Section 504 and ADA

I. INTRODUCTION

As a policy matter, Congress has recognized that disability-related discrimination in public education presents a problem that we, as a nation, must address. *See, e.g.*, 42 U.S.C. § 12101(a)(3) (listing "education" in the ADA congressional findings section as one of "critical areas" in which disability discrimination exists); *Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (listing "public education" among the sites of discrimination that Congress intended to reach with Title II). To that end, the IDEA includes language designed to protect the ability of children receiving IDEA services to pursue civil rights claims under other federal laws. Specifically, Section 615(*l*) of the IDEA, 20 U.S.C. § 1415(*l*) 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 [42 U.S.C. § 12101, *et seq*.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 790, *et seq*.], 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 subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Congress enacted this provision in direct response to the US Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* held that the Education for the Handicapped Act ("EHA"), a predecessor to the IDEA, provided the exclusive avenue of relief for appropriate education claims. *Id.* at 1008-1009. Thus, the plaintiff in *Smith* could not assert a Rehabilitation Act claim for damages and attorney's fees not available under the EHA.

Congress swiftly responded to *Smith* with the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372. Congress enacted the provision now codified at 20 U.S.C. § 1415(*l*) "to reaffirm . . . the viability of Section 504, 42 U.S.C. § 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." H.R. REP. NO. 296, 99th Cong., 1st Sess. 4 (1985) ("H.R. REP. NO. 99-296"). In doing so, Congress sought to ensure that school children with disabilities entitled to services under the IDEA retained all other federal civil rights protections.

"Statutory goals, especially those set out in the legislative text or

frequently proclaimed in public, tend to reflect public values to a greater extent than other statutory provisions." David M. Driesen, *Purposeless Construction*, 48 Wake Forest L. Rev. 97, 98 (2013).

The plain language of Section 1415(*l*) establishes that IDEA does not restrict a student's ability to pursue claims under other federal civil rights laws, and "compliance with the IDEA does not automatically immunize a party from liability under" other federal laws. *CG v. Pennsylvania Dep't of Educ.*, 734 F.3d 229, 235 (3d Cir. 2013) (discussing application of the IDEA, Section 504 and the ADA); *cf. K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096 (9th Cir. 2012) (ADA imposes less elaborate procedural requirements but establishes different substantive requirements on public entities); *Hornstine v. Township of Moorestown Bd. of Educ.*, 263 F. Supp. 2d 887, 901 (D.N.J. 2003) (plaintiff provided with FAPE under IDEA but also subjected to unlawful discrimination). As the court noted in *K.D. ex rel J.D. v. Starr*, 55 F.Supp. 3d 782 (D. Md. 2014), Section 504 of the Rehabilitation Act provides an "independent source of rights" for students with disabilities, in addition to their rights under the Individuals with Disabilities Education Act. *See, also Oberti v. Bd. of Educ. of the Borough of Clementon*, 801 F.Supp. 1392, 140405 (D.N.J. 1992).

The statutes have separate purposes: Section 504 and the ADA provide relief from discrimination, while "the IDEA provides relief from inappropriate educational placement decisions, regardless of discrimination." *Ellenberg v. New Mexico Military Inst.*, 572 F.3d 815, 822 (10th Cir. 2009) (citations omitted). Consistent with these distinct purposes, the two (2) statutes contain "separate statutory definitions of what it means to be disabled." *Id., quoting Bowers v. Nat'l Collegiate Athletic Ass'n*, 563 F.Supp.2d 508, 533 (D.N.J. 2008).

II. The differing purposes and objectives of Section 504, the ADA and the IDEA

The IDEA

One of the main purposes for enacting the IDEA was "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). Unlike Section 504 and the ADA, IDEA was not designed to "serve as a tort-like mechanism for compensating personal injury." *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125 (1st Cir. 2003).

At its heart, the IDEA is a remedial statute designed to redress perceived obstacles to education by providing additional programs or services to individual students with qualifying disabilities in order to help the individual student achieve certain individualized goals. It is individual specific and it focuses on the identification of a qualifying disability and the development of an individualized education program (the "IEP") in order to provide special or additional services or accommodations meant to achieve the goals set under the IEP. The IEP then guides the school and student with regards to modified educational goals and means and accommodations to achieve those goals.

Relying upon the statutory language and legislative history of the IDEA, the Supreme Court has held that IDEA:

> was designed to fill the need identified in the House Report -- that is, to provide a "basic floor of opportunity" consistent with equal protection -- neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

Rowley, at 200.

Thus, an IEP is neither intended nor designed to put the student with a disability on the same or equal footing with other students or to ensure "strict equality of opportunity" for the IEP student – rather, FAPE under the IDEA requires an IEP to be "reasonably calculated to enable the child to receive educational benefit." *Rowley, Id.* at 198 and 206-207.

Section 504 and the ADA

In contrast to the IDEA, Section 504 and the ADA are broad civil rights statutes. At their core, these statutes are anti-discrimination, and effective participation laws - established to create a "level playing field", eliminate barriers to entry and equal participation, and to ensure the comparable treatment of disabled and non-disabled individuals. See, 29 U.S.C. § 794 and 42 U.S.C. § 12132. Section 504 prohibits recipients of federal funding, including public school districts, from engaging in disability discrimination. The ADA prohibits all public entities from discriminating against individuals with disabilities. 29 U.S.C. § 794(a)(b)(2)(B) and 42

U.S.C. § 12132.

Section 504 provides, *inter alia*, that its purpose is to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society. Specifically in respect of education, Section 504 imposes greater obligations on public schools than provided for by the IDEA in that the obligation to provide FAPE under Section 504 by public schools requires them to provide education and services" designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1).

The ADA was enacted, *inter alia*, to ensure the federal government enforces the standards of the ADA and:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; 42 U.S.C. § 12101.

Section 504 requires public school systems who receive federal funds to "provide a free appropriate public education" to each "qualified handicapped person," and defined "appropriate education" as: "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 [34 C.F.R. §§] 104.34, 104.35, and 104.36." 29 U.S.C. § 794 (b)(2)(B); 34 C.F.R. § 104.33(a),(b)(1). Thus, this definition of FAPE is different than that provided for under IDEA. See, 20 U.S.C. § 1401(9). In particular, the 504 FAPE definition requires that the aids and services provided "meet the educational needs of handicapped persons *as adequately* as the needs of the needs of the nonhandicapped persons are met." 34 C.F.R. § 104.33 (b)(1)(emphasis added).

A. REQUIREMENTS:

What is Section 504?

The Rehabilitation Act of 1973

Civil Rights Act for persons with disabilities

Persons with disabilities cannot be denied benefits or in any way be discriminated
against in any program receiving federal financial assistance.
Provides for employment practices, accessibility to facilities and programs
Actions prohibited: denial of opportunity to participate in or benefit from aid, benefit or Service. 29 USC 794

Eligibility for Section 504

Does not specifically list disabilities for eligibility, but defines disability as an impairment that substantially limits one or more major life activities.

1. Learning is a major life activity.
   29 USC 705(20) now incorporates definition under ADA. ADHD, for example, may be a
   disability under Section 504, but is not specifically listed under IDEA.

2. No categories for eligibility.
   No age limit in general, but must be of age that students without disabilities are provided school. 34 CFR 104.3(l)
   Any student with an identified physical or mental disability that substantially impairs one or more major life activities (such as learning); or has a record of such is regarded as having such an impairment.

3. Actions prohibited:
   - Unequal opportunity
   - Less effective opportunity
   - Different or separate aids, services
     or benefits
   - Aid or perpetuate discrimination
   - Otherwise limit enjoyment

What does Section 504 require?

1. Section 504's "Child Find"
   Annually undertake to identify and locate every qualified handicapped person who is not receiving a public education, and Take appropriate steps to notify handicapped persons and parents or guardians of agency's duty under Section 504. 34 CFR 104.32

2. Section 504's FAPE
   (a) Must provide FAPE

(b)(1) Regular or special education and related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as needs of
nonhandicapped persons.
(b)(2) IEP is one method of meeting of FAPE standard. 34 CFR 104.33

3. Other regulations
    - Facilities for handicapped persons must be comparable to other facilities. 104.34
    - Evaluation and placement procedures. 104.35
    - Procedural safeguards. 104. 36
    - Nonacademic and extracurricular activities must afford handicapped students equal opportunity for participation. 104.37
    - Preschool and adult education may not exclude handicapped persons on basis of disability. 104.38
    - Private schools that receive FFA may not exclude or charge handicapped persons more unless justified by substantial increase in cost. 104.39

III. Substantive requirements of Section 504

Who Is Protected?

Originally introduced as an amendment to the Civil Rights Act of 1964,

Section 504 was finally passed as Title V of the Vocational Rehabilitation Act of
1973. Codified at 29 U.S.C. § 794, Section 504 states:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress,

and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

"Program or activity" includes all of the operations of several enumerated entities, including "local educational agencies" as defined by the ESEA. Thus, Section 504's anti-discrimination mandate applies to public school districts that receive any federal funding, including but not limited to special education funding under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* Section 504 incorporates the remedial provisions of Title VI of the Civil Rights Act of 1964, as does Title IX of the Education Amendments of 1972. This is significant because cases interpreting Title VI and Title IX inform the construction of Section 504.

The definition of a "disability" for purposes of Section 504/ADA is "a physical impairment that substantially limits one or more major life activities of an individual, a record of such impairment, or being regarded as having such an impairment. Congress passed the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (effective January 1, 2009) to reverse the previously unjustified judicial narrowing of the ADA. The definitional changes to the ADA also apply to Section 504. The chart below illustrates the undeniable Congressional intent to ensure the broadest possible reading of the ADA to eliminate all discrimination against individuals with disabilities.

Findings & Purposes 110 P.L. 325, Section 2 42 USC 12101 *note*	(a) Findings.--Congress finds that-- (1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and provide broad coverage; (2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully

	participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers; (3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled; (4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect; (5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA; (6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities; (7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term "substantially limit" to require a

	greater degree of limitation than was intended by Congress; and (8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term "substantially limits" as "significantly restricted" are inconsistent with congressional intent, by expressing too high a standard. (b) Purposes.--The purposes of this Act are-- (1) to carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection to be available under the ADA; (2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures; (3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc*., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of

	handicap under the Rehabilitation Act of 1973; (4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives"; (5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for "substantially limits", and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress 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, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and (6) to express Congress' expectation that the Equal

	Employment Opportunity Commission will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with this Act, including the amendments made by this Act.
Definition of disability, rules of construction 42 USC 12102(4)	(4) Rules of construction regarding the definition of disability. The definition of "disability" in paragraph (1) shall be construed in accordance with the following: (A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act. (B) The term "substantially limits" shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008. (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability. (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. (E) (i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . . .
42 USC § 12101(a)	(a) FINDINGS. -- The Congress finds that – (1) ~~some 43,000,000 Americans have one or more~~ ***physical or mental disabilities in no way diminish a person's right to***

	participate in all aspects of society, yet many people with physical or mental disabilities ***have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination***. ~~, and this number is increasing as the population as a whole is growing older;~~ Note: Congress expressly adopted this change to address the Court's narrowing of the law based upon previous findings.

Discrimination Under Section 504 and the ADA

Title II of the ADA includes the following broad prohibition on discrimination on the basis of disability: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also* 28 C.F.R. § 35.149. The Department of Education has the responsibility for regulating compliance in elementary and secondary education.

Section 504 prohibits discrimination as follows:

> (b) *Discriminatory actions prohibited*. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:
> (i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;
> (ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
> (iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

> (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program or activity;
> (vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or
> (vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.
> 34 C.F.R. 104.4(b).

Section 504 requires that a federal funds recipient operating a public elementary or secondary educational program provide a "free and appropriate public education" to all qualified students with disabilities within the recipient's jurisdiction. The definition of FAPE for purposes of Section 504 is:

> (b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is 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 104.34, 104.35, and 104.36.

34 C.F.R. § 104.33.

Application of the Section 504 FAPE Obligation

When there is a clearly defined obligation under Section 504 or the ADA that is *greater than* the basic floor of opportunity guaranteed by *Rowley*, the cases finding the FAPE

obligations under all federal statutes to be co-extensive are not persuasive. As the Ninth Circuit has recognized, the requirements under Section 504/ADA and the IDEA are not entirely or necessarily co-extensive:

FAPE under the IDEA and FAPE as defined in the § 504 regulations are similar but not identical. When it promulgated its § 504 regulations, the U.S. DOE described them as "*generally* conform[ing] to the standards established for the education of handicapped persons in . . . the [IDEA]." Department of Education, Establishment and Title and Chapters, 45 Fed. Reg. 30,802, 30,951 (May 4, 1980) (emphasis added). Although overlapping in some respects, the two requirements contain significant differences.

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

In *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008), the parents sued the Hawaii Department of Education and individual school officials for damages related to the HDOE's failure to provide appropriate educational services to their daughters with autism. The district court held that Section 504 did not support a claim for violations of the IDEA and there was no private right of action under Section 504. 513 F.3d at 924-925. On appeal, the Ninth Circuit reversed, noting that Congress clearly stated its intent to preserve all remedies under Section 504 for acts that violated both the Rehabilitation Act and IDEA. In reaching its decision, the court of appeals also held that the FAPE requirements in IDEA and Section 504 are "overlapping but different." 513 F.3d at 925. The appellate court reversed the district court's ruling in favor of HDOE and remanded for consideration of whether the agency had violated the distinct FAPE requirement in Section 504.

The most critical difference is that Section 504 requires a program "*designed* to meet individual educational needs of handicapped persons *as adequately* as the needs of nonhandicapped persons are met." *Id.* (emphasis in original). Courts have recognized that this language can create different legal obligations. *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013) (Section 504 claims predicated on other theories of liability under that statute and its implementing regulations, however, are not precluded by a determination that the student has been provided an IDEA FAPE).

Although *Mark H.* held that a valid IEP was "sufficient but not necessary" to establish compliance with the non-discrimination provisions of Section 504, *Mark H.* did not address the situation where there is a separate regulation that creates a higher non-discrimination standard.

There is no provision in the IDEA, the ADA, or Section 504 that states or suggests that the existence of an otherwise valid IEP under the IDEA, bars access to or relief for claims of unlawful discrimination under Section 504 or the ADA.

On the contrary, Congress clarified its intent and the limits of IDEA in 20 U.S.C. § 1415(*l*).

Section 504 and the IDEA have substantively different requirements. While both IDEA and section 504 require the provision of an appropriate education, the FAPE requirements under the two (2) statutes are "overlapping but different." *Mark H. v. Lemahieu,* 513 F.3d 922 (9th Cir. 2008). Under Section 504, FAPE means education and services "designed to meet the individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met." 34 C.F.R. § 104.33(b)(1). Section 504 thus creates a "comparative" obligation, one that is satisfied by designing an educational program for a child with disabilities that is "intended to meet their educational needs to the same degree that the needs of nondisabled students are met, not more." *Mark H. v. Lemahieu*, 513 F.3d at 936-37. In contrast, under IDEA, FAPE means "special education and related services… [that] are provided in conformity with the individualized education program required under section 1414(d)." 20 U.S.C. § 1401(9).

*K.M. Id.*at 1099, *and Mark H.,Id* at 934, held that this plain text preserves all rights and remedies under the Rehabilitation Act. Section 504 expressly forbids a student with a disability from being excluded from "participating in, be denied the benefits of, or be subjected to discrimination" while in public school program. 29 U.S.C. § 794 (a). It is true that many courts have, without analysis, conflated the FAPE standard under IDEA with the anti-discrimination requirements of Section 504 and the ADA, they have done so without acknowledging the specific regulatory requirements the latter statutes. *See* Mark C. Weber, "A New Look at Section 504 and the ADA in Special Education Cases," TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS, Vol. 16:1 (Fall 2010), p. 19 & n.114.

The provision found in 34 C.F.R. § 104.33 (b)(2) has apparently led to some of the confusion in earlier decisions which have summarily addressed the issue of treating IDEA FAPE and 504 FAPE as the same. This section provides: "[i]mplementation of an [IEP] developed in accordance with [IDEA] is one means of meeting the standard established [by the "as adequately" regulation]." 34 C.F.R. § 104.33 (b)(2). To read this provision as saying that if an IEP is found to provide FAPE under IDEA then FAPE is found under 504 is improper as it would render the "as adequately" language as mere surplusage and ignore the express intent

of 504 – to eliminate discrimination against individuals with disabilities. *See*, Mark C. Weber, "A New Look at Section 504 and the ADA in Special Education Cases," TEXAS JOURNAL ON CIVIL LIBERTIES & CIVIL RIGHTS, Vol. 16:1 (Fall 2010), pp.20-21. A more harmonious reading would be to read section 104.33(b)(2) as referring to simply the procedures and mechanisms of the IDEA. Doing so would have the effect of designing an "as adequate plan" in an IEP that was written with parental consent and all of the other considerations extensively set forth in the IDEA. *Id.* Another possible harmonization of these sections is to find that the *Rowley* standard is a floor for the as-adequate analysis required by § 104.33 (b)(1), rather than as a ceiling. *Id.* Under either of these harmonious readings, the finding that FAPE was satisfied under IDEA does not end the inquiry for the 504 and ADA claims.

In *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863 (9th Cir. 2011), the Ninth Circuit held that courts should look to the relief sought as a guide in determining if the IDEA's requirements apply, emphasizing that the IDEA's requirements are "not intended to temporarily shield school officials from all liability for conduct that violates constitutional and statutory rights that exist *independent* of the IDEA and entitles a plaintiff to relief *different* from what is available under the IDEA." *Id.* at 876 (emphasis added).

Payne's recognition of these statutory distinctions and its focus on the nature of the relief sought accurately reflects well-settled precedent that is consistent with the IDEA's express terms. *See* 20 U.S.C. § 1415(l) ("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 …."); *Mark H., Id.* at 934 ("The plain text of the statute preserves all rights and remedies under the Rehabilitation Act."). Congress enacted this IDEA amendment over 25 years ago in response to Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the IDEA's predecessor statute constituted "the exclusive avenue" of relief in cases placing the education of children with disabilities at issue. *Id.* at 1009. The § 1415(l) non-exclusivity provision "reaffirm[s] . . . the viability of . . . other statutes as separate vehicles for ensuring the rights of handicapped children." *Digre v. Roseville Schs. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988).

As one district court aptly noted in rejecting a motion to dismiss Section 504 claims, "Plaintiffs who have either lost or prevailed in administrative proceedings brought under the IDEA may file an independent claim in federal district court for monetary relief under Section

504." *Stephen L. v. Lemahieu*, 2000 U.S. Dist. LEXIS 22305 (D. Haw. Oct. 18, 2000) at*10, citing *Witte v. Clark County School Dist*., 197 F.3d 1271 (9th Cir. 1999).

IV. EXHAUSTION

IDEA provides significant remedies for statutory and regulatory violations which will be accessed when they are applicable

Requiring exhaustion only in cases where a school district has violated IDEA and an educationally related remedy is available and necessary to rectify the educationally-related harm is consistent with HCPA. Mandating exhaustion when there is no available administrative remedy, however, transforms the HCPA from a guarantee of access for protection of civil rights to a barrier to access.

Beyond the substantive requirements for programming contained within IDEA it also confers upon courts and administrative hearing officers' broad equitable authority to provide appropriate educationally related relief. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009). Such relief "would include a prospective injunction directing the school officials to develop and implement at public expense an [appropriate] IEP." *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 370 (1980). For those children whose parent have the means and the opportunity to provide special education and/or related services for their children while pursuing an IDEA remedy, relief could include reimbursement of funds spent on unilateral placements and services. *Id.; Forest Grove*, 557 U.S. at 240; *Leggett v. Dist. of Columbia*, 793 F.3d 59, 63-64 (D.C. Cir. 2015) (awarding placement at residential school that met student's needs when school district failed to identify alternative appropriate placement). For children whose parents are unable to afford or find alternative services, relief includes compensatory education. *L.O. v. N. Y. C. Dep't of Educ.*, 822 F.3d 95, 124 (2d Cir. 2016); *M.S.*, 822 F.3d at 1136; *B.D. v. Dist. of Columbia*, 817 F.3d 792, 799 (D.C. Cir. 2016) (remanding for calculation of compensatory education to ensure that student is in educational position he would have achieved absent the denial of FAPE); *See Douglas*, 2016 WL 2818995, at *2 (ALJ ordered compensatory education); *Doe v. East Lyme*, 790 F.3d at 454 (awarding reimbursement and compensatory education for violation of "stay put" protection). Compensatory education "may include services that would not ordinarily be available under IDEA, such as education beyond age 21." *B.D*, 817 F.3d at 800. *See also Draper v. Atlanta Indep. Sch. Sys.*, 518 F.3d 1275, 1290 (11th Cir. 2008) (compensatory education under IDEA is designed to place children with disabilities in the same position they would have occupied but for the school district's

violations of IDEA); *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 720 (3d Cir. 2010) (holding 24-year-old student can only be fully compensated by awarding compensatory education).

In situations where a school district has failed to meet the substantive requirements of IDEA where compensatory education, or educationally related reimbursement could remedy some (if not all) of the alleged harm caused, students with disabilities are well positioned to take advantage of the administrative hearing officers' "broad equitable authority to provide appropriate relief." 20 U.S.C. §1415(i)(2)(C)(iii). And though IDEA's remedies are often meaningful, in many situations they are inappropriate and/or limited.

SECTION 504 AND ADA ADDRESS DISCRIMINATORY CONDUCT WITH PROCEDURES AND REMEDIES THAT ARE DISTINCT FROM AND ARE UNAVAILABLE UNDER IDEA

While IDEA creates a comprehensive standard and procedural framework by which students with disabilities will be educated in a meaningful way, Section 504 and ADA are civil rights statutes designed to end unlawful discrimination against individuals with disabilities, including students in public schools. Because the statutes were developed at different times, and with different purposes in mind, the mechanisms and remedies that have developed for each are distinct.

504/ADA claims address discrimination and offer remedies not available under IDEA

Section 504 of the Rehabilitation Act was passed on September 26, 1973 and is codified at 29 U.S.C. § 701. It was the first piece of federal civil rights legislation directed at the protection of people with disabilities, and arguably paved the way for the passage of what is now known as IDEA and ADA. Section 504 is an antidiscrimination statute which provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." 29 U.S.C. § 794. Unlike the IDEA (which was enacted a few years after), Section 504 prohibits discriminatory conduct, policies, and programs, but creates no affirmative obligation on entitlements to ensure people with disabilities access.

In 1990, Congress passed the Americans with Disabilities Act, a landmark law protecting the rights of individuals with disabilities. Title II barred discrimination by public entities, including school districts.

In drafting ADA to be a comprehensive statute protecting people with disabilities from discrimination, Congress paid careful attention to the various civil rights laws that it had previously passed. Thus, Title I of ADA, employment, follows the same format as Title VII of the Civil Rights Act of 1964; employees who are covered by ADA must file complaints first with EEO agencies, just like employees who are covered by Title VII. Title III of ADA is modeled after Title II of the Civil Rights Act of 1964; in light of the extensive litigation over the definition of public accommodation, Congress provided a far more detailed definition of public accommodation. *Compare* 42 U.S.C. § 12181(7) *with* 42 U.S.C. § 2000a(b)&(c).

Like Section 504, in Title II of ADA, Congress prohibited discrimination by public agencies. Title II goes beyond Section 504 in applying to state and local government agencies regardless of whether they receive any federal funds; while Section 504 applies to private schools and other private businesses that receive federal funds. Because public schools receive federal funds and are public agencies, public schools are subject to the requirements of both Title II of ADA and Section 504.

Unlike IDEA, however, the scope of Section 504 and ADA is much broader, particularly for specific disability-related areas. In fact, ADA includes a mandate to eliminate discrimination against individuals with disabilities, and it required the U.S. Department of Justice to promulgate regulations to implement ADA to that end. 42 U.S.C. § 12134. Thus, while IDEA may set the "basic floor of opportunity," ADA/504 may require more. To achieve that end, inclusive in both ADA and Section 504 is the ability to pursue damages to make victims of discrimination whole, and also to disincentivize discrimination at an institutional level. As such, the purpose and scope of remedy for these statutes differ.

ADA imposes different substantive obligations than IDEA

A good example of how ADA can impose a higher obligation on an agency to a person with a disability is found in the case of *K.M. v. Tustin*. In that case, a student who was deaf sought Communication Access Real-time Translation services—an accommodation that provides word-for-word transcription—to enable her to follow classroom instruction. The district in that case declined to provide her with such supports and instead offered her different supports which did not provide her with the type of word-for-word transcription she felt she needed to be able to access instruction. *K.M. v. Tustin*. Under the *Rowley* analysis, the District's failure to provide the CART services was deemed to not have denied K.M. a FAPE

because "[u]nder the *Rowley* 'educational benefit' standard, it cannot reasonably be said that K.M. was deprived of a FAPE. For one thing, as the ALJ held, Plaintiff has not demonstrated a need for CART services; rather, she has just shown that it would likely offer a benefit for her." *Id.* at *12. However, ADA and DOJ regulations regarding effective communications provide a completely different legal claim, and a good one at that. Those regulations require that communication be made equally accessible to people with communication disabilities, regardless of whether equal access is necessary for the child to benefit from education under *Rowley*. *See, e.g., K.M.*

In *K.M.*, the Ninth Circuit recognized that IDEA sets the "floor of access to education," while Title II and its implementing regulations "require public entities to take steps toward making existing services not just accessible, but *equally* accessible to people with communication disabilities." The court did "not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the school context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied." *Id.* at 1092.

A student with similar facts as Amy Rowley, whose IDEA claim is foreclosed by binding precedent from this Court, should be able to bring her ADA/504 effective communication claim in federal court without exhausting IDEA administrative remedies—particularly given that there will be cases where it is clear there is no denial of FAPE, as students with disabilities risk sanction for bringing cases that are not meritorious. *See* 20 U.S.C. § 1415(i)(3)(B)(i)(II) (allowing awards of reasonable attorneys' fees and costs to school districts when students with disabilities are found to have filed cases that are "frivolous, unreasonable, or without foundation.").

Congress chose not to impose an exhaustion requirement on 504/ADA claims

Unlike IDEA, which requires IDEA claims be heard by an independent hearing officer prior to any suit being brought before a state or federal court, Section 504's federal regulations do not require administrative due process exhaustion prior to bringing suit in federal court. *Compare* 20 U.S.C. § 1415(f)(3)(A) *with* 34 C.F.R. § 104.36 (2015). There are also other significant procedural differences in bringing forth cases under IDEA and Section 504, *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011). For example, while documents and experts need to be exchanged at least 5 days before an IDEA due process hearing, there is no such requirement for a Section 504 hearing. *Compare* 20 U.S.C. § 1415(f)(2) *with* 34 C.F.R. § 104.36.

Congress was familiar with IDEA, yet it chose not to require exhaustion of administrative remedies for all Title II or Section 504 claims involving public elementary and secondary education. Just as it provided for all Title I ADA[1] claims to be filed first with EEO agencies, it could have required all Title II ADA claims involving public elementary and secondary education claims to be brought first in the same due process proceedings provided for IDEA claims. It chose not to do so, but instead later amended HCPA to provide that ADA claims, like Section 504 claims, could be brought separately and without IDEA exhaustion unless they seek the same relief available under IDEA. *See* Individuals with Disabilities Education Act Amendments Act of 1997, 105 Pub. L. No 17, 111 Stat. 37. But beyond that, ADA regulations do not set out any due process procedures for ADA claims. Instead, apart from § 1415(*l*) Congress used the same format for ADA education claims as it did with Title VI and Title IX of the Civil Rights Act, which bar discrimination on the basis of race and national origin and sex, and allow individuals with disabilities to bring suit in federal court directly, without any administrative exhaustion. *See Fitzgerald v. Barnstable Sch. Comm*., 555 U.S. 246, 255 (2009) ("Title IX has no administrative exhaustion requirement")*; Cannon v. Univ. of Chicago*, 441 U.S. 677, 707 n.41 (1979) (noting Title VI does not provide for exhaustion of administrative remedies).

Because Section 504 and ADA and civil rights statutes are designed to protect all individuals with disabilities, they cover all students who are eligible for IDEA, but they also cover other students with disabilities, students who do not need special education under IDEA. Thus, while all students who are IDEA-eligible are also Section 504-eligible by virtue of having a disability that significantly impairs their ability to learn, there are many students with disabilities under Section 504 and ADA who do not need special education and, therefore, are not eligible for IDEA. Some such students may choose to have Section 504 plans; there were 738,477 students on Section 504 plans without an IEP.[2]

V. *Fry v. Napoleon Cmty. Sch*., 137 S. Ct. 743, 752 (2017).

[1] Notably, in Title I, of ADA, Congress required that coordination of ADA and Section 504 employment claims to "prevent imposition of inconsistent or conflicting standards," 42 U.S.C. § 12117(b), but did not provide any similar statutory requirement that ADA/Section 504 claims be consistent with IDEA claims.

[2] http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12

HOLDING:

> (1) Exhaustion of the administrative procedures established by the Individuals with Disabilities Education Act is unnecessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a "free appropriate public education"; and (2) the case is remanded to the U.S. Court of Appeals for the 6th Circuit for a proper analysis of whether the gravamen of E.F.'s complaint -- which alleges only disability-based discrimination, without making any reference to the adequacy of the special-education services E.F.'s school provided -- charges, and seeks relief for, the denial of a FAPE.

In *Fry v. Napoleon*, 788 F.3d 622 (6th Cir. 2015), the Court of Appeals for the Sixth Circuit upheld a ruling by a Michigan federal court that Elhena Fry's parents were required to request a special education due process hearing, i.e., exhaust their administrative remedies, before they could file suit for monetary damages under the ADA and Section 504. This ruling widened a split among circuits about requiring parents to exhaust administrative remedies under IDEA, even though the relief they sought was not available under the IDEA. Section 1415(*l*) requires that a plaintiff exhaust IDEA's procedures prior to filing an action under the ADA, the Rehabilitation Act, or similar laws when (and only when) her suit "seek[s] relief that is also available" under IDEA. *Fry v. Napoleon Cmty. Sch*., 137 S. Ct. 743, 752 (2017).[3] As the Supreme Court held in *Fry*: "The only relief that an IDEA officer can give—hence the thing a plaintiff must seek in order to trigger §1415(*l*)'s exhaustion rule—is relief for the denial of a FAPE." *Id.* at 753. Therefore, as Section 1415(*l*) and the Supreme Court's holding in *Fry* make clear, exhaustion of IDEA administrative remedies for Section 504/ADA is required only

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[3] The Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372 (HCPA), now codified at 20 U.S.C. § 1415(*l*), states:

> 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 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], 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 subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(*l*), as amended (alterations in original).

where the claims implicate a denial of FAPE and relief is available under IDEA. *Id.*; *see also Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011).

To settle any question that non-IDEA eligible students need not exhaust IDEA administrative remedies, the Supreme Court warned against ALJs asserting jurisdiction in cases that do not implicate FAPE:

> In the IDEA's administrative process, a FAPE denial is the *sine qua non*. Suppose that a parent's complaint protests a school's failure to provide some accommodation for a child with a disability. If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. **There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might *require* the accommodation on one of those alternative grounds. See *infra*, at ___, 197 L. Ed. 2d, at 62. But still, the hearing officer cannot provide the requested relief.** His role, under the IDEA, is to enforce the child's "substantive right" to a FAPE. *Smith*, 468 U. S., at 1010, 104 S. Ct. 3457, 82 L. Ed. 2d 746. And that is all.

Id. at 754 (emphasis added).

Therefore, if an accommodation is needed to fulfill IDEA's FAPE requirement through the child's IEP then 1415(*l*) requires administrative exhaustion. *Id.* But if a child is ineligible under IDEA, brought claims to address a denial of accommodations for his disability-related absences and for discrimination and retaliation arising from his disability and his parents' advocacy for his protected rights, those claims squarely fall within the purview of 504/ADA and are incapable of IDEA remediation through an IEP (there is no IEP). Consequently, under *Fry*, an ALJ would be unable to provide relief to this student and therefore, exhaustion of administrative remedies would be futile.

VI. Section 504 and the ADA: No exclusion based on disability

School districts must not exclude students from school because of their disabilities. The following facts supported claims for unlawful exclusion.

> • Parents alleged that the New Mexico Military Institute had a written policy of excluding students with disabilities from admission to NMMI" and "engaged in discrimination by refusing to admit" their daughter. *Ellenburg v. New Mexico Mil. Inst.*, 478 F.3d 1262, 1280 (10th Cir. 2007).
> • Mother of a student with intellectual disabilities alleged that teachers sent home notes attempting to induce her to refrain from sending her son to school. *Bess v. Kanawha County Bd. of Educ.*, 2009 U.S. Dist. LEXIS 85006 (S.D.W.V. Sept. 17, 2009).

• School, over course of two years, dismissed students with disabilities three hours earlier than students without disabilities on Wednesdays. *K.F. v. Francis Howell R-III Sch. Dist.*, 2008 U.S. Dist. LEXIS 20700, (E.D. Mo. Mar. 17, 2008).

School districts may not segregate students with disabilities.

In *L.M.P. v. School Bd. of Broward County*, 516 F. Supp.2d 1294 (S.D. Fla. 2007), the district court refused to dismiss the parents' claim that the school district violated the law by automatically segregating children with autism in a separate private school. The regulations implementing Title II require the provision of services in the "most integrated setting" appropriate to the needs of qualified handicapped persons. Since *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), the Department of Justice has aggressively pursued discrimination claims related to failure to provide services to individuals with disabilities in the least restrictive environment. The materials related to DOJ's efforts are available online (http://www.ada.gov/olmstead). Although these materials often relate to non-education related settings, this website provides excellent summaries of the legal requirements for provision of services in the most integrated setting.

School districts must maintain a school environment free from disability-related harassment.

Section 504, like Title IX of the Education Amendments, is a general prohibition of discrimination on the basis of aprotected classification. These statutes "operate in the same manner conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of the funds." *Gebser v. Lago Vista Indep. Sch. Dist*, 524 U.S. 274 (1994). Cases decided under Title IX and Title VI provide guidance for Section 504.

The following Title IX cases form the basis for harassment claims:

• *Franklin v. Gwinnett County Pub. Sch*., 503 U.S. 60, 76 (1992) (Title IX authorizes private suits for damages)

• *Gebser, supra* (students subjected to sexual harassment by teachers may have a claim for damages under Title IX)

• *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629 (1999) (Students subjected to sexual harassment by peers may have a claim for damages under Title IX)

T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011), succinctly **summarizes** the statutory bases for claims of disability related harassment:

> Title IX, IDEA, and Section 504 of the Rehabilitation Act place upon schools the affirmative duty to address bullying and harassment. The United States Department of Education has been advising schools of their obligations, and possible liability under these statutes, for at least ten years. DOE Reminder of Responsibilities Letter[4]. "Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately."

Other cases discussing liability for harassment by fellow students:

> • *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) ("verbal harassment of a young child by fellow students that is tolerated or condoned in any way by adult authority figures is likely to have a far greater impact than similar behavior would on an adult")
> • *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 448 (6th Cir. 2009): "[E]ven though a school district takes some action in response to known harassment, if further harassment continues, a jury is not precluded by law from finding that the school district's response is clearly unreasonable. We cannot say that, as a matter of law, a school district is shielded from liability if that school district knows that its methods of response to harassment, though effective against an individual harasser, are ineffective against persistent harassment against a single student. Such a situation raises a genuine issue of material fact for a jury to decide."

See also M.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885, 888 (8th Cir. 2008) (Parents were not required to exhaust administrative remedies under the IDEA when suing for past injuries suffered from a sexual assault).

By contrast, the Seventh and Tenth Circuits have adopted an "injury centered" approach when determining whether exhaustion is required. See *McCormick v. Waukegan Sch. Dist. No. 60*, 374 F.3d 564, 568-69 (7th Cir. 2004) (exhaustion necessary unless "the plaintiff has alleged injuries that cannot be redressed to any degree by the IDEA's administrative

[4] "Reminder of Responsibilities Letter" refers to U.S. Dep't of Educ., Reminder of Responsibility Under Section 504 and Title II of the ADA July, 25 2000, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html

procedures and remedies"); *Cudjoe v. Indep. Sch. Dist. # 12*, 297 F.3d 1058, 1066 (10th Cir. 2002) ("[T]he dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies. If so, exhaustion of those remedies is required.")

In *H.W. v. Long Beach Unified Sch. Dist.*, No. 11-55595, 2012 U.S. App. LEXIS 17891 (9th Cir. August 23, 2012), the court of appeals remanded in light of *Payne*, instructing the district court that defendants may file an unenumerated Rule 12(b) motion for failure to exhaust in place of its motion to dismiss for lack of jurisdiction IDEA does not require exhaustion of claims arising under state statutory or common law. *See, e.g*., *Dowler v. Clover Park Sch. Dist. No. 400*, 258 P.3d 676 (Wash. 2011), (reversing dismissal of claims based on physical, verbal, and psychological abuse of IDEA-eligible students by educators for the school

district for intentional torts, outrage, negligence, and unlawful discrimination under state Law Against Discrimination).

VII. Access to Extracurricular Activities

In a 2013 Dear Colleague letter, USDOE advised school districts that they must afford students with disabilities equal opportunity to participate in extracurricular athletics. The Resource Guide, starting at page 27, also addresses this issue. School districts may require a level of skill or ability, so long as the selection or competition criteria are not discriminatory. School districts must adopt grievance procedures that comply with due process standards to resolve Section 504 complaints. Additionally, the non-discrimination mandate supersedes any association, organization, club or league rule that would render a student ineligible to participate.

School districts must not operate their programs on the basis of generalizations, assumptions, prejudices or stereotypes about disability generally or specific disabilities. USDOE provided this example.

> *Example 1*: A student has a learning disability and is a person with a disability as defined by Section 504. While in middle school, this student enjoyed participating in her school's lacrosse club. As she enters the ninth grade in high school, she tries out and is selected as a member of the high school's lacrosse team. The coach is aware of this student's learning disability and believes that all students with the student's particular learning disability would be unable to play successfully under the time constraints and pressures of an actual game. Based on this assumption, the coach decides

never to play this student during games. In his opinion, participating fully in all the team practice sessions is good enough.

Analysis: OCR would find that the coach's decision violates Section 504. The coach denied this student an equal opportunity to participate on the team by relying solely on characteristics he believed to be associated with her disability. A school district, including its athletic staff, must not operate on generalizations or assumptions about disability or how a particular disability limits any particular student. Rather, the coach should have permitted this student an equal opportunity to participate in this athletic activity, which includes the opportunity to participate in the games as well as the practices. The student, of course, does not have a right to participate in the games; but the coach's decision on whether the student gets to participate in games must be based on the same criteria the coach uses for all other players (such as performance reflected during practice sessions).

School districts must make reasonable modifications to policies, practices, or procedures when necessary to ensure equal opportunity, unless the modification would constitute a fundamental alteration of the nature of the activity. USDOE provided these examples:

Example 2: A high school student has a disability as defined by Section 504 due to a hearing impairment. The student is interested in running track for the school team. He is especially interested in the sprinting events such as the 100 and 200 meter dashes. At the tryouts for the track team, the start of each race was signaled by the coach's assistant using a visual cue, and the student's speed was fast enough to qualify him for the team in those events. After the student makes the team, the coach also signals the start of races during practice with the same visual cue. Before the first scheduled meet, the student asks the district that a visual cue be used at the meet simultaneously when the starter pistol sounds to alert him to the start of the race. Two neighboring districts use a visual cue as an alternative start in their track and field meets. Those districts report that their runners easily adjusted to the visual cue and did not complain about being distracted by the use of the visual cue.

After conducting an individualized inquiry and determining that the modification is necessary for the student to compete at meets, the district nevertheless refuses the student's request because the district is concerned that the use of a visual cue may distract other runners and trigger complaints once the track season begins. The coach tells the student that although he may practice with the team, he will not be allowed to participate in meets.

Analysis: OCR would find that the school district's decision violates Section 504.

While a school district is entitled to set its requirements as to skill, ability, and other benchmarks, it must provide a reasonable modification if necessary, unless doing so would fundamentally alter the nature of the activity. Here, the student met the benchmark requirements as to speed

and skill in the 100 and 200 meter dashes to make the team. Once the school district determined that the requested modification was necessary, the school district was then obligated to provide the visual cue unless it determined that providing it would constitute a fundamental alteration of the activity.

In this example, OCR would find that the evidence demonstrated that the use of a visual cue does not alter an essential aspect of the activity or give this student an unfair advantage over others. The school district should have permitted the use of a visual cue and allowed the student to compete.

Example 3: A high school student was born with only one hand and is a student with a disability as defined by Section 504. This student would like to participate on the school's swim team. The requirements for joining the swim team include having a certain level of swimming ability and being able to compete at meets. The student has the required swimming ability and wishes to compete. She asks the school district to waive the "two-hand touch" finish it requires of all swimmers in swim meets, and to permit her to finish with a "one-hand touch." The school district refuses the request because it determines that permitting the student to finish with a "one-hand touch" would give the student an unfair advantage over the other swimmers.

Analysis: A school district must conduct an individualized assessment to determine whether the requested modification is necessary for the student's participation, and must determine whether permitting it would fundamentally alter the nature of the activity. Here, modification of the two-hand touch is necessary for the student to participate. In determining whether making the necessary modification – eliminating the two-hand touch rule – would fundamentally alter the nature of the swim competition, the school district must evaluate whether the requested modification alters an essential aspect of the activity or would give this student an unfair advantage over other swimmers.

OCR would find a one-hand touch does not alter an essential aspect of the activity. If, however, the evidence demonstrated that the school district's judgment was correct that she would gain an unfair advantage over others who are judged on the touching of both hands, then a complete waiver of the rule would constitute a fundamental alteration and not be required.

In such circumstances, the school district would still be required to determine if other modifications were available that would permit her participation. In this situation, for example, the school district might determine that it would not constitute an unfair advantage over other swimmers to judge the student to have finished when she touched the wall with one hand and her other arm was simultaneously stretched forward. If so, the school district should have permitted this modification of this rule and allowed the student to compete.

Example 4: An elementary school student with diabetes is determined not eligible

for services under the IDEA. Under the school district's Section 504 procedures, however, he is determined to have a disability. In order to participate in the regular classroom setting, the student is provided services under Section 504 that include assistance with glucose testing and insulin administration from trained school personnel. Later in the year, this student wants to join the school-sponsored gymnastics club that meets after school. The only eligibility requirement is that all gymnastics club members must attend that school. When the parent asks the school to provide the glucose testing and insulin administration that the student needs to participate in the gymnastics club, school personnel agree that it is necessary but respond that they are not required to provide him with such assistance because gymnastics club is an extracurricular activity.

Analysis: OCR would find that the school's decision violates Section 504. The student needs assistance in glucose testing and insulin administration in order to participate in activities during and after school. To meet the requirements of Section 504 FAPE, the school district must provide this needed assistance during the school day.

In addition, the school district must provide this assistance after school under Section 504 so that the student can participate in the gymnastics club, unless doing so would be a fundamental alteration of the district's education program. Because the school district always has a legal obligation under IDEA to provide aids or services in its education program to enable any IDEA-eligible students to participate in extracurricular activities, providing these aids or services after school to a student with a disability not eligible under the IDEA would rarely, if ever, be a fundamental alteration of its education program. This remains true even if there are currently no IDEA-eligible students in the district who need these aids or services.

In this example, OCR would find that the school district must provide glucose testing and insulin administration for this student during the gymnastics club in order to comply with its Section 504 obligations. The student needs this assistance in order to participate in the gymnastics club, and because this assistance is available under the IDEA for extracurricular activities, providing this assistance to this student would not constitute a fundamental alteration of the district's education program.

VIII. RESTRAINT AND SECLUSION

In December 2016, USDOE informed school districts how the use of restraint and seclusion may result in discrimination against students with disabilities.

Broadly, "restraint" means restricting the student's ability to move his or her torso, arms, legs or head freely. "Seclusion" is confining a student alone in a room or area that he or she is not permitted to leave. "OCR's Civil Rights Data Collection (CRDC), which includes

self-reported data on 99 percent of the public school districts in the nation, indicates that schools restrain and seclude students with disabilities at higher rates than students without disabilities." *Guidance* at 2. The most recent data available indicate that students with disabilities eligible under IDEA comprise 12% of students nationwide, but 67% of students subject to restraint or seclusion.

"Mechanical restraint" is the use of any device or equipment to restrict a student's freedom of movement. If a school relies upon law enforcement to use handcuffs to gain compliance (not merely for arrest), then it is subjecting its students to mechanical restraint.

"*Physical restraint* refers to a personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely. The term physical restraint does not include a physical escort. Physical escort means a temporary touching or holding of the hand, wrist, arm, shoulder or back for the purpose of inducing a student who is acting out to walk to a safe location." *Guidance* at 6.

"*Seclusion* refers to the involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. It does not include a timeout, which is a behavior management technique that is part of an approved program, involves the monitored separation of the student in a non-locked setting, and is implemented for the purpose of calming." *Guidance* at 7.

The Guidance warns that "the use of restraint or seclusion could violate Section 504 in several ways, if the restraint or seclusion of a student with a disability: (1) constitutes unnecessary different treatment (discussed in Q&As 8 and 9 of the Guidance); (2) is based on a policy, practice, procedure, or criterion that has a discriminatory effect on students with disabilities (discussed in Q&A 10) or (3) denies a student's right to FAPE (discussed in Q&As 5-6 and 11-13)

The *Guidance* also provides the following information:

- The need to use restraints may indicate that the student should be evaluated under Section 504.
- "OCR would likely find it to be a justified response to restrain or seclude a student with a disability in situations where the student's behavior poses imminent danger of serious physical harm to self or others. OCR would likely not, however, find the repeated use of restraint and seclusion to be a justified response where alternative methods also could prevent imminent danger to self or others. When a student exhibits behavior that interferes with the student's education or the education of other students in a manner that

would reasonably cause a teacher or other school personnel to believe or suspect that the student has a disability (i.e., to suspect that the behavior is caused by or related to a disability), the school district must evaluate the student to determine if the student has a disability and needs special education or related services because of that disability." *Guidance* at 9.

- Behavioral challenges, even if unaccompanied by academic challenges, can indicate a need for special education. "When a school district suspects a student may have a disability because of social, emotional, or behavioral needs, and requires special education or related services to address those needs, the evaluation and placement process must draw upon information from a variety of sources and include an assessment of the student's social, emotional, or behavioral needs to address the identified concerns." *Guidance* at 9-10.
- If a student is already eligible under Section 504, use of restraint or seclusion could indicate a need to reevaluate.
    - o "In OCR's view, persuasive indicators that a student's needs are not being met appropriately would include: situations that would impede the student's learning or that of others, such as new or more frequent emotional outbursts by the student, or an increase in the frequency or intensity of behavior; a sudden change into withdrawn, non-communicative behavior; and/or a significant rise in missed classes or sessions of Section 504 services. A notable drop in academic performance, such as a sudden decline in grades, could also be an indicator of the need to consider different or additional approaches or services, but a change in a student's academic performance is not a necessary indicator in every instance. Alternatively, a student's current array of services might only address the student's academic challenges but now must be modified to address new or changed disability-related behavioral challenges that the student may be experiencing. These and other indicators that the student's behavior is out of the expected range of behaviors of students that age could trigger a school district's Section 504 obligation to determine if the student's needs are being met appropriately, and whether a reevaluation is needed under Section 504." *Guidance* at 11.

- The use of restraint or seclusion can result in a denial of 504 FAPE. There could be a traumatic impact, affecting her ability to access her education. Depending on the disability, a student could be particularly physically or emotionally sensitive to the techniques. Potential negative impacts that could result in denial of FAPE include: new behaviors, impaired concentration, increased absences, diminished class participation, and social withdrawal. In addition, seclusion denies the student access to educational services. *Guidance* at 16-17.
- Section 504 may require the school to provide the related service of counseling as a result of the improper use of restraint and seclusion. *Guidance* at 17.

OCR recommends the following resources regarding restraint and seclusion:

- The Positive Behavioral Interventions and Supports Implementation Blueprint and Self-Assessment is a guide for leadership teams in the assessment,

development, and execution of action plans. The outcome is the development of local capacity for sustainable, culturally and contextually relevant, and high fidelity implementation of multi-tiered practices and systems of support for supporting and responding to behavior. For further information, see www.pbis.org.

- Students who have experienced trauma in the past may be vulnerable in ways that some of their peers are not, and could therefore be impacted by the use of coercive practices in a much more significant way. The U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration's National Center for Trauma-informed Care and Alternatives to Seclusion and Restraint (NCTIC) offers consultation and technical assistance to develop trauma-informed care to eliminate the use of restraints, seclusion, and other coercive practices. NCTIC is also working to develop a knowledge base related to implementing trauma-informed approaches. Trauma- informed care is an approach to engaging people with histories of trauma that recognizes the presence of trauma symptoms and acknowledges the role that trauma has played in their lives. For further information, see www.samhsa.gov/nctic.

- The National Child Traumatic Stress Network, funded by the Substance Abuse and Mental Health Services Administration, provides several resources for educators, parents and children on the serious impact of traumatic stress on children. The Network works with established systems of care, including the health, mental health, education, law enforcement, child welfare, juvenile justice, and military family service systems, to ensure that there is a comprehensive trauma-informed continuum of accessible care. For further information, see www.nctsn.org/resources/audiences/school- personnel.

- "Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers" summarizes evidence-based, positive, proactive, and responsive classroom behavior intervention and support strategies for teachers. These strategies could be used classroom-wide,

or intensified to support small group instruction, or amplified further for individual students. For further information, see www.osepideasthatwork.org/evidencebasedclassroomstrategies.

IX. Students with ADHD

After the ADA Amendments Act, with its broadened definition of "qualified individual with a disability, more students enjoy 504/ADA protection. The ADAAA materially expanded the terms that identify disability in a manner that renders more students eligible. It "expanded the list of examples of major life activities by adding, among other things, concentrating, reading, thinking, and functions of the brain." *ADHD Guidance* at 5. The Act also provides that mitigating measures that reduce the effect of the impairment cannot be considered in determining whether the student is covered by the ADA.

Further, an impairment that limits *any* major life activity, not just an activity related to learning or school, is a qualifying disability under Section 504. In July, 2016, USDOE Office of Civil Rights issued guidance on the rights of students with ADHD. Violations of Section 504 that result from a school district's failure to meet the obligations identified in the 2016 Guidance and Resource Guide also constitute violations of Title II. 42 U.S.C. § 12201(a).

Based upon the definition of the three types of ADHD, OCR will presume that the student has a disability and is substantially limited in one or more major life activities. "Every type of ADHD affects the functioning of the parts of the brain related to thinking, concentrating, and planning." *ADHD Guidance* at 10.

OCR identified the following common problems:

- Students never being referred for, or identified by the school district as needing, an evaluation to determine whether the student has a disability and needs special education or related services;
- Students not being evaluated in a timely manner once identified as needing an evaluation; or
- School districts conducting inadequate evaluations of students.

School districts fail to comply with their obligation when, because of a misunderstanding of ADHD and/or their Section 504 obligations, they provide inappropriate education and/or related aids and services and/or supplementary aids and services. Additionally, they may not disseminate appropriate documentation to staff. Another problem arises in the selection and

provision of services. At times, school districts inappropriately consider administrative and financial burdens in selecting and providing services.

School districts have a "child find" obligation under Section 504. Before taking any action with respect to an initial placement, and before making a change in placement, a school district must conduct an individual evaluation.

> **"[P]lacement means whatever regular or special education, related aids and services, or supplementary aids and services the student needs and the appropriate setting in which the student is to receive those services."**

ADHD Guidance at 10.

It is not uncommon for students with ADHD to achieve academic success but be substantially limited in a major life activity because of additional time or effort he must expend. When school districts rely upon grade point average without considering these factors, it can erroneously fail to identify a student as a child eligible under the ADA/504. In particular, school districts must pay attention to whether the family is providing academic supports outside of school. *ADHD Guidance* at 11. District personnel must consider how much time it takes for the student with ADHD, as compared to his typical peers, to plan, begin, complete, amd turn in an essay, term paper, homework assignment, or exam.

School districts should not rely on intervention strategies to delay evaluations to determine whether a student is covered by ADA/504. In fact, schools can pursue intervention strategies and evaluation at the same time. "Interventions could be implemented while a student is being evaluated, and information gathered during the intervention protocol could be useful in the evaluation process." *ADHD Guidance* at 16. OCR specifically noted that districts fail in their child find obligation under Section 504 when they are rigid in insisting on implementing interventions before conducting an evaluation.

Nothing in Section 504 requires a medical assessment as a condition to a determination that a student has a disability and requires special education. In fact, the question of whether a student has a disability should not demand extensive analysis. If a district believes a medical assessment is necessary, it must provide the assessment at no cost.

Districts must make ***individualized*** determinations of necessary aids and services. School districts may not simply group together a few aids and services, providing the same array to any student with ADHD.

Further, some educators believe that Section 504 placement options must be limited to free or low-cost services. OCR makes clear:

> If a student with a disability, including a student with ADHD, is eligible for FAPE under Section 504 but is not receiving FAPE services under the IDEA, that student is entitled to the provision of any services the placement team decides are appropriate to meet their individual educational needs, regardless of cost or administrative burden, and especially where such services have been provided to IDEA-eligible students in the past. Those services can be as varied and as comprehensive as necessary to meet a student's need.

ADHD Guidance at 27.

School districts must have a system of procedural safeguards for parents to appeal 504 identification and placement determinations. *ADHD Guidance* at 30. School districts must also identify a Section 504 coordinator and provide procedural safeguards notices to parents.

X. Effective Communications

The ADA regulations include particular requirements with respect to communication needs that exceed the FAPE requirement in IDEA. In particular, 28 C.F.R. § 35.160 provides:

> (b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.
>
> (2) The type of auxiliary aid or service necessary to ensure effective communication will vary in accordance with the method of communication used by the individual; the nature, length, and complexity of the communication involved; and the context in which the communication is taking place. In determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the requests of individuals with disabilities. In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.
>
> Auxiliary aids and services includes--
>
> (1) Qualified interpreters on-site or through video remote interpreting (VRI) services; notetakers; real- time computer- aided transcription services; written materials; exchange of written notes; telephone handset amplifiers; assistive listening devices; assistive listening systems;

telephones compatible with hearing aids; closed caption decoders; open and closed captioning, including real-time captioning; voice, text, and video-based telecommunications products and systems, including text telephones (TTYs), videophones, and captioned telephones, or equally effective telecommunications devices; videotext displays; accessible electronic and information technology; or other effective methods of making aurally delivered information available to individuals who are deaf or hard of hearing;

(2) Qualified readers; taped texts; audio recordings; Brailled materials and displays; screen reader software; magnification software; optical readers; secondary auditory programs (SAP); large print materials; accessible electronic and information

(3) technology; or other effective methods of making visually delivered materials available to individuals who are blind or have low vision;

(4) Acquisition or modification of equipment or devices; and

(5) Other similar services and actions.

28 C.F.R. 35.104.

In *K.M. v. Tustin Unified Sch. Dist.* the court of appeals reversed a district court ruling that a holding that the school district had provided FAPE under the IDEA precluded liability under the ADA effective communication regulation. Because the ADA regulation imposed a different obligation, the finding of FAPE did not preclude an action under the ADA. The court observed that "as a general matter, public schools must comply with both the IDEA and the ADA. The IDEA obviously governs public schools. There is also no question that public schools are among the public entities governed by Title II." 725 F.3d at 1097 (citing 42 U.S.C. § 12101(a)(3) (listing "education" in the ADA congressional findings section as one of "critical areas" in which disability discrimination exists) and *Tennessee v. Lane,* 541 U.S. at 525 (listing "public education" among the sites of discrimination that Congress intended to reach with Title II)).

"Most Integrated Setting" Mandate

The regulations implementing Title II require the provision of services in the "most integrated setting" appropriate to the needs of individuals. With disabilities. In *L.M.P. v. School Bd. of Broward County*, 516 F. Supp.2d 1294 (S.D. Fla. 2007), the district court refused to dismiss the parents' claim that the school district violated the law by automatically segregating children with autism in a separate private school.

Since *Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999), the Department of Justice has aggressively pursued discrimination claims related to failure to provide services to individuals with disabilities in the least restrictive environment. In June, 2013, DOJ sued the State of Rhode Island and City of Providence (including the Providence Public School Department), asserting that the use of segregated sheltered workshops violates the ADA. The Complaint, included in the Appendix to these materials, alleged that the defendants discriminated against individuals with intellectual and developmental disabilities ("I/DD") by unnecessarily segregating them or by placing them at risk of segregation in violation of Title II of the ADA. Specifically, they had "placed approximately 85 public school students with I/DD from the Providence Public School Department at risk of unnecessary segregation by placing them in a sheltered workshop and segregated day program. *United States of America v. State of Rhode Island, et al.*, Compl. at p.1. On January 6, 2014, DOJ issued a letter finding that Rhode Island's system of providing vocational, employment and day services to individuals with I/DD violated Title II. The arguments in the Complaint and the conclusions in the findings letter can prove powerful tools in obtaining appropriate transition services for individuals with disabilities. *United States v. Georgia* (GNETS) Georgia unnecessarily segregates public school students with behavioral disabilities

- Separate classroom in basement of gen ed school with separate entrance
- Other students attend "Centers" – totally segregated
- Mental health and therapeutic educational supports could be provided in home schools, but they are not

Other materials related to DOJ's efforts are available online (http://www.ada.gov/olmstead). Although these materials often relate to non- education related settings, this website provides excellent summaries of the legal requirements for provision of services in the most integrated setting.