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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

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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

By Lewis M. Wasserman*

ABSTRACT

The Individuals with Disabilities Education Act (IDEA), enacted through Congress's Spending Clause Power, is the principal federal statute aimed at insuring that children with disabilities receive a Free Appropriate Public Education (FAPE) in the nation's public schools. The Act has spawned a substantial and growing body of litigation between parents and local and state educational agencies in federal and state courts during the last decade. During this period nearly 20%-21% of these cases have addressed the issue of exhaustion of IDEA's administrative remedies, and the related concern about federal courts' jurisdiction, when the law's exhaustion requirements have not been satisfied. This article examines and categorizes the case law on these issues. It considers whether IDEA's exhaustion requirement is a claims processing procedure or a jurisdiction-giving provision and challenges the majority view in the circuits where it is a jurisdiction-giving device. It proposes amendments to IDEA's section 1415, including the addition of provisions which state with particularity exceptions to IDEA exhaustion, emanating from the author's analysis of cases, and the establishment of guidelines to clarify courts' jurisdiction over IDEA disputes. The author asserts that Congressional implementation of the foregoing recommendations will advance IDEA's salutary purpose of affording each child with a disability a Free Appropriate Public Education by offering parents, agencies, and courts a more predictable and efficient structure for resolving disputes arising under IDEA and related statutes.

Table of Contents

I. INTRODUCTION	352
II. IDEA-CREATED RIGHTS.....	354
III. IDEA'S PROCEDURAL SAFEGUARDS.....	356
A. <i>Due Process Procedures</i>	357
B. <i>State Complaint Procedure/CRP</i>	359
IV. THE PURPOSES OF IDEA EXHAUSTION	360
V. JUDICIAL ENFORCEMENT OF THE EXHAUSTION MANDATE	362
A. <i>Section 1415's Exhaustion Requirement</i>	362
1. Direct Actions Under IDEA	362
2. Section 1983 Actions and Direct Actions under ADA, Section 504, and other Federal Laws Protecting the Rights of Children with Disabilities	363
B. <i>Relief Available under IDEA</i>	363
C. <i>Playing the Exhaustion Field</i>	366
1. The Post-Graduation Cases	367
2. Allegations of Psychological Harm Caused by Agency Personnel	369
3. Renunciation	371
4. Removal of the Child from the Public School Program	372
5. Section 504 Classified Students Who May Be IDEA Eligible.....	373
6. The Failure to Request Educational Programming Prior to Initiation and Exhaustion of IDEA's Due Process Procedures	375
7. Allegations of Unlawful Policies Where Student Litigant Seeks Individual Relief Only.....	376
8. Claims of Insufficient Notice from the Agency Concerning the Exhaustion Requirement.....	378
9. Issue Exhaustion	379
10. Assertion of Claims in Court, Arising Subsequent to IDEA Due Process Proceedings.....	381
11. Attempted Enforcement in Federal Court of Settlement Agreements Entered into Outside of the Resolution Session, or Before Due Process Tribunals.....	382
VI. RELATIONSHIP OF IDEA DUE PROCESS EXHAUSTION PROCEDURES AND THE STATE COMPLAINT PROCEDURE/CRP	383
VII. WHEN IDEA EXHAUSTION IS EXCUSED	384
A. <i>The Agency's Failure to Implement Services that were Specified or Otherwise Clearly Stated in the IEP</i>	386
B. <i>Enforcement of Final Due Process Hearing Orders</i>	388
C. <i>Monetary Damages for Past Physical Injuries by School Officials</i>	390
D. <i>Denial of Parent Access to IDEA's Due Process Procedures</i>	393
E. <i>The Emergency Doctrine</i>	395
F. <i>Untimely Due Process Decisions</i>	397
G. <i>Status-Quo/Maintenance of Placement Violations</i>	398
H. <i>The Class Action</i>	400
I. <i>Retaliation Claims for Exercise of Protected Rights</i>	403
J. <i>The Absence of an IDEA Administrative Forum to Adjudicate the Complaint</i>	406
K. <i>Failure of SEA to Adequately Implement IDEA-Required Policies and Procedures</i>	406

Table of Contents (cont.)

L.	<i>Parents' Independent Rights, or Lack Thereof</i>	407
M.	<i>Parental Refusal of IDEA Classification as a Ground for Exhaustion Avoidance</i>	408
N.	<i>Non-FAPE Programming and Services</i>	410
VIII.	IDEA EXHAUSTION: JURISDICTION GIVING DEVICE OR CLAIMS PROCESSING	411
A.	<i>United States Supreme Court Jurisprudence</i>	411
B.	<i>Kontrick and Eberhart and IDEA</i>	413
C.	<i>Enter Jones v. Bock</i>	414
D.	<i>The Impact of Kontrick, Eberhart, and Jones on IDEA Exhaustion as a Claims Processing Rule Versus a Jurisdiction-Creating Predicate</i>	416
E.	<i>Jurisdiction v. Claims Processing Distinction for ADA, Section 504, and Other Federal Laws Protecting the Rights of Children with Disabilities</i>	417
IX.	PROPOSALS TO REFORM THE ACT	418
A.	<i>Delineating Excusal of IDEA's Exhaustion Requirements</i>	421
B.	<i>Heightened Pleading Requirement</i>	422
C.	<i>Residue Exception to the IDEA Exhaustion Obligation</i>	423
D.	<i>Establishing Agency Non-Compliance with Final Due Process Orders as a Basis for Federal Jurisdiction</i>	423
E.	<i>A Bar to the Addition of Exhaustion Requirements Not Contained in Section 1415 of the Act</i>	424
F.	<i>Stipulated-to Section 504 Classifications</i>	425
G.	<i>Direct Enforcement of Final State Complaint Procedure/CRP Orders</i>	425
H.	<i>Amending the Procedural Safeguards Notice</i>	426
I.	<i>Establishment of Unambiguous Jurisdictional Requirements</i>	427
X.	SUMMARY	428
XI.	CONCLUSION	429
XII.	APPENDIX A – GLOSSARY OF TERMS	430

I. INTRODUCTION

More than 6.6 million children, about 13.5% of the total student population, receive special education services annually in public school systems in the United States.¹ These services are provided under the Individuals with Disabilities Education Improvement Act (IDEA or the Act).² At IDEA's core is the individualized education program (IEP). IEPs furnish an instructional roadmap and services protocol for schools to follow for each student with a disability.³

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1. In 2008, the National Center for Educational Statistics (NCES) of the United States Department of Education reported that for school year 2006-07, 6,686,000 students ages 3-21 were served under IDEA. That represented 13.5% of total public school enrollment. National Center for Education Statistics, *Children 3 to 21 Years Old Served in Federally Supported Programs For The Disabled, By Type of Disability: Selected Years, 1976-77 Through 2006-07*, http://nces.ed.gov/programs/digest/d08/tables/dt08_050.asp (last visited Oct. 8, 2009).

2. IDEA/2004 was enacted as Pub. L. No. 108-446, and codified at 20 U.S.C. §§ 1400-1485. It contains Part A-General Provisions, sections 1400-1409; Part B-Assistance for Education of All Children with Disabilities, sections 611-619; Part C-Infants and Toddlers with Disabilities, sections 1431-1434; Part D-National Activities to Improve Education for Children with Disabilities, sections 1450-1482. It is the most recent in a series of enactments beginning with the Education of the Handicapped Act in 1970. Education of the Handicapped Act, Pub. L. 91-230, 84 Stat. 175, 175-88 (1970) (current version at 20 U.S.C. § 1400(a)). The original act was amended substantially in the Education for All Handicapped Children Act of 1975 (EAHA), and again as the Individuals with Disabilities Education Act of 1997. Education for All Handicapped Children Act of 1975, Pub. L. 94-142, 89 Stat. 773; Individuals with Disabilities Education Act of 1997, 20 U.S.C. § 1400. In 1990, EAHA-75 was renamed the Individuals with Disabilities Education Act. *Learning Disabilities Ass'n of Md., Inc. v. Bd. of Educ. of Baltimore County*, 837 F. Supp. 717, 719-20 (D. Md. 1993).

3. The Supreme Court has described the IEP as the "modus operandi" of IDEA. *Sch. Comm. of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 368 (1985). The IEP "is a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." *Id.* It is described more fully in Part I below.

IDEA has spawned a substantial amount of litigation, wherein parents and other advocates have contended that students' or parents'⁴ rights were denied under IDEA or other federal statutes protecting disabled children.⁵ The clear trend in IDEA and related litigation, viewed from the perspective of the last decade, is one of an increased judicial caseload.⁶ During this time, the percentage of decisional references to exhaustion of remedies in IDEA cases has consistently hovered around 20%-21%.⁷

4. The issue of parents' rights under IDEA has been a source of controversy. In 2007 the United States Supreme Court in *Winkelman v. Parma City Sch. Dist.*, held that IDEA must be read as a whole and that it makes parents real parties in interest, with independent, enforceable rights on substantive matters emanating from the Act. *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 530-35 (2007). Thus, they are not merely representatives of their children in IDEA disputes. Among other things, this enables them to sue pro se under proper circumstances. *Id.*

5. On January 1, 2009 the author conducted a Westlaw search, covering the last 10, 3, and 2 years, respectively, for the terms "special education" and "IEP". This search revealed that during the last ten years, 1,969 federal and state judicial decisions were issued. These were comprised of 1,549 federal and 420 state court decisions. Three hundred nine of the total reported decisions were issued from United States courts of appeals. During the last three years 957 such decisions issued. These were comprised of 767 from the federal system and 190 from state courts. Of the federal cases, 120 were from United States courts of appeals. In the last two years, 664 such federal and state decisions were issued. Of these, 518 were issued from the federal courts and 146 from state systems. Of the federal cases, 73 were from United States Courts of Appeal.

6. An average of 196.9, 319, and 332 federal and state decisions per year contained both the terms "special education" and "IEP" during the last 10, 3, and 2 years, respectively. This is approximately a 50% increase in the number of judicial decisions, whether measured by the last 2 or 3 years, compared to the average of the last 10 years, involving IEP and special education issues.

7. When the search term "exhaustion" was added to the basic search terms "special education" and "IEP," 408 decisions appeared for the preceding 10 year period. Of these, 376 were issued by federal courts and 32 by state systems. Among the federal decisions, 55 were issued by appellate courts. For the last three years, exhaustion was referenced in 196 cases. Of these, 178 were issued by federal courts and 18 by state tribunals. Among these decisions, 17 were issued by United States courts of appeals. For the last 2 years, 141 federal and state decisions contain references to IDEA administrative exhaustion. Among these, 129 were produced by the federal system, with 12 of those from United States courts of appeal. Twelve of the 141 were issued by state judicial systems. Examining these figures in relation to the total volume of cases for the 10, 3, and 2 year periods,

Part I of this article describes the substantive rights created by IDEA, including the duty of Local Educational Agencies (LEAs) and State Educational Agencies (SEAs) to furnish children with disabilities a Free Appropriate Public Education (FAPE) through the IEP. Part II examines IDEA's principal procedural safeguards, focusing on its due process and state complaint procedures as sources of securing children's rights when parents or other child advocates contend LEAs or SEAs have not satisfied their obligations under the Act. Part III examines the doctrine of exhaustion of administrative remedies as to its general purposes and specific application to IDEA. Part IV examines and categorizes cases, emphasizing situations where exhaustion was required. Part V looks at the relationship between IDEA's due process exhaustion requirement and its State Complaint Procedure. Part VI examines case law, emphasizing cases where exhaustion was excused. Part VII examines the issue of whether IDEA's exhaustion requirement is a claims processing procedure or a jurisdiction-giving provision. Part VIII proposes amendments to IDEA's section 1415, including the addition of provisions that state with particularity exceptions to IDEA exhaustion, emanating from analysis of cases reviewed in Parts IV and VI, and the establishment of guidelines to clarify courts' jurisdiction over IDEA disputes. Part IX summarizes the principal recommendations discussed in the previous sections and the grounds therefore. Part X, in conclusion, asserts that congressional implementation of the foregoing recommendations will advance IDEA's salutary purpose of affording each child with a disability a Free Appropriate Public Education (FAPE) by offering parents, agencies and courts a more predictable and efficient structure for resolving disputes arising under IDEA and related statutes. Part XI is an appendix that includes a short glossary of terms commonly used in the education of children with disabilities, and which appears in this article.

II. IDEA-CREATED RIGHTS

IDEA is a comprehensive educational scheme, conferring on disabled students a substantive right to public education and

respectively (408/1969, 196/957, and 141/664), reveals 20.72%, 20.48%, and 21.23% of the cases referenced exhaustion.

providing financial assistance to enable states to meet their educational needs.⁸ Federal funding is conditioned upon state compliance with IDEA's extensive substantive and procedural requirements. To qualify for federal funds, the state must have in effect "a policy that assures all children with disabilities the right to a free appropriate public education" (FAPE).⁹ IDEA describes a FAPE as special education and related services that are provided at public expense, meet the standards of the SEA, and are rendered in conformity with an IEP.^{10 11} Under IDEA, parents collaborate with teachers and school district representatives in the formulation of the IEP which must be tailored to the child's unique needs.¹² The IEP is the "governing document for all [special] educational decisions concerning the child."¹³ Indeed, the United States Supreme Court has described it as the "centerpiece" of IDEA's educational delivery system.^{14 15 16 17}

8. 20 U.S.C. §§ 1400-1482 (2006); *Honig v. Doe*, 484 U.S. 305, 310 (1988).

9. 20 U.S.C. § 1412(a)(1)(A) (2006).

10. 20 U.S.C. § 1401(9) (2006).

11. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (describing the substantive FAPE standard required by IDEA's predecessor, the EAHA).

12. 20 U.S.C. §§ 1401(14), 1414(d) (2006).

13. *Bd. of Educ. of Cmty. High Sch. Dist. No. 218 v. Ill. State Bd. of Educ.*, 103 F.3d 545, 546 (7th Cir. 1996).

14. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

15. IEP content requirements are contained in § 1414(d)(1)(A)(i) of IDEA/2004. They are implemented at 34 C.F.R. § 300.320 (2008). These requirements include: A statement of the child's present levels of academic achievement and functional performance; a statement of measureable annual goals, including academic and functional goals; a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress toward meeting the annual goals will be provided; a statement of the special education and related services and supplementary aids and services based on peer-reviewed research to the extent practicable, to be provided to or on behalf of the child; explanation of the extent, if any, the child will not participate with nondisabled children in school activities; a statement of any individual appropriate accommodations that are necessary to measure academic achievement and function performance of the child on state and district-wide assessments; the projected date for the beginning of the services and modifications the child will receive, along with the anticipated frequency, location, and duration of those services and modifications; and appropriate measureable goals for the student's transition to postsecondary training, education, employment, and where appropriate, independent living. *Id.* For an examination of standards for IEP adequacy, see

III. IDEA'S PROCEDURAL SAFEGUARDS

To guarantee that parents have “an opportunity for meaningful input into all decisions affecting their child's education,” IDEA

Phillip K. Daniel, “*Some Benefit*” or “*Maximum Benefit*”: *Does the No Child Left Behind Act Render Greater Educational Entitlement to Students with Disabilities?*, 37 J.L. & Educ. 347 (2008) (questioning whether NCLB has heightened the IEP FAPE requirement).

16. The Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794, 34 C.F.R. § 104.33(b) (2008), creates an independent obligation on SEAs and LEAs, as recipients of federal financial assistance, to provide a FAPE to disabled students as defined in that law. Although it overlaps with IDEA's FAPE requirement, it is not identical. The most important differences are that section 504 requires “a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the ‘design’ of a child's educational program.” *Mark H. v. Lemahieu*, 513 F.3d 922, 933-35 (9th Cir. 2008). The essence of section 504 is to ensure that the educational needs of handicapped persons are met as adequately as the needs of non-handicapped persons. *Id.* Although a valid IEP is one way of meeting section 504's FAPE requirement, it is not the only way. This means that a section 504 plaintiff may not state a cause of action for damages merely by establishing an IDEA FAPE violation. Conversely, a final determination that IDEA's FAPE requirements were satisfied should be conclusive on the section 504 plaintiff's FAPE claim. *See, e.g., M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 889 (8th Cir. 2008). In *M.Y.*, the Court of Appeals affirmed the district court's judgment that the LEA's refusal to provide summer school transportation to a child with an IDEA disability did not constitute a section 504 FAPE violation. Since the child's IEP did not contain extended school year services, that is, provision for summer school, it followed that the district's failure to provide transportation during summer school was not a section 504 FAPE violation. *Id.* For an exposition on section 504/ADA eligibility determinations, *see Perry A. Zirkel, A Step-by-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 Ed. L. Rep. 333 (2009).

17. Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, extends to state and local government agencies, including public school systems, the anti-discrimination provisions of section 504. The federal regulations implementing Title II require public entities to “make reasonable modifications in policies, practices [and] procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.” 28 C.F.R. § 35.130(b)(7) (2008). Title II includes § 504's FAPE obligation. OCR has adopted the standards established under section 504 to meet the requirements of the ADA, except where the ADA has specifically adopted a different standard from section 504. *See, e.g., Waltham (MA) Public Sch.*, 29 IDELR 37, 38 (OCR 1993).

prescribes an elaborate system of procedural safeguards.¹⁸ Parents must be notified, in writing, of changes the school district proposes or refuses to make in their child's educational program.¹⁹ This notice must contain a description of the procedural rights available to parents for challenging the district's decision²⁰ and an explanation of the reasons for the decision.²¹ Parents have the right to examine their child's educational records²² and obtain an independent educational evaluation (IEE) of their child when they disagree with the LEA's evaluation.²³ Moreover, IDEA requires that states guarantee parents the right to bring complaints about "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."²⁴ IDEA provides two avenues for parents to obtain administrative relief for such complaints: The "due process" hearing and the "state complaint procedures" also known as the complaint resolution procedure (CRP).²⁵

A. Due Process Procedures

IDEA due process complaints must:

set[] forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint or, if the state has an explicit time limitation for presenting such

18. *Honig*, 484 U.S. at 311.

19. 20 U.S.C. § 1415(b)(3) (2006).

20. 20 U.S.C. § 1415(d)(2) (2006).

21. 20 U.S.C. § 1415(c) (2006).

22. 20 U.S.C. § 1415(b)(1) (2006).

23. 34 C.F.R. § 300.502(b) (2008). The right to an IEE is conditional in that the LEA may refuse to pay for the IEE and initiate a due process hearing if it believes its own evaluation is appropriate. If the decision at due process is that the LEA's evaluation was appropriate, the parent still has a right to an IEE, but not at public expense. 34 C.F.R. § 300.502(b)(3) (2008). *See*, Perry A. Zirkel, *Independent Educational Evaluation Reimbursement Under the IDEA*, 231 Ed. L. Rep. 21 (2008) (providing a practical legal checklist synthesizing court decisions and OSEP policy decisions respecting this right).

24. 20 U.S.C. § 1415(b)(6)(A) (2006).

25. 34 C.F.R. §§ 300.151-153 (2008) (state complaint procedures/CRP).

a complaint, . . . in such time as the state law allows.²⁶

IDEA requires that after a due process hearing has been requested, the parties must attend a resolution meeting in an attempt to put the dispute to rest.^{27 28}

At the “due process” hearing the parties have “the right to present evidence and confront, cross-examine, and compel the attendance of witnesses.”²⁹ The due process hearing officer must prepare findings of fact and a decision.³⁰ IDEA grants to the states the option of offering one or two-tier administrative tribunals for review of the due process complaint. In a two-tier system, the initial forum is the impartial due process hearing “conducted” by the local school district (LEA).³¹ Parties aggrieved by the Tier I decision may appeal the

26. 20 U.S.C. § 1415(b)(6)(B) (2006).

27. 34 C.F.R. § 300.510(a) (2008). Where a settlement is achieved at the resolution meeting, the parties must execute a legally binding written agreement, signed by both the parents and a representative of the agency who has the authority to bind the agency. 34 C.F.R. § 300.510(d)(1) (2008). That agreement is enforceable in any state court of competent jurisdiction or federal district court or by the SEA, if it has adopted a mechanism for enforcement of resolution agreements. 34 C.F.R. § 300.510(d)(2) (2008). Although mandatory, the holding of the resolution session may be waived by written agreement of the parties or if the parties agree in lieu thereof to participate in mediation. 34 C.F.R. § 300.510(a)(3) (2008).

28. *See, e.g.,* *Spencer v. Dist. of Columbia*, 416 F. Supp. 2d 5, 11-12 (D.D.C. 2006) (agreeing with the school district that, absent consent of the parties, the parents’ refusal to participate in the resolution process resulted in an exhaustion failure since such participation was required before due process proceedings could begin). *See also* Allan G. Osborne, Jr. & Charles J. Russo, *Resolution Sessions Under the IDEA: Are They Mandatory?*, 218 Ed. L. Rep. 7 (2007) (predicting that, absent agreement between the parties, courts will construe participation in resolution sessions as a precondition to access to IDEA’s due process procedures); *c.f.* *R.M. ex rel. R.M. v. Waukee Cmty. Sch. Dist.*, 589 F. Supp. 2d 1141, 1148-49 (S.D. Iowa 2008) (finding neither “pre-appeal” conference nor mediation replaces or satisfies the due process requirement).

29. 20 U.S.C. § 1415(h)(2) (2006).

30. 20 U.S.C. § 1415(h)(2) (2006).

31. 20 U.S.C. § 1415(f) (2006). This language is somewhat misleading in that the LEA essentially arranges for the Tier-I hearing, rather than actually “conducts” it. Under 20 U.S.C. § 1415(f)(3)(A), the presiding hearing officer may not be an employee of the SEA or LEA or have a personal or professional interest that conflicts with the person’s objectivity in the hearing. Moreover, the hearing officer must possess knowledge of, and the ability to understand the relevant provisions of IDEA; possess the knowledge and ability to conduct hearings in accordance with

decision to Tier II review at the state educational agency ("SEA").³² In states adopting a one-tier due process system, the sole administrative hearing is held by a state agency's hearing officer. When parents or the applicable agency are aggrieved by the decision at Tier I in a one-tier state, or the Tier II decision in a two-tier state, they may appeal the decision by filing a civil action in federal or state court.³³ IDEA provides a ninety-day limitation period, measured from the date of the Tier-I decision in a one-tier state or Tier II decision, for bringing the judicial action for review of the state agency's final decision, "or, if the State has an explicit time limitation for bringing such action, . . . in such time as the State law allows."³⁴

B. State Complaint Procedure/CRP

The state complaint procedures/CRP were promulgated by the U.S. Department of Education pursuant to its general rulemaking authority requiring each recipient of federal funds, including funds provided through IDEA, to put such procedures in place.³⁵ The regulations require each SEA to adopt written procedures for "[r]esolving any [state level] complaint"³⁶ regarding the education of a child with a disability. Under state complaint/CRP, the complainant must allege a violation that occurred not more than one year prior to the date the complaint is received by the SEA.³⁷ The regulations permit a complaint to be filed under both the state complaint/CRP and the IDEA due process hearing systems, in which case the state complaint/CRP must await the due process hearing's

appropriate, standard legal practice; and possess the ability to render and write decisions in accordance with appropriate, standard legal practice. *Id.*

32. 20 U.S.C. § 1415(g) (2006).

33. 20 U.S.C. § 1415(i)(2)(A) (2006).

34. 20 U.S.C. § 1415(i)(2)(B) (2006).

35. 34 C.F.R. §§ 300.151 to 300.153 (2008). For discussions distinguishing IDEA's due process procedures and the state complaint procedures/CRP, see, e.g., *Vultaggio v. Bd. of Educ.*, 216 F. Supp. 2d 96 (E.D.N.Y. 2002), *aff'd*, 343 F.3d 528 (2d Cir. 2003); *Lucht v. Molalla River Sch. Dist.*, 225 F.3d 1023, 1029 (9th Cir. 2000); and *Ass'n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1045 (10th Cir. 1993).

36. 34 C.F.R. § 300.151(a) (2008).

37. 34 C.F.R. § 300.153(c) (2008).

resolution of overlapping issues.³⁸ A final due process hearing decision is binding on state complaint/CRP administrators.³⁹ State complaint/CRP administrators must resolve, as well, a complaint alleging that a public agency failed to implement a due process hearing decision.⁴⁰ The regulations require that the SEA resolve the state complaint/CRP within sixty days after a complaint is filed.⁴¹ They do not, however, state that a parent must exhaust the state complaint/CRP to enforce a due process decision in court. Moreover, it appears that at least some non-FAPE claims need not be exhausted through IDEA due process procedures, at least where CRP has been employed.^{42 43}

IV. THE PURPOSES OF IDEA EXHAUSTION

The rationale for requiring administrative exhaustion before parties may avail themselves of judicial forums is as follows: It prevents courts from interrupting permanently the administrative process, it allows the agency to apply its specialized expertise to the problem, it gives the agency an opportunity to correct its own errors, it ensures that there will be a complete factual record for the court to

38. 34 C.F.R. § 300.152(c) (2008).

39. 34 C.F.R. § 300.152(c) (2008).

40. 34 C.F.R. § 300.152(c)(3) (2008).

41. 34 C.F.R. § 300.152(a)(2008).

42. In *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205 (9th Cir. 2004), for example, the court held that IDEA due process exhaustion was not required where three students sufficiently exhausted their administrative remedies through CRP. This was because they challenged a blanket decision to shorten the school day for autistic students, including the state policy for treatment of lunch and recess as instructional time. The court noted that the state's decisions were made outside of the IEP process. *Id.* at 1213. *See also* *S.A. v. Tulare County Office of Educ.*, 2009 WL 30298, at 6-8 (E.D. Cal. Jan. 6, 2009) (concluding that student's IDEA records access claim pursuant to 34 C.F.R. § 300.611(b) (2008) need not be further exhausted after the parents obtained a final decision from the state under CRP, and noting that the California Department of Education, which issued the decision, directed that any further disagreement with its decision can be addressed to a court of competent jurisdiction). *Id.* at 6.

43. For a useful overview of IDEA's CRP, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 Ed. L. Rep. 565 (2008) (discussing, among other things, CRP jurisdiction, procedures, and remedies).

review, and it prevents the parties from undermining the agency by deliberately flouting the administrative process.⁴⁴ Whether exhaustion is necessary requires an understanding of the particular administrative scheme involved.⁴⁵

Under IDEA, “judicial review is normally not available until all administrative [due process] proceedings are completed.”⁴⁶ “IDEA’s exhaustion requirement was intended to channel disputes related to the education of disabled children into an administrative process that could apply administrators’ expertise in the area and promptly resolve grievances.”⁴⁷

Even where an IDEA administrative hearing may be unsuccessful in resolving a dispute, it may at least have produced a helpful record because administrators versed in the relevant issues were able to

44. *E.g.*, *McKart v. United States*, 395 U.S. 185, 193-98 (1969) (holding that based on the text of the statute potential Armed Forces inductee who failed to appeal his classification and failed to appear for pre-induction physical did not have to exhaust Selective Service procedures; the purposes of exhaustion would not be served since he qualified for an exemption from service as a matter of law).

45. *McKart*, 395 U.S. at 193.

46. *Honig v. Doe*, 484 U.S. 305 (1988). *See Handberry v. Thompson*, 436 F.3d 52, 60 (2d Cir. 2006) (holding, “It is well settled that the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a civil action in federal or state court” (quoting *J.S. v. Attica Cent. Sch. Dist.*, 386 F.3d 107, 112 (2d Cir. 2004), *cert. denied*, 544 U.S. 968 (2005))).

47. *Polera v. Bd. of Educ.*, 288 F.3d 478, 487 (2d Cir. 2002). *See also, e.g.*, *Ass’n for Cmty. Living in Colo. v. Romer*, 992 F.2d 1040, 1044 (10th Cir. 1993) (“[Even where plaintiffs] challeng[e] a policy of general applicability rather than an IEP formulated pursuant to that policy. . . . [they] must still show that the policy is contrary to law and that the underlying purposes of exhaustion would not be served [citation omitted]”; *Heldman v. Sobol*, 962 F.2d 148, 159 (2d Cir. 1992).

Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcoming in their educational programs for disabled children.

Crocker v. Tenn. Secondary Sch. Athletic Ass’n, 873 F.2d 933, 935 (6th Cir. 1989) (holding, “States are given the power to place themselves in compliance with the law . . . Federal Courts—generalists with no exper[ience] in the educational needs of handicapped students—are given the benefit of expert fact finding by a state agency devoted to this very purpose.”).

probe and illuminate those issues for the court.⁴⁸ In deciding whether IDEA plaintiffs should be subject to the exhaustion requirement, courts must consider “whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the legislative scheme.”⁴⁹

V. JUDICIAL ENFORCEMENT OF THE EXHAUSTION MANDATE

A. Section 1415's Exhaustion Requirement

1. Direct Actions Under IDEA.

IDEA affords aggrieved parties an opportunity for judicial review of LEA and SEA IDEA compliance following completion of state established administrative IDEA “due process” procedures. Section 1415(i)(2)(A) states:

Any party aggrieved by the findings and decision made [after completion of the State established administrative review procedures enacted pursuant to the IDEA] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.⁵⁰

48. See, e.g., *Riley v. Ambach*, 668 F.2d 635, 640 (2d Cir. 1981) (discussing benefits of exhaustion in context of IDEA proceedings). *Riley* seems to stretch the limits of the exhaustion doctrine. The *Riley* plaintiffs challenged the state's regulatory definition of a “learning disability” as contrary to the Act and its refusal to fund residential placements for students who were classified under that category. Since the Commissioner of Education enforced the policy and also served as the Tier II review officer, plaintiffs contended exhaustion was futile. The court rejected the argument on the ground that, among other reasons, its exposition of the law might benefit from the application of the agency's expertise to the facts, and if the agency was given the opportunity, it could correct its own errors. *Id.* This was an extremely optimistic view of the benefits to be gained through the administrative process generally, and in this case, in particular.

49. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992) (citation omitted).

2. Section 1983 Actions and Direct Actions under ADA, Section 504, and other Federal Laws Protecting the Rights of Children with Disabilities.

IDEA 2004's exhaustion requirement applies to non-IDEA actions where the putative plaintiff seeks relief which is also available under IDEA. That provision, section 1415(l) of the Act, states:

Nothing in this Title [twenty of the United States Code in section 1400] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 [(Title Twenty-nine of the United States Code in section 790)], 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 this part* [20 U.S.C. §§ 1411 et seq.], the procedures under subsections (f) and (g) [the state established administrative exhaustion procedures] shall be exhausted to the same extent as would be required had the action been brought under this part [20 U.S.C. §§ 1411 et seq.].⁵⁰

B. Relief Available under IDEA

Relief available under IDEA includes the following: declaratory orders,⁵¹ orders for future conduct,⁵² compensatory education,⁵³

50. 20 U.S.C. § 1415(1) (2006) (emphasis added). In 1986, the Handicapped Children Protection Act (HCPA) restored the availability of remedies under the federal Constitution and section 504 of the Rehabilitation Act of 1973, as amended in section 794 of the Title Twenty-nine of the United States Code, for the deprivation of disabled student's educational rights, after the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* held, among other things, that such remedies were unavailable in light of the comprehensiveness of EABA (now IDEA). After passage of the Americans with Disabilities Act in 1990 Congress enacted legislation that year, requiring IDEA exhaustion for ADA claims for which relief was also available under IDEA.

51. See Mark C. Weber, SPECIAL EDUCATION LAW AND LITIGATION TREATISE, 20:22 (3d ed. 2008) (commenting that for reasons of enforceability,

reimbursement for tuition and other costs incurred to obtain an appropriate program for the student,⁵⁴ rescission of diplomas,⁵⁵

hearing officers should “order” rather than “recommend” placements, citing to *Cox v. Jenkins*, 878 F.2d 414 (D.C. Cir. 1989), as a case in point.) Because the plaintiffs in *Cox* failed to present the court with an enforceable order, but a mere recommendation only, it dismissed the case for failure to exhaust administrative remedies. *Cox*, 878 F.2d at 414.

52. *E.g.*, *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66, 72-73 (1999) (affirming the provision of related services directly ordered by a hearing officer); *Burlington Sch. Comm. v. Dep’t of Educ.*, 471 U.S. 359, 368-70 (1985) (stating that in an appeal of a due process hearing order, a court may direct school officials to implement an IEP placing a child in a private school).

53. *E.g.*, *ex rel. P. v. Newton Bd. of Educ.*, 546 F.3d 111, 123 (2d Cir. 2008) (affirming a hearing officer’s award of additional services as a form of compensatory education to a student whose rights were violated, and noting permissibility of this remedy for a FAPE denial when the student is still age-eligible under the Act); *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005) (applying for compensatory education award, an individual assessment approach, aimed at putting the child where he would have been, but for the FAPE denial). For a developmental perspective on the law of compensatory education under the Act, see a series of articles on this subject: Perry A. Zirkel, *Compensatory Education under the Individuals with Disabilities Education Act: The Third Circuit’s Partially Misleading Position*, 110 PENN. ST. L. REV. 879 (2006); Perry A. Zirkel, *Compensatory Education under the IDEA, An Annotated Update*, 190 ED. L. REP. 745 (2004); *See also* Perry A. Zirkel, *Compensatory Educational Services in Special Education Cases: An Update*, 150 ED. L. REP. 311 (2001); *See also* Perry A. Zirkel, *The Remedy of Compensatory Education Under the IDEA*, 95 ED. L. REP. 483 (1995); *See also* *Compensatory Educational Services in Special Education Cases*, 67 ED. L. REP. 881 (1991).

54. *E.g.*, *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 14-16 (1993) (holding that reimbursement under IDEA to parents who have placed their child in private school after public school failed to provide a FAPE to their child is not barred by the private school’s failure to meet state education standards, so long as the private placement is “proper” under the Act); *Burlington Sch. Comm. v. Mass. Dep’t of Educ.*, 471 U.S. 359, 368-370 (1985). *See also* Lewis M. Wasserman, *Reimbursement to Parents of Tuition and Other Costs Under the Individuals with Disabilities Education Improvement Act of 2004*, 21 ST. JOHN’S J. LEGAL COMMENT 171 (2006) (examining elements of IDEA reimbursement claims and defenses thereto).

55. The rescission issue arises because the student’s right to IDEA services terminates upon graduation with a regular high school diploma. Parents have sometimes obtained revocation, on the ground that a FAPE was denied prior to the student’s receipt of the diploma, with the effect that the student will continue to be IDEA eligible. *See e.g.*, *Kevin T. v. Elmhurst County Sch. Dist.*, 34 IDELR 202 (N.D. Ill. 2001) (granting preliminary injunction after student had graduated).

expunction of records,⁵⁶ and payment for independent educational evaluations (IEE).⁵⁷ Circuit courts have determined nearly uniformly that compensatory monetary damages,⁵⁸ and punitive damages⁵⁹ are not available under the IDEA.

56. IDEA's implementing regulations provide for amendment, 34 C.F.R. § 300.618 (2008), or destruction, 34 C.F.R. § 300.624 (2008), of records under various circumstances and use of the due process procedural mechanism to obtain such relief.

57. 34 C.F.R. § 300.502(a) (2008). Parents have an automatic right to an IEE at any time during the child's education so long as the IEE meets the "agency criteria." *Id.* Parents have the right to have the IEE considered by the school district in any decision made with respect to providing FAPE for that student. *Id.*

58. *See, e.g.,* Mark H. v. Lemahieu, 513 F.3d 922, 929 (9th Cir. 2008) (citing Ninth Circuit cases and noting that ordinarily monetary damages are not available under IDEA); Cave v. E. Meadow Union Free Sch. Dist., 514 F.3d 240, 246-47 (2d Cir. 2008) (citing Polera v. Bd. of Educ., 288 F.3d 478, 483-86 (2d Cir. 2002)) (stating that compensatory and punitive damages are not available under IDEA); Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 34-35 (1st Cir. 2006) (noting that compensatory damages are not available under IDEA and determining that no monetary relief, including tuition reimbursement and compensatory education, is available against individual school officials under IDEA); Ortega v. Bibb County Sch. Dist., 397 F.3d 1321, 1325-26 (11th Cir. 2005) (citing cases from other circuits and then concluding that IDEA is not a "tort-like" mechanism for compensating personal injury); Bradley *ex rel.* Bradley v. Ark. Dep't of Educ., 301 F.3d 952, 957 (8th Cir. 2002) (holding that state officials were entitled to qualified immunity with respect to the plaintiffs' IDEA claims because the plaintiffs could not recover compensatory or punitive damages under IDEA); Sellers *ex rel.* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 532 (4th Cir. 1998) (rejecting attempt to recover compensatory and punitive damages in IDEA action), *cert. denied* 525 U.S. 871 (1998); Charlie F. v. Bd. of Educ. of Skokie Sch. Dist., 98 F.3d 989, 991 (7th Cir. 1996) (concluding that IDEA "with its elaborate provision for educational services and payments to those who deliver them-is inconsistent with monetary awards to children and parents"); Crocker v. Tennessee Secondary Sch. Athletic Ass'n, 980 F.2d 382, 386 (6th Cir. 1992) (finding no "case authority interpreting [IDEA] to allow an award of general damages for emotional injury or injury to a dignitary interest"). *See also* D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 494-95 (D.N.J. 2008) (dismissing IDEA claim where plaintiffs sought only compensatory and consequential damages against the district and observing the Third Circuit had not yet decided the issue), *reconsideration denied*, *But see* Salley v. St. Tammany Parish Sch. Bd., 57 F.3d 458, 466 (5th Cir. 1995) (affirming nominal damages award under IDEA, without further discussion).

59. *E.g.,* Cave, 514 F.3d at 246-47; Bradley, 301 F.3d at 957; Sellers, 141 F.3d at 532.

C. Playing the Exhaustion Field

The exhaustion requirement applies whenever a plaintiff's claims "relate to" a disabled child's education, within the meaning of the IDEA,⁶⁰ or where "the injury could be redressed *to any degree* by IDEA's administrative procedures".^{61 62} Where IDEA's ability to remedy a particular injury is unclear, exhaustion under IDEA is required in order to give the agencies an initial opportunity to ascertain and alleviate the alleged problem.⁶³ Whether IDEA exhaustion is required in a particular case is a question of law.⁶⁴ It is

60. *E.g.*, *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1162, 1158-68 (11th Cir. 2006) (finding retaliation claims clearly related to child's evaluation and education, thus subjecting plaintiffs to exhaustion).

61. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1164-67 (9th Cir. 2007) (emphasis added) (suggesting the administrative process might be helpful to the court with respect to two of plaintiff's eighteen factual allegations where, after the action was commenced, the SEA on the district's request, found the disputed IEP failed to offer FAPE).

62. For exhaustion purposes IDEA relief is deemed "available" where both "the genesis and the manifestations of the problem are educational." *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921 (9th Cir. 2005), (quoting *Charlie F.*, 98 F.3d at 993). However, "IDEA's administrative remedies cannot compensate for a plaintiff's injuries that are completely non-educational." (citations omitted). *Blanchard*, 420 F.3d at 921 (no exhaustion is required where mother's claim relates solely to her own emotional distress and lost wages, relief not available to her in the IDEA administrative process, but expressing no opinion on the merits of her claim). The "relief" that is "available" issue is examined by first asking whether the 'events, condition, or consequences' of which Plaintiffs complain, i.e., the nature of Plaintiff's claims and the alleged harms at issue in [the] case, can be addressed by the IDEA administrative process. To the extent that Plaintiffs' claims relate to the 'special education and related services' guaranteed by the IDEA, and Plaintiffs' injuries can be remedied through the IDEA administrative process, such claims are subject to the IDEA exhaustion requirement.

M.G. v. Crisfield, 547 F. Supp. 2d 399, 413 (D. N.J. 2008).

63. *E.g.*, *Robb v. Bethel Sch. Dist.* No. 403, 308 F.3d at 1050; *Charlie F.*, 98 F.3d at 991-93; *See also* *McQueen ex rel. McQueen v. Colorado Springs Sch. Dist.* No. 11, 488 F.3d 868, 875 (10th Cir. 2007) (asserting that the overriding consideration in deciding whether exhaustion should be excused is whether it is clear at the outset that the administrative procedure under IDEA could not provide the student with a FAPE to which he is entitled).

64. *Hoefl v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992).

reviewed *de novo* by courts of appeal.⁶⁵ Most parents seeking to avoid IDEA's exhaustion requirement have sued under IDEA, or section 504, or ADA, or section 1983, or under a combination of some or all of these statutes.

This Part examines and categorizes cases where exhaustion has been required and, where appropriate, contrasts them with cases where exhaustion was excused. These overlapping categories include cases where the parents did the following: Claimed their child's high school graduation effectively mooted the need for exhaustion; asserted that their child's treatment by agency personnel caused psychological harm; attempted to relinquish claims under IDEA, arguing that this excused them from exhaustion; removed the child to a private setting and then sought to avoid IDEA exhaustion; failed to request IDEA programming prior to the initiation and exhaustion of due process procedures; alleged unlawful agency policies, but requested individual relief only; claimed that they received insufficient notice regarding the exhaustion requirement; failed to exhaust particular issues during the due process proceedings, though having literally completed that process; asserted in court, claims arising subsequent to IDEA due process proceedings; and attempted enforcement in federal court of settlement agreements entered into outside of a resolution session, or before due process hearing officers. Each of these categories is discussed in turn.

1. The Post-Graduation Cases

The Ninth Circuit recently held in *Fraser ex rel. Fraser v. Tamalpais Union High School District*, 281 F. App'x 746 (9th Cir. 2008), that the parents' failure to use the IDEA administrative process when it was available to them prior to the student's graduation did not excuse them from the exhaustion requirement

65. See, e.g., *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1421 (11th Cir. 1998), *cert. denied*, 525 U.S. 816 (1998) (applying *de novo* standard where there was no underlying administrative proceeding); *P. ex rel. P. v. Newington Bd. of Educ.*, 546 F.3d 111, 118 (2d Cir. 2008) (*de novo* standard applies to both the district court award of summary judgment and whether it correctly applied the law to the facts, with deference to the SEA's findings).

post-graduation.⁶⁶ In *Fraser*, the parents sued under sections 504 and 1983 (but not IDEA), claiming that the student suffered mental and emotional injuries related to the district's initial decision that the student was not IDEA eligible.⁶⁷ The parents claimed that since the student had graduated, exhaustion would serve no purpose since he could no longer receive any benefit from the IDEA administrative process.⁶⁸ In rejecting this argument, the court plainly disapproved of an approach to the exhaustion doctrine which would permit parents to lie in wait until a student's graduation, and then later spring on LEAs claims for injuries which could have been timely cured through the IDEA administrative process.⁶⁹

In *Polera v. Board of Education*, 288 F.3d 478, 480-81 (2d Cir. 2002), the parents sued under ADA and section 504 seeking monetary damages unavailable under the IDEA, as well as injunctive and equitable relief clearly available under the IDEA.⁷⁰ The gravamen of their complaint was that the LEA denied the student a FAPE prior to her graduation from high school by failing to provide adequate study materials and sufficient tutoring services.⁷¹ The court rejected the parents' futility argument, holding that the IDEA administrative process was designed precisely to address issues like Polera's lost educational opportunities and related forms of relief.⁷² Thus, Polera's claim was dismissed for failure to exhaust IDEA's administrative remedies.⁷³

In *Frazier v. Fairhaven School Committee*, 276 F.3d 52, 57-63

66. *Fraser ex rel. Fraser v. Tamalpais Union High Sch. Dist.*, 281 F. App'x 746, 748 (9th Cir. 2008).

67. *Id.* at 747.

68. *Id.*

69. *Id.* at 748. The *Fraser* court also rejected the parents' argument that "the school district had a policy of intentionally misinforming or failing to inform parents and students about the existence of section 504 accommodations, and [parents] therefore are not required to exhaust the IDEA remedies to seek injunctive relief for this systemic problem." *Id.* In rejecting this assertion the court pointed out that the parents failed to bring their claims as a class action and moreover, any claim for injunctive relief became moot upon the student's graduation. *Id.*

70. See *Polera v. Board of Education*, 288 F.3d 478, 480-81 (2d Cir. 2002).

71. *Id.*

72. *Id.*

73. *Id.* at 490-91.

(1st Cir. 2002), the court held that notwithstanding her graduation from high school, a plaintiff must exhaust her administrative remedies when she sought only money damages under section 1983 for violations of IDEA, where she alleged among other things, that the school inappropriately disciplined her for conduct related to her disability.⁷⁴ The court noted that the student's graduation from high school did not necessarily eliminate the possibility of her receiving benefits from IDEA, in light of the availability of an in-kind services remedy under the Act, such as compensatory education, in a proper case.⁷⁵ The court emphasized that the plaintiffs could have invoked the administrative process at several points during her high school years, and allowing her to hold back from seeking IDEA-related relief when the issue arose would undermine IDEA's complex remedial scheme as designed by Congress.^{76 77}

2. Allegations of Psychological Harm Caused by Agency Personnel

Courts have tended to treat allegations of psychological damage caused by school personnel to students with disabilities as "educational in nature" so as to require IDEA exhaustion. In *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 989 (7th Cir. 1996), for example, the parents sued under § 1983, ADA, and section 504 for psychological harm allegedly caused to Charlie

74. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 57-63 (1st Cir. 2002).

75. *Id.* at 63.

76. *Id.* at 62-64.

77. Other cases demonstrate that graduation does not render exhaustion of IDEA's administrative remedies futile. *See, e.g., Ruecker v. Sommer*, 567 F. Supp.2d 1276, 1297 (D. Or. 2008) (holding that for a student with attention deficit and hyperactivity disorder, graduation did not render administrative exhaustion futile where that process could have provided any relief for his educational injuries, including compensatory education, that the student sought in court); *Oliver v. Dallas Indep. Sch. Dist.* 2004 WL 1800878, at *5-6 (N.D. Tex. Aug. 11 2004) (plaintiff's graduation held insufficient to establish futility where plaintiff failed to follow administrative process and waited until after she had graduated to bring suit); *c.f. Amidon v. Michigan*, 2008 WL 723536, at *8 (E.D. Mich. March 17, 2008) (plaintiff who chose to voluntarily drop out of school after bringing suit was required to exhaust administrative remedies for past injuries); *Allensworth-Cannaday v. Windham Exempted Village Sch. Dist.*, 2007 WL 3129818, at *6 (N.D. Ohio Oct. 23, 2007) (exhaustion required despite imminent graduation where relief remained available and delay was attributable to plaintiff).

during the fourth grade. The essence of the complaint was that Charlie's teacher invited her pupils to vent their feelings about certain topics, which apparently included Charlie, a student with an IDEA disability.⁷⁸ Charlie suffered from, among other things, an attention deficit disorder and panic attacks.⁷⁹ The parents alleged the teacher's invitation resulted in complaints about Charlie causing him humiliation, loss of confidence and self-esteem, and disruption of Charlie's educational progress and even fistfights with other students.⁸⁰ Since, according to the complaint, the genesis of the problem as well as the consequences occurred in the educational setting, the court concluded rendition of IDEA services might have provided a remedy for the injury in the form of counseling and other related services.⁸¹ The court observed the following:

Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can. . . [T]he IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.⁸²

Charlie F. may be distinguished from the cases where parties seek redress for past physical injuries for which IDEA clearly provides no relief. The physical injury cases are discussed in Part VI, C below. Nevertheless, *Charlie F.* may have gone too far in mandating use of the IDEA administrative process. Although the conduct complained of arose in an "educational setting," IDEA was designed for the purpose of furnishing a FAPE via an IEP, to address students' special needs. It was not established to provide a remedy for an injury caused by a teacher's independent tort-like treatment of her students.

Robb v. Bethel School District, 308 F.3d 1047 (9th Cir. 2002), is

78. See *Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996).

79. *Id.*

80. *Id.* at 990.

81. *Id.* at 993.

82. *Id.*

conceptually similar to *Charlie F.* and, indeed, relies on that case.⁸³ There, a student diagnosed with cerebral palsy sued for damages under section 1983 predicated on violations of IDEA.⁸⁴ She claimed, among other things, emotional distress damages and lost educational opportunities based on her removal from the classroom in favor of an allegedly deficient, unsupervised peer tutorial program.⁸⁵ Since the core of the complaint was based in the delivery of educational services, the court concluded that the plaintiffs were required to use IDEA's administrative process before coming to court.⁸⁶ Although damages could be measured by the cost of services to make the student whole,⁸⁷ the administrative process might have resulted in requiring the LEA to provide such related services as counseling and psychologist supports and/or educational interventions in kind under IDEA. Thus, according to the court, exhaustion might have provided a remedy for the injuries the parents claimed their child suffered.^{88 89}

3. Renunciation

In *Cave v. East Meadow Union Free Sch. Dist.*, 514 F.3d at 240 (2d Cir. 2008),⁹⁰ the parents sued an LEA after their deaf child was denied entry to a high school and its facilities because he was accompanied by his service dog. Although the parents claimed

83. *Robb v. Bethel Sch. Dist.*, 308 F.3d 1047, 1052-54 (9th Cir. 2002).

84. *Id.* at 1048.

85. *Id.*

86. *Id.* at 1054.

87. *Id.* at 1050.

88. *Robb*, 308 F.3d at 1054.

89. In contrast to *Charlie F.* and *Robb*, in *Covington v. Knox County School System*, 205 F.3d 912, 917 (6th Cir. 2000), the mother brought a claim pursuant to section 1983, but not IDEA, alleging that school officials had locked her son inside a small, dark, unheated, unventilated cell for long periods of time as a disciplinary measure, during the time the student attended special education classes under the auspices of the LEA. *Id.* At the time the claim was filed the student had already graduated from high school. *Id.* The court concluded that under these "unique circumstances" exhaustion was excused – the student's injuries were wholly in the past, and there was no relief that the administrative process could provide him. Moreover, money damages were the only relief which could make him whole.

90. *Cave*, 514 F.3d at 240 (2d Cir. 2008).

violations of ADA, section 504, and section 1983 and renounced any claim that the student's IEP was deficient,⁹¹ the court nevertheless affirmed the dismissal of the case for want of exhaustion.⁹² The court characterized the complaint as, in substance, seeking a modification of the IEP,⁹³ since it did not include a service dog. The court concluded that since the IDEA administrative process could have provided at least some equitable relief to the plaintiffs which addressed the facts of which plaintiffs complained,⁹⁴ IDEA's exhaustion requirement was applicable.^{95 96}

4. Removal of the Child from the Public School Program

Parents who have unilaterally removed their children from public school programs and then sought public benefits to serve the educational needs of their disabled child in private settings generally have been unsuccessful in avoiding their obligation to exhaust IDEA's due process procedures. This result has obtained in private school,⁹⁷ home schooling,⁹⁸ and alternative public school

91. *Id.* at 247.

92. *Id.* at 248.

93. *Id.*

94. *Id.* Notably the parents in *Cave* made no allegations of system-wide IDEA violations, or district-wide policy of discrimination against hearing impaired students, nor did the parents make a sufficient showing that the superintendent's recommendation against allowing the dog on the school premises would contaminate the impartiality of the administrative review process, thereby making it futile to pursue. *Id.* at 249-50.

95. *Id.* at 248-49. The *Cave* court construed section 1415(l) as sufficiently broad to encompass complaints asserted under *any federal statute*, as long as plaintiffs seek relief available under IDEA. *Id.* at 248.

96. *See also* Brandon V. v. Chichester Sch. Dist., 2007 WL 2155722, at 7 (E.D. Pa. July 25, 2007) ("Although Plaintiffs claim to be 'satisfied' with [child's] current educational programming . . . the administrative process [respecting plaintiff's § 504 claim] is still valuable, as the IDEA and its implementing regulations provide a wide range of services that may enable [the child] to overcome the adverse effects of the abuse he suffered. . .").

97. *E.g.*, Doe v. Smith, 879 F.2d 1340, 1343 (6th Cir. 1989) (concluding that the parents' decision to send a child to private school does not excuse their failure to exhaust administrative remedies).

98. *E.g.*, S.E. v. Grant County Bd. of Educ., 544 F.3d 633 (6th Cir. 2008). In S.E. the court rejected the parents' contention that IDEA's futility exception to the

placements.⁹⁹ Where, however, a parent has placed her child in a private school after exhausting IDEA's due process requirements and then files a complaint in the district court, she will not be obligated to re-exhaust those remedies for events arising after the conclusion of the administrative proceedings, where the factual basis for the new claim was decided in a previous due process proceeding.¹⁰⁰

5. Section 504 Classified Students Who May Be IDEA Eligible

In *Cudjoe v. Independent Sch. Dist.*, 297 F.3d 1058 (10th Cir. 2002) a student who suffered from Epstein-Barr virus, a disease which results in debilitating fatigue, participated in a home-bound instructional program between grades five and eleven, pursuant to a

exhaustion requirement applied when parents elected to home-school their disabled child. *Id.* at 642. Although the parents claimed that the school district failed to implement a section 504 educational plan as written, and further made unilateral changes to the child's program in violation of the child's due process rights, the court did not find IDEA remedies futile. Among other reasons it concluded the administrative process could furnish the compensatory education they sought. *Id.* at 642. It seems unsound for courts to require IDEA exhaustion when the parties have stipulated to the child's classification under another statute such as section 504 since, among other reasons, the court is substituting its judgment for that of the agency about the nature of the child's disability.

99. *E.g.*, *B.H. ex rel. K.H. v. Portage Public Sch. Bd. of Educ.*, 2009 WL 277051, at *3, 12 (W.D. Mich. February 2, 2009) ("... courts have unanimously rejected the argument that parents' unilateral decision to remove a child from the defendant school district [here, to another public school district] renders exhaustion futile"); *R.M. ex rel. R.M. v. Waukeet Cmty. Sch. Dist.*, 2008 WL 5111065, at *2, *8 n. 4 (S.D. Iowa Dec. 5, 2008), (citing *Franklin v. Frid*, 7 F. Supp. 2d 920, 924 (W.D. Mich. 1998)) (observing that plaintiffs were bound to follow the administrative process regardless of whether the disabled student had been removed by plaintiffs to another public school).

100. *See J.P.E.H. v. Hooksett Sch. Dist.*, 2008 WL 4681827 (D.N.H. Oct. 22, 2008). In *J.P.E.H.*, the parent filed for IDEA due process and a final administrative decision was rendered in May, 2007. *Id.* at *1-2. The parent *then* removed the child to a private school for school year 2007-2008, and sought reimbursement for the tuition she incurred for that time period. *Id.* She alleged in her complaint the inadequacy of the 2006-2007 program. *Id.* Since the May, 2007 decision found the district offered a FAPE for 2006-2007, the court concluded that no purpose would be served by returning to IDEA due process hearings and for that reason denied the district's motion to dismiss for failure to exhaust. *Id.* at *3 (citing to *Missouri Sch. Admin. Dist. No. 35 v. Mr. and Mrs. R.*, 321 F.3d 9, 18 (1st Cir. 2003)).

section 504 individual accommodation plan (IAP).¹⁰¹ The student's IAPs were revised annually at meetings in which the parent participated.¹⁰² The student's instructional program for those years was comprised of a teacher coming to his home to teach the general curriculum for his grade level, with the exception of his being excused from physical education.¹⁰³ Significantly, *the student had never been classified under IDEA at any time by the school district*.¹⁰⁴ The parents brought a lawsuit under section 1983, ADA, and section 504, among other statutes, but not IDEA.¹⁰⁵ They alleged that the teacher selected by the LEA would not meet the student's educational needs and as a result the parents refused to accept the district's offer of tutoring and, because the LEA refused to allow the student to be tutored by a person the parent preferred, he was without a teacher for his eleventh grade year.¹⁰⁶ The parents further alleged that the district furnished teaching materials in a tardy fashion.¹⁰⁷ Reading broadly section 1415(l)'s "relief available" provision, the court concluded that the student might well have been found IDEA eligible as having an "other health impairment"¹⁰⁸ had the parent used the Act's due process tribunals. Since "relief" might have been "available" under the IDEA administrative process, it was impermissible for plaintiffs to spurn those procedures at the time of the injury, and later sue for damages.¹⁰⁹

101. *Cudjoe v. Indep. Sch. Dist.*, 297 F.3d 1058, 1061, 1068 (10th Cir. 2002).

102. *Id.*

103. *Id.* at 1061 n. 5.

104. *Id.* at 1066, 1068.

105. *Id.* at 1060.

106. *Id.* at 1066.

107. *Cudjoe*, 297 F.3d at 1066.

108. *Id.* at 1068.

109. *Id.* at 1067-68. *Cudjoe* raises troubling concerns about the extent to which courts will go to require IDEA exhaustion. Between grades five and eleven the parents *and* LEA had stipulated to the fact the student had a section 504 disability and, by inference, *not* an IDEA disability. *Id.* at 1060. The LEA should have been estopped from claiming at this late date that the district court did not enjoy subject matter jurisdiction based on the parents' failure to exhaust IDEA's administrative procedures. Moreover, although a federal court may at any time raise jurisdictional issues, irrespective of whether they are raised by the parties, six consecutive years of section 504, and not IDEA classification, should have been a

6. The Failure to Request Educational Programming Prior to Initiation and Exhaustion of IDEA's Due Process Procedures

In *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007) the parents, anticipating that their daughter would be discharged from her treatment facility in summer 2003, applied for her admission to New Mexico Military Institute (NMMI), a publicly funded school with strict admissions requirements, for fall 2003.¹¹⁰ The parents contended that NMMI was the only appropriate placement for their daughter. Instead of requesting an amended or new IEP from the IEP team after her rejection from NMMI,¹¹¹ the parents proceeded to a Tier I due process hearing and a Tier II administrative appeal of that decision, but lost at both levels.¹¹² They then filed claims in the federal district court under IDEA, among other laws, which granted summary judgment to the defendants.¹¹³ In dismissing the parents' appeal the Tenth Circuit stated:

We hold today that before a party may seek relief in federal court alleging a violation of the IDEA's substantive provisions, a party must first request an IEP for the disabled child, or seek a change to a current IEP if one exists, from the agency designated to create that plan under the state's educational framework. Because it is undisputed that plaintiffs never attempted to amend their child's existing IEP or obtain a new IEP before pursuing the IDEA claim, they have failed to exhaust the IDEA's administrative procedures and remedies.¹¹⁴

Clearly then, the Tenth Circuit sweeps into IDEA section 1415(i)(2)(A), the requirement that the parents request of the LEA, an IEP, or an amendment to an existing IEP as a predicate for using

jurisdictional fact which outweighed any other considerations in making its decision.

110. *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1271-72 (10th Cir. 2007).

111. *Id.* at 1267.

112. *Id.* at 1273.

113. *Id.*

114. *Id.* at 1267.

the state's due process apparatus, unless an exception to the rule applies.^{115 116}

7. Allegations of Unlawful Policies Where Student Litigant Seeks Individual Relief Only

The Tenth Circuit recently held in *McQueen ex rel. McQueen v. Colorado Springs Sch. Dist.*, 488 F.3d 868 (10th Cir. 2007) that the parents of an autistic child were required to exhaust IDEA's administrative remedies, notwithstanding their allegations that the LEA, following SEA guidelines, maintained a policy which violated IDEA, since it limited extended-school year services (ESY) to only those services which were necessary to maintain previously learned skills. In *McQueen* the parents sought, among other things, reimbursement for their purchase of summer services for their child.¹¹⁷ The court observed that the parents' claim was grounded in a single component of the Colorado Department of Education's (CDE) educational program, that is, the effects of its ESY policy on IEPs. Because there was no factual record concerning the student's particular needs, the court asserted it was in no position to ascertain

115. *Ellenberg* is disturbing in that for all intents and purposes the parents exhausted their remedies provided in section 1415. There is a case to be made that under these circumstances it was the federal court's *duty* to decide the merits of the case. By adding procedures not contained in IDEA's exhaustion provision, the Tenth Circuit may have expanded section 1415's exhaustion requirements beyond what Congress intended, and thereby unnecessarily burdened the parents' access to the courts.

116. In *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918 (W.D. Tex. 2008), the parents had prevailed in a state level one-tier system due process hearing, and the LEA appealed that decision in court. The LEA contended that because the parents refused to participate in a so-called Student Teacher Assessment Team (STAT) before or after initiating due process procedures, they failed to satisfy IDEA's exhaustion requirement. *Id.* at 937-40. In rejecting this argument the court stated it found nothing in the IDEA or Texas law requiring use of STAT in order to gain access to the courts. The *El Paso* court expressly refused to apply *Ellenberg's* "expansive holding" to the facts of the case, observing that under the LEA's argument new procedural requirements not contained in the Act would be required. *Id.* at 939. Instead, it applied the law of the circuit *Gardner v. Sch. Bd. Caddo Parish*, 958 F.2d 108 (5th Cir. 1992), allowing access to the courts based on literal adherence to IDEA's exhaustion requirements. *Id.* at 938.

117. *McQueen ex rel. McQueen v. Colorado Springs Sch. Dist.*, 488 F.3d 868 (10th Cir. 2007).

the effects of that policy on *this* student's receipt of a FAPE.¹¹⁸ Since it was not clear that the due process procedures would be unable to provide the FAPE to which this student was entitled, futility was not established.^{119 120 121}

The nature of the relief sought by the plaintiffs is critical in

118. *Id.* at 875.

119. The court also rejected the parents' argument that because they were challenging a "policy or practice of general applicability" exhaustion must be excused. *Id.* at 875-76. Notwithstanding the fact that the parents challenged facially, a policy which prevented teaching children new skills in ESY program, the issue here was whether the student received a FAPE and whether the parents were entitled under IDEA to reimbursement. *Id.* at 875-76. Therefore, the general applicability exception to the exhaustion requirement did not apply. Finally, the court observed that exhaustion may be excused where plaintiffs allege structural or systemic failures and seek system-wide reform, but this was not such a case. *Id.* at 874-75.

120. See *Fraser v. Tamalpais Union Sch. Dist.*, 281 F. App'x. 746, (9th Cir. 2008); *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548 (E.D. Pa. 2008); *Gardner v. Sch. Bd. of Caddo Parish*, 958 F.2d 108 (5th Cir. 2002). In *Fraser*, the parents argued that the district had a policy of intentionally misinforming or failing to inform parents and students about section 504 accommodations. *Fraser*, 281 F. App'x at 748. The court held that exhaustion was still required, to give the agency an opportunity to correct the allegedly systemic failure. *Id.* In *Blunt*, the court rejected multiple sets of parents' complaints that exhaustion should be excused on the ground of futility. The court stated, "Allowing plaintiffs to bypass the administrative process by merely including conclusory allegations of systemic deficiencies would permit the exception to the exhaustion requirement to swallow the rule." *Id.* at 559. In *Gardner*, the parents commenced an action in court, contending the district's policy of limiting tape recordings of IEP meetings violated IDEA. *Gardner*, 958 F.2d at 109-10. The court concluded the complaint was subject to IDEA's exhaustion strictures since it fell within the scope of IEP matters. *Id.* at 111-12 (stating that even if Tier I review might be futile, parents did not allege Tier II review could not correct the error).

121. In *A.W. ex rel. Wilson v. Fairfax County Sch. Bd.*, 548 F. Supp. 2d 219 (E.D. Va. 2008), the parents sought relief under ADA and section 504, but not IDEA, related to the student's suspension in a direct judicial action, in which they sought "a declaratory judgment, injunctive relief and monetary damages on the basis of alleged disparate discipline of disabled students by the School Board." *Id.* at 221. The parents argued that exhaustion was not required since they alleged constitutional due process violations and sought money damages. Therefore, relief was unavailable in IDEA proceedings. *Id.* at 223. The court, in rejecting the parents' position, invoked IDEA's section 1415, noting that since July 1, 2005 IDEA's due process procedures included provision for student suspensions. This made relief available to the plaintiff under IDEA. *Id.* at 223.

determining whether a court will characterize the violations alleged under the Act as systemic. *Waters v. South Bend Cmty. Sch. Corp.*, 1999 WL 528173, 191 F.3d 457 (7th Cir. 1999) (table decision), illustrates this point. In *Waters*, the plaintiff claimed that since the LEA systemically failed to identify students with learning disabilities, relief could not be obtained through the Act's administrative process. In rejecting that assertion the court stated:

Even if we assume that Mr. Waters is claiming that the underlying causes of his failure to receive a sufficient education involve the systemic failure to identify disabled students, the remedy he seeks is an individual remedy to make himself whole. He does not seek relief that requires restructuring, by judicial order, of the mechanism that the state has in place to meet the needs of students with special educational problems. Nor does he allege that he effectively has been deprived of an administrative forum. The individual-specific relief that he ultimately seeks may be granted through the administrative process (internal citation omitted).¹²²

Further, whether relief is "systemic" for exhaustion purposes based on allegations that state policy violates IDEA is highly fact dependent. Where there is no factual dispute and the outcome of the case turns on whether the state policy is unlawful, no exhaustion should be required, since the issue is one of law and not within the agency's expertise.¹²³ By contrast, as in *McQueen* and *Waters*, where the individual needs of the child were in dispute, a court could benefit from application of administrative expertise to the facts, exhaustion should be required before judicial review is sought.

8. Claims of Insufficient Notice from the Agency Concerning the Exhaustion Requirement

Some parents have attempted to gain access to the courts on the ground that the information the LEA or SEA provided to them was insufficient to inform them of their obligation to exhaust. This

122. *Waters v. S. Bend Cmty Sch. Corp.*, 1999 WL 528173, 191 F.3d 457 (7th Cir. 1999) (table decision).

123. See *McKart v. United States*, 395 U.S. 193, 193-98 (1969) (discussing pure law exception to administrative exhaustion).

argument has been rejected where the court finds the notice to have been adequate to apprise parents of their rights.¹²⁴

9. Issue Exhaustion

Courts generally will dismiss issues not fully exhausted administratively, even where exhaustion of other issues has occurred.¹²⁵ Recently, in *Loch v. Board of Education of Edwardsville*, 573 F. Supp.2d 1072 (S.D. Ill. 2008) the court dismissed, for want of exhaustion, the parents' claim concerning the adequacy and completeness of the student's evaluation on the ground that they had failed to raise that particular issue during IDEA's mandated due process procedures, although they did raise the issue of "[w]hether the district's review and determination of eligibility [were] correct."¹²⁶ This failure barred the parents from arguing the evaluation issue to the court.¹²⁷ In *J.W. ex rel. J.E.W. v. Fresno*

124. See, e.g., *Papania-Jones v. Dupree*, 275 F. App'x 301, 303 (5th Cir. 2008) (rejecting argument that language in state notice informing parents that they may initiate a due process proceeding was inadequate to inform them that IDEA exhaustion was required as a condition of gaining access to the courts); *MM ex rel DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 535-36 (4th Cir. 2002) (recognizing school board's failure to give parents proper notification of their administrative rights as an exemption to the exhaustion requirement, but requiring exhaustion, upon a finding that these parents were sufficiently informed of the obligation, based on their having challenged other IEPs); *Levine v. Greece Cent. Sch. Dist.*, No. 08-CV-6072, 2009 WL 261470, at *7 (W.D.N.Y. Feb. 4, 2009) (finding district was under no obligation to advise plaintiff that administrative remedies must be exhausted before filing suit, where plaintiff admitted receiving standard state notice of procedural rights).

125. See, e.g., *Wooley v. Valley Ctr.-Pauma Unified Sch. Dist.*, No. 07cv0675, 2007 WL 2023525, at *2-3 (S.D. Cal. July 11, 2007) (finding failure to exhaust issues contained in due process request, which the parents withdrew after the balance of their claim was dismissed administratively); and *Hesling v. Avon Grove Sch. Dist.*, 428 F. Supp. 2d 262, 275-76 (E.D. Pa. 2006) (explaining the problem of piecemeal litigation).

126. *Loch v. Bd. of Educ. of Edwardsville*, 573 F. Supp. 2d 1072, 1073, 1078-79 (S.D. Ill. 2008). In *Loch* the parents and LEA had stipulated to a list of issues the hearing officer would decide. The list was later expanded over the objection of the LEA. The amended list did not, however, include the specific allegation that the district had failed to adequately and completely evaluate the student in accord with IDEA mandates. *Id.* at 1078-79.

127. *Id.* at 1081-82.

Unified School District, 570 F. Supp. 2d 1212 (E.D. Cal. 2008), the court dismissed the complaint for lack of subject matter jurisdiction where the plaintiff asserted that the school district had failed to produce the specific records he requested¹²⁸ and challenged the qualifications of the hearing officer who presided at the due process proceedings, but failed to raise these issues in the prior administrative proceedings.^{129 130 131}

A case concluding that the issues were adequately exhausted is *H.B. v. Las Virgenes Unified School District*, 239 F. App'x 342 (9th Cir. 2007).¹³² There the court held that the parent had exhausted administrative remedies under IDEA on the issue of whether the LEA had predetermined a child's IEP in advance of the IEP meeting. In *H.B.* the administrative hearing officer refused to evaluate that issue because the parents had failed to identify it in their complaint or at the beginning of the hearing. Nevertheless, both sides questioned

128. *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1213, 1220 (E.D. Cal. 2008).

129. Indeed, Cal. Gov. Code § 11425.40(d) (Deering 1997 & Supp. 2009); Cal. Code of Regs. tit. 1 §§ 1034(a)-(b) (2009) expressly gave the right to plaintiff to exercise a preemptory challenge to replace an assigned administrative law judge. See *J.W.*, 570 F. Supp. 2d at 1221. Even if this express right did not exist under California law it seems likely that the complaint would have been dismissed anyway, for failure to exhaust these issues.

130. See also *A.E. v. Westport Bd. of Educ.*, 251 F. App'x 685, 687 (2d Cir. 2007) (holding that plaintiffs waived their procedural challenges to the IEP meetings by failing to raise those challenges either prior to or during the due process hearing); *Stanley C. v. M.S.D.*, 2008 WL 5423486, at *70 (N.D. Ind. Dec. 29, 2008) (holding that where Tier I hearing officer refused parents' request to entertain claims respecting school year 2006-2007 in proceeding reviewing 2005-2006 and 2004-2005 issues, and parents failed to seek review of that decision at Tier II, parents were barred from seeking judicial review of the adverse decision in court for failure to exhaust administrative remedies on that issue); *Neena S. v. The Sch. Dist. of Phila.*, No. 05-5404, 2008 WL 5273546, at *10 (E.D. Pa. Dec. 19, 2008) (holding that where parents' complaint sought compensatory education award for period including February 10, 1998 through the 2001-2002 school year, but only appealed *restrictions* on the Tier I award to Tier II hearing panel, parents could not litigate in court the denial of compensatory education they sought, for failure to exhaust).

131. There is no IDEA statutory or regulatory requirement addressing issue exhaustion.

132. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342 (9th Cir. 2007).

witnesses on the predetermination issue and submitted arguments about it in their closing briefs. Since the hearing officer had a “clear opportunity” to rule on the issue, the Ninth Circuit considered it sufficiently exhausted to establish the right to judicial review of that issue.^{133 134}

Finally, a procedural deficiency similar to failure to exhaust issues is failure to join parties. For example, in *Horen v. Board of Education of Toledo School District*, 568 F. Supp. 2d 850 (N.D. Ohio 2008) the court dismissed the complaint for lack of subject matter jurisdiction against the Ohio Department of Education where the parents first introduced a complaint against the Department during their Tier II appeal of the due process hearing officer’s Tier I decision.¹³⁵ This denied the Department the opportunity to remedy any claim against it by not including it in the initial dispute, or bringing a separate due process claim against the Department.

10. Assertion of Claims in Court, Arising Subsequent to IDEA Due Process Proceedings

Plaintiffs may not seek to litigate claims in court that arose subsequent to the time period at issue in the underlying administrative proceeding.¹³⁶ This rule should not prevent a party

133. *Id.* at 344.

134. *Brenneise v. San Diego Unified Sch. Dist.*, 2008 WL 4853329 (S.D. Cal. Nov. 7, 2008) is another case where issue exhaustion was deemed adequate. There, the parents contended that two IEPs failed to provide for feeding of the child by a registered nurse, through a gastrostomy tube, in violation of IDEA. Notwithstanding the district’s claim to the contrary, the administrative record revealed that this issue was presented by the parents both at the due process hearing and in the decision by the Office of Administrative Hearings. *Id.* at *8-9.

135. *Horen v. Bd. of Educ. of Toledo Sch. Dist.*, 568 F. Supp. 2d 850, 852, 857 (N.D. Ohio 2008).

136. *See, e.g., Metro. Bd. of Public Educ. v. Guest*, 193 F.3d 457, 463 (6th Cir. 1999) (court exceeded its jurisdiction to the extent it ruled on later proposed IEP issues for subsequent school years not at issue in administrative proceeding); *Jeremy H. v. Mt. Lebanon Sch. Dist.*, 95 F.3d 272, 283-84 (3d Cir. 1996) (claims arising after conclusion of the administrative hearing and claims not raised in that hearing must be exhausted, and cannot be raised in due process appeal); *Brennan v. Reg’l Sch. Dist. No. 1 Bd. of Educ.*, 531 F. Supp. 2d 245, 263-64 (D. Conn. 2008) (dismissing claims relating to school year subsequent to the filing of the due process complaint for lack of subject matter jurisdiction and finding them to be

who initiates a due process proceeding from initiating another due process proceeding relative to events which arise later, and then moving before the hearing officer entertaining the first case to consolidate the second case into the first. This would serve the purposes of judicial efficiency, and make more likely that final orders are consistent with one another.¹³⁷

11. Attempted Enforcement in Federal Court of Settlement Agreements Entered into Outside of the Resolution Session, or Before Due Process Tribunals.

The only express provision in IDEA which permits judicial enforcement of written settlement agreements addresses those agreements achieved during the mandatory resolution sessions held prior to commencement of the due process proceeding. Federal courts have utilized this provision to dismiss enforcement actions where settlements were achieved prior to commencement of the due process hearing, and outside an IDEA resolution session.^{138 139 140}

premature; commenting that parents should have brought a separate administrative proceeding respecting the later events).

137. See, e.g., *N.N.J. v. Broward County Sch. Bd.*, 2007 WL 3120299, at *1 (S.D. Fla. Oct. 23, 2007) (noting that the pro se parent's six due process cases filed under IDEA had been consolidated by the hearing officer, with 26 days of hearing).

138. See notes 27 and 28 and accompanying text (discussing provision).

139. In *J.M.C. ex rel. E.G.C. v. La Bd. of Elementary and Secondary Ed.*, 584 F. Supp. 2d 894, 897-98 (M.D. La. 2008), the court found the LEA had timely held a preliminary meeting but reached a settlement with the parent *after* that meeting but before the hearing was scheduled to begin. The court expressly declined to interpret Congress's intent, and dismissed the complaint based on failure to exhaust. The court determined it did not have jurisdiction because IDEA, by its terms – 20 U.S.C. 1415(f)(1)(B)(iii) (2006), makes enforceable in court, agreements reached “at” the preliminary [resolution] meeting. This case was probably correctly decided, since IDEA does not create the jurisdictional predicate for stipulations of settlement under these circumstances.

140. See, e.g., *Pope ex rel. Pope v. Cherokee County Bd. of Educ.*, 562 F. Supp. 2d 1371, 1374, 1376 (N.D. Ga. 2006) (dismissing case on ground of plaintiff's failure to exhaust administrative remedies where parents alleged defendants breached the 2.5 year old settlement agreement requiring the district to provide sufficient training to staff members); *W.L.G. ex rel. Nora Riley v. Houston County Bd. of Educ.*, 975 F. Supp. 1317, 1328-29 (M.D. Ala. 1997) (holding, “A post-settlement enforcement claim should be exhausted, in the same manner as are all other [IDEA] claims . . .”, and suggesting the court would then consider “the

VI. RELATIONSHIP OF IDEA DUE PROCESS EXHAUSTION PROCEDURES AND THE STATE COMPLAINT PROCEDURE/CRP

School districts and SEAs have sometimes contended that exhaustion of the state complaint/CRP, in addition to due process, is required before seeking judicial review. Such claims have been fairly uniformly rebuffed by the courts, principally on the ground that Congress did not intend to allow states to add exhaustion requirements not identified in the statute.¹⁴¹ Thus, parents' use of state complaint procedures/CRP is purely elective, and cannot be used to thwart parental access to the courts once administrative exhaustion is completed or rendered futile or inadequate.¹⁴² Moreover, parents will not be successful where they argue that their use of state complaint procedures, *per se*, is an adequate substitute for exhaustion of IDEA due process procedures.¹⁴³ There may,

changed or subsequent circumstances as only incident to a current, viable and already exhausted IDEA claim").

141. *E.g.*, *Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1071 (9th Cir. 2002), cert. denied, 537 U.S. 1194 (2003) (rejecting argument that parents who obtained a final order of a state special education agency under IDEA's due process mechanism must further exhaust CRP before bringing an enforcement proceeding in federal court); *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987) (rejecting defendant's assertion that CRP must be exhausted prior to bringing a § 1983 action to enforce EAHA, IDEA's predecessor, noting that EAHA section 1415 does not directly, or by its legislative history, suggest that once CRP is invoked, it must be exhausted prior to commencing an enforcement action); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 274 (3d Cir. 1996) (refusing to require exhaustion of CRP in judicial proceeding to enforce decision of due process hearing officer, that LEA refused to implement); *Radcliffe v. Sch. Bd.*, 38 F. Supp. 2d 994 (M.D. Fla. 1999) (same, but observing that state complaint/CRP may adequately substitute for due process).

142. *Porter v. Bd. of Trustees*, 307 F.3d at 1072 (further observing the United States Department of Education has never interpreted its CRP regulations as creating a mandatory step before suit alleging an IDEA violation). *See also*, *Antkowiak v. Ambach*, 838 F.2d 635, 641 (2d Cir. 1988) (courts may not add steps to IDEA exhaustion not contemplated in the Act by *sua sponte* review of unappealed due process decisions, since such activity by the courts is not consistent with Congressional intent); *Diamond v. McKenzie*, 602 F. Supp. 632, 639 (D.D.C. 1985) (holding that state may not subject children and their parents to additional steps not required by EAHA).

143. *See Webster v. Cranston Sch. Comm.*, 212 F.3d 738 (1st Cir. 2000) (utilizing the state complaint procedures does not satisfy IDEA's exhaustion requirement); *Levine v. Greece Central Sch. Dist.*, 2009 WL 261470, at *5

however, be situations where CRP exhaustion serves as a substitute for due process exhaustion, where resort to due process would be futile or inadequate.¹⁴⁴ Finally, there is some controversy over whether final CRP decisions are reviewable in court.¹⁴⁵

VII. WHEN IDEA EXHAUSTION IS EXCUSED

A threshold question in exhaustion disputes is whether or not a claimed right, anchored in the IDEA, actually exists. This seemingly simple question can be quite difficult to resolve. The Second Circuit's decision in *Coleman v. Newburg Enlarged City Sch. Dist.*, 503 F.3d 198 (2d Cir. 2007), illustrates this issue.¹⁴⁶ In *Coleman*, plaintiffs sought a preliminary injunction ordering a disabled student's reinstatement from suspension and assignment to an interim alternative educational setting (IAES) during the pendency of an administrative appeal from the determination that the student's misconduct was not a manifestation of his disability.¹⁴⁷ Plaintiffs claimed that as a result of the erroneous suspension the student would not graduate on time, or be able to participate in extracurricular

(W.D.N.Y. Feb. 4, 2009); *J.M.C. ex rel. E.G.C. v. La. Bd. of Elementary and Secondary Ed.*, 562 F. Supp. 2d 748, 755-56 (M.D. La. 2008) (state complaint procedure for resolving disputes under IDEA, being different in purpose and scope and procedure from IDEA due process hearing, is insufficient to satisfy the exhaustion requirement of IDEA).

144. *E.g.*, *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275-76 (9th Cir. 1999) (where all educational issues are resolved in CRP, leaving only issues for which there is no adequate administrative remedy, due process exhaustion is not required).

145. *See* *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205 (9th Cir. 2004); and *S.A. v. Tulare County Office of Educ.*, 2009 WL 30298 (E.D. Cal. Jan. 6, 2009) (both concluding that CRP decisions are subject to judicial review); *but see*, *Va. Office of Prot. and Advocacy v. Va. Dep't of Educ.*, 262 F. Supp. 2d 648 (E.D. Va. 2003) (concluding that because IDEA's § 1415 creates a cause of action after due process procedures are completed, but does not do so for CRP, there is no private right of action for review of CRP decisions); *Wachlarowicz v. Sch. Bd. of Independent Sc. Dist. No. 832*, 40 IDELR 209 (D. Minn. August 1, 2003) (same). *See also* Part VIII hereof (discussing legislative amendment to eliminate uncertainty).

146. *Coleman v. Newburgh Enlarged City Sch. Dist.*, 503 F.3d 198 (2d Cir. 2007).

147. *Id.* at 202.

activities.¹⁴⁸ The court framed the issue as “whether he had a right, under the IDEA, to be reinstated at [his home school] while the allegedly erroneous manifestation determination was reviewed.”¹⁴⁹ It concluded that IDEA created neither a right to such reinstatement nor to graduate on a date certain or from a particular educational institution.¹⁵⁰ Since the claimed rights did not exist, they could not be frustrated by the administrative process.¹⁵¹ “In sum, while Coleman had a right not to be removed from [his home school] based on an erroneous determination of no manifestation, he had no right to reinstatement while that determination was being reviewed [administratively].”¹⁵²

Moreover, this question must be resolved whether the complaint is brought directly under IDEA, section 504, ADA, or other federal statutes protecting children with disabilities. It requires a detailed examination of the Act’s purposes and precise language.¹⁵³ If the answer is “no, it does not exist,” then the next question – whether relief is “available” – for the complainant under the Act – becomes irrelevant for purposes of an exhaustion inquiry. If the answer is “yes, an IDEA-based right exists,” the threshold query should help ascertain the nature of IDEA relief which might be “available” a declaration, an order for future conduct, reimbursement, compensatory education, payment for IEE, reformation of the IEP, rescission of a diploma, for example, for the conduct of which plaintiff complains.

Upon ascertaining that an IDEA right exists, that such right may have been violated by defendant’s conduct, and what can be the IDEA “relief available,” the court will know whether exhaustion is required. If the overlap between the right and the claim is sufficient, plaintiff must exhaust IDEA’s due process mechanism, even if it does not provide the relief plaintiff would prefer for the alleged violation(s). Once the court determines that IDEA requires exhaustion of a particular claim, it must then consider whether

148. *Id.*

149. *Id.* at 205.

150. *Id.* at 205-206.

151. *Id.* at 206.

152. *Coleman*, 503 F.3d at 205.

153. *Id.*

exhaustion is excused, at least where plaintiff has raised that argument.

This Part examines cases in which courts have excused IDEA exhaustion and places them into categories arising in IDEA litigation. Although they overlap conceptually, they form concrete reference points for understanding what futility and inadequacy mean in the IDEA administrative scheme. Where appropriate, cases requiring exhaustion within these categories are included. These categories include the following: the agency's failure to implement unambiguous IEP requirements; enforcement of final due process hearing orders; monetary damages for past physical injuries; the agency's denial of access to the IDEA's due process procedures; the emergency situation exception; untimely due process decisions; status quo or pendency of placement violations; the class action; retaliation for exercise of protected rights; the absence of an IDEA administrative forum to adjudicate the dispute; failure of the SEA to adequately implement IDEA required policies and procedures; parents' independent rights, or lack thereof; parental refusal of the IDEA classification and services exception; and non-FAPE programming and services exception. Each of these categories will be examined in turn.

A. The Agency's Failure to Implement Services that were Specified or Otherwise Clearly Stated in the IEP.

Often, looking to the IDEA's legislative history, courts have grappled with the issue of whether an agency's failure to implement IEP programs and services excused the IDEA's exhaustion requirements. Their conclusions rest mostly on how specific, or unambiguous, the IEP entries are.¹⁵⁴ This ground for exhaustion

154. Compare, e.g., *Polera v. Bd. of Educ.*, 288 F.3d 478, 489-90 (2d Cir. 2002) (recognizing excusal based on legislative history for IEP implementation failures, but finding *Polera's* IEPs to lack specificity, with "long lists of abstract goals" and virtual silence as to materials or services and, therefore, "not the sort of case described by Senator Simon, in which a school failed to implement specified or clearly stated IEP services") with *Heldman v. Sobol*, 962 F.2d 148, 158 n. 11 (2d Cir. 1992) (quoting Senator Paul Simon, co-sponsor of the 1975 and 1986 Acts from the congressional record at 131 Cong. Rec. 21392-93 (1985), to the effect that IDEA exhaustion is not required where an agency has failed to provide services in the child's IEP); *Valentino C. v. Sch. Dist.*, 2004 WL 225038 (E.D. Pa. Feb. 3,

excusal has been extended to failure to fund cases as well.¹⁵⁵

Courts have not, however, been uniform in their willingness to excuse exhaustion based on IEP implementation failures, and this proposition is not free from doubt.^{156 157} Before concluding that

2004) (relying on legislative history to excuse exhaustion when plaintiffs alleged district failed to implement IEP); *Irene B. v. Phila. Acad. Charter Sch.*, 2003 WL 24052009 (E.D. Pa. Jan. 29, 2003) (applying futility exception in action against charter schools for failure to comply with old IEP or develop new one; noting absence of damages remedy under IDEA and legislative history relating to excusing exhaustion for disputes over implementation of IEP); *Joseph M. v. Se. Delco Sch. Dist.*, 2001 WL 283154 (E.D. Pa. March 19, 2001) (not requiring exhaustion in dispute over failure to provide placement recommended in IEP; relying on legislative history); *O.F. v. Chester Upland Sch. Dist.*, 2000 WL 424276 (E.D. Pa. April 19, 2000) (applying futility exception when allegations made that defendant failed to comply with IEP by not placing the student in an appropriate school and there was a sufficient factual record to determine what level of care he required).

155. *See, e.g.*, *Kerr Ctr. Parents Ass'n v. Charles*, 897 F.2d 1463 (9th Cir. 1990) (futility of exhaustion found in case over funding of education of children in intermediate care facility); *Petties v. Dist. of Columbia*, 881 F. Supp. 63 (D.D.C. 1995) (granting preliminary injunction when District of Columbia failed to pay for private school placements it had made for children with disabilities).

156. *See, e.g.*, *Papania-Jones v. Dupree*, 275 F. App'x 301, 303 (5th Cir. 2008) (dismissing complaint alleging failure to deliver IDEA required occupational therapy services for failure to state a claim, concluding that "[e]ven if [plaintiffs] could prove that a portion of the required administrative review would be futile, i.e. the due process hearing, they must prove that an appeal of the hearing to the state administrative agency would be futile as well"); *Andrew M. v. Del. County Office of Mental Health & Mental Retardation*, 2005 WL 18000 (E.D. Pa. Jan. 4, 2005) (dismissing, on exhaustion grounds, claims for compensatory education for failure to provide hours of services called for on individualized family service plans); *Bishop v. Martin County Sch. Bd.*, 41 IDELR 177 (S.D. Fla. 2004) (dismissing claim based on implementation, rather than content, of educational program, despite futility argument); *Fliess v. Washoe County*, 38 IDELR 67 (D. Nev. 2002) (requiring exhaustion of damages claim when school district allegedly failed to follow IEP by having police handcuff and issue citation to child after child hit teacher), *aff'd*, 90 F. App'x 240 (9th Cir. 2004); *Rabideau v. Beekmantown Cent. Sch. Dist.*, 89 F. Supp. 2d 263 (N.D.N.Y. 2000) (dismissing on exhaustion grounds when IEP was ignored or altered and child put in new placement without official notice but parents had actual notice after the fact and did not object).

157. For discussion concerning the yardstick by which IEP implementation failures are measured, *see* Elexis Reed, *The Individuals with Disabilities Education Act - Ninth Circuit Determines that Only a Material Failure to Implement an Individualized Educational Program Violates the Individuals with Disabilities*

exhaustion is excused, close scrutiny of the claim is required.¹⁵⁸ Where plaintiff's claim "unavoidably encompasses both a failure to provide services and a significant underlying failure to specify what services were to be provided," exhaustion may not be avoided.¹⁵⁹

B. Enforcement of Final Due Process Hearing Orders.

IDEA requires implementation of the final due process decisions favorable to the parents.^{160 161} A problem concerning enforcement

Education Act. 61 SMU. L. REV. 495 (2008) (reviewing recent circuit cases on this point).

158. *See, e.g.,* Gardner v. Uniondale Pub. Sch. Dist., 2008 WL 4682442, at *8 (E.D.N.Y. Oct. 21, 2008). In *Gardner*, the parent alleged the district's failure to enforce, on one occasion, that part of the child's IEP calling for her to have unlimited access to the restroom. Since the claim for § 504 damages arose from the same operative facts as the IDEA complaint, IDEA exhaustion was required. Moreover, the court concluded that a singular failure to comply with an IEP provision was not an implementation failure within the futility exception. Finally, the court assumed, *arguendo*, that even if the failure was one of IEP implementation, the allegations did not relate solely to one of implementation, in that they revealed potential deficiencies in the plan itself, including the lack of specificity as to how compliance with the plan would be ensured. *Id.* at *10-11.

159. *Polera*, 288 F.2d at 489; *see also, e.g.,* R.M. *ex rel.* R.M. v. Waukee Cmty. Sch. Dist., 2008 WL 5111065 (S.D. Iowa Dec. 5, 2008) (looking to the original rather than the amended complaint, finding a FAPE denial allegation and directing the parties to brief reasons why the case should not be dismissed for failure to exhaust, inasmuch as the parents' due process and equal protection claims were based on excessive use of time outs, the same conduct as gave rise to their IDEA claims).

160. *See, e.g.,* Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 n. 13 (3d Cir. 1996) (observing that it would be "curious" for Congress to have developed these elaborate procedures merely to produce advisory opinions, but explicitly leaving open the question of whether IDEA grants jurisdiction to a district court to enforce a hearing officer's decision); *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274 (4th Cir. 1987) ("While the existence of a wrong without a remedy is not itself a reason for the application of section 1983, the existence of such a state of affairs enters into our reasoning in finding that the city has . . . violated [EAHA]").

161. Although *Jeremy H.* held that hearing officer's orders could be enforced pursuant to section 1983, that is no longer the case, at least in the Third Circuit. *See A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791 (2007) (holding that plaintiffs may not enforce IDEA claims via § 1983). The question of whether final orders emanating from the IDEA due process mechanism are enforceable under IDEA, § 1983 or under neither statute is troublesome. *See James S. v. Sch. Dist. of Phila.*,

arises because IDEA confers jurisdiction on the federal court to a party aggrieved by final Tier I or where applicable, Tier II order.¹⁶² Since the prevailing party is not “aggrieved,” the jurisdiction-giving language in section 1415(i)(2) would seem to preclude an IDEA enforcement cause of action.¹⁶³ It would make no sense to require parents to re-exhaust those remedies to enforce a favorable decision, since due process hearing officers do not enjoy subject matter jurisdiction to enforce their own orders.¹⁶⁴

Although sometimes relying on different authority, courts have been fairly uniform in excusing exhaustion of the IDEA’s administrative remedies to enforce a favorable hearing decision.¹⁶⁵

559 F. Supp. 2d 600, 614-15 (E.D. Pa. 2008) (commenting that because the order is binding does not mean that the district court has jurisdiction to enforce it, and finding the factual allegations too speculative to reach the question of IDEA jurisdiction).

162. *See* IDEA § 1415(i)(2) (granting access to the federal courts to persons “aggrieved by the findings and decision”)

163. The counter argument is that where an LEA fails to comply with the final order plaintiff is aggrieved by the fact that it contained no enforcement mechanism. *See* *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d at 278 n. 10 (discussing issue).

164. *E.g.*, *Porter v. Bd. of Trs. of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1070 (9th Cir. 2002); *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026 (9th Cir. 2000), cert. denied, 534 U.S. 1140 (2002).

165. *E.g.*, *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274-75 (4th Cir. 1987) (holding that parent had right to bring section 1983 action, but not an action under EAHA, to enforce federal substantive rights established by a final decision under EAHA’s administrative scheme, where school district failed to give effect to that decision); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108 (1st Cir. 2003) (permitting non-section 1983 IDEA action to enforce due process hearing decision without further exhaustion); *Porter v. Bd. of Trs.*, 307 F.3d 1064, 1071 (9th Cir. 2002) (reaching same result on basis of IDEA; noting futility and stating “Requiring exhaustion of California’s [complaint resolution process] to file suit based on a failure to implement an unappealed administrative order would add an additional step of administrative exhaustion not contemplated by the IDEA”); *Brenneise v. San Diego Unified Sch. Dist.*, 2008 WL 4853329 (S.D. Cal. Nov. 7, 2008) (holding that plaintiffs were not required to exhaust IDEA administrative procedures before suing the district under section 504 and ADA based on district’s alleged failure to implement a final due process decision); *A.V. ex rel. B.V. v. Burlington Township Bd. of Educ.*, 2007 WL 1892469, at *14-16 (D. N.J. June 7, 2007) (in action brought under IDEA, on plaintiff’s motion unopposed as to failure to implement the IEP, finding for plaintiff and ordering steps toward compliance with ALJ order); *Olson v. Robbinsdale Area Schs.*, 2004 WL 1212081 (D. Minn.

Notwithstanding this general rule, a plaintiff who obtains a favorable result at due process may be required to return to the administrative forum, where the nature of the due process decision contemplated further proceedings of the IEP team.¹⁶⁶ Moreover, where parties have entered into stipulations of settlement which have been “so ordered” by an IDEA hearing officer, courts have excused exhaustion on the ground of futility in actions to enforce those orders.¹⁶⁷

C. Monetary Damages for Past Physical Injuries by School Officials.

Courts sometimes have excused IDEA exhaustion where the complaint alleges infliction of severe physical and/or mental injuries, for which IDEA does not provide a remedy.

In a Ninth Circuit case, *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999), plaintiffs alleged substantial physical and verbal abuse by a teacher and an instructional assistant against their son, a child suffering from among other things, Tourette’s Syndrome.¹⁶⁸ The court excused exhaustion on the ground that the

May 28, 2004) (applying Section 1983 and entering preliminary injunction to require district to permit child to participate in graduation in accordance with hearing officer order); *SJB v. New York City Dep’t of Educ.*, 2004 WL 1586500 (S.D.N.Y. July 14, 2004) (not requiring further exhaustion in IDEA action over failure to implement hearing officer decision); *R.B. ex rel. L.B. v. Bd. of Educ. of City of New York*, 99 F. Supp. 2d 411, 415-416 (S.D.N.Y. 2000) (finding no requirement to exhaust IDEA procedures in action to enforce brought under IDEA, section 1983, ADA, and section 504).

166. *E.g.*, *Johnson v. Bd. of Educ. of the Glens Falls Common Sch. Dist.*, 488 F. Supp. 2d 202, 207-208 (N.D.N.Y. 2007) (finding no futility excusing exhaustion where parents alleged that defendant failed to comply with review officer’s order that required reevaluation of child and determination whether child should continue to be classified as child with disability since order did not provide specific plan to implement or identify specific services to be provided or goals to be achieved).

167. *E.g.*, *Eddins v. Excelsior Indep. Sch. Dist.*, 1997 WL 470353, at *6-7, 9-11 (E.D. Tex. 1997) (excusing any further exhaustion in a § 1983 action but dismissing several additional claims, including jurisdiction under IDEA, for want of exhaustion) (magistrate’s recommendation); *cf.* *Woods ex rel. T.W. v. N. J. Dep’t of Educ.*, 796 F. Supp. 767, 775 (D. N.J. 1992) (finding IDEA jurisdiction where ALJ approved stipulation of settlement); *see, generally*, Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 3 (2003).

168. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275-76 (9th Cir. 1999). The plaintiff in *Witte* was a ten-year-old who alleged he had been tortured

parties had resolved the educationally-related issues through the IEP process, and sought only monetary damages for past physical injuries, relief not available under IDEA.

In *Padilla v. School Dist. No. 1 City and County of Denver*, 233 F.3d 1268 (10th Cir. 2000) a similar result obtained.¹⁶⁹ There, the court excused IDEA exhaustion when the parents sued under ADA and IDEA on behalf of an IDEA-eligible child, seeking only damages.¹⁷⁰ They sought redress for the fractured skull and other physical injuries, including an exacerbation of her seizure disorder, their daughter suffered, allegedly as the result of the school district's and its board's ADA violations, including placing her in an unsupervised, windowless closet.¹⁷¹ Since the parents did not complain about the child's current educational program, and indeed attested to the program's adequacy, the court saw no need to require exhaustion, particularly because of the IDEA's emphasis in furnishing prospective educational benefits and the unavailability of damages under the Act.¹⁷²

by two teachers because of his illness. He had been: force-fed oatmeal, even though he was allergic to it; strangled so badly he had to be taken to the emergency room; tackled and held to the ground repeatedly; made to run on a treadmill set at high speed with weights strapped to his ankles; deprived of meals; sprayed in the face with water; and forced to stay outside without food or water. *Id.* at 1273. Neither the source nor the nature of the plaintiff's alleged injuries was educational. "The foregoing abuses were inflicted on Plaintiff for making noise in the classroom, not running fast enough, not staying on task, not cutting his food, and making involuntary body movements. All these actions are characteristics of Plaintiff's disabilities and occurred because of his disabilities." *Id.*

169. *Padilla v. Sch. Dist. No. 1 City and County of Denver*, 233 F.3d 1268 (10th Cir. 2000).

170. *Id.* at 1275.

171. *Id.* at 1274.

172. *Id.* at 1274-75. For a case holding that exhaustion was required after the use of physical restraint on an autistic child, see *Pope v. Cherokee County Bd. of Educ.*, 562 F. Supp. 2d 1371, 1375-76 (N.D. Ga. 2006). In *Pope*, the parents brought a direct claim under IDEA alleging that the district and its employees failed and refused to properly train staff members who supervised their autistic child in an after-school program. *Id.* The complaint alleged that on one occasion four female defendants piled on top of the student to restrain him from acts of aggression and another where an officer who was called to the scene handcuffed the student's hands behind his back. The plaintiffs asserted these incidents resulted in educational and social set-backs for the child which the court described as a "temporary regression." *Id.* The court concluded that even if the current

In a Seventh Circuit case,¹⁷³ parents of an IDEA-eligible child afflicted with muscular dystrophy brought a section 1983 claim alleging their child was subjected to physical abuse at school, leading to severe kidney damage that permanently reduced the child's quality of life.¹⁷⁴ Since these injuries were physical, not educational, the court concluded they fell outside the scope of IDEA, and exhaustion was excused.^{175 176}

educational plan was sufficient, the basic dispute was still about a failure to provide public education to an autistic child and the adverse consequences of that failure. *Id.* Finally, the *Pope* court concluded the parents had not met their burden in establishing futility of the administrative process. To a similar effect *see* *Franklin v. Frid*, 7 F. Supp. 2d 920, 925 (W.D. Mich. 1998). The *Franklin* court looked to the pleadings and found an allegation of FAPE deprivation in its Count IV, and dismissed the action for failure to exhaust. *Id.* at 925-26. The *Franklins* had alleged they were satisfied with the IEP (*Id.* at 924-25), but that the child's aide poked him, took away utensils, taunted him, hit and slapped him, and verbally abused him. *Id.* at 921. *Franklin* could be explained as an implementation failure case requiring exhaustion since the particular failures alleged were not unambiguously included in the IEP.

173. *McCormick v. Waukegan Sch. Dist.* # 60, 374 F.3d 564 (7th Cir. 2004).

174. *McCormick*, 374 F.3d at 566. In *McCormick*, notwithstanding a physical education teacher's notice of the risk to the student's health, she instructed the student to run laps and perform push-ups. *Id.* She advised the student if he could not complete those tasks, he would receive a failing grade in physical education and would have to repeat the ninth grade. *Id.* Despite the student's protestations and references to his IEP – containing express limitations on physical activity due to known dangers, the teacher continued to threaten the student with failure and berate him, until he agreed to perform the exercises. *Id.* Even though he informed the teacher during the exercise that his muscles were cramping and hurting, she insisted that he should continue, again ignoring the IEP. *Id.*

175. *Id.* at 1274-75.

176. *See also e.g., M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885 (8th Cir. 2008). In *M.Y.* parents sought damages under section 504 and section 1983 for a sexual assault suffered by the child on a school bus. The Court of Appeals rejected the district's claim that the parents were required to exhaust IDEA administrative remedies before seeking relief under these statutes. It explained that IDEA's section 1415(l) exhaustion requirement was designed "to address prospective educational benefits and not the past injuries that *M.Y.* suffered from the sexual assault." *Id.* at 888. This permitted the parents to proceed on the merits of their claim. *Id.* at 888-90. To the same effect *see, Campbell v. Nye County Sch. Dist.*, No. 94-15747, 1995 WL 597706, at *2 (9th Cir. Oct. 10, 1995) (mem. op.) (finding that section 1983 claim for compensatory damages based on beating of students by school personnel where beatings were not disciplinary in nature would not come within the purview of IDEA), and *Webb v. McCullough*, 828 F.2d 1151,

D. Denial of Parent Access to IDEA's Due Process Procedures.

Courts may excuse exhaustion where the LEA fails to act on a parent's request for a due process hearing,¹⁷⁷ or has failed to timely conclude the hearing.¹⁷⁸ Moreover, courts may excuse exhaustion where the LEA did not furnish to the parents adequate notice of the administrative remedies that the IDEA requires them to exhaust.¹⁷⁹

1159 (6th Cir. 1987) (cause of action for substantive due process violation recognized based upon corporal punishment which demonstrates "a brutal and inhumane abuse of . . . official power, literally shocking to the conscience). *But see, e.g.,* Brandon V. v. Chichester Sch. Dist., 2007 WL 2155722, at *5, 8 (E.D. Pa. July 25, 2007) (dismissing section 504 claim, but not constitutional claims, seeking only money damages, for failure to exhaust, where complaint alleged physical and mental abuse including sexual assault, along with lack of appropriate programming and instruction, all leading to regression).

177. *See, e.g.,* Manecke v. Sch. Bd. of Pinellas County, 762 F.2d 912, 919 (11th Cir. 1985) ("The plain language of [IDEA] . . . suggests that Congress must not have intended [IDEA] to be the exclusive method to redress denial of access to that very mechanism," allowing claim to go forward under section 1983), *cert. denied* 474 U.S. 1062 (1986); C.O. v. Portland Pub. Schs., 46 IDELR 243 (D. Or. 2006) (finding allegations that SEA officials failed to conduct full investigation of complaints, failed to implement legally required due process hearing procedures, and failed to oversee local school district need not be exhausted); Hornstine v. Township of Moorestown, 263 F. Supp. 2d 887, (D. N.J. 2003) (not requiring exhaustion in action to compel naming of special education student as sole valedictorian of high school class when SEA denied hearing on jurisdictional grounds); Meehan v. Patchogue-Medford Sch. Dist., 29 F. Supp. 2d 129 (E.D.N.Y. 1998) (excusing exhaustion when district ignored hearing requests); Doe v. Town of Framingham, 965 F. Supp. 226 (D. Mass. 1997) (denying motion to dismiss based on exhaustion when district allegedly deterred use of process by referring to individualized education program as hypothetical); Upper Valley Ass'n for Handicapped Citizens v. Mills, 928 F. Supp. 429 (D. Vt. 1996) (challenge to state complaint resolution procedures); Essen v. Bd. of Educ., 1996 WL 191948 (N.D.N.Y. April 15, 1996) (failure to appoint hearing officer); Sherry v. New York State Educ. Dep't, 479 F. Supp. 1328 (W.D.N.Y. 1979).

178. *E.g.,* Blackman v. Dist. of Columbia, 382 F. Supp. 2d 3, 9 (D.D.C. 2005) (finding no administrative remedy to exhaust to compel district to timely conclude due process hearing); *but see* Williams v. Overturf, 580 F. Supp. 1365, 1370 (W.D. Wis. 1984) (finding that since Congress did not expressly allow a failure to respond to be equated with a negative Tier II response for purposes of exhaustion, parents would not be deemed under EHA to have exhausted their administrative remedies; mandamus was available to obtain a decision, albeit an untimely one).

179. *E.g.,* Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *aff'd sub nom* Honig v. Doe, 484 U.S. 305 (1988) (no exhaustion required when parent not informed of

This is so because failure of the defendants to so notify the plaintiffs “deprive[s them] of the opportunity to take advantage of their procedural safeguards offered by the statute.”¹⁸⁰

Parents will not be required to administratively exhaust issues that the hearing officer refused to consider upon their request.¹⁸¹ Moreover, direct access to the federal courts has been allowed where a school district effectively denied a parent’s request for an IEE at district expense, by failing to initiate a due process hearing as required by the Act, to establish that its evaluation was appropriate.¹⁸² Exhaustion has been excused as well where the agency has not adopted procedures to give parents access to due process.¹⁸³ Direct access to the courts was also allowed where the parent alleged that a school official, through his fraud, completed a form in the parents’ names denying parental consent to evaluate their

appeal rights); *Abney ex rel. Kantor v. Dist. of Columbia*, 849 F.2d 1491 (D.C. Cir. 1988) (exhaustion not required for period in which surrogate parent did not receive notice); *Emma C. v. Eastin*, 26 IDELR 1279 (N.D. Cal. 1997) (excusing exhaustion in action claiming failure to identify and evaluate children with disabilities, leaving them unaware of procedural rights), *overruling* 26 IDELR 544 (N.D. Cal. 1997); *Mason v. Schenectady Sch. Dist.*, 879 F. Supp. 215 (N.D.N.Y. 1993) (excusing exhaustion when parent contended that district failed to inform parents of procedural rights, which followed *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 147-48 (2d Cir. 1983), *cert. denied* 465 U.S. 1071 (1984)).

180. *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 147 (2d Cir. 1983), *cert. denied* 465 U.S. 1071, 104 S.Ct. 1426 (1984).

181. *E.g.*, *Independent Sch. Dist. No. 623 v. Digre*, 893 F.2d 987 (8th Cir. 1990) (affirming prevailing party status and fee award where IDEA issues were excluded by hearing officer and SEA); *Robertson v. Arlington Cent. Sch. Dist.*, 229 F.3d 1136, 2000 WL 1370273, 2000 U.S. App. LEXIS 2376431, at n.5 (S.D.N.Y. 2000) (holding exhaustion does not apply to claims regarding safety that hearing officer refused to consider), *aff’d*, 229 F.3d 1136, 33 IDELR 123 (2d Cir. 2000); *Hyde Park Cent. Sch. Dist. v. Peter C.*, 1994 WL 67944, at *3-5 (S.D.N.Y. March 1, 1994) (exhaustion excused where hearing officer failed to consider parents’ IEE request).

182. *Doe v. Bd. of Educ.*, 441 IDELR 106 (M.D. Tenn. 1988).

183. *E.g.*, *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb. 1980) (futility in challenging statutory administrative procedure), *aff’d in part and vacated in part*, 645 F.2d 592 (8th Cir. 1981); *Doe v. Koger*, 480 F. Supp. 225 (N.D. Ind. 1979), *aff’d*, 710 F.2d 1209 (7th Cir. 1983) (exhaustion excused when no procedure to challenge expulsion); *Sherry v. N.Y. State Educ. Dep’t*, 479 F. Supp. 1328 (W.D.N.Y. 1979) (absence of hearing rights; exhaustion excused).

child, which effectively denied the child of needed IDEA services.¹⁸⁴ One court excused exhaustion where a school district itself resorted to the courts for a declaratory judgment on the issue of parental surrogacy and then claimed that the parents were required to exhaust on the issues they wished to litigate.¹⁸⁵ Parents have not, however, been uniformly successful where they have claimed denial of access to the procedures IDEA was intended to afford.¹⁸⁶

E. The Emergency Doctrine.

The legislative history of the IDEA's predecessor, EAHA, listed in its House Report, "emergency situations" within the futility exception. An emergency exists where the failure to take immediate action will adversely affect a child's mental or physical health.¹⁸⁷ The emergency exception to IDEA exhaustion should be "sparingly invoked."¹⁸⁸ The burden of establishing futility based on the emergency exception appears heavy: "[M]ere allegations by plaintiffs of irreversible harm will not be enough to excuse the completion of administrative proceedings. Plaintiffs must provide a sufficient preliminary showing that the child will suffer serious and irreversible mental or physical damage (e.g., irremediable intellectual regression) before the administrative process may be circumvented."¹⁸⁹

184. *Quackenbush*, 716 F.2d at 143.

185. *Converse County Sch. Dist. No. 2 v. Pratt*, 993 F. Supp. 848 (D. Wyo. 1997).

186. *See, e.g., Doe v. Bd. of Educ. of the Elyria City Sch.*, 149 F.3d 1182, 1998 WL 344061, at *4 (6th Cir. May 27, 1998) (dismissing claim on basis of exhaustion when district did not provide hearing but parents' request was vague and did not specify issues to be resolved); *D.R. v. Bedford Bd. of Educ.*, 926 F. Supp. 47 (S.D.N.Y. 1996) (parents cannot avoid exhaustion by simply asserting that a hearing officer was biased, without submitting evidence of the bias); *Doe v. East Greenwich Sch. Dep't*, 899 A.D.2d 1258 2004 WL 2821639 (R.I. Sup. Ct. December 3, 2004) (dismissing on exhaustion grounds despite delays in hearing process and failure to create IEP when parents had withdrawn child from school system and irreparable harm situation not present), *aff'd by Doe v. East Greenwich Sch. Dep't*, 899 A.D.2d 1258 (R.I. 2006).

187. H.R. No. 296, 99th Cong. (1st Sess. 7 1985).

188. *Komninos v. Upper Saddle River Bd. of Educ.*, 13 F.3d 775, 779 (3d Cir. 1994); *accord, Rose v. Yeaw*, 214 F.3d 206, 212 (1st Cir. 2000) (agreeing that emergency exception should be invoked sparingly).

189. *Komninos*, 13 F.3d at 779.

Courts have excused exhaustion in a variety of emergency situations. These have included, for example, the failure of an LEA to fund a unilateral placement; the lack of which might cause irreparable harm to the child;¹⁹⁰ exclusion from an appropriate education during an expulsion from school;¹⁹¹ and mental and behavioral deterioration of the child in the absence of a seven day-per-week, 24-hour program.¹⁹² Other emergencies warranting excusal from exhaustion under the Act have included a child's insufficient access to adequate toileting facilities,¹⁹³ denying access to maintenance of a summer school placement,¹⁹⁴ and a state-wide practice of charging parents fees for residential placements made by the public agencies.¹⁹⁵

Two recent cases rejecting emergency claims by parents are *Plumbly v. Northeast Indep. Sch. Dist.*, 2006 WL 2469169 (W.D. Tex. Aug. 17, 2006),¹⁹⁶ and *Olivas v. Cincinnati Pub. Schs.*, 171 Ohio App. 3d 669 (Ohio Ct. App. 2007).¹⁹⁷ In *Plumbly*, the court denied a motion for a preliminary injunction, and granted dismissal for lack of

190. *Id.* at 777 (recognizing exception and remanding matter to district court for determination of irreparable injury if district fails to fund unilateral residential placement).

191. *Gutin v. Washington Twp. Bd. of Educ.*, 467 F. Supp. 2d 414 (D.N.J. 2006) (denying summary judgment to defendants on claims based on board's decision to exclude student from appropriate education while expelled).

192. *Marcus X. v. Adams*, 856 F. Supp. 395, 397 (E.D. Tenn. 1994) (excusing exhaustion when child's mental condition and behavior were deteriorating daily in absence of an "integrated education and treatment program").

193. *Ramirez v. Dist. of Columbia*, 31 IDELR 78 (D.D.C. 1999) (entering preliminary injunction under Americans with Disabilities Act to require accessibility of bathroom; noting futility and inadequacy of exhaustion).

194. *Pachl v. Sch. Bd. of Independent Sch.*, 2003 WL 21406191, at *2 (D. Minn. 2003) (finding exhaustion futile as a practical matter, where dispute centered on entitlement to maintenance of placement in private summer program which began "yesterday").

195. *Parks v. Pavkovic*, 536 F. Supp. 296, 302 (N.D. Ill. 1982) (finding parents could not obtain administrative relief before the residential school discharged the students).

196. *Plumbly v. Northeast Indep. Sch. Dist.*, 2006 WL 2469169 (W.D. Tex. Aug. 17, 2006).

197. *Olivas v. Cincinnati Pub. Schs.*, 171 Ohio App. 3d 669 (Ohio Ct. App. 2007).

exhaustion.¹⁹⁸ There, the parents sought to stop expulsion of their child where the settlement of a previous due process hearing included an agreement that the child would no longer receive special education services and would be enrolled in the district's regular education program. In *Olivas*, the court held that the failure of the school district to provide door-to-door transportation for a child unable to get from an apartment door to the street did not support excusing exhaustion when the parent could obtain alternative transportation and seek reimbursement.¹⁹⁹ Under the Third Circuit decision in *Komninios v. Upper Saddle River Board of Education*, 13 F.3d 775 (1994), these cases were properly decided, since in both *Plumbly* and *Olivas* plaintiffs did not establish that the children would suffer "serious and irreversible mental or physical damage."^{200 201}

F. Untimely Due Process Decisions.

Judicial forums have sometimes been willing to excuse exhaustion where the parents properly invoked IDEA due process procedures, but the hearing officer taking jurisdiction of the case failed to comply with IDEA-mandated timelines.²⁰² However, some

198. *Plumbly*, 2006 WL 2469169 at *3.

199. *Olivas*, 171 Ohio App. 3d at 675.

200. Where the *Plumbly* child remained age-eligible under IDEA and his condition changed such that he required services under the Act, that part of the agreement waiving future rights might violate public policy.

201. See also *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1097-98 (1st Cir. 1989) (finding no irreparable harm where student was not at the time subject to an indefinite suspension or expulsion "which arguably might require immediate attention").

202. See, e.g., *McAdams v. Bd. of Educ.*, 216 F. Supp. 2d 86 (E.D.N.Y. 2002) (excusing exhaustion on futility grounds when challenge to previous IEP took almost two years to decide); *Engwiller v. Pine Plains Cent. Sch. Dist.*, 110 F. Supp. 2d 236 (S.D.N.Y. 2000) (finding futility with regard to claim against state for delays and allowing ten days before finding futility with regard to undecided claim on merits against school district); *Sabatini v. Corning-Painted Post Area Sch. Dist.*, 78 F. Supp. 2d 138 (W.D.N.Y. 1999) (excusing exhaustion when Tier-II review officer's decision still pending despite expiration of 30-day deadline). But see, e.g., *Paul K. ex rel. Joshua K.*, 567 F. Supp. 2d 1231, 1235, 1238 (D. Haw. 2008) (finding the forty-five-day timeline to render a decision from the filing of the due process complaint not to be jurisdictional, vacating hearing officer's order of

courts have concluded that the remedy in such circumstances is to obtain a mandamus order directing the hearing officer to decide the case, rather than initially deciding the merits of the dispute itself.²⁰³ In some instances, the parties themselves have created the delay by requesting postponements. In such cases the court may be more likely to direct the parties to return to the administrative process, rather than address the merits of the dispute itself.²⁰⁴

G. Status-Quo/Maintenance of Placement Violations

IDEA section 1415(j) requires that, absent agreement of the parents and the LEA, the school district maintain the child in the then-current educational placement during the pendency of proceedings brought pursuant to that section.²⁰⁵ *Murphy v. Arlington Central School District*, 297 F.3d 195, 199-200 (2d Cir. 2002), illustrates the operation of this provision.²⁰⁶ There, a school district refused to maintain a child in his then-current educational placement (a private day school for which the parents had attained “pendency” status by reason of a favorable Tier II review decision), while the

dismissal for failure to comply with the timeline and remanding to hearing officer to proceed on merits).

203. *E.g.*, *Williams v. Overturf*, 580 F. Supp. 1365 (W.D. Wis. 1984) (finding no ground for failure to exhaust due to overdue administrative decision, and stating that the party should seek mandamus).

204. *See, e.g.*, *Doe v. East Greenwich Sch. Dep't*, 899 A.2d 1258 (R.I. Sup. Ct. 2006) (affirming dismissal of claim for failure to exhaust when delay in hearing officer decision beyond 45 days stemmed from parties' requested postponements of hearing).

205. 20 U.S.C. § 1415(j) (2004). Excepts from this require a child's placement made pursuant to section 1415(k)(4) – pertaining to placements in interim alternative educational settings on disciplinary and dangerousness grounds, subject to certain limitations. Although perhaps apparent, an invocation of stay-put is conditioned on the child's current status as a child with an IDEA disability. Thus, where a child's IEP team has previously determined he is no longer eligible for special education and related services, and his parents later attempt to thwart his expulsion from school based on stay-put principles, their application for an injunction based on stay-put will be denied due to their failure to exhaust administrative remedies over the non-eligibility determination. *See E.K. v. Stamford Bd. of Educ.*, 2007 WL 1746201 (D. Conn. June 15, 2007).

206. *Murphy v. Arlington Cent. Sch. Dist.*, 297 F.3d 195, 199-200 (2d Cir. 2002).

parents contested the next developed IEP.²⁰⁷ The court held that the parents were not required to exhaust administrative remedies to enforce their child's stay-put rights during the administrative and judicial review process over the subsequent IEP, and granted the parents' request for an injunction requiring the district to fund the placement.²⁰⁸ The court concluded that the administrative review process was "inadequate" to remedy the LEA's violation of this rule since the IDEA's stay-put provision is "time-sensitive" and judicial intervention is necessary to give realistic protection to the claimed right.²⁰⁹ To avoid exhaustion on the ground of "stay-put," the proposed change to the pendency placement must be "fundamental" or involve elimination of a basic element of the student's educational program.^{210 211 212}

207. *Id.* at 198-99.

208. *Id.* at 199-201.

209. *Id.* at 199. A necessary implication of this rule is that LEAs are required to pay for the pendency placement until such time as the student's placement is changed pursuant to IDEA's terms. *See id.* at 200-01, *relying in part on* Bd. of Educ. v. Schutz, 290 F.3d 476 (2d Cir. 2002).

210. *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1582 (D.C. Cir. 1984).

211. In *Alston et al. v. Dist. of Columbia*, 439 F. Supp. 2d 86 (D.D.C. 2006), for example, the child's pendency placement was comprised of a day placement at a special education middle school and a residential school component. After the residential school announced it was closing, the parents sought from the district an adequate substitute for that component, but the district refused to comply with that request. The parents brought a direct action in the district court which granted the parents' application for a stay-put injunction. The court held that if a child's then-current placement is not available, the school system must place the student in a similar program during the pendency of administrative and judicial proceedings. *Id.* at 91.

212. Even where the parents have not initiated due process proceedings over the next succeeding IEP offered to the child, they may be able to obtain a stay-put injunction where the district's appeal from a state hearing officer's decision – awarding the parents reimbursement for the their unilateral placement related to an earlier developed IEP – is still pending in the courts. This is because parents need not exhaust their administrative remedies to benefit from IDEA's stay- put provision. *See, e.g., Cranston Sch. Dist. v. Q.D.*, 2008 WL 4145980 (D.R.I. Sept. 8, 2008).

H. The Class Action.^{213 214}

The *sine qua non* for permitting class actions to go forward without IDEA exhaustion is a systemic violation.²¹⁵ The Ninth Circuit defines a systemic violation as follows:

[A] claim is ‘systemic’ if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act; but . . . it is not ‘systemic’ if it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem.²¹⁶

The Second Circuit in *J.S. ex rel. N.S. v. Attica Central School District*, 386 F.3d 107, 114 (2d Cir. 2004) attempted to distill its case law in holding that certain violations of the Act were “systematic,”

213. Plaintiffs seeking to certify a class bear the burden of demonstrating the four requirements of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a). In addition to satisfying all of Rule 23(a)’s requirements, the plaintiffs requesting class certification must qualify under one of Rule 23(b)’s class categories as well. *Id.* at 23(b). Under Rule 23(b) the class will be certified if separate actions will create the risk of inconsistent adjudications, if the opposing party’s actions or omissions toward the class as a whole make injunctive or declaratory relief appropriate, or if common questions predominate over individual questions. *Id.* IDEA class actions are typically certified as so-called “(b)(2)” classes, that is those where the opposing party’s actions or omissions toward the class as a whole make injunctive or declaratory relief appropriate.

214. For a history of the class action procedure, see Richard A. Nargareda, *Class Actions in the Administrative State: Klaven and Rosenfeld Revisited*, 75 U. CHI. L. REV. 603 (2008) (discussing relationship of agency oversight, the class action procedure and individual rights, among other things).

215. Exhaustion may be excused where there are systemic violations that cannot be remedied by local or state administrative agencies through the IDEA due process mechanism “because the framework and procedures for assessing and placing students in appropriate educational programs [are] at issue, or because the nature and volume of complaints [are] incapable of correction of the administrative hearing process.” *J.S. ex rel. N.S. v. Attica Cent. Sch. Dist.*, 386 F.3d 107, 114 (2d Cir. 2004).

216. *Doe v. Ariz. Dept. of Educ.*, 111 F.3d 678, 682 (9th Cir. 1997). The *Doe* court observed that, “[W]hat constitutes a systemic failure is not so easily defined.” *Id.* at 681.

and that exhaustion was excused.²¹⁷ The court found the following common elements to exist:

. . . . [T]he plaintiffs' problems could not have been remedied by administrative bodies because the framework and procedures for assessing and placing students in appropriate educational programs were at issue, or because the nature and volume of complaints *were incapable of correction by the administrative hearing process*. If each plaintiff had been forced to take his or her claim before a hearing officer and appeal to another local or state official, there would have been a high probability of inconsistent results. Moreover, the plaintiffs' claims were such that an administrative record would not have been of substantial benefit to the district court.²¹⁸

In *J.S.*, the plaintiff alleged the following systemic violations:

. . . failure to perform timely evaluations and reevaluations of disabled children; failure to provide parents with required procedural safeguards regarding identification, evaluation, and accommodation of otherwise disabled children; and failure to perform legally required responsibilities in a timely manner, including providing and implementing transition plans, transitional support services, assistive technology services, and declassification services for children with disabilities.²¹⁹

Moreover, the *J.S.* plaintiffs alleged that the LEA failed to properly notify parents of meetings as required by law, provide parents with legally required progress reports, and to provide required staff training.²²⁰ Significantly, the complaint did not challenge the content of particular IEPs, but rather the LEA's total failure to prepare and implement IEPs.²²¹ The court in *J.S.* affirmed the lower court's denial of defendants' motion to dismiss for failure

217. *J.S. ex rel. N.S. v. Attica Cent. Sch. Dist.* 386 F.3d 107, 114 (2d Cir. 2004).

218. *Id.* at 114 (emphasis added).

219. *Id.* at 115.

220. *Id.*

221. *Id.*

to exhaust administrative remedies.²²²

Heldman ex rel. T.H. v. Sobol, 962 F.2d 148 (2d Cir. 1992), is another case illustrating when violations of the Act are systemic and where exhaustion is excused.²²³ *Heldman* involved an attack on New York's statutory scheme as it related to the selection of hearing officers and its administrative review procedures. The court made the following observations:

Resort to the New York state administrative process in this case would be futile. Heldman claims that the NYSED regulation specifying the hearing officer selection procedure violates the mandate of IDEA. Because the regulation implements a New York statute, neither the Commissioner nor the assigned hearing officer has the authority to alter the procedure; therefore, it would be an exercise in futility to require Heldman to exhaust the state administrative remedies (internal citation omitted). To require a systemic challenge, such as Heldman's, to pursue administrative remedies would not further the purposes of IDEA and would only serve to insulate the state procedures from review – an outcome that would undermine the system Congress selected for the protection of the rights of children with disabilities.^{224 225}

222. *Id.* at 116.

223. *Heldman ex rel. T.H. v. Sobol*, 962 F.2d 148 (2d Cir. 1992).

224. *Id.* at 159 (footnote omitted). Other Second Circuit cases have found systemic violations and excused exhaustion in the class action context. In *Handberry v. Thompson*, 436 F.3d 52 (2d Cir. 2006), for example, the plaintiffs challenged the Department of Education's and Department of Correction's actions with respect to providing educational services to all entitled inmates. *Id.* at 60. Relying on *J.S.*, the court concluded that individual administrative remedies would be insufficient to address the defendants' failure to provide the service required by the IDEA to all relevant inmates, and concluded that plaintiffs' failure to exhaust did not bar the claim for lack of subject matter jurisdiction. *Id.* In *J.G. v. Board of Educ. of Rochester City Sch. Dist.*, 830 F.2d 444 (2d Cir. 1987), the court concluded that class allegations of systemic failure to evaluate and place students, to develop IEPs, and to inform parents of their rights excused administrative exhaustion. *Id.* at 447-48. In the same year in *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), the Second Circuit reviewed a judgment granted on the pleadings and found that the plaintiffs were entitled to exemption from exhausting administrative remedies since they were unlikely to receive adequate relief because

I. Retaliation Claims for Exercise of Protected Rights.

In a case reviewed by the Second Circuit,²²⁶ a parent alleged that

the hearing officer lacked the authority to effectuate class action and system-wide relief. In another class action, plaintiffs sought systemic reform to allow more timely evaluation and placement of handicapped children in appropriate programs. *Id.* at 757. This was *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982), in which plaintiffs sued New York City and various state officials for FAPE denial. *Id.* There, the city's education commissioner acknowledged that "he would be unable to expeditiously process the appeals of all the members of the plaintiff class were they to pursue administrative proceedings. *Id.* at 869. In light of this admission and the complexity of the educational issues involved, the court held it could not be sure that . . . administrative remedies would not be 'futile' for purposes of obtaining class relief," and excused exhaustion. *Id.*

225. In a more recent case, *New Jersey Prot. & Advocacy, Inc. v. New Jersey Dep't of Educ.*, 563 F. Supp. 2d 474 (D.N.J. 2008), the court held that plaintiffs were not obligated to exhaust the IDEA's administrative remedies where they alleged, among other things, a state-wide failure of the agency to enforce the Act's Least Restrictive Environment requirement. *Id.* In particular, the plaintiffs made the following allegations: Unnecessary segregation and denial of the students' right to be educated with nondisabled students to the maximum extent appropriate; and placement in general education classrooms without sufficient aids, services and accommodations needed to receive an appropriate education. *Id.* at 486. Since the students' complaint alleged systematic violations and they sought by judicial order, restructuring of state mechanisms, no purpose would be served by employing IDEA due process procedures. *Id.* In the same vein, *see CG v. Pennsylvania Dept. of Educ.*, 547 F. Supp. 2d 422 (M.D. Pa. 2008). There, the parents of special education students challenged the state's allocation of special education funds under IDEA and sought injunctive relief compelling state-wide restructuring of special education funding. In these circumstances the court concluded exhaustion would be futile since the complaint sought to correct a systemic deficiency rather than individual relief for the children. *Id.* at 432-33; *see also J.D. v. Nagin*, 2008 WL 2522127 (E.D. La. June, 20, 2008) (denying motion to dismiss in class action alleging that defendants failed to provide youth at pretrial detention center required screening services, IEPs and a FAPE).

226. *Weixel v. Bd. of Educ. of the City of New York*, 287 F.3d 138 (2d Cir. 2002). In *Weixel*, IDEA exhaustion was excused because of the LEA's failure to give the parent notice of IDEA's administrative remedies before the parent brought suit. The court found that the parent had stated a claim sufficient to proceed under IDEA as well, since she had pleaded facts which might establish IDEA eligibility and FAPE failures under the Act. *Id.* at 148-50. Arguably, had the LEA provided the parent with adequate notice of IDEA's administrative remedies the parent might have been relegated to those procedures before the courts would entertain her ADA and section 504 claims. This is because there was substantial relief available

school officials threatened and instituted child welfare investigations in response to the student's medically excused absences from school; threatened to file child abuse charges in response to her efforts to obtain home schooling for the student; refused to promote the student to the eighth grade; and refused to evaluate the student academically and place the student according to her abilities, allegedly in retaliation for the student's attempts to obtain reasonable accommodation. The court held that such allegations were sufficient to support viable ADA and section 504 retaliation claims, without the necessity of IDEA exhaustion.²²⁷

In *Mosley v. Board of Education, City of Chicago*,²²⁸ the court held the parent stated a First Amendment retaliation claim under section 1983 resulting from her efforts to obtain adequate educational services for her son under IDEA and she was not required to exhaust IDEA's administrative remedies to gain access to the courts.²²⁹ The parent asserted that, for approximately two years, the LEA prevented her from participating meaningfully in her role as chairperson of the so-called Improving America Schools Act (IASA) Committee, to which she had been elected; that it had deprived her of necessary information for competent evaluation of a school's budget proposals; and asked her to rubber stamp team decisions and lend her name to decisions which might have been erroneous, in essence, preventing her from serving as chairperson.²³⁰ Moreover, she asserted that a teacher summoned the police to have her removed from the school when she was passing out flyers inviting parents to attend an IASA

under IDEA to cure the classification failure and pedagogical deficiencies in the child's program, even if it was not the precise relief the parent preferred.

227. See also *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1161-62 (D. Haw. 2008) (holding although parents of autistic child never specifically raised their section 504 retaliation claim at the IDEA due process proceeding, they were not barred from pursuing that claim in court where they sought money damages only). The section 504 retaliation cases do not answer the question of whether asserting IDEA FAPE violations at the administrative level is sufficient to satisfy section 1415(l)'s requirement for exhaustion of non-IDEA federal claims, where relief is available under the IDEA. See *Mark H. v. Lemahieu*, 513 F.3d 922, 935 n.11 (9th Cir. 2008) (recognizing, but not deciding the issue).

228. *Mosley v. Board of Education, City of Chicago*, 434 F. 3d 527, 534-35 (7th Cir. 2006).

229. *Id.*

230. *Id.*

meeting.²³¹

In *M.T.V. v. DeKalb County School District*, 446 F.3d 1153 (11th Cir. 2006), however, the court dismissed, for want of IDEA exhaustion, claims brought by a parent pursuant to section 1983, section 504, and ADA for retaliation against her and her son.²³² Among the injuries the parent alleged were the following: Harassment at IEP team meetings, sending plaintiffs intimidating letters in response to educational demands, and subjecting the student to intrusive and needless testing.²³³ The parent contended that the retaliation was based on her advocacy for her son's right to receive an appropriate education and be free from discrimination based on his disability. The parent also argued that IDEA's administrative process could not furnish a remedy for retaliation under these laws, since she sought relief that was not "available" under the Act.²³⁴ The court firmly rejected the parent's arguments, concluding that the "claims clearly relate to M.T.V.'s evaluation and education and, therefore, were subject to the exhaustion requirement."^{235 236}

231. In *Mosley*, the circuit court consolidated two lawsuits dismissed by district courts, one brought on behalf of plaintiff's child under IDEA, dismissed for failure to exhaust, and one brought under the First Amendment via § 1983 for retaliation against the plaintiff parent, dismissed for failure to state a cause of action. The Seventh Circuit reversed both dismissals.

232. *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153 (11th Cir. 2006).

233. *Id.* at 1158.

234. *Id.*

235. *Id.* at 1158-59. The *M.T.V.* court went to great pains to explain that the parent was required to exhaust IDEA administrative remedies for the specific forms of retaliation to which her present complaint related. Thus, even though she had raised the retaliation issue in earlier due process proceedings, that did not suffice with respect to her current claims. *Id.* at 1159.

236. The *M.T.V.* court relied, in part, on two First Circuit retaliation cases involving IDEA exhaustion issues, both of which cases dismissed the complaint for failure to exhaust. *Id.* at 1158-59 (citing *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 51 (1st Cir. 2000), and *Rose v. Yeaw*, 241 F.3d 206, 210 (1st Cir. 2000). *Kutasi v. Las Virgenes*, 494 F.3d 1162 (9th Cir. 2007), presented similar facts to *M.T.V.* In *Kutasi*, plaintiff parents filed a lawsuit under section 504 and section 1983 alleging a pattern and practice of retaliatory and discriminatory action against them and their son. *Id.* at 1163. No prior administrative due process hearing had been requested regarding the student's IEP. After the complaint was filed the school district requested a due process hearing to determine the adequacy of the proposed IEP. The Ninth Circuit held the plaintiffs were required to exhaust their

J. The Absence of an IDEA Administrative Forum to Adjudicate the Complaint.

In *Blunt v. Lower Merion School District*, 559 F. Supp. 2d 548 (E.D. Pa. 2008), multiple sets of parents filed a complaint asserting that the Pennsylvania Department of Education, its Secretary and Bureau of Special Education (Commonwealth) had failed to perform compliance monitoring, complaint resolution and “child find” duties as mandated by IDEA.²³⁷ The Commonwealth defendants asserted the court lacked subject matter jurisdiction since plaintiffs had failed to exhaust IDEA’s due process procedures. In rejecting this argument, the court scrutinized IDEA and Pennsylvania regulations, finding that the Commonwealth furnished a forum for IDEA disputes between parents and local districts, but failed to provide one for parents to challenge the actions of the Commonwealth defendants. This, the court concluded, made exhaustion futile, thereby permitting plaintiffs to proceed in court against the Commonwealth defendants.²³⁸

K. Failure of SEA to Adequately Implement IDEA-Required Policies and Procedures.

In *Mrs. W. v. Tirozzi*,²³⁹ the court held that plaintiffs were not required to exhaust IDEA’s administrative remedies where they alleged that the State Board of Education failed to make bona fide attempts to resolve complaints against an LEA and to fully implement its obligations under the CRP.²⁴⁰ The court reasoned that such exhaustion would be futile since a due process hearing officer

administrative remedies regarding the issues raised in their complaint because their injuries could be redressed to some degree by IDEA. *Id.* at 1166, 1170.

237. *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548 (E.D. Pa. 2008).

238. *Id.* at 560.

239. *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2d Cir. 1987), *remanding* *Mrs. W. v. Tirozzi*, 706 F. Supp. 164, (D. Conn. 1989).

240. *Id.* at 750. On remand, the trial court denied defendants’ motion on the pleadings and held the plaintiffs stated a cause of action by asserting that the agency’s application of CRP constitutes a pattern and practice of failing to meet its responsibility under the EAHA to assure that local boards are in compliance with federal law. *Tirozzi*, 706 F. Supp. at 169.

lacked the authority to provide a remedy for the injury.²⁴¹

In the same vein, where a state maintained a settled policy of disallowing special education programs in excess of 180 days – and thereby denied a FAPE to students who needed extended school year services, and conceded that the Act’s due process “procedure[s] would be futile,” exhaustion was excused.²⁴²

*L. Parents’ Independent Rights, or Lack Thereof.*²⁴³

In *Blanchard v. Morton School District*, 420 F.3d 918 (9th Cir. 2005) a parent sought review of an order of the federal district court dismissing her section 1983 claim for failure to exhaust the IDEA’s administrative remedies.²⁴⁴ In her complaint against the school district and its officials, the parent sought money damages and other relief for her own emotional distress and other injuries personal to her, resulting from her efforts to secure special education services for her son. The Ninth Circuit stated, “The issue in this appeal . . . is whether Blanchard was seeking ‘relief that was also available under the IDEA, so that exhaustion was required.’”²⁴⁵ The Ninth Circuit reversed the trial court, concluding that since the IDEA’s administrative remedies provided relief for disabled children, not their parents, Blanchard’s emotional distress could not be remedied through the IDEA’s administrative procedures.²⁴⁶ The court emphasized that its holding was a narrow one, merely that the IDEA’s procedural requirements posed no barrier to Blanchard’s claim.²⁴⁷

241. *Id.* at 756.

242. *Crawford v. Pittman*, 708 F.2d 1028, 1033 n.17 (5th Cir. 1982) (table), *rehearing denied*, 715 F.2d 577 (1983).

243. *See Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, (2007) (holding that parents have the status of real parties in interest under IDEA).

244. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 919-20 (9th Cir. 2005).

245. *Id.* at 921.

246. *Id.* at 921-22.

247. *Id.* at 922. After the remand and a subsequent appeal back to the Ninth Circuit, the court held that section 1983 does not create a cause of action for money damages under the IDEA for lost earnings and suffering of a parent in pursuing her child’s IDEA rights. *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 936 (9th Cir. 2007), *cert. denied*, ___ U.S. ___, 128 S.Ct. 1447(2008). The court observed that it was not required to decide here whether Blanchard might have had an individual

In *Taylor v. Vermont Dep't of Pub. Edu.*, 313 F.3d 768 (2d Cir. 2002), a non-custodial parent brought a section 1983 action to enforce her IDEA-conferred right to access her child's educational records.²⁴⁸ The parent had previously brought a due process proceeding complaining, among other things, about the child's education program. The IDEA hearing officer dismissed her from the case, ruling that she lacked standing to challenge educational decisions about her daughter based on the custody decree.²⁴⁹ Moreover, the hearing officer concluded that since the IDEA confers jurisdiction on hearing officers only with respect to "the identification, evaluation, and placement" of the student in a special education program, his jurisdiction did not encompass parental claims concerning *her* treatment, including access to records under IDEA.²⁵⁰ Agreeing with the hearing officer that IDEA's due process procedures did not furnish a remedy for this parent's records access claim, the Second Circuit held that use of IDEA's administrative procedures would be futile.²⁵¹

M. Parental Refusal of IDEA Classification as a Ground for Exhaustion Avoidance.

IDEA provides expressly that parents may refuse IDEA eligibility and services.²⁵² This creates interpretative problems in construing section 1415(l), since IDEA services might be "available" to the child, but for the parents' exercise of this right to refuse. *M.G. v. Crisfield*, 547 F. Supp. 2d 399 (D. N.J. 2008), is a case in point.²⁵³ In *M.G.*, the parents exercised their right to refuse IDEA classification and services, contending that their child was not disabled and did not

cause of action under ADA and section 504 for emotional distress resulting from her enforcement of her child's rights against the LEA because she did not preserve that issue for appellate review. *Id.* at 938.

248. *Taylor v. Vermont Dep't of Pub. Educ.*, 313 F.3d 768 (2d Cir. 2002).

249. *Id.* at 788 n.18.

250. *Id.*

251. *Id.* at 789.

252. 20 U.S.C. § 1414(a)(1)(D) (2006).

253. *M.G. v. Crisfield*, 547 F. Supp. 2d 399 (D.N.J. 2008).

require special education and related services of any kind.²⁵⁴ The parents alleged that, thereafter, the student was suspended indefinitely from school for alleged misconduct. The parents further claimed they were told that if they did not consent to IDEA classification and an out-of-district placement, he would be placed in an elementary school for handicapped children or in another school with the equivalent of handicapped services. Plaintiffs refused these options.²⁵⁵

The parents then brought an action under section 1983, alleging a constitutional due process violation.²⁵⁶ They contended their son received inadequate pre-deprivation procedures.²⁵⁷ Moreover, they asserted a section 504 claim on the ground that the student was “regarded as” having a disability and, therefore, discriminated against.²⁵⁸ The court rejected the agency’s defense that the parents’ claims were barred by their failure to exhaust IDEA administrative remedies because the parents did not allege the student was disabled.²⁵⁹ Indeed, they vigorously contended he was not, and exercised their statutory right to refuse classification and services.²⁶⁰ Therefore, the plaintiffs could get no relief whatsoever from IDEA.²⁶¹ The court observed that this was not a situation where the parents cloaked their IDEA claims in constitutional and section 504 garb because they disavowed any disability-related benefits. In parsing their complaint, the court concluded the due process claim asserted an unlawful removal from school in the absence of adequate constitutional procedures, a right enjoyed by “*any general education student*.”²⁶² Respecting the section 504 claim, the court concluded that, like the due process claim, this section 504 “regarded as” cause of action could be brought by “*any general education student*” who

254. This relieved the school district from its obligation to convene an IEP, develop an IEP, or provide a FAPE – including special education and related services – for this student. *Id.* at 414 (citing 20 U.S.C. § 1414(a)(1)(D)).

255. *Id.* at 414.

256. *Id.* at 415.

257. *Id.*

258. *Id.* at 415-16.

259. *M.G.*, 547 F. Supp. 2d at 416-17.

260. *Id.* at 416.

261. *Id.*

262. *Id.*

claims to have been discriminated against because of a perceived disability.”²⁶³ ²⁶⁴

N. Non-FAPE Programming and Services

In *AP ex rel. Peterson v. Anoka-Hennepin Sch. No. 11*, 538 F. Supp. 2d 1125 (D. Minn. 2008), the parents of a child with Type-I diabetes attempted to enroll the five-year old in a summer day care program run by a public school district.²⁶⁵ They requested from the day care program, staff training and the grant of authorization to its staff, to operate the child’s blood-glucose meter and insulin pump, activities the parents asserted were necessary for the child to participate safely. After the district refused the requested accommodations, the parents sued the school district under section 504 and Title II of the ADA, among other statutes, for compensatory damages for refusal to grant the requested accommodations. The court rejected the district’s defense that the parents had failed to exhaust IDEA’s administrative remedies. The court observed that the parents’ claims related to a summer day care program, and not to an educational program offered by the child’s regular elementary school.²⁶⁶ In other words, in *AP*, FAPE was not an issue. Moreover, to the extent that the summer program might be construed as the equivalent of kindergarten, the court concluded that plaintiffs’ section 504 and ADA claims were only tangentially related to his education. Accordingly, the parents were not obligated to exhaust

263. *Id.* at 417 (emphasis in original).

264. Notably, the *M.G.* court rejected the parents’ claim that the school district violated the student’s rights by failing to provide him with a so-called “manifestation hearing.” *Id.* at 419. The purpose of a manifestation hearing is to determine whether a student’s misconduct is a result of the student’s disability. If so, the district is obligated to provide certain educational benefits, among other things, to the disabled child during his suspension, notwithstanding that misconduct. 20 U.S.C. § 1415(k)(1). The *M.G.* court concluded that by foregoing IDEA classification and programming the parents waived the right to claim benefits for the child under IDEA. See *M.G.*, 547 F. Supp. 2d at 418-19 (discussing, in general, manifestation procedures). In essence the court told the parents they couldn’t have it both ways.

265. *AP ex rel. Peterson v. Anoka-Hennepin Sch. No. 11*, 538 F. Supp. 2d 1125 (D. Minn. 2008).

266. *Id.* at 1152.

IDEA's administrative remedies.^{267 268}

VIII. IDEA EXHAUSTION: JURISDICTION GIVING DEVICE OR CLAIMS PROCESSING?^{269 270}

This part critically examines the majority view that courts lack subject matter jurisdiction where plaintiffs have failed to exhaust IDEA's administrative remedies, as required by sections 1415(i) and (l) of the Act. This challenge derives from a trilogy of non-IDEA exhaustion cases recently decided by the United States Supreme Court.

A. *United States Supreme Court Jurisprudence.*

In *Kontrick v. Ryan*, 540 U.S. 443 (2004) the Supreme Court held that in bankruptcy proceedings, the sixty-day time limit found in Bankruptcy Rule 4004(a) for a creditor to file a complaint objecting to the debtor's discharge is not jurisdictional, but rather is a judicially-created "claim-processing rule" that is subject to waiver and forfeiture.²⁷¹ The Court reasoned that under the bankruptcy laws, Congress provided that "objections to discharges" are "[c]ore proceedings" that are clearly within the jurisdiction of the federal courts, and that no statute curtails that jurisdiction by specifying a time limit for filing a complaint objecting to discharge.²⁷² Thus, Rule

267. *Id.*

268. See also *Spann ex rel. Hopkins v. Word of Faith Christian Ctr. Church*, 589 F. Supp. 2d 759 (S.D. Miss. 2008) (in suit against church daycare/preschool program under section 504, claim that school refused to allow autistic child to fully enroll in program solely because of his disability did not require exhaustion; plaintiff alleged "pure discrimination claim" for which IDEA offered no relief).

269. The party seeking to invoke the jurisdiction of a federal court bears the burden to establish subject matter jurisdiction. See, e.g., *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

270. "If exhaustion is a jurisdictional requirement, the district court *must* always dismiss if there has been a failure to exhaust. If exhaustion is not jurisdictional, the court must dismiss only if the issue has been properly presented for decision." *McQueen*, 488 F.3d at 873 (finding no need to decide jurisdictional issue "because there [was] no question of waiver or forfeiture by the District").

271. See *Kontrick v. Ryan*, 540 U.S. 443, 454-56 (2004).

272. *Id.* at 453-54 (quoting 28 U.S.C. § 157(b)(2)(J)).

4004(a)'s sixty-day time limit does not affect “the classes of cases falling within a court's adjudicatory authority;” that is, its subject matter jurisdiction.²⁷³

The Supreme Court in *Eberhart v. United States*, 546 U.S. 12 (2005) (per curium), followed *Kontrick* in holding that the seven-day time limit for a defendant to file a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33 was not jurisdictional.²⁷⁴ The Court explained that Rule 33, like Bankruptcy Rule 4004(a), is nothing more than an “emphatic time prescription in [a] rule[] of court” that regulates motion practice in an action – a federal criminal prosecution – over which district courts already possess subject matter jurisdiction to adjudicate.^{275 276}

Kontrick and *Eberhart* thus teach that where Congress has provided courts with jurisdiction over the claim at issue, judicial rules cannot be relied upon to abdicate that jurisdiction.²⁷⁷ In both cases, Congress had clearly provided jurisdiction over the underlying actions – an objection to discharge and a federal criminal prosecution – and the time limitations that affected the processing of those actions were not dictated by statute in a way that could affect the authority of the court to adjudicate the disputes.

B. Kontrick and Eberhart and IDEA.

The overwhelming majority of appellate courts considering the issue have concluded that failure to exhaust IDEA's administrative remedies is jurisdictional.²⁷⁸ At first blush, these decisions might

273. *Id.* at 455.

274. *See Eberhart v. United States*, 546 U.S. 12, 13 (2005) (per curium).

275. *Id.* at 18 (quoting *Kontrick*, 540 U.S. at 454).

276. In reaching its conclusion, the Court stressed that “[c]larity would be facilitated’...‘if courts and litigants used the label “jurisdictional” not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.’” *Id.* at 16 (quoting *Kontrick*, 540 U.S. at 455).

277. *See Kontrick*, 540 U.S. at 452-53 (holding, “Only Congress may determine a lower federal court's subject-matter jurisdiction.... ‘[I]t is axiomatic’ that [judicially-created] rules ‘do not create or withdraw federal jurisdiction.’ ”) (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)).

278. *See, e.g., Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1279 (10th Cir. 2007); *Fliess v. Washoe County Sch. Dist.*, 90 F. App'x. 240, 242 (9th Cir.

appear to be sound since, as illustrated in Part IV, A above, IDEA's section 1415(i) and (l) require completion of the §§ 1415(i)(1) & (i)(2) state review process before a plaintiff may obtain judicial relief under IDEA, the Constitution, section 504, ADA, or other federal laws protecting children with disabilities, where some IDEA relief is available for the conduct subject to complaint. The argument would be that although IDEA creates a series of procedural protections for disabled children as a means to ensure their "access to a free appropriate public education,"²⁷⁹ and a right to appeal that decision before a state review officer,²⁸⁰ it does not permit students or their parents to sue the moment they are dissatisfied with the outcome of any of these proceedings. Rather, IDEA grants prospective plaintiffs access to federal or state courts only at the end of the administrative process, after a "final" decision is rendered in the dispute.²⁸¹ Thus, the argument would go, courts' subject matter jurisdiction for IDEA suits is linked inextricably to the state's rendering a final decision.²⁸²

The argument would continue: IDEA makes a plaintiff's right to use the courts subject to his being "*aggrieved* by the [final] findings and decision."²⁸³ This requirement seems unambiguous, appearing to manifest a Congressional intent, for jurisdictional purposes, that the

2004) (unpublished decision); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 483 (2d Cir. 2002); *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1421 (11th Cir.1998) (per curiam), cert. denied, 525 U.S. 816 (1998); *W.B. v. Matula*, 67 F.3d 484, 491 (3d Cir. 1995); *Christopher W. v. Portsmouth Sch. Comm.*, 877 F.2d 1089, 1095 (1st Cir.1989). *See also* *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1213 (E.D. Cal. 2008) (holding that court lacked subject matter jurisdiction when plaintiff asserting section 504 claim failed to exhaust IDEA administrative remedies) (citing *Polera*, 288 F.3d 478; *Babicz*, 135 F.3d 1420); *but see* *Mosely v. Bd. of Educ. of City of Chicago*, 434 F.3d 527, 532-33 (7th Cir. 2006) (concluding that IDEA's exhaustion requirement is a claims processing rule and not a jurisdiction granting provision).

279. 20 U.S.C. § 1400(c)(3).

280. 20 U.S.C. § 1415(g).

281. *See* 20 U.S.C. §§ 1415(i)(1) & (i)(2).

282. Courts, of course, do not possess jurisdiction over claims that Congress has specified do not yet exist. *See, e.g., Bowles v. Russell*, 551 U.S. 205 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them").

283. 20 U.S.C. §§ 1415(i)(2)(A) (emphasis added).

plaintiff must assert some injury emanating from the agency's "final" decision in order to bring an IDEA-based claim into court.²⁸⁴

C. Enter Jones v. Bock.

In 2007, the Supreme Court in *Jones v. Bock*, 549 U.S. 199 (2007) addressed the relationship of administrative exhaustion rules and formal pleading obligations.²⁸⁵ It held unanimously that prison inmates' failure to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA) as an affirmative defense and not an element of an adequately stated claim under section 1983. While recognizing that under the PLRA exhaustion was mandatory before commencing a section 1983 judicial action,²⁸⁶ the *Jones* court observed that PLRA was silent on the issue whether exhaustion must be pleaded as an element of the claim, or is an affirmative defense which may be waived.²⁸⁷ According to the court, this silence is strong evidence that the usual practice of regarding exhaustion as an affirmative defense to be pleaded and demonstrated should be followed.²⁸⁸ The *Jones* court said to do otherwise would create a heightened pleading requirement, thereby departing from Rule 8's plain statement pleading standards.²⁸⁹ ²⁹⁰ Notably, the court

284. See, e.g., *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1219-20 (E.D. Cal. 2008) (holding that the court lacked subject matter jurisdiction under IDEA based on plaintiffs' failure to establish facts sufficient to show they exhausted the required administrative remedies respecting their allegation that defendants failed to produce all school records they requested, and that in meeting defendants' factual jurisdictional attack, the plaintiff must furnish affidavits and other evidence sufficient to establish the court's subject matter jurisdiction). *Id.* at 1220.

285. *Jones v. Bock*, 549 U.S. 199 (2007).

286. *Id.* at 211.

287. *Id.* at 212.

288. *Id.*

289. *Id.* Rule 8 states:

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing the pleader is entitled to relief, and (3) a demand for judgment for

expressly *rejected* the argument that PLRA exhaustion should be read into the statute as a pleading requirement since PLRA's *raison d'être* was reduction of the number of prisoner complaints clogging the federal courts, and exhaustion was the principal tool to achieve this end.

Indeed, the *Jones* court asserted that the statute's extensive addressing of exhaustion proved the opposite.²⁹¹ It simply highlighted the failure of Congress to include exhaustion among the enumerated grounds justifying dismissal upon early screening.²⁹² *Jones* means that when courts consider complaints brought under IDEA, they must apply Rule 8's "liberal" pleading standards and not require allegations concerning plaintiff's administrative exhaustion in the jurisdictional statement or as an element of the IDEA cause of action. In the same vein they must apply Rule 8's "liberal" standards to section 504, the ADA, and section 1983 claims, even where they implicate an IDEA cause of action, since these statutes do not impose a heightened pleading requirement either.

the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Id.

290. Rule 8's pleading requirements are relatively lenient upon pleaders in federal court. See *Dura Phar., Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (holding, "ordinary pleading rules are not meant to impose a great burden upon a plaintiff"). Absent an exception to Rule 8's requirements, litigants are generally required to satisfy only "notice" pleading obligations; that is, they must provide their opponent with fair notice of their claim and grounds upon which the claim rests. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, (2002); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 8 the complaint must "directly or inferentially contain allegations from which each of the material elements necessary to support a recovery under some cognizable legal theory can be discerned. See e.g., *Jordan v. Alternative Res. Corp.*, 458 F.3d 332 (4th Cir. 2006); *Snow v. Direct TV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006). The notice pleading standard does not apply in certain particular contexts. See Rule 9(b) (requiring particularity for fraud and mistake). IDEA does not contain a provision requiring extra factual detail beyond the minimal notice requirement.

291. *Jones*, 549 U.S. at 212.

292. *Id.* *Jones* was careful to point out that it did not intend to say that failure to exhaust might not be a basis to dismiss for failure to state a claim, where the complaint on – its face and taken as true – shows that the plaintiff is not entitled to relief. *Id.* at 215.

D. The Impact of Kontrick, Eberhart, and Jones on IDEA Exhaustion as a Claims Processing Rule Versus a Jurisdiction-Creating Predicate.

The *Kontrick*, *Eberhart*, and *Jones* trilogy cast into serious doubt the majority view that a plaintiff's failure to exhaust IDEA's administrative remedies is a jurisdictional defect.²⁹³ Consistent with these decisions, Congress's failure to refer in section 1415's text to administrative exhaustion and individual injury resulting from the agency's decision as establishing courts' subject matter jurisdiction, suggests strongly that the Seventh Circuit's decision in *Mosley v. Board of Educ. of Chicago*, 434 F.3d 527 (7th Cir. 2006), comports more closely with these cases than with the majority view in the circuits when it decided that failure to exhaust IDEA's administrative remedies is not a jurisdiction defect.^{294 295} This means, if a court examines a complaint brought pursuant to IDEA and dismisses it pursuant to Federal Rule of Civil Procedure 12(b)(1) – for want of

293. In *Ellenberg*, the Tenth Circuit treated a failure to exhaust IDEA's administrative remedies as jurisdictional. *Ellenberg*, 478 F.3d at 1262. Later that year, the Tenth Circuit in *McQueen*, questioned, in light of *Jones*, whether the exhaustion requirement was jurisdictional. Because the defendant in *McQueen* neither waived nor forfeited the defense, the *McQueen* court did not have to reach this issue. *McQueen*, 488 F.3d at 873. Recently, in *B.H. ex rel. K.H. v. Portage Public Sch. Bd. of Educ.*, 2009 WL 277051, at *3-4, 7, 13 (W.D. Mich. Feb. 2, 2009), the court – applying *Jones* – concluded that an IDEA exhaustion failure was not jurisdictional, but dismissed the section 504 claims anyway. The undisputed facts, established outside of the pleadings, made clear that IDEA relief was available for the injuries alleged in due process proceedings.

294. *Mosley v. Board of Educ. of Chicago*, 434 F.3d 527 (7th Cir. 2006).

295. The *Mosley* court relied on *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) and its pre-*Kontrick* decision in *Charlie F.*, in concluding that IDEA's exhaustion requirement was a claims processing rule. This means that the earliest possible time to consider a 12(b)(1) jurisdictional motion would normally be after the answer has been filed, if it is possible to decide the issue through a Rule 12(c) motion for judgment on the pleadings. *Mosley*, 434 F.3d at 533. Although there may be cases where the allegations in the complaint, even when construed most favorably to the plaintiff, might justify a dismissal under Rule 12(b)(6) for failure to state a claim based on failure to exhaust, such a disposition would not typically occur unless there was no way for plaintiff to salvage her claim. Plaintiffs have no obligation to allege facts negating an affirmative defense in their complaints. *Id.* In *Mosley*, there was nothing on the face of the complaint that compelled the conclusion that she failed to exhaust. *Id.*

subject matter jurisdiction, on ground that the plaintiff failed to plead IDEA exhaustion, that decision should be reversed on appeal.²⁹⁶ Moreover, where the LEA or SEA fails to plead affirmatively plaintiff's failure to exhaust in its answer and prove same on a summary judgment motion,²⁹⁷ or in an appropriate case, a motion on the pleadings,²⁹⁸ defendants may waive this otherwise valid IDEA defense. Finally, in light of *Jones*, courts should not dismiss an IDEA plaintiff's claim for failure to state a cause of action under Rule 12(b)(6) on the ground that plaintiff fails to assert that he/she completed IDEA's exhaustion requirements, since that would impose on plaintiff a heightened pleading obligation under circumstances not permitted by *Jones*, since IDEA's text does not establish that requirement.

E. Jurisdiction v. Claims Processing Distinction for ADA, Section 504, and Other Federal Laws Protecting the Rights of Children with Disabilities

If *Kontrick*, *Eberhart*, and *Jones* portend a re-examination of the jurisdictional versus claims processing distinction in the First, Second, Ninth, Tenth, and Eleventh Circuits for direct IDEA claims, they suggest even more strongly that claims brought under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, and "other Federal laws protecting the rights of children with disabilities" – should be subject to claims processing rules and not jurisdictional treatment.²⁹⁹ Section 1415(l) sweeps these laws into its exhaustion ambit. That provision dovetails with section 1415(i)(2)(A)'s exhaustion requirement for actions brought directly under IDEA. Both sections are silent on the question of jurisdictional prerequisites and pleading requirements. This strongly suggests that these other claims, like those under IDEA, should be subject to "claims processing," not jurisdictional treatment, under *Kontrick*, *Eberhart*, and *Jones*.

Neither section 504, the ADA, nor section 1983 contain

296. See *Mosley*, 434 F.3d at 533.

297. Fed. R. Civ. P. 56.

298. Fed. R. Civ. P. 12(c).

299. 20 U.S.C. § 1415(l).

provisions requiring administrative exhaustion and each statute has legislative origins separate from IDEA. For courts to create a jurisdictional bar for failure to exhaust IDEA-created remedies may erect obstacles not contemplated by Congress for these causes of action.³⁰⁰

IX. PROPOSALS TO REFORM THE ACT

Section 1415(l)'s provision requiring exhaustion where "relief [] is also available under [the IDEA]" means that the IDEA must offer some relief suitable to remedy part or all of the injury inflicted on the plaintiff specified in, or necessarily implied from, the complaint brought under section 504, the ADA, the Constitution, or other statutes which protect the rights of children with disabilities.³⁰¹ Courts seem to agree that for IDEA exhaustion to be required, the conduct of which a plaintiff complains must infringe on IDEA-created rights. This necessarily relates to the "identification, evaluation, educational placement of the child, [or] the provision of a free appropriate public education to such child."³⁰² This insures that whatever relief is fashioned is linked meaningfully to an IDEA and not some other injury. The operative facts underlying the complaint speak to whether the injury is tethered to IDEA for exhaustion purposes.

The relief referred to in section 1415(l) must mean declarations, orders for future conduct, reimbursement of tuition and other costs, compensatory education, IEE-related remedies, rescission of diplomas, and expunction of records. This is the only relief available in IDEA due process proceedings. It does not mean the IDEA remedy will give all that plaintiff prefers, or might be available under other statutes, but rather it will provides relief that is meaningful, within the IDEA framework, and that is not de minimus. Since the relief available through the due process mechanism may be

300. Moreover, sections 1983 and 504 were enacted prior to EAHA, the predecessor to IDEA. This gives further force to the argument that Congress would have alerted litigants to a jurisdictional bar in IDEA or by amending these other statutes, if that was what it intended.

301. 20 U.S.C. § 1415(l).

302. 20 U.S.C. § 1415(b)(3)(B). This is the predicate for invoking IDEA due process, and the hearing officer's subject matter jurisdiction. *Id.* at § 1415(b).

incomplete, relative to other viable causes of action available to the plaintiff, section 1415 permits the plaintiff to obtain such other and additional relief after obtaining a final administrative order under the state law mechanism implementing the IDEA's due process procedures.

In the same vein, where plaintiff brings a direct action under IDEA, the foregoing analysis would apply respecting section 1415(i)(2)(A)'s exhaustion requirement. The court should examine the agency's conduct for its pertinence to IDEA-created rights. If it finds that the injury alleged relates to the "identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," the plaintiff will be required to exhaust unless exhaustion is excused.

The criteria applied by the courts in exhaustion excusal disputes have been largely derived from traditional administrative law principles as to the purposes of exhaustion and from the Act's legislative history, effectively reading that history into the statute.³⁰³ There is some doubt about whether these methods for determining excusal are sound, in light of recent developments at the Supreme Court, as discussed in Part VII above.

Although IDEA's legislative history could certainly be used to

303. See, e.g., *Smith v. Robinson*, 468 U.S. 992, 1014 n. 17 (1984) (citing *Robert M. v. Benton*, 622 F.2d 370 (8th Cir. 1980); *Monahan v. Nebraska*, 491 F. Supp. 1074 (D. Neb.1980), *aff'd* in part and vacated in part, 645 F.2d 592 (8th Cir. 1981); *Howard S. v. Friendswood Indep. Sch. Dist.*, 454 F. Supp. 634 (S.D. Tex. 1978); *Armstrong v. Kline*, 476 F. Supp. 583, 601-02 (E.D. Pa. 1979), *remanded on other grounds sub nom. Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir. 1980), *cert. denied*, 452 U.S. 968, (D.C. 1981); *North v. D.C. Bd. of Educ.*, 471 F. Supp. 136 (D.D.C. 1979); *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1213 (9th Cir. 2004) (relying on "Congressional intent behind the IDEA scheme," without a specific reference, to excuse exhaustion where parent had put the SEA "on notice [via CRP] of the facially unlawful policy of providing a shortened school day for all autistic students", and the SEA declined to act); *Heldman v. Sobol*, 962 F.2d 148,158-59 & n. 11 (2d Cir. 1992) (explaining that the three recognized exceptions to exhaustion of IDEA claims – futility, a challenge to a policy of general applicability, and inadequacy of relief – derive directly from the legislative history of the Education for All Handicapped Children Act of 1975 and the Handicapped Children's Protection Act of 1986, the precursors to the IDEA); *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303-04 (9th Cir. 1992); and other cases cited in Parts IV and VI hereof; 121 Cong. Rec. 37416 (1975) (remarks of Sen. Williams) (holding, "exhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter").

argue for exceptions to the exhaustion requirement, at least where they are sufficiently particularized, *Jones* dictates a different analytic framework, one relying directly on the text of statute. Under this view, the absence of express textual authority in section 1415 explaining when exhaustion is required, and when it is excused, requires the application of tools of statutory construction which may produce results which are unpredictable, if not unsound.³⁰⁴ ³⁰⁵ Moreover, it augers confusion about courts' subject matter jurisdiction. Rather than continuing to operate in a jurisprudence of doubt, Congress should take up the gauntlet of reform and solve these important problems.

A. Delineating Excusal of IDEA's Exhaustion Requirements.

The case law reviewed in Parts IV and VI above suggests how IDEA's purposes may be more completely fulfilled. IDEA exhaustion should not be required where the agency denies parents access to IDEA's due process procedures; fails to give them written notice of IDEA due process procedures; or in emergency situations which will result in permanent and irreparable harm to the child, in the absence of immediate judicial relief. IDEA exhaustion should not be required where the child has suffered past physical injuries under the school's auspices, whether of a permanent or non-permanent nature. Although this type of claim may sometimes blend with IEP implementation review, especially respecting severely

304. See *Jones v. Bock*, 549 U.S. at 214-17 (eschewing, in PLRA context, courts overstepping established procedural rules and substituting their own notions of appropriate policy respecting administrative exhaustion). See also *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (holding, given that the PLRA does not itself require plaintiffs to plead exhaustion, such a result "must be obtained by . . . amending the Federal Rules, and not by judicial interpretation)." See also Elliot M. Davis, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y. 983 (2007) (examining statutory construction through use of legislative history, using Justices Scalia and Alito to illustrate differing approaches).

305. In *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007), even though there was no specific provision in IDEA mandating in direct and explicit terms that parents have the status of real parties in interest, the Court examined the entire text of the statute and determined parents had such rights. Notably, the Court found it unnecessary to resort to legislative history to answer the question posed. *Id.* at 521-23.

disabled children – for example, physical contact with the child in a behavioral intervention program, such claims are sufficiently independent of the IDEA framework to warrant exhaustion excusal. Moreover, exhaustion should not be required where the following occurs: the agency refuses to maintain the child in the status quo or pendency placement; class action plaintiffs seek systemic reforms, rather than individual relief; where retaliation for exercise of protected rights occurs and that retaliation does not deprive the student of his IDEA right to identification, evaluation, educational placement, or the provision of a free appropriate public education to such child; or if the state's administrative apparatus does not provide a forum to adjudicate the dispute. Exhaustion should not be required where the state's statutory and/or regulatory bodies failed to adequately implement IDEA-required policies and procedures.

In this regard, parents should not have to exhaust a process, doomed to grant no relief, on the thin reed that the court will be assisted by factual development and agency expertise from the very agency whose rules defeat the child's IDEA rights. IDEA should not compel exhaustion where the parents have exercised their IDEA-based right to refuse classification and services for the student, as expressly permitted by IDEA, and then assert non-IDEA claims in court. Moreover, exhaustion should not be required where the parties have stipulated to the classification of the child under section 504, and then the parents complain of agency non-compliance with the agreed-to services regimen under that other statute. This should be the case regardless of whether the student is possibly IDEA eligible, in light of the parties' prior agreement as to the student's status.³⁰⁶

306. The problem of issue exhaustion is more difficult, especially since parents *and* districts often appear unrepresented by attorneys at IDEA administrative proceedings. Where, for example, a party has completed the administrative process, but failed to articulate an issue – say in a list of issues it is asking the hearing officer to adjudicate – should it be permitted to raise that issue in court? This author tends to favor not permitting the parties to raise that issue, unless – in the case of parents, the LEA failed to provide adequate notice of that particular right. Raising an issue for the first time in court does violence to the purposes of exhaustion, including application of agency expertise and development of a factual record, for example. Moreover, it would also create problems in parties getting notice of what issues were being tried, how to prepare the case, and efficiency in use of resources. This view is not uniform. *See* Mark C. Weber, SPECIAL EDUCATION LAW AND LITIGATION TREATISE, 21:19 (3d ed. 2008)

Section 1415 should be amended to authorize bringing a direct action under IDEA in the enumerated circumstances listed in the preceding paragraphs. It should expressly state that exhaustion shall not be required to obtain relief in a civil action in a state court of competent jurisdiction or a district court of the United States for relief from these injuries. Each of these recommendations advances the interests of children protected by the Act, and is justified by sound policy, emanating from case law interpreting IDEA.

B. Heightened Pleading Requirement.

Nevertheless, because each of these recommendations may invite some attempts to avoid exhaustion when it should be used, section 1415 should also contain a requirement that when a civil action is brought on any of these grounds, the plaintiff must specifically state the facts giving rise to the claim. This will enable the court to determine facially whether an adequate IDEA claim is stated, which falls within these enumerated exceptions. This would create a heightened pleading obligation, analogous to Federal Rules of Civil Procedure Rule 9, which is consistent with the requirements of *Kontrick*, *Eberhart*, and *Jones*, in that its origin was Congressional. More importantly, it would create an understandable framework for parents, agencies and courts in performing their assigned roles within IDEA's framework.

C. Residue Exception to the IDEA Exhaustion Obligation.

IDEA should also create a residue form of "futility and inadequacy," which would permit avoidance of the IDEA administrative process for circumstances not included in the proposed amendments. IDEA should make available a summary proceeding whereby putative plaintiffs who claim IDEA administrative due process is futile or inadequate can engage the court by summary motion for a determination of this issue. In effect, it would be an action, brought as a motion, which the court would be required to dispose of it in short-measure; sixty days from its inception, for example, might suffice. The complaint would be accompanied by

(recommending an approach whereby the court would determine whether a "waiver of any contention or request for relief" occurred during the due process hearing).

affidavits in support of the complaint, and the answer would include responsive affidavits and other papers, as appropriate. If sufficient factual questions arise from the submissions, the court would hold a hearing forthwith, and resolve questions of fact, and decide whether it has jurisdiction to decide the case. This will produce a timely, relatively inexpensive, and expeditious solution, which preserves the respective rights of the parties, and enables IDEA's purposes to be better realized.

D. Establishing Agency Non-Compliance with Final Due Process Orders as a Basis for Federal Jurisdiction.

IDEA section 1415(i)(2)(A) authorizes an “aggrieved” party to bring a civil action in a state court of competent jurisdiction, or a federal district court, for review of a final order obtained within the due process apparatus.³⁰⁷ A party who prevails after exhausting due process is not “aggrieved” by that order. Where the agency fails thereafter to provide the relief granted administratively, a party is certainly aggrieved, but not by the final order. Thus, the Act, by its terms, fails to create the jurisdictional predicate to enforce the victory won administratively. Some of the cases reviewed have permitted enforcement actions to proceed under section 1983, recognizing implicitly or explicitly that refusing enforcement would defeat the purposes of the Act.³⁰⁸ However, the viability of the enforceability of IDEA rights through section 1983 is not free from doubt.³⁰⁹ Some

307. 20 U.S.C. § 1415(i)(2)(A) (emphasis added).

308. See, e.g., *supra* notes 151 and 154.

309. See Suzanne Solomon, *The Intersection of 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act*, 76 *FORDHAM L. REV.* 3035 (2008) (arguing that the legislative history of the 2004 amendment to IDEA section 1415 manifests a specific congressional intent that IDEA violations be addressed through section 1983); see also Mark C. Weber, *Disability Harassment in the Public Schools*, 43 *WM. & MARY L. REV.* 1079, 1113-19 (2002) (relying on legislative intent and concluding that section 1983 damage claims are available for IDEA violations and other suitable cases); Allan G. Osborne, Jr., *Can Section 1983 Be Used to Redress Violations of the IDEA? An Update*, 230 *West's EDUC. L. REPORTER* 453 (2008) (arguing that section 1983 should be reserved for egregious conduct by school officials, such as failure of school officials to implement a hearing officer's order, among other conduct, but not explaining why, in light of the prevailing authority he cites, section 1983 is available for IDEA enforcement). But see Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in*

courts have granted enforcement relief under IDEA,³¹⁰ based on the conclusion the party is aggrieved by the agency's non-compliance.³¹¹

Congress should amend IDEA section 1415 to expressly provide that a party may bring a civil action in a state court of competent jurisdiction or a United States district court to enforce any final order obtained in IDEA state due process proceedings. This would include "so-ordered" stipulations of settlement by due process hearing officers terminating the proceeding. This will allow parties to obtain relief through procedures anchored in IDEA itself, without having to speculate about what procedures may be available to enforce their rights.

E. A Bar to the Addition of Exhaustion Requirements Not Contained in Section 1415 of the Act.

Congress must also address recent developments in situations like that found in *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007). Since the parents there plainly completed the IDEA exhaustion required by section 1415(i), the court acted outside its powers in dismissing the complaint on that ground.³¹² The case should have been decided on the merits, not because the parents were correct, but rather, because under powers exercised by Congress under Article I, the court was obligated to decide the case on the merits because of its Article III responsibilities. Since some courts may want to dispose of IDEA cases for reasons not contained in the text of the statute's exhaustion provisions, Congress should address this problem when it reviews the efficacy of section 1415. In contrast to *Ellenberg*, the cases that have eschewed departure from the text of IDEA's exhaustion requirements have been decided more soundly. Following its review of section 1415's efficacy, Congress should include a provision stating that unless a requirement is contained in sections 1415(i) or (l), no additional procedural requirements shall be imposed on an aggrieved party to gain access

Special Education Law Suits, 36 GA. L. REV. 465, 499-520 (2002) (relying on legislative intent in rejecting section 1983 damage claims).

310. See *supra* notes 155 and 157.

311. *Id.*

312. *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007).

to the court for relief under the IDEA.

F. Stipulated-to Section 504 Classifications.

With respect to students classified under section 504 by agreement between the parties, parents should not be required to exhaust IDEA procedures on the issue of whether the child is eligible for IDEA classification and, thus, eligible for relief that may be available under the IDEA. Requiring exhaustion under these circumstances allows LEAs to “game” the system by claiming a student “might” be IDEA eligible, although the LEA previously admitted otherwise, implicitly or explicitly, by reason of its prior section 504 classification of the child.

G. Direct Enforcement of Final State Complaint Procedure/CRP Orders.

In terms of state complaint procedures/CRP, section 1415 should be amended to (a) recognize final orders resulting from such proceedings, and (b) permit direct enforcement actions where a final state agency decision has been rendered on the issue in dispute.

H. Amending the Procedural Safeguards Notice.

IDEA’s requirements for notice of its Part B procedural safeguards are contained in its implementing regulations. They require transmission of such notice to parents and others at designated, meaningful intervals related to decision making about the child.³¹³ Such notices must contain pertinent information about hearings on due process complaints, including information about disclosure of evaluation results and recommendations. Furthermore, where applicable, Tier-II appeals; civil actions, including the time period within which to file such actions; and attorneys’ fees should be included.³¹⁴ If Congress includes the proposed section 1415

313. See 34 C.F.R. § 300.504(c) (2008).

314. *Id.* IDEA also requires prior written notice whenever it proposes to or refuses “to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. *Id.* at § 300.503(1)-(7).

amendments in the Act, it should also require LEAs and SEAs to include the new rules in their procedural safeguard notices. The Department of Education should promulgate regulations containing model procedural safeguard notices, in plain language, explaining when use of the due process mechanism is mandated and when direct actions, in derogation of ordinary exhaustion will be permitted. By including these items as enumerated exceptions to ordinary exhaustion, in the procedural safeguards notice, parties should be adequately informed of what they must do and when they must do it in order to preserve their IDEA-based rights. This notice should feature a statement informing the parties of the specific risks attendant to issue waivers and failures to establish at due process, facts sufficient to meet their respective burdens of proof. It should also advise parents that, as a prerequisite to a federal court's jurisdiction, an agreement reached between the parties must be approved by the hearing officer.³¹⁵

315. In *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375 (1994), a case was removed from state to federal court based on diversity jurisdiction and was then settled. The federal court dismissed the case with the consent of the parties, pursuant to Rule 41 of the Federal Rules of Civil Procedure. *Id.* at 376-77. Subsequently, when the defendant did not meet the terms of the settlement, the plaintiff sought to invoke federal jurisdiction. The Supreme Court ruled that it lacked authority to hear the matter. *Id.* at 378-82. The Court explained that there was no case properly before the federal court, and the enforcement action would require a separate suit that properly invoked the federal jurisdiction of the Court. *Id.* The Court observed that the situation would have been different if there had been a clause in the settlement that provided for the continuing jurisdiction of the federal court to enforce its incorporation into the court's order of dismissal. *Id.* In *A.R. ex rel. R.V. v. New York City Department of Education*, 407 F.3d 65, 76 (2d Cir. 2005), the court held that a settlement agreement "so ordered" and entered by an IDEA administrative hearing officer was sufficient to confer prevailing party status on the parents for purposes of obtaining in federal court a fee award under the IDEA. These rather complex requirements are almost certainly going to be a trap for the unwary, especially the *pro se* parent. Clauses creating enforcement jurisdiction in federal courts for IDEA settlement agreements should be made *pro forma*. This could be achieved by statutory forms incorporating *Kokkonen's* requirements and giving notice of such forms in the mandated IDEA parental notices. For an interesting review of *Kokkonen*, see Morton Denlow, *Federal Jurisdiction in the Enforcement of Settlement Agreements: Kokkonen Revisited*, 2003 FED. CTS. L. REV. 2 (2003) (discussing jurisdictional prerequisites and proposal model forms contemplating maintenance of federal jurisdiction).

I. Establishment of Unambiguous Jurisdictional Requirements

Courts “lack[] authority to create equitable exceptions to jurisdictional requirements.”³¹⁶ In light of *Jones*, it appears that IDEA exhaustion is not a jurisdictional prerequisite, although this view runs contrary to the majority view in the circuits. The jurisdictional question will remain an open one until the circuits apply *Jones* to IDEA, the Supreme Court resolves this issue, or Congress acts to fix the problem.

Since *Jones*, it is an open question as to whether, when required, the failure to exhaust IDEA’s administrative remedies creates a jurisdictional bar to bringing a civil action under IDEA and other federal laws which protect children with disabilities. In addressing this issue, Congress should amend section 1415 and treat the failure to exhaust IDEA administrative remedies as a jurisdictional requirement, subject to the enumerated exceptions proposed in this article. If plaintiff fails to establish the right to use the courts, the case should be dismissed for want of subject matter jurisdiction, and the plaintiff will be relegated to IDEA due process procedures.

If plaintiff’s jurisdictional allegations under this scenario initially satisfy the new heightened pleading requirement, but later prove insufficient factually, the complaint will be subject to dismissal after defendant answers the complaint, in a motion for summary judgment or on the pleadings. Since the jurisdictional facts alluded to will always remain in the case, and since the court can always dismiss for want of jurisdiction, even on appeal, this will not deprive defendant of opportunities to deny plaintiff access to the court if plaintiff should not be there. On the contrary, relief for the specified injuries for which exhaustion is not required will enable plaintiff to avoid an arduous, unnecessary, and unjust burden where immediate relief is needed, re-exhaustion is unproductive or inadequate, or the due process procedure cannot grant relief for the conduct of the agency and its actors.

316. See *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

X. SUMMARY

Enacted through Congress's Spending Clause powers, IDEA provides fifty state jurisdictions with federal money in exchange for implementing the Act's requirements. When parents contend their children are being denied a Free Appropriate Public Education (FAPE) or other IDEA benefits to which they or their children are entitled, they may initiate administrative proceedings (due process) prescribed by the Act. These must ordinarily be completed before parents may sue in court to obtain relief available under IDEA, or other federal statutes, which protect the rights of children with disabilities where relief for those injuries is available under IDEA.

Congress has failed to particularize in the text of section 1415 when exhaustion is required and when it is excused, and how the failure to exhaust, when required, affects courts' subject matter jurisdiction. One consequence of this legislative failure is that approximately 20%-21% of IDEA litigation brought in federal and state courts involves issues of administrative exhaustion. Because of these statutory gaps, courts have often relied on traditional administrative law principles and the Act's legislative history to ascertain Congress's intent. In construing exhaustion obligations and jurisdictional prerequisites, resorting to these interpretive sources may be unreliable and unsound methodologically, especially in light of recent Supreme Court cases giving less weight to such sources and placing greater emphasis on statutory text.

These ambiguities require a Congressional fix to section 1415. This article proposes remedies for these deficiencies. The proposed remedies include the following: Enumeration in the text of the statute situations where exhaustion should be excused; establishing a heightened pleading requirement when plaintiffs claim they have satisfied a statutory ground for excusal; creating of a residue exception for instances where exhaustion should be excused on equitable grounds, and procedures for expediting such proceedings; establishing agency non-compliance with final due process orders as a basis for federal courts' jurisdiction under the IDEA, thereby making such party "aggrieved" within the meaning of IDEA; creating a bar in section 1415 to courts creating additional exhaustion requirements not contained in IDEA's text; permitting direct actions under section 504, where the parties have stipulated to the student's status as "504 disabled" under that provision, irrespective of whether

the child might be IDEA eligible; granting federal court enforcement jurisdiction for final state complaint procedure/CRP directives, and where the parties stipulate to facts sufficient for a federal court to apply the law; amending the procedural safeguards notice to incorporate the above revisions, and including explanations of the consequences of settling cases without the benefit of a due process hearing officer's imprimatur, and how to obtain an order recognizing the settlement by such officer sufficient to invoke the jurisdiction of the federal court for enforcement purposes. Finally, the amendments should establish unequivocally that failure to satisfy section 1415's exhaustion requirements goes to the court's subject matter jurisdiction. These legislative changes will enable agencies, parents, and the courts to better understand their respective roles in bringing to fruition the Act's purpose of furnishing an appropriate education to children with disabilities.

XI. CONCLUSION

IDEA's section 1415 requires Congressional review and an amendment respecting its exhaustion and jurisdictional requirements. In light of recent Supreme Court decisions, this need is revealed by both a growing body of IDEA litigation over the last decade, of which 20%-21% has consistently involved issues of administrative exhaustion, and uncertainty about the effects of failure to exhaust, when required, on courts' subject matter jurisdiction. These amendments should include particularized statements in the statute's text concerning when exhaustion is excused. This will help clarify when direct civil actions to enforce the Act's provisions concerning a Free Appropriate Public Education and other IDEA rights are permitted, as well as when direct actions under other federal statutes protecting disabled children may be commenced, without first resorting to IDEA's administrative remedies. This article enumerated specific proposals to accomplish that purpose.

In this regard, IDEA's pleading requirements should be amended to enable courts to determine at the outset whether they should adjudicate such disputes, including those exceptions to the exhaustion requirements proposed in this article. The IDEA's text should be amended to expressly establish clear jurisdictional prerequisites, something not adequately addressed in the current statute. These amendments should include heightened pleading

requirements for establishing excusal of IDEA's exhaustion requirements. By including these amendments in IDEA's notice provisions, the result will better inform parents and other interested persons of the role of the courts and the agencies in adjudicating IDEA disputes. These legislative changes will enable agencies, parents, and the courts to better understand their respective roles in bringing to fruition the Act's purpose in furnishing an appropriate education to children with disabilities.

XII. APPENDIX A – GLOSSARY OF TERMS

These terms are part of a much larger array of acronyms and vocabulary related to this complicated subject:

- ADA (Americans with Disabilities Act): This is a federal law prohibiting discrimination against individuals with disabilities. Title II of the ADA applies to public education and has been applied to public school students.

- Compensatory education: Although not expressly identified as a remedy under IDEA, it refers to services above and beyond those normally provided to the student to make up for deficiencies in the provision of a FAPE by the agency. It may also be a remedy for deficiencies in services under section 504.

- EAHCA or EHA (Education for all Handicapped Children Act): Enacted in 1975, as Public Law 94-142, it is the predecessor to the current IDEA federal special education legislation.

- ESY (extended school year programming): Special education programming that extends beyond the traditional 180-day school year.

- FAPE (free appropriate public education): This is the yardstick by which the adequacy of a child with a disability's program under IDEA will be measured. It includes special education and necessary related services provided, without charge, in conformity with state standards and a student's IEP.

- IEP (individualized education program): This is a written plan embodying IDEA program content requirements, particularized for each child in special education.
- IAES (interim alternative educational setting): The placement for a child with a disability for up to forty-five days, based upon specific weapon or drug offenses occurring in the school setting, authorized by IDEA itself. IDEA also authorizes a hearing officer to place a student with a disability in an IAES if the student determines the district has demonstrated, by substantial evidence, that maintaining the student's current placement is substantially likely to result in injury to the child or others.
- IEE (independent educational evaluation): An evaluation of a child by a qualified non-school district employee that parents may obtain, as a right under the IDEA, when the parents disagree with the evaluation of the agency.
- LEA (local educational agency): A public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district or other political subdivision of the State, or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools.
- LRE (least restrictive environment): This is an IDEA mandate which states that school districts maximize the disabled child's contact with nondisabled children, to the extent appropriate in implementing the child's educational plan.
- Manifestation determination: The evaluation of the relationship between a student's disability and act of misconduct that must be undertaken when a district proposes to take specified serious disciplinary actions. The same review is required under section 504 in connection with disciplinary actions that constitute a significant change in

educational placement.

-NCLB (No Child Left Behind Act of 2001): Legislation reauthorizing the Elementary and Secondary Education Act. It overhauled existing federal efforts to support elementary and secondary education and was designed around four essential components: accountability for results; an emphasis on scientific research; expanded parental options; and expanded local control and flexibility.

-OSEP (United States Office of Special Education Programs): This is the part of the United States Department of Education which administers the IDEA.

-SEA (state educational agency): This term is used to designate the final state administrative level of review in IDEA due process proceedings between parents and school districts. Generally, such review is required before parents or school districts are permitted, under IDEA, to obtain judicial review. SEA is used as well to refer to the state agency performing executive functions in carrying out state obligations under the IDEA.

-“Section 504” [of the Rehabilitation Act]: This statute, enacted by Congress in 1973, commonly referred to as “section 504,” prohibits recipients of federal financial assistance, including public schools, from discriminating against otherwise qualified individuals with disabilities, solely on that basis. Although it is an antidiscrimination statute, section 504 has been interpreted by the USDOE and the courts, to include a FAPE requirement.

-USDOE or DOE (United States Department of Education): This is the administrative agency charged with oversight of the various federal education laws.