MASKS, MAYHEM, AND THE FUTURE OF DISABILITY RIGHTS IN SCHOOLS

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Disability rights took center stage in the recent battles over universal mask mandates in public schools. Pro-mask advocates argued that universal mask policies were necessary to ensure equal access to education under two different federal disability statutes, Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Opponents argued universal masking was an infringement on personal liberty and uncalled for by either law. Courts responded with a great deal of confusion that resulted in disparate legal outcomes for cases with essentially the same facts.

This confusion, however, is not new—it is rooted in decades of doctrinally flawed reasoning interpreting whether K–12 students' requested accommodations are reasonable. Courts imported this reasonableness framework from federal regulations for post-secondary and vocational schools. But those regulations do not apply to the K–12 space. In fact, the regulations governing K–12 schools say nothing about accommodations and do not limit schools' obligations to ensure equal access for students with disabilities. To confuse matters further, the U.S. Department of Education (DOE), tasked with enforcing disability rights in public schools, applies an entirely different analysis when resolving allegations of disability discrimination in administrative claims.

This Article is the first to identify and resolve courts' and agencies' confusion regarding K–12 disability discrimination claims. It argues that lower courts have misapplied the Supreme Court's higher education precedent to limit K–12 disability rights claims while the DOE has ignored legitimate limits on such claims to the confusion of individuals, schools, and courts. Further, it offers an amendment to Section 504 regulations that will clarify the law's reach for both lower courts and administrative claims.

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Introduction

The global pandemic transformed the world in countless ways.[1] In the United States, it reignited the inherent tension between personal liberty and the government's authority to ensure the common good.[2] That tension is particularly prevalent in the debate over school mask mandates.[3] One camp viewed masks as a necessary and effective public health tool in the fight against the spread of coronavirus.[4] The other

1. *See* Patrick Van Kessel, Chris Baronavski, Alissa Scheller & Aaron Smith, In *Their Own Words, Americans Describe the Struggles and Silver Linings of the COVID-19 Pandemic*, Pew Rsch. Ctr. (Mar. 5, 2021), https://www.pewresearch.org/2021/03/05/in-their-own-words-americans-describe-the-struggles-and-silver-linings-of-the-covid-19-pandemic/ [https://perma.cc/RR6B-K3AB].

2. Dennis Wagner, *The COVID Culture War: At What Point Should Personal Freedom Yield to the Common Good?*, USA Today (Aug. 2, 2021), https://www.usatoday.com/story/news/nation/2021/08/02/covid-culture-war-masks-vaccine-pits-liberty-against-common-good/5432614001/ [https://perma.cc/EVW6-CB6Z].

3. Deepa Shivaram, *The Topic of Masks in Schools Is Polarizing Some Parents to the Point of Violence*, NPR (Aug. 20, 2021), https://www.npr.org/sections/back-to-school-live-updates/2021/08/20/1028841279/mask-mandates-school-protests-teachers/ [https://perma.cc/PB8Q-W6DV].

4. Wagner, *supra* note 2.

viewed masks as an oppressive infringement on personal liberty that was both ineffective to combat the virus and harmful to mental health.[5] These dueling positions triggered battles in the streets, at school board meetings, and in courts over whether to ban or mandate masks in public schools.[6]

Surprisingly, students with disabilities took center stage in this war.[7] Pro-mask advocates leveraged two federal anti-discrimination laws, the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), to successfully argue that bans on universal masking violated anti-discrimination principles that are at the heart of both laws.[8] Essentially, plaintiffs claimed that state laws restricting schools' ability to implement universal masking in K–12 schools prevented students with disabilities from safely attending school and thus illegally denied them equal access to a safe school environment.[9] Unfortunately, federal courts had limited prece-

5. *See* Gwilym David Blunt, *Face Mask Rules: Do They Really Violate Personal Liberty?*, THE CONVERSATION (July 21, 2020), https://theconversation.com/face-mask-rules-do-they-really-violate-personal-liberty-143634 [https://perma.cc/77QT-JQSL]; *see also* Neeraj Sood & Jay Bhattacharya, *Mandatory Masking of School Children is a Bad Idea*, UNIV. S. CAL. SCHAEFFER CTR. HEALTH POL'Y & ECON. (Jul. 16, 2021), https://healthpolicy.usc.edu/article/mandatory-masking-of-school-children-is-a-bad-idea/; *About 40% of parents think mask-wearing harmed their kids' school experience*, HARVARD T.H. CHAN SCH. OF PUB. HEALTH (Mar. 30, 2022), https://www.hsph.harvard.edu/news/hsph-in-the-news/about-40-of-parents-think-mask-wearing-harmed-their-kids-school-experience/ [https://perma.cc/TD4X-M6ME] ("Mask-wearing harmed children's social learning and interactions as well as their mental and emotional health, according to a significant percentage of parents surveyed.").

6. Assoc. Press, *Mask Debate Moves from School Boards to Courtrooms*, U.S. NEWS & WORLD REP. (Aug. 28, 2021), https://www.usnews.com/news/health-news/articles/2021-08-28/mask-debate-moves-from-school-boards-to-courtrooms.

7. *See infra* Part III for a discussion on how disability lawsuits were a central piece of advocacy to force mask policies in schools.

8. Douglas Cnty. Sch. Dist. RE-1 v. Douglas Cnty. Health Dep't, 568 F. Supp. 3d 1158 (D. Colo. 2021) (holding that order prohibiting universal masking has the effect of discriminating against SWDs and violates Section 504 and ADA); Arc of Iowa v. Reynolds, 33 F.4th 1042 (8th Cir. 2022); M.B. v. Lee, No 21-6007, 2021 WL 6101486 (6th Cir. Dec. 20, 2021); S.B. *ex rel.* M.B. v. Lee, 566 F. Supp. 3d 835 (E.D. Tenn. 2021).

9. A disability rights group and parents of students with severe disabilities challenged Iowa's law prohibiting mask mandates in schools. *Arc of Iowa*, 33 F.4th 1042. Although the District Court granted a preliminary injunction blocking the law from being enforced, the Eighth Circuit vacated it because the availability of vaccines decreased the plaintiffs' children's risk of serious bodily injury or death from contracting COVID-19. *Id.* at 1044. In dissent, Circuit Judge Kelley argued that "schools are equipped to determine on an individualized, case-by-case basis—just as schools do for any other type of reasonable accommodation request—whether a mask requirement for certain people or places in the school building is a reasonable accommodation under the ADA and [Section 504]." *Id.* at 1050.

dent to guide their own rulings, and what little precedent they had was doctrinally flawed.[10]

For decades, the question of how far schools must go to accommodate students with disabilities has been analyzed through the lens of reasonableness. Courts understood Section 504 and the ADA, which this article will refer to collectively as "disability rights laws," as requiring schools to provide "reasonable accommodations" to ensure students with disabilities have meaningful access to education.[11] Requests are unreasonable when they impose "undue . . . burdens" on school districts or demand "fundamental" or "substantial" modifications to the existing program.[12] Consequently, most courts applied this reasonable accommodations framework to determine whether a universal masking policy was unduly burdensome or a fundamental alteration of the existing educational program.[13] Section 504, however, does not mention "reasonable accommodations," "undue burdens," or "fundamental alterations" in the statute or in regulations applicable to K–12 schools.[14] Courts simply imported this standard from other contexts, namely cases involving post-secondary schools.[15]

When the U.S. Department of Education's Office for Civil Rights (OCR)—the agency capable of clarifying any potential confusion regarding Section 504's scope in public schools—was asked to weigh in on the subject, it only made matters worse. Instead of addressing the interpretive errors in the courts, OCR papered over them by issuing confusing guidance that attempted to draw unhelpful distinctions between the types of claims asserted by students with disabilities.[16] Now rather than just confusion in the courts, there is ambiguity and conflict

10. Kristin L. Lingren, *The Demise of Reasonable Accommodation under Section 504: Special Education, the Public Schools, and an Unfunded Mandate*, 1996 WIS. L. REV. 633 (1996).

11. *Id.* at 634.

12. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 412 (1979).

13. *See infra* Section I.B.

14. *See* Letter from the Off. of Civ. Rts., E. Div., to Perry A. Zirkel, Prof., Lehigh Univ., 20 INDIVIDUALS DISABILITIES EDUC. L. REP. 134 (Aug. 23, 1993) [hereinafter Response to Prof. Perry A. Zirkel] (responding to inquiry from Professor Perry A. Zirkel requesting clarification on OCR's position regarding the extent of school districts' substantive obligations under Section 504). The ADA calls for "reasonable modifications" where such modifications do not "fundamentally alter" the nature of program. 28 C.F.R. § 35.130(b)(7). However, when enacting the ADA, Congress clarified that nothing in the ADA was meant to apply a lesser standard than that demanded by Section 504. Thus, the ADA acts as a floor while Section 504 determines the scope of rights and remedies available to eligible individuals with disabilities. 28 C.F.R. § 35.103 ("Relationship to other laws").

15. *Davis*, 442 U.S. at 404.

16. *See e.g.*, Response to Prof. Perry A. Zirkel, *supra* note 14.

within the administrative state.[17] The net results are seemingly random outcomes for claimants and unwarranted restrictions on individual rights.

This Article is the first to fully deconstruct these errors and provide a coherent explanation as to how courts and agencies should interpret and apply the disability rights laws to ensure students with disabilities have equal access to a meaningful public education. By reexamining the two Supreme Court opinions that speak to the scope of Section 504 and distinguishing their holdings as applied to discrimination claims in the K–12 context, this Article identifies limits of the reasonable accommodations framework as applied to K–12 claims. It analyzes lower court disability discrimination rulings, OCR decisions, and recent mask litigation revealing the doctrinal confusion and errors pervading K–12 disability rights cases.

Courts' adjudication of disability rights claims in the K–12 space lack consistency.[18] While many circuits apply the reasonable accommodations framework, their application is erratic across circuits and sometimes within the same circuit.[19] Other circuits eschew the framework alltogether and instead engage in a faulty analysis to determine whether a child is an "'otherwise qualified' individual with a disability."[20] This varied application leads to inconsistent results, making it difficult for both students with disabilities and school districts to un-

17. *See e.g.*, U.S. Dep't Of Educ., Off. For Civ. Rts., OCR-00104, Frequently Asked Questions About the Rights of Students with Disabilities in Public Charter Schools Under Section 504 of the Rehabilitation Act of 1973 (Dec. 28, 2016) [hereinafter Pub. Charter Schs. Disability FAQ], https://www2.ed.gov/about/offices/list/ocr/docs/dcl-faq-201612-504-charter-school.pdf [https://perma.cc/XYM5-V7CQ].

18. *C.f.* Ridley Sch. Dist. v. M.R., 680 F.3d 260, 281 (3d Cir. 2012) (applying a standard of "meaningful participation" to hold that a school district did not violate Section 504 when it provided a student with food allergies a different snack than her classmates), *with* Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990), *aff'd*, 943 F.2d 51 (6th Cir. 1991) (unpublished table decision) (applying a standard of "reasonable accommodations" to determine that a school district did not violate Section 504 when it denied admission to a specialized school for the blind because the student was both blind and intellectually disabled).

19. *Compare* Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp.3d 668 (E.D. Pa. 2022) (finding a school district's decision to end its universal masking policy would disparately impact students with disabilities and was a reasonable accommodation required under disability rights laws), *with* Doe 1 v. Upper Saint Clair Sch. Dist., No. 2:22-CV-112, 2022 WL 189691, at *3 (W.D. Pa. Jan. 21, 2022), *vacated and remanded*, No. 22-1141, 2022 WL 2951467 (3d Cir. Mar. 1, 2022) (request to reinstate universal masking was unreasonable because other safety measures were enough to satisfy Section 504 and the ADA).

20. Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 183 (7th Cir. 1983).

derstand their rights and obligations under the law.[21] For instance, when some politicians and parents began pushing back against mask wearing in schools, school districts were unsure whether disability rights laws compelled them to establish universal mask-wearing policies.[22]

The problem stems from lower courts' failure to consider crucial distinctions between the Supreme Court's precedent analyzing the scope of Section 504 in the post-secondary context from K–12 cases. Specifically, post-secondary regulations call for modifications to academic requirements unless a requirement is essential to the program.[23] K–12 regulations contain no such limitations regarding the extent that schools must furnish students with disabilities to avoid discrimination. Further, in all contexts other than K–12 schools, to be eligible to receive Section 504's protections, an individual must be "otherwise qualified" to participate in the program. In post-secondary schools, this means a student must meet the required academic and technical standards for admission.[24] Students in K–12 schools, however, are eligible for the law's protections by virtue of simply being old enough to attend public school.[25] Lower courts have consistently failed to notice these distinctions and instead apply those limitations applicable to the post-secondary context to K–12 schools.[26]

To complicate matters further, OCR takes the confusing position that while the reasonable accommodations framework can be appropriate for certain claims, it should not apply to limit schools' obligation to ensure students with disabilities receive equal access to education, defined in Section 504's regulation on Free Appropriate Public Education (FAPE).[27] The FAPE regulation requires schools to offer students with disabilities a program of regular and special education that meets their needs as adequately as the needs of students without disabilities.[28] Because the regulation does not explicitly contain any "reasonableness" limits, OCR's position is that the reasonable accommodations framework simply does not limit FAPE.[29] In short, the

21. *See infra* Section I.B.
22. *See infra* Section III.A.
23. 34 C.F.R. § 104.44 (2020) ("Academic adjustments").
24. 34 C.F.R. § 104.3(*l*)(3) (2020).
25. 34 C.F.R. § 104.3(*l*)(2) (2020).
26. *See infra* Section III.A.
27. PUB. CHARTER SCHS. DISABILITY FAQ, *supra* note 17.
28. 34 C.F.R. § 104.33 (2020).
29. Response to Prof. Perry A. Zirkel, *supra* note 14.

FAPE regulation requires that schools furnish whatever is necessary to ensure equality of access for students with disabilities.[30]

Calling for schools to ensure equality without limitation, however, fails to account for Supreme Court precedent finding that Congress intended to impose some limits on covered entities' obligations under Section 504.[31] This ruling applies to Section 504 broadly and is not constrained by post-secondary employment or K–12 regulations.[32] Thus, OCR's requirement that schools do whatever is necessary to ensure equal access to the educational program goes beyond the scope of Section 504's purpose.

OCR's position on FAPE also indirectly skews plaintiffs toward making reasonable accommodations claims in court. The reason is rather mundane. The Individuals with Disabilities Education Act (IDEA) has an identically named, but legally distinct, FAPE obligation. It also contains an exhaustion clause that requires plaintiffs to exhaust IDEA administrative remedies prior to seeking relief in federal court.[33] Because courts often conflate the two FAPE claims, they require plaintiffs to exhaust the IDEA's administrative procedures even where plaintiffs are seeking Section 504 relief.[34] To avoid this exhaustion requirement, plaintiffs bring reasonable accommodation claims that would more appropriately be cognizable under the Section 504 FAPE regulation.[35] As a result, courts rarely acknowledge or analyze Section 504's distinct FAPE regulation.

Courts and OCR have ultimately left both students and schools with uncertainty about students' rights and school district obligations under the law. Schools are often forced to balance varying interests, with limited resources, and are at a disadvantage when they lack the ability to understand their obligations to students with disabilities. One lesson from mask litigation thus far is that agency and court guidance

30. *Id.*

31. Alexander v. Choate, 469 U.S. 287, 299 (1985) ("While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.").

32. *Choate*, 469 U.S. at 299 ("Any interpretation of § 504 must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds." While we reject the boundless notion that all disparate-impact showings constitute prima facie cases under § 504, we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.").

33. 20 U.S.C. § 1415(*l*); Fry v. Napoleon Cmty. Sch., 580 U.S. 154 (2017).

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

35. *Id.*

does little to help schools understand the parameters of their obligations on behalf of students with disabilities.[36] Schools need clearer guidance to help them constructively analyze their obligations to ensure meaningful access to students with disabilities.

This Article offers a better way forward. It proposes an amendment to Section 504 regulations that would acknowledge a modified framing of reasonable accommodations which defines the limit of "reasonable" as only those accommodations that would pose "undue burdens" on a school district. To ensure students with disabilities have access to the law's protections, it proposes a presumption in favor of a requested accommodation so long as the student can make an initial showing to demonstrate a need for the accommodation. The burden then shifts to the school district to demonstrate why providing it would pose an undue burden. The modified framework also includes factors to help individuals, schools, and courts better understand what constitutes an undue burden. Finally, it offers a balancing test, modeled after the "best interests of the child" standard in family law, as an alternative to the reasonable accommodations framework altogether.

Part I of this Article begins with a background of the disability rights laws—Section 504 and Title II of the ADA. It explores Congressional intent when enacting the laws and highlights key differences, often overlooked by courts. It then unpacks key Supreme Court precedents that interpret Section 504 and establishes the limits of these opinions when applied to K–12 discrimination claims. Next, it explores OCR's interpretation of the laws' scope identifying significant differences between court and agency interpretation.

Part II observes patterns in lower court rulings with respect to disability rights claims and categorizes them into several distinct approaches that courts take when analyzing such claims. It then contrasts the judiciary's method with OCR's dispensation of administrative complaints illustrating the profoundly different approaches taken by the Agency as compared to courts.

Part III provides an overview of the mask litigation that inundated courts across the country, identifies themes, and illustrates the confusion around courts' interpretation of disability rights laws in the K–12 context. Part IV calls for several reforms and proposes a new standard by which to adjudicate disability rights claims in K–12 schools that seeks to stay true to the spirit of the laws while acknowledging the importance of equality of access within the practical considerations of cost, administration, and bureaucracy.

36. *See infra* Section I.B.

I.
The Doctrinal Mess: Flaws in Disability Discrimination Doctrine in K–12 Schools

Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act (ADA) are far-reaching federal laws that prohibit discrimination against individuals with disabilities in a variety of contexts, including children with disabilities in school settings.[37] Yet, since their enactment, lower courts have been perplexed by their reach in the K–12 space. This confusion has created several interpretive problems.

First, lower courts have been applying a reasonable accommodations framework to discrimination claims, despite the fact that the regulatory obligations of K–12 schools are far more expansive.[38] Section 504's regulations task K–12 schools with designing educational programs that serve students with disabilities as equally as students without disabilities, with no mention of reasonable accommodations to limit their obligations.[39] Lower courts mistakenly adopted the reasonable accommodations framework from two Supreme Court opinions analyzing Section 504 in other contexts, including post-secondary schools.[40]

A second problem with lower courts' interpretation of disability discrimination in K–12 schools is the failure to recognize Section 504's distinct FAPE regulation, which obligates schools to "provide regular or special education and related aids and services that are designed to meet the individual educational needs of [students with disabilities] as adequately as the needs of [their nondisabled peers]."[41] Most courts are quick to assign all FAPE claims as matters to be dealt with under the IDEA's administrative process, which must be exhausted prior to filing a federal court claim under disability rights laws. Thus, plaintiffs are disincentivized from invoking Section 504's FAPE regulation and instead fall back on reasonable accommodations requests.

The following section will first provide an overview of Section 504, Title II of the ADA, and the IDEA to help ground the doctrinal

37. Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; Title II of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12131.

38. Lingren, *supra* note 10.

39. 34 C.F.R. § 104.33 (2020).

40. *Id.* § 104.44. The two Supreme Court cases include Se. Cmty. Coll. v. Davis, 442 U.S. 397, 400 (1979) and Alexander v. Choate, 469 U.S. 287, 289 (1985), discussed below.

41. *Id.* § 104.33.

discussion. It will then unpack the relevant Supreme Court precedent analyzing the scope of Section 504 outside of the K–12 context to better illustrate where lower courts went astray. Finally, it will discuss how current OCR guidance only serves to confuse students, schools, and courts further with respect to Section 504's reach in public schools.

A. Section 504 of the Rehabilitation Act, Title II of the ADA, and the IDEA

Section 504 and the ADA are essentially civil rights bills enacted to ensure that individuals with disabilities were not discriminated against in any aspect of life. When enacted in 1973, Section 504's purpose was to prohibit disability discrimination in federal government-created programs and programs receiving federal government funding.[42] Section 504's antidiscrimination principle was included to "eliminate" the "glaring neglect" of individuals with disabilities which caused those individuals to "live among society 'shunted aside, hidden, and ignored.'"[43] The mandate cut across the areas of employment, facility access, and education.[44] To effectuate this statute, the Department of Education regulations governing K–12 education directed schools to both prohibit discriminatory practices and also take affirmative actions to ensure students with disabilities had equal access to the educational program.[45] Several decades later, Congress enacted the ADA to expand this antidiscrimination prohibition to all public organizations, not just those receiving federal funding, and "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[46] While the ADA has several chapters, this article will focus on Title II, which forbids any public entity from discriminating based on disability.[47]

The ADA was in large part modeled after Section 504, adopting its eligibility parameters and remedies,[48] as well as borrowing language from its key provisions. For example, Section 504's core an-

42. Section 504's purpose was "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1).

43. *Choate*, 469 U.S. at 295 (internal citation omitted).

44. 29 U.S.C. § 35.102.

45. 34 C.F.R. § 104.31–104.37 (2020).

46. 42 U.S.C. § 12101(b)(1).

47. *See id.* §§ 12131–12165.

48. *Id.* § 12133 ("The remedies, procedures, and rights set forth in [Section 505 of the Rehabilitation Act of 1973] shall be the remedies, procedures, and rights this [title] provides to any person alleging discrimination on the basis of disability in violation of [the ADA].").

tidiscrimination principle states, "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[49] Title II's antidiscrimination language is almost identical.[50] Because of these similarities, the ADA and Section 504 are nearly always read in concert.[51] In fact, Congress clarified that ADA regulations shall be consistent with Section 504 regulations with the exception of "program accessibility, existing facilities" and "communications."[52] However, important, and often overlooked, distinctions between the laws exist.[53]

In the context of K–12 public education, both laws require that schools ensure students with disabilities have equal access to the educational program as a whole, including extracurricular activities and school transportation.[54] Section 504 regulations detail affirmative ob-

49. 29 U.S.C. § 794(a),

50. 42 U.S.C. § 12132.

51. Kimber v. Thiokol Corp., 196 F.3d 1092, 1102 (10th Cir. 1999) (citing Bragdon v. Abbott, 524 U.S. 624 (1998)) ("Because the language of disability used in the ADA mirrors that in the Rehabilitation Act, we look to cases construing the Rehabilitation Act for guidance when faced with an ADA challenge."); Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 115 (3d Cir. 2018) (citing PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001)) (" 'To effectuate its sweeping purpose,' Congress designed the ADA to fit hand in glove with the RA, leaving intact the 'scope of protection . . . under [Section 504].' "); Miller *ex rel.* S.M. v. Bd. of Educ. of Albuquerque Pub. Schs., 565 F.3d 1232, 1245 (10th Cir. 2009) (When evaluating a discrimination claim under both Section 504 and Title II of the ADA, "[b]ecause these provisions involve the same substantive standards, [courts] analyze them together.").

52. 42 U.S.C. § 12134(b); 34 C.F.R. § 35.103(a) (2020).

53. There are three distinctions between Title II's antidiscrimination language and Section 504's. First, Title II eliminates the federal funding limitation and applies to all "services, programs or activities of a public entity." Second, with respect to eligibility, it eliminates "otherwise," stating only that "no qualified individual with a disability" shall be denied benefits. Third, it eliminates "solely" from the causation clause, stating "no qualified individual with a disability shall, *by reason* of such disability, be excluded . . . ." 42 U.S.C. § 12132 ("Discrimination") (emphasis added). The final difference centers on causation, exploring whether the alleged discriminatory conduct was "solely by reason of" (Section 504) or "by reason of" (ADA) disability. Some commentators and courts opine that the word "solely" suggests a higher level of causation required by Section 504 to establish discrimination. A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195, 1203 n.5 (9th Cir. 2016) ("For instance, section 504 imposes a stricter causal standard ('solely by reason of disability') than Title II's 'motivating factor' standard."). Despite these distinctions, the majority of courts continue to analyze claims arising under these laws jointly. K.M. *ex rel.* Bright v. Tustin Unified Sch. Dist., 725 F.3d 1088, 1099 (9th Cir. 2013) ("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.").

54. 34 C.F.R. §§ 104.33, 104.34, 104.37 (2021).

ligations schools must undertake to ensure that students with disabilities are not denied the benefits of public education. Specifically, schools are obligated to identify students with disabilities using comprehensive evaluations to assess their needs.[55] Once identified, Section 504 regulations call on schools to ensure that students receive a "Free Appropriate Public Education" (FAPE), defined as "regular or special education and related aids and services that are designed to meet the individual needs of [students with disabilities] as adequately as the needs of [students without disabilities]."[56] Schools must also ensure students with disabilities are educated with nondisabled children to the maximum extent appropriate in academic, nonacademic, and extracurricular settings, such as during meals, recess periods, and physical education.[57]

Title II regulations call for equality of opportunity and access to public education by prohibiting public schools from providing students with disabilities with "an aid, benefit or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement."[58] The law mirrors Section 504's integration requirement by calling for public entities to administer programs in "the most integrated setting appropriate."[59] Title II regulations also speak to program accessibility,[60] including the use of service animals[61] and mobility devices.[62] They do not, however, include a FAPE obligation. And, unlike Section 504, they do not contain regulations specifically aimed at K–12 schools. Title II regulations specifically call for "reasonable modifications when necessary to avoid discrimination unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[63] This limitation is often referred to by courts as an obligation to make "reasonable accommodations."[64]

55. *Id.* §§ 104.32–104.33.

56. *Id.* § 104.33(b)(1). This obligation is known as Free Appropriate Public Education (FAPE). The IDEA also contains a FAPE obligation, but IDEA's FAPE is measured differently. Fry v. Napoleon Cmty. Sch., 580 U.S. 154 (2017).

57. 34 C.F.R. § 104.34, 104.37.

58. 28 C.F.R. § 35.130(b)(iii) (2021).

59. *Id.* § 35.130(d).

60. *Id.* § 35.149–35.151.

61. *Id.* § 35.136.

62. *Id.* § 35.137.

63. *Id.* § 35.130(b)(7).

64. The term "reasonable accommodations" is taken from Title I of the ADA which applies to employment. *Id.* § 41.53.

While not mentioned by Section 504 regulations, in practice, courts apply reasonable accommodations to both Section 504 and Title II claims.[65] However, the trouble with doing so is that courts fail to recognize that the reasonable accommodations framework is not firmly grounded in Section 504's plain language or regulations. When enacting the ADA, Congress clarified that nothing in the ADA was meant to apply a lesser standard than that demanded by Section 504.[66] The ADA will never restrict rights provided for under Section 504; it acts as a floor, not a ceiling, when determining the scope of rights and remedies available to qualifying individuals under both laws. Consequently, if Section 504's FAPE regulation calls for something more than the ADA's "reasonable modifications" analysis, the ADA would not limit this expanded right. Thus, the fact that courts apply reasonable accommodations in both statutory contexts is evidence of a larger interpretative problem.

Another source of confusion for the courts involves a third disability law: the Individuals with Disabilities Education Act (IDEA).[67] Unlike the broader anti-discrimination reach of Section 504 and ADA, the IDEA's focus is on children with disabilities, rather than all individuals.[68] The law provides states with federal funding in exchange for a commitment to ensure children with disabilities are provided certain procedural and substantive rights including a "free appropriate public education" (FAPE).[69] The IDEA's FAPE obligation requires schools to provide eligible children with disabilities an Individualized Education Program (IEP) that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."[70] Additionally, the IDEA contains an exhaustion clause requiring plaintiffs to first exhaust its administrative remedies prior to seeking relief under other statutes in federal court.[71] Crucially, the IDEA's exhaustion clause is triggered when a plaintiff seeks a remedy for the denial of FAPE.[72]

65. *See infra* Section III.B.

66. 28 C.F.R. § 35.103 (2020) ("Relationship to other laws").

67. Individuals with Disabilities Education Act, 20 U.S.C. §1400.

68. 20 U.S.C. §1401(3).

69. 20 U.S.C. §1412(a)(1)(A).

70. Endrew F. *ex rel.* Joseph F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017). An IEP is a written plan that is drafted in compliance with a detailed set of procedures that require careful consideration of a child's individual circumstances. 20 U.S.C. § 1414(d).

71. 20 U.S.C. §1415(l).

72. Fry v. Napoleon Cmty. Sch., 580 U.S. 154, 755 (2017).

The problem created by the lower courts involving the IDEA is a combination of doctrinal misinterpretation and procedural oversight. FAPE under the IDEA is legally distinct from Section 504's FAPE regulation. In practice, however, courts do not typically recognize Section 504's FAPE regulation as distinct from an IDEA FAPE claim. Thus, when a plaintiff alleges they were denied certain educational supports or services required by Section 504's FAPE regulation, courts often treat this as an IDEA claim requiring exhaustion and dismiss it entirely.[73] The implications of this will be further explored later in this article.[74]

When it comes to discrimination claims under Section 504 and the ADA, courts typically recognize three theories of liability: disparate treatment, disparate impact, and failure to make a reasonable accommodation.[75] Disparate treatment occurs when a student is singled out for negative or unequal treatment because of their disability.[76] Disparate impact occurs when a rule or policy, though facially neutral, results in a denial of meaningful access to the educational program or unequal treatment of students with disabilities.[77] Reasonable accommodations claims are based on an individual's need for some modification or service to ensure meaningful and equal participation in the benefit of public school.[78] Failure to make reasonable accommodations allegations are frequent in the K–12 context and can overlap with disparate impact claims. If a public entity's procedures deny people with disabilities meaningful access to its programs, causing a disparate impact, then the public entity is required to make reasonable

73. Raj, *supra* note 34; *see also*, Perez v. Sturgis Pub. Schs., 3 F.4th 236, 242 (6th Cir. 2021), *cert. granted*, No. 21-887, 2022 WL 4651225 (U.S. Oct. 3, 2022) (finding a deaf student's discrimination claim was subject to the IDEA's exhaustion requirements even after student settled his IDEA claim prior to completion of the administrative proceedings).

74. *See infra* Section I.C.

75. Payan v. L.A. Cmty. Coll. Dist., 11 F.4th 729, 738 (9th Cir. 2021).

76. L.E. v. Ragsdale, 568 F. Supp. 3d 1364, 1368 (N.D. Ga. 2021) ("Disparate treatment involves discriminatory intent and occurs when a disabled person is singled out for disadvantage because of his disability.").

77. *Payan*, 11 F.4th at 738 ("To assert a disparate impact claim, a plaintiff must allege that a facially neutral government policy or practice has the 'effect of denying meaningful access to public services' to people with disabilities.").

78. *Id.* at 738–39 (comparing cases involving requests for reasonable accommodations with those requesting modifications to a policy that has a disparate impact). *Compare* Updike v. Multnomah Cnty., 870 F.3d 939, 949–53 (9th Cir. 2017) (considering reasonable accommodation claim against county over its denial of an ASL interpreter and auxiliary aids to individual deaf pretrial detainee), *with* Crowder v. Kitagawa, 81 F.3d 1480, 1485–86 (9th Cir. 1996) (considering reasonable modifications to Hawaii law requiring 120-day quarantine of all dogs entering the state, which was found to have a disparate impact on blind users of guide dogs).

modifications to those procedures. Consequently, "although failure to make a reasonable accommodation and disparate impact are two different theories of a Title II claim, a public entity may be required to make reasonable modifications to its facially neutral policies which disparately impact people with disabilities."[79]

To state a claim alleging a failure to make a reasonable accommodation, a plaintiff must show that they are a qualified individual with a disability who was denied a reasonable accommodation needed to meaningfully access the educational program.[80] A school district can defend their denial of that accommodation by arguing that the modification would fundamentally alter the nature of their program or would be unduly burdensome to administer.[81] Courts use a variety of factors to determine when a request fundamentally alters a program or is unduly burdensome, which can make it difficult for both plaintiff students and defendant school districts to know whether a request for an accommodation will be seen as "reasonable" and thus required by law.[82]

Crucially, none of these theories of liability originated in discrimination claims brought by K–12 students. Rather, this doctrine was developed in cases arising from post-secondary schools and Medicaid regulations. In fact, the Supreme Court has yet to take on the scope of disability rights laws in the K–12 space. The following section analyzes the two Supreme Court cases that considered the scope of Section 504's discrimination principle and distinguishes the applicability of those holdings when applied to the K–12 context.

B. Supreme Court Interpretation of Section 504

The reasonable accommodation framework arises from Section 504 regulations that are implemented in employment and post-secondary education contexts.[83] In employment, regulations require an em-

79. *Payan*, 11 F.4th at 738.

80. A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195, 1204 (9th Cir. 2016).

81. Eva N. v. Brock, 741 F. Supp. 626, 632 (E.D. Ky. 1990), *aff'd*, 943 F.2d 51 (6th Cir. 1991) (unpublished table decision) ("[Section 504] has been interpreted, a 'reasonable accommodation' does not include fundamental modifications of institutional requirements or programs.").

82. Sandison v. Mich. High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995) (finding that waiver of the age restriction fundamentally alters the sports program and is not a reasonable accommodation); Cruz *ex rel.* Cruz v. Pa. Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 (E.D. Pa. 2001) (finding that high school athletic association's maximum-age rule was not "essential eligibility requirement" within meaning of ADA and a waiver of the was a reasonable accommodation).

83. 34 C.F.R. § 104.12 (2021).

ployer to make "reasonable accommodations . . . unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of its program."[84] In post-secondary education, regulations call for "modifications" to the academic program when necessary to eliminate discrimination.[85] Post-secondary schools are exempted from making modifications to academic requirements that are "essential to instruction or to licensing requirements."[86] Title II contains a regulation adopting the Section 504 language and calling for "reasonable modifications" when necessary to avoid discrimination unless such modifications would "fundamentally alter" the nature of program.[87]

Critically, there is no mention of reasonable accommodations or modifications in the Section 504 regulations governing K–12 schools.[88] Yet, courts have consistently incorporated the reasonable accommodations framework when evaluating schools' Section 504 obligations in the K–12 context. Often courts import employment and post-secondary reasonable accommodations language when evaluating discrimination claims in K–12 schools.[89] The confusion is rooted in the misapplication of two foundational Supreme Court cases, *Southeastern Community College v. Davis* and *Alexander v. Choate*.[90] While neither case involved K–12 schools, the Court's dicta and holdings from both cases continue to influence lower court rulings about Section 504's reach in the K–12 space. A review of *Davis* and *Choate* confirms that these cases are distinguishable from the K–12 setting both factually and with respect to the Court's conclusions about legislative intent.

84. *Id.*

85. *Id.* § 104.44(a). Modifications are described as changes in the length of time permitted for completion of a degree, substitutions of courses, and adaptions to the manner in which courses are taught. *Id.*

86. *Id.*

87. 28 C.F.R. § 35.130(7) (2020).

88. 34 C.F.R. § 104.31–104.39 (2020) (Subpart D governs Preschool, Elementary, and Secondary Education).

89. J.D. *ex rel.* J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 70 (2d Cir. 2000) (citing *Davis* and *Choate* for limits on Section 504 including the idea that "while a federal funds recipient must offer "reasonable" accommodations to individuals with disabilities to ensure meaningful access to its federally funded program, Section 504 does not mandate "substantial" changes to its program.").

90. Lingren, *supra* note 10; Se. Cmty. Coll. v. Davis, 442 U.S. 397, 400 (1979); Alexander v. Choate, 469 U.S. 287, 289 (1985).

1. Southeastern Community College v. Davis

Section 504's anti-discrimination mandate was first evaluated by the Supreme Court in *Southeastern Community College v. Davis*, a case involving the law's post-secondary regulations.[91] The plaintiff was a woman with a hearing impairment who was denied admission to a nurse training program at a community college because the college determined that her disability would make it impossible for her to safely participate in the program and care for patients.[92] Ultimately, the Court found for the college, holding that Section 504, "does not compel educational institutions to disregard the disabilities of handicapped individuals or to make substantial modifications in their programs to allow disabled persons to participate."[93] Rather, it only requires that "otherwise qualified handicapped individual[s]" not be excluded "solely by reason of [their] handicap."[94] While the fact of one's disability "is not permissible ground for assuming an inability to function in a particular context," colleges are not required to modify essential functions of their curricular programs.[95]

The Court's analysis centered on the definition of "otherwise qualified" persons, in essence a kind of eligibility prerequisite to engender the law's protections. To have rights under Section 504, one had to be "otherwise qualified" to receive the benefit. In the context of postsecondary education, regulations defined "qualified handicapped person" as someone, "who meets the academic and technical standards requisite to admission or participation in the [school's] educational program or activity."[96] Thus, the court determined that an "otherwise qualified" individual with a disability is someone who is able to meet a program's requirements "in spite of" their disability.[97] In reaching this conclusion, the Court relied on agency comments to regulations indicating that individuals with disabilities may be required to meet certain essential physical qualifications.[98] Ultimately, the Court held that plaintiff was not "otherwise qualified" because the physical quali-

91. *Davis*, 442 U.S. at 400.
92. *Id.* at 403.
93. *Id.* at 405.
94. *Id.*
95. *Id.*
96. 34 C.F.R. § 104.3(*l*)(3) (2020).
97. *Davis*, 442 U.S. at 406.
98. *Id.* at 407 n.7 ("Paragraph (k) of § 84.3 defines the term 'qualified handicapped person.' . . . The Department believes that the omission of the word 'otherwise' is necessary in order to comport with the intent of the statute because, read literally, 'otherwise' qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap.").

fications necessary for participation in the nursing program (the ability to understand speech without reliance on lipreading) was essential to the program and the modifications requested by the plaintiff, including individual attention by a supervisor, would be a fundamental alteration to the nature of the program and more than the "modification" required by the regulation.[99]

The post-secondary regulations were central to the Court's analysis in *Davis* and formed the basis for establishing a limit to how far a college must go in the service of offering a non-discriminatory program. Post-secondary schools, per regulation, must make certain "modifications" to academic requirements when necessary to avoid discrimination.[100] The regulation, however, specifically limits these modifications. Post-secondary schools are not required to modify academic requirements that are "essential to the instruction being pursued" or "directly related licensing requirement."[101] Consequently, the *Davis* Court's holding limiting the reach of Section 504 to individuals who can meet "academic and technical standards" with reasonable, not substantial modifications, to the program is uniquely tied to post-secondary and vocational schools.[102] And yet, in the decades since, lower courts have routinely applied *Davis* to K–12 schools despite the latter being governed by an entirely distinct set of regulations.[103]

Section 504 regulations governing K–12 schools do not contain any limits to how far schools must go to ensure students with disabilities have meaningful access to the educational program. To be clear, schools are not required to provide students with disabilities more than what they provide students without disabilities, but rather the law de-

99. *Id.* at 410. Lower courts applied *Davis* to hold colleges accountable via Section 504, when they denied accommodations that would have allowed access to the educational program. For instance, in a case decided just a few years later, a deaf graduate student sought a qualified interpreter under Section 504 to ensure access to his course of study. The Fifth Circuit affirmed the district court's preliminary injunctive relief to plaintiff stating that the Supreme Court's decision in *Davis* "says only that Section 504 does not require a school to provide services to a handicapped individual for a program for which the individual's handicap precludes him from ever realizing the principal benefits of the training." Camenisch v. Univ. of Tex., 616 F.2d 127, 133 (1980). Other Circuits followed suit and held that Section 504 does require federal grantees to provide individualized accommodations where necessary to ensure access to the program. Thomas *ex rel.* Thomas v. Davidson Acad., 846 F. Supp. 611, 619 (M.D. Tenn. 1994) (finding school failed to reasonably accommodate plaintiff).

100. 34 C.F.R. § 104.44(a).

101. *Id*.

102. *Id.* § 104.3(*l*)(3).

103. Eva N. v. Brock, 741 F. Supp. 626 (E.D. Ky. 1990), *aff'd*, 943 F.2d 51 (6th Cir. 1991) (unpublished table decision); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998); St. Johnsbury Acad. v. D.H., 240 F.3d 163 (2d Cir. 2001); A.H. *ex rel.* Holzmueller v. Ill. High Sch. Ass'n, 881 F.3d 587 (7th Cir. 2018).

mands equality.[104] Moreover, the K–12 regulations compel schools to disregard the nature or severity of an individual's disability for purposes of being "qualified" for the statute's protections.[105] In the context of K–12 schools, a "qualified individual" is any child that is of the requisite age for which a state has either offered an educational program or is mandated to offer an educational program.[106] Consequently, when reading the plain language of the statue in the context of the K–12 regulations, Section 504 demands that schools ensure that any school-age student with a disability not be excluded from participation in or denied the benefit of school, or subjected to discrimination in school solely on the basis of disability. Further, Section 504's FAPE regulation compels K–12 schools to design an educational program that can meet the needs of individual students with disabilities "as adequately" as the needs of their nondisabled peers.[107] Thus, rather than enacting limits, in the K–12 space, Section 504's protections are wholly defined by an individual student's needs.

In the decades since *Davis* was decided, the precedential value of its holding as applied to K–12 education is rarely called into question by lower courts, and yet, significant differences exist between K–12 schools and post-secondary education beyond those contained in the regulations. To start, states are compelled by their constitutions to provide for a system of public schools available to all students.[108] Additionally, compulsory school attendance laws mandate that children of a certain age participate in some form of educational program.[109] Attending post-secondary schools or vocational training

104. 34 C.F.R. § 104.34 (2021); *see also* Response to Prof. Perry A. Zirkel, *supra* note 14.

105. *Id.* § 104.3(*l*)(2).

106. *Id.*

107. *Id.* § 104.33.

108. For example, North Carolina's state constitution provides the right to a "sound basic education." N.C. GEN. STAT. § 115C-1 (2022); Leandro v. State, 488 S.E.2d 249 (N.C. 1997). California's state constitution provides that "[t]he Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year." CAL. CONST. art. IX, § 5; *see also* Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ [https://perma.cc/E7BM-RJUW]; Natalie A.E. Young, *ACSBR-006, Childhood Disability in the United States: 2019*, U.S. Dep't of Commerce & U.S. Census Bureau (Mar. 25, 2021), https://www.census.gov/library/publications/2021/acs/acsbr-006.html [https://perma.cc/P8ZT-46JR].

109. *Table 1.2. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, By State: 2017*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/statereform/tab1_2-2020.asp [https://perma.cc/SK3H-QSXB].

programs is, of course, entirely voluntary. Reflecting these significant differences, the Section 504 regulations implementing the law within these two contexts are very different. Relying on *Davis* in the K–12 context equates to a rejection of Section 504's FAPE mandate.

2. Alexander v. Choate

Davis was the first case to interpret Section 504, but shortly thereafter, another foundational opinion helped define the parameters of the law's reach. *Alexander v. Choate* was a class action by Medicaid recipients challenging Tennessee's proposed reduction of the number of inpatient hospital days (twenty to fourteen) that state Medicaid programs would reimburse recipients each year. Plaintiffs alleged that the proposed limitation would disproportionately impact individuals with disabilities and therefore violate Section 504.[110] Relying on both plain language and Congressional intent, the Court determined that Section 504's prohibition against discrimination could reach certain claims of disparate-impact discrimination.[111] Ultimately, the Court declined to set the parameters around what types of disparate impact claims Section 504 covered, stating only, "we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[112]

The Court relied heavily on its previous decision in *Davis* when analyzing Section 504's scope. Quite critically, however, the Court failed to acknowledge that the *Davis* decision was based on Section 504's post-secondary regulations, which were not at issue in *Choate.*[113] The *Choate* opinion cited *Davis* for the proposition that while federal grantees may not be required to make "fundamental" or "substantial" modifications to accommodate individuals with disabilities, they may be required to make reasonable ones.[114] Despite the fact that the *Davis* conclusions were grounded in post-secondary regulations, the Court in *Choate* nonetheless appropriated these findings to Section 504 as a whole when it concluded that the statute's scope was

110. Alexander v. Choate, 469 U.S. 287, 289 (1985).
111. *Id.* at 298 ("Had Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history.").
112. *Id*. at 299.
113. *Id.* at 301.
114. *Id.* at 300.

limited to only "reasonable accommodations."[115] Consequently, it is at least arguable that the reasonable accommodations limitation announced in *Davis* and adopted by *Choate* are limited to post-secondary and vocational contexts.

The question remains then, what, if anything, does *Choate*'s holding have to say about Section 504's reach in K–12 schools?

Recall that the Court in *Choate* was ultimately trying to determine whether Section 504's reach included claims of disparate-impact or unintentional discrimination.[116] It looked beyond *Davis* to Congressional intent to find that, in some cases, it does.[117] The Court cited Congress' clearly stated desire to root out "previous societal neglect" of individuals with disabilities, but found that Congress did not intend for this obligation to be limitless.[118] Rather, the Court held, "[a]ny interpretation of [Section 504] must therefore be responsive to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep [Section 504] within manageable bounds."[119] Consistent with this holding, the Court determined that Section 504 required covered entities to ensure qualified individuals with disabilities have "meaningful access" to the benefit or program offered, and reasonable accommodations may be warranted to ensure such access.[120] The Court then defined "reasonableness" by referring to *Davis* and the post-secondary regulations at issue in that case.[121] Arguably, if *Davis*' established limits do not apply in the K–12 context, then *Choate* only stands for two broader principles derived from Congressional intent: 1) Section 504 reaches some but not all claims of disparate impact[122] and 2) covered entities must ensure individuals with disabilities have "meaningful access" to the offered benefit or program.[123]

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115. *Id.* at 301 n.21 ("The regulations implementing § 504 are consistent with the view that reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access" citing to regulations outside of the K–12 context).
116. *Id*. at 299.
117. *Id.* at 295 ("Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.").
118. *Id.*
119. *Id.* at 299.
120. *Id.* at 301 ("The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.").
121. *Id.* at 300.
122. *Id.*
123. *Id*. The parameters of "meaningful access" have never been defined by the Supreme Court and, thus, this Article theorizes that those limits should be clearly

Critics of this interpretation point to the Supreme Court's discussion of the Rehabilitation Act's overall structure.[124] In *Davis*, the Court concluded that state agencies, unlike federal agencies and federal contractors, were not tasked with taking affirmative steps to overcome disabilities.[125] Based on this, the Court concluded that Congress intended a "distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps."[126] Yet, in *Choate* the Court walked back this language, stating that state agencies were obligated to take affirmative steps to ensure meaningful access to programs that received federal funds.[127] The Court limited those changes to reasonable accommodations, but again, this limit was based in post-secondary school regulations.[128] In fact, the only regulations the Court in *Choate* relied on as support for the reasonable accommodations limitation came from the contexts of employment, facilities accessibility, and post-secondary schools.[129] Noticeably absent from this list was K–12 regulations.

In sum, Section 504 makes no mention of "reasonable modifications" or "reasonable accommodations" in the regulations governing K–12 schools. Yet, plaintiffs regularly invoke reasonable accommodations as a means of enforcing disability rights laws in courts and through the U.S. Department of Education, the executive agency tasked with enforcing Section 504 and the ADA in schools.[130] Agency guidance on the subject both acknowledges the lack of regulatory authority for reasonable accommodations while at the same time upholding such claims as valid interpretations of Section 504 and the ADA in

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established by the U.S. Department of Education in future amendments to regulations and guidance. *See infra* Part IV ("Solutions").

124. Lingren, *supra* note 10, at 659.

125. Se. Cmty. Coll. v. Davis, 442 U.S. 397, 410 (1979) (citing Section 501(b) which requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of" individuals with disabilities and Section 503(a), requiring federal contractors to "take affirmative action to employ and advance in employment qualified handicapped individuals. . .").

126. *Id.*

127. *Choate*, 469 U.S. at 300 n.20 ("Use of the phrase 'affirmative action' in this context is unfortunate . . . . It is clear from the context of *Davis* that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' or that would constitute 'fundamental alteration[s] in the nature of a program . . ., rather than to those changes that would be reasonable accommodations.") (internal citations omitted).

128. *Id.* at 301.

129. *Id.* at 301 n.21.

130. *About OCR*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/aboutocr.html [https://perma.cc/N38D-QVXV].

certain instances.[131] Specifically, the U.S. Department of Education's Office for Civil Rights (OCR) maintains that the fundamental alteration and undue burden limits do not apply to schools' obligation to confer FAPE under Section 504.[132] However, it endorses courts' use of the reasonable accommodation framework with respect to non-FAPE related issues. This confusing guidance fails to provide needed clarity on the scope of disability rights protections for litigants and school districts. In practice, boundaries between FAPE obligations and other nonacademic obligations are not always clearly delineated. The following section will explore Agency interpretation of Section 504's reach in K–12 schools and further illustrate its shortcomings.

C. Agency Interpretation

The U.S. Department of Education's Office for Civil Rights (OCR) is tasked with enforcing Section 504 and Title II of the ADA in schools. In addition to investigating complaints of discrimination, OCR also issues guidance reflecting the Agency's interpretation of the laws it enforces.[133] Through this guidance, OCR has taken the following positions. First, the terms "reasonable modification" and "reasonable accommodation" are interchangeable for purposes of statutory meaning. Second, Title II and Section 504 both require public schools to make reasonable modifications necessary to ensure that an educational program is accessible to students with disabilities. Third, covered entities do not need to make a requested modification if they can demonstrate that doing so would pose a fundamental alteration to the program or pose an undue administrative burden. Finally, the limits of fundamental alteration and undue burden do not apply to Section 504's FAPE regulation.[134] While the first three points track court interpretation of Section 504's reach, the last point requires further clarification.

As noted above, Section 504's FAPE regulation is unique to the K–12 context and not found in regulations governing post-secondary

131. PUB. CHARTER SCHS. DISABILITY FAQ, *supra* note 17, at 14 n.53 (clarifying "the term *reasonable accommodation* incorporates the obligation to provide reasonable modifications of policies, practices, and procedures unless those changes pose a fundamental alteration to the program or pose an undue financial and administrative burden").

132. Response to Prof. Perry A. Zirkel, *supra* note 14.

133. OCR will issue "significant guidance" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432 (Jan. 25, 2007), which is non-binding. The Agency will also issue guidance through "Dear Colleague letters."

134. PUB. CHARTER SCHS. DISABILITY FAQ, *supra* note 17, at 14 n.53.

schools or employment.[135] It directs schools to ensure they are providing "regular or special education and related aids and services that are designed to meet individual educational needs of [students with disabilities] as adequately as the needs of [students without disabilities]."[136] Stated differently, schools are required to take affirmative steps to ensure equality of educational access for students with disabilities. OCR believes this obligation is not limited to only those accommodations that are "reasonable," but rather that schools must furnish whatever is necessary to avoid discrimination.[137] Because of this, OCR maintains that the affirmative defenses of undue burden and fundamental alteration are simply not applicable here.

Practically speaking, however, requested accommodations often impact both academic and nonacademic aspects of the educational program. For example, a student who needs to be dismissed from class early so that they can navigate the hallways during quieter times requires that accommodation for both their academic classes and extracurricular activities. The Section 504 FAPE regulation demands that a school provide this accommodation when necessary to avoid discrimination. However, a plaintiff may also frame this as a request for a "reasonable accommodation." Based on Agency guidance, the way in which the plaintiff frames the request may determine what, if any, limits the law may impose on such a request. If framed as required by FAPE under Section 504, then no limits are applied. But if it is framed as a "reasonable accommodation," then the limits of undue burden and fundamental alteration are applicable.

Presumably, the Agency takes this convoluted position because it must acknowledge both the plain language of its own regulations (which do not mention reasonable accommodations) and the more than forty years of court opinions applying a reasonable accommodations framework to K–12 claims of disability discrimination.[138] However, by attempting to hold both as legitimate interpretations of the law's reach, the Agency fails to offer needed guidance about the

135. 34 C.F.R. § 104.33 (2020).

136. *Id.*

137. *See* Response to Prof. Perry A. Zirkel, *supra* note 14 ("The key question in your letter is whether OCR reads into that Section 504 regulatory requirement for a FAPE a "reasonable accommodation" standard, or other similar limitation. The clear and unequivocal answer to that is no.").

138. *See id.* (discussing reasonable accommodation limitation in Subpart B, applicable to employment, and a similar modification requirement in Subpart E, applicable to postsecondary and vocational schools, and concluding that since no such limits exist in Subpart D, applicable to elementary and secondary education, "the regulation writers intended to create a different standard for elementary and secondary students than for employees or postsecondary/vocational students").

scope and limits of disability discrimination claims. Moreover, this position does not acknowledge that most courts fail to even recognize Section 504's FAPE regulation, let alone attempt to excise Section 504's FAPE regulation from reasonable accommodations claims.[139]

In practice, plaintiffs rarely bring claims invoking Section 504's FAPE regulation—and for good reason. Many students who have rights under Section 504 and Title II also have rights under the IDEA, which arguably confers more robust due process protections.[140] The IDEA requires plaintiffs to exhaust its administrative procedures whenever they are seeking a remedy that is available under the statute.[141] The combined effect of the IDEA's rights and remedies often results in courts' application of the IDEA's exhaustion clause to any plaintiff attempting to bring a FAPE claim, regardless of whether it is derived from the IDEA or Section 504.[142] Consequently, plaintiffs who can resolve their requests for accommodations under the IDEA must do so prior to bringing a Section 504 or ADA claim. Even plaintiffs who have no rights under the IDEA have been told their claims are not proper without first exhausting (non-existent) IDEA remedies.[143] When courts see the term "FAPE," they immediately assume the IDEA must be involved and force plaintiffs to resolve disputes using the IDEA's remedies. This results in scant court decisions interpreting Section 504's FAPE regulation.

Because courts are regularly confused about the appropriate application of the IDEA's exhaustion clause, plaintiffs seeking relief under Section 504 and Title II rightly try to avoid any implication that they are seeking relief related to the IDEA's FAPE requirement.[144] Thus, plaintiffs seeking relief under Section 504 and Title II most often style their cases as demands for reasonable accommodations rather than invoking a right to Section 504's FAPE regulation.[145] Of course, as discussed above, a claim for a reasonable accommodation could quite easily center on Section 504's FAPE obligation. And, because they are so often intertwined, OCR guidance attempting to seg-

139. The Ninth Circuit has been a rare outlier to courts' general failure to acknowledge Section 504's FAPE regulation. Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008); A.G. v. Paradise Valley Unified Sch. Dist. No. 69, 815 F.3d 1195 (9th Cir. 2016).

140. Raj, *supra* note 34.

141. 20 U.S.C. § 1415(l); Fry v. Napoleon Cmty. Sch., 580 U.S. 154 (2017).

142. Raj, *supra* note 34.

143. *Id.*

144. *Fry*, 580 U.S. at 164 (granting certiorari to address "confusion in the Court of Appeals" and holding that the language of 20 U.S.C. § 1415(l) compels exhaustion when a plaintiff seeks relief that is available under the IDEA).

145. *See supra* Section I.B.2.

regate the Section 504 FAPE regulation as outside of the reasonable accommodations framework is both unhelpful and impractical. The following section provides an overview of analyses by lower courts and by OCR of reasonable accommodations claims, illustrating the shortcomings of the reasonable accommodations framework.

II.
The Practical Mess: Court and Agency Interpretation of Disability Discrimination Claims

In the absence of a Supreme Court opinion that directly speaks to Section 504's reach in K–12 schools, lower courts are left to their own devices. Lower courts, in turn, are fairly inconsistent with respect to their analysis of disability discrimination claims. Complicating matters further, OCR tends to adopt an entirely different analysis than what is used by courts. The following section provides an overview of lower court decisions in K–12 disability discrimination claims, identifying certain "hard limits" which courts tend to agree are outside of what the law requires of schools. It then analyzes the many "gray areas" where courts apply varied analysis with respect to defining the scope of disability rights laws. Finally, it illustrates how OCR's approach in resolving administrative complaints vastly differs from the analysis taken by lower courts.

A. Lower Court Rulings

Little uniformity exists in lower courts' disposition of disability discrimination claims in the K–12 context. While several theories of discrimination are recognized by lower courts (i.e., disparate impact, disparate treatment, and failure to provide a reasonable accommodation), there is significant variation between courts over how each type of claim should be analyzed.[146] For instance, some lower courts require plaintiffs to demonstrate intent when alleging disparate treatment, meaning that plaintiffs must demonstrate that a school's discriminatory actions were taken because of disability, despite the

146. Timothy H. v. Cedar Rapids Cmty. Sch. Dist., 178 F.3d 968, 972 (8th Cir. 1999) (finding that a school district's transportation policy was not discriminatory because the policy was neutrally applicable to all students regardless of disability and "unrelated to disabilities and misconceptions about them"); Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 905 (D. N.J. 2003) (finding school board's action of attempting to retroactively designate multiple valedictorians likely violated Section 504 and the ADA because it discriminated against a high school senior with disability, who received highest weighted grade point average in her class and was entitled to be named sole valedictorian under existing policy).

Supreme Court's ruling that Section 504 was intended to reach unintentional acts of discrimination.[147] Other courts force plaintiffs to demonstrate they are "otherwise qualified" for school, invoking language from employment and post-secondary regulations that are not applicable to K–12 students.[148] Finally, most courts do not even acknowledge that K–12 schools are governed by a different set of regulations than the post-secondary or employment contexts and routinely cite to cases analyzing discrimination claims in those settings.[149]

When plaintiffs frame a discrimination claim as a failure to provide a needed accommodation, most circuit courts apply a similar framework, which this article deems the "reasonable accommodations framework." Essentially, the courts define the bounds of "reasonableness" by asking whether the requested accommodation is unduly burdensome or calls for a fundamental alteration to the program.[150] If the request does not meet any of these thresholds, then the accommoda-

147. Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998).

148. School Bd. of Nassau Cnty., v. Arline, 480 U.S. 273, 287–88 n.17 (1987) ("When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any 'reasonable accommodation' by the employer would enable the handicapped person to perform those functions." (citing *Davis*, 442 U.S. at 412)); *see also* Doherty v. S. Coll. of Optometry, 862 F.2d 570, 574–75 (6th Cir. 1988) ("[I]t is clear that the phrase 'otherwise qualified' has a paradoxical quality; on the one hand, it refers to a person who has the abilities or characteristics sought by the grantee; but on the other, it cannot refer only to those already capable of meeting *all* the requirements. . . . The question after *Alexander* is the rather mushy one of whether some 'reasonable accommodation' is available to satisfy the legitimate interests of both the grantee and the handicapped person.").

149. For example, in *Anderson v. Banks*, 520 F. Supp. 472, 511 (S.D. Ga. 1981), the court explicitly rejected plaintiff's argument that Davis did not apply. Instead, finding that the different definition of "qualified handicapped person" in the K–12 context was only meant to "aid a school district in determining who must be provided [FAPE]." *Id.* The Eleventh Circuit appears to be the outlier. In a class action brought by parents of students with intellectual disabilities who sought to challenge the refusal of a local school district to provide extended school year services for their children, the court distinguished *Davis* because it involved a post-secondary setting which, "required the interpretation of a different set of implementing regulations than those at bar." Ga. Ass'n of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), *aff'd* 716 F.2d 1565 (11th Cir. 1983). Ultimately, the court concluded that Section 504 required schools to pay individual attention to the needs of students with disabilities and thus, the school's blanket policy, which refused to consider individual students' needs for summer instruction, violated the law. *Id.*

150. *School Bd. of Nassau Cnty.*, 480 U.S. at 287 n.17 ("In the employment context, an otherwise qualified person is one who can perform 'the essential functions' of the job in question. [If not, an employer must consider] whether any 'reasonable accommodation' . . . would enable the [individual with a disability] to perform those functions. Accommodation is not reasonable if it either imposes 'undue financial and administrative burdens' . . . or requires 'a fundamental alteration in the nature of [the] program.'"). Some courts further define a fundamental alteration by asking whether the requested modification "alters the essential nature of the program or imposes an

tion is reasonable. These limits also act as affirmative defenses. Thus, when schools can demonstrate a requested accommodation is an undue burden or would be a fundamental alteration to their program, the accommodations are no longer reasonable.

Unfortunately for plaintiffs and school districts, courts rarely provide much clarity regarding the factors they consider when weighing whether an accommodation is unduly burdensome or a fundamental alteration. Several circuits routinely cite decisions analyzing Section 504 and the ADA in the post-secondary and employment contexts for guidance in K–12 cases.[151] Obviously, there are significant differences between what employers owe employees and what schools owe students. Not the least of which, students in K–12 schools, unlike employers, do not have to demonstrate their ability to perform the "essential functions" of a job to be "qualified" individuals with rights under the laws.[152] Rather, students only need to have reached the requisite age by which public school is either an option or mandated by their state.[153] The continued reliance on this precedent in spite of these discrepancies denotes a larger issue—the courts are failing to provide relevant and appropriate insight into how to define the scope of "reasonableness" of a requested accommodation.

Courts also differ in how they approach the threshold question of whether an accommodation is required under the law.[154] Some courts begin their analysis by asking whether the accommodation sought by plaintiff was necessary for "meaningful access" of the educational program.[155] Meaningful access, per *Choate*, requires "evenhanded treatment and the opportunity for [individuals with disabilities] to participate in and benefit from programs," but it does not "guarantee . . . equal results."[156] As part of this analysis, many courts declare that the law does not provide for a plaintiff's preferred accommoda-

undue burden or hardship in light of the overall program."). Helen L. v. DiDario, 46 F.3d 325, 337 (3d Cir. 1995).

151. *See e.g.*, AP *ex rel.* Peterson v. Anoka-Hennepin Indep. Sch. Dist. No. 11, 538 F. Supp. 2d 1125, 1139 (D. Minn. 2008).

152. 45 C.F.R. § 84.4 (2019).

153. 34 C.F.R. § 104.3(*l*)(2) (2020).

154. J.D. *ex rel.* J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 70 (2d Cir. 2000) ("While a federal funds recipient must offer 'reasonable' accommodations to individuals with disabilities to ensure meaningful access to its federally funded program, § 504 does not mandate 'substantial' changes to its program.").

155. Mark H. v. Hamamoto, 620 F.3d 1090, 1096 (9th Cir. 2010) (holding that a plaintiff may establish denial of "meaningful access" under § 504 and Title II by showing there was "a violation of one of the regulations implementing" § 504, if such violation denied the plaintiff meaningful access to a public benefit).

156. *Choate*, 469 U.S. at 304.

tion, but rather any accommodation that would ensure meaningful access.[157] Other courts ask whether the accommodation sought was "reasonable," defining it within the limits of undue burden and fundamental alteration, as previously discussed.

Ultimately, despite relatively universal adoption of the reasonable accommodations theory of liability in lower courts, there is little consistency in their analysis of these claims. The following section will evaluate where lower courts tend to agree and where they differ with respect to the scope of disability rights laws.

1. Hard Limits

When analyzing the limits of reasonable accommodations, most lower courts seem to agree on a few hard lines that are always seen as unreasonable, and thus not required by disability rights laws. One such line involves requests to waive either entry to an essential program or certification requirements, which typically amount to fundamental alterations. For instance, a Fifth Circuit court found that a parent's request to waive their child's grade-level performance requirements amounted to a fundamental alteration of the school's program, making it unreasonable and not required by disability rights laws.[158] Similarly, the Seventh Circuit determined that waiving a minimum competency test was a substantial alteration and thus not required by Section 504.[159]

A second hard line appears to be when schools claim excessive financial costs, such as hiring additional staff, recreating specialized programs, or assuming the cost of in-home supplemental services. For example, parents were unsuccessful in forcing a school to duplicate a specialized program for the hearing impaired at their child's neighborhood school.[160] In another instance, the Sixth Circuit applied the reasonable accommodations framework to hold that a school could refuse admission to a child who would require the hiring of additional specialized teachers because it presented a fundamental alteration of their

157. Berardelli v. Allied Servs. Inst. of Rehab. Med., 900 F.3d 104, 123 (3d Cir. 2018).

158. St. Johnsbury Acad. v. D.H., 240 F.3d 163, 165 (2d Cir. 2001).

159. Brookhart v. Ill. State Bd. of Educ., 697 F.2d 179, 181 (7th Cir. 1983); *see also* Ellenberg v. N.M. Mil. Inst., 572 F.3d 815, 819 (10th Cir. 2009) (finding that school's denial of admission to military-style school based on behavioral problems, drug use, and need for counseling and medication did not violate Section 504 because student was not otherwise qualified to attend).

160. Barnett *ex rel.* Barnett v. Fairfax Cnty. Sch. Bd., 927 F.2d 146 (4th Cir. 1991).

existing program.[161] The Eighth Circuit found that a $24,000 annual cost to implement a new bus route for a student who selected a school through an intra-district transfer program, where transportation was not routinely provided, was unduly burdensome.[162] On the contrary, the Fourth Circuit found that Section 504 compelled a school district to pay for in-home services to supplement the school day.[163]

In each of these cases, the courts seem to focus on the affirmative defenses and gloss over the question of whether the child needs the requested accommodation to ensure meaningful access to the educational program. Recall that OCR guidance suggests that the only relevant question is whether a child needs the requested accommodation to ensure non-discrimination. Thus, stated differently, a school district is required to provide the requested accommodation where the child requires it to ensure meaningful access. Courts have limited schools' obligations to include only those accommodations that are not an undue burden or fundamental alteration. Nonetheless, it is notable that courts tend to skip over this threshold question of whether the requested accommodation is necessary.

2. *Gray Zones*

Courts often consider issues that do not fit quite so neatly into the boxes of unduly burdensome or fundamental alteration. For these issues, the reasonable accommodations framework provides less guidance because so much gray area exists around the question of what constitutes reasonableness. Courts that consider requested accommodations which are clearly not unduly burdensome or fundamental alterations are left to ponder the question of whether a requested accommodation is necessary for meaningful access. Unfortunately, courts rarely discuss the factors that go into their analysis and, as a result, their conclusions often seem arbitrary.

For instance, in a case alleging that a school district's refusal to heat up a diabetic student's lunch violated Section 504, the Second Circuit determined that the accommodations the school had already provided (lunch menu options and monitoring blood glucose levels) afforded meaningful access to public school lunches, rendering the re-

161. Eva N. v. Brock, 741 F. Supp. 626, 632 (E.D. Ky. 1990), *aff'd*, 943 F.2d 51 (6th Cir. 1991) (unpublished table decision).
162. Timothy H. v. Cedar Rapids Cmty. Sch. Dist., 178 F.3d 968, 972 (8th Cir. 1999).
163. Burke Cnty. Bd. of Educ. v. Denton *ex rel.* Denton, 895 F.2d 973 (4th Cir. 1990).

quested accommodation (heating lunch) unreasonable.[164] The court did not discuss how it came to the conclusion or explicitly weigh any factors it considered. Presumably, if the child refused to eat cold lunch, it is at least arguable that heating lunch is necessary for meaningful access, as it represents the only method which would allow the child to eat lunch. Moreover, were the Second Circuit to have presumed the accommodation was necessary and jumped to the affirmative defenses of unduly burdensome and fundamental alteration, it seems plausible that the court could have reached a different result.

In a case before the Third Circuit, a parent argued that a school district's refusal to ensure all students had the same allergy-free snack violated disability rights laws.[165] The court first asked whether the requested accommodation was necessary to ensure meaningful participation in the educational program. The court then found it was not necessary since providing one student with a slightly different snack still allowed for meaningful participation in food-related activities. While this resolution certainly seems reasonable, here again, the court did not engage in much analysis to help clarify what makes it so. If the appropriate framework for determining what is owed under the disability rights laws is meaningful access, this suggests something short of perfect equality of experience and makes similar, but not equal, experiences seem adequate under the law. However, if courts are to define meaningful access by ensuring equality of educational experience, per Section 504's FAPE regulation, then "reasonability" may only be limited by the affirmative defenses of undue burden and fundamental alteration. Were this the case, a question asking whether providing all children an allergy-free snack is unduly burdensome or fundamentally alters the educational program becomes much murkier. One could argue that schools already select and provide students with snacks, so how difficult would it be to ensure that all those snacks were nut free? What factors should a court consider when determining whether changing to allergy-free snacks is an acceptable versus unacceptable burden?

Additionally, consider a case arising out of the Eighth Circuit where parents sought a waiver to a school district policy that prohibited a school nurse from dispensing their son's ADHD medication because his prescribed dose conflicted with the Physician's Desk Reference.[166] The court confusingly engaged in two separate theories

164. Moody *ex rel.* J.M. v. N.Y.C. Dep't of Educ., 513 F. App'x 95, 96 (2d Cir. 2013).
165. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 281 (3d Cir. 2012).
166. Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (8th Cir. 1998).

of analysis to conclude that the school district's actions were not discriminatory. First, the court held that the district's refusal to modify the policy was not due to the student's disability, but rather to guard against potential liability.[167] Thus, the policy itself was non-discriminatory.[168] Of course, non-discriminatory policies that have a discriminatory effect, such as denial of an educational benefit, can still violate the law.[169] In this instance, the child could not successfully participate in school without his medication, so the policy had the effect of denying him equal access to the benefit of school.[170] Nonetheless, the court determined that because the plaintiffs could not demonstrate that their son was treated differently on the basis of his disability, they were unable to prove discrimination.[171]

As a second justification for the holding, the Eighth Circuit rejected the plaintiffs' request for a waiver using the reasonable accommodations framework.[172] Here, the court never asked whether the accommodation was necessary to ensure meaningful benefit of the program.[173] Rather, it jumped directly to whether a waiver would be unduly burdensome or a fundamental alteration. Using that framework, the court determined that a waiver would, indeed, impose undue financial and administrative burdens on the district by requiring it to determine the safety of the dosage, the likelihood of future harm to the child, and its own potential liability.[174] The court also found that the school's proposed accommodation—allowing parents to come to school daily to administer the medication—was reasonable despite the practical limitations of such an arrangement due to the parents' employment and other daytime commitments.[175]

One particularly prominent gray zone for the courts is the analysis of disability discrimination claims in high school competitive sports. Eligibility requirements for these sports have been a source of inconsistency between the circuit courts. Unlike educational programs, there is no guaranteed right to make a competitive athletic team; how-

167. *Id.* at 756.
168. *Id.*
169. *Choate*, 469 U.S. at 287.
170. *Francis Howell*, 138 F.3d 754.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. To support its finding that the waiver was unreasonable, the court cited to a string of cases involving accommodations in high school competitive athletic programs. Importantly, competitive athletic programs have eligibility requirements not applicable to public school—a fact the court appeared to gloss over. *Francis Howell*, 138 F.3d 754.

ever, disability rights laws still mandate against discrimination in this context. In two cases with similar facts, one in the Sixth Circuit and the other in the Third Circuit, courts landed on opposite sides of an issue involving age limits for high school athletics eligibility.

In the Sixth Circuit case, two high school runners were ineligible to compete on their respective schools' cross country and track teams because of an age requirement.[176] Since both plaintiffs were held back in elementary school due to learning disabilities, they alleged that their athletic ineligibility amounted to disability discrimination.[177] The court disagreed and found that the plaintiffs were not otherwise qualified to participate in the competition because they could not meet the age requirement. Rather than focus on whether a waiver was reasonable, the court focused on the age requirement as disability-neutral; it was related to the passage of time, not disability. But here again, the court seems to ignore the Supreme Court's holding in *Choate* which found that disability-neutral laws could have disparate impacts on individuals with disabilities, some of which are cognizable under Section 504. Instead, the court determined that a waiver of the age requirement would amount to a substantial modification and was not required under the law.[178] When faced with similar facts, the Third Circuit came to the opposite conclusion, finding that a school district's refusal to waive a maximum age rule for a student with a learning disability violated the ADA.[179] In essence, the court held that the age restriction was not an essential eligibility requirement and that waiver of it would not fundamentally alter the nature of competition.[180]

Perhaps what is most surprising about the treatment of disability discrimination claims by lower courts is how drastically different their analysis is compared to OCR's analysis of claims arising under the same laws. The following section will walk through OCR's interpretation of Section 504 and ADA rights to demonstrate the sharp difference in approach.

176. Sandison v. Mich. High School Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995).
177. *Id.* at 1028; *see also* Pottgen v. Mo. St. High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994) (finding that a student who repeated two grades in elementary school due to a learning disability was not an otherwise qualified individual because he could not meet the age requirement).
178. *Sandison*, 64 F.3d at 1028.
179. Cruz *ex rel.* Cruz v. Pa. Interscholastic Athletic Ass'n, Inc., 157 F. Supp. 2d 485 (E.D. Pa. 2001).
180. *Id.*

B. Agency Decisions

Unfortunately, OCR decisions regarding Section 504 disputes in K–12 schools fail to offer a consistent framework of analysis to help understand the scope of the law's reach in the K–12 space. To be clear, OCR policies, guidance, and letters of findings do not bind courts. Plaintiffs or complainants maintain their right to file a separate action in federal court regardless of the outcome of an OCR investigation.[181] However, some federal judges cite to OCR decisions and treat them as persuasive authority.[182] Without consistency in the OCR, the Department of Education leaves federal judges to their own devices, the parties' pleadings, and years of inconsistent precedent. Moreover, OCR is overwhelmed with a backlog of cases going back years.[183] Scholars have written about the "patchwork of conflicting decisions by OCR" for over a decade.[184] OCR's twelve regional offices differ in how they investigate and decide complaints alleging discrimination.[185] However, as illustrated here, agency and court analysis with respect to Section 504's reach is vastly different, which is confusing to both students seeking to ensure their rights and school districts attempting to do the same.

As stated above, OCR takes the convoluted position of endorsing the undue burden and fundamental alteration limits in all matters that do not involve a school's obligation to confer FAPE under Section 504. The FAPE regulation demands that schools provide students with disabilities equality of access to the educational program. Consequently, it has a broad reach and many requests for accommodations could also fall under the umbrella of conferring FAPE.[186] OCR routinely centers its disability discrimination analysis in Section 504's

181. *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/complaints-how.html [https://perma.cc/A5MS-6GS2] (last updated July 2022).

182. *See e.g.*, Kimble v. Douglas Cnty. Sch. Dist. RE-1, 925 F. Supp. 2d 1176, 1183 (D. Colo. 2013) ("As no binding authority exists to which the Court may defer, the persuasive value of the authority the parties cite may be considered.").

183. Alison Renfrew, Comment, The *Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PA. ST. L. REV. 563 (2012).

184. *See id.* at 577 (discussing lack of uniformity in OCR's twelve regional offices resulting in complaints); *see also* U.S. DEP'T OF EDUC., SEC'Y COMM'N FOR OPPORTUNITY IN ATHLETICS, "OPEN TO ALL" TITLE IX AT THIRTY: THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS (2003), https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf [https://perma.cc/468P-5EPK].

185. Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights to Achieve Better Title IX Enforcement*, 32 COLUM. J. L. & SOC. PROBS. 331 (1999).

186. 34 C.F.R. § 104.33 (2020).

FAPE regulation, asking whether school districts have met their obligation to confer equality of access to students with disabilities. OCR also rarely distinguishes claims falling outside of the FAPE regulation or applies the reasonable accommodation framework common in lower courts. Courts, on the other hand, rarely if ever analyze Section 504's reach using its FAPE regulation.

For example, in cases involving students with allergies, OCR has frequently found Section 504's scope to be broad enough to compel significant actions on the part of the school district to ensure a safe learning environment. For instance, in a Virginia case, OCR determined that a district was required to execute an individualized plan that will "limit or prevent the risk of exposure to the allergens in each type of school program or activity in which the student participates," including the gymnasium, library, hallways, cafeteria, recess, and fields trips.[187] Further, OCR found that Section 504 required a school district to make the school environment for students with disabilities as safe as the environment for their nondisabled peers, including: "a medically safe environment in which they do not face the possibility of serious or life-threatening reactions to their environment."[188] In a Texas case, OCR found that a student with allergies was discriminated against when the school district refused to accommodate him in their summer debate camp due to his potential need for an epinephrine auto-injector. Here, OCR framed the issue as whether the modifications requested were necessary to afford a student with a disability the opportunity to participate in nonacademic or extracurricular activities.[189] In a charter school case involving a student with a severe peanut allergy, OCR again used FAPE's equal access framework, opining that, "without the assurance of a [medically] safe environment, students with [peanut and/or tree nut allergy]-related disabilities might even be precluded from attending school, i.e., may be denied access to the educational program."[190]

Notably, none of the OCR's decisions embraced a reasonable accommodations framework or cited to any language regarding the af-

187. U.S. Dep't of Educ. Off. of Civ. Rts., Resolution Letter, Loudoun Cnty. Pub. Schs., OCR Complaint No. 11-18-1450, 120 L.R. L.R. PUB. 1766 (Feb. 8, 2019).
188. *Id.*
189. U.S. Dep't of Educ. Off. of Civ. Rts., Resolution Agreement, Plano Indep. Sch. Dist., OCR Complaint No. 0616053, 119 L.R. L.R. PUB. 20767 (OCR S.D. Tex. Dec. 18, 2018).
190. U.S. Dep't of Educ. Off. of Civ. Rts., Resolution Agreement, Wash. (N.C.) Montessori Pub. Charter Sch., OCR Complaint No. 11-12-1295, 112 L.R. L.R. PUB. 50276 (OCR S.D. N.C. Aug. 16, 2012).

firmative defenses that are so often relied on by lower courts.[191] Rather, OCR's rationale is always centered on the FAPE regulation and bases its analysis on "equality of access" rather than "meaningful participation."[192] An exception to this general rule occurs when OCR investigates claims specific to ADA regulations, which explicitly require school districts to "make reasonable modifications in policies, practices, and procedures to allow service animals when necessary, unless the modifications would fundamentally alter the nature of the service, program, or activity."[193]

This messy doctrine and varied outcomes represent the state of disability rights claims in federal courts when these laws took center stage in the recent mask litigation that swept much of the country beginning in 2021. The mask litigation illustrates how courts' failure to provide consistent guidance with respect to the scope of disability rights laws results in varied and erratic rulings. Lack of on-point precedent in this area of law makes it ripe for continued litigation until the U.S. Supreme Court settles it, as evidenced by the fact 108 lawsuits have been filed in thirty-six states over the last two years. The following section describes recent lawsuits that have invoked Section 504 and the ADA to oppose limits on universal masking in schools.

III.
THE PANDEMIC MESS: DISABILITY RIGHTS LAWS AND MASK MANDATES

When the coronavirus pandemic swept the globe in the spring of 2020 and forced the entire country to essentially stay home, schools

191. *See U*.S. Dep't of Educ. Off. of Civ. Rts., Resolution Agreement, Va. Beach City L.R. PUB. Schs., OCR Complaint No. 11-11-1359, 112 L.R. Pub. 24920 (OCR S.D. Va. Mar. 1, 2012) (finding that schools must proactively take steps to ensure that schools environments are as safe for students with disabilities as they are for their nondisabled peers); U.S. Dep't of Educ. Off. of Civ. Rts., Resolution Agreement, Fayette Cnty. (WV) Schs., OCR Complaint No. 03-13-1121, 113 L.R. L.R. PUB. 32052 (OCR S.D. Ga. Apr. 2, 2014) (resolving the OCR complaint when the school district agreed to not use latex balloons to accommodate a student's latex allergy).

192. *See* 34 C.F.R. § 104.33 (2020); Claire Raj, *The Promise and Peril of Using Disability Law as a Tool for School Reform*, 94 WASH. L. REV. 1831, 1871 (2019) (clarifying Section 504 obligation—courts interpret FAPE to mean that a school district must reasonably accommodate the needs of the student with a disability to ensure meaningful participation in educational activities and meaningful access to educational benefits).

193. U.S. Dep't of Educ. Off. of Civ. Rts., Resolution Agreement, *In re* Student with a Disability, OCR Complaint No. 04-13-1318, 114 L.R. PUB. 32429 (OCR S.D. Ga. Apr. 2, 2014).

had little choice but to follow suit and shut their doors.[194] Once the initial shock subsided, however, school districts were faced with difficult questions about whether and how to safely reopen the following academic year.[195] Many attempted to institute universal mask-wearing policies as a means of mitigating the spread of the coronavirus.[196] In several states, these attempts were met with hastily passed legislation or ordinances seeking to ban or limit the use of universal masking in schools.[197] Opposition to these bans quickly sprang up. Leading the charge with a series of lawsuits were the parents of children with disabilities for whom contracting COVID-19 could mean death.[198] They centered their legal challenges in disability rights laws, specifically Section 504 and the ADA.

194. The *Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WK. (July 1, 2020), https://www.edweek.org/leadership/the-coronavirus-spring-the-historic-closing-of-u-s-schools-a-timeline/2020/07 [https://perma.cc/MT89-M8US] (noting that "48 states, four U.S. territories, the District of Columbia, and the Department of Defense Education Activity ordered or recommended school building closures for the rest of their academic year [2019–2020], affecting at least 50.8 million public school students").

195. Jesse Pratt Lopez, *Glimpses of How Pandemic America Went Back to School*, N.Y. TIMES (Sept. 22, 2021), https://www.nytimes.com/2021/09/17/education/learning/schools-reopening-united-states.html [https://perma.cc/FF7J-5HFP]; *see also* Alfonso Landeros, Xiang Ji, Kenneth Lange, Timothy C. Stutz, Jason Xu, Mary E. Sehl, Janet S. Sinsheimer, *An Examination of School Reopening Strategies During the SARS-CoV-2 Pandemic*, 16 PLOS ONE e0251242 (2021).

196. Clare Lombardo, *Students Need to Be in Classrooms, with Masks, this Fall, Education Secretary Says*, NPR (Aug. 2, 2021), https://www.npr.org/2021/08/02/1022429844/schools-masks-students-in-person-education-secretary-cardona [https://perma.cc/597J-6V7Z]; *see also Operational Guidance for K–12 Schools and Early Care and Education Programs to Support Safe In-Person Learning*, CTR. FOR DISEASE CONTROL AND PREVENTION (Aug. 11, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-childcare-guidance.html [https://perma.cc/9YAC-SGMA] ("Wearing a well-fitting mask or respirator consistently and correctly reduces the risk of spreading the virus that causes COVID-19.").

197. Evie Bland, *States Pressured to Rethink Bans on School Mask Mandates as COVID Delta Variant Surges*, EDUC. WK. (Aug. 3, 2021), https://www.edweek.org/policy-politics/states-pressured-to-rethink-bans-on-school-mask-mandates-as-covid-delta-variant-surges/2021/08 [https://perma.cc/9YAC-SGMA] (listing Arizona, Arkansas, Florida, Georgia, Iowa, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia as states banning local school mask mandates). Eric Schmitt, Missouri's Attorney General, filed lawsuits against school districts requiring masks. Attorney General Schmitt dropped the suits when the schools no longer required masks. However, new lawsuits were filed when mask requirements were reinstated.

198. Nik Popli, A*s Schools Drop Mask Mandates, Parents of Kids With Disabilities Prepare to Fight*, TIME MAG. (Feb. 10, 2022), https://time.com/6146341/school-mask-mandates-disabilities/ [https://perma.cc/KH7T-QMKT] ("[P]arents have also argued that eliminating mask mandates violates the ADA, but judges so far have ruled inconsistently.").

Exploring this recent litigation provides a snapshot of courts' confusion around disability rights claims and offers lessons for these claims beyond the COVID-19 pandemic. The following section will summarize the various ways plaintiffs sought to invoke disability rights laws to challenge mask bans across the country and distill the outcomes of these legal battles.

A. Mask Litigation

Though litigation involving the use of masks began in 2021, by 2022, more than half of all states had pending cases invoking Section 504 and the ADA as a tool to either require universal mask-wearing or block laws attempting to ban universal masking in K–12 schools.[199] This litigation illustrates the confusion and shortcomings of courts' current framework for analyzing the reach of disability rights laws. Analysis of these claims varies by circuit, and even sometimes between district courts in the same circuit. For instance, some courts apply a reasonable accommodations framework and focus their findings on the affirmative defenses of undue burden and fundamental alteration.[200] Others question whether universal masking is required for meaningful access or whether a school district's actions to mitigate the spread of the virus (short of universal masking) suffice. Finally, some courts approach the analysis as a question of disparate impact, asking whether scaling back a universal masking policy disparately impacts students with disabilities, and often requiring plaintiffs to prove a causal link between the changed policy and a denial of benefit.[201] Without a clear test for determining the *reasonableness* of a requested accommodation, what constitutes meaningful access, and whether plaintiffs must establish causation, neither school districts nor students have a clear sense of the scope of these laws. Stated differently, neither party knows how far a school must go to ensure nondiscrimination for students with disabilities. This lack of clarity is evidenced in the varied outcomes of mask litigation discussed below.

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199. Stacey Decker, *Which States Banned Mask Mandates in Schools, and Which Required Masks?*, EDUC. WK. (July 8, 2022), https://www.edweek.org/policy-politics/which-states-ban-mask-mandates-in-schools-and-which-require-masks/2021/08 [https://perma.cc/3SWY-4PAG] (listing Arizona, Arkansas, California, Colorado, Florida, Georgia, Iowa, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, and Texas).

200. ARC of Iowa v. Reynolds, 559 F. Supp. 3d 861 (S.D. Iowa 2021), *vacated as moot*, 33 F.4th 1042 (8th Cir. 2022).

201. Doe 1 v. Delaware Valley Sch. Dist., 572 F. Supp. 3d 38 (M.D. Pa. 2021).

By March 2022, litigants had brought 127 lawsuits involving universal mask policies in schools, with the majority occurring in the Sixth Circuit.[202] Plaintiffs, generally parents of students with disabilities, brought eleven of the twenty-six cases in Pennsylvania with varied results. Most litigants styled their claims as requests for a reasonable accommodation, seeking the universal use of masks as an accommodation to ensure safe in-person school environments in light of the pandemic.[203] Most courts applied a reasonable accommodations framework that required the plaintiff parents to bear the burden of demonstrating that their requested accommodation, universal masking, was "reasonable" and "necessary to permit meaningful participation."[204] The burden then shifted to the defendant school district to demonstrate that the requested accommodations were "unreasonable," typically by alleging that enacting such policies would result in "substantial changes to the school's programs."[205] Yet, this was where the similarities ended. Courts varied considerably with respect to their adjudication of these claims.

Courts not only vacillated with respect to the core question of the "reasonableness" of universal masking, but they also disagreed on how to weigh certain factors that predicated their decisions. For example, courts diverged with respect to how much weight to give public health officials, such as the Center for Disease Control (CDC), the American Academy of Pediatrics, and local county health administrations;[206] whether "meaningful access" could be satisfied with access to virtual learning rather than in-person environments;[207] and whether attempts to enforce universal masking superseded democratic princi-

202. Amy E. Slater & Amy K. Onaga, *State-by-State Analysis Reveals Hot Spots for COVID-19 Litigation*, L.R. PUB., SPECIAL ED CONNECTION (Mar. 2, 2022).

203. R.K. v. Lee, 568 F. Supp. 3d 895, 913 (M.D. Tenn. 2021) ("This Court agrees that '[a] universal masking requirement instituted by a school is a reasonable modification that would enable disabled students to have equal access to the necessary in-person school programs, services, and activities.' "); Seaman v. Virginia, 593 F. Supp. 3d 293, 299 (W.D. Va. 2022); G.S. *ex rel*. Schwaigert v. Lee, No. 21-5915, 2021 WL 5411218, at *2 (6th Cir. Nov. 19, 2021).

204. Muhammad v. Ct. of Common Pleas, 483 F. App'x 759, 763–74 (3d Cir. 2012) (unpublished table decision).

205. *See, e.g.*, Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 (3d Cir. 2012).

206. *See* Doe 1 v. Perkiomen Valley Sch. Dist., 585 F. Supp. 3d 668, 689 (E.D. Pa. 2022) (regarding the court's reliance on the recommendation of public health officials in weighing the reasonableness of plaintiffs' requests for masking as an accommodation).

207. ARC of Iowa v. Reynolds, 559 F. Supp. 3d 861, 871 (S.D. Iowa 2021), *vacated as moot*, 33 F.4th 1042 (8th Cir. 2022).

ples.[208] Courts also disagreed on the appropriate application of the IDEA's exhaustion clause, with some courts finding that this clause required plaintiffs to first bring their accommodation claims through the IDEA's administrative scheme prior to filing them in federal courts and others finding that exhaustion was not required.[209]

1. Pennsylvania Cases

Perhaps, the most compelling example of the confusion permeating mask litigation can be found by examining three cases litigated in the Pennsylvania district courts.[210] In November 2021, a court in the Middle District of Pennsylvania denied a temporary restraining order after parents of students with disabilities requested universal masking without broad exemptions.[211] In January of 2022, the Western District of Pennsylvania found that requiring a school district to reinstate a universal mask requirement during periods of high COVID transmission so that medically fragile students with disabilities could safely attend school was unreasonable and, thus, not required by disability rights laws.[212] Only a few days later, a judge in the Eastern District of Pennsylvania ordered a preliminary injunction to prohibit a school board from moving from universal mask wearing to an optional mask wearing policy, finding that an optional mask wearing policy would prevent medically fragile students with disabilities from obtaining meaningful access to school.[213] The three Pennsylvania decisions attempted to resolve the same issue: whether a request for universal mask wearing was reasonable under the disability rights laws. Certainly each court considered distinct facts, but since these cases were decided at virtually the same time, it is likely that the pandemic

208. *See* N. Allegheny Sch. Dist., No. 2:22-CV-55, 2022 WL 170035, at *3 (W.D. Pa. Jan. 17), *vacated* No. 2:22-CV-55, 2022 WL 295858 (W.D. Pa. Feb. 1, 2022), *remanded sub nom.* Upper Saint Clair Sch. Dist., *supra* note 19 (discussing whether plaintiff parents are superseding democratic vote of the school board in their request for universal masking accommodations).

209. *See Upper Saint Clair Sch. Dist.*, No. 22-1141, 2022 WL 2951467; Donohue v. Hochul, No. 21-CV-8463 (JPO), 2022 WL 673636 (S.D.N.Y. Mar. 7, 2022); Hayes v. DeSantis, 561 F. Supp. 3d 1187 (S.D. Fla. 2021); E.T. *ex rel.* J.R. v. Paxton, 41 F.4th 709 (5th Cir. 2022) (requiring exhaustion of administrative remedies under the IDEA); *see also* G.S. v. Lee, 560 F. Supp. 3d 1113 (W.D. Tenn. 2021) (finding administrative exhaustion was not required).

210. *Upper Saint Clair Sch. Dist.*, WL 2951467; Doe 1 v. Del. Valley Sch. Dist., 572 F. Supp. 3d 38 (M.D. Pa. 2021); *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 668.

211. *Del. Valley Sch. Dist*., 572 F. Supp. 3d at 53-55.

212. *Upper Saint Clair Sch. Dist.*, No. 22-1141, 2022, 2022 WL 189691.

213. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d at 694. A later March ruling lifted the injunction finding that CDC data indicating low transmission rates supported the opt-in policy.

had similar effects across both communities. Yet, the outcome variation makes it difficult for potential litigants to predict how a court would rule if they invoked protections under these laws. Perhaps more troubling, school districts lack clear guidance to understand their obligations under these laws.

These three cases, all brought within six months of each other, illustrate the varied analyses of the lower courts and, consequently, the different outcomes in application of Section 504 and the ADA to the issue of universal masking in K–12 schools. The following section unpacks each decision to further illustrate the chaos of disability discrimination claims.

	Doe #1 v. Delaware Valley Sch. Dist.	***Doe v. Perkiomen Calley Sch. Dist.***	***Doe v. Upper Saint Clair Sch. Dist.***
Judicial District	Middle District of Pennsylvania	Eastern District of Pennsylvania	Western District of Pennsylvania
Filing Date	10/18/2021	1/21/2022	1/24/2022
Date decided	11/11/2021	2/7/2022	1/21/2022
Claims	Section 504/ADA	Section 504/ADA	Section 504/ADA
Analysis applied	Disparate treatment	Disparate impact; meaningful access; reasonable accommodations	Reasonable accommodations
Other considerations by court	Public interest	Public health authorities (CDC); public interest	Other accommodations available; unprecedented nature of universal masking; public interest
Outcome	Preliminary injunction denied; TRO dissolved	Preliminary injunction granted	TRO denied

FIGURE 1

Doe 1 v. Delaware Valley, filed on October 18, 2021, involved five parents of students with disabilities who challenged a school district's opt-out mask policy, which allowed parents to opt their children out of wearing a mask without medical documentation.[214] The opt-out policy modified a previous district policy that required appropriate medical documentation to grant exemptions from the mask requirement.[215] Plaintiffs alleged that Section 504 and the ADA required a more rigid adherence to universal masking to ensure equal access to a safe school environment for their medically vulnerable children, who

214. *Del. Valley Sch. Dist.*, 572 F. Supp. 3d at 53-55.
215. *Id.*

could suffer grave consequences were they to become infected with COVID-19.[216]

The court's analysis here centered on the causation element—whether the student's alleged denial of the benefits of certain classes was due to disability discrimination.[217] Ultimately, the court found that the student's inability to attend certain classes was not due to disability, but rather was the result of the student's own preferences.[218] While the court acknowledged that guidance from the CDC, Pennsylvania Department of Health, and Pennsylvania Department of Education required universal masking to protect the safety and well-being of schoolchildren and the public during the COVID-19 public health crisis, it chose to frame the issue as a question of causation.[219] Because the student made the decision to leave certain classes, albeit after the masking policy was loosened, the court concluded that any denial of benefit was a result of the student's individual choice, not the school's actions.[220] As such, the student's decision to refrain from attending these classes did not rise to the level of someone "deprived of a benefit or opportunity provided to non-disabled students . . . because of their disability."[221]

This was one of several analytical frameworks the court could have employed to reach its conclusion. Notably, the court also could have taken a broader view of causation here and determined that the student's choice to remove herself from certain elective classes was caused by her fear of an increased risk of COVID-19 infection stemming from the school's decision to loosen its universal mask wearing policy. The court also could have framed this case as a question of reasonable accommodations and analyzed whether the plaintiff's requested accommodation (the stricter mask policy) was necessary to ensure her meaningful access to the educational program, or whether it posed an undue burden or fundamental alteration to the program. As previously stated, part of the trouble with the current interpretation of disability rights laws in the K–12 setting is the very fact that there *are* varied applications of analysis to determine the scope of the laws.

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216. *Id.* at 79 (noting that with respect to the Section 504 and ADA claims, only one plaintiff sufficiently established eligibility under both laws and thus, these claims were only considered with respect to Jane Doe 1's daughter).

217. *Id.* at 80 (quoting CG v. Pa. Dep't of Educ., 734 F.3d 229, 235–36 & n.10, 11 (3d Cir. 2013)) ("Plaintiffs must prove that they were treated differently based on the protected characteristic, namely the existence of their disability.").

218. *Id.*

219. *Id.*

220. *Id.*

221. *Pa. Dep't of Educ.*, 236 734 F.3d at 236.

In *Doe v. Perkiomen Valley School District*,[222] filed in Pennsylvania just three months after *Delaware Valley*, the court applies yet another theory of analysis—disparate impact—to a claim brought by five parents alleging that a school district's decision to end its universal mask policy discriminated against immunocompromised students with conditions such as chronic bronchitis and pneumonia.[223] Here, the court appeared to combine a disparate impact theory with a reasonable accommodations analysis, essentially finding that a school district's decision to end a universal mask policy would disparately impact students with disabilities and that plaintiffs' request to continue the universal mask policy was a reasonable accommodation necessary for their meaningful access to in-person school.[224] The court relied heavily on expert opinions from local and federal public health authorities as part of their reasonableness analysis.[225] The fact that the school district had initially implemented a universal mask requirement which followed the CDC and local public health authority recommendations, but later rescinded this policy without the support of federal or local public health officials, factored quite heavily in the final outcome.[226] The court determined, "without universal indoor masking, the [c]hild-[p]laintiffs face a significant risk of serious illness and/or death if they attend school in-person while transmissions are substantial or high."[227] Because the school district had previously implemented a universal masking policy, the affirmative defenses of undue burden and fundamental alteration were not persuasive.[228]

Moreover, in *Perkiomen Valley*, the court also shut down the school district's argument that their obligation to ensure meaningful access could be met by encouraging students with disabilities to wear high-quality masks without mandating universal masking for all students.[229] The court's finding was grounded in two principles—one based in science and the other based in the reasonable accommodations framework. With respect to science, the school district was not

222. *Perkiomen Valley Sch. Dist.*, 585 F. Supp. 3d 668 (E.D. Pa. 2022).
223. *Id*.
224. *Id.*
225. *Id.* at 689-95. The school district initially relied on a public health expert who made recommendations based on guidance from the CDC, the Montgomery County Public Health, and PolicyLab at Children's Hospital of Philadelphia, the U.S. Environmental Protection Agency (EPA) and the American Academy of Pediatrics (AAP). All recommended indoor masking to reduce the risk of airborne transmission of COVID-19.
226. *Id.*
227. *Id.* at 693-94.
228. *Id.*
229. *Id.*

able to compellingly support their theory that students with disabilities could safely access in-person school by wearing high-quality masks. Instead, the research and guidance from public health authorities supported the opposite conclusion—that "wearing a mask provides only limited protection against contracting COVID-19 if the wearer is near one or more unmasked carriers."[230] Next, applying the reasonable accommodations framework, the court found that an opt-in mask policy prevented plaintiffs from meaningful access as they "cannot attend school alongside their unmasked peers without incurring a real risk of serious illness or worse."[231] As further support, the court determined that disability rights laws put the onus of providing reasonable accommodations on the schools, not students. Essentially, the court stressed that the laws do not require students with disabilities to make reasonable accommodations to protect themselves from discriminatory practices.[232]

Initially, this appears to be a doctrinally sound finding. Schools, not students, are tasked with ensuring that students with disabilities have equal access to educational programs. Notably, the true weakness in the school district's argument was the lack of scientific data to support their theory that the limited use of high-quality masks was as effective as universal masking. If the school district could have found scientific evidence to back their theory, then it is likely their obligation to ensure meaningful access would be met by providing students with disabilities with high-quality masks. In short, the problem is not who must wear masks, but rather who bears the responsibility of ensuring an equally safe school environment for students with disabilities. If that environment could be ensured through the provision of high-quality masks for medically fragile students, it is not clear that the reasonable accommodations framework would require more.

A third Pennsylvania case, *Doe 1 v. Upper Saint Clair School District*,[233] was filed around the same time as *Perkiomen Valley* and was also brought by the parents of children with disabilities.[234] Plaintiffs again sought to force the school district to implement a policy of universal masking, claiming that the policy was necessary to

230. *Id.* at 701.
231. *Id.* at 694.
232. *Id.* at 701 ("Even more importantly, Defendant's argument about one-way masking errs in imposing a duty on the Child-Plaintiffs to shield themselves from the disparate impact of Defendants' policy.").
233. Doe 1 v. Upper Saint Clair Sch. Dist., No. 2:22-CV-112, 2022 WL 189691, at *3 (W.D. Pa. Jan. 21, 2022), *vacated and remanded*, No. 22-1141, 2022 WL 2951467 (3d Cir. Mar. 1, 2022).
234. *Id.* at *3

ensure their children had equal access to in-person school.[235] In *Upper Saint Clair*, the judge applied a reasonable accommodations framework and found the requested accommodation to be unreasonable in light of the school's other safety precautions which included air filters, social distancing, frequent cleaning, and virtual school.[236] Here, unlike in *Perkiomen Valley*, the court gave credibility to the school district's claim that medically fragile students could request accommodations including high-quality masks and virtual school. The court found these mitigation strategies were enough to ensure meaningful access to the school environment, despite the enhanced medical risks faced by students with disabilities.

Quite clearly, *Upper Saint Clair* differs from the other Pennsylvania cases in significant respects. First, the court determined that meaningful access could entail something short of equality of experience. Stated differently, the court equated a virtual learning experience to an in-person experience when it found that the school district could satisfy its obligation to provide students with disabilities meaningful access to the school program. Second, the court deferred to the school district's COVID-19 mitigation strategies as a reasonable method of ensuring safe and equal access to the educational program despite the heightened risk of serious illness faced by certain medically fragile students with disabilities. Finally, the court specifically rejected the notion that disability rights laws required non-disabled individuals to change their behavior to ensure non-discrimination.[237] The next section summarizes the mask litigation decisions beyond the Pennsylvania courts.

2. Summary of Mask Litigation Findings

The inconsistency in Pennsylvania's federal courts is representative of disability rights litigation in K–12 schools across the country. Between 2021 and 2022, parents of students with disabilities filed at least nineteen cases seeking universal masking as an accommodation in the K–12 school setting.[238] In four out of the nineteen cases, courts

235. *Id.* at *1.

236. *Id.* at *15.

237. *Id.* ("While not alone dispositive, the unreasonableness of Plaintiffs' position is highlighted by its unprecedented nature. Although immunocompromised children have always been present in our schools, and communicable diseases have always circulated, prior to COVID-19 there was never an argument for mandatory, indefinite, universal masking in schools—much less the argument that the failure of a school district to mandate universal masking constitutes a violation of federal law.").

238. Douglas Cnty. Sch. Dist. RE-1 v. Douglas Cnty. Health Dep't, 568 F. Supp. 3d 1158 (D. Colo. 2021); Hayes v. DeSantis, 561 F. Supp. 3d 1187 (S.D. Fla. 2021); L.E.

found that the IDEA's exhaustion clause applied to the plaintiffs' claims and, thus, did not decide the merits of these claims.[239] Courts dismissed three other cases, either on procedural grounds (i.e., finding the facts insufficient to state a claim under the ADA, updated facts), or because an agreement was reached by the parties.[240] In the remaining cases, courts applied varying tests to determine whether universal masking was required by disability rights laws, including whether masking is required as a reasonable accommodation or to ensure meaningful access to in-person learning, or whether rescinding a universal mask policy disparately impacts students with disabilities.[241] The remaining decisions seem to turn on unique factors specific to a global pandemic, such as federal and local guidance from health authorities, general public interest in reducing COVID, and evidence of other available accommodations.

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v. Ragsdale, 568 F. Supp. 3d 1364 (N.D. Ga. 2021); ARC of Iowa v. Reynolds, 559 F. Supp. 3d 861 (S.D. Iowa 2021); Donohue v. Hochul, No. 21-CV-8463 (JPO), 2022 WL 673636 (S.D.N.Y. Mar. 7, 2022); Speidel v. Buffalo City Sch. Dist., 1:22-cv-00054 (W.D.N.Y. Jan. 19, 2022); Doe 1 v. Del. Valley Sch. Dist., 572 F. Supp. 3d 38 (M.D. Pa. 2021); Doe 1 v. Perkiomen Valley Sch. Dist., No. 22-CV-287, 2022 WL 356868 (E.D. Pa. Feb. 7, 2022); Doe 1 v. N. Allegheny Sch. Dist., No. 2:22-CV-55, 2022 WL 170035, at *3 (W.D. Pa. Jan. 17, 2022), *motion to certify appeal granted*, No. 2:22-CV-55, 2022 WL 295858 (W.D. Pa. Feb. 1, 2022), *vacated and remanded sub nom*, *Upper Saint Clair Sch. Dist.*, No. 2:22-CV-112, 2022 WL 189691; Complaint at 1, Doe v. Cumberland Valley Sch. Dist., No. 1:22-CV-00241 (M.D. Pa. Feb. 28, 2022); Disability Rts. S.C. v. McMaster, 564 F. Supp. 3d 413 (4th Cir. 2021), *vacated on other grounds*, 24 F. 4th 893, 903 (4th Cir. 2022); S.B. *ex rel.* M.B. v. Lee, 566 F. Supp. 3d 835 (E.D. Tenn. 2021); R.K. v. Lee, 568 F. Supp. 3d 895 (M.D. Tenn. 2021); G.S. *ex rel. S*chwaigert v. Lee, 560 F. Supp. 3d 1113 (W.D. Tenn. 2021); E.T. *ex rel. J*.R. v. Paxton, 41 F.4th 709 (5th Cir. 2022); Complaint at ¶ 71, Doe Lago Vista v. Lago Vista Indep. Sch. Dist., No. 1:21-CV-00862 (W.D. Tex. 2021); Seaman v. Virginia, 593 F. Supp. 3d 293, 299 (W.D. Va. 2022).

239. *Hayes*, 561 F. Supp. 3d 1187; *Paxton*, 41 F.4th at 709; *Donohue*, No. 21-CV-8463 (JPO), 2022 WL 673636; *Upper Saint Clair Sch. Dist.*, No. 2:22-CV-112, 2022 WL 189691.

240. *Donohue*, No. 21-CV-8463 (JPO), 2022 WL 673636; Stipulated Abeyance Order at ¶ 2, *Cumberland Valley Sch. Dist.*, No. 1:22-CV-00241 (M.D. Pa. Feb. 28, 2022) (dismissed after parties agreed to abeyance following CDC reclassified county from "high risk" to "medium risk" for spread of COVID-19); *N. Allegheny Sch. Dist.*, No. 2:22-CV-55, 2022 WL 170035, at *3.

241. *Douglas Cnty. Sch. Dist. RE-1*, 568 F. Supp. at 1158; A*RC of Iowa*, 559 F. Supp. 3d at 861; *S.B. ex rel. M.B.*, 566 F. Supp. 3d at 835; *Seaman*, 593 F. Supp. 3d at 317.

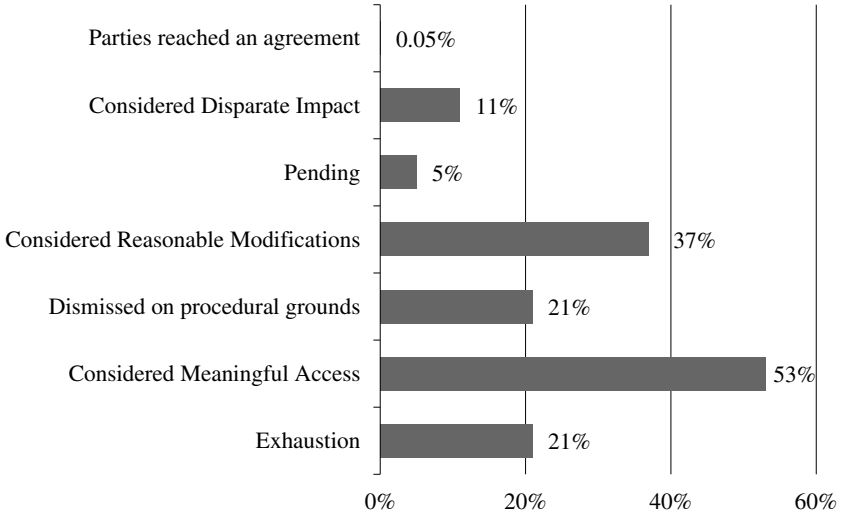

FIGURE 2

Unfortunately, judicial doctrine interpreting disability discrimination and the scope of Section 504 and the ADA in K–12 schools has never been clear.[242] This lack of clarity is problematic for both school districts who are unsure about the scope of their responsibilities to students with disabilities under these laws and to parents seeking accommodations for their children. Plaintiffs' attorneys practicing disability rights law under the current framework cannot depend on precedent and recent case outcomes when advising their clients and evaluating the merits of their case. In practice, the courts have left attorneys to plead a laundry list of factors and legal arguments and hope that the assigned judge finds something persuasive.

As previously discussed, while the Supreme Court has yet to rule squarely on the scope of Section 504 in K–12 schools, it has considered Section 504's anti-discrimination principle in other contexts.[243] Lower courts have treated these decisions as having direct applicability to disability rights claims brought in K–12 schools. However,

242. *See* Kerri Lynn Stone, *The Politics of Deference and Inclusion: Toward a Uniform Framework for the Analysis of Fundamental Alteration Under the ADA*, 58 HASTINGS L. J. 1241 (2006) (discussing litigation from the early 2000s and acknowledging that courts have been applying the "fundamental alteration analyses [under the ADA] without meaningful guidance in the form of a workable framework or a coherent standard").

243. *See, e.g.*, Se. Cmty. Coll. v. Davis, 442 U.S. 397 (1979); Alexander v. Choate, 469 U.S. 287 (1985).

K–12 schools are a unique setting as indicated by the Section 504 regulations applicable to them.[244]

Overall, the recent mask litigation stemming from the COVID-19 pandemic reaffirmed the inadequacy of the reasonable accommodations framework in K–12 schools. Even within geographic regions, circuits have failed to articulate consistent legal factors in determining reasonableness under Section 504 and the ADA. This area of disability law remains underdeveloped even as the rate of childhood disability in the United States increases.[245] Changes to the applicable laws are inevitable and it behooves the relevant stakeholders to propose solutions that are practical, clear, and advance disability justice. The next section outlines proposed solutions to the current Section 504 and ADA framework.

IV.
SOLUTIONS

Fixing the doctrinal and practical disorder faced by litigants attempting to assert their rights, schools attempting to fulfill their obligations, and courts attempting to appropriately adjudicate disability discrimination disputes requires immediate action from the U.S. Department of Education. The Agency must clarify and revise Section 504 regulations for K–12 public education and issue guidance to help courts, individuals, and schools better understand the law's scope. Fortunately, in May 2022, the Agency announced its intention to strengthen the rights of students with disabilities by amending the regulations implementing Section 504.[246]

As demonstrated through the mask litigation that has swept the country, elementary and secondary schools face complex questions about their obligations to students with disabilities. Decades of doctrinally flawed precedent that misapplied standards from the post-secondary education and employment contexts in K–12 schools have created a confusing and unsound framework that does little to help students or schools effectively apply the law. With this in mind, we explore potential amendments to Section 504's regulations, as well as alternative frameworks for interpreting disability rights laws in

244. Lingren, *supra* note 10.
245. Young, *supra* note 108.
246. Press Release, U.S. DEP'T OF EDUC., *U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504* (May 6, 2022), https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504 [https://perma.cc/83NW-BHXU].

schools. This section also applies the proposed amendments and frameworks to some of the mask litigation cases discussed earlier in the article.

A. Amendments and Guidance

As a starting point, the Agency must adopt a modified version of the ADA's reasonable accommodations regulation as a way to enact Section 504's discrimination protections and clear up any confusion about the operation of the two laws. Doing so is the only way to give adequate consideration to the existing FAPE regulation, Section 504's interplay with established ADA regulations, and the decades-long precedent establishing the reasonable accommodations framework as a legitimate theory in lower courts. The clearest path forward is to acknowledge that there are limits to Section 504's ability to compel school districts to make affirmative changes on behalf of students with disabilities and offer meaningful factors to help guide individuals, schools, and courts to those limits.

The Agency must acknowledge that a school's obligation to confer FAPE under Section 504 must have limits beyond whatever is "necessary to avoid discrimination."[247] The Supreme Court's ruling in *Alexander v. Choate*, broadly interpreting the law's reach, held that Congress intended Section 504 to operate within reasonable limits.[248] This part of the opinion is binding precedent, as it speaks to the law as a whole and does not rely on regulations. Consequently, OCR cannot simply ignore the Supreme Court's instruction to consider whether the covered organizations, in this case K–12 schools, have offered "meaningful access."[249] Meaningful access and "equality of access" are not the same. Rather, "meaningful access" suggests that something short of equal access may, at times, suffice. Thus, OCR must acknowledge that its current FAPE regulation may go beyond what is authorized by the plain language of Section 504 and amend it. This suggestion is not intended to weaken the rights of students with disabilities, but instead to acknowledge the practical limits of the law and create a more realistic framework to govern the law's reach. Consequently, the following proposals attempt to sufficiently balance the need to ensure a robust anti-discrimination principle within reasonable limits.

Currently, Section 504's FAPE regulation states, in part, that schools must ensure "the provision of regular or special education and

247. Response to Prof. Perry A. Zirkel, *supra* note 14.
248. *Choate*, 469 U.S. at 287.
249. *Id.* at 292.

related aids and services that are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met."[250] A separate regulation related to nonacademic services tasks schools with providing "non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities."[251] OCR currently distinguishes between the two and applies the reasonable accommodations framework to limit non-academic services, but not to limit the FAPE regulation.[252] OCR should do away with this confusing distinction and adopt a modified version of the reasonable accommodations framework, already established in ADA regulations and in the courts. The modified version, discussed further below, should include presumptions of reasonableness and specific factors to assist courts in determining when requested accommodations legitimately cause undue burdens or fundamental alterations.

While the FAPE regulation attempts to ensure equality for students with disabilities, the reasons to amend it are abundant. First, lower courts rarely acknowledge that Section 504 even contains a FAPE obligation separate from the IDEA's. This often erroneously forces students who attempt to raise questions of Section 504's FAPE to first exhaust their claims under IDEA's administrative process before seeking a Section 504 remedy in federal court.[253] Second, the FAPE regulation arguably goes beyond Congressional intent for the law, as set forth in *Alexander v. Choate*.[254] Third, the standard itself, which compels schools to measure programs for students with disabilities against nondisabled students, has already been deemed unworkable by the Supreme Court in dicta.[255] Finally, because FAPE is not mentioned by the ADA, continuing to include the standard in Section 504 creates inequity in the core discrimination principle that is otherwise identical in the two laws.

1. Proposed Amendment

To prevent any unintentional rolling back of rights, the cleanest path forward is to incorporate a modified version of the ADA's general nondiscrimination regulation addressing reasonable modifica-

250. 34 C.F.R. § 104.33 (2021).
251. *Id.* § 104.37.
252. Pub. Charter Schs. Disability FAQ, *supra* note 17.
253. Raj, *supra* note 34.
254. *Choate*, 469 U.S. at 287.
255. Bd. of Educ. v. Rowley, 458 U.S. 176, 198 (1982).

tions. The current ADA regulation states, "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."[256] We propose that OCR adopt a similar regulation for the K–12 context with the following language:

> *A public entity shall make reasonable accommodations in polices, practices, or procedures when the accommodations are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modification would be unduly burdensome for the administration of the program as a whole.*

First, using "reasonable accommodations" rather than "modifications" reflects the common understanding by individuals, schools, and courts of the framework already established to invoke remedies under Section 504 and the ADA, providing needed consistency between the two laws. Adopting a reasonable accommodations framework strikes the correct balance between ensuring meaningful access for students with disabilities and acknowledging doctrinally sound limits to schools' obligations on behalf of these students. It also does away with distinctions between the educational program and non-academic services and instead attempts to ensure equality across the educational program.

Turning to the other key language changes, the phrase "discrimination on the basis of disability" is necessary to reflect congressional intent regarding the purpose of the law. Additionally, removing "fundamental alteration" and only including the limit of "undue burden" signals that obligations owed by schools to students in the K–12 context are, in fact, more substantial than obligations owed by covered entities to individuals with disabilities in other contexts.[257] Because students in the K–12 context are qualified individuals as long as they are the appropriate age to attend school, they are not limited by their inability to meet essential program requirements unlike the post-secondary and employment contexts. Consequently, schools must at times make fundamental alterations to their programs to ensure students with disabilities have meaningful access to their educational programs. For instance, a school district may need to purchase assistive technology for a student who is deaf or hard of hearing, hire or consult with additional staff who are specialized in auxiliary aids for the

256. 28 C.F.R. § 35.130(b)(7) (2020).
257. *Id.* § 35.104(1) ("Qualified individual with a disability").

visually impaired, or train or hire a school nurse to be able to change a catheter. Each of these examples could arguably represent a fundamental change if the school district must make new purchase or hire new staff as a result, but each is required by Section 504 because all students of appropriate age are entitled to a meaningful educational benefit.

To further clarify the limits of "undue burden," the Department of Education should include a list of factors to assist students, schools, and courts with identifying when a request falls into this category. Potential factors could include: 1) estimated cost of the requested accommodation, 2) impact on students without disabilities, 3) impact on other students with disabilities, and 4) availability of service within the school district.

In revisiting the Pennsylvania cases, the language above would apply a clear definition of the school district's responsibilities and restrictions when considering universal masking as a reasonable accommodation. For example, in *Delaware Valley*, instead of focusing the analysis on whether the student "caused" a disparate impact by removing herself from certain elective classes, applying the proposed standard would require the court to consider the following: first, whether the student's requested accommodations are necessary to avoid discrimination on the basis of disability; second, whether the school district made reasonable accommodations in their polices, practices, or procedures when the accommodations are necessary to avoid discrimination; and third, whether the school district demonstrated that making the modification would be unduly burdensome for the administration of the program as a whole.

The proposed standard would not guarantee a different outcome in *Delaware Valley*. The student's request for universal masking as an accommodation could still be denied, but at least it would have faced the same legal standard and analysis as other K–12 requests for accommodations under Section 504 and the ADA. The proposed analysis remains student-focused and is in line with the legislative intent of the disability laws. The amendment reconciles the ADA with Section 504 while maintaining student rights and appropriate limits on school accommodations.

2. Proposed Presumption

In addition to the proposed amendment, the Department of Education should issue guidance to establish a presumption in favor of students when they identify a reasonable accommodation. In litigation, presumptions allocate the burden of proof to one party when they

plead a prima facie case.[258] In a Section 504 case involving the reasonableness of accommodations in K–12 schools, a presumption in favor of the student with a disability would shift the burden to the school district to present evidence rebutting the presumptive facts. This framework would still require an initial showing by students before the burden shifted to school districts to establish an affirmative defense.[259]

We suggest that a student with a disability requesting an accommodation should be required to make an initial showing of why the accommodation is needed to ensure meaningful access. However, the evidentiary burden for this showing should be low in order to promote liberal access to accommodations and to reflect the information and power imbalances between an individual student and a school district.[260] Once a student has made this initial showing, the burden should flip to the school district to demonstrate why the accommodation is unduly burdensome. Here again, putting the onus on the school district to affirmatively defend their decision to refuse the accommodation acknowledges congressional intent behind the law (to ensure individuals with disabilities have equal access to benefits) and reflects the information asymmetry in the relationship between school districts and individuals where school districts have direct answers to questions of cost, resources, and broader impact of any requested accommodation.

For example, a parent presenting a doctor's note explaining that a specific accommodation would assist their child with a disability to better access the educational program would clearly meet their initial burden to establish the reasonableness of the requested accommodation. The burden would then shift to the school district to rebut the reasonableness by demonstrating that the accommodation would be too burdensome to administer. Establishing a presumption in favor of students requesting accommodations would help ensure that students with disabilities have access to needed accommodations and put pressure on school districts to provide those accommodations unless they can prove that doing so would be an undue burden.

Applying this presumption could also make a difference in the recent mask litigation cases. In *Upper Saint Clair*, the court applied a

258. Leo H. Whinery, *Presumptions and Their Effect*, 54 OKLA. L. REV. 553 (2001).

259. An "affirmative defense" is defined as an "assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true." *Defense*, BLACK'S LAW DICTIONARY (11th ed. 2019).

260. Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1437 (2011).

reasonable accommodations framework but found the request for universal masking to be unreasonable in light of the school's other safety precautions, which included air filters, social distancing, frequent cleaning, and virtual school. Notably, the court equated reasonableness with the exclusion of other options, essentially determining that an accommodation is only reasonable if it is the only option. However, establishing a presumption would require the school district to respond to the student's request with a showing that masking is unduly burdensome, limiting the student's role to identifying an accommodation that will provide meaningful access to school, without the additional labor of proving no other options exist or weighing multiple options. The case ultimately could come out the same way, but at least this would attempt to reconcile the disadvantageous position plaintiffs often find themselves in. School districts are in the best position to rebut the presumption with a showing that the requested accommodation is unduly burdensome.

In sum, a presumption within the reasonable accommodations framework aids students and schools by clearly defining the rights and limits under Section 504 and the ADA. Ultimately, this will aid the OCR in providing clearer guidance and enforcement.

3. Suggested Guidance

OCR should also consider issuing guidance in three areas: 1) the interplay of IDEA's exhaustion clause and claims under disability rights laws, 2) disparate impact claims, and 3) the definition of "otherwise qualified." Despite Supreme Court guidance on the scope of IDEA's exhaustion clause, courts continue to be confused about its application.[261] Litigants are only required to exhaust IDEA's administrative remedies when the gravamen of their complaint is a denial of IDEA's FAPE.[262] Because many courts do not recognize a separate FAPE right under Section 504, they often force plaintiffs to exhaust properly pled Section 504 cases.[263] For example, courts in two of the cases involving universal masking disputes dismissed plaintiffs' requests for accommodations for failure to exhaust under the IDEA.[264]

261. Fry v. Napoleon Cmty. Sch., 580 U.S. 154, 164 (2017).

262. 20 U.S.C. § 1415(l); *see also Fry*, 580 U.S. at 154 (vacating a Sixth Circuit Court of Appeals' dismissal of a suit, brought by Stacy and Brent Fry, parents of a child (E.F.) with severe cerebral palsy, under Title II of the ADA of 1990 and Section 504).

263. Raj, *supra* note 34.

264. Hayes v. DeSantis, 561 F. Supp. 3d 1187 (S.D. Fla. 2021) (requiring parents seeking a temporary restraining order prohibiting Florida's mask ban in schools to exhaust their claims under the IDEA); Donohue v. Hochul, No. 21-CV-8463 (JPO),

OCR must issue guidance that affirms a private of right of action to bring claims invoking Section 504's FAPE regulation without first exhausting administrative remedies under the IDEA, as the two FAPE standards are distinct. In addition to affirming a private right of action under Section 504, explicit examples of appropriate fact patterns would aid in demystifying the illusive Section 504 FAPE provision.

OCR should also issue guidance that reiterates that disparate impact claims need not prove intent. Rather, plaintiffs alleging a disparate impact need only demonstrate that the neutral law or policy has a negative impact on students with disabilities that could be remedied through a reasonable accommodation. Too often, courts are erroneously forcing plaintiffs to prove that the policy was motivated by disability or targeted students with disabilities, which of course, runs entirely counter to the idea of unintentional disparate impact.[265]

Finally, OCR must issue guidance that amplifies the distinctions in the definition of "otherwise qualified" with respect to the K–12 context.[266] Courts continue to engage in analyses that limit the rights of students with disabilities based on a faulty understanding of what it means to be "otherwise qualified."[267] Although the Supreme Court's ruling in *Davis* centered on the definition of "otherwise qualified" in the post-secondary school context, lower courts that have accepted *Davis* as binding precedent improperly apply this definition to K–12 cases. To clear up this continued confusion, OCR should reiterate the difference in definitions and, by doing so, affirm that public K–12 schools have a greater obligation to students with disabilities than employers or post-secondary schools. In addition to amending Section 504 and providing guidance, we can create a new or alternative framework by examining other areas of law.

B. Alternative Frameworks

Because any standard involving reasonableness has an element of subjectivity and vagueness, it is worth exploring other areas of law

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2022 WL 673636 (S.D.N.Y. Mar. 7, 2022) (requiring parents to exhaust under the IDEA where their children with disabilities needed as exemption from the mask mandate due to their disabilities).

265. Davis v. Francis Howell Sch. Dist., 138 F.3d 754 (1998) (court found school district policy regarding medication that had the effect of limiting plaintiffs access to medication nondiscriminatory because the policy was not made on the basis of disability).

266. 34 C.F.R. § 104.3(*l*) (2020).

267. Brookhart v. Ill. St. Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983) ("A student who is unable to learn because of his handicap is surely not an individual who is qualified in spite of his handicap.").

that have developed objective factors to help guide these evaluations with the goal of producing more uniform decisions. The following section explores the "best interest" analysis used in family law and offers guiding values that may influence future amendments of Section 504.

In family law, courts apply the "best interests of the child standard" to decisions concerning children.[268] This best interests of the child standard is a multi-factor balancing test. State courts, administrative agencies, and private entities all rely on this standard when making decisions about child custody, child welfare in abuse and neglect proceedings, parental responsibilities after divorce, and adoption approvals.[269] Legal scholars have called for application of the best interests of the child standard to additional areas of law involving children, such as immigration matters.[270] And, in international law, the best interests of the child standard permeates all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies.[271]

In the United States, the best interests of the child standard used in family law is derived from the Uniform Marriage and Divorce Act.[272] The standard looks to the following five factors, selected because they were most cited in appellate decisions:[273]

> The wishes of the child's parent or parents as to his custody;
> The wishes of the child as to his custodian;
> The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> The child's adjustment to his home, school, and community; and
> The mental and physical health of all individuals involved.[274]

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268. Adrián E. Alvarez, *Enabling the Best Interests Factors*, 2 ARIZ. ST. L.J. ONLINE 90 (2020).

269. *Id.* at 97 n.45 (quoting Ann Laquer Estin, *Child Migrants and Child Welfare: Toward a Best Interests Approach*, 17 WASH. U. GLOBAL STUD. L. REV. 589, 609 (2018)); Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104–235, 110 Stat. 3063 (codified as amended at 42 U.S.C. § 5106a(b)(2)(A)(ix)(1)–(11) (2000 & Supp. V 2005)).

270. Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009).

271. Comm. on the Rts. of the Child., General Comment No. 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (art. 3, para. 1), U.N. DOC. CRC/C/GC/14 (2013).

272. UNIF. MARRIAGE & DIVORCE ACT § 402 (1970).

273. Erin Bajackson, *Best Interests of the Child—A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAWS. 311 (2013).

274. UNIF. MARRIAGE & DIVORCE ACT § 402.

> Each state has adopted their own variation of the best interests of the child standard, building on these core principles set forth in the Unified Marriage and Divorce Act.[275] Many states include a category for "other relevant factors" capturing relevant information that falls outside the articulated factors.[276]

Similar to a family custody case, both parents and schools have a shared interested in ensuring that students with disabilities have meaningful access to their education. Like Section 504, there are a plethora of factors family courts could use to make decisions regarding the custody and care of minor children. Decision makers in both areas of law can benefit from a balancing test to outline the relevant factors that should be considered and applied. Disability rights laws in the K–12 space are essentially focused on ensuring children have equal and meaningful access to the benefit of public education; however, a best interests analysis is never considered. Taking a page from family law doctrine, Section 504 could be amended to include a list of factors to be considered whenever a plaintiff requests a reasonable accommodation. For instance, courts could ask: 1) is the accommodation needed to ensure meaningful access to the educational program, 2) does the accommodation promote equality of access, 3) is the child at a current disadvantage or being denied a benefit without the accommodation, 4) is the accommodation likely to be effective, 5) would the school district face undue hardship if it were to provide the accommodation, and 6) does the provision of the accommodation negatively impact other students.

Consider again, *Delaware Valley*, where a student could not attend some elective courses without universal masking. We can apply the proposed balancing test. Does the student need masking to ensure meaningful access to their core educational program? Does the mask accommodation promote equality of access? In this case, the student had access to some, but not all courses. Would the student be at a disadvantage or denied a benefit without the masking accommodation? Presumably, the ability to select course electives is a benefit afforded to students. Would the mask accommodation be effective? Would the school district face undue hardship in granting the accommodation? This question acknowledges the hard limits and potential burdens of universal masking and other accommodations. Lastly, would the mask accommodation negatively impact other students?

275. CHILD.'S BUREAU, ACYF, ACF, HHS, DETERMINING THE BEST INTERESTS OF THE CHILD (June 2020), https://www.childwelfare.gov/pubpdfs/best_interest.pdf [https://perma.cc/5KH5-6NJ4].

276. *Id.*

The negative impact on other students was addressed in various mask litigation cases through the discussion of "public interest" and enforcement, however, never directly balanced with the needs of the student with a disability as part of a broader assessment.

A multi-factor balancing test is flexible enough to apply to cases beyond masking but narrow enough to exclude the laundry list of possible factors that could be applied. In these cases, judges retain some discretion while balancing competing equities. By providing relevant factors for consideration, courts may arrive at more predictability and uniformity in their decision-making.

Conclusion

The chaotic outcomes of mask mandate litigation across the country signify courts' utter confusion with respect to disability discrimination claims in K–12 schools. This confusion, moreover, is reflective of a decades-long misunderstanding of Section 504 and the ADA's scope in public schools. Essentially, courts have erroneously applied limits that restrict students with disabilities' rights under both laws. Quite unhelpfully, the Office for Civil Rights—tasked with enforcing the laws in public schools—uses an entirely distinct analysis in its administrative review process, virtually ignoring the reasonable accommodations framework used by federal courts. This utter disconnect between court and agency adjudication of rights harms both students and schools.

Fortunately, realistic solutions are both possible and potentially fast-approaching as the Office for Civil Rights is seeking public comment on its Section 504 regulations. Amending these regulations to include the modified reasonable accommodation framework suggested here would go a long way towards creating a unified understanding and application of Section 504, and by extension the ADA, in public schools. Moreover, courts would benefit from objective factors to consider when trying to locate the limits of schools' obligations under the law.

With the ever-present potential for new global pandemics and higher rates of disability on the horizon, the challenges highlighted in this article will only increase, creating additional barriers to education for the most vulnerable children in our schools.[277] It is imperative that courts and agencies correct their understanding of disability rights

277. Maya Riser-Kositsky, "Special Education: Definition, Statistics, and Trends," Educ. Wk, https://www.edweek.org/teaching-learning/special-education-definition-statistics-and-trends/2019/12 (last updated Jul. 22, 2022) ("The percentage of special education students who spend most of their time in regular education classes is now

laws to ensure students with disabilities and schools have a solid framework from which to interpret their respective rights and obligations.

66 percent, up from 31.7 percent in 1989, these students all qualify under Section 504 and the ADA.").