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The Lost Promise of Disability Rights

Claire Raj

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THE LOST PROMISE OF DISABILITY RIGHTS

Claire Raj*

Children with disabilities are among the most vulnerable students in public schools. They are the most likely to be bullied, harassed, restrained, or segregated. For these and other reasons, they also have the poorest academic outcomes. Overcoming these challenges requires full use of the laws enacted to protect these students' affirmative right to equal access and an environment free from discrimination. Yet, courts routinely deny their access to two such laws—the Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973 (section 504).

Courts too often overlook the affirmative obligations contained in these two disability rights laws and instead assume that students with disabilities' only legal recourse is the Individuals with Disabilities Education Act (IDEA). Regrettably the IDEA is not capable of remedying all the harms students endure. In fact, the IDEA, by its terms, extends to only a subset of students with disabilities. Even so, courts force all students to exhaust the IDEA's administrative procedures before invoking remedies under the other two disability rights laws. By narrowly construing antidiscrimination principles and ignoring the affirmative obligations contained in disability rights laws, courts unduly restrict students' protections under these laws.

This Article solves that problem by explaining and clarifying the nuance that drives confusion in this area: the difference between the IDEA's guarantee of a free appropriate public education and the ADA and section 504's guarantee of equal access to public education. With that distinction clear, this Article disaggregates the types of claims that are most often erroneously obstructed by the IDEA's exhaustion clause and then creates a framework that would allow courts to analyze and correctly apply the exhaustion clause. In doing so, it hopes to remove these laws from the IDEA's shadow and renew their promise of equal access to educational opportunity.

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INTRODUCTION

Two of the nation's most important civil rights laws affecting students with disabilities—the Americans with Disabilities Act (ADA) and section

504 of the Rehabilitation Act of 1973 (section 504)—have long been mischaracterized as purely antidiscrimination statutes.¹ As a result, vital components of their protective regime go overlooked.² Both statutes certainly forbid schools from taking actions that would treat students with disabilities differently than their peers.³ In truth, this antidiscrimination principle is the bedrock upon which both laws stand.⁴ But schools and courts are missing the breadth of key affirmative rights these laws extend to students, and thus, the principles embodied in these important laws remain underrealized.⁵

These laws' antidiscrimination components, which this Article will refer to as the "disability rights laws,"⁶ are too often narrowly construed as only requiring freedom from negative treatment.⁷ While that definition may generally suffice outside of schools, within the context of education, antidiscrimination means not only refraining from harm but also taking affirmative actions to ensure equality between students with disabilities as compared to their nondisabled peers.⁸ These affirmative obligations are typically over-

1. 1 PERRY A. ZIRKEL & STEVEN R. ALEMAN, SECTION 504, THE ADA AND THE SCHOOLS 5 (2d ed. 2000); see Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 611, 614–17 (2012); Ruth Hocker, *More Than a Consolation Prize: Using § 504 to Advance Special Education Rights*, 38 T. JEFFERSON L. REV. 71, 73–74 (2015). While the ADA contains several titles, this Article's reference to the "ADA" is meant to signal a reference to Title II of the ADA, which directly impacts public schools. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 201, 104 Stat. 327, 337.

2. See, e.g., *N.L. ex rel. Ms. C. v. Knox Cnty. Schs.*, 315 F.3d 688, 695–96 (6th Cir. 2003) ("In sum, precedent has firmly established that section 504 claims are dismissed when IDEA claims brought on the theory of a denial of free appropriate public education are also dismissed. These holdings make sense in light of section 504's general applicability and its status as an anti-discrimination statute." (citing *Smith v. Robinson*, 468 U.S. 992, 1019 (1984))).

3. 29 U.S.C. § 794; 42 U.S.C. § 12132; see also *Eva N. v. Brock*, 741 F. Supp. 626 (E.D. Ky. 1990) ("[Section 504] is not a general bill of rights for the handicapped."), *aff'd*, 943 F.2d 51 (6th Cir. 1991) (unpublished table decision).

4. 34 C.F.R. § 104.1 (2019); 42 U.S.C. § 12101(b).

5. See *infra* Part II; see also Christopher J. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post-Schaffer Public School*, 58 STAN. L. REV. 1563, 1566 (2006) ("Section 504 of the Rehabilitation Act . . . is a powerful, yet oft-neglected, complement to the IDEA—perhaps more powerful and effective in certain instances—if it is understood and applied correctly."); Hocker, *supra* note 1.

6. While some differences in the laws exist, for ease of understanding, this Article will refer to section 504 and Title II of the ADA as the "disability rights laws" and will note any differences between obligations under each when relevant to the discussion. *R.K. ex rel. J.K. v. Bd. of Educ.*, No. 5:09-CV-344, 2014 WL 4277482, at *7 (E.D. Ky. Aug. 28, 2014) ("As noted by the Sixth Circuit, "Title II of the ADA "shall not be construed to apply a lesser standard than the standards applied under [§ 504] or the regulations issued by Federal agencies pursuant to that [statute]."" (citations omitted)), *aff'd*, 637 F. App'x 922 (6th Cir. 2016).

7. Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119 (2010) (arguing that the ADA's duty to accommodate is a substantial obligation requiring accommodation up to the limit of hardship).

8. 42 U.S.C. § 12132; 34 C.F.R. § 104.33(a) (2019). Reasonable accommodations must be made when necessary to avoid discrimination on the basis of disability unless the public

shadowed by the much larger and more comprehensive law at the intersection of education and disability—the Individuals with Disabilities Education Act (IDEA).⁹ The IDEA extends both procedural and substantive rights to eligible students with disabilities.¹⁰ Courts and scholars generally conceptualize the IDEA as the sole dictator of public schools’ obligations to eligible students with disabilities.¹¹ This leaves section 504 and the ADA as underdeveloped and underused afterthoughts.¹² Critically, some courts go as far as precluding students from invoking their rights under the disability rights laws at all.¹³

Failing to fully grasp the scope and interaction of these three disability laws, courts routinely strip section 504 and the ADA of their original congressional intent. First, courts erroneously force students to exhaust their IDEA rights before bringing a claim under section 504 or the ADA.¹⁴ Second, courts misconstrue schools’ affirmative obligations under disability rights laws and impose unfounded limits on schools’ duties to students with disabilities.¹⁵ Finally, courts require plaintiffs to demonstrate intent to assert claims under section 504 and the ADA when no such showing is actually needed.¹⁶ While the last two impediments to the viability of section 504 and the ADA have been explored by scholars, courts’ continued misapplication

entity can demonstrate that the modifications would result in a “fundamental alteration” of the service, program, or activity. 28 C.F.R. § 35.130(b)(7) (2019); see *McPherson v. Mich. High Sch. Athletic Ass’n*, 119 F.3d 453, 461 (6th Cir. 1997). Likewise, a school may not treat a disabled student differently, unless that differential treatment is shown to be necessary for the individual. 28 C.F.R. § 36.202(c) (2019); 34 C.F.R. § 104.4(b)(1)(iv) (2019).

9. 20 U.S.C. §§ 1400–1482.

10. *Id.* See generally MITCHELL L. YELL, *THE LAW AND SPECIAL EDUCATION* (5th ed. 2019).

11. 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, 3 (2010) (“Section 504 and the ADA have often been viewed as supplemental causes of action in special education cases, used mostly when a student who is eligible for services under IDEA has a plausible claim for damages relief.”).

12. *Id.*

13. See *infra* Part II.

14. See *infra* Part II.

15. Compare Letter from Off. of C.R., U.S. Dep’t of Educ. to Perry A. Zirkel (Aug. 23, 1993), in 20 IDELR 134 (1993) [hereinafter Response to Inquiry of Professor Perry A. Zirkel] (rejecting reasonable accommodation limits on accommodations as applicable to public primary and secondary schools), with *Rothschild v. Grotenthaler*, 907 F.2d 286 (2d Cir. 1990) (holding that section 504 obligations are limited to reasonable accommodations), *Barnett v. Fairfax Cnty. Sch. Bd.*, 927 F.2d 146 (4th Cir. 1991) (deeming proposed modification requesting resource-intensive program in school district unreasonable and not required by section 504), and *Scokin v. Texas*, 723 F.2d 432 (5th Cir. 1984) (holding that section 504 only requires reasonable accommodations).

16. Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015) (arguing that courts should not impose an intent burden in section 504 and ADA cases for liability or monetary relief).

of the IDEA's exhaustion clause is ripe for discussion.¹⁷ This Article is the first to offer a comprehensive examination of misplaced restrictions on disability rights claims and identify a novel approach for sorting and analyzing such claims that is consistent with congressional intent.¹⁸

Courts' confused application of the IDEA's exhaustion clause is, in many respects, understandable. The IDEA requires plaintiffs to exhaust the statute's administrative remedies prior to filing claims under other applicable laws.¹⁹ But, exhaustion is only triggered when a plaintiff seeks a remedy for the denial of a "free appropriate public education" (FAPE) as guaranteed by the IDEA.²⁰ What most courts miss, however, is that disability rights laws also contain a right to FAPE and that while obligations under all three laws overlap, they are not entirely coextensive. Thus, a necessary first step—and one completely ignored by most courts—is identifying which FAPE right the plaintiff intends to invoke.

FAPE, as defined in the IDEA, is a substantive standard of education owed to eligible students with disabilities.²¹ More specifically, schools are tasked with providing an educational program individually tailored to enable a child to make progress appropriate in light of the child's circumstances.²²

17. See, e.g., David L. Dagley & Charles W. Evans, Annotation, *The Reasonable Accommodation Standard for Section 504-Eligible Students*, 97 EDUC. L. REP. 1 (1995); Kristin L. Lingren, Comment, *The Demise of Reasonable Accommodation Under Section 504: Special Education, the Public Schools, and an Unfunded Mandate*, 1996 WIS. L. REV. 633; Hocker, *supra* note 1; Ronald D. Wenkart, Annotation, *Section 504: A Reasonable Accommodation Standard or an Unfunded Mandate for Special Education Services?*, 116 EDUC. L. REP. 531 (1997); Weber, *supra* note 16 (arguing that courts should not impose an intent burden in section 504 and ADA cases for liability or monetary relief).

18. See Ruth Colker, *Did the Fry Decision Under the IDEA Overturn Rowley?*, 46 J.L. & EDUC. 443, 444 (2017) (exploring *Fry*'s reach as it relates to the ADA's communication regulation and arguing *Fry* may have overturned *Rowley*); Robert Garda, *Fry v. Napoleon Community Schools: Finding A Middle Ground*, 46 J.L. & EDUC. 459, 459 (2017) (arguing that while *Fry* expanded access to section 504 and ADA claims, it did not liberalize access to courts or school liability as much as it could have); Terry Jean Seligmann, *Flags on the Play: The Supreme Court Takes the Field to Enforce the Rights of Students with Disabilities*, 46 J.L. & EDUC. 479, 480 (2017) (arguing that *Andrew F.* and *Fry* suggest "a continued willingness by the Court to work at discerning and carrying out the purposes of congressional actions"); Maureen A. MacFarlane, *In Search of the Meaning of an "Appropriate Education": Ponderings on the Fry and Andrew Decisions*, 46 J.L. & EDUC. 539, 540 (2017) (exploring the possible impact that *Fry* and *Andrew F.* may have on courts seeking to further refine, and define, the meaning of an "appropriate education" within the context of the IDEA); Katherine Bruce, Comment, *Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief After Fry v Napoleon Community Schools*, 85 U. CHI. L. REV. 987 (2018) (arguing that exhaustion should not be required when a plaintiff alleges a denial of FAPE but seeks remedies outside of the IDEA).

19. 20 U.S.C. § 1415(l).

20. *Id.*

21. 20 U.S.C. § 1401(9); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 995 (2017) ("[T]he Court nonetheless made clear that the Act guarantees a substantively adequate program of education to all eligible children.").

22. *Andrew F.*, 137 S. Ct. at 1000 ("When a child is fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasona-

Hence, the IDEA's FAPE obligation is inward looking. It tasks schools with evaluating a child's individual needs and developing a program of special education and related services designed to address those needs in an effort to ensure progress toward individualized goals.²³ While its many protections undoubtedly help to safeguard students with disabilities' educational rights, the law has limits. It is, in part, these very limits that make access to section 504 and the ADA so vital.

Critically, the disability rights laws impose a separate FAPE obligation on schools, and this obligation is outward looking. That is, the laws obligate schools to meet the needs of students with disabilities "as adequately as" the needs of nondisabled students.²⁴ Thus, the standard is a comparative one, requiring schools to take stock not just of an individual child's needs but also of her peer's educational access to determine whether equal access to the educational program is being achieved.²⁵ These laws require schools to provide students with disabilities the educational support and services necessary to ensure equal access to educational opportunity.²⁶ To be clear, section 504's FAPE regulation does not demand equal educational outcomes, but it does demand equality of access.²⁷ In short, the IDEA's FAPE obligation demands adequacy while the disability rights laws demand equality.

The IDEA's exhaustion clause was not designed to eliminate students' rights to these distinct forms of FAPE or preference one over the other.²⁸ In fact, Congress enacted the current exhaustion clause as a repudiation of an earlier Supreme Court ruling that declared the IDEA to be the "exclusive avenue" through which a plaintiff could pursue disability-based discrimination in an educational program.²⁹ The statute's plain language unambiguously states that nothing in the IDEA should be read to restrict or limit the rights or remedies available under those laws or other federal laws protecting the rights of children with disabilities, except that plaintiffs "seeking relief that is

bly calculated to permit advancement through the general curriculum." If a child is not capable of meeting grade level norms, a school must still ensure that the child's goals are "appropriately ambitious in light of his circumstances." *Id.*

23. 20 U.S.C. § 1414(a)-(d); *Andrew F.*, 137 S. Ct. at 999.

24. 34 C.F.R. § 104.33 (2019).

25. Samuel R. Bagenstos, *Educational Equality for Children with Disabilities: The 2016 Term Cases*, 2016-2017 AM. CONT. SOC'Y SUP. CT. REV. 17, 42-45; Weber, *supra* note 11, at 5.

26. 34 C.F.R. § 104.33 (2019); Response to Inquiry of Professor Perry A. Zirkel, *supra* note 15.

27. 34 C.F.R. § 104.33 (2019); *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008).

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

29. *Smith v. Robinson*, 468 U.S. 992, 1013 (1984) ("[W]here the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim."). At the time of the case, the IDEA was called the Education of the Handicapped Act (EHA). To avoid confusion, this Article will refer to the statute by its current name.

also available under [the IDEA]” must first exhaust IDEA’s administrative remedies.³⁰

In an effort to resolve ongoing uncertainties, the Supreme Court recently explored the contours of the IDEA’s exhaustion clause in *Fry v. Napoleon Community Schools*.³¹ Unfortunately, the majority’s opinion may have actually produced more confusion than clarity.³² While the *Fry* Court recognized that some students were needlessly being prevented from asserting claims under section 504 and the ADA, it ultimately gave the disability rights laws too cramped a reading. It directed courts to focus on the “gravamen[] of the . . . complaint.”³³ If the complaint is essentially about FAPE, IDEA’s exhaustion clause applies. If FAPE is not at issue, exhaustion is not required, and the disability rights claims can proceed.

While simple on their face, these instructions do not match the substance of the rights that the statutes protect. In arriving at this test, the Court missed a fundamental point: the existence of dual FAPE obligations under competing statutes. The IDEA assures FAPE in the form of an individualized right to progress. Section 504 and the ADA assure FAPE in the form of a comparative right to equality of access. The Court’s failure to recognize the separate and distinct right to equality-of-access claims has effectively stripped students with disabilities of that right under section 504 and the ADA—the exact thing the IDEA’s exhaustion clause warned against.

Following the lead of the Court’s overly simplistic litmus test, lower courts have restricted students’ right to sue in any number of different situations. They have forced students asserting section 504 and ADA equality-of-access rights to exhaust IDEA remedies when they were not even eligible for or seeking IDEA protections.³⁴ They have required students attempting to remedy discrimination under section 504 and the ADA to exhaust IDEA procedures merely because the allegations occurred in schools.³⁵ Finally,

30. 20 U.S.C. § 1415(l).

31. 137 S. Ct. 743, 748 (2017).

32. See *infra* Part II.

33. *Fry*, 137 S. Ct. at 752.

34. S.D. *ex rel.* A.D. v. Haddon Heights Bd. of Educ., 722 F. App’x 119, 121 (3d Cir. 2018) (holding exhaustion required when student with multiple medical issues including asthma challenged accommodations in his 504 plan); *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 128 (3d Cir. 2017) (holding exhaustion required for student with postconcussive syndrome even after school determined that child was not IDEA eligible); *L.G. ex rel. G.G. v. Bd. of Educ.*, 775 F. App’x 227, 229 (6th Cir. 2019) (holding exhaustion required for student with E. coli infection who was approved for a 504 plan and subsequently brought a 504 claim for denial of services); *Nelson ex rel. C.N. v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 589 (8th Cir. 2018) (holding exhaustion required when child with PCOS and depression brought a claim for access to an online school program); *J.Q. v. Wash. Twp. Sch. Dist.*, 92 F. Supp. 3d 241, 243 (D.N.J. 2015) (holding exhaustion required when a plaintiff brought a claim alleging school’s failure to identify child with ADHD for section 504 accommodations).

35. *J.L. ex rel. Leduc v. Wyo. Valley W. Sch. Dist.*, 722 F. App’x 190, 193 (3d Cir. 2018) (holding exhaustion required when a plaintiff brought allegations of physical abuse as a result of an unlawful restraint method resulting in bruising on legs); see also *J.M. ex rel. McCauley v.*

courts have gone so far as to preclude disability rights claims when plaintiffs were unsuccessful in winning an IDEA claim.³⁶ In other words, bring your IDEA claims before your 504 and ADA claims, but if you lose under the IDEA, you lose under all three statutes.³⁷ The real-world effect for students is at best delayed access to critical educational supports and at worst no access at all.³⁸

The Supreme Court's thin analysis combined with lower courts' interpretation of it has had a chilling effect on students' ability to assert disability rights claims and, in turn, hold schools accountable for disability-based educational harms. This chilling effect can be broken down into two broad categories: (1) students without IDEA rights who seek to assert section 504 and ADA equality-of-access claims; and (2) students with rights under all three laws, but who only seek to assert disability-rights-law claims. In both categories, students with disabilities who should be able to access section 504 and the ADA's protections are effectively denied them.³⁹

This Article seeks to resurrect disability rights laws' promise to protect students with disabilities by offering an alternate analysis to IDEA's exhaustion clause—one that acknowledges section 504 and the ADA's distinct FAPE obligation. It disaggregates the types of claims that are most often erroneously obstructed by the exhaustion clause and creates a framework that allows courts to more easily sort and analyze the appropriate application of the exhaustion clause. In doing so, it hopes to remove these laws from the IDEA's shadow and renew their promise to ensure students with disabilities have equal access to educational opportunity.

Part I describes the three laws impacting the rights of students with disabilities in schools—the IDEA, section 504, and the ADA—and explores the scope of all three, comparing rights and remedies available under each. Part II investigates the history of IDEA's exhaustion clause, beginning with its

Francis Howell Sch. Dist., 850 F.3d 944, 949 (8th Cir. 2017) (holding exhaustion required when a plaintiff brought a claim for unauthorized use of physical restraints and isolation); *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 26 (1st Cir. 2019) (holding that class of students alleging Olmstead violation based on segregation and isolation of students with mental health disabilities had to exhaust under the IDEA).

36. *Pollack v. Reg'l Sch. Unit 75*, 886 F.3d 75, 83–85 (1st Cir. 2018) (holding that plaintiff's ADA claim was precluded because the IDEA hearing officer (IHO) found no denial of FAPE); *Smith v. Rockwood R-VI Sch. Dist.*, 895 F.3d 566, 569–70 (8th Cir. 2018) (holding that the plaintiff should have exhausted administrative remedies under the IDEA when bringing a claim alleging that the IDEA violation amounted to disability discrimination under section 504 and the ADA); *Doe v. Dallas Indep. Sch. Dist.*, No 3:17-CV-1284-B, 2018 WL 1899296, at *4 (N.D. Tex. Apr. 19, 2018) (Title IX case).

37. See generally *Pollack*, 886 F.3d at 75. Importantly, not all of these flawed circuit court decisions correctly applied the Supreme Court's *Fry* guidance. That is, a more nuanced understanding of *Fry*'s guidance may have led to an appropriate outcome in some instances. Yet, the very fact that so many circuits are misapplying the exhaustion clause suggests that the Supreme Court's guidance is at best confusing.

38. See *infra* Part II.

39. See *infra* Part II.

enactment and describing courts' confused application of the clause leading up to the Supreme Court's *Fry* opinion. It then exposes the gaps in the Court's *Fry* analysis. Part III discusses *Fry*'s fallout—lower courts' continued confusion and restriction of rights. It identifies three categories of disability rights claims that are routinely and erroneously thwarted by IDEA's exhaustion clause: (1) students without IDEA eligibility seeking to assert section 504 and ADA equality-of-access claims; (2) students with IDEA eligibility seeking to assert disability-discrimination claims; and (3) students with previously litigated IDEA claims who are prevented, by issue and claim preclusion, from stating section 504 and ADA claims. Part IV offers a solution that disaggregates common disability rights claims and establishes a framework by which courts can recognize viable claims and prevent the unnecessary restriction of students' rights.

I. AN ASSORTMENT OF RIGHTS: LAWS PROTECTING EDUCATIONAL RIGHTS OF STUDENTS WITH DISABILITIES

Children with disabilities in schools have distinct rights under three separate federal statutes: the Individuals with Disabilities Education Act (IDEA),⁴⁰ section 504 of the Rehabilitation Act of 1973,⁴¹ and Title II of the Americans with Disabilities Act (ADA).⁴² While all three laws seek to ensure that students with disabilities can have meaningful access to educational opportunities, parents, schools, and even courts are often confused about the scope of each law as well as how the three laws intersect with one another.⁴³

Section 504 was one of the first civil rights laws enacted to protect people with disabilities from discrimination.⁴⁴ It was authorized as part of the Rehabilitation Act of 1973, but regulations for the law were not implemented until 1977, and only after impressive and sustained political pressure from disability rights activists.⁴⁵ Shortly thereafter, the Education for All Handicapped Children Act, the precursor to the IDEA, was passed in 1975 to “assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs[and] to assure that the

40. 20 U.S.C. §§ 1400–1482.

41. 29 U.S.C. § 794.

42. 42 U.S.C. §§ 12131–12165.

43. See, e.g., *Mark H. v. Lemahieu*, 513 F.3d 922, 925 (9th Cir. 2008) (describing confusion of both family and court when both assumed that alleging a violation of the IDEA FAPE requirement is sufficient to allege a violation of section 504).

44. *Helen L. v. DiDario*, 46 F.3d 325, 330 (3d Cir. 1995) (“[Section 504] was the first broad federal statute aimed at eradicating discrimination against individuals with disabilities.”).

45. Kitty Cone, *A Short History of the 504 Sit In*, DISABILITY RTS. EDUC. & DEF. FUND, <https://dredf.org/504-sit-in-20th-anniversary/short-history-of-the-504-sit-in/> [https://perma.cc/T4DV-CSFL].

rights of handicapped children . . . are protected.”⁴⁶ More than a decade later, in 1990, the ADA was passed to expand the reach of section 504 and, perhaps, as a reaction to what was viewed as section 504’s inability to ensure comprehensive protections for individuals with disabilities.⁴⁷

While rights and remedies under all three laws overlap, critical—and sometimes overlooked—differences exist. The following Section provides a brief overview of each relevant law, as well as the rights and potential remedies contained therein, in order to better situate a more nuanced discussion of interactions among all three laws.

A. *The Individuals with Disabilities Education Act (IDEA)*

The IDEA obligates public schools to ensure that all eligible students with disabilities receive a substantive level of education, defined as a “free appropriate public education” (FAPE).⁴⁸ FAPE is conferred through an individualized education program (IEP), which, in turn, has its own highly specific criteria.⁴⁹ In order to be eligible for IDEA services, a child must meet the statute’s definition of a “child with a disability,” meaning he or she must fall into one of the thirteen recognized categories of disability, the disability must adversely impact education, and the child must need special education and related services as a result.⁵⁰ The IDEA’s disability categories are legal definitions, not medical definitions of disability, and they are not without controversy.⁵¹

46. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, sec. 3, § 601(c), 89 Stat. 773, 775. The EAHCA is technically an amendment to the 1970 Education of the Handicapped Act (EHA), which had provided grants for states to provide special education services. Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 121 (1970).

47. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213); Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> [<https://perma.cc/2CBW-EARY>].

48. 20 U.S.C. § 1400(d)(1)(A). The IDEA is essentially a grant-making statute that originated as Spending Clause legislation. When states agree to its terms, they receive federal dollars to support the cost of special education services. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 51 (2005) (“The Individuals with Disabilities Education Act (IDEA or Act) is a Spending Clause statute that seeks to ensure that ‘all children with disabilities have available to them a free appropriate public education’” (citation omitted) (quoting 20 U.S.C. § 1400(d)(1)(A))). The Spending Clause authorizes the federal government to spend money to support the “general Welfare.” U.S. CONST. art I, § 8, cl. 1.

49. See 20 U.S.C. § 1414(d); see also Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 994 (2017) (clarifying the obligations that the FAPE requirement imposes on school districts’ IEPs).

50. 20 U.S.C. § 1401(3); 34 C.F.R. § 300.8 (2019).

51. See Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 102–22 (2009). Intellectual disability, emotional disturbance, and specific learning disability are subjectively measured and thus prone to bias on the part of evaluators, as evidenced by the overrepresentation of minority children who make up these categories. See Robert A. Garda, Jr., *The New*

The IDEA's purpose is to ensure that all children with disabilities receive special education and related services designed to meet their "unique" needs.⁵² Each eligible child has a right to FAPE delivered through an IEP that must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁵³ The IEP describes the child's current educational and functional needs, targets specific and measurable annual goals, and lists the specialized instruction and related supports that will be provided so a child can advance toward those goals.⁵⁴ Thus, FAPE under the IDEA is a highly individualized notion that obligates schools to ensure that an individual child is making progress that is tied to his or her unique needs and educational goals.⁵⁵

The IDEA has a comprehensive administrative due process structure that gives eligible students and their parents the right to bring complaints about anything related to identification, evaluation, or placement or the provision of FAPE before an independent hearing officer.⁵⁶ The law tasks state departments of education with managing an administrative review process.⁵⁷ Hearing officers are appointed and tasked with making determinations about the provision of FAPE.⁵⁸ These complaints can range from issues of

IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education, 56 ALA. L. REV. 1071, 1087–88 (2005); see also Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237. If by virtue of eligibility for special education services, students improved their educational outcomes, such overrepresentation would warrant minimal concern. Unfortunately, data illustrates that students with special education needs (and particularly students receiving services under the category of emotional disturbance) achieve markedly less educational success. SHARON VAUGHN, LOUIS DANIELSON, REBECCA ZUMETA & LYNN HOLDHEIDE, JOBS FOR THE FUTURE, DEEPER LEARNING FOR STUDENTS WITH DISABILITIES 3 (2015), <https://files.eric.ed.gov/fulltext/ED560790.pdf> [<https://perma.cc/36U3-S6FW>] ("According to the most recent [National Assessment of Educational Progress] (NCES 2013), 38–45 percent of students without disabilities performed at the proficient level or above in reading and mathematics in fourth and eighth grade, while a mere 8–17 percent of students with disabilities did so . . .").

52. 20 U.S.C. § 1400(d).

53. *Endrew F.*, 137 S. Ct. at 991. The *Endrew F.* decision clarified another Supreme Court decision on the meaning of FAPE—*Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, the Court held that "a 'free appropriate public education' consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." 458 U.S. at 188–89. The Court did not overturn *Rowley* in *Endrew F.* but merely sought to clarify its interpretation of the IDEA's FAPE standard, since in the decades after *Rowley* circuit courts had varying interpretations of FAPE. See *Endrew F.*, 137 S. Ct. at 998.

54. 20 U.S.C. § 1414(d)(1)(A)(i)(I), (II), (IV).

55. See *id.* § 1414(d)(1)(A)(i)(I)–(III).

56. 20 U.S.C. § 1415(f)(1), (g). Placement refers to where the child will receive special education services. The IDEA requires that students with disabilities receive services in the least restrictive environment, meaning a regular education setting. See *id.* § 1412(a)(5)(A).

57. *Id.* § 1415(a).

58. § 1415(f)(3)(A). Hearing officers are tasked with making decisions on substantive grounds. Violations of process can only rise to the level of a denial of FAPE in limited cir-

timely identification of children with a disability and the substance of the special education supports in the IEP to the placement of a child in a segregated setting or the disciplinary exclusion of a child.⁵⁹ Remedies are broad as the statute gives courts the authority to grant whatever relief they deem appropriate.⁶⁰ However, most courts draw a hard line at money damages.⁶¹ They limit relief to compensatory damages in the form of educational services and reimbursement of out-of-pocket educational costs.⁶²

While Congress sought to ensure parents' ability to hold schools accountable by including this explicit private right of action in the law, it also stipulated that before heading directly to federal courts, parents must first exhaust administrative remedies.⁶³ Thus, the IDEA includes an exhaustion clause, which requires plaintiffs "seeking relief that is also available under [the IDEA]" to first exhaust IDEA's administrative procedures prior to invoking other federal laws protecting the rights of students with disabilities.⁶⁴ The purpose of exhaustion has been described as placing "those with specialized knowledge—education professionals—at the center of the decisionmaking process."⁶⁵ Additional goals of exhaustion more generally include "allow[ing] administrative agencies an opportunity to correct their own errors"⁶⁶ and acknowledging that agencies, not courts, "ought to have primary responsibility for the programs that Congress has charged them to administer."⁶⁷ However, exhaustion under the IDEA has long been mired in controversy, in part due to the complicated interplay of the second set of disability rights laws that offer protections for many students with disabilities.⁶⁸ The following section tells the story of those laws and seeks to lay the groundwork for a discussion about the interaction of all three.

cumstances. *Id.* § 1415(f)(3)(E)(ii). Hearing officers can order school districts to comply with procedural requirements, but such procedural violations will not always rise to the level of a denial of FAPE. *See id.* § 1415(f)(3)(E)(iii).

59. *Id.* § 1415(b)(6)(A).

60. *See id.* § 1415(i)(2)(C)(iii).

61. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002) (citing *Sellers ex rel. Sellers v. Sch. Bd.*, 141 F.3d 524, 525 (4th Cir. 1998)) (noting that money damages are not available under the IDEA).

62. *A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791, 802 (3d Cir. 2007); *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006); *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321, 1325 (11th Cir. 2005); *Polera v. Bd. of Educ.*, 288 F.3d 478, 486 (2d Cir. 2002); *Thompson ex rel. Buckhanon v. Bd. of Special Sch. Dist. No. 1*, 144 F.3d 574, 580 (8th Cir. 1998); *Sellers ex rel. Sellers v. Sch. Bd.*, 141 F.3d 524, 525 (4th Cir. 1998); *Charlie F. ex rel. Neil v. Bd. of Educ.*, 98 F.3d 989, 991 (7th Cir. 1996).

63. 20 U.S.C. § 1415(l).

64. *Id.*

65. *Frazier*, 276 F.3d at 60.

66. *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 115 F.3d 100, 104 (1st Cir. 1997).

67. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992).

68. *See infra* Section II.B.

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

In contrast to the IDEA, Section 504 and the ADA apply to all individuals, not just students, who meet the statutes' relevant definition of disability.⁶⁹ Both provide, in slightly different words, that “[n]o . . . qualified individual with a disability . . . shall . . . by reason of her or his disability[] be excluded from the participation in[or] be denied the benefits of” the services, programs or activities of a public entity receiving federal aid, or “be subjected to discrimination” by these entities.⁷⁰

Section 504's purpose was to prohibit disability discrimination in not just federal government programs but also programs receiving federal government funding.⁷¹ The ADA expanded the antidiscrimination prohibition to all public organizations.⁷² The ADA has several chapters, but this Article will focus on Title II as it is the most relevant to public schools.⁷³ Because the ADA was in large part modeled after section 504, adopting section 504's eligibility parameters and patterning its regulations after section 504, the two laws are often read in concert.⁷⁴ The remainder of this Article will refer to the two laws jointly as the “disability rights laws,” where no distinction between the rights or remedies exists between the two.⁷⁵

There are several significant differences between the disability rights laws and the IDEA. The first relates to eligibility for protections under the laws. The second relates to rights and the remedies that follow. Each will be discussed in turn.

Unlike the IDEA, where eligibility is limited to thirteen legally defined categories of disability, the disability rights laws offer protections to any “otherwise qualified” individual (1) with a physical or mental impairment that substantially limits one or more major life activities; (2) with a record of such an impairment; or (3) who is regarded as having such an impairment.⁷⁶

69. 29 U.S.C. § 794(a); 42 U.S.C. § 12132.

70. 29 U.S.C. § 794(a); 42 U.S.C. § 12132.

71. Section 504's purpose was “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.” 29 U.S.C. § 701(b)(1).

72. 42 U.S.C. §§ 12131–12132.

73. *See id.* §§ 12131–12165.

74. *E.g.*, *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 115 (3d Cir. 2018) (“To effectuate its sweeping purpose, Congress designed the ADA to fit hand in glove with the RA, leaving intact the ‘scope of protection . . . under [section 504].’” (citation omitted) (first quoting *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001); and then quoting *Menkowitz v. Pottstown Mem'l Med. Ctr.* (3d Cir. 1998))).

75. When evaluating a discrimination claim under both section 504 and Title II of the ADA, “[b]ecause these provisions involve the same substantive standards, [courts] analyze them together.” *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1245 (10th Cir. 2009) (citing *Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir. 1996) (“[W]e analyze [plaintiff's] ADA claim by reference to section 504's standards. . . .”)).

76. 29 U.S.C. § 794; 28 C.F.R. § 35.108(a)(1) (2019).

Congress intended this definition to be broad and, accordingly, indicated that the focus should be on whether discrimination occurred, not on an exhaustive analysis of whether the individual has a disability.⁷⁷ Thus, the disability rights laws cover many more students than the IDEA.⁷⁸ Further, to be “otherwise qualified” within the context of K–12 education, a child only needs to meet the age requirements that a state has prescribed for eligibility into the public education system.⁷⁹

Students with eligibility under disability rights laws gain significant affirmative protections rooted in the laws’ mandate requiring schools to ensure meaningful access to public education.⁸⁰ Schools must identify and locate students with potential disabilities, evaluate students with disabilities who may require special education or related services, and ensure such students are educated with their nondisabled peers whenever appropriate.⁸¹ Just like the IDEA, disability rights laws require that schools provide students with disabilities a FAPE, but in the regulations implementing section 504, FAPE is defined as “regular or special education and related . . . services . . . designed to meet [students with disabilities’ educational needs] as adequately as the needs of [their peers].”⁸² Finally, as with the IDEA, the disability rights laws task schools with establishing procedural safeguards for parents of students with disabilities so that they can enforce these rights.⁸³ Unlike the IDEA, they do not require exhaustion of those remedies before proceeding to federal court with a claim.⁸⁴

Rights and remedies under the disability rights laws can vary from those found under the IDEA. While the IDEA’s rights and remedies flow from a

77. 28 C.F.R. § 35.108(d)(1) (2019); 154 CONG. REC. S9626 (daily ed. Sept. 26, 2008) (statement of Sen. Reid) (concerning the Americans with Disabilities Amendment Act of 2008).

78. See ADA Amendment Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. The ADAAMA specifically stated that the broad eligibility analysis should be applied to both section 504 and ADA coverage, as the definition for a “qualified individual with a disability” is the same under both laws.

79. 34 C.F.R. § 104.3(l)(2) (2019) (“With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which non-handicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act.”).

80. See *Alexander v. Choate*, 469 U.S. 287, 301 (1985); 34 C.F.R. §§ 104.33–104.36 (2019). While there are some differences in the regulations implementing each section 504 and Title II, Title II specifically states that it “shall not be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act.” 28 C.F.R. § 35.103 (2019). Further, Title II has been interpreted to adopt section 504 standards in areas where Title II has not adopted a different standard.

81. 34 C.F.R. §§ 104.32–104.35 (2019).

82. *Id.* § 104.33.

83. *Id.* § 104.36.

84. See *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754 (2017).

school's obligation to confer FAPE, section 504 and ADA remedies stem from the right to be free from disability-based discrimination.⁸⁵ Discrimination under these laws can take a variety of forms. Students can allege disability harassment when they are subjected to physical or verbal abuse by school officials or peers with the knowledge of school officials.⁸⁶ Students can bring retaliation claims if they can demonstrate they suffered an adverse action after engaging in a protected activity such as advocating for their rights under disability laws.⁸⁷ Students can also allege a denial of FAPE—essentially, that a school failed to provide them with equal access to the educational program.⁸⁸ These accessibility claims can center on the prevention of access to physical space, such as when a school refuses to permit a child to have a service animal in school.⁸⁹ But such claims can also arise from a failure to provide special education, supportive services, or accommodations where necessary to ensure equal access to the educational program.⁹⁰ While the former stands apart from any claim that could be brought under the IDEA, the latter can overlap with IDEA's FAPE guarantee. Both center on alleged inadequacies of the educational program and argue that such inadequacies result in a denial of FAPE. This overlap in protections has caused confusion in lower courts' application of the exhaustion clause and ultimately led to a restriction of access to section 504 and ADA remedies.

When courts fail to appropriately disentangle disability rights claims from IDEA claims, they needlessly restrict access to important remedies, limiting plaintiffs' ability to ensure fair treatment and hold bad actors accountable. Remedies under disability rights laws can be equitable or legal, spanning from requests for injunctive relief to declaratory relief to money

85. 29 U.S.C. § 794; 42 U.S.C. §§ 12131–12132.

86. See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1085–86 (2002) (arguing that disability harassment constitutes discrimination that violates section 504 and its implementing regulations). “Harassment excludes students with disabilities from the educational environment provided to students without disabilities and discourages students with disabilities from continuing their education beyond the minimum period required by law.” *Id.* at 1095.

87. Title II regulations prohibit retaliation at 28 C.F.R. § 35.134. Regulations made applicable to section 504 impose a similar duty. 34 C.F.R. § 104.61 (incorporating by reference antiretaliation provisions of 34 C.F.R. § 100.7(e)). To state a prima facie case of retaliation under the ADA and section 504, an individual must show that (1) she engaged in a protected activity, (2) she suffered an adverse action, and (3) there was a causal link between the two. *T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 472–73 (9th Cir. 2015) (adopting the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for retaliation claims under the ADA).

88. 28 C.F.R. § 35.130(b)(1), (7) (a public entity must make “reasonable modifications” to its “policies, practices, or procedures” when necessary to avoid discrimination); see also *Alexander v. Choate*, 469 U.S. 287, 299–300 (1985) (interpreting section 504 to require certain “reasonable” modifications in order to “accommodate” persons with disabilities).

89. *Fry*, 137 S. Ct. at 743.

90. See *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008).

damages.⁹¹ Because money damages are not available under the IDEA, plaintiffs who have rights under both laws may elect to pursue claims under section 504 and the ADA when equitable relief does not fully negate the harms they or their children experienced.⁹² For example, an IDEA-eligible child who was physically harmed when a teacher attempted to restrain her may allege that the school denied her a FAPE under the IDEA by not properly following the IEP that banned restraints. The child's parents may also allege a disability discrimination claim under disability rights laws, alleging that the assault constitutes disability discrimination by subjecting the child to unequal treatment based on her disability. Here, the plaintiff seeks monetary damages to acknowledge the harm suffered and to deter the school from engaging in this conduct again. The child has distinct rights and remedies under both sets of laws. However, many courts will restrict access to section 504 and ADA remedies by forcing this hypothetical student to exhaust IDEA's administrative remedies first.⁹³

Courts' unwarranted restriction of access to section 504 and ADA remedies is rooted in a failure to acknowledge the full panoply of rights contained within these laws—in particular, the reticence to acknowledge section 504's distinct FAPE obligation. Courts erroneously assume that the IDEA's FAPE guarantee is robust enough to remedy plaintiffs' complaints. But as explored below, distinctions in FAPE rights can lead to meaningful differences in schools' obligations to students with disabilities.

C. FAPE's Dual Meaning

While both the IDEA and the disability rights laws confer a right to FAPE, the concept has two distinct meanings. The IDEA's right to FAPE is the right to an individualized plan of special education supports and services designed to ensure students' progress toward personalized goals.⁹⁴ The student is measured against herself rather than others. Section 504, in contrast, defines FAPE comparatively. It tasks schools with gauging whether the needs of students with disabilities are met as adequately as those of their nondisabled peers.⁹⁵ Put differently, the IDEA's FAPE obligation is inward looking, while section 504's is outward looking.

Although section 504's FAPE standard has been criticized as being too difficult to measure, no court has found it to be an unauthorized regula-

91. See 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133 (providing for injunctive relief or money damages).

92. See Weber, *supra* note 11, at 3.

93. For a nonhypothetical example, see *Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996).

94. 20 U.S.C. § 1414(d)(1)(A)(i)(I)–(IV); *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999 (2017).

95. 34 C.F.R. § 104.33(b)(1)(i) (2019).

tion.⁹⁶ Thus, public schools must ensure that they are meeting FAPE obligations under both the IDEA and section 504 for all qualifying students with disabilities.

The ADA does not contain a FAPE obligation. However, Congress mandated that its regulations be consistent with all section 504 regulations.⁹⁷ Further, the ADA clearly states that its regulations should not be construed to apply a lesser standard than section 504's regulations, unless explicitly stated.⁹⁸ Thus, the ADA, while not adopting its own FAPE regulation, at the very least does nothing to undermine section 504's FAPE obligation.

Practically speaking, public schools will need to ensure they are meeting IDEA's right to an individualized program designed to confer reasonable progress and the disability rights laws' entitlement to equality of educational access. But thus far, many courts have failed to acknowledge these two distinct rights and rather conflated claims about educational programs and claims about IDEA's conceptualization of FAPE.⁹⁹ By labeling these claims IDEA FAPE claims and forcing exhaustion, courts restrict access to section 504 and ADA remedies.

The Supreme Court recently had the opportunity to clarify application of the IDEA's exhaustion clause, but as this Article demonstrates, by failing to fully address the broad scope of disability rights laws, the Court only further muddied the waters, leading to a continued restriction of access to disability rights laws' remedies. The following Part will discuss the IDEA's exhaustion clause and unpack the Supreme Court's recent analysis of it.

II. A MISPERCEPTION OF RIGHTS: APPLYING THE IDEA'S EXHAUSTION CLAUSE

Because all three statutes intersect, courts are often confused about how the three laws interact with each other, and at times this confusion results in

96. See Professor Weber's discussion of Justice Rehnquist's opinion that the "as adequately" standard is unworkable:

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons.

Weber, *supra* note 11, at 14 (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982)). *But see* *Lyons v. Smith*, 829 F. Supp. 414, 419 n.8 (D.D.C. 1993).

97. See 42 U.S.C. § 12133.

98. 28 C.F.R. § 35.103(a) (2019); *see also* *Berardelli v. Allied Servs. Inst. of Rehab. Med.*, 900 F.3d 104, 117 (3d Cir. 2018) ("We conclude that, although the statutes may diverge as to the entities they cover and remedies they provide, they impose the same substantive liability standard and require a unified approach to the 'reasonableness' of accommodations and modifications.").

99. See *infra* Part IV.

a deprivation of access to remedies under the disability rights laws.¹⁰⁰ Central to the confusion is the IDEA's exhaustion clause and its reliance on the concept of FAPE.¹⁰¹ The Supreme Court recently clarified the IDEA's exhaustion clause, but it did so without acknowledging the full breadth of rights under section 504 and the ADA—specifically, the right to equal access of the educational program.¹⁰² This Part will begin with background on the IDEA's exhaustion clause and then unpack the Supreme Court's *Fry* opinion, noting significant gaps in the Court's analysis.

A. Congress's Clarification of Disability Rights

The IDEA's exhaustion clause was enacted in 1986 as a response to a Supreme Court ruling that held that the IDEA was the "exclusive avenue" through which a child or their parents could pursue a claim about disability-based discrimination in an educational program.¹⁰³ The Court essentially held that the IDEA eclipsed all actions under section 504 and the ADA, citing to the IDEA's "elaborate procedural mechanism" designed to address challenges to the adequacy of education.¹⁰⁴

Congress responded by passing the Handicapped Children's Protection Act of 1986, which essentially overturned the Supreme Court's opinion.¹⁰⁵ The Act amended the IDEA to add its current exhaustion requirement, which states:

Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . , [section 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].¹⁰⁶

Thus, Congress explicitly rejected the notion that the IDEA was the exclusive avenue for relief for students with disabilities and "reaffirm[ed] . . . the viability" of federal statutes like section 504 and the ADA "as separate vehicles for ensuring the rights of handicapped children."¹⁰⁷

100. See Weber, *supra* note 86, at 1083 (discussing how courts routinely dismissed claims based on disability harassment for failure to exhaust administrative remedies).

101. See Payne v. Peninsula Sch. Dist., 653 F.3d 863, 874–75 (9th Cir. 2011) (cataloguing different circuits' understandings of the IDEA's exhaustion clause).

102. See Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743 (2017); 34 C.F.R. § 104.33 (2019).

103. Smith v. Robinson, 468 U.S. 992, 1009 (1984).

104. *Id.* at 1010.

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

106. 20 U.S.C. § 1415(l).

107. H.R. REP. NO. 99-296, at 4 (1985).

B. *Lower Courts Continue to Restrict Rights*

Despite this seemingly straightforward plain language, lower courts struggled with proper application of the IDEA's exhaustion clause. Several circuits held that exhaustion turned on the nature of the harms—when harms were generally educational, IDEA exhaustion was required.¹⁰⁸ Others held that exhaustion was required whenever IDEA could have adequately provided relief for the alleged educational harms, despite the plaintiff's failure to “seek remedies” under the IDEA.¹⁰⁹ Still others took the exact opposite approach: they recognized a path forward for section 504 and ADA discrimination claims without requiring exhaustion even when harms were related to education.¹¹⁰ These courts deferred to plaintiffs' choice of remedy, allowing plaintiffs to proceed with claims that specifically invoked remedies outside of the IDEA's reach.¹¹¹ Finally, several courts applied exceptions to the exhaustion requirement.¹¹² However, these courts failed to recognize a viable

108. *Fry v. Napoleon Cmty. Schs.*, 788 F.3d 622, 627 (6th Cir. 2015) (“[E]xhaustion is required at a minimum when the claim explicitly seeks redress for a harm that IDEA procedures are designed to and are able to prevent—a harm with educational consequences that is caused by a policy or action that might be addressed in an IEP.”), *vacated*, 137 S. Ct. 743 (2017); *Charlie F. ex rel. Neil F. v. Bd. of Educ.*, 98 F.3d 989, 993 (7th Cir. 1996) (requiring exhaustion when “[b]oth the genesis and the manifestations of the problem [were] educational”).

109. *Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 241, 248–49 (2d Cir. 2008) (holding that parents' section 504 and ADA claim for discrimination based on their child's school prohibiting the use of a service dog required IDEA exhaustion as relief was available under the IDEA); *Batchelor ex rel. R.B. v. Rose Tree Media Sch. Dist.*, 759 F.3d 266, 273–74 (3d Cir. 2014) (holding that the parent of student with disabilities was required to exhaust IDEA's administrative process before bringing retaliation claims against school district under section 504 and the ADA since alleged retaliation arose out of the mother's advocacy with respect to the student's educational rights).

110. *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 867–68 (8th Cir. 2006) (holding that parents alleging discrimination under section 504 and the ADA when the school nurse disclosed that their child had schizophrenia, resulting in harassment, did not have to exhaust their claim under the IDEA); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 871 (9th Cir. 2011) (holding 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”), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014).

111. *See M.P.*, 439 F.3d at 867; *Payne*, 653 F.3d at 883.

112. *Blunt v. Lower Merion Sch. Dist.*, 559 F. Supp. 2d 548, 557–58 (E.D. Pa. 2008) (holding that plaintiff may bypass IDEA's exhaustion of administrative remedies requirement where “(1) exhaustion would be futile or inadequate; (2) the issue presented is purely a legal question; (3) the administrative agency cannot grant relief; or (4) exhaustion would work severe or irreparable harm upon a litigant. Where plaintiffs allege ‘systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process’ as described in the IDEA, they may be excused from exhaustion requirement” (citation omitted) (quoting *Beth V. ex rel. Yvonne V. v. Carroll*, 87 F.3d 80, 88–89 (3d Cir. 1996))); *see also MG ex rel. LG v. Caldwell-W. Caldwell Bd. of Educ.*, 804 F. Supp. 2d 305, 306 (D.N.J. 2011) (holding that the parents failed to satisfy the futility exception to the exhaustion requirement); *J.M. ex rel. Mata v. Tenn. Dep't of Educ.*, 358 F. Supp. 3d 736, 752 (M.D. Tenn. 2018) (finding that the administrative procedures available under the IDEA

path for section 504 and ADA claims that does not trigger the exhaustion clause.

Some lower courts' confusion seemingly centers on a misguided assumption that all claims about the adequacy of an educational program are complaints about the IDEA's FAPE guarantee. These courts fail to unpack plaintiffs' allegations to determine whether their claims were truly centered on IDEA's guarantee of FAPE or rather on disability rights laws' promise of equality and freedom from discrimination. Per the IDEA, only those claims centered on IDEA's FAPE guarantee require exhaustion of the IDEA's administrative remedies.¹¹³

Courts directing plaintiffs to exhaust under the IDEA sometimes cite the goals of administrative exhaustion, including judicial economy, deference to agencies more familiar with educational policy, and the development of a complete and accurate factual record.¹¹⁴ While such policy considerations may be compelling, they clearly do not eclipse the primacy afforded to the plain-language expression of congressional intent.¹¹⁵ The plain language of the exhaustion clause unambiguously states that plaintiffs must only exhaust IDEA's remedies when "seeking relief that is also available under [the IDEA]."¹¹⁶ Thus, courts must do the work to investigate whether a plaintiff's claim is grounded in IDEA's FAPE guarantee in order to correctly determine whether IDEA's exhaustion clause applies.

Largely because of the inconsistent application of IDEA's exhaustion clause across circuits, the Supreme Court, in 2017, stepped in with the goal

would be inadequate to address plaintiffs' surviving claims); *Jamie S. v. Milwaukee Pub. Schs.*, 668 F.3d 481, 494 (7th Cir. 2012); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41, 52 n.12 (1st Cir. 2000) ("[E]xhaustion of the administrative procedures . . . [w]ould not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter." (quoting 121 CONG. REC. 37,416 (1975))).

113. 20 U.S.C. § 1415(l).

114. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 60 (1st Cir. 2002) ("Insisting on [such a requirement] forces parties to take administrative proceedings seriously, allows administrative agencies an opportunity to correct their own errors, and potentially avoids the need for judicial involvement altogether." (quoting *P. Gioioso & Sons, Inc. v. Occupational Safety & Health Rev. Comm'n*, 115 F.3d 100, 104 (1st Cir. 1997))); *Polera v. Bd. of Educ.*, 288 F.3d 478, 489 (2d Cir. 2002) ("[T]he exhaustion requirement is predicated on Congress's belief, expressed through the statutory scheme, that administrative agencies can 'get it right': that the agencies themselves are in the optimal position to identify and correct their errors and to fine-tune the design of their programs.").

115. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

116. 20 U.S.C. § 1415(l).

of providing some needed clarity.¹¹⁷ Unfortunately, by failing to recognize the breadth of section 504 and ADA rights, the Court's opinion only caused further confusion, ultimately resulting in a continued restriction of rights.

C. *The Supreme Court Examines Exhaustion*

The Supreme Court considered the question of the IDEA's exhaustion clause in *Fry v. Napoleon*, settling on a litmus test of sorts. If the plaintiff invoked the right to FAPE, exhaustion of IDEA remedies was required. If not, then a claim under the disability rights laws could proceed.¹¹⁸ The Court acknowledged the continued viability of certain section 504 and ADA claims, stating, "A school could offer a FAPE to a child with a disability but still run afoul of the laws' ban on discrimination."¹¹⁹ Yet, the Court's opinion is flawed in two significant ways. First, the Court gave the disability rights laws too cramped a reading, ascribing only certain types of discriminatory conduct as within their reach. Second, the Court failed to give effect to the plain language of the exhaustion clause, which defers to the plaintiff as the master of their own claim.¹²⁰ By failing to acknowledge section 504 and the ADA's affirmative rights, the Court ultimately sowed more confusion than clarity. The following Section distills the *Fry* opinion as a backdrop to the later discussion of lower courts' interpretations of *Fry*.

1. *Fry*: What the Supreme Court Said

Fry involved a young girl, Ehlena Fry, with cerebral palsy who was eligible for protections under all three disability laws.¹²¹ Ehlena was prescribed a service dog to assist her with certain daily tasks, such as "retrieving dropped items, helping her balance, . . . [and] opening and closing doors."¹²² When Ehlena began kindergarten, rather than allowing the service dog to accompany her to school, the school district proposed including a one-on-one human aide to support her throughout the school day.¹²³ Given that the aide would perform the same tasks as the service dog, the school believed it was satisfying FAPE.¹²⁴ However, Ehlena and her parents felt differently.¹²⁵ They believed a service dog would afford Ehlena more independence than a human aide and that by denying her access to the dog, the school was discrimi-

117. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017) ("We granted certiorari to address confusion in the courts of appeals as to the scope of [the IDEA's] exhaustion requirement.").

118. *Id.*

119. *Id.* at 751.

120. *Id.* at 755.

121. *See id.* at 750–52.

122. *Id.* at 751.

123. *Id.*

124. *Id.*

125. *Id.* at 751–52.

nating against her in violation of section 504 and the ADA.¹²⁶ Thus, the Frys filed a lawsuit invoking these disability rights laws to seek declaratory relief and money damages to compensate for Ehlena's injuries, including emotional distress and pain, embarrassment, and mental anguish.¹²⁷

The central question before the Court was whether the Frys were required to first exhaust their disability rights claims under the IDEA.¹²⁸ The Court, purporting to rely on plain language and congressional intent, reasoned that exhaustion applies only where a suit seeks relief for the denial of a FAPE "because that is the only 'relief' the IDEA makes 'available.'"¹²⁹ The Court then developed a test, directing lower courts to examine the "gravamen" of the complaint to determine whether it seeks relief for the denial of FAPE.¹³⁰ If the crux of the plaintiff's claim involves FAPE, then IDEA exhaustion is required.¹³¹

To help guide lower courts in their quest for the gravamen of a plaintiff's claim, the Court suggested two hypotheticals. First, could the plaintiff have brought the same claim in a public place that was not a school? Second, could an adult have brought essentially the same claim?¹³² If the answer to either question is no, the complaint likely centers on FAPE.¹³³ The two hypotheticals are meant to help lower courts distinguish complaints about the IDEA's provision of FAPE from complaints about disability-based discrimination.¹³⁴ The Court also suggested that lower courts could look to the history of the proceedings to determine whether a plaintiff had previously engaged with the IDEA's formal administrative procedures to resolve their complaint.¹³⁵ A history of invoking IDEA due process procedures, in the Court's opinion, was indicative of a FAPE claim.¹³⁶

126. The Frys initially filed a complaint with the Department of Education's Office for Civil Rights (OCR) alleging that the school's denial of the service dog was a violation of the ADA and section 504. OCR found for the Frys, stating that denial of a service dog was discrimination in violation of section 504 and the ADA. It went on to state that "[a] school could offer a FAPE to a child with a disability but still run afoul of the laws' ban on discrimination." OCR compared the school district's refusal to permit the service dog as similar to forcing a blind student to be led around by others rather than use a cane. *Id.* at 751.

127. *Id.* at 751–52.

128. *Id.* at 752.

129. *Id.* at 752–53.

130. *Id.* at 752.

131. *Id.* at 753 ("The only relief that an IDEA officer can give—hence the thing a plaintiff must seek in order to trigger [the exhaustion clause]—is relief for the denial of a FAPE.").

132. *Id.* at 756.

133. *Id.*

134. *Id.*

135. *Id.* at 757. The Court explicitly cautions that this inquiry should be

limited to commencement of the IDEA's formal administrative procedures; it does not apply to more informal requests to IEP Team members or other school administrators for accommodations or changes to a special education program. After all, parents of a child with a disability are likely to bring *all* grievances first to those familiar officials, whether or not they involve the denial of a FAPE

Perhaps more important than what the Court said in *Fry* is what it left unsaid. The Court left significant gaps in its analysis, and these gaps have led to a restriction of access to legitimate disability-rights-law claims.

2. *Fry*: What the Supreme Court Left Unsaid

While the Supreme Court's *Fry* opinion reaffirmed a plaintiff's right to assert disability-based protections independent of the IDEA, it failed to fully explore the reach of the disability rights laws, leaving a fatal gap in its analysis. First, the Court failed to account for the scope of schools' obligations toward students with disabilities by virtue of their status as students. Disability rights laws impose certain obligations on schools with respect to their treatment of students with disabilities. Second, the Court, while acknowledging the plain language of the exhaustion clause, failed to give effect to it; thereby giving permission for lower courts to utterly ignore congressional intent. Finally, the Court failed to recognize the very real confusion plaintiffs face when attempting to decipher which law presents their best hope for a remedy.

a. Disability Rights Laws Contain a Distinct FAPE Right

To the extent the majority opinion discussed the disability rights laws, it did so through the lens of what it termed "simple discrimination."¹³⁷ Per *Fry*, claims of "simple discrimination" do not need to exhaust IDEA administrative procedures because they do not involve a denial of IDEA's FAPE.¹³⁸ But schools owe more than just protections against discrimination for students in schools. Schools have specific affirmative duties to students with disabilities that exist apart from general antidiscrimination obligations toward adults with disabilities. Such affirmative duties include the mandate to provide these students with a FAPE as defined by section 504 regulations—the right to whatever supports are necessary to meet their educational needs as adequately as those of their peers.¹³⁹ A failure to provide these supports is another form of discrimination cognizable under the disability rights laws. The Supreme Court's failure to acknowledge the breadth of discrimination that can occur with respect to students with disabilities left a gaping hole in its exhaustion analysis.

Rather, the *Fry* Court's two hypotheticals further encourage lower courts to constrict disability-rights-law claims into only those involving "simple discrimination"—defined as claims that could exist either outside of the

Id. at 757 n.11.

136. *Id.* at 757.

137. *Id.* at 756.

138. *See id.*

139. 34 C.F.R. § 104.33(a)–(b) (2019).

school setting or by an adult.¹⁴⁰ As a result, lower courts are erroneously forcing children raising section 504 and ADA discrimination claims, independent of the IDEA's FAPE obligation, to exhaust administrative procedures under the IDEA.

The issue can be clarified through a hypothetical. Victor, a child with diabetes, does not need special education and thus does not qualify for services under the IDEA. But Victor meets eligibility requirements under section 504 and the ADA and requires supportive services to ensure equality of access to the educational program. For instance, he may need a special meal and snack schedule including unfettered access to snacks and water to ensure his ability to remain attentive in class. Victor quite clearly would not need to exhaust rights under the IDEA because he is not eligible as a "child with a disability" under the IDEA. The IDEA's FAPE guarantee does not even apply to him. Yet, per the Supreme Court's holding in *Fry*, if Victor were to file a complaint alleging the school district violated section 504 and the ADA by failing to provide him supports necessary to equally access the educational program, the lower court may, using the *Fry* hypotheticals, erroneously capture this as an IDEA claim and impose exhaustion.

Applying *Fry*'s guidance, a court would ask first whether Victor could have brought this claim in a public, nonschool, environment. The answer, of course, would be no, given that the claim centers on the special relationship between a school and a student with a disability. Schools are obligated to provide for students with disabilities in ways that other public entities simply are not. No other public place would owe Victor access to snacks. A court would next ask whether an adult in the school could have brought a similar claim. Again, the answer would be no. An adult would have no need for accommodations providing access to the educational program. Children, by virtue of their status as students, are conferred special rights in schools that are not similarly applicable to adults. Thus, an adult is simply not an appropriate comparison to determine whether such rights are being invoked.

This hypothetical highlights the unique obligations that section 504 and the ADA place on schools with respect to the *children* in their care. Schools do not necessarily owe the same duties to adults, but the Court failed to explore this nuance in *Fry*. Put differently, Victor is invoking his section 504 FAPE right, which requires equality of access to the educational program. He is not invoking the IDEA's FAPE guarantee, as he does not qualify for IDEA's protections. Because the *Fry* Court did not distinguish between the two, lower courts, applying the Supreme Court's hypotheticals, may require Victor to exhaust this claim under the IDEA.¹⁴¹ Of course, such an action would be futile as Victor does not have rights under the IDEA.

140. *Fry*, 137 S. Ct. at 756.

141. Victor could only bring the claim against a school and could only do so as a student—an adult could not bring a similar claim. Thus, the Supreme Court's *Fry* analysis would suggest that IDEA exhaustion applies.

Fry's two hypotheticals may help to distinguish claims of what the Court termed "simple discrimination" from claims about FAPE, but only where a plaintiff is asserting a claim that is not inextricably linked to the educational program.¹⁴² Of course, students asserting claims arising out of school will often take issue with their educational program. When that happens, the *Fry* hypotheticals curtail students' rights when applied to disability-rights-law claims seeking equal access to the educational program. Section 504 and the ADA's prohibition on disability-based discrimination mean that schools must ensure that their educational programs are equally accessible to students with disabilities as they are to students without disabilities.¹⁴³ Students with rights under these laws should be able to hold schools accountable when they fail to furnish "reasonable modifications to [existing] practices."¹⁴⁴ By failing to account for the disability laws' FAPE obligation, mandating equality of access, the Supreme Court proscribed an ill-fitting solution for determining whether exhaustion is required when plaintiffs seek to assert this FAPE standard, and not an IDEA FAPE claim.

b. Plain Language Matters

A second oversight in *Fry* relates to the Court's pallid treatment of plain language. The plain language of the exhaustion clause states that exhaustion is triggered when a plaintiff is "seeking relief that is also available under [the IDEA]."¹⁴⁵ The inquiry centers on the plaintiffs' choice of claims and, as the Court acknowledged, does not impose the stricter standard of whether the plaintiff "could have sought" relief available under the IDEA.¹⁴⁶ Importantly, the Court recognized that the exhaustion clause anoints the plaintiff as the master of their own claim.¹⁴⁷ The plaintiff decides what relief to seek. By this logic, a plaintiff with rights under both the IDEA and disability rights laws may elect to seek remedies under the disability rights laws and forgo those available under the IDEA. Yet, the Court's hypotheticals fail to give credence to this choice. Because the hypotheticals only assist in carving out one category of disability rights claims—in the Court's words, claims of "simple discrimination"—they capture equality-of-access claims as IDEA FAPE claims.¹⁴⁸ Put differently, the *Fry* opinion fails to give effect to a plaintiff's choice to assert an equality-of-access claim under the disability rights laws.

While the Court acknowledged the plain-language meaning, it seemed preoccupied with the danger of effectuating a "magic words" approach whereby a plaintiff would only need to avoid mention of the IDEA in order

142. *Fry*, 137 S. Ct. at 756.

143. See 34 C.F.R. § 104.33(a)–(b).

144. 42 U.S.C. §§ 12131–12132; see *Alexander v. Choate*, 469 U.S. 287, 299–301 (1985).

145. 20 U.S.C. § 1415(l).

146. *Fry*, 137 S. Ct. at 755.

147. *Id.*

148. See *id.* at 756.

to avoid exhaustion under that statute.¹⁴⁹ Thus, the Court instructed lower courts to look beyond “artful pleading” to the “gravamen” of a complaint to determine whether it seeks relief for the denial of FAPE.¹⁵⁰ Yet, if the exhaustion clause was meant both to give plaintiffs the power to choose which claim to assert and to ensure the viability of section 504 and ADA claims, arguably the Court’s concern is misplaced.

Certainly, if the exhaustion clause is to have any meaning, courts must scrutinize a complaint to determine whether a plaintiff is alleging a denial of the IDEA’s FAPE, but two important signals in the plain language of the text cut against the *Fry* Court’s preoccupation with “magic words.”¹⁵¹ First, because the plaintiff is given authority to shape the claim, the analysis should shift away from whether the plaintiff *could* have sought relief under the IDEA to whether the plaintiff *actually* sought relief that is also available under the IDEA. To give effect to this language, courts need to consider the plaintiff’s choice of framing, choice of remedy, and choice of words. Second, if the plaintiff chooses to forgo IDEA’s FAPE remedy and pursue section 504 and the ADA’s equality-of-access right, courts must allow those claims to proceed without exhaustion. As the Supreme Court itself has noted, the IDEA does not demand equality of access, and thus there is no corresponding remedy for equality under the IDEA.¹⁵²

Ultimately, the plain language of the exhaustion clause calls for courts to make two distinct inquiries. The first is a question of scope—what is encompassed within the IDEA’s FAPE obligation? A plaintiff is only required to exhaust administrative procedures when they are seeking to assert IDEA rights. This is the question tackled by the Supreme Court in *Fry* and the question that the Court’s two hypotheticals fail to tease out. The second, however, is a question of the plaintiff’s autonomy to seek relief under various disability rights laws. Exhaustion is only required when a plaintiff is seeking relief also available under the IDEA. It is not required when a plaintiff seeks relief unavailable under the IDEA. While the Court acknowledged the second, it only attempted to give effect to the first.¹⁵³

149. *Id.* at 755 (“The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words(?) ‘FAPE’ or ‘IEP.’”).

150. *Id.* at 755. In a footnote, the Court explicitly punted on the question whether exhaustion is required when a plaintiff complains about the denial of FAPE but seeks a remedy such as money damages, which fall outside of the IDEA’s scope of relief. *Id.* at 752 n.4.

151. *Id.* at 755.

152. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189–90 (1982) (“Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’”).

153. See *Fry*, 137 S. Ct. at 752 n.4 (“[W]e leave for another day a further question about the meaning of § 1415(I): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?”).

c. The Past Is Not Prologue

The Supreme Court left lower courts with one last befuddling instruction. It suggested that lower courts look to the procedural history for insights into whether a plaintiff's claim was rooted in the IDEA's FAPE obligation, stating that "prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term."¹⁵⁴ For examples of jurists out of touch with the practical realities of ordinary citizens, one need look no further.

To state that interplay between the disability rights laws and the IDEA is complicated is a massive understatement. School officials charged with administering these laws are often unsure about their obligations under each.¹⁵⁵ Courts can get equally mired in the complexity, as evidenced by differences across circuits when it comes to interpretations of the three laws.¹⁵⁶ Given the lack of clarity involved when seeking to assert claims under any of the laws, it seems unwise to place virtually any weight on a plaintiff's prior decision to invoke the IDEA's formal procedures, particularly when the vast majority of parents who initially invoke the IDEA's due process procedures do so without retaining counsel.¹⁵⁷ The *Fry* concurrence, accounting for both the complexity in the law and the understandable gap in knowledge by pro se parents, cautioned against relying on a history of the proceedings as a signpost of a plaintiff's intended claim.¹⁵⁸

To summarize, the *Fry* Court's guidance is flawed for three distinct reasons. First, it refused to acknowledge the breadth of discrimination claims cognizable under disability rights laws. By narrowly defining discrimination claims under section 504 and the ADA as "simple discrimination," the Court

154. *Id.* at 757. The Court cautioned that lower courts should only consider plaintiff's invocation of the IDEA's formal administrative procedures and not informal requests made to teachers or other school officials. *Id.* at 757 n.11.

155. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-348, SPECIAL EDUCATION: VARIED STATE CRITERIA MAY CONTRIBUTE TO DIFFERENCES IN PERCENTAGES OF CHILDREN SERVED 15-16 (2019); see also Josh Cowin, Note, *Is That Appropriate?: Clarifying the IDEA's Free Appropriate Public Education Standard Post-Andrew F.*, 113 NW. U. L. REV. 587, 591 (2018) (arguing that lower courts and individuals remain confused about legal rights under the IDEA following *Andrew F.*).

156. See Perry A. Zirkel, Annotation, *Three Birds with One Stone: Does Meeting the Requirements of the IDEA for an IDEA-Eligible Student Also Comply with the Requirements of Section 504 and the ADA?*, 300 EDUC. L. REP. 29, 34-35 (2014).

157. Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for Pro Se and Represented Parents?*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263, 268 n.21 (2014); see also Lisa Lukasik, *Special-Education Litigation: An Empirical Analysis of North Carolina's First Tier*, 118 W. VA. L. REV. 735, 767 (2015) (documenting a 13.8 percent success rate for complaints brought by petitioner parents without legal representation).

158. *Fry*, 137 S. Ct. at 759 (Alito, J., concurring in part and concurring in the judgment) ("It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or [Section 504] that seeks relief that the IDEA cannot provide.").

completely ignored equality-of-access claims. And by failing to acknowledge section 504 and the ADA's independent equal-access right, the Supreme Court gave lower courts permission to ignore the plaintiffs' actual claim and reframe virtually all education-related grievances as a question of the IDEA's obligation to confer FAPE. Second, the Court failed to give effect to congressional intent appointing the plaintiff as master of their own claim. Rather than defend the plaintiff's autonomy to choose their own relief, the Court imposed a type of mandatory exhaustion regardless of the plaintiff's choice of remedy. Finally, the Court erroneously led lower courts astray when it advised them to use procedural history to help determine the claim centered on the IDEA's FAPE right. Parents may attempt to invoke IDEA remedies before realizing that the relief they seek is only available under disability rights laws. These combined missteps have resulted in a restriction of access to disability rights laws' remedies. The following Part traces and catalogues this confusion.

III. A RESTRICTION OF RIGHTS: LOWER COURTS' CONFUSION CONTINUES

Lower courts are clearly confused about how to apply *Fry*'s exhaustion analysis. Several circuits seem to be applying the Court's hypotheticals as a two-part test for determining when exhaustion is needed.¹⁵⁹ Others do not routinely apply the Court's hypotheticals but still fail to recognize equality-of-access claims as viable under disability rights laws and independent of IDEA rights or remedies.¹⁶⁰ When courts fail to recognize section 504 and the ADA's reach, or when they fail to appreciate the IDEA's limits, students with disabilities are prevented from accessing remedies that were meant to address their unequal treatment.

Lower courts are misapplying *Fry* and restricting access to disability rights remedies in three ways. First, courts are requiring exhaustion when students are not eligible under the IDEA and thus not seeking or privy to IDEA remedies. Second, courts force dually eligible students—students with rights under both the IDEA and the disability rights laws—to exhaust under the IDEA even when they seek remedies for disability discrimination available under only section 504 and the ADA. Finally, courts erroneously preclude disability-rights-law claims when a plaintiff is unable to prove a denial of the IDEA's FAPE. In such cases, courts mistakenly conclude that a finding suggesting that a school has not denied FAPE applies to shield the school equally from violations under section 504 and the ADA, not accounting for the distinction in obligations under each law.

159. MacFarlane, *supra* note 18, at 551.

160. *See id.* at 549–50.

A. *IDEA-Ineligible Students Are Forced to Exhaust*

The IDEA's affirmative rights and remedies only apply to those students who can meet the statute's definition of a "child with a disability."¹⁶¹ As discussed above, eligibility under the IDEA is much more stringent than eligibility under the disability rights laws.¹⁶² Because of the eligibility variances, virtually all students who meet the IDEA's narrower eligibility parameters will also have rights under section 504 and the ADA. The reverse, however, is not true. Students with eligibility under the disability rights laws do not always meet the IDEA's narrower definition of a "child with a disability." Thus, some students who seek remedies for disability-based discrimination do not engage with the IDEA simply because they are not eligible for the IDEA's protections. Many courts fail to recognize this nuance and instead assume that when a student brings a section 504 or ADA complaint about the quality of their educational program, they are disguising an IDEA claim to get around exhaustion. Rather than recognize the section 504 or ADA claim as an independent assertion of rights that only exists under disability rights laws, courts force these students to exhaust remedies under the IDEA—a law that does not even apply to them.

The Third Circuit Court of Appeals has twice restricted access to disability-rights-law claims by forcing plaintiffs without IDEA eligibility to exhaust administrative procedures under the IDEA.¹⁶³ In *Wellman v. Butler Area School District*, a high school student with postconcussive syndrome alleged that the school district failed to properly accommodate him under section 504 and the ADA.¹⁶⁴ The parents initially requested an evaluation for IDEA services, but the school concluded that the student only met eligibility criteria under section 504 and ADA.¹⁶⁵ Despite several meetings to discuss accommodations under the disability rights laws, the plaintiff continued to feel that the school was "uninterested" in providing "any sort of accommodations."¹⁶⁶ This continued frustration with the school's failure to meet the student's needs caused the plaintiff to file suit against the school district

161. 20 U.S.C. § 1401(3).

162. See *supra* Section II.B.

163. *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125 (3d Cir. 2017); *S.D. ex rel. A.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119 (3d Cir. 2018). Plaintiff also alleged violations under the Equal Protection Clause of the Fourteenth Amendment. *Wellman*, 887 F.3d at 129.

164. 887 F.3d at 127–29. The student's parent requested that the student not participate in physical education classes, avoid unsuitable physical activity during football practice, and be given extra study halls. In addition, the student's doctor wrote a letter asking the school to provide academic accommodations including tutors and extended time to complete assignments. Plaintiff alleges that school was dismissive of these requests, causing a worsening in symptoms. *Wellman*, 887 F.3d at 127.

165. *Id.* at 128.

166. *Id.*

claiming that the school's inactions equated to disability discrimination barred by the disability rights laws.¹⁶⁷

Rather than view this claim as a legitimate invocation of section 504 rights, the Third Circuit viewed this as an IDEA issue requiring exhaustion.¹⁶⁸ The court, applying *Fry's* hypotheticals, concluded that because the claims could only be brought by a student and would not have occurred outside the school setting, the claims centered on the IDEA's FAPE guarantee.¹⁶⁹ Thus, the Court dismissed the claim.¹⁷⁰ In truth, the plaintiff did not assert rights under the IDEA because the plaintiff was not eligible as a "child with a disability"¹⁷¹ under the IDEA.¹⁷² Instead, the plaintiff attempted to assert his right to equal access by claiming that the school's failure to provide him with necessary accommodations amounted to discrimination under the disability rights laws.¹⁷³

Wellman is complicated by the fact that plaintiffs initially filed an administrative complaint under the IDEA and settled their claim.¹⁷⁴ Yet, its precedent has restricted the ability of students with viable disability rights claims to successfully have their day in court. For instance, in a subsequent case before the Third Circuit, a student attempting to complain about the quality of her accommodations was again prevented from filing this claim and shut out of court.¹⁷⁵ In that case, the plaintiff, who suffered from chronic sinusitis and intermittent asthma, received accommodations through a sec-

167. *Id.* at 128–29.

168. *Wellman* set a precedent in the Third Circuit to "review both the entire complaint and each claim to determine if the plaintiff seeks relief for the denial of a FAPE." *Id.* at 133. The instruction acknowledged that a "plaintiff [may bring] a single complaint with different claims arising from her school experience"—one requiring exhaustion, and the other not. *Id.*

169. *Id.* at 134. While the court correctly surmised that the plaintiff's claims "all stem from the alleged failure to accommodate his condition and fulfill his educational needs," it then erroneously determined that the claims were rooted in the IDEA's provision of FAPE. *Id.*

170. *Id.* at 136.

171. 20 U.S.C. § 1401(3).

172. *Wellman*, 877 F.3d at 128. Facts indicate that the plaintiff initially requested IDEA eligibility, but after evaluation, the school concluded he was not eligible under the IDEA. The plaintiff could have alleged that the school district failed to identify him as a child with a disability—a violation of IDEA's "child find" obligation, but the plaintiff chose not to bring that claim. 20 U.S.C. §§ 1412(a)(3), 1415(i)(2).

173. *Wellman*, 877 F.3d at 129.

174. *Id.* The plaintiff initially invoked due process remedies under the IDEA and settled his claim by signing a general release appearing to waive all claims that could have been pursued under section 504 or the ADA. But the Third Circuit's analysis did not take into consideration that release or the underlying due process procedures when determining that the claims were purely rooted in the IDEA's FAPE guarantee. *Id.* at 132–33.

175. *S.D. ex rel. A.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119, 123 (3d Cir. 2018) ("The District Court concluded that Appellants' claims required compliance with the IDEA's administrative process and dismissed the claims without prejudice for lack of subject matter jurisdiction."), *aff'g* *A.D. ex rel. S.D. v. Haddon Heights Bd. of Educ.*, 90 F. Supp. 3d 326, 341–43 (D.N.J. 2015).

tion 504 plan.¹⁷⁶ The plaintiff's complaint centered around the quality of accommodations, including an alleged failure to provide specialized instruction that would enable the child to "enjoy the benefits of the educational program to the same extent as his non-disabled peers."¹⁷⁷ With this language, the plaintiff directly invoked section 504's FAPE regulation, which demands equality of access to the education program.¹⁷⁸ The plaintiff never invoked the IDEA, nor did the plaintiff ever receive services under the IDEA.¹⁷⁹ Yet, the appellate court, applying its precedent, concluded that both the discrimination and retaliation claims were subject to the IDEA's exhaustion requirement.¹⁸⁰

The appellate court summarized the plaintiff's complaint as "education injuries," stating that the "substance of [the plaintiffs'] grievance is that [the school] failed to provide instruction tailored to meet [the child's] special needs resulting from his disability."¹⁸¹ The summary is accurate, but the conclusion that such injuries could only be characterized as a denial of the IDEA's right to FAPE is not.¹⁸² In fact, the educational injuries were complaints about the quality and implementation of the student's accommodations under section 504. By labeling these allegations as complaints about the denial of the IDEA's FAPE guarantee, the appellate court blocked the plaintiff's access to relief under the disability rights laws, something that Congress specifically wanted to avoid when it drafted the exhaustion clause.¹⁸³

The Third Circuit is not alone in its erroneous application of the IDEA's exhaustion clause to students who only seek section 504 and the ADA's remedies. Both the Sixth and Eighth Circuits have prevented students with disability-rights-law claims from asserting them without first exhausting the IDEA's administrative procedures when the students did not have rights under the IDEA, nor were they seeking the IDEA's remedies.¹⁸⁴ In the Sixth Circuit, a child who was offered a 504 plan for a diagnosis of E. coli leading to prolonged school absences attempted to complain about the school's lack

176. *Id.* at 121.

177. *Id.* at 123 (quoting Amended Complaint at para. 41).

178. 34 C.F.R. § 104.33 (2019).

179. *See S.D.*, 722 F. App'x at 121–23.

180. *Id.* at 126.

181. *Id.*

182. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017) (rejecting lower court's conclusion that all injuries that are educational in nature are rooted in the IDEA's FAPE obligation).

183. H.R. REP. NO. 99-296, at 4 (1985).

184. *See L.G. ex rel. G.G. v. Bd. of Educ.*, 775 F. App'x 227, 231 (6th Cir. 2019) (holding that a student diagnosed with E. coli infection alleging discrimination and retaliation pursuant to section 504 and Title II had to first exhaust his claims under the IDEA); *Nelson ex rel. C.N. v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 593 (8th Cir. 2018) (holding that a student with polycystic ovarian syndrome and depression alleging discrimination under section 504 when the school failed to allow her access to online schooling had to first exhaust this claim under the IDEA).

of accommodations and alleged retaliation for claiming disability discrimination.¹⁸⁵ The court there held exhaustion was required, summarizing the injury as the school district's failure to "provide him with the individually-tailored educational support he needed in order to continue his academic studies."¹⁸⁶ In the Eighth Circuit, a student with polycystic ovarian syndrome and depression claimed that a school district's denial of access to an online educational program amounted to discrimination under section 504.¹⁸⁷ Just like the Sixth and Third Circuits, the Eighth Circuit required exhaustion despite the plaintiff having never been identified for IDEA services, having never sought out IDEA services, and having specifically sought to invoke section 504's prohibition on unequal or discriminatory treatment based on disability.¹⁸⁸

Courts that force students who have never been found eligible under the IDEA and who do not seek IDEA remedies to nonetheless exhaust IDEA's administrative procedures actively restrict access to important congressionally mandated rights. When Congress amended the IDEA to include an exhaustion clause, it "'reaffirm[ed] the viability' of federal statutes like the ADA or Rehabilitation Act 'as separate vehicles,' no less integral than the IDEA, 'for ensuring the rights of handicapped children.'"¹⁸⁹ Congress's "carefully defined exhaustion requirement" only demands IDEA exhaustion when IDEA relief is at issue.¹⁹⁰ Students who have never been identified as eligible to receive services under the IDEA, and who are not attempting to invoke IDEA rights, are not seeking IDEA relief. They are seeking to invoke section 504's "provision of regular or special education and related aids and services" designed to meet their needs as equally as their peers without disabilities.¹⁹¹ They seek disability rights laws' promise of equal access. Per section 504's regulations, this can and does include access to special education and related aides and services to the extent such services are necessary to prevent discrimination.¹⁹²

185. *L.G.*, 775 F. App'x 227 at 228–29.

186. *Id.* at 231 ("L.G.'s invocation of his failing grades as evidence of the Board's dereliction of duty is further revealing. Grades are, after all, academic markers used to signify a student's intellectual progress along an education plan.").

187. *Nelson*, 900 F.3d at 589–90.

188. *Id.*

189. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 750 (2017) (citing H.R. REP. NO. 99-296, at 4 (1985)).

190. *Id.*

191. 34 C.F.R. § 104.33 (2019).

192. *Id.*; see also *Lyons ex rel. Alexander v. Smith*, 829 F. Supp. 414, 420 (D.D.C. 1993) ("As noted, the § 504 regulations include special education as one means of providing a free appropriate public education. Therefore, in 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).").

Arguably, students who have not yet been found eligible under the IDEA may still have claims under the IDEA if they can prove that a school violated a provision of the statute called “child find.”¹⁹³ Child find obligates schools to affirmatively seek out children who they suspect may have a disability resulting in a need for special education and related services.¹⁹⁴ Thus, students can claim a failure on the school’s part to timely identify them for IDEA services.¹⁹⁵ However, the students mentioned in the above cases did not allege an IDEA child-find violation. When courts require plaintiffs without rights under the IDEA to exhaust, courts are effectively forcing plaintiffs to assert a child-find claim. Such action goes against congressional intent to anoint the plaintiff as master of the claim.¹⁹⁶ Rather, it completely disregards the plaintiff’s stated desire to invoke remedies under disability rights laws and forces plaintiffs to seek IDEA remedies. Put differently, it forces plaintiffs to raise IDEA claims whenever they “could have” in complete disregard for the plain language of the statute.¹⁹⁷

B. *Dually Eligible Students Are Forced to Exhaust*

Without question, children with disabilities can be eligible for protections under all three laws—the IDEA, section 504 and the ADA. In fact, IDEA-eligible students are generally also covered by section 504 and the ADA.¹⁹⁸ Like the plaintiff in *Fry*, these dually eligible students can elect to invoke rights under any of these statutes but, of course, should only be required to exhaust the IDEA’s administrative remedies when their claim centers on the denial of the IDEA’s FAPE requirement.¹⁹⁹ Frustratingly, courts often fail to make this distinction and force dually eligible students to exhaust their claims of disability discrimination under the IDEA.

Courts too often conflate all education-based claims with IDEA claims because they fail to recognize the breadth of cognizable discrimination claims under disability rights laws. These laws contain a right to be free from disability-based discrimination, which includes the right to equal access to

193. See 20 U.S.C. § 1412(a)(3).

194. *Id.*

195. *D.K. ex rel. Stephen K. v. Abington Sch. Dist.*, 696 F.3d 233, 250 (3d Cir. 2012) (“We have ‘infer[red] a requirement that [schools identify disabled children] within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.’” (quoting *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012))).

196. See *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 755 (2017) (citing *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 n.7 (1987)).

197. *Id.* The Supreme Court noted that the IDEA’s exhaustion clause asks whether the complaint “seeks” relief available under the IDEA, as opposed to a stricter clause that asks whether the plaintiff “could have sought” relief available under the IDEA. *Id.*

198. See Zirkel, *supra* note 157.

199. Even though these students technically have rights under three laws, this Article will refer to them as “dually eligible” since the eligibility parameters of section 504 and the ADA are the same. Thus, “dually eligible students” means to signify students with eligibility under the IDEA and section 504/the ADA.

the educational program. The IDEA's exhaustion clause only applies when the IDEA's right to FAPE is at issue. This FAPE right, in turn, is only at issue when a plaintiff's claims are centered on progress toward individualized goals. A complaint centered on disability-based discrimination can include allegations of negative treatment due to disability, failure to provide equal access to the educational program, or denial of benefits of the program. While these complaints all touch on the educational program, they are not invoking IDEA's right to FAPE and thus should not be subjected to exhaustion of IDEA's administrative remedies.

Disability rights laws also provide distinct remedies—namely, money damages—that are not cognizable under the IDEA. Parents, understandably, often seek money damages to deter and punish school officials for their failure to protect a child.²⁰⁰ Money damages are unavailable under the IDEA.²⁰¹ Rather than recognize that claims invoking disability rights laws to seek money damages are wholly outside the IDEA's scope, as discussed below, courts will look at the surrounding circumstances—namely, a child with an IEP and an event being brought by a student in a school setting—and determine that exhaustion is required.

When plaintiffs request monetary relief, lower courts' confusion arises from the application of *Fry*'s two hypotheticals.²⁰² As the *Fry* concurrence aptly predicted, the hypotheticals can be “misleading” because of the overlap in relief available under the IDEA, section 504, and the ADA.²⁰³ That is, sometimes a student whose claim arises at school and is inextricably linked to the educational program has potential remedies under both the IDEA and the disability rights laws. However, given the plain language of the exhaustion clause, plaintiffs seeking remedies only available under the disability rights laws should not be required to exhaust potential IDEA claims. Unfortunately, as the cases below highlight, lower courts continue to misapply the exhaustion clause when dually eligible children attempt to invoke disability rights laws' remedies.

In *J.L. v. Wyoming Valley West School District*, a dually eligible student with severe disabilities, including autism and language delays, alleged he “suffered a deprivation of his protected educational rights” under both the IDEA and section 504 due to improper use of restraints that resulted in physical and emotional harm.²⁰⁴ The defendant moved to dismiss the com-

200. See Weber, *supra* note 86, at 1102, 1107–10.

201. See, e.g., *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 59 (1st Cir. 2002) (citing *Sellers ex rel. Sellers v. Sch. Bd.*, 141 F.3d 524, 525 (4th Cir. 1998)) (money damages are not available under the IDEA); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 386 (6th Cir. 1992).

202. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 756–57 (2017).

203. *Id.* at 759 (Alito, J., concurring in part and concurring in the judgment).

204. *J.L. ex rel. Leduc v. Wyo. Valley W. Sch. Dist.*, No. 3:15-1750, 2016 WL 4502451, at *1–2 (M.D. Pa. Aug. 29, 2016) (“Plaintiffs allege that as a result of defendants’ misconduct, J.L. has suffered a deprivation of his protected educational rights under the IDEA and § 504, a deprivation of his substantive due process rights under § 1983 ‘to be free from wrongful confine-

plaint since the plaintiff failed to exhaust the IDEA's administrative remedies.²⁰⁵ The plaintiff countered by arguing that since their claim sought money damages for physical injuries, exhaustion was not required.²⁰⁶ The district court sided with the school and dismissed the case for failure to exhaust under the IDEA. While the district court decided the case prior to the *Fry* decision, the Third Circuit Court of Appeals had the benefit of *Fry* when it affirmed the ruling.²⁰⁷

The facts in *J.L.* demonstrate the complexity involved in analyzing a complaint implicating both the denial of the IDEA's FAPE and discriminatory conduct under section 504 and the ADA. The plaintiff's claims arose from conduct that occurred on a van provided by the school district to transport the child to and from school, per his IEP.²⁰⁸ The plaintiff's parents first raised their concerns with the use of restraints in an IEP meeting.²⁰⁹ The questions whether a restraint was necessary, consented to, and properly implemented could correctly be categorized as issues arising from the provision of FAPE under the IDEA. However, in addition to this FAPE analysis, there exists a separate pure disability-based discrimination claim cognizable under section 504 and the ADA. This claim is segregable from the IDEA's FAPE question and could not be remedied through the IDEA's administrative process.²¹⁰ Whereas the IDEA is limited to equitable remedies, such as compensatory education, the disability rights laws' remedies include money damages.²¹¹

Establishing a successful claim for money damages under disability rights laws is, without doubt, a monumental task.²¹² It requires a showing of intent and, in some circuits, a showing of something that amounts to educational malpractice.²¹³ Nonetheless, it is a plaintiff's right to invoke this remedy and marshal the evidence to support it. Trial courts should not be in the business of passing judgment about the strength or weakness of a plaintiff's initial complaint but, rather, should only look to determine whether a plain-

ment, physical abuse/restraint, unjustified intrusions on personal liberty/security and arbitrary governmental action,' severe emotional distress and trauma, and educational and emotional set-backs.'), *aff'd*, 722 F. App'x 190 (3d Cir. 2018).

205. *Id.* at *4.

206. *Id.*

207. *Id.*; see *J.L. ex rel. Leduc v. Wyo. Valley W. Sch. Dist.*, 722 F. App'x 190 (3d Cir. 2018).

208. *J.L.*, 2016 WL 4502451, at *2.

209. *Id.*

210. The plaintiffs sought money damages, which are not available under the IDEA. Thus, an IDEA administrative claim would not remedy the alleged harm.

211. 20 U.S.C. § 1415(i)(2)(C)(iii); *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749–50, 754 n.8 (2017); see also Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011).

212. Weber, *supra* note 86, at 1102–05.

213. Weber, *supra* note 16, at 1450–64.

tiff has sufficiently alleged facts to establish a *prima facie* case of discrimination.²¹⁴

The *Fry* opinion acknowledged circumstances, like *J.L.*'s, with an “overlap in coverage” where “[t]he same conduct might violate all three statutes.”²¹⁵ Yet, as illustrated by *J.L.*'s conclusion, *Fry*'s suggested framework failed to help tease out disability rights claims from IDEA claims.²¹⁶ When applying the *Fry* hypotheticals, the Third Circuit ultimately concluded that “[t]he use of restraints ‘would not have occurred outside the school setting and . . . a nonstudent could not (and would not) have “pressed essentially the same grievance.”’²¹⁷ Thus, they dismissed the complaint for failure to exhaust under the IDEA despite the “overlap” discussed in *Fry* and in complete disregard of the plaintiff's stated claim for money damages—a remedy unavailable under the IDEA.²¹⁸

A similar ruling came out of the Eighth Circuit, where the plaintiff claimed unlawful use of isolation and physical restraints in violation of the disability rights laws.²¹⁹ Just as in *J.L.*, the child at issue had an IEP and thus was dually eligible under both the IDEA and the disability rights laws.²²⁰ Again, the central issue was the school's use of restraints, with the plaintiff alleging that the child was “placed in physical restraints for half of the time he actually spent at [school]” and consequently was “denied[,] . . . because of his disability, participation in and the benefits of a public education.”²²¹ There, the court acknowledged section 504 and the ADA's prohibition on disability discrimination but failed to see how the use of prolonged isolation and restraints could be cognizable as a disability-discrimination claim. The Eighth Circuit faulted the complaint for failing to use the word “discrimination” and surmised that because the claim tied the alleged misuse of isolation and physical restraints to a failure to provide “sufficient ‘supportive services’

214. *M.Y. ex rel. J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 888 (8th Cir. 2008) (“To state a *prima facie* case under section 504, a plaintiff must show that he or she (1) is a qualified individual with a disability; (2) was denied the benefits of a program or activity of a public entity receiving federal funds; and (3) was discriminated against based on her disability. . . . Additionally, a plaintiff must show that the discrimination reflected bad faith or gross misjudgment.” (citations omitted)).

215. *Fry*, 137 S. Ct. at 756.

216. *See id.*

217. *J.L. ex rel. Leduc v. Wyo. Valley W. Sch. Dist.*, 722 F. App'x 190, 193 (3d Cir. 2018) (quoting *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 133 (3d Cir. 2017)).

218. *Id.* at 194.

219. *J.M. ex rel. McCauley v. Francis Howell Sch. Dist.*, 850 F.3d 944, 946 (8th Cir. 2017). The plaintiff also claimed violations of the Equal Protection Clause of the Fourteenth Amendment and state civil rights laws.

220. *Id.* at 946–47.

221. *Id.* at 948–49 (third alteration in original) (quoting Second Amended Complaint at 2, 8, *J.M. ex rel. McCauley v. Francis Howell Sch. Dist.*, 4:15-CV00866, 2016 WL 795804 (E.D. Mo. Mar. 1, 2016)).

to permit [the child] to benefit from . . . instruction,” it was related to FAPE and required exhaustion of the IDEA’s administrative remedies.²²²

Such a conclusion obscures the “overlap” in rights acknowledged in *Fry* and fails to disentangle the IDEA FAPE claim from the discrimination claim.²²³ As acknowledged in *Fry*, “[a] school’s conduct[,] . . . say, some refusal to make an accommodation[,] might injure [a child] in ways unrelated to a FAPE.”²²⁴ Thus, when the injury or harm is not intertwined with “measuring the adequacy of education that a school offers to a child with a disability,” the IDEA’s FAPE right is not at issue.²²⁵ The IDEA’s FAPE is rooted in questions about whether a school reasonably calculated an IEP that “enable[d] a child to make progress appropriate in light of the child’s circumstances.”²²⁶ Complaints about physical and emotional harm stemming from the alleged improper use of physical restraints and isolation are not complaints about the adequacy of the educational program. They are, in fact, complaints about discrimination suffered because of disability. Yet, because they happen at school and to children, courts fail to extricate them from the IDEA’s FAPE.

The *Fry* Court acknowledged that a complaint arising out of a school’s treatment of a child with a disability, and thus related to their education, may not always be a complaint about FAPE.²²⁷ Yet, its two hypotheticals—at least as applied by lower courts—do not appear to help distinguish FAPE claims from disability rights claims when the underlying facts could support either. Possibly, lower courts are misapplying the hypotheticals. In *Fry*, the Court acknowledged that a hypothetical claim arising out of a scenario of a teacher striking a student “out of animus or frustration” would likely not require exhaustion.²²⁸ The Court opined, “A telling indicator of that conclusion is that a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official.”²²⁹ Arguably, the same is true in the restraint-and-isolation fact pattern. A child could file a similar suit against an official at another public facility. The key difference is that schools, unlike many other public facilities, have special duties to children with disabilities rooted in disability rights statutes. Put differently, employees at a public facility would never have reason to restrain a child. The reality that such actions could have occurred at only school—at the behest of school employees—is not always determinative that the plaintiff intends to invoke

222. *Id.* at 949 (quoting *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748–49 (2017)).

223. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754–55 (2017).

224. *Id.* at 754.

225. *Id.* at 753–54.

226. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

227. *Fry*, 137 S. Ct. at 754.

228. *Id.* at 756 n.9.

229. *Id.* at 757 n.9.

IDEA's rights or remedies. And, at least when the plaintiff alleges money damages, the remedy is not one that the IDEA can provide.

To give effect to congressional intent as set forth in the plain language of the exhaustion clause, courts must give more weight to the plaintiff's stated choice of remedy. Doing so would ensure that in situations where the same set of facts could establish a claim under either the IDEA or the disability rights laws, it is plaintiffs who choose, and not courts that demand, which remedy to seek.

C. Courts Misconstrue Preclusion

The final way in which courts restrict student access to disability rights laws is through erroneous application of claim and issue preclusion. Claim preclusion, or *res judicata*, is the legal principle that a cause of action cannot be relitigated once it has been decided on the merits.²³⁰ Claim preclusion will act as a bar to a subsequent action when the parties have previously litigated the same claim to a valid final judgment.²³¹ The central issue is generally whether the second action is identical to one that the parties previously litigated.²³² Issue preclusion, also known as collateral estoppel, prohibits relitigation of factual or legal issues that have been decided in earlier litigation.²³³ In short, "a losing litigant deserves no rematch after a defeat fairly suffered."²³⁴ The following Section will highlight the danger in applying both principles to preclude claims under the disability rights laws.

Claim and issue preclusion block plaintiffs' ability to invoke disability rights law remedies in two distinct ways. First, courts find that when the same set of facts underlies both the disability rights and IDEA claims, once the IDEA claim is adjudicated, the disability rights claim is redundant. Put differently, a finding that a school provided FAPE under the IDEA acts to insulate schools from allegations of disability-based discrimination. Second,

230. John F. Wagner, Jr., Annotation, *Proper Test to Determine Identity of Claims for Purposes of Claim Preclusion by Res Judicata Under Federal Law*, 82 A.L.R. FED. 829 Art. 2(a) (1987) ("'Res judicata,' or 'res adjudicata' in the parlance of some of the earlier decisions, is a Latin phrase which in translation within a legal context can be rendered 'a matter adjudged' or 'a thing adjudicated.' As a judicial doctrine in Anglo-American jurisprudence, the traditional rule of *res judicata* holds that the judgment of a court of concurrent jurisdiction directly upon a matter is conclusive between the same parties as to that matter when drawn in question in another court.").

231. *Id.*

232. *Id.*

233. The Restatement describes the general rule as follows: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1980); *see also id.* § 28 (listing exceptions such as whether appellate review was available or whether there were "differences in the quality or extensiveness of the procedures followed").

234. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991).

courts find that plaintiffs are unable to state a claim for damages under disability rights laws after a finding that a school met its obligation to confer FAPE under the IDEA. Both approaches result in outright dismissal of disability-rights-law claims based purely on rulings premised on IDEA obligations.

1. Conflating FAPE with Disability Discrimination

When courts apply principles of *res judicata* to block disability rights claims, they engage in a false equivalency. To establish a *prima facie* case under section 504 or the ADA, a plaintiff must allege facts that demonstrate disability-based discrimination.²³⁵ Some circuits have held that “complying with the IDEA is *sufficient* to disprove educational discrimination.”²³⁶ Thus, in these circuits, plaintiffs that lose IDEA claims are barred from even establishing a disability-rights-law claim.²³⁷ As one court held, “When [the IDEA] process produces an administrative decision that is upheld on judicial review under IDEA, principles of issue and claim preclusion may properly be applied to short-circuit redundant claims under other laws.”²³⁸ The critical misstep in the analysis centers on the word “redundant.” The IDEA’s right to FAPE is simply not the same as disability rights laws’ promise of equal access. Because courts erroneously conflate IDEA rights and remedies with those available under the disability rights laws, they apply issue and claim preclusion to restrict access to section 504 and ADA remedies even though the obligations under each law are distinct.²³⁹

235. *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1246 (10th Cir. 2009) (stating that plaintiffs must also allege facts to demonstrate that they are (1) an individual with a disability under the Act (2) “otherwise qualified” to participate in the program, and for section 504 only, that (3) “the program receives federal financial assistance”).

236. *Id.*; see also *Boutelle v. Bd. of Educ.*, No. 17-1232, 2019 WL 3081113, at *3–5 (D.N.M. July 15, 2019) (holding that the plaintiff was unable to establish a section 504 discrimination claim because an administrative court had held that the school district did not deny FAPE and specifically found that the child was disciplined not because of disability but rather because of misconduct not related to disability); *Moubry v. Indep. Sch. Dist.* 696, 9 F. Supp. 2d 1086, 1108–09 (D. Minn. 1998) (“Notwithstanding a plaintiff’s ability to proceed simultaneously with IDEA and other statutory claims, he cannot establish a viable claim under the non-IDEA causes of action, where the predicate acts, upon which he has premised those claims, have withstood judicial review under the IDEA.” (citing *Indep. Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 562 (8th Cir. 1996))); *M.P. ex rel. K. v. Indep. Sch. Dist. No. 721*, 439 F.3d 865, 868 (8th Cir. 2006) (holding that student’s section 504 and ADA claims of “unlawful discrimination” are not precluded if they are “wholly unrelated to the IEP process”).

237. *E.g., Miller*, 565 F.3d at 1246; *Boutelle*, 2019 WL 3081113, at *3; *Moubry*, 9 F. Supp. 2d at 1108–09; see also *M.P.*, 439 F.3d at 868.

238. *Indep. Sch. Dist. No. 283*, 88 F.3d at 562.

239. *E.g., I.Z.M. v. Rosemount-Apple Valley-Eagan Pub. Schs.*, 863 F.3d 966, 972 (8th Cir. 2017) (precluding plaintiff’s ADA and section 504 equality-of-access claims because they “all grew out of or were intertwined with allegations that the District failed to properly implement his IEP, allegations that were necessarily resolved in rejecting his IDEA claims”).

Courts that find the “provision of FAPE [to be a] *per se* provision of education free from disability discrimination” are simply wrong.²⁴⁰ In fact, the *Fry* case is a direct repudiation of the belief that IDEA judgments should, in all cases, act as a bar to disability-based discrimination claims.²⁴¹ The *Fry* Court recognized that a school could meet its obligations under the IDEA while still engaging in unlawful discrimination per the disability rights laws.²⁴² This is precisely because obligations imposed on schools by each law are not entirely coextensive. The IDEA’s FAPE requirement is rooted in an individual child’s right to receive the special education and supports he or she requires to ensure appropriate progress toward individual goals.²⁴³ The law is inward looking, concerned about whether the child’s individual progress is “appropriately ambitious in light of [their] circumstances.”²⁴⁴ Section 504 and the ADA are outward looking because they require schools to consider questions of equality of access as compared to nondisabled peers.²⁴⁵ Thus, as in *Fry*, when questions of equal access arise, whether a school met its obligations to ensure individual progress under the IDEA is not relevant to the analysis.

One reason many courts feel comfortable with an outright dismissal of disability rights claims after a plaintiff has lost an IDEA challenge has to do with the language of section 504’s FAPE regulation. The regulation states that one way to meet section 504’s FAPE standard is by developing and implementing a valid IEP.²⁴⁶ However, the regulation cannot be read as stating an equivalency in all cases between the IDEA and section 504. To read it that way would be to deny the clearly distinct FAPE standards written into each law.²⁴⁷ Rather, the only way to make sense of the regulation within the context of the statutes’ distinct FAPE obligations is to read it as establishing one

240. *Miller*, 565 F.3d at 1246 (citation omitted).

241. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 754–55 (2017).

242. *Id.* at 754 (“A school’s conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA.”).

243. 20 U.S.C. § 1412; *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.* RE-1, 137 S. Ct. 988, 993–94 (2017).

244. *Andrew F.*, 137 S. Ct. at 1000.

245. 28 C.F.R. § 35.160(b)(1) (2019); 34 C.F.R. § 104.33(b)(1) (2019).

246. 34 C.F.R. § 104.33(b)(2); *see also* *Reed v. Kerens Indep. Sch. Dist.*, No. 3:16-CV-1228-BH, 2017 WL 2463275, at *13 (N.D. Tex. June 6, 2017) (“At a minimum, then, a plaintiff is required to allege a denial of a FAPE under IDEA to sustain a § 504 claim based on the denial of a § 504 FAPE because ‘§ 504 regulations distinctly state that adopting a valid IEP is sufficient but not necessary to satisfy the § 504 FAPE requirements.’” (citing *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 992 (5th Cir. 2014))).

247. *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008) (“FAPE under the IDEA and FAPE as defined in the § 504 regulations are similar but not identical.”).

path, but not the exclusive path, to meeting section 504's FAPE requirement.²⁴⁸

Section 504's FAPE regulation details only one of several ways in which the statute's broader prohibition against discrimination must be met.²⁴⁹ The text of the statute prohibits not just discrimination but also exclusion from participation in and the denial of benefits of public programs.²⁵⁰ Schools must also abide by several other regulations including prohibiting the separation of students with disabilities from their peers without justifiable reasons, ensuring validated and unbiased evaluations, and providing equal access to nonacademic and extracurricular activities.²⁵¹ Moreover, both courts and federal agencies enforcing these laws have acknowledged separate obligations under all three laws.²⁵² Compliance under one does not necessarily equate to compliance under all three. Thus, a plaintiff's disability-rights-law claim can involve issues of equality that go beyond what is obligated by the IDEA.

Several courts have recognized the differences in rights and remedies allowed under the IDEA as opposed to disability rights laws. But, even there, courts' application of issue preclusion needlessly restricts section 504 and ADA claims.²⁵³ For instance, in a case appealed to the First Circuit, parents of a nonverbal child with multiple disabilities, including autism and cognitive impairments, wanted their child to wear an audio-recording device to

248. 34 C.F.R. § 104.33(b)(2) (2019) ("Implementation of an Individualized Education Program developed in accordance with the [IDEA] is *one* means of meeting [the substantive portion of the § 504 of FAPE regulation.]") (emphasis added).

249. 34 C.F.R. §§ 104.32–104.37.

250. 29 U.S.C. § 794(a).

251. 34 C.F.R. § 104.32 (requiring schools to identify and locate individuals with disabilities); § 104.34 (requiring that students with disabilities be educated with their nondisabled peers to the maximum extent appropriate); § 104.35 (requiring unbiased and validated evaluations to determine appropriate placement); § 104.36 (requiring that schools implement procedural safeguards that include notice, access to records, and impartial hearings); § 104.37 (requiring equal access to nonacademic services and extracurricular activities).

252. See, e.g., *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1098–99, 1101 (9th Cir. 2013) ("Given these differences between the two statutes, we are unable to articulate any unified theory for how they will interact in particular cases. Precisely because we are unable to do so, we must reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her Title II claim."). The Departments of Justice and Education issued joint guidance attempting to clarify schools' obligations to students with communication needs under all three laws. CIV. RTS. DIV., U.S. DEP'T OF JUST. & OFF. OF SPECIAL EDUC. & REHAB. SERVS., OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS ON EFFECTIVE COMMUNICATION FOR STUDENTS WITH HEARING, VISION, OR SPEECH DISABILITIES IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (2014), https://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.pdf [<https://perma.cc/Y4WZ-AZZN>] [hereinafter *FAQs*] (indicating that in order to comply with the ADA, schools may need to provide auxiliary aides and services not required under the IDEA).

253. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 290 (5th Cir. 2005). Issue preclusion is appropriate when "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; and (3) the previous determination was necessary to the decision." *Id.*

school.²⁵⁴ The parents argued the recording would help them better understand their child's school day as he was unable to communicate for himself.²⁵⁵ The parents initially filed an IDEA administrative complaint and subsequently filed an ADA complaint.²⁵⁶ The First Circuit found that the hearing officer's holding, indicating that the recording device was not necessary for the provision of the IDEA's FAPE, prevented the plaintiffs from establishing their ADA claim.²⁵⁷ Quite simply, the court's analysis is akin to comparing apples to oranges. A finding premised on the school's ability to offer an educational program that is reasonably calculated to ensure an individual child's progress may have little bearing on whether this program also affords equal access to the educational program.²⁵⁸

The plaintiffs in that case were attempting to invoke the ADA's effective-communication regulation, which requires schools to "furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities[, including companions,] an equal opportunity to participate in, and enjoy the benefits of [a public program]."²⁵⁹ The plaintiffs argued that because their son was unable to communicate with them about his school day, the ADA's effective-communication regulation required that the school district allow him to wear a recording device to ensure his equal access to the educational program.²⁶⁰

The question whether the ADA's effective-communication regulation would require implementation of a recording device is not easily decided.²⁶¹ It is at least arguable that the parents, as companions, were not denied equal access because they were able to adequately communicate with teachers about their child's experiences. What is crystal clear, however, is that the IDEA's FAPE obligation is utterly irrelevant to that analysis. The ADA's regulation imposes an equal-opportunity-to-benefit standard while the IDEA only asks what services are necessary to ensure appropriate progress. Thus, whether a school met its obligation to students under the IDEA is not relevant to an inquiry about whether a particular communication aide is necessary to provide a child, or their companions, equal access to the educational program.

254. *Pollack ex rel. B.P. v. Reg'l Sch. Unit 75*, 886 F.3d 75, 79 (1st Cir. 2018).

255. *See id.*

256. *Id.* at 80.

257. *Id.* at 91.

258. 28 C.F.R. § 35.160(b)(1) (2019); *FAQs, supra* note 252.

259. *Pollack*, 886 F.3d at 81 (quoting 28 C.F.R. § 35.160(b)(1) (2018)); 28 C.F.R. § 35.160(a)(2) ("For purposes of this section, 'companion' means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate."); *see also* *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1102 (9th Cir. 2013).

260. *Pollack*, 886 F.3d at 80.

261. In *Pollack*, the school district raised compelling arguments about the recording device's potential for disruption and interference with the learning process. *Id.* at 83.

The First Circuit recognized the different obligations under the IDEA and the disability rights laws but still proceeded to apply *res judicata* principles to dismiss the ADA claim.²⁶² Their analysis highlights another frequent misstep courts make when analyzing ADA claims. The court applied regulations intended for the employment context to an education case.²⁶³ Citing an employment law case, the First Circuit determined that plaintiffs were required to demonstrate that the accommodation provided increased access to a public service.²⁶⁴ Because the administrative ruling found that a recording would provide no educational benefit and thus was unnecessary for FAPE, the First Circuit found that the plaintiffs were unable to meet the ADA's increased-benefit standard.²⁶⁵

The court's increased-benefits analysis is flawed in two distinct ways. First, the ADA's different subchapters govern vastly different settings.²⁶⁶ Title I, applying to employment, sets forth different standards for accommodations than Title II, which, of course, applies to schools.²⁶⁷ For a myriad of reasons, duties that employers owe to employees with disabilities differ from duties that schools owe to students with disabilities. Second, even if plaintiffs had to demonstrate an increased benefit, the IDEA's benefit analysis should still not act as a complete bar to the ADA claim. Benefit in this context is defined in relationship to IEP goals. Put differently, the central question is whether the audio recording increases the student's ability to make progress toward IEP goals. The ADA, however, defines benefit in the context of equal access for the student and his parents. It asks whether the recording is necessary to afford the student or his parents "an equal opportunity to participate in, and enjoy the benefits of," public education.²⁶⁸ Thus, the IDEA's finding regarding individual progress has no bearing on whether the audio recording provides equal access to the educational program.

This is not to say that issue preclusion could never be appropriately applied to dismiss disability rights claim. However, the analysis should turn on whether the legal standards, and not just the facts, are identical. For example, the Fifth Circuit correctly traversed the nuance between the IDEA and disability rights laws when it precluded inaccessibility claims that were already rejected under the IDEA.²⁶⁹ The case involved a high school student who

262. *Id.* at 79–81.

263. Lingren, *supra* note 17, at 642; Nunes v. Mass. Dep't of Corr., 766 F.3d 136 (1st Cir. 2014).

264. Reed v. LePage Bakeries, Inc., 244 F.3d 254, 259 (1st Cir. 2001).

265. Pollack, 886 F.3d at 83–86.

266. 42 U.S.C. §§ 12111–12117 (employment); §§ 12131–12165 (public services); §§ 12181–12189 (public accommodations and services operated by private entities); §§ 12201–12213 (miscellaneous provisions).

267. Compare *id.* §§ 12111–12117, with *id.* §§ 12131–12165.

268. 28 C.F.R. § 35.160(b)(1) (2019); see also FAQs, *supra* note 252, at 13–14 (questions 8 and 9).

269. Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 297 (5th Cir. 2005).

used a wheelchair and brought suit under both the IDEA and disability rights laws, alleging that parts of the high school campus were inaccessible to him.²⁷⁰ The Court noted the difference between the goals of the IDEA and those of section 504 and the ADA, but it also traced the root of the legal standard at issue—accessibility—to the same federal guidelines. Because accessibility standards are identical under all laws, what is owed to a student under the IDEA is equivalent to what is owed under the disability rights laws. Thus, when a final judgment has been rendered on an accessibility issue under the IDEA, it is redundant and therefore precluded from being re-litigated under disability rights laws.

2. Requiring Intent to Recover Damages

The final way issue and claim preclusion act to restrict legitimate disability rights claims has to do with the intent standard that many courts impose on plaintiffs seeking monetary damages under the disability rights laws.²⁷¹ Although scholars have compellingly called into question whether an intent standard is warranted under disability rights laws, most circuits impose one, at least in cases where plaintiffs seek money damages.²⁷² Courts requiring intent generally agree that the standard may be met by a showing of “deliberate indifference,” but in some circuits a heightened showing of “bad faith [or] gross misjudgment” is required.²⁷³ As one court explained, “So long as [the] state officials involved have exercised professional judgment, in such a way as not to depart grossly from accepted standards among educational professionals, we cannot believe that Congress intended to create liability under § 504.”²⁷⁴ In short, compliance with the IDEA’s FAPE guarantee insulates schools against allegations of professional misjudgment.²⁷⁵

270. *Id.* at 275.

271. Weber, *supra* note 16, at 1417.

272. Compare Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008) (“Thus, a public entity can be liable for damages under § 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons.”), with D.A. *ex rel.* Latasha A. v. Hous. Indep. Sch. Dist., 629 F.3d 450, 455 (5th Cir. 2010) (“[F]acts creating an inference of professional bad faith or gross misjudgment are necessary to substantiate a cause of action for intentional discrimination under § 504 or ADA against a school district . . .”).

273. See Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students’ Section 504 and ADA Claims Against School Districts?*, 47 J.L. & EDUC. 109, 114 (2018).

274. *Latasha*, 629 F.3d at 454–55 (quoting Monahan v. Nebraska, 687 F.2d 1164, 1171 (8th Cir. 1982)); see also *Washington ex rel. J.W. v. Katy Indep. Sch. Dist.*, 403 F. Supp. 3d 610, 622 (S.D. Tex. 2019) (“[Section] 504 do[es] not create ‘general tort liability for educational malpractice.’”); *Hoekstra ex rel. Hoekstra v. Indep. Sch. Dist.*, No. 283, 103 F.3d 624, 627 (8th Cir. 1996) (holding that where the claim is brought in the context of educational services of disabled children, ADA liability does not attach absent a showing of gross misjudgment, or bad faith, on the part of the school officials).

275. Interestingly, courts have held that “[t]he mere fact that complying with the IDEA is sufficient to disprove educational discrimination does not mean that every violation of the IDEA necessarily *proves* a discrimination claim.” *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d

There are compelling reasons for courts to hold that intent is not required under section 504 and the ADA.²⁷⁶ However, assuming that intent is required, the fact that a school complied with the IDEA is not conclusive proof that it did not also act with gross misjudgment. For instance, a school may have thoroughly complied with a child's IEP and simultaneously employed a teacher who physically struck a child. A plaintiff may wish to invoke disability rights laws to allege discrimination and seek compensatory damages. Certainly, a school's correct implementation of the IDEA would have no bearing on whether physically hitting a child amounts to "bad faith or gross misjudgment."²⁷⁷

Rather than exclude viable disability-discrimination claims, courts should allow plaintiffs to marshal the evidence required to state a claim for money damages, even where a showing of intent is required. Because obligations under all three laws are not coextensive, compliance with one does not equate to compliance with all. Put differently, an individual's right to an educational program reasonably calculated to ensure progress toward appropriate goals cannot be fashioned into their right to be free from physical abuse or mistreatment on the basis of their disability. To give effect to congressional intent in enacting disability rights laws, courts must ensure plaintiffs are not unduly proscribed from invoking their rights under these laws.

Despite the Supreme Court's attempt to clarify the exhaustion clause, lower courts remain confused in its application. Their confusion leads to needless restriction of access to important disability law rights and remedies. Courts force exhaustion when students have no rights under the IDEA, when they are not attempting to invoke the IDEA's remedies, and when the IDEA is unable to redress their alleged harms. Courts must take a more nuanced approach when applying the exhaustion clause to ensure appropriate access to disability rights laws. The following Part outlines a path that would assist courts in that effort.

1232, 1246 (10th Cir. 2009). This is in part because many circuits hold that in order to establish discrimination under the disability rights laws a plaintiff must prove an element of causation—that the discrimination was "by reason of the plaintiff's disability." *Id.* (quoting *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999)).

276. Weber, *supra* note 16, at 1450–52 (noting absence of intent or animus requirement for ADA Title II and section 504 claims and tracing courts' imposition of the intent standard for such claims back to misguided application of judicial language from Title VI and Title IX of the Civil Rights Act of 1964); see also Claire Raj, *The Misidentification of Children with Disabilities: A Harm with No Foul*, 48 ARIZ. ST. L.J. 373, 419 (2016) (arguing that courts mistakenly incorporate Title VI's intent requirement into ADA Title II and section 504 misidentification claims because they fail to adhere to Supreme Court precedent acknowledging differences between race discrimination and discrimination against persons with disabilities (the former often rooted in animus and the latter in benign neglect)).

277. *Monahan v. Nebraska*, 687 F.2d 1164, 1171 (8th Cir. 1982).

IV. A RESURRECTION OF RIGHTS: DISAGGREGATING CLAIMS

Congress did not enact the exhaustion clause to curtail rights under other disability rights statutes. Nor did Congress enact the exhaustion clause to ordain the IDEA as an exclusive path to remedy disability-based harms. To the contrary, its central objective was to ensure students with disabilities still had access to important statutes meant to facilitate equality and prohibit disability discrimination.²⁷⁸ In *Fry*, the Supreme Court had the opportunity to clarify how the IDEA and the disability rights laws interact, but instead the Court's guidance has had the opposite effect.²⁷⁹ The Court's failure to recognize the full scope of rights and remedies under section 504 and the ADA has resulted in plaintiffs' inability to access these rights. Given both the recency and finality of the Supreme Court decision, it is now incumbent upon Congress or the U.S. Department of Education to take steps to clarify the path forward. Short of that, lower courts must analyze section 504 and the ADA claims with much more nuance if they are to avoid unnecessarily restricting rights.

As the likelihood of congressional or executive action falls somewhere between seriously unlikely and utterly inconceivable, it is up to courts to ameliorate the problem. This Article proposes a straightforward framework that will give courts the tools to do just that. It disaggregates cases into two major categories and then three subparts. The major categories are obvious: (1) cases involving students only eligible under section 504 and ADA and (2) cases involving dually eligible students with rights under disability rights laws as well as the IDEA. Cases under the first category never require plaintiffs to exhaust the IDEA before proceeding. The second major category requires special attention to the type of disability barrier a student is facing and the remedy the student is seeking. Students bringing cases under these subparts must also be permitted to proceed without exhausting IDEA remedies.

A. *Students with Eligibility Under Section 504 and the ADA*

The first step is to recognize that the IDEA does not cover all students who have disabilities. Courts must be aware of the IDEA's relatively narrow eligibility categories as compared to disability rights laws.²⁸⁰ The result is that many students with disabilities only have access to one set of remedies—those under disability rights laws. Second, while the IDEA and the disability rights statutes both guarantee FAPE, courts must recognize that the concept has different meanings under each law.²⁸¹ While there is certainly overlap between students and remedies under the statutes, there are also distinct categories of students and remedies that do not overlap. Where these students

278. H.R. REP. NO. 99-296, at 4 (1985).

279. See *supra* Parts II, III.

280. See *supra* Sections I.A–B.

281. See *supra* Section I.C.

and remedies do not overlap, it is entirely inappropriate to require students with claims under the disability rights laws to exhaust theoretical claims under the IDEA prior to filing a complaint in federal court.

To avoid this problem, courts must recognize the full breadth of disability rights laws, and in particular their distinct FAPE right. Section 504 and the ADA, by incorporation, define FAPE as the right to an educational program “designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons.”²⁸² This means that when students have complaints about the availability or quality of educational services or related supports, they are invoking the right to equal access as set forth in disability rights laws. Forcing a student who is not IDEA eligible to exhaust their claim both is futile and unjustly delays their attempt at a remedy.

Courts can identify plaintiffs who are eligible under section 504 and the ADA but not the IDEA quite easily. As a starting point, courts should assume complaints that do not specifically invoke the IDEA are invoking disability rights laws. Of course, courts should then scrutinize the complaint for any indication otherwise, such as the existence of an IEP. Courts’ focus should be on the plain language of the complaint. Students who only have rights under section 504 and the ADA will not invoke the IDEA in a complaint. Further, such students will not have an IEP and will not focus their remedies on changes or improvements to an IEP, again because they are ineligible for IEPs altogether. These students could challenge IDEA eligibility and thereby seek an IDEA remedy, but short of that action any child without an IEP and who is not affirmatively making an IDEA claim should not be assumed to be IDEA eligible by a court. Nor should such a student be forced to exhaust a complaint about IDEA rights that they are not choosing to invoke.²⁸³ Rather, courts must view their complaints—even when centering on the quality of their educational program—to be complaints rooted in section 504 and the ADA.

In some instances, such children may have some past history of invoking IDEA’s due process remedies, but this alone does not indicate that their current action is centered on IDEA’s right to FAPE.²⁸⁴ Parents are often confused about their rights under these statutes and may have been previously and incorrectly directed to the IDEA as their only recourse for complaints

282. 34 C.F.R. § 104.33 (2019).

283. Such a child could theoretically have rights under the IDEA if the school should have reasonably suspected they were a child with a disability and evaluated them as such. The IDEA places an affirmative obligation on schools to seek out children suspected of having disabilities who are in need of special education services. 20 U.S.C. § 1412(a)(3)(A); *see also* D.K. *ex rel.* Stephen K. v. Abington Sch. Dist., 696 F.3d 233, 250 (3d Cir. 2012) (“We have ‘infer[red] a requirement that [schools identify disabled children] within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.’” (alterations in original) (quoting *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 271 (3d Cir. 2012))).

284. *See* *Wellman v. Butler Area Sch. Dist.*, 877 F.3d 125, 129 (3d Cir. 2017).

about the educational program.²⁸⁵ Because of the lack of clarity surrounding the interactions between all three laws, a parent's past mistaken invocation of the IDEA in a prior administrative proceeding should not act as a bar to the current claim.

Students with rights only under disability rights laws have simpler cases to disaggregate. The facts should clearly indicate that a child, without IDEA rights, is clearly not filing a complaint about the IDEA's provision of FAPE. Courts simply must acknowledge a separate, but no less important, right to equal access of the educational program under section 504 and the ADA.²⁸⁶ The more complicated cases are those involving children who are dually eligible for IDEA as well as disability rights law protections. However, as demonstrated in the following Section, by disaggregating those claims into identifiable categories, courts can more readily ensure the continued viability of section 504 and ADA claims.

B. *Students with Eligibility Under All Laws*

Students with eligibility under the disability rights laws as well as the IDEA present the most difficult exhaustion questions. With these students, courts cannot rely simply on whether the child is IDEA eligible. Rather, courts must examine the substance of the student's chosen claim, paying specific attention to whether the claim seeks a remedy that the IDEA can actually provide. More specifically, it does not matter whether the IDEA might provide "some" service or remedy to the student. The question is whether the IDEA provides the specific service or remedy that a student has been denied or is requesting. In at least three categories of cases, the IDEA is not responsive to the specific claims students are raising: (1) infliction of physical or emotional harm, (2) exclusion from the educational program, and (3) denials of equal access. In each category, courts should recognize that such claims are not rooted in IDEA's FAPE obligation and thus not precluded by its exhaustion clause.

1. *Infliction of Physical or Emotional Harm*

Students with disabilities who have suffered physical or emotional harm based on their disability often seek money damages for those harms, not a change in their educational program or compensatory educational services.²⁸⁷ Were they seeking only equitable relief in the form of modifications to their educational program, they might be required to exhaust under the IDEA.²⁸⁸ But such exhaustion makes no sense when their claim is rooted in remedying the prior injury itself. More specifically, such claims are not a

285. See *supra* note 43.

286. See *supra* Section I.C.

287. See *supra* Part III.

288. See 20 U.S.C. § 1415(l).

product of IDEA's provision of FAPE but rather purely a form of disability-based discrimination. Further, the IDEA does not afford the money damages these students are seeking. The IDEA is limited to modifications to the educational program and equitable remedies.²⁸⁹ As a result, IDEA exhaustion simply does not apply.

Courts can easily recognize such cases by focusing on the facts pled and avoiding distracting issues pertaining to possible IDEA claims that could have been raised. For instance, a child may have an IEP that delineates the parameters for appropriate behavioral interventions. A child injured when a teacher uses inappropriate restraints may bring a claim under disability rights laws and seek a remedy of money damages for the injury. Even though the child could raise a FAPE claim and question the implementation of the IEP, a claim centered on injury should be segregated from the FAPE issue and allowed to proceed under disability rights laws. The exhaustion clause is only triggered when a plaintiff seeks IDEA-based relief.²⁹⁰ In the hypothetical case in which a child seeks money damages based on a school injury, courts can feel certain that by allowing the claim to proceed they are giving effect to the plain language of the exhaustion clause, which was never meant to block such claims.²⁹¹

2. Exclusion from the Educational Program

Students bringing claims alleging exclusion from the educational program where facts support intentional discrimination are attempting to invoke section 504 and ADA rights and therefore are not required to exhaust under the IDEA. Such claims arise when schools exclude a student—through repeated suspensions or repeated removals from class—as a means of targeting them because of their disability.²⁹² Some courts have recognized that when plaintiffs plead such facts they are alleging something more than simply a denial of FAPE and have correctly characterized claims alleging exclusion as a form of intentional discrimination outside of the scope of the IDEA.²⁹³

289. Weber, *supra* note 86, at 1113.

290. 20 U.S.C. § 1415(l).

291. See K.G. *ex rel.* Gosch v. Sergeant Bluff-Lufton Cmty. Sch. Dist., 244 F. Supp. 3d 904 (N.D. Iowa 2017) (holding that parents were not required to exhaust claims of excessive force and disability discrimination when teacher dragged student across classroom floor, causing injury).

292. See J.S., III *ex rel.* J.S. Jr. v. Hous. Cnty. Bd. of Educ., 877 F.3d 979, 986 (11th Cir. 2017) (holding that allegations that a disabled student was repeatedly removed from class could not be analyzed simply as a FAPE violation but were “cognizable as a separate [section 504/ADA] claim for intentional discrimination”); see also Patrick v. Success Acad. Charter Schs., Inc., 354 F. Supp. 3d 185 (E.D.N.Y. 2018) (holding plaintiff's allegations of repeated suspensions and retaliatory calling of EMS or threats to do so were outside the scope of IDEA's right to FAPE and more properly represented discrimination claims under section 504/the ADA).

293. See, e.g., Patrick, 354 F. Supp. 3d at 228.

Because all three laws contain overlapping protections guaranteeing students with disabilities the right to be educated in the least restrictive environment, courts must carefully scrutinize claims touching on exclusion from that setting.²⁹⁴ A child alleging school exclusion could viably bring such a claim under all three laws.²⁹⁵ When this type of overlap in rights exists, courts must guard against an instinct to compel exhaustion whenever a claim *could* involve the IDEA's FAPE obligation. Rather, they must examine the entirety of facts presented and remedies sought to determine whether the plaintiff seeks to invoke an antidiscrimination principle enshrined in disability rights laws or the IDEA's right to FAPE, which includes a right to be educated in the least restrictive environment.²⁹⁶

A few guiding principles can help courts in this context. First, courts must identify whether a plaintiff has alleged intent. Facts supporting allegations of intentional action taken because of disability clearly take a complaint outside the framework of the IDEA. Second, courts must analyze the requested relief. If the plaintiff seeks relief in the form of an injunction or a return to the original placement, the complaint is both rooted in the IDEA and seeking relief that the IDEA can provide, and thus, exhaustion would be required. If, however, the plaintiff seeks money damages for the harms endured because of exclusion and invokes section 504 or the ADA's right to education in the least restrictive environment, such a claim represents the plaintiff's legitimate attempt to invoke disability-rights-law principles of nondiscrimination, is not remediable by the IDEA, and should be allowed to proceed without exhaustion.

The Supreme Court intentionally punted on the question whether a plaintiff can circumvent the exhaustion clause by pleading a remedy not available under the IDEA.²⁹⁷ Scholars post-*Fry* have argued both for and against an interpretation that would allow plaintiffs to bypass the exhaustion clause by essentially requesting money damages.²⁹⁸ However, when a plaintiff seeks to remedy harms based in exclusion, they are not simply using money damages as a way to circumvent the IDEA. Instead, they are invoking a germinal right enshrined in disability rights laws—the right to be free from discrimination and to seek a remedy when that right is breached.²⁹⁹ Thus,

294. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 104.34 (2019); *supra* note 97 and accompanying text.

295. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 104.34; *supra* note 97 and accompanying text.

296. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 104.34.

297. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017) (“In reaching these conclusions, we leave for another day a further question about the meaning of § 1415(l): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?”).

298. Compare Martha McCarthy, Annotation, *Fry v. Napoleon Community Schools: Could This Supreme Court Decision Open a Pandora's Box?*, 344 EDUC. L. REP. 18, 29–30 (2017), and Garda, *supra* note 18, at 476–77, with Bruce, *supra* note 18, at 1011.

299. 29 U.S.C. § 794; 42 U.S.C. §§ 12132–12133.

because plaintiffs are invoking a right that exists independently outside of the IDEA and are clearly seeking relief that the IDEA is unable to offer, courts must allow these claims to proceed without exhaustion. Congress never intended the exhaustion clause to bar access to remedies unavailable under the IDEA.

3. Denial of Equal Access

Students who bring equality-of-access claims are not required to exhaust under the IDEA.³⁰⁰ These claims center on section 504's FAPE regulation, defined as equal access to the educational program, and, as such, are not rooted in a denial of IDEA's individual right to appropriate progress.³⁰¹ As the *Fry* Court described, a school district may meet its IDEA obligations and still run afoul of disability rights laws' promise of equal access. Courts must recognize claims grounded in equality as viable disability-rights-law claims not subject to exhaustion. This tenet should hold true even when claims could only be brought by a student and in a school setting.

Understanding the limits of the IDEA's FAPE obligation is essential for courts tasked with disentangling FAPE claims from this category of disability rights claims. Importantly, the IDEA does not ensure equality.³⁰² Rather, it only ensures access to the special education and supportive services necessary to ensure students can make appropriate progress toward annual goals.³⁰³ Sometimes those services may have the functional effect of moving a student toward equality. Other times, a school might fully meet its requirements under the IDEA but leave the student with an educational program that does not provide equal access as compared to nondisabled peers. The *Fry* case is an example of such facts. There, the plaintiffs chose not to bring an IDEA claim because they recognized that the school had met its IDEA obligation to ensure individual progress.³⁰⁴ The crux of their claim was a right to an accommodation that would bring their daughter closer to equality with

300. *Sophie G. ex rel. Kelly G. v. Wilson Cnty. Schs.*, 742 F. App'x 73, 78, 80 (6th Cir. 2018) (finding that a plaintiff's ADA claim, alleging a school district denied her child access to an after-school childcare program due to the child's lack of independent toileting ability, did not require exhaustion: "Looking to the gravamen of Plaintiffs' complaint—the violations alleged and relief sought—admission to the Kid's Club is distinct from Sophie's education, is not alleged to be necessary for Sophie to receive a FAPE, and is, at most, tangentially related to Sophie's IEP").

301. *See supra* Part IV; *see also* *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008) (followed in the D.C. Circuit in *Torrence v. District of Columbia*, 669 F. Supp. 2d 68, 72 (D.D.C. 2009)).

302. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 198 (1982).

303. *Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

304. *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 751–52, 758 (2017).

her nondisabled peers.³⁰⁵ A service dog provided her independence in a way that a human aide could not.³⁰⁶

Courts can recognize these claims when plaintiffs plead facts to suggest any form of inequality born out of a difference between students with disabilities and those without. While these claims will center on the educational program, the framing is central to the court's analysis. Plaintiffs who invoke disability rights laws will situate their demands within a framework that calls for equality of access. Typical allegations will involve a school's failure to provide some form of educational support or modification as creating or exacerbating inequity.³⁰⁷ While plaintiffs in such cases will have rights under the IDEA, they may recognize (like the Frys) that the school has met the IDEA's FAPE obligations, but an inequity remains. Such demands invoke rights only available through section 504 and the ADA; therefore these claims do not invoke IDEA rights and should not be subject to exhaustion requirements.

A subset of equal-access claims includes plaintiffs seeking to invoke the ADA's effective-communication regulation.³⁰⁸ This regulation demands that schools "take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others."³⁰⁹ Here again, the obligation owed students is grounded in not the IDEA's right to individualized progress but rather a comparative right to equality. Thus, plaintiffs invoking the ADA's effective-communication requirement, even those with IEPs, should not be forced to exhaust their claims under the IDEA. The IDEA simply contains no basis to remedy an equality claim.

CONCLUSION

Disability rights laws promise an environment free from discrimination where students with disabilities have equal access to educational opportunity. But too often, courts incorrectly restrict students' access to this promise. Courts instead view the IDEA as the sole arbiter of all education-related challenges involving students with disabilities, failing to recognize that the law has real limits. These limits are what make access to section 504 and the ADA essential. For some, the promise of equality, freedom from discrimina-

305. *Id.* at 751–52.

306. *Id.* at 751; *see also* Bagenstos, *supra* note 25, at 41.

307. *Supra* Part III.

308. 28 C.F.R. § 35.160 (2019); *see also* K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013).

309. Hocker, *supra* note 1, at 85, 92.

309. 28 C.F.R. § 35.160(a)(1). "For purposes of this section, 'companion' means a family member, friend, or associate of an individual seeking access to a service, program, or activity of a public entity, who, along with such individual, is an appropriate person with whom the public entity should communicate." *Id.* § 35.160(a)(2).

tion, and the ability to *attain* both are only found within these disability rights laws.

Courts must acknowledge the full scope of the rights embodied in section 504 and the ADA and stop needlessly restricting students' ability to invoke their remedies. As a first step, courts must recognize that these laws' distinct FAPE rights are not cognizable under the IDEA and therefore not restricted by the IDEA's exhaustion clause. To avoid needless restriction of disability rights law claims, courts should disaggregate claims, separating cases involving students only eligible under disability rights laws from cases involving dually eligible students. Cases under the first category never require plaintiffs to exhaust before proceeding. Courts must pay special attention to cases in the second category and unpack the type of disability barrier alleged as well as the remedy sought. By doing so, courts can ensure plaintiffs' disability rights claims are fairly adjudicated. Congress intended plaintiffs to have access to these important laws and courts must ensure this promise is kept.

