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Saving Special Education: 504's Stopgap Rights

*By Adrian E. Alvarez**

In May 2022, the Department of Education ("ED") announced that it would be updating regulations implementing Section 504 of the Rehabilitation Act of 1973, a general antidiscrimination statute that provides qualified individuals legal and administrative remedies when they experience disability discrimination in federally assisted programs and activities. Many constituents recommended amending the K-12 portion of the regulations so that they more closely align with the Individuals with Disabilities Education Act ("IDEA"), a statute that allocates funding to states to provide special education and related services to children with disabilities.

While there are benefits to taking this approach, this Article argues that ED should not adopt this strategy whole hog. IDEA is flawed in ways that deny many children with disabilities equal educational opportunity, and in some instances (both obvious and not so obvious), § 504 regulations contain "stopgap rights" that could be used to ensure that all disabled children are able to access the school curriculum when IDEA falls short. This Article also argues that the congressional record suggests that Congress intended for § 504 to serve as a stopgap to IDEA and provide a distinct path for disabled students to secure special education and related services needed to receive

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meaningful access to their education. Although there are barriers in the way of full realization of § 504 rights, advocates should know that they are on sound footing when they request educational services under the statute, given Congress's understanding that § 504 could be an alternate pathway for ensuring that disabled children receive the special education and related services they need to access their education.

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INTRODUCTION

Section 504 of the Rehabilitation Act of 1973 is a federal antidiscrimination statute which protects disabled individuals¹ from

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1. This Article alternates between people-first and identify-first language. “People-first language avoids defining people in terms of their disability” and in most instances “entails placing the reference to the disability after the reference to a person” (e.g., “person with a disability” or “person with autism”). Nat’l Ctr. on Disability & Journalism, *Disability Language Style Guide*, ARIZ. STATE UNIV. (2021), <https://ncdj.org/style-guide/#P> [<https://perma.cc/45MM-55QX>]. People-first language contrasts with identity-first language, where the definition of disability is mentioned first (e.g., “autistic person” or “disabled person”). *Id.* Many people with disabilities consider people-first language to be more respectful than identity-first language because it recognizes that individuals are more than their disabilities. *See generally* Cara Liebowitz, *I Am Disabled: On Identity-First Versus People-First Language*, BODY IS NOT AN APOLOGY (Mar. 20, 2015), <https://dfwhcfoundation.org/wp-content/uploads/2018/10/I-am-Disabled.-On-Identity-First-Versus-People-First-Language-TBISNAA.pdf> [<https://perma.cc/99TB-PJ77>]. People-first language is preferred in some communities, such as among people with intellectual disabilities. *Id.* But not all individuals with a disability prefer people-first language because disability cannot be separated from the person and placing the disability after the person suggests that having a disability is a negative characteristic. *See* Jim Sinclair, *Why I Dislike “Person-first” Language*, AUTISM MYTHBUSTERS (1999), <https://autismmythbusters.com/general-public/autistic-vs-people-with-autism/jim-sinclair-why-i-dislike-person-first-language> [<https://perma.cc/AE6N-QGTW>]. Many autistic individuals prefer identity-

disability discrimination in federally funded programs and activities.² The statute's antidiscrimination mandate provides in part that "[n]o otherwise qualified individual with a disability in the United States . . . 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."³ The U.S. Department of Education ("ED") has promulgated regulations interpreting § 504 to explain to recipients the steps they must take to satisfy the statute's antidiscrimination mandate.⁴ The regulations require K-12 public schools in some cases to provide disabled children access to "special education" and "related services"—two critical services, discussed in detail in Part II, that some disabled children need to access their education.⁵ The mandate is known colloquially as the "504 FAPE standard," a reference to a recipient's duty to provide a "free appropriate public education" ("FAPE") as a means of fulfilling § 504's antidiscrimination mandate.

The central contention of this Article is twofold. First, using examples not previously discussed in the academic literature and drawing from my experience helping to revise ED's § 504 regulations, I argue that § 504 FAPE is an underappreciated resource in helping to secure appropriate educational services for disabled public school children that includes special education and related services. Although the conventional wisdom among scholars and practitioners alike (myself included) is that the FAPE standard found in the federal special education statute—the Individuals with Disabilities Education Act ("IDEA")⁶—provides greater substantive and procedural protections to children with disabilities for securing special education and related services in the public schools than § 504 FAPE, this

first language, among other reasons because it affirms and validates an individual's identity as an autistic person. See Lydia Brown, *The Significance of Semantics: Person-First Language: Why It Matters*, AUTISTIC HOYA (Aug. 4, 2011), <https://www.autistichoya.com/2011/08/significance-of-semantics-person-first.html> [<https://perma.cc/5U5E-553P>]. This Article honors these different perspectives by alternating between person-first and identity-first language.

2. See 29 U.S.C. § 794(a) (2024).

3. *Id.*

4. See generally 34 C.F.R. pt. 104 (2025).

5. See generally *id.* §§ 104.33-35.

6. See 20 U.S.C. §§ 1400-1482 (2024).

Article argues that in some instances § 504 FAPE operates as a stopgap⁷ in obvious (and not so obvious) ways when children who need these services are unable to access them under IDEA. These 504 “stopgap rights” afford disabled students a distinct and alternate path for receiving educational services needed to access their education when they are unavailable through IDEA. Moreover, they provide a host of procedural protections that help to ensure that disabled children do not fall through the cracks when IDEA falls short.

The Article’s second contention—which is a new argument in the academic literature—is that Congress intended for § 504 to serve as a stopgap to IDEA and provide a distinct path for disabled students to secure special education and related services needed to receive meaningful access to their education. When Congress amended the Rehabilitation Act in 1973 to include § 504, it was aware of widespread ableist practices that served to exclude disabled children from most public schools in the United States at the time. These practices included the failure to develop appropriate methodologies for educating disabled children under the false assumption that some disabled children were simply incapable of learning. To encourage school districts to stop excluding disabled children from school, Congress intended § 504 to be one of several legislative tools (including IDEA’s predecessor statute) that parents could use to ensure that disabled children could access appropriate public educational services.

But § 504 FAPE is under threat. Many school districts fail to comply with § 504 FAPE. In May 2022, when ED’s Office for Civil Rights (“OCR”) announced that it planned to update its § 504 regulations,⁸ some national organizations representing school boards and school officials asked OCR to repeal the § 504 FAPE regulations outright.⁹ Moreover, given that school

7. A stopgap is “[a]n improvised substitute for something lacking; temporary expedient.” *Stopgap*, THE AMERICAN HERITAGE DICTIONARY 1201 (2d coll. ed. 1991). The word recognizes that IDEA has problems that § 504 might temporarily fix.

8. See Press Release, U.S. Dep’t of Educ., U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504 (May 6, 2022), <https://web.archive.org/web/20220506160242/https://content.govdelivery.com/accounts/USED/bulletins/3168169/> [<https://perma.cc/C24B-HTKG>].

9. See generally Letter from Sonja H. Trainor, Managing Dir., Legal Advoc., Nat’l Sch. Bd. Ass’n, to Off. for Civ. Rts., U.S. Dep’t of Educ. (Dec. 7, 2022) [hereinafter NSBA Letter] (on file with author); Letter from Phyllis Wolfram, Exec. Dir., Council of Adm’rs of Special Educ. (CASE) & Sasha Pudelski, Dir. of Advoc., AASA, The Sch. Superintendents Ass’n, to Seth Galanter, Deputy Assistant

officials regularly fail to comply with the § 504 FAPE requirements, ED's individual-complaint mechanism operated through the agency's OCR served an important role in helping to nudge school districts into compliance without costly litigation.¹⁰ But the Trump Administration's recent dismantling of ED—including closing several of OCR's field offices—has removed an important tool for ensuring that disabled children receive the educational services that they need to learn and thrive in school under § 504.

Part I discusses the history of ableist and exclusionary practices in American schools that were prevalent until the mid-1970s to illustrate the magnitude of the problem that Congress sought to address by passing § 504 and the Education for All Handicapped Children's Act of 1975, later amended as IDEA. These exclusionary practices included the widespread denial of appropriate educational services such as special education and related services. Part II describes the two alternate paths that Congress created for disabled children to access appropriate educational services in public schools: IDEA and § 504 of the Rehabilitation Act. This Part explains why the conventional wisdom is that IDEA provides greater substantive and procedural protections for securing these essential services. In Part III, I argue that § 504 provides stopgap mechanisms for securing these services when they are unavailable under IDEA. Part IV argues that Congress intended for § 504 to serve as a stopgap to IDEA and provide a distinct path for disabled students to secure special education and related services needed to receive meaningful access to their education. Finally, in Part V I discuss obstacles to full realization of § 504 rights, but encourage advocates to assert these rights nonetheless.

Sec'y for Civ. Rts., Off. for Civ. Rts., U.S. Dep't of Educ. (June 30, 2022) [hereinafter CASE-AASA Letter] (on file with author).

10. See *infra* text accompanying note 408 (discussing how simply filing a complaint with OCR could nudge a school district forward to resolve an allegation of discrimination under Section 504); see also USAFacts Team, *What Are the Most Common Civil Rights Violations in Education?*, USAFACTS (Feb. 14, 2025), <https://usafacts.org/articles/what-are-the-most-common-civil-rights-violations-in-education/> [https://perma.cc/6SVB-6UCM] (reviewing OCR data from fiscal year 2023 to conclude that nearly a quarter of all complaints brought under Section 504 and Title II of the Americans with Disabilities Act (the "ADA") alleged a denial of a free appropriate public education).

I. HISTORIC ABLEISM IN U.S. PUBLIC SCHOOLS

While the ideal of universal public education is a central American value, until the 1970s, state and local school districts regularly excluded disabled children from the public schools.¹¹ Ableist¹² assumptions and stereotypes about some disabled children's capacity to learn justified this exclusion. Rather than question the validity of pedagogical methods that failed to consider the unique educational needs of disabled children, educators (wrongly) concluded that some disabled children—particularly those with mental and intellectual disabilities—were incapable of learning.¹³ Children with disabilities that impaired their ability to ambulate were excluded by inaccessible public spaces. In the days when most

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11. See Marcia Pearce Burgdorf & Robert Burgdorf Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a Suspect Class Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 868-75 (1975); RUTH COLKER, *DISABLED EDUCATION* 17-19 (2013) [hereinafter COLKER, *DISABLED EDUCATION*]; RUTH COLKER, *WHEN IS SEPARATE UNEQUAL?: A DISABILITY PERSPECTIVE* 83-86 (2009); see also ROSEMARY C. SALOMONE, *EQUAL EDUCATION UNDER LAW: LEGAL RIGHTS AND FEDERAL POLICY* 137 (1986) ("School systems denied educational services to the severely handicapped pursuant to state law, haphazardly admitted or denied access to students with the same disabilities, left students on endless waiting lists, misclassified them through the use of discriminatory measures, and placed them in dead-end tracks without periodic evaluations.").
 12. See FRED PELKA, *THE ABC-CLIO COMPANION TO THE DISABILITY RIGHTS MOVEMENT* 3 (1997) ("Ableism is that set of often contradictory stereotypes about people with disabilities that acts as a barrier to keep them from achieving their full potential as equal citizens in society. Among these are the beliefs that people with disabilities are inherently unable to manage their own lives, that they are embittered and malevolent, and that they are, by reason of their disability, morally, intellectually, and spiritually inferior to temporarily able-bodied people, or, conversely, that people with disabilities are saintlike, ever cheerful, asexual, childlike, and unusually heroic. Ultimately, it is the belief that people with disabilities are different from 'normal' people and that their lives are inherently less worthwhile than those of people without disabilities. It is the 'ism' at the root of discrimination against people with disabilities on the job, in school, and in the community.").
 13. Burgdorf & Burgdorf, *supra* note 11, at 871; see, e.g., *Watson v. City of Cambridge*, 32 N.E. 864, 864 (Mass. 1893) ("The records of the school committee of the defendant city set forth that the plaintiff in 1885 was excluded from the schools 'because he was too weak-minded to derive profit from instruction.'").

children traveled to school on foot or horseback, it was virtually impossible for many students with physical disabilities to even arrive at the schoolhouse door.¹⁴ But even well into the twentieth century, legendary disability rights activist Judy Heumann recalled being excluded from New York City schools simply because she used a wheelchair:

I still remember the day I was five and my mother had taken me to register for kindergarten. My mother helped me put on a nice dress, pushed me to school, and pulled my wheelchair up the steps. But the principal refused to allow to me to enter.

“Judith is a fire hazard,” he said, explaining to my shocked mother how the school system saw wheelchairs as a dangerous obstruction. Children who used wheelchairs were not permitted to attend school. I would stay home.¹⁵

Because disabled children were excluded from school, educators lacked incentives to develop appropriate pedagogies for educating students with intellectual, mental, and sensory disabilities (e.g., blindness or low vision).¹⁶ Those children with disabilities who did attend school would often drop out, unable to access the curriculum without appropriate instruction and services.¹⁷ Early legislative attempts to address the problem through compulsory-education laws¹⁸ or laws requiring states to educate children

14. Burgdorf & Burgdorf, *supra* note 11, at 871.

15. JUDY HEUMANN, *BEING HEUMANN: AN UNREPENTANT MEMOIR OF A DISABILITY RIGHTS ACTIVIST* 8 (2020).

16. Burgdorf & Burgdorf, *supra* note 11, at 874.

17. *See, e.g.*, *Honig v. Doe*, 484 U.S. 305, 309 (1988) (noting that many students with disabilities who did attend school at this time “were simply ‘warehoused’ in special classes or were neglectfully shepherded through the system until they were old enough to drop out”).

18. Legislatures did not necessarily pass compulsory-education laws intending to include disabled children. Massachusetts was the first state to pass a compulsory-education law in 1852. *See An Act Concerning the Attendance of Children at School*, ch. 240, 1852 Mass. Acts 170; *see also* MICHAEL S. KATZ, *A HISTORY OF COMPULSORY EDUCATION LAWS* 17 (1976). But the law created an exception for children with disabilities. *See* 1852 Mass. Acts 171, § 4 (exempting children whose “bodily or mental condition has been such as to prevent his attendance at school, or his acquisition of learning for such a period of time”).

with disabilities were frustrated¹⁹ by what Professor Jasmine E. Harris has called the “aesthetics of disability.”²⁰ Harris defines the aesthetics of disability as “visible sensory and behavioral markers that trigger particular aesthetic and affective judgments about marked individuals.”²¹ She argues that the negative affective responses from nondisabled individuals to these aesthetic markers can mitigate disabled individuals’ rights, particularly integrative ideals found in law.

For instance, in *Watson v. City of Cambridge*, the parents of a child with a disability sued the local school committee in the 1880s after it expelled their son who because of disability was “troublesome to other children” because he made “unusual noises.”²² The trial court also found that the child was “unable to take ordinary, decent, physical care of himself,” notable perhaps because nondisabled peers at this age may have been able to care for themselves with limited adult supervision.²³ Despite the ableist assumption that some children are uneducable, the high court of Massachusetts deferred to the local school committee’s decision because the record supported the committee’s defense that its members had acted in good faith.²⁴

Similarly, the “good faith standard” applied in *Watson* operated in conjunction with the aesthetics of disability to exclude Merritt Beattie, a child with a physical disability,²⁵ from the public schools of Antigo, Wisconsin, in *State ex rel. Beattie v. Board of Education*.²⁶ In jarring and ableist language, the Supreme Court of Wisconsin described Merritt as “a crippled and defective child” who was “afflicted with a form of paralysis” affecting “his whole physical and nervous make-up.”²⁷ The court noted that Merritt was “slow and hesitating in speech” with “a peculiarly high, rasping,

19. See COLKER, *DISABLED EDUCATION*, *supra* note 11, at 17-18.

20. See Jasmine E. Harris, *The Aesthetics of Disability*, 119 COLUM. L. REV. 895, 897 (2019).

21. *Id.*

22. 32 N.E. 864, 864 (Mass. 1893).

23. *Id.*

24. See *id.* at 865.

25. U.S. Supreme Court Justice David Souter describes Merritt as having cerebral palsy. See *Tennessee v. Lane*, 541 U.S. 509, 535 (2004) (Souter, J., concurring).

26. 172 N.W. 153, 153-54 (Wis. 1919).

27. *Id.* This Article replicates the court’s pejorative language to illustrate the stigma and prejudice that antidiscrimination legislation seeks to address.

and disturbing tone of voice accompanied with uncontrollable facial contortions” that made it difficult for others to understand him.²⁸ The court also noted that Merritt had “an uncontrollable flow of saliva” that “drool[ed] from his mouth onto his clothing and books, causing him to present an unclean appearance.”²⁹

Because Merritt had no cognitive impairments and “kept pace with the other pupils in the respective grades,”³⁰ there was no sound pedagogical reason why Merritt should not have received an education with his nondisabled peers. But the aesthetics of disability mitigated Merritt’s experience: The school argued that his “physical condition and ailment produce[d] a depressing and nauseating effect upon the teachers and school children.”³¹ In the eyes of administrators, his mere presence interfered with school operations because he took up “an undue portion of the teacher’s time and attention” and distracted other students.³² Like in *Watson*, the aesthetics of disability interacted with the “good faith standard” and the Court declined to second-guess the school board’s decision to exclude Merritt from school. It was satisfied that the school board had used its “best judgment, exercised in good faith” to exclude Merritt from a public education with his nondisabled peers.³³

Starting in the 1960s, “under strong pressure” from disability rights advocates, Congress passed legislation pursuant to its Spending Clause powers to provide grants to states to encourage them to develop special education programs and train special education professionals.³⁴ But these early federal interventions lacked specific guidelines and progress was slow in helping to increase the number of disabled children in school.³⁵ Some states remained averse to the notion that they were responsible for

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 155.

34. SALOMONE, *supra* note 11, at 142-43; *see also* Bd. of Educ. v. Rowley, 458 U.S. 176, 179-80 (1982) (“Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program ‘for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children.’”).

35. *Rowley*, 458 U.S. at 180.

educating disabled children. As recently as 1969, it was a crime in North Carolina for parents to insist that their disabled child be allowed to attend public schools after the superintendent had already found that the child should be excluded.³⁶ In 1970, just 7 states educated over half of the disabled children in their jurisdiction.³⁷ As a result, 2 million children with disabilities between the ages of 7 and 17 were not enrolled in school in 1970.³⁸

In response, advocates resorted to litigation at the tail end of the 1960s into the mid-1970s to demand equal educational opportunities for disabled children, this time under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.³⁹ The problem galvanized parent associations of disabled children,⁴⁰ legal aid and public interest lawyers,⁴¹ and titans of the disability rights⁴² and Civil Rights movement.⁴³ The new wave of litigation was based in part on the Supreme Court's opinion in *Brown v.*

36. RUTH COLKER & PAUL D. GROSSMAN, *THE LAW OF DISABILITY DISCRIMINATION* 414 (8th ed. 2013) (citing Act of May 18, 1965, ch. 584, 1965 N.C. Sess. Laws 641 (amending N.C. GEN. STAT. § 115-165 (1963))).

37. MARTHA MINOW, *IN BROWN'S WAKE* 72 (2010).

38. See David Neal & David L. Kirp, *The Allure of Legalization Reconsidered: The Case of Special Education*, 48 CHILD. WITH SPECIAL NEEDS 63, 67 (1985).

39. The first case in the wave was *Wolf v. Legislature of Utah*, No. 182646 (D. Utah Jan. 8, 1969).

40. See, e.g., *Pa. Ass'n for Retarded Child v. Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) [hereinafter PARC I]; *Pa. Ass'n for Retarded Child v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) [hereinafter PARC II].

41. See, e.g., *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

42. See, e.g., HEUMANN, *supra* note 15, at 75 (describing Heumann's role as a congressional staff person who helped develop Pub. L. No. 94-142, IDEA's predecessor).

43. This included Marion Wright Edelman, the first woman admitted to the Mississippi bar, a Yale Law graduate, and the head of the NAACP Legal Defense and Educational Fund office in Jackson, Mississippi. See MINOW, *supra* note 37, at 74. In 1973, Edelman founded the Children's Defense Fund in response to a U.S. census figure indicating that "750,000 children between the ages of seven and thirteen" were out of school. Initially she believed that these were African American children, but a study indicated that these were largely white children excluded because of disability. *Id.* As a result, her organization prioritized securing legislation guaranteeing education for disabled children. *Id.*

Board of Education,⁴⁴ which held that excluding African American students from all-white schools denied the children the equal protection of the law.⁴⁵ As applied to disabled children excluded from school, advocates argued that “the unjustified exclusion of any child from all public schooling denies to that child the equal protection of the laws when the state makes the opportunity freely available to other children.”⁴⁶ Attorneys also argued that the arbitrary process of labeling and placing children with disabilities in inappropriate educational programs that resulted in stigmatizing labels (e.g., “uneducable”) denied them due process of law.⁴⁷ *Pennsylvania Association for Retarded Children v. Pennsylvania* (“PARC”)⁴⁸ and *Mills v. Board of Education*⁴⁹ were two landmark cases.

PARC was brought on behalf of children with intellectual disabilities and challenged various provisions of the public school code, including one that permitted schools to exclude “beginners” (i.e., children first enrolling in school) who had not “attained a mental age of five years”⁵⁰ at the start of the school year and a provision that permitted schools to exclude children that had been certified as “uneducable and untrainable.”⁵¹ The plaintiffs’ expert

44. 347 U.S. 483 (1954); U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

45. Burgdorf & Burgdorf, *supra* note 11, at 876.

46. Paul R. Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1093 (1973); *PARC I*, 334 F. Supp. 1257, 1259 (E.D. Pa. 1971) (“Having undertaken to provide a free public education to all of its children, including its exceptional children, the Commonwealth of Pennsylvania may not deny any mentally retarded child access to a free public program of education and training.”); *see also Brown*, 347 U.S. at 493 (stating that the “opportunity [of an education], where the state has undertaken to provide it, is a right which must be made available to all on equal terms”).

47. Dimond, *supra* note 46, at 1093; *see also* LEOPOLD D. LIPPMAN & I. IGNACY GOLDBERG, *RIGHT TO EDUCATION* 21 (1973) (noting that litigation was brought on behalf of children “labeled ‘uneducable’ but not considered so in modern educational concept”).

48. *PARC I*, 334 F. Supp. 1257 (E.D. Pa. 1971); *PARC II*, 343 F. Supp. 279 (E.D. Pa. 1972).

49. 348 F. Supp. 866 (D.D.C. 1972).

50. *PARC I*, 334 F. Supp. at 1260 (citing 24 PA. CONS. STAT. § 13-1304 (1970)).

51. *Id.* at 1264 (citing 24 PA. CONS. STAT. § 13-1375 (1970)). Another practice the lawsuit sought to challenge was that of postponing an intellectually disabled child’s admission into school even though they had reached the age when parents were required to send their children to school. *Id.* at 1261.

witnesses introduced overwhelming evidence that all intellectually disabled children were capable of learning with appropriate education and training.⁵² Given the strength of the experts' testimony, the state withdrew its opposition to the complaint after the first day of trial and began negotiating a consent agreement with the plaintiffs.⁵³

Mills v. Board of Education was a much more ambitious case than *PARC* that sought to vindicate the rights of all disabled children in the District of Columbia ("D.C."), not just those with intellectual disability. The resulting judgment in *Mills* had a tremendous impact on the future development of federal special education law. Given that the court's judgment came before Congress had delegated full legislative powers to local D.C. government,⁵⁴ implementation of the so-called "Waddy Decree"⁵⁵ that resulted from the *Mills* case was a challenge with which even Congress had to grapple.⁵⁶

PARC and *Mills* helped to establish substantive and procedural standards needed to ensure disabled children received equal educational opportunity in the public schools first by inspiring subsequent litigation. The litigation brought to light a pattern of practices that school districts used to exclude children with disabilities. Marcia Pearce Burgdorf and Professor Robert Burgdorf Jr. categorized these cases according to the ableist practices that these cases struck down.⁵⁷ These practices included: (1) ableist classifications (e.g., distinction between "educable" and "uneducable" children); (2) administrative buck passing (i.e., unclear or shared responsibilities for disabled children that resulted in some children

52. LIPPMAN & GOLDBERG, *supra* note 47, at 29 ("The essence of the experts' testimony was...to indicate the importance of education in the full development of [intellectually disabled] children, and, most important, to support their opinion—with all the prestige that their professional credentials could confer—that every child can indeed be educated.").

53. *Id.* at 30 ("Overnight, spokesmen for the Commonwealth of Pennsylvania consulted with counsel for the plaintiff and agreed that further testimony would serve no purpose. The two attorneys thereupon joined their efforts to develop a consent agreement, which later received the approval of the court.").

54. See District of Columbia Self-Government and Reorganization Act, Pub. L. No. 93-198, 87 Stat. 777 (1973) (codified at D.C. CODE §§ 1-201.01 to -207.71).

55. The decree was named after the presiding judge, the Hon. Joseph C. Waddy.

56. See *Implementing the Waddy Decree and Authorizing the University of the District of Columbia: Hearings Before the Subcomm. on Educ. of the H. Comm. on the Dist. of Columbia*, 93d Cong. (1974).

57. Burgdorf & Burgdorf, *supra* note 11, at 879-83.

falling through the cracks); (3) waitlisting (i.e., refusing to offer an immediate educational placement for a child or making placement contingent on availability); (4) lagging implementation of court orders; (5) insufficient funding; (6) exclusion, placement, or transfer without the opportunity to be heard; (7) difficulties determining in which jurisdiction the child resides; (8) partial public funding and tuition-reimbursement ceilings; (9) misclassification; and (10) failure to educate children in residential facilities.⁵⁸

The courts in many of these cases adopted *PARC*'s and *Mills*'s substantive and procedural standards.⁵⁹ Many state departments of education took notice of these cases, modifying their practices to avoid liability.⁶⁰ By 1972, nearly seventy percent of states "had enacted mandatory legislation requiring the education of all handicapped children."⁶¹ And by 1975, only two states had not adopted some form of mandatory legislation to educate children with disabilities.⁶² Despite progress in the courts and through state legislatures, these "new rights" did not necessarily result in more disabled children being enrolled in schools.⁶³

58. *Id.*; see also LIPPMAN & GOLDBERG, *supra* note 47, at 25 ("Exclusions, postponements, waiting lists, and excusals were frequently employed to keep [intellectually disabled] children out of the public schools of Pennsylvania.").

59. MINOW, *supra* note 37, at 73.

60. For instance, the year after the court in *PARC* accepted the parties' consent agreement, the New York Commission recommended to the state department of education that it "should produce a plan to identify all the handicapped children in the state over the next two years and to expand special-education services to meet their needs. An important part of the plan should be identification of the number of trained professionals—teachers, psychologists, physicians and so forth—available to serve these children throughout the state." LIPPMAN & GOLDBERG, *supra* note 47, at 48 (quoting 2 REPORT OF THE NEW YORK STATE COMMISSION ON THE QUALITY, COST AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION 9.18 (1972)).

61. Fedrick J. Weintraub & Joseph Ballard, *Introduction: Bridging the Decades*, in JOSEPH BALLARD, BRUCE A. RAMIREZ & FREDERICK J. WEINTRAUB, SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 1, 3 (1982).

62. *Id.*

63. See Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 (P.L. 94-142): Its History, Origins, and Concepts*, in BALLARD ET AL., *supra* note 61, at 11, 14. ("In spite of the ongoing litigation on behalf of handicapped children, and despite the continuing development and refinement of state-level legislative mandates, it became clear in the early to mid 1970s that altogether too many handicapped children either were still

PARC and *Mills* helped Congress understand that a disabled child's ability to access special education and related services was a right and not merely the ability to access a governmental benefit. This reframing of special education services as a right would have important discursive consequences. As Professor Richard Scotch notes, "In periods of limited resources, which is to say virtually always, it is politically acceptable to limit benevolent acts of charity because of budgetary constraints, traditional practice, or administrative difficulty. Reducing benefits may be legitimate, while violating rights is not."⁶⁴

Congress addressed the problem of excluding disabled children from school by taking what Professor Rosemary C. Salomone has called "a carrot and stick" approach.⁶⁵ One strategy (the carrot) has involved apportioning funds to states under Congress's Spending Clause powers to encourage them to develop appropriate educational programming for disabled children—sometimes under a public-benefit framework and other times using the language of rights. IDEA is characteristic of the rights-based approach. A second strategy (the stick), which also utilized a rights-based framework, involved federal antidiscrimination legislation such as § 504, which provides legal and administrative remedies to children who have been denied meaningful access to their education. Part II discusses how these two statutes operate.

II. FEDERAL ACCESS TO SPECIAL EDUCATION AND RELATED SERVICES

As Part I illustrates, prior to the mid-1970s, one reason that disabled children were regularly excluded from school was because school districts failed to provide them with appropriate educational services that included access to special education and related services. Federal law now provides two distinct pathways to ensure that disabled children can access these crucial services. The first pathway is the federal special education statute—the Individuals with Disabilities Education Act.⁶⁶ The second pathway is found in ED's regulations implementing § 504 of the Rehabilitation Act of

being excluded from the nation's school systems or were receiving an inappropriate education.").

64. RICHARD SCOTCH, FROM GOOD WILL TO CIVIL RIGHTS: TRANSFORMING FEDERAL DISABILITY POLICY 42 (2001).

65. SALOMONE, *supra* note 11, at 141.

66. 20 U.S.C. §§ 1400-1409 (2024).

1973.⁶⁷ Although IDEA may provide stronger substantive and procedural protections for accessing these services than ED's § 504 regulations, IDEA has some structural limitations, including narrow eligibility criteria, that serve to exclude some disabled children from receiving educational services needed to access their education.

A. Individuals with Disabilities Education Act (IDEA)

The Individuals with Disabilities Education Act is the current name of the Education for the Handicapped Act ("EHA") as amended under the name the "Education for All Handicapped Children Act of 1975."⁶⁸ It is the primary pathway that most disabled children will take to receive special education and related services in public schools. Under Part B of IDEA, states are required to provide every child with a disability aged three to twenty-one the substantive right to a free appropriate public education as a condition of receiving financial assistance.⁶⁹

1. Eligibility for Services – A Child with a Disability

Only students who meet the narrow statutory definition of the term "child with a disability" are entitled to IDEA services. Under the statutory definition of the term, it is not enough for a child to be diagnosed with a condition such as an intellectual disability or a traumatic brain injury. The child's disability must also meet the specific statutory requirements of one

67. See 34 C.F.R. §§ 104.31-104.36 (2025).

68. Pub. L. No. 94-142, 89 Stat. 773 (1975). The statute was originally part of an amendment to the Elementary and Secondary Education Act of 1965, Pub. L. No. 91-230, 84 Stat. 121 (1970); see also *Bd. of Educ. v. Rowley*, 458 U.S. 176, 179 (1982) (summarizing Congress's previous attempts to provide for the educational needs of disabled children in the United States). As the Supreme Court has said, "To avoid confusion—and acronym overload—[I will] refer throughout this [Article] only to the IDEA." *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 160 n.1 (2017).

69. 20 U.S.C. § 1412(a)(1)(A). This Article predominantly deals with Part B of IDEA, the statutory and regulatory provisions requiring states to provide a free appropriate public education to children with disabilities ages three to twenty-one. See *id.* §§ 1411-1419. While Part B generally applies to children ages three to twenty-one, the statute allows states to narrow that age range. See *id.* § 1412(a)(1)(B). Part C of IDEA provides formula grants to assist states in providing early intervention services to infants and toddlers ages birth to two. See *id.* §§ 1431-1444.

of several “disability categories.”⁷⁰ In addition, to qualify for services under IDEA, the child must need special education and related services because of their disability.⁷¹ Some of IDEA’s disability categories include autism, emotional disturbance, deafness, intellectual disabilities, orthopedic impairments, other health impairments, specific learning disabilities, speech or language impairments, traumatic brain injury, and blindness.⁷²

2. Free Appropriate Public Education (FAPE)

IDEA requires states receiving funding under the statute to provide all children with a disability living in the state with a free appropriate public education.⁷³ FAPE is defined as the provision of “special education and related services” that meet four conditions,⁷⁴ including that the services be provided for free;⁷⁵ that the services meet state educational standards;⁷⁶ that the services are provided in an appropriate educational setting;⁷⁷ and that the services are tailored to the child’s unique needs.⁷⁸ The final

70. *See id.* § 1401(3)(A)-(B) (generally defining the term “child with a disability”).

71. *See id.*

72. *Id.* § 1401(3)(A). In response to concerns that African American children were being overidentified under the statute and that children in general receiving IDEA services were stigmatized and “labeled,” Congress allowed states the option of including the “developmental delay” category for children ages three to nine. *See id.* § 1401(3)(B); *see also* MARK C. WEBER, UNDERSTANDING DISABILITY LAW 100 (3d ed. 2019) (explaining Congress’s motives for including the developmental delay category). ED’s regulations interpreting IDEA also include two additional disability categories, deaf-blindness and multiple disabilities. 34 C.F.R. § 300.8(a) (2025).

73. *See generally* 20 U.S.C. § 1412(a)(1) (requiring states receiving funds under the statute to ensure that “[a] free appropriate public education is available to *all* children with disabilities residing in the State between the ages of 3 and 21”) (emphasis added).

74. 20 U.S.C. § 1401(9) (2024).

75. *Id.* § 1401(9)(A).

76. *Id.* § 1401(9)(B).

77. *Id.* § 1401(9)(C).

78. *See Bd. of Educ. v. Rowley*, 458 U.S. 176, 181 (1982) (“The ‘free appropriate public education’ required by the Act is tailored to the unique needs of the handicapped child by means of an ‘individualized educational program’ (IEP)”).

condition is satisfied when the school district provides the special education and related services as part of an appropriately crafted individualized education program (“IEP”)—discussed below.⁷⁹

The statutory language is somewhat misleading, however: Not *all* children with disabilities living in their jurisdiction are entitled to FAPE as the statute proclaims. As discussed in the previous Section, only an *eligible* child with a disability is entitled to what the Supreme Court has called the “enforceable substantive right” to FAPE.⁸⁰ But the statute provides states with wide discretion in determining who will be eligible for services, leading to different IDEA-eligibility rates across states. As a result, a child may be eligible for IDEA FAPE in one jurisdiction, but not in another.

The following Sections discuss FAPE’s individual components using the example of a child with attention deficit/hyperactivity disorder (“ADHD”) to illustrate how IDEA FAPE might help a child with ADHD access needed services.⁸¹

a. Special Education

The first individual component of FAPE is access to special education. IDEA broadly defines special education as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability.”⁸² Special education or specialized instruction is defined broadly, encompassing not only “cognitive skills, but basic functional skills as well.”⁸³

79. 20 U.S.C. § 1401(9)(D).

80. *Honig v. Doe*, 484 U.S. 305, 310 (1988) (“Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States.”).

81. A child with ADHD found ineligible for services may experience serious consequences given that ADHD can significantly impair learning by disrupting attention, working memory, and impulse control. *See* Crystal Bray, *How Does ADHD Affect Learning?*, FORBRAIN, [https://www.forbrain.com/adhd-learning/\[https://perma.cc/96FY-NNZL\]](https://www.forbrain.com/adhd-learning/[https://perma.cc/96FY-NNZL]). These impairments can lead to difficulties accessing core academic subjects as well as classroom behavior. *Id.*

82. 20 U.S.C. § 1401(29).

83. *Timothy W. v. Rochester, N.H., Sch. Dist.*, 875 F.2d 954, 962 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989); *see also* *Cnty. of San Diego v. Cal. Special Educ. Hearing Off.*, 93 F.3d 1458, 1468 (9th Cir. 1996) (“Rosalind had been designated as a[] [seriously emotionally disturbed] student, not merely one

For instance, a child with ADHD might require specialized instruction in the form of techniques to help manage attention difficulty and impulsivity.⁸⁴ These techniques could include visual and auditory cues to help the child maintain focus on their assignment; use of a visual timer to prepare the student for how long the task will take to complete; and verbal reminders and signals as an auditory cue to help the child refocus on their lesson.⁸⁵ A child with ADHD who is distracted while coming to school might also require travel training as a form of specialized instruction, such as teaching the student to move about on public transportation.⁸⁶

The case law interpreting the term “special education” has helped to define its limits. For example, the Sixth Circuit recently found that a request to ban eating or chewing inside the classroom to accommodate a child with misophonia (i.e., a decreased tolerance to specific sounds) was not “specialized instruction” as IDEA defines it, because the ban did not require the teacher to alter how she imparted knowledge to her students and the teacher could offer identical instruction with or without the eating ban.⁸⁷ The Fourth Circuit found that a public school district was not required to provide religious instruction to an Orthodox Jewish student with Down Syndrome, such as “‘keeping kosher,’ ‘wearing a yarmulke,’ ‘observing mitzvot,’ and ‘observing Jewish holidays,’” because the specialized instruction sought did not assist the child to access the state’s general curriculum.⁸⁸ Finally, “specialized instruction” that ensures access to the general curriculum may differ across states given that states may define the general curriculum as they choose. As such, the First Circuit found that teaching social skills and pragmatic language—something a child with ADHD might require⁸⁹—met the regulatory definition of “specialized instruction” because it was a form of adapting “the content of the usual

who has learning disabilities. Accordingly, her goals are not limited to academic benefits, but also include behavioral and emotional growth.”).

84. Amy Yacoub, *IEP For ADHD Explained: A Comprehensive Resource*, FORBRAIN (2025), <https://www.forbrain.com/adhd-learning/iep-for-adhd/> [<https://perma.cc/G676-GBE3>].

85. *Id.*

86. 34 C.F.R. § 300.39(a)(2)(ii)-(iii) (2025); *see id.* § 300.39(b)(4) (defining travel training); *id.* § 300.39(b)(5) (defining vocational education).

87. *Doe v. Knox Cnty. Bd. of Educ.*, 56 F.4th 1076, 1084-85 (6th Cir. 2023).

88. *M.L. v. Smith*, 867 F.3d 487, 496 (4th Cir. 2017).

89. *See generally* Yacoub, *supra* note 84.

instruction” to address a child’s unique needs and helped the student access the “career preparation” component of Maine’s general curriculum.⁹⁰

b. Related Services

The second individual component of FAPE is access to related services. Related services are “transportation, and such developmental, corrective, and other supportive services” “as may be required to assist a child with a disability to benefit from special education.”⁹¹ Because the services must assist a child in benefitting from special education, under IDEA, if a child does not qualify for special education, they will not be eligible for related services—even if they may otherwise need those services to access the general education curriculum. The Act provides a nonexhaustive list of related services, including speech-language pathology, psychological services, and social work services to name a few. A child with ADHD might require services such as speech or occupational therapy, and/or counseling services to help the child “regulate sensory input, improve social-emotional skills, and increase auditory processing, expressive communication, and organization skills.”⁹²

c. Individualized Education Program (IEP)

The third individual component of FAPE is access to an individualized education program. The Supreme Court has called the IEP IDEA’s modus operandi⁹³ or the “primary vehicle” for implementing Congress’s goals under the statute.⁹⁴ An IEP is “a written statement for each child with a disability that is developed, reviewed, and revised” in accordance with the statute’s numerous procedural requirements.⁹⁵ Among other things, the IEP must contain a statement of the child’s present levels of academic and functional achievement.⁹⁶ For a child with ADHD, a statement of the child’s

90. Mr. I. *ex rel.* L.I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1, 20–21 (1st Cir. 2007).

91. 20 U.S.C. § 1401(26)(A) (2024).

92. *See* Yacoub, *supra* note 84.

93. Sch. Comm. of Burlington, Mass. v. Dep’t of Educ. of Mass., 471 U.S. 359, 368 (1985).

94. Honig v. Doe, 484 U.S. 305, 311 (1988).

95. 20 U.S.C. § 1414(d)(1)(A)(i).

96. *Id.* § 1414(d)(1).

present levels might indicate that the student faces challenges focusing or sustaining attention during instruction, which leads to incomplete assignments or missed instruction.⁹⁷ The IEP must also contain a statement of measurable academic and functional goals.⁹⁸ An example of a measurable goal for a child with ADHD could be, “By the end of the academic year, the student will independently complete and submit at least 90% of assigned homework tasks across all subjects.”⁹⁹ Finally, the IEP must contain a statement of the services and accommodations/modifications the child needs to receive a FAPE.¹⁰⁰ Common accommodations or modifications for a child with ADHD include preferential seating at the front of the class to minimize distractions, extended time on exams or to complete assignments, and the use of assistive technology such as noise-canceling headphones while in class or during an exam.¹⁰¹

IDEA does not include a substantive standard prescribing the level of education due to a child with a disability.¹⁰² But the legislative history indicates that Congress was motivated to pass the statute by the exceedingly large number of disabled children who were being excluded from public schools outright.¹⁰³ IDEA thus requires that the IEP provide a disabled child what the Supreme Court has described as “meaningful access” to their education.¹⁰⁴ In *Board of Education v. Rowley* the Court held that a school district provides meaningful access to a child with a disability by providing “personalized instruction with sufficient support services to permit the child to *benefit educationally* from that instruction.”¹⁰⁵ This later became known as the “some benefit standard.”¹⁰⁶ A child received “some benefit”

97. See Yacoub, *supra* note 84.

98. 20 U.S.C. § 1414(d)(1).

99. See Yacoub, *supra* note 84.

100. 20 U.S.C. § 1414(d)(1).

101. See Yacoub, *supra* note 84.

102. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 189 (1982).

103. *Id.* at 191-92.

104. *Id.* at 192 (“Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.”).

105. *Id.* at 203 (emphasis added).

106. See Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1, 13 (2010).

when their IEP was “reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.”¹⁰⁷

The Court revisited some lower court interpretations of *Rowley*’s “some benefit” standard thirty-five years later in *Endrew F. v. Douglas County School District RE-1*.¹⁰⁸ In that case, the Court held that an IEP provides a child with a disability meaningful access to their education when the IEP is “reasonably calculated to enable [the] child to make progress appropriate in light of the child’s circumstances.”¹⁰⁹ For most children, this will mean “integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.”¹¹⁰ But even for children who are unable to receive their instruction in the general education setting, the IEP must be “appropriately ambitious” in light of the child’s individual circumstances and “every child should have the chance to meet challenging objectives.”¹¹¹ Some scholars such as Professor Richard D. Marsico have argued that *Endrew F.*’s substantive standard is more demanding than *Rowley*’s “some educational benefit” standard,¹¹² while Professor Mark C. Weber has argued that *Endrew F.* did not overrule *Rowley* but merely clarified that an interpretation of *Rowley* “that imposes only minimal obligations [on school districts] is wrong.”¹¹³ Whether or not *Endrew F.* creates a new standard or merely clarifies that narrow interpretations of *Rowley* are inconsistent with IDEA, the upshot of the case is that lower courts interpreting the statute must ensure that all disabled children, regardless of their ability to perform on grade level, have an ambitious IEP that provides challenging objectives.¹¹⁴ Finally, the IEP must

107. *Rowley*, 458 U.S. at 203-04.

108. For instance, the Tenth Circuit had interpreted *Rowley* to establish a rule that a child’s IEP is adequate when it is calculated to provide “an ‘educational benefit [that is] merely . . . more than *de minimis*.’” 580 U.S. 386, 397 (2017) (quoting *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 798 F.3d 1329, 1338 (10th Cir. 2015)).

109. *Id.* at 399.

110. *Id.* at 401.

111. *Id.* at 402.

112. See, e.g., 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 (2019).

113. Mark C. Weber, *Endrew F. Clairvoyance*, 35 TOURO L. REV. 591, 595 (2019).

114. See *Endrew F.*, 580 U.S. at 402.

ensure that the child is educated in the “least restrictive environment.”¹¹⁵ This means that “to the maximum extent appropriate,” the child with a disability is educated with nondisabled children and only placed in a separate classroom or school when “the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”¹¹⁶

d. Procedural Safeguards

The fourth component of FAPE is its procedural rights. The procedural safeguards “guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate.”¹¹⁷ For instance, parents have the right to inspect records and to participate in meetings concerning the identification, evaluation, placement, or provision of FAPE.¹¹⁸ Parents also have the right to seek an independent educational evaluation of their child at the expense of the school district¹¹⁹ if the parent disagrees with the public agency’s evaluation.¹²⁰ Moreover, parents have a right to prior written notice whenever the local educational agency (e.g., school district) “proposes to initiate or change” or “refuses to initiate or change” the identification, evaluation, placement, or provision of FAPE.¹²¹

Finally, IDEA provides administrative and legal remedies to challenge educational decisions made pursuant to the statute. For instance, parents have a right to file a complaint challenging the identification, evaluation,

115. The least restrictive environment is what the Supreme Court has called IDEA’s “mainstreaming” preference or requirement. *See Honig v. Doe*, 484 U.S. 305, 311 (1988). Federal funds under the statute are conditioned upon a state’s ability to educate children with disabilities in the “least restrictive environment.” *See* 20 U.S.C. § 1412(5) (2024).

116. *See* 34 C.F.R. § 300.114(a)(2) (2025). Supplemental aids and services are “aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.” *Id.* § 300.42.

117. *Honig*, 484 U.S. at 311.

118. 20 U.S.C. § 1415(b)(1).

119. *Id.*

120. 34 C.F.R. § 300.502(b)(1) (2025).

121. 20 U.S.C. § 1415(b)(3) (2024).

placement, or provision of FAPE¹²² and a right to have those complaints resolved at an impartial due process hearing.¹²³ The statute affords the parent the right to appeal the decision to the state educational agency (i.e., the state department of education) if the local educational agency holds the initial hearing.¹²⁴ Once parents have exhausted administrative remedies, the statute creates a private right of action in state or federal court.¹²⁵

B. Section 504 of the Rehabilitation Act of 1973

Unlike IDEA, § 504 of the Rehabilitation Act of 1973 is not an education-specific statute but a law that protects all “qualified individuals with a disability” from disability discrimination in federally assisted and federally conducted programs and activities. The statute’s antidiscrimination mandate provides in relevant part:

No otherwise qualified individual with a disability in the United States . . . 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.¹²⁶

The statute reflects “a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of [disability].”¹²⁷ But to simply say that § 504 is a general antidiscrimination statute obscures that as early as 1971, Congress understood that disabled children in schools would be one of the key groups that would benefit from federal disability antidiscrimination legislation.¹²⁸ This Section discusses some of § 504’s doctrinal features that

122. *Id.* § 1415(b)(6).

123. *Id.* § 1415(f).

124. *Id.* § 1415(g).

125. *Id.* § 1415(i)(2).

126. 29 U.S.C. § 794(a) (2024).

127. *See* S. REP. NO. 93-1297, at 39 (1974).

128. *See* 117 Cong. Rec. 45974 (1971) (statement of Rep. Charles Vanik) (introducing a bill that would amend Title VI of the Civil Rights Act of 1964 to prohibit disability discrimination in federally assisted programs and activities); *see also id.* (“The parents of handicapped children pay school taxes—and cannot send their children to public school. They pay Federal

have enabled it to serve as a stopgap when IDEA falls short. Among the stopgap features are the statute's generous and expansive eligibility criteria, including how the statute defines the term "disability," the substantive and procedural rights found in the statute's implementing regulations, and the statute's remedies, including a private right of action for damages as well as an administrative complaint mechanism operated through ED's OCR.

1. § 504 Eligibility

The broad coverage of § 504's eligibility criteria is one of the primary doctrinal features that has allowed it to serve as a stopgap when IDEA falls short. An individual is eligible for the statute's protections when they are both an "individual with a disability" and "qualified" as the statute defines it. Both concepts are discussed in turn.

a. Individual with a Disability

Under § 504 an individual with a disability is one who has "a physical or mental impairment that substantially limits one or more major life activities;" "a record of such an impairment;" or is "regarded as having such an impairment."¹²⁹ The term must "be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of section 504."¹³⁰ The term is defined much more broadly than the term "child with a disability" is under IDEA. The critical distinction is that § 504 protects all disabled individuals whose impairment substantially limits *any* major life activity, while IDEA only protects children in school who need special education and related services because their disability impairs their ability to access their education.¹³¹ Because § 504 provides broader coverage,

taxes, but how much effort is made to help educate the nonschool handicapped child through ESEA, impacted aid, and other [federal] programs.") .

129. *See* 42 U.S.C. § 12102(1)(A)-(C) (2024) (defining the term "disability" under the Americans with Disabilities Act of 1990 (the "ADA")). Section 504 defines the term "disability" as the term is defined under the ADA as amended. *See* 29 U.S.C. § 705(20)(B) (defining the term "individual with disability" for § 504 as it is defined at 42 U.S.C. § 12102).

130. 45 C.F.R. § 84.1(b) (2025).

131. Under IDEA, a student is a child with a disability if they meet the legal requirements of one of thirteen "disability categories," and "by reason

disabled students who are not eligible for special education and related services under IDEA may still be entitled to § 504 protections if they have a disability as § 504 defines it. These are the so-called “504-only students” discussed in Part III.¹³²

The Americans with Disabilities Act of 1990 (the “ADA”)¹³³ as amended and § 504 share the definition of the term “disability.”¹³⁴ In addition, Title II of the ADA, which prohibits public entities (i.e., state and local governments) from discriminating on the basis of disability in their programs and activities, was modeled after § 504,¹³⁵ and their respective antidiscrimination mandates are nearly identical.¹³⁶ As a result, when a school district (which is also a public entity under Title II because it is an arm of state or local government) violates § 504, it often also violates Title II.¹³⁷ When the Supreme Court narrowed the definition of disability under

thereof” need “special education and related services.” 34 C.F.R. § 300.8 (2025).

132. See U.S. DEP’T OF EDUC., OFF. FOR CIVIL RIGHTS, SUPPORTING STUDENTS WITH DISABILITIES AND AVOIDING THE DISCRIMINATORY USE OF STUDENT DISCIPLINE UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973, at 4 (July 2022).

133. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213 (2024)).

134. See 29 U.S.C. § 705(20)(b) (2024).

135. See, e.g., *Parker v. Universidad de P.R.*, 225 F.3d 1, 4 (1st Cir. 2000). Title II effectively extends § 504’s antidiscrimination mandate to state and local governments that do not receive federal financial assistance. *Id.* at 4 n.2.

136. Compare 29 U.S.C. § 794(a) (§ 504’s antidiscrimination mandate), with 42 U.S.C. § 12132 (Title II’s antidiscrimination mandate). For a discussion on the differences between the two statutes’ antidiscrimination mandates, see COLKER & GROSSMAN, *supra* note 36, at 167-68.

137. For instance, as discussed *infra* Section II.B.2, § 504’s implementing regulations in some instances require school districts to provide FAPE to a student with a disability as the § 504 regulations define FAPE. ED’s OCR, which resolves individual complaints, has interpreted Title II to require school districts to provide FAPE to qualified students with disabilities to the same extent as required under § 504. See, e.g., *Pasadena (CA) Unified Sch. Dist.*, 80 IDELR (LRP Publ’ns) 139, at 2 (OCR Nov. 5, 2021). OCR has reached this conclusion interpreting three provisions within the Department of Justice’s Title II regulations. First, the Title II regulations provide that the regulations should not be construed to apply a lesser standard than the standards applied under § 504 itself or the regulations (of any federal agency) implementing § 504. See 28 C.F.R. § 35.103(a) (2025). Moreover, OCR has also found that § 35.130(b)(1) of the Title II regulations requires school districts

the ADA,¹³⁸ Congress responded by passing the Americans with Disabilities Act Amendments Act of 2008 (the “ADAAA”) to ensure that the term continued to have the same broad meaning under the ADA that the term “handicapped individual” had acquired in the case law interpreting § 504.¹³⁹ Because the ADAAA clarifies that disability means the same thing under both § 504 and the ADA,¹⁴⁰ the ADAAA’s generous rules of construction also

to provide FAPE to qualified students with disabilities. Pasadena (CA) Unified Sch. Dist., 80 IDELR at 2. Specifically, § 35.130(b)(1)(i) prohibits a public entity (like a public school district) from denying a qualified individual with a disability the opportunity to “participate in or benefit from” an “aid, benefit, or service.” 28 C.F.R. § 35.130(b)(1)(i). Similarly, § 35.130(b)(1)(iii) prohibits a public entity from providing “a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others.” *Id.* § 35.130(b)(1)(iii).

138. *See e.g.*, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002) (holding that an individual is only disabled within the meaning of the ADA when their impairment prevents or restricts them from performing tasks that are of central importance to most people’s daily lives); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 481-82 (1999) (noting that determinations of whether an individual is disabled under the ADA should be made with reference to measures that mitigate the individual’s impairment); *Murphy v. United Parcel Serv.*, 527 U.S. 516, 518-19 (1999) (affirming the Tenth Circuit’s ruling that a plaintiff with hypertension was not disabled under the ADA because the impairment did not substantially limit a major life activity when medicated).
139. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(3), 122 Stat. 3553, 3554 (“The purposes of this Act are . . . 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.”); *see also id.* § 2(a)(3), 122 Stat. at 3553 (“Congress finds that . . . 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.”).
140. *See* 29 U.S.C. § 705(9)(B) (specifying that under Section 504 the term “disability” has the meaning given to it under the ADA).

apply when construing the term “disability” under § 504.¹⁴¹ The upshot of these and other changes brought about by the ADAAA is that more students are now qualifying for § 504 protections than before the statute’s passage.¹⁴²

b. Qualified Individual

Section 504 only protects “qualified individuals” with a disability from discrimination in federally assisted programs. While the Rehabilitation Act does not define the term “qualified,” ED’s regulations implementing § 504 define the term as it applies to K-12 public schools in one of three ways. Under the first definition, a disabled child is qualified for K-12 public education if they are of an age during which nondisabled children are provided such services.¹⁴³ Given the history of ableist exclusion of disabled children from school based on the false assumption that some children were “uneducable,” this first definition could be understood to stand for the proposition that a disabled child is automatically “qualified” for public school services not based on their physical or mental abilities but based solely on whether they are old enough to attend public school under state law.¹⁴⁴

141. See 42 U.S.C. § 12102(4) (codifying the ADAAA’s rules of construction regarding the definition of disability).

142. For instance, under the Supreme Court’s narrowed definition of the term “disability” prior to passage of the ADAAA, some students with learning disabilities or ADHD may have been denied accommodations or failed to request them, believing that they would be denied. See 28 C.F.R. § 35.108. The Department of Justice’s regulations implementing the ADAAA added ADHD to its list of examples of physical or mental impairment given its prevalence and lack of public understanding of the condition. *Id.* § 35.108(b)(2). These and other changes have led to greater student eligibility in K-12 schools under § 504. See generally Weber, *supra* note 106, at 7 (discussing the expansion of coverage under § 504 for elementary and secondary students).

143. 34 C.F.R. § 104.3(l)(2)(i) (2025).

144. For instance, if state law offers public educational services to nondisabled children starting at age five, then a disabled child would also be eligible for public educational services when they turned five. This definition would prevent a school from failing to admit a child with a disability into its kindergarten program if the child had not obtained the “mental age” of a typically developing five-year-old as was done in *Pennsylvania Association for Retarded Children (PARC) v. Pennsylvania*, one of two cases that inspired Congress to pass both § 504 and IDEA. 334 F.Supp. 1257, 1260 (E.D. Pa. 1971).

A disabled child is also “qualified” to participate in K-12 public schools under ED’s regulations if they are of any age during which it is mandatory under state law to provide individuals with disabilities such services.¹⁴⁵ For instance, if state law provided early intervention services to disabled children starting at the age of three, the state would have to provide these services to all disabled children and could not reserve eligibility for those services based on the severity of the child’s disability.

Finally, under ED’s regulations a disabled child is “qualified” to participate in public elementary and secondary education programs and activities if the state is required to provide the individual with a “free appropriate public education” as IDEA defines it.¹⁴⁶ One interpretation of the regulation is that all children who are IDEA eligible are automatically protected under § 504.¹⁴⁷ A more nuanced reading interprets the regulation to mean that an IDEA-eligible child is “qualified” as long as they also meet the statutory definition of the term “disability.”¹⁴⁸ It stands to reason, however, that if a disabled child is IDEA eligible because they require special education and related services to meaningfully access their education because of their disability, then they are also disabled as § 504 defines it, because they have a physical or mental impairment that likely substantially

145. 34 C.F.R. § 104.3(l)(2)(ii).

146. *Id.* § 104.3(l)(2)(iii).

147. *See, e.g.,* NAT’L COUNCIL ON DISABILITY, CHARTER SCHOOLS—IMPLICATIONS FOR STUDENTS WITH DISABILITIES 47 (2018) (“All students who are served under IDEA are automatically protected under Section 504 and Title II [of the Americans with Disabilities Act of 1990]” (citing 34 C.F.R. § 104.3(l)(2)(iii))).

148. *See* *Ellenberg v. N.M. Mil. Inst.*, 572 F.3d 815, 820 (10th Cir. 2009) (rejecting the argument that IDEA-eligible students are per se protected under § 504); *see also* *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 159 (2d Cir. 2016) (explaining that a child might need special education and related services even if the impairment does not substantially limit a major life activity). This line of cases emphasizes the general rule that there are no per se disabilities under § 504. *See generally* 45 C.F.R. § 84.4(d)(vi) (2025) (“The determination of whether an impairment substantially limits a major life activity requires an *individualized assessment*.” (emphasis added)). *But see id.* § 84.4(d)(2)(ii) (“[T]he individualized assessment of some types of impairments . . . will, in virtually all cases, result in a determination of coverage under . . . the ‘actual disability’ prong [of the definition].”). However, the cases may also unnecessarily limit the rule that the term “disability” should be “construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of” § 504. *See* 42 U.S.C. § 12102(4)(A) (2024).

limits the major life activities of learning, reading, concentrating, thinking, or writing, among others.¹⁴⁹

The process for determining who is a “qualified individual with a disability” in K-12 public education is often simply a straightforward application of ED’s regulations defining the term. But as Professors Claire S. Raj and Crystal Grant have discussed, some courts find that a disabled child is not “qualified” even when they would satisfy the regulatory definition of the term for K-12 schools because they get bogged down in an irrelevant analysis that the Supreme Court crafted to determine what it means to be a “qualified individual” with a disability in postsecondary education.¹⁵⁰ Under the postsecondary analysis, a disabled admissions applicant might not be “qualified” if they could not meet all the essential program requirements because of a disability,¹⁵¹ with or without reasonable accommodations.¹⁵² But applying this analysis to compulsory K-12 public education would lead to absurd results. It would mean that a school district could determine that a disabled child was not “qualified” for universal education if—because of

149. See 45 C.F.R. § 84.4(c)(1)(i) (defining the term “major life activity” under § 504 to include learning, reading, concentrating, thinking, and writing).

150. See generally Claire Raj & Crystal Grant, *Masks, Mayhem, and the Future of Disability Rights in Schools*, 25 N.Y.U. J. LEGIS. & PUB. POL’Y 247 (2023). The case in question is *Southeastern Community College v. Davis*, where the Court held that a community college did not violate § 504’s antidiscrimination mandate when it took into consideration an applicant for admission’s disability in determining whether she was “qualified” to participate in a federally funded nursing program. 442 U.S. 397, 405 (1979). The Court said that “mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context,” but that by its terms, § 504 “does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate.” *Id.* The Court held that “[a]n otherwise qualified person” for purposes of admissions to a college or university “is one who is able to meet all of a program’s requirements *in spite of his*” disability and not *without regard* to disability, as the appellate court had found. *Id.* at 406 (emphasis added).

151. *Davis*, 442 U.S. at 406.

152. The most recently updated federal regulations implementing § 504 have made clear that generally, an individual is qualified to participate in a federally assisted program or activity if they meet the program’s essential eligibility requirements “with or without the provision of reasonable modifications” to program rules or benefits. See, e.g., 45 C.F.R. § 84.10 (defining the term “qualified individual with a disability”).

disability—they could not access the general education curriculum or make progress towards a high school diploma. And deeming a disabled child “unqualified” on these grounds would hearken back to the days when school districts illegally excluded disabled children for these very reasons.¹⁵³

2. Section 504’s Substantive Antidiscrimination Mandate

Section 504’s substantive standard is found in the statute itself,¹⁵⁴ in the federal regulations implementing the statute,¹⁵⁵ and in the caselaw interpreting the statute and regulations.¹⁵⁶ In *Alexander v. Choate*, the Court held that § 504 generally requires recipients of federal funds to provide qualified individuals with disabilities “meaningful access” to federally assisted programs and activities.¹⁵⁷ In some instances, federal grantees must make “reasonable accommodations” to their programs or benefits to ensure that disabled individuals receive meaningful access.¹⁵⁸ But recipients are not required to fundamentally alter their programs or activities to accommodate disabled individuals,¹⁵⁹ nor are they required to make accommodations that would create an undue financial or administrative burden on the recipient.¹⁶⁰

The Supreme Court has also recognized that the regulations implementing § 504 play an important role in establishing the statute’s

153. *See supra* Part I.

154. 29 U.S.C. § 794(a) (2024).

155. Currently, the Department of Health and Human Services (“HHS”) has the most up-to-date regulations implementing § 504. *See* 45 C.F.R. pt. 84. The agency updated its regulations in 2024, among other things, to adopt substantive standards established through caselaw interpreting § 504. *See* Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066 (May 9, 2024). But because HHS does not primarily fund public educational programs and activities, the regulations do not supersede ED’s § 504 regulations applicable to elementary and secondary programs and activities discussed below. *See* 34 C.F.R. pt. 104, subpt. D (2025).

156. *See, e.g.,* *Se. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979); *Alexander v. Choate*, 469 U.S. 287 (1985); *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273 (1987).

157. *Choate*, 469 U.S. at 301.

158. *Id.*

159. *Id.* at 300.

160. *Davis*, 442 U.S. at 411-12.

substantive mandate.¹⁶¹ ED's § 504 regulations contain general provisions that apply to all recipients of federal funds, and program-specific rules. For instance, the regulations establish general principles applicable to all recipients for determining whether a recipient's actions violate the statute's antidiscrimination mandate.¹⁶² The regulations then apply the general principles to program-specific areas such as elementary and secondary education¹⁶³ and postsecondary institutions.¹⁶⁴ The following Section discusses in greater detail the elementary and secondary education regulations that create the § 504 FAPE mandate—perhaps the most important doctrinal feature that enables § 504 to serve as a stopgap to IDEA.

161. For instance, in *Choate*, the Court recognized that the regulations implementing § 504 are an “important source of guidance on the meaning of § 504.” *Choate*, 469 U.S. at 304 n.24. In *Consolidated Rail Corp. v. Darrone*, the Court understood that Congress intended to codify the Department of Health, Education, and Welfare’s (“HEW”) May 1977 regulations implementing § 504 through the 1978 amendments to the Rehabilitation Act. *See* 465 U.S. 624, 635 (1984) (“[T]he legislative history reveals that this section was intended to codify the regulations of the Department of Health, Education and Welfare governing enforcement of § 504.”). And in *Davis*, the Court found that “[i]dentification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW” to accomplish through its § 504 regulations. *Davis*, 442 U.S. at 413.

162. *See generally* 34 C.F.R. § 104.4 (2025). For instance, recipients may not deny a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or service, and recipients are required to afford a qualified individual with a disability an opportunity to participate in or benefit from an aid, benefit, or service that is equal to that afforded others. *See id.* § 104.4(b)(1)(i) (“[A] recipient, in providing any aid, benefit, or service, may not” deny a qualified individual with a disability “the opportunity to participate in or benefit from the aid, benefit, or service.”); *id.* § 104.4(b)(1)(ii) (stating that “[a] recipient, in providing any aid, benefit, or service, may not” on the basis of disability afford a qualified individual with a disability “an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others”).

163. *Id.* §§ 104.31-104.39.

164. *Id.* §§ 104.41-104.47.

a. Section 504 Regulations for Elementary and Secondary Education Programs

Under Subpart D of ED's § 504 regulations, in some instances, K-12 public schools are required to provide a free appropriate public education to disabled children that includes special education and related services to fulfill the statute's antidiscrimination mandate. While the rules were drafted to be consistent with both the substantive standards established through federal equal protection litigation that challenged the outright exclusion of disabled children from school (e.g., *PARC* and *Mills*) and IDEA's predecessor, the Education for All Handicapped Children's Act of 1975 (discussed above), they provide far fewer substantive and procedural protections than IDEA's FAPE entitlement.¹⁶⁵ Nevertheless, as Part III argues, there are still instances where these regulations can serve as a stopgap when IDEA falls short.

Section 504's FAPE mandate is found at § 104.33 of ED's regulations. The rule generally requires public elementary and secondary schools to provide a free, appropriate public education to each qualified individual with a disability¹⁶⁶ "who is in the recipient's jurisdiction, regardless of the nature or severity" of the individual's disability¹⁶⁷ and defines an

165. See 34 C.F.R. pt. 104, app. A, subpt. D ("Subpart B generally conforms to the standards established for the education of handicapped persons in *Mills v. Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 344 F. Supp. 1257 (E.D. 1971), 343 F. Supp. 279 (E.D. Pa. 1972), and *Lebanks v. Spears*, 60, F.R.D. 135 (E.D. La. 1973), as well as in the Education of the Handicapped Act, as amended by Pub. L. 94-142 (the EHA)."). According to HEW, the substantive standards common to the federal cases, IDEA, and § 504 include the following: "(1) that [disabled] persons, regardless of the nature or severity of their [disability], be provided a free appropriate public education, (2) that [disabled] students be educated with [nondisabled] students to the maximum extent appropriate to their needs, (3) that educational agencies undertake to identify and locate all unserved [disabled] children, (4) that evaluation procedures be improved in order to avoid the inappropriate education that results from the misclassification of students, and (5) that procedural safeguards be established to enable parents and guardians to influence decisions regarding the evaluation and placement of their children." *Id.*

166. See generally 34 C.F.R. § 104.3(l)(2) (defining the term "qualified handicapped person" for K-12 schools).

167. See *id.* § 104.33(a).

appropriate education as “the provision of regular or special education and related aids and services” “designed to meet individual educational needs” of disabled students “as adequately as the needs” of nondisabled students are met. Section 504 also sets out procedural requirements governing educational setting, evaluation and educational placement, and procedural safeguards.¹⁶⁸ As Part III discusses in greater detail, there is debate among scholars regarding whether § 504 FAPE’s “as adequately standard” created in § 104.33(b) is more or less protective than IDEA’s substantive standard. Here, it is important to note that unlike IDEA, § 504’s FAPE mandate may require a school district to provide a disabled child related services even if they are ineligible for special education services.¹⁶⁹

Section 504 FAPE also requires schools to educate each qualified individual with a disability “in its jurisdiction” with nondisabled students “to the maximum extent appropriate to the needs” of the disabled student.¹⁷⁰ To do this, a school must place a disabled student in “the regular educational environment” unless the school can demonstrate that the education of the student “in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.”¹⁷¹ This provision is very similar to IDEA’s “least restrictive environment” requirement discussed above.¹⁷² Section 104.35 requires school districts to evaluate any person who “needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.”¹⁷³ The regulations’ rigorous evaluation

168. *Id.* § 104.33(b)(1).

169. *Id.* (defining an appropriate education to included “regular *or* special education and related aids and services”) (emphasis added).

170. *Id.* § 104.34(a). This requirement is a specific application of the principle that a recipient may not provide “different or separate aid, benefits, or services” to disabled individuals unless it is necessary to provide qualified individuals with disabilities “with aid, benefits, or services that are as effective as those provided to others.” *Id.* § 104.4(b)(1)(iv).

171. *Id.* § 104.34(a).

172. *See* 20 U.S.C. § 1412(5) (2024).

173. 34 C.F.R. § 104.35(a). This requirement is a specific application of several principles, including the prohibition against providing a qualified individual with a disability with “an aid, benefit, or service that is not as effective as that provided to others.” *Id.* § 104.4(b)(1)(iii).

procedures¹⁷⁴ are meant to ensure that disabled students are not misclassified or misplaced,¹⁷⁵ as was common before the 1970s.¹⁷⁶ Nevertheless, § 504 evaluation requirements are less rigorous than those found under IDEA.¹⁷⁷

Finally, § 104.36 generally requires school systems to create procedural safeguards that include among other things, “notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person’s parents or guardian and representation by counsel, and a review procedure.”¹⁷⁸ These procedural safeguards were intentionally drafted to contain fewer protections than those under IDEA. The appendix to ED’s § 504 regulations explains as follows: “Because the due process procedures of [IDEA] . . . are inappropriate for some recipients not subject to that Act, the section now specifies *minimum* necessary procedures: notice, a right to inspect records, an impartial hearing with a right to representation by counsel, and a review procedure.”¹⁷⁹ At the time the § 504 regulations were drafted, not all states (such as New Mexico) were “subject” to IDEA because they refused to receive funding under the statute.¹⁸⁰ The regulators therefore tried to craft

174. *See id.* § 104.35(b).

175. 34 C.F.R. pt. 104, app. A ¶ 25.

176. *See* Burgdorf & Burgdorf, *supra* note 11, at 882 (providing examples of cases where plaintiffs challenged “[c]ulturally biased tests, improper labeling, and inappropriate educational programs” that resulted in misclassifying students as having a disability.)

177. For a comprehensive discussion of IDEA’s evaluation requirements, see generally Mark C. Weber, *All Areas of Suspected Disability*, 59 LOY. L. REV. 289 (2013).

178. 34 C.F.R. § 104.36.

179. 34 C.F.R. pt. 104, app. A ¶ 25.

180. Because New Mexico refused funding under IDEA’s predecessor and failed to provide adequate educational services to disabled children, organizations representing this group sued to allege a denial of FAPE under § 504. *See* N.M. Ass’n for Retarded Citizens v. New Mexico, 678 F.2d 847, 849 (10th Cir. 1982); *see also* Alex Heard, *Special Education Ruling Overturned in N.M.*, EDUCATIONWEEK (May 16, 1982), <https://www.edweek.org/education/special-education-ruling-overturned-in-n-m/1982/05> [<https://perma.cc/MZ63-847D>] (discussing New Mexico’s § 504 liability and noting that New Mexico bears all the costs of providing appropriate educational services to disabled children because it does not receive IDEA funding).

the § 504 procedural safeguards in such a way that required only *minimum* protections. Thus, entities that received no funding under IDEA would not be required to provide all of IDEA's extensive procedural safeguards.

3. Section 504's Remedies

Section 504's remedies are another doctrinal feature that enable the statute to serve as a stopgap to IDEA. The first remedy is § 504's individual-complaint mechanism. ED's OCR has the authority to investigate individual complaints of discrimination brought under the civil rights statutes that it enforces, including § 504.¹⁸¹ The individual-complaint mechanism is an important means for ensuring that school districts comply with § 504.¹⁸² In addition to the individual-complaint mechanism, the Supreme Court has interpreted § 504 to contain a private right of action against recipients of federal funding.¹⁸³ Aggrieved parties under § 504 may recover compensatory damages and injunctive relief, but not punitive or emotional distress damages.¹⁸⁴

181. OCR has this authority to investigate individual complaints because the Rehabilitation Act expressly provides that the rights and remedies established under Title VI of the Civil Rights Act of 1964 are available for violations of § 504. *See* 29 U.S.C. § 794a(a)(2) (2024). Title VI empowers federal agencies to create administrative compliance programs by promulgating rules and regulations intended to bring noncomplying recipients into voluntary compliance through investigations, negotiations, and sanctions, including the termination of federal financial assistance. *See generally* 42 U.S.C. § 2000d-1 (2024); *see also* S. REP. NO. 93-1297, at 40 (1974) (discussing congressional intent for § 504 to contain a compliance program similar to the one under Title VI). Pursuant to this authority, OCR has developed its individual-complaint mechanism.

182. Carrie Gillispie, *Young Children Face Greater Risks at School from Office for Civil Rights Reduction: Attorneys Warn of "Impossible" Caseloads*, NEW AM. (Apr. 28, 2025), <https://www.newamerica.org/education-policy/edcentral/young-children-face-greater-risks-at-school-from-office-for-civil-rights-reduction/#:~:text=Investigations%20like%20these%20are%20not,civil%20rights%20laws%20going%20forward> [https://perma.cc/T9HG-BGCA].

183. *See* *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 218 (2022).

184. *See* *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) ("Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under § 202 of the ADA and § 504 of the Rehabilitation Act."); *Cummings*, 596 U.S. at 230 ("[W]e hold that emotional distress damages are not recoverable under

III. § 504'S STOPGAP RIGHTS

In May 2022, ED announced that it would begin updating its regulations interpreting § 504 and sought public comments to inform its rulemaking.¹⁸⁵ Some commenters asked ED to update outdated terms such as replacing the term “handicapped person” with “individual with a disability,”¹⁸⁶ the term that the Rehabilitation Act now uses. Other comments were highly specialized, focusing on a particular group of disabled children.¹⁸⁷ Still other

the Spending Clause antidiscrimination statutes [such as § 504, among others that] we consider here.”).

185. See Press Release, *supra* note 8.

186. See, e.g., Letter from Judy Rich, President, 2022 Am. Speech-Language-Hearing Ass’n, to Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ. 2-3 (June 29, 2022), <https://www.asha.org/siteassets/advocacy/comments/asha-comments-to-doe-on-section-504-062922.pdf> [<https://perma.cc/3X4Z-VMFD>].

187. See, e.g., Young Ctr. for Immigr. Child.’s Rts. et al., Comment Letter on Potential Amendments to the Department of Education’s Regulations at 34 C.F.R. pt. 104, Implementing Section 504 of the Rehabilitation Act of 1973, at 3-4 (Oct. 25, 2022) (explaining that unaccompanied immigrant children in federal custody fail to receive appropriate educational services and accommodations under Section 504 and asking ED to clarify that recipients that provide educational services to this group of children are bound by Section 504); Letter from Kandi Pickard, President & CEO, Nat’l Down Syndrome Soc’y, to Seth Galanter, Deputy Assistant Sec’y for Legal Affs., U.S. Dep’t of Educ. 3-4 (June 30, 2022), <https://ndss.org/sites/default/files/2022-08/National%20Down%20Syndrome%20Society%20Comments%20on%20Sec.%20504%20Regs%2C%20June%202022.pdf> [<https://perma.cc/J79N-9LT2>] (noting that individuals with Down Syndrome have long faced barriers accessing higher educational programs and activities and stating that the “Department must clarify that students with intellectual disabilities in higher education, whether enrolled in degree-bearing or enrolled inclusive post-secondary programs, are qualified under Section 504 to receive the same aid, benefits, and services provided to other qualified students”); Letter from Judy Rich, *supra* note 186, at 1 (advocating “that updated regulations ensure transgender individuals with disabilities and other individuals who experience difficulty participating in major life activities due to incongruence in how their voice presents receive equal access to speech-language pathology services”).

groups representing people with disabilities¹⁸⁸ and their families asked ED to amend the § 504 FAPE regulations¹⁸⁹ so that they mirror the substantive and procedural protections guaranteeing the right to FAPE in IDEA.¹⁹⁰

There are benefits to making § 504 FAPE regulations coextensive with IDEA. The general wisdom is that IDEA provides more substantive and procedural protections to students and their parents than those afforded under § 504.¹⁹¹ By contrast, services under § 504 are often considered a mere “consolation prize” offered to students who are found ineligible under IDEA.¹⁹² As a result, if the two were synced, § 504-only students would enjoy more rights than are currently codified in the Rehabilitation Act itself or in ED’s regulations implementing § 504.

188. In keeping with the multiple ways that people with disabilities proudly identify, this Article alternates between people-first (e.g., a person with Autism) and identity-first language (e.g., an Autistic man).

189. *See* 34 C.F.R. §§ 104.33-104.36 (2024).

190. *See, e.g.*, Letter from the Leadership Conf. on Civ. & Hum. Rts., to Seth Galanter, Deputy Assistant Sec’y for C.R., U.S. Dep’t of Educ. 2-3 (Dec. 5, 2022) (on file with author) (recommending that ED identify a recipient’s “child find” obligation under Section 504 to locate, identify, and evaluate students suspected of having a disability with the specificity used in a similar IDEA statutory provision); Letter from the Consortium for Constituents with Disabilities, to Seth Galanter, Deputy Assistant Sec’y for C.R., U.S. Dep’t of Educ. 8 (July 1, 2022) (on file with author) (recommending that § 504 plans be more like IEPs under IDEA, such as by requiring recipients to memorialize § 504 plans in writing and granting parents and guardians a formal right to participate in developing § 504 plans).

191. For example, IDEA requires that each child with a disability have an IEP that documents the accommodations and services required for the child to receive FAPE. However, neither the Rehabilitation Act nor ED’s implementing regulations require school districts to document the services and accommodations that a qualified student with a disability requires to receive § 504 FAPE in a “Section 504 plan.” *See generally* Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?*, 40 J.L. & EDUC. 407, 411 (2011). Instead, legal requirements for a § 504 plan appear to come only from ED’s policy interpretations of its regulations. *Id.*

192. *See, e.g.*, Ruth Hocker, *More Than a Consolation Prize: Using § 504 to Advance Special Education Rights*, 38 T. JEFFERSON L. REV. 71, 73 (2015) (“Section 504 plans, by contrast, have long been considered the ‘consolation prize’ in special education, given to children to appease their parents when the child is not eligible under the IDEA.”).

School districts and school personnel would also benefit from harmonizing requirements under the two statutes. School districts are often confused about their obligations under § 504 FAPE.¹⁹³ Harmonizing requirements under both statutes would make it easier for school groups to understand their obligations under both frameworks. Further, making § 504's FAPE rights coextensive with IDEA could likewise ease administrative burdens on school personnel as schools could create unified systems that would comply with their responsibilities under both laws.¹⁹⁴

Given these advantages, amending the § 504 regulations so that they more closely aligned with IDEA would be an enormous win for school groups and parents alike. But ED should tread cautiously before going down this path whole hog. In some instances, § 504 and its regulations are more protective of disabled students' rights than IDEA. Specifically, § 504 operates as a stopgap in obvious (and not so obvious) ways when IDEA falls short. § 504's "stopgap rights" afford disabled students an alternate path for receiving services needed to access their education when they are unavailable through IDEA.

Others have made similar arguments regarding the relationship between IDEA and § 504, as Section III.A points out. But the stopgap rights discussed in Sections III.B-D have not previously been addressed in the academic literature. These stopgap rights include special education and related services for § 504-only students, and a more generous understanding of residency.

193. For example, school groups asked ED to specify the disciplinary protections under § 504; standardize dispute-resolution procedure for use across the country; and clarify school districts' responsibilities to identify, locate, and evaluate children suspected of having a disability as the statute defines. *See* CASE-AASA Letter, *supra* note 9.

194. In many school districts, guidance counselors serve as § 504 coordinators and case managers. But in June 2024, the American School Counselor Association issued a position statement advocating that guidance counselors "not be tasked with 504 coordination/management to avoid a conflict between school counseling program implementation and the administrative duties of the 504 coordinator/case manager." *The School Counselor and Section 504 Plan and Process*, AM. SCH. COUNS. ASS'N (2024), <https://www.schoolcounselor.org/Standards-Positions/Position-Statements/ASCA-Position-Statements/The-School-Counselor-and-Section-504-Plan-and-Proc> [<https://perma.cc/FWP6-RWYU>].

A. Section 504 FAPE's "As Adequately" Standard

Before supporting my claim that § 504 can sometimes provide greater protections to disabled students than IDEA with examples not previously made in the legal academy, this Section addresses prior arguments that § 504 FAPE's substantive standard at times provides greater protection to disabled students than IDEA's substantive standard.¹⁹⁵

Recall that § 504 FAPE requires recipient school districts to provide qualified students with a disability "regular or special education and related aids and services" "designed to meet individual educational needs" of disabled students "*as adequately as the needs*" of nondisabled students are met, and adherence to enumerated procedural safeguards is required.¹⁹⁶ In contrast, IDEA requires school districts to provide children with disabilities an IEP that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances."¹⁹⁷ Professor Claire Raj has described § 504's "as adequately" standard as "outward looking" because "[i]t tasks schools with gauging whether the needs of students with

195. See, e.g., Weber, *supra* note 106, at 9-20 (arguing that the substantive FAPE standard under § 504 is more protective than IDEA's substantive standard); Hocker, *supra* note 192, at 90-92 (analyzing *K.M. v. Tustin Unified Sch. Dist.*, 725 F.3d 1088 (9th Cir. 2013), to argue that auxiliary aids and services for hearing-impaired children that were unavailable under IDEA were available under § 504 and the ADA's effective-communication requirements); Christopher J. Walker, Note, *Adequate Access or Equal Treatment: Looking Beyond the IDEA to Section 504 in a Post Schaffer Public School*, 58 STAN. L. REV. 1563, 1588 (2006) (arguing that when understood correctly, § 504 FAPE is a more powerful tool than IDEA to challenge exclusionary practices towards multidisabled children at state schools for the deaf).

196. See 34 C.F.R. § 104.33(b)(1)(i)-(ii) (2025) (emphasis added). ED's § 504 regulations establish general principles for determining whether a recipient's actions violate § 504's antidiscrimination mandate. See *id.* § 104.4(b). The "as adequately" standard in § 104.33(b) is a specific application of two of these general principles. First, the standard applies to K-12 education the principle that recipients must afford a qualified individual with a disability the opportunity to participate in or benefit from an aid, benefit, or services on an equal basis to that afforded nondisabled individuals. See *id.* § 104.4(b)(1)(ii). Second, the rule applies the principle that recipients must provide qualified individuals with a disability with an aid, benefit, or service that is as effective as that provided to nondisabled individuals. See *id.* § 104.4(b)(1)(iii).

197. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

disabilities are met as adequately as those of their nondisabled peers.”¹⁹⁸ Conversely, she argues that IDEA’s FAPE right is “inward looking” because “the student is measured against herself.”¹⁹⁹

Professor Mark Weber has argued that depending on the situation, the “as adequately” standard may be both a higher and a lower standard than IDEA’s substantive standard.²⁰⁰ Weber made this claim based on the § 504 regulations themselves and the Ninth Circuit’s interpretation of these regulations, which found that § 504 FAPE’s substantive standard requires “a comparison between the manner in which the needs of disabled and non-disabled children are met.”²⁰¹ Moreover, when Weber wrote his article, the Supreme Court had only interpreted IDEA’s FAPE standard to require school districts to provide a child with a disability “services [in an IEP] sufficient to provide ‘some educational benefit’ to the eligible child.”²⁰² The Supreme Court established the “some educational benefit” standard in 1982, interpreting IDEA’s predecessor statute in *Board of Education v. Rowley*.²⁰³

Given these judicial interpretations of each statute’s FAPE standards, Weber argues that § 504 would provide a higher standard than *Rowley*’s “some educational benefit” standard in some cases, and in other cases would provide a lower standard than the *Rowley* standard:

[A] wealthy school district that does exceedingly well for its students who do not have disabilities, offering them a range of instruction and activities that truly maximizes their educational opportunities, would be held to a high standard for children covered by section 504, a standard well above that of *Rowley*. For school districts that are poor or fail for other reasons to offer a decent level of services to children without disabilities, [§ 504-only students] in those districts might receive services that are below some of the more generous interpretations of the IDEA standard.²⁰⁴

198. Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933, 948 (2021).

199. *Id.*

200. See Weber, *supra* note 106, at 14.

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

202. Weber, *supra* note 106, at 9 (emphasis added) (quoting *Bd. of Educ v. Rowley*, 458 U.S. 176, 200 (1982)).

203. 458 U.S. 176 (1982).

204. Weber, *supra* note 106, at 14.

Weber's contention that § 504's substantive standard in relationship to IDEA's substantive standard will vary depending on whether a school district is characterized as "wealthy" and "high performing" or "poor" and "low performing" could unintentionally allow school districts with fewer resources to fail to fully meet their § 504 obligations. Taken to its logical conclusion, this interpretation of § 504's standard could embolden school officials where nondisabled children on average fail to perform on grade level²⁰⁵ to violate the *chutzpah* doctrine.²⁰⁶ For instance, a school official at an IEP meeting once told me something to the effect of, "Your client's child is not on grade level because the district has failed to provide them with appropriate services and supports; she's not on grade level because none of the students at the school are on grade level." If lower-performing school districts adopted this interpretation of § 504 FAPE's substantive standard, there might also be adverse implications for Black and brown students given that racially minoritized students disproportionately attend schools commonly characterized as "low performing."²⁰⁷

This interpretation of § 504's substantive FAPE standard would also allow school districts with fewer resources to limit their FAPE obligations based on cost—an interpretation of the regulations that would go against § 504's regulatory history and how ED's OCR has understood the limits of § 504's FAPE substantive standard. Specifically, when ED's predecessor

205. For instance, results from the District of Columbia Comprehensive Assessment of Progress in Education assessment indicated that for the 2023-24 school year, close to half (47%) of all students at Ballou High School failed to meet state standards in math, while over half of all students (55%) at the same high school failed to meet state expectations in English and language arts. Under Weber's interpretation of the § 504 standard, the school district would not violate § 504's "as adequately" standard if it failed to provide disabled students an education geared to meet state standards given that many nondisabled students also fail to meet these standards. *DCPS School Profile: Ballou High School*, D.C. PUB. SCHS., <https://profiles.dcps.dc.gov/Ballou+High+School> [<https://perma.cc/AS27-2U9L>].

206. *See Harbor Ins. Co. v. Schnabel Found. Co.*, 946 F.2d 930, 937 n.5 (D.C. Cir. 1991) ("[T]he legal definition of *chutzpah*: *chutzpah* is a young man, convicted of murdering his parents, who argues for mercy on the ground that he is an orphan.").

207. *See generally* Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382 (2024) (arguing that the laws surrounding school district boundary lines enable white students in racially diverse metropolitan areas to engage in "social closure" and to monopolize high-quality schools).

agency, the Department of Health, Education, and Welfare (“HEW”) promulgated its Notice of Proposed Rulemaking under § 504 in July 1976, the agency stated that HEW’s position regarding K-12 education was that “neither cost nor other difficulty in complying are appropriate considerations in determining what practices constitute discrimination,” except when cost considerations are taken into account for nondisabled individuals.²⁰⁸ This is because HEW understood that the district court in *Mills v. Board of Education* (discussed in Part I) had rejected the argument that the District of Columbia Public Schools could exclude disabled children from an education due to a lack of resources.²⁰⁹ Similarly, in 1993, ED’s OCR stated in a letter that has received much criticism that cost-conscious limitations such as the “fundamental alteration” defense to § 504 that the Supreme Court has endorsed outside K-12 education did not apply to school districts’ obligations to provide § 504 FAPE.²¹⁰ Weber’s argument, in

208. *See* Programs or Activities Receiving or Benefiting from Federal Financial Assistance: Nondiscrimination on the Basis of Handicap, 41 Fed. Reg. 29548, 29555 (July 16, 1976).

209. *See id.* (citing *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972)).

210. *See* Letter to Zirkel, 20 IDELR (LRP Publ’ns) 134, 136 (OCR Aug. 23, 1993) (explaining that OCR does not read into the § 504 regulatory requirement for a free appropriate public education a “reasonable accommodation” standard, which allows for cost-conscious considerations such as a fundamental-alteration defense). The Supreme Court endorsed the fundamental-alteration defense to a claim for reasonable accommodations under § 504 in *Alexander v. Choate*. *See* 469 U.S. 287, 300 (1985) (“[W]hile a grantee need not be required to make ‘fundamental’ or ‘substantial’ modifications to accommodate the handicapped, it may be required to make ‘reasonable’ ones.”). Scholars like Professor Katherine Macfarlane have read *Choate* to conclude that cost may be considered in a fundamental-alteration analysis. *See* Katherine Macfarlane, *The Higher Education Accommodation Mistake*, 114 GEO. L.J. 219, 228 (2025) (“Though [*Choate*] did not invoke the fundamental alteration concept expressly, the Court noted that ‘[i]t should be obvious that administrative costs of implementing such a regime would be well beyond the accommodations that are required’” (emphasis added) (quoting *Choate*, 469 U.S. at 308)). Moreover, in interpreting Title II of the ADA, the Supreme Court has said that the fundamental-alteration defense includes cost consideration. *See* *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (“In evaluating a State’s fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State’s obligation to mete out those services equitably.” (emphasis added)). For a

contrast, might unintentionally endorse the position that cost-conscious considerations might serve as legitimate limitations to § 504's FAPE standard, at least in school districts with fewer resources.

In practice, cost considerations sometimes limit § 504 rights. While some courts have interpreted § 504 FAPE's substantive standard as written (i.e., without cost-conscious limitations),²¹¹ coauthors Professors Claire Raj and Crystal Grant have surveyed cases to show that the majority of courts have limited the standard in some way, such as by applying the fundamental-alteration and undue-burden defenses to § 504 FAPE claims.²¹²

But § 504's substantive FAPE standard is likely not as strong as IDEA's substantive standard after *Endrew F. v. Douglas County School District RE-1* clarified that *Rowley*'s "some educational benefit" was more demanding than some federal circuit courts such as the Tenth Circuit had previously believed.²¹³ Under *Endrew F.*, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances,"²¹⁴ meaning that the educational program should be "appropriately ambitious," offering each child an opportunity to "meet challenging objectives."²¹⁵ This standard would arguably be stronger than § 504's substantive standard, which requires "a comparison between the manner in which the needs of disabled and non-disabled children are met."²¹⁶ *Endrew F.*'s standard is stronger because it requires the school district to craft an ambitious educational program with challenging objectives without regard to how nondisabled students are performing. This means that even in schools with fewer resources, an IDEA-eligible child would have to have an ambitious educational program with challenging objectives.

discussion of the relationship between Title II and § 504, see *infra* notes 135-137 and accompanying text.

211. See, e.g., *B.S.M. v. Upper Darby Sch. Dist.*, 103 F.4th 956 (3d Cir. 2024).

212. See Raj & Grant, *supra* note 150.

213. See 580 U.S. 386, 388 (2017) (overturning the Tenth Circuit's "merely more than *de minimis*" interpretation of the *Rowley* standard); see also Weber, *supra* note 113, at 595 (arguing that *Endrew F.* did not create a new standard but simply clarified that any interpretation of *Rowley* "that imposes only minimal obligations is wrong").

214. *Endrew F.*, 580 U.S. at 399.

215. *Id.* at 402.

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

Even if IDEA's standard is now more protective than § 504 FAPE's standard, § 504 still has the potential to serve as a stopgap when IDEA falls short in other areas, as the subsequent three Sections illustrate.

B. Special Education Services for § 504-Only Students

One way that § 504 serves as a stopgap to shore up some of IDEA's structural limitations is by providing an alternate path for securing special education services to "§ 504-only" students who do not meet the definition of "a child with a disability" as defined by IDEA but do qualify as an "individual with a disability" under § 504. Most disabled children in the United States who require special education to access their education should be able to receive these services under IDEA.²¹⁷ However, there is wide variability in disability-identification rates across states.²¹⁸ Researchers theorize that variations across states in both the criteria used to determine eligibility and in the procedures employed to identify and assess students reasonably suspected of having a disability can help explain this variability.²¹⁹

While the IDEA regulations describe general characteristics of each disability category,²²⁰ IDEA provides states with some flexibility in implementing their special education programs, including in determining

217. See 20 U.S.C. § 1400(d)(1)(A) (2024) ("The purposes of this chapter are . . . to ensure that *all* children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs" (emphasis added)).

218. For instance, in school year 2022-2023 (the most recent data available), 15.2% of all students ages 3 to 21 in the United States received services under IDEA Part B, but there was great variability among states. See *Number and Percentage of Children Served Under Individuals with Disabilities Education Act (IDEA), Part B, by Age Group and State or Jurisdiction: Selected School Years, 1990-91 Through 2022-23*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d23/tables/dt23_204.70.asp [<https://perma.cc/CCX7-J675>]. For instance, 21.1% of children in Pennsylvania received Part B services in school year 2022-2023, while only 11.7% of children in Hawaii received these services for that school year. *Id.*

219. See, e.g., JACQUELINE M. NOWICKI, U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-348, SPECIAL EDUCATION: VARIED STATE CRITERIA MAY CONTRIBUTE TO DIFFERENCES IN PERCENTAGES OF CHILDREN SERVICED (2019); see also KYRIE E. DRAGOO, CONG. RSCH. SERV., R46566, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: A COMPARISON OF STATE ELIGIBILITY CRITERIA 6 (2020).

220. 34 C.F.R. § 300.8(c) (2025).

who is eligible for IDEA-funded services. This means that coverage varies from state to state, leaving students out. As explained in Part II, a student is eligible for IDEA Part B services when they meet the definition of a child with a disability (i.e., one whose impairment falls within one of several disability categories and who “by reason thereof” needs special education and related services).²²¹ Some states have operational definitions²²² of IDEA’s fourteen disability categories that may include “tests, such as checklists of behaviors, test scores from certain types of assessments, or medical assessments.”²²³ To qualify for federal IDEA funding, a state must certify to ED that state policies and procedures are consistent with the statute and the implementing regulations.²²⁴ However, the Act allows states to define how disabilities are observed and measured, leading to inconsistencies and gaps in coverage for many children.²²⁵ Section 504 provides coverage to students who require special education to access the general education curriculum but are ineligible for IDEA FAPE when states adopt operational definitions of disabilities that restrict eligibility. The case of children with ADHD is a case in point.

As Part II explained, children with ADHD may require special education and/or related services to access their education because ADHD can significantly impair learning by disrupting attention, working memory, and impulse control.²²⁶ Under IDEA, a child with ADHD would be found eligible under the “other health impairments” (“OHI”) disability category.²²⁷ Federal regulations define the OHI disability category to mean having “a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment” due “to chronic or acute health problems” such as ADHD, which “[a]dversely affects a child’s educational performance.”²²⁸

221. See 20 U.S.C. § 1401(3)(A)-(B) (generally defining the term “child with a disability”).

222. The Congressional Research Service defines operational definition as “a description of something in terms of the operational procedures, actions, or processes by which it could be observed and measured.” See DRAGOO, *supra* note 219, at 6.

223. *Id.*

224. See 20 U.S.C. § 1412.

225. DRAGOO, *supra* note 219, at 6.

226. See Bray, *supra* note 81.

227. 34 C.F.R. § 300.8(c)(9) (2025).

228. See *id.* § 300.8(c)(9)(i)-(ii).

Some jurisdictions simply define the OHI disability category consistent with federal regulations.²²⁹ But other states have specific operational definitions that may narrow eligibility. For instance, in South Carolina a child with ADHD being considered for IDEA eligibility under the OHI disability category must satisfy all of the federal requirements.²³⁰ In addition, South Carolina also requires documentation “from at least two observations in the school setting” where services “that indicate the child’s observable educational performance related” to ADHD “are occurring *at a significantly different* rate, intensity, or duration than the substantial majority of typical school peers.”²³¹ If a child’s observable educational performance related to ADHD does not meet this standard, she would not qualify for services under IDEA.

Alabama also has operational definitions for students with ADHD seeking IDEA eligibility under the OHI disability classification that may limit the number of eligible children with this condition compared to other states. For example, in addition to meeting the federal IDEA eligibility requirements, state law specifies that “[s]tandard scores (total or composite) on two out of three of the same norm-referenced scale designed specifically to determine the presence of ADD or ADHD must be at least two standard deviations above or below the mean (70, depending on the rating

229. For example, New York requires school districts to interpret evaluation data to determine whether a student is a “student with a disability” as state regulations define, and the state regulations simply adopt federal definitions of IDEA disability classifications without adding operational definitions. *See* N.Y. COMP. CODES R. & REGS. tit. 8, §§ 200.4(c), 200.1(zz) (2022). The District of Columbia, on the other hand, has operational definitions of the disability classifications, but these definitions largely follow federal regulations. *See, e.g.,* D.C. Mun. Regs. tit. 5-A, § 3011.10 (2022) (defining requirements for determining eligibility on the basis of other health impairments).

230. *See* ELLEN E. WEAVER, S.C. DEP’T OF EDUC., OFF. OF SPECIAL EDUC. SERVS., STANDARDS FOR EVALUATION & ELIGIBILITY DETERMINATION (SEED) 25-26 (2024).

231. *Id.* at 27 (emphasis added). Prior to 2024, a student with ADHD could only qualify for IDEA services in South Carolina if the student “rated *within the highest level of significance* on a valid and reliable problem behavior rating scale in areas related to the diagnosis of ADHD by both [their] classroom teacher and parent.” *See* MICK ZAIS, S.C. DEP’T OF EDUC., OFF. OF EXCEPTIONAL CHILD., STANDARDS FOR EVALUATION & ELIGIBILITY DETERMINATION (SEED) (2011) (emphasis added). But that requirement was removed when the state standards for evaluation and eligibility determination were revised in May 2024. *See* WEAVER, *supra* note 230.

scale).²³² Because not all states include operational definitions to determine eligibility under IDEA, if a student with ADHD who receives IDEA-funded services in New York were to transfer to South Carolina or Alabama, she may not qualify for those services under state law even though she may need the services to meaningfully access her education.²³³

As Part II explained, a child with ADHD might require specialized instruction to meaningfully access her education, which could include learning techniques for managing attention difficulty and impulsivity.²³⁴ Such techniques might include visual and auditory cues to help the child maintain focus on her assignment; the use of a visual timer to prepare the child for how long the task will take to complete; and verbal reminders and signals as an auditory cue to help the child refocus on her lesson.²³⁵

If a child with ADHD needs special education services to access her education and is found ineligible for those services under IDEA in states that use restrictive operational definitions, she may still be eligible for those services under § 504. Recall that § 104.33(b) defines an appropriate education as “the provision of regular or special education and related aids and services that are designed to meet individual educational needs” of a disabled student “as adequately as the needs” of nondisabled students are

232. ALA. ADMIN. CODE r. 290-8-9-.03(9)(d) (2026).

233. Operational definitions of the term “developmental delays” have also contributed to variable eligibility rates for infants and toddlers with disabilities from birth to age two served under IDEA Part C. *See* NOWICKI, *supra* note 219, at 8 (using a graphic to illustrate variability in Part C eligibility as reported in 2016). For instance, “in Maryland, a child must have at least a 25 percent delay in one or more developmental areas to be eligible for Early Intervention services [under IDEA Part C], while in Arizona, a child must demonstrate a 50 percent delay in one or more developmental areas to be eligible.” *Id.* at 9. While toddlers and infants are not entitled to FAPE under IDEA Part B, in 2022 more than half (51.7%) of all infants and toddlers served under IDEA Part C were found eligible for IDEA Part B services when they reached the age of three. *45th Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, 2023*, U.S. DEP’T OF EDUC. 22 (2023), <https://sites.ed.gov/idea/files/45th-arc-for-idea.pdf> [<https://perma.cc/2ZKL-X33V>]. As a result, variability in eligibility rates for IDEA Part C can ultimately affect variability in eligibility rates under IDEA Part B, because if a child is not identified for services under Part C, they may also not be identified (or will be identified late) for services under Part B.

234. Yacoub, *supra* note 84.

235. *Id.*

met.²³⁶ Thus, a student would qualify for special education under § 504 as long as she needed the visual and auditory cues and other services discussed above to help maintain focus and meet her particular educational needs “as adequately as the needs” of nondisabled students at the school.

Although ED’s OCR has interpreted its regulations to require school districts to provide special education services to § 504-only students,²³⁷ some courts are generally skeptical that § 504 would require school districts to provide special education services to § 504-only students.²³⁸ Moreover, some groups that represent schools have recently argued that ED’s § 504 regulations exceed its authority under § 504 by requiring schools to provide special education services to meet the FAPE requirements.²³⁹ The crux of some of these arguments is that § 504’s antidiscrimination mandate only requires “access” and not “services.”²⁴⁰ But as Part IV argues, the legislative history of § 504 indicates that Congress understood that parents of disabled children could use § 504 as an alternate path for securing special education and related services. In other words, Congress knew that § 504 would play a stopgap role vis-à-vis IDEA.

C. Related Services for § 504-Only Students

Another § 504 stopgap right is the availability of related services for § 504-only students. Related services are transportation, developmental, corrective, and other supportive services needed for a child to benefit from

236. 34 C.F.R. § 104.33(b)(1) (2025).

237. *See, e.g.*, Akron (OH) City Sch. Dist., 19 IDELR (LRP Publ’ns) 542, at 2-4 (OCR Nov. 18, 1992) (finding that district violated 34 C.F.R. §§ 104.35(a)-(b) when it failed to evaluate a student with ADHD to determine eligibility for special education under § 504 after he was found ineligible for those services under IDEA).

238. *See, e.g.*, Lyons *ex rel.* Alexander v. Smith, 829 F. Supp. 414, 420 n.11 (D.D.C. 1993) (“The Court believes that the only students likely to be entitled to special education under § 504 are the same students also entitled to special education under the IDEA.”).

239. *See, e.g.*, NSBA Letter, *supra* note 9 (“The intent of Congress when it passed Section 504 was to prohibit discriminatory practices in a broad range of programs receiving federal financial assistance. The statute itself imposes no affirmative obligations with respect to special educational programs.”).

240. *See, e.g.*, CASE-AASA Letter, *supra* note 9, at 2 (“The difference between the *service* protections (in IDEA) and the *access* protections (in Section 504) should be articulated, enumerated, and clearly defined.”).

their education. They include services such as in-school counseling, occupational therapy services, or speech therapy services.

Amber Leigh Tatro's story illustrates the importance of related services. She was a friendly child with an upbeat attitude known for wearing big glasses and bright-colored bows.²⁴¹ She loved music—Elvis Presley, Michael Jackson, Prince, New Kids on the Block—and had spina bifida, a congenital physical condition causing partial paralysis and impaired speech.²⁴² Because of her disability, Amber had neurogenic bladder, a condition that required her to receive clean intermittent catheterization ("CIC") three to four times a day to allow urine to drain from her bladder.²⁴³ Without the procedure, she risked developing chronic kidney infection.²⁴⁴

When Amber was three-and-a-half years old, she became eligible to participate in the Irving Independent School District's early childhood development program and received services under the statute now called IDEA.²⁴⁵ School officials developed an IEP offering to provide Amber with early childhood development classes (i.e., special education) and physical and occupational therapy (i.e., related services).²⁴⁶ The IEP did not include CIC, reflecting the school district's belief that this procedure was a "medical service" that fell outside what the school district was legally required to provide. Instead, school officials suggested that one of Amber's parents come to school throughout the day to catheterize their daughter themselves.²⁴⁷

241. Marc Ramirez, *Amber Leigh Tatro, Disabled Student Who Won Landmark Supreme Court Case, Dies at 42*, WASH. POST (Aug. 11, 2018), https://www.washingtonpost.com/local/obituaries/amber-leigh-tatro-disabled-student-who-won-landmark-supreme-court-case-dies-at-42/2018/08/11/17f96f3a-9da9-11e8-b60b-1c897f17e185_story.html.

242. Sam Roberts, *Amber Tatro, Whose Suit Gave Rights to Disabled Students, Dies at 42*, N.Y. TIMES (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/obituaries/amber-tatro-whose-suit-gave-rights-to-disabled-students-dies-at-46.html>.

243. *Tatro v. Texas*, 481 F. Supp. 1224, 1226 (N.D. Tex. 1979), *vacated*, 625 F.2d 557 (5th Cir. 1980). The procedure entails inserting a small clean metal tube into the urethra to allow urine to drain from the bladder, pulling the tube out, and then wiping clean the bladder region. *Id.*

244. *Tatro*, 625 F.2d at 558.

245. *See id.*

246. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 886 (1984).

247. *Tatro*, 481 F. Supp. at 1228. For a parent who works outside the home during school hours, arrangements like these can cause a parent to lose their job or

The case, *Irving Independent School District v. Tatro*, made its way to the Supreme Court to determine whether CIC was a “related service” that Irving school officials were legally required to provide as part of Amber’s substantive right to IDEA FAPE. At oral argument, the Tatro’s attorney framed the issue as one of school access and the unnecessary segregation of a child with a disability.²⁴⁸ The Court agreed with this framing: “It is clear on this record that, without having CIC services available during the school day, Amber cannot attend school and thereby ‘benefit from special education.’”²⁴⁹ The Court understood that such related services could be integral in granting access to education: “Services like CIC that permit a child to remain at school during the day are no less related to the effort to educate than are services that enable the child to reach, enter, or exit the school.”²⁵⁰

One key takeaway from *Tatro* is that, under IDEA, school districts are only required to provide a child with disability-related services if they are also entitled to special education services. But what if a disabled child does

can prevent a parent from taking on employment altogether. A parent might also have to use family resources to hire someone else to perform these services—as was ultimately the case with Amber’s family. *See Tatro v. Texas*, 516 F. Supp. 968, 972 (N.D. Tex. 1981) (“Amber . . . continued to attend her classes, with CIC provided by her babysitter as necessary.”). Moreover, asking a parent to provide a service which a school district is legally required to provide violates IDEA and other laws. *See, e.g., In re: Student with a Disability*, 71 IDELR (LRP Publ’ns) 47, at 7 (S.D. State Educ. Agency July 14, 2017) (holding that school district failed to implement student’s IEP when it requested that a family member come in to feed the student when the school nurse was absent).

248. “The true issue of this case before the Court is one of access to public education; more specifically, whether an eight-year old girl of normal intelligence who is capable of doing schoolwork in regular public elementary school will be able to attend class in a regular public elementary school alongside her nonhandicapped age group peers.” Transcript of Oral Argument at 17, *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984) (No. 83-558) This Article only uses outdated terms such as “handicap” and “handicapped” when quoting court opinions or historical texts such as this one. The statute’s 1990 amendments replaced these terms with the preferred terms “disabled” and “disability.” *See, e.g., Education of the Handicapped Act Amendments of 1990*, Pub. L. No. 101-476, § 101(a)(1), 104 Stat. 1103, 1103 (“Handicapped Children . . . is amended to read as follows . . . The term ‘children with disabilities’ means . . .”).

249. *Tatro*, 468 U.S. at 890.

250. *Id.* at 891.

not qualify for special education services under IDEA but nevertheless requires a related service? For instance, a child with AIDS, asthma, juvenile arthritis, or depression might require a related service such as physical therapy, occupational therapy, or transportation services to participate in, or benefit from, an educational program or activity.²⁵¹

Consider the situation of a child with juvenile arthritis. Juvenile arthritis is an umbrella term used to describe autoimmune and inflammatory conditions that occur in children.²⁵² Many children with juvenile arthritis experience pain, fatigue, stiffness, and swelling just by interacting with the school environment.²⁵³ Specifically, sitting inside the classroom throughout the school day may be uncomfortable for a child with juvenile arthritis if periods of reading or desk work bring about stiffness or neck problems.²⁵⁴ Similarly, without extra support, a child with this condition might have difficulty participating in school lunch programs, eating with peers, or accessing educational materials if they cannot carry heavy textbooks, lunch trays, book bags, or other school-related items because of their disability.²⁵⁵ Finally, some children with juvenile arthritis have reported that their disability makes it difficult for them to play and engage in leisure activities, challenging their ability to participate in, or benefit from, recess activities and physical education.²⁵⁶

251. See generally Gloria Frolek Clark, Jean Polichino & Leslie Jackson, *Occupational Therapy Services in Early Intervention and School-Based Programs*, 58 AM. J. OCCUPATIONAL THERAPY 681, 684 (2004) (explaining that some children with AIDS, asthma, arthritis, attention deficit disorder, traumatic brain disorder, conduct disorder, or depression may require in-school occupational therapy services but not special education services); see also Fairfax Cnty. (VA) Pub. Schs., 115 LRP (LRP Publ'ns) 3293, at 3 (OCR Sept. 19, 2014) (resolving that the school district will determine whether it failed to consider a visually impaired student's request to receive large print reading materials as a related service under Section 504).

252. *Juvenile Arthritis: A Teacher's Guide*, ARTHRITIS FOUND., <https://www.arthritis.org/getmedia/4fee18c7-7c56-4bfa-8951-fccf7c16aad0/ja-teachers-guide-pdf.pdf> [<https://perma.cc/8TWA-NAKX>].

253. *Id.* at 3.

254. *Kids Get Arthritis, Too! How Juvenile Arthritis May Affect a Child at School*, ARTHRITIS FOUND. 1, https://www.arthritis.org/media/arthritis-dev-2018.bluemod.me/PDFs/Health%20Wellness/Daily_Development/JA_at_School-NEW.pdf [<https://perma.cc/XR63-HMWK>].

255. *Id.*

256. Janine Hackett, *Perceptions of Play and Leisure in Junior School Aged Children with Juvenile Idiopathic Arthritis: What Are the Implications for Occupational*

In-school occupational therapy,²⁵⁷ physical therapy, or specialized transportation services may provide a child with juvenile arthritis with the support they need to participate in, or benefit from, an educational program or activity on equal footing with their nondisabled peers. For instance, an in-school occupational therapist can teach students with this condition proper ergonomic principles to avoid injury in the classroom; modifications so that the child can participate in physical education programs and recess without discomfort or injury; joint-protection and lifting techniques to help carry heavy items; and tips on pain management and pacing activities to avoid pain and fatigue throughout the school day.²⁵⁸ Moreover, an in-school physical therapist can work with students with juvenile arthritis to teach them exercises designed to improve flexibility, coordination, strength, and balance, thus ensuring that the students participate in school programs and activities.²⁵⁹ Likewise, a child with juvenile arthritis who finds it difficult to wait for the school bus or who is unable to get on or off public transportation

Therapy?, 66 BRIT. J. OCCUPATIONAL THERAPY 303, 305 (2003). One child explains how their arthritis limits their ability to play:

“I didn’t play out in year one I had to play in the house, I couldn’t do it because my legs and arms were really stiff. If my friends came round and I was bad I couldn’t play with them and they had to go home sometimes. It felt really silly that I couldn’t play with them and I felt that they wouldn’t like me no more.”

Id.

257. Occupational therapists work with individuals to help them participate in their “occupations,” “which are daily life activities that are purposeful and meaningful to the person.” Clark, *supra* note 251, at 1. In-school occupational therapy services might be geared to help disabled students maintain, improve, and restore bodily function (e.g., neuro-musculoskeletal function; motor function; sensory function; cognitive function; and/or psychosocial function) so that they can participate in different school settings including the classroom, the bathroom, the cafeteria, and the playground. See *Occupational and Physical Therapists*, NYC PUB. SCHS., <https://www.schools.nyc.gov/careers/other-jobs-in-schools/occupational-and-physical-therapists> [<https://perma.cc/54HJ-HEW7>].
258. Bryan D. Vargo, *The Benefits of Occupational Therapy*, <https://www.arthritis.org/health-wellness/treatment/complementary-therapies/physical-therapies/the-benefits-of-occupational-therapy> [<https://perma.cc/N9XV-JBNB>].
259. *Physical Therapy for Arthritis*, ARTHRITIS FOUND., <https://www.arthritis.org/health-wellness/treatment/complementary-therapies/physical-therapies/physical-therapy-for-arthritis> [<https://perma.cc/SVA5-K4DR>].

because of their disability might benefit from specialized transportation to ensure that the child arrives at the schoolhouse door each morning.²⁶⁰

Moreover, what if a child with diabetes does not require special education services at school but can only participate in school-sponsored field trips with the assistance of a person trained in administering an insulin pump,²⁶¹ ketone calculation,²⁶² or glucagon²⁶³ administration?²⁶⁴ Similarly, what if a child identified as having a severe allergy to nuts, dairy, and eggs with an increased risk of anaphylaxis²⁶⁵ requires no special education but can only participate in school programs and activities if they are accompanied throughout the school day with an individual trained in administering an EPIPEN®²⁶⁶ who can also ensure that the child is learning

260. See *Kids Get Arthritis, Too!*, *supra* note 254, at 1.

261. An insulin pump is a small wearable computerized device used by some individuals with diabetes that delivers insulin to the body to control blood glucose levels. See generally *Insulin Pumps: Relief and Choice*, AM. DIABETES ASS'N, <https://diabetes.org/about-diabetes/devices-technology/insulin-pumps-relief-and-choice> [https://perma.cc/LM25-2G9J].

262. When the body is unable to turn glucose into energy due to a lack of insulin, it starts breaking down body fats. Ketones are a chemical by-product of this process. *Five Things to Know About Ketones*, AM. DIABETES ASS'N, <https://diabetes.org/blog/five-things-know-about-ketones> [https://perma.cc/X853-5DJE]. Because ketones upset the chemical balance of the blood, they can poison the body if left untreated. *Id.* Therefore, some children with diabetes must check for ketones every four to six hours to manage their condition. *Id.*

263. Glucagon is a hormone used to treat severe hyperglycemia (low blood sugar) administered as a nasal spray or an injection. *Glucagon & Other Emergency Glucose Products*, AM. DIABETES ASS'N, <https://diabetes.org/health-wellness/medication/glucagon-other-emergency-glucose-products> [https://perma.cc/GYW3-YQUZ].

264. See Clayton Cnty. (GA) Sch. Dist., 52 NDLR (LRP Publ'ns) 170, at 4, 7-8 (OCR Sept. 4, 2015) (describing how a school district settled denial-of FAPE-claim under § 504 and Title II after failing to provide an aide trained in diabetes management to allow a student with a disability to participate in school-sponsored field trips).

265. Anaphylaxis is a severe, life-threatening allergic reaction. *Anaphylaxis*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/anaphylaxis/symptoms-causes/syc-20351468> [https://perma.cc/4W5W-YD7A].

266. EPIPEN® is the brand name of an autoinjector used to administer the drug epinephrine (i.e., adrenaline) to treat a person who is having an anaphylactic

in an allergen-free environment?²⁶⁷ In these two examples, the disabled child would put their life at risk without the related services and could therefore not safely participate in the educational program or activity without these services.

But these students would not be entitled to these life-saving related services under IDEA unless they were first found eligible for special education services under the statute. Some states have begun regulating in this area—especially for children with severe allergies²⁶⁸—but § 504 offers the possibility of providing disabled students access to related services regardless of their need for special education.

Under ED’s § 504 regulations set out in § 104.33(b), an “appropriate education” includes “regular *or* special education” and “related aids and services” designed to meet a disabled student’s needs “as adequately as” the needs of nondisabled students are met—making related services available to qualified students with a disability irrespective of their need for special education.²⁶⁹ Because § 504 FAPE includes both regular or special education, the regulations have been interpreted to afford a qualified disabled student access to related services irrespective of their need for special education services.

This interpretation of § 504 is not controversial for many school districts. Indeed, some school districts acknowledge on their websites that related services are available to disabled students through § 504.²⁷⁰ But this

reaction. *See generally* Emily H. Zadikoff, Stephanie A. Whyte, Liliana DeSantiago-Cardenas, Blair Harvey-Gintoft & Ruchi S. Gupta, *The Development and Implementation of the Chicago Public Schools Emergency EPIPEN® Policy*, 84 J. SCH. HEALTH 342, 342 (2014); Prathyusha Sanagavarapu, *Don’t Forget to Pack My EPIPEN® Please: What Issues Does Food Allergy Present For Children’s Starting School?*, 37 AUSTRALASIAN J. EARLY CHILDHOOD 56, 56 (2012).

267. OCR Complaint No. 11-16-1127 Resolution Letter from Off. for C.R., U.S. Dep’t of Educ., to Bruce Benson, Superintendent, Stafford Cnty. Pub. Schs (Apr. 5, 2017), <https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/11161127-a.pdf> [<https://perma.cc/DZ2B-NTEH>].

268. *See* Anna Volerman, Claire Brindley, Nancy Amerson, Tiffanie Pressley & Nikki Woolverton, *A National Review of State Laws for Stock Epinephrine in Schools*, 92 J. SCH. HEALTH 209, 209 (2021) (“As of 2018, all 50 states and the District of Columbia have had laws facilitating allergy management within schools . . .”).

269. *See* 34 C.F.R. § 104.33(b)(i) (2025) (emphasis added). The regulations also require the recipient to adherence to the rules’ detailed procedures. *Id.* § 104.33(b)(ii).

270. *See, e.g., Overview of Section 504*, D.C. PUB. SCHS., <https://dcps.dc.gov/page/section-504> [<https://perma.cc/BC4Q-Z7G6>]

interpretation of the law is far from universally understood, even by seasoned practitioners. The responses in 2016 to a question about the availability of related services under § 504 on *Wrightslaw Way* (a popular blog for special education law and advocacy) are illustrative.

The blog thread begins: “Can a student receive related services (speech, [occupational therapy], [physical therapy]) in a 504 plan or just [under IDEA]?”²⁷¹ One respondent stated as follows: “Related services can be offered under Section 504, but not ALL related services. Section 504 is to level the playing field for access to FAPE; however, there are certain services that a district can regulate its offerings under [IDEA], Section 504 or both. For [occupational therapy/physical therapy], we only offer it on a *consult basis and not the actual [direct] service*. The actual service is given under [IDEA].”²⁷² Reacting to this comment, one reader responded, “Wow this is New information to me as someone who provided those ‘related services’ but does make total sense. Thank you for sharing this information.”²⁷³ These

(“Unlike special education, Section 504 provides accommodations and *related services* to eligible students with disabilities so that they can access the general education curriculum, opportunities for learning, and school activities to the same extent as their non-disabled peers.” (emphasis added)); *Section 504 Procedural Manual 2019-2020 School Year*, CHI. PUB. SCHS. 6, https://www.cps.edu/globalassets/cps-pages/services-and-supports/special-education/understanding-special-education/cps-policies-and-procedures/odlss_section_504_procedural_manual_sy_1920_final.pdf [<https://perma.cc/ENF3-2CEM>] (“A student qualifies for a Section 504 Plan if he or she requires accommodations, *related services* (except for speech therapy) and/or other supports to access, participate in, and derive benefits from the general education program as adequately as nondisabled students” (emphasis added))).

271. *Section 504: Related Services in a 504 Plan*, WRIGHTSLAW WAY, <https://www.wrightslaw.com/blog/section-504-related-services-in-a-504-plan/> [<https://perma.cc/QU9W-RRNQ>].

272. *See id.* (emphasis added).

273. *Id.* A related service is provided as a “direct service” when the related service provider works directly with a child—either individually or in a group—to achieve the service’s objectives. *See* Jim Durkel, *Related Services: Direct v. Consult*, PATHS TO LITERACY, <https://www.pathstoliteracy.org/related-services-direct-versus-consult/> [<https://perma.cc/S3K9-9EM4>]. On the other hand, a consultation service occurs when the service provider supports another professional (e.g., teacher, coach, paraprofessional) to help the student meet the service’s objectives. *Id.* Direct services are not inherently better than consultation services. By supporting the various professionals that interact with the child throughout the school day, consultation services

comments illustrate a fundamental misunderstanding about § 504 FAPE given that nothing in the Rehabilitation Act itself nor in ED's implementing regulations limits § 504 related services to consultation services.²⁷⁴ Moreover, when school district officials argue that § 504 simply "levels the playing field for access" to an appropriate education, the implication is that § 504's antidiscrimination mandate only requires "access" and not "services." However, § 504's antidiscrimination mandate does sometimes require recipients to provide services, providing coverage where IDEA does not.

D. ED Defines "Residence" More Broadly Under § 504 Than Under IDEA

Another way that § 504 serves as a stopgap when IDEA falls short is through its broader approach to who counts as a "resident" for purposes of receiving the Act's protection. ED has interpreted the terms "in the recipient's jurisdiction"²⁷⁵ or "residing in the recipient's jurisdiction" under § 504's K-12 regulations²⁷⁶ to encompass the notion of both the child's domicile and the child's actual residence, while it has understood a similar term under IDEA—"residing in the State"—to only mean the child's domicile.²⁷⁷ ED's more generous understanding of who is within the school district's "jurisdiction" under § 504 operates to ensure that no child is left without appropriate services, even when school districts cannot agree on who is financially responsible for educating the child.

Under both § 504 and IDEA, school districts are only responsible for children who are within their "jurisdictions" as each of those statutes define the term. For instance, under § 504, school districts are only required to appropriately educate qualified individuals with disabilities "*in the*

ensure that the child has multiple opportunities to practice a particular skill learned through the related service. *Id.*

274. *See generally* 34 C.F.R. § 104.33(b).

275. *Id.* § 104.33(a).

276. *Id.* § 104.32(a).

277. *See, e.g.*, 20 U.S.C. § 1412(a)(3)(A) (2024) ("All children with disabilities *residing in the State*, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated." (emphasis added)).

recipient's jurisdiction,”²⁷⁸ while under IDEA, states must provide an appropriate education to “all children with disabilities *residing in the State* between the ages of 3 and 21.”²⁷⁹ Similarly, under § 504 a school district is required to “identify and locate” every qualified individual with a disability “*residing in the recipient's jurisdiction* who is not receiving a public education,”²⁸⁰ while under IDEA the state must identify, locate, and evaluate all children with disabilities “*residing in the State*” reasonably suspected of needing special education and related services.²⁸¹ Finally, § 504 requires school districts to educate each qualified individual with a disability “*in its jurisdiction*” with nondisabled individuals “to the maximum extent appropriate to the needs” of the disabled individual.²⁸² IDEA has an analogous requirement.²⁸³

1. The Distinction Between “Domicile” and “Actual Residence”

ED has broadly interpreted the word “in” as used in the § 504 phrase “in the recipient's jurisdiction,”²⁸⁴ so as “to encompass the concepts of both domicile and actual residence.”²⁸⁵ This interpretation ensures residence is the place where someone “actually lives” (i.e., the place where a person goes to sleep at night).²⁸⁶ The concept requires “bodily presence” “in a given place.”²⁸⁷

Domicile requires bodily presence but additionally requires that the person intends to make the place their permanent home.²⁸⁸ A person does not have to be continuously present in a location to regard it as their domicile as long as they were physically present when they decided to make

278. See 34 C.F.R. § 104.33(a) (emphasis added).

279. 20 U.S.C. § 1412(a)(1)(A) (emphasis added).

280. 34 C.F.R. § 104.32(a) (emphasis added).

281. 20 U.S.C. § 1412(a)(3)(A) (emphasis added).

282. 34 C.F.R. § 104.34(a) (emphasis added).

283. See 20 U.S.C. § 1412(a)(5)(A).

284. 34 C.F.R. § 104.33(a).

285. See Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 42 Fed. Reg. 22676, 22685 (May 4, 1977) (codified at 34 C.F.R. pt. 104, app. A ¶ 23).

286. *Residence*, BLACK'S LAW DICTIONARY (12th ed. 2024).

287. *Id.*

288. *Id.*

it their permanent home. Although an individual may have more than one residence at any given time, they may have only one domicile.²⁸⁹ This is so because domicile is the place the “person intends to return and remain even though currently residing elsewhere.”²⁹⁰

School-aged children are typically entitled to free public education in the school district in whose jurisdiction they are domiciled.²⁹¹ Because most children are not legally capable of “forming the requisite intent to establish a domicile, their domicile is determined by that of their parents.”²⁹² Under both IDEA²⁹³ and § 504,²⁹⁴ students are entitled to FAPE from the school districts in the jurisdictions where they are domiciled. However, if a jurisdiction is only required to provide FAPE to students domiciled in the state, some students may slip through the cracks—particularly if they do not live in the jurisdiction where their parents are domiciled, such as when they live out-of-state to receive medical care for disabilities. But since ED has interpreted § 504 to require jurisdictions to provide FAPE to students who are both domiciled and “actual residen[ts]”²⁹⁵ in a jurisdiction, these students are more likely to be covered.

ED’s interpretation of § 504’s jurisdictional component is more generous than most state laws on this point. Professor LaToya Baldwin Clark has canvassed state public education residency laws, finding that “[c]hildren who have care relationships with people who are not their parents or formal legal guardians are prohibited—via per se rules—from deriving residency from those people.”²⁹⁶ Although some states have

289. *Id.*

290. *Domicile*, BLACK’S LAW DICTIONARY (12th ed. 2024).

291. *See, e.g.*, N.J. STAT. ANN. § 18A:38-1(a) (West 2019) (“Public schools shall be free to” any person “over five and under 20 years of age” “who is domiciled within the school district . . .”).

292. *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989); *see also* Somerville Bd. of Educ. v. Manville Bd. of Educ., 752 A.2d 793, 796 (N.J. Super. Ct. App. Div. 2000), *aff’d*, 768 A.2d 779 (N.J. 2001) (“Under state law, a child’s domicile is normally that of his or her parents.”).

293. *See generally* Letter to McAllister, 21 IDELR (LRP Publ’ns) 81 (Off. of Special Educ. Programs June 9, 1994) .

294. 34 C.F.R. pt. 104, app. A ¶ 23 (explaining that § 104.33(a)’s use of the terms “in the recipient’s jurisdiction” “encompasses the concepts of both *domicile* and actual residence” (emphasis added)).

295. *See supra* note 285 and accompanying text.

296. LaToya Baldwin Clark, *Family / Home / School*, 117 Nw. U. L. REV. 1, 14 (2022).

created statutory exceptions to the general rule that a child takes on their parent or legal guardian's domicile for school enrollment purposes, Baldwin Clark argues that these exceptions are "only available by meeting a high standard of parental hardship."²⁹⁷

2. Applying § 504 Based on "Domicile" and "Actual Residence"
Ensures That Fewer Children Fall Through the Cracks.

Administrative complaints filed with OCR—the branch of ED that enforces § 504—illustrate how fewer children fall through the cracks when § 504 rights apply to children who actually reside in a jurisdiction, even if they are not domiciled there. *Boulder (MT) River School and Hospital*, an OCR administrative complaint brought against the Boulder River School and Hospital ("BRSH") in Montana, illustrates how OCR has interpreted § 504's mandate for students "in the recipient's jurisdiction"²⁹⁸ in such a way that broadens § 504's coverage.²⁹⁹ BRSH was part of a state-run residential facility for individuals with developmental disabilities that closed in 2016.³⁰⁰ Although BRSH was located in Boulder, Montana, some of the facility's residents were not domiciled in Boulder because their parents lived in towns and cities across the state.³⁰¹

297. *Id.*

298. *See supra* note 284.

299. 257 IDELR (LRP Publ'ns) 159 (OCR Sept. 10, 1980).

300. Phil Drake, *Boulder Braces for MDC to Close*, GREAT FALLS TRIB. (Feb. 11, 2016), <https://www.greatfallsribune.com/story/news/local/2016/02/11/boulder-braces-mdc-close/80217748/> [<https://perma.cc/YKR8-N9HL>]. At the time of the facility's closure in 2016, it was called the Montana Development Center. *Id.* Previous names of the facility included the "Montana Deaf and Dumb Asylum." *Id.*

301. *See* *Boulder (MT) River School and Hospital*, 257 IDELR at 2 ("OCR also cited the districts of domicile of the residents [as defined by the regulation] as responsible entities.").

Saving Special Education

OCR found that BRSH,³⁰² the Montana Office of Public Instruction, the now-defunct Montana Department of Institutions,³⁰³ and the school districts where the students were domiciled³⁰⁴ had all denied the facility's residential students an appropriate education as the § 504 regulations require.

Moreover, OCR found that the public school district where BRSH was located—Boulder Public Schools—had also failed to provide an appropriate education to the students even though no student at BRSH had requested services from Boulder Public Schools and even though some were not domiciled in the school district's jurisdiction.³⁰⁵

Because BRSH students were physically present “in” the Boulder Public Schools jurisdiction, the school district had responsibilities to these children under § 504.³⁰⁶ For instance, § 104.32 required Boulder Public

302. *Id.* at 3. OCR found that BRSH had denied the residential students FAPE because BRSH's educational services were not comparable to services available in the public schools (to nondisabled students), and BRSH did not have an adequate explanation for the difference. *Id.* Specifically, OCR found that the education at BRSH violated § 104.33 because “supervised, goal-oriented instruction is provided for fewer days and hours than those provided for nonhandicapped children, without documented educational jurisdiction for such disparity.” *Id.* OCR also found that BRSH had violated § 104.33 when it placed them on a waiting list for services deemed necessary and for failing to provide the students services in the appropriate setting. *Id.* Further, BRSH violated § 104.35 when it failed to complete accurate hearing assessments needed to develop an appropriate plan of study for the students. *Id.*

303. *Id.* at 4-5. OCR found both the Montana Office of Public Instruction and the Montana Department of Institutions liable under 34 C.F.R. § 104.54, a regulation that requires recipients that supervise programs that provide services to school-aged children who are institutionalized because of their disabilities to ensure that they receive an appropriate education as § 104.33 defines. *Id.*; 34 C.F.R. § 104.54 (2025).

304. *Id.* at 2. OCR did not explain why the school district where the children were domiciled was liable under § 504, but OCR has stated that “a recipient may not place a child in a program that is inappropriate or that otherwise violates the requirements of Subpart D.” 34 C.F.R. pt. 104, app. A ¶ 23. Because the district where the child is domiciled is responsible for placement, these school districts could have denied the students FAPE under § 504 *by placing* them in an inappropriate educational program (i.e., a program that denied them FAPE).

305. *See* Boulder (MT) River School and Hospital, 257 IDELR at 4.

306. *Id.* (“Children in residence at BRSH, which is located within the services area of the district, are ‘in’ the jurisdiction of Boulder Public Schools, based on the

Schools to contact BRSH to “identify and locate every qualified handicapped person within its jurisdiction who is not receiving a free appropriate public education or taken steps to notify appropriate persons of the district’s duty under Subpart D.”³⁰⁷ As long as the students at BRSH met the definition of the term “qualified handicapped person” as the § 504 regulations define in the K-12 context,³⁰⁸ the local school district was required to identify and locate these students pursuant to § 104.32.

Moreover, Boulder Public Schools had a duty under § 104.34(a) to “provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person.”³⁰⁹ OCR found that the school district had violated this rule because it had not established procedures to ensure that intellectually disabled students at BRSH were given the opportunity to participate in Boulder Public Schools’ educational programs with nondisabled students.³¹⁰ It was of no consequence that none of the children residing at BRSH had reached out to Boulder Public Schools to request services or access to programing with nondisabled children.³¹¹

Although § 504 includes more students within its protections by covering children who are either domiciled in or actually reside in a state, there are a few limits to this coverage. First, OCR has not required a school district to provide FAPE to a child who only intermittently resides in a school district. In *District of Columbia (DC) Public Schools*, OCR found that § 504 did not require the District of Columbia Public Schools to provide an appropriate education to a child domiciled in Cincinnati, Ohio, who intermittently received inpatient hospital treatment at the children’s hospital in Washington, D.C.³¹² Although some of the child’s inpatient stays lasted up to two months, these stays were interrupted by brief periods of discharge when the child would either return to her home in Cincinnati or stay at her grandmother’s home in Northern Virginia.³¹³

residence standards of the regulation; the provisions of 34 C.F.R. Part 104, Subpart D, cited in pertinent part above, are applicable to Boulder Public Schools.”).

307. *Id.* at 4-5.

308. *See* 34 C.F.R. § 104.3(l)(2).

309. *Id.* § 104.34(a)

310. *See* Boulder (MT) River School and Hospital, 257 IDELR at 5.

311. *Id.* at 4-5.

312. 20 IDELR (LRP Publ’ns) 274, at 3 (OCR May 13, 1993).

313. *Id.* at 2.

Second, OCR has distinguished between the duty to provide appropriate educational services and the financial responsibility for paying for those services. In *Owensboro (KY) Independent School District*, OCR clarified that § 504 only makes a school district *financially responsible* for providing an appropriate education to children residing (but not domiciled) in the district's jurisdiction when the recipient "places" the child in the educational facility.³¹⁴ But although OCR distinguishes between the duty to provide appropriate educational services and the financial responsibility for paying for those services, it has explained that "in no case may a recipient refuse to provide services to a handicapped child in its jurisdiction because of another person's or entity's failure to assume financial responsibility."³¹⁵

This interpretation of the regulations makes sense given that disabled children were regularly subjected to "administrative buckpassing" before Congress passed § 504.³¹⁶ In the education context, administrative buckpassing is defined as "the practice of having unclear or shared responsibility for providing education programs to certain groups of children."³¹⁷ Buckpassing causes children to "fall through the holes in the net" when school districts or state education agencies bicker about which of them is responsible for educating certain children.³¹⁸ The court vigorously denounced this practice in *Mills v. Board of Education of the District of Columbia*, a case that led to passage of both § 504 and IDEA, writing: "The lack of communication and cooperation between the Board of Education and the other defendants in this action shall not be permitted to deprive plaintiffs and their class of publicly supported education."³¹⁹

Finally, OCR has stated that recipients are not required to make available noneducational programs to disabled students under § 504 where a child neither resides nor is domiciled within a school district's jurisdiction.

314. 16 IDELR (LRP Publ'ns) 170, at 2 (OCR Apr. 7, 1989); *see also* 34 C.F.R. § 104.33(c)(4) ("If a recipient has made available, in conformance with the requirements of this section and § 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school.").

315. 34 C.F.R. pt. 104, app. A ¶ 23.

316. *See generally* Burgdorf & Burgdorf, *supra* note 11, at 880.

317. *Id.*

318. *Id.*

319. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 876 (D.D.C. 1972).

In *Genesee Valley (NY) Central School District*, a resident of District A who was attending an independent day program housed at a school building owned by District B sought to participate in District B's afterschool program but was denied admission because the program was only available for District B residents.³²⁰ OCR found that there was no discrimination under § 504 because the child—who returned home to stay with his parents at the end of the school days—was neither a resident of the district nor domiciled in District B.³²¹

Some might argue that the exceptions to the rule that OCR has carved out are signs that the agency has wavered in its commitment to broadly interpreting the term “in the recipient’s jurisdiction” since deciding *Boulder (MT) River School and Hospital*. But a case from 2024 illustrates that the Biden Administration was still committed to these principles. In February 2023, OCR initiated a compliance review of Garrison School in Jacksonville, Illinois, to determine whether the Four Rivers Special Education District (“FRSED”) denied disabled children an appropriate education under § 504 by “referring students to law enforcement for misbehaviors; by disciplining students for disability-based behavior; and by not reevaluating students as needed to determine appropriate supports for disability-based behavior.”³²²

Garrison School is the only school that the FRSED operates. The district serves special education students who reside within 19 “member” school districts in the region, and students are placed at the school by the IEP teams in their home school district.³²³ Children who reside in nonmember districts may also attend Garrison School, but the nonmember district must pay

320. 120 LRP (LRP Publ'ns) 9278, at 1-2 (OCR Dec. 17, 2019).

321. *Id.* at 2. Although this was not included in OCR's analysis, afterschool programs are governed not by § 504's FAPE provisions, but by § 104.37, which deals with “nonacademic services.” See 34 C.F.R. § 104.37(a) (“A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.”).

322. Letter from Karen E. Mines, Reg'l Dir., U.S. Dep't of Educ., Off. for C.R., to Tracey Fair, Dir., Four Rivers Special Educ. Dist. 1 (Sept. 5, 2024), <https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/05235001-a.pdf> [<https://perma.cc/K2W4-T5PK>]

323. *Id.* at 2; see also FOUR RIVERS SPECIAL DIST., GOVERNING BOARDS POLICY MANUAL § 7:60 [hereinafter GBPM] (“Students who are residents of Member Districts may participate in the programs available through the Special Education District.”).

FRSED tuition for those students.³²⁴ FRSED's policies recognize that § 504 requires the district to provide an appropriate education to all its students without distinguishing between students who reside in member districts and those who reside in nonmember districts.³²⁵

OCR found "compliance concerns" with some of FRSED's policies and practices and therefore entered into an agreement with the district that would ensure compliance with § 504's regulations.³²⁶ In identifying these compliance concerns, OCR did not distinguish between children residing in member districts and those residing in nonmember districts. The agreement requires FRSED to make changes to ensure that all students receive an appropriate education under § 504, not just those who reside in member school districts.

It is unclear why OCR did not also find the nonmember school districts liable for their role in placing their students at an educational program found to have denied students an appropriate education as § 504 requires. Indeed, OCR has found placing school districts liable for similar violations in previous investigations.³²⁷ Instead, OCR focused its investigation on FRSED, the recipient that delivered the educational services to the students. This is significant because it shows how § 504 FAPE in some instances expands responsibility beyond a child's home school district for a failure to provide a disabled child FAPE. As the next Section illustrates, FRSED would bear no responsibility for denying an appropriate education to the nonmember school district students under IDEA. Only the sending districts (i.e., the nonmember school districts) would be responsible under IDEA for providing their students with an appropriate education under the statute.

324. GBPM, *supra* note 323, at § 7:60 ("Upon approval of the Director, students who are residents of non-member districts may participate in the programs available through the Member Districts, providing the 'sending district' pay the receiving Special Education District the regular tuition charge as determined by the provisions of The Illinois School Code.").

325. *Id.* § 6:120 ("The District shall provide a free appropriate public education in the least restrictive environment and necessary related services to *all* children with disabilities enrolled in the District, as required by ... Section 504 of the Rehabilitation Act of 1973." (emphasis added)).

326. *See* Letter from Karen E. Mines, *supra* note 322, at 9.

327. *See* Boulder (MT) River School and Hospital, 257 IDELR (LRP Publ'ns) 159, at 2 (OCR Sept. 10, 1980) (finding that hospital which provided educational services to children as well as the jurisdiction where the children were domiciled were responsible for denials of § 504 FAPE); *see also* 34 C.F.R. pt. 104, app. A ¶ 23 ("[A] recipient may not place a child in a program that is inappropriate or that otherwise violates [§ 504 FAPE requirements]").

3. IDEA Only Secures FAPE to Students in the State of “Domicile”

The extra coverage provided by § 504 provides an important stopgap, as IDEA fails to secure education for children who are living in a state other than the state in which they are domiciled. IDEA requires states to make a free appropriate public education available to each child with a disability “residing in the State” between the ages of three and twenty-one.³²⁸ The Office for Special Education Programs (“OSEP”), the division within ED responsible for enforcing IDEA, has stated that a state’s duty to provide an appropriate education under the statute turns on the child’s residence, not their location.³²⁹ A child’s residence under IDEA is: (1) the state where their parent or guardian resides; or (2) the state of which the child is a ward.³³⁰ OSEP’s materials explaining this rule indicate that OSEP understands the parent or guardian’s residence to be synonymous with the term “domicile.”³³¹

Under ED’s interpretation of “residing” as it appears in IDEA, a state is not required to provide FAPE to a child with a disability who is physically present in its jurisdiction if the child’s parents are domiciled outside of the state. In *Letter to McAllister*, an out-of-state public health agency placed a child at a residential treatment facility in Utah and accepted responsibility for the child’s treatment, room, and board, but not the child’s education.³³² When Utah contacted the out-of-state school district where the child’s parents resided, the school district refused to assume responsibility for

328. See 20 U.S.C. § 1412(a)(1)(A) (2024) (“A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.”).

329. Letter to McAllister, 21 IDELR (LRP Publ’ns) 81, at 2 (Off. of Special Educ. Programs June 9, 1994) (“It is residence that creates the duty under the statute and regulations, not the location of the child or school.”).

330. *Id.* IDEA defines a “ward of the state” to mean “a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.” 20 U.S.C. § 1401(36)(A). A state might place one of its wards in residential care across states lines if the state lacks sufficient beds to house the child. But the child’s residency under IDEA does not change simply because the state has placed its ward at a residential facility in another state. See Letter to McAllister, 21 IDELR at 2.

331. See Letter to McAllister, 21 IDELR at 2; see also Letter to Moody, 23 IDELR (LRP Publ’ns) 833, at 1 (Off. of Special Educ. Programs Oct. 24, 1995).

332. Letter to McAllister, 21 IDELR at 2.

paying for the child's education because the state public health agency did not inform the district that it would be placing the child at a treatment facility in Utah.³³³ In addition, the school district argued that it was not financially responsible for providing for the child's education in Utah because it was willing and capable of educating the student within its own educational programs.³³⁴ Under these facts, OSEP found that neither the Utah State Board of Education (the state education agency) nor the school district in whose jurisdiction the Utah residential facility was located violated IDEA by refusing to provide educational services to these students, because the ultimate responsibility for those students lay with the sending state's department of education.³³⁵

OSEP's rule, however, results in buckpassing and could potentially delay the delivery of services to the child. Section 504 could be used in this instance to provide additional protections to the child. First, the Utah State Board of Education and the local school district would have had the responsibility for identifying and locating the child under § 504.³³⁶ Once the child was discovered, Utah and its school district would have had the responsibility of ensuring that the child was receiving an appropriate education in the least restrictive environment.³³⁷ This could include allowing the child at the residential facility to participate in art or music classes not available at the residential treatment facility, to ensure that the child could be educated for part of the day with nondisabled children. Finally, because the child was domiciled out-of-state, the Utah school district could have sought reimbursement from the out-of-state jurisdiction.

OSEP further developed this limited understanding of IDEA coverage for children receiving residential care outside of their parents' state in *Letter to Moody*, which involved a Massachusetts school committee placing a child with a disability at a residential program in Massachusetts.³³⁸ When the child's parents subsequently moved to another state, leaving the child behind, the Massachusetts Department of Elementary and Secondary Education (the state education agency) asked OSEP whether, under IDEA, it continued to bear responsibility for making an appropriate education

333. *Id.*

334. *Id.*

335. *Id.* at 3.

336. *See* 34 C.F.R. § 104.32(a) (2025).

337. *See id.* §§ 104.33-104.34.

338. 23 IDELR (LRP Publ'ns) 833, at 1 (Off. of Special Educ. Programs Oct. 24, 1995).

available to the child attending the Massachusetts residential program. OSEP responded that because the parents of the student had established residency out-of-state, Massachusetts and its school committees (the school districts) were no longer responsible for the child.³³⁹

Section 504's stopgap function would require the local Massachusetts school committee to ensure that the child received an appropriate education while they were in the residential program. Applying OCR's understanding of the term "in the recipient's jurisdiction" as used in § 504's K-12 regulations, the Massachusetts school committee where the residential program was located would have an obligation to make an appropriate education available to the child as § 504 defines it, but could charge tuition for those services to the state and school district where the child's parents were domiciled. Thus, if the local Massachusetts school committee found that the residential treatment program lacked the capacity to provide appropriate special education or related services to the child, § 504 would still require the school committee to provide these services to the child.

IV. CONGRESS INTENDED § 504 TO GRANT DISABLED CHILDREN ACCESS TO APPROPRIATE EDUCATION SERVICES

The Article's second contention—a new argument in the academic literature—is that Congress intended for § 504 to serve as a stopgap to IDEA, providing a separate pathway for disabled students to secure special education and related services needed to receive meaningful access to their education. Part IV examines the legislative histories of a bill to amend Title VI of the Civil Rights Act of 1964 to prohibit disability discrimination and the Rehabilitation Amendments Act of 1974—two key sources containing § 504's congressional history. A close read of these histories indicates that when Congress passed § 504, it was acutely aware that disabled children at the time were being excluded from schools precisely because school districts lacked the capacity to provide appropriate educational services, such as special education and related services, and understood that § 504 could be an important tool to help these children access these services.

339. *Id.* at 1-2.

A. Legislative History of a Bill to Amend Title VI of the Civil Rights Act of 1964

This Section begins by providing context for how Congress came to understand that antidiscrimination legislation was needed to protect disabled individuals. It then provides examples from floor debates to show that Congress understood that antidiscrimination legislation could be a tool to help disabled children secure special education and related services. While the debates predated § 504, the bills at issue were in many ways precursors to § 504, and responded to the same concerns that animated Congress when it passed the Rehabilitation Act of 1973 and thereby brought § 504 into being.

Prior to the early 1970s, federal disability policy focused on vocational rehabilitation “whose purpose was to integrate disabled persons into the economic mainstream.”³⁴⁰ By the early 1970s, members of Congress began to expand their understanding of federal disability policy to include antidiscrimination legislation: “[T]he concept that disabled people had a civil right to broad social and economic participation was beginning to be accepted outside of the disability and rehabilitation community, and this acceptance was reflected in the United States Congress.”³⁴¹

In 1971 and 1972, two members of Congress “with histories of support for both civil rights and health and human service systems”³⁴²—Rep. Charles A. Vanik (D-OH) and Sen. Hubert Humphrey (D-MN)—introduced legislation that would have amended Title VI of the Civil Rights Act of 1964, a statute that prohibits race, color, and national-origin discrimination in federally assisted programs.³⁴³ The bills would also prohibit “physical and mental handicap” discrimination in federally assisted programs and activities.³⁴⁴ The congressional record on these bills contains floor debates that provide important insight into how the bills’ sponsors understood the problems that the legislation would address. Their remarks introducing the legislation indicate that one of their primary concerns was to ensure that disabled schoolchildren had access to appropriate educational services

340. SCOTCH, *supra* note 64, at 22.

341. *Id.* at 42-43.

342. *Id.* at 43.

343. 42 U.S.C. § 2000d (2024) (Title VI’s antidiscrimination mandate).

344. See 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik); 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey); see also SCOTCH, *supra* note 64, at 42-45.

needed to attend public school, such as special education and related services. While neither of the proposed bills came up for vote in committee or on the floor of either house,³⁴⁵ the Supreme Court has called these bills “the proposal that later became § 504” and cited the floor debates surrounding the legislation as reflective of “the conduct that Congress sought to alter in passing the Rehabilitation Act [of 1973].”³⁴⁶

Vanik’s remarks make clear that a primary concern that motivated his House bill “to provide equal treatment of the handicapped in all programs which receive Federal assistance” was the need for appropriate educational services to ensure greater public school access for disabled children.³⁴⁷ First, he lamented that although “the parents of handicapped children pay Federal taxes,” existing federal educational programs such as the Elementary and Secondary Education Act (“ESEA”) and the Impact Aid Program made no effort “to help educate the nonschool handicapped child.”³⁴⁸ To frame the extent of the problem, he said, “We can no longer ignore the fact that the U.S. Office of Education estimates that over 1 million handicapped children are excluded from school and exist in a no-man’s land between school, the State institution, and home.”³⁴⁹ His subsequent comments make clear that his concern included disabled children excluded from school because they were denied appropriate educational services such as special education and related services. Vanik explained:

Handicapped children, even the most severely handicapped, do learn when given the chance to participate in *educational programs tailored to meet their special needs*. The incredible number of mentally handicapped not receiving any *educational services* is one of the great tragedies in the American way of life. I discovered from

345. SCOTCH, *supra* note 64, at 44. Scotch speculates that the reason why the bills did not advance is because the legislation received opposition from civil rights advocates who were “concerned that any significant broadening of the scope of the Civil Rights Act would necessarily distract from and thus diminish enforcement of the existing provisions.” *Id.* at 45.

346. *Alexander v. Choate*, 469 U.S. 287, 297 (1985); *see id.* at 296 (citing 118 Cong. Rec. 525-26 (1972)).

347. *See, e.g.*, 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik).

348. *Id.*

349. *Id.*

the U.S. Office of Education that less than 40 percent of the 7 million handicapped children receive the *educational services* they need.³⁵⁰

Vanik also provided specific examples of parents who had written letters to HEW's Bureau of Education for the Handicapped "seeking *appropriate educational services* for their children."³⁵¹ In one letter, a parent stated:

I have an emotionally disturbed son, one of five children. He is nine years old. I have tried to get him in *special education* for almost two years. I keep hearing he's on a list: [W]ait. He had all tests, I talked to teachers, principals, psychologists. That does no good, if they go on ignoring the problem. I am very concerned and wonder how many other children are neglected like this. You advertise on TV, in newspapers, then have no room for these children! Maybe it is only in my area. I hope it isn't a widespread problem.³⁵²

Vanik also explained to his colleagues (citing *State ex rel. Beattie v. Board of Education*,³⁵³ discussed in Part I) that while courts had once sanctioned the exclusion of disabled children from school, courts were now recognizing that this exclusion violated disabled children's constitutional rights.³⁵⁴ To make the point, Vanik discussed *Pennsylvania Association for Retarded Children v. Pennsylvania*³⁵⁵ (discussed in Part I).³⁵⁶ In *PARC*, plaintiffs challenged Pennsylvania's practice of excluding children with intellectual disabilities labeled "uneducable,"³⁵⁷ objecting to the premise

350. *Id.* (emphasis added).

351. *Id.* (emphasis added).

352. *Id.* (citing "inquiries" submitted to "Closer Look," a project that HEW's Bureau of Education for the Handicapped funded).

353. 172 N.W. 153, 154 (Wis. 1919); *see supra* notes 25-33 and accompanying text. In describing *Beattie*, Vanik states: "At times, handicapped children were seen as a physical threat or as uneducable. In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect on his classmates.'" 117 Cong. Rec. 45974 (1971).

354. *Id.* at 45975.

355. 334 F. Supp. 1257 (E.D. Pa. 1971); 343 F. Supp. 279 (E.D. Pa. 1972).

356. 117 Cong. Rec. 45974-75 (1971).

357. *See PARC I*, 334 F. Supp. 1257, 1264 (E.D. Pa. 1971); *PARC II*, 343 F. Supp. 279, 282 (E.D. Pa. 1972).

that some children were simply unable to learn because of disability. As Part I explains, the case quickly settled after the plaintiffs' expert witnesses introduced overwhelming evidence that all intellectually disabled children were capable of learning with appropriate education and training.³⁵⁸ Vanik recognized that cases like *PARC* were "developing across the country," putting school districts on notice that their exclusionary practices and denials of appropriate educational services violated disabled children's constitutional rights to equal protection and due process.³⁵⁹ In discussing cases like *PARC* in a civil rights bill, Vanik expressed that the legislation could be another legal tool that parents could use to challenge the exclusion of disabled children from school due to failure to provide them with appropriate educational services.

Like Vanik's remarks in the House, Humphrey's remarks on the Senate floor make clear that school districts' failure to provide appropriate educational services to disabled children was animating the legislation. But Humphrey went a step further, making clear that a school district's failure to provide disabled children with appropriate educational services would violate the proposed legislation's antidiscrimination mandate. Humphrey began by reciting the proposed legislation's antidiscrimination mandate (here in italics): "Let me cite certain examples documenting the need for this legislation—cases where *people with a mental or physical handicap are excluded from participation in, are denied the benefits of, or are subjected to discrimination under programs or activities receiving Federal assistance.*"³⁶⁰ The first example that Humphrey cites—where disabled students were being *excluded from participation in, denied the benefits of, or subjected to discrimination* because of disability—includes the denial of appropriate educational services in schools:

358. LIPPMAN & GOLDBERG, *supra* note 47, at 29-30; *see also supra* notes 50-53 and accompanying text.

359. *See* 117 Cong. Rec. 45975 (1971) ("There is a vital message in the decision for those in America who wish to protect the civil rights of the handicapped. Not only is exclusion from educational services a discriminatory practice [under the equal protection clause of the 14th Amendment], but it is a violation of due process rights.").

360. 118 Cong. Reg. 525 (1972) (emphasis added). The bill's antidiscrimination mandate is almost identical to § 504's antidiscrimination mandate. *Cf.* 29 U.S.C. § 794(a) (2024) ("No otherwise qualified individual with a disability in the United States . . . 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.") (emphasis added).

The U.S. Office of Education has reported that less than 40 percent of the 7 million handicapped children get the special educational assistance they need—yet this Nation has made a fundamental commitment to the right of all children to education. Many of these children are classified as educable mentally retarded. But more than 1 million children are denied entry into public schools, even to participate in special classes.³⁶¹

Regrettably, Humphrey bought into the ableist dichotomy between “educable” and “uneducable” students. Nevertheless, his comment that children are excluded from school “even to participate in special classes” suggests that he understood that school districts must provide appropriate educational services needed to ensure disabled children receive full access to an education. Elsewhere, he noted that school districts’ failure to provide related services such as transportation was another barrier to disabled children’s full participation in school.³⁶²

Finally, while it is true that Vanik and Humphrey understood that their bills would also protect disabled individuals from discrimination in other contexts such as employment, on airlines, in insurance coverage,³⁶³ and in institutions,³⁶⁴ their comments suggest that their primary focus was education. Indeed, the proposed bills’ definition of the term “physical or mental handicap” would have limited the statute’s antidiscrimination protections to those who have an impairment “which requires *special education and related services*.”³⁶⁵ The bills’ definition of “physical or mental

361. 118 Cong. Rec. 525 (1972) (statement of Sen. Humphrey).

362. *Id.* (“The variety of explanations for this denial include problems of transportation and architectural barriers.”).

363. *See, e.g., id.* at 525-26 (“I have focused my attention on the handicapped child. But injustices confronted by the hidden population of millions of handicapped persons across America are being increasingly brought to light, with challenges being raised where a handicapped person cannot travel alone on an airline flight, or is denied mortgage life insurance protection or a fair wage for his work, or experiences the discriminatory effect of job qualification questionnaires or employment procedures.”).

364. 117 Cong. Rec. 45974 (1971) (statement of Rep. Vanik) (“In this country we still have the snakepit mental institutions—institutions for confinement without treatment, where brutality and unexplained deaths are common.”).

365. *See* 118 Cong. Rec. 526 (1972) (defining the term “physical or mental handicap” in S.3044 (1972) as including “mental retardation, hardness of hearing, deafness, speech impairment, visual handicap, serious emotional

handicap” is strikingly similar to the one used five years later to define “handicapped children” for purposes of determining eligibility for special education and related services under IDEA’s predecessor statute.³⁶⁶

B. The Rehabilitation Act Amendments of 1974 and Their Legislative History

The Rehabilitation Act Amendments of 1974 and their legislative history also reflect congressional intent that § 504 would be an important tool in protecting disabled children’s access to special education and related services. Section 504 of the Rehabilitation Act of 1973 provided key protections against discrimination on the basis of disability, and the later 1974 amendments sought to strengthen protections for students with disabilities seeking access to education. Two sections within the 1974 amendments to the Rehabilitation Act reflect this congressional intent: § 111(a), broadening the definition of the term “handicapped individual”; and §§ 300-306 (Title III of the Act), creating the White House Conference on Handicapped Individuals. These sections are discussed below.

1. Amendments to Broaden the Definition of “Handicapped Individual”

The Rehabilitation Act of 1973 originally defined the term “handicapped individual” as one who “has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment” and “can reasonably be expected to benefit in terms of employability from vocational rehabilitation services.”³⁶⁷ This definition was well-suited to the Rehabilitation Act’s vocational training and counseling programs but unintentionally limited § 504’s protections to

disturbance, being crippled, or any other health impairment which requires special education and related services.”).

366. See Education of Handicapped Children, 42 Fed. Reg. 42474, 42478 (Aug. 23, 1977) (codified at 45 C.F.R. § 121a.5 (1977)) (“As used in this part, the term ‘handicapped children’ means those children evaluated in accordance with §§ 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, *who because of those impairments need special education and related services.*” (emphasis added)).

367. See Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7(6), 87 Stat. 355, 361.

those who could gain job skills with the assistance of vocational rehabilitation services.³⁶⁸ Concerned that this narrow definition would have excluded many individuals from coverage under § 504 (including disabled children who were not receiving appropriate educational services in school),³⁶⁹ Congress passed the Rehabilitation Act Amendments of 1974 (the “Amendments Act”).³⁷⁰ The Amendments Act significantly broadened the definition of the term “handicapped individual” as it applied to the Act’s antidiscrimination provisions, including § 504.

The new definition expanded antidiscrimination protections to disabled individuals who could not seek employment but who nevertheless had a “physical or mental impairment” that “substantially limit[ed] one or more of such person’s major life activities.”³⁷¹ This included children who may never be employed because of a disability, but who were nevertheless capable of learning with appropriate special education and related services. Indeed, in reconciling the House and Senate versions of the Rehabilitation Act Amendments of 1974, the Senate Committee on Labor and Public Welfare issued a report to serve as legislative history for the Amendments Act and, retroactively, for the 1973 Rehabilitation Act.³⁷² In discussing who would benefit from the broadened definition of the term “handicapped individuals,” the committee report first gives the example of disabled children excluded from schools:

Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from, vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation,

368. For a full history of how HEW staffers worked with Congress to amend the Rehabilitation Act to expand the definition of the term “handicapped individual,” see SCOTCH, *supra* note 64, at 64-68.

369. *Id.*

370. Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, 88 Stat. 1617.

371. § 111(a), 88 Stat. at 1619. The new definition also expanded antidiscrimination protections to any person who “has a record of such an impairment,” and to persons “regarded as having such an impairment.” *Id.* This amended definition of the term “handicapped individual” is virtually indistinguishable from the Rehabilitation Act’s current definition of the term “individual with a disability.” See 29 U.S.C. § 705(20) (2024). Congress amended the Rehabilitation Act in 1992 to substitute the word “handicapped” for “disabled.” See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344, 4348-49.

372. See SCOTCH, *supra* note 64, at 66-67.

*education, health services, or any other Federally-aided programs. Examples of handicapped individuals who may suffer discrimination in the receipt of Federally-assisted services but who may have been unintentionally excluded from the protection of section 504 by the references to enhanced employability . . . are as follows: physically or mentally handicapped children who may be denied admission to Federally-supported school systems on the basis of their handicap . . .*³⁷³

This legislative history demonstrates that in expanding the definition of “handicapped individuals,” Congress specifically intended to include more students within § 504’s protections, and in so doing to protect their access to education.

2. Creation of the White House Conference on Handicapped Individuals

The creation of the White House Conference on Handicapped Individuals through the Amendments Act illustrates that Congress understood that it would have to use a variety of legislative devices to help disabled children access appropriate educational services like special education. The menu of policy options included antidiscrimination legislation with legal remedies like § 504 as well as legislation to fund special education and related services, such as IDEA.

Title III of the Amendments Act created the White House Conference on Handicapped Individuals. The purpose of the Conference was “to develop recommendations and stimulate a national assessment of problems, and solutions to such problems, facing individuals with handicaps.”³⁷⁴ The Amendments Act directed the Conference to give “special consideration” for making recommendations on several issues related to providing disabled individuals with appropriate educational services.³⁷⁵

Some of the recommendations that Congress wanted the Conference to provide illustrate that the legislative body understood that it would have to use a variety of legislative devices to provide disabled children access to public education. For instance, Congress sought recommendations for “assuring that every individual with a handicap receives appropriately designed benefits of the educational system,” which could be interpreted to

373. See S. REP. NO. 93-1297, at 38 (emphasis added).

374. Rehabilitation Act Amendments of 1974 § 302(a), 88 Stat. at 1631.

375. See generally *id.* § 302(d).

mean appropriately designed instruction (i.e., special education) or related services needed to ensure that disabled students access the curriculum.³⁷⁶ Congress also sought recommendations for “assuring that individuals with handicaps have available to them all special services and assistance which will enable them to live their lives as fully and independently as possible.”³⁷⁷ This might require the Conference to make recommendations on how special education could help disabled children transition from public education to postsecondary life. Indeed, Congress eventually amended IDEA to require the IEP to contain an individual transition plan as part of the special education provided to help students ages sixteen and older transfer out of secondary education.³⁷⁸ This final directive along with other sections of the committee report discussing the Conference suggests that Congress understood that an appropriate education is a prerequisite for independent living.³⁷⁹

Importantly, the committee report also illustrates that the legislature understood that it would have to use multiple legislative devices such as funding legislation and legislation providing legal remedies to help disabled children receive appropriate educational services like special education in public schools. For instance, the committee recognized that states could not comply with court decrees ordering schools to provide disabled children with equal access to educational services or with state legislation requiring schools to educate all children “without appropriate *remedies* and without adequate *funding*.”³⁸⁰ Having established a two-pronged federal strategy for addressing the educational needs of disabled children through adequate remedies and adequate funding, the committee tasked the Conference with evaluating implementation of legislation that would do each of these things.³⁸¹

376. *Id.* § 302(d)(2).

377. *Id.* § 302(d)(3) (emphasis added).

378. *See* Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101-476, § 101(a)(1), 104 Stat. 1103, 1104 (amending the definition of IEP to include “a statement of the needed transition services for students beginning no later than age 16 and annually thereafter”).

379. *See, e.g.*, S. REP. NO. 93-1297, at 58 (“Presently, of the 22 million individuals with physical handicaps, only about 800,000 are employed. Of the 6 million individuals with [intellectual disability], nine of ten could work and live more independently if properly trained. Few receive this training.”).

380. *Id.* at 57 (emphasis added).

381. *Id.* at 58.

With regard to legislation to fund special education programs, the committee charged the Conference with evaluating the Education Amendments of 1974, which amended ESEA to provide states with a one-time grant of funds to educate unserved disabled children.³⁸² Likewise, the committee charged the Conference with evaluating implementation of “[m]ore permanent and comprehensive legislation” that at the time was still “in the final stage of consideration in both the Senate and House Committees.”³⁸³ The pending legislation would provide “funding which is greatly needed for expansion of full services to school-age and pre-school children with handicaps.”³⁸⁴ This, of course, was legislation that would ultimately become IDEA.

Finally, the committee made clear that in evaluating these funding programs, particularly with regard to how these programs prepared disabled individuals for employment, the Conference should consider legislation that provided remedies such as § 504 to enforce disabled individuals’ access to entitlements created through funding programs.³⁸⁵ Specifically, the committee tasked the Conference with paying “[s]pecial attention” “to the enforcement of sections 501, 503, and 504 of the Rehabilitation Act of 1973.”³⁸⁶ Section 501 of the Rehabilitation Act of 1973 prohibits disability discrimination in federal employment³⁸⁷ and § 503 requires federal contractors to take affirmative action to recruit, hire, promote, and retain disabled individuals.³⁸⁸ Taken together, these three statutes created strong federal remedies to ensure that disabled individuals would no longer be relegated to the margins of society. Congress understood that the problems facing disabled individuals were too great to be addressed through funding legislation alone. Federal disability policy would also have to provide disabled individuals with the remedies needed to enforce their rights.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* (“Special attention must be paid to the needs of those individuals who through no fault of their own have not received adequate education.”).

386. *Id.*

387. 29 U.S.C. § 791 (2024).

388. *See id.* § 793.

V. BARRIERS TO § 504'S STOPGAP RIGHTS

While § 504 provides meaningful stopgap rights, several barriers operate to ensure that these rights are either never realized, partially realized, or only realized once a parent hires an attorney. One barrier to full realization of § 504's stopgap rights is that school districts refuse to recognize § 504 FAPE, relying on a Supreme Court decision that Congress subsequently overturned.³⁸⁹

As recently as 2022, the National School Board Association ("NSBA") asserted that Congress intended IDEA and its predecessor to be the sole means of protecting a disabled child's access to a FAPE that includes special education and related services.³⁹⁰ NSBA claimed that the Rehabilitation Act of 1973 "imposes no affirmative obligations with respect to special educational programs,"³⁹¹ whereas the 1975 predecessor to IDEA "did obligate schools to provide special education services" and dedicated federal funds towards those services.³⁹²

The Supreme Court advanced similar arguments in *Smith v. Robinson*,³⁹³ but Congress subsequently overturned the opinion. In *Smith*, plaintiffs alleged that the school district had denied their right to FAPE under EHA (IDEA's predecessor), the Equal Protection Clause of the U.S. Constitution, and § 504.³⁹⁴ While the Court found a denial of FAPE under EHA, it rejected the plaintiffs' FAPE claims brought under the other laws. The Court held that Congress had not intended to have EHA's statutory scheme guaranteeing FAPE circumvented by resort to "more general" statutes like § 504.³⁹⁵

389. *See Smith v. Robinson*, 468 U.S. 992 (1984).

390. NSBA letter, *supra* note 9, at 3

391. *Id.*

392. *Id.* at 1-2.

393. *See, e.g., Robinson*, 468 U.S. at 1018 ("[A]lthough both [§ 504 and EHA] begin with an equal protection premise that handicapped children must be given access to public education, it does not follow that the affirmative requirements imposed by the two statutes are the same. The significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA.").

394. *Id.* at 994.

395. *Id.* at 1016 ("We also concluded that Congress did not intend to have the EHA scheme circumvented by resort to the more general provisions of § 1983. We reach the same conclusion regarding petitioners' § 504 claim."); *see also id.* at

In response to *Smith*, Congress passed the Handicapped Children's Protection Act of 1986, which amended EHA to ensure that the statute could not be construed to limit a child's FAPE rights under more general laws like the Equal Protection Clause or § 504.³⁹⁶ However, Congress placed an important restriction on plaintiffs' ability to legally enforce FAPE rights under more general statutes. Before a plaintiff can file a claim for denial of FAPE under § 504 (or any other law) in court, the plaintiff must exhaust their claim "to the same extent as would be required" had they brought the action under the EHA.³⁹⁷ In construing this amendment to the EHA (now IDEA), the Supreme Court has twice recognized a plaintiff's right to file a denial-of-FAPE claim under other laws, including as recently as 2023.³⁹⁸ Therefore, unlike what NSBA has argued, Congress and the Supreme Court have made clear that IDEA is not the sole means to protect a disabled child's access to FAPE.

The federal courts are poised to undermine § 504 FAPE's potential even further in light of *Loper Bright Enterprises v. Raimondo*, a case that held that courts do not have to defer to an agency's interpretation of an ambiguous statute when exercising judicial review under the Administrative Procedures Act.³⁹⁹ Advocates and scholars are still seeking to understand the effect that this opinion will have on § 504. However, because many of the substantive rights that § 504 guarantees are only found in regulations (including the right to FAPE), disability rights advocates may worry that

1009 ("Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education.").

396. See Pub. L. No. 99-372, § 3, 100 Stat. 796, 797 (codified at 20 U.S.C. § 1415(l)) ("Nothing in this title shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of handicapped children and youth, except that before the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (b)(2) and (c) shall be exhausted to the same extent as would be required had the action been brought under this part.").

397. *Id.*

398. *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 146-48 (2023) (holding that a plaintiff seeking compensatory damages under the ADA for a denial of FAPE was not required to exhaust under IDEA); see also *Fry v. Napoleon Cmty. Schs.*, 580 U.S. 154, 168 (2017) (holding that a plaintiff bringing a claim under § 504 is not required to exhaust under IDEA if "the remedy sought is not for the denial of a FAPE").

399. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 413 (2024).

courts will begin narrowing these rights even further if courts no longer have to defer to ED's interpretation of these standards.

Another barrier that has operated to limit a disabled child's ability to access § 504's stopgap rights is the actual or perceived cost to the school district to guarantee disabled students § 504 FAPE. School districts are not reimbursed for providing the services that § 504 FAPE guarantees.⁴⁰⁰ As such, schools balk at having to provide unreimbursed § 504 FAPE services, when they receive partial reimbursement for those same services if the child qualifies for them under IDEA.⁴⁰¹ Moreover, ED has stated that K-12 schools cannot allege high costs as a defense against failure to meet § 504 FAPE obligations,⁴⁰² while the Supreme Court has said that cost considerations may be asserted as a defense to separate and distinct requirements under § 504.⁴⁰³ ED's position that cost may not be asserted as a defense to § 504 FAPE has created resentment among school districts that provides fodder for schools and school officials who would like nothing more than to blow up § 504 FAPE entirely.⁴⁰⁴

400. See Kristin L. Lingren, Comment, *The Demise of Reasonable Accommodation Under Section 504: Special Education, the Public Schools, and an Unfunded Mandate*, 1996 Wis. L. Rev. 633, 649 ("Section 504 . . . provides school districts with no funding whatsoever to implement its mandates . . .").

401. *Id.* ("Congress authorized states to receive funding for forty percent of their IDEA costs."); cf. CASE-AASA Letter, *supra* note 9, at 3 ("Consistent funding streams for schools have not increased at the rate of inflation nor are there any funding streams which support the implementation of Section 504. As we seek improvements and protections for students with disabilities across the country, we must be careful to ensure any additional protections are not at the expense of an overburdened and highly stressed educational system which is at the breaking point.").

402. See Letter to Zirkel, 20 IDELR (LRP Publ'ns) 134, 136 (OCR Aug. 23, 1993).

403. See *supra* note 210 for discussion of *Alexander v. Choate*, 469 U.S. 287 (1985).

404. For example, the NSBA has advocated streamlining § 504's antidiscrimination mandate by abolishing the FAPE standard under 504 while preserving the "reasonable accommodation" requirements, which allow recipients to raise costs as a defense. Cf. NSBA Letter, *supra* note 9, at 6 ("Without the 'FAPE' language, the Section 504 regulations could provide guidance on addressing the needs of a large population of students with disabilities in this era, many of whom are struggling with mental health issues, allergies, and attention difficulties that were not broadly understood when the original regulations were issued. Consistent with the structure and purpose of the statutes, IDEA would apply to students with disabilities whose 'FAPE' requirements exceed the Section 504 'reasonable accommodation' standards.").

A final barrier to full realization is the Trump Administration's dismantling of ED itself. In March 2025, the Administration fired forty percent of OCR's staff and shuttered the majority of the agency's regional offices.⁴⁰⁵ Moreover, in June 2026 the Administration announced that it would move OCR to the Department of Justice and would move the Office of Special Education and Rehabilitative Services, which oversees IDEA, to the Department of Health and Human Services.⁴⁰⁶ Some advocates have argued that these closures and agency transfers will likely undermine the federal government's capacity to process and resolve individual complaints.⁴⁰⁷

It is still too early to measure exactly what has been lost by these closures and transfers. Anecdotally, scholars like Professor Claire Raj have stated that although OCR's individual-complaint mechanism traditionally had a large backlog, simply filing a complaint with the office used to be enough to get school districts to make needed changes to ensure compliance with § 504 FAPE.⁴⁰⁸ My experience as well during my time as a litigator suggested that simply filing a complaint with OCR could cause a school district to come to the table to negotiate a resolution without the need for litigation. But data on OCR complaint filings following the office closures in March 2025 suggest that the agency is no longer interested in helping parties reach an amicable resolution. For example, a report by the Government Accountability Office found that OCR received 9,000

405. Gillispie, *supra* note 182.

406. Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Additional Partnerships to Strengthen Coordination for Individuals with Disabilities Programs, Bolster Civil Rights Enforcement (June 16, 2026), <https://www.ed.gov/about/news/press-release/us-department-of-education-announces-additional-partnerships-strengthen-coordination-individuals-disabilities-programs-bolster-civil-rights> [<https://perma.cc/8DW9-B282>].

407. See Robyn Linscott, *Moving Special Education and Civil Rights out of Education Department Risks a Patchwork of Rights for Students with Disabilities*, ARC (June 16, 2026), <https://thearc.org/blog/moving-special-education-and-civil-rights-out-of-education-department-risks-a-patchwork-of-rights-for-students-with-disabilities/> [<https://perma.cc/6E77-ZQGL>].

408. Claire Raj, Remarks on Panel, Pillars in Peril: Civil and Disability Rights Laws Under Attack at Association of American Law Schools (AALS) 2026 Annual Meeting (Jan. 7, 2026).

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complaints between March and September 2025.⁴⁰⁹ The agency resolved 7,000 of those 9,000 and dismissed 90% of those resolved.⁴¹⁰ More troubling, the Supreme Court has allowed the agency to move forward with its staffing cuts.⁴¹¹

CONCLUSION

§ 504 FAPE continues to be an underappreciated resource for securing special education services for disabled children who are either ineligible for services under IDEA, or who cannot access those services due to structural flaws, such as the statute's residence requirements. Advocates should know that they are on sound footing when they request educational services under the statute. The congressional history illustrates that Congress understood that § 504 could be an alternate pathway for ensuring that disabled children receive the special education and related services they need to access their education.

409. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-26-108320, DEPARTMENT OF EDUCATION: FULL COSTS AND SAVINGS ESTIMATE NEEDED FOR REDUCTION-IN-FORCE AND RESTRUCTURING OF THE OFFICE FOR CIVIL RIGHTS 2 (2026).

410. *Id.*

411. *See* McMahon v. New York, 145 S. Ct. 2643, 2643 (2025).