THE MISIDENTIFICATION OF CHILDREN WITH DISABILITIES: A Harm with No Foul

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I. INTRODUCTION

Special education, despite being a uniform federal mandate, is often implemented drastically differently depending on the school system delivering services, the particular category of disability, and the race or ethnicity of students.[1] Affluent white children who attend well-managed school districts tend to benefit from special education services.[2] In the under-funded and over-tasked districts where most minorities attend school, the special education system does not always provide the same benefits.[3] In these schools, special education, too often, operates as a dumping ground for those students the general education system cannot or refuses to serve. In these instances, the label of "special education" may carry harms that outweigh its benefits.[4] For instance, African-American and American-Indian boys are the most likely to be removed from the general education classroom, be educated in more restrictive or separate environments, drop out of school, and be tracked into lower achieving classes.[5] Consequently, they have the least

1. MINORITY STUDENTS IN SPECIAL AND GIFTED EDUCATION 1 (M. Suzanne Donovan & Christopher T. Cross eds., 2002) [hereinafter MINORITY STUDENTS]; Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 420 (2001).

2. Daniela Caruso, *Bargaining and Distribution in Special Education*, 14 CORNELL J.L. & PUB. POL'Y 171, 174, 179 (2005) (arguing that parents with "financial and educational resources" are likely to secure Individualized Educational Programs (IEPs) which are "better written . . . contain more clearly measurable goals . . . and [are] more easily enforceable against non-compliant districts").

3. Robert Garda, *The New IDEA: Shifting Educational Paradigms to Achieve Racial Equality in Special Education*, 56 ALA. L. REV. 1071, 1078 (2005); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1242.

4. Glennon, *supra* note 3.

5. PATTI RALABATE, NAT'L EDUC. ASS'N, TRUTH IN LABELING: DISPROPORTIONALITY IN SPECIAL EDUCATION 2 (2007), http://www.nea.org/assets/docs/HE/EW-TruthInLabeling.pdf. Further, African American and American Indian boys with disabilities are the most likely to receive out of school suspensions and are disciplined at higher rates than their non-disabled peers. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA

access to higher education and post-high school employment.[6] In short, special education does not appear to be helping many of these students overcome the challenges they face, and it can sometimes make matters worse.

The overrepresentation of minorities in certain categories of disability is a decades old problem. For more than thirty years, schools have struggled with the accurate identification of disabilities for students of color.[7] Without a doubt, identifying the optimal level of special education is complex and fraught with uncertainty.[8] But what seems relatively clear is that when students are inaccurately identified as having disabilities—when in fact they do not—the label and provision of special education services can cause educational harm, particularly for minority students. As the National Resource Council described:

> [T]o be eligible for the additional resources a child must be labeled as having a disability, a label that signals substandard performance. And while that label is intended to bring additional supports, it may also bring lowered expectations on the part of teachers, other children, and the identified student. When a child cannot learn without the additional support, *and* when the supports improve outcomes for the child, that trade-off may well be worth making. But because there is a trade-off, both the need and the benefit should be established before the label and the cost are imposed.[9]

That calculus is complicated and varies for each child. For many students the trade-offs are well worth it. But too often, schools provide what they perceive to be the benefits of special education before making a careful, unbiased evaluation to determine whether those "benefits" are truly needed and whether they outweigh the costs. When special education is perceived by teachers and schools as only a benefit, they may be too quick to label children "disabled" resulting in more harm than good.

Despite the well documented problem of overrepresentation and its accompanying harms, courts generally refuse to provide a remedy for "misidentified" students.[10] Thus, special education operates as a one-way

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SNAPSHOT: SCHOOL DISCIPLINE (2014), http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf.

6. RALABATE, *supra* note 5.

7. *See generally* Larry P. v. Riles, 793 F.2d 969, 973–74 (9th Cir. 1984).

8. *See generally* Paul M. Secunda, *"At Best an Inexact Science": Delimiting the Legal Contours of Specific Learning Disability Eligibility Under IDEA*, 36 J.L. & EDUC. 155, 156–57 (2007).

9. MINORITY STUDENTS, *supra* note 1, at 2–3.

10. *See generally* S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 251 (3d Cir. 2013). The term "misidentified" as used in this article, is meant to describe those students

street. Plaintiffs routinely sue schools to get more or better services, but when a school implements services the child does not need or want, courts disregard any educational harms suffered as a result of the erroneous label and provision of services. This Article argues courts rejecting misidentification claims do so under a misguided analysis. Misidentified students have valid claims for relief and schools can and should be held accountable for their failure to accurately identify disabilities when such a failure creates educational harms.

Plaintiffs have attempted, at least, four different legal strategies to challenge the over-identification of minority children with disabilities. Three strategies grow out of the federal statutes governing special education: the Individuals with Disabilities Education Act (IDEA),[11] Section 504 of the Rehabilitation Act of 1973 (Section 504),[12] and Title II of the Americans with Disabilities Act (Title II).[13] The fourth strategy extends from the prohibitions on racial discrimination in Title VI of the Civil Rights Act of 1964[14] and the Equal Protection Clause of the Fourteenth Amendment.[15] But, regardless of how plaintiffs frame their claims, courts have been unreceptive. The Third Circuit's opinions in a series of cases arising out of Pennsylvania provide the perfect example.

In 2007, a class of African-American students claimed their school was misidentifying black students as disabled, moving them into lower level and special education classes, denying them the opportunity to take regular education courses, and leaving them inadequately prepared for college.[16] Students claimed the district had no written policies or consistent standards to assess disabilities.[17] In the absence of those checks, racial stereotypes and biases heavily influenced the identification process.[18] They argued the district was identifying plaintiffs as having learning disabilities despite evidence to the contrary.[19] The data seemed to support their claim.[20] African-American

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who are not disabled, but were identified and treated by schools as though they had disabilities that required special education services.

11. 20 U.S.C. §§ 1400–1482 (2012).

12. 29 U.S.C. § 794 (2012).

13. Americans with Disabilities Act of 1990 § 203, 42 U.S.C. § 12133 (2012).

14. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012).

15. U.S. CONST. amend. XIV.

16. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 255–57 (3d Cir. 2014), *cert. denied sub nom*. Allston v. Lower Merion Sch. Dist., 135 S. Ct. 1738 (2015).

17. Brief for Appellant at 10, Blunt v. Lower Merion Sch. Dist., 767 F.3d 247 (3d Cir. 2014), 2012 WL 6625856 (C.A.3).

18. *Id.* at 6.

19. *Id.* at 10.

20. *Blunt*, 767 F.3d at 300.

students made up eight percent of the overall student population in the district but were fourteen percent of the special education population.[21] Plaintiffs further alleged that they missed educational opportunities as a direct result of being labeled "learning disabled."[22] For example, most plaintiffs were not offered science classes in middle school.[23] They were placed in resource classes that did not count towards GPA.[24] Many participated in "pull out" instruction, where they were pulled from general education classrooms for specialized instruction but never offered the opportunity to catch up on missed material.[25]

Plaintiffs challenged their misidentification under Title VI and Equal Protection.[26] The trial and appellate courts dismissed their Title VI and Equal Protection claims, reasoning that the plaintiffs had failed to plead intentional discrimination.[27] According to the Third Circuit, plaintiffs had simply plead "errors in evaluation," which do not give rise to race discrimination claims.[28] Thus, despite dramatic evidence of over-identification, questionable disability assessment protocols, and evidence of lost educational opportunity, plaintiffs were unable to hold the school accountable for their misidentification and resulting educational harm.[29]

Several plaintiffs subsequently filed individual lawsuits raising violations of the IDEA, Section 504, and Title II of the ADA.[30] Courts dismissed the IDEA claims, reasoning that plaintiffs, who were not claiming to be disabled, had no access to the IDEA's remedies which only extend to "children with disabilities."[31] Section 504 and the ADA both offer broader definitions of disability.[32] Under both statutes, it is enough to be "regarded as" disabled,

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21. *Id.*
22. Brief for Appellant, *supra* note 17, at 6.
23. *Id.* at 16.
24. *Id.*
25. *Id.*
26. *Blunt*, 767 F.3d at 255. Plaintiffs also raised claims under IDEA, Section 504 and Title II of the ADA; however, these claims were all dismissed for procedural reasons. *Id.* at 255, 259–64. IDEA claims were dismissed for failure to exhaust and some were barred by the IDEA's two-year statute of limitations. *Id.* at 259. Section 504 and ADA claims were barred due to claim preclusion as result of prior class action settlement in another case involving the Pennsylvania Department of Education. *Id.* at 281.
27. *Id.* at 257.
28. *Id.* at 263.
29. *Id.* at 257.
30. A.G. v. Lower Merion Sch. Dist., 542 F. App'x 193, 197–99 (3d Cir. 2013); S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 251 (3d Cir. 2013).
31. *A.G.*, 542 F. App'x at 197; *S.H.*, 729 F.3d at 255.
32. 29 U.S.C. § 794(a) (2012); 42 U.S.C. § 12132 (2012).

regardless of one's actual disability.[33] But here, the courts still rejected plaintiffs' claims because plaintiffs failed to demonstrate the necessary intentional discrimination.[34] In short, the trial and appellate courts in the Third Circuit refused to intervene in what appeared to be gross over-identification of minorities and a failure to comply with the IDEA not because the students were unharmed or the district did a reasonably good job providing services, but because the courts reasoned that no relevant law protected the students, despite the harm they incurred.

While these and other courts' reasoning under Title VI is arguably correct, their analysis under disability statutes is flawed on multiple accounts. First, while non-disabled plaintiffs may lack a claim directly under the IDEA, the IDEA's structure for evaluating students remains relevant to claims under Section 504 and the ADA. The IDEA's affirmative obligations intersect with the other statutes' obligations to deliver a free appropriate education. A district's disregard for its obligations under IDEA is pertinent evidence that the district has, in fact, discriminated against students whom they perceive to be disabled. That discrimination may not be actionable under the IDEA, but it is under the ADA and Section 504.

Second, courts analyzing disability misidentification claims have misinterpreted the remedies provisions of Section 504 and Title II of the ADA. Those remedy provisions indicate that Section 504 and Title II provide the same remedies as Title VI of the Civil Rights Act.[35] Meaning, both statutes, like Title VI, allow for a private cause of action and the damages flowing from a valid claim. Courts, however, have gone one step further and reasoned that Section 504 and Title II plaintiffs must, in effect, present the same type of evidence as plaintiffs in race cases: intentional discrimination.[36] This additional step conflates available remedies with the evidence necessary to secure a remedy. While interconnected, the two are distinct. More important, disability discrimination and race discrimination are themselves distinct. As Congress has repeatedly pointed out, disability discrimination is largely a product of benign neglect, implicit biases against a group, rather than affirmative desires to harm.[37] When accounting for these differences, Section 504 and Title II's protection of individuals perceived as disabled should easily include a cause of action for students whom districts harm as a result of misidentifying them as disabled, whether intentionally or not.

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33. 29 U.S.C. § 794(a); 42 U.S.C. § 12132.
34. *A.G.*, 542 F. App'x at 198–99; *S.H.*, 729 F.3d at 262–67.
35. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 12133 (2012).
36. *A.G.*, 542 F. App'x at 198; *S.H.*, 729 F.3d at 262–65.
37. *See generally* Alexander v. Choate, 469 U.S. 287, 295 (1985).

Third, even if intent were required to establish a claim under Section 504 or Title II, courts fail to apply the appropriate standard of intent in the context of misidentification cases. Courts unreasonably frame intent as either a desire on the part of the school to disadvantage students based on their perceived disability or consciously disregarding disabled students' needs.[38] Neither standard is appropriate. Again, the nature of disability discrimination is distinct from race. Thus, the failure to knowingly carry out obligations toward students perceived as disabled, in and of itself, should satisfy the intent standard needed to establish a violation Section 504 and Title II. Requiring proof of the desire to harm misidentified students is unreasonable. The provision of special education services to these students is by its very nature an attempt to help, albeit a flawed attempt. Thus, the desire to harm would never exist and the extrapolation of race concepts of discrimination to these claims would amount to a per se bar for misidentified students. This result would render the inclusion of misidentified students within the statutes' protected class pointless—a result at odds with language and intent of the statute.

Correctly analyzed, Section 504 and Title II of the ADA provide a pathway for misidentified students to access remedies for educational harms suffered as a result of their inaccurate designation as disabled. Once established, this pathway would serve as an important check on the over-placement minority youth in special education. Congress has long been aware of the problem of over-identification and, despite several IDEA amendments targeting the issue, has failed to make much progress combatting it. Bringing claims for injunctive relief through Section 504 and the ADA is a way to reform the over-identification problems that have, thus far, alluded Congress and educators alike.

This article will explore the misidentification claims as follows: Part II examines the current problem surrounding misidentification of disabilities and investigates the questions of why schools fail to accurately identify disabilities and what harms arise out of misidentification. Part III then analyzes the laws in place which purport to guard against discrimination on the basis of race or disability and why those laws fail to offer remedies for misidentified students. Finally, Part IV explores the possibility of injunctive relief or compensatory damages, both of which may force schools to increase accuracy of disability identification, thereby reducing the likelihood that children will be misidentified.

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38. *See, e.g.*, Carter v. Orleans Par. Pub. Sch. 725 F.2d 261, 264 (5th Cir. 1984).

II. THE MISIDENTIFICATION DILEMMA

A. Misidentification: Why Do We Do It?

Schools are tasked with identifying, evaluating, and appropriately serving children with disabilities as well as tracking their educational outcomes.[39] The Individuals with Disabilities Education Act (IDEA) is the driving force behind how schools interact with children who have disabilities and require special education services.[40] Several other statutes affect how schools interact with children who may be disabled, most notably Section 504 of the Rehabilitation Act of 1973,[41] the Americans with Disabilities Act (ADA),[42] and the newly enacted, Every Student Succeeds Act (ESSA) which replaced No Child Left Behind, in December of 2015.[43] Because the IDEA creates the most affirmative rights for students with disabilities, it is helpful to begin the discussion there.

The IDEA operates much like a contract in which the federal government promises funding to schools who agree to abide by IDEA's proscriptions regarding the treatment of students with disabilities.[44] At the heart of the contract is the obligation to provide all children with disabilities residing in the state a "free appropriate public education" (FAPE).[45] States must affirmatively seek out children who may have disabilities and fall within the

39. *See generally* Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400–1485 (2012); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2012); No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of the U.S. Code) (repealed 2015).

40. 20 U.S.C. §§ 1400–1485.

41. 29 U.S.C. § 794.

42. 42 U.S.C. §§ 12101–12213 (2012).

43. Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1801 (2015). ESSA reauthorizes the 50-year-old Elementary and Secondary Education Act (ESEA) and takes the place of NCLB.

44. *See generally* 20 U.S.C. §§ 1400–1485 (2012).

45. 20 U.S.C. § 1412(a)(1) (2012). The IDEA limits this obligation to children between the ages of 3 and 21, and ages 3 through 5 and 18 through 21 only to the extent that the state is already providing public education to children in those age ranges. *Id.* § 1412(a)(1)(B). Section 504 and the ADA also require FAPE which will be discussed in Part II.C. of this Article.

statutes protections.[46] This obligation, known as "child find," is expansive.[47] Schools must put in place procedures that will make it likely that they will be able to identify these students, evaluate them and determine what, if any, types of services they require in order to access the general education curriculum.[48] The mandate is broad, requiring that schools "find" disabled students even among the private school population, migrant-children, homeless children, and children who are passing from grade to grade and thus, not obviously struggling academically.[49]

Once a school becomes aware of a potential disability, they are obligated to perform a timely and accurate assessment to determine whether the child is a "child with a disability" within the meaning of the IDEA.[50] Following the assessment, a team that includes, at a minimum, the parents of the child, one regular-education teacher of the child, one special-education teacher of the child, and a representative of the local educational agency must develop an individualized education program (IEP) which complies with the procedures of the IDEA and is "reasonably calculated to enable the child to receive educational benefits."[51] The IEP must describe the services that will be provided for the child as well as educational goals for the child.[52] This detailed plan, often referred to as an educational "blueprint," describes how the school will engage with the child.[53] If the parents disagree with any matter related to the identification, evaluation, educational placement, or provision of FAPE, they may request an impartial due process hearing. [54] If either party

46. 20 U.S.C. § 1412(a)(3). A child who is suspected of having a qualifying disability must be identified "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability," W.B. v. Matula, 67 F.3d 484, 501 (3d Cir. 1995), even if the child is advancing from grade to grade. D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 (3d Cir. 2012) (citing 34 C.F.R. § 300.111(c)(1) (2015)); *accord* Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007); Taylor v. Altoona Area Sch. Dist., 737 F. Supp. 2d 474, 484 (W.D. Pa. 2010). A school district's failure to timely evaluate a child who it should reasonably suspect of having a disability constitutes a procedural violation of the IDEA. *D.K.*, 696 F.3d at 249.

47. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111 (2015).

48. 34 C.F.R. § 300.111(a).

49. 34 C.F.R. § 300.111(a)(1)(i), (c)(1)–(2).

50. The IDEA defines several categories of disability. A child must qualify under one of the defined categories in order to be eligible for services under the IDEA. Importantly, a child may have a disability as diagnosed by a medical professional, but may not meet the definition of a "child with a disability" for purposes of the IDEA. This child may still receive protections under other disability statutes. *See generally* 20 U.S.C. § 1401(3)(A)–(B) (2012).

51. 20 U.S.C. § 1412(d)(1)(B), (d)(3)(A) (2012); Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982).

52. 20 U.S.C. § 1414(d)(1)(A) (2012).

53. Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983).

54. 20 U.S.C. § 1415(b)(6), (f)(1)(A) (2012).

is aggrieved by the decision of the state educational agency, the party can file a civil action in a Federal District Court.[55]

There are many areas of contention that arise throughout the process of identifying and providing services to ensure FAPE.[56] At the forefront of this process, and central to this paper, are eligibility determinations. Eligibility determinations are rooted in evaluations of the child.[57] Per the IDEA, a school is required to "use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information" that may assist in determining whether the child qualifies for services and the types of services that would allow the child to progress in the general education curriculum.[58] Although the IDEA requires that evaluations are selected and administered in a way that avoids racial or cultural bias,[59] it is universally accepted that some categories of disability are more difficult to accurately diagnose than others because they are not based on objective measures, but rather rest on subjective observations.[60]

Psychologists split disabilities into two broad categories: judgment or "low incidence" and non-judgment or "high incidence."[61] Non-judgment disabilities are much easier to accurately identify as they are based on scientific measures and can be objectively tested.[62] Examples of non-judgment disabilities are deafness, blindness, and physical impairments.[63] Judgment disabilities are much harder to accurately identify because they require subjective judgment on the part of the evaluator.[64] Examples of judgment disabilities include learning disabilities, emotional disabilities, and intellectual disabilities.[65] Essentially, children who may have judgment disabilities are more likely to be misdiagnosed as having a disability when they do not simply due to the imperfect science that we use to measure such

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55. § 1415(i)(2)(A).

56. *See generally* § 1414.

57. § 1414(b)(3); G.G. v. Dist. of Columbia, 924 F. Supp. 2d 273, 274 (D.D.C. 2013); 34 C.F.R. § 300.34(c)(10) (2015).

58. § 1414(b)(2)(A).

59. 20 U.S.C. § 1400(c)–(d) (2012).

60. *See generally* Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*, 20 J. GENDER SOC. POL'Y & L. 107, 109–62 (2011).

61. *See generally* Garda, *supra* note 3, at 1078 n.36; Sarah E. Redfield & Theresa Kraft, *What Color Is Special Education?*, 41 J.L. & EDUC. 129, 182 (2012).

62. ÖZLEM SENSOY & ROBIN DIANGELO, IS EVERYONE REALLY EQUAL?: AN INTRODUCTION TO KEY CONCEPTS IN SOCIAL JUSTICE EDUCATION 63–64 (2012).

63. *Id.* at 63.

64. *See* Redfield & Kraft, *supra* note 61, at 182.

65. *Id.*

disabilities.[66] More troubling, these categories of disabilities reflect the problem of subconscious racial biases of evaluators as demonstrated in the over-representation of racial and ethnic minorities therein.[67]

African-American, Latino, and Native-American youth are significantly over-represented in certain categories of judgment disabilities. The vast majority of students who receive special education services through the IDEA fall into the category of "specific learning disability."[68] According to recent data, American-Indian/Alaska-Native students are 1.7 times more likely than all other racial and ethnic groups combined to be identified as learning disabled.[69] African-American students are 1.4 times more likely and Latino students are 1.0 times more likely.[70] There is no biological reason why disabilities should be more prevalent in minority youth than white youth, yet statistics indicate that youth of color continue to be over-represented in certain categories of judgment disabilities, even when controlling for effects of poverty.[71]

Though there is general agreement that over-representation exists, the cause of such disparities remains unclear.[72] Many scholars focus on poverty as the root cause, with the general theory being that children in poverty face more biological, environmental, and societal challenges than children from

66. Losen & Welner, *supra* note 1, at 420; *see also* Nicole M. Oelrich, *A New "IDEA": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 28 (2012).

67. *See* Redfield & Kraft, *supra* note 61, at 199.

68. Hyman et al., *supra* note 60, at 113 (citing NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, WHO ARE THE CHILDREN RECEIVING SPECIAL EDUCATION SERVICES 6 (2003)).

69. OFFICE SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., 36TH ANNUAL REPORT TO CONGRESS, IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES ACT, 2014, at xxv (2014).

70. *Id.*

71. Garda, *supra* note 3, at 1086.

72. A recent study by Paul L. Morgan and George Farkas stands opposed to the previously generally accepted view that minorities are over-represented in special education and rather suggests that African-American children are actually underrepresented in certain eligibility categories when controlling for effects of poverty. Paul L. Morgan et al., *Minorities Are Disproportionately Underrepresented in Special Education: Longitudinal Evidence Across Five Disability Conditions*, 44 EDUC. RESEARCHER 278, 287 (2015). However, several prominent researchers have criticized the data on which the Morgan study is based. *See* J. Weston Phippen, *The Racial Imbalances of Special Education*, THE ATLANTIC (July 6, 2015), http://www.theatlantic.com/education/archive/2015/07/the-racial-imbalances-of-special-education/397775/; Kevin Welner & Russell Skiba, *Big News or Flawed Research? The New Special Education Controversy*, HUFFPOST EDUC. (July 6, 2015), http://www.huffingtonpost.com/kevin-welner/big-news-or-flawed-resear_b_7718746.html. Even if the findings in the Morgan study are presumed to be accurate, it does not negate the actual harm of misidentification, but rather only indicates that this harm does not impact as many minority students as was previously thought.

middle or high income families.[73] For example, research indicates that children from low income households are immersed in lower literacy environments and higher levels of chronic stress which both negatively impact a child's ability to obtain basic academic competencies at the pre-K level.[74] Further, the biological effects of poverty which include low birth weight, poor nutrition, and increased exposure to toxins (such as lead, alcohol, and drugs) can all impact educational achievement.[75] Because a disproportionate number of African-American and Latino youth live in low-income households, children from these racial and ethnic groups are affected in larger numbers.[76]

Related to poverty, an additional factor complicating accurate identification of minority students with disabilities, is the lack of resources in the schools serving a majority of this student population. Schools serving low-income minority populations are often under-funded or under-resourced.[77] When schools lack resources, they are unable to retain the necessary professionals on staff to ensure competent and accurate evaluations of children with disabilities.[78] At a more basic level, these schools often lack the ability to hire and retain well-trained, general-education teachers equipped with the appropriate skills and knowledge necessary to develop and implement effective curriculum.[79] When proper curriculum is not being taught in the general education program, children fail to develop basic academic competencies. As former education secretary Rod Paige put it,

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73. *See* James E. Ryan, *Poverty as Disability and the Future of Special Education Law*, 101 GEO. L.J. 1455, 1458 n.13 (2013). According to a 2003 report by the National Dissemination Center for Children with Disabilities, nearly a quarter (2 million) of all children eligible for special education services live below the poverty line and approximately two-thirds (4.5 million) of all children eligible live in households where the total income is less than $50,000. Hyman et al., *supra* note 60, at 112–13 (citing NAT'L DISSEMINATION CTR. FOR CHILDREN WITH DISABILITIES, WHO ARE THE CHILDREN RECEIVING SPECIAL EDUCATION SERVICES 6 (2003)).

74. *Education and Socioeconomic Status*, AM. PSYCHOLOGICAL ASS'N, http://www.apa.org/pi/ses/resources/publications/factsheet-education.aspx (last visited May 17, 2016).

75. Ryan, *supra* note 73, at 1483.

76. The National Center for Children in Poverty indicates in 2013, 31% of white children (ages 18 and under) lived in low-income households (between 100%–199% of the federal poverty threshold), while 65% of African-American children and 63% of Hispanic children came from low-income households. YANG JIANG ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS, 2013, at 4 (2015).

77. BRUCE D. BAKER & SEAN P. CORCORAN, CTR. FOR AM. PROGRESS, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 1 (2012), https://cdn.americanprogress.org/wp-content/uploads/2012/09/StealthInequities.pdf.

78. Garda, *supra* note 3, at 1086.

79. *Id.* at 1084.

"[o]ur educational system fails to teach many children fundamental skills like reading, then inappropriately identifies some of them as having disabilities, thus harming the educational future of those children who are misidentified and reducing the resources available to serve children with disabilities."[80] In short, children who need more intensive instruction and support are attending schools that are the least likely to provide them with such supports. Consequently, it comes as no surprise to find that many of these schools fail to accurately identify children with disabilities.[81]

Despite the immense burdens of poverty, poverty alone cannot account for the over-representation of African-Americans in certain disability categories. African-American children are more likely to be identified with disabilities even in higher income schools.[82] Further, Congress, itself, has acknowledged "schools with predominately [w]hite students and teachers have placed disproportionately high numbers of their minority students into special education."[83] And finally, similar disparities along racial and ethnic lines are not present in the hard science, non-judgement disability categories.[84] The explanation we are left with is that a certain amount of bias creeps its way into the evaluation process, making it more likely that a young black child's reading struggles will be interpreted as a disability than his white peers.[85] A majority of scholars, scientists, advocates, educators, and even legislators all agree on this point—minority youth who are not disabled are currently being labeled and treated as though they have disabilities.

It is important to consider the significant distinction between mislabeling one disability for another and misidentifying a child as having a disability when she has none. Mislabeling a child with the wrong disability, although worrisome, is at least theoretically redressable through the IDEA. Although the IDEA is not overly concerned with accuracy of the disability label, it is designed to ensure appropriate supports and services.[86] A cornerstone of the IDEA is the provision of appropriate services designed to meet individual educational needs irrespective of disability category.[87] If an IEP itself is individualized to a particular child, effective for that child, and the proper procedures were used to develop the IEP, then a child will not get relief for

80. *Id.* at 1073.
81. *Id.* at 1086–87.
82. *Id.* at 1088.
83. 20 U.S.C. § 1400(c)(12)(E) (2012).
84. Garda, *supra* note 3; Losen & Welner, *supra* note 1, at 416–17.
85. Losen & Welner, *supra* note 1, at 419.
86. 20 U.S.C. § 1412(a)(3)(B) (2012).
87. *Id.*

an incorrect disability label or category.[88] However, if incorrect services are in place, a mislabeled child has access to the procedural protections in the IDEA and can challenge the adequacy of services through due process.[89] Misidentifying a child with a disability when she in fact has none is potentially much more damaging. This child, were she to be harmed, is unable to seek redress through the IDEA as she is not a "child with a disability" under the IDEA and thus not privy to its protections. In fact, the misidentified child is in a worse position, as far as remedies are concerned, than the child who has an IDEA eligible disability but was never identified as such by her school district. The latter still has rights under the IDEA to challenge the school's failure to timely identify and evaluate her as a child with a disability.[90] Finally, as discussed in Part III of this Article, the misidentified child may not even have a remedy under any of the anti-discrimination statutes currently in place to relating to the rights of persons with disabilities or those perceived as having disabilities.

B. Misidentification: Why Should We Care?

Having discussed why it is difficult to properly diagnose the category of judgment disabilities as well as the evidence proving that schools are doing a poor job of it, it is incumbent to discuss the underlying issue of why this matters. What is the harm in misidentifying a child as having a disability when she does not?[91] After all, the IDEA's purpose is to support children with disabilities and provide them with services designed to promote academic achievement, as well as procedural rights to hold schools accountable when they fail to offer and implement such services.[92] A logical assumption is a child who is struggling with reading could certainly benefit from extra academic supports, regardless of whether she technically meets the definition

88. R.C. *ex rel.* S.K. v. Keller Indep. Sch. Dist., 958 F. Supp. 2d 718, 732 (N.D. Tex. 2013) (holding plaintiff's belief that he was mislabeled as emotionally disabled rather than autistic did not result in a denial of FAPE because the court's main focus is whether the IEP itself was "sufficiently individualized to meet plaintiff's unique needs and provide him with educational benefits"); *see also*, 20 U.S.C. §1412(a)(3)(B).

89. 20 U.S.C. § 1415 (2012).

90. See child find requirements under 20 U.S.C. § 1412(a)(1)(3).

91. Research indicates that children with severe disabilities may often benefit dramatically from services put in place through an IEP; however, this discussion is limited to a discussion of the category of judgment disabilities which are often known as high-incidence due to their statistical significance as the majority of disabilities occurring in the K–12 public education context. *See* Garda, *supra* note 3, at 1086; Losen & Welner, *supra* note 1, at 420; Oelrich, *supra* note 66.

92. 20 U.S.C. § 1400(d) (2012).

of learning disabled.[93] But, the harm of being labeled and subsequently treated as a child with a disability can be significant. It can equate to stigma, lowered educational opportunity, and increased contact with the juvenile justice system.[94] Thus, before extending such a label, it is vital that educators understand the potential risks and pitfalls that distinction of "special education" may carry.

Statistics indicate children with IEPs tend to take less challenging courses, have lower graduation rates, and attend college at lower levels than children who do not receive special education services.[95] This is certainly not to say that children with disabilities cannot achieve at the same academic level as their peers. The vast majority of children with IEPs can and should be achieving at the same level as their peers, with obvious exceptions for children with severe intellectual disabilities.[96] In fact, the IDEA requires that children with disabilities must be held to the same accountability standards as any other child.[97] Despite these mandates, children with disabilities tend to lag behind their peers when it comes to academic achievement.[98] Many

93. Several scholars have called for an expansion of special education eligibility to make it easier for children to get the supports they need; however, such calls downplay the serious harms that can come with over-inclusion of children labeled as disabled. *Compare* Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1152 (2007) (concluding that "although the special education population increasingly includes students with more moderate, intangible impairments, this growth is positive in some respects and consistent with early Congressional intent to bring all students, regardless of functioning, into the mainstream of American education"), *and* Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 86 (2009) (concluding that the solution is a renewed attention by courts and educational policy makers to the actual terms of the statute and the underlying purposes), *with* Garda, *supra* note 3, at 1086.

94. Michael L. Perlin, *"Simplify You, Classify You": Stigma, Stereotypes and Civil Rights in Disability Classification Systems*, 25 GA. ST. U. L. REV. 607, 608 (2009) (arguing that the process of labeling children with intellectual disabilities can be a "triple-edged" or "quadruple-edged" sword in that it increases the challenges that child will face in obtaining educational achievement).

95. Glennon, *supra* note 3, at 1241.

96. *See* Garda, *supra* note 3, at 1107.

97. The IDEA requires each child's IEP to include "a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II)-(II)(aa) (2012). Further, it requires "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments consistent with section 1412(a)(16)(A)." 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa) (2012). *See generally* Perry A. Zirkel, *NCLB: What Does It Mean for Students with Disabilities?*, 185 EDUC. L. REP. 805 (2004).

98. SHERYL S. LAZARUS ET AL., NAT'L CTR. ON EDUC. OUTCOMES, 2013-14 PUBLICALLY REPORTED ASSESSMENT RESULTS FOR STUDENTS WITH DISABILITIES AND ELLS WITH DISABILITIES (2016); *see also* Glennon, *supra* note 3, at 1259.

psychologists and academics highlight the stigma associated with being a child with a disability as one reason for the lowered academic achievement. Once labeled as such, a "child with a disability" often has lower expectations for herself after grasping what that label means.[99] Further, teachers often lower expectations for children with disabilities making under-achievement a self-fulfilling prophecy.[100] Thus, although special education services were designed to provide a benefit, for some children the designation more often means limited educational opportunity.

More troubling, students designated as disabled have higher rates of contact with the juvenile justice system. Research indicates that up to one-in-three children arrested nationally has a disability.[101] National statistics demonstrate students with emotional disabilities and learning disabilities are arrested at higher rates than their nondisabled peers.[102] However, it is important to clarify this does not indicate a causation—that children with disabilities are more likely to engage in criminal behavior—but rather only suggests that a correlation exists between being identified as disabled and having contact with the juvenile justice system.[103]

More than other racial or ethnic groups, African-American children may be particularly harmed by the special education label. Studies demonstrate that black children are less likely to have a positive outcome from special education than their white peers.[104] One issue is that African-American students are more likely than their white peers to be placed in restrictive self-

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99. MINORITY STUDENTS, *supra* note 1, at 1–3; Glennon, *supra* note 3, at 1241; Perlin, *supra* note 94, at 631.

100. MINORITY STUDENTS, *supra* note 1, at 1–3; Glennon, *supra* note 3, at 1241; Perlin, *supra* note 94, at 631.

101. Mary Magee Quinn et al., *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILD. 339, 342 (2005).

102. Sue Burrell & Loren Warboys, *Special Education and the Juvenile Justice System*, JUV. JUST. BULL., July 2000, at 1, http:// www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf.

103. *See* ROBERT B. RUTHERFORD JR. ET AL., YOUTH WITH DISABILITIES IN THE CORRECTIONAL SYSTEM: PREVALENCE RATES AND IDENTIFICATION ISSUES 7–19 (2002), http://cecp.air.org/juvenilejustice/docs/Youth%20with%20Disabilities.pdf (describing the prevalence of disabilities in detained youth as compared to the general population); David Osher et al., *Schools Make a Difference: The Overrepresentation of African American Youth in Special Education and the Juvenile Justice System*, *in* RACIAL INEQUITY IN SPECIAL EDUCATION 93, 99–100 (Daniel J. Losen & Gary Orfield eds., 2005) (concluding that the educational system is allowing children with, or at risk for, emotional disturbance to be funneled into the juvenile justice system rather than supporting their emotional, behavioral, and educational needs); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD & FAM. ADVOC. 3, 4 n.2 (2003).

104. MINORITY STUDENTS, *supra* note 1, at 1–3; Losen & Welner, *supra* note 1, at 418–19.

contained classrooms with less access to the general education curriculum.[105] Children with disabilities benefit more when educated amongst their peers, and thus this inclusive setting is mandated by statute.[106] Unfortunately, once students are placed in more restrictive settings, it is often difficult to move back into the regular education environment.[107]

Sadly, but perhaps not surprisingly, this is not a new phenomenon. Over-identification of African-American students in certain disability categories has been of significant federal concern for quite some time.[108] As early as the 1970s, the United States Department of Education was aware of overrepresentation of minorities, and particularly African-Americans, in certain special education disability categories.[109] The IDEA explicitly acknowledges that issue, stating "greater efforts are needed to prevent the intensification of problems conncected with mislabeling... minority children with disabilities."[110] The House committee report prepared in anticipation of the IDEA further illuminates Congress's concerns that "[f]or minority students misclassification or inappropriate placement in special education programs can have signficicant adverse consequences, particularly when these students are being removed from regular educatin settings and denied access to the core curriculum."[111]

Congress attempted to address overidentification through the IDEA in several ways. It required states to take affirmative steps by enacting policies and procedures designed to reduce and prevent over-identification.[112] It also explicitly included language directing that testing and evaluation materials "must not be racially or culturally discriminatory."[113] Congress, by acknowledging the interwoven nature of race and misidentification, sought

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105. Garda, *supra* note 3, at 1084–85.

106. 20 USC § 1412(a)(5) (2012).

107. Garda, *supra* note 3, 1084–85; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1469 (2011).

108. MINORITY STUDENTS, *supra* note 1, at 15. "In 1979 the National Research Council (NRC) was asked to conduct a study to determine the factors accounting for the disproportionate representation of minority students and males in special education programs for students with mental retardation, and to identify placement criteria or practices that do not affect minority students and males disproportionately. More than 20 years later, they were again asked to revisit the issue." *Id.* at 1–2; *see also* Larry P. v. Riles, 793 F.2d 969, 985–87 (9th Cir. 1984).

109. Osher et al., *supra* note 103.

110. 20 U.S.C. § 1400(c)(12)(A) (2012).

111. H.R. REP. NO. 108-77, at 84 (2003).

112. 20 U.S.C. § 1412(a)(24) (requires state to have "policies and procedures designed to prevent the inappropriate over-identification or disproportionate representation by race and ethnicity of children as children with disabilities").

113. § 1412(a)(6)(B).

to better guard against its effects through an emphasis on accurate and unbiased evaluations.

Further, in 2004, Congress again amended the IDEA, with two changes focused on the persistent overrepresentation dilemma.[114] First, it added a provision which allows schools to use up to 15% of funds to provide "early intervening services" to students before they are identified as needing special education services with the goal of addressing potential challenges to learning early so that children are developmentally ready to achieve once they enter kindergarten.[115] Second, Congress changed the requirements surrounding diagnoses of specific learning disabilities, the category representing by far the largest percentage of IDEA eligible children. In the past, a specific learning disability diagnosis was based on evidence of severe discrepancy between IQ and ability.[116] Over time academics criticized this method of diagnosis, claiming it exacerbated misidentification of minorities because it was based on assessments which were inherently biased.[117] The 2004 amendments added a new diagnostic tool termed Response to Intervention (RTI).[118] RTI focuses on providing increasingly intensive and evidence based instruction in the general education setting prior to referring a child for a special education eligibility evaluation.[119] The hope was that increased support and personally tailored instruction in the general education classroom would help children overcome academic struggles without needing to resort to special education.[120] At the same time, the RTI process would ferret out those children with true learning disabilities, who would then be referred for special education evaluations.[121] Unfortunately, RTI has not proven to be the answer to the misidentification quandary, and the problem of over-identification persists.[122]

In sum, African-American students labeled as needing special education services are at risk of inaccurate identification, negative stigma, lowered academic expectations, including denial of access to the general education curriculum, increased contact with the juvenile justice system, and reduced chances of obtaining higher education and gainful employment. Although

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114. 20 U.S.C. §§ 1400–1450 (2012).

115. *Id.* § 1413(f), (a)(4)(A)(ii).

116. Angela Ciolfi & James Ryan, *Race and Response-to-Intervention in Special Education*, 54 HOW. L.J. 303, 304 (2011).

117. *Id.* at 339.

118. § 1400(c)(5)(F).

119. *Id.*

120. Ciolfi & Ryan, *supra* note 116, at 305.

121. *Id.*

122. *Id.* (arguing that RTIs and the 2004 Amendments to IDEA have not eliminated misidentification along racial lines).

Congress has attempted to address some of these inequities, thus far, legislative fixes have proven inept at solving this complex problem. One problem may be the school districts, who are ultimately responsible for accurate identification of disabilities, are not held accountable for their failures in this regard. The following section will discuss how schools escape responsibility for educational harms imposed on minority students through inaccurate identification of disability.

III. SCHOOLS MISIDENTIFY WITH IMPUNITY—A HARM, WITH NO FOUL

Despite the challenges involved in diagnosing certain categories of judgement disabilities, schools, nonetheless, are tasked with finding children who may have disabilities, referring them for evaluations, and accurately conducting those evaluations, such that they root out disabilities in a non-biased manner. Three separate laws—the IDEA, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act—all mandate accurate identification of disability.[123] Logic would dictate that if schools fail in this regard, they would be held accountable under one, if not all three, laws. As the following section demonstrates, logic fails to govern this murky world of disability identification. Currently, a student who learns that she was inaccurately categorized as learning disabled and subsequently placed in lower achieving classes based on this label, will find no remedy in any of the laws that ostensibly guarantee equal educational opportunity for children with disabilities. To date, courts have seemed largely unwilling to hold schools accountable for misidentification, even when it results in educational harm.

A. The Individuals with Disabilities Education Act

The IDEA places the most affirmative obligations on schools and also contains the most procedural protections for students with disabilities. Section 1415 sets forth procedural safeguards for the statute, stating in part "children with disabilities and their parents" must have an opportunity to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[124] Courts interpreting this section within the context of misidentification cases have held that students who acknowledge that they are not disabled do not have standing to bring an IDEA

123. 34 C.F.R. § 300.304 (2015); 34 C.F.R. § 104.35 (2015); 28 C.F.R. § 35.103(a) (2015).
124. 20 U.S.C. § 1415(a), (b)(6)(A) (2012).

complaint as they are not a "child with a disability."[125] An example of such a case is *S.H. v. Lower Merion School District*.[126]

In *S.H.*, a high school student alleged violations of the IDEA, Section 504, and the ADA when her school misidentified her as learning disabled and subsequently placed her in special education courses.[127] S.H. claimed that she missed out on science and foreign language courses due to her special education classification and sought compensatory education through the IDEA as well as monetary damages through the ADA and Section 504.[128] When evaluating the IDEA claim, the court, looking at the plain meaning of the statute, held that the IDEA's guarantees are limited to "*children with disabilities* and their parents" and upheld the district court's dismissal of the IDEA claim.[129] Several other circuits have analyzed the issue in the same way, essentially holding that because the child was mistakenly classified as disabled, she is not a "child with a disability" and subsequently does not have standing under the IDEA.[130]

At first blush, this analysis is compelling in its apparent simplicity. A guiding principal of statutory interpretation is to begin with plain language. The Supreme Court has consistently held "[w]hen the words of a statute are unambiguous, then the first canon [of statutory interpretation] is also the last: judicial inquiry is complete."[131] Where plain language is ambiguous or where "literal application of the plain language would frustrate the statute's purpose or lead to an absurd result," courts should look to legislative history to help clear up ambiguity.[132] In misidentification cases, relying on plain language alone is flawed for three reasons. First, the IDEA creates a substantive right

125. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 260 (3d Cir. 2013) (granting summary judgment for school district in misidentification claims under IDEA because plain language of the statute limited to children with disabilities); J.P. v. Anchorage Sch. Dist., 260 P.3d 285, 291 (Alaska 2011) (denying reimbursement of parents' out-of-pocket tutoring where child was ultimately found ineligible for special education services).

126. *S.H.*, 729 F.3d at 248.

127. *S.H.*'s 504 and ADA claims will be discussed in section III.C. of this Article.

128. *S.H.*, 729 F.3d at 251–56.

129. *Id.* at 257.

130. D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012) (finding the school not in violation because child ultimately did not require special education services); R.B. *ex rel.* F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007) (holding that even though absence of special education teacher in eligibility determination meeting was a procedural violation, it did not result in a denial of FAPE because student was not eligible for services under the IDEA); *J.P.*, 260 P.3d at 285.

131. Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

132. Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Allen, 152 F.3d 283, 288 (4th Cir. 1988); *see also* Milner v. Dep't of Navy, 562 U.S. 562, 573–74 (2011).

to an accurate and unbiased evaluation for children *suspected* of having disabilities, not just children who do, in fact, have disabilities. For misidentified children, the school clearly failed to meet this statutory obligation by the very fact that the school inaccurately identified them as disabled. Second, the IDEA creates a cause of action to challenge identification claims and courts routinely hear such cases without knowing whether the plaintiff has an underlying disability.[133] Thus, literal application of the statute would "lead to an absurd result" as courts would only be permitted to hear eligibility cases from plaintiffs who were bonafide IDEA eligible "children with disabilities" making the question of eligibility irrelevant. Third, misidentified minority children have historically been a central focus of the IDEA. Congress has repeatedly acknowledged the problem of over-identification of minorities for certain categories of disability and has amended the IDEA to address this issue. It seems obvious that with misidentification being at the heart of Congress's concern when drafting the IDEA, minority children who find themselves harmed through misidentification should have a remedy within the statute to address these harms. Thus, plain language alone does not resolve the question of whether misidentified students have rights under the IDEA.

However, even assuming misidentified students have a procedural right to accurate evaluations and eligibility determinations, they may not have access to a suitable remedy within the IDEA. The IDEA's central purpose is the guarantee of free appropriate public education (FAPE) to students with disabilities. It does not govern appropriate education for general education students. In order for a court to find a remedy for a misidentified student within the IDEA, it would need to read in an implied remedy based on the substantive right to accurate and unbiased evaluations. Courts thus far, have not been willing to do so, but perhaps this decision is rooted in a stilted analysis based only in the plain language of the text. The following sections explore the substantive and procedural rights that apply misidentified students, thus creating a pathway to an implied remedy.

133. *R.B.*, 496 F.3d at 932 (finding child was ineligible for services under the IDEA because her mild depression did not rise to the level of "severe emotional disturbance." Although school district violated procedural requirements of IDEA by not including special education teacher on the IEP team, the violation did not result in the loss of FAPE because child was found ineligible for IDEA services); *see also* Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525 (2007); D.C. v. Mount Olive Twp. Bd. of Educ., No. 12-5592, 2014 WL 1293534 (D.N.J. Mar. 31, 2014).

1. The IDEA Creates a Substantive Right to Unbiased Evaluations and Eligibility Determinations

The IDEA demands schools conduct comprehensive evaluations in order to determine whether the child has an IDEA eligible disability as well as the educational needs of that child.[134] In order to ensure accuracy in the evaluation process, the statute requires: use of a variety of assessment tools, technically sound instruments, valid and reliable assessments or measures, and administration by trained and knowledgeable persons.[135] In addition, the IDEA makes clear that assessments must be "selected and administered so as not to be discriminatory on a racial or cultural basis"[136] and that schools must assess children in "all areas of suspected disability."[137] When schools fail to live up to these requirements, they are held liable.[138]

To put it plainly, *all* students with suspected disabilities are entitled to unbiased and accurate evaluations and eligibility determinations, including misidentified students. Misidentified students were once suspected of having disabilities. This suspicion is what brought them within the umbrella of the IDEA. Schools, following IDEA mandates, conducted evaluations to determine whether or not these students were IDEA eligible students with disabilities. In the case of misidentified students, schools simply got it wrong. They inaccurately found disabilities where none were present. This mistake, if it results in educational harms, should be borne by the school district and not the student.

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134. 20 U.S.C. §1414(b)(2)(A); M.Z. *ex rel.* D.Z v. Bethlehem Area Sch. Dist., No. 11-2887, 2013 WL 1224091, at *2 (3d Cir. Mar. 27 2013) (finding that where school's assessment tools and strategies were not "sufficiently comprehensive," school had to pay for an independent educational evaluation of the child); Sch. Dist. of Phila. v. Drummond, No. 14-2804, 2016 WL 1444566, at *1 (E.D. Pa. Apr. 12, 2016) (holding school's flawed assessment which misdiagnosed child as intellectually disabled entitled the child to an independent educational evaluation at public expense).

135. 20 U.S.C. § 1414(b)(2)–(3). This does not present an exhaustive list of IDEA requirements. Additional requirements demand that assessments are provided and administered in the language and form most likely to yield accurate results, are administered according to their instructions, and that children are assessed in all areas of suspected disability. *See* § 1414(b)(3).

136. § 1414(b)(3)(A)(i).

137. § 1414(b)(3)(B).

138. Millburn Twp. Bd. of Educ. v. J.S.O., No. 13–1208 (FSH), 2014 WL 3619979, at *2 (D.N.J. July 21, 2014) (New Jersey School District denied FAPE to girl with autism when it failed to evaluate her in all areas of suspected disability); S.F. v. McKinney Indep. Sch. Dist., No. 4:10–CV–323–RAS–DDB, 2012 WL 718589, at *1 (D. Tex. Mar. 6, 2012) (finding the school's evaluations were inappropriate where they assessed a student with autism and a hearing impairment using a tool which cautioned against use with hearing impaired individuals and failed to administer assessments in the student's best known language, sign language).

2. The IDEA Creates a Cause of Action to Challenge Identification and Evaluation of Disability

The IDEA permits a "child with a disability" to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child."[139] Scores of children and parents bring complaints related to identification and evaluation across the country each year.[140] When a court considers such a case, it must decide the underlying issue of whether or not the child is a "child with a disability" and as such entitled to receive FAPE as required by the IDEA. The child may not be a "child with a disability," but the case is still properly before the court because the IDEA tasks courts with resolving such disputes and grants children the right to bring complaints about identification and evaluation.[141] Thus, it is simply illogical to hold that only "children with disabilities" and their parents can have standing under the IDEA to bring complaints about identification or evaluation. Rather, it seems the type of claim—identification, evaluation, or placement and subsequent challenge to FAPE—determines whether or not the action is redressable under the IDEA.

For example, a Connecticut district court applied such an analysis in an eligibility context and held that a school violated the IDEA even when it turned out that the child later did not have an IDEA eligible disability.[142] In *M.A. v. Torrington Board of Education*, a student alleged that the school had failed to evaluate him to determine whether his severe asthma fit within the category of Other Health Impairment (OHI) such that he was eligible for

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139. 20 U.S.C. § 1415 (b)(6)(A) (2005).

140. D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012); Davis v. Hampton Pub. Sch. Dist., 396 F. App'x 960 (4th Cir. 2010); R.B. *ex rel.* F.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932 (9th Cir. 2007); Rodiriecus v. Waukegan Sch. Dist. No. 60, 90 F.3d 249 (7th Cir. 1996); J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska 2011); s*ee generally* Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 EDUC. L. REP. 1 (2011) (indicating that special education litigation in federal courts has consistently increased each year since 1980).

141. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 516–17 (2007) ("Any party aggrieved by the [hearing officer's] findings and decision has the right to bring a civil action with respect to the complaint.").

142. *Compare* M.A. v. Torrington Bd. of Educ., 980 F. Supp. 2d 245, 265 (D. Conn. 2013) (holding that board's refusal to continue evaluation process for child was a denial of FAPE, even though child was ultimately found to be ineligible for services), *with* D.G. v. Flour Bluff Indep. Sch. Dist., 481 F. App'x 887 (5th Cir. 2012) (holding that no violation of child find where child is shown ineligible for services because IDEA does not penalize school districts for not timely evaluating students who do not need special education).

special education services under the IDEA.[143] He argued the school's refusal to evaluate him violated his right to FAPE.[144] The court held that the school was obligated to evaluate M.A. and determine whether he was eligible for special education services, and the school's failure to do so was a violation of FAPE.[145] The court reached this conclusion even though it also concluded that M.A. was ultimately ineligible for special education services through the IDEA.[146] The fact that the child was ineligible for special education services meant that the school was not responsible for the tuition reimbursement that parents sought as a remedy.[147] To put it another way, the court made a distinction between procedural rights and remedial rights. It concluded that all children have the procedural rights guaranteed by the IDEA—to invoke due process and have their day in court. But, the court in M.A. also said that only certain children, those with IDEA eligible disabilities, have remedial rights under the statute—the right to invoke the remedies contained therein.[148]

An analogous interpretation of procedural rights exists in the context of discipline cases under the IDEA. Prior to 1997, the IDEA did not speak to the issue of whether or not a child, who had not yet been found IDEA eligible, could invoke IDEA procedural protections by claiming a disability after the disciplinary action had begun.[149] For example, in a case arising out of the Ninth Circuit, *Hacienda v. Honig*,[150] the plaintiff student was expelled for frightening another student with a starter pistol. Prior to the incident, the plaintiff, at his mother's request, was evaluated but found ineligible for special education. Shortly thereafter, plaintiff engaged in the activity which

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143. *M.A.*, 980 F. Supp. 2d at 245. OHI is defined as "limited strength, vitality, or alertness that . . . (1) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition . . . and (2) adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9) (2007).

144. *M.A.*, 980 F. Supp. 2d at 245.

145. *Id.* The court in *M.A.* relied upon precedent from the Supreme Court in *Forest Grove School District v. T.A.*, which held, "a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP." Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 238–39 (2009).

146. The court found that due to M.A.'s average and above average educational performance, his asthma did not adversely affect his education. *M.A.*, 980 F. Supp. 2d at 278.

147. *Id.* at 278–79.

148. *Id.*

149. In 1997, IDEA was amended to include additional procedural protections for disabled students who were facing school discipline, including mandating that schools conduct manifestation determination hearings to determine whether the conduct at issue is a manifestation of the child's disability. If conduct is determined to be a manifestation of the child's disability, the school is limited in its ability to punish the child for that behavior. 20 U.S.C. § 1415(k) (2012). Thus, children facing school expulsion can dramatically increase their chances of staying in school if they are able to successfully assert that a disability was at the root of their conduct.

150. Hacienda v. Honig, 976 F.2d 487 (9th Cir. 1992).

resulted in expulsion. The plaintiff, through his mother, initiated an IDEA due process complaint claiming he had a disability and was entitled to IDEA protections.[151] A hearing officer sided with plaintiff, finding him IDEA eligible, his behavior was a manifestation of this disability, and therefore he was entitled to the protections offered in the IDEA including placement with services at the public school. The school appealed, claiming the IDEA is limited to "children with disabilities" and since the plaintiff was not found to have a disability prior to invoking procedural protections, he had no rights under the IDEA. The Ninth Circuit rejected the school's argument, holding "[t]he IDEA and accompanying federal regulations [sic] make plain that, even though not previously identified as disabled, the student's alleged disability may be raised in an IDEA administrative due process hearing."[152] Thus, the plain language limiting procedural protections to "children with disabilities" was set aside when it obviously did not comport with the purpose of the statute. It was unknown whether the child in *Hacienda* was a "child with a disability" when the matter came before the court. However, the court proceeded to consider the case because the question of disability was at the heart of the case and is central to the purpose of the IDEA.

The obvious difference between *Hacienda* and a misidentified claim is that in *Hacienda* the child was alleging a disability; in a misidentified claim, the child is alleging she is not disabled. This may be a crucial difference that will ultimately prevent the misidentified child from finding remedy within the IDEA.[153] The question being, even if the misidentified child has standing to bring a claim under the IDEA (procedural rights), does she have a right to a remedy under the statute (remedial rights)?

The IDEA's discussion of remedies is contained within Section 1415 "Procedural Safeguards." Although the opening paragraph mandates procedures "to ensure that children with disabilities and their parents are

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151. The mother wanted to invoke IDEA's "stay put" provision, which mandates that children facing discipline proceedings must remain in their "then current educational placement" during the pendency of the often lengthy administrative proceedings. 20 U.S.C. § 1415(j); *see generally* Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002) (referring to 20 U.S.C. § 1415(j) as the IDEA's "stay-put" provision).

152. *Hacienda*, 976 F.2d at 492.

153. After *Hacienda*, Congress clarified the stay put regulation by including a new section outlining protections for children not yet eligible for special education and related services, 20 U.S.C. § 1415(k)(5). Under this section, children may still invoke IDEA protections if the school "had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred." A school has knowledge when: (1) the parent expressed concern in writing to the school; (2) the parent requested an evaluation of the child; or (3) a teacher or other personnel of the school expressed specific concerns about a pattern of behavior. § 1415(k)(5)(i)–(iii).

guaranteed procedural safeguards," a subsequent paragraph grants a reviewing court broad authority to grant "such relief as [it] determines appropriate."[154] Courts interpreting the scope of this section have generally found it to have a broad reach, determining that relief must be "appropriate" in light of the purpose of the IDEA.[155] The IDEA's purpose is clearly grounded in ensuring a free appropriate public education for children with disabilities.[156] The provision of FAPE, too, is explicitly tied to "children with disabilities."[157] Thus, even if a misidentified child could bring a claim challenging inaccurate identification, by virtue of not being a child with a disability, a court may find that remedies for this child are outside of the purpose of the IDEA. In short, the school district could successfully claim that it is not obligated to provide a misidentified child with FAPE, thus, obliterating the chance for any remedy.

At times courts look past the literal reading of a statute when it leads to an absurd or unjust result. For example, in a recent Supreme Court case relating to a school's failure to find a child IDEA eligible, the Court stated in dicta, "[i]t would be particularly strange for the [IDEA] to provide a remedy, as all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether."[158]

Similarly, in this instance, it seems "particularly strange" to provide a remedy when a school unreasonably fails to identify a child as having a disability when she alleges one, but deny a remedy when the school wrongly

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154. 20 U.S.C. § 1415(a), (i)(2)(C)(iii).

155. *See* Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247 (2009); Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass., 471 U.S. 359, 369 (1985); Draper v. Atlanta Indep. Sch. Sys., 518 F. 3d 1275, 1280 (11th Cir. 2008). Courts have traditionally been willing to order relief in the form of compensatory education, tuition reimbursement or other out-of-pocket education-related reimbursement such as tutoring, and injunctive relief. *Sch. Comm. of the Town of Burlington, Mass.*, 471 U.S. at 369; *see, e.g.*, J.C. v. Vacaville Unified Sch. Dist., No. S-05-0092 FCD KJM, 2006 WL 2644897, at *9 (E.D. Cal. Sept. 14, 2006) (ordering cost of compensatory education to be paid into trust for providing education to student no longer in district); Susquehanna Twp. Sch. Dist. v. Frances J., 823 A.2d 249, 258 (Pa. Commw. Ct. 2003) (affirming an award of one year's tuition and fees at a college prep program). But some courts are less willing to order compensatory or punitive damages under the IDEA. *See* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 527 (4th Cir. 1998). In addition, the IDEA explicitly provides for attorney's fees, but does not otherwise define other types of "appropriate relief." 20 U.S.C. § 1415(i)(3).

156. 20 U.S.C. § 1400(d) (2012). Purposes (1)–(4) each explicitly mention "children with disabilities."

157. *Id.* § 1412 (a)(1)(A) (2012) ("A free appropriate public education is available to all children with disabilities residing in the state.").

158. *Forest Grove*, 557 U.S. at 245.

identifies and treats a child as disabled, denies access to regular education services, and creates an educational harm. Both actions are rooted in the same behavior—the school's obligation to accurately identify and evaluate a child for a disability. Thus, fairness dictates relief should be made available in both scenarios.

To put it another way, if a school evaluates Susie for a learning disability and finds her ineligible for services under the IDEA, Susie (who may or may not be a child with a disability) is permitted to bring a claim under the IDEA challenging the school's eligibility determination. Assuming, Susie has a learning disability and is harmed by a lack of educational services to address this disability, she can demand that the school provide her with such services or compensatory education to bring her up to speed. If, however, we change the facts and assume Susie is not learning disabled, but the school using inappropriate or incomplete assessment tools finds that she has a learning disability, Susie no longer has the right to challenge the school's actions. Even where the school's actions caused Susie harm by removing her from the general education classroom, she still cannot invoke the IDEA to hold them accountable. Susie, by virtue of being a child without a disability, is unable to find a remedy within the IDEA no matter whether the school violated its responsibility under the statute to accurately identify her and no matter that this action directly caused Susie an educational harm. Why should the child, who may or may not have a disability, be entitled to relief under the IDEA, but a misidentified child, who has been treated as a child with a disability, is not? Allowing for the two disparate treatments of the same action seems unjust. Thus, like the Supreme Court in *Forest Grove*, courts faced with the obvious inequitable result, could read an implied remedy for children treated as disabled under the IDEA.

3. The IDEA Prohibits the Over-identification of African-American Students

Finally, misidentified minority students have an additional argument rooted in the historic failure to accurately identify minority youth with disabilities. The IDEA itself acknowledges this failure several times in the "Findings" section of the statute.[159] Congress also made its concern over the issue evident when stating, "[g]reater efforts are needed to prevent the intensifications of problems connected with mislabeling . . . minority children with disabilities."[160] Moving beyond rhetoric, Congress required states to take

159. 20 U.S.C. § 1400(c).
160. H.R. REP. NO. 108-77, at 3 (2003).

affirmative steps to address the problem. The IDEA requires states to have "policies and procedures designed to prevent the inappropriate over-identification" of minority children.[161] Further, the IDEA explicitly requires that evaluations not be racially discriminatory.[162] Consequently, the IDEA not only prohibits racially discriminatory evaluations, but also requires states to take affirmative steps to address and prevent inappropriate over-identification of minorities.

The Court in *S.H.* cited to the IDEA's mandate that states enact policies and procedures to address over-identification as the sole way over-identification was to be remedied through the IDEA.[163] This argument is simply nonsensical when the IDEA also explicitly calls for accurate and unbiased evaluations.[164] While the IDEA's section on enacting policies to address over-identification certainly evidences congressional intent to address the issue, it by no means otherwise limits the obligation that states already have to ensure accurate and unbiased evaluations nor does it purport to be the means of addressing the issue. Rather, with the mandate to address overrepresentation explicitly written into the IDEA, it seems irrational to presume that Congress would have intended to strip misidentified children of the right to challenge accurate identification under the very statute that purports to demand it. The IDEA clearly puts identification and eligibility on the table by explicitly creating a cause of action for such challenges. Why then, would Congress demonstrate the will to reduce minority misidentification and then restrict the ability to raise such claims under the IDEA? Preventing misidentified minority children from accessing remedies through the IDEA is clearly at odds with the statute's stated concerns over accurate identification of minority children with disabilities.

Despite the IDEA's concern with misidentification and requirement for accuracy when assessing for disabilities, the plain language of the statute operates as a significant obstacle, preventing a misidentified student from winning relief under the statute. Even assuming a misidentified child had the right to bring a claim under the IDEA, she likely has no remedy. The statute's remedies are clearly interwoven with its stated purpose, which is the provision of a free appropriate education for children *with disabilities*. Unless a court is willing find an implied remedy, arguably supported through the statute's demand for accurate identification of disability and requirement that

161. 20 U.S.C. § 1412(a)(24).

162. § 1412(a)(6)(B) ("testing and evaluation materials and procedures utilized for the purposes of evaluation and placement" must "not be racially or culturally discriminatory"); 20 U.S.C. § 1414(b) (2012) (evaluation procedures).

163. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 259 n.17 (3d Cir. 2013).

164. *See* § 1412(a)(6)(B).

states address inappropriate over-identification, misidentified plaintiffs are likely stuck with the plain language limiting remedies to "children with disabilities."

B. Title VI of the Civil Rights Act of 1964 and the Equal-Protection Clause of the Fourteenth Amendment

Finding no solace in the IDEA, misidentified minority students turn to the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 for help.[165] The Equal Protection Clause prohibits states from denying any person within its jurisdiction equal protection of the laws.[166] The party alleging discrimination has the burden of proving that the state's conduct was motivated by discriminatory purpose.[167] Title VI states, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[168] Courts have held that Title VI claims are coextensive with Equal Protection claims based on race.[169] In both cases, a plaintiff must prove intent on the part of defendant. A plaintiff must prove that a defendant's actions were motivated by race in order to establish a violation of either law.[170] The Supreme Court has held there is no private cause of action for disparate impact claims under Title VI.[171] In other words, a plaintiff cannot use evidence demonstrating that a facially neutral policy or law has a disproportionate impact on minorities to establish a violation of Title VI.[172] Thus, under either law, plaintiffs must establish intentional discrimination on the part of a school district in order to get relief. For misidentified students, this has proven to be an insurmountable summit.

An example of how difficult it is to overcome the burden of establishing discriminatory intent can be found in the case of *Blunt v. Lower Merion*

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165. *See generally* Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984); Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749 (E.D. Pa. 2011); Bell v. Bd. of Educ. of the Albuquerque Pub. Schs., No. CIV 06-1137 JB/ACT, 2008 WL 5991062 (D.N.M. Nov. 28, 2008); M.G. v. Crisfield, 547 F. Supp. 2d 399 (D.N.J. 2008); Mrs. M. v. Bridgeport Bd. of Educ., 96 F. Supp. 124 (D. Conn. 2000).

166. U.S. CONST. amend. XIV, § 1.

167. Whitus v. Georgia, 385 U.S. 545, 550 (1967).

168. 42 U.S.C. § 2000d (2012).

169. Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

170. *See* E.E.O.C. v. Muhlenberg Coll., 131 F. App'x 807, 812 (3d Cir. 2005) (stating there must be some evidence that procedural irregularities were related to plaintiff's race).

171. Alexander v. Sandoval, 532 U.S. 275, 291 (2001).

172. *Id.* at 291–92.

School District.[173] There, a group of current and former African American students alleged they were improperly identified as disabled by their school district and subsequently placed in remedial classes.[174] Plaintiffs alleged their identification as learning disabled resulted in removal from the general education classroom, denial of the opportunity to take more challenging courses, and prevented them from higher educational achievement.[175] Plaintiffs claimed incomplete and inaccurate evaluations led to their misidentification as children with disabilities.[176] They presented statistical data demonstrating a disproportionate number of African-American students receiving special education as compared to white students.[177] Over the span of a five-year period, the percentage of white students in special education was roughly equivalent to the percentage in the general population; whereas, the percentage of African-American students in special education was nearly double their percentage in the general student population.[178] To support their claim of intentional discrimination, plaintiffs alleged, *inter alia*, that the school destroyed testing protocols, failed to obtain parental permission before conducting evaluations, neglected to notify parents of procedural safeguards available under the IDEA, omitted information from evaluation reports, and failed to conduct proper and timely re-evaluations.[179] The plaintiffs originally brought claims under the IDEA, Title VI, and the Equal Protection Clause.[180] However, the district court dismissed IDEA claims holding that some plaintiffs had failed to exhaust their administrative remedies and others were barred by the IDEA's statute of limitations.[181] The defendant school district brought a motion for summary judgement on the only claims before the district court, Title VI and the Equal-Protection Clause.[182]

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173. *See generally* Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749 (E.D. Pa. 2011).

174. *Id.* at 753.

175. *Id.* at 753–58 (plaintiffs introduced evidence demonstrating African-American students were over-represented in special education courses and completely absent from "high expectation" college prep or advanced placement classes).

176. *Id.* at 754.

177. *Id.* at 756–57 (disproportionality is defined as "significantly greater or lower participation in special education by one or more groups compared to the participation rates for other groups").

178. *Id.*

179. *Id.* at 760.

180. *Id.* at 751.

181. *Id.* at 752. The IDEA requires plaintiffs who have claims which can be addressed through the IDEA must exhaust these remedies prior to bringing suit based on these claims in federal court. 20 U.S.C. § 1415(f), (g), (i)(2) (2012); FED. R. CIV. P. 12(b)(1). A number of exceptions to the exhaustion requirement exist, see *infra* note 261.

182. *Blunt*, 826 F. Supp. 2d at 751.

The district court found for the defendant school district holding that the plaintiffs had failed to put forth any evidence from which a reasonable inference could be drawn that the defendant intentionally segregated the students on the basis of race into inferior educational programs.[183] Essentially, even assuming the plaintiffs' allegations to be true, they failed to demonstrate that the school's decisions were related to race.[184] The court emphasized that this was not an IDEA action, and unlike under the IDEA, "[p]laintiffs cannot merely produce evidence that their rights were violated . . . . Instead, they must raise at least some reasonable inference that they were placed into [special education classes] and offered services by the School District due to intentional discrimination based on their race and not simply due to errors in evaluation."[185] The appellate court affirmed, stating, "[l]ooking at the whole record, which includes statistical evidence showing that minorities are overrepresented in low achievement classes, we conclude that there is no genuine issue of material fact concerning [the School District's] intent."[186]

The *Blunt* case not only demonstrates the insurmountable obstacles in place for plaintiffs who attempt to seek recovery for misidentification through Title VI and the Equal-Protection clause, but also re-emphasizes the futility of the IDEA in protecting rights of misidentified students. Plaintiffs in this case presented evidence of stark statistical over-representation of African-American students in special education courses, inaccurate and incomplete evaluations which did not meet professional standards, and a disregard for parental input and communication; however, none of these facts matter under Title VI or Equal Protection. Rather, the only thing that matters is whether plaintiffs can demonstrate that defendant's actions were motivated by race. As the Appellate Court held, "[t]here is no sufficient evidence to show that the educators and administrators responsible for placing students intended to discriminate against them because of their race."[187] Further, the court refused to hear claims under the IDEA because of the plaintiffs' failure to exhaust administrative remedies under the IDEA.[188] However, as was discussed, students who attempt to invoke the IDEA for misidentification claims, as

183. *Id.* at 764.
184. *Id.* at 764.
185. *Id.* at 763.
186. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 257 (3d Cir. 2014).
187. *Id.* at 294.
188. *Id.* at 333. "[B]efore the filing of a civil action under such laws seeking relief that is also available under this part, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this part." 20 U.S.C. § 1415(l) (2012).

many from the Blunt class action eventually did, are refused because they are not "children with disabilities."[189]

In evaluating the Title VI and Equal-Protection claims, courts focus on equality of treatment of children regardless of race.[190] Evidence of similarly situated students who were treated differently, although not dispositive, can help a plaintiff meet her burden of intent needed to demonstrate a violation of these anti-discrimination laws.[191] On the flip side, Courts embrace evidence of equality in procedures and evaluations (similarly situated students being treated equally) as evidence of equal treatment. In other words, when a school demonstrates that the same testing protocols and evaluations are used for white students and black students, courts take notice.[192] Consequently, courts reason, when all similarly situated students are treated equally, there is no evidence supporting a violation of either law.[193] However, when it comes to misidentified children, this logic does not necessarily hold true. Rather, it fails to consider that assessment procedures, in and of themselves, can be inherently biased. In the case of judgement disabilities, equality of process does not serve as an adequate measure of equality of treatment. As previously discussed, subjective observations on the part of an evaluator, and both implicit and explicit biases, are at the heart of many judgement disability evaluations, such as the diagnoses of learning disability. Thus, a focus on equal procedures does not adequately guarantee equality of treatment.[194] Unfortunately for minority plaintiffs, it appears that courts are currently unwilling to take a nuanced look at evaluations. As long as that holds true, unless plaintiffs have evidence of the proverbial "smoking gun,"

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189. *See generally* S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013); A.G. v. Lower Merion Sch. Dist., 542 F. App'x. 194 (3d Cir. 2013); Dudley v. Lower Merion Sch. Dist., No. 10-2749, 2011 WL 5237308 (E.D. Pa. 2011) (court refused to let plaintiff student amend complaint to include allegations of misidentification because "new" information that is the basis of misidentification could have been discovered earlier).

190. *See Blunt*, 826 F. Supp. 2d at 759; Bell v. Bd. of Educ. of the Albuquerque Pub. Schs., No. CIV 06-1137 JB/ACT, 2008 WL 5991062, at *5 (D.N.M. Nov. 28, 2008) (court dismissed plaintiff's Title VI claim in part because plaintiff failed to present evidence that potentially disabled black students were subjected to different procedures than potentially disabled white students).

191. *See* Meditz v. City of Newark, 658 F.3d 364, 371 (3d Cir. 2011) (stating that gross statistical disparities may serve to establish a prima facie case in a Title VI discrimination suits).

192. *Blunt*, 767 F.3d at 276.

193. *Id.* Chief Judge McKee distinguished between the equality of process and equality of actual procedures with regard to disability assessment. *Blunt*, 767 F.3d at 304 (McKee, C.J., dissenting in part and concurring in part). He took issue with the majority's opinion because it 1) assumed the procedures themselves were not discriminatory and 2) ignored "discretion and subjectivity" on the part of the evaluator. *Id.*

194. Nicole M. Oelrich, *A New "Idea": Ending Racial Disparity in the Identification of Students with Emotional Disturbance*, 57 S.D. L. REV. 9, 28 (2012).

they will inevitably fail to demonstrate the requisite intent under Title VI or the Equal Protection Clause regardless of the depth and breadth of their circumstantial evidence.[195]

C. Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act

1. An Overview of Section 504 and Title II of the ADA

Misidentified students may also seek relief through Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (Title II).[196] Unlike Title VI and the Equal Protection Clause, Section 504 and Title II cover all students, regardless of race, so long as they meet the relevant definition of disability and were subjected to discrimination on the basis of disability.[197] Section 504 was the first broad federal statute to prohibit discrimination against the disabled, stating "[n]o 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 Federal financial assistance . . . ."[198] Despite this broad language, Section 504 did little to advance the cause of equality of treatment for the disabled.[199] Consequently, the ADA was enacted to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[200] Title II of the ADA was based in large part on Section

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195. *Blunt*, 826 F. Supp. 2d at 761; *see also* People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205, 111 F.3d 528, 536 (7th Cir. 1997); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F. 2d 750, 754-55 (5th Cir. 1989) (upholding ability-grouping programs that disproportionately placed minority students in low tracks); Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1418 (11th Cir. 1985) (holding tracking did not violate Title VI because it was an "accepted pedagogical practice"); Losen & Welner, *supra* note 1, at 434.

196. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990); Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355 (1973). The ADA has several additional sections. Title I prohibits discrimination against the disabled in employment. 42 U.S.C. §§ 12101–12108. Title III applies to places of public accommodations, including private entities if they affect commerce. *Id.* §§ 12301–12310. However, when this article refers to the "ADA" it is referring specifically to Title II of the ADA unless otherwise indicated.

197. 29 U.S.C. § 794(a) (2012); 42 U.S.C. § 12131(2) (2012).

198. 29 U.S.C. § 794(a).

199. Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 394 (1991).

200. 42 U.S.C. § 12101(b)(1); *see also* Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 TEMP. L. REV. 471, 479 (1991).

504, with Title II regulations patterned after Section 504 regulations.[201] Both operate as nondiscrimination statutes and bar organizations from discriminating against persons with disabilities for reasons related to their disabilities.[202] Section 504 is limited to any program or activity receiving federal funds and Title II extends this prohibition to all public organizations.[203] Thus, both statutes apply to public schools. In addition, both define disability similarly as 1) a physical or mental impairment that substantially limits one or more of the major life activities; 2) having a record of such an impairment; or 3) being regarded as having such an impairment.[204] This definition of disability is substantially broader than the IDEA's definition and thus, generally speaking, a child who is eligible for services under the IDEA will usually qualify for services under either Section 504 or Title II of the ADA.[205]

In the context of disabled students, although both are considered anti-discrimination statutes and protect negative rights—the right to be left alone—they also create affirmative rights, benefits gained by those who are eligible for statutory protections. Section 504 regulations require schools to provide a free appropriate public education to each child covered by Section 504.[206] The Section 504 regulations define appropriate education as:

> the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence

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201. The regulations under Section 504 and the ADA must be "consistent" with each other. 42 U.S.C. § 12134(b) (2012). Courts may not construe the provision of the ADA "to apply to a lesser standard than the standards applied under [Section 504] or the regulations issued by Federal agencies pursuant" to Section 504. *Id.* § 12201(a). The regulations pursuant to Title II of the ADA are found at 28 C.F.R. pt. 35, and the regulations under Section 504 are found at 28 C.F.R. pt. 42, subpart G.

202. Title II of the ADA states, in part, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also* 29 U.S.C. § 794.

203. 29 U.S.C. § 794(a); 42 U.S.C. § 12132.

204. § 794(a); § 12132.

205. Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. ON C. L. & C.R. 1, 24 (2010). The ADA Amendments Act, passed in 2008, reaffirmed the broad definition of disability, stating disability "shall be construed in favor of broad coverage of individuals," and declares that the intent of Congress is "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations," rather than whether the claimant's impairment meets the definition of a disability. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(5), 122 Stat. 3553, 3554 (2008).

206. 34 C.F.R. § 104.33 (2010).

> to procedures that satisfy the requirements of [other regulations related to: academic setting, evaluation and placement, and procedural safeguards].[207]

It is well-settled that both statutes not only prohibit discrimination, but also require reasonable accommodations when necessary to ensure disabled children have equal access to educational opportunity.[208] Although there are some differences between Section 504 and Title II, the statutes are sufficiently similar to warrant discussing them together. The following section will discuss claims under both statutes in the educational context.

2. Misidentification Claims Under Section 504 and Title II of the ADA

a. Prima Facie Case

In order to establish a claim under Section 504 or Title II, a plaintiff must establish that she: 1) is an individual with a disability; 2) is otherwise qualified to receive the benefit; and 3) was denied the benefits of the program or otherwise subjected to discrimination because of her disability.[209] Section 504 has an additional prong of establishing that the program in question receives federal financial assistance.[210] Unlike the IDEA, Section 504 and Title II have broader definitions of disability which include anyone who is "regarded as" having a disability.[211] A student meets the "regarded as" definition if she has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[212]

When applying these three prongs to misidentified students, it appears that they would easily be able to state a *prima facie* case for discrimination under either statute. Misidentified students will have no trouble meeting the first prong of the standard, as schools are identifying and treating them as disabled. Prong two is also not at issue as most students are "qualified" to participate in school. Prong three is met if a student can show that she was denied the benefits of an education program or subject to different treatment because of her perceived disability. Again, this prong seems easy to establish

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207. 34 C.F.R. §104.33(a), (b)(1).
208. *Id.* §§ 104.4, 104.34; 28 C.F.R. § 35.130(b)(7) (2015).
209. Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 253 (3d Cir. 1999).
210. 29 U.S.C. § 794(a) (2012).
211. 29 U.S.C. § 705(20)(B) (2012); 42 U.S.C. § 12102(1) (2012).
212. ADA Amendments Act § 3(3)(A). For provisions that apply to the ADA, see ADAA § 7.

because the essence of a misidentified student's claim is different treatment based on perceived disability. Plaintiffs generally allege schools place them in lower-achieving classes based on perceived disability which results in educational harm. Consequently, it seems that a misidentified student can quite convincingly allege violations of Section 504 and Title II. Thus, the school must do something in response. The more difficult task is defining what that "something" is. Is it enough for schools to simply stop treating the misidentified students as disabled and allow them to take regular education courses,[213] or are schools obligated to provide some type of equitable relief, or even compensatory damages? The following sections will address the unsettled question of what, if anything, schools must do for misidentified children.

b. Remedies Under Section 504 or Title II of the ADA

Plaintiffs who have been harmed through misidentification seek remedies to help make them whole. It is well established that private parties may seek remedies under both Section 504 and Title II.[214] The trouble is, Congress did not clearly define remedies under either Title II or Section 504, but rather referenced and incorporated other statutes to define remedies. Title II states that its remedies shall be those contained in Section 505 of the Rehabilitation Act.[215] Section 505 of the Rehabilitation Act states that Section 504 remedies are coextensive with those remedies in Title VI.[216] Based on this statutory language, the Supreme Court has stated, "the remedies for violations of [Title II] of the ADA and Section 504 of the Rehabilitation Act are coextensive with

213. As subsequent sections will illustrate, schools benefit by not contesting a student's claim that she is not disabled because when a student is not disabled, the school does not have a statutory obligation to serve them. Further, it appears that the school can escape liability under the IDEA, Section 504, and the ADA when the plaintiff is not disabled.

214. Barnes v. Gorman, 536 U.S. 181, 185 (2002) (finding that a private right of action exists under both statutes, but bars punitive damages for private causes of action); Mark H. v. Lemahieu, 513 F.3d 922, 930 (9th Cir. 2008) (holding Section 504 includes an implied private right of action allowing victims of prohibited discrimination, exclusion or denial of benefits to seek the full panoply of remedies, including equitable relief and compensatory damages); Rodgers v. Magnet Cove Pub. Sch., 34 F.3d 642, 645 (8th Cir. 1994) (finding private right of action for monetary damages exists under Section 504); Carter v. Orleans Parish Pub. Sch., 725 F.2d 261, 262 (4th Cir. 1984) (finding personal cause of action to people excluded based on perceived disability).

215. The ADA states, "[t]he remedies, procedures, and rights set forth in [Section 504] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132." 42 U.S.C. § 12133 (2012).

216. Section 505 states, "[t]he remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . ." 29 U.S.C. § 794a(a)(2) (2012).

the remedies available in a private cause of action under [Title VI]."[217] Thus, appellate courts analyzing cases under Section 504 or Title II have looked to Title VI to define available remedies.

Title VI does not, in fact, contain a remedies provision; however, there exists a complicated body of jurisprudence setting forth the framework for Title VI remedies. At the root of this framework is the Supreme Court's holding that private individuals seeking compensatory damages under Title VI must prove intentional discrimination.[218] Consequently, appellate courts analyzing Title II and Section 504 cases incorporate the Title VI intent standard when plaintiffs seek compensatory damages.[219] Several scholars have criticized the application of Title VI's intent standard to Section 504 and Title II of the ADA;[220] nonetheless, all appellate courts that have considered the issue in the context of education cases have held that plaintiffs must prove intent in order to win compensatory damages.[221] At the same time, courts have also held that plaintiffs seeking injunctive relief—relief that is not monetary in nature, but rather asks the court to force defendant to comply with the

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217. *Barnes*, 536 U.S. at 185.

218. Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 593 (1983); *see also* Alexander v. Sandoval, 532 U.S. 275 (2001); Derek Black, *Picking Up the Pieces After* Alexander v. Sandoval*: Resurrecting A Private Cause of Action for Disparate Impact*, 81 N.C. L. REV. 356, 357 (2002).

219. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 263 (3d Cir. 2013); T.W. *ex rel.* Wilson v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 603–04 (11th Cir. 2010); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009); Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008); Nieves–Marquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003).

220. Sande Buhai & Nina Golden, *Adding Insult to Injury: Discriminatory Intent as a Prerequisite to Damages Under the ADA*, 52 RUTGERS L. REV. 1121, 1133 (2000); Nina Golden, *Compounding the Error: "Deliberate Indifference" vs. "Discriminatory Animus" Under Title II of the ADA*, 23 N. ILL. U. L. REV. 227, 253 (2003); Mark Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C. L. REV. 1417, 1417 (2015).

221. Meagley v. City of Little Rock, 639 F.3d 384, 389 (8th Cir. 2011) ("The ADA was modeled on the Rehabilitation Act, which had been modeled after Title VI, so it follows rationally that the rights and remedies afforded under both statutes should be governed by Title VI precedent."); *T.W.*, 610 F.3d at 603–04; *Loeffler*, 582 F.3d at 275; *Mark H.*, 513 F.3d at 938; Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267, 278 (7th Cir. 2007); *Nieves–Marquez*, 353 F.3d at 126 ("[P]rivate individuals may recover compensatory damages under § 504 . . . only for intentional discrimination."); Delano–Pyle v. Victoria Cty., 302 F.3d 567, 574 (5th Cir. 2002) ("A plaintiff asserting a private cause of action for violations of the ADA or the RA may only recover compensatory damages upon a showing of intentional discrimination."); Powers v. MJB Acquisition Corp., 184 F.3d 1147, 1153 (10th Cir. 1999) (holding that a claim for compensatory damages under the RA "requires proof the defendant has intentionally discriminated against the plaintiff"); Pandazides v. Va. Bd. of Educ., 13 F.3d 823, 830 n.9 (4th Cir. 1994) (acknowledging that recovery of damages under the RA requires a finding of intentional discrimination).

law—do not need to prove intentional discrimination.[222] Because courts often conflate the standard for injunctive relief with that of compensatory relief, the next section will parse out a claim of injunctive relief under Section 504 or Title II.

c. Injunctive Relief Under Section 504 or Title II of the ADA

Plaintiffs seeking injunctive relief through Section 504 and Title II would first need to establish a violation of the statutes. The question of what a statute prohibits is distinct from the question of what remedies might be available when a defendant violates those prohibitions.[223] The standard for establishing liability is distinct from the question of allowable remedies.[224] For instance, a statute might prohibit a particular action or result and permit a plaintiff to sue, regardless of a defendant's intent, when this action or result occurs. But that same statute might only allow for monetary damages when a defendant intentionally engaged in the practice or intended the result. Although liability and damages obviously intersect, they should be treated distinctly.

Many courts, however, fail to distinguish between liability and remedies and jump straight to Section 504 remedies language, assuming that intent is required both to justify monetary damages and when making out a basic violation of Section 504 and Title II.[225] This is simply the wrong analysis.[226] Neither the text of Section 504 or Title II impose an intent standard to establish a violation of either statute. Rather, the plain language of the statutes indicates that as long as a plaintiff can establish she: 1) is disabled within the meaning of the statute; 2) would otherwise qualify for services; and 3) was

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222. Ridgewood Bd. of Educ. v. N.E. *ex rel.* M.E., 172 F.3d 238, 253 (3d Cir. 1999) (finding plaintiff need not prove intentional discrimination to establish a violation of Section 504 based on allegations that school failed to identify his learning disability and provide him with FAPE); J.T. *ex rel.* Harvell v. Mo. State Bd. of Educ., No. 4:08CV1431RWS, 2009 WL 262094, at *7 (E.D. Mo. Feb. 4, 2009); Neena S. v. Sch. Dist. of Phila., No. CIV. A. 05-5404, 2008 WL 5273546, at *15 (E.D. Pa. Dec. 19, 2008); Lower Merion Sch. Dist. v. Doe, 931 A.2d 640, 644 (Pa. 2007).

223. Injunctive relief is not a proper claim for relief in and of itself, but rather a remedy that is available upon a finding of liability on a claim. Alabama v. U.S. Army Corps of Eng'rs, 424 F.3d 1117, 1127 (11th Cir. 2005).

224. *See Mark H.*, 513 F.3d at 938 ("For purposes of determining whether a particular regulation is ever enforceable through the implied right of action contained in a statute, the pertinent question is simply whether the regulation falls within the scope of the statute's prohibition. The mens rea necessary to support a damages remedy is not pertinent at that stage of the analysis. It becomes essential, instead, in determining whether damages can actually be imposed in an individual case.").

225. *See supra* note 208 and accompanying text.

226. Mark C. Weber, *Procedures and Remedies Under Section 504 and the ADA for Public School Children with Disabilities*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 611, 627–28 (2012).

denied the benefits of the program or otherwise subjected to discrimination because of her disability, she is entitled to relief.[227] An individual can be impermissibly denied the benefits of a program, regardless of whether that was the defendant's intent. In this respect, these statutory requirements are aimed at the effect of harm, not the motivation of the actor.

When Section 504 or Title II have been violated, plaintiffs, regardless of intent, have the right to bring a cause of action and can secure equitable or injunctive relief.[228] Courts have ordered equitable relief in the form of compensatory education,[229] occupational therapy services,[230] ongoing educational services,[231] and tuition reimbursement.[232] Further, several courts have determined that plaintiffs are not required to prove intent in order to win injunctive relief.[233] Rather, plaintiffs can win injunctive relief by demonstrating a violation of the Act.[234] As the Third Circuit recently explained, a plaintiff "need not prove deliberate indifference to obtain declaratory, injunctive, or equitable relief under the Rehabilitation Act," she need only "establish that the District is liable under the Act based on a failure

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227. *See supra* Part III (C)(2)(a) discussing prima facie case for relief under Section 504 or Title II of the ADA.

228. *Mark H.*, 513 F.3d at 935 (holding Section 504 includes an implied private right of action allowing victims of prohibited discrimination, exclusion or denial of benefits to seek the full panoply of remedies, including equitable relief and compensatory damages); *see also* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995).

229. Neena S. v. Sch. Dist. of Phila., No. CIV. A. 05-5404, 2008 WL 5273546, at *14 (E.D. Pa. Dec. 19, 2008).

230. Lower Merion Sch. Dist. v. Doe, 931 A.2d 640, 644 (Pa. 2007).

231. J.T. *ex rel.* Harvell v. Mo. State Bd. of Educ., No. 4:08CV1431RWS, 2009 WL 262094, at *7 (E.D. Mo. Feb. 4, 2009).

232. Bd. of Educ. v. F.C. *ex rel.* R.C., 2 F. Supp. 2d 637, 643 (D.N.J. 1998) (finding plaintiffs would not need to prove intent to sustain injunctive relief requiring school to pay for private tuition and transportation).

233. K.K. *ex rel.* L.K. v. Pittsburgh Pub. Sch., 590 F. App'x 148, 153 (3d Cir. 2014) ("Although K.K. need not prove deliberate indifference to obtain declaratory, injunctive, or equitable relief under the Rehabilitation Act, she must still establish that the District is liable under the Act based on a failure 'to ensure meaningful participation in educational activities and meaningful access to educational benefits.'"); Washington v. Ind. High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir. 1999); McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 460 (6th Cir. 1997); Crowder v. Kitagawa, 81 F.3d 1480, 1483–84 (9th Cir. 1996); Helen L. v. DiDario, 46 F.3d 325, 334 (3d Cir. 1995) (finding plaintiff did not need to prove intentional discrimination in a reasonable accommodations case); Norcross v. Sneed, 755 F.2d 113, 117 n.4 (8th Cir. 1985); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1385 (10th Cir. 1981); Prewitt v. U.S. Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981); *Bd. of Educ.*, 2 F. Supp. 2d at 637 (finding plaintiffs would not need to prove intent to sustain injunctive relief requiring school to pay for private tuition and transportation).

234. *See* sources cited *supra* note 233.

'to ensure meaningful participation in educational activities and meaningful access to educational benefits.'"[235] Other courts frame the issue slightly differently but acknowledge the same point: intent is not required for injunctive relief.

The Seventh Circuit, for instance, divided disability claims into different categories, writing that a plaintiff can establish violation of Section 504 or Title II with "evidence that (1) the defendant intentionally acted on the basis of the disability, (2) the defendant refused to provide a reasonable modification, or (3) the defendant's rule disproportionally impacts disabled people."[236] The important point here is that although some disability discrimination may include intent, the court rejected the notion "that liability under [Title II] must be premised on an intent to discriminate on the basis of disability."[237] Rather, the court affirmed that plaintiffs making claims under the Rehabilitation Act need not prove an impermissible intent.[238] Thus, discrimination can be demonstrated through means other than impermissible intent, such as failure to provide a reasonable accommodation or disparate impact.

Despite the plain language of statute and the foregoing precedent, some courts have required plaintiffs to prove intent, even when plaintiffs are only seeking injunctive relief.[239] This flawed analysis is largely a product of the fact that the remedies section of both statutes are intertwined with Title VI.[240] In the context of Title VI, courts have held that plaintiffs must establish intent for all violations and remedies.[241] Thus, with Title VI, the violation and remedy can potentially be collapsed. While the Section 504 and Title II remedies are connected to Title VI, the violation of the Acts is entirely distinct. The Supreme Court's holding in *Alexander v. Choate* makes this distinction clear.[242]

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235. Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 (3d Cir. 2012).

236. *Washington*, 181 F.3d at 847 (adopting rule from *McPherson*, 119 F.3d at 460).

237. *Id.* at 846.

238. *Id.*

239. M.P. *ex rel.* K. & D.P. v. Indep. Sch. Dist. No. 721, 439 F.3d 865, 867 (8th Cir. 2006) (finding that plaintiff "must also show bad faith or gross misjudgment to make a successful Section 504 violation claim").

240. The ADA states that its remedies shall be those contained in Section 505 of the Rehabilitation Act. 42 U.S.C. § 12133 (2012). Section 505 of the Rehabilitation Act states that Section 504 remedies are coextensive with those remedies in Title VI. Based on this statutory language, the Supreme Court has stated, "the remedies for violations of [Title II] of the ADA and Section 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action under [Title VI]." Barnes v. Gorman, 536 U.S. 181, 185 (2002).

241. Alexander v. Sandoval, 532 U.S. 275, 282–83 (2001).

242. Alexander v. Choate, 469 U.S. 287, 309 (1985). In *Alexander v. Choate*, a plaintiff class of Medicaid recipients sued the State of Tennessee claiming the State's proposed legislation to

In *Choate*, the Court acknowledged that Title VI jurisprudence established an intent requirement. That is, plaintiff's seeking to establish a violation of Title VI's prohibition on race discrimination must prove that the defendant's actions were motivated by race. However, the Court declined to extend Title VI's intent requirement to Section 504.[243] To the contrary, the Court indicated that Section 504's prohibition on disability discrimination extended to some, unintentional actions—or disparate impacts.[244] The Court emphasized that "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent."[245] Moreover, when Section 504 was first enacted Title VI was widely interpreted as prohibiting unintentional actions or disparate impacts. Had Congress wanted to limit Section 504's reach to only intentional actions, it would have explicitly written that into the law rather than incorporate a law that at the time was interpreted as prohibiting unintentional acts.[246] Given the issues before the Court, it did not, however, establish a bright line test to determine which instances of disparate impact were prohibited. It only rejected the direct application of Title VI's intent jurisprudence to limit Section 504's reach.[247]

Choate's analysis of Section 504's prohibition on unintentional acts of discrimination remains unchanged. Lower courts miss the import of *Choate* and focus entirely on the fact Section 504 is modeled after Title VI in important structural respects. But *Choate*'s analysis aside, the nature of disability discrimination is distinct from race discrimination and, thus, Title VI holdings cannot be blindly carried over to Section 504. Although Section 504's language is almost identical to Title VI's language, legislative history reveals that Congress intended the statutes to address two very different types of discrimination.

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reduce the number of inpatient hospital days that Medicaid would cover was a violation of Section 504. *Id.* at 287. The issue before the court was whether Section 504 prohibited unintentional acts that had the effect of discrimination on the disabled, referred to as "disparate impact." *Id.* at 289.

243. The Court declined to extend Title VI intent to Section 504 for three reasons: 1) unlike Title VI, section 504 clearly prohibits some forms of disparate impact; 2) legal underpinnings related to the Title VI intent analysis have no bearing on Section 504 analysis; 3) when Section 504 was modeled after Title VI, Title VI was widely interpreted as barring actions with disparate impact. *Id.* at 293–98. Had Congress wanted Section 504 to be limited to only intentional discrimination and not disparate impact, it would have expressly written that language into the act. *Id.*; *see also* Weber, *supra* note 220, at 1441.

244. *Choate*, 469 U.S. at 299.

245. *Id.* at 296–97.

246. *Id.* at 294 n.11; *see also* Weber, *supra* note 220, at 1441.

247. *Choate*, 469 U.S. at 299.

Section 504 was a response to "previous societal neglect" intended to remedy "the country's 'shameful oversights' which caused the handicapped to live among society 'shunted aside, hidden and ignored.'"[248] Unlike race discrimination, the emphasis in disability discrimination was on benign neglect borne from ignorance rather than ill will. Decades later, Title II of the ADA sought to extend those same concerns beyond government entities receiving federal financial assistance to all public entities.[249] The clearest indication of Congress's intent to address not just intentional discrimination, but neglect is the fact that both the ADA and Rehabilitation Act affirmatively require public entities to make reasonable accommodations in order to ensure equal access by the disabled.[250] Covered entities are required to make these accommodations and are liable for the failure to do so regardless of whether or not there was an intent to discriminate against the disabled.[251] For example, the reasonable accommodations mandate requires that schools ensure that physically disabled students have access to classrooms. When determining whether or not a school must make changes in order to allow equal access, intent is not a factor. Thus, a reviewing court does not need to hear any evidence regarding whether or not the school intended to prevent access, but need only worry about whether the disabled student does in fact have access, and if not, does the school's decision to not accommodate fall under the limits allowed by the statutes.[252]

In sum, that the statutory text of Section 504 and Title II incorporate the remedies of Title VI tells us nothing of what activities Section 504 and Title

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248. *Id.* at 296.

249. 42 U.S.C. § 12101(b)(1) (1990).

250. Title II of the ADA directs the federal government to promulgate regulations to implement the ADA. 42 U.S.C. § 12134. The implementing regulations prohibit disability discrimination and require public entities to make reasonable accommodations for disabled persons. 28 C.F.R. § 35.130(a) (2015) ("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."); 28 C.F.R. § 35.130(b)(7). Similarly, section 504 regulations state "A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program." 28 C.F.R. § 41.53.

251. *See, e.g.*, Olmstead v. L.C., 527 U.S. 581, 597 (1999) (upholding finding of discrimination under the ADA against mental patients who were institutionalized rather than given community placements as failure to reasonably accommodate despite lack of intent to discriminate on part of state agency); *see also* Helen L. v. DiDario, 46 F.3d 325, 333 (3d Cir. 1995) (finding plaintiff did not need to prove intentional discrimination in a reasonable accommodations case where issue was whether plaintiff should be allowed to receive in-home care).

252. *Id.*

II prohibit. Congressional intent, *Choate*, and numerous lower court decisions establish that Section 504 and Title II prohibit unintentional acts. The incorporation of Title IV remedies simply means that plaintiffs can sue for those violations and enjoin prohibited acts when necessary. Those courts holding or suggesting otherwise simply confuse statutory violations with statutory remedies.

IV. DRAWING A FOUL: FINDING A REMEDY FOR MISIDENTIFICATION UNDER SECTION 504 AND TITLE II OF THE ADA

A. The Promise of Injunctive Remedies under Section 504 and Title II of the ADA

Litigation around misidentified children has largely focused on compensatory relief[253]; however, with the right class of plaintiffs, injunctive relief could be a powerful tool toward curbing misidentification of minorities. A misidentified student should be able to state a successful claim for injunctive relief. Such a student could make a *prima facie* case by showing: 1) she was "regarded as" having a disability, 2) she was otherwise qualified to participate in school, 3) she was denied the benefits of the educational program or otherwise subjected to discrimination because of her perceived disabilities.[254] A misidentified student is "regarded as" disabled if she has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[255] Given this broad language, the misidentified student clearly fits within the "regarded as" category. The student's entire claim centers around the fact that the school treated her differently due to a perceived disability. The misidentified student will also easily be able to demonstrate that she was qualified to participate in school. Finally, the student must prove she was denied benefits of the educational program or subject to discrimination on the basis of her disability. Facts such as being scheduled for lower-achieving courses, being denied the opportunity for regular education courses and any other different treatment stemming from her perceived disability will help meet this prong. When analyzing such a case, a court's focus should be on the effect of a school's actions, rather

253. *See* sources cited *supra* note 222.

254. To state a claim under section 504, they would also need to establish that the school received federal funding. 29 U.S.C. § 794(a) (2012).

255. 42 U.S.C. § 12102(3)(A)(2012).

than intent or motive. Did the school's actions have the effect of denying plaintiff benefits of a program based on a perceived disability? If so, the plaintiff should be entitled to a remedy.

Once that showing is made, a court would have broad authority to fashion appropriate remedies under either statute.[256] A likely remedy for an individual student may be an award of compensatory educational services meant to bring the student up to speed on material he or she may have missed due to inappropriate placement in low achieving courses. A likely remedy for a class of misidentified students may be enjoining the school from continuing to use the same identification and evaluation procedures that misidentified the students to begin with, and requiring the school to adopt new evaluation protocols to guard against misidentification of minority students with disabilities. Such a remedy could have far reaching effects for minority students experiencing misidentification.

Systemically reforming the identification process to one that is more accurate and unbiased would likely require class based claims, rather than individual claims. While both would need to establish the same straightforward *prima facie* case, certifying the class itself may present significant challenges. In particular, identifying and establishing the class of plaintiffs will be difficult because the class is premised on a group of children who are not actually disabled but may currently believe they are. In other words, they are unaware of their erroneous misidentification as "disabled." Further, meeting the "commonality" requirement—that there are "questions of law or fact common to the class" has become much more difficult in light of recent Supreme Court ruling articulating a "heightened commonality" standard.[257]

To date, class actions brought by minority students claiming misidentification have also contained claims of mislabeling. That is, certain plaintiffs concede that they have disabilities, but allege the school mislabeled them with the wrong disability category resulting in unlawful discrimination and educational harm.[258] In *Mrs. M. v. Bridgeport Board of Education*, a class

256. The Supreme Court has articulated the general rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 70–71 (1992).

257. *See* A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 442 (2013).

258. Although the IDEA is not concerned about category, if plaintiff can demonstrate she is not receiving appropriate services due to a mislabeled disability, she may be able to successfully state a claim for injunctive relief under either the IDEA or section 504 and the ADA. *See supra* Section II.A.2; Bell v. Bd. of Educ. of Albuquerque Pub. Sch., No. CIV 06-1137 JB/ACT, 2008 WL 5991062 (D.N.M. Nov. 28, 2008).

of minority students brought suit under Section 504, the ADA, and the Equal-Protection Clause asserting that the school district engaged in the practice of over-identifying Latino students as mentally retarded at a rate of over three times the national average and subsequently failing to provide these students with an appropriate education.[259] The Connecticut District Court dismissed the claims of the class for failure to exhaust administrative claims under the IDEA prior to asserting federal claims.[260] Plaintiffs with claims of both misidentification and mislabeling were required to exhaust remedies under the IDEA prior to bringing Section 504 and Title II claims, unless they meet one of the exceptions to the exhaustion requirement. The IDEA requires plaintiffs to first exhaust the state administrative remedies provided under the IDEA before seeking "remedies available under the Constitution, [S]ection 504, the ADA or other federal laws protecting the rights of children with disabilities."[261] The plaintiffs in the Connecticut case failed to meet one of the exceptions to exhaustion and thus, their claim failed.[262] The court held that plaintiffs claim of illegal over-identification ultimately could be remedied individually through IDEA's administrative process.[263] "Although the plaintiffs in this case have alleged that the [School District] engages in a pattern and practice of illegally over-identifying minority school children as mentally retarded, such a pattern or practice is subject to review by [sic] hearing officers on a case-by-case basis."[264]

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259. Mrs. M. v. Bridgeport Bd. of Educ., 96 F. Supp. 2d 124, 127 (D. Conn. 2000).

260. *Id.*

261. 20 U.S.C. § 1415(l) (2012). "[B]efore the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." *Id.*

262. "The dispute over exhaustion reduces to one issue: whether there is a meaningful administrative enforcement mechanism for the vindication of personal rights . . . . It is a well-established principle of administrative law that exhaustion is not required if the only available administrative remedy is plainly inadequate." Riley v. Ambach, 668 F.2d 635, 641 (2d Cir. 1981). One court summarized the recognized exceptions to exhaustion as follows: exhaustion is not required when "(1) it would be futile to use the due process procedures [required by the IDEA] . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; [or] (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)." Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987).

263. "[T]he Court determines that the plaintiffs' complaint in essence presents a challenge to the identification decisions made by the BBE with respect to certain children and not to the actual framework under which the identification decisions were made. In other words, their challenge really is to the *substantive determinations* reached by the BBE concerning certain children, not to the structure of the system under which the identification was made." *Mrs. M.*, 96 F. Supp. 2d at 133.

264. *Mrs. M.*, 96 F. Supp. 2d at 130–31.

Fortunately, a class consisting only of students who were misidentified for disabilities when they had none, would not be bound by IDEA's administrative exhaustion requirement. Since courts have held that misidentified students, by virtue of not being "children with disabilities" have no right to invoke IDEA's procedural protections, they could proceed directly with Section 504 and Title II claims.[265] Based on this reasoning, it would seem that a class of minority students seeking to challenge identification procedures under Section 504 and the ADA may have a strong chance of successfully acquiring injunctive relief. And injunctive relief, more than any other remedy, offers the best chance of improving the evaluation process. This approach, however, has not taken hold, primarily for practical reasons. To date, many of the claims of misidentification have not been brought or heard by courts until after a student has already graduated from high school. At that point, remedial services offered by the school are not useful. Thus, these plaintiffs ask for compensatory damages. Moreover, because compensatory damages are generally thought to be unavailable under the IDEA, but are clearly permitted by Section 504 and the ADA, these claims have all been funneled solely through Section 504 and the ADA.[266] For these individual plaintiffs, monetary damages are clearly important, but they are not necessarily important to a broader and more impactful remedy of injunctive relief for a class of minority students. If the goal is systemic reform rather than individual remedies, the best strategy would be to avoid the issue of compensatory damages altogether. However, given the difficulties establishing an appropriate class, individual cases for compensatory damages may be the only viable option. Such individual claims, in greater numbers, could also incentivize schools toward reforming their identification processes as a way to avoid the potential costs associated with liability. Thus, the following section will analyze misidentification cases seeking compensatory damages.

B. Compensatory Damages and the Intent Requirement

While the question of the general liability standard for Section 504 and the ADA and the subsequent availability of injunctive relief should be straightforward, the question of the appropriate standard for compensatory

265. *See supra* discussion in Part III.A.

266. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 256 (3d Cir. 2014) *cert. denied sub nom.* Allston v. Lower Merion Sch. Dist., 135 S. Ct. 1738 (2015); A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194 (3d Cir. 2013); S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013).

damages is more complex and less certain. Here the question is not simply whether the defendant must stop violating the statute and structure its education program to fix the discrimination, the question is whether the defendant might also be required to pay a plaintiff for the harm it caused. On this question, most courts hold that plaintiffs must establish intent to receive compensatory damages. The rationale for this holding rests on two distinct points 1) the incorporation of Title VI remedies into Section 504 and by extension Title II of the ADA and 2) notice requirements attached to spending clause legislation. Each will be discussed in turn.

1. The Long Arm of the Title VI Intent Doctrine

To date, most courts interpreting Section 504 and Title II have held that plaintiffs seeking compensatory damages under either statute must prove intent.[267] That is, they must demonstrate that the defendant intended to discriminate against the plaintiff because of their disability. Interestingly, Congress did not clearly require "intent" to establish a violation in the language of either statute. As stated above, Congress did not clearly define remedies under the ADA or Section 504, but rather incorporated remedies contained in Title VI. Consequently, courts have incorporated Title VI's intent requirement into Section 504 and the ADA. However, several scholars have criticized this analysis and for good reason.[268] As discussed above, the Supreme Court declined to limit Section 504 to intentional acts of discrimination, noting the differences between Title VI and Section 504 as well as the distinctions between race and disability discrimination.[269] Unfortunately, lower courts analyzing Section 504 and ADA claims for compensatory damages give weight to the language contained in Section 504 which incorporates remedies of Title VI without reaching back to *Choate* for its cautionary language warning against conflating Title VI and Section 504.

Rather than relying on *Choate*, they look to another Supreme Court case, *Guardians Association v. Civil Service Commission of New York City*, for the proposition that Title VI is limited to acts of intentional discrimination.[270] In other words, they employ the following analysis. Section 504 incorporates by reference the remedies contained in Title VI. Title VI is limited to acts of intentional discrimination; therefore, Section 504 is limited to acts of

267. *See, e.g.*, Blunt v. Lower Merion Sch. Dist., 826 F. Supp. 2d 749, 759 (2011).

268. Golden & Buhai, *supra* note 220, at 1135–36; Weber, *supra* note 220, at 1419.

269. See *supra* Section III.D. and accompanying discussion of *Alexander v. Choate*, 469 U.S. 287 (1985).

270. Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 597 (1983).

intentional discrimination.[271] This analysis fails to incorporate the careful analysis in *Choate* which clearly states that "*Guardians* . . . does not support [the] blanket proposition that federal law proscribes only intentional discrimination against the *handicapped*."[272] Rather the Court acknowledged the differences in disability discrimination and race discrimination and with that the differences in the legislation enacted to combat each one. Professor Mark Weber clearly explains the misapplication as follows: "*Guardians Association* barred monetary relief for disparate impact discrimination because the statute—Title VI itself—outlawed only intentional discrimination. Its holding is not relevant when a statute [Section 504], as authoritatively interpreted by its regulations, forbids disparate impact discrimination."[273]

The other Supreme Court case directly exploring the reach of Section 504 and ADA remedies is *Barnes v. Gorman*.[274] In *Barnes*, the Supreme Court held that punitive damages may not be awarded in private suits brought under the ADA and Section 504 of the Rehabilitation Act.[275] The Court's discussion focused on the scope of Spending Clause legislation. It held that Spending-Clause legislation only allows for relief if the recipient of federal funding is on notice that, by accepting the funds, it exposes itself to certain liability.[276] The Court acknowledged that "a recipient of federal funds is nevertheless subject to suit for compensatory damages" as they are traditionally available in breach of contract claims. Consequently, the Court held that since the remedies provisions of Section 504 and Title II of the ADA are tied to Title VI, which is Spending-Clause legislation, the former are limited to compensatory damages and do not allow for punitive damages. *Barnes* did not over-rule *Choate*'s previous holding regarding the scope of Section 504's prohibited conduct, nor did it speak to the issue of intent at all. Rather, the Court in *Barnes* was focused on the scope of remedies and the unavailability of punitive damages for spending clause legislation.[277] Thus, *Barnes* stands for the proposition that remedies of Spending-Clause legislation are limited

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271. *See generally* S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013).

272. Alexander v. Choate, 469 U.S. 287, 294 (1985) (emphasis added).

273. Weber, *supra* note 220, at 1447.

274. Barnes v. Gorman, 536 U.S. 181 (2002).

275. *Id.* at 189.

276. In *Barnes*, the court made clear that "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those traditionally available in breach of contract suits." *Id.* at 187.

277. *Id.*

to remedies traditionally available in breach of contract suits, which excludes punitive damages.[278]

Despite the analysis set forth above, all courts of appeal that have considered the issue of damages under Section 504 and the ADA have held that compensatory damages are not available without a showing of intentional discrimination.[279] Recent examples can be seen in several cases before the Third Circuit where plaintiffs brought claims of misidentification under both Section 504 and the ADA but were dismissed for failure to plead facts regarding intentional discrimination. Two of those cases are discussed below.

S.H. was an 18 year old African American female who was classified as learning disabled in her fifth grade year while attending school in Lower Merion School District.[280] She was subsequently given learning supports in a resource room as well as itinerant speech and language therapy.[281] S.H. continued to receive special education services into high school and these services at times conflicted with regular education courses.[282] Although S.H.'s mother was an active participant in IEP meetings and approved the special education classes, S.H., herself, did not believe she required special education courses and objected to the classes.[283] In her tenth-grade year, S.H.'s mother requested and was granted an Independent Educational Evaluation by a nationally certified school psychologist who was not affiliated with the school district.[284] This independent expert determined that "S.H.'s designation as learning disabled was, and always had been, erroneous."[285] Following the independent expert's report, S.H.'s mother requested that S.H. be removed from special education which the school granted.[286] S.H. subsequently filed a suit in federal court alleging: 1) the school district violated IDEA's mandate of accurate identifications of children with disabilities, 2) the school district violated Section 504 and the ADA by erroneously identifying S.H. as a student with disabilities and

278. Weber, *supra* note 220.

279. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 261 (3d Cir. 2013); T.W. *ex rel.* Wilson v. Sch. Bd. of Seminole Cty., 610 F.3d 588, 603–04 (11th Cir. 2010); Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 275 (2d Cir. 2009); Mark H. v. Lemahieu, 513 F.3d 922, 938 (9th Cir. 2008); Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003).

280. *S.H.*, 729 F.3d at 252–53.

281. *Id.*

282. *Id.* at 255.

283. *Id.* at 251.

284. *Id.* at 254.

285. *Id.* The expert determined that the initial evaluation performed by the school psychologist contained data that did not support the school's conclusion that S.H. had a learning disability. *Id.*

286. *Id.* at 255.

discriminating against her because of her perceived disability.[287] S.H. sought compensatory education and monetary damages in the amount of $127,010.[288]

The district court dismissed the IDEA claim, holding that because S.H. asserted that she is not disabled, she is not entitled to protection under the IDEA.[289] The court then granted summary judgement in the School District's favor for the Section 504 and ADA claims, holding that plaintiff must be able to show evidence of intentional discrimination to sustain a claim for compensatory damages under Section 504 or the ADA.[290] The court characterized S.H.'s misidentification as "unfortunate," but ultimately held that "plaintiffs have not come forward with any evidence which would allow a reasonable jury to find that the School District intentionally discriminated against S.H. when it regarded her as disabled."[291] In a case of first impression, the Third Circuit affirmed, stating, "[w]hile Appellants' arguments are emotionally compelling, they are ultimately to no avail."[292]

Like S.H., A.G. was an eighteen-year-old African-American female who was classified as disabled in elementary school under the category of "specific learning disability" and later in high school under the category of "Other Health Impairment."[293] Due to this classification, she was placed in special-education classes which, at times, preempted her from taking regular courses. In her senior year of high school, A.G. filed a due process claim under the IDEA alleging she was not disabled and that the school erroneously identified her as such through incomplete and inaccurate evaluations which resulted in a denial of FAPE.[294] And, similar to S.H., A.G. was told she had no standing to invoke the IDEA's procedural protections, because she was not a "child with a disability."[295] A.G. subsequently filed a claim in district court alleging that the school district violated the Title II of the ADA and Section 504 when it erroneously identified her as a student with a disability,

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287. S.H. initially filed a due process request for an administrative hearing through the IDEA, but this request was dismissed since the hearing officer determined that S.H. was not a "child with a disability" and thus not entitled to IDEA protections. *Id.*

288. Plaintiff's expert witness calculated damages by including two additional years of college tuition, 50 hours of psychotherapy, and 600 hours of tutoring. *Id.*

289. Durrell *ex rel.* S.H. v. Lower Merion Sch. Dist., No. 10-6070, 2011 WL 2582147, at *3 (E.D. Pa. June 30, 2011).

290. Durrell *ex rel.* S.H. v. Lower Merion Sch. Dist., No. 10-6070, 2012 WL 2953956, at *8 (E.D. Pa. July 19, 2012).

291. *Id.*

292. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 257 (3d Cir. 2013).

293. A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194, 196–97 (3d Cir. 2013).

294. *Id.* at 200.

295. Brief of Appellant, A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194 (3d Cir. 2013) (No. 12-4029), 2013 WL 1623568, at *5.

segregated her from the regular education classroom, and thus deprived her of access to regular education.[296] The defendant school district filed a motion for summary judgment, which was granted by the district court, and subsequently affirmed by the Third Circuit.

In both cases, the Third Circuit imposed an intent standard on the plaintiffs' claims for compensatory damages under Section 504 and Title II of the ADA. In each case, the Court relied on the text of Section 504, incorporating remedies in Title VI, as well as the Supreme Court's decisions in *Guardians* and *Barnes* as the basis for requiring intent in order to win compensatory damages.[297] The court cited to *Barnes* for confirmation that Section 504 incorporated remedies available in Title VI and cited to *Guardians* for the proposition that individuals who brought suit under Title VI could not recover compensatory relief in the absence of a showing of intentional discrimination.[298] Based on this, the court extended Title VI's intent requirement to Section 504 and Title II of the ADA.[299]

This analysis, however, again treats Title VI, Section 504, and Title II of the ADA as synonymous in all respects, when they are not. *Choate* explicitly warned against doing exactly what the Third Circuit did: applying the *Guardians* intent analysis to Section 504. An intent standard could potentially be appropriate for Section 504 damage claims, but if it is, it is not because of *Guardians* or any other Title VI precedent. Section 504's reference to Title VI's remedies simply makes individual causes of action permissible and injunctive and compensatory damages available. It does not make the definition of prohibited and compensable disability discrimination dependent on the definition of prohibited and compensable racial discrimination. When courts, such as the Third Circuit, make this logical leap they cement an unnecessary roadblock in the path of misidentified students seeking compensatory relief under Section 504 and the ADA.

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296. Complaint at 6–7, A.G. v. Lower Merion Sch. Dist., No. 11-5025, 2012 WL 4473244 (E.D. Pa. Sept. 28, 2012) (No. 11-5025), 2011 WL 9211059.

297. *S.H.*, 729 F.3d at 261–63 (citing Barnes v. Gorman, 536 U.S. 181, 185 (2002); Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 597 (1983)); *A.G.*, 542 F. App'x at 198.

298. *S.H.*, 729 F.3d at 261.

299. *Id.* ("We therefore take the next logical step and hold that claims for compensatory damages under § 504 of the RA and § 202 of the ADA also require a finding of intentional discrimination.")

2. The Spending Clause Quagmire

If some level of intent is required for compensatory damages under Section 504, the more likely rationale would be based on Spending Clause doctrine. The Supreme Court has held that legislation enacted pursuant to Congress's spending clause powers is much like the nature of a contract, the State agrees to comply with federal statutory terms in return for federal funds.[300]

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.[301]

In other words, Congress cannot impose ambiguous obligations on the state. The state must know about potential liability that arises upon receipt of funds. Thus, the Court has held that to succeed in an implied private right of action for compensatory damages under spending clause legislation, a plaintiff must prove that the defendant was on notice of the statute's prohibitions, but violated them anyway.[302]

Section 504 is spending clause legislation and thus may be subject to spending clause jurisprudence.[303] According to the Supreme Court, when Congress legislates under its spending clause authority, it must do so "unambiguously."[304] In other words, Congress must clearly set forth conditions attached to federal money and states must "voluntarily and knowingly accept[] the terms of the 'contract.'"[305] When a statute contains an implied private right of action, such as Title VI and by extension Section 504, the Court has held that states cannot realistically predict that they would be subject to liability.[306] Thus, to succeed on an implied private right of action, plaintiffs must prove intent on the part of the defendant.[307] This requirement ensures that recipient, in deliberately violating the statute, has notice that this conduct exposes him to liability.[308] The Supreme Court has held that

300. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).
301. *Id.* (citation omitted).
302. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 74 (1992); *Pennhurst*, 451 U.S. at 25.
303. Barnes v. Gorman, 536 U.S. 181, 185–86 (2002).
304. *Id.* at 186.
305. *Id.*
306. *Pennhurst*, 451 U.S. at 25; Buhai & Golden, *supra* note 220.
307. *Pennhurst*, 451 U.S. at 51–52.
308. *Id.*; *see also* Buhai & Golden, *supra* note 220.

"deliberate indifference" to a statute's prohibitions is enough to satisfy the notice requirement.[309]

Courts requiring an intent standard do so, in part, to ensure notice pursuant to Spending Clause doctrine.[310] However, per the Supreme Court in *Choate*, Section 504, unlike Title VI and Title IX, prohibits a broader form of discrimination which includes discriminatory effects such as lack of meaningful access to a benefit.[311] Thus, a state is on notice when accepting funds that it will be liable for unintentional discrimination. To put it differently, the state was aware that when it agreed to the "terms" of Section 504, it agreed to be on the hook for some unintentional forms of discrimination. This unintentional discrimination is a violation of the statute. Thus, the question is not whether the discrimination was intentional, but whether the defendant was aware that it engaged in prohibited unintentional discrimination and persisted in it anyway. The simplest example involves reasonable accommodations. Section 504 clearly requires that recipients make reasonable accommodations.[312] Courts hearing reasonable-accommodations claims have held that plaintiffs do not need to prove intent to win on a reasonable accodations claim.[313] The act of not providing the accommodation is a prohibited form of discrimination under the statute. This analysis reinforces the Supreme Court's spending clause jurisprudence. If the state "voluntarily and knowingly" agreed to abide by a statute prohibiting unintentional discrimination, then requiring plaintiff to prove an intentional violation is unnecessary.

The difficulty arises in regard to defining the scope of unintentional discrimination prohibited by Section 504. If that is not clear, it is more difficult to conclude that a defendant has knowledge of a violation. Cases of failures to reasonably accommodate are clearly within the scope, but other types of disparate impacts are not so easily defined. While *Choate* indicates that some disparate impacts violate Section 504, it is careful to indicate that not all disparate impacts are violations.[314] Thus, the key to meeting any potential intentional violation or notice standard for compensatory damages under Section 504 would be some relatively bright line rules regarding the

309. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (finding that deliberate indifference was required to establish claim for compensatory damages in Title IX case in the absence of actual notice on part of school district to allegations of teacher's sexual harassment of student).

310. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 264 (3d Cir. 2013).

311. Alexander v. Choate, 469 U.S. 287, 292 (1985).

312. Weber, *supra* note 226, at 618.

313. Bartlett v. N.Y. Dep't of Law Exam'rs, 156 F.3d 321, 330 (2d Cir. 1998).

314. *Choate*, 469 U.S. at 299.

disparate impacts and unintentional violations that defendants are obligated to eliminate.

This same line of reasoning, however, does not follow for the ADA. The ADA is not Spending Clause legislation. Rather, the ADA was enacted pursuant to Section 5 of the Fourteenth Amendment and is mandatory on states regardless of their receipt of federal funds.[315] This distinction makes the intent and notice of disparate impact concerns irrelevant. The only question would be whether the defendant has engaged in prohibited activity under the ADA, which does not require any intent, only evidence of a violation of the terms of the statute.[316]

In sum, the only instance in which intent is even arguably required is when a plaintiff seeks compensatory damages. But even there, intent is not obviously required. Title VI precedent does not require this result in regard to Section 504 or the ADA. At best, Spending Clause principles require the defendant to knowingly engage in the violation of the statute, but as demonstrated throughout, a violation of Section 504 and the ADA can occur without intent. In other words, at most, Spending Clause doctrine requires that a defendant engage in activity that it knows violates the statute, such as denial of reasonable accommodations. But again, a knowing violation would be unnecessary to establish in regard to ADA claims because the ADA is not Spending Clause legislation.

3. Current Intent Standards for Compensatory Damages

Assuming that intent may sometimes be required when plaintiffs seek compensatory damages at least with respect to Section 504, the question remains as to what is the appropriate intent standard. It is a mistake to assume that intent means the same thing across discrimination paradigms. As discussed, race discrimination and disability discrimination are distinct. Both Congress and courts have acknowledged that disability discrimination is more often the product of benign neglect or ignorance than ill will.[317] Moving beyond the motivation behind discrimination, there are several other important differences as well. First, unlike race, disability can actually affect one's ability to perform a job or participate in school.[318] Race, on the other

315. 42 U.S.C. § 12101(b)(4) (2012) (stating the ADA's purpose is "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities"); *see also* Buhai & Golden, *supra* note 220, at 1142.

316. Buhai & Golden, *supra* note 220, at 1142.

317. *Choate*, 469 U.S. at 299.

318. Buhai & Golden, *supra* note 220, at 1129.

hand, is not itself a relevant factor in one's ability to perform tasks or participate equally in school. Second, one's disability may not be as obvious or readily apparent as one's race or gender.[319] Third, Section 504 prohibits actions that have discriminatory effects, whereas Title VI is limited to intentional discrimination.[320]

Finally, and perhaps most importantly, both disability rights statutes require states to take affirmative actions in order to fulfill the anti-discrimination mandate. This affirmative obligation comes in more than one form. One obligation is to provide "reasonable accommodations."[321] Another, in the education context, is Section 504's mandate that schools provide "appropriate education" defined as "meeting the educational needs of disabled students as adequately as the needs of nondisabled students."[322] Title VI has no comparative obligations. Thus, disability discrimination can mean failing to carry out one's affirmative obligation to provide reasonable accommodations or appropriate education, whereas race discrimination is typically construed as intentionally choosing to inflict harm or deny benefits based on race. This affirmative obligation distinction becomes essential in determining an appropriate intent standard that triggers compensatory damages for violations of Section 504 and Title II of the ADA.

Currently, courts lack any uniform approach to defining intent requirements in disability, but most agree that the test is something less than the discriminatory animus that is generally required to establish intent under Title VI. The majority of circuits hearing Section 504 and ADA cases for compensatory damages require plaintiffs to demonstrate intent in one of two ways, either by establishing "deliberate indifference" or "bad faith, gross misjudgment" on the part of the defendant. Only one circuit has held that the higher standard of discriminatory animus is required.[323] Each will be discussed in detail below.

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319. *See* Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399 (2001) (discussing the distinctions in race or gender discrimination as opposed to disability discrimination. In the first two categories, people are discriminated against because of their membership in a group; however, people with disabilities are not as readily identifiable as one uniform group and can experience individualized discrimination based on a typical type of disability.).

320. *See supra* Section III.C.3.

321. Weber, *supra* note 226, at 618.

322. 34 C.F.R. § 104.33(a)(b) (2010).

323. Carter v. Orleans Par. Pub. Sch., 725 F.2d 261 (5th Cir. 1984). *But see* Nieves–Marquez v. Puerto Rico, 353 F.3d 108, 126 (1st Cir. 2003) (hinting that intent as required under *Sandoval*, would be imposed in that circuit on Section 504 claims for compensatory damages).

Discriminatory animus is the most stringent standard of intent. It requires the plaintiff to prove that defendant acted with "prejudice, spite or ill will."[324] It is the standard the Supreme Court has imposed on plaintiffs seeking to establish violations of Title VI.[325] In such cases, plaintiff must prove that defendant's actions were motivated by race. "It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of' its adverse effects upon an identifiable group."[326] The Fifth Circuit found that discriminatory animus is the appropriate standard for compensatory damages in Section 504 and ADA cases and relied on Title VI as the basis for imposing this standard.[327] Most other courts of appeal have declined to apply the animus standard because of the fundamental differences between race discrimination and disability discrimination. Instead, they opt for different standards which still require plaintiffs prove "something more" than a mere violation of Section 504 or the ADA, but do not force plaintiffs to demonstrate ill will.

A second, slightly-lower intent standard imposed by several circuits is "bad faith or gross misjudgment." Here, plaintiff must prove that defendant grossly departed from acceptable professional standards when seeking compensatory damages.[328] Courts using this standard generally require a showing of aggravated circumstances beyond a mere violation of the requirements of Section 504 or the ADA.[329] Generally negligence or statutory noncompliance in and of themselves do not constitute bad faith or gross misjudgment.[330] However, evidence of ill will or animosity is not necessarily required to meet the standard.[331] The Eighth Circuit first raised this standard

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324. Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012).

325. *See supra* Section III.B. and accompanying discussion of Title VI.

326. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

327. *Carter*, 725 F.2d at 264.

328. Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982).

329. B.M. *ex rel.* Miller v. S. Callaway R-II Sch. Dist., 732 F.3d 882, 887 (8th Cir. 2013); *see also* Sellers *ex rel.* Sellers v. Sch. Bd. of City of Manassas, Va., 141 F.3d 524, 529 (4th Cir. 1998).

330. *B.M.*, 732 F.3d at 887.

331. "Under some circumstances, notice of a student's disability coupled with delay in implementing accommodations can show bad faith or gross misjudgment." *B.M.*, 732 F.3d at 888; *see also* M.P. *ex rel.* K. v. Indep. Sch. Dist. No. 721, 326 F.3d 975, 982–83 (8th Cir.2003) (parents of a child with schizophrenia who had received accommodations alleged a Section 504 violation when the school failed to take appropriate steps to address harassment by other students once his disability was made public, the court found that summary judgment was inappropriate because bad faith or gross misjudgment could be inferred from the school's failure to return the mother's phone calls to discuss the harassment, its offer of inadequate accommodations to address the harassment, and the rescission of an offer to pay for transportation costs).

in *Monahan v. Nebraska*,[332] a case concerning the provision of special education services.[333] There, the court stated in dicta, "[m]anifestly, in order to show violation of the Rehabilitation Act, *something more* than a mere failure to provide the 'free appropriate education' required by the [IDEA] must be shown."[334] However, courts should be exceedingly cautious about continuing to impose this standard in the context of education cases as several interceding legislative and judicial developments call into question its continued appropriateness.

First, as Professor Mark Weber aptly points out, the *Monahan* language originated at a time when courts were trying to reconcile the IDEA and Section 504 due to a belief that the IDEA preempted remedies available in Section 504.[335] At that time, courts felt that plaintiffs could not use the same facts to establish violations of both the IDEA and Section 504. Thus, in order to state a case under Section 504, courts required plaintiffs to prove "something more" than violations of the IDEA.[336] In 1986, Congress amended the IDEA to include language clarifying that the IDEA should not be read to "restrict or limit the rights, procedures, and remedies available under the Constitution, ADA, [Section 504], or other Federal laws protecting the rights of children with disabilities . . . ."[337] Consequently, the need to harmonize Section 504 with the IDEA became moot as plaintiffs were expressly permitted to seek redress under both statutes for the same underlying allegations. Second, some courts have called into question *Monahan*'s continued relevance in light of the Supreme Court's clarity in *Choate* affirming that Section 504 does require reasonable accommodations and prohibits some forms of unintentional discrimination.[338] They correctly

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332. Monahan v. Nebraska, 687 F.2d 1164, 1170 (8th Cir. 1982).

333. *Id.* at 1167.

334. *Id.* at 1170 (emphasis added).

335. Weber, *supra* note 220, at 1456–58.

336. *Id.* at 1458.

337. 20 U.S.C. § 1415(l) (2012). The section does impose an exhaustion requirement when a plaintiff is seeking relief that is the same under either statute. In those cases, plaintiff must exhaust IDEA remedies before filing suit under another federal statute based on the same facts. However, as most courts have found that the IDEA does not allow for compensatory damages, plaintiffs seeking such damages are generally able to bring an IDEA claim at the as well as Section 504 and ADA claims together. *See generally* Sellers *ex rel.* Sellers v. Sch. Bd. of City of Manassas, Va., 141 F.3d 524 (4th Cir. 1998); Pasachoff, *supra* note 107.

338. In *A.P.* ex rel. *Peterson v. Anoka-Hennepin Independent School District No. 11*, the court declined to follow the "bad faith or gross misjudgment" standard in a reasonable accommodations claim for compensatory damages, calling into question its continued relevancy. 538 F. Supp. 2d 1125, 1145 (D. Minn. 2008). The court pointed out that *Monahan* relied on language from a previous Supreme Court case, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), asserting Section 504 is not "an affirmative-action statute." *Id.* at 1146. The

point out that the *Monahan* standard was developed at a time when many thought that Section 504 did not necessarily mandate affirmative action in the form of reasonable accommodations.[339] It has since become clear that Section 504 does require states to take affirmative actions in the form of reasonable accommodations.[340] Finally, since *Monahan*, new jurisprudence surrounding Spending Clause legislation has developed. At the heart is the Supreme Court's holding that when Congress legislates via its powers under the Spending Clause, it must be clear and unambiguous in its terms.[341] One way to ensure states are aware of conditions imposed by Spending Clause legislation, and subsequent violation of conditions, is by requiring notice.[342] The "bad faith or gross misjudgment" standard does not contain an element of notice and thus may be a poor fit for finding liability, at least as it relates to Section 504, which is Spending Clause legislation.[343] Despite this new clarity, many courts continue to impose the "bad faith or gross misjudgment" standard on plaintiffs seeking compensatory damages under Section 504 and Title II of the ADA and with it create unnecessary obstacles on plaintiffs seeking relief for clear violations of the law.[344]

The final standard of intent courts use in Section 504 and Title II cases involving education is "deliberate indifference." Courts imposing the deliberate indifference standard generally acknowledge the disability-race distinction and the fact that both disability statutes are focused on addressing

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court in *Monahan* interpreted that as meaning the statute did not require affirmative action by the school in order to fulfill its mandate. *Id.* However, in *Alexander v. Choate*, the Court clarified what it meant was that states were not required to take "affirmative action" to make changes or modifications that would be "substantial" or constitute "fundamental [alterations] in the nature of the program . . . ." *Id.* Rather, Section 504 only required those accommodations that were "reasonable." *Id.* (citing Alexander v. Choate, 469 U.S. 287, 300 n.20 (1985)).

339. *Choate*, 469 U.S. at 300 n.20.

340. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 274 (3d Cir. 2014).

341. Barnes v. Gorman, 536 U.S. 181, 186 (2002).

342. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

343. *Barnes*, 536 U.S. at 190 n.3.

344. *See generally* M.Y. *ex rel.* J.Y. v. Special Sch. Dist. No. 1, 544 F.3d 885 (8th Cir. 2008); Birmingham v. Omaha Sch. Dist., 220 F.3d 850 (8th Cir. 2000) (plaintiff could not recover damages under section 504 or the ADA where school graduated plaintiff early without prior notice to her mother); Sellers *ex rel.* Sellers v. Sch. Bd. of Manassas, 141 F.3d 524 (4th Cir. 1998) (high school student and his parents could not recover compensatory or punitive damages for alleged violations of IDEA and section 504 based on school officials' failure to diagnose student's learning disabilities); K.D. *ex rel.* J.D. v. Starr, 55 F. Supp. 3d 782 (D. Md. 2014); D.L. v. District of Columbia, 730 F. Supp. 2d 84 (D.D.C. 2010); D.A. v. Hous. Indep. Sch. Dist., 716 F. Supp. 2d 603 (S.D. Tex. 2009), *aff'd*, 629 F.3d 450 (5th Cir. 2010) (disabled student's parent failed to demonstrate that school district acted with bad faith or gross misjudgment when it failed to timely identify student for special education services, as required to prevail on her claim for violation of ADA and RA).

"more subtle forms of discrimination" than "obviously exclusionary conduct."[345] In order to prove the defendant acted with deliberate indifference, the plaintiff must demonstrate that the defendant 1) knew that harm to a federally protected right was substantially likely, and 2) failed to act on that likelihood.[346] Courts have made clear that this standard does not call for mere negligence or failure to act, but rather requires a "deliberate choice . . . rather than negligence or bureaucratic inaction."[347]

In discussing its decision to adopt the deliberate indifference standard for Section 504 and ADA claims, the Third Circuit relied on two conclusions: 1) disability discrimination is often rooted in different motivations than race discrimination and 2) notice is required because Section 504 is Spending Clause legislation.[348] For the first proposition, the Third Circuit reasoned that the deliberate-indifference standard would target neglect of the disabled as opposed to ill will or hatred better than an animus standard would.[349] Regarding the Spending Clause restriction, the Court determined deliberate indifference would adequately fulfill notice concerns raised by Spending Clause legislation.[350]

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345. Chapman v. Pier 1 Imports (U.S.) Inc., 631 F.3d 939, 944–45 (9th Cir. 2011).

346. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 265 (3d Cir. 2013); Liese v. Indian River Cty. Hosp. Dist., 701 F.3d 334, 344 (11th Cir. 2012); Duvall v. Cty. of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001).

347. Reynolds v. Giuliani, 506 F.3d 183, 193 (2d Cir. 2007). The Supreme Court has described deliberate indifference as a "stringent standard of fault . . . ." Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 410 (1997). "A showing of simple or even heightened negligence will not suffice" to establish deliberate indifference. *Id.* at 407. Rather, a defendant is deliberately indifferent only if he acts with "conscious disregard" for a plaintiff's rights. *Id.* Such conscious disregard exists only if either (1) the defendant actually knows that its actions will violate the plaintiff's rights or (2) such a violation is the "plainly obvious consequence" of the defendant's actions. *Id.* at 410–12.

348. *S.H.*, 729 F.3d at 264. The Court incorrectly characterizes the ADA as Spending Clause legislation. The ADA was not enacted under the Spending Clause, but draws its authority through the Commerce Clause and the Fourteenth Amendment. 42 U.S.C. § 12101(b)(4) (2012); *see also* Barnes v. Gorman, 536 U.S. 181, 190 n.3 (2002).

349. *S.H.*, 729 F.3d at 264.

350. There remains a question about whether the Spending Clause restriction on notice applies to Section 504. The Supreme Court has not directly ruled on the issue. The Court has ruled that notice is required under Spending Clause legislation, the key being, "[t]he legitimacy of Congress's power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. Arguably, Section 504, unlike Title VI and Title IX, prohibits unintentional discrimination. Thus, a state is on notice when accepting funds that it will be liable for unintentional discrimination. Further, unlike Title IX, courts have permitted respondeat superior liability in section 504 cases consistent with unintentional liability. *See, e.g.*, Weber, *supra* note 220.

When applying a deliberate indifference standard to a misidentification case, it is easy to see how plaintiffs may face an uphill battle in establishing the requisite intent. One court required a misidentified plaintiff to plead facts which demonstrated: 1) the school had "knowledge that [the plaintiff] was likely not disabled and therefore should not have been in special education," and 2) failure to act despite that knowledge.[351] The plaintiff's assertions that she put the school on notice by telling teachers she was not disabled and scoring near average on standardized tests, were not enough to establish notice under prong one of the deliberate indifference test.[352] Thus, the court did not reach analysis under the second prong of the deliberate-indifference standard.

Framed in this way, deliberate indifference is almost as difficult a standard to meet as discriminatory animus. It requires knowledge on the part of the defendant that the plaintiff is likely not a child with a disability, and despite this knowledge, a decision to treat the child as disabled. In fact, adopting the deliberate-indifference standard leads to perverse and anomalous results. Recall that schools are tasked with additional obligations to ensure students with eligible disabilities have equal educational opportunities. Students with eligible disabilities are entitled to FAPE, reasonable accommodations, and will have procedural due-process rights to enforce their claims. It is difficult to imagine a scenario in which a school would knowingly misidentify a child for disabilities thereby exposing themselves to more liability. In fact, schools readily concede that plaintiff-students are not disabled in misidentification cases so that they can escape liability.[353] Given this dynamic, it seems illogical to frame the "deliberate indifference" standard so narrowly. Rather, when courts analyze claims using deliberate indifference, they should seek to reconcile a school's affirmative obligations under the statutes with the intent

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351. *S.H.*, 729 F.3d at 265.

352. The Appellate Court held that S.H.'s personal feelings about not needing special education did not constitute notice to the school of a lack of disability, particularly when her mother consented to special education placement. *Id.* at 266. With regard to the independent expert evaluations, the court held that because the reports were made subsequent to the school's evaluation, they have no bearing on whether or not the school knew at the time of its decision to place S.H. in special education, that the school's diagnosis was wrong. *Id.* at 267. Further, the court held that liability under the deliberate indifference standard is not dependent on whether the school erred in its psychological evaluation of S.H., "evidence that the School District may have been wrong about S.H.'s diagnosis is not evidence that the School District had *knowledge* that it was a wrong diagnosis." *Id.* at 266. Finally, the court found unpersuasive evidence of S.H.'s test scores because scores indicated she performed well in some areas and below average in others and there was no evidence in the record indicating that high test scores are an indicator of no learning disability. *Id.* at 266–67.

353. *S.H.*, 729 F.3d at 256; A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194, 198 (3d Cir. 2013). In both cases the school did not contest that plaintiffs were not disabled.

standard. The following section will discuss an alternative way to analyze deliberate indifference in misidentification cases.

C. An Alternate Analysis of Intent under Section 504 and Title II of ADA

Plaintiffs claiming they were wrongly identified as disabled do not easily fit in any of the current categories of education-based disability claims. Generally, in the education context, plaintiffs' claims are based on intentional discrimination, disparate impact, failure to make reasonable accommodations, or failure to provide FAPE.[354] Violations in the latter two categories represent failure by the school to carry out an affirmative duty. At first blush, the misidentified student's claim may look like an intentional discrimination claim. The student is claiming a school intentionally discriminated against her because of a perceived disability. However, the school's discrimination would be permissible if the student was disabled, and in fact the school engaged in the discrimination based on the perceived disability. Thus, in this context, the discrimination based on disability is, arguably, permissible. At heart, a misidentification claim does not center around impermissible discrimination, but rather represents a school's failure to carry out an affirmative obligation, and courts should analyze them as such.

The crux of a misidentified student's claim is the inaccurate identification and classification of the student as disabled. Schools are obligated under Section 504 and Title II of the ADA to identify and assess students for disabilities. Thus, the central question is at what point does a school become liable for compensatory damages when it gets this identification wrong? The school's failure to accurately identify the student led to a denial of educational opportunity. Assuming intent is required for compensatory damages, and assuming "deliberate indifference" is the appropriate level of intent that accomplishes the goal of providing notice for Spending Clause legislation, how should courts analyze misidentification claims in this context to determine whether a school appropriately fulfilled its obligation of accurate identification under Section 504 and Title II of the ADA?

Section 504 and Title II of the ADA both obligate schools to find students with potential disabilities and evaluate them using valid tests, administered by professionals, assessing specific areas of educational need rather than a general intelligence quotient.[355] Schools are, or should be, aware of these

354. 1 THOMAS R. TRENKNER, AMERICANS WITH DISABILITIES: PRACTICE & COMPLIANCE MANUAL § 2:199 (2016).

355. 34 C.F.R. §§ 104.32(a), 104.35(b)(1)(2) (2016).

requirements, which are clearly set forth in the statutes' regulations.[356] Schools agree to abide by Section 504's requirements when they accept Federal dollars for their special education costs and are obligated to abide by the ADA's requirements.[357] In other words, the obligation to accurately identify children with disabilities is clear and unambiguous.

Currently, courts analyzing misidentification cases have held that plaintiffs must demonstrate a school had knowledge that the child was likely not disabled to establish the first prong of deliberate indifference—knowledge that harm to a federally protected right was substantially likely.[358] However, courts fail to consider the statutes' affirmative obligations—mandating accurate identification of disability—as a part of this analysis. In other words, an argument could be made that since Section 504 and Title II require certain standards and protocols to ensure accurate disability evaluations, violations of these standards, could rise to the level of a deliberate or intentional act. Again, the school is aware of these standards as encompassed in regulations, and thus, a decision to flout them should be viewed as an intentional act.

Against this backdrop, a misidentified plaintiff could establish intent by demonstrating that the school failed to use valid tests,[359] failed to ensure the tests were administered by professionals, or failed to assess all appropriate areas of educational need. These are all express directives contained in Section 504 regulations. A school's choice to use incorrect or incomplete protocols to evaluate students is something more than negligence. It is a direct violation of the regulations that the school agreed to – a direct violation of their contract with the federal government. In other words, when schools intentionally conduct incomplete and inaccurate evaluations in direct contradiction of the terms set forth in the Section 504 and the ADA, schools are on notice that this action makes it substantially likely they are violating a federally-protected right.

If courts were to apply such an analysis it would ensure that schools are held accountable for clear violations of federally protected rights while at the same time, guarding against imposition of unfair burdens on schools. To make this point more clearly, it is useful to apply the above framework to

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356. *Id.*

357. *See supra* Section IV.B.2.

358. S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248, 265 (3d Cir. 2013); A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194, 198 (3d Cir. 2013).

359. Validity is the extent to which a test accurately measures what it purports to measure. *See generally* Samuel Messick, *Validity of Psychological Assessment: Validation of Inferences from Persons' Responses and Performances as Scientific Inquiry into Score Meaning*, 50 AM. PSYCHOL. 741 (1995), http://dx.doi.org/10.1037/0003-066X.50.9.741.

S.H. and A.G. Recall that both S.H. and A.G. alleged defects in their initial evaluations and reevaluations, which amounted to a failure to comply with professional standards, including the failure to observe plaintiffs in the classroom, which the school district conceded was required by the IDEA.[360] The Court should have started from the premise that the school had knowledge of professional standards with regards to disability assessments. Failure to abide by these standards could amount to an intentional act—an intentional violation of the terms of the agreement. Because of this intentional violation, the school was on notice of "harm to a federally protected right." This analysis stays true to the obligation schools enter into when accepting funds from the federal government and prevents schools from escaping liability when they do not fulfill these obligations. In order to protect against liability, a school must ensure that it follows the terms set forth in the Section 504 and the ADA, which is something they already agreed to do. Thus, courts are not imposing undue burdens on schools.

1. The Parental Consent Trap

Courts must also re-frame their current analysis surrounding parental consent in the context of misidentification cases. When defending misidentification claims, schools may argue that the parent consented to the special education label and services. Schools maintain that parental consent immunizes the school from any wrongdoing. In *S.H.*, the school district successfully advanced such a defense, arguing that mother's consent to her daughter's diagnosis and subsequent services estopped her from now claiming those services were unwanted.[361] However, parents, and particularly poor parents, are significantly disadvantaged when negotiating with schools in the context of special education services.[362] The imbalance of power, information, and resources, all in favor of the school, combine to place parents in a wholly inferior bargaining position. Thus, parents' consent to a

360. 34 C.F.R. §300.310(b)(2) (2016); Reply Brief of Appellants at 22 ,24, 25, S.H. *ex rel.* Durrell v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013) (No. 12-3264), 2013 WL 523723; *see supra* Section IV.E.3. The IDEA requires that at least one member of the evaluation team who was *not* the child's regular classroom teacher conduct an observation of the child's academic performance in the regular classroom as part of the evaluation and eligibility determination process. A.G. introduced evidence which indicated that the school failed to conduct classroom observations as required by the IDEA, and incorrectly interpreted test results finding no conclusive basis for the diagnosis of "specific learning disability" based on the test scores. *A.G.*, 542 F. App'x at 200.

361. *S.H.*, 729 F.3d at 266.

362. Caruso, *supra* note 2, at 180–81; Hyman et al., *supra* note 60, at 140–45; Pasachoff, *supra* note 107, at 1436.

disability label should not prevent them from a later attempt to hold schools accountable for inaccurate identifications.

The IDEA requires schools to include parents in the planning and decision making process surrounding their child's education.[363] Parents are required to give consent for their child to be evaluated for disabilities, must be present at the IEP meeting, and must consent to any and all services that are to be put in place to address a child's needs.[364] Although parents are ensured a seat at the table, there remains an unequal balance of power at these meetings.[365] For instance, the school's expert—generally a school psychologist—is the person who has conducted the evaluation and presents this information to the team. Parents, who are often unfamiliar with the various types of testing protocols, rely on the expert for guidance in interpreting results of their child's performance on evaluations. Likewise, parents rely on the school psychologist as well as teacher observations of their child and assessment of their child's performance in comparison to peers. This is all information that the parent cannot otherwise get.[366] When presented with the expert's opinion, one can see why a parent, lacking a depth of knowledge of the expert, would rely on that opinion. Further, schools have an independent obligation to ensure accuracy in disability identification and evaluation.[367] This obligation exists whether or not parents ultimately consent to disability classification and services. Schools should not be permitted to insulate themselves from liability for inaccurate evaluations through parental consent. This puts an undue burden on parents to have the requisite knowledge needed to challenge expert analysis of assessment tools used to measure disability as well as the technical requirements contained in state regulations enforcing the IDEA.

At least one court has rejected a school's claim that parental consent to a diagnosis acted as a bar to subsequent parent initiated action against the school. In *Draper v. Atlanta Independent School System*,[368] the parents filed suit claiming that the school had misidentified their son as intellectually disabled when he was actually learning disabled.[369] The school tried to claim that the family should have known about the misdiagnosis much earlier and that the statute of limitations prevented the family from now bringing the

363. 20 U.S.C. § 1414(d)(1)(B) (2016).

364. § 1414(a)(1)(D).

365. Caruso, *supra* note 2, at 174, 179; Pasachoff, *supra* note 107, at 1474.

366. Scholars also point how the confidentiality of disability in general makes it difficult for parents to determine how other similarly situated children have been treated by the school, including what types of assessments they may have undergone, services they have been offered, and results of those services. Caruso, *supra* note 2; Pasachoff, *supra* note 107.

367. 20 U.S.C. § 1414(b)(2).

368. Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008).

369. *Id.* at 1281.

claim.[370] The Eleventh Circuit, appropriately rejected this argument holding, "[w]e decline the invitation of the School System to conclude, as a matter of law, that the Draper family should be blamed for not being experts about learning disabilities."[371] Thus, the court correctly placed the burden on the school to ensure accurate evaluation of the child.

V. CONCLUSION

2015 marked 40th anniversary of the IDEA. In the decades since its enactment, countless improvements have been made to improve educational outcomes for students with disabilities. But at the same time, the disproportionate classification of minority students that plagued the statute at its inception continues to trouble educators and advocates forty years later. Perpetuating a status quo in which schools are free to inaccurately identify students as disabled, causing educational harms without fear of liability, only exacerbates this entrenched problem. Until schools feel pressure to ensure accuracy in their identification of disabilities, they will continue to use special education as a dumping ground for "difficult" children. By leveraging disability discrimination statutes, misidentified minority plaintiffs can hold schools accountable, forcing them to ensure racially unbiased evaluations and accuracy in identification of disabilities. Narrowing the entry point into special education may also incentivize schools to find ways to address unmet educational needs in the general education classroom rather than relying on special education to solve these challenges.

370. *Id.* at 1287–88.
371. *Id.* at 1288.