CASE NO. 23-35522

IN THE

United States Court Of Appeals For The Ninth Circuit

J.S., by and through their next friends S.S. and E.S.

Plaintiffs and Appellants,

vs.

EUGENE SCHOOL DISTRICT 4J

Defendant and Appellant.

Appeal From The United States District Court,
District of Oregon, Case No. 6:21-cv-01430-MK, Hon. Ann Aiken

BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION AND OREGON SCHOOL BOARDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF EUGENE SCHOOL DISTRICT 4J

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CORPORATE DISCLOSURE STATEMENT

Amici curiae National School Boards Association and Oregon School Boards Association certify they have no parent corporations. They have no stock and, therefore, no publicly held company owns 10% or more of their stock.

DATED: February 12, 2024

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 1
TABLE OF CONTENTS 2
TABLE OF AUTHORITIES 3
CONSENT OF THE PARTIES TO FILE *AMICI CURIAE* BRIEF 6
INTEREST OF THE *AMICI CURIAE* 6
STATEMENT OF AUTHORSHIP 7
I. INTRODUCTION 8
II. ARGUMENT 9
A. Section 504 and the IDEA Have Complimentary Requirements As Applied to Students With Disabilities that Can and Do Overlap. 12
B. Courts Have Long Held that Compliance with the IDEA Can Foreclose Section 504 Discrimination Claims. 16
C. Exceptions to 34 C.F.R. § 104.33(b)(2) Are Narrow and Inapplicable to This Matter. 21
III. CONCLUSION 26
STATEMENT OF RELATED CASES 28
Form 8. Certificate of Compliance for Briefs 29

TABLE OF AUTHORITIES

Page(s)

Cases

A.G. v. Paradise Valley Unified Sch. Dist. No. 69,
815 F.3d 1195 (9th Cir. 2016) 12, 18, 25

A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.,
627 F.3d 773 (9th Cir. 2010) 19

Burke Cnty. Bd. of Educ. v. Denton By & Through Denton,
895 F.2d 973 (4th Cir. 1990) 13, 20

CTL ex rel. Trebatoski v. Ashland Sch. Dist.,
743 F.3d 524 (7th Cir. 2014) 12, 18

D.B. ex rel. Elizabeth B. v. Esposito,
675 F.3d 26 (1st Cir. 2012).....19

D.K. v. Abington Sch. Dist.,
696 F.3d 233 (3d Cir. 2012) 20

D.T. by & through Yasiris T. v. Cherry Creek Sch. Dist. No. 5,
55 F.4th 1268 (10th Cir. 2022) 18

Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1,
580 U.S. 386 (2017).....11, 18

Est. of Lance v. Lewisville Indep. Sch. Dist.,
743 F.3d 982 (5th Cir. 2014) 17, 18, 20, 24

Fry v. Napoleon Community Schools,
580 U.S. 154 (2017).....9, 22, 23

Gill v. Columbia 93 Sch. Dist.,
217 F.3d 1027 (8th Cir. 2000) 21

J.D. ex rel. J.D. v. Pawlet Sch. Dist.,
224 F.3d 60 (2d Cir. 2000) 12, 19

K.M. ex rel. Bright v. Tustin Unified Sch. Dist.,
725 F.3d 1088 (9th Cir. 2013) 24

Lartigue v. Northside Indep. Sch. Dist.,
86 F.4th 689 (5th Cir. 2023) 24

M.R. v. Ridley Sch. Dist.,
744 F.3d 112 (3d Cir. 2014) 13

M.Y., ex rel., J.Y. v. Special Sch. Dist. No., 1, 544 F.3d 885 (8th Cir. 2008) 20

Mark H. v. Lemahieu,
513 F.3d 922 (9th Cir. 2008) 13, 17, 18, 19

McIntyre v. Eugene Sch. Dist. 4J,
976 F.3d 902 (9th Cir. 2020) 18, 25

Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.,
565 F.3d 1232 (10th Cir. 2009) 12

Payne v. Peninsula Sch. Dist.,
653 F.3d 863 (9th Cir. 2011) 22

Rettig v. Kent City Sch. Dist.,
720 F.2d 463 (6th Cir. 1983) 20

Rogers v. Bennett,
873 F.2d 1387 (11th Cir. 1989) 14, 15

S.D. by A.D. v. Haddon Heights Bd. of Educ.,
722 F. App'x 119 (3d Cir. 2018).....20, 22, 24

Smith v. Robinson,
468 U.S. 992 (1984).....13, 15, 16, 22

Timms on Behalf of Timms v. Metro. Sch. Dist. of Wabash Cnty., Ind.,
722 F.2d 1310 (7th Cir. 1983) 13

Urb. by Urb. v. Jefferson Cnty. Sch. Dist. R-1,
89 F.3d 720 (10th Cir. 1996) 21

Weber v. Cranston Pub. Sch. Comm.,
245 F. Supp. 2d 401 (D.R.I. 2003) 13, 14

Statutes

20 U.S.C. § 1415 21

Regulations

34 C.F.R. § 104.31 21
34 C.F.R. § 104.32 16
34 C.F.R. § 104.33 ..... passim
34 C.F.R. § 104.34 16
34 C.F.R. § 104.35 16
34 C.F.R. § 104.36 16
34 C.F.R. § 104.37 16
34 C.F.R. § 300.101-300.113 16
34 C.F.R. § 300.111, 300.131 16
34 C.F.R. § 300.114-300.120 16
34 C.F.R. § 300.300-300.311 16
34 C.F.R. § 300.504 16

Other Authorities

Pub.L. No. 92-112 14

CONSENT OF THE PARTIES TO FILE *AMICI CURIAE* BRIEF

Pursuant to Rule 29(a) Federal Rule of Appellate Procedure and Circuit Rule 29-3 the National School Boards Association and Oregon School Board Association confirm that all Parties have consented to *amici curiae* filing this brief in the above-captioned matter in support Eugene School District 4J on appeal.

INTEREST OF THE *AMICI CURIAE*

The National School Boards Association's ("NSBA") is a non-profit organization representing state associations of school boards and the Board of Education of the U.S. Virgin Islands. NSBA advocates for equity and excellence in public education through school board leadership. NSBA regularly represents its members' interests before Congress and federal courts, and has participated as *amicus curiae* in a number of cases involving issues concerning the interpretation and implementation of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq.*

The Oregon School Boards Association ("OSBA") supports over 1,400 locally elected public officials who serve on school district, education service district and community college boards. OSBA serves K-12 public school boards, community college boards, and the state Board of Education. Through legislative advocacy at state and federal levels, board leadership training, employee management assistance,

policy, communications, and legal and financial services, OSBA helps locally elected volunteers fulfill their complex public education roles, including the crucial work of educating students with disabilities.

Amici curiae submit this brief to assist this Court's understanding of the interrelated history between Section 504 and the IDEA so that it can reaffirm the long-held principle that substantive and procedural compliance with the IDEA remains a complete and definitive defense to Section 504 discrimination claims premised on the design and provision of a student with disabilities' educational program.

STATEMENT OF AUTHORSHIP

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, *Amici* state that: (1) no party's counsel authored this Brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting this Brief; and (3) no person—other than the *Amici*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this Brief.

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I.
INTRODUCTION

Amici Curiae file this brief in support of Respondent Eugene School District 4J to provide a broader context to this Court regarding the interrelation between actions brought under the IDEA and complaints of denial of a free appropriate public education ("FAPE") as defined by Section 504 of the Rehabilitation Act ("Section 504"). Plaintiff J.S.'s appeal to this Court as well as the *amicus curiae* brief filed by the Council of Parent Attorneys and Advocates ("COPAA") misunderstand the history and purpose of Section 504 and IDEA regulations. As a result, J.S. and COPAA propose that this Court create a distinction between actions alleging disability discrimination, such as the instant case, and actions alleging a denial of FAPE as defined by the IDEA that would both greatly expand Section 504's purpose in the school environment and put this Circuit in conflict with not only its Sister Circuits, but its own case law. Plaintiff and COPAA's interpretation also ignores the collaborative framework of the IDEA process that favors cooperation between local educational agencies ("LEA") and families to develop a program appropriate for a child, and disposition of disputes through an administrative hearing process overseen by a hearing officer with specialized expertise, rather than costly, contentious, and emotionally painful litigation.

In this brief, *Amici Curiae* first provides this Court with the history of the parallel development of Section 504 and the IDEA's predecessor—the Education for All Handicapped Children Act ("EAHCA" which was an amendment to the Education of the Handicapped Act, or "EHA")—and judicial interpretation of those provisions' concomitantly promulgated regulations for elementary and secondary schools. Next, *Amici Curiae* outline the history of judicial application of 34 C.F.R. § 104.33(b)(2), which provides that the implementation of an individualized educational program ("IEP") under the IDEA meets Section 504's FAPE requirements. Finally, *Amici Curiae* evaluate the analytical framework of administrative exhaustion under the IDEA—following the United States Supreme Court's decision in *Fry v. Napoleon Community Schools*, 580 U.S. 154 (2017)—further supporting the specific application of 34 C.F.R. § 104.33 in this case.

II.
ARGUMENT

In its *amicus curiae* brief supporting Plaintiff J.S., COPAA argues that the district court erred both legally and analytically in holding that J.S.'s unsuccessful challenge to his Individualized Educational Program ("IEP") developed by Eugene School District 4J in accordance with the IDEA foreclosed any allegation by J.S. that

he was discriminated against in the design of that same IEP under Section 504.[1] In comparison with rights afforded to students with disabilities under the IDEA, COPAA argues that the protections afforded under Section 504 "may be greater in scope" in that they provide students with disabilities "equal opportunity, not merely appropriate education." Doc 14-2 at 19. The IDEA, according to COPAA, is "at its heart" a "remedial statute designed to redress perceived obstacles to education by providing federal funds to assist states in providing additional programs or services to individual students with qualifying disabilities." *Id.* at 15. In comparison, Section 504 "imposes *greater* obligations on public school than provided for in the IDEA" through its regulatory definition of "appropriate education." *Id.* 16-7 (emphasis added).

As applied to the underlying case, COPAA, like Plaintiff, seeks to uncouple the analysis of J.S.'s IEP under the standards of the IDEA from his argument that the placement and services provided for *in* that IEP discriminated against him in accordance with Section 504. Thus, while the state hearing officer and district court both concluded that J.S.'s IEP team appropriately provided him with interim home instruction with related services, and while that interim placement and services did not deny J.S. a FAPE under the IDEA, Plaintiff argues that Section 504's prohibition against discrimination independently mandated that Eugene School District 4J

[1] While COPAA refers to the ADA as well in its *amicus* brief, it does not appear from Plaintiff's Opening Brief in this Court that ADA claims are at issue. *See* Doc. 11 at 12.

provide J.S. with in-school instruction with greater supportive services. While not directly attacking the legality of 34 C.F.R. § 104.33(b)(2), COPAA and J.S. insist that a legally-compliant IEP under the IDEA cannot be sufficient to provide a FAPE under Section 504.

COPAA and J.S.'s legal analysis imposes additional, and potentially conflicting, legal burdens on LEAs that find no place in the history of Section 504 or the analysis of that section in relation to the IDEA. If this Court were to adopt COPAA and J.S.'s interpretation of Section 504 requirements, IEP teams would be required to look beyond the individualized benefit analysis at the heart of the IDEA (*see Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386 (2017)) to evaluate whether a student's placement and services provide the alleged greater "heightened" "appropriate education" standard of Section 504. In this approach, if an LEA provides an IEP "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (*Id.* at 399), it might still provide an IEP that is discriminatory. Such a precedent would undermine the collaborative nature of the IEP process and the expertise of special education practitioners and parents in designing educational programs based on the individual needs of students with disabilities. *See Id.* at 390 (IDEA procedures "emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances.")

A. Section 504 and the IDEA Have Complimentary Requirements As Applied to Students With Disabilities that Can and Do Overlap.

Developed in tandem, federal regulations implementing Section 504 and the IDEA in elementary and secondary education have complimentary requirements that overlap in many major respects. As explained by the Second Circuit, Section 504 "complements the IDEA" and corresponding state statutes and regulations.[2] *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70 (2d Cir. 2000). "Whereas the latter authorities require federally funded State and local educational agencies to provide special education and related services to students who meet specified eligibility criteria, § 504 of the Rehabilitation Act prohibits such agencies from discriminating against students with disabilities." *Id.* This Circuit has explained that in comparison with the IDEA, "Section 504's regulations gauge the adequacy of services provided to disabled individuals by comparing them to the level of services provided to individuals who are not disabled." *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1203 (9th Cir. 2016). However, these requirements are "less exacting than the IDEA's." *CTL ex rel. Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 529–30 (7th Cir. 2014) (*citing Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232,

[2] As a Spending Clause statute, the IDEA's statutory and regulatory scheme requires state educational agencies to promulgate state law enacting the IDEA's provisions as the minimum substantive requirements and procedural safeguards for eligible students with disabilities receiving special education services.

1246 (10th Cir. 2009); *Mark H. v. Lemahieu*, 513 F.3d 922, 936 (9th Cir. 2008); *Weber v. Cranston Pub. Sch. Comm.*, 245 F. Supp. 2d 401, 406 (D.R.I. 2003).

While the IDEA is described and understood as a comprehensive mandatory statutory and regulatory scheme imposing requirements on states to adopt state-specific comprehensive schemes, Section 504 is described as a prohibitive law that is both broader in application—applying generally to all recipients of federal funding—but narrower in scope. *See Timms on Behalf of Timms v. Metro. Sch. Dist. of Wabash Cnty., Ind.*, 722 F.2d 1310, 1317–18 (7th Cir. 1983) ("We agree with the Eighth Circuit . . . that the Rehabilitation Act is broader than the EAHCA in the range of federally-funded activities it reaches, but narrower in the kind of actions it regulates."). Critically, while the IDEA "imposes affirmative duties regarding the content of the programs that must be provided to the handicapped," "section 504 forbids exclusion from programs rather than prescribing the programs' content[.]" *Id. See, also, M.R. v. Ridley Sch. Dist.*, 744 F.3d 112, 116 (3d Cir. 2014) (reaffirming prior Third Circuit precedent explaining that "§ 504's 'negative prohibition' is similar to the IDEAs 'affirmative duty'"). As explained by the Fourth Circuit, "The Supreme Court has emphasized that the purpose of the Rehabilitation Act is to prevent discrimination against the handicapped; it is not intended to impose an affirmative obligation on all recipients of federal funds." *Burke Cnty. Bd. of Educ. v. Denton By & Through Denton*, 895 F.2d 973, 984 (4th Cir. 1990) (*Citing Smith v. Robinson*, 468

U.S. 992, 1016 (1984)). "[S]ection 504 only prevents discrimination against the handicapped; unlike the EHA, it does not require that states devote extra resources to meeting the needs of handicapped individuals." *Rogers v. Bennett*, 873 F.2d 1387, 1390 (11th Cir. 1989). The District of Rhode Island described the relationship between Section 504 and the IDEA in a more colorful way: "In contrast to the IDEA's imposition of specific, affirmative obligations, Section 504 blankly forbids discrimination on the basis of disability in any context. It is a bludgeon to the IDEA's stiletto, protecting a broader swath of the population without describing a precise manner of compliance." *Weber*, 245 F. Supp. 2d at 406–07.

While the Department of Education's ("DOE") regulations implementing Section 504 in the school setting include a FAPE requirement, both Plaintiff and COPAA fail to understand the history of the development of Section 504's regulations and the impact of that history on how the regulations should be interpreted.

"The main purpose of the Rehabilitation Act was to provide funding for the vocational rehabilitation of handicapped individuals. [Pub.L. No. 92-112 at § 2, 87 Stat. 357.] A miscellaneous provision at the end of the Act, however, also provided handicapped individuals with general protection against discrimination." *Rogers*, 873 F.2d at 1390. Section 504, when originally enacted, contained no language expressly authorizing the promulgation of implementing regulations; and the predecessor to the DOE—the Health, Education and Welfare Department ("HEW")—initially refused to

promulgate regulations, "believing the section to be self-executing." *Id.* at 1394. After Congress clarified its intent in amendments to the Rehabilitation Act, each federal department developed its own implementing regulations. As it happened, regulations under Section 504 and the EHA were being formulated by HEW *at the same time*—with the implementing regulations of Section 504 effective June 3, 1977, and the implementing regulations of the EHA effective October 1, 1977. *Smith*, 468 U.S. at 1018. "The Secretary of HEW and the Commissioner of Education emphasized the coordination of effort behind the two sets of regulations and the Department's *intent that the § 504 regulations be consistent with the requirements of the EHA*." *Id.* (emphasis added). "Because both statutes are built around fundamental notions of equal access to state programs and facilities, their substantive requirements, as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar." *Id.* at 1017–18.

Even though the IDEA's regulations have undergone a few major revisions since 1977—the most recent major revision being in 2008—the similarity to DOE's Section 504 regulations (which have changed little since 1977) is still facially apparent when comparing the two regulatory schemes. The six primary Section 504 implementing regulations are chaptered in sections 104.32 *et seq.* of Title 34 of the Code of Federal Regulations. Each of these regulations has a parallel in the IDEA regulations, which include the following:

- 34 C.F.R. § 104.32 (Location and Notification) = 34 C.F.R. § 300.111, 300.131
- 34 C.F.R. § 104.33 (Free Appropriate Public Education) = 34 C.F.R. § 300.101-300.113
- 34 C.F.R. § 104.34 (Educational Setting) = 34 C.F.R. § 300.114-300.120
- 34 C.F.R. § 104.35 (Evaluation and Placement) = 34 C.F.R. § 300.300-300.311
- 34 C.F.R. § 104.36 (Procedural Safeguards) = 34 C.F.R. § 300.504
- 34 C.F.R. § 104.37 (Nonacademic Services) = 34 C.R.R. §§ 300.107-300.108

When originally drafting these parallel regulations, the Secretary of HEW and the Commissioner of Education "emphasized the coordination of effort behind the two sets of regulations" and "declined to require the exact EHA procedures" for Section 504 "because those procedures might be inappropriate for some recipients not subject to the EHA, but indicated that compliance with EHA procedures would satisfy" the procedural requirements of Section 504. *Smith*, 468 U.S. at 1018, fn. 20. In other words, HEW (now DOE) in drafting regulations implementing Section 504 expressly stated that those regulatory requirements can be met by following the procedures in the IDEA.

B. Courts Have Long Held that Compliance with the IDEA Can Foreclose Section 504 Discrimination Claims.

As set forth above, from the earliest interpretations of Section 504's regulatory requirements, the Supreme Court and the Circuits have recognized that DOE

intended for compliance with the IDEA's substantive and procedural requirements to be sufficient for compliance with Section 504 regulations. Contrary to Plaintiff and COPAA's interpretation, no court has held that Section 504 imposes greater obligations on school districts in the education of students with disabilities than the IDEA—especially as applied to students qualified under the IDEA to receive special education services.

In fact, the FAPE requirement under Section 504 is generally interpreted as less exacting than the FAPE requirement under the IDEA. This Court has explained that "FAPE under the IDEA and FAPE as defined in the § 504 regulations are similar but not identical." *Mark H.*, 513 F.3d at 933. While the IDEA's FAPE obligation is statutory, Section 504's FAPE definition is a creation of DOE solely through its Section 504 regulations. *Est. of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 991 (5th Cir. 2014). Following Section 504's prohibitory nature, Section 504's FAPE requirement focuses on the *design* of a child's educational program and requires "a comparison between the manner in which the needs of disabled and non-disabled children are met." *Mark H.*, 513 F.3d at 933. By comparison, the IDEA focuses on an individualized program collaboratively developed by parents and the LEA. It defines FAPE as programs, accommodations, and services provided through an IEP, "reasonably calculated to enable a child to make progress appropriate in light of the

child's circumstances." *Endrew F. ex rel. Joseph F.*, 580 U.S. at 399. *See Estate of Lance*, 743 F.3d at 991.

It is expressly contrary to the DOE's Section 504 regulations to conclude that an appropriate individualized program designed in accordance with the exacting standards of the IDEA can otherwise violate Section 504 in a discriminatory manner. For students with disabilities not eligible for special education services under the IDEA, academic aides and services are delivered through a Section 504 plan. Even so, "the blueprints for these plans" come from the IDEA. *CTL ex rel. Trebatoski*, 743 F.3d at 529. An IEP meets the requirements of Section 504 because it is "more specialized." *D.T. by & through Yasiris T. v. Cherry Creek Sch. Dist. No. 5*, 55 F.4th 1268, 1271 (10th Cir. 2022) (*citing McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 912 (9th Cir. 2020)). The converse is not true—a Section 504 Plan cannot meet the requirements of the IDEA—because of its broader and more general nature. *Id.*

For all these reasons, a school district providing FAPE through an IEP developed in accordance with the IDEA provides FAPE under the Section 504 regulations. 34 C.F.R. § 104.33(b)(2). *Accord*, *A.G.*, 815 F.3d at 1203 ("One method of ensuring that the educational aids and services are "designed to meet individual education needs" as required under § 104.33(b)(1)(i) is to implement an IEP developed in accordance with the IDEA, 34 C.F.R. § 104.33(b)(2)[.]"); *Mark H.*, 513 F.3d at 933 ("Moreover, the U.S. DOE's § 504 regulations distinctly state that

adopting a valid IDEA IEP is sufficient but not necessary to satisfy the § 504 FAPE requirements."). Indeed, when IDEA and Section 504 claims overlap, courts including this Circuit hold that while compliance with the IDEA satisfies Section 504, noncompliance with the IDEA does *not* necessarily mean noncompliance with Section 504. *Mark H.*, 513 F.3d at 927.

Indeed, 34 C.F.R. § 104.33(b)(2)'s rule that compliance with the IDEA is sufficient for compliance with Section 504 has been applied in case law for over 40 years in dismissing Section 504 discrimination actions upon a finding that an LEA has abided by its substantive and procedural obligations under the IDEA. *See, e.g.*:

- *A.M. ex rel. Marshall v. Monrovia Unified Sch. Dist.*, 627 F.3d 773, 782 (9th Cir. 2010) (holding plaintiffs "have no viable Section 504 claim against Defendant" because school district implemented a valid IEP);
- *D.B. ex rel. Elizabeth B. v. Esposito*, 675 F.3d 26, 40 (1st Cir. 2012) ("The district court agreed with the IHO that there was no denial of a FAPE. We have now affirmed that ruling, which necessarily precludes any claim that there was a discriminatory denial of a FAPE.");
- *J.D. ex rel. J.D.*, 224 F.3d at 71 ("The sole issue on appeal with respect to the § 504 claim is whether the proposed IEP constituted a reasonable accommodation. We find that it did.");

- *S.D. by A.D. v. Haddon Heights Bd. of Educ.*, 722 F. App'x 119, 128 (3d Cir. 2018) (holding that provision of FAPE as defined by the IDEA forecloses disability discrimination actions under Section 504 and ADA);
- *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 253 (3d Cir. 2012) ("[O]ur finding that the School District did not deny D.K. a FAPE is equally dispositive of Plaintiffs' § 504 claim.");
- *Burke County Bd. of Educ.*, 895 F.2d at 984 (holding county board of education did not discriminate in provision of educational services because it complied with EHA and satisfied obligations under Section 504);
- *Estate of Lance*, 743 F.3d at 992–93 (holding that to sustain Section 504 discrimination cause of action, plaintiff "at a minimum" was "required to allege a denial of FAPE under the IDEA");
- *Rettig v. Kent City Sch. Dist.*, 720 F.2d 463, 465 (6th Cir. 1983) (complaints arising under Section 504 with exception of complaint regarding extracurricular activities resolved by disposition of EHA claims);
- *M.Y., ex rel., J.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 889 (8th Cir. 2008) (because IEP team concluded student did not require transportation to and from summer school, refusal to provide transportation cannot be denial of FAPE under Section 504);

- *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1031 (8th Cir. 2000) (affirming dismissal of Section 504 claims after summary judgment granted in favor of LEA on IDEA claims);
- *Urb. by Urb. v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 728 (10th Cir. 1996) ("Relying on the similarity between the substantive and procedural frameworks of the IDEA and section 504, *see* 34 C.F.R. § 300.340 et seq., 34 C.F.R. § 104.31 et seq., we conclude that if a disabled child is not entitled to a neighborhood placement under the IDEA, he is not entitled to such a placement under section 504.").

Plaintiff and COPAA have provided this Court with no legal or policy grounds upon which this Court must depart from this long and established jurisprudential history, grounded in the understanding that an appropriate individualized program designed in accordance with the exacting standards of the IDEA does not violate Section 504's prohibition on discrimination.

C. Exceptions to 34 C.F.R. § 104.33(b)(2) Are Narrow and Inapplicable to This Matter.

While a body of case law exists establishing fact scenarios in which 34 C.F.R. § 104.33(b)(2) does not foreclose discrimination claims when an IEP developed under the IDEA is held to provide FAPE, those fact scenarios are narrow and inexorably intertwined with the IDEA's administrative exhaustion requirement. 20 U.S.C. §

1415(l). In *Fry*, 580 U.S. 154, the Supreme Court provided necessary guidance on how courts are to analyze when an educationally-related claim for a student eligible under the IDEA must first be prosecuted through the IDEA's "due process" procedures, and when those claims can be raised through Section 504 or the ADA independently of a cause of action alleging denial of an IDEA FAPE. As Justice Kagan wrote for the majority, what matters in determining whether a claim falls first under the IDEA's provisions "is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading." *Fry*, 580 U.S. at 169. *See, Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 877 (9th Cir. 2011), *overruled on other grounds by Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014) ("[P]laintiffs cannot avoid exhaustion through artful pleading."). With *Smith v. Robinson* as an express example, the Supreme Court instructed that a plaintiff cannot escape the IDEA by claiming that the denial of FAPE under the IDEA "also violat[es] the Rehabilitation Act." *Id.* at 168. If a state hearing officer under the IDEA could have granted relief for the claimed failure to provide disability accommodation, then, generally, a discrimination claim alleging that failure falls under the IDEA. *Id. See, also, S.D. by A.D.*, 722 F. App'x at 128 (rejecting discrimination theory as coextensive with IDEA FAPE denial even when "Appellants argue that a FAPE under the ADA and Section 504 differs from the FAPE defined by the IDEA and, therefore, their ADA and Section 504 claims cannot be remedied through the IDEA administrative process.").

Practically, the Supreme Court gave courts a framework for analyzing whether a claim falls, primarily, under the IDEA. First, could the plaintiff have brought essentially the same claim if the public facility was not a school, but rather, for example, a theater or public library? *Fry*, 580 U.S. at 171. Second, could an adult employee or visitor to the school have brought the same claim? *Id.* Finally, in the history of the litigation, did the plaintiff him or herself indicate that the claim was directly related to the IDEA by bringing or attempting to bring an administrative due process complaint? *Id.* Thus, in *Fry*, the plaintiff—who had a trained service dog assisting her in multiple environments due to a physical disability—had claimed disability discrimination as a result of the failure of the LEA to allow her use of her service dog in the educational environment even though the plaintiff conceded that the one-to-one human aide provided for her through her IEP likely did not violate the IDEA's FAPE provision. *Id.* at 175. In reversing the lower court's dismissal of the plaintiff's discrimination claims, the Supreme Court did not evaluate whether the plaintiff's claim would survive its clarified analysis. Rather, the Supreme Court "did not foreclose" that an evaluation of the history of the case along with the gravamen of the plaintiff's complaint would, in fact, prohibit the plaintiff from further raising her discrimination claim.

With *Fry* as analytical background, the case law in which plaintiffs have been allowed to prosecute discrimination claims after pursuing claims under the IDEA do not assist Plaintiff and COPAA's arguments to this Court. As set forth in II.B, *ante*,

Section 504 discrimination analysis regarding accommodations and services provided to students with disabilities with IEPs starts with the assumption that a mere denial of FAPE under the IDEA is not sufficient to maintain a suit for discrimination. Rather, while the denial of FAPE under Section 504 can factually satisfy the necessary element that a student with disabilities is denied a reasonable accommodation necessary to enjoy meaningful access to the benefits of a public education, a plaintiff must nonetheless still prove discriminatory animus. *S.D. by A.D.*, 722 F. App'x at 128.

Thus, for example, in *Estate of Lance*, 743 F.3d at 993, the Fifth Circuit held that a claim of disability discrimination as a result of a failure to stop peer-on-peer harassment could survive because it was "not necessarily predicated on the denial of FAPE." In *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1100 (9th Cir. 2013), this Circuit allowed an ADA discrimination claim to proceed for a deaf student who had alleged discrimination as a result of her school district failing to provide real-time transcription services on the basis that such services are generally provided for deaf and hard-of-hearing individuals as a reasonable accommodation and on the express legal basis that ADA regulations explicitly provides for "effective communication" for deaf and hard-of-hearing individuals. *Accord*, *Lartigue v. Northside Indep. Sch. Dist.*, 86 F.4th 689, 695 (5th Cir. 2023) (allowing ADA claim to be maintained under similar claim of failure to provide appropriate communication services to deaf and hard-of-hearing student).

Other precedents of this Court are inapposite based on the history of those cases. For example, in *A.G.*, 815 F.3d at 1205, while the complaint of discrimination focused on a student's IEP placement, the plaintiff and LEA had settled the plaintiff's IDEA claims prior to an administrative hearing and so there was no underlying IDEA FAPE analysis controlling the discrimination claims. In *McIntyre*, 976 F.3d at 916, this Court reversed the dismissal of discrimination claims brought by a student related to allegations of discriminatory refusal to implement that student's classroom-based accommodations for attention deficit-hyperactivity disorder where that student did not have an IEP under the IDEA and only qualified for services under Section 504.

With the above background, turning to the facts of the instant case, it is evident that both the Oregon state administrative decision and district court order were correct. As *Amici* understand Plaintiff's arguments, Plaintiff alleges that in providing him with an interim home-based program pending his enrollment in a private program, Eugene School District 4J denied him a FAPE under the IDEA because that home-based program provided education to Plaintiff in a reduced school day. Plaintiff's claim of discrimination under Section 504 is premised on this same reduction in instructional hours. Plaintiff does not allege that his discrimination claim is not subject to the IDEA's exhaustion requirements, and, in fact, exhausted his administrative remedies by bringing both IDEA and Section 504 claims in his state administrative due process complaint. By holding that the home-based program

provided Plaintiff a FAPE under the IDEA, the state hearing officer and, later, the district court foreclosed any argument that Plaintiff was denied a FAPE under Section 504's regulations. Having fulfilled its obligations under Section 504 to Plaintiff by providing Plaintiff with a substantively and procedurally appropriate IEP, Eugene School District 4J has fulfilled its section 504 FAPE obligation. Plaintiff simply cannot maintain a Section 504 discrimination claim based on the *same* educational program.

III.
CONCLUSION

Working closely with families of students with disabilities, *Amici*'s members expend great efforts to comply, and to help LEAs comply, with federal and state requirements to provide the highest quality education to students regardless of disability. In this case, Plaintiff and COPAA encourage this Court to impose extra-statutory obligations on LEAs under Section 504 that find no support in statute or case law. *Amici curiae* urge this Court to uphold precedent recognizing the historic relationship between Section 504 and the IDEA: an LEA's substantive and procedural compliance with IDEA's exacting FAPE fulfills its FAPE obligation under Section 504. This long-held understanding enables students eligible for services under the IDEA to reap the benefit of collaboratively-developed, individualized learning programs and relatively swift administrative procedures overseen by knowledgeable

hearing officers specified in the statute, rather than costly and emotionally painful litigation, in most situations.

DATED: February 12, 2024

By: /s/ David R. Mishook
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STATEMENT OF RELATED CASES

Amici are not aware of any related cases pending before the Court.

DATED: February 12, 2024 FAGEN FRIEDMAN & FULFROST, LLP

By: /s/ David R. Mishook
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-35522

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