

A New Look at Section 504 and the ADA in Special Education Cases

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Abstract

School districts are finding fewer children eligible for services under the Individuals with Disabilities Education Act (IDEA). At the same time Congress has expanded the number of children who are protected by section 504 of the Rehabilitation Act and title II of the Americans with Disabilities Act (ADA). These developments present the largely unexplored question of what obligations school districts owe children who have disabilities and are protected under section 504 and the ADA, but who are not eligible for services under IDEA. This article concludes that these children must be provided an education that meets their needs as adequately as the needs of children without disabilities are met in the same school district. This level of services may be higher or lower than the level of services required by IDEA. Other educational obligations apply, as do procedural protections and rights in the student disciplinary process. In general, exhaustion defenses should not apply, and a wide range of remedies should be available.

In a 2009 article, I commented that school districts seem increasingly eager to restrict the eligibility of children for services under the Individuals with Disabilities Education Act (IDEA) and that frequently, courts let them do so when parents file challenges.¹ Caselaw indicates that this trend has intensified over the past two years.² In

¹ Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83 (2009).

² See, e.g., *Anello v. Indian River Sch. Dist.*, No. 09-1650, 2009 WL 4755714 (3d Cir. Dec. 14, 2009) (upholding summary judgment in favor of school district on claim that child should have been found eligible earlier, noting child's success under section 504 plan); *Brado v. Weast*, No. CIV. PJM 07-2696, 2010 WL 333760, (D. Md. Jan. 26, 2010) (holding that child with section 504 plan was not eligible under IDEA); *A.J. v. Board of Educ., East Islip Union Free Sch. Dist.*, No. 07-CV-2103(DRH)(MLO), 2010 WL 126034 (E.D.N.Y., Jan. 8, 2010) (holding child with Asperger syndrome ineligible on ground that academic performance was satisfactory); *Chase v. Mesa County Valley Sch. Dist.* No. 51, No. CIV.A. 07-CV-00205RE, 2009 WL 3013752 (D. Colo. Sept. 17, 2009) (holding that child managing average grades was properly terminated from special education); *E.M. v. Pajaro Valley Unified Sch. Dist.*, No. C 06-4694 JF, 2009 WL 2766704 (N.D. Cal. Aug. 27, 2009) (holding child continually at risk of grade retention not eligible on basis of learning disability). Of course, cases continue to run in the other direction too. E.g., *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150 (D. Mass. 2009) (holding that school district should

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the article, I advocated reexamining the cases that limit eligibility and adopting an interpretation of IDEA that calls for broader coverage under that statute.³ Nevertheless, the likelihood remains that eligibility for services under IDEA will continue to be cut back. What happens if that occurs?

A probable result is that parents of children with disabilities will bring more claims⁴ for services under section 504 of the Rehabilitation Act of 1973⁵ and title II of the Americans with Disabilities Act (ADA).⁶ Section 504 forbids disability discrimination by federal grantees, including local school districts; title II forbids disability discrimination by state and local government, again including school districts. The regulations promulgated to enforce section 504 require that all children with disabilities, as defined by section 504 and the ADA, be provided with free, appropriate public

have evaluated child with record of truancy); *W.H. v. Clovis Unified Sch. Dist.* No. CV F 08-0374 LJO DLB, 2009 U.S. Dist. LEXIS 47736 (E.D. Cal. June 8, 2009) (upholding IDEA eligibility under other-health-impaired category).

³ See Weber, *supra* note __ (mess), at 152-59.

⁴ Relatively few parents use existing IDEA procedures to challenge the decisions of school districts concerning their children, so one should not expect a litigation explosion in any instance. See U.S. GEN. ACCOUNTING OFFICE, SPECIAL EDUCATION: NUMBERS OF FORMAL DISPUTES ARE GENERALLY LOW AND STATES ARE USING MEDIATION AND OTHER STRATEGIES TO RESOLVE CONFLICTS 3 (2003) (“While data are limited and inexact, four national studies indicate that the use of the three formal dispute resolution mechanisms has been generally low relative to the number of children with disabilities. Due process hearings, the most resource-intensive dispute mechanism, were the least used nationwide. Using data from the National Association of State Directors of Special Education, we calculated that nationwide, in 2000, about 5 due process hearings were held per 10,000 students with disabilities.”); see also Dick Zeller, Five Year State and National Summaries of Dispute Resolution Data, Center for Appropriate Dispute Resolution in Special Education (March 2010), <http://www.directionservice.org/cadre/pdf/National%20Part%20B%20Dispute%20Resolution%20Data%20Summary%20FFY2003-FFY2007%2015April2010.pdf> (“Due process complaint filings have shown a very slight decline on average but with variability from year to year. The reported number of due process hearings fully adjudicated peaked in 2004-05 but has declined sharply over the last four years.”). It remains uncertain whether parents whose children are denied IDEA eligibility will assert rights under the other statutes, or whether they will choose to make a stand on the issue of IDEA eligibility, or perhaps do both.

⁵ 29 U.S.C.A. § 794 (West 2010).

⁶ 42 U.S.C.A. §§ 12131-12150 (West 2010).

education as interpreted by those regulations.⁷ That entitlement does not hinge on IDEA eligibility.

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. The general consensus is that IDEA does not allow claims for compensatory or punitive damages;⁸ although punitive damages are not available under section 504 and title II of the ADA, compensatory damages may be.⁹ Nevertheless, section 504 and title II ADA special education cases in which viable compensatory damages claims exist are rare. Courts generally insist that the plaintiff show the defendant engaged in intentional wrongful conduct, or at least manifested deliberate indifference,¹⁰ and they frequently apply a test of whether the school district engaged in gross misjudgment or bad faith conduct.¹¹ Section 504 and the ADA remain underdeveloped as avenues of judicial relief in special education cases that do not assert compensatory damages claims.¹²

Two facts suggest that this underdevelopment will end soon. The first, as noted, is the effort at cutting back on who is protected under IDEA, which will force parents and

⁷ 34 C.F.R. § 104.33(a) (2010).

⁸ The Supreme Court recognized this fact as early as 1984. *Smith v. Robinson*, 468 U.S. 992, 1020 n.24 (1984), *superseded by statute in part not relevant*, 20 U.S.C. § 1415(l) (“Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504, but are available under the EHA only in exceptional circumstances.”).

⁹ See *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding ADA title II damages claim against Eleventh Amendment defense); *Barnes v. Gorman*, 536 U.S. 181 (2002) (holding that title II of ADA does not permit punitive damages).

¹⁰ See Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1103-06 (2002).

¹¹ For an extensive discussion of cases applying this standard, see Drew Millar, Note, *Judicially Reducing the Standard Of Care: An Analysis of the Bad Faith/Gross Misjudgment Standard in Special Education Discrimination*, 96 KY. L.J. 711 (2007-08).

¹² The statement in the text should be taken with the caveat that some development of section 504 and the ADA has occurred in an administrative setting, the Office for Civil Rights of the United States Department of Education, which receives complaints and issues letters of findings.

advocates to look to other legal avenues in asserting rights to have children with disabilities educated properly in the public schools. The second is the recent extension of section 504-ADA title II coverage to many more children through the redefinition of “individuals with disabilities” in the ADA Amendments Act of 2008.¹³ The ADA Amendments Act overturns Supreme Court precedent that had narrowed the coverage of the ADA and section 504. It provides that impairments are to be considered in their unmitigated state and it greatly expands the definition of major life activities provided in the statute’s coverage provision.¹⁴

Much commentary¹⁵ concerning section 504 and the ADA in the context of elementary and secondary schooling focuses on damages claims¹⁶ or modification of

¹³ Pub. L. No. 110-325, 122 Stat. 3553 (Sept. 25, 2008).

¹⁴ See *infra* text accompanying notes ____ (describing expansion of coverage of ADA in ADA Amendments Act).

¹⁵ Professor Zirkel’s work is a notable exception. to the generalization in the text. He has written on section 504 and ADA coverage, Perry A. Zirkel, *A Step-by-Step Process § 504/ADA Eligibility Determinations: An Update*, 239 WEST’S EDUC. LAW REP. 333 (2009); *Conducting Legally Defensible § 504/ADA Eligibility Determinations*, 176 WEST’S EDUC. LAW REP. 1 (2003); student discipline issues under section 504 and the ADA, Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 WEST’S EDUC. LAW REP. 9 (2008); *Discipline Under Section 504 and the ADA*, 146 WEST’S EDUC. L. REP. 617 (2000); and other section 504-ADA matters, Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 WEST’S EDUC. L. REP. 541 (2004); *Comparison of IDEA IEP’s and Sec. 504 Accommodations Plans*, 191 WEST’S EDUC. L. REP. 563 (2004); *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 WEST’S EDUC. L. REP. 761 (2000); *Section 504 and Public School Students: An Empirical Overview*, 120 WEST’S EDUC. L. REP. 369 (1997); *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 WEST’S EDUC. L. REP. 471 (1996) (hereinafter, Zirkel, *Substantive Standard*). Professor Zirkel is also author of a two volume treatise, SECTION 504, THE ADA, AND THE SCHOOLS (2d ed. 2000). Other articles that discuss coverage of section 504 and the ADA in the context of public schooling include Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REF. 21, 228-33 (2002), and Susan G. Glark, *Making Eligibility Determinations Under Section 504*, 214 WEST’S EDUC. L. REP. 451 (2007).

¹⁶ This includes my own. Weber, *supra* note __ (wm. & m. harass); see also Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83 (2002). Other work includes Sarah Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue*, 1992-93 ANN. SURV. AM. L. 419 (1994); see also Paul M. Secunda, *At the Crossroads of Title IX and a New “IDEA”: Why Bullying Need Not Be “a Normal Part of Growing Up” for Special Education Children*, 12 DUKE J. GENDER L. & POL’Y 1, 31 (2005) (discussing redress for bullying under section 504 and the ADA).

standards for participation in athletic programs.¹⁷ This article takes the scholarship in a new direction by asking what section 504 and the ADA require of school districts in educating children with disabilities who are not eligible under IDEA but who qualify for coverage only under those two statutes. It concludes that an obligation exists to provide appropriate education that meets the needs of those children as adequately as the needs of children without disabilities are met. This obligation may be greater or lesser than the duty under IDEA to provide appropriate education, and will vary from one school district to another. Other obligations apply as well—duties not to segregate, to provide procedural protections, and to afford special rights in the student disciplinary process. In general, exhaustion defenses should not apply to claims to enforce these obligations, and a wide range of remedies should be available. The questions about the scope of section 504 and the ADA's obligations and these proposed answers gain salience from the amendment of section 504 and the ADA to cover more potential claimants, and the potential decrease of children who are designated as eligible for services under the Individuals with Disabilities Education Act.

Part I of this article discusses the increase in the numbers of children who are covered by section 504 and the ADA because of the ADA Amendments Act of 2008. Part II goes into the obligations owed those children, discussing in depth the duty to educate as adequately as others are educated. Part III briefly takes up the exhaustion defense, and Part IV closes the discussion by exploring remedies issues.

¹⁷ E.g., Tessie E. Rose & Dixie Snow Huefner, *High School Athletic Age-Restriction Rules Continue to Discriminate Against Students with Disabilities*, 196 WEST'S EDUC. L. REP. 385 (2005); Kimberly M. Brown, Comment, *Leveling the Playing Field: A Commentary on the Impact of High School Athletic Eligibility Requirements on Students with Learning Disabilities*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 255 (2008); Brooke A. Frederickson, *The Age Nineteen Rule and Students with Disabilities: Discrimination Against Disabled Students with Athletic Ability*, 25 T. JEFFERSON L. REV. 635 (2003).

I. Expanded Coverage under Section 504 and the ADA

Section 504 and the ADA define disability as a physical or mental impairment that substantially limits one or more of the major life activities of an individual, a record of such an impairment, or being regarded as having such an impairment.¹⁸ Although this language sounds broad, the Supreme Court held that it should be read narrowly.¹⁹ It ruled that impairments must be evaluated in their mitigated state, that is, after considering any medical intervention or other means—including those of the body’s own automatic systems²⁰— that the individual uses to reduce the impact of the impairments.²¹ It held that the regarded-as term applies only if an entity subject to the law mistakenly believes that a person has a physical or mental impairment that substantially limits one or more major life activities or mistakenly believes that an actual impairment substantially limits one or more major life activities.²² The Court held that to be substantially limited in the major life activity of performing manual tasks, an individual must be prevented or severely restricted “from doing activities that are of central importance to most people’s daily lives,” and that the impairment’s impact must be “permanent or long term.”²³ Other courts followed the Supreme Court’s example and adopted their own restrictive readings of the definitional provisions.²⁴

¹⁸ 29 U.S.C.A. § 705(9)(B) (West 2010), 34 C.F.R. § 104.3(j) (2010) (section 504); 42 U.S.C.A. § 12102(2) (West 2010) (ADA).

¹⁹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002), *superseded by statute*, Pub. L. 110-325, 122 Stat. 3553 (2008) (“[T]hese [definitional] terms need to be interpreted strictly to create a demanding standard for qualifying as disabled . . .”).

²⁰ An example is the unconscious correction that the brain makes for some of the limits on seeing when a person has unequal vision in the two eyes. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 565 (1999).

²¹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, Pub. L. 110-325, 122 Stat. 3553 (2008).

²² *Id.* at 489.

²³ *Williams*, 534 U.S. at 198.

²⁴ See Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992, 994-95 (2008) (collecting sources).

The ADA Amendments Act, passed in 2008 and effective January 1, 2009, explicitly disapproves the two major Supreme Court cases limiting the coverage of the ADA, and by extension, section 504.²⁵ It provides that the definition of disability “shall be construed in favor of broad coverage of individuals,”²⁶ and declares that the intent of Congress is “that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations,” rather than whether the claimant’s impairment meets the definition of a disability.²⁷ Further, “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active,”²⁸ and the determination whether an impairment substantially limits a major life activity is to be made “without regard to the ameliorative effects of mitigating measures,”²⁹ except for ordinary eyeglasses or contact lenses.³⁰ A nonexclusive list of mitigating measures to be disregarded appears in the statute. Of particular relevance to education disputes are medication, hearing aids, cochlear implants, mobility devices, assistive technology, “reasonable accommodations or auxiliary aids and services,” and “learned behavioral or adaptive neurological modifications.”³¹

The new statute provides a nonexclusive list of major life activities, similar to that previously found in regulations promulgated under the ADA, but expanded to explicitly include sleeping, reading, concentrating, thinking, and communicating as well as performing manual tasks, seeing, hearing, eating, walking, speaking, learning, and

²⁵ Pub. L. 110-325, § 2(b)(2)-(5), 122 Stat. 3553, 3553 (2008)

²⁶ § 3(4)(A).

²⁷ § 2(b)(5).

²⁸ § 3(4)(D).

²⁹ § 3(4)(E)(i)-(ii).

³⁰ The exception does not apply to low-vision devices. § 3(4)(E)(i)(I).

³¹ § 3(4)(E)(i)-(ii).

working.³² The term “major life activities” now also includes operation of major bodily functions, such as “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”³³ A person meets the requirement of being regarded as having an impairment that substantially limits a major life activity if the person establishes that he or she has been subjected to a prohibited action “because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”³⁴ These definitional provisions apply to section 504 as well as the ADA.³⁵

With respect to elementary and secondary education students, the expansion of coverage of section 504 and the ADA in the new law is momentous. Children may through their own extraordinary effort, or through medical and other therapies, or through supplemental devices, aids, or services overcome whatever limits their physical or mental conditions impose on them. These children are now covered by section 504 and the ADA as long as their impairments would substantially limit a major life activity if the impairments were not mitigated. Moreover, the list of what is a major life activity now explicitly includes reading, concentrating, thinking, communicating, and sleeping, as well as hearing, speaking, and learning. The “operation of a major bodily function” provision is especially noteworthy in its coverage of children with serious medical conditions even if the conditions are satisfactorily treated. Were that not enough, the restrictive reading

³² § 3(2)(A).

³³ § 3(1)(B).

³⁴ § 3(3)(A). This provision does not apply if the impairment is “transitory and minor;” a transitory impairment is one with an actual or expected duration of six months or less. § 3(3)(B).

³⁵ § 7.

that the Supreme Court imposed on what “substantially limits” means is now a dead letter.³⁶

Due to the general underdevelopment of section 504 and the ADA in the elementary and secondary education context, there has not been the level of judicial controversy over coverage that has taken place in the employment field.³⁷ If the ADA Amendments Act functions as intended, controversy regarding the coverage of section 504 and the ADA may well not arise because the broad scope of the statutes will be so clearly established. But at the minimum the new law calls into question the future applicability of what caselaw there is that restricts eligibility of elementary and secondary education students under section 504 and the ADA. One now-doubtful precedent is *Ellenberg v. New Mexico Military Institute*,³⁸ the most prominent elementary and secondary education case relying on a narrow understanding of who is covered by section 504 and the ADA.

In *Ellenberg*, a student sued the state military academy contending that it violated IDEA, section 504, and the ADA by denying her admission.³⁹ The court of appeals affirmed a grant of summary judgment against her on the section 504 and ADA claims, reasoning that she failed to make a prima facie showing that she had a disability within the meaning of those statutes.⁴⁰ As characterized by the court, the student’s argument was that any child eligible under IDEA is automatically covered by section 504 and the ADA, but the court rejected a proposed interpretation of a section 504 regulation that

³⁶ § 2(a)(7), (b)(4)-(5).

³⁷ See Wendy Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1180-87 (2007) (comparing restrictions on coverage of ADA in employment cases to restrictions on eligibility under IDEA, but not drawing similar comparison for coverage under section 504).

³⁸ 572 F.3d 815 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1016 (2009).

³⁹ *Id.* at 818.

⁴⁰ *Id.* at 819.

would have supported that conclusion.⁴¹ Because no other evidence was put forward that the student had an impairment that substantially limited a major life activity, the claims failed.⁴²

It may perhaps remain the case that IDEA eligibility does not automatically establish coverage under section 504 and the ADA, but absence of coverage is exceedingly unlikely. In order to be eligible under IDEA, a child must have one or more listed conditions, any of which would qualify as a physical or mental impairment within the meaning of section 504 and the ADA.⁴³ For all but specific learning disability, for which the requirement appears implied, the impairment must adversely affect educational performance, and for all impairments, the condition must cause a need for special education and related services.⁴⁴ Conceivably, an adverse effect on educational performance is not necessarily a substantial limit on the major life activity of learning.⁴⁵ Nonetheless, if the impairment is such that the adverse effect is so significant that it causes the child to need special education and related services, the conclusion hard to escape that the impairment causes a substantial limit either on learning or on another

⁴¹ *Id.* at 820-21. The student relied on 34 C.F.R. § 104.3(l)(2), which defines a “qualified handicapped person” to include “a handicapped person . . . to whom a state is required to provide a free appropriate public education under [IDEA].” The court determined that the regulation had to be read in the context of another regulation, which defines handicapped person as an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. *See* 34 C.F.R. § 104.3(j)(1).

⁴² *Ellenberg*, 572 F.3d at 821.

⁴³ 20 U.S.C.A. § 1401(3)(A)(i) (West 2010) (“mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities”). The test for children aged three to nine is less specific. § 1401(3)(B)(i).

⁴⁴ § 1401(3)(A)(ii) (West 2010); 34 C.F.R. § 300.8(c) (2010)

⁴⁵ It should be noted, however, that some states have in their own rules required that there be a significant adverse effect on the child’s educational performance. *See, e.g., J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 67 (2d Cir. 2000) (applying Vermont provision requiring functioning significantly below expected age or grade norms). In my view, these restrictions beyond what is in IDEA violate the federal statute. *See Weber*, *supra* note __ (Buffalo), at 118-19. But where a child meets such an enhanced standard, an automatic conclusion of section 504 and ADA coverage appears well justified.

major life activity such as speaking, reading, thinking, concentrating, communicating, or something else.⁴⁶

II. Entitlements Under Section 504 and the ADA

If more children are now covered ADA and section 504, the question arises as to what the duties of public school systems are towards these children. This discussion entails a comparison to the duties owed children eligible under IDEA, development of the specific obligations imposed by section 504's regulations, exploration of the potential limits on those obligations for children who are also eligible under IDEA, consideration of other educational duties imposed section 504 and the ADA, and special attention to student discipline issues.

A. The Comparison to IDEA and *Rowley*

In any discussion of the substantive entitlements of children with disabilities to public education, the standard of reference—or elephant in the living room, depending on one's way of thinking—is appropriate education under IDEA. In *Board of Education v. Rowley*, the Supreme Court construed the duty to provide appropriate education to children with disabilities who are eligible under IDEA to mean services sufficient to provide “some educational benefit” to the eligible child.⁴⁷ The entitlement is to services that are beneficial,⁴⁸ so that access to education is meaningful.⁴⁹ Nevertheless, Congress's intent was “more to open the door of public education to handicapped

⁴⁶ For commentary on the ADA Amendments Act not specific to elementary and secondary education, see Stephen F. Befort, *Let's Try this Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, UTAH L. REV. (forthcoming, 2010); Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187 (2010); Alex Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NORTHW. U.L. REV. COLLOQUY 217 (2008).

⁴⁷ 458 U.S. 176, 200 (1982)

⁴⁸ *Id.* at 200-01.

⁴⁹ *Id.* at 192. There must be “personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.” *Id.* at 203.

children on appropriate terms than to guarantee any particular level of education once inside.”⁵⁰

The Court applied this definition of appropriate education to overturn a ruling that a first-grader who was deaf but had lipreading skills and a hearing aid was entitled to a sign language interpreter even though she was achieving satisfactory grades and progressing from grade to grade without having an interpreter.⁵¹ The Court rejected a standard adopted by the lower courts that she be provided services sufficient to maximize her potential commensurate with the opportunity provided children without disabilities to maximize theirs.⁵² The lower courts had adapted that standard from the regulations applicable to elementary and high schools under section 504.⁵³ The *Rowley* case did not present any claims under section 504 or the section 504 regulations themselves, so there was no occasion to investigate the rights that section 504 (and later the ADA) would confer on a public school student. *Rowley* remains good law with regard to IDEA, though several observers have commented that the lower courts frequently apply a standard for appropriate education that is not as modest as much of the language in *Rowley* suggests.⁵⁴ Some judicial and academic sources have contended as well that subsequent legislation has effectively raised the *Rowley* standard.⁵⁵

⁵⁰ *Id.* at 192.

⁵¹ *Id.* at 209-10. The Court said, “We do not attempt to establish a single test for determining the adequacy of educational benefits conferred upon all children covered by the Act,” *id.* at 202, but suggested that if a child is advancing from grade to grade in regular education classrooms the standard is likely to be met, *id.* at 203-04 & n.25.

⁵² *Id.* at 198.

⁵³ *See id.* at 186 n.8.

⁵⁴ *See, e.g.,* Mark C. Weber, *The Transformation of the Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349 (1990).

⁵⁵ *See, e.g.,* N.B. v. Hellgate Elementary Sch. Dist., 541 F.3d 1202, 1213 & n.3 (9th Cir. 2008); Scott F. Johnson, *Reexamining Rowley: A New Focus in Special Education Law*, 2003 B.Y.U. EDUC. & L.J. 561 (2003).

B. Meeting Educational Needs as Adequately As Needs of Others Are Met

Regulations promulgated under section 504 require a recipient of federal funding that operates a public elementary or secondary education program to provide a free, appropriate public education to each child covered by section 504 in the recipient's jurisdiction.⁵⁶ The section 504 regulations define appropriate education as "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements" of further regulations governing educational setting, evaluation and placement, and procedural safeguards.⁵⁷

It is significant, but essentially noncontroversial, that the section 504 regulations and the ADA bar unnecessary segregation, unjustified disparate impact discrimination, refusal to furnish comparable academic and nonacademic facilities and settings, and failure to provide reasonable accommodation.⁵⁸ What is controversial is the use of section 504 and the ADA to challenge school district programs that do not meet the needs of individual children with disabilities as adequately as the needs of other children are met—applying the standard that the lower courts used in *Rowley* and the Supreme Court rejected in that case, but adopting it not as an interpretation of IDEA but as a direct application of the section 504 regulation. Caselaw, the caselaw's implications, practicability, regulatory authority, and judicial enforceability all come into play in resolving the controversy.

⁵⁶ 34 C.F.R. § 104.33(a) (2010).

⁵⁷ 34 C.F.R. § 104.33(a) (2010).

⁵⁸ See 34 C.F.R. §§ 104.4 (listing general prohibitions on discriminatory conduct), .34 (governing settings and facilities for elementary and secondary school students) (2010).

1. *Cases Interpreting the Section 504 Regulation.* Two notable cases suggest that the section 504 appropriate education regulation should be interpreted and enforced exactly as written. *Mark H. v. Lemahieu* is a damages case in which parents contended that their two daughters, both of whom had autistic conditions, were denied adequate services from the public schools in Hawaii.⁵⁹ A hearing officer found that the children were denied appropriate education in violation of IDEA and ordered prospective remedial action. The parents subsequently filed suit for damages, asserting among other claims, that the failure to provide adequate services during the period before remediation constituted a violation of section 504. The district court granted summary judgment for the school system, holding that there is no section 504 cause of action for violation of the right to appropriate education, and that IDEA is the exclusive avenue for claims that fall within its scope.

The Ninth Circuit overturned the decision, ruling that IDEA is not an exclusive remedy⁶⁰ and that the appropriate education duty under IDEA is not identical with that under section 504.⁶¹ The court stressed that the section 504 appropriate education standard requires “a comparison between the manner in which the needs of disabled and non-disabled children are met”⁶² Adopting a valid IDEA individualized education program “is sufficient but not necessary to satisfy” section 504’s appropriate education requirement,⁶³ which implies that failure to offer such a valid IDEA program may, but does not necessarily, violate the section 504 duty. Because the parents, like the school

⁵⁹ 513 F.3d 922 (9th Cir. 2008).

⁶⁰ *Id.* at 934-35.

⁶¹ *Id.* at 933.

⁶² *Id.* The court said that the section 504 regulation also entailed a focus on the design of the child’s educational program, but did not specify how this approach differed from that of IDEA. *See id.*

⁶³ *Id.*

system, incorrectly assumed that the standards are identical and that the failure to provide appropriate education under IDEA identified by the hearing officer necessarily supported the section 504 claim, the case had to be remanded for proceedings on whether the school system violated the section 504 standard.⁶⁴

*Lyons v. Smith*⁶⁵ foreshadowed *Mark H.* In *Lyons*, the federal district court affirmed a hearing officer's decision that a child with attention deficit hyperactivity disorder did not fit in the IDEA category of "other health impaired."⁶⁶ At the same time, it reversed the hearing officer's decision declining to order that the child be given special education pursuant to section 504.⁶⁷ The parties, the court noted, agreed that the child was covered by section 504. The court declared that the mere fact of section 504 eligibility "does not necessarily mean that [the child] is entitled to the special education that he seeks."⁶⁸ Instead, he was entitled to "an education designed to meet his individual educational needs as adequately as the needs of nonhandicapped persons are met."⁶⁹

Lyons is precisely parallel to the situation that is likely to become common in the wake of IDEA eligibility cutbacks and section 504-ADA coverage expansion: a claim by a non-IDEA eligible child, not necessarily for damages relief, but rather for prospective creation and implementation of a program providing appropriate education under the section 504 standard. *Lyons* cautioned that section 504 does not require anything more than preventing discrimination on the basis of disability,⁷⁰ and expressed doubt that the

⁶⁴ *Id.* at 939-40.

⁶⁵ 829 F. Supp. 414 (D.D.C. 1993).

⁶⁶ *Id.* at 418.

⁶⁷ *Id.* at 419.

⁶⁸ *Id.* at 420.

⁶⁹ *Id.* (citing 34 C.F.R. § 104.33(b)). The court may have believed that this duty is lower than that under IDEA, for it repeatedly used the word "merely" in describing the section 504 entitlement. *See id.* at 419 n.9, 420.

⁷⁰ *Id.* at 419.

interventions required to serve a child who is not eligible under IDEA in a nondiscriminatory manner would include special education,⁷¹ but it placed its emphasis on the regulation mandating that the needs of the child be met as adequately as the needs of others.⁷² In response to a request for interpretation of the duties that public schools owe students covered by section 504 but not IDEA, the Office for Civil Rights of the United States Department of Education stated that the section 504 appropriate education duty does not incorporate any cost or other limit as may be conveyed by a “reasonable accommodation” standard, but instead that precedent imposing such a limit in some education cases applies to post-secondary institutions only.⁷³ Thus in the view of the Department of Education, the section 504 appropriate education duty may in fact be more exacting than the *Lyons* court envisioned.

2. *Implications: A Standard Both Higher and Lower.* The upshot of *Mark H.* and *Lyons* is that the section 504 appropriate education standard is enforceable when a case is brought for violation of that statute, but also that the standard it imposes on public schools is different from the IDEA appropriate education standard. Some commentators suggest that it is higher—“an entitlement to services greater than the *Rowley* ‘some benefit’ standard.”⁷⁴ Others, quite likely the school districts who resist making children

⁷¹ *Id.* at 420 n.11.

⁷² *See id.* at 420; *see also* Zirkel, *Substantive Standard*, *supra* note __, at 475-76 (discussing *Lyons*).

⁷³ Letter to Zirkel, 20 Individuals with Disabilities Educ. L. Rep. 134 (1993). The relevant case regarding higher education is *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). Regarding implied limits on reasonable accommodations duties in other contexts, *see* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, FLA. L. REV. (forthcoming 2010) (discussing scope of reasonable accommodation duty and continuing viability of *Davis*).

⁷⁴ Kristine 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, 652. I have suggested this position myself, stressing the fact that the *Rowley* court rejected the commensurate opportunity standard embodied in the section 504 regulation, viewing it as imposing excessive duties on schools. Weber, *supra* note __ (Davis) at 417-18. Nevertheless, I have acknowledged the possibility that courts could read 34 C.F.R. § 104.33(b) to say that if the IDEA standard has been met for an IDEA-eligible child, then the child is entitled to nothing more under the section 504 regulations. *See* MARK C. WEBER, SPECIAL

eligible under IDEA but who do not or cannot oppose the children's coverage under section 504, may be banking on the proposition that the standard is lower.⁷⁵

What remains is the possibility that the standard is both, depending on the circumstances. Thus a wealthy school district that does exceedingly well for its students who do not have disabilities, offering them a range of instruction and activities that truly maximizes their educational opportunities,⁷⁶ would be held to a high standard, well above that of *Rowley*, for children covered by section 504.⁷⁷ For school districts that are poor or fail for other reasons to offer a decent level of services to children without disabilities, non-IDEA-eligible children with disabilities in those districts might receive services that are below some of the more generous interpretations of the IDEA standard.⁷⁸

3. *Practicability*. One may ask whether the “as adequately” standard is workable. Justice Rehnquist’s opinion in *Rowley* suggested that such a standard was not. The opinion states:

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

EDUCATION LAW AND LITIGATION TREATISE § 1.4(2), at 1:10 (3d ed. 2008). See generally *infra* text accompanying notes ___ (discussing “floor” and “ceiling” issues for children covered by both IDEA and section 504).

⁷⁵ See Zirkel, *Substantive Standard*, *supra* note ___, at 476 (“[T]he *Lyons* Section 504 ruling provides the alternative answer that the substantive standard is commensurate opportunity. . . . Only indirectly related to cost, application of this standard will usually yield a lesser result than under the IDEA . . .”).

⁷⁶ See generally Laurie Reynolds, *Skybox Schools: Public Education as Private Luxury*, 82 WASH. U. L.Q. 755 (2004) (describing high levels of educational services in wealthy school districts).

⁷⁷ See Zirkel, *Substantive Standard*, *supra* note ___, at 476 (“[B]ut in the unusual case of a student eligible solely under Section 504 and enrolled in a district characterized by extremely high educational achievement, the entitlement may be deeper than under the IDEA.”). The trend toward resisting IDEA identification and the expansion of the coverage of section 504 may render this case far from unusual in the present day.

⁷⁸ See *supra* note ___ and accompanying text (commenting on prevailing interpretations of appropriate education standard that may exceed narrower readings of *Rowley*).

provide “equal” educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of “free appropriate public education”; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child’s potential is, we think, further than Congress intended to go.⁷⁹

Meeting the individual educational needs of a student with a disability as adequately as the needs of students without disabilities does require a potentially difficult comparison, but the task is hardly impossible. There are some levels of services for both children with and without disabilities that educational observers would consider excellent, good, fair, or poor at serving the respective students’ needs. If the children without disabilities receive excellent services in comparison to their peers nationally, then so should the children with disabilities. If non-disabled children’s services are good, fair, or poor, the same level of quality would apply for children with disabilities. The section 504 standard does not mean maximizing the opportunities of children with disabilities, but instead simply entails treating all children equitably.⁸⁰ Moreover, even if the implementation of the standard is challenging, it remains true that Congress is free to impose such challenges on courts. Often legal standards created by legislation or regulations are hard to apply. This does not authorize the judiciary to ignore them.

⁷⁹ *Rowley*, 458 U.S. at 198-99.

⁸⁰ The Court may be criticized for attacking a straw man. See Zirkel, *Substantive Standard*, supra note ___, at 474 (“Deftly mischaracterizing the lower courts’ standard as ‘strict equality of opportunity or services,’ the Rehnquist majority criticized it as ‘an entirely unworkable standard requiring impossible measurements and comparisons.’”).

4. *Regulatory Authority.* One writer has questioned whether the standard in the section 504 regulation exceeds regulatory authority as an impermissible interpretation of section 504.⁸¹ The controlling decision on this issue is *Chevron v. Natural Resources Defense Council*.⁸² It holds that if a statute speaks directly to “the precise question,” a contrary regulation will not be followed,⁸³ but when there is any ambiguity “with respect to the specific issue,” a regulation that is duly promulgated by an agency charged with administration of a statute will prevail as long as it “is based on a permissible construction of the statute.”⁸⁴ This exceedingly high standard for overturning a regulation governs the United States Department of Education’s section 504 regulation providing that in the context of public elementary and secondary education the law requires appropriate education as defined by the “as adequately” terminology.

The text of section 504 expressly forbids exclusion from participation, denial of benefits, and subjection to discrimination by reason of disability. Those terms, however, are hardly self-defining, and Congress looked to federal administering agencies, in particular what was then the Department of Health, Education, and Welfare, to define the terms with regulations.⁸⁵ The question under *Chevron* is whether it is permissible to define disability discrimination in the context of public elementary and secondary schooling to include denial of appropriate education as further defined by meeting the needs of children with disabilities as adequately as the needs of other children are met. Defining discrimination to require a comparable level of excellence or adequacy is within

⁸¹ Ronald D. Wenkart, *Section 504: A Reasonable Accommodation Standard or an Unfunded Mandate for Special Education Services*, 116 WEST’S EDUC. L. REP. 531, 544 (1997).

⁸² 467 U.S. 837 (1984).

⁸³ *Id.* at 842.

⁸⁴ *Id.* at 843.

⁸⁵ The regulation in fact was promulgated by the Department of Health, Education, and Welfare before the creation of a separate Department of Education, but it continues to be enforced by the Department of Education.

the bounds of reason. Other definitions could be imagined, but it would strain belief to call this one an impermissible construction of the statutory term.⁸⁶

The rule that conditional spending provisions are to strictly construed does nothing to undermine the section 504 regulation's validity.⁸⁷ The regulation itself makes abundantly clear that the needs of children with disabilities must be met as adequately as those of others. What that means in a given case may need to be hammered out by administrative or judicial decision, but the obligation itself is unambiguous, and if it were not, the Office for Civil Rights interpretation that rejects any reasonable-accommodation limits provides clarification and has done so for more than fifteen years. States are thus on notice of what their obligations are when they decide to accept federal education money.⁸⁸

It is also misleading to refer to the regulation as an unfunded mandate.⁸⁹ Section 504 is not a mandate at all, but a condition on federal funding. States and localities are in no way obligated to accept federal education money. Section 504 does not have a specific funding stream attached to it, but neither does title VI of the Civil Rights Act or title IX of the Education Amendments, both of which may require increased spending by

⁸⁶ See *Lyons*, 829 F. Supp. at 419 & n.8 (upholding regulation); Lingren, *supra* note __, at 675 n.225 (“Any attempt to declare the current [section 504] FAPE regulatory provision invalid is likely to fail because of the stringency of the [*Chevron*] test . . .”). That the definition applied in the context of higher education differs, or that the interpretation of free, appropriate education in IDEA differs, does nothing to contradict the proposition that the “appropriate education” and “as adequately” regulations are a permissible interpretation of the language of section 504. Cf. Wenkart, *supra* note __, at 544-545 (advancing arguments based on differences in interpretation for post-secondary education and IDEA).

⁸⁷ See *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (applying principle to hold that attorneys’ fees provision in IDEA does not encompass expert witness fees).

⁸⁸ As the Court noted in *Rosado v. Wyman*, when statutes placing conditions on federal spending are interpreted, enforcement of federal policy is paramount. 397 U.S. 397, 423 (1970) (“When (federal) money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states.”) (quoting *Helvering v. Davis*, 301 U.S. 619, 645 (1937)).

⁸⁹ Cf. Wenkart, *supra* note __ (using “unfunded mandate” terminology); Lingren, *supra* note __ (same).

entities that choose to accept federal funds.⁹⁰ Any entity that accepts federal money is aware, as noted above, that section 504 needs to be followed and its regulations obeyed if the federal money is accepted. What is more, services for children with disabilities, even those who do not qualify under IDEA, are not unfunded. Local school districts may use 15% of their IDEA funding to serve children who do not meet IDEA eligibility standards but who need additional academic or behavioral support to succeed in general education.⁹¹ This would appear to cover children who are eligible under section 504 but not IDEA.⁹²

5. *Judicial Enforceability.* Finally, there seems little doubt that the duties imposed by the section 504 regulations on appropriate education can be enforced in court, subject in some cases to an administrative exhaustion requirement.⁹³ The courts have long recognized an implied private right of action to enforce section 504,⁹⁴ following on the acceptance of an implied right of action to enforce the similarly worded title IX of the Education Amendments of 1972.⁹⁵ An objection may be lodged based on *Alexander v. Sandoval*, which ruled that no private right of action existed to enforce regulations promulgated to enforce title VI of the Civil Rights Act of 1964⁹⁶ when the regulations forbade disparate impact discrimination rather than the intentional discrimination

⁹⁰ For example, title VI requires access to education for non-English speakers, *see Lau v. Nichols*, 414 U.S. 563 (1974), and title IX requires expenditures to make educational opportunities equal for women when existing services and facilities are unequal.

⁹¹ 20 U.S.C.A. § 1413(f) (West 2010).

⁹² *See generally* Mark C. Weber, *Reflections on the New Individuals with Disabilities Education Improvement Act*, 58 FLA. L. REV. 7, 22-23 (2006) (discussing funding provision).

⁹³ *See infra* text accompanying notes ____ (discussing exhaustion).

⁹⁴ *See, e.g.,* Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 120-121 (1st Cir. 2003); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1272 (9th Cir. 1999); *see also* Mark H. v. Lemahieu, 513 F.3d 922, 935 (9th Cir. 2008) (“It has long been established that § 504 contains an implied private right of action for damages to enforce its provisions.”).

⁹⁵ Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

⁹⁶ 20 U.S.C.A. § 1681 (West 2010).

outlawed by title VI itself.⁹⁷ The *Mark H.* court confronted this argument and made three responses: (1) the section 504 education regulation does not prohibit disparate impact or negative outcomes, and the emphasis in the regulation on “design” of programs reinforces that point;⁹⁸ (2) the imposition of comparative obligations to meet the needs of some as adequately as the needs of others “clearly represent a prohibition on simple discrimination as long understood,”⁹⁹ and (3) given the nature of disability discrimination, the ban on discriminatory conduct requires the positive obligation to afford meaningful access.¹⁰⁰ Moreover, whatever the scope of title VI’s statutory ban on discrimination may be, the Supreme Court recognized in *Alexander v. Choate* that section 504 itself—not just its regulations—bars some unintentional discriminatory conduct,¹⁰¹ and commented specifically that Congress focused on “special educational assistance,”¹⁰² in imposing on federal grantees positive obligations to afford meaningful access.¹⁰³

C. Dually Eligible Children and *Rowley* as a Floor or a Ceiling

Can a child who is eligible for services under IDEA and also covered by section 504 claim a higher level of services than that required by *Rowley* by invoking section 504’s “as adequately” regulation? The text of the regulation would suggest that the answer is yes, though there are numerous cases saying that when the student loses on an appropriate education claim under IDEA, the court will not look further to determine if

⁹⁷ 532 U.S. 275 (2001). The Court did not find the disparate impact regulations invalid, but merely not enforceable through a private right of action. See *Sandoval*, 532 U.S. at 281.

⁹⁸ *Mark H. v. Lemahieu*, 513 F.3d 922, 936 (9th Cir. 2008).

⁹⁹ *Id.* at 937.

¹⁰⁰ *Id.* at 937-39.

¹⁰¹ 469 U.S. 287, 295-97 (1985) (“Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference-of benign neglect. . . . In addition, much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent.”)

¹⁰² *Id.* at 297.

¹⁰³ *Id.* at 297, 307 & n.29.

section 504 has been satisfied. These cases, however, rarely even acknowledge 34 C.F.R. § 104.33(b)(1)(i), the “as adequately” regulation, much less analyze its meaning.¹⁰⁴

The holdings could be correct if IDEA were the exclusive remedy in all cases in which the education of children with disabilities is at issue. *Smith v. Robinson* said that IDEA’s predecessor statute preempted claims based on section 504,¹⁰⁵ but that case was overruled by the Handicapped Children’s Protection Act, which as currently codified provides:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under [IDEA]

¹⁰⁴ *E.g.*, *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 29 (1st Cir. 2006). (dismissing claims under § 1983, section 504, and ADA title II in dispute over failure to provide adaptive physical education to child); *Burke v. Brookline Sch. Dist.*, 257 Fed. App’x 335 (1st Cir. 2007), *aff’g* No. 06-cv-317-JD, 2007 WL 268947 (D.N.H. Jan. 29, 2007) (dismissing damages claims under IDEA and Family Educational Rights and Privacy Act; also dismissing claims for retaliation and coercion under ADA and claims based on failure to follow proper procedures under section 504 and 42 U.S.C. § 1983 on ground that claims presented IDEA-based claims in guise of ADA claims), *cert. denied*, 128 S. Ct. 2934 (U.S. June 16, 2008); *Seladoki v. Bellaire Local Sch. Dist.*, No. C2-07-1272, 2009 WL 4884199 (S.D. Ohio Dec. 14, 2009) (holding that when IDEA claim for denial of appropriate education failed, claim under section 504 and ADA for denial of appropriate education failed as well); *Emily Z. v. Mount Lebanon Sch. Dist.*, No. CIV.A. 06-442, 2007 WL 3174027, 49 IDELR 10 (W.D. Pa. Oct. 29, 2007) (granting summary judgment for school district on section 504 and ADA claims on ground they were derivative of IDEA violation claims). *But see* *Edwards v. Fremont Pub. Schs.*, 21 Individuals with Disabilities Educ. L. Rep. 903 (D. Neb. 1994) (finding argument that IDEA is exclusive remedy to be frivolous); *Hebert v. Manchester, N.H. Sch. Dist.*, 833 F. Supp. 80 (D.N.H. 1994) (denying motion to dismiss section 504 claim that overlapped with claim under IDEA).

¹⁰⁵ 468 U.S. 992, 1016-21 (1984). Even the *Smith* Court said, however, “We do not address a situation where [IDEA] is not available or where § 504 guarantees substantive rights greater than those available under [IDEA].” *Smith*, 468 U.S. at 1021.

shall be exhausted to the same extent as would be required had the action been brought under this subchapter.¹⁰⁶

So the mere fact that an IDEA claim fails is not determinative of a section 504 claim if, as indicated above, the laws create different standards and the section 504 standard may, in some cases, be higher.

The other possible argument for why claims based on the “as adequately” regulation might automatically fail when a child who is eligible under IDEA is provided appropriate education under that statute would be based on 34 C.F.R. § 104.33(b)(2), which states that “Implementation of an Individualized Education Program developed in accordance with [IDEA] is one means of meeting the standard established in paragraph (b)(1)(i) of this section,”¹⁰⁷ the “as adequately”¹⁰⁸ regulation. The argument would be that for section 504 students also eligible under IDEA and served under an IDEA IEP, the duty is no greater than that imposed by *Rowley*, whereas for other section 504 students, the duty is as-adequate meeting of needs, whether that be a standard higher or lower than *Rowley* in a given instance. Thus the IDEA appropriate education standard is a ceiling if the child is eligible under that statute.

A difficulty with this reading is that it would render the “as adequately” regulation surplusage in the typical situation when a child is eligible under both IDEA and section 504. Another difficulty is that the reading suggests that Congress meant to limit the entitlements of children with disabilities to education when passing IDEA, when precisely the opposite seems to have been the case.¹⁰⁹ One can harmonize the two

¹⁰⁶ 20 U.S.C.A. § 1415(l) (West 2010).

¹⁰⁷ 34 C.F.R. § 104.33(b)(2) (2010).

¹⁰⁸ 34 C.F.R. § 104.33(b)(1)(i) (2010)

¹⁰⁹ See 20 U.S.C.A. § 1400 (West 2010) (expressing statutory purposes).

provisions by reading section 104.33(b)(2) to refer simply to the procedures and mechanisms of IDEA. That is, if the child is eligible under IDEA, the as-adequate educational design may be spelled out in a individualized education program written with parental participation and with consideration of all the matters IDEA requires.¹¹⁰

Another way to harmonize the provisions is to say that the as-adequate meeting of needs obligation applies to all students eligible under section 504, whether served under IDEA or not, and that for the IDEA students the standard is thus as-adequate meeting of needs, with a floor provided by the *Rowley* standard in terribly performing school systems where even students without disabilities are not provided meaningful access to education. Of course, even if the hypothesized interpretation of subsection (b)(2) were correct for children who are eligible under IDEA as well as under section 504, the provision would remain inapplicable for children who are eligible solely under section 504 and the ADA.

D. Other Substantive Educational Obligations

As noted, there are other educational obligations that have been found to inhere in section 504 and the ADA's application to public schooling, though these are generally less controversial and are less the focus of the current inquiry than is the content of the appropriate education obligation. These duties include avoiding the outright¹¹¹ or subtle¹¹² exclusion of children with disabilities from school, providing comparable non-

¹¹⁰ These are substantial. See 34 C.F.R. §§ 300.320-.328 (2010).

¹¹¹ *B.T. v. Dep't of Educ.*, No. CIV 08-00356DAEBMK, 2009 WL 1978184 (D. Haw. July 7, 2009) (denying defendant's motion for summary judgment in claim that state rule prohibiting children with disabilities from continuing special education services after reaching age 20 when general education students face no such prohibition violates IDEA and Section 504).

¹¹² *Bess v. Kanawha County Bd. of Educ.*, No. CIV.A. 2:08-CV-01020, 2009 WL 3062974 (S.D. W. Va. Sept. 17, 2009) (upholding section 504 and ADA claims based on school district's inducing parent to keep child with disabilities home from school); *K.F. v. Francis Howell R-III Sch. Dist.*, No. 4:07 CV 01691 ERW, 2008 WL 723751 (E.D. Mo. Mar. 17, 2008) (denying motion to dismiss complaint requesting

educational benefits such as free meals,¹¹³ providing protection against harassment and abuse on the basis of disability,¹¹⁴ and avoiding segregation of children with disabilities.¹¹⁵ The section 504 regulations also explicitly impose duties on public schools with regard to educational settings and evaluation and placement of section 504-covered children.¹¹⁶

E. Procedural Protections

The section 504 regulations require public elementary and secondary education providers to afford children who need or are believed to need special education due to disability “a system of procedural safeguards that includes notice, an opportunity . . . to examine relevant records, and impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.”¹¹⁷ These duties, which closely resemble the rights provided children covered by IDEA,¹¹⁸ have been enforced in court proceedings.¹¹⁹

damages and compensatory education in suit brought under section 504 and ADA over practice of school for two years to dismiss student with disabilities three hours earlier than students without disabilities on Wednesday of each week).

¹¹³ C.D. v. N.Y. City Dep’t of Educ., No. 05 Civ. 7945 (SHS), 2009 WL 400382 (S.D.N.Y. Feb. 11, 2009) (denying motion to dismiss section 504 and ADA title II claims of students to entitlement to free meals in out-of-district private schools in which they were placed by public school system, when students would have received free meals had they been in public school; dismissing IDEA claims).

¹¹⁴ Enright v. Springfield Sch. Dist., No. 04-CV-1653, 2007 WL 4570970 (E.D Pa. Dec. 27, 2007) (denying renewed motion for directed verdict and new trial in action ending in \$400,000 verdict against school district over exposure of seven-year old child with ADHD and Asperger’s Syndrome to indecent display and other sexual conduct and language on school bus, upholding claims under IDEA, ADA, and section 504); *see* Weber, *supra* note __ (Harassment) at 1093-1110 (collecting cases).

¹¹⁵ L.M.P. v. Sch. Bd., 516 F. Supp. 2d 1294, 49 IDELR 14 (S.D. Fla. 2007) (denying motion to dismiss claims based on section 504 and state law as well as class claims based on IDEA when parents of triplets alleged that school district automatically denied ABA services to children with autism, segregating them in an insular private school).

¹¹⁶ 34 C.F.R. §§ 104.34-.35 (2010).

¹¹⁷ 34 C.F.R. § 104.36 (2010).

¹¹⁸ *See id.* The regulation further provides that compliance with the procedures under IDEA is a means of complying with the section 504 regulation.

¹¹⁹ J.P.E.H. v. Hooksett Sch. Dist., No. 07-cv-276-SM, 2007 WL 4893334 (D.N.H. Dec. 18, 2007) (report and recommendation of magistrate judge) (permitting service of IDEA claims, section 504 claims, and state law claims arising out of alleged failure to provide appropriate IEP to child, failing to properly implement

However, one district court case, *Power v. School Board*, ruled that there is no private right of action to enforce the procedural obligations imposed by the section 504 regulations in the context of a dispute over discipline of a child with a disability.¹²⁰ The controlling authority on this point, *Alexander v. Sandoval*, may imply that the Supreme Court has a restrictive attitude towards allowing private causes of action to enforce federal regulations that could be thought to exceed the exact contours of statutory terms,¹²¹ even when those statutes carry their own implied causes of action.¹²² The *Mark H.* court provided an answer to this concern by saying that although it was not determining whether an objection would lie under *Sandoval* to a claim to enforce the section 504 procedural-protections regulations, the claim could be justified on the ground that failure to afford protections may constitute denial of meaningful access to public education, which is the core focus of section 504 in the context of governmental services.¹²³

The *Power* court also ignored the availability of a cause of action under 42 U.S.C. § 1983 to enforce the procedural protections regulation. *Sandoval*, too, did not consider a § 1983 cause of action. If § 1983 is asserted as the cause of action to assert the violation of the section 504 regulations, the controlling case would be not *Sandoval* but *Gonzaga*

IEP by providing required information to and contact with parent, failing to provide impartial due process hearing, and failing to provide sufficient notice and hearing or furnish child with advocate before finding child ineligible for continued special education services), *adopted*, *Campbell v. Hooksett Sch. Dist.*, 2008 WL 145099 (D.N.H. Jan. 15, 2008)

¹²⁰ 276 F. Supp. 2d 515 (E.D. Va. 2003) (also finding case not ripe given pendency of administrative appeal).

¹²¹ 532 U.S. 275 (2001).

¹²² The Court's later recognition of an implied cause of action for retaliation under title IX of the Education Amendments, 20 U.S.C. § 1681(a) may undermine such a fraught interpretation of *Sandoval*, of course. *See Jackson v. Birmingham*, 544 U.S. 167 (2005).

¹²³ *Mark H.*, 513 F.3d at 937-38 & n.14.

University v. Doe,¹²⁴ and the controlling question would be whether the regulation confers rights. Procedural rights are rights, so that test should not be difficult to meet. Although the Supreme Court has sometimes found § 1983 causes of action preempted by other statutorily provided causes of action, there is no candidate for that role in this situation, except to the extent there might be an implied cause of action under section 504 itself, which the *Power* court denied, and which is the kind of remedy that the Supreme Court recently declared would be highly unlikely ever to preempt a § 1983 cause of action.¹²⁵

A procedural protection that appears to be lacking under section 504 and its regulations is any avenue for a school district to appeal to federal court an adverse hearing decision under section 504. The school district is not a person with a disability under section 504 or the ADA, and unlike with IDEA, there is no explicit conferral of any right to sue on the school district. Nor is the school district a person deprived of a federal law right by someone acting under color of law, who can sue under 42 U.S.C. § 1983. Accordingly, one court has ruled that a school district lacks the ability to appeal an unfavorable section 504 administrative hearing decision.¹²⁶

¹²⁴ 536 U.S. 273 (2002) (finding no enforceable personal right under Family Educational Rights and Privacy Act such that violation would be actionable under § 1983).

¹²⁵ See *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 796 (2009) (“This Court has never held that an implied right of action had the effect of precluding suit under § 1983, likely because of the difficulty of discerning congressional intent in such a situation.”). Even *Smith v. Robinson* held that statutory preemption did not apply to the plaintiffs’ claims of due process violations. 468 U.S. 992, 1014 n.17 (1984) (“[M]aintenance of an independent due process challenge to state procedures would not be inconsistent with [IDEA]’s comprehensive scheme . . .”).

¹²⁶ *Bd. of Educ. v. Smith*, No. Civ. RDB 04-4016, 2005 WL 913119, at *3 (D. Md. Apr. 20, 2005) (“[W]hile an individual can assert the original jurisdiction of this Court on a claim under the Rehabilitation Act, the institution alleged to have violated the provisions of Section 504 cannot directly seek to assert an appeal from a decision by a state administrative law judge directly to federal court by asserting original jurisdiction.”).

F. Student Discipline

I have speculated that one of the reasons school districts are more and more reluctant to determine children eligible for services under IDEA is their unwillingness to afford the children the protections from ordinary student discipline provided by that statute.¹²⁷ However, disciplinary protections for students with disabilities are also provided under section 504, and may in some respects be greater than those under the current codification of IDEA. The grandparent of all special education discipline cases is *S-I v. Turlington*, which relied on section 504 as well as IDEA in holding that a student with a disability may not be expelled for misconduct that results from the disability itself, and that any proposed expulsion must be preceded by “a trained and knowledgeable group of persons whether the student’s misconduct bears a relationship to his” or her disability.¹²⁸ This right to manifestation review—whether the misconduct is a manifestation of the disability—is necessarily entailed by the duty not to discriminate on the ground of disability. As the court said, “How else would a school board know whether it is violating section 504?”¹²⁹ The court held that the protections against expulsion applied not just to students categorized as emotionally disturbed,¹³⁰ that complete cessation of educational services may never occur even during a valid period of expulsion,¹³¹ that the burden is on the school to make the manifestation determination

¹²⁷ Weber, *supra* note __ (Buffalo), at 154 (referring, *inter alia*, to 20 U.S.C. § 1415(k)).

¹²⁸ 635 F.2d 342, 350 (5th Cir. 1985). The section 504 reasoning was essential to the holding, given that at least some of the plaintiffs in the case were expelled before the effective date of the predecessor of IDEA. *See id.* at 344, 350.

¹²⁹ *Id.* at 346.

¹³⁰ *Id.* at 347.

¹³¹ *Id.* at 348.

even if the student does not demand it,¹³² and that expulsion is a change of placement invoking the procedural protections of section 504.¹³³

The *S-I* case considered only expulsion, but its principles would apply to lesser forms of discipline, such as long term suspensions or disciplinary removals, that constitute a unilateral change in a child's placement by school authorities. Under the current version of IDEA, some disciplinary removals may take place irrespective of whether the child's behavior was a manifestation of the disability,¹³⁴ and the definition of what is a manifestation of the disability is quite limited.¹³⁵ Application of *S-I* to non-IDEA eligible children would call into question whether school officials have such broad unilateral authority with regard to children protected by section 504 and the ADA. In these respect, the rights of children who are covered by section 504 but not IDEA may exceed those of IDEA-eligible children.¹³⁶

¹³² *Id.* at 349.

¹³³ *Id.* at 350. The court found that the same obligations applied under the statute that is now IDEA. *Id.*

¹³⁴ 20 U.S.C.A. § 1415(k)(1)(G) (West 2010) (allowing removal for up to forty-five days to interim alternative educational setting when child's behavior involves weapons, illegal drugs, or infliction of serious bodily injury at school or school function).

¹³⁵ § 1415(k)(1)(E) (stating that manifestation will be found if the conduct in question was caused by or had direct and substantial relation to child's disability, or if conduct was direct result of failure to implement individualized education program). There also are limits in the current law on when children not previously identified as IDEA-eligible will be given disciplinary protections on the ground that they have disabilities. *See* § 1415(k)(5). Previous iterations of IDEA were more protective of children on these points. *See* Weber, *supra* note __ (Fla.), at 34-39.

¹³⁶ Other cases upholding rights in the school disciplinary process under section 504 include *Dean v. Sch. Dist. of City of Niagara Falls*, 615 F. Supp. 2d 63 (D. Mass. 2009) (upholding right to notice concerning expulsion under IDEA and section 504); *M.G. v. Crisfield*, No. 06 CV 5099 (FLW), 2008 WL 611679 (D.N.J. Mar. 5, 2008) (denying motion to dismiss section 1983 procedural due process claim and section 504 claim based on discrimination against person regarded as having disability in case of third-grader suspended indefinitely for misconduct whose parents alleged that defendants conditioned continued educational services on their consent to accepting placement in special education school for child in another district).

III. Exhaustion Defenses

Although there is no general rule requiring exhaustion of claims under section 504 or title II of the ADA before filing suit,¹³⁷ IDEA provides that “before the filing of a civil action under [other federal laws protecting the rights of children with disabilities], seeking relief that is also available under [IDEA], the procedures under [IDEA] shall be exhausted to the same extent as would be required had the action been brought under [IDEA].”¹³⁸ In other writing, I have argued that this provision should be interpreted as written, that actions brought under section 504 and title II of the ADA must be exhausted when they seek relief that is also available under IDEA.¹³⁹ Many courts, however, have acted as though the language were not “a civil action . . . seeking relief that is also available under IDEA” but instead, “not seeking relief that is also available under IDEA, but involving a situation that hypothetically might be addressed in some way under IDEA.”¹⁴⁰ The focus here, however, is on cases whose remedy is similar to that available in IDEA cases: not compensatory damages or other relief generally found not within the scope of IDEA, but rather orders for ongoing services, compensatory education, tuition reimbursement, and the like. If a section 504 or ADA claim is for this relief and IDEA exhaustion would not be futile, then the case would fall within the IDEA exhaustion requirement as that requirement is written, and exhaustion should be required.

¹³⁷ *Petersen v. Univ. of Wis. Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wis. 1993). Some courts have ruled differently in employment contexts, however. *See, e.g., Zimmerman v. Or. Dep’t of Justice*, 170 F.3d 1169 (9th Cir. 1999) (ruling that ADA title II does not apply to employment).

¹³⁸ 20 U.S.C.A. § 1415(l) (West 2010).

¹³⁹ *See Weber, supra note __* (Harassment) at 1137-38.

¹⁴⁰ *See id.* (collecting cases). For an example of a more recent case, see *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162 (9th Cir. 2007) (affirming dismissal of case without prejudice, holding that exhaustion applies to section 504 and § 1983 claims if alleged injury can be redressed to any degree by IDEA’s administrative procedures; applying exhaustion requirement to case that included claim for damages).

Where things get somewhat stranger is when courts require exhaustion under IDEA in actions where the defendant school system has determined that the child is not eligible under IDEA and the parents are not contesting that determination. For example, the Eleventh Circuit held that parents of two children being served under section 504 plans but not found eligible under IDEA had to exhaust through the IDEA administrative process their claim that the school failed to implement the section 504 plans and retaliated against them after they hired an attorney.¹⁴¹ At least one other court has required exhaustion of a section 504 claim even though the school district itself admitted that the child was not eligible for services under IDEA¹⁴² Although the claimant is in a sense seeking relief that would be available under IDEA in a case involving a child who is eligible under IDEA, to say that the relief is available under IDEA for a child who is concededly not eligible under IDEA has an Alice-in-Wonderland quality. Where both sides agree that the child is not eligible under IDEA, there is no statutory provision requiring exhaustion, and in the absence of a statute requiring it, the general rule is that exhaustion is not required.¹⁴³

IV. Remedies

As suggested above, the remedies available under section 504 and the ADA are broader than those under IDEA in that they encompass compensatory damages. The focus here, however, is not on damages cases but rather on the case in which the most plausible remedy is an order for future services or other equitable relief such as tuition

¹⁴¹ *Babicz v. Sch. Bd.*, 135 F.3d 1420, (11th Cir. 1998).

¹⁴² *Weber v. Cranston Sch. Comm.*, 245 F. Supp. 2d 401, 411 (D.R.I. 2003). The court may have been requiring exhaustion through a hearing held pursuant to section 504, rather than due process procedure under IDEA.

¹⁴³ *See Patsy v. Bd. of Regents*, 457 U.S. 496, 513 (1982) (“[P]olicy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent.”).

reimbursement or compensatory education. Hence the relevant discussion includes nondamages remedies in general as well as attorneys' fees and expert witness fees.

A. In General

The range of remedies for denials of appropriate education under section 504 should be no smaller than that applicable to IDEA cases. In *Lyons v. Smith*, for example, the court overturned a decision by a hearing officer that the hearing officer lacked authority to order a placement for a child upon making a finding that the school system failed to meet the requirements of section 504.¹⁴⁴ Courts have frequently approved actions for ongoing educational services, compensatory education, and tuition reimbursement to be encompassed by section 504 or ADA claims, although in some instances the courts have held that the remedy is supported by IDEA as well.¹⁴⁵

B. Attorneys' Fees

A consideration that may be holding some lawyers back in pressing section 504-ADA claims in special education cases is uncertainty over attorneys' fees entitlements.

¹⁴⁴ *Lyons v. Smith*, 829 F. Supp. 414, 419 (“[T]he court finds that a hearing officer may order [the public school system] to provide special education to a student designated as “otherwise qualified handicapped” under § 504, but may only do so under appropriate circumstances [I]n some situations, a school system may have to provide special education to a handicapped individual in order to meet the educational needs of a handicapped student ‘as adequately as the needs’ of a nonhandicapped student, as required by § 104.33(b)(1).”).

¹⁴⁵ *J.T. v. Mo. State Bd. of Educ.*, No. 4:08CV1431RWS, 2009 WL 262094 (E.D. Mo. Feb. 4, 2009) (denying motion to dismiss claim for violation of section 504 and ADA in action over alleged failure to provide appropriate education to child in state school; further holding that permissible relief could include audio-visual monitoring to allow independent parental review of activities and monitoring of child's safety); *Neena S. v. School Dist.*, No. CIV.A. 05-5404, 2008 WL 5273546 (E.D. Pa. Dec. 19, 2008) (affirming limited award of compensatory education for long-term failure to provide appropriate special education services, stating that compensatory education would be limited to specific areas where child was denied appropriate education and that hourly amount would correspond to hours of education denied, not whole days; upholding section 504 claim for failure to provide appropriate special education services but denying compensatory damages); *Damian J. v. School Dist. of Phila.*, No. 06-3866, 2008 WL 191176 (E.D. Pa. Jan. 22, 2008) (awarding compensatory education under IDEA and section 504 on account of emotional support classroom teachers' failure to implement substantial portions of child's individualized education program); *Lower Merion Sch. Dist. v. Doe*, 931 A.2d 640 (Pa. 2007) (finding private school child not deemed eligible for services under IDEA entitled to occupational therapy services at public school under section 504 of Rehabilitation Act).

Both section 504 and the ADA provide for fees for successful claimants. The ADA specifically allows for fees in administrative proceedings (which proceedings, as suggested above, may be a necessary step in many section 504-ADA special education cases).¹⁴⁶ The section 504 provision is not so explicit, but impliedly allows fees for necessary administrative proceedings. Section 504's provision states: "In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."¹⁴⁷ This language is drawn from title VII of the Civil Rights Act of 1964, which has been held to allow attorneys' fees for all administrative proceedings that must be prosecuted in order to present a claim in court.¹⁴⁸ Although the Civil Rights Attorneys' Fees Act has been held not to permit a separate action for attorneys' fees if the claimant has been successful in his or her claim on the merits in administrative proceedings and nothing remains to litigate in court,¹⁴⁹ the language in that statute differs from that of title VII and section 504. Indeed, in the leading Supreme Court case on the issue, the Court declared that "Since it is clear that Congress intended to authorize fee awards for work done in administrative proceedings, we must conclude

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

¹⁴⁷ 29 U.S.C.A. § 794a (West 2010).

¹⁴⁸ *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

¹⁴⁹ *N.C. Dep't of Transp. v. Crest St. Cmty. Council*, 479 U.S. 6 (1986). The fees claim in that case would also appear not be viable under current law due to *Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001) (holding that claim resolved without award of judicial relief did not support attorneys' fees award even if it served as catalyst for achievement of litigation's goal).

that [title VII]’s authorization of a civil suit in federal court encompasses a suit solely to obtain an award of attorney’s fees for legal work done in state and local proceedings.”¹⁵⁰

C. Expert Witness Fees

The ADA fees provision explicitly includes “litigation expenses, and costs,”¹⁵¹ which would appear to cover the charges that parents frequently need to pay to expert witnesses in disputes over special education programs. Although the Supreme Court has ruled that IDEA’s fees provision does not extend to expert witness fees,¹⁵² as least one court has ruled that the section 504 fees provision should be read to cover these charges.¹⁵³

Conclusion

As more parents turn to section 504 and the ADA in special education cases, courts will need to confront questions of appropriate education, procedural protections, defenses, and remedies under those laws as distinct from IDEA. This article proposes that the courts be guided by a straightforward reading of the statutes and regulations. If they give the relevant provisions their natural reading, they will provide the protection that Congress wished to give schoolchildren with disabilities when it enacted those laws.

¹⁵⁰ 477 U.S. at 66. The Court in *Crest Street* noted that this statement was dicta, but further said that *Carey* was distinguishable on the ground that it involved a statute that was worded differently. See *Crest Street*, 479 U.S. at 13-14.

¹⁵¹ 42 U.S.C.A. § 12205 (West 2010).

¹⁵² *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

¹⁵³ *L.T. v. Mansfield Twp. Sch. Dist.*, No. CIV.A.04-1381, 2009 WL 2488181 (D.N.J. Aug 11, 2009) (disallowing expert witness fees under IDEA but allowing expert witness fees under section 504 claim).