*,²⁰⁰ thus, arguably not applying to certain students with disabilities under Section 504/ADA who only receive *regular education services*. In contrast, the IDEA requires an LEA to reevaluate a student receiving special education services and related services under the IDEA at least once every three years.²⁰¹

Third, while both the IDEA and Section 504’s regulations mandate that students with disabilities must receive an education alongside peers without disabilities and in the regular education environment to the “maximum extent appropriate,”²⁰² the procedures for determining a

¹⁹⁵ 20 U.S.C. § 1415(b)(6)(A), (I).

¹⁹⁶ *Id.* § 1401(3)(A).

¹⁹⁷ 29 U.S.C. §§ 705(20)(B), 794 (2006) (cross-referencing Section 504’s definition of “individual with a disability” as an individual who has a disability as defined by the ADA, 42 U.S.C. § 12102(1) (Supp. III 2008)); 42 U.S.C. § 12102(1) (Supp. III 2008) (defining “disability” under the ADA).

¹⁹⁸ 20 U.S.C. § 1414(a)-(c).

¹⁹⁹ 34 C.F.R. § 104.35(a), (b) (2011).

²⁰⁰ *Id.* § 104.35(d).

²⁰¹ 20 U.S.C. § 1414(a)(2).

²⁰² *Id.* § 1412(a)(5)(A); 34 C.F.R. § 104.34(a)-(b).

student's educational placement differ between the laws. Under the IDEA, an LEA must ensure that the parents are part of any group that makes decisions about a student's educational placement.²⁰³ In addition, the IDEA requires that an LEA provide prior written notice to the parents when it proposes to or refuses to initiate or change a student's educational placement.²⁰⁴ Furthermore, the IDEA contains provisions detailing the authority with which an LEA may remove a student for disciplinary reasons and when such a removal constitutes a change in the student's educational placement.²⁰⁵ On the other hand, the Section 504 regulations allow an LEA to place a student with a disability in a setting other than a regular education environment if the LEA demonstrates that it cannot educate the student satisfactorily even with supplementary aids and services.²⁰⁶ Moreover, Section 504's regulations do not require that the group who makes the student's placement decisions include the student's parents.²⁰⁷

Fourth, the definition of FAPE differs under the IDEA and Section 504/ADA. FAPE under the IDEA includes "special education and related services" that meet the state education standards and that conform to a student's IEP.²⁰⁸ The standard for FAPE under the IDEA requires that a student's IEP be reasonably calculated to provide educational benefit.²⁰⁹ Yet, FAPE under Section 504's regulations includes "the provision of regular or special education and related aids and services" designed to meet the needs of students with disabilities "as adequately as the needs of" students without disabilities.²¹⁰

Thus, the procedures and substantive requirements for the identification, evaluation, educational placement, and FAPE for students receiving services under the IDEA differ from the provisions for the identification, evaluation, educational placement, and FAPE for students receiving services only under Section 504/ADA. Students who receive services only under Section 504/ADA and who are ineligible for services under the IDEA are not entitled to the IDEA's more robust substantive rights and procedural safeguards. Therefore, the IDEA's administrative due process provisions that allow a party to bring a complaint based on

²⁰³ 20 U.S.C. § 1414(e); *see also id.* § 1415(b)(1) (providing that, as a procedural safeguard, parents must have an opportunity to participate in meetings regarding educational placement).

²⁰⁴ *Id.* § 1415(b)(3).

²⁰⁵ *Id.* § 1415(k).

²⁰⁶ 34 C.F.R. § 104.34(a).

²⁰⁷ *See id.* § 104.35(c) (stating that the group who determines a student's placement must include persons knowledgeable about the student, persons who can interpret evaluation data, and persons familiar with placement options).

²⁰⁸ 20 U.S.C. § 1401(9).

²⁰⁹ *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982).

²¹⁰ 34 C.F.R. § 104.33(b).

“any matter relating to the identification, evaluation, or educational placement of the child, or the provision of [FAPE]”²¹¹ must only be referring to identification, evaluation, educational placement, and FAPE as employed within the context of the IDEA—not the regulations for Section 504. As a result, based on § 1415(l)’s reference to the IDEA’s administrative due process procedures, § 1415(l)’s exhaustion requirement can apply only to students who are eligible for, or are seeking eligibility for, services under the IDEA who also allege violations of Section 504/ADA. Accordingly, parties who allege a violation of Section 504/ADA must exhaust the IDEA’s administrative due process procedures, as required by § 1415(l), only if the student is double covered by both the IDEA and Section 504/ADA.

Nevertheless, courts, apparently confused by the procedural and substantive similarities and differences between the IDEA and Section 504/ADA, have applied § 1415(l)’s requirements to students eligible only under Section 504/ADA. As a result, in addressing a parent’s Section 504/ADA claim when the student is eligible only under Section 504/ADA, courts mistakenly analyze whether relief would have been also available under the IDEA—if packaged as an IDEA claim—not understanding that the IDEA can only provide relief for students eligible or seeking eligibility under that statute.

For example, in *Prins v. Independent School District No. 761*,²¹² the parents of a student with attention deficit disorder filed a complaint against the LEA for violations of civil rights acts, including Section 504/ADA.²¹³ The student was disabled under Section 504/ADA, but did not receive services under the IDEA and the parents did not seek services under the IDEA.²¹⁴ The parents alleged that the LEA failed to comply with their son’s Section 504 plan and a previous settlement agreement when it applied its regular school district discipline policy to the student rather than the individual disciplinary plan specified in the student’s Section 504 plan.²¹⁵ The parents sought accommodations and modifications for their child, staff training, a court monitor, declaratory relief regarding discriminatory implementation of the LEA’s discipline procedures, and monetary damages.²¹⁶ The United States District Court for the District of Minnesota concluded that the parents’ requests for accommodations, modifications, and staff training were essentially asking for an IEP under

²¹¹ 20 U.S.C. § 1415(b)(6).

²¹² 23 IDELR 544 (D. Minn. 1995).

²¹³ *Id.* at 545.

²¹⁴ *Id.* at 547.

²¹⁵ *Id.* at 545. The parties reached this settlement agreement after the parents requested a due process hearing under Section 504, but before the hearing commenced. *Id.*

²¹⁶ *Id.* at 545, 547.

the IDEA and interpreted the parents' request for a court monitor as a request for an "evaluation procedure" for assessing the student's progress.²¹⁷ Thus, the court determined the parents could have brought those claims under the IDEA.²¹⁸ The court also found that the parents' discrimination claim related to the LEA's disciplinary procedures, which the parents also could have brought under the IDEA.²¹⁹ The court acknowledged that an IDEA hearing officer could not have granted declaratory or monetary relief, but ultimately held that, because the parents' claims sought relief that was substantially available under the IDEA, they were required to exhaust IDEA administrative remedies.²²⁰

The court's analysis in *Prins* is flawed for two reasons. First, at the outset of its discussion, the court noted that students with disabilities have "several statutory options for pursuing grievances" when an LEA fails to provide adequate educational services.²²¹ While it is true that the ADA, Section 504, and the IDEA all protect students with disabilities,²²² a student eligible under the IDEA generally may only bring educational claims via the IDEA's due process mechanism or the state complaint resolution process.²²³ On the other hand, as the court noted, Section 504 also provides for an impartial hearing and review for claims regarding identification, evaluation, and placement.²²⁴ The court found that the parents "explicitly chose to bring their claims under the ADA and Section 504 and not to bring their claims under the IDEA."²²⁵ However, given the court's holding that, barring any recognized exemptions, the only avenue into federal court for Section 504/ADA claims is through the IDEA's administrative procedures,²²⁶ the court effectively reads any "statutory option[]"²²⁷ out of existence.

Second, the court summarized the exhaustion requirement of what is now § 1415(l) as follows:

Essentially, if parents file a suit encompassing a claim that could have been filed under the IDEA, but chose to file under the ADA rather than the IDEA, they are first required to exhaust the IDEA's remedies to the same

²¹⁷ *Id.* at 547.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 549.

²²¹ *Id.* at 545–46.

²²² *See id.* at 546.

²²³ 20 U.S.C. § 1415(b)(6), (f) (2006); 34 C.F.R. §§ 300.151–153 (2010).

²²⁴ *Prins*, 23 IDELR at 546 (citing 34 C.F.R. § 104.36).

²²⁵ *Id.* at 546.

²²⁶ *Id.* at 547–49.

²²⁷ *Id.* at 545.

extent as if the suit had originally been filed under the IDEA.²²⁸

In this case, the parents did not *choose* to file under Section 504/ADA instead of the IDEA; both parties had previously agreed that the student was eligible for Section 504 services and the parents made clear that they did not seek IDEA services.²²⁹ As a result, their claims did not relate to the identification, evaluation, placement, or FAPE as provided in the IDEA. The court improperly generalized that all issues relating to the identification, evaluation, placement, and FAPE are analogous to IDEA claims,²³⁰ neglecting to address the different eligibility criteria, definitions of FAPE, and evaluation and placement requirements.²³¹

In another case, *Babicz v. School Board of Broward County*,²³² the parents of two students with chronic asthma, allergies, migraine syndrome, and sinusitis brought an action against the LEA under § 1983 for violations of Section 504/ADA for failing to provide the students equal educational opportunities.²³³ The LEA issued both students Section 504 plans, which included accommodations for notice of assignments and make up work when they were absent from school and access to inhalers, nebulizers, and oxygen to manage their asthma when they were at school.²³⁴ The parents claimed that the LEA failed to implement the students' Section 504 plans and retaliated against the mother and students after the parents obtained counsel.²³⁵ The complaint alleged that the LEA forced the mother out of her position as the PTA president, followed her on occasion, and restricted her access to the school.²³⁶ The complaint further alleged that the students' school did not follow a national contest's rules resulting in the students not receiving an award, accused one of the students of plagiarism, denied one of the students a place on the basketball team, and told one of the students that her mother was not welcome at the school.²³⁷

The Eleventh Circuit held that what is now § 1415(*l*) required the parents to exhaust IDEA remedies before bringing Section 504/ADA claims.²³⁸ The court relied on two other Circuits' cases, both of which held

²²⁸ *Id.* at 547 (citing *Mrs. W. v. Tirozzi*, 832 F.2d 748, 756 (2d Cir. 1987)).

²²⁹ *Id.* at 545, 547.

²³⁰ *See id.* at 547 (“[A] case encompassing analogous IDEA claims such as issues of FAPE and identification, evaluation and placement, would require exhaustion.”).

²³¹ *See supra* Section V.B.2 (discussing differences in procedural requirements and substantive standards between the IDEA and Section 504/ADA).

²³² 135 F.3d 1420 (11th Cir. 1998) (per curiam).

²³³ *Id.* at 1420–21.

²³⁴ *Id.* at 1421 & n.6.

²³⁵ *Id.* at 1421.

²³⁶ *Id.* at 1421 n.7.

²³⁷ *Id.* at 1421 n.8.

²³⁸ *Id.* at 1422.

that Section 504/ADA claims are subject to the IDEA's exhaustion requirement.²³⁹ However, the court in *Babicz* failed to distinguish the fact that the plaintiff-students in those cases who brought Section 504/ADA claims were also eligible under the IDEA.²⁴⁰ Because those students were double covered under both the IDEA and Section 504/ADA, an analysis under § 1415(l) was appropriate in those cases. In contrast, the students in *Babicz* were eligible under Section 504/ADA but did not receive services under the IDEA.²⁴¹ In a footnote, the court noted that under the IDEA's eligibility criteria, the "other health impairment" disability category includes asthma.²⁴² The court then rejected the parents' argument that the students required only related services but not special education—a fact which would have precluded eligibility under the IDEA—as "meritless."²⁴³ The court characterized that argument as merely an attempt to obtain compensatory damages, which are unavailable under the IDEA.²⁴⁴ However, the students' eligibility for special education under the IDEA category of other health impairment was not at issue in the case, and, in any event, such a determination would have required an evaluation and a determination by the LEA and parents. The issue was whether the Section 504/ADA claims on behalf of students who were only eligible under Section 504/ADA were subject to the exhaustion requirement of § 1415(l). The court answered that question by relying on cases in which the students were double covered and by unilaterally casting the net of IDEA eligibility over the *Babicz* children, who were only eligible under Section 504/ADA.

As another example, in *Cudjoe v. Independent School District No. 12*,²⁴⁵ a parent filed a complaint against the LEA for, among other things, disability discrimination under Section 504/ADA.²⁴⁶ The student had a diagnosis of Epstein-Barr virus, a condition that caused him to be so fatigued that he could not attend class.²⁴⁷ As a result, the student had a Section 504 plan that allowed him to receive homebound instruction during which a teacher would instruct him in his home at his grade level.²⁴⁸ The student had not received services under the IDEA previously.²⁴⁹ The mother based her Section 504/ADA claims on allegations that the LEA

²³⁹ *Id.*

²⁴⁰ See *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 990–91 (7th Cir. 1996) (noting that the student received services under the IDEA); *Hope v. Cortines*, 872 F. Supp. 14, 18 (E.D.N.Y. 1995) (same), *aff'd*, 69 F.3d 687, 688 (2d Cir. 1995).

²⁴¹ *Babicz*, 135 F.3d at 1421, 1422 n.10.

²⁴² *Id.* at 1422 n.10.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ 297 F.3d 1058 (10th Cir. 2002).

²⁴⁶ *Id.* at 1060.

²⁴⁷ *Id.* at 1061.

²⁴⁸ *Id.* & n.5.

²⁴⁹ *Id.* at 1066.

failed to provide instructional material to her son's teachers, hired teachers other than those that the mother requested, and allowed additional school personnel to attend the Section 504 meetings.²⁵⁰ The Tenth Circuit held that § 1415(*l*) required the mother to exhaust her Section 504/ADA claims under the IDEA's administrative process before filing a civil suit in court.²⁵¹

In reaching its conclusion, the court determined that the mother sought relief that was also available under the IDEA.²⁵² In deciding whether relief was available under the IDEA, the court acknowledged that “[o]ne plausible interpretation” is that the IDEA's “administrative remedies must be available immediately to a person, thereby requiring that a student be already identified, evaluated, and receiving special education pursuant to IDEA.”²⁵³ However, the court ultimately adopted a “broader construction” and interpreted “available relief” to mean that “a student with a disability who attempts to file a suit asserting that the school is not meeting his educational needs may have to first assert his rights to be evaluated for eligibility under the IDEA, before making appropriate demands for hearings and procedures to address that claim.”²⁵⁴

Requiring a parent to not merely use the IDEA's administrative procedures for Section 504/ADA claims, but also placing an affirmative obligation on the parents to request eligibility under the IDEA before asserting a claim under Section 504/ADA reaches far beyond even the broadest reading of the text of § 1415(*l*). Even if one gave merit to the interpretation that § 1415(*l*) requires parents to pursue Section 504/ADA claims through the IDEA's *hearing procedures*—even when a student is not eligible under the IDEA—nothing in the text of § 1415(*l*) suggests parents must seek IDEA *eligibility* before pursuing Section 504/ADA claims. Under *Cudjoe*'s framework, for parents who choose not to seek an IDEA evaluation for eligibility, this interpretation effectively waives their rights to bring claims under Section 504/ADA even if they would have pursued their Section 504/ADA claims via the IDEA's administrative procedures.

The court also took it upon itself to assert that the student “appear[ed]” to meet the eligibility criteria for “other health impairment” under the IDEA based on his condition of “debilitating fatigue,” which corresponds with the definition of other health impairment that includes health

²⁵⁰ *Id.* at 1062.

²⁵¹ *Id.* at 1064, 1068.

²⁵² *Id.* at 1068.

²⁵³ *Id.* at 1066.

²⁵⁴ *Id.* (internal quotation marks omitted). The court also reiterated that parents cannot escape the IDEA's exhaustion requirement by seeking compensatory damages and that whether relief is available involves determining whether the IDEA can provide any redress to the claims. *Id.*

problems that result in limited strength or vitality.²⁵⁵ The court then concluded that the parent did not show that her son was ineligible under the IDEA and that she therefore could have filed a due process request pertaining to his identification and evaluation and used the IDEA's procedural safeguards to address her son's FAPE.²⁵⁶ Besides ignoring the fact that eligibility determinations under the IDEA involve more than a court's casual observation that a student "appears" to be eligible under the IDEA,²⁵⁷ the court completely disregarded the second prong of IDEA eligibility, which requires that, in addition to having one of the IDEA's enumerated disabilities, a student must also require special education and related services as a result of the disability.²⁵⁸ The court even noted earlier in its opinion that the student's homebound instruction "consist[ed] of a teacher coming to [the student's] house to teach him the normal curriculum for his grade level, with the exception of his being excused from physical education."²⁵⁹ "Special education" under the IDEA involves adapting the "content, methodology, or delivery of instruction."²⁶⁰ The student in this case received instruction in the normal curriculum at his grade level²⁶¹ and, therefore, arguably did not need special education, and, as a result, would not be eligible under the IDEA. This omission in the court's analysis highlights its misunderstanding of the differences between eligibility under the IDEA and Section 504/ADA and, likely, the applicable procedural safeguards.

C. *The Proper Interpretation of § 1415(l) of the IDEA*

The lack of jurisdiction of many states' hearing officers over purely Section 504/ADA claims²⁶² and the differences in the respective statutory and regulatory schemes of the IDEA and Section 504/ADA in terms of identification, evaluation, educational placement, FAPE, and procedural safeguards lead to only one plausible interpretation of § 1415(l). If a student is eligible or seeking eligibility under the IDEA or is double covered under both the IDEA and Section 504/ADA, and his or her parents bring a claim based on Section 504/ADA, then § 1415(l) applies. In that

²⁵⁵ *Id.* at 1068.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See 20 U.S.C. § 1401(3)(A) (2006) (providing that, to qualify as a "child with a disability" under the IDEA, the child must, in addition to having an enumerated disability, need special education and related services).

²⁵⁹ *Cudjoe*, 297 F.3d at 1061 n.5.

²⁶⁰ 34 C.F.R. § 300.39(a)(1), (b)(3) (2010).

²⁶¹ *Cudjoe*, 297 F.3d at 1061 n.5.

²⁶² Zirkel & McGuire, *supra* note 168, at 106 ("[R]elatively few states . . . have opened their IDEA [impartial due process hearing] systems to claims under § 504 that are alternative to or instead of those under the IDEA.").

case, courts must determine whether the IDEA could have provided relief for the parents' claims had they brought the claims under the IDEA. If so, the parents cannot avoid the IDEA's due process procedures and must exhaust their administrative remedies under the IDEA's procedures unless the court finds that an exception applies, such as the inadequacy or futility of the administrative review.²⁶³ If the IDEA could not have provided relief for the Section 504/ADA claim, then the parents likewise would not have to exhaust the IDEA's administrative remedies.

However, if a student is eligible under Section 504/ADA, but not under the IDEA, and his or her parents wish to bring a claim based on Section 504/ADA, then the parents must follow the procedures of Section 504/ADA. Section 1415(l) and its exhaustion requirement would not apply because the IDEA does not grant IDEA hearing officers jurisdiction over purely Section 504/ADA claims, and therefore the IDEA could not provide relief. Moreover, the IDEA cannot provide relief except for matters relating to the identification, evaluation, educational placement, and provision of FAPE based on IDEA standards,²⁶⁴ which are distinct from the standards in the Section 504 regulations.

The legislative history of the HCPA also suggests the inapplicability of § 1415(l)'s exhaustion provision to students eligible only under Section 504/ADA. Both the House and Senate reports explain that, in enacting the HCPA, Congress intended to overturn the Supreme Court's opinion in *Smith v. Robinson* and its interpretation that the EHA preempted other federal laws protecting the rights of individuals with disabilities.²⁶⁵ While the House Report's explanation of the exhaustion provision merely paraphrases the provision's language,²⁶⁶ the Senate Report elucidates the congressional intent of the provision, explaining:

[T]he EHA does not limit the applicability of other laws which protect handicapped children and youth, except that when a parent brings suit under another law *when that suit could have been brought under the EHA*, the parent will be required to exhaust EHA administrative remedies to the same degree as would have been required had the suit been brought under the EHA.²⁶⁷

This explanation shows that Congress envisioned that the provision

²⁶³ E.g., *Honig v. Doe*, 484 U.S. 305, 326–27 (1988) (citations omitted).

²⁶⁴ 20 U.S.C. § 1415(b)(6), (f) (2006).

²⁶⁵ S. REP. NO. 99-112, at 2 (1985); H.R. REP. NO. 99-296, at 4, 15 (1985).

²⁶⁶ See H.R. REP. NO. 99-296, at 7 (“[P]arents alleging violations of [S]ection 504 . . . are required to exhaust administrative remedies before commencing actions in court where exhaustion would be required under EHA and the relief they seek is also available under EHA.”).

²⁶⁷ S. REP. NO. 99-112, at 3 (emphasis added).

should apply only to Section 504/ADA suits on behalf of students who are also eligible (or whose parents claim they are eligible) under the IDEA. Otherwise, such a “suit could [not] have been brought under the [IDEA]”²⁶⁸ since the only way parents may bring a claim under the IDEA is to allege a violation of that statute.²⁶⁹

Another similar statement from the Senate Report explains that “when parents *choose* to file a suit under another law,” such as Section 504, then parents must exhaust the IDEA’s administrative remedies to the same extent as would have been required “if that suit could have been filed under” the IDEA.²⁷⁰ This statement suggests that the exhaustion requirement applies to scenarios in which parents have a choice of whether to file under Section 504 or the IDEA. The choice under that scenario implies that a student would be double covered under both the IDEA and Section 504/ADA. Otherwise, a parent would not have a choice whether to pursue a claim under Section 504/ADA or the IDEA.

As noted, Congress enacted Section 1415(*l*) in response to the Supreme Court’s holding in *Smith v. Robinson* that the EHA preempted the ability of parents of students with disabilities to pursue claims based on violations of a Section 504.²⁷¹ In *Smith*, the student’s parents brought claims under both the EHA and Section 504.²⁷² It is that scenario—in which a student is subject to the protections of both Section 504/ADA and the IDEA—that provided the backdrop for Congress’s enactment of the HCPA and § 1415(*l*). With the HCPA, Congress intended to “re-establish[] the relationship between [the] EHA and [S]ection 504” and “reaffirm[] the viability of [S]ection 504 . . . as separate from but equally viable with [the] EHA as vehicles for securing the rights of” students with disabilities.²⁷³ This stated intention directly targets the *Smith* Court’s holding that the EHA precluded student claims based on Section 504. Congress also intended that, in reestablishing Section 504 as an avenue for students to pursue claims of disability discrimination, the HCPA should not “allow parents to circumvent the due process procedures and protections created under the EHA.”²⁷⁴ Thus, the legislative history indicates that Congress intended the HCPA to allow students who receive services under the IDEA to bring claims based on Section 504/ADA as well as claims based on the IDEA. For those students who are double covered under both the IDEA and Section 504, Congress clarified that they

²⁶⁸ *Id.* at 3.

²⁶⁹ See 20 U.S.C. § 1415(b)(6), (f), (k) (2006) (establishing the bases and procedures for a complaint under the IDEA).

²⁷⁰ S. REP. NO. 99-112, at 15 (emphasis added).

²⁷¹ *Id.* at 2; H.R. REP. NO. 99-296, at 4, 15.

²⁷² *Smith v. Robinson*, 468 U.S. 992, 998, 1000 (1984).

²⁷³ H.R. Rep. No. 99-296, at 6.

²⁷⁴ S. Rep. No. 99-112, at 15.

may not ignore the IDEA's due process procedures by choosing to file under Section 504, thus avoiding the IDEA's exhaustion requirement.

For example, a student with a specific learning disability in math likely would be double covered under both the IDEA and Section 504/ADA. If that student required instruction in a special education classroom during math class but did not need special education in other areas, and yet the LEA placed her in a special education classroom for all subjects, her parents likely would have a claim against the LEA for violating both the IDEA's and Section 504's mandates that students with disabilities receive their education with nondisabled peers to the maximum extent appropriate.²⁷⁵ In this case, based on § 1415(*l*), the student's parents could not avoid exhausting the IDEA's administrative remedies by choosing to file a claim based on a violation of Section 504/ADA directly in court. Because the LEA's conduct concerned a matter relating to the placement of a student who was eligible under the IDEA, the parents clearly could have brought their claim under the IDEA. As a result, § 1415(*l*) would require the parents to exhaust the IDEA's administrative procedures before filing a civil action in court based on Section 504/ADA.

A student eligible only under Section 504/ADA presents another scenario altogether. For example, a student with severe asthma could be eligible under Section 504/ADA because his impairment substantially limits the major life activity of breathing. However, that student might be ineligible under the IDEA because he does not require special education and related services. If the student required an accommodation to carry an inhaler for quick access, but the LEA refused to modify its policy of requiring the school nurse to keep and administer all medication, the student's parents potentially could have a claim for disability discrimination under Section 504/ADA. Since the student is ineligible for IDEA services, the parents could not bring a claim under the IDEA. As a result, § 1415(*l*) would not apply to the parents' claim. The parents would not be circumventing the IDEA's due process procedures because the LEA did not violate the IDEA.

VI. POLICY IMPLICATIONS AND RECOMMENDATIONS

Courts have recognized the policy arguments for requiring the exhaustion of administrative remedies in the special education context before proceeding to court. One potential benefit of exhaustion is that administrative hearing officers with specialized knowledge and training

²⁷⁵ See 20 U.S.C. § 1412(a)(5) (2006) (requiring LEAs to educate students with disabilities with children without disabilities to the maximum extent appropriate under the IDEA); 34 C.F.R. § 104.34(a) (2011) (requiring LEAs to educate students with disabilities with children without disabilities to the maximum extent appropriate under Section 504).

can use their expertise to make an initial determination about the adequacy of a student's services and allow the LEA to correct deficiencies.²⁷⁶ Another potential benefit is that administrative exhaustion allows the creation of a detailed record, which courts can rely upon if a party seeks judicial review.²⁷⁷ Furthermore, administrative exhaustion also can "promot[e] accuracy, efficiency, agency autonomy, and judicial economy."²⁷⁸

Parties who can utilize the IDEA's due process hearing procedures—namely, students who are eligible or seeking eligibility under the IDEA—may receive the potential benefits associated with the doctrine of exhaustion of administrative remedies. Notwithstanding these potential benefits, some courts misapply § 1415(*l*)'s exhaustion requirement to students who are not eligible for the IDEA but who are eligible only under Section 504/ADA.²⁷⁹ These students find that in some jurisdictions IDEA hearing officers do not have authority to hear purely Section 504/ADA claims.²⁸⁰ It is true that courts might consider parents to have exhausted their administrative remedies for their Section 504/ADA claims if they raised those claims at an IDEA hearing and the hearing officer subsequently dismissed the claims for lack of jurisdiction.²⁸¹ Even so, in those cases a hearing officer with specialized training will not make initial determinations about the Section 504/ADA claims, the process will not be efficient, and the hearing will produce no factual or evidentiary record to assist the courts upon judicial review. This result renders the policy arguments for requiring administrative exhaustion inapplicable within the context of Section 504/ADA claims by students eligible solely under Section 504/ADA.

If the exhaustion requirement of § 1415(*l*) does not apply to students covered only by Section 504/ADA, then, currently, these students likely do not have to exhaust available administrative remedies before filing an action in court. On their own, neither Section 504 nor Title II of the ADA

²⁷⁶ *E.g.*, *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1065 (10th Cir. 2002); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 487 (2d Cir. 2002); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60–61 (1st Cir. 2002).

²⁷⁷ *E.g.*, *Cudjoe*, 297 F.3d at 1065; *Polera*, 288 F.3d at 487 (citations omitted); *Frazier*, 276 F.3d at 61.

²⁷⁸ *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1094 (1st Cir. 1989) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969); *Ezratty v. Puerto Rico*, 648 F.2d 770, 774 (1st Cir. 1981)).

²⁷⁹ *See supra* Section V.B.2 (discussing case law pertaining to exhaustion for students eligible solely under Section 504/ADA).

²⁸⁰ *See supra* Section V.B.1

²⁸¹ *See, e.g.*, *E.S. v. Konocti Unified Sch. Dist.*, No. 1:10-cv-02245-NJV, 2010 WL 4780257, at *4 (N.D. Cal. Nov. 16, 2010) (finding plaintiff exhausted administrative remedies when he raised Section 504 claims at an IDEA hearing, which the hearing officer dismissed based on lack of jurisdiction to hear the claims).

contain an exhaustion requirement.²⁸² In fact, the regulations implementing Title II of the ADA specify that “at *any time*, the complainant may file a private suit pursuant to section 203” of the ADA.²⁸³ Section 203 of the ADA adopts the procedures available for claims under Section 504,²⁸⁴ which, in turn, adopts the procedures available for claims under Title VI of the Civil Rights Act of 1964.²⁸⁵ Courts have consistently held that a plaintiff need not exhaust administrative remedies for Title VI claims before filing in court.²⁸⁶ Additionally, in its analysis of the regulations implementing Title II of the ADA, the U.S. Department of Justice reiterated that Title II of the ADA “does not require exhaustion of administrative remedies” and that “the complainant may elect to proceed with a private suit at any time.”²⁸⁷

Given the lack of an express requirement to exhaust administrative remedies within Section 504 and the ADA, Congress, through legislation, or the U.S. Department of Education, through regulation, should clarify this issue in one of several ways. First, policymakers may favor a system where students with disabilities, whether covered by both the IDEA and Section 504/ADA or only by Section 504/ADA, must pursue claims via the IDEA’s more formal due process system. If so, then Congress should amend Section 505 of the Rehabilitation Act, which specifies the procedures available under Section 504/ADA, to incorporate the IDEA’s administrative procedures for claims by public school students with disabilities under Section 504/ADA, rather than the procedures of Title VI of the Civil Rights Act of 1964.²⁸⁸ Alternatively, the U.S. Department of Education should issue new Section 504 regulations to specify that LEAs must comply with the IDEA’s due process procedures to meet Section 504’s procedural safeguards requirement, which would replace the current provision, which merely permits, but does not require, compliance with the

²⁸² *E.g.*, *O’Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1061 (9th Cir. 2007) (citation omitted); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 281, 282 n.17 (3d Cir. 1996).

²⁸³ 28 C.F.R. § 35.172(d) (2011) (emphasis added).

²⁸⁴ 42 U.S.C. § 12133 (2006) (adopting the “remedies, procedures, and rights set forth in” 29 U.S.C. § 794a).

²⁸⁵ 29 U.S.C. § 794a(2) (2006) (adopting the “remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964,” 42 U.S.C. §§ 2000d to 2000d-7 (2006)).

²⁸⁶ *E.g.*, *Neighborhood Action Coal. v. City of Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989) (citations omitted) (noting that courts have “squarely h[e]ld that litigants need not exhaust their administrative remedies prior to bringing a Title VI claim in federal court”); *Cheyney State College Faculty v. Hufstedler*, 703 F.2d 732, 737 (3d Cir. 1983).

²⁸⁷ Appendix B to Part 35—Guidance on ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services Originally Published July 26, 1991, 28 C.F.R. Part 35 App. B (2011).

²⁸⁸ 29 U.S.C. § 794a (providing the procedures available under Section 504 and adopting the procedures of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7); 42 U.S.C. § 12133 (2006) (adopting the procedures of Section 505 of the Rehabilitation Act, 29 U.S.C. § 794a).

IDEA's procedures as a method of satisfying Section 504's requirement.²⁸⁹

Second, policymakers may prefer the less formal,²⁹⁰ and likely less costly, dispute resolution mechanism currently available under the Section 504 regulations²⁹¹ for students covered only by Section 504/ADA, but may still favor requiring the exhaustion of administrative remedies. Accordingly, the U.S. Department of Education should issue new Section 504 regulations to clarify that parents must exhaust their remedies via Section 504's less formal impartial due process hearing before they may file in court.

Finally, notwithstanding the policy arguments in favor of exhausting administrative remedies, policymakers may favor allowing parents of students covered solely by Section 504/ADA the option of proceeding directly to court with Section 504/ADA claims. Some courts have not required exhaustion for Section 504/ADA claims based on certain conduct²⁹² or seeking particular remedies.²⁹³ Implicit in such holdings is that courts are capable of adjudicating those claims despite the lack of prior administrative review. Moreover, claims based on Section 504 and Title II of the ADA, arising in contexts other than that of students with disabilities, generally do not require the exhaustion of administrative remedies.²⁹⁴

However, on balance, the benefits of requiring administrative exhaustion for students eligible only under Section 504/ADA outweigh the benefits of proceeding directly to court. Determining appropriate programs, services, and placements for students with disabilities is unlike the traditional discrimination inquiry into whether an entity's actions resulted in the disparate treatment of, or impact on, a member of a protected class. Instead of asking whether an LEA treated a student differently because of his or her disability, the question is what specific accommodations, modifications, and services the student needs to obtain a FAPE. This question is complex, and, as a result, it is preferable for the parties to create a record before a trained hearing officer who makes the

²⁸⁹ 34 C.F.R. § 104.36 (2011).

²⁹⁰ See Zirkel & McGuire, *supra* note 168, at 106–07 (noting that Section 504's regulations do not include timelines or hearing officer appointment procedures and, based on OCR guidance, do not require court reporters or the right to cross-examination during Section 504 hearings).

²⁹¹ 34 C.F.R. § 104.36.

²⁹² See, e.g., *M.P. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (alleging discrimination); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274–75 (10th Cir. 2000) (seeking relief for physical injuries); *O'Hayre v. Bd. of Educ. for Jefferson Cnty. Sch. Dist. R-1*, 109 F. Supp. 2d 1284, 1294 (D. Colo. 2000) (alleging discrimination).

²⁹³ See, e.g., *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999), *overruled on other grounds by Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011) (en banc) (seeking money damages); *Jeffery Y. v. St. Mary's Area Sch. Dist.*, 967 F. Supp. 852, 855 (W.D. Pa. 1997) (same).

²⁹⁴ E.g., *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1061 (9th Cir. 2007) (citation omitted); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 281, 282 n.17 (3d Cir. 1996).

initial decision. Moreover, given that the substantive and procedural rights under Section 504/ADA are less robust than those under the IDEA, it makes sense for the administrative hearing procedures under Section 504/ADA to be less formal than the IDEA's procedures. As a result, Congress or the Department of Education should clearly specify that parents of students eligible only under Section 504/ADA must exhaust Section 504/ADA hearings before proceeding to court.

Yet, in the absence of congressional or administrative action concerning the issue of administrative exhaustion for claims by students covered only by Section 504/ADA, courts must clarify their conceptual understanding of the substantive and procedural differences between the IDEA and Section 504/ADA. As a related matter, courts must understand whether a parent's Section 504/ADA claim is in addition to or in the alternative of an IDEA claim versus whether a parent is seeking relief via Section 504/ADA because his or her child is not eligible under the IDEA and therefore Section 504/ADA is the only viable avenue. Careful analysis of these issues will allow courts to determine correctly whether the IDEA's procedures should apply through § 1415(*l*) or whether Section 504/ADA's independent procedures apply.

VII. CONCLUSION

Section 1415(*l*) of the IDEA allows parents to bring claims against LEAs based on laws other than the IDEA, such as Section 504/ADA, but requires that parents exhaust the IDEA's administrative due process procedures before filing in court if the IDEA could also provide relief.²⁹⁵ Correctly interpreted, this provision governs the Section 504/ADA claims of students covered by or seeking coverage of the IDEA. Section 1415(*l*) thereby specifies that the IDEA does not preclude parents of students covered by the IDEA from bringing claims based on Section 504/ADA, rebuking the Supreme Court decision in *Smith v. Robinson* that held to the contrary. Courts and hearing officers, apparently confused by the overlapping coverage of the IDEA and Section 504/ADA and their independent procedural safeguards, have misapplied the exhaustion provision of § 1415(*l*). They erroneously have required parents to exhaust their Section 504/ADA claims under the IDEA's due process procedures even when a student is not eligible for services under the IDEA.²⁹⁶ Courts have reached this result despite many IDEA hearing officers' lack of jurisdiction over Section 504/ADA claims and the fact that the substantive standard and procedural requirements differ under the IDEA and Section

²⁹⁵ 20 U.S.C. § 1415(*l*) (2006).

²⁹⁶ See *supra* Section V.B.2.

504/ADA.²⁹⁷ Courts must clarify their understanding of the similarities and differences between the IDEA and Section 504/ADA, and policymakers must clarify their intent regarding whether parents must exhaust Section 504/ADA claims when the student is eligible only under Section 504/ADA. The failure to do so will result in many students with disabilities, covered by Section 504/ADA but not by the IDEA, continuing to face procedural obstacles and dead ends in their attempts to seek appropriate services and redress for discrimination.

²⁹⁷ See *supra* Section V.B.