THE RUTGERS UNIVERSITY LAW REVIEW
VOLUME 74 | COMMENTARIES FALL 2021

EXHAUSTION OF SECTION 504 AND ADA CLAIMS UNDER THE IDEA: RESOLVING THE CONFUSION

Perry A. Zirkel[*]

TABLE OF CONTENTS

I. INTRODUCTION 123
II. FOUNDATIONAL OVERVIEW OF § 504, THE ADA, AND THE IDEA 125
III. MAJOR INTERSECTIONS AMONG § 504, ADA, AND IDEA IN THE P–12 CONTEXT 127
 A. *Interwoven Initiation in the 1970s* 127
 B. *Non-Exclusivity and Exhaustion in the Mid-1980s* 128
 C. *The ADA Amendments of 2008 and Regulations of 2016* 129
 D. *The Supreme Court's* Fry *Decision in 2017* 132
IV. RECOMMENDATIONS FOR RESOLVING PREVAILING MISINTERPRETATIONS 134
 A. *Do Not Apply the IDEA's Exhaustion Provision to "504-only" Students* 134
 B. *In Cases in Which Exhaustion of § 504/ADA Claims Justifiably Applies, Require Completion of an IDEA Impartial Hearing for the IDEA, Not the § 504/ADA, Claims.* 136
V. CONCLUSION 141

I. INTRODUCTION

The history of the sister statutes of Section 504 of the Rehabilitation Act ("§ 504")[1] and the Americans with Disabilities Act ("ADA")[2] and their relationship to the Individuals with Disabilities Education Act ("IDEA")[3] has been convoluted, culminating in particular confusion in applying the long-standing exhaustion doctrine, which requires completion of the

---

* Perry A. Zirkel, Ph.D., J.D. (U. Conn.), LL.M. (Yale), is university professor emeritus of education law at Lehigh University. His website is perryzirkel.com.

1. 29 U.S.C. §§ 705(20)(B), 794.
2. 42 U.S.C. §§ 12101–12103 (definitions); *id.* §§ 12131–12134 (Title II, which applies to public schools).
3. 20 U.S.C. §§ 1411–1419 (part B, which applies to P–12 public schools).

available administrative process before going to court.[4] For many years, this issue, particularly the application of the IDEA's exhaustion provision for § 504/ADA and other non-IDEA claims,[5] has accounted for a significant segment of the burgeoning litigation in special education.[6] Adding to the significance of this provision, the relatively recent Supreme Court decision in *Fry v. Napoleon Community Schools*[7] interpreted it as requiring exhaustion of any non-IDEA claims that hinge on the denial of a free appropriate public education ("FAPE") under the IDEA.[8]

The purpose of this Article is to identify the successive major intersections in the roadmap history of § 504/ADA and the IDEA that culminate in a clarifying pair of recommendations for applying the IDEA's exhaustion provision to claims under § 504 or the IDEA. The first part of the Article provides a foundational overview of the respective contours of § 504, the ADA, and the IDEA. The second part traces the aforementioned major intersections in relation to litigation in the P–12 school context. The final part sets forth the two overall recommendations for judicial application of the IDEA's exhaustion provision to § 504 and ADA claims in this context. These recommendations target interpretive problems that arose before and continue after *Fry*, and thus neither depend on nor address the contours of the Supreme Court's ruling.

---

4. *E.g.*, Louis L. Jaffe, *The Exhaustion of Administrative Remedies*, 12 BUFF. L. REV. 327, 328–54 (1962) (identifying confusion and problems in applying the originally discretionary rule of requiring the plaintiff to pursue available administrative remedies before proceeding to court); Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 981, 983, 986–91 (1939) (tracing the first fifty years of the prerequisite of completing available administrative remedies before resorting to the courts). For purposes of this doctrine under the IDEA and more generally, see, for example, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) ("Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children."). The courts have similarly recognized exceptions to requiring exhaustion, including futility and inadequacy. *Id.* at 1303–04.

5. *Infra* note 40 and accompanying text.

6. Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1, 3 (2011) (finding that special education litigation in federal courts doubled in 2000–2009 compared to the previous decade); Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349, 353 (2009) (finding that cases referencing exhaustion accounted for approximately one fifth of the IDEA decisions during the same most recent decade).

7. 137 S. Ct. 743 (2017).

8. *Id.* at 754.

II. FOUNDATIONAL OVERVIEW OF § 504, THE ADA, AND THE IDEA

§ 504 is a civil rights statute that follows the model of Title VI of the Civil Rights Act of 1964[9] but prohibits discrimination based on disability rather than race or national origin.[10] Like Title VI, § 504 applies to any organization that receives federal financial assistance, including but not at all limited to public schools. Moreover, as its regulations for the U.S. Department of Education illustrate,[11] the coverage includes not only P–12 students,[12] but also employees,[13] facilities,[14] and postsecondary education institutions.[15] The regulations for public school students include the right to an impartial hearing.[16] Finally, serving as an engine for litigation, § 504 has long provided for attorneys' fees[17] and compensatory money damages.[18]

---

9. 42 U.S.C. § 2000d ("No person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."). Making clear the connection, § 505(a)(2) of the Rehabilitation Act of 1973 provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available" for violations of § 504. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, sec. 120, §505(a)(2), 92 Stat. 2955, 2983 (1978).

10. 29 U.S.C. § 794 ("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 . . . .").

11. The second sentence of the § 504 legislation required the head of each federal administrative agency to issue regulations for the statute's implementation. *Id.* § 794(a). At the time, the forerunner agency was the U.S. Department of Health, Education & Welfare.

12. 34 C.F.R. §§ 104.31–.39 (2019). This part expressly includes preschool programs and private schools that receive federal financial assistance. *Id.* §§ 104.38–.39.

13. *Id.* §§ 104.11–.14.

14. *Id.* §§ 104.21–.23.

15. *Id.* §§ 104.41–.47.

16. *Id.* § 104.36 (providing for procedural safeguards including "an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure"). This obligation is specific to "a recipient [of federal financial assistance] that operates a *public* school elementary or secondary education program." *Id.* (emphasis added).

17. 29 U.S.C. § 794a(b). This provision has been in § 505 in the Rehabilitation Act since 1978. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, sec. 120, §505, 92 Stat. 2955, 2982 (1978).

18. *E.g.*, Miener v. Missouri, 673 F.2d 969, 979 (8th Cir. 1982); Pool v. S. Plainfield Bd. of Educ., 490 F. Supp. 948, 949 (D.N.J. 1980). For the rationale, which ultimately led to the conclusion that punitive damages are not additionally available, see Barnes v. Gorman, 536 U.S. 181, 185–89 (2002) (relying on the § 504 model of Title VI and the general principles of federal civil rights laws under the spending clause). Other limitations on the availability

In addition to providing more specifications for employees and governmental entities,[19] the ADA broadened the coverage to organizations that do not receive federal financial assistance.[20] These organizations include private schools that are not religiously controlled.[21] In light of the broad statutory coverage, the ADA followed the § 504 definition of disability, which extended well beyond learning.[22]

In contrast, the IDEA is a funding statute that is limited to a subset of P–12 students who not only meet the criteria of one or more specified classifications, such as specific learning disability ("SLD") or other health impairment ("OHI"), but also have a resulting need for special education.[23] As the length of the IDEA legislation and its regulations amply reveal, the requirements are much more detailed than those specific to P–12 students under § 504 and the ADA.[24] For example, the IDEA includes detailed requirements for administrative adjudication via an impartial due process hearing and, at the option of each state, a second, review officer level.[25]

---

of money damages concern the role of § 1983 in connection with § 504 and the intent-based standards for liability. *See, e.g.*, Perry A. Zirkel, *Monetary Liability of Public School Employees Under the IDEA or Section 504/ADA*, 2019 BYU EDUC. & L.J. 1, 16 (finding that recent federal appellate decisions have followed the lead of *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 803–06 (3d Cir. 2007) that § 1983 is not available to remedy § 504 violations); Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?*, 47 J.L. & EDUC. 109, 114 (2018) (finding intent-based standard in all of the various circuits that have addressed this issue in relation to compensatory damages).

19. 42 U.S.C. §§ 12111–12117 (Title I); *id.* §§ 12131–12134 (Title II).

20. *Id.* §§ 12181–12189 (Title III).

21. *Id.* §§ 12181(7)(J), 12187.

22. *Id.* § 12102(1)(A) ("[A] physical or mental impairment that substantially limits one or more major life activities. . ."); *id.* § 12102(2) (defining "major life activities" by way of various examples, including eating, sleeping, breathing, and major bodily functions, such as bowel, bladder, and endocrine functions).

23. 20 U.S.C. § 1401(3). The separate coverage of Part C of the IDEA, which is not subject to the exhaustion provision, extends to children under age three who need special interventions. *Id.* §§ 1432–1444.

24. The IDEA legislation and regulations together amount to more than 100 pages, whereas the combined length of the § 504 legislation and the regulations specific to P–12 students add up to approximately ten pages and the specifically relevant provisions of the lengthy ADA legislation and regulations specific to students are limited to, at most ten pages. *See, e.g.*, Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ ADA*, 342 EDUC. L. REP. 886 (2018) (providing a systematic identification of the various similarities and differences among the three laws).

25. 20 U.S.C. § 1415(f)–(h); 34 C.F.R. §§ 300.507–.515 (2019).

III. MAJOR INTERSECTIONS AMONG § 504, ADA, AND IDEA IN THE P–12 CONTEXT

The historical course of these three laws leading up to the application of the IDEA's exhaustion provision has been marked by several successive relevant junctures. These road markers provide key guidance for the application of this provision to § 504 and ADA claims on behalf of P–12 students.

A. Interwoven Initiation in the 1970s

The first interweaving juncture was in the 1970s, highlighted by the passage of § 504 in 1973,[26] the passage of the original version of what is now the IDEA in 1975,[27] the relatively prompt issuance of its original regulations in 1977,[28] and the belated issuance of the § 504 regulations in 1977.[29] The major import of these overlapping and intersecting roads was twofold: (1) the broader coverage of § 504/ADA,[30] and (2) the harmonizing parallelism between the skeletal § 504 requirements and the detailed IDEA requirements, with the option of using the IDEA for compliance with § 504.[31]

26. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394.

27. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773. The EAHCA amended the Education of the Handicapped Act, which provided a system of federal funding to states for special education services but did not contain procedural and substantive rights for students with disabilities. Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1970). The legislation has been amended in successive authorizations in 1986, 1990, 1997, and 2004. The 1990 amendments included its renaming as the IDEA, which remains as its prevailing designation. Education of the Handicapped Act, Pub. L. No. 91-230, 84 Stat. 175 (1990). The "IDEA" will be used hereinafter in this Article generically to include the EAHCA and its various other designations.

28. Implementation of Part B of the Education of the Handicapped Act, 42 Fed. Reg. 42,474 to 42,504 (Aug. 23, 1977).

29. Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22,676 to 22,685 (May 4, 1977) (codified at 34 C.F.R. §§ 104.1–.61). For an overview of the controversial and belated issuance of these regulations, which required court action in Cherry v. Matthews, 419 F. Supp. 922, 923–24 (D.D.C. 1976), see, for example, Ass'n for Retarded Citizens v. Frazier, 517 F. Supp. 105, 120–21 (D. Colo. 1981).

30. The major differences are that (1) the IDEA is limited to a specified list of classifications, such as SLD or OHI, whereas § 504 extends to any recognized physical or mental impairment, and (2) the IDEA additionally requires a resulting need for special education, whereas the initial version of § 504 extended not only to overlapping activities, such as learning, seeing, and hearing but also the less-learning related examples of walking and breathing. *Supra* notes 22, 26–27.

31. The harmonizing intent is evident on both sides. For the IDEA side, the commentary accompanying the proposed regulations observed: "As the regulations being developed under section 504 . . . are in the process of being finalized at the same time these

B. Non-Exclusivity and Exhaustion in the Mid-1980s

The interrelationship of § 504 and the IDEA for litigation in the P–12 student context came to the fore in a Supreme Court decision in 1984 and the directly resulting IDEA amendments in 1986. In *Smith v. Robinson*,[32] the Supreme Court addressed an attorneys' fees award for a student with an IEP whose parents had sued not only under the IDEA but also alternative bases, including § 504. The parents had prevailed on the merits of their placement dispute under the IDEA, but they sought their attorneys' fees under civil rights laws[33] because at that time the IDEA did not have an attorneys' fees provision.[34] The Court concluded that for a student covered under the IDEA, it is the exclusive avenue, and, thus, attorneys' fees under alternative bases are not available.[35] Specifically, in relation to § 504, after recognizing its substantive differences from, along with its basic commonalties with, the IDEA,[36] the Court clarified: "We hold only that where, as here, whatever remedy might be provided under § 504 is provided with more clarity and precision under the [IDEA], a plaintiff may not circumvent or enlarge on the remedies available under the [IDEA] by resort to § 504."[37] In direct response, Congress amended the IDEA in two respects retroactive to

proposed regulations for [the IDEA] are being published, every effort will be made to have the final regulations [for the IDEA] be consistent in concept, policy, and, wherever possible, consistent with the language of the final 504 regulations." Education of Handicapped Children and Incentive Grants Program, 41 Fed. Reg. 56,966, 56,967 (Dec. 30, 1976). On the § 504 side, the more skeletal parallel requirements of the regulations for K–12 students clarified the option of using the more detailed requirements of what was then the EAHCA and now the IDEA for compliance. 34 C.F.R. § 104.33 (2019) (FAPE section including implementation of an Individualized Education Program ("IEP") under the IDEA as "one means of meeting [this] standard); *id.* § 104.36 (procedural safeguards section including the option of compliance with the procedural safeguards provision of the IDEA as "one means of meeting this requirement"); *see also infra* note 36.

32. 468 U.S. 992 (1984).

33. In addition to § 1988, which corresponded to their claim under § 1983 for alleged Fourteenth Amendment violations, they cited a forerunner of the attorneys' fees provision accompanying § 504. *Id.* at 1000, 1000 n.5.

34. *Smith*, 468 U.S. at 1016–21.

35. *Id.*

36. *E.g.*, *id.* at 1017 (observing that in developing the § 504 regulations specific to K–12 students, the agency "declined to require the exact [IDEA] procedures, because those procedures might be inappropriate for some recipients not subject to the [IDEA]"); *id.* at 1021 (distinguishing the unaddressed broader coverage of § 504 "where the [IDEA] is not available").

37. *Id.* at 1021. In a companion case, the Court rejected attorneys' fees under § 504 after the parent obtained clean intermittent catherization as related services under her child's IDEA IEP, explaining that "[w]e hold today, in *Smith v. Robinson* . . . that § 504 is inapplicable when relief is available under the [IDEA] to remedy a denial of educational services." Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 895 (1984) (citation omitted).

Smith's decision date:[38] (1) authorizing attorneys' fees for prevailing parties,[39] and (2) providing for non-exclusivity of the IDEA with an exhaustion exception or condition:

> Nothing in this [the IDEA part for P–12 students] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], 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 of (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.*[40]

The cited procedures "(f) and (g)" refer to the impartial hearing and, in the states that have opted for a second tier, the review officer provisions of the IDEA.[41]

C. The ADA Amendments of 2008 and Regulations of 2016

The passage of the ADA in 1990 extended the institutional coverage of § 504[42] and added a few other broad protections that were notable in relation to P–12 students and their parents, such as an anti-retaliation provision,[43] but the more significant impact arose in the 2008 amendments to the ADA.[44] Specifically, the most dramatic change was the expanded scope of the definition of disability under the ADA and § 504 in two ways: (1) expanding the illustrative list of major life activities

38. Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, sec. 3, 100 Stat. 796, 797 (including applicability to any actions or proceedings under the IDEA pending on July 4, 1984).

39. 20 U.S.C. § 1415(i)(3)(B).

40. *Id.* § 1415(l) (emphasis added). Thus, Congress opted for the approach taken by the *Smith* dissent, which was "to require *a plaintiff with a claim covered by the [IDEA]* to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504." *Smith*, 468 U.S. at 1024 (Brennan, J., dissenting) (emphasis added).

41. *Supra* note 25 and accompanying text. Approximately eight states currently have a review officer tier. *E.g.,* Jennifer F. Connolly, Perry A. Zirkel & Thomas A. Mayes, *State Due Process Hearing Systems Under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156, 157–58 (2019). Moreover, in most states, the impartial hearing is at the state level. *Id.* at 157.

42. *Supra* notes 20–21 and accompanying text.

43. Americans with Disabilities Act, Pub. L. No. 101-336, § 503, 104 Stat. 327, 370 (1990) (codified at 42 U.S.C § 12203).

44. Americans with Disabilities Act Amendments Act, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101).

both with regard to learning and health,[45] and (2) liberalizing the interpretation of the "substantially limits" element of eligibility.[46] The implementing 2016 regulations for the ADA amendments added further examples to the illustrative list of major life activities, such as writing, interacting with others, reaching, immune system functions, circulatory system functions, and endocrine system functions.[47] In contrast, the relatively unchanged eligibility criteria under the IDEA were limited to (1) a circumscribed set of classifications, such as SLD and OHI, that (2) necessitated special education.[48]

The practical result is perhaps best visualized via the following figure, which shows the generally broader student coverage of § 504/ADA than the IDEA.[49] The result, as the figure shows, is that the students with IEPs are covered by both the IDEA and, to the extent of any added rights or remedies, § 504 and the ADA, whereas those who are covered only by the wider definition of disability under § 504/ADA typically are designated with a document other than an IEP, which is often called a

45. The originally identified examples of major life activities were broader and more learning-related. *Supra* note 30. The additions included subsets of learning, such as reading and concentrating. For health, the additions were more extensive, including eating, sleeping, bending, lifting, and bowel, bladder, and digestive functions. § 4, 122 Stat. at 3555.

46. The liberalizations included reversal of the triad of Supreme Court decisions in 1999 that had interpreted "substantial limitation" with the ameliorative effects of mitigating measures and applying this eligibility element for impairments that are episodic or in remission as of the time they would be active. 42 U.S.C. § 12102(4).

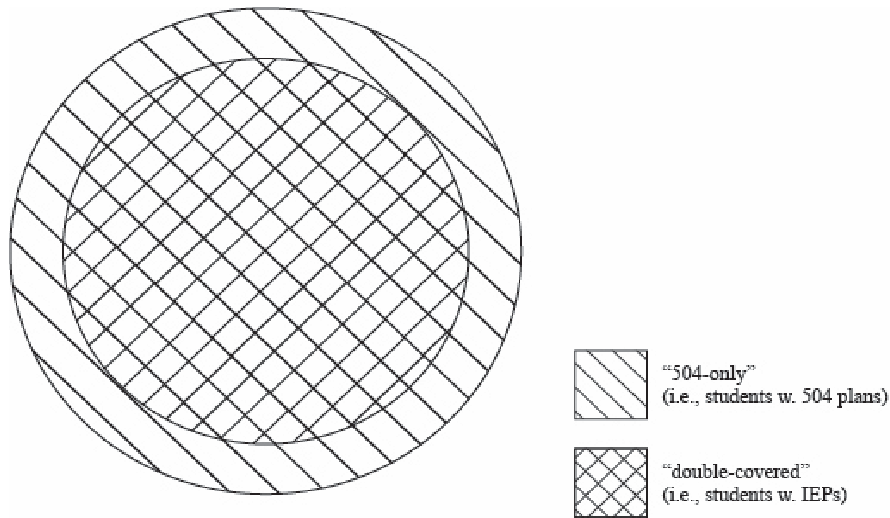
47. Amendments of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 81 Fed. Reg. 53,204–53,243 (Aug. 11, 2016) (codified at 28 C.F.R. §§ 35.101–.130, 36.101–36.302). The specific subsections containing these additions are at 28 C.F.R. § 35.108(c)(1) (2019) (Title II); *id.* § 36.105(c)(1) (2019) (Title III). Among the other additions, these regulations provided specific provisions for services animals, which happened to be the underlying issue of the Supreme Court's *Fry* decision, which originated two years before their issuance and strengthened requirements for effective communications for students with vision, hearing, and speech disabilities. *Id.* §§ 35.136, 36.302(c) (2019) (Titles II and III—service animals); *id.* § 35.106 (2019) (Title II—effective communications).

48. *Supra* note 23 and accompanying text; *see also* Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility Under the IDEA*, 357 EDUC. L. REP. 30, 30 n.12 (2018) (extending to the bridging criterion of adverse effect on educational performance). The slight change was adding attention deficit disorder to the list of examples in the OHI classification starting in the 1999 IDEA regulations. Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed. Reg. 12,406, 12,422 (Mar. 12, 1999).

49. Courts occasionally require proof of the dual coverage for students with IEPs. *E.g.*, B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 159–61 (2d Cir. 2016); Ellenberg v. N.M. Mil. Inst., 572 F.3d 815, 820–21 (10th Cir. 2009). Theoretically, a student who has an IEP premised on SLD eligibility may not necessarily qualify under § 504 due to the narrower scope of some of the eight enumerated activities, such as the three specified subsets of reading and the two for math, 34 C.F.R. § 300.309(a)(1)(iv)–(viii) (2019), but for practical purposes any such exceptions are de minimis.

504 plan.[50] Reflecting its broader coverage for eligibility, the § 504 definition of FAPE extends beyond the IDEA FAPE obligation, including related services without special education.[51]

Figure: Relationship Between § 504 and IDEA Student Coverage



The proportions of students served by public schools, including district-placed private school students,[52] within the outer concentric

50. In contrast with the much more detailed specifications of the IDEA, § 504 and the ADA do not require formal documentation, but, in practice, most districts provide a confirming form, most often called a "504 plan." *See, e.g.*, Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J.L. & EDUC. 407, 411, 414 (2011).

51. 34 C.F.R. § 104.33(b) (2019) ("special or general education and related aids and services"). The substantive standard for FAPE under § 504 is similarly not the same as under the IDEA, with the Office for Civil Rights following the regulatory commensurate-opportunity standard and the courts tending to apply the reasonable accommodation standard. *See, e.g.*, Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?*, 106 EDUC. L. REP. 479 (1996) (setting forth alternative interpretations of FAPE under Section 504). Their differences from the IDEA's substantive standard apply within and beyond the overlapping coverage of the IDEA. *See, e.g.*, Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008) (illustrating the differential effect for student with IEP under the IDEA); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 428 (E.D. Pa. 2002) (identifying reasonable accommodation standard for student with 504 plan as distinct from the FAPE standard under the IDEA).

52. Although the sources cited *infra* notes 54–59 for the IDEA and the 504-only students are not identical, both include at least some of the limited number of preschool and private school students, thus serving sufficiently for the approximations fitting with the purposes of this Article.

circle reveals the expanding effect of the aforementioned ADA revisions.[53] Specifically, the proportion of students under the IDEA has ranged during the past two decades between 13% and 14% without a consistent upward trajectory,[54] whereas the corresponding proportion of 504-only students has steadily increased from about 1% prior to the 2008 amendments[55] to approximately 1.5% in 2011–2012,[56] 1.8% in 2013–2014,[57] 2.3% in 2015–16,[58] and 2.7% in 2017–18.[59]

D. The Supreme Court's Fry *Decision in 2017*

Unusually, in 2017, the Supreme Court issued two decisions specific to students with disabilities.[60] The one that attracted much more public and scholarly attention was *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*.[61] Addressing the IDEA's central obligation

53. *Supra* note 45–47 and accompanying text.

54. *E.g.*, NAT'L CTR. FOR EDUC. STAT., STUDENTS WITH DISABILITIES (May 2021), https://nces.ed.gov/programs/coe/indicator_cgg.asp (reporting that, starting in 2000–01, the percentages of special education students ages 3–21 gradually increased for the first four years, then gradually decreased for the next seven years, and then gradually increased again for the most recent seven years ending in 2018–19, with the overall net result being an increase from 13% to 14%).

55. Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students*, 92 NASSP BULL. 19, 27 (2008) (finding a proportion of 1.2%).

56. Perry A. Zirkel & John M. Weathers, *K–12 Students Eligible Solely Under Section 504: Updated National Incidence Data*, 27 J. DISABILITY POL'Y STUD. 67, 70 (2016).

57. Perry A. Zirkel, *State-by-State Rates of 504-Only Students in K–12 Schools*, 352 EDUC. L. REP. 9, 11 (2018).

58. Perry A. Zirkel & Tiedan Huang, *State Rates of 504-Only Students in K–12 Schools: An Update*, 354 EDUC. L. REP. 621, 624 (2018).

59. Perry A. Zirkel & Gina L. Gullo, *State Rates of 504-Only Students in K–12 Public Schools: The Next Update*, 385 EDUC. L. REP. 14, 18 (2021).

60. As a more general matter, the Supreme Court has addressed the P–12 students with disabilities on average only once every nine or so years. *See, e.g.*, Perry A. Zirkel, *An Updated Primer of Special Education Law*, 52 TEACHING EXCEPTIONAL CHILD. 261, 262, 264–65 (2020) (summarizing approximately fifteen Supreme Court decisions under the IDEA or § 504 since 1975).

61. 137 S. Ct. 988 (2017). For a representative sampling of the initial stage in the continuing line of professional literature, see Perry A. Zirkel, *The Aftermath of* Endrew F. *One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 453 nn.37–38 (2018). For more recent views, see Diana Autin, Maria Docherty & Lauren Agoretus, Endrew F. *Supreme Court Case: Strengthening the Voices of Families at IEP Meetings*, 48 EXCEPTIONAL PARENT 38 (2018); Terrye Conroy & Mitchell L. Yell, *Free Appropriate Public Education after* Endrew F. v. Douglas County School District *(2017)*, 35 TOURO L. REV. 101 (2019); Janet R. Decker, Francesca Hoffman & Suzanne Eckes, *Behavior Intervention Plans: More Important than Ever After* "Endrew," PRINCIPAL LEADERSHIP, Jan. 2018, at 56; Miriam Kurtzig Freedman, *Waterstone's* Endrew F.*: Symbolism and Reality from the Schools' Perspective*, 47 J.L & EDUC. 517 (2018); Rachel B. Hitch, *Flags on the Play: We're*

of FAPE, the Court held that the substantive standard is that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[62]

Receiving much less scholarly analysis,[63] the Court's decision a month earlier in *Fry v. Napoleon Community Schools*[64] formulated a FAPE-gravamen test for applying the IDEA's exhaustion provision to § 504/ADA and other IDEA claims.[65] Yet, as an approximate indicator of litigation activity applying these two decisions, the lower courts have cited *Fry* more frequently than *Endrew F.*[66] Moreover, a systematic analysis of the federal appeals court decisions that have applied *Fry* found that (1) 90% of the decisions required exhaustion, and (2) § 504 and

on the Same Team, 48 J.L & EDUC. 87 (2019); Richard D. Marsico, *From* Rowley *to* Endrew F.: *The Evolution of a Free Appropriate Public Education for Children with Disabilities*, 63 N.Y.L. SCH. L. REV. 29 (2018/2019); William Moran, *The IDEA Demands More: A Review of FAPE Litigation After* Endrew F., 22 N.Y.U. J. LEG. & PUB. POL'Y 495 (2020); Shawn K. O'Brien, *Did* Endrew F. *Change the "A" in FAPE? Questions and Implications for School Psychologists*, 46 NASP COMMUNIQUÉ 1 (2018); Angela M. T. Prince, Mitchell L. Yell & Antonis Katsiyannis, Endrew F. v. Douglas County School District *(2017): The U.S. Supreme Court and Special Education*, 53 INTERVENTION & SCH. CLINIC 321 (2018); H. Rutherford Turnbull, Ann P. Turnbull & David H. Cooper, *The Supreme Court,* Endrew*, and the Appropriate Education of Students with Disabilities*, 84 EXCEPTIONAL CHILD. 124 (2018); Mark C. Weber, Endrew F. *Clairvoyance*, 35 TOURO L. REV. 591 (2019); Catherine A. Bell, Note, Endrew*'s Impact on Twice-Exceptional Students*, 61 WM. & MARY L. REV. 845 (2020); Hetali M. Lodaya, Note, *Making a Reasonable Calculation: A Strategic Amendment to the IDEA*, 53 U. MICH. J.L. REFORM 495 (2019); Allison Zimmer, *Solving the IDEA Puzzle: Building a Better Special Education Development Process through* Endrew F., 93 N.Y.U. L. REV. 1014 (2018).

62. *Endrew F.*, 137 S. Ct. at 999, 1002.

63. *See, e.g.*, Robert Garda, Fry v. Napoleon Community Schools: *Finding a Middle Ground*, 46 J.L. & EDUC. 459 (2017); Martha McCarthy, Fry v. Napoleon Community Schools: *Could This Supreme Court Decision Open a Pandora's Box?*, 344 EDUC. L. REP 18 (2017); Katherine Bruce, Note, *Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief After* Fry v. Napoleon Community Schools, 86 U. CHI. L. REV. 987 (2018).

64. 137 S. Ct. 743 (2017).

65. Adding three "clues," or guidelines, for its application, *id.* at 756–57, the Court held that "exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of [FAPE]." *Id.* at 748. In reaching this conclusion, the Court recognized the legislative compromise in the IDEA's exhaustion provision between the non-exclusivity role of other statutes, such as § 504 and the ADA, as separate vehicle and the exclusive avenue of an IDEA due process hearing for relief also available under the IDEA. *Id.* at 750.

66. As of Dec. 30, 2021, the lower courts have cited *Endrew F.* in 430 cases and *Fry* in 515 cases, as determined by filtering "citing references" by "cases" on Westlaw. The difference is only partially attributable to *Fry* being issued approximately a month before *Endrew F.*

the ADA accounted for more than all of the other non-IDEA claims combined.[67]

Beyond the questions left in the direct wake of *Fry*,[68] the application of the IDEA's exhaustion provision has resulted in confusion and misinterpretation before as well as after *Fry*. The final part of this article identifies the ongoing interpretive problems and corresponding recommendations.

IV. RECOMMENDATIONS FOR RESOLVING PREVAILING MISINTERPRETATIONS

A review of the case law applying the IDEA's exhaustion provision to § 504 and ADA claims before and after *Fry* reveals the two principal long-time problems in interpreting this provision. This culminating section provides a specific recommendation for resolving each of these problems in terms of two over-arching direct "do's" and "don'ts" for judicial consideration.

A. *Do Not Apply the IDEA's Exhaustion Provision to "504-only" Students.*

The scope of the IDEA and, thus, its exhaustion provision, is limited to students who meet its two-pronged definition of disability.[69] Yet, some

67. Perry A. Zirkel, *Post-*Fry *Exhaustion Under the IDEA*, 381 EDUC. L. REP. 1, 11–12 (2020) (analyzing the twenty-four federal appellate court decisions that applied *Fry* in the thirty-one months after its issuance). These trends have continued in the more recent cases. *See, e.g.*, D.D. v. L.A. Unified Sch. Dist., 18 F.4th 1043 (9th Cir. 2021); Logan v. Morris Jeff Cmty. Sch., 2021 WL 4451980, at *2–3, 79 IDELR ¶ 211 (5th Cir. Sept. 28, 2021); T.R. v. Sch. Dist. of Phila., 4 F.3d 179, 194–96 (3d Cir. 2021); Perez v. Sturgis Pub. Sch., 3 F.4th 236, 240–42 (6th Cir. 2021); Ahearn v. E. Stroudsburg Area Sch. Dist., 848 F. App'x 75, 77 (3d Cir. 2021); T.B. *ex rel.* Bell v. Nw. Indep. Sch. Dist., 980 F.3d 1047, 1054–55, 1059–60 (5th Cir. 2020) (requiring exhaustion of § 504/ADA claims of double-covered students). *But see* McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 914–15 (9th Cir. 2020) (not requiring exhaustion for 504-only student).

68. In addition to the question of whether non-IDEA claims for money damages that hinge on FAPE fit in the futility exception for exhaustion, which *Fry* expressly declined to address, 137 S. Ct. at 752 n.4, another example is the application of its gravamen test to claims that are not directly or entirely in the IDEA's FAPE category, such as child find, least restrictive environment, or disciplinary changes in placement.

69. *Supra* note 23 and accompanying text. The primary possible but limited exception is the IDEA's child find obligation, which may or may not be separable from FAPE depending on eligibility. *See, e.g.*, J.N. *ex rel.* M.N. v. Jefferson Cnty. Bd. of Educ., 12 F.4th 1355, 1366–68 (11th Cir. 2021) (upholding denial of compensatory education and attorneys' fees based on parent's failure to meet burden of proof of substantive FAPE deficiency); D.G. *ex rel.* B.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887, 893–94 (5th Cir. 2012) (reversing compensatory education and attorneys' fees awards, broadly concluding that the

court decisions before and after *Fry* have applied this provision to 504-only students. For example,[70] the Third Circuit required exhaustion under *Fry* for claims on behalf of a high school student with chronic sinus problems that his 504 plan was "punitive and retaliatory" rather than educationally effective.[71] Concluding that the plaintiff's complaint alleging that the 504 plan lacked supplemental instruction "implicate[s] a potential need for 'special education,'"[72] the court transmuted the parents' § 504 discrimination claims against the plan to an IDEA child find claim.[73] This strained conversion effectively provided a defense to

"IDEA does not penalize school districts for not timely evaluating students who do not *need* special education"); *cf.* D.S. v. Neptune Twp. Bd. of Educ., 264 F. App'x 186, 189–90 (3d Cir. 2008) (denying attorneys' fees because "there is no evidence that Congress intended IDEA to protect the rights of 'children with a disability who have not been determined eligible for special education services and children merely suspected of having a disability'") (citation omitted). An even more limited but problematic issue is if parents filed § 504/ADA claims on behalf of their child who had an IEP but subsequently revoked special education services and obtained a 504 plan for the child. This situation arose in a Rhode Island case that resulted in two separate rulings requiring exhaustion. *See* Weber v. Cranston Sch. Comm., 212 F.3d 41, 44 (1st Cir. 2000) (parent's § 504 retaliation claim); Weber v. Cranston Sch. Comm., 245 F. Supp. 2d 401, 403–04 (D.R.I. 2003) (student's § 504 plan FAPE claim). However, the complicating factors in these seemingly inconsistent or at least confusing rulings include the district's intervening decision that the child was not eligible under the IDEA and the state's generic hearing and appeal procedure for any school board action or any other action under the state's education laws. Moreover, these decisions were not only prior to *Fry* but also the 2017 change in the IDEA regulations. The revised regulation provides that in the wake of written revocation of consent for special education services, the matter is not subject to the impartial hearing procedure and the district's FAPE obligation no longer applies. 34 C.F.R. § 300.300(b)(4) (2019).

70. For others at the federal appellate level, see *McIntyre*, 976 F.3d at 914–17 (rejecting the exhaustion argument by detailed application of *Fry* gravamen test to the discrimination claims of student with 504 plan for Addison's disease and ADD); L.G. *ex rel.* G.G. v. Bd. of Educ. of Fayette Cnty., 775 F. App'x 227, 228–29 (6th Cir. 2019) (requiring exhaustion of § 504 FAPE claim of student to whom the district offered a 504 plan for e-coli infection); S.E. *ex rel.* A.E. v. Grant Cnty. Bd. of Educ., 544 F.3d 633, 635, 642–43 (6th Cir. 2008) (requiring exhaustion of failure-to-implement claim of student with 504 plan for medication for ADD and bipolar disorder); Cudjoe v. Indep. Sch. Dist. No. 12, 297 F.3d 1058, 1061, 1068 (10th Cir. 2002) (requiring exhaustion of failure-to-implement claim of student with 504 plan for Epstein Barr virus, reflecting confusion between § 504 and IDEA eligibility definitions); Babicz v. Sch. Bd. of Broward Cnty., 135 F.3d 1420, 1421–42 (11th Cir. 1998) (requiring exhaustion for two sibling students with 504 plans for asthma).

71. S.D. *ex rel.* A.D. v. Haddon Heights Bd. of Educ., 722 F. App'x 119, 121, 123 (3d Cir. 2018).

72. *Id.* at 127.

73. *Id.* In doing so, the court (1) failed to show how the broad reference to "supplemental instruction" fit the much narrower scope of "special education," *id.*; and (2) similarly did not come close to establishing eligibility by expressly declining to determine whether the district violated its child find obligation, *id.* at 129. Moreover, for the *Fry* test, the court confused appropriateness of a 504 plan with appropriateness of an IEP. *Id.* at 128.

the district that classified the child as 504-only, thus rewarding it for potential violations of its IDEA obligations of child find and eligibility.[74]

A recent state appellate court decision illustrates another source of the misapplication of exhaustion to 504-only students—the aforementioned difference between FAPE under the IDEA and Section 504.[75] In this case, the court required exhaustion for the § 504 claims of two students who were indisputably not also covered under the IDEA by confusing the *Fry* gravamen for FAPE under the IDEA and the parents' claim for FAPE under § 504.[76]

Regardless of the source of confusion, requiring exhaustion of 504-only students is beyond the scope of the IDEA, serves as a waste of litigation resources, and unduly delays a decision on the merits of claims that are exclusively under § 504/ADA.[77]

B. In Cases in Which Exhaustion of § 504/ADA Claims Justifiably Applies, Require Completion of an IDEA Impartial Hearing for the IDEA, Not the § 504/ADA, Claims.

The confusing and contradictory problems in the courts' interpretation and application of the IDEA exhaustion provision to § 504/ADA claims that continued under *Fry* extend to students with IEPs. These double-covered students account for the bulk of the exhaustion rulings.[78] In most cases, the courts continue to require exhaustion

---

74. For the ultimate requisite of denial of FAPE, the limited "potential" child find claim is insufficient. *Supra* note 69; *cf.* D.R. *ex rel.* Courtney v. Antelope Valley Union High Sch. Dist., 746 F. Supp. 2d 1132, 1140–43, 1145 (E.D. Cal. 2010) (ruling that student on 504 plan met the first but not the second prong for eligibility under the IDEA and, as a result, was not subject to the IDEA's exhaustion provision).

75. *Supra* note 51.

76. Reinoehl v. St. Joseph Cnty. Health Dep't, No. 21A-CT-433, 2021 WL 5754990, at *1–16 (Ind. Ct. App. Dec. 3, 2021). The court erroneously characterized its decision as consistent with Borishkevich v. Springfield Public Schools Board of Education, No. 20-03240-CV-S-BP, 2021 WL 2213237, at *6–7, 78 IDELR ¶ 277 (W.D. Mo. May 27, 2021) by failing to apprehend the difference between FAPE under the IDEA and FAPE under § 504. *See Reinoehl*, 2021 WL 5754990, at *9.

77. *See, e.g.*, Peter J. Maher, *Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259, 300 (2011) ("The failure to [resolve the confusion] will result in many students with disabilities, covered by Section 504/ADA but not by the IDEA, continuing to face procedural obstacles and dead ends in their attempts to seek appropriate services and redress for discrimination."); Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1, 25 (2010) ("[T]o say that relief is available under IDEA [and therefore requiring exhaustion of the IDEA's procedures] for a child who is concededly not eligible under IDEA has an Alice-in-Wonderland quality.").

78. *See, e.g.*, Zirkel, *supra* note 67, at 8–11.

myopically, without considering the fundamental and sometimes fatal overlapping problems of jurisdiction and expertise at the resulting administrative level of adjudication. Before and after *Fry*, the focus for the non-IDEA claims has been on whether exhaustion applies, not what it means when it does apply. The courts tend to answer the yes-no question as to whether exhaustion applies, usually with a yes, without addressing what exhaustion means when the case is at the hearing officer level. In the absence of such guidance, all too often the parties and the hearing officer assume that exhaustion means resolving the § 504/ADA or other non-IDEA claim under its applicable standards, which is contrary to not only the genesis of the IDEA exhaustion provision[79] but also the efficacy of the resulting impartial hearing.

For double-covered students, the IDEA's exhaustion provision directs § 504/ADA claims to the IDEA administrative adjudicative forum of an impartial due process hearing, which in most jurisdictions is at the state level.[80] In clear contrast, an impartial hearing under § 504 is the direct responsibility of the school district,[81] is not subject to an exhaustion,[82] and, most significantly, is an option for parents of both double-covered and 504-only students.[83]

However, in most states, IDEA hearing officers do not have jurisdiction for § 504/ADA or other non-IDEA claims.[84] Instead, because IDEA hearings have jurisdiction for IDEA issues, including but not

79. For its genesis that reflects Congressional intent, see *supra* notes 32–41 and accompanying text.

80. *Supra* notes 25, 41 and accompanying text.

81. *Supra* note 16 and accompanying text. The very limited exception is for elementary or secondary students in a state school, which are rare for students not eligible under the IDEA.

82. *E.g.,* Miener v. Missouri, 673 F.2d 969, 978 (8th Cir. 1982); Sanders v. Marquette Pub. Sch., 561 F. Supp. 1361, 1369 (W.D. Mich. 1983). Based on the specific context of this § 504 regulation, this case law authority is limited to the K–12 student context as distinguished from postsecondary education or employment. Moreover, the required "review procedure" under § 504, *supra* note 16, is—unlike the IDEA—not necessarily the right to a judicial appeal by the aggrieved party. *E.g.*, J.D. v. Georgetown Indep. Sch. Dist., No. A–10–CA–717 LY, 2011 WL 2971284, *8, 57 IDELR ¶ 36 (W.D. Tex. July 21, 2011) (ruling that the plaintiff parent, who relied on this § 504 regulation alone without additional legal authority, failed to meet the burden to show that federal courts have jurisdiction for the appeal of an impartial hearing under § 504).

83. *Supra* note 16.

84. *See, e.g.*, Perry A. Zirkel*, The Public Schools' Obligation for Impartial Hearings Under Section 504*, 22 WIDENER L.J. 135, 166–67 (2012). In a few states, the hearing officer has concurrent jurisdiction for § 504 claims, and in some others this jurisdiction depends on the relationship to the IDEA claims or the school district's option for fulfilling its obligation for an impartial hearing under § 504. *Id.*

limited to FAPE under the IDEA,[85] the exhaustion provision's explicit references to "relief . . . available under [the IDEA]" and "procedures of [an IDEA impartial hearing]"[86] should apply to the scope and standards specific to the IDEA.[87] Under *Fry*, for which the scope is FAPE under the IDEA,[88] the procedural and substantive standards are relatively settled[89] and not identical to those for FAPE under § 504.[90] For IDEA FAPE and the other issues within the jurisdiction of IDEA hearings, the hearing officer's specialized expertise is one of the foundational planks for not only judicial deference[91] but also the exhaustion doctrine.[92]

In the absence of the specialized experience and jurisdiction, hearing officers often dismiss § 504 claims, thus causing exhaustion to be not only a waste of time and resources but potentially a dead end.[93] This problem is not at all exclusive to applying the IDEA's exhaustion provision to 504-only students.[94]

85. 20 U.S.C. § 1415(f)(1)(A) (cross-refers to § 1415(b)(6)(A) ("any matter relating to the identification, evaluation, or educational placement . . . or the provision of a [FAPE] to [an IDEA-eligible] child") and § 1415(k) (disciplinary changes in placement)).

86. *Supra* note 40 and accompanying text; 20 U.S.C. § 1415(l).

87. Not only the language but also the history of the IDEA's exhaustion provision support this interpretation. It is obvious that this provision arose in direct response to *Smith v. Robinson*, with the amendments adopting the dissenting rather than majority opinion for exclusivity and adding the compromise condition of exhaustion of an IDEA impartial hearing. *Supra* notes 38–40 and accompanying text.

88. *E.g.*, Fry v. Napoleon Cmty. Schs., 137 S. Ct. 742, 752 (2017) ("We first hold that to meet that statutory standard, a suit must seek 'relief' for the denial of a FAPE, because that is the only relief the IDEA makes 'available.'" (quoting 20 U.S.C. § 1415(l))); *see also supra* note 65.

89. *See, e.g.*, 20 U.S.C. § 1415(f)(3)(E)(ii) (specifying two-part test for procedural FAPE); Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 999 (2017) (setting forth the substantive standard for FAPE, *supra* text accompanying note 62).

90. *See, e.g.*, 34 C.F.R. § 104.33(b)(1) (2019) (specifying broader definition for FAPE that extends to regular education and related services and a commensurate opportunity standard); Mark H. v. Hamamoto, 620 F.3d 1090, 1101 (9th Cir. 2010) (meaningful access for design standard); Ridley Sch. Dist. v. M.R., 680 F.3d 260, 282 (3d Cir. 2012) (reasonable accommodation standard). The different standards for other potentially applicable issues that overlap or extend beyond FAPE include, for example, the statute of limitations and the availability of expert witness fees, a jury trial, and damages under § 504/ADA. *See, e.g.*, Zirkel, *supra* note 24, at 887 tbl..

91. *See, e.g.*, Woods v. Northport Pub. Sch., 487 F. App'x 968, 977–78 (6th Cir. 2012) (deferring to the hearing officer's expertise).

92. *Supra* note 4.

93. Maher, *supra* note 77, at 283 ("If a court subjects parents of students eligible solely under Section 504/ADA to the exhaustion requirement of § 1415(*l*), thus requiring them to utilize an IDEA due process hearing for their Section 504/ADA claims, the potential of an IDEA hearing officer's lack of jurisdiction over Section 504/ADA issues may result in the parents finding both the doors of the hearing room and courtroom closed.").

94. Indeed, in some states, dismissal of any claims other than those specific to IDEA jurisdiction is explicitly required. *E.g.*, ARK. CODE R. § 005.18.10-10.01.22.2(A)–(B) (2017).

For example, in a pre-*Fry* case in Texas,[95] the parents of a child with an IEP filed claims under the IDEA and under other federal bases, including § 504/ADA. The hearing officer dismissed the non-IDEA claims for lack of jurisdiction and subsequently issued a decision addressing the merits of the IDEA claims.[96] When the parents filed their § 504/ADA and other non-IDEA claims in federal court, the court rejected them because the parents had not fulfilled the purposes of exhaustion.[97]

Similarly, in a Texas case after *Fry*,[98] the parent of a child with an IEP filed for an IDEA impartial hearing, adding § 504/ADA and constitutional claims by way of an amended complaint. The hearing officer dismissed the non-IDEA claims for lack of jurisdiction.[99] Next, the parties settled all the IDEA claims prior to a hearing officer decision but reserved the parents' right to file the non-IDEA, money-damages claims.[100] Concluding that the hearing officer's jurisdictional dismissal did not fulfill this purpose, the court rejected the parent's § 504/ADA and other non-IDEA claims for failure to exhaust the administrative adjudication mechanism of the IDEA.[101]

As an additional post-*Fry* example, the Eleventh Circuit upheld the lower court's ruling that exhaustion applied to the § 504/ADA claims on behalf of a student in the wake of an IDEA hearing officer decision that ruled, contrary to the parent's IDEA claim, that he did not meet the two-part eligibility definition under the IDEA.[102] Although the circumstances

Yet, after a hearing officer did so in a recent case for a child with an IEP, the reviewing court dismissed the parent's § 504/ ADA retaliation claim for lack of exhaustion. T.R. v. Russellville Sch. Dist., No. 4:20-cv-000735, 2021 WL 1148794, at *6, 78 IDELR ¶ 155 (E.D. Ark. Mar. 25, 2021). The court rejected the futility exception even though the hearing officer had already decided the accompanying IDEA claims. *Id.* Consequently, the parent was left without recourse, and none of the purposes of exhaustion remained viable. *Id.*

95. Wood v. Katy Indep. Sch. Dist., No. H–08–0358, 2009 WL 2485967, at *3, 53 IDELR ¶ 10 (S.D. Tex. Aug. 6, 2009).

96. *Id.*

97. *Id.* (citing the purposes outlined in the Ninth Circuit's *Hoeft* decision, *supra* note 4). Additionally, the court declined to address the potential futility exception because the plaintiffs had not raised it. *Id.*

98. Heston v. Austin Indep. Sch. Dist., 816 F. App'x 977, 979–80 (5th Cir. 2020).

99. *Id.* at 980.

100. *Id.*

101. *Id.* at 983–84. Although not directly considering the dismissal as part of its consideration of the futility exception, the court interpreted this exception narrowly upon rejecting it in relation to money damages. *Id.*

102. Durbrow v. Cobb Cnty. Sch. Dist., 887 F.3d 1182, 1186, 1188 (11th Cir. 2018). The parents originally filed for a separate 504 hearing but withdrew this filing after the IDEA hearing officer denied their motion to consolidate the 504 and IDEA hearings. *Id.* at 1188. The court rejected the futility exception, concluding that the parents created the futility. *Id.* at 1191–92. The reasoning, which is difficult to follow, is that "the [hearing officer]

presented variations of the same basic theme, these decisions left all of these parents in the Catch 22 of closed doors at both the administrative level and the judicial level. The core reason was that these courts misinterpreted the exhaustion provision as applying to the standards of § 504/ADA rather than those of the IDEA.

Conversely, when parents exercise their child's right to the specialized procedures and presumed expertise under § 504 for a double-covered child, the courts have made clear that completion of a § 504 hearing does not fulfill the requirement of the IDEA's exhaustion provision.[103] This understanding further supports the interpretation that the IDEA's exhaustion provision is to obtain a decision on the underlying or overlapping IDEA claims as a prerequisite for pursuing the § 504/ADA claims in court.[104]

Providing an IDEA hearing for the factual findings and legal conclusions specific to the FAPE issue(s) per the standards and procedures of the IDEA fulfills the purposes of exhaustion to the extent feasible within the context and content of this particular provision.[105] Absent a Congressional amendment to re-do or refine the policy position of the IDEA's exhaustion provision, addressing the IDEA's FAPE gravamen at a completed IDEA hearing, which provides the requisite administrative expertise, is far better than dismissal.[106] The futility exception is another alternative, but (1) the courts have been relatively stingy in affording this "narrow" exception[107] to § 504/ADA and other non-IDEA claims,[108] and (2) applying it for lack of hearing officer

declined to adjudicate [their § 504/ADA claims] in response to [the parents'] opposition to [their] consolidation and subsequent withdrawal of their § 504 hearing request." *Id.* at 1192.

103. *E.g.*, Parker v. W. Carroll Sch. Dist., 20-CV-1044-STA-TMP, 2021 WL 2910207, at *6, 79 IDELR ¶ 7 (W.D. Tenn. May 27, 2021); Avoletta v. City of Torrington, No. 3:07CV841, 2008 WL 2811517, at *2, 50 IDELR ¶ 5 (D. Conn. July 18, 2008).

104. In contrast, addressing the § 504/ADA claims is a separate matter beyond the requirements of the IDEA's exhaustion provision, reserved for the relatively few states in which hearing officers have jurisdiction for them. *Supra* note 84.

105. Under this proposed interpretation, for cases exhausted due to and for their FAPE gravamen, the separable claims under § 504 or, to the extent of further differences, the ADA—e.g., effective communications or service animals—remain undisturbed for judicial appeal and determination regardless of the hearing officer's decision concerning the IDEA FAPE issue.

106. In the relatively few states that extend jurisdiction to Section 504/ADA claims within the IDEA's hearing system, applying the partially different standards of these laws should supplement, not supplant, the IDEA FAPE determination.

107. *See, e.g.*, F.C. v. Tenn. Dep't of Educ., 745 F. App'x 605, 608 (6th Cir. 2018) (characterizing the limited exceptions to the IDEA's exhaustion provision as "narrow").

108. In some cases, the courts have sidestepped this exception. *E.g.*, *supra* notes 68 and 97. In the cases that addressed it, the courts have tended to reject its applicability. *E.g.*, Z.G. *ex rel.* C.G. v. Pamlico Cnty. Pub. Sch. Bd. of Educ., 744 F. App'x 769, 778–80 (4th Cir. 2018).

jurisdiction for those claims would not fulfill any of the purposes of exhaustion.[109]

As rather singularly recognized by the Sixth Circuit, the IDEA's exhaustion provision is strange and unconventional, but its proper interpretation is to require exhaustion of the IDEA FAPE claims, not the § 504/ADA or other non-IDEA claims.[110] More specifically, the court explained:

> [It] may seem strange—since when do we graft exhaustion requirements from one law onto another? We usually don't. But the provision is not a conventional exhaustion requirement: It doesn't require [the plaintiff] to exhaust his *ADA* claim before bringing it to court. Instead, it requires him to exhaust his corresponding *IDEA* claim.[111]

This approach makes the jurisdictional dismissal of § 504/ADA claims irrelevant. The relatively few potential problems that remain are marginal and seemingly resolvable. For example, child find should be strictly limited to denials of FAPE.[112] Similarly, settlements of IDEA FAPE claims should suffice for exhaustion purposes if the terms of the agreement clearly do not include non-IDEA claims. Finally, revocation of FAPE under the IDEA[113] should depend on the timing of the revocation in relation to the filing and the parties' subsequent actions with regard to a possible 504 plan, including whether it includes special education.[114]

V. CONCLUSION

The IDEA's exhaustion provision is subject to confusion among courts as well as the parties. Its proper judicial interpretation in relation to § 504/ADA claims requires careful consideration of the historical framework for both the overlap of § 504/ADA with the IDEA and the

109. *See, e.g.*, J.M. v. Frances Howell Sch. Dist., 850 F.3d 944, 951 (8th Cir. 2017) ("Although the administrative process may not address all claims, this court has held exhaustion is not futile because it would allow 'the agency to develop the record for judicial review and apply its expertise' to the plaintiff's 'claims to the extent those claims are related to implementation' of the IEP." (quoting J.B. *ex rel.* Bailey v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 594–95 (8th Cir. 2013))).

110. Perez v. Sturgis Pub. Sch., 3 F.4th 236, 240 (6th Cir. 2021).

111. *Id.*

112. *Supra* note 69.

113. 34 C.F.R. § 300.300(b) (2019).

114. Although not within the *Fry* "clues," such fact-based considerations similarly address whether the plaintiff "is indeed seeking relief for the denial of a FAPE." Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 757 (2017).

compromise that this provision represents in reversing the *Smith v. Robinson* exclusivity ruling. The result of the confusion is making the adjudicative process under federal special education laws even more ponderous and wasteful and, in some cases, leaving plaintiff-parents in an inescapable dead end for the § 504/ADA claims. Although not necessarily resolving the relatively limited issues at their margins to a definitive extent,[115] the two culminating recommendations of this Article provides an interpretation of the exhaustion provision before, after, and, thus, separable from *Fry* that aligns with the purposes of exhaustion, the language of the IDEA's exhaustion provision, and fundamental fairness for the parties.

115. *E.g.*, *supra* notes 107–09 and accompanying text. The particular nuances of these peripheral issues should not impede the resolution of the much larger and more frequent problems that this pair of recommendations address.