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## Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities

Mark C. Weber

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# Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities

By Mark C. Weber\*

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*Much has been written about procedures and remedies under the Individuals with Disabilities Education Act, but few scholars have explored procedural rights and corresponding mechanisms of administrative and judicial relief for victims of public schools' violations of children's rights under section 504 of the Rehabilitation Act of 1973 and title II of the Americans with Disabilities Act. This paper will discuss the administrative procedures that must be followed in hearings regarding complaints of violations of those laws by public school districts and the relief that hearing officers and courts may provide. It will begin with an update on developments regarding eligibility and substantive protections under section 504 and title II, then take up administrative process matters, including hearing officer impartiality, demands to examine and cross-examine witnesses, and judicial review of administrative decisions. Finally, it will consider remedies that may be ordered by hearing officers and courts. This paper builds on the earlier research of the author and of other writers, who have developed theories about how section 504 and title II should be applied to students in public elementary and secondary schools. Recent developments, most significantly the ADA Amendments Act and the Mark H. litigation in the Ninth Circuit, will have a major effect on section 504 and title II cases. However, the Amendments Act and the Mark H. decisions are merely the starting point for a new area of legal development that may have great significance for the administrative law judiciary.*

Section 504 of the Rehabilitation Act of 1973<sup>1</sup> and title II of the Americans with Disabilities Act (ADA)<sup>2</sup> protect public school

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\* Vincent dePaul Professor of Law, DePaul University. B.A. Columbia, J.D. Yale. Many thanks to my co-panelist, Robert Garda, and to all who organized and participated in the Special Education Law Symposium at Pepperdine University School of Law. Special thanks to my research assistants, Elizabeth Powell and Rachel Milos. © Mark C. Weber 2012.

<sup>1</sup> 29 U.S.C. § 794 (2006). The law protects otherwise qualified individuals with a disability against exclusion from participation in, denial of benefits of, and discrimination under, programs or activities receiving federal financial assistance. *Id.*

<sup>2</sup> 42 U.S.C. §§ 12131–12150 (2006). The law protects qualified individuals with a disability against exclusion from participation in, denial of

children who have disabilities. To obtain remedies under those laws, however, children and their parents frequently must resort to hearing procedures before members of the administrative law judiciary. Much has been written about procedures and remedies under the Individuals with Disabilities Education Act (IDEA).<sup>3</sup> But little has been written about procedures and remedies under section 504 and the ADA,<sup>4</sup> leaving the scholarship in the area underdeveloped.<sup>5</sup> This

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benefits of, and discrimination under, services, programs, or activities of state and local government. *Id.* § 12132.

<sup>3</sup> 20 U.S.C. §§ 1400–1482 (2006). A sampling of recent work on IDEA procedures and remedies includes: Sonja Kerr, *Mediation of Special Education Disputes in Pennsylvania*, 15 U. PA. J.L. & SOC. CHANGE 179 (2012); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413 (2011); Jon Romberg, *The Means Justify the Ends: Structural Due Process in Special Education Law*, 48 HARV. J. ON LEGIS. 415 (2011); Mark C. Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 LOY. L.A. L. REV. 641 (2010); Perry A. Zirkel, *Case Law for Functional Behavioral Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175 (2011); T. Daris Isbell, Note, *Distinguishing Between Compensatory Education and Additional Services as Remedies Under the IDEA*, 76 BROOK. L. REV. 1717 (2011); Natalie Pyong Kocher, Note, *Lost in Forest Grove: Interpreting IDEA's Inherent Paradox*, 21 HASTINGS WOMEN'S L.J. 333 (2010); Brianna L. Lennon, Note, *Cut and Run? Tuition Reimbursement and the 1997 IDEA Amendments*, 75 MO. L. REV. 1297 (2010).

<sup>4</sup> Damages remedies under section 504 and the ADA have received some development. See, e.g., Sarah Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue*, 1992–93 ANN. SURV. AM. L. 419 (1994); Paul M. Secunda, *At the Crossroads of Title IX and a New "IDEA": Why Bullying Need Not Be "a Normal Part of Growing Up" for Special Education Children*, 12 DUKE J. GENDER L. & POL'Y 1, 31 (2005) (discussing redress for bullying under section 504 and the ADA); Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83 (2002). Of the remaining commentary, much concerns eligibility for and accommodations in athletics. See, e.g., James P. Looby, *Reasonable Accommodations for High School Athletes with Disabilities: Preserving Sports While Providing Access for All*, 19 SPORTS LAW. J. 227 (2012); Tessie E. Rose & Dixie Snow Huefner, *High School Athletic Age-Restriction Rules Continue to Discriminate Against Students with Disabilities*, 196 WEST'S EDUC. L. REP. 385 (2005); Kimberly M. Brown, Comment, *Leveling the Playing Field: A Commentary on the Impact of High School Athletic Eligibility Requirements on Students with Learning Disabilities*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 255 (2008) Brooke A. Fredrickson, Note, *The Age Nineteen Rule and Students with Disabilities: Discrimination Against Disabled Students with Athletic Ability*, 25 T.

article seeks to close the gap in the commentary and contribute to the scholarly dialogue on procedural and remedial issues in cases involving public schoolchildren who are making claims that their rights under section 504 and the ADA have been violated.

It is an apt time for this dialogue to take place. Although school districts are growing progressively more resistant to identifying children as entitled to the protections of IDEA,<sup>6</sup> Congress has recently extended the coverage of section 504 and the ADA to large numbers of children through the redefinition of “individuals with disabilities” in the ADA Amendments Act of 2008, effective January 1, 2009.<sup>7</sup> The ADA Amendments Act overturns Supreme Court precedent that had narrowed the coverage of the ADA and section 504, provides that impairments are to be considered in their unmitigated state when determining if an individual has a disability, and greatly expands the definition of major life activities provided in the statute’s coverage provision.<sup>8</sup> In the past, section 504 and the ADA have typically been used as supplemental causes of action in cases involving children in the public schools, frequently being

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JEFFERSON L. REV. 635 (2003).

<sup>5</sup> Professor Zirkel’s work is a notable exception, and will be discussed at various points in this Article. An article of mine that takes up the issues in brief following a longer discussion of substantive entitlements under the two statutes is Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. ON C.L. & C.R. 1 (2010).

<sup>6</sup> Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 102–22 (2009); see *Anello v. Indian River Sch. Dist.*, 355 F. App’x 594 (3d Cir. 2009) (upholding summary judgment in favor of school district on claim that child should have been found IDEA-eligible earlier, noting child’s success under section 504 plan); *Brado v. Weast*, No. CIV. PJM 07-2696, 2010 WL 333760 (D. Md. Jan. 26, 2010) (holding that child with section 504 plan was not eligible under IDEA); *A.J. v. Bd. of Educ.*, 679 F. Supp. 2d 299 (E.D.N.Y. 2010) (holding child with Asperger’s syndrome ineligible on ground that academic performance was satisfactory); *Chase v. Mesa County Valley Sch. Dist. No. 51*, No. CIV.A. 07-CV-00205RE, 2009 WL 3013752 (D. Colo. Sept. 17, 2009) (holding that child maintaining average grades was properly terminated from special education); *E.M. v. Pajaro Valley Unified Sch. Dist.*, No. C 06-4694 JF, 2009 WL 2766704 (N.D. Cal. Aug. 27, 2009) (holding child continually at risk of grade retention not eligible on basis of learning disability).

<sup>7</sup> ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (amended 2008) [hereinafter *ADA Amendments Act*].

<sup>8</sup> See *infra* text accompanying notes 21–35 (describing expansion of coverage of ADA in ADA Amendments Act).

asserted when a student who is eligible for services under IDEA wants compensatory damages relief.<sup>9</sup> In addition, in the words of Professor Zirkel, “Section 504 is often used as a consolation prize in the wake of a determination of non-eligibility for an IEP [individualized education program] under the IDEA.”<sup>10</sup> As the “consolation prize” becomes the prize itself, the rules and object of the contest will become progressively more important.

Upon analyzing the relevant statutory and regulatory provisions, this Article will conclude that section 504 and the ADA require school districts to afford significant procedural protections to students with disabilities, and that hearing officers and courts may award a wide range of remedies in section 504 and ADA cases. The text of the applicable section 504 regulation affords the basic right to a hearing; due process principles provide support for the implication of specific rights regarding impartiality, examination of witnesses, and other topics, even if the procedural protections are not all that parties might desire. Remedies in section 504 and ADA cases include compensatory damages and attorneys’ fees, although hearing officers may not be able to award them under state law and practice; courts will need to provide these remedies in follow-up litigation. Other remedies should be freely available through the administrative hearing process, such as orders for future conduct, tuition reimbursement, records amendments, and additional equitable relief. Recent developments, including the ADA Amendments Act and the *Mark H.* litigation in the Ninth Circuit,<sup>11</sup> significantly affect section 504 and title II rights. However, the Amendments Act and the *Mark H.* decisions are merely the starting point for a new area of legal development that may have great significance for the work of the administrative law judiciary.

Parts I and II of this Article provide background by describing and updating the law pertaining to coverage of public school children under section 504 and the ADA (Part I) and entitlements under the two statutes (Part II). Part II will place emphasis on the right to

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<sup>9</sup> See *infra* text accompanying notes 172–183 (discussing damages relief under section 504 and ADA).

<sup>10</sup> Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J. L. & EDUC. 407, 414 (2011).

<sup>11</sup> *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), *appeal after remand*, *Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010).

services that meet the needs of children with disabilities as adequately as the needs of other children are met. Part III discusses procedures at length, considering service plans, hearing officer impartiality, examination of witnesses at hearing, and judicial review. Part IV takes up remedies, including compensatory damages, tuition reimbursement and orders for future conduct, and attorneys' and expert witness fees.

#### I. COVERAGE OF CHILDREN UNDER SECTION 504 AND THE ADA

Under section 504 and the ADA, disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.<sup>12</sup> More than a decade ago, the Supreme Court held that this definition should be read narrowly<sup>13</sup> and that impairments must be evaluated in their mitigated state, only after considering any medical intervention or other mechanisms, including those of the body's own systems,<sup>14</sup> that the individual applies to reduce the effect of the impairments.<sup>15</sup> It held that the "regarded as" provision applies only if an employer or entity subject to the ADA incorrectly believes that a person has a physical or mental impairment that substantially limits one or more major life activities or erroneously believes that an actual impairment substantially limits one or more major life activities.<sup>16</sup> According to the Court, to be substantially limited in the major life activity of performing manual tasks, an individual had to be prevented or severely restricted "from doing activities that are of central

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<sup>12</sup> 29 U.S.C.A. § 705(9)(B) (West 2012), 34 C.F.R. § 104.3(j) (2012) (section 504); 42 U.S.C.A. § 12102(2) (West 2012) (ADA).

<sup>13</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) ("[T]hese [definitional] terms need to be interpreted strictly to create a demanding standard for qualifying as disabled . . .").

<sup>14</sup> An example would be the unconscious correction that the brain makes when a person has unequal vision in the two eyes. See *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999).

<sup>15</sup> *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>16</sup> *Id.* at 489.



importance to most people's daily lives" and the restriction had to be "permanent or long term."<sup>17</sup> Other courts adopted further restrictive readings of the definitional provisions.<sup>18</sup> Commentators complained that the interpretations of the ambiguous definitional terms contradicted the ADA's legislative history<sup>19</sup> and that the Court's approach created a dilemma for claimants: the more a person did to minimize the effects of an impairment and become better able to perform a job, to use government services, or to take advantage of public accommodations, the more likely the person was to be excluded from the protections of the Act.<sup>20</sup>

The ADA Amendments Act, passed in 2008 and effective on January 1, 2009, changes the definitional terms of the ADA and section 504.<sup>21</sup> It explicitly disapproves the major Supreme Court cases that limited the coverage of the ADA and section 504.<sup>22</sup> It declares that the definition of disability "shall be construed in favor of broad coverage of individuals,"<sup>23</sup> and that the intent of Congress is "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," rather than whether an impairment meets the definition of a disability.<sup>24</sup> Making the legislative disapproval of the Supreme Court's views more concrete, the statute provides: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,"<sup>25</sup> and the determination whether an impairment substantially limits a major life

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<sup>17</sup> *Williams*, 534 U.S. at 198.

<sup>18</sup> See Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 994–95 (2008) (collecting authorities); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L. J. 187, 200–01 (2010) (collecting additional authorities).

<sup>19</sup> See Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000).

<sup>20</sup> See Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321, 342 (2000).

<sup>21</sup> *ADA Amendments Act*, *supra* note 7.

<sup>22</sup> *Id.* § 2(b)(2)–(5).

<sup>23</sup> *Id.* § 4(a) (adding ADA § 3(4)(A)).

<sup>24</sup> *Id.* § 2(b)(5).

<sup>25</sup> *Id.* § 4(a) (adding ADA § 3(4)(D)).



activity is to be made “without regard to the ameliorative effects of mitigating measures,”<sup>26</sup> apart for ordinary eyeglasses or contact lenses.<sup>27</sup> Examples of mitigating measures to be disregarded are medication, hearing aids, cochlear implants, mobility devices, assistive technology, “reasonable accommodations or auxiliary aids or services,” as well as “learned behavioral or adaptive neurological modifications.”<sup>28</sup>

The Amendments Act sets out a nonexclusive list of major life activities drawn from examples previously found in regulations promulgated under the ADA, but expanded to include sleeping, reading, concentrating, thinking, and communicating, plus performing manual tasks, seeing, hearing, eating, walking, speaking, learning, and working.<sup>29</sup> The term “major life activities” is further defined to cover operation of major bodily functions, such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”<sup>30</sup> A person meets the definition of being regarded as having an impairment that substantially limits a major life activity if the person establishes that he or she has been subjected to a prohibited action “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”<sup>31</sup>

The definitional changes in the Amendments Act dramatically expand the coverage of the ADA and section 504 with respect to elementary and secondary students. Children who achieve an adequate level of educational performance, but who need medical and other therapies or supplemental devices, aids, or services as they do so, are now covered by section 504 and the ADA, as long as their

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<sup>26</sup> *ADA Amendments Act*, *supra* note 7, at § 4(a) (adding ADA § 3(4)(E)(i)).

<sup>27</sup> *Id.* (adding ADA § 3(4)(E)(ii)). Low-vision devices do not count as ordinary eyeglasses or contact lenses. § 3(4)(E)(i)(I).

<sup>28</sup> *Id.* (adding ADA § 3(4)(E)(i)(III), (IV)).

<sup>29</sup> *Id.* (adding § 3(2)(A)).

<sup>30</sup> *Id.* (adding § 3(2)(B)).

<sup>31</sup> *ADA Amendments Act*, *supra* note 7, at § 4(a) (adding ADA § 3(3)(A)). This provision does not apply if the impairment is “transitory and minor”; “[a] transitory impairment is an impairment with an actual or expected duration of 6 months or less” under the ADA’s new § 3(3)(B).

impairments would substantially limit a major life activity if the impairments were not mitigated.<sup>32</sup> The list of major life activities now explicitly includes several activities that are closely tied into education: reading, concentrating, thinking, and communicating, as well as hearing, speaking, and learning.<sup>33</sup> The “operation of a major bodily function” provision expands the law’s coverage to many children with serious medical conditions even if the conditions are satisfactorily treated.<sup>34</sup> The bar for what is embraced by the term “substantially limits” is now much lower as well.<sup>35</sup>

IDEA’s more restrictive coverage provisions remain unchanged, so the Amendments Act creates the likelihood there will be a large class of children eligible under the ADA and section 504 who are not covered by IDEA. Though eligibility of a child under IDEA may not automatically establish coverage under section 504 and the ADA, non-coverage under section 504 and the ADA of a child covered under IDEA is exceedingly unlikely. To be eligible under IDEA, a child must have one or more specified conditions, any of which constitutes a physical or mental impairment within the meaning of section 504 and the ADA.<sup>36</sup> For all but specific learning disabilities, for which the requirement seems to be implied, the impairment has to adversely affect educational performance; for all impairments, the condition must cause a need for special education and related services.<sup>37</sup> An adverse effect on educational performance appears to be the same thing as a limit on the major life activity of learning.<sup>38</sup> And if the adverse effect is so great that it causes the

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<sup>32</sup> *Id.* (adding ADA § 3(4)(E)).

<sup>33</sup> *Id.* (adding ADA § 3(2)(A)).

<sup>34</sup> *Id.* (adding ADA § 3(2)(B)).

<sup>35</sup> *Id.* § 2(a)(7)-(8), (b)(4)-(6).

<sup>36</sup> 20 U.S.C.A. § 1401(3)(A)(i) (West 2012) (“intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities”). The test for children aged three to nine is less specific. *Id.* § 1401(3)(B)(i).

<sup>37</sup> *Id.* § 1401(3)(A)(ii); 34 C.F.R. § 300.8(c) (2012).

<sup>38</sup> Some states have adopted rules demanding that there be a significant adverse effect on the child’s educational performance for the child to be eligible under IDEA. *See, e.g., J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 67 (2d Cir. 2000) (applying Vermont provision requiring functioning significantly below expected

child to need special education and related services, it would constitute a substantial limit either on learning or on another major life activity such as reading, concentrating, hearing, speaking, thinking, or communicating, at least if the impairment is evaluated in its unmitigated state. Hence the child would be covered under section 504 and the ADA.

## II. ENTITLEMENTS UNDER SECTION 504 AND THE ADA

Other writing of mine discusses the obligations of school districts and correlative entitlements of public school children under section 504 and the ADA.<sup>39</sup> A brief recapitulation of that topic may help to set the stage for the discussion of procedures and remedies, and it will provide an occasion to consider a few new authorities and clear the underbrush of some old ones. The current discussion comprises a description of authorities establishing the section 504 requirement of meeting the needs of children with disabilities as adequately as the needs of other children are met, then a critical examination of cases equating the section 504-ADA standard with that applied in IDEA disputes, and finally, consideration of cases that require plaintiffs in section 504-ADA actions to show intentional conduct on the part of defendants.

### A. *Meeting Needs as Adequately as Needs of Others Are Met*

Title II of the ADA contains a broad prohibition on disability discrimination,<sup>40</sup> a provision stating that the remedies, procedures, and rights under the title are to be those that relate to section 504,<sup>41</sup> and a delegation of regulatory authority to the Attorney General with a directive to make the regulations consistent with those promulgated under section 504.<sup>42</sup> The Attorney General's regulations forbid

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age or grade norms). In my view, these standards imposing restrictions beyond what is in IDEA violate the federal statute. *See Weber, supra* note 6, at 118–19. Nevertheless, where a child meets such an enhanced standard, the conclusion that there is coverage under section 504 and ADA coverage seems certain.

<sup>39</sup> *See Weber, supra* note 5, at 9–21.

<sup>40</sup> 42 U.S.C.A. § 12132 (West 2012).

<sup>41</sup> *Id.* § 12133.

<sup>42</sup> *Id.* § 12134(a)–(b).

discrimination using broad language,<sup>43</sup> and contain elaborate provisions regarding accessibility of facilities,<sup>44</sup> but delegate to the Department of Education the responsibility for implementing compliance procedures relating to elementary and secondary education.<sup>45</sup>

Regulations promulgated under section 504, which predate the ADA, require all recipients of federal funding that operate a public elementary or secondary education program to provide a free, appropriate public education to each child in the recipient's jurisdiction covered by section 504.<sup>46</sup> The section 504 regulations define appropriate education as "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements" of Department of Education regulations regarding educational setting, evaluation and placement, and procedural safeguards.<sup>47</sup> The requirement of meeting needs as adequately as the needs of children without disabilities are met furnished the standard for appropriate education used by the lower courts in *Board of Education v. Rowley*.<sup>48</sup> The Supreme Court, however, rejected that interpretation as going beyond the requirements of the statute that is now IDEA.<sup>49</sup> The expansion of section 504-ADA coverage in the ADA Amendments Act, creating a conspicuous class of children covered by section 504 but not IDEA, has directed new attention to the as-adequately-met standard.<sup>50</sup>

Earlier writing of mine on this topic discusses *Mark H. v. Lemahieu*<sup>51</sup> and *Lyons v. Smith*,<sup>52</sup> which both establish that the as-

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<sup>43</sup> 28 C.F.R. § 35.149 (2012).

<sup>44</sup> *Id.* §§ 35.150–152.

<sup>45</sup> *Id.* § 35.190(b)(1).

<sup>46</sup> 34 C.F.R. § 104.33(a) (2012). The section 504 regulations also forbid unnecessary segregation, unjustified disparate-impact discrimination, refusal to furnish comparable academic and nonacademic facilities and settings, and failure to provide reasonable accommodation. *See id.* §§ 104.4, 104.34.

<sup>47</sup> *Id.* § 104.33(b)(1).

<sup>48</sup> 458 U.S. 176 (1982).

<sup>49</sup> *Id.* at 198 n. 8.

<sup>50</sup> *See Weber, supra* note 5, at 3.

<sup>51</sup> 513 F.3d 922 (9th Cir. 2008).

adequately-met language of the regulation is to be given a straightforward reading. Under those cases, the language entails comparing the depth and quality of services provided children without disabilities with those provided children with disabilities, and requires that the children with disabilities not come out on the short side of the comparison.<sup>53</sup> Moreover, according to the Office for Civil Rights of the United States Department of Education, the section 504 appropriate education duty does not incorporate a cost limit, as might be suggested by a “reasonable accommodation” standard, but instead such a limit applies only to post-secondary education.<sup>54</sup>

Two more recent authorities merit discussion here. One is *Mark H. v. Hamamoto*, the appeal after remand of *Mark H. v. Lemahieu*.<sup>55</sup> In the *Mark H.* litigation, parents contended that their two daughters, both of whom had autistic conditions, were denied adequate services by the public schools in Hawaii for a protracted period of time.<sup>56</sup> A hearing officer found that the children were denied appropriate education in violation of IDEA and ordered prospective relief.<sup>57</sup> The parents then filed suit for damages, asserting that the failure to provide adequate services before the hearing and implementation of relief under IDEA constituted a violation of section 504.<sup>58</sup> The district court granted summary judgment against the plaintiffs, holding that there is no section 504 cause of action for violation of the right to appropriate education, and that IDEA is the exclusive avenue for claims that fall within its scope.<sup>59</sup> In the *Lemahieu* decision, the Ninth Circuit reversed the district court, ruling that IDEA is not an exclusive remedy<sup>60</sup> and that the appropriate education duty under IDEA is not identical with that

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<sup>52</sup> 829 F. Supp. 414, 419 (D. D.C. 1993).

<sup>53</sup> Weber, *supra* note 5, at 11–14.

<sup>54</sup> Letter to Zirkel, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 134 (1993).

<sup>55</sup> *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), *appeal after remand*, *Mark H. v. Hamamoto*, 620 F.3d 1090 (9th Cir. 2010).

<sup>56</sup> *See generally supra* note 11.

<sup>57</sup> *Lemahieu*, 513 F.3d at 928.

<sup>58</sup> *Id.* at 930.

<sup>59</sup> *Id.* at 931.

<sup>60</sup> *Id.* at 934–35.

under section 504.<sup>61</sup> The court stated that the section 504 standard requires “a comparison between the manner in which the needs of disabled and non-disabled children are met . . . .”<sup>62</sup> Because the parents, like the school system, incorrectly assumed that the standards were identical and that the failure to provide appropriate education under IDEA as identified by the hearing officer necessarily established any section 504 claim that might exist, the case had to be remanded for proceedings on whether the school system violated the section 504 standard.<sup>63</sup> On remand, however, the district court again entered summary judgment against the plaintiffs.<sup>64</sup>

In the *Hamamoto* decision, the Ninth Circuit reversed again and this time assigned the case to a different district judge.<sup>65</sup> According to the court, the plaintiffs’ damages claim rested on two violations of section 504: the defendants failed to provide the girls with reasonable accommodations for their disabilities through autism-specific special education services, and they failed to design the girls’ educational programs to meet their needs as adequately as the needs of students without disabilities were met.<sup>66</sup> The court declared that the reasonable accommodation damages claim would succeed if “(1) the girls needed autism-specific services to enjoy meaningful access to the benefits of a public education, (2) [defendants were] on notice that the girls needed those autism-specific services but did not provide those services, and (3) autism-specific services were available as a reasonable accommodation.”<sup>67</sup> The court found that evidence in the record supported all of these propositions, as well as the allegation that the defendants acted with deliberate indifference.<sup>68</sup>

On the damages claim for failure to meet the needs of the girls as adequately as those of others were met, the court said that the

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<sup>61</sup> *Id.* at 933.

<sup>62</sup> *Lemahieu*, 513 F.3d at 933. The court stated that the section 504 regulation also requires a focus on the design of the child’s educational program, but did not elaborate on how this differs from IDEA. *Id.*

<sup>63</sup> *Id.* at 939–40.

<sup>64</sup> *Mark H. v. Hamamoto*, 620 F.3d 1090, 1093 (9th Cir. 2010).

<sup>65</sup> *Id.* at 1103.

<sup>66</sup> *Id.* at 1093.

<sup>67</sup> *Id.* at 1097.

<sup>68</sup> *Id.* at 1098–99.

parents alleged that the girls were unable to access any of the benefits of public education, and provided evidence that without access to autism-specific services, they received no meaningful access to education.<sup>69</sup> The court stated: “Presumably, at a minimum, [the defendants’] education programs for its non-disabled students allow those students to access at least some benefits of a public education.”<sup>70</sup> Denial of any benefits constituted denial of meaningful access, and the defendants’ knowledge of the as-adequately-met regulation and their failure to provide services they knew would likely be needed to satisfy the regulation would amount to deliberate indifference.<sup>71</sup>

The *Hamamoto* opinion reaffirms the proposition that reasonable accommodations and as-adequately-met claims are available under section 504, and it establishes that denial of equally adequate services may constitute actionable denial of meaningful access. But since the plaintiffs alleged denial of any benefit from the educational services offered the girls, the court did not have to flesh out the comparison between services received by children with disabilities and those without disabilities, nor determine when the imbalance is significant enough to amount to a failure of meaningful access. Moreover, since the claims were for damages, the court did not discuss how much less plaintiffs need to plead and prove if all they seek is prospective relief. The deliberate-indifference standard was minted for damages cases,<sup>72</sup> and decisions in cases demanding other forms of relief have not required the showing.<sup>73</sup>

A second case of note is *M.M. v. Lafayette School District*,<sup>74</sup> which involved a child with learning disabilities and claims that a school district failed to timely identify and evaluate the child and provide adequate services. In considering a motion to dismiss the claim under section 504 for failure to meet the child’s educational needs as adequately as the needs of students without disabilities were

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<sup>69</sup> *Hamamoto*, 620 F.3d at 1098.

<sup>70</sup> *Id.* at 1101.

<sup>71</sup> *Id.* at 1101–02.

<sup>72</sup> See *Lemahieu*, 513 F.3d at 938 (discussing *mens rea* in section 504 cases).

<sup>73</sup> See, e.g., *Lyons v. Smith*, 829 F. Supp. 414 (D. D.C. 1993); see also cases cited *infra* note 185.

<sup>74</sup> No. C 10-04223 SI, 2011 WL 830261 (N.D. Cal. Mar. 3, 2011).



met, the court, following *Lemahieu*, stated that plaintiffs who allege a violation of the section 504 appropriate education requirement must show something more than that the IDEA appropriate education requirements were not met.<sup>75</sup> But the court said the plaintiffs were alleging more than denial of appropriate education under IDEA:

[T]hey are alleging additionally that C.M.'s educational needs were not being met "as adequately as the educational needs of nondisabled students were met," and that the district failed "to develop an IEP that included necessary accommodations to enable CM to access his education and participate in the general education curriculum at his ability level with his non-disabled peers."<sup>76</sup>

Since the claim went to the design of educational needs, the court allowed the case to proceed and granted the plaintiffs' permission to amend their complaint to specify the needs not addressed, accommodations not provided, and regulations thus violated that would support a cause of action.<sup>77</sup>

As with *Hamamoto*, the procedural posture of the case meant that there was no occasion to develop the as-adequately-met standard. But the court did establish that the standard requires no extraordinary showing: the as-adequately-met language is itself something more than the IDEA standard, and a claim may be asserted under it by identifying deficiencies in services and accommodations, which might then be the basis for the comparison with services provided students who do not have disabilities.<sup>78</sup>

Ample room exists for further development of the as-adequately-met standard and its application both in cases seeking damages and in those seeking prospective relief. Courts appear to be edging towards drawing the comparison with services provided

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<sup>75</sup> *Id.* at \*8.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at \*9. A lesser showing might be permitted if the plaintiffs challenge the implementation of the child's programs rather than its design. See *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1158 (D. Haw. 2008) (permitting section 504 claim based on implementation of program to proceed).

<sup>78</sup> *M.M. v. Lafayette Sch. Dist.*, 2011 WL 830261, at \*8.

children without disabilities that the regulation's language requires. As my earlier work sought to demonstrate, this comparison is well within hearing officers' and courts' competence, and will require that those school districts that provide adequate services to students without disabilities provide adequate services to those with disabilities as well. Thus, districts that furnish high quality or top-of-the-line services to non-disabled students will have a commensurately higher obligation to students with disabilities.<sup>79</sup>

### B. Cases Equating Section 504-ADA and IDEA Obligations

Numerous cases state that if a claim under IDEA fails, the court may dismiss a claim under section 504 based on the same facts.<sup>80</sup> With respect, I submit that the statement is incorrect. The only bases for such a statement would be: (1) IDEA remedies are exclusive and supplant those under section 504; (2) a section 504 regulation provides that “[i]mplementation of an Individualized Education Program developed in accordance with [IDEA] is one means of meeting the [as-adequately-met] standard,”<sup>81</sup> so compliance with IDEA is sufficient; and (3) the as-adequately-met regulation

<sup>79</sup> See Weber, *supra* note 5, at 14–15.

<sup>80</sup> *E.g.*, Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 29 (1st Cir. 2006) (dismissing claims under § 1983, section 504, and title II in dispute over failure to provide adaptive physical education to child); Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ., No. C2-07-1272, 2009 WL 4884199, at \*3 (S.D. Ohio Dec. 14, 2009) (holding that when IDEA claim for denial of appropriate education failed, claim under section 504 and ADA for denial of appropriate education failed as well); Emily Z. v. Mount Lebanon Sch. Dist., No. CIV.A. 06-442, 2007 WL 3174027, at \*4 (W.D. Pa. Oct. 29, 2007) (granting summary judgment for school district on section 504 and ADA claims on ground they were derivative of IDEA violation claims); see Burke v. Brookline Sch. Dist., 257 F. App'x 335 (1st Cir. 2007), *aff'g* No. 06-cv-317-JD, 2007 WL 268947 (D.N.H. Jan. 29, 2007) (dismissing damages claims under IDEA and Family Educational Rights and Privacy Act, claims for retaliation and coercion under ADA and claims based on failure to follow proper procedures under section 504 and 42 U.S.C. § 1983 on ground that claims presented IDEA-based claims in guise of ADA claims). *But see* Edwards v. Fremont Pub. Schs., 21 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 903 (D. Neb. 1994) (finding argument that IDEA is exclusive remedy to be frivolous); Hebert v. Manchester, N.H., Sch. Dist., 833 F. Supp. 80, 81 (D. N.H. 1994) (denying motion to dismiss section 504 claim that overlapped with claim under IDEA).

<sup>81</sup> 34 C.F.R. § 104.33(b)(2) (2012).

does not mean what it says. The first proposition is patently false.<sup>82</sup> The second proposition is somewhat more plausible, but as I have argued elsewhere, the one-means-of-meeting regulation is most sensibly read to be referring only to the mechanisms and procedures of IDEA, not the *Rowley* standard for appropriate education,<sup>83</sup> otherwise the as-adequately-met regulation is rendered surplusage in the common case in which a child is covered by both IDEA and section 504.<sup>84</sup> The third proposition works only if one ignores the language of the regulation, which is not what hearing officers and courts interpreting the law ought to do. As indicated above, that reading is contrary to the recent, well-considered interpretations in the *Mark H.* opinions and *M.M.*

### C. Cases Requiring Intent

Many cases also state that a showing of intent or something like it—a showing of gross misjudgment or bad faith conduct, or one of deliberate indifference—is needed to support a claim under section 504 and the ADA for a child with disabilities in an education case.<sup>85</sup> On closer examination, however, it emerges that the courts are discussing damages claims, and base their conclusions on the caselaw interpreting title VI of the Civil Rights Act<sup>86</sup> and title IX of the Education Amendments,<sup>87</sup> which are worded similarly to section 504,

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<sup>82</sup> See 20 U.S.C. § 1415(l) (2006) (“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under [IDEA] shall be exhausted to the same extent as would be required had the action been brought under this subchapter.”); Weber, *supra* note 5, at 19–20.

<sup>83</sup> See *supra* note 48–50 and accompanying text (describing *Rowley* standard).

<sup>84</sup> See Weber, *supra* note 5, at 20–21.

<sup>85</sup> See, e.g., *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000); *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999); *Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir. 1998); *Scokin v. Texas*, 723 F.2d 432, 441 (5th Cir. 1984); *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982).

<sup>86</sup> 42 U.S.C. §§ 2000d–2000d-7 (2006).

<sup>87</sup> 20 U.S.C. §§ 1681–88 (2006).

and for which a private right of action exists only for intentional discrimination, with damages as the usual remedy.<sup>88</sup> The comparison of section 504 to these two statutes is not very apt, at least when considering claims for anything other than damages relief. As I have emphasized in earlier writing, section 504 differs from title VI and title IX in being intended to cover at least some disparate impacts (that is, non-intentional conduct); the ADA clearly addresses disparate impacts.<sup>89</sup> Moreover, both section 504 and the ADA forbid failure to provide reasonable accommodations, something that is obviously intentional<sup>90</sup> but perhaps does not match the *mens rea* that courts considering title VI and title IX cases are talking about when they discuss intent. In any instance, whatever *mens rea* might be required for a damages claim does not matter if the claim is for prospective or other equitable relief.<sup>91</sup>

Courts have recently acknowledged that intent or proxies for intent will not be required in all section 504 and ADA cases regarding children with disabilities in public schools. A 2010 decision from the Northern District of Illinois relied on Seventh Circuit precedent<sup>92</sup> interpreting the Supreme Court's decision in *Alexander v. Choate*<sup>93</sup> to conclude that an individual may show exclusion or discrimination in violation of the ADA with "evidence (1) the school acted intentionally on the basis of the disability; (2) the school refused to provide a reasonable modification; or (3) a rule

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<sup>88</sup> See, e.g., *Scokin*, 723 F.2d at 441.

<sup>89</sup> See *Weber*, *supra* note 5, at 18–19 (collecting and discussing authorities).

<sup>90</sup> See *Lemahieu*, 513 F.3d at 938 (“[Section] 504 itself prohibits actions that deny disabled individuals ‘meaningful access’ or ‘reasonable accommodations’ for their disabilities.”); *Marvin H. v. Austin Indep. Sch. Dist.*, 714 F.2d 1348, 1356 (5th Cir. 1983) (“[A] cause of action is stated under section 504 when it is alleged that a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program.”).

<sup>91</sup> *Lemahieu*, 513 F.3d at 938 (“For purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in the statute, the pertinent question is simply whether the regulation falls within the scope of the statute’s prohibition. The *mens rea* necessary to support a damages remedy is not pertinent at that stage of the analysis.”).

<sup>92</sup> *Washington v. Ind. High Sch. Athletic Ass’n*, 181 F.3d 840, 847 (7th Cir. 1999).

<sup>93</sup> 469 U.S. 287, 295–97 (1985).

disproportionally impacts the disabled.”<sup>94</sup> The court said that the relevant question was whether the denial of services to the child “affected [the child’s] access to education in relation to nondisabled students.”<sup>95</sup> The court declined to apply any standard of bad faith or gross misjudgment.<sup>96</sup> Ultimately, however, the court granted summary judgment for the public school system, ruling that none of the services the student alleged he had been denied contributed to his failure at school.<sup>97</sup> The court said that the child’s removal from a general education English class to a self-contained class for special education students, when he could have participated in the general education class with accommodations, could present a valid claim, but the claim was not properly exhausted through the administrative process.<sup>98</sup>

#### *D. Additional Substantive Educational Obligations*

There are additional educational obligations that section 504 and the ADA impose on public schools. These duties include avoiding the exclusion<sup>99</sup> of children with disabilities from school,

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<sup>94</sup> *Brown v. Dist. 299-Chicago Pub. Schs.*, 762 F. Supp. 2d 1076, 1083–84 (N.D. Ill. 2010).

<sup>95</sup> *Id.* at 1084.

<sup>96</sup> *Id.* at 1085 n. 8.

<sup>97</sup> *Id.* at 1085.

<sup>98</sup> *Id.*; *see also* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE § 21.6(3) (2008 & Supp. II 2012) (collecting cases upholding section 504 and ADA title II liability without requiring showing of intent).

<sup>99</sup> *Bess v. Kanawha Cnty. Bd. of Educ.*, No. CIV.A. 2:08-CV-01020, 2009 WL 3062974 (S.D. W. Va. Sept. 17, 2009) (upholding section 504 and ADA claims based on school district inducing parents to keep their child with disabilities home from school); *B.T. v. Dep’t of Educ.*, No. CIV 08-00356 DAEB-MK, 2009 WL 1978184 (D. Haw. July 7, 2009) (denying defendant’s motion for summary judgment in claim that state rule prohibiting children with disabilities from continuing special education services after reaching age twenty when general education students face no such prohibition violates IDEA and section 504); *K.F. v. Francis Howell R-III Sch. Dist.*, No. 4:07 CV 01691 ERW, 2008 WL 723751 (E.D. Mo. Mar. 17, 2008) (denying motion to dismiss complaint requesting damages and compensatory education in suit brought under section 504 and ADA over practice of school for two years to dismiss student with disabilities three hours earlier than students without disabilities on Wednesday of each week).

establishing protection against harassment on the basis of disability,<sup>100</sup> and avoiding segregation of children with disabilities.<sup>101</sup> Section 504 and the ADA also offer protection for children in the student disciplinary process.<sup>102</sup> The classic case from the courts of appeals requiring that children with disabilities be afforded special rights with regard to school discipline is *S-I v. Turlington*.<sup>103</sup> In *S-I*, the court relied on section 504 as well as the statute that is now IDEA in holding that a student with a disability may not be expelled for misconduct that results from the child's disability, and that before any expulsion "a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his" or her disability.<sup>104</sup> The court held that the right to manifestation review is necessarily entailed by the duty not to discriminate on the ground of disability.<sup>105</sup> The principles that *S-I* established continue to be vital.<sup>106</sup> In *N.T. v. Baltimore City Board of School*

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<sup>100</sup> *Enright v. Springfield Sch. Dist.*, No. 04-CV-1653, 2007 WL 4570970 (E.D. Pa. Dec. 27, 2007) (denying renewed motion for directed verdict and new trial in action ending in \$400,000 verdict against a school district over exposure of seven-year-old child with ADHD and Asperger's syndrome to indecent display and other sexual conduct and language on school bus, upholding claims under IDEA, ADA, and section 504); see Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1093-1110 (2002) (collecting cases).

<sup>101</sup> *L.M.P. v. Sch. Bd.*, 516 F. Supp. 2d 1294 (S.D. Fla. 2007) (denying motion to dismiss claims based on section 504 and state law as well as class claims based on IDEA when parents of triplets alleged that school district automatically denied behavioral analysis services to children with autism, segregating them in insular private school).

<sup>102</sup> See generally Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 ED. LAW. REP. 9 (2008) (discussing disciplinary process protections); Perry A. Zirkel, *Discipline Under Section 504 and the ADA*, 146 ED. LAW. REP. 617 (2000) (discussing disciplinary process protections).

<sup>103</sup> 635 F.2d 342 (5th Cir. 1981).

<sup>104</sup> *Id.* at 350. The court's reliance on section 504 was essential to the holding, given that at least some of the plaintiffs in the case were expelled before the effective date of the predecessor of IDEA. See *id.* at 344, 350.

<sup>105</sup> *Id.* at 346.

<sup>106</sup> Additional cases upholding rights in the school disciplinary process under section 504 include: *Dean v. Sch. Dist.*, 615 F. Supp. 2d 63 (W.D.N.Y. 2009) (upholding right to notice concerning expulsion under IDEA and section 504); *M.G. v. Crisfield*, 547 F. Supp. 2d 399 (D.N.J. 2008) (denying motion to dismiss Section 1983 procedural due process claim and section 504 claim based on

*Commissioners*, a 2011 case, the court held that allegations about a manifestation meeting that was held without advance notice to the parent and at which the child was not permitted to say anything or given other basic procedural rights stated a valid section 504 claim.<sup>107</sup>

### III. PROCEDURES UNDER SECTION 504 AND THE ADA

IDEA contains an elaborate mechanism for resolving disputes, including the perhaps optimistically named “due process hearing,”<sup>108</sup> as well as rights to obtain independent educational evaluations,<sup>109</sup> to keep the child in the child’s current educational placement during the pendency of proceedings,<sup>110</sup> and to be represented by counsel or others, present evidence, and confront, cross-examine, and compel the attendance of witnesses at the hearing.<sup>111</sup> The section 504 regulation on the subject is much less specific, but requires public elementary and secondary education providers to afford children who need or are believed to need special education due to disability “a system of procedural safeguards that includes notice, an opportunity . . . to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.”<sup>112</sup> Although the section 504 regulation states that voluntarily affording the safeguards provided in IDEA satisfies the

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discrimination against person regarded as having disability in case of third-grader suspended indefinitely for misconduct, whose parents alleged that defendants conditioned continued educational services on their consent to accepting placement in special education school for child in another district). *See generally* Perry A. Zirkel, *Discipline Under Section 504 and the ADA*, 146 ED. LAW. REP. 617 (2000) (collecting Office for Civil Rights decisions in complaints concerning discipline).

<sup>107</sup> *N.T. v. Balt. City Bd. of Sch. Comm’rs*, No. JKB–11–356, 2011 WL 3747751, at \*8 (D. Md. Aug. 23, 2011). The court applied a bad faith or gross misjudgment standard. *Id.* *See generally* PERRY A. ZIRKEL, SECTION 504: STUDENT ISSUES, LEGAL REQUIREMENTS, AND PRACTICAL RECOMMENDATIONS 18–19 (2005) (discussing procedural issues in section 504 disciplinary matters).

<sup>108</sup> 20 U.S.C. § 1415(f) (2006).

<sup>109</sup> 34 C.F.R. § 300.502 (2012).

<sup>110</sup> 20 U.S.C. § 1415(j) (2006).

<sup>111</sup> *See id.* § 1415(h)(2).

<sup>112</sup> 34 C.F.R. § 104.36 (2010).



obligations imposed by section 504,<sup>113</sup> the regulation nowhere requires identical procedures. School districts may, if they choose, establish a hearing system different from that which applies to IDEA disputes. Indeed, IDEA hearing officers in a number of jurisdictions lack the authority to entertain section 504 claims.<sup>114</sup>

Given the bare-bones language of the section 504 regulation, it makes sense to ask whether some basic procedural safeguards may be imposed either by implication or by the operation of other legal authority. These guarantees might include: the right to a service plan or other document constituting a final offer of services, which may be used as the basis for a hearing request; impartiality rights, including prohibition of service by officials of neighboring school districts or state educational agency personnel as hearing officers; rights to subpoena witnesses for hearing and to cross-examine witnesses; and judicial review.

#### A. Service Plans

A major virtue of IDEA's requirement of an Individualized Education Program (IEP) for each child with a disability is that the document represents the school district's final offer of what services it will provide to comply with the law's obligations. If the parent wants more or different services, the IEP is what to challenge. If the parent believes that the school system is not following through on its commitments, the IEP is what to compare with the services that are actually being delivered. For children who are served under section 504 but not IDEA, many school districts create a service plan, which fills the same role. Nevertheless, Professor Zirkel, who has studied section 504 extensively, has recently concluded that "[i]n the judicial forum, the odds are likely but not certain that the court would rule in favor of the defendant school district that does not provide a 504

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<sup>113</sup> *See id.*

<sup>114</sup> *See, e.g.,* Indep. Sch. Dist. of Boise City No. 1, 112 LRP 16142 (Idaho Educ. Agency 2012) (disavowing authority to hear section 504 claim); Student with a Disability, 112 LRP 5356 (N.M. Educ. Agency 2012) (same). *But see* Swope v. Cent. York Sch. Dist., 796 F. Supp. 2d 592, 602 (M.D. Pa. 2011) ("Plaintiff's unsupported statement that hearing officers do not have jurisdiction over Plaintiff's ADA and section 504 claims also fails. No statutory or case law supports this assertion.").

plan.”<sup>115</sup> He bases his conclusion on the uncertain status with regard to judicial enforceability of the section 504 regulations,<sup>116</sup> the difficulty with success of a claim on the merits, and the tendency of courts to view procedural failings as harmless error.<sup>117</sup> As he notes, the section 504 regulations do not require a plan, whereas IDEA requires one and goes into great detail about its contents.<sup>118</sup>

If Professor Zirkel is correct, parents who wish to make section 504 claims will face some practical problems pinning down the position of the school district when they assert claims at a hearing or in court. They will need to rely on general communications, rather than a single document designed to convey clearly what the school district believes the child ought to receive under the law. Cases challenging the application of broad policies may benefit from reference to public pronouncements or documents obtained from Freedom of Information Act requests. Individual decisions might be discerned from the student records that the section 504 regulations and various student record laws enable the parents to examine.<sup>119</sup> In an extreme case, a parent might argue that the school district’s decision-making is so opaque or capricious that constitutional due

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<sup>115</sup> Zirkel, *supra* note 10, at 414.

<sup>116</sup> *Compare* *Power ex rel. Power v. Sch. Bd.*, 276 F. Supp. 2d 515 (E.D. Va. 2003) (finding no private right of action to enforce procedural obligations imposed by section 504 regulations in school discipline dispute), *with* J.P.E.H. *ex rel. Campbell v. Hooksett Sch. Dist.*, No. 07-cv-276-SM, 2007 WL 4893334 (D.N.H. Dec. 18, 2007) (report and recommendation of magistrate judge) (permitting service of IDEA claims, section 504 claims, and state law claims arising out of alleged failure to provide appropriate IEP to child, failing to properly implement IEP by providing required information to and contact with the parent, failing to provide impartial due process hearing, and failing to provide sufficient notice and hearing or furnish child with advocate before finding the child ineligible for continued special education services), *aff’d sub nom. Campbell v. Hooksett Sch. Dist.*, 2008 WL 145099 (D.N.H. Jan. 15, 2008). *See generally* Weber, *supra* note 5, at 22–23 (questioning persuasiveness of *Power*’s analysis).

<sup>117</sup> Zirkel, *supra* note 10, at 414–15.

<sup>118</sup> Zirkel, *supra* note 10, at 411 (“Conspicuously missing—and fitting with a pattern of much more streamlined procedural safeguards of section 504 than those of the IDEA—is a 504 plan. In comparison, the IDEA legislation provides not only a definition but multiple pages of requirements for an individualized education program (IEP), and the IDEA regulations provide further specifications as to its development, contents, and revisions.”) (footnotes omitted).

<sup>119</sup> *See* 34 C.F.R. § 104.36 (2012).

process has been violated and that violation may become a claim in its own right.<sup>120</sup> In any instance, the absence of a service plan creates a high risk of confusion if the case gets to hearing and the parent and school district dispute what services are actually being offered or delivered.

### B. Impartiality of Hearing Officers

The section 504 regulations guarantee an impartial hearing,<sup>121</sup> but say nothing more on the subject. IDEA, by contrast, provides:

- (A) Person conducting hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—
- (i) not be—
    - (I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or
    - (II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing.<sup>122</sup>

The leading case applying this language, *Mayson v. Teague*, ruled that individuals working for school districts other than the district involved in the hearing and the state university personnel involved in formulating special education policies for the state could not serve as hearing officers.<sup>123</sup> The factual history recounted in the case showed that after school districts complained to the state superintendent about the districts' negative experiences in due process cases, the superintendent began to select hearing panels

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<sup>120</sup> Cf. *White v. Roughton*, 530 F.2d 750, 753–54 (7th Cir. 1976) (holding that making welfare eligibility determinations based on unwritten personal standards violated due process). See generally Mark C. Weber, *Services for Private School Students Under the Individuals with Disabilities Education Improvement Act: Issues of Statutory Entitlement, Religious Liberty, and Procedural Regularity*, 36 J.L. & EDUC. 163 (2007) (discussing *White*'s applicability to decisions regarding publicly funded special educational services for private school children).

<sup>121</sup> 34 C.F.R. § 104.36 (2012).

<sup>122</sup> 20 U.S.C. § 1415(f)(3)(A) (2006).

<sup>123</sup> *Mayson v. Teague*, 749 F.2d 652 (11th Cir. 1984)

predominantly composed of local school system employees.<sup>124</sup> The court of appeals upheld the district court's conclusion that employees of local school boards other than the one from which the child receives services are involved in the education and care of the child, in light of the employees' close connection to the state's administration of educational policy.<sup>125</sup> Moreover, the susceptibility of all local school personnel to influence and political pressure, even when they work for districts other than the one serving the child, constituted personal or professional interests conflicting with the individuals' objectivity in the hearing.<sup>126</sup> The court also considered university personnel who had a role in formulating state policies to be involved in the education and care of special education children as a group, and found a conflict of interest in the difficulty a person formulating a state policy would have in reversing or modifying the policy as a hearing officer.<sup>127</sup>

Not all courts have gone as far as *Mayson* in interpreting the IDEA provision,<sup>128</sup> and the section 504 regulation, of course, lacks the IDEA provision's specificity. But one needs little imagination to conclude that section 504 hearing officers who are employees of other school districts, much less those who are employees of the district involved in the hearing, lack the independence of thought and action to be impartial. A court has also barred a state superintendent of public education from serving as an IDEA hearing officer;<sup>129</sup> it would be reasonable to conclude that a superintendent or other state agency supervisory personnel would lack the necessary independence in section 504 cases as well. Similarly, people who have formulated statewide or district-wide policies should not be the ones hearing challenges to the policies. The Second Circuit Court of Appeals

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<sup>124</sup> *Id.* at 656.

<sup>125</sup> *Id.* at 658.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 659.

<sup>128</sup> See *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004) (finding that employment by district other than one involved in the hearing did not disqualify hearing officer); see also *Silvio v. Commonwealth*, 439 A.2d 893 (Pa. Commw. Ct. 1982), *aff'd* 456 A.2d 1366 (Pa. 1983) (finding state university personnel in general not disqualified by virtue of employment by state department of education).

<sup>129</sup> *Robert M. v. Benton*, 634 F.2d 1139, 1142 (8th Cir. 1980).

ruled that a parent had standing to challenge a state procedure by which a school board selected an IDEA hearing officer from a list of state-certified individuals, and that hearing officer held the hearing and made a recommendation to the board.<sup>130</sup> The court emphasized that, “It is elementary that the provision of a fair hearing before an impartial tribunal is a basic requirement of due process” under the Constitution, even though the challenge in the case relied solely on the statute.<sup>131</sup> Indeed, the Supreme Court has held that Fourteenth Amendment due process rights are violated when an adjudicator has a stake in the outcome of the case.<sup>132</sup> Interests that threaten impartiality undermine constitutional due process rights in section 504 cases, just as they do in cases under IDEA and other laws.

### C. Hearing Rights

The right to subpoena witnesses would appear to be fundamental, and is found in IDEA<sup>133</sup> and state administrative codes applicable to IDEA.<sup>134</sup> The same right ought to apply to hearings under section 504. As for presentation of oral testimony and cross examination, the very term “hearing” suggests the ability to put forward one’s own witnesses and cross-examine opposing witnesses. Although these rights are not spelled out in the section 504 regulations, they should be considered implied. If there were any doubt on the matter, principles of procedural due process under the Constitution would call for these rights to be afforded. In *Goldberg v. Kelly*, the Supreme Court ruled that confronting adverse witnesses and presenting one’s own arguments and evidence orally are due process minima in the context of termination of welfare benefits.<sup>135</sup> In considering the deprivation of education, “the very foundation of good citizenship,” for which “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the

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<sup>130</sup> *Heldman v. Sobol*, 962 F.2d 148, 158 (2d Cir. 1992).

<sup>131</sup> *Id.* at 154.

<sup>132</sup> *See* *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Monroeville*, 409 U.S. 57, 59–60 (1972); *Tumey v. Ohio*, 273 U.S. 510, 531–33 (1927).

<sup>133</sup> 20 U.S.C. § 1415(h)(2) (2006).

<sup>134</sup> *See, e.g.*, ILL. ADMIN. CODE tit. 23, § 226.660 (2012).

<sup>135</sup> 397 U.S. 254, 267–68 (1970).

opportunity,”<sup>136</sup> the level of procedural due process needs to be high.<sup>137</sup> It would surely be great enough to compel the same rights effective participation in a hearing as found to be required for a pre-termination welfare eligibility hearing or a claim for relief from being required to repay government benefits.<sup>138</sup> Cross-examination, “the greatest legal engine ever invented for the discovery of truth,”<sup>139</sup> is a

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<sup>136</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“Public education is not a ‘right’ granted to individuals by the Constitution . . . . But neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The ‘American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.’ We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government,’ and as the primary vehicle for transmitting ‘the values on which our society rests.’ ‘[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.’ And these historic ‘perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.’ In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”) (citations omitted).

<sup>137</sup> *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

<sup>138</sup> *See Califano v. Yamasaki*, 442 U.S. 682, 696–97 (1979) (upholding injunction requiring oral hearing in which claimant for waiver of repayment of benefits may present testimony and evidence and cross-examine witnesses).

<sup>139</sup> *California v. Green*, 399 U.S. 149, 158, (1970) (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)). One Department of Education regional office letter of finding from 1996 declined to find a violation of section 504 when a hearing officer in a section 504 dispute did not allow cross-examination but did allow participants to ask follow-up questions and obtain clarification when necessary. *Houston Indep. Sch. Dist.*, 25 INDIVIDUALS WITH DISABILITIES EDUC. L.

particularly important component of due process when life-altering interests are at stake and the risk of erroneous decisions by school officials is significant.

#### *D. Judicial Review*

The section 504 regulation requires a “review procedure,” but does not specify what that means. Professor Zirkel and a co-author state that this appears to mean judicial review, not an additional administrative review, and that the review would be in federal court “without the concurrent option of state court.”<sup>140</sup> This interpretation could be correct, though a Department of Education regulation on administrative safeguards would be an odd place to put a grant of federal jurisdiction, and the default rule with regard to federal jurisdiction is that it is concurrent.<sup>141</sup> In any case, there is federal jurisdiction under 28 U.S.C. § 1331 for claims that section 504 and its regulations have been violated, and a cause of action may be found under the statute itself or under 42 U.S.C. § 1983, so judicial review in federal court seems to be a given for the aggrieved child and parent acting as next friend.<sup>142</sup> Of course, a school district is not a person with a disability covered by section 504 or the ADA, and there is no explicit conferral of any right to sue on the school district, unlike the situation with IDEA.<sup>143</sup> Hence, there is no federal law basis on which a school district can appeal an unfavorable section

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REP. 163 (U.S. Dep’t of Educ. Office for Civil Rights, S. Div., Dallas 1996). The decision contains no mention of precedent, no discussion of rights in proceedings under analogous laws, and no consideration of due process requirements.

<sup>140</sup> Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100, 107 (2010). The authors cite two administrative decisions considering section 504 hearing procedures that lack a second level of administrative review. Since having two tiers of administrative review was the dominant practice in the early years of the law that is now IDEA, the regulation may well be referring to a second-level review, however odd that may seem nowadays.

<sup>141</sup> *Tafflin v. Levitt*, 493 U.S. 455, 459 (1990) (noting “deeply rooted presumption in favor of concurrent state court jurisdiction”).

<sup>142</sup> See Weber, *supra* note 5, at 22–23 (discussing implied right of action under section 504 and explicit cause of action under 42 U.S.C. § 1983 to enforce section 504 procedural safeguards provision).

<sup>143</sup> See 20 U.S.C. § 1415(i)(2)(A) (2006) (“Any party aggrieved by the findings and decision . . . shall have the right to bring a civil action . . .”).



504 administrative hearing decision.<sup>144</sup>

Judicial review of hearing officer decisions under IDEA is highly deferential. Courts must give due weight to administrative rulings when they consider appeals of IDEA cases,<sup>145</sup> even though the courts are explicitly directed to hear evidence at the request of a party.<sup>146</sup> The basis for the deferential standard in IDEA cases is that the statutory requirement “that the reviewing court ‘receive the records of the [state] administrative proceedings’ carries with it the implied requirement that due weight shall be given to these proceedings.”<sup>147</sup> In the absence of any similar statutory requirement in section 504, at least one court has held that the ordinary standards of summary judgment should apply to section 504 cases, rather than the deferential summary judgment or review-on-the-record standards ordinarily used by courts in IDEA proceedings.<sup>148</sup>

Exhaustion defenses may apply in section 504-ADA actions when the relief sought is also available under IDEA,<sup>149</sup> and courts have been known to require that the factual basis for the specific section 504 claim be raised in the administrative proceedings, even when the parent is acting *pro se*.<sup>150</sup> Earlier writing of mine takes up exhaustion and its exceptions in section 504 cases at some length,<sup>151</sup>

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<sup>144</sup> Bd. of Educ. v. Smith, No. Civ. RDB 04-4016, 2005 WL 913119, at \*3 (D. Md. Apr. 20, 2005) (“[W]hile an individual can assert the original jurisdiction of this Court on a claim under the Rehabilitation Act, the institution alleged to have violated the provisions of section 504 cannot directly seek to assert an appeal from a decision by a state administrative law judge directly to federal court by asserting original jurisdiction.”).

<sup>145</sup> Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982).

<sup>146</sup> 20 U.S.C. § 1415(i)(2)(C)(ii) (2006).

<sup>147</sup> Rowley, 458 U.S. at 206.

<sup>148</sup> Bd. of Educ. v. Ross, 486 F.3d 267, 278 (7th Cir. 2007) (holding that district court on review of hearing officer decision in section 504-ADA case should apply ordinary summary judgment standard rather than deferential standard used in IDEA cases).

<sup>149</sup> See 20 U.S.C. § 1415(l) (2006).

<sup>150</sup> Brown v. Dist. 299-Chicago Pub. Schs., 762 F. Supp. 2d 1076, 1085–86 (N.D. Ill. 2010) (“Represented at the hearing by his mother, [plaintiff] need not have specifically mentioned the ADA or discrimination at the hearing. But he was required to present the issues underlying his ADA claim so that the hearing officer had the opportunity to consider a remedy.”).

<sup>151</sup> See Weber, *supra* note 5, at 25–26; see also WEBER, *supra* note 98, § 21.8 (collecting and analyzing section 504 and ADA cases on exhaustion).

and other commentators have weighed in on the topic.<sup>152</sup> A major recent development requires discussion, however: the Ninth Circuit's *en banc* decision in *Payne v. Peninsula School District*.<sup>153</sup>

In *Payne*, a damages case brought under 42 U.S.C. § 1983 asserting constitutional violations, the parent alleged that a child with autism and motor apraxia was repeatedly locked in a closet-like time out room without supervision over the course of a school year.<sup>154</sup> While confined, the child would take off his clothes and would urinate and defecate on himself.<sup>155</sup> The court overturned the district court's dismissal of the case for failure to exhaust administrative remedies and remanded.<sup>156</sup> The court reexamined the statutory provision on which the exhaustion requirement is based, which permits claims under the Constitution, section 504, and the ADA, but says that "before the filing of a civil action under such laws seeking relief that is also available under [IDEA], the [due process hearing] procedures . . . shall be exhausted to the same extent as would be required had the action been brought under [IDEA]."<sup>157</sup> The court ruled that the exhaustion requirement is not jurisdictional<sup>158</sup> and, following the language of the statute, held that "[n]on-IDEA claims that do not seek relief available under the IDEA are not subject to the exhaustion requirement, even if they allege injuries that could conceivably have been redressed by the IDEA."<sup>159</sup> The court overruled earlier cases using an "injury-centered approach," and adopted a "relief-centered approach."<sup>160</sup> Instead of treating the IDEA section as "a quasi-preemption provision, requiring administrative exhaustion for any case that falls within the general 'field' of

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<sup>152</sup> See, e.g., Peter J. Maher, Note, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259 (2011).

<sup>153</sup> 653 F.3d 863 (9th Cir.), *cert. denied*, No. 11-539, 2012 WL 538336 (U.S. 2011).

<sup>154</sup> *Id.* at 866.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 884.

<sup>157</sup> 20 U.S.C. § 1415(l) (2006).

<sup>158</sup> *Payne*, 653 F.3d at 870.

<sup>159</sup> *Id.* at 871.

<sup>160</sup> *Id.* at 874.

educating disabled students,”<sup>161</sup> a court should look “[at the] prayer for relief and determine whether the relief is also available under the IDEA.”<sup>162</sup>

According to the court, exhaustion would be required in three instances: first, when the “plaintiff seeks an IDEA remedy or its functional equivalent,” such as a tuition reimbursement case, even if brought under the ADA rather than IDEA; second, when the plaintiff seeks prospective relief to alter an IEP or educational placement even if the remedy is sought under a statute other than IDEA; and third, when the plaintiff “is seeking to enforce rights that arise as a result of a denial of a free appropriate public education, whether pled as an IDEA claim or any other claim that relies on the denial of a FAPE to provide the basis for the cause of action,” such as a section 504 damages claim “premised on a denial of a FAPE.”<sup>163</sup> The court rejected its previous distinction between cases alleging physical injuries and those alleging non-physical injuries.<sup>164</sup> It also said that damages should not be assumed to be equivalent to enhanced services that might be available in an IDEA proceeding.<sup>165</sup> “If the measure of a plaintiff’s damages is the cost of counseling, tutoring, or private schooling—relief available under the IDEA—then the IDEA requires exhaustion.”<sup>166</sup> But “a plausible claim for damages unrelated to the deprivation of a FAPE” does not need exhaustion.<sup>167</sup>

In general, claims independent of IDEA do not require exhaustion: “If a complaint can stand on its own without reference to the IDEA, it is difficult to see why the IDEA should compel its dismissal.”<sup>168</sup> The court said that “[t]he fact that the plaintiff *could have* added IDEA claims to an otherwise sound complaint (and thus subjected themselves to the exhaustion requirement), but chose not to, should not detract from the viability of that complaint.”<sup>169</sup> The

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<sup>161</sup> *Id.* at 875.

<sup>162</sup> *Id.*

<sup>163</sup> *Payne*, 653 F.3d at 875.

<sup>164</sup> *Id.* at 876.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 877.

<sup>167</sup> *Id.*

<sup>168</sup> *Payne*, 653 F.3d at 879.

<sup>169</sup> *Id.*

nature of the complaint in *Payne*, one of excessive force in violation of the Fourth Amendment, seems to stand well apart from a claim for deprivation of appropriate education under IDEA. By contrast, some section 504 and ADA cases brought by parents of children who are eligible under IDEA might fall under the exhaustion requirement if they are seeking educational services that IDEA might provide, or reimbursement for obtaining those services on the private market. Further developments will be needed to outline the precise contours of *Payne*'s rule in cases brought under section 504 and IDEA. But the rule seems plainly to provide a smaller reach for the exhaustion defense than had been the case under previous interpretations.

Of course, *Payne* does nothing to undermine, and appears to reinforce, the conclusion that if the child is by the school district's own admission not eligible for services under IDEA, exhaustion is not required.<sup>170</sup> If the child is not eligible under IDEA, the relief sought is not available under that statute. Moreover, if a hearing is sought but refused in a section 504 case, exhaustion should be excused on the ground of futility.<sup>171</sup>

#### IV. REMEDIES

Remedies in section 504-ADA cases involving the education of children with disabilities might include compensatory damages, tuition reimbursement, orders for future conduct, and ancillary relief such as attorneys' fees and expert witness fees.

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<sup>170</sup> See Weber, *supra* note 5, at 26; Zirkel, *supra* note 10, at 414 n. 42 (“[T]he exhaustion language is within the IDEA and arguably only applies to students double-covered by the IDEA and Section 504.”); Maher, *supra* note 152, at 299 (“[Courts] erroneously have required parents to exhaust their Section 504/ADA claims under the IDEA’s due process procedures even when a student is not eligible for services under IDEA.”); see also *D.R. v. Antelope Valley Union High Sch. Dist.*, 746 F. Supp. 2d 1132, 1145 (C.D. Cal. 2010) (“Thus, in fact and law, Plaintiff is not a child with disability as defined under IDEA or an individual with exceptional needs as defined under the [California] Education Code. Since Plaintiff is not eligible for relief under IDEA, she does not need to administratively exhaust her remedies to assert claims under Section 504, the ADA, and the Unruh Act.”).

<sup>171</sup> *McNeal v. Duval Cnty. Sch. Bd.*, No. 3:11-cv-00498-J-32MCR, 2011 WL 6010293, at \*8 (M.D. Fla. Dec. 1, 2011).

### A. *Compensatory Damages*

At least in cases of intentional conduct, or conduct that meets gross misjudgment, bad faith, or deliberate indifference standards, compensatory damages are available for violations of section 504 and the ADA.<sup>172</sup> This conclusion is unsurprising. Section 504 adopts the remedies available under title VI of the Civil Rights Act of 1964,<sup>173</sup> and title II of the ADA adopts the remedies available under section 504.<sup>174</sup> The Supreme Court has upheld damages awards under title IX of the Education Amendments of 1972,<sup>175</sup> which the Court interprets consistently with title VI of the Civil Rights Act.<sup>176</sup> The Court said that under title IX, damages are available “where a funding recipient intentionally violates the statute.”<sup>177</sup> Applying this principle to peer sexual harassment, the Court held that school districts may be liable for damages on the basis of a violation of title IX if the district administrator or administrators are deliberately indifferent to known conduct that is severe or pervasive enough to deprive the victim of equal access to an educational program or activity.<sup>178</sup>

As noted above, the reach of section 504 and the ADA is broader than that of title VI and title IX, which have been read to embrace only intentional discrimination. Instead, section 504 and ADA title II forbid at least some disparate impacts and require the provision of accommodations.<sup>179</sup> Accordingly, the title VI and title

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<sup>172</sup> See, e.g., *M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975 (8th Cir. 2003); *Miles v. Cushing Pub. Schs.*, No. CIV-06-1431-D, 2008 WL 4619857 (W.D. Okla. Oct. 16, 2008).

<sup>173</sup> 29 U.S.C. § 794a(a)(2) (adopting remedies under Civil Rights Act title VI, 42 U.S.C. §§ 2000d–2000d-7).

<sup>174</sup> 42 U.S.C. § 12133 (2006).

<sup>175</sup> *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 70–71 (1992) (construing Education Amendments title IX, 20 U.S.C. §§ 1681–88 (2006)).

<sup>176</sup> *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (“[T]he court has interpreted Title IX consistently with Title VI . . .”).

<sup>177</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999). The Court suggested the use of a similar test for teacher sexual harassment of students in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 283 (1998).

<sup>178</sup> *Davis*, 526 U.S. at 651.

<sup>179</sup> See *supra* text accompanying notes 89–98 (discussing analogy to title VI and title IX).

IX precedent should not necessarily be read to restrict damages awards under section 504 and title II to the intentional discrimination situations covered by a title VI-title IX analogy.<sup>180</sup> At the minimum, however, damages should be available for conduct that manifests deliberate indifference or otherwise indicates intent.<sup>181</sup>

Hearing officers may view entry of a damages award in a section 504 proceeding as beyond their authority.<sup>182</sup> If hearing officers in section 504 cases are thought not to have that power, there may arise a situation rather like that regarding attorneys' fees under IDEA, where the hearing officer awards whatever relief is within his or her authority and the prevailing claimant then files an action for the additional relief available from a court.<sup>183</sup>

### B. Tuition Reimbursement and Orders for Future Conduct

Relief other than compensatory damages ought to be as extensive under section 504 and the ADA as under IDEA, and accordingly should embrace reimbursement awards for tuition and privately obtained related services, orders for future conduct, records amendment orders, and the like. In *Lyons v. Smith*, the District of Columbia district court reversed a decision by a hearing officer refusing to exercise authority to order a placement for a child upon a finding that the school system failed to meet section 504

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<sup>180</sup> See generally Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121 (2000) (contending that proof of intent should not be required in ADA cases).

<sup>181</sup> See *Mark H. v. Lemahieu*, 513 F.3d 922, 939 (9th Cir. 2008). Although the Supreme Court disallowed punitive damages as a remedy under ADA title II in *Barnes v. Gorman*, 536 U.S. 181, 189 (2002), the Court did nothing to challenge the proposition that compensatory damages are available, and left undisturbed the \$1 million compensatory award in that case.

<sup>182</sup> This appears to be the conclusion reached in IDEA cases that have entertained the possibility of damages relief. See Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 42 (2011) ("Although a minority of courts have taken the view that money damages are available under the IDEA, it is generally accepted that this form of relief is not within H/ROs' authority.") (footnotes omitted).

<sup>183</sup> See, e.g., *Barlow-Gresham Union High Sch. Dist. No. 2 v. Mitchell*, 940 F.2d 1280 (9th Cir. 1991).

requirements.<sup>184</sup> Other courts have ordered or upheld orders for ongoing educational services, compensatory education, and similar remedies in section 504 or ADA cases.<sup>185</sup>

### C. Attorneys' Fees and Expert Witness Fees

Both section 504 and the ADA provide for attorneys' fees for prevailing claimants. The ADA specifically allows for fees in administrative proceedings.<sup>186</sup> Section 504's fees provision states: "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."<sup>187</sup> This language mimics title VII of the Civil Rights Act of 1964, which has been held to permit attorneys' fees for administrative proceedings that must be pursued to

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<sup>184</sup> *Lyons v. Smith*, 829 F. Supp. 414, 419–20 (D.D.C. 1993) ("[T]he Court finds that a hearing officer may order [the public school system] to provide special education to a student designated as 'otherwise qualified handicapped' under § 504, but may only do so under appropriate circumstances . . . . [I]n some situations, a school system may have to provide special education to a handicapped individual in order to meet the educational needs of a handicapped student 'as adequately as the needs' of a nonhandicapped student, as required by § 104.33(b)(1)." (quoting *Smith v. Robinson*, 468 U.S. 992, 1016 (1984))).

<sup>185</sup> *J.T. v. Mo. State Bd. of Educ.*, No. 4:08CV1431RWS, 2009 WL 262094, at \*7 (E.D. Mo. Feb. 4, 2009) (denying motion to dismiss claim for violation of section 504 and ADA in action over alleged failure to provide appropriate education to child in state school, holding that permissible relief could include audio-visual monitoring to allow independent parental review of activities and monitoring of child's safety); *Neena S. v. Sch. Dist. of Phila.*, No. CIV.A. 05-5404, 2008 WL 5273546 (E.D. Pa. Dec. 19, 2008) (affirming limited award of compensatory education for long-term failure to provide appropriate special education services); *Damian J. v. Sch. Dist. of Phila.*, No. CIV.A. 06-3866, 2008 WL 191176, at \*1 (E.D. Pa. Jan. 22, 2008) (awarding compensatory education under IDEA and section 504); *Lower Merion Sch. Dist. v. Doe*, 931 A.2d 640, 644 (Pa. 2007) (finding private school child not deemed eligible for services under IDEA entitled to occupational therapy services at public school under section 504).

<sup>186</sup> 42 U.S.C.A. § 12205 (West 2010) ("In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs . . . .").

<sup>187</sup> 29 U.S.C. § 794a(b) (2006).



file the claim in court.<sup>188</sup> An action may be filed solely for fees after the claimant has prevailed in the administrative proceedings. The Supreme Court in a case interpreting the applicable provision from title VII stated:

Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude that [title VII]'s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney's fees for legal work done in state and local proceedings.<sup>189</sup>

The ADA fees provision includes "litigation expenses, and costs,"<sup>190</sup> which would seem to embrace the fees that parents in special education cases frequently need to pay to expert witnesses. Although the Supreme Court has ruled that the attorneys' fees provision in IDEA does not cover expert witness fees,<sup>191</sup> a court has held that the section 504 fees provision extends to those charges.<sup>192</sup>

## V. CONCLUSION

As more parents turn to section 504 and the ADA in special education cases, the administrative law judiciary will face hard questions about procedures and remedies under those laws. This Article suggests some answers, applying methods that look to the text

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<sup>188</sup> N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 71 (1980).

<sup>189</sup> *Id.* at 66. Although the Civil Rights Attorneys' Fees Act has been held not to permit a separate action for attorneys' fees if the claimant has been successful in his or her claim on the merits in administrative proceedings and nothing remains to litigate in court, N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc., 479 U.S. 6, 13–15 (1986), the language in that statute is different from that of title VII and section 504. *See id.* at 13–14.

<sup>190</sup> 42 U.S.C. § 12205 (2006).

<sup>191</sup> Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 297–98 (2006).

<sup>192</sup> L.T. *ex rel.* B.T. v. Mansfield Twp. Sch. Dist., No. 04-1381 (NLH), 2009 WL 2488181 (D.N.J. Aug. 11, 2009) (disallowing expert witness fees under IDEA but allowing expert witness fees under section 504 claim).

of the relevant provisions and underlying constitutional principles to find a robust set of procedural protections and remedial options.