SPECIAL EDUCATION LAW: CASES AND MATERIALS

Fourth Edition

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EDUCATING STUDENTS WITH DISABILITIES: CORE LEGAL CONCEPTS

PAGE 3, add to the end of note 1:

Another blog of interest is "Education Law Prof Blog," found at http://lawprofessors.typepad.com/education_law/.

PAGE 32, insert following note 3:

ENDREW F. V. DOUGLAS CNTY. SCH. DIST. RE-1
137 S. Ct. 988 (2017)

> *The lower courts applied an incorrect standard for determining whether a child with severe disabilities received free, appropriate public education. Without overruling* Rowley, *the Supreme Court determined that an educational program should be appropriately ambitious in light of a child's circumstances, and that every child should have the chance to meet challenging objectives.*

Chief Justice Roberts delivered the opinion of the Court.

Thirty-five years ago, this Court held that the Individuals with Disabilities Education Act establishes a substantive right to a "free appropriate public education" for certain children with disabilities. *Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U. S. 176 (1982). We declined, however, to endorse any one standard for determining "when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act." That "more difficult problem" is before us today.

I

A

The Individuals with Disabilities Education Act (IDEA or Act) offers States federal funds to assist in educating children with disabilities. In exchange for the funds, a State pledges to comply with a number of statutory conditions. Among them, the State must provide a free appropriate public education—a FAPE, for short—to all eligible children.

A FAPE, as the Act defines it, includes both "special education" and "related services." "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. A State covered by the IDEA must provide a disabled child with such special education and related services "in conformity with the [child's] individualized education program," or IEP.

The IEP is "the centerpiece of the statute's education delivery system for disabled children." A comprehensive plan prepared by a child's "IEP Team" (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. The IEP is the means by which special education and related services are "tailored to the unique needs" of a particular child.

The IDEA requires that every IEP include "a statement of the child's present levels of academic achievement and functional performance," describe "how the child's disability affects the child's involvement and progress in the general education curriculum," and set out "measurable annual goals, including academic and functional goals," along with a "description of how the child's progress toward meeting" those goals will be gauged. The IEP must also describe the "special education and related services . . . that will be provided" so that the child may "advance appropriately toward attaining the annual goals" and, when possible, "be involved in and make progress in the general education curriculum."

Parents and educators often agree about what a child's IEP should contain. But not always. When disagreement arises, parents may turn to dispute resolution procedures established by the IDEA. The parties may resolve their differences informally, through a "[p]reliminary meeting," or, somewhat more formally, through mediation. If these measures fail to produce accord, the parties may proceed to what the Act calls a "due process hearing" before a state or local educational agency. And at the conclusion of the administrative process, the losing party may seek redress in state or federal court.

B

This Court first addressed the FAPE requirement in *Rowley*. Plaintiff Amy Rowley was a first grader with impaired hearing. Her school district offered an IEP under which Amy would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. The district proposed that Amy's classroom teacher speak into a wireless transmitter and that Amy use an FM hearing aid designed to amplify her teacher's words; the district offered to supply both components of this system. But Amy's parents argued that the IEP should go further and provide a sign-language interpreter in all of her classes. Contending that the school district's refusal to furnish an interpreter denied Amy a FAPE, Amy's parents initiated administrative proceedings, then filed a lawsuit under the Act.

The District Court agreed that Amy had been denied a FAPE. The court acknowledged that Amy was making excellent progress in school: She was "perform[ing] better than the average child in her class" and "advancing easily from grade to grade." At the same time, Amy "under[stood] considerably less of what goes on in class than she could if she were not deaf." Concluding that "it has been left entirely to the courts and the hearings officers to give content to the requirement of an 'appropriate education,'" the District Court ruled

that Amy's education was not "appropriate" unless it provided her "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Second Circuit agreed with this analysis and affirmed.

In this Court, the parties advanced starkly different understandings of the FAPE requirement. Amy's parents defended the approach of the lower courts, arguing that the school district was required to provide instruction and services that would provide Amy an "equal educational opportunity" relative to children without disabilities. The school district, for its part, contended that the IDEA "did not create substantive individual rights"; the FAPE provision was instead merely aspirational.

Neither position carried the day. On the one hand, this Court rejected the view that the IDEA gives "courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed." After all, the statutory phrase "free appropriate public education" was expressly defined in the Act, even if the definition "tend[ed] toward the cryptic rather than the comprehensive." This Court went on to reject the "equal opportunity" standard adopted by the lower courts, concluding that "free appropriate public education" was a phrase "too complex to be captured by the word 'equal' whether one is speaking of opportunities or services." The Court also viewed the standard as "entirely unworkable," apt to require "impossible measurements and comparisons" that courts were ill suited to make.

On the other hand, the Court also rejected the school district's argument that the FAPE requirement was actually no requirement at all. Instead, the Court carefully charted a middle path. Even though "Congress was rather sketchy in establishing substantive requirements" under the Act, the Court nonetheless made clear that the Act guarantees a substantively adequate program of education to all eligible children. We explained that this requirement is satisfied, and a child has received a FAPE, if the child's IEP sets out an educational program that is "reasonably calculated to enable the child to receive educational benefits." For children receiving instruction in the regular classroom, this would generally require an IEP "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

In view of Amy Rowley's excellent progress and the "substantial" suite of specialized instruction and services offered in her IEP, we concluded that her program satisfied the FAPE requirement. But we went no further. Instead, we expressly "confine[d] our analysis" to the facts of the case before us. Observing that the Act requires States to "educate a wide spectrum" of children with disabilities and that "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end," we declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act."

C

Petitioner Endrew F. was diagnosed with autism at age two. Autism is a neurodevelopmental disorder generally marked by impaired social and communicative skills, "engagement in repetitive activities and stereotyped movements, resistance to

environmental change or change in daily routines, and unusual responses to sensory experiences." A child with autism qualifies as a "[c]hild with a disability" under the IDEA, and Colorado (where Endrew resides) accepts IDEA funding. Endrew is therefore entitled to the benefits of the Act, including a FAPE provided by the State.

Endrew attended school in respondent Douglas County School District from preschool through fourth grade. Each year, his IEP Team drafted an IEP addressed to his educational and functional needs. By Endrew's fourth grade year, however, his parents had become dissatisfied with his progress. Although Endrew displayed a number of strengths—his teachers described him as a humorous child with a "sweet disposition" who "show[ed] concern[ ] for friends"—he still "exhibited multiple behaviors that inhibited his ability to access learning in the classroom." Endrew would scream in class, climb over furniture and other students, and occasionally run away from school. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Endrew's parents saw it, his academic and functional progress had essentially stalled: Endrew's IEPs largely carried over the same basic goals and objectives from one year to the next, indicating that he was failing to make meaningful progress toward his aims. His parents believed that only a thorough overhaul of the school district's approach to Endrew's behavioral problems could reverse the trend. But in April 2010, the school district presented Endrew's parents with a proposed fifth grade IEP that was, in their view, pretty much the same as his past ones. So his parents removed Endrew from public school and enrolled him at Firefly Autism House, a private school that specializes in educating children with autism.

Endrew did much better at Firefly. The school developed a "behavioral intervention plan" that identified Endrew's most problematic behaviors and set out particular strategies for addressing them. Firefly also added heft to Endrew's academic goals. Within months, Endrew's behavior improved significantly, permitting him to make a degree of academic progress that had eluded him in public school.

In November 2010, some six months after Endrew started classes at Firefly, his parents again met with representatives of the Douglas County School District. The district presented a new IEP. Endrew's parents considered the IEP no more adequate than the one proposed in April, and rejected it. They were particularly concerned that the stated plan for addressing Endrew's behavior did not differ meaningfully from the plan in his fourth grade IEP, despite the fact that his experience at Firefly suggested that he would benefit from a different approach.

In February 2012, Endrew's parents filed a complaint with the Colorado Department of Education seeking reimbursement for Endrew's tuition at Firefly. To qualify for such relief, they were required to show that the school district had not provided Endrew a FAPE in a timely manner prior to his enrollment at the private school. Endrew's parents contended that the final IEP proposed by the school district was not "reasonably calculated to enable [Endrew] to receive educational benefits" and that Endrew had therefore been denied a FAPE. An Administrative Law Judge (ALJ) disagreed and denied relief.

Endrew's parents sought review in Federal District Court. Giving "due weight" to the decision of the ALJ, the District Court affirmed. The court acknowledged that Endrew's performance under past IEPs "did not reveal immense educational growth." But it concluded that annual modifications to Endrew's IEP objectives were "sufficient to show a pattern of, at the least, minimal progress." Because Endrew's previous IEPs had enabled him to make this sort of progress, the court reasoned, his latest, similar IEP was reasonably calculated to do the same thing. In the court's view, that was all *Rowley* demanded.

The Tenth Circuit affirmed. The Court of Appeals recited language from *Rowley* stating that the instruction and services furnished to children with disabilities must be calculated to confer "*some* educational benefit." The court noted that it had long interpreted this language to mean that a child's IEP is adequate as long as it is calculated to confer an "educational benefit [that is] merely . . . more than *de minimis.*" Applying this standard, the Tenth Circuit held that Endrew's IEP had been "reasonably calculated to enable [him] to make *some* progress.". Accordingly, he had not been denied a FAPE. . . .

II

A

The Court in *Rowley* declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." The school district, however, contends that *Rowley* nonetheless established that "an IEP need not promise any particular *level* of benefit," so long as it is "'reasonably calculated' to provide *some* benefit, as opposed to *none*."

The district relies on several passages from *Rowley* to make its case. It points to our observation that "any substantive standard prescribing the level of education to be accorded" children with disabilities was "[n]oticeably absent from the language of the statute." The district also emphasizes the Court's statement that the Act requires States to provide access to instruction "sufficient to confer *some* educational benefit," reasoning that any benefit, however minimal, satisfies this mandate. Finally, the district urges that the Court conclusively adopted a "some educational benefit" standard when it wrote that "the intent of the Act was more to open the door of public education to handicapped children . . . than to guarantee any particular level of education."

These statements in isolation do support the school district's argument. But the district makes too much of them. Our statement that the face of the IDEA imposed no explicit substantive standard must be evaluated alongside our statement that a substantive standard was "implicit in the Act." Similarly, we find little significance in the Court's language concerning the requirement that States provide instruction calculated to "confer some educational benefit." The Court had no need to say anything more particular, since the case before it involved a child whose progress plainly demonstrated that her IEP was designed to deliver more than adequate educational benefits. The Court's principal

concern was to correct what it viewed as the surprising rulings below: that the IDEA effectively empowers judges to elaborate a federal common law of public education, and that a child performing *better* than most in her class had been denied a FAPE. The Court was not concerned with precisely articulating a governing standard for closer cases. And the statement that the Act did not "guarantee any particular level of education" simply reflects the unobjectionable proposition that the IDEA cannot and does not promise "any particular [educational] outcome." No law could do that—for any child.

More important, the school district's reading of these isolated statements runs headlong into several points on which *Rowley* is crystal clear. For instance—just after saying that the Act requires instruction that is "sufficient to confer some educational benefit"—we noted that "[t]he determination of when handicapped children are receiving *sufficient* educational benefits . . . presents a . . . difficult problem." And then we expressly declined "to establish any one test for determining the *adequacy* of educational benefits" under the Act. It would not have been "difficult" for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough. And it would have been strange to refuse to set out a test for the adequacy of educational benefits if we had just done exactly that. We cannot accept the school district's reading of *Rowley*.

B

While *Rowley* declined to articulate an overarching standard to evaluate the adequacy of the education provided under the Act, the decision and the statutory language point to a general approach: To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an "ambitious" piece of legislation enacted "in response to Congress' perception that a majority of handicapped children in the United States 'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to "drop out."'" *Rowley* (quoting H. R. Rep. No. 94-332, p. 2 (1975)). A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act.

That the progress contemplated by the IEP must be appropriate in light of the child's circumstances should come as no surprise. A focus on the particular child is at the core of

the IDEA. The instruction offered must be "*specially* designed" to meet a child's "*unique* needs" through an "[*i*]*ndividualized* education program." (emphasis added). An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth. As we observed in *Rowley*, the IDEA "requires participating States to educate a wide spectrum of handicapped children," and "the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."

Rowley sheds light on what appropriate progress will look like in many cases. There, the Court recognized that the IDEA requires that children with disabilities receive education in the regular classroom "whenever possible." When this preference is met, "the system itself monitors the educational progress of the child." "Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material." Progress through this system is what our society generally means by an "education." And access to an "education" is what the IDEA promises. Accordingly, for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

This guidance is grounded in the statutory definition of a FAPE. One of the components of a FAPE is "special education," defined as "specially designed instruction . . . to meet the unique needs of a child with a disability." In determining what it means to "meet the unique needs" of a child with a disability, the provisions governing the IEP development process are a natural source of guidance: It is through the IEP that "[t]he 'free appropriate public education' required by the Act is tailored to the unique needs of" a particular child.

The IEP provisions reflect *Rowley*'s expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade. Every IEP begins by describing a child's present level of achievement, including explaining "how the child's disability affects the child's involvement and progress in the general education curriculum." It then sets out "a statement of measurable annual goals . . . designed to . . . enable the child to be involved in and make progress in the general education curriculum," along with a description of specialized instruction and services that the child will receive. The instruction and services must likewise be provided with an eye toward "progress in the general education curriculum." Similar IEP requirements have been in place since the time the States began accepting funding under the IDEA.

The school district protests that these provisions impose only procedural requirements—a checklist of items the IEP must address—not a substantive standard enforceable in court. Tr. of Oral Arg. 50-51. But the procedures are there for a reason, and their focus provides insight into what it means, for purposes of the FAPE definition, to "meet the unique needs" of a child with a disability. When a child is fully integrated in the regular

classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the general curriculum.[2]

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the "merely more than *de minimis*" test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.

When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to "sitting idly . . . awaiting the time when they were old enough to 'drop out.'" The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.

C

Endrew's parents argue that the Act goes even further. In their view, a FAPE is "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities."

This standard is strikingly similar to the one the lower courts adopted in *Rowley*, and it is virtually identical to the formulation advanced by Justice Blackmun in his separate writing in that case. ("[T]he question is whether Amy's program . . . offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her non-handicapped classmates"). But the majority rejected any such standard in clear terms. ("The requirement that States provide 'equal' educational opportunities would . . . seem to present an entirely unworkable standard requiring impossible measurements and comparisons"). Mindful that Congress (despite several intervening

[2] This guidance should not be interpreted as an inflexible rule. We declined to hold in *Rowley*, and do not hold today, that "every handicapped child who is advancing from grade to grade . . . is automatically receiving a [FAPE]."

amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided, we decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case.

D

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

The judgment of the United States Court of Appeals for the Tenth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

NOTES AND QUESTIONS

1. The *Endrew* Court emphasizes that it is not overruling *Rowley*. But do you think that if an case identical to *Rowley* were to arise after *Endrew*, that the result would be the same as it was in *Rowley* back in 1982?

2. What do you think is the significance of note 2? When might a child be advancing from grade to grade but still not be receiving an appropriate education under the standards the Court articulates?

3. What do you expect to happen in *Endrew* now that the case has been remanded? *See Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, 290 F. Supp. 3d 1175, 1183, (D. Colo. 2018) (ordering reimbursement for private placement, stating that IEP demonstrated "continued pattern of unambitious goals and objectives of his prior IEPs"), *appeal dismissed*, No. 18-1089 (10th Cir. Apr. 5, 2018).

4. The impact of the *Endrew F.* decision remains uncertain. Professor Zirkel looked at 49 court cases with appropriate education holdings in which hearing officers or

administrative law judges relied on pre-*Endrew F.* caselaw and the court applied *Endrew F.* He found that the court upheld that administrative outcome in 90% of the decisions, although he noted that 7 of 44 outcomes that stayed the same were in favor of the parent. Perry A. Zirkel, *The Aftermath of* Endrew F. *One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 450 (2018). Of course, greater changes in results may occur over time, or at the due process hearing or IEP meeting levels. For further analysis of *Endrew F.* see Endrew F. *and* Fry *Symposium*, 46 J.L. & EDUC. 425 (2017).

CHAPTER 2
ELIGIBILITY AND EVALUATION

PAGE 56, add to the end of note 56:

See generally Letter to Woolsey, 61 IDELR 144 (Office of Special Educ. Programs 2012) ("Each State has the discretion to define significant disproportionality for the LEAs and for the State in general. The State's definition needs to be based on an analysis of numerical information, and may not include consideration of the State's or IDEA's policies, procedures, or practices. . . . Under IDEA section 618(d)(2), when the SEA identifies an LEA with significant disproportionality in any of the areas identified above, the State must: (1) provide for the review and, if appropriate, revision of its policies, procedures, and practices; (2) require the LEA to reserve the maximum amount of funds under section 613(f) to provide [early intervening services] to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly overidentified; and (3) require the LEA to report publicly on the revision or policies, procedures, and practices.").

PAGE 100, add to the end of note 8:

Caselaw development continues as well. Of particular interest is a recent decision vacating a lower court determination that a child was not eligible for special education because of overall achievement academically and some test results that showed above-average performance in reading when the child continued to show indications of a reading fluency deficit. *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 81 (1st Cir. 2016) ("[W]hen the risk is high that a child's overall academic performance could mask her learning disability because of innate or ancillary factors specific to that child, and the regulations included that disability category to mitigate such masking, . . . generalized academic measures—even when proven to be a fair indicator of the child's learning disability—must have high probative value to outweigh specific disability measures in identifying an SLD." (citation omitted)). If a child succeeds academically, but it appears that the child would not do so except for additional services and accommodations provided by the school without deeming the child eligible for special education, is the child nevertheless eligible and ought to be identified as such? *Compare L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2017) (holding that when parties agreed that child met standards for several IDEA disability categories, but school district contended child was not in need of special education under IDEA eligibility definition, child was eligible; reasoning that average or above academic performance took place when child was given specially designed mental health services, assistance from one-on-one aide, and clinical interventions from behavior specialist, services that were not offered to general education students; also noting that child's behavior interfered with learning), *with Durbrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1196 (11th Cir. 2018) (affirming determination that student was not eligible under IDEA before district found him eligible and that school fulfilled child-find obligation, stating "When a school district uses

measures besides special education to assist struggling students, it is even less likely in breach of its child-find duty.").

PAGE 123, add to the end of note 3:

But see D.F. v. Leon Cnty. Sch. Bd., No. 4:13CV3, 2014 U.S. Dist. LEXIS 144, at *5, (N.D. Fla. Jan. 2, 2014) (denying motion to dismiss case alleging violations of Section 504 and ADA by refusing to provide requested services for child with hearing impairment after parent revoked consent to services under IDEA that parent believed harmful to child; stating "there is no basis for asserting that by withdrawing consent to offered IDEA services, the plaintiff forfeited the right to different services that allegedly were available under a different federal statute.").

PAGE 125, add to the end of note 6:

For commentary on the specific requirement of 20 U.S.C. § 1414(b)(3)(B) that schools assess children in all areas of suspected disability, see Mark C. Weber, *"All Areas of Suspected Disability,"* 59 LOY. L. REV. 289 (2013).

PAGE 129, at the end of the second full paragraph, delete the period and insert:

; *see also L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. as amended February 27, 2017) (finding that child receiving extensive interventions but not designated as eligible under IDEA should have been identified as eligible). School districts also need to pay attention to the impact of RTI on other procedural rights and protections. In *M.M. v. Lafayette School District*, 767 F. 3d 842 (9th Cir. 2014), the court ruled that the school violated IDEA by failing to furnish parents with the RTI data it collected on the child, preventing the parents from giving fully informed consent for the initial evaluation and special education services the child received. The court relied on 34 C.F.R. § 300.311(a)(7), which requires school districts to provide parents a statement of the student-centered data they collect; the court stated that the requirement applies even when RTI is not used to determine eligibility.

PAGE 129, add to the end of note 10:

In another *Letter to Zirkel*, 62 IDELR 151 (Office of Special Educ. Programs 2013), the Department stated that it does not endorse any particular RTI model, but spelled out that essential components of RTI include: "(1) high quality, evidence-based instruction in general education settings; (2) screening of all students for academic and behavioral problems; (3) two or more levels (sometimes referred to as 'tiers') of instruction that are progressively more intense and based on the student's response to instruction; and (4) progress monitoring of student performance."

CHAPTER 3
RESIDENCY

PAGE 159, add to the end of note 4:

In *Los Angeles Unified School District v. Garcia*, 314 P.3d 767 (Cal. 2013) the court declared that under California law, the cost of special education for those students is allocated to the school district of the parent's residence. The Ninth Circuit accepted that ruling in *Los Angeles Unified Sch. Dist. v. Garcia*, 741 F.3d 922 (9th Cir. 2014).

5. Should due process hearing officers be deciding disputes over residency of children who are eligible for IDEA services, or should the disputes be handled in the same fashion as residency challenges for students without disabilities? *See A.P. v. Lower Merion Sch. Dist.*, 294 F. Supp. 3d 406, (E.D. Pa. 2018) (holding that due process hearing officer should determine residency issue for child with disability instead of school board proceedings). Can school district objections to a child's residency be forfeited? *See Phillips v. Independent Sch. Dist. No. 3 of Okmulgee Cnty.*, No. CIV-16-561-RAW, 2018 U.S. Dist. LEXIS 6621 (E.D. Okla. Jan. 16, 2018) (affirming hearing officer and review officer decision denying motion to dismiss due process hearing on ground student was not resident when student was enrolled in district since 2005 but district did not object to residency until parent filed due process hearing request in 2016).

CHAPTER 4
FREE, APPROPRIATE PUBLIC EDUCATION (FAPE)

PAGE 168, add to the end of note 4:

A court failed to find that the Tennessee provision cited above imposes a higher standard for appropriate education than that applied in *Rowley*. *Doe v. Board of Educ. of Tullahoma City Schs.*, 9 F.3d 455, 457-58 (6th Cir. 1993).

PAGE 169, insert following note 7:

ENDREW F. V. DOUGLAS CNTY. SCH. DIST. RE-1
137 S. Ct. 988 (2017)

> *The lower courts applied an incorrect standard for determining whether a child with severe disabilities received free, appropriate public education. Without overruling* Rowley, *the Supreme Court determined that an educational program should be appropriately ambitious in light of a child's circumstances, and that every child should have the chance to meet challenging objectives.*

[The opinion in this case is reproduced in Chapter 1 (Core Concepts), *supra*.]

PAGE 202, add to the end of note 2:

In a variation on some of these cases, a court decided that a school itself was the wrong size – too big to provide appropriate education for a child with severe anxiety who became overcome in crowded and noisy places and experienced severe behavior problems at home, as well as a muscle tic and vomiting, when moved to a high school with 3600 students. *R.L. v. Miami-Dade Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014).

PAGE 218, add to the end of note 3:

For an example of a case rejecting a school district's IEP for failure to include appropriate, measurable post-secondary transition goals, see *Jefferson County Board of Education v. Lolita S.*, 977 F. Supp. 2d 1091 (N.D. Ala. 2013), *aff'd*, 581 F. App'x 760, 64 IDELR 34 (11th Cir. 2014).

PAGE 229, add to the end of the first full paragraph at the top of the page:

On December 10, 2015, the Every Student Succeeds Act (ESSA), Pub. L. No. 114–95, 129 Stat. 1802, 2171 (2015), replaced the No Child Left Behind Law described

in the previous paragraphs. Highlights of the ESSA include both state choice with respect to accountability indicators and new measures to guarantee high student participation rates in assessments. High schools with low graduation rates and all schools performing in the bottom 5 percent of schools must undertake interventions, but the interventions are not as draconian as those under NCLB. Of particular importance for students with disabilities, the interventions for schools whose performance with regard to the disability subgroup is poor include devising an evidence-based plan to help those students, district monitoring of the plan, and creating comprehensive improvement plans if the subgroup chronically underperforms despite interventions. Testing and reporting requirements of NCLB (including subgroup reporting) are retained, but the federal government cannot force states to adopt any specific set of academic standards, such as the Common Core. Only 1 percent of students (or about 10 percent of special education students) may be evaluated under alternative standards. The highly qualified teacher requirement is now supplanted, and teacher evaluation need not be based on student outcomes. The new law takes full effect in the 2017-18 school year. *See generally* Alyson Klein, *The Every Student Succeeds Act: An ESSA Overview*, EDUCATION WEEK (Mar. 31, 2016), http://www.edweek.org/ew/issues/every-student-succeeds-act/.

PAGE 230, add to the end of the first full paragraph under note 7:

The United States Department of Education and the Department of Justice have issued an extensive guidance emphasizing the entitlement of students in juvenile justice facilities to appropriate education under Section 504. *Dear Colleague Letter*, 64 IDELR 284 (Office for Civil Rights & U.S. Dep't of Justice 2014); *see also Dear Colleague Letter*, 64 IDELR 249 (Office of Special Educ. Programs & Office of Special Educ. & Rehabilitative Servs. 2014) ("Absent a specific exception, all IDEA protections apply to students with disabilities in correctional facilities and their parents.").

PAGE 230, add to the end of the second full paragraph under note 7:

The bona fide security or compelling penological interest must be the subject of an individualized determination based on actual facts rather than deference to standard operating procedure. *See Buckley v. State Corr. Inst.-Pine Grove*, 98 F. Supp. 3d 704 (M.D. Pa. 2015) (in case of incarcerated 21-year-old confined to cell 23 hours per day, whose educational services were limited to generic self-study packets delivered through tray opening in door with teacher remaining outside cell, ruling that IEP did not provide appropriate education). Two recent cases grant class action status to challenges to the use of solitary confinement and other practices that interfere with delivery of special education services to juveniles who are jailed. *A.T. v. Harder*, 298 F. Supp. 3d 391 (N.D.N.Y. 2018); *V.W. v. Conway*, 236 F. Supp. 3d 554 (N.D.N.Y. 2017).

PAGE 231, add to the end of the first full paragraph on the page:

The Office for Civil Rights of the U.S. Department of Education has been active in enforcing Section 504 and Americans with Disabilities Act obligations of charter schools.

See, e.g., *Prairie Crossing Charter Sch.*, 63 IDELR 25 (Office for Civil Rights 2013) (resolution agreement demanding accessibility of routes, thresholds, entrances and exits, restrooms, and signs at charter school); *Virtual Cmty. Charter Sch.*, 62 IDELR 124 (Office for Civil Rights 2013) (resolution agreement demanding that internet-based public charter school comply with requirements regarding evaluation, placement, notice of procedural rights, and accessibility for persons with visual and other impairments of web-based materials). *See generally Dear Colleague Letter*, 63 IDELR 138 (Office for Civil Rights 2014) (stating that all children enrolled in charter schools have to be provided free, appropriate public education, and that charter schools "may not ask or require students or parents to waive their right to a free appropriate public education in order to attend the charter school").

CHAPTER 5
INDIVIDUALIZED EDUCATION PROGRAM

PAGE 252, in note 1, line 9, before "As a matter of policy and practice" insert:

School districts may feel themselves whipsawed by the combination of the parental participation requirement and a looming annual review date for the child's IEP. *See Doug C. v. Hawaii Dep't of Educ.*, 720 F.3d 1038, 1046 (9th Cir. 2013) (holding that placing higher priority on strict compliance with annual review deadline than on parental participation was unreasonable under circumstances, declaring: "When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE.").

Add to the end of note 2:

On the other hand, school administrators may be bound to follow the consensus of the IEP team even when it conflicts with their position on services to be offered. *See A.M. v. New York City Dep't of Educ.*, 845 F.3d 523, 543 (2d Cir. 2017) ("[W]hen the reports and evaluative materials present at the [IEP Team] meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits, and the state's determination to the contrary is thus entitled to no deference because it is unsupported by a preponderance of the evidence. . . . This remains true whether the issue relates to the content, methodology, or delivery of instruction in a child's IEP." (internal quotation marks and citation omitted)).

PAGE 272, at the end of note 2, delete the period and insert:

; *see also M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9th Cir. as amended May 30, 2017) ("An IEP, like a contract, may not be changed unilaterally. It embodies a binding commitment and provides notice to both parties as to what services will be provided to the student during the period covered by the IEP. If the District discovered that the IEP did not reflect its understanding of the parties' agreement, it was required to notify [the parent] and seek her consent for any amendment."; finding unilateral amendment to be per se procedural violation denying educational benefit).

PAGE 286, add to the end of note 6:

This comparable services requirement applies to extended school year (ESY) services as well. See *Letter to State Directors of Special Education*, 61 IDELR 202 (Office of

Special Educ. & Rehabilitative Servs. 2013) ("[T]he new school district generally must provide ESY services as comparable services to a transfer student whose IEP from the previous school district contains those services, and may not refuse to provide ESY services to that child merely because the services would be provided during the summer.").

CHAPTER 6
LEAST RESTRICTIVE ENVIRONMENT

PAGE 317, renumber note 6 as note 7 and insert after carryover paragraph at top of page:

6. The Second Circuit Court of Appeals has ruled that the least restrictive environment obligation applies with full force to summer school placements, a logical reading of the law but one that may present challenges to districts that maintain no summer school classes for children without disabilities. *See T.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145 (2d Cir. 2014) (holding that district violated IDEA by offering child only self-contained special education classroom options for extended year services when child was scheduled in fall to be in mainstream kindergarten class with aide and 90 minutes in special education classroom).

CHAPTER 7
RELATED SERVICES

PAGE 321, in note 4, at the top of the page, before "*Kennedy v. Board of Educ*." insert:

K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (9th Cir. 2013) (requiring consideration of communication-access realtime translation (CART) captioning for students with hearing impairments as accommodation under Americans with Disabilities Act Title II) (reproduced *infra* Chapter 10);

PAGE 336, in note 4, three lines from the bottom, before "See generally Ralph D. Mawdsley, delete the period and insert:

; *see also Munir v. Pottsville Area Sch. Dist*., 723 F.3d 423 (3d Cir. 2013) (denying tuition reimbursement for residential treatment facility on basis that placement was needed for mental health treatment and educational benefit was incidental).

PAGE 355, in note 2, second line, delete the citation for *P. v. Newington Bd. of Educ.* and insert:

546 F.3d 111, 120 (2d Cir. 2008).

CHAPTER 8
DUE PROCESS HEARINGS

PAGE 358, at the end of the carryover paragraph at the top of the page insert:

For a discussion of various recent criticisms of IDEA due process hearing rights and responses to the critique, see Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425896.

PAGE 364, add to the end of note 2:

Should the due process complaint provisions be applied strictly or loosely? What considerations should come into play when a court asks itself that question? *See generally C.F. v. New York City Dep't of Educ.*, 746 F.3d 68 (2d Cir. 2014) (stating that rule that alleged deficiencies in IEP have to be raised in due process complaint should not be applied mechanically and that parents gave adequate notice of charge that school district's placement would not be available before beginning of academic year).

PAGE 385, add to the end of note 1:

Other courts have found *R.E.*'s approach persuasive. *See, e.g., Jenna R.P. v. Chicago Sch. Dist. 299*, 3 N.E.3d 927, 939-40 (Ill. App. 2013). A case of related interest is *M.C. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1197-98 (9th Cir. as amended May 30, 2017) (finding unilateral change to IEP without notice to parent to undermine participation rights of parents and deny educational benefit). The *M.C.* court was also critical of the administrative law judge's handling of the hearing. *Id*. at 1194-96.

PAGE 386, at the end of the carryover paragraph at the top of the page insert:

Sometimes, individual procedural failings are not enough to support a remedy, but the cumulative effects of multiple errors are. *See, e.g., L.O. v. New York City Dep't of Educ.*, 822 F.3d 95 (2d Cir. 2016).

PAGE 437, add to the end of note 1:

The D.C. Circuit has emphasized that compensatory education is more than what an IEP providing appropriate education must include. *Boose v. District of Columbia*, 786 F.3d 1054, 1058 (D.C. Cir. 2015) ("IEPs are forward looking and intended to 'conform[ ] to ... [a] standard that looks to the child's present abilities," whereas compensatory education is meant to "make up for prior deficiencies.' *Reid [v. District of Columbia]*, 401 F.3d at 522–23. Unlike compensatory education, therefore, an IEP 'carries no guarantee of undoing damage done by prior violations,' *Reid*, 401 F.3d at 523, and that plan alone cannot do compensatory education's job.").

PAGE 440, above heading "2. Enforcing Settlements" insert new note 3:

3. Will an offer to settle a case for the entirety of the relief sought moot the case? In a case not involving special education, the Supreme Court decided that an unaccepted offer of settlement does not make the case moot even if it embodies everything to which the plaintiff is entitled. *Campbell-Ewald v. Gomez*, 136 S. Ct. 663 (2016) (holding that offer to settle named plaintiff's claim in uncertified class action does not moot case if it is not accepted, reasoning that unaccepted offer is legal nullity).

PAGE 444, add to the end of note 5:

The Department, however, has cautioned school districts against stonewalling at the resolution session. *See Letter to Casey*, 61 IDELR 203 (Office of Special Educ. Programs 2013) ("[W]hen the LEA convenes a resolution meeting with the parent and other required participants, and in the absence of a written agreement that the resolution meeting need not be held, it would be inconsistent with the requirements in 34 C.F.R. § 300.510(a)(2) regarding the purpose of the resolution meeting for the LEA to refuse to discuss the issues raised in the parent's due process complaint during that meeting" and merely offer to convene IEP team meeting regarding those issues).

PAGE 445, above heading "D. Appeals and Judicial Review" insert new note 7:

7. The Department of Education has issued useful guidance concerning mediation, dispute resolution, and related topics. *See* Questions and Answers on Dispute Resolution Procedures, 61 IDELR 232 (Office of Special Educ. Programs 2013) (stating that school district cannot require pledge of confidentiality from parent as condition for mediation (A-24), district must act diligently to have parent who fails to appear at resolution session to appear before end of 30-day period and must not seek dismissal until then (D-12), and district must not exact confidentiality pledge as condition for participation in resolution session (D-16)).

CHAPTER 9
STUDENT DISCIPLINE

PAGE 456, add to the end of note 1 in the carryover paragraph at the top of the page:

The Department of Education has offered its position on the relationship of behavioral support, appropriate education, least restrictive environment, and disciplinary intervention. *Dear Colleague Letter*, 68 IDELR 76 (Office of Special Education and Rehabilitation Servs. & Office of Special Educ. Programs Aug. 1, 2016) ("[T]he failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the LRE."; further stating, "Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child's IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE.").

PAGE 476, add to the end of note 1:

H.B. 1893, the Keeping All Students Safe Act, died at the end of the 113th Congress. The Department of Education has issued a letter stating that use of seclusion and restraint may violate Section 504 and Title II of the Americans with Disabilities Act, and providing an extensive explanation of when and why that would be so. *Dear Colleague Letter*, 69 IDELR 80 (Office for Civil Rights 2016) ("A school district discriminates on the basis of disability in its use of restraint or seclusion by (1) unnecessarily treating students with disabilities differently from students without disabilities; (2) implementing policies, practices, procedures, or criteria that have an effect of discriminating against students on the basis of disability or defeating or substantially impairing accomplishment of the objectives of the school district's program or activity with respect to students with disabilities; or (3) denying the right to a free appropriate public education (FAPE)").

CHAPTER 10
COURT PROCEEDINGS

PAGE 478, in note 4, lines 20-21, replace the citation for the appellate decision in DL v. District of Columbia with 713 F.3d 120 (D.C. Cir. 2013), and following the citation add:

See generally Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471 (2014), *available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363145 (discussing *Jamie S.*, *DL*, continuing viability of IDEA class actions, and alternative remedies). Ultimately, the *DL* court found that the District of Columbia improperly failed to identify and serve preschoolers needing special education; the court granted classwide relief. *DL v. District of Columbia*, 194 F. Supp. 3d 30 (D.D.C. as amended June 21, 2016). The Court of Appeals affirmed. 860 F.3d 713 (D.C. Cir. 2017); *see also D.R. v. Michigan Dep't of Educ.*, No. 16-13694, 2017 WL 4348818 (E.D. Mich. Sept. 29, 2017) (denying motions to dismiss on grounds of failure to exhaust in class action of about 30,000 school-age children at risk of disability from exposure to lead in drinking water, in case alleging child-find and other IDEA violations), *appeals dismissed sub nom. D.R. v. Genesee Intermediate Sch. Dist.*, Nos. 17-2255, 17-2257, 17-2260, 2017 U.S. App. LEXIS 24113 (6th Cir. Nov. 28, 2017). Two recent cases granted class action status to challenges to the use of solitary confinement and other practices that interfere with delivery of special education services to juveniles who are jailed. *A.T. v. Harder*, 298 F. Supp. 3d 391 (N.D.N.Y. 2018); *V.W. v. Conway*, 236 F. Supp. 3d 554 (N.D.N.Y. 2017).

PAGE 511, insert before "Notes and Questions":

K.M. v. TUSTIN UNIFIED SCHOOL DISTRICT
725 F.3d 1088 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1493, 1494 (2014)

The court held that compliance with IDEA obligations with respect to two children with hearing impairments did not necessarily establish compliance with the effective-communication duty imposed by ADA Title II, and that the ADA may potentially require a school district to provide word-for-word transcription of classes through Communication-Access Realtime Translation (CART).

BERZON, Circuit Judge:

These two cases, consolidated for oral argument, raise questions about the obligations of public schools under federal law to students who are deaf or hard-of-hearing. The plaintiffs' central claim is that their school districts have an obligation under the Americans with Disabilities Act ("ADA") to provide them with a word-for-word transcription service so that they can fully understand the teacher and fellow students without undue strain and consequent stress.

K.M., a high schooler in the Tustin Unified School District ("Tustin") in Orange County, California, and D.H., a high schooler in the Poway Unified School District ("Poway") in San Diego County, California, both have hearing disabilities. Each student, through her parents, requested that, to help her follow classroom discussions, her school district provide her with Communication Access Realtime Translation ("CART") in the classroom. CART is a word-for-word transcription service, similar to court reporting, in which a trained stenographer provides real-time captioning that appears on a computer monitor. In both cases, the school district denied the request for CART but offered other accommodations. Also in both cases, the student first unsuccessfully challenged the denial of CART in state administrative proceedings and then filed a lawsuit in federal district court.

In the district court, both K.M. and D.H. claimed that the denial of CART violated both the Individuals with Disabilities Education Act ("IDEA") and Title II of the ADA. In each case, the district court granted summary judgment for the school district, holding that the district had fully complied with the IDEA and that the plaintiff's ADA claim was foreclosed by the failure of her IDEA claim. On appeal, both K.M. and D.H. do not contest the conclusion that their respective school districts complied with the IDEA. They challenge, however, the district courts' grants of summary judgment on their ADA claims, because they maintain that Title II imposes effective communication obligations upon public schools independent of, not coextensive with, schools' obligations under the IDEA.

In light of this litigation history, these appeals present this court with a narrow question: whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also necessarily establishes compliance with its effective communication obligations to that child under Title II of the ADA. For the reasons explained below, we hold that it does not. We do not find in either statute an indication that Congress intended the statutes to interact in a mechanical fashion in the schools context, automatically pretermitting any Title II claim where a school's IDEA obligation is satisfied. Moreover, in one of these cases, *K.M. v. Tustin*, the Department of Justice ("DOJ") has filed an amicus brief in support of the plaintiff that includes an interpretation of the relevant Title II regulations, to which we accord deference under *Auer v. Robbins*, 519 U.S. 452, (1997), and which bolsters our conclusion.

FACTUAL AND PROCEDURAL BACKGROUND

K.M.

Because of her hearing loss, K.M. is eligible for special education services under the IDEA. Her eligibility means that Tustin must provide K.M. with a "free appropriate public education" ("FAPE") suited to her individual needs. As required by the statute, Tustin has convened regular meetings to develop an annual "individualized education plan" ("IEP") identifying K.M.'s educational goals and laying out which special services Tustin will provide to address those goals in the upcoming academic year.

In spring 2009, when K.M. was completing the eighth grade, Tustin and her parents began to prepare for her upcoming transition to high school. At a June 2009 meeting of K.M.'s IEP team, K.M.'s mother requested that Tustin provide her with CART beginning the first day of ninth grade, in Fall 2009. K.M.'s long-time auditory-visual therapist

recommended that K.M. receive CART in high school. The IEP team deferred a decision on the CART request, instead developing an IEP that offered K.M. other accommodations.

Shortly thereafter, K.M. filed an administrative complaint challenging the June 2009 IEP. During the course of K.M.'s ninth grade year, her parents and Tustin officials met for several IEP meetings but were unable to come to an agreement that would resolve the complaint. After providing K.M. with trials of both CART and an alternative transcription technology called TypeWell, her IEP team concluded that she did not require transcription services to receive a FAPE under the IDEA, and reaffirmed the June 2009 IEP.

K.M.'s challenge to the June 2009 IEP proceeded to a seven-day hearing before a California administrative law judge ("ALJ"). K.M. testified that she could usually hear her teachers but had trouble hearing her classmates and classroom videos. Several of K.M.'s teachers testified that, in their opinion, K.M. could hear and follow classroom discussion well.

Applying the relevant legal standards, the ALJ concluded that Tustin had complied with both its procedural and substantive obligations under the IDEA and had provided K.M. with a FAPE. The ALJ observed that K.M.'s mother was requesting CART so that K.M. could "maximize her potential," but the IDEA, as interpreted by the Supreme Court in Board of Education of Hendrick Hudson School District, Westchester County v. Rowley, 458 U.S. 176 (1982), does not require schools to provide "a potential-maximizing education."

Dissatisfied, K.M. filed a complaint in district court challenging the ALJ decision on her IDEA claim. She also asserted disability discrimination claims under Section 504 of the Rehabilitation Act, Title II of the ADA, and California's Unruh Civil Rights Act. With respect to her ADA claim, she sought, in addition to other relief, "an Order compelling Defendants to provide CART." The complaint alleges that CART "is commonly paid for by other Southern California public school districts," including the Los Angeles Unified School District and the Santa Monica Malibu School District, and "is also commonly provided at the college level under the ADA."

In declarations submitted to the district court, K.M.'s teachers declared that she participated in classroom discussions comparably to other students. K.M. saw her situation quiet differently, emphasizing that she could only follow along in the classroom with intense concentration, leaving her exhausted at the end of each day.

The district court granted summary judgment for Tustin. First, as to K.M.'s IDEA claim, the district court stated that it was "reluctant to adopt fully teacher and administrator conclusions about K.M.'s comprehension levels over the testimony of K.M. herself," and found "that K.M.'s testimony reveals that her difficulty following discussions may have been greater than her teachers perceived." Nevertheless, the district court agreed with the ALJ that, under the relevant legal standards, K.M. had been afforded a FAPE compliant with the IDEA. Second, the district court held that "K.M.'s claims under the ADA and the Rehabilitation Act fail on the merits for the same reason that her claim under [the] IDEA failed." Finally, the district court noted that Unruh Act liability requires intentional discrimination or an ADA violation, neither of which K.M. had shown.

This appeal followed, in which K.M. challenges only the district court's rulings on her ADA and Unruh Act claims.[1]

D.H.

Like K.M., D.H. is eligible for and receives special education services under the IDEA, pursuant to an annual IEP. At an IEP meeting held towards the end of D.H.'s seventh-grade year, D.H.'s parents "agreed . . . that [D.H.] was making progress," but said that they "believed that [she] needed CART in order to have equal access in the classroom." The IEP team decided that CART was not necessary to provide D.H. with a FAPE, noting that D.H. was making good academic progress.

D.H. filed an administrative complaint challenging her April 2009 IEP. During the ensuing hearing, D.H. testified that she sometimes had trouble following class discussions and teacher instructions. The ALJ concluded, however, that Poway had provided D.H. with a FAPE under the IDEA, finding that D.H. "hears enough of what her teachers and fellow pupils say in class to allow her to access the general education curriculum" and "did not need CART services to gain educational benefit."

D.H. challenged the ALJ decision on her IDEA claim in district court, and also alleged disability discrimination claims under Section 504 of the Rehabilitation Act and Title II of the ADA, seeking, in addition to other relief, "an Order compelling Defendants to provide CART." Like K.M.'s complaint, D.H.'s complaint alleges that CART is commonly provided by other Southern California school districts and at the college level.

D.H. entered high school in Fall 2010. Before the district court, D.H. submitted a declaration in support of her motion for summary judgment which she declared that she has continued to have difficulty hearing in her classes. Although D.H. can use visual cues to follow conversations, "[u]se of these strategies requires a lot of mental energy and focus," leaving her "drained" at the end of the school day. D.H.'s declaration questioned whether her teachers understood the extra effort it required for her to do well in school.

The district court initially granted partial summary judgment for Poway on D.H.'s IDEA claim, holding that the April 2009 IEP provided a FAPE under the IDEA. Although noting that it was "sympathetic to the parents' view that the CART service would make it easier for [D.H.] to follow the lectures and class discussions," the district court denied the request to order the service, on the ground that "the IDEA does not require States to 'maximize each child's potential . . . .'" Later, the district court granted summary judgment for defendants on D.H.'s remaining — ADA and Section 504 — claims. Relying in part on the earlier district court decision in K.M. v. Tustin, the district court held that "a plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, accordingly, under the ADA."

This appeal, in which D.H. challenges only the district court's ruling on her ADA claim, followed.

[1] [FN 1] Under California law, "a violation of the ADA is, per se, a violation of the Unruh Act." *Lentini v. Calif. Ctr. for the Arts*, 370 F.3d 837, 847 (9th Cir. 2004). We therefore do not discuss K.M.'s Unruh Act claim separately from her ADA claim.

DISCUSSION

I. General Statutory Background

Before discussing K.M. and D.H.'s specific claims, we provide some necessary context concerning the three statutes primarily implicated by these appeals, the IDEA, Title II of the ADA, and Section 504 of the Rehabilitation Act, especially as they apply to accommodation of students with communication difficulties.

A.

The IDEA requires schools to make available to children with disabilities a "free appropriate public education," or "FAPE," tailored to their individual needs. States receiving federal funds under the IDEA must show that they have implemented "policies and procedures" to provide disabled children with a FAPE, including procedures to develop an IEP for each eligible child.

The . . . IDEA enumerates "special factors" that must be considered if a child has a particular type of disability. For a child who is deaf or hard-of-hearing, the IEP team is required to

> consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode[.]

Id. § 1414(d)(3)(B)(iv). The IEP team is also required to "consider whether the child needs assistive technology devices and services." *Id.* § 1414(d)(3)(B)(v).

The IDEA does not, however, specify "any substantive standard prescribing the level of education to be accorded handicapped children." *Rowley*, 458 U.S. at 189. Rather, the IDEA primarily provides parents with various procedural safeguards, including the right to participate in IEP meetings and the right to challenge an IEP in state administrative proceedings and, ultimately, in state or federal court. *Rowley* saw the statute as resting on the premise "that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. . . .

The IDEA does have a substantive component, but a fairly modest one: The IEP developed through the required procedures must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. The IDEA does not require states to provide disabled children with "a potential-maximizing education." This access-centered standard means that, for a child being educated in mainstream classrooms, an IEP is substantively valid so long as it is "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."

B.

In contrast to the more process-oriented IDEA, the ADA imposes less elaborate procedural requirements. It also establishes different substantive requirements that public entities must meet.

Title II of the ADA, the title applicable to public services, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity*," and requires that the DOJ promulgate regulations to implement this provision. 42 U.S.C. §§ 12132, 12134 (emphasis added). We have recognized that, under the principles of deference established in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the DOJ's Title II-implementing regulations "should be given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010).

Among the DOJ's Title II-implementing regulations, and at the core of these appeals, is the so-called "effective communications regulation," which spells out public entities' communications-related duties towards those with disabilities. *See* 28 C.F.R. § 35.160 (2010). The Title II effective communications regulation states two requirements: First, public entities must "take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others." Second, public entities must "furnish appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity." The Title II regulations define the phrase "auxiliary aids and services" . . . as including, inter alia, "real-time computer-aided transcription services" and "videotext displays." *Id*. § 35.104. "In determining what type of auxiliary aid and service is necessary, a public entity shall give primary consideration to the requests of the individual with disabilities." *Id*. § 35.160(b)(2).

A separate, more general Title II regulation limits the application of these requirements: Notwithstanding any other requirements in the regulations, a public entity need not, under Title II, "take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." *Id*. § 35.164. The public entity has the burden to prove that a proposed action would result in undue burden or fundamental alteration, and the decision "must be made by the head of the public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity and must be accompanied by a written statement of the reasons for reaching that conclusion." The public entity must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity."

As should be apparent, the IDEA and Title II differ in both ends and means. Substantively, the IDEA sets only a floor of access to education for children with communications disabilities, but requires school districts to provide the individualized services necessary to get a child to that floor, regardless of the costs, administrative burdens, or program alterations required. Title II and its implementing regulations, taken together, require public entities to take steps towards making existing services not just accessible, but equally accessible to people with communication disabilities, but only

insofar as doing so does not pose an undue burden or require a fundamental alteration of their programs.

C.

Finally, at least as a general matter, public schools must comply with both the IDEA and the ADA. The IDEA obviously governs public schools. There is also no question that public schools are among the public entities governed by Title II. *See* 42 U.S.C. § 12101(a)(3) (listing "education" in the ADA congressional findings section as one of "critical areas" in which disability discrimination exists); *Tennessee v. Lane*, 541 U.S. 509, 525 (2004) (listing "public education" among the sites of discrimination that Congress intended to reach with Title II).

Moreover, Congress has specifically and clearly provided that the IDEA coexists with the ADA and other federal statutes, rather than swallowing the others. *See Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 872 (9th Cir. 2011) (en banc). After the Supreme Court interpreted an earlier version of the IDEA to provide the "exclusive avenue" for pursuing "an equal protection claim to a publicly financed special education," *Smith v. Robinson*, 468 U.S. 992, 1009 (1984), Congress enacted legislation to overturn that ruling. An amendment to the IDEA, enacted in 1986, clarified that the IDEA does not foreclose any additional constitutional or federal statutory claims that children with disabilities may have, so long as they first exhaust their IDEA claims through the IDEA administrative process. *See* Pub. L. 99-372, 100 Stat. 796 (1986); *see also Mark H. v. Lemahieu*, 513 F.3d 922, 934 (9th Cir. 2008). In its current version, the IDEA non-exclusivity provision reads:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

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

D.

It is against this statutory background that we shall consider how the IDEA and Title II interact with respect to school districts' obligations to IDEA-eligible students, like K.M. and D.H., who are deaf or hard-of-hearing. First, however, we must clarify one way in which the statutes do not interact.

In the district court's analysis in *K.M.*, relied upon by the district court in *D.H.*, the plaintiffs' ADA claims were tethered to their IDEA claims through the connective thread of a third federal statute, Section 504 of the Rehabilitation Act. Section 504 bars the exclusion of individuals with disabilities from any program or activity receiving federal funds. The district court in *K.M.* reasoned that "the fact that K.M. has failed to show a deprivation of a FAPE under IDEA . . . dooms her claim under Section 504, and,

accordingly, her ADA claim" (emphasis added). Similarly, the district court in D.H. reasoned that "a plaintiff's failure to show a deprivation of a FAPE under the IDEA dooms a claim under [Section] 504, and, *accordingly*, under the ADA" (emphasis added).

The district courts arrived at this reasoning by combining two lines of our case law. In the first line of cases, we have identified a partial overlap between the statutory FAPE provision under the IDEA and a similar provision within the Section 504 regulations promulgated by the Department of Education, requiring schools receiving federal funds to provide "a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction." 34 C.F.R. § 104.33(a). Although both the IDEA and the Section 504 regulation use the locution "free appropriate public education," or "FAPE," we have concluded that the two FAPE requirements are "overlapping but different." *See Mark H.*, 513 F.3d at 925, 933.[2] At the same time, we have noted that, as provided by the Section 504 FAPE regulation, "adopting a valid IDEA IEP is sufficient but not necessary to satisfy the [Section] 504 FAPE requirements." *Id*. at 933 (citing 34 C.F.R. § 104.33(b)(2)).

In the second line of cases, we have discussed the close relationship between Section 504 and Title II of the ADA. Congress used the earlier-enacted Section 504 as a model when drafting Title II. *See Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). We have observed on occasion that "there is no significant difference in the analysis of rights and obligations created by the two Acts." *Vinson v. Thomas*, 288 F.3d 1145, 1152 n.7 (9th Cir. 2002).

Combining these two lines of cases, the district courts reasoned that (1) a valid IDEA IEP satisfies the Section 504 FAPE regulation; (2) Section 504 and Title II are substantially similar statutes; (3) therefore, a valid IDEA IEP also satisfies Title II. This syllogism overstates the connections both between the IDEA and Section 504, and between Section 504 and Title II.

First, we have never held that compliance with the IDEA dooms all Section 504 claims. In *Mark H.*, we held only that "adopting a valid IDEA IEP is sufficient . . . to satisfy the [Section] 504 FAPE requirements." We so held because the Section 504 FAPE regulation itself provides that provision of a FAPE under the IDEA "is one means of meeting *the standard established in paragraph (b)(1)(i) of this section*," 34 C.F.R. § 104.33(b)(2) (emphasis added), i.e., the Section 504 FAPE standard. Because a school district's provision of a FAPE under the IDEA meets Section 504 FAPE requirements, a claim predicated on finding a violation of the Section 504 FAPE standard will fail if the IDEA FAPE requirement has been met. Section 504 claims predicated on other theories of liability under that statute and its implementing regulations, however, are not precluded by a determination that the student has been provided an IDEA FAPE.

Second, the connection between Title II and Section 504 is nuanced. Although the general anti-discrimination mandates in the two statutes are worded similarly, there are material differences between the statutes as a whole. First, their jurisdictions, while

[2] [FN 3] Most importantly, the Section 504 regulations define FAPE "to require a comparison between the manner in which the needs of disabled and non-disabled children are met, and focus[] on the 'design' of a child's educational program," while the IDEA definition of FAPE does not require a comparative analysis. *Id*. at 933.

overlapping, are not coextensive: Section 504 governs all entities receiving federal funds (public or private), while Title II governs all public entities (federally funded or not). Second, Title II's prohibition of discrimination or denial of benefits "by reason of" disability "establishes a 'motivating factor' causal standard for liability when there are two or more possible reasons for the challenged decision and at least one of them may be legitimate." *Martin v. Cal. Dep't of Veterans Affairs*, 560 F.3d 1042, 1048-49 (9th Cir. 2009). In other words, "if the evidence could support a finding that there is more than one reason for an allegedly discriminatory decision, a plaintiff need show only that discrimination on the basis of disability was a 'motivating factor' for the decision." *Id*. By contrast, "[t]he causal standard for the Rehabilitation Act is even stricter," *id*., requiring a plaintiff to show a denial of services "solely by reason of" disability.

Congress has also delegated regulatory responsibility differently under the two statutes. Section 504 mandates generally that the head of each executive agency must promulgate its own regulations "as may be necessary" to implement Section 504's nondiscrimination mandate with respect to that agency's programs. *See* 29 U.S.C. § 794(a). Thus, for example, the Department of Education promulgates regulations implementing Section 504 with respect to federally funded education programs. For Title II, Congress made a more specific, and centralized, delegation, confiding regulatory authority wholly in the Justice Department.

Congress also mandated that the federal regulations implementing Title II be consistent with certain, but not all, of the regulations enforcing Section 504. Specifically, Congress mandated that the Title II regulations as to all topics "[e]xcept for 'program accessibility, existing facilities,' and 'communications'" be consistent with the Section 504 regulations codified at 28 C.F.R. part 41, and that the Title II regulations as to "'program accessibility, existing facilities,' and 'communications'" be consistent with the Section 504 regulations codified at 28 C.F.R. part 39. Congress did not, however, mandate that Title II regulations be consistent with the Section 504 FAPE regulation, which is codified at 34 C.F.R. part 104.

Neither K.M. nor D.H.'s theory of Title II liability is predicated on a denial of FAPE under any definition of that term; indeed, Title II does not impose any FAPE requirement. Rather, both K.M. and D.H. ground their claims in the Title II effective communications regulation, which they argue establishes independent obligations on the part of public schools to students who are deaf or hard-of-hearing. Insofar as the Title II effective communications regulation has a Section 504 analog, it is not the Section 504 FAPE regulation at 34 C.F.R. § 104.33 we construed in the *Mark H.* line of cases. Rather, it is the Section 504 communications regulation at 28 C.F.R. § 39.160, as that is the regulation with which Congress has specified that Title II communications regulations must be consistent.

II. The IDEA and ADA Communications Provisions

A.

The question whether a school meets the ADA's requirements for accommodating deaf or hard-of-hearing students as long as it provides a FAPE for such students in accord with the IDEA is therefore one that cannot be answered through any general principles concerning the overall relationship between the two statutes. Instead, we must address the

question by comparing the particular provisions of the ADA and the IDEA covering students who are deaf or hard-of-hearing, as well as the implementing regulations for those provisions. If the ADA requirements are sufficiently different from, and in some relevant respect more stringent than, those imposed by the IDEA, then compliance with the IDEA FAPE requirement would not preclude an ADA claim. Because we have no cases addressing the parallelism between the IDEA and either the Title II effective communications regulation or its analogous Section 504 regulation, we must construe the relevant statutes and regulations as a question of first impression.

In doing so, "[w]e afford . . . considerable respect" to the DOJ's interpretation of the ADA effective communication regulation, as expressed in its amicus brief to this court. *M.R. v. Dreyfus*, 697 F.3d 706, 735 (9th Cir. 2011). "An agency's interpretation of its own regulation is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Id*. (quoting *Auer*, 519 U.S. at 461). Applying that standard, we conclude from our comparison of the relevant statutory and regulatory texts that the IDEA FAPE requirement and the Title II communication requirements are significantly different. The result is that in some situations, but not others, schools may be required under the ADA to provide services to deaf or hard-of-hearing students that are different than the services required by the IDEA.

First, the factors that the public entity must consider in deciding what accommodations to provide deaf or hard-of-hearing children are different. The key variables in the IDEA framework are the child's "needs" and "opportunities." When developing a deaf or hard-of-hearing child's IEP for IDEA purposes, the IEP team is required to consider, among other factors, "the child's language and communication *needs*," "*opportunities* for direct communications with peers and professional personnel in the child's language and communication mode," and "whether the child *needs* assistive technology devices and services." 20 U.S.C. § 1414(d)(3)(B)(iv) & (v) (emphases added). Under the ADA effective communications regulation, a public entity is also required to "furnish appropriate auxiliary aids and services *where necessary*." 28 C.F.R. § 35.160(b)(1) (emphasis added). But the ADA adds another variable: In determining how it will meet the child's needs, the ADA regulations require that the public entity "give primary consideration to the *requests* of the individual with disabilities." *Id*. § 35.160(b)(2) (emphasis added). That provision has no direct counterpart in the IDEA. . . .

Second, Title II provides the public entity with defenses unavailable under the IDEA. Specifically, Title II "does not require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens." 28 C.F.R. § 35.164. In particular, as the DOJ explained in its amicus brief to this court, the ADA effective communication obligation "is limited to the provision of services for *existing programs*; the ADA does not require a school to provide new programs or new curricula" (emphasis in original). The IDEA does not provide schools with any analog to Title II's fundamental alteration and undue burden defenses.

Third, the specific regulation at issue here, the Title II effective communications regulation, requires public schools to communicate "as effective[ly]" with disabled students as with other students, and to provide disabled students the "auxiliary aids . . . necessary to afford . . . an *equal opportunity* to participate in, and enjoy the benefits of,"

the school program. 28 C.F.R. §§ 35.160(a)(1) & (b)(1) (emphasis added). That requirement is not relevant to IDEA claims, as the IDEA does not require schools to "provide 'equal' educational opportunities" to all students. *Rowley*, 458 U.S. at 198.

Given these differences between the two statutes, we are unable to articulate any unified theory for how they will interact in particular cases. Precisely because we are unable to do so, we must reject the argument that the success or failure of a student's IDEA claim dictates, as a matter of law, the success or failure of her Title II claim. As a result, courts evaluating claims under the IDEA and Title II must analyze each claim separately under the relevant statutory and regulatory framework. We note, however, that nothing in our holding should be understood to bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims where the IDEA administrative appeals process has functionally adjudicated some or all questions relevant to a Title II claim in a way that precludes relitigation. . . .

B.

Both school districts make one final argument that requires a brief response. They argue that, even if analyzed independently under Title II, K.M. and D.H.'s claims must fail because ADA liability requires plaintiffs to show that they were denied "meaningful access" to school services, programs, or activities, and that they cannot make this showing. The phrase "meaningful access" derives not from the text of the ADA or its implementing regulations, but from the Supreme Court's opinion in *Alexander v. Choate*, 469 U.S. 287 (1985).

Choate involved a class-action lawsuit brought by individuals with disabilities who argued that cost-saving measures to Tennessee's Medicaid program would disproportionately affect them and therefore amounted to impermissible discrimination under Section 504. Rejecting both the contention that Section 504 reaches only purposeful discrimination and "the boundless notion that all disparate-impact showings constitute prima facie cases under [Section] 504," the Court construed Section 504 as including a "meaningful access" standard that identified which disparate-impact showings rise to the level of actionable discrimination. In construing Section 504 in this manner, the Court considered and relied on the regulations applicable to Section 504.

We have relied on *Choate*'s construction of Section 504 in ADA Title II cases, and have held that to challenge a facially neutral government policy on the ground that it has a disparate impact on people with disabilities, the policy must have the effect of denying meaningful access to public services. As in *Choate*, in considering Title II's "meaningful access" requirement, we are guided by the relevant regulations interpreting Title II. Consequently, in determining whether K.M. and D.H. were denied meaningful access to the school's benefits and services, we are guided by the specific standards of the Title II effective communications regulation.[3]

In other words, the "meaningful access" standard incorporates rather than supersedes applicable interpretive regulations, and so does not preclude K.M. and D.H. from

[3] [FN 6] Neither school district has argued that the effective communications regulation is an impermissible application of Title II, including its meaningful access standard. Our court has applied the regulation before. *E.g. Duvall*, 260 F.3d 1124. As no party has challenged it, we do not address the regulation's validity.

litigating their claims under those regulations. The school districts' suggestion to the contrary therefore fails.

III. Application to This Case

Finally, we return to the specifics of the cases before us in this appeal. Here, in both cases, the district court held that the plaintiff's Title II claim was foreclosed as a matter of law by the failure of her IDEA claim. For the reasons explained above, the district courts legally erred in granting summary judgment on that basis. The failure of an IDEA claim does not automatically foreclose a Title II claim grounded in the Title II effective communications regulation.

Although we could review the record to determine whether there are alternate legal or factual grounds on which to affirm summary judgment, we are not bound to do so. In *Mark H.*, for example, we reversed a grant of summary judgment where the parties and the district court had misunderstood the interaction between two federal statutes, and remanded for further proceedings consistent with the relationship between those statutes as newly clarified by our opinion.

Here too, prudence counsels in favor of returning these cases to the district court for further proceedings. Having granted summary judgment on legal grounds, neither district court considered whether there was a genuine issue of material fact as to the school districts' compliance with Title II. Moreover, the school districts have litigated these cases thus far from the position that the plaintiffs' IDEA and Title II claims were coextensive. Now that we have clarified that the school districts' position is not correct, we expect that the parties may wish to further develop the factual record and, if necessary, revise their legal positions to address the specifics of a Title II as opposed to an IDEA claim.

To give the district courts an opportunity to consider the merits of K.M. and D.H.'s Title II claims in the first instance, we reverse the grants of summary judgment on the ADA claims in both cases and on the Unruh Act claim in *K.M. v. Tustin*, and remand for further proceedings consistent with this opinion, without prejudice to whether the school districts may renew their motions for summary judgment on other grounds. . . .

PAGE 512, add to the end of note 4:

For a challenge to the view that there must be a showing of gross misjudgment, bad faith, deliberate indifference, or some other stand-in for intentional discrimination when the student claims that the school denied reasonable modifications and asks for monetary relief, see Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417 (2015) (collecting and analyzing authorities), *available at*: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579263. *See generally A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195 (9th Cir. 2016) (stating that sustaining damages claim under section 504 and ADA entails showing that covered entity was on notice of need for accommodation and failed to act).

PAGE 513, in note 7, line 9, after the parenthetical description of *TK. v. New York City Dep't of Educ.* insert:

, *aff'd*, 810 F.3d 869, 877 (2d Cir. Jan. 20, 2016) ("Here, Plaintiffs were reasonably concerned that bullying severely restricted L.K.'s educational opportunities, and that concern powerfully informed their decisions about her education. By refusing to discuss that bullying during the development of the IEP, the Department significantly impeded Plaintiffs' ability to assess the adequacy of the IEP and denied L.K. a FAPE.")

Add to the end of note 7:

A provocative discussion of legal remedies for bullying and harassment of children with disabilities is found in Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. ILL. L. REV. 175.

PAGE 513, at the bottom of the page insert new note 8:

8. *K.M. v. Tustin* raises intriguing questions. Are you persuaded by the court's opinion? What (if anything) did Congress have in mind when enacting the ADA fifteen or more years after IDEA and Section 504? Is the reach of *K.M. v. Tustin* limited to communications cases? Should it apply at least to other cases in which there are specific ADA regulations from the Department of Justice, such as service animal and accessibility controversies? The court relied heavily on the position of the Department of Justice in its amicus brief. Do you think the case would have come out the same way had the federal government not taken an active role? What do you expect will be the outcome on remand? *See D.H. v. Poway Unified Sch. Dist.*, No. 09-CV-2621, 2013 U.S. Dist. LEXIS 179116 (S.D. Cal. Dec. 19, 2013) (granting preliminary injunction requiring school district to provide CART transcription services in high school senior's classes), *reconsideration denied*, 2014 U.S. Dist. LEXIS 4738 (S.D. Cal. Jan. 14, 2014).

PAGE 525, delete the last sentence of the carryover paragraph at the top of the page and the remainder of pp. 525-51 up to heading 2. Insert:

FRY v. NAPOLEON COMMUNITY SCHOOLS
137 S. Ct. 743 (2017)

In a case seeking declaratory and damages relief for the failure of a school district to allow a student to use a service dog, the Supreme Court ruled that whether a claim under a law other than IDEA must be exhausted depends on whether the claim seeks relief for denial of free, appropriate public education. That depends on the gravamen of the plaintiff's complaint and may be decided by looking to several "clues" the Court identifies.

Justice Kagan delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act) ensures that children with disabilities receive needed special education services. One of its provisions, §1415(*l*), addresses the Act's relationship with other laws protecting those children. Section 1415(*l*) makes clear that nothing in the IDEA "restrict[s] or limit[s] the rights [or] remedies" that other federal laws, including antidiscrimination statutes, confer on children with disabilities. At the same time, the section states that if a suit brought under such a law "seek[s] relief that is also available under" the IDEA, the plaintiff must first exhaust the IDEA's administrative procedures. In this case, we consider the scope of that exhaustion requirement. We hold that exhaustion is not necessary when the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee—what the Act calls a "free appropriate public education."

I

A

The IDEA offers federal funds to States in exchange for a commitment: to furnish a "free appropriate public education"—more concisely known as a FAPE—to all children with certain physical or intellectual disabilities. As defined in the Act, a FAPE comprises "special education and related services"—both "instruction" tailored to meet a child's "unique needs" and sufficient "supportive services" to permit the child to benefit from that instruction. An eligible child, as this Court has explained, acquires a "substantive right" to such an education once a State accepts the IDEA's financial assistance.

Under the IDEA, an "individualized education program," called an IEP for short, serves as the "primary vehicle" for providing each child with the promised FAPE. (Welcome to—and apologies for—the acronymic world of federal legislation.) Crafted by a child's "IEP Team"—a group of school officials, teachers, and parents—the IEP spells out a personalized plan to meet all of the child's "educational needs." Most notably, the IEP documents the child's current "levels of academic achievement," specifies "measurable annual goals" for how she can "make progress in the general education curriculum," and lists the "special education and related services" to be provided so that she can "advance appropriately toward [those] goals."

Because parents and school representatives sometimes cannot agree on such issues, the IDEA establishes formal procedures for resolving disputes. To begin, a dissatisfied parent may file a complaint as to any matter concerning the provision of a FAPE with the local or state educational agency (as state law provides). That pleading generally triggers a "[p]reliminary meeting" involving the contending parties; at their option, the parties may instead (or also) pursue a full-fledged mediation process. Assuming their impasse continues, the matter proceeds to a "due process hearing" before an impartial hearing officer. Any decision of the officer granting substantive relief must be "based on a determination of whether the child received a [FAPE]." If the hearing is initially conducted at the local level, the ruling is appealable to the state agency. Finally, a parent

unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court.

Important as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests. Of particular relevance to this case are two antidiscrimination laws—Title II of the Americans with Disabilities Act (ADA) and §504 of the Rehabilitation Act—which cover both adults and children with disabilities, in both public schools and other settings. Title II forbids any "public entity" from discriminating based on disability; Section 504 applies the same prohibition to any federally funded "program or activity." A regulation implementing Title II requires a public entity to make "reasonable modifications" to its "policies, practices, or procedures" when necessary to avoid such discrimination. 28 CFR §35.130(b)(7) (2016); see, e.g., Alboniga v. School Bd. of Broward Cty., 87 F. Supp. 3d 1319, 1345 (SD Fla. 2015) (requiring an accommodation to permit use of a service animal under Title II). In similar vein, courts have interpreted §504 as demanding certain "reasonable" modifications to existing practices in order to "accommodate" persons with disabilities. Alexander v. Choate, 469 U. S. 287, 299-300 (1985); see, e.g., Sullivan v. Vallejo City Unified School Dist., 731 F. Supp. 947, 961-962 (ED Cal. 1990) (requiring an accommodation to permit use of a service animal under §504). And both statutes authorize individuals to seek redress for violations of their substantive guarantees by bringing suits for injunctive relief or money damages.

This Court first considered the interaction between such laws and the IDEA in Smith v. Robinson, 468 U. S. 992. The plaintiffs there sought "to secure a 'free appropriate public education' for [their] handicapped child." But instead of bringing suit under the IDEA alone, they appended "virtually identical" claims (again alleging the denial of a "free appropriate public education") under §504 of the Rehabilitation Act and the Fourteenth Amendment's Equal Protection Clause. The Court held that the IDEA altogether foreclosed those additional claims: With its "comprehensive" and "carefully tailored" provisions, the Act was "the exclusive avenue" through which a child with a disability (or his parents) could challenge the adequacy of his education.

Congress was quick to respond. In the Handicapped Children's Protection Act of 1986, it overturned *Smith*'s preclusion of non-IDEA claims while also adding a carefully defined exhaustion requirement. Now codified at 20 U. S. C. §1415*(l)*, the relevant provision of that statute reads:

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

The first half of §1415*(l)* (up until "except that") "reaffirm[s] the viability" of federal statutes like the ADA or Rehabilitation Act "as separate vehicles," no less integral than the IDEA, "for ensuring the rights of handicapped children." H. R. Rep. No. 99-296, p. 4 (1985); see *id.*, at 6. According to that opening phrase, the IDEA does not prevent a plaintiff from asserting claims under such laws even if, as in *Smith* itself, those claims allege the denial of an appropriate public education (much as an IDEA claim would). But the second half of §1415*(l)* (from "except that" onward) imposes a limit on that "anything goes" regime, in the form of an exhaustion provision. According to that closing phrase, a plaintiff bringing suit under the ADA, the Rehabilitation Act, or similar laws must in certain circumstances—that is, when "seeking relief that is also available under" the IDEA—first exhaust the IDEA's administrative procedures. The reach of that requirement is the issue in this case.

B

Petitioner E.F. is a child with a severe form of cerebral palsy, which "significantly limits her motor skills and mobility." When E.F. was five years old, her parents—petitioners Stacy and Brent Fry—obtained a trained service dog for her, as recommended by her pediatrician. The dog, a goldendoodle named Wonder, "help[s E.F.] to live as independently as possible" by assisting her with various life activities. In particular, Wonder aids E.F. by "retrieving dropped items, helping her balance when she uses her walker, opening and closing doors, turning on and off lights, helping her take off her coat, [and] helping her transfer to and from the toilet."

But when the Frys sought permission for Wonder to join E.F. in kindergarten, officials at Ezra Eby Elementary School refused the request. Under E.F.'s existing IEP, a human aide provided E.F. with one-on-one support throughout the day; that two-legged assistance, the school officials thought, rendered Wonder superfluous. In the words of one administrator, Wonder should be barred from Ezra Eby because all of E.F.'s "physical and academic needs [were] being met through the services/programs/ accommodations" that the school had already agreed to. Later that year, the school officials briefly allowed Wonder to accompany E.F. to school on a trial basis; but even then, "the dog was required to remain in the back of the room during classes, and was forbidden from assisting [E.F.] with many tasks he had been specifically trained to do." And when the trial period concluded, the administrators again informed the Frys that Wonder was not welcome. As a result, the Frys removed E.F. from Ezra Eby and began homeschooling her.

In addition, the Frys filed a complaint with the U. S. Department of Education's Office for Civil Rights (OCR), charging that Ezra Eby's exclusion of E.F.'s service animal violated her rights under Title II of the ADA and §504 of the Rehabilitation Act. Following an investigation, OCR agreed. The office explained in its decision letter that a school's obligations under those statutes go beyond providing educational services: A school could offer a FAPE to a child with a disability but still run afoul of the laws' ban on discrimination. And here, OCR found, Ezra Eby had indeed violated that ban, even if its use of a human aide satisfied the FAPE standard. OCR analogized the school's

conduct to "requir[ing] a student who uses a wheelchair to be carried" by an aide or "requir[ing] a blind student to be led [around by a] teacher" instead of permitting him to use a guide dog or cane. Regardless whether those—or Ezra Eby's—policies denied a FAPE, they violated Title II and §504 by discriminating against children with disabilities.

In response to OCR's decision, school officials at last agreed that E.F. could come to school with Wonder. But after meeting with Ezra Eby's principal, the Frys became concerned that the school administration "would resent [E.F.] and make her return to school difficult." Accordingly, the Frys found a different public school, in a different district, where administrators and teachers enthusiastically received both E.F. and Wonder.

C

The Frys then filed this suit in federal court against the local and regional school districts in which Ezra Eby is located, along with the school's principal (collectively, the school districts). The complaint alleged that the school districts violated Title II of the ADA and §504 of the Rehabilitation Act by "denying [E.F.] equal access" to Ezra Eby and its programs, "refus[ing] to reasonably accommodate" E.F.'s use of a service animal, and otherwise "discriminat[ing] against [E.F.] as a person with disabilities." According to the complaint, E.F. suffered harm as a result of that discrimination, including "emotional distress and pain, embarrassment, [and] mental anguish." In their prayer for relief, the Frys sought a declaration that the school districts had violated Title II and §504, along with money damages to compensate for E.F.'s injuries.

The District Court granted the school districts' motion to dismiss the suit, holding that §1415*(l)* required the Frys to first exhaust the IDEA's administrative procedures. See App. to Pet. for Cert. 50. A divided panel of the Court of Appeals for the Sixth Circuit affirmed on the same ground. In that court's view, §1415*(l)* applies if "the injuries [alleged in a suit] relate to the specific substantive protections of the IDEA." And that means, the court continued, that exhaustion is necessary whenever "the genesis and the manifestations" of the complained-of harms were "educational" in nature. On that understanding of §1415*(l)*, the Sixth Circuit held, the Frys' suit could not proceed: Because the harms to E.F. were generally "educational"—most notably, the court reasoned, because "Wonder's absence hurt her sense of independence and social confidence at school"—the Frys had to exhaust the IDEA's procedures. Judge Daughtrey dissented, emphasizing that in bringing their Title II and §504 claims, the Frys "did not allege the denial of a FAPE" or "seek to modify [E.F.'s] IEP in any way."

We granted certiorari to address confusion in the courts of appeals as to the scope of §1415*(l)*'s exhaustion requirement. We now vacate the Sixth Circuit's decision.

II

Section 1415*(l)* requires that a plaintiff exhaust the IDEA's procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her

suit "seek[s] relief that is also available" under the IDEA. We first hold that to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only "relief" the IDEA makes "available." We next conclude that in determining whether a suit indeed "seeks" relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint. [4]

A

In this Court, the parties have reached substantial agreement about what "relief" the IDEA makes "available" for children with disabilities—and about how the Sixth Circuit went wrong in addressing that question. The Frys maintain that such a child can obtain remedies under the IDEA for decisions that deprive her of a FAPE, but none for those that do not. So in the Frys' view, §1415*(l)*'s exhaustion requirement can come into play only when a suit concerns the denial of a FAPE—and not, as the Sixth Circuit held, when it merely has some articulable connection to the education of a child with a disability. The school districts, for their part, also believe that the Sixth Circuit's exhaustion standard "goes too far" because it could mandate exhaustion when a plaintiff is "seeking relief that is *not* in substance available" under the IDEA. And in particular, the school districts acknowledge that the IDEA makes remedies available only in suits that "directly implicate[ ]" a FAPE—so that only in those suits can *§*1415*(l)* apply. For the reasons that follow, we agree with the parties' shared view: The only relief that an IDEA officer can give—hence the thing a plaintiff must seek in order to trigger §1415*(l)*'s exhaustion rule—is relief for the denial of a FAPE.

We begin, as always, with the statutory language at issue, which (at risk of repetition) compels exhaustion when a plaintiff seeks "relief" that is "available" under the IDEA. The ordinary meaning of "relief" in the context of a lawsuit is the "redress[] or benefit" that attends a favorable judgment. Black's Law Dictionary 1161 (5th ed. 1979). And such relief is "available," as we recently explained, when it is "accessible or may be obtained." Ross v. Blake, 136 S. Ct. 1850, 1858, (2016) (quoting Webster's Third New International Dictionary 150 (1993)). So to establish the scope of §1415*(l)*, we must identify the circumstances in which the IDEA enables a person to obtain redress (or, similarly, to access a benefit).

That inquiry immediately reveals the primacy of a FAPE in the statutory scheme. In its first section, the IDEA declares as its first purpose "to ensure that all children with disabilities have available to them a free appropriate public education." That principal purpose then becomes the Act's principal command: A State receiving federal funding

[4] In reaching these conclusions, we leave for another day a further question about the meaning of §1415(l): Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award? The Frys, along with the Solicitor General, say the answer is no. But resolution of that question might not be needed in this case because the Frys also say that their complaint is not about the denial of a FAPE—and, as later explained, we must remand that distinct issue to the Sixth Circuit. Only if that court rejects the Frys' view of their lawsuit, using the analysis we set out below, will the question about the effect of their request for money damages arise.

under the IDEA must make such an education "available to all children with disabilities." The guarantee of a FAPE to those children gives rise to the bulk of the statute's more specific provisions. For example, the IEP—"the centerpiece of the statute's education delivery system"—serves as the "vehicle" or "means" of providing a FAPE. And finally, as all the above suggests, the FAPE requirement provides the yardstick for measuring the adequacy of the education that a school offers to a child with a disability: Under that standard, this Court has held, a child is entitled to "meaningful" access to education based on her individual needs.

The IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement. As noted earlier, any decision by a hearing officer on a request for substantive relief "shall" be "based on a determination of whether the child received a free appropriate public education." Or said in Latin: In the IDEA's administrative process, a FAPE denial is the *sine qua non*. Suppose that a parent's complaint protests a school's failure to provide some accommodation for a child with a disability. If that accommodation is needed to fulfill the IDEA's FAPE requirement, the hearing officer must order relief. But if it is not, he cannot—even though the dispute is between a child with a disability and the school she attends. There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might *require* the accommodation on one of those alternative grounds. But still, the hearing officer cannot provide the requested relief. His role, under the IDEA, is to enforce the child's "substantive right" to a FAPE. And that is all.

For that reason, §1415*(l)*'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape §1415*(l)* merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs in *Smith* claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises. But if, in a suit brought under a different statute, the remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: A hearing officer, as just explained, would have to send her away empty-handed. And that is true even when the suit arises directly from a school's treatment of a child with a disability—and so could be said to relate in some way to her education. A school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA. A complaint seeking redress for those other harms, independent of any FAPE denial, is not subject to §1415*(l)*'s exhaustion rule because, once again, the only "relief" the IDEA makes "available" is relief for the denial of a FAPE.

B

Still, an important question remains: How is a court to tell when a plaintiff "seeks" relief for the denial of a FAPE and when she does not? Here, too, the parties have found some

common ground: By looking, they both say, to the "substance" of, rather than the labels used in, the plaintiff's complaint. And here, too, we agree with that view: What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading.

That inquiry makes central the plaintiff's own claims, as §1415*(l)* explicitly requires. The statutory language asks whether a lawsuit in fact "seeks" relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit "could have sought" relief available under the IDEA (or, what is much the same, whether any remedies "are" available under that law). See Brief for United States as Amicus Curiae 20 (contrasting §1415*(l)* with the exhaustion provision in the Prison Litigation Reform Act, 42 U. S. C. §1997e(a)). In effect, §1415*(l)* treats the plaintiff as "the master of the claim": She identifies its remedial basis—and is subject to exhaustion or not based on that choice. A court deciding whether §1415*(l)* applies must therefore examine whether a plaintiff's complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education.

But that examination should consider substance, not surface. The use (or non-use) of particular labels and terms is not what matters. The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words(?) "FAPE" or "IEP." After all, §1415*(l)*'s premise is that the plaintiff is suing under a statute *other than* the IDEA, like the Rehabilitation Act; in such a suit, the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program. And still more critically, a "magic words" approach would make *§1415(l)*'s exhaustion rule too easy to bypass. . . . Section 1415*(l)* is not merely a pleading hurdle. It requires exhaustion when the gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed in precisely that way.

In addressing whether a complaint fits that description, a court should attend to the diverse means and ends of the statutes covering persons with disabilities—the IDEA on the one hand, the ADA and Rehabilitation Act (most notably) on the other. The IDEA, of course, protects only "children" (well, really, adolescents too) and concerns only their schooling. And as earlier noted, the statute's goal is to provide each child with meaningful access to education by offering individualized instruction and related services appropriate to her "unique needs." By contrast, Title II of the ADA and §504 of the Rehabilitation Act cover people with disabilities of all ages, and do so both inside and outside schools. And those statutes aim to root out disability-based discrimination, enabling each covered person (sometimes by means of reasonable accommodations) to participate equally to all others in public facilities and federally funded programs. In short, the IDEA guarantees individually tailored educational services, while Title II and §504 promise non-discriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes—which is why, as in *Smith*, a plaintiff might seek relief for the denial of a FAPE under Title II and §504 as well as the IDEA. But still, the statutory differences just discussed mean that a complaint

brought under Title II and §504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation.

One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Take two contrasting examples. Suppose first that a wheelchair-bound child sues his school for discrimination under Title II (again, without mentioning the denial of a FAPE) because the building lacks access ramps. In some sense, that architectural feature has educational consequences, and a different lawsuit might have alleged that it violates the IDEA: After all, if the child cannot get inside the school, he cannot receive instruction there; and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success. But is the denial of a FAPE really the gravamen of the plaintiff's Title II complaint? Consider that the child could file the same basic complaint if a municipal library or theater had no ramps. And similarly, an employee or visitor could bring a mostly identical complaint against the school. That the claim can stay the same in those alternative scenarios suggests that its essence is equality of access to public facilities, not adequacy of special education. And so §1415*(l)* does not require exhaustion. [9]

But suppose next that a student with a learning disability sues his school under Title II for failing to provide remedial tutoring in mathematics. That suit, too, might be cast as one for disability-based discrimination, grounded on the school's refusal to make a reasonable accommodation; the complaint might make no reference at all to a FAPE or an IEP. But can anyone imagine the student making the same claim against a public theater or library? Or, similarly, imagine an adult visitor or employee suing the school to obtain a

[9] The school districts offer another example illustrating the point. They suppose that a teacher, acting out of animus or frustration, strikes a student with a disability, who then sues the school under a statute other than the IDEA. Here too, the suit could be said to relate, in both genesis and effect, to the child's education. But the school districts opine, we think correctly, that the substance of the plaintiff's claim is unlikely to involve the adequacy of special education—and thus is unlikely to require exhaustion. A telling indicator of that conclusion is that a child could file the same kind of suit against an official at another public facility for inflicting such physical abuse—as could an adult subject to similar treatment by a school official. To be sure, the particular circumstances of such a suit (school or theater? student or employee?) might be pertinent in assessing the reasonableness of the challenged conduct. But even if that is so, the plausibility of bringing other variants of the suit indicates that the gravamen of the plaintiff's complaint does not concern the appropriateness of an educational program.

math tutorial? The difficulty of transplanting the complaint to those other contexts suggests that its essence—even though not its wording—is the provision of a FAPE, thus bringing §1415*(l)* into play. [10]

A further sign that the gravamen of a suit is the denial of a FAPE can emerge from the history of the proceedings. In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute—thus starting to exhaust the Act's remedies before switching midstream. Recall that a parent dissatisfied with her child's education initiates those administrative procedures by filing a complaint, which triggers a preliminary meeting (or possibly mediation) and then a due process hearing. A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE—with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy. Whether that is so depends on the facts; a court may conclude, for example, that the move to a courtroom came from a late-acquired awareness that the school had fulfilled its FAPE obligation and that the grievance involves something else entirely. But prior pursuit of the IDEA's administrative remedies will often provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term. [11]

III

The Court of Appeals did not undertake the analysis we have just set forward. As noted above, it asked whether E.F.'s injuries were, broadly speaking, "educational" in nature. See 788 F. 3d at 627 (reasoning that the "value of allowing Wonder to attend [school] with E.F. was educational" because it would foster "her sense of independence and social confidence," which is "the sort of interest the IDEA protects"). That is not the same as asking whether the gravamen of E.F.'s complaint charges, and seeks relief for, the denial of a FAPE. And that difference in standard may have led to a difference in result in this case. Understood correctly, §1415(*l*) might not require exhaustion of the Frys' claim. We lack some important information on that score, however, and so we remand the issue to the court below.

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[10] According to Justice Alito, the hypothetical inquiries described above are useful only if the IDEA and other federal laws are mutually exclusive in scope. That is incorrect. The point of the questions is not to show that a plaintiff faced with a particular set of circumstances could *only* have proceeded under Title II or §504—or, alternatively, could *only* have proceeded under the IDEA. (Depending on the circumstances, she might well have been able to proceed under both.) Rather, these questions help determine whether a plaintiff who has chosen to bring a claim under Title II or §504 instead of the IDEA—and whose complaint makes no mention of a FAPE—nevertheless raises a claim whose *substance* is the denial of an appropriate education.

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

The Frys' complaint alleges only disability-based discrimination, without making any reference to the adequacy of the special education services E.F.'s school provided. The school districts' "refusal to allow Wonder to act as a service dog," the complaint states, "discriminated against [E.F.] as a person with disabilities . . . by denying her equal access" to public facilities. The complaint contains no allegation about the denial of a FAPE or about any deficiency in E.F.'s IEP. More, it does not accuse the school even in general terms of refusing to provide the educational instruction and services that E.F. needs. See 788 F. 3d, at 631 (acknowledging that the Frys do not "state that Wonder enhances E.F.'s educational opportunities"). As the Frys explained in this Court: The school districts "have said all along that because they gave [E.F.] a one-on-one [human] aide, that all of her . . . educational needs were satisfied. And we have not challenged that, and it would be difficult for us to challenge that." The Frys instead maintained, just as OCR had earlier found, that the school districts infringed E.F.'s right to equal access—even if their actions complied in full with the IDEA's requirements.

And nothing in the nature of the Frys' suit suggests any implicit focus on the adequacy of E.F.'s education. Consider, as suggested above, that the Frys could have filed essentially the same complaint if a public library or theater had refused admittance to Wonder. Or similarly, consider that an adult visitor to the school could have leveled much the same charges if prevented from entering with his service dog. See *ibid.* In each case, the plaintiff would challenge a public facility's policy of precluding service dogs (just as a blind person might challenge a policy of barring guide dogs) as violating Title II's and §504's equal access requirements. The suit would have nothing to do with the provision of educational services. From all that we know now, that is exactly the kind of action the Frys have brought.

But we do not foreclose the possibility that the history of these proceedings might suggest something different. As earlier discussed, a plaintiff's initial pursuit of the IDEA's administrative remedies can serve as evidence that the gravamen of her later suit is the denial of a FAPE, even though that does not appear on the face of her complaint. The Frys may or may not have sought those remedies before filing this case: None of the parties here have addressed that issue, and the record is cloudy as to the relevant facts. Accordingly, on remand, the court below should establish whether (or to what extent) the Frys invoked the IDEA's dispute resolution process before bringing this suit. And if the Frys started down that road, the court should decide whether their actions reveal that the gravamen of their complaint is indeed the denial of a FAPE, thus necessitating further exhaustion.

With these instructions and for the reasons stated, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Justice Alito, with whom Justice Thomas joins, concurring in part and concurring in the judgment.

I join all of the opinion of the Court with the exception of its discussion (in the text from the beginning of the first new paragraph on page 15 to the end of the opinion) in which the Court provides several misleading "clue[s]," for the lower courts.

The Court first instructs the lower courts to inquire whether the plaintiff could have brought "essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library." Next, the Court says, a court should ask whether "an *adult* at the school—say, an employee or visitor—[could] have pressed essentially the same grievance." These clues make sense only if there is no overlap between the relief available under the following two sets of claims: (1) the relief provided by the Individuals with Disabilities Education Act (IDEA), and (2) the relief provided by other federal laws (including the Constitution, the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973). The Court does not show or even claim that there is no such overlap—to the contrary, it observes that "[t]he same conduct might violate" the ADA, the Rehabilitation Act and the IDEA. And since these clues work only in the absence of overlap, I would not suggest them.

The Court provides another false clue by suggesting that lower courts take into account whether parents, before filing suit under the ADA or the Rehabilitation Act, began to pursue but then abandoned the IDEA's formal procedures. This clue also seems to me to be ill-advised. It is easy to imagine circumstances under which parents might start down the IDEA road and then change course and file an action under the ADA or the Rehabilitation Act that seeks relief that the IDEA cannot provide. The parents might be advised by their attorney that the relief they were seeking under the IDEA is not available under that law but is available under another. Or the parents might change their minds about the relief that they want, give up on the relief that the IDEA can provide, and turn to another statute.

Although the Court provides these clues for the purpose of assisting the lower courts, I am afraid that they may have the opposite effect. They are likely to confuse and lead courts astray.

NOTES AND QUESTIONS

1. Can you summarize the rule on exhaustion after *Fry*? How consistent is that rule with the language of 20 U.S.C. § 1415(*l*)? Is the concurrence's critique of the "clues" persuasive?

2. Predict what the Court would do in the case hypothesized in footnote 4 of the majority opinion. Should a litigant be able to avoid exhaustion simply by adding a damages claim to the suit? On the other hand, isn't damages relief precisely that relief that is not available under IDEA's procedures? For additional commentary on *Fry*, see Endrew F. *and* Fry *Symposium*, 46 J.L. & EDUC. 425 (2017).

3. Constitutional claims asserted under 42 U.S.C. § 1983 may also be subject to exhaustion. For a pre-*Fry* instance in which the court found exhaustion not to be required, see *F.H. v. Memphis City Schools*, 764 F.3d 638 (6th Cir. 2014), a case involving

allegations that a child with cerebral palsy, limited use of his hands, and other disabilities was frequently left unattended and unsupervised in the bathroom and was unable to clean himself properly. It was alleged that on one occasion, he suffered a seizure there, and on other occasions he was subject to verbal and physical abuse from aides and other school personnel for coming back to class soiled. The court reasoned that the injuries were not educational in nature, stating that requiring exhaustion of the § 1983 claims would create an administrative barrier that would not be present for children without disabilities subjected to comparable injuries. Does the comparison to claims that could be brought by non-disabled children without pursing administrative complaints provide a useful frame for deciding when exhaustion should be required for children with disabilities?

PAGE 551, add to the paragraph at the bottom of the page:

Should the length of the limitations period operate as a limit on the compensatory education or other retroactive relief that a parent's due process challenge can achieve? In *G.L. v. Ligonier Valley School District Authority*, 802 F.3d 601 (3d Cir. 2015), the court answered no. It declared: "[O]nce a violation is reasonably discovered by the parent, any claim for that violation, however far back it dates, must be filed within two years of the 'knew or should have known' date. If it is not, all but the most recent two years before the filing of the complaint will be time-barred; but if it is timely filed, then, upon a finding of liability, the entire period of the violation should be remedied. In other words, § 1415(f)(3)(C), like its synopsis in § 1415(b)(6)(B), reflects a traditional statute of limitations." *Id*. at 621-22.

CHAPTER 11
ATTORNEYS' FEES IN SPECIAL EDUCATION LITIGATION

PAGE 557, in heading 2, Procedural Victories and Partial Success, line 7 before "More difficult questions" insert:

But see M.R. v. Ridley Sch. Dist., 868 F.3d 218 (3d Cir. 2017) (awarding fees when violation of maintenance-of-placement provision resulted in award of retrospective and compensatory relief).

PAGE 578, add to the end of the first full paragraph after the carryover paragraph at the top of the page:

A fee reduction will not be imposed if the parent is substantially justified in rejecting a proposed settlement. *See Rena C. v. Colonial Sch. Dist.*, 890 F.3d 404 (3d Cir. 2018) (awarding fees; finding rejection justified when offer did not include attorneys' fees accrued up to point of offer). Parents and their attorneys may be vulnerable to fees awards under limited circumstances. 20 U.S.C. § 1415(i)(3)(B)(i)(II)-(III); *see Lincoln-Sudbury Reg'l Sch. Dist. v. W.*, No. CV 16-10724-FDS, 2018 U.S. Dist. LEXIS 72828 (D. Mass. May 1, 2018) (entering judgment of fees against parents), *appeal filed*, No. 18-1524 (1st Cir. June 13, 2018).

CHAPTER 12
CHILDREN IN PRIVATE SCHOOLS

PAGE 592, in note 5, line 3, before "In *Bay Shore Union*" delete the period and insert:

; see also Special Sch. Dist. No. 1 v. R.M.M., 861 F.3d 769 (8th Cir. 2017) (holding that Minnesota law establishes individual right to special education for children in private schools, and that right may be enforced by private suit under IDEA).

PAGE 596, add to the end of note 2:

A more recent challenge to an alleged local policy promoting placement of children eligible for special education in private religious schools failed for lack of standing on the part of plaintiffs. *Montesa v. Schwartz*, 836 F.3d 176 (2d Cir. 2016).

PAGE 608, add to the end of note 3:

However, in *Niehaus v. Huppenthal*, 310 P.3d 983 (Ariz. App. 2013), the appeals court upheld, under the state's constitution, a state statute providing scholarships to students with disabilities, even though the scholarships could be used to pay tuition to religious schools. The state appeals court held that the statute passed the state constitution's Religion Clause and Aid Clause tests because beneficiary families, not the private or sectarian schools, were the specified objects of the state program. *See generally Oliver v. Hofmeister*, 368 P.3d 1270, 1277 (Okla. 2016) (upholding state voucher program for special education students against claim that it violates state constitution's prohibition on use of public funds to benefit or support religion, declaring: "We are persuaded that the Act is completely neutral with regard to religion and that any funds deposited to a sectarian school occur as the sole result of the parent's independent decision completely free from state influence."). For a comprehensive discussion of voucher and scholarship programs, see Wendy F. Hensel, *Vouchers for Students with Disabilities: The Future of Special Education?*, 39 J.L. & EDUC. 291 (2010), and *Recent Developments in Voucher Programs for Students with Disabilities*, 59 LOY. L. REV. 323 (2013).

4. Most recently, the Supreme Court ruled that Missouri violated the free exercise clause by excluding a church from participating in a program offering reimbursement to nonprofit organizations buying playground surfaces made from recycled tires. The Court reasoned that to disqualify an otherwise eligible recipient from a public benefit solely because it was a religious organization imposed a penalty on free exercise of religion. *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017). Justices Thomas and Gorsuch found the case indistinguishable from *Locke v. Davey* on the basis given by the Court and emphasized that the Court's opinion construed *Locke* narrowly and that no party before the Court had asked for it to be overruled. What implications, if any, might the *Trinity Lutheran* case have children in religious schools seeking public support for special education?