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STATE EDUCATIONAL AGENCIES AND SPECIAL EDUCATION: OBLIGATIONS AND LIABILITIES

THOMAS A. MAYES & PERRY A. ZIRKEL*

Disputes between parents of children with disabilities and school officials regarding the special education of children with disabilities are reaching courts with greater frequency.[1] Although a vast majority of disputes under the Individuals with Disabilities Education Act (hereinafter "the IDEA")[2] and related statutes are limited to the development or implementation of special education programming for a particular child, some disputes implicate statewide concerns. In such cases, parents of children with disabilities may proceed against the "state educational agency" (SEAs)[3] in addition to, or in lieu of, local school districts (local educational agencies, or LEAs).[4] The stakes in such lawsuits are extraordinarily high, with effects that reach beyond the immediate parties. Furthermore, informed observers predict that actions against SEAs will occur more often. For example, both Charles Weatherly and Reed Martin, prominent special education attorneys who represent districts and parents respectively, predict that parental lawsuits against SEAs will occur much more frequently in the near future.[5]

Given the projected and potential import of those predicted lawsuits, this article explores the statutory, regulatory, and judicial boundaries for the responsibility of

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[1] *See, e.g.*, Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 EDUC. L. REP. 341, 346-49 (1997); *What the Numbers Say About Special Education*, 10 THE SPECIAL EDUCATOR 325, 334-35 (1995).

[2] 20 U.S.C.A. §§ 1400-87 (West 1990 & Supp. 1998).

[3] *See id.* § 1401(28) (defining SEA).

[4] *See id.* § 1401(15) (defining LEA); 34 C.F.R. § 300.18 (1999).

[5] Reed Martin, *Making a State Education Agency Exercise Their Responsibility to Make the System Work*, at http://www.reedmartin.com; Charles Weatherly, Reading the Crystal Ball, Address to Special Education Law Institute, Lehigh University (June 30, 2000).

SEAs for violations of IDEA-imposed duties and other laws. Part I provides a basic overview of the IDEA, Section 504 of the Rehabilitation Act[6], and the Americans with Disabilities Act (ADA).[7] Part II discusses a SEA's obligation to supervise and regulate SEAs. Part III considers when and under what conditions an SEA must provide direct services to children with disabilities. Part IV examines state policies that allegedly contravene federal law. Part V highlights several defenses SEAs commonly raise, including the recently rejuvenated defense of Eleventh Amendment immunity. Finally, Part VI explores how state law may alter the outcomes of suits against SEAs.

I. OVERVIEW OF THE IDEA, SECTION 504, AND THE ADA

Determining the relative responsibilities of SEAs and LEAs under the IDEA is a matter of statutory construction. Statutory construction, a function ultimately for the courts, [8] begins with the language of the statute in question. [9] Further, any construction must find support in, and be faithful to, the text of the statute. Portions of a statute may not be read in isolation.[10] Without reference to a statutory provision's context, a reader may distort the provision's true meaning. Additionally, an act with a clear meaning is enforced as written.[11] If an act's meaning is not clear, however, one must attempt to determine the intent of Congress and interpret the act to conform to that divined intent.[12] Thus, any language within the IDEA concerning SEA responsibility must be read with reference to the entire enactment's language, structure, and purpose.

Mindful of these underlying principles, one may turn to the statutory and regulatory language of the IDEA, Section 504, and the ADA. Under the IDEA and its implementing regulations, the federal government provides financial assistance for the education of children with disabilities[13] to states that subject themselves to the IDEA's requirements.[14] A participating state agrees to provide a "free appropriate public education" (FAPE)[15] to all children with disabilities residing in

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[6] 29 U.S.C.A. § 794 (West 1985 & Supp. 1997).

[7] 42 U.S.C.A. §§ 12101-213 (West 1995 & Supp. 1998).

[8] *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 312-13, n.12 (1994).

[9] *See* Norfolk & W. Ry. Co. v American Train Dispatchers' Ass'n, 499 U.S. 117, 128 (1991).

[10] *See* King v. St. Vincent's Hosp., 502 U.S. 215, 221 (1991).

[11] *See* Arkansas v. Farm Credit Servs., 520 U.S. 821, 827 (1997).

[12] *See, e.g.*, Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?*, 8 J.L. & POL'Y 455, 458-59 (2000).

[13] *See* 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7(definition of a child with a disability).

[14] 20 U.S.C.A. § 1400(d)(2) (expressing legislative intent to assist states with special education); 1411 (authorizing allocation of funds); 1412 (specifying requirements).

[15] *See* 20 U.S.C.A. § 1401(8) (defining FAPE); 34 C.F.R. § 300.13 (further definition of FAPE). "Special education" and "related services" are core components of FAPE. *See* 20 U.S.C.A. § 1401(22) (related services), (25) (special education); 34 C.F.R. §§ 300.24

the state.[16] Each child with a disability is entitled to an "individualized education program" (IEP)[17] that describes the child's specially designed instruction and support services. The child receives her education in the "least restrictive environment" (LRE),[18] presumptively a general classroom in the child's neighborhood school.[19]

A parent or school dissatisfied with any aspect of the child's education may request a due process hearing before an impartial hearing officer.[20] Further, after the conclusion of administrative proceedings,[21] the aggrieved party may file a civil action in state or federal court.[22] The court may grant appropriate relief,[23] including declaratory relief, injunctive relief, compensatory education,[24] and tuition reimbursement.[25] The court may also award reasonable attorney fees to a prevailing parent.[26]

The IDEA and its implementing regulations assign a key role to SEAs in

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(related services); 300.26 (special education).

In Board of Education v. Rowley, the Supreme Court of the United States held that the IDEA's substantive standard for FAPE was satisfied if the child's educational programming was reasonably calculated to confer "an educational benefit." 458 U.S. 176, 207-08 (1982). For more information on the Rowley decision, see Perry A. Zirkel, *Building An Appropriate Education from* Board of Education v. Rowley: *Razing the Door and Raising the Floor*, 42 MD. L. REV. 466 (1983).

[16] 20 U.S.C.A. § 1412(a)(1) (imposing this obligation on SEAs); 34 C.F.R. §§ 300.121-.122.

[17] 20 U.S.C.A. §§ 1401(11), 1414(d); 34 C.F.R. §§ 300.15, 300.340(a).

[18] 20 U.S.C.A. § 1412(a)(5) (imposing this obligation on SEAs); 34 C.F.R. §§ 300.130, 300.550-.556.

[19] 20 U.S.C.A. § 1412(a)(5), 1414(d)(1)(A)(iv); 34 C.F.R. § 300.550.

[20] 20 U.S.C.A. § 1415(f); 34 C.F.R. § 300.507.

[21] Based on the option in the IDEA for a second tier of review, about one-half of the states provide for additional administrative review of hearing officer decisions. *See, e.g.*, Eileen M. Ahearn, *Mediation and Due Process Procedures in Special Education: An Analysis of State Policies* (Sept. 30, 1994) (Prepared by Project Forum: National Association of State Directors in Special Education) (ERIC Doc. Reproduction Serv. No. ED 378714). In those states, an aggrieved party must exhaust administrative remedies at both tiers before filing a civil action. For more information on proceedings in "two-tiered" states, see Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871 (1994).

[22] 20 U.S.C.A. § 1415(i)(2)-(3); 34 C.F.R. § 300.512.

[23] 20 U.S.C.A. § 1415(i)(2)(B)(iii); 34 C.F.R. § 300.512(b)(3).

[24] *See* Perry A. Zirkel, *The Remedy of Compensatory Education Under the IDEA*, 95 EDUC. L. REP. 483, 484 (1995).

[25] 20 U.S.C.A. § 1412(a)(10)(C); 34 C.F.R. § 300.403 (c); *see* Burlington Sch. Comm. v. Department of Educ., 471 U.S. 359, 371 (1985); Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 (1993); Perry A. Zirkel, *Revisiting the Issues: Tuition Reimbursement for Special Education Students*, FUTURE OF CHILDREN, Winter 1997, at 122.

[26] 20 U.S.C.A. § 1415(i)(3)(B); 34 C.F.R. § 300.513 (a).

providing FAPE to children with disabilities.[27] The IDEA conditions federal assistance upon an SEA's demonstration that it has adopted "policies and procedures to ensure that it meets each" of twenty-two conditions.[28] Included among these conditions, SEAs must find[29] and evaluate[30] children with disabilities, provide those children with an FAPE[31] in the LRE,[32] ensure an adequate number of well-trained personnel,[33] and coordinate the efforts of other governmental agencies that provide special education and related services.[34]

One of these SEA eligibility conditions requires participant SEAs to assume general supervisory responsibilities for the education of children with disabilities.[35] The IDEA states that each SEA is "responsible for ensuring that" the IDEA's requirements are satisfied[36] and that individuals under the SEA's supervision provide special education in conformity with the SEA's requirements.[37]

Under certain circumstances, an SEA may discharge its duty under Section 1412(a)(1) to ensure that "*all* children with disabilities"[38] receive an FAPE and provide educational services directly to an eligible child. The IDEA provides that an SEA must provide direct services under four specific conditions,[39] two of which have spawned significant amounts of controversy. Under the first controversial condition, the SEA must provide direct services when an LEA is "unable" to do so.[40] According to the second condition, the SEA must provide direct services whenever a child with a disability "can best be served by a regional or State program or service-delivery system."[41]

In addition to the IDEA, Section 504 and the ADA provide potential avenues for relief against SEAs.[42] Both Section 504[43] and the ADA[44] prohibit discrimination based on disability. Section 504 prohibits discrimination on the part of recipients of "Federal financial assistance."[45] The ADA's parallel prohibition is not conditioned

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[27] 20 U.S.C.A. § 1412(a)-(b); 34 C.F.R. §§ 300.110-.156, 300.360-.372, 300.600-.662.
[28] 20 U.S.C.A. § 1412(a).
[29] 20 U.S.C.A.. § 1412(a)(3); 34 C.F.R. § 300.125.
[30] 20 U.S.C.A. § 1412(a)(7); 34 C.F.R. § 300.126.
[31] 20 U.S.C.A. § 1412(a)(1); 34 C.F.R. §§ 300.121-.122.
[32] 20 U.S.C.A. § 1412(a)(5); 34 C.F.R. § 300.130.
[33] 20 U.S.C.A. § 1412(a)(14)-(15); 34 C.F.R. §§ 300.135-.136.
[34] 20 U.S.C.A. § 1412(a)(12); 34 C.F.R. 300.142.
[35] 20 U.S.C.A. § 1412(a)(11); 34 C.F.R. § 300.141.
[36] 20 U.S.C.A. § 1412(a)(11)(A)(i); 34 C.F.R. § 300.600(a)(1).
[37] 20 U.S.C.A. § 1412(a)(11)(A)(ii): 34 C.F.R. § 300.600(a)(2).
[38] 20 U.S.C.A. § 1412(a)(1)(A) (emphasis added).
[39] 20 U.S.C.A. . §1413(h)(1); 34 C.F.R. § 300.360(a). *See* discussion *infra* Part III. A. 1.
[40] 20 U.S.C.A. § 1413(h)(1)(B); 34 C.F.R. § 300.360(a)(2).
[41] 20 U.S.C.A. § 1413(h)(1)(D); 34 C.F.R. § 300.360(a)(4).
[42] For more information on these two statutes, see PERRY A. ZIRKEL & JEANNE M. KINCAID, SECTION 504, THE ADA, AND THE SCHOOLS (1995).
[43] 29 U.S.C.A. § 706(8).
[44] 42 U.S.C.A. § 12102(2).
[45] 29 U.S.C.A. § 794(a).

on federal funding, but rather applies to public entities (such as SEAs) and private entities that provide services to the public (such as private schools).[46] Section 504 requires covered schools to provide FAPE to students with disabilities.[47] For children covered by the IDEA, Section 504 and the ADA not only provide overlapping protections, but also offer additional avenues of redress, such as enforcement by the United States Department of Education's Office for Civil Rights (OCR).[48] In addition, given their broader definitions of "disability,"[49] Section 504 and the ADA provide primary protection to a limited number of children with disabilities who lack coverage under the IDEA.[50] For example, to meet its obligations to students who are solely covered by Section 504, an LEA may, but is not required to, adhere to the requirements of the IDEA.[51] Additionally, for Section 504 or ADA violations, plaintiffs may obtain similar remedies as under the IDEA. Furthermore, courts in some jurisdictions may grant compensatory[52] and punitive[53] damages to successful Section 504 and ADA litigants, while not granting similar relief under the IDEA.

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[46] 42 U.S.C.A. §§ 12131-32 (public entities), 12181-82 (private "places of public accommodation). The ADA exempts certain private entities, such as religious schools, from its prohibition of discrimination by places of public accommodation. 42 U.S.C.A. § 12187.

[47] 34 C.F.R. § 104.33(a).

[48] *See, e.g.*, ZIRKEL & KINCAID, *supra* note 42, at 1:4. For a suggestion that Section 504 may in some limited situations provide a greater substantive right than the IDEA, see Perry A. Zirkel, *The Substantive Standard For FAPE: Does Section 504 Require Less than the IDEA?*, 106 EDUC. L. REP. 471, 476-77 (1996).

[49] Under the IDEA, a child with a disability must have one or more of thirteen specified impairments and must need special education. *See* 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7. Section 504 and the ADA, in contrast, 1) include a much broader range of mental and physical impairments, 2) extend to major life activities beyond learning, and 3) do not require the need for special education. *See* 29 U.S.C.A. § 706(8)(B) (§ 504); 42 U.S.C.A. § 12102(2) (ADA). This breadth, however is subject to an important qualification – the alleged impairment must be "substantially" limiting. 29 U.S.C.A. § 706(8)(B); 42 U.S.C.A. § 12102(2).

[50] *See* OCR Memorandum, 19 IDELR 876, 877 (1993) (stating Section 504 coverage is available to children with ADD that are not eligible under IDEA); Inquiry by Anonymous, 18 IDELR 229 (OCR 1991) (discussing that a child ineligible under the IDEA may still qualify for coverage under Section 504); Richard Fossey et al., *Section 504 and "Front Line" Educators: An Expanded Obligation to Serve Children with Disabilities*, PREVENTING SCH. FAILURE, Winter 1995, at 10, 11 (positing that Section 504 is broader and requires schools to offer services to children who may not qualify for benefits under the IDEA).

[51] *See* 34 C.F.R. § 104.33(b)(2); OCR Memorandum, 19 IDELR at 877-78.

[52] *See* Perry A. Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 EDUC. L. REP. 601, 617-18 (1993) (collecting cases).

[53] *Compare, e.g.*, Fitgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) (punitives available), *with, e.g.*, Walker v. District of Columbia, 969 F. Supp. 794, 798 (D.D.C. 1997) (not available).

II. STATE EDUCATION AGENCIES AND SUPERVISORY DUTIES

A. *SUPERVISION OF LEAS: THE STATUTE AND REGULATIONS*

As noted above in Part I, the IDEA, as amended, requires a participant state to develop policies to "ensure that it meets"[54] twenty-two conditions. One of these "conditions" is a duty of "general supervision,"[55] which requires the SEA to ensure the satisfaction of all the provisions of IDEA Part B.[56] Under this provision, the IDEA requires SEAs to ensure that all "educational programs" for children with disabilities 1) are "under the general supervision of individuals . . . who are responsible for the educational programs of children with disabilities"[57] and 2) meet the SEA's "educational standards."[58] According to the IDEA, the existence of this general supervisory duty does not limit the obligation of other agencies to directly provide or pay for, in whole or in part, an eligible child's FAPE.[59]

There is one limited exception to an SEA's obligation of general supervision. The amended IDEA allows states to shift to another state agency the general supervisory responsibility for children with disabilities who have been convicted as adults and are confined to adult prisons.[60] Aside from this minor change, the legislative history of the IDEA, as amended in 1997, indicates that Congress did not alter the "general supervisory authority" of SEAs.[61]

The Department of Education's implementing regulations restate the statutory text with little guidance or elaboration.[62] The Department's commentary, however, is illuminating. The Department rejected several suggested changes to its proposed regulations. First, the Department rejected requests to emphasize the monitoring role of SEAs. Instead, it stated that the general supervisory role "includes not just monitoring, and enforcement when noncompliance is not corrected, but effective

[54] 20 U.S.C.A. § 1412(a).

[55] *Id.* § 1412(a)(11).

[56] *Id.* § 1412(a)(11)(A)(i).

[57] *Id.* § 1412(a)(11)(A)(ii)(I).

[58] *Id.* § 1412(a)(11)(A)(ii)(II).

[59] *Id.* § 1412(a)(11)(B).

[60] *Id.* § 1412(a)(11)(C). This amendment is a concession to the state of California. Elsewhere, the amended IDEA allows states that transfer the supervisory obligation for these children from the SEA to another agency to discontinue special education for these children with minimal consequences. Under the IDEA, the United States Department of Education may only withhold IDEA funds equal to the proportion of IDEA-eligible children who this other agency serves. *See* 20 U.S.C.A. § 1416(c). For more information on these provisions, see Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law and Special Education Law*, 4 UC DAVIS J. JUV. L. & POL'Y 125, 150-51 (2000).

[61] H.R. REP. NO. 105-95, at 94 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 92; *accord* Letter to Garrett, 29 IDELR 975 (OSEP 1997).

[62] 34 C.F.R. § 300.600 (1999).

technical assistance."[63] Second, it declined to impose a specific time by which SEAs must verify an LEA's remedial actions, reserving to SEAs "some flexibility in fashioning remedies and timelines for correction."[64] Finally, the Department rejected any notion that SEAs have supervisory responsibility concerning the education of children with disabilities who are in adult prisons for adult convictions, when the state has transferred the responsibility for ensuring that those children receive special education to another state agency.[65]

B. *Cases Regarding the General Supervision Obligation of SEAs*

Administrative or judicial proceedings by or against SEAs concerning supervisory obligations can be clustered in two major, though not mutually exclusive, categories: 1) cases concerning whether such an obligation exists and 2) cases concerning whether the SEA breached this obligation.

1. "Leave it to OSEP"?

Courts have uniformly rejected the notion that approval of a state's special education plan by the U.S. Department of Education's Office of Special Education Programs (OSEP) insulates that plan from judicial review and that any prayer for relief must be made to OSEP.[66] This argument is inconsistent with the statute's authorization for reviewing courts to grant "such relief as the court deems appropriate."[67] As the federal district court in *Corey H. v. Board of Education of the City of Chicago* noted in rejecting what it termed a "leave-it-to-OSEP"[68] defense:

> Because adequate monitoring on the part of the state is imperative to ensure a free appropriate public education, the court must review the state's monitoring policies when a parent or guardian files a complaint regarding those monitoring policies.[69] In addition, even if an SEA's federally approved plan appears facially adequate, the SEA may violate the IDEA by not following its plan.[70]

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[63] Attachment 1 – Analysis of Comments and Changes, 64 Fed. Reg. 12,537, at 12,644 (Mar. 12, 1999).

[64] *Id.* at 12,655. In contrast to this flexibility, the IDEA requires that SEAs resolve complaints made under the SEAs complaint resolution procedure within sixty days of filing. 34 C.F.R. § 300.661.

[65] 64 Fed. Reg. at 12,655.

[66] *See, e.g.*, Doe v. Maher, 793 F.2d 1470, 1492-93 (9th Cir. 1986); Corey H. v. Board of Educ., 995 F. Supp. 900, 915-17 (N.D. Ill. 1998).

[67] 20 U.S.C.A. § 1415(i)(2)(B)(iii).

[68] Corey H., 995 F. Supp. at 916.

[69] *Id.*; *accord* Maher, 793 F.2d at 1492-93.

[70] Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565, 1572-73 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1213 (1984), *aff'd on this issue on remand*, 740 F.2d 902 (11th Cir. 1984) [hereinafter Georgia ARC]; Corey H., 995 F. Supp. at 915.

Nevertheless, before the 1999 promulgation of the IDEA regulations, there was at least limited uncertainty regarding whether suits concerning SEA monitoring required exhaustion of OSEP review. At least one court, *Moubry v. Indep. Sch. Dist. No. 696,* held that individuals who have complaints about an SEA's monitoring procedure must first exhaust administrative remedies available through OSEP before seeking judicial relief.[71] This court's reasoning, already subject to criticism and reflecting a minority position,[72] is now undermined because the U.S. Department of Education no longer provides for OSEP review of complaints to SEAs.[73] In announcing the final IDEA regulations in 1999, the Department concluded that the "possibility of Secretarial review has not been an efficient use of the Department's resources."[74]

2. When Does an SEA Violate its Supervisory Obligation?

Courts have rejected any notion that an SEA has no supervisory authority over LEAs.[75] In addition the courts have uniformly rejected a related argument that SEAs have "mere" supervisory obligations with limited or no enforcement powers.[76]. The thought that an SEA has little or no enforcement power is inconsistent with the common meaning of "supervision" as used in the IDEA:

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[71] 951 F. Supp. 867, 892-93 (D. Minn. 1996). For more information on the exhaustion doctrine, see *infra* Part IV.B.

[72] Even before the promulgation of the 1999 regulations, the Moubry court's decision was contrary to the weight of the authorities on this issue. *See, e.g.,* Jeremy H. v Mount Lebanon Sch. Dist., 95 F.3d 272, 282-83 (3d Cir. 1996); Mrs. W. v. Tirozzi, 832 F.2d 748, 758 (2d Cir. 1987); Georgia ARC, 716 F.2d at 1572-73 n.5; Upper Valley Ass'n of Handicapped Citizens v. Mills, 928 F. Supp. 429, 434-35 (D. Vt. 1996). *But see* Hoeft v. Tuscon Unified Sch. Dist., 967 F.2d 1298, 1303-08 (9th Cir. 1992) (may require administrative exhaustion, and determined on "a case-by-case basis"). As a general rule, administrative exhaustion is a prerequisite to judicial proceedings only if legislation or administrative rule require it. *See, e.g.,* Darby v. Cisneros, 509 U.S. 137 (1993) (interpreting the Administrative Procedure Act). There was nothing in the IDEA or implementing regulations in effect at the time of the Moubry decision that would require an appeal to the Department of Education before proceeding to a judicial forum. *See, e.g.,* Upper Valley, 928 F. Supp. at 434-35. Thus, the Moubry court appears to have imposed an unwarranted exhaustion requirement.

[73] *Compare* 34 C.F.R. § 300.661(d) (1994) (allowing Department of Education review) *with* 34 C.F.R. § 300.661 (1999) (omitting that language).

[74] Attachment 1, 64 Fed. Reg. at 12,646.

[75] *See, e.g.,* Gadsby v. Grasmick, 109 F.3d 940, 955 (4th Cir. 1997) (rejecting notion that SEAs are never liable for a LEA's failure to develop an IEP); Cordero v. Pennsylvania Dep't of Educ., 795 F. Supp. 1352, 1361-64 (M.D. Pa. 1992) (defendant's argument that its role under the IDEA was "essentially [to] provid[e] funds, promulgat[e] regulations and review[] individual complaints" did not persuade the trial court).

[76] *See* Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 697 (3d Cir. 1981) (rejecting notion that SEA is "solely a supervisory agency"); Corey H., 995 F. Supp. at 912-15; *accord* Jose P. v. Ambach, 669 F.2d 865, 870-71 (2d Cir. 1982).

"having authority over others, to superintend or direct."[77] This argument also is inconsistent with the language and structure of the IDEA, which requires the SEA to "ensure" that all children with disabilities receive FAPE,[78] and provide methods to enforce LEA compliance.[79]

The IDEA requires an SEA to do more than passively await notification of a violation.[80] As one court noted, an SEA must do more than "creating and publishing procedures and waiting for the phone to ring."[81] The SEA must be vigilant and must correct violations that it detects.[82] It has an "overarching responsibility" to enforce the requirements of the IDEA.[83] For example, the Illinois State Board of Education (ISBE) violated the IDEA when it became aware of major violations by the Chicago School District but took no corrective action.[84]

One can consider the IDEA's required supervisory regime as analogous to the air traffic control system. Just as air traffic controllers do not fly the airplanes, so SEAs are not required to micromanage LEAs.[85] However, when LEAs violate the IDEA's mandates and the SEA has the ability to take corrective action, the SEA must act. An air traffic controller who allows a plane to take off in the wrong direction and from the wrong runway is still responsible even though he was not actually flying the plane. The SEA must have an adequate monitoring and compliance system that is reasonably calculated to detect IDEA violations.[86] If an SEA detects any such violations, it must act to ensure that LEAs correct those violations.[87] Although the SEA has some latitude in the nature and timing of its

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[77] BLACK'S LAW DICTIONARY 1003 (6th ed. 1991).

[78] 20 U.S.C.A. § 1412(a)(1), (a)(11).

[79] 20 U.S.C.A. § 1413 (d). For an example of SEA withholding of LEA funds, see Albuquerque Bd. of Educ., 17 EHLR 775 (N.M. SEA 1991). *See also* Letter to Weithers, EHLR 211:107 (OSEP 1979) (SEA must withhold funds from LEA).

[80] *See, e.g.*, Cordero, 795 F. Supp. at 1362.

[81] *Id.*

[82] *Id.*; *see also* Garrity v. Gallen, 522 F. Supp. 171, 223-24 (D.N.H. 1981); Duane B. v. Chester-Upland Sch. Dist., 1994 U.S. Dist. LEXIS 18755 at *27 (E.D. Pa. Dec. 29, 1994); *In re* Child with Disabilities, 22 IDELR 222, 230 (Conn. SEA 1993) (hearing officer admonished the SEA to be "more proactive").

[83] Cordero, 795 F. Supp. at 1362; *accord* Maher, 793 F.2d at 1492; Kruelle, 642 F.2d at 696-97; Corey H., 995 F. Supp. at 915 *passim*; Moubry, 951 F. Supp. at 891-92; Felter v. Cape Girardeau Sch. Dist., 830 F. Supp. 1279, 1280 (E.D. Mo. 1993); Hines v. Pitt County Bd. of Educ., 497 F. Supp. 403, 406 (E.D.N.C. 1980); Woolcott v. Intermediate Sch. Bd., 351 N.W.2d 601, 606 (Mich. Ct. App. 1984); *cf.* Gaskin v. Commonwealth, 23 IDELR 61 (E.D. Pa. 1995) (certifying class in suit alleging, *inter alia*, that SEA failed to monitor LEA compliance with several IDEA provisions).

[84] Corey H., 995 F. Supp. 900.

[85] *See, e.g.*, Kruelle, 642 F.2d at 697; Corey H., 995 F. Supp. at 912-15 (rejecting SEA's claim that it is not responsible for micro-managing schools).

[86] Corey H., 995 F. Supp. at 910, 912-15; Cordero, 795 F. Supp. at 1360-64.

[87] *See, e.g.*, Jose P., 669 F.2d at 870-71; Corey H., 995 F. Supp. at 915; Cordero, 795 F. Supp. at 1360-61; J.F. v. School Dist. of Philadelphia, 32 IDELR ¶ 93, 307-08 (E.D. Pa.

enforcement action,[88] it has no alternative but to take such action.

The relevant authorities indicate three ways in which an SEA may become aware of LEA violations. First, an SEA may discover LEA noncompliance through required periodic monitoring.[89] Second, an SEA may find violations through its required complaint procedure.[90] Finally, OSEP has indicated that, in certain circumstances, a hearing officer decision may contain sufficient findings of fact to trigger an SEA's duty to monitor and possibly take corrective action.[91]

Although some courts have stated that an IDEA violation implicates SEA liability, these courts have made such statements in cases of flagrant LEA violations of the IDEA.[92] In fact, several courts note that the IDEA does not hold SEAs to a standard of perfection[93] or make them strictly liable for LEA violations.[94] The conventional view is that, before liability attaches for a monitoring failure, the SEA must have some attributable fault.[95] If an LEA commits an IDEA violation in spite of a suitable SEA monitoring and enforcement scheme, then the SEA's liability is somewhat tenuous. If, however, an SEA fails to maintain a monitoring regime or to act when it detects an LEA denying a student's FAPE, it is liable under the IDEA. For example, in *Whitehead v. School Board for Hillsborough County*,[96] the plaintiff-parents prevailed in administrative hearings against the LEA. The plaintiffs named the SEA as a party, alleging that the SEA "acquiesced and/or failed to prevent" the LEA's violations. Noting that there was no indication in the administrative record regarding the SEA's culpability, the court dismissed claims against the SEA.[97] Repudiating the notion that SEAs are liable for the wrongs of LEAs on a "respondeat superior" basis,[98] the court stated that plaintiffs may not "piggyback" claims against SEAs on claims against LEAs.[99]

2000) (claim survived SEA's motion for summary judgment); Samuel C. v. Worcester Pub. Sch., EHLR 502:160, 502:167 (Mass. SEA 1980) (SEA acted promptly to ensure LEA compliance).

[88] Attachment 1, 64 Fed. Reg. at 12,655.

[89] *See, e.g.*, Corey H., 995 F. Supp. at 915; J.F., 32 IDELR ¶ 93, at 308.

[90] *Cf.* Maher, 793 F.2d at 1492. (parental "notice" may call LEA violations to SEA's attention).

[91] Letter to Armstrong, 28 IDELR 303, 304 (OSEP 1997).

[92] *See, e.g.*, Cordero, 795 F. Supp. at 1363 and authorities cited therein.

[93] Corey H., 995 F. Supp. at 912; *cf.* Maher, 793 F.2d at 1492 (stating that duty to provide direct services does not attach when LEA violates the IDEA in "some small regard").

[94] Beard v. Teska, 31 F.3d 942, 953-54 (10th Cir. 1996).

[95] *Id.*; *see also* Jose P., 669 F.2d at 868 (trial court apportioned attorney fees based on "relative culpability" of city and state defendants); Gadsby, 109 F.3d at 955. On remand, the Gadsby trial court granted summary judgment for the SEA, concluding that the SEA was not responsible for the LEA's denial of FAPE to plaintiff. Gadsby v. Amprey, 28 IDELR 8, 12 (D. Md. 1998).

[96] 932 F. Supp. 1393 (M.D. Fla. 1996).

[97] *Id.* at 1396.

[98] *Id.* at 1395-96 (citing Beard, 31 F.3d at 954).

[99] *Id.* at 1396. Aside from its assertion that SEAs are not strictly liable for LEA

As a matter of statutory interpretation and public policy, the cases that require a showing of some SEA culpability before imposing liability are preferred readings of the IDEA. Making SEAs strictly liable for LEA violations would lessen the incentive for LEAs to comply with the IDEA, as liability for noncompliance could be passed on to the SEA. This reading would hinder the abilities of SEAs to "ensure" that LEAs comply with the IDEA.[100]

C. *Supervision of Other Public and Private Educational Providers*

Under the IDEA, an SEA's supervisory obligation extends beyond LEAs in two directions. First, Section 1412(a)(11) of the IDEA and its implementing regulations state that the supervisory obligations of the SEA extend to other state agencies that provide special education.[101] For example, in *Parks v. Pavkovic*,[102] in which numerous Illinois agencies engaged in "finger-pointing"[103] regarding the responsibility for education of children with disabilities, the federal trial court held that the ISBE was liable for the collective failure to serve a class of children with disabilities.[104] The court noted, citing the statutory predecessor to Section 1412(a)(11):[105] "The ultimate responsibility is placed on ISBE precisely to avoid an abdication of responsibility by other state agencies as has occurred here."[106] The analysis of the *Parks* court is in accordance with long-standing OSEP interpretations of the IDEA. OSEP notes that an SEA's oversight obligation

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violations, much of the Whitehead court's reasoning is conceptually weak. A portion of the claim involved allegations that the SEA refused to enforce hearing officer orders. The court faulted the plaintiffs for failing to exhaust administrative remedies, stating that the plaintiffs should have pursued administrative remedies for claims against the SEA. To the extent that it did not expressly consider whether plaintiff's failure to exhaust should be excused due to futility or other recognized exception to the exhaustion rule, the court's reasoning is suspect. *See* Christopher N. v. McDaniel, 569 F. Supp. 291, 300-01 (N.D. Ga. 1983) (rejecting exhaustion argument under similar facts). For more information regarding exhaustion see infra Part IV.B. Further, the court's intimation that final administrative decisions do not bind the SEA is contrary to the vast weight of authority. *See, e.g.*, Burr v. Ambach, 863 F.2d 1071, 1076 (2d Cir. 1988); Mr. X. v. New York State Educ. Dep't, 975 F. Supp. 546, 553-54 (S.D.N.Y. 1997).

[100] 20 U.S.C.A. § 1412(a); *cf.* Jeffrey F. Champagne, Do States Matter – The Role of the State Education Agency (SEA) in Special Education Disputes, Presentation at the 1994 National Institute on Legal Issues of Educating Individuals with Disabilities 17 (May 1994) (on file with authors).

[101] 20 U.S.C. § 1412(a)(11)(A)(ii); 34 C.F.R. § 300.600(a)(2).

[102] 557 F. Supp. 1280 (N.D. Ill. 1983), *aff'd*, 753 F.2d 1397 (7th Cir. 1985).

[103] 557 F. Supp. At 1288; *cf.* Kruelle, 642 F.2d at 698 ("buck-passing" between LEA and SEA); Garrity, 522 F. Supp. at 224.

[104] Parks, 557 F. Supp. at 1288.

[105] 20 U.S.C. § 1412(6) (1976 & Supp. V 1981) (current version, as amended, at 20 U.S.C.A. § 1412(a)(11)).

[106] Parks, 557 F. Supp. at 1288.

encompasses "any . . . program" under the IDEA "administered by any other public agency."[107] The legislative history of the IDEA's predecessor statute supports this reading.[108]

In addition to supervision of other state agencies, the IDEA and parallel regulations require SEAs to supervise the education of children with disabilities that public agencies have placed in private educational settings.[109] In *Kerr Center Parents Association v. Charles*, the Ninth Circuit held that the Oregon SEA violated the IDEA when, as a consequence of the state's statutory funding scheme, it failed to ensure that children placed in private schools received FAPE. [110] The court relied on the SEA's obligation to "ensure" that publicly placed private school students with disabilities received FAPE.[111]

D. *Supervision Under Section 504 and the ADA*

Section 504 of the Rehabilitation Act bars any recipient of federal financial assistance from discriminating against otherwise qualified persons with disabilities "solely by reason of a disability." [112] The ADA provides similar protection.[113] By regulation implementing Section 504, each recipient operating a public primary or secondary education program must provide FAPE to each qualified individual within its jurisdiction.[114] OCR has repeatedly ruled that SEAs may violate Section 504 when they fail to correct violations by LEAs. For example, in *West Virginia Department of Education*, parents successfully complained to OCR, alleging that an LEA denied FAPE to nine students. [115] Their OCR complaint revealed that the parents called the LEA's violations to the SEA's attention, but the SEA did not intervene. Consequently, OCR opened a separate complaint against the SEA.[116] OCR found that the SEA's inaction denied FAPE to the complainants' children, in violation of Section 504.[117] To resolve the complaint, the SEA agreed to "take action to ensure" LEA compliance whenever the SEA "identifies the failure" of an

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[107] Letter to Garrett, 29 IDELR at 975; *accord, e.g.*, Letter to Lever, EHLR 211:185, at 211:187 (OSEP 1978); Letter to Miller, EHLR 211: 216 (OSEP 1980); Letter to Porer, EHLR 211:244 (OSEP 1980); Letter to Rehabilitation Team of Ambulatory Services, EHLR 211:301 (OSEP 1983).

[108] *See, e.g.*, Kruelle, 642 F.2d at 697 (citing legislative history).

[109] 20 U.S.C.A. § 1412(a)(10)(B); 34 C.F.R. § 300.401.

[110] 897 F.2d 1463, 1470-72 (9th Cir. 1990).

[111] *Id.*

[112] 29 U.S.C.A. § 794.

[113] *See, e.g.*, ZIRKEL & KINCAID, *supra* note 42, at 1:2. Even though the ADA and Section 504 prohibit the same conduct, as a practical matter plaintiffs may have a lower hurdle to clear under the ADA. *See, e.g.*, Baird v. Rose, 192 F.3d 462 (4th Cir. 1999) (stating that ADA has lower standard of causation than § 504).

[114] 34 C.F.R. § 104.33.

[115] EHLR 352:627 (OCR 1988).

[116] *Id.* at 352:628.

[117] *Id.* at 352:631.

LEA to provide FAPE.[118] In another example, OCR found that the California State Department of Education violated Section 504 by neglecting to take enforcement action when LEAs failed to comply with IDEA hearing officer decisions.[119]

Similarly, courts have recognized that an SEA's failure to supervise local districts can rise to the level of a Section 504 or ADA violation.[120] For example, in *Emma C. v. Eastin*,[121] plaintiffs alleged that the SEA violated Section 504 and the ADA by failing to monitor an LEA's compliance with state and federal law, by failing to investigate complaints against the LEA, and by failing to take corrective action against the LEA.[122] The trial court held that these allegations were sufficient to overcome the SEA's motion to dismiss for failure to state a claim upon which relief could be granted.[123]

However, some authorities of limited persuasive value have stated that Section 504 and the ADA do not require SEAs to monitor LEAs.[124] The Section 504 regulations provide that no covered entity shall, "directly or through contractual or other arrangements, utilize criteria or methods of administration" that "perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State."[125] This regulation engenders a duty of one covered entity to monitor for and to correct another related covered entity's disability-based discrimination. It provides textual support for a duty to monitor LEAs distinct from that imposed by the IDEA. The breadth of this regulation also creates a duty for SEAs to monitor other governmental agencies, as well as private agencies, such as private schools.[126]

III. DIRECT SERVICES BY SEAs

This Part explores the nature and extent of an SEA's duty to provide direct educational services to children with disabilities. This issue is controversial, as this rule runs counter to common American ideas of "local control" of education.[127]

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[118] *Id.*

[119] California State Dep't of Educ., EHLR 352:549 (OCR 1987); *see also* Texas Educ. Agency, EHLR 352:459 (OCR 1987); Alabama State Dep't of Educ., EHLR 352:41 (OCR 1985).

[120] *See, e.g.*, Jose P. v. Ambach, 669 F.2d 865, 871 (2d Cir. 1982) (SEA's failure to supervise LEAs is a violation of Section 504); Hendricks v. Gilhool, 709 F. Supp. 1368 (E.D. Pa. 1989) (holding that SEA is ultimately responsible for ensuring LEA compliance with EHA). *But see* McGraw v. Board of Educ., 952 F. Supp. 248, 255 (D. Md. 1997) (holding that neither the ADA nor Section 504 require a SEA to monitor LEAs).

[121] 985 F. Supp. 940 (N.D. Cal. 1997).

[122] *Id.* at 948.

[123] *Id.*

[124] *E.g.*, McGraw, 952 F. Supp. at 255.

[125] 34 C.F.R. § 104.4(b)(4).

[126] *E.g.*, Illinois State Bd. of Educ., 20 IDELR 687, 690 (OCR 1993).

[127] *E.g.*, San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 29-30 (1973).

A. *Direct Services: The IDEA's "Fail-Safe"*[128] *Provision?*

1. The Relevant Texts.

The recently amended IDEA now provides that SEAs must redirect IDEA funds from an LEA or other responsible state agency and provide direct services to children with disabilities when the LEA or other agency 1) "has not provided the information needed to establish" the LEA's or agency's IDEA eligibility; 2) "is unable to establish and maintain programs of free appropriate public education" under Section 1413(a); 3) "is unable or unwilling to be consolidated with" other LEAs to establish or maintain programs under Section 1413(a); or 4) "has one or more children with disabilities who can best be served by a regional or State program or service-delivery system designed to meet the needs of such children."[129] Although it deleted words from this portion of the IDEA,[130] Congress viewed this section of the 1997 amendments as restating prior law. Specifically, Congress stated that "consequences connected to direct services by the SEA when an LEA cannot or does not provide [FAPE] to children with disabilities within its jurisdiction" are "retained without substantive alteration."[131] IDEA-97 also states that an SEA may provide direct services "in such manner and at such locations (including regional or State centers)" as the SEA deems appropriate.[132] However, when a state provides direct services, it must comply with all of the IDEA's requirements for LEAs.[133]

The 1999 IDEA regulations restate the statutory language without any discernible change in meaning.[134] In addition, the regulations explicitly state two propositions that are inherent in the statute. First, an SEA must ensure that FAPE is available to eligible children when the LEA does not apply for IDEA funds.[135] Second, the discretion afforded to SEAs in providing direct services is subject to the general rule that special education is provided in the least restrictive environment.[136]

2. Questions Raised by the 1997 IDEA Amendments.

Prior to the 1997 amendments, the statute required SEAs to provide direct services whenever an LEA was "unwilling or unable" to do so.[137] Although

[128] Champagne, *supra* note 100, at 7.
[129] 20 U.S.C.A. § 1413(h)(1).
[130] *See infra* Part III.A.2 (discussing alterations to this provision).
[131] H.R. REP. NO. 105-95, at 95, *reprinted in* 1997 U.S.C.C.A.N. at 93.
[132] 20 U.S.C.A. § 1413(h)(2).
[133] *Id.* § 1412(b).
[134] 34 C.F.R. §§ 300.360-.372.
[135] *Id.* § 300.360(b).
[136] *Id.* § 300.361.
[137] *See, e.g.*, Todd T. v. Andrews, 933 F.2d 1576, 1583 (11th Cir. 1991) (citing 20

purporting not to make substantive alterations in the law regarding direct services by SEAs,[138] Congress did create some uncertainty when it deleted the word "unwilling" from the statutory text. In the wake of this change, the Department of Education declined a commentator's request to add "or unwilling" to the final IDEA regulations because, after examining the language of the statute, it considered it inappropriate to make the requested change.[139]

In light of this amendment, what happens if an LEA is "unwilling" to provide FAPE to a child with a disability? Does the SEA have an obligation to provide direct services? It almost certainly does. First, the amended IDEA retains the requirement that SEAs provide direct services when a LEA has "one or more children" that can best be served by a state or regional facility or program.[140] As interpreted by the courts, this clause may be implicated when an LEA declines to provide services to a child.[141] Second, the IDEA's plain language specifically requires the SEA to "ensure" that "all" children receive FAPE.[142] Regardless of the numerous amendments to the IDEA, one requirement remains constant – the statute still does not allow the deprivation of a child's FAPE. When an LEA does not provide services to a child because it is "unwilling" to do so, the SEA retains its obligations to ensure the child receives FAPE by any means necessary including providing services directly. Third, to the extent that it is examined,[143] the legislative history would undermine any argument that SEAs do not have a duty to provide direct services when an LEA refuses to provide FAPE. As noted above,[144] Congress clearly stated that the "consequences connected to direct services by the SEA when an LEA cannot or *does not* provide [FAPE]" to children with disabilities were not altered by the 1997 amendments.[145] Finally, the IDEA and its implementing regulations are to be applied in a sensible manner.[146] The regulations require an SEA to ensure availability of FAPE to all eligible children when an LEA does not seek IDEA funds.[147] There is no plausible reason why SEAs should be required to provide direct services to a whole district's children with disabilities

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U.S.C.A. § 1414(d)(1) (West 1990 & Supp. 1991) ("unwilling or unable"), *on remand*, 20 IDELR 250 (N.D. Ga. 1993).

[138] H.R. REP. NO. 105-95, at 95, *reprinted in* 1997 U.S.C.C.A.N. at 93.

[139] Attachment 1, 64 Fed. Reg. at 12,598.

[140] 20 U.S.C.A. § 1413(h)(1)(D).

[141] *See, e.g.*, Todd T., 933 F.2d at 1583; Maher, 793 F.2d at 1491-92

[142] 20 U.S.C.A. § 1412(a)(1).

[143] Legislative history is a highly controversial aid in statutory construction. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Mayes & Zirkel, *supra* note 12, at 478-79 (briefly discussing this controversy). The United States Supreme Court will not consult legislative history if a statutory text's meaning is clear or easily discernible from its context. *See* Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2146 (1999).

[144] *See supra* note 131 and accompanying text.

[145] H.R. REP. NO. 105-95, at 95, *reprinted in* 1997 U.S.C.C.A.N. at 93 (emphasis added).

[146] *See, e.g.*, Mayes & Zirkel, *supra* note 12, at 459.

[147] 34 C.F.R. § 300.360(b).

when an LEA does not apply for IDEA funds but the same SEAs are not required to do so when an LEA refuses to serve an individual child with a disability.

What meaning, then, is to be ascribed to Congress's deletion of the word "unwilling"? Generally, one presumes that a legislative body intended to change the law when it amends a statute.[148] Like all rules of statutory construction, however, this rule yields to contrary indications of legislative intent,[149] especially if the provision amended embodies a long-standing governmental policy.[150] In light of congressional retention of SEA responsibilities to "ensure" that "all" children with disabilities receive an FAPE,[151] one must interpret the 1997 Amendments to mean that SEA obligations remain the same. LEAs, however, no longer have any argument that they may be "unwilling" to provide FAPE to a child with a disability. Under this interpretation, the amendment retains a practical meaning while conforming to the balance of the IDEA.

B. *Cases on Direct Services*

Very few reported decisions have considered the direct services issue since Congress approved the 1997 amendments to the IDEA. To the extent that the 1997 IDEA made no substantive change in the law regarding direct services by SEAs, the rules announced in cases decided before the amendments remain instructive pending a definitive judicial resolution of this question.

Although the United States Supreme Court agreed to consider the direct services issue once before, it did not issue a definitive decision. In *Honig v. Doe*,[152] an equally divided court affirmed by operation of law[153] a Ninth Circuit order[154] requiring California to provide direct special education services "where the local agency has failed to do so. . . ."[155] In doing so, the Supreme Court rejected California's argument that the Ninth Circuit's direct services order "placed an intolerable burden on the State."[156]

The statute and cases make clear that an SEA must step in whenever necessary to

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[148] *See* Powell v. Board of Educ., 545 N.E.2d 767, 770 (Ill. App. Ct. 1989); Jeter v. Board of Educ., 435 N.W.2d 170, 173 (Neb. 1989); Benson v. Roberts, 666 P.2d 947, 948 (Wash. Ct. App. 1983).

[149] *See* McElroy v. United States, 455 U.S. 642, 650-51 n.14 (1982); Board of Educ. v. Vic Regnier Builders, 648 P.2d 1143, 1147 (Kan. 1982).

[150] *See* Robertson v. Railroad Labor Bd., 268 U.S. 619, 627 (1925).

[151] 20 U.S.C.A. § 1412(a).

[152] 484 U.S. 305 (1988).

[153] "If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. . . . The legal effect would be the same if the appeal . . . were dismissed." Durant v. Essex Co., 74 U.S. (7 Wall.) 107, 112 (1869). Similar to a denial of a petition for certiorari, an affirmance by an equally divided court has no precedential value. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264 (1960).

[154] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

[155] Honig, 484 U.S. at 329.

[156] *Id.* at 317.

provide FAPE to a child with a disability.[157] The authorities also demonstrate that LEAs may not lightly declare themselves unable to serve an eligible child.[158] Courts and hearing officers must assess the ability of an LEA to serve a student on an individualized basis.[159]

Three leading cases are particularly useful in examining the SEA's direct-services obligation. In *Doe v. Maher*, the Ninth Circuit held that an SEA has a duty to provide services directly whenever an LEA's violation of IDEA is significant, the SEA has adequate notice of the breach, and the SEA has a reasonable opportunity to obtain LEA compliance.[160] The *Maher* court held that California had an obligation to provide direct services to children with disabilities whom LEAs had excluded from school for disciplinary reasons.[161] Similarly, in reversing a judgment for the SEA in *Todd T. v. Andrews*, the Eleventh Circuit held that the SEA may be liable for plaintiff's residential placement if it was shown that the LEA was "unwilling or unable" to provide the required care.[162] Finally, in response to a class action in Pennsylvania, the *Cordero* court, after indicating that the SEA may be responsible for providing direct services,[163] ordered the SEA to develop a remedy for a class of children with disabilities who were in inappropriate educational placements.[164]

In addition to providing guidance regarding SEA obligations, these cases

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[157] *See* Muth v. Central Bucks Sch. Dist., 839 F. 2d 113, 129 (3d Cir. 1988); Georgia ARC, 716 F.2d at 1574-75 & n.6; Kruelle, 642 F.2d at 696-97; Moubry, 951 F. Supp. at 892; Duane B., 1994 U.S. Dist. LEXIS 18755 at *7; Cordero, 795 F. Supp. at 1360; Hill v. Laurel Sch. Dist., 22 IDELR 489, 492 (S.D. Miss. 1995); Pamela B. v. Longview Sch. Dist., 18 IDELR 514, 521 (W.D. Wash. 1992) (on the record before it, rejecting LEA's claim that it was "unable" to serve student); *see also* Samuel C., EHLR at 502:167 (SEA not obligated to provide direct services because it took prompt action to correct LEA violations).

[158] *See, e.g.*, Pamela B., 18 IDELR at 521 (rejected LEA's "strictly speculative" assertion that it was "unable" to serve plaintiff's son).

[159] *Cf.* Kyle K. v. Baldwin County Sch. Dist., 22 IDELR 37, 39 (N.D. Ga. 1995).

[160] Maher, 793 F.2d at 1492. The Maher court indicated that notice must come from the child's parent or guardian. *Id.* This requirement is too narrow. The SEA must provide direct services whenever it discovers that a child with a disability is not receiving FAPE regardless of the manner in which it acquired that information.

[161] *Id.* at 1491-93.

[162] Todd T., 933 F.2d at 1582-83; *cf.* St. Tammany Parish Sch. Bd. v. State, 142 F.3d 776, 784-85 (5th Cir. 1998) (holding under facts of the case that SEA responsible for residential tuition during "stay-put"). Citing Todd T., the court in Tennessee Department of Mental Health & Mental Retardation v. Doe held that the SEA remained liable to provide FAPE where no state law or interagency agreement assigned responsibility to any LEA or state agency. Tennessee Dep't of Mental Health & Mental Retardation v. Doe, 22 IDELR 347 (Tenn. Ct. App. 1993); *cf.* St. Tammany Parish, 142 F.3d at 784 (in assigning interim liability for residential tuition to SEA, court noted that SEA has not developed interagency agreements).

[163] Cordero, 795 F. Supp. at 1360-61.

[164] *Id.* at 1364.

illustrate the limited impact of the 1997 deletion of "unwilling" from the IDEA. Both *Maher* and *Todd T.* establish the SEA's obligation to provide direct services simultaneously on the "unwilling and unable" clause and the "better served by the State" clause.[165] As the *Maher* court reasoned: "[i]t would seem incontrovertible that, whenever the local agency refuses or wrongfully neglects to provide a handicapped child with a free appropriate public education, that child 'can best be served' on the regional or state level."[166] The *Maher* court's reasoning advocates providing direct services when an LEA is "unwilling" to do so in spite of the 1997 amendment. In addition, this reasoning accords with legislative history that indicates that the legislature did not intend the amendment to provide any substantive alteration to the IDEA.[167]

As noted previously,[168] when providing direct services, the SEA must comply with all rules governing LEAs.[169] For instance, in *Hunt v. Bartman*,[170] the Missouri SEA, after concluding that plaintiff should be placed in a state school for "severely handicapped children,"[171] refused to participate in a due process hearing concerning the appropriateness of plaintiff's placement.[172] The court held that the SEA violated the plaintiff's IDEA due process rights and issued an injunction requiring the SEA to participate in due process hearings concerning SEA-recommended placements at a state school where appropriateness of such placement is at issue.[173]

As an alternative to providing direct services, a court may order an SEA to provide funding so a noncompliant LEA is no longer "unable" to provide services. For example, the *Kerr Center Parents Association* court held that, because a court possesses the authority to order an SEA to provide direct services to children with disabilities, a court might permissibly order an SEA to provide sufficient funding to LEAs to provide FAPE.[174]

C. *Direct Services Under Section 504 and the ADA*

An SEA obligated to or having undertaken to provide an FAPE violates Section 504 or the ADA when it fails to do so.[175] Although not arising in the education context, one recent United States Supreme Court case is particularly instructive regarding the nature of an SEA's duties to provide direct services. In *Olmstead v.*

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[165] Todd T., 933 F.2d at 1583; Maher, 793 F.2d at 1491-92.

[166] Maher, 793 F.2d at 1492 (quoting predecessor to § 1413(h)(1)(D)).

[167] H.R. REP. NO. 105-95, at 95, *reprinted in* 1997 U.S.C.C.A.N. at 93.

[168] *See supra* notes 131-32,135 and accompanying text.

[169] 20 U.S.C.A. § 1412(b).

[170] 873 F. Supp. 229 (W.D. Mo. 1994).

[171] Compare this description with 20 U.S.C.A. § 1413(h) (direct services provided at SEA operated "State centers").

[172] Hunt, 873 F. Supp. at 242-45.

[173] *Id.* at 245, 251.

[174] Kerr Ctr. Parents Ass'n, 897 F.2d at 1469 n.6.

[175] *See, e.g.*, 34 C.F.R. 104.33 (§ 504 regulation); Garrity, 522 F. Supp. 171; Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016 (N.D. Ill. 1993) (pretrial detainees).

Zimring, the Court held that the ADA required states to place mentally disabled persons in a community setting rather than an institution if a community placement is appropriate, if the disabled person does not oppose such placement, and if such placement is accommodated reasonably and equitably[176] given the needs of "a large and diverse population of persons with mental disabilities."[177] The Court makes clear, however, that a State's interest in keeping "its institutions fully populated" would not justify unnecessary institutionalization of persons with disabilities.[178] Although the *Olmstead* case concerned adults in mental health facilities, the ADA's concern over unwarranted segregation applies in all covered institutional settings.[179] The *Olmstead* decision appears to be applicable to SEA-administered schools, and its language negating a state's interest in maintaining fully populated state schools appears to require some reevaluation of several SEA policies.

The *Olmstead* court endorsed a waiting list as a means of correcting unduly restrictive placements.[180] To the extent that the IDEA imposes affirmative obligations to provide FAPE, whereas the ADA and Section 504 prohibit discrimination against otherwise qualified individuals based on disability, adequate remedies under the ADA and Section 504 may – perhaps – not suffice under the IDEA.[181]

IV. SEA POLICIES IN VIOLATION OF THE IDEA, SECTION 504, AND THE ADA

All SEA rules and regulations must conform to the requirements of the IDEA.[182] Several litigants, either individually or collectively, have successfully pursued actions under the IDEA to challenge state policies and regulations that conflict with the IDEA.[183] Litigants have successfully lodged challenges against rules and policies that limited special education to a certain number of days per year,[184]

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[176] 527 U.S. 581, 607, 119 S. Ct. 2176, 2190 (1999).

[177] *Id.* at 604.

[178] *Id.* at 605.

[179] *Id.* at 600 (citing 42 U.S.C.A. § 12101(a)(2), (5)).

[180] *See* Olmstead, 527 U.S. at 605-606.

[181] *Compare id.* at 605-606 (endorsing reasonable waiting list), *with* Cordero, 795 F. Supp. 1352 (plaintiff class consisted of children who waited for thirty or more days for an appropriate placement).

[182] 20 U.S.C.A. § 1412(a) (SEA must have "policies and procedures" that conform to IDEA's requirements); 34 C.F.R. § 300.110.

[183] *But see* Yamen v. Board of Educ., 909 F. Supp. 207, 210-11 (S.D.N.Y. 1996) (claims against SEA dismissed because petition contained no allegation that purported policy caused any "traceable" injury, distinguishing Jose P.).

[184] *See, e.g.*, Crawford v. Pittman, 708 F.2d 1028, 1035 (5th Cir. 1983); Battle v. Pennsylvania, 629 F.2d 269, 280 (3d Cir. 1980);Yaris v. Special Sch. Dist., 558 F. Supp. 545, 559 (E.D. Mo. 1983); Georgia ARC, 716 F.2d at 1575-76; In re Richard K., EHLR 551:192 (N.H. Dist. Ct. 1979). *But see* Association for Community. Living in Colorado v. Romer, 992 F.2d 1040 (10th Cir. 1993) (dismissing claim for failure to exhaust

against termination of special education at an age younger than required by the IDEA,[185] against defective or nonexistent "child find" procedures,[186] against deficiencies in an SEA's administrative appeals system and complaint resolution systems, [187] against refusal to provide related services,[188] against funding formulae and other policies that encourage violation of the IDEA's placement standards,[189] against deficiencies in teacher training programs,[190] and against failure to develop interagency agreements,[191] among other possible challenges to state policy.

In addition to implicating the IDEA, state policies may also violate Section 504 and the ADA.[192] For example, if the SEA supervises interscholastic competition

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administrative remedies).

[185] *See, e.g.*, Tuttle v. Evans, 18 IDELR 945 (Ind. Cir. Ct. 1991).

[186] *See, e.g.*, Asbury v. Missouri Dep't of Elementary & Secondary Educ., 29 IDELR 877, 881 (E.D. Mo. 1999) (claim survives motion to dismiss).

[187] Beth V. v. Carroll, 87 F.3d 80 (3d Cir. 1996); Burr v. Ambach, 863 F.2d 1071, 1077 (2d Cir. 1988); Muth, 839 F.2d at 120-26; Hunt, 873 F. Supp. at 242-55; L.C. v. Utah State Bd. of Educ., 57 F. Supp. 2d 1214, 1222-23 (D. Utah 1999); Upper Valley Ass'n for Handicapped Citizens v. Mills, 26 IDELR 718 (D. Vt. 1997) (consent decree); Bray v. Hobart City Sch. Corp., 818 F. Supp. 1226 (N.D. Ind. 1993); Evans v. Evans, 818 F. Supp. 1215, 1221-23 (N.D. Ind. 1993); Cordero, 795 F. Supp. at 1360-64; Christopher N., 569 F. Supp. 291, 301; John A. v. Gill, 565 F. Supp. 372, 381-82, 385 (N.D. Ill. 1983) (denying motion to dismiss); Garrity, 522 F. Supp. 171 *passim*; Letter to Tucker, 18 IDELR 965 (OSEP 1992) (OSEP disapproves of state rule allowing the SEA to disregard IEP team placement decision, outside of due process or court action); Letter to Armstrong, 28 IDELR at 304 (stating that SEA required to provide hearing officers with authority to grant relief under the IDEA); *see also* S-1 v. Spangler, 20 IDELR 609 (4th Cir. 1993); Monahan v. Nebraska, 645 F.2d 592, 597 (8th Cir. 1981). For further information on several issues raised by these cases, *see* Elaine A. Drager & Perry A. Zirkel, *Impartiality Under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (1993).

[188] *See, e.g.*, William S. v. Gill, 536 F. Supp. 505, 511-12 (N.D. Ill. 1982) (policy of refusing to pay for "non-educational" expenses); Matter of "A" Family, 602 P.2d 157 (Mont. 1979) (invalidating state rule that excluded psychotherapy from special education services provided by SEA).

[189] *See, e.g.*, Corey H., 995 F. Supp. at 911; Hunt, 873 F. Supp. at 245-51; Cordero, 795 F. Supp. at 1357-60.

[190] *See* Corey H., 995 F. Supp. at 910-11; *see also,* Moubry, 951 F. Supp. at 893-94 (claim survives motion to dismiss); Asbury, 29 IDELR at 883; Upper Valley Ass'n for Handicapped Citizens, 26 IDELR 718 (consent decree).

[191] *See, e.g.*, Ciresoli v. Martin, 901 F. Supp. 378, 387-89 (D. Me. 1995); *see also, e.g.*, Asbury, 29 IDELR at 882-83 (claim survives motion to dismiss). *But see* Barretown Elementary Sch. Dist., 29 IDELR 521 (Vt. SEA 1998) (no educational harm). *Cf.* Colorado Dep't of Educ., EHLR 352:373 (OCR 1987) (particular interagency agreement violated Section 504).

[192] *See, e.g.*, William S., 536 F. Supp. 505; Tuttle, 18 IDELR 945; Department of Pub. Instruction of the Commonwealth of Puerto Rico, EHLR 352:653 (OCR 1988); California Dep't of Youth Auth., EHLR 352:307 (OCR 1986) (denial of FAPE to children in state-operated juvenile justice facility); Vermont State Dep't of Educ., EHLR 257:547 (OCR

(i.e., sports, speech and debate) and employs inflexible eligibility rules (i.e., eight semesters limits, age limits) that restrict the participation of children with disabilities, the SEA may violate Section 504 and the ADA.[193] In another example, an SEA may violate Section 504 and the ADA by failing to provide reasonable accommodations in the administration of high stakes assessments to students with disabilities.[194] Another area subject to frequent attack under Section 504 and the ADA is the SEA's due process procedure.[195]

V. LITIGATION BY AND AGAINST SEAS.

While the preceding three Parts reviewed substantive issues of SEA responsibility under statutes concerning special education, this Part discusses commonly asserted limits to the ability to grant relief for SEA violations. They are as follows: Eleventh Amendment immunity, exhaustion of administrative remedies, standing, and failure to join necessary parties or dismissal of improper parties.

1984) (evaluation and placement procedures conflict with § 504). For examples of cases in which SEA policy was not found to be in violation of Section 504, see, *e.g.*, Mr. B. v. Board of Educ., 27 IDELR 685, 687-88 (E.D.N.Y. 1998) (finding no policy); Connecticut State Dep't of Educ., 18 IDELR 467 (OCR 1991) (rule regarding convening IEP team within 14 days after a child's hospitalization); Pennsylvania Dep't of Educ., 17 EHLR 1006 (OCR 1991) (holding that state policy of not approving out-of-state placements until in-state placement options had been examined did not violate Section 504); New Hampshire Dep't of Educ., EHLR 352:197 (OCR 1986) (rules limiting SEA reimbursement to LEAs for out-of-state placements); South Dakota Dep't of Educ. & Cultural Affairs, EHLR 352:191 (OCR 1986) (use of "noncategorical" approach to identification, among other allegations); Georgia Dep't of Educ., EHLR 352:05 (OCR 1985) (revised eligibility criteria did not violate § 504).

[193] *See, e.g.*, Kathleen A. Sullivan et al., *Leveling the Playing Field or Leveling the Players? Section 504, the Americans with Disabilities Act, and Interscholastic Sports*, 33 J. SPEC. EDUC. 258 (2000).

[194] *See, e.g.*, Texas Educ. Agency, 23 IDELR 566 (OCR 1995); Perry A. Zirkel, *Tabular Analysis of Case Law Concerning High Stakes Testing*, 143 EDUC. L. REP. 697, 705 (2000); *see also* Rene v. Reed, 726 N.E.2d 808 (Ind. Ct. App. 2000) (challenge to high-stakes testing based on the IDEA) (reversing denial of class certification).

[195] *See, e.g.*, John A., 565 F. Supp. at 372; New Hampshire Dep't of Educ., 18 IDELR 420 (OCR 1991) (failure to provide due process hearings after voluntarily assuming that responsibility); Pennsylvania Dep't of Educ., EHLR 352:615 (OCR 1988) (failure of SEA to provide notices to parents when composition of multi-categorical classroom was to change); Missouri Dep't of Educ., EHLR 352:397 (OCR 1987) (state policy requiring administrative review before due process hearing violates § 504); Montana State Office of Pub. Instruction, EHLR 352:372 (OCR 1987) (state policy did not provide for impartial hearing officers); Massachusetts Dep't of Educ., EHLR 352:313 (OCR 1986) (policy of requiring mediation before due process violates § 504); Vermont Dep't of Educ., EHLR 352:03 (OCR 1985) (failure to notify parents that approval of home-schooling program would end eligibility for FAPE); Virginia State Dep't of Educ., EHLR 257:649 (OCR 1985) (failure of hearing officer to render timely decisions); *accord* Letter to Autin, 20 IDELR 1157 (OSEP 1992); *see generally* Drager & Zirkel, *supra* note 187.

A. *Eleventh Amendment "Immunity"*

The Eleventh Amendment bars nearly all actions against states in federal courts.[196] In response to a United States Supreme Court case holding that the Eleventh Amendment barred suits against SEAs,[197] Congress passed an amendment to the IDEA that purports to abrogate such SEA immunity.[198] Recent United States Supreme Court decisions under the Eleventh Amendment[199] have reinvigorated Eleventh Amendment defenses. There is a division of authorities concerning the extent of Congress' power under the Fourteenth Amendment to abrogate Eleventh Amendment immunity to federal suits alleging disability discrimination,[200] and the Supreme Court has granted certiorari to resolve this issue, in a case involving the employment provisions of the ADA.[201] Although the ultimate resolution of this issue may change outcomes in Section 504/ADA suits, there is additional analysis necessary under the IDEA. The most recent appellate decisions regarding Eleventh Amendment immunity to IDEA suits have held that SEAs waive their immunity by accepting IDEA funds.[202] As the Seventh Circuit held: "[S]tates must take the bitter with the sweet; having accepted the money, they must litigate in federal court."[203]

Under the *Ex Parte Young* doctrine, the Eleventh Amendment does not bar suits against state officers, in their official capacities, to enjoin violations of federal law.[204] This doctrine appears unaffected, so far, by the recent change in the Supreme Court's Eleventh Amendment jurisprudence regarding SEAs.[205]

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[196] U.S. CONST. amend. XI.

[197] Dellmuth v. Muth, 491 U.S. 223 (1989).

[198] 20 U.S.C.A. § 1403(a). For the abrogation provisions of Section 504 and the ADA, see 42 U.S.C.A. §§ 2000-7 and 12202, respectively.

[199] Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996); *see* Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 640 (2000); Alden v. Maine, 526 U.S. 706 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 634-648 (1999).

[200] *Compare* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (states immune from ADA suits in federal court), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct. 1265 (2000) *with* Kimel v. Florida Dep't of Corrections, 139 F.3d 1426 (11th Cir. 1998) (not immune), *cert. granted sub nom.* Florida Dep't of Corrections v. Dickson, 120 S. Ct. 976, *cert. dismissed*, 120 S. Ct. 1236 (2000).

[201] University of Alabama at Birmingham Bd. of Trustees v. Garrett, 120 S. Ct. 1669 (2000).

[202] *See, e.g.*, Bradley v. Arkansas Dep't of Educ., 189 F.3d 745, 752-53 (8th Cir. 1998); Board of Educ. v. Kelley E., 207 F.3d 931, 935 (7th Cir.), *cert. denied, 121 S. Ct. 70 (2000).*

[203] Kelley E., 207 F.3d at 935.

[204] Ex Parte Young, 209 U.S. 123, 154-66 (1908).

[205] *See* Alden, 527 U.S. at 747-48 (citing Young). The authors of this Article expect the Ex Parte Young rule to survive any attack. This doctrine is not based on any notion of abrogation; in fact, the rule predates common congressional abrogation of Eleventh Amendment Immunity. Rather, the Ex Parte Young doctrine concerns the scope of the Eleventh Amendment itself. Concluding that suits against state officials seeking injunctive relief to enforce federal law are not barred by the Eleventh Amendment, the Ex Parte Young

B. *Exhaustion of Administrative Remedies*

Generally, the IDEA requires exhaustion of administrative remedies.[206] However, exhaustion is not required if the "administrative process would be futile or inadequate"[207] or where plaintiffs would be irreparably harmed by the delay occasioned by resort to the administrative process.[208] Although courts are not to presume that pursuit of an administrative remedy is futile,[209] plaintiffs routinely show administrative futility in actions against SEAs,[210] such as when plaintiffs seek structural reforms of the SEA or its policies or hearing officers lack the authority to grant the relief sought.[211] Courts will excuse a plaintiff's failure to exhaust when the plaintiff was never informed of IDEA's procedural safeguards.[212] In addition, some authorities do not require exhaustion where the plaintiff's complaint presents pure questions of law.[213] Furthermore, for class actions, some authorities hold that each member of the class need not exhaust administrative remedies to satisfy the exhaustion requirement.[214]

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court made a decision that is entirely distinct from questions of Congressional action.

[206] 20 U.S.C.A. § 1415(i)(2); *see, e.g.*, Association for Community Living in Colorado, 992 F.2d 1040, 1043; Whitehead, 932 F. Supp. at 1396; Ciresoli, 901 F. Supp. at 385-86. *Cf.* Wallingford Bd. of Educ. v. State Dep't of Educ., 25 IDELR 26 (Conn. Super. Ct. 1996) (LEA required to exhaust administrative remedies when challenging ruling of a hearing officer).

[207] Honig, 484 U.S. at 327 (citing legislative history).

[208] *See, e.g.*, Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994).

[209] *See, e.g.*, Colonial Sch. Dist. v. Commonwealth, 602 A.2d 455, 456 (Pa. Commw. Ct. 1992).

[210] *See, e.g.*, Lester H. v. Gilhool, 916 F.2d 865, 869-70 (3rd Cir. 1990); Kerr Ctr. Parents Ass'n, 897 F.2d at 1469-70; Burr, 863 F.2d at 1077; Maher, 793 F.2d at 1490-91; Jose P., 669 F.2d at 869-70; Brett v. Goshen Comm. Sch. Corp., 29 IDELR 210 (N.D. Ind. 1998); Peter v. Johnson, 958 F. Supp. 1383, 1392-93 (D. Minn. 1997); Garrity, 522 F. Supp. at 220-21. *But see, e.g.*, Alaja v. New York City Bd. of Educ., 27 IDELR 38 (S.D.N.Y. 1997) (finding no futility, dismissing case for failure to exhaust).

[211] *See, e.g.*, W.B. v. Matula, 67 F.3d 484 (3rd Cir. 1995); Hoeft, 967 F.2d at 1309; Heldman v. Sobol, 962 F.2d 148, 158-59 (2nd Cir. 1992); Burr, 863 F.2d at 1077; Crawford, 708 F.2d at 1033 n.17; Monahan, 645 F.2d at 597; Upper Valley Ass'n For Handicapped Citizens, 928 F. Supp. at 434-36; Ciresoli, 901 F. Supp. at 387-88; Bray, 818 F. Supp. at 1232-33; Hendricks, 709 F. Supp. at 1367; *accord* Felix v. Waihee, 21 IDELR 48, 51 (D. Hawaii 1994).

[212] Maher, 793 F.2d at 1491.

[213] Connors v. Mills, 34 F. Supp. 2d 795, 800 (N.D.N.Y. 1998); Peter, 958 F. Supp. at 1392 (citing Pihl v. Massachusetts Dep't of Educ., 9 F.3d 184, 190 (1st Cir. 1993)); Rene, 726 N.E.2d at 819-20.

[214] *See, e.g.*, Hoeft, 967 F.2d 1298, 1309 (9th Cir. 1992); Gaskin v. Commonwealth, 22 IDELR 702, 706 & n.6 (citing Hoeft and legislative history). *But see, e.g.*, Jackson v. Fort Stanton Hosp. & Training Sch., 757 F. Supp. 1243, 1303-04 (D.N.M. 1990) (each member of class must exhaust administrative remedies).

If a plaintiff seeks relief under other federal statutes, such as Section 504, that is also available under the IDEA, the plaintiff must exhaust IDEA administrative remedies "to the same extent as would be required had the action been brought under the IDEA."[215] Some courts require exhaustion even where the plaintiff is seeking relief not available under the IDEA in that jurisdiction, such as money damages.[216]

C. *"Standing"*

SEA challenges to a parent's standing under the IDEA have not fared well. For example, the Second Circuit held that a parent challenging the New York SEA's rule for selecting impartial hearing officers had standing to sue.[217] In contrast, IDEA litigants other than parents are vulnerable to standing challenges.

In *Andrews v. Ledbetter*, the Eleventh Circuit held that LEAs do not have "standing" to challenge an SEA policy allegedly in violation of the IDEA.[218] In contrast, the *Kelley E.* court held that LEAs challenging such a policy have standing, but held that they did not have a valid cause of action for contribution beyond their statutorily-required share of IDEA funds.[219] Similarly, the trial court in *Board of Education v. Leininger* held that LEAs did not have a cause of action under the IDEA to compel the SEA to "immediately disburse" IDEA funds.[220]

To the extent that *Leininger*, *Kelley E.* and *Andrews* purport to foreclose litigation by LEAs against SEAs, they are subject to criticism. Although these courts note that the IDEA does not expressly grant LEAs a right of action against SEAs, these courts also note that LEAs may still have such a cause of action by implication.[221] Although LEAs may not be the intended beneficiaries of the IDEA,[222] LEAs have a responsibility to comply with the IDEA[223] and may bear the brunt of a state's noncompliance.[224] To the extent that an SEA policy hinders an

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[215] 20 U.S.C.A. § 1415(l); *see, e.g.*, Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000); Babicz v. School Bd., 135 F.3d 1420 (11th Cir. 1998).

[216] *See, e.g.*, Charlie F. v. Board of Educ., 98 F.3d 989, 991-93 (7th Cir. 1996); *accord* Babicz, 135 F.3d 1420. *But see* Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1275 (9th Cir. 1999) (no exhaustion requirement where relief sought is unavailable under IDEA).

[217] Heldman, 962 F.2d at 154-58; *accord* Peter, 958 F. Supp. at 1390-91.

[218] Andrews v. Ledbetter, 880 F.2d 1287, 1289 (11th Cir. 1989).

[219] Kelley E., 207 F.3d at 934, 938.

[220] Board of Educ. v. Leininger, 822 F. Supp. 516 (N.D. Ill. 1993).

[221] *See* Cort v. Ash, 422 U.S. 66, 78-85 (1975) (setting forth test for implying a cause of action from a federal statute).

[222] Leininger, 822 F. Supp. at 518.

[223] 20 U.S.C.A. § 1413(a)(1).

[224] *See, e.g.*, In re Drew P., 877 F.2d 927 (11th Cir. 1989) (ordering a LEA, to reimburse parents for private school tuition because its placement is inadequate as a result of state policy), *cert. denied*, 494 U.S. 1046 (1990); *see also* Clark County (NV) Sch. Dist., EHLR 257:245 (OCR 1981) (SEA policy compelled LEA violation of § 504, even so, LEA violation not excused).

LEA's compliance with the IDEA, then allowing that LEA to proceed against the SEA to obtain relief from that policy would further the purpose of the IDEA—a key condition for implying a right of action under a federal statute.[225]

As a related matter, advocacy groups routinely face challenges to their standing in IDEA actions. One court, considering such a challenge to an advocacy group's standing under the IDEA, concluded that these groups have standing if they use their own resources to remedy a defendant's statutory violations.[226] Advocacy groups also may have "associational standing."[227] Under this rule, an organization has standing if its members have standing to sue in their own right; the interests the organization wishes to vindicate is related to its purpose; and "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[228]

D. *Necessary and Proper Parties*

The reported decisions contain a bewildering variety of views on necessary or proper parties under the IDEA. First, are there any necessary parties when a litigant proceeds directly against an SEA? In an issue that it identified sua sponte, the Eleventh Circuit held that the United States Secretary of Education is not a necessary party in a challenge to a state law plan.[229] Are LEAs necessary parties in such actions? In cases where plaintiffs have sought systemic reform at the SEA level, courts have uniformly rejected SEA arguments that LEAs are required parties.[230]

In contrast to actions challenging an SEA's adoption or implementation of a statewide plan, in cases concerning an LEA's provision of FAPE to a single child, the authorities are divided concerning the propriety of joining the SEA as a party.[231] Some hold that an SEA is not a necessary party.[232] Others state that SEAs are

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[225] *See* Cort, 422 U.S. at 78.

[226] Gaskin, 22 IDELR at 705. *But see* Felix, 21 IDELR at 52.

[227] *See* Heldman, 962 F.2d at 158 (allowing plaintiff, on remand, to clarify pleadings re: associational standing); Peter, 958 F. Supp. at 1391 (dismissing advocacy claims by organization for failing to "sufficiently allege standing"); Felix, 21 IDELR at 51-52.

[228] Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

[229] Georgia ARC, 716 F.2d at 1573.

[230] Evans, 818 F.2d at 1225-26; Hendricks, 709 F. Supp. at 1367-68; Association for Retarded Citizens v. Frazier, 517 F. Supp. 105, 123-24 (D. Colo. 1981).

[231] Often, the SEA raises this defense via a motion to dismiss for failure to state a claim upon which relief may be granted, *see* FED. R. CIV. P. 12(b)(6) or via a motion for summary judgment, *see* FED R. CIV. P. 56. Under either of these motions, the SEA has an exceedingly high hurdle to clear. *See, e.g.*, Mr. X., 975 F. Supp. at 550-55 (rejecting SEA's motion to dismiss); Kyle K., 22 IDELR at 38 (Rule 12(b)(6) motions are rarely granted; also, court denied SEA motion for summary judgment); *see also, e.g.*, J.F., 32 IDELR ¶ 93, at 307-08 (rejecting SEA motion for summary judgment, as material facts are in dispute); Hill, 22 IDELR at 492 (denying both motions to dismiss and for summary judgment).

[232] *See, e.g.*, M.C. v. Voluntown Bd. of Educ., 178 F.R.D. 367 (D. Conn. 1998) (denying

proper parties in such disputes, especially if SEA action may be required to obtain LEA compliance or an SEA policy would be altered.[233] Many of these disputes concern the authority of impartial hearing officers,[234] as opposed to courts, to grant relief against an SEA. To the extent that a hearing officer is not empowered to provide remedies for SEA violations and a child with a disability is thereby deprived of FAPE, the IDEA is violated.[235]

When are other state and local agencies proper parties to special education disputes? The dividing line appears to be entitlement to FAPE versus financial responsibility. Insofar as other agencies provide special education, they are proper parties to due process hearings if the provision of FAPE is at issue.[236] In contrast,

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LEA motion to dismiss for failure to join necessary party); Glazier v. Indep. Sch. Dist. No. 876, 558 N.W.2d 763, 769 (Minn. Ct. App. 1997) (dismissing SEA commissioner from suit challenging particular child's IEP). The Glazier court, citing state law, appears to imply that a SEA is never a proper party to a challenge to a particular child's IEP. To the extent that a SEA provides direct services, *see supra* Part III, has a policy in violation of a child's rights under the IDEA, *see supra* Part IV, or causes harm to a particular child by failing to monitor the LEA, *see supra* Part II, the Glazier court's implication is unwarranted.

[233] *See, e.g.*, John T. v. Delaware County Intermediate Unit, 2000 U.S. Dist. LEXIS 6169, at * 29 (E.D. Pa. May 8, 2000); Connors, 34 F. Supp. 2d at 801-02; Hill, 22 IDELR at 492; Felter, 830 F. Supp. at 1280; Woolcott, 351 N.W.2d at 606; South Hadley Pub. Sch., 32 IDELR ¶ 161, 506-07 (Mass. SEA 2000).

In an anomalous decision, a federal court held the New York SEA jointly liable for a LEA's IDEA violations in Mr. X. v. New York State Education Department, 975 F. Supp. 546. Plaintiff's factual allegation for asserting SEA liability was the state hearing officer's refusal to grant plaintiff's desired relief on plaintiff's appeal from a decision of the impartial hearing officer. The Mr. X court reasoned that the SEA was ultimately responsible for approving educational placements and programs. That being true, and assuming that a SEA can be held accountable for the decisions of an independent review officer, the decision still is disturbing. The prime mover in this case was the LEA. There is no indication that Mr. X sought state review through the New York complaint procedure, that reasonable and routine monitoring would have uncovered the LEA's violations, or that the SEA would have allowed the LEA's violations to remain uncorrected. Although one can readily conceive of a situation in which a SEA should be held liable for a hearing officer or review officer decision, it did not seem appropriate in Mr. X's case.

The trial court awarded plaintiff $46,846.84 in attorney fees against the SEA. The LEA was ordered to pay $99,878.58 of plaintiff's attorney fees. Mr. X v. New York State Educ. Dep't, 20 F. Supp. 2d 561, 565 (S.D.N.Y. 1998).

Query: Is a SEA a proper party in child welfare disputes concerning a child with a disability, such as a Person in Need of Services (PINS) petition? Answers to this question depend on state law. For example, the Indiana Court of Appeals held that they were not proper parties under Indiana law. *In re* E.I., 653 N.E.2d 503 (Ind. Ct. App. 1995). For more information on juvenile justice and special education, *see* Mayes & Zirkel, *supra* note 60.

[234] *Cf.* Glazier, 558 N.W.2d at 769.

[235] *See, e.g.*, Letter to Armstrong, 28 IDELR at 303-04.

[236] *See, e.g.*, In re Child with Disabilities, 20 IDELR at 229-30. This reasoning also includes private schools that provide receive state support to provide FAPE to children with

if the question concerns another agency's purported obligation to pay for special education, in contrast to the requirements of FAPE, other agencies are not proper parties to due process hearings.[237]

VI. SELECTED STATE LAW COMPLICATIONS

While the preceding Part concerned common issues under the IDEA and other federal statutes, this Part focuses on state law concerns that may alter the SEA-LEA balance. Specifically, this Part considers state "unfunded mandate" rules as they may relate to SEA obligations. It also considers state laws that may provide additional protections for LEAs, as well as the ability of litigants to bring additional state law claims in federal courts.

A. *"Taxpayer Revolt" Cases*

In states where voters or legislators have approved taxpayer revolt measures, such as California's Proposition 13, the SEA/LEA relationship is further complicated.[238] Typically, these measures require states to fully fund or reimburse local governments for "new program[s] or higher level[s] of service."[239] In effect, they freeze proportional local taxing and spending burdens. For example, after Missouri required LEAs to provide FAPE to three- and four-year-olds with disabilities in 1991, the Missouri Supreme Court held that the state must entirely fund this new program.[240]

Some of these measures do not discriminate between state and federal mandates, and require the SEAs to reimburse states fully for increased special education costs due to new or improved programs whether they be mandated by the federal or state government.[241] Other statutes, notably California's Proposition 13, are triggered only by state mandates. California courts view the IDEA as a federal mandate; however, they require state reimbursement for special education expenses due to "state choice in the implementation of the federal program."[242] This appears to be a difficult distinction to draw.[243] However they may allocate fiscal responsibility for special education, it is clear that these measures may not be used to deprive an

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disabilities. *See, e.g.*, South Hadley Pub. Sch., 32 IDELR ¶ 161, at 505-06.

[237] *See, e.g.*, In re A.N., EHLR 504:295 (N.J. SEA 1983); Interboro Sch. Dist., 29 IDELR 838 (Pa. SEA 1998); Letter to Loeffler, EHLR 211:275 (OSEP).

[238] *See, e.g.*, City of Sacramento v. State, 785 P.2d 522 (Cal. 1990); Ft. Zumwalt Sch. Dist. v. State, 896 S.W.2d 918 (Mo. 1995).

[239] Hayes v. Commission on State Mandates, 15 Cal. Rptr. 2d 547, 557 (Ct. App. 1992).

[240] Rolla 31 Sch. Dist. v. State, 837 S.W.2d 1, 5-7 (Mo. 1992).

[241] Durant v. State, 566 N.W.2d 272, 280 (Mich. 1997).

[242] Hayes, 15 Cal. Rptr. 2d at 568.

[243] California's Commission on State Mandates recently ordered the state to reimburse LEAs, in the amount of $8 billion, for certain state-mandated special education programs. *Legal Trends*, YOUR SCH. & L., June 19, 2000, at 12.

eligible child of an FAPE.[244]

These measures have several disturbing implications at their outer limits. First, do they require states to match local increases in special education funding? If so, that would materially change the meaning of the measures.[245] At first, they prohibited the states from adding to the fiscal burden of localities. Now, some courts are apparently reading them to require states to subsidize voluntarily assumed local burdens.[246] Second, do these measures reallocate liability for LEA violations? Although there are apparently no such cases in the law reports, it would be profoundly disturbing if an LEA successfully used a taxpayer revolt measure to shift costs for its own volitional IDEA violations to an SEA. It is doubtful that most local violations of federal statute could be considered state "mandates," although it is certainly possible that an LEA would make that argument.

B. *Litigating State Law Claims in Federal Court*

Although the IDEA does not provide a formulaic method for apportioning liability among agencies,[247] state law often does, whether by statute, rule, or interagency agreement.[248] For example, state law often allows LEAs to sue SEAs.[249] States also may provide more rights under state statutes than are provided in the IDEA.[250]

Can one litigate such state law claims against SEAs in federal court? According to the general rule, the Eleventh Amendment would bar such claims and, furthermore, theyare outside the scope of IDEA's jurisdictional grant.[251] In addition, the trial court has discretion to dismiss remaining state law claims that the Eleventh Amendment does not bar.[252] However, to the extent that the IDEA incorporates the state law in question by reference,[253] such claims are subject to

[244] *See, e.g.*, Birmingham and Lamphere Sch. Dists. v. Superintentent of Pub. Instruction, 328 N.W.2d 59, 64-65 (Mich. Ct. App. 1982).

[245] Ft. Zumwalt, 896 S.W.2d at 923-26 (Price, J., dissenting).

[246] *Id.*

[247] *See, e.g.*, Gadsby, 109 F.3d at 950, 952; *accord* Kruelle, 642 F.2d at 697 & n.34.

[248] *See, e.g.*, Ashland Sch. Dist. v. New Hampshire Div. for Children, Youth, and Families, 681 A.2d 71 (N.H. 1996) (child incarcerated in juvenile correction facility); New York City Bd. of Educ. v. Ambach, 452 N.Y.S.2d 731 (App. Div. 1982) (private tuition division between LEA and SEA, per statute); Curtis H. v. Boston Pub. Sch., EHLR 502:240 (Mass. SEA 1981) (interagency agreement); Smith v. Cumberland Sch. Comm., 415 A.2d 168 (R.I. 1980) (LEA and state mental health agency).

[249] *See, e.g.*, John T., 2000 U.S. Dist. LEXIS 6169, at *28.

[250] *See, e.g.*, In re Conklin, 946 F.2d 306, 308-09 (4th Cir. 1991).

[251] *See, e.g.*, 20 U.S.C.A. § 1415(i); Kelley E., 207 F.3d at 935; Emma C., 985 F. Supp. at 947-48.

[252] 20 U.S.C.A. § 1367.

[253] *See, e.g.*, 20 U.S.C.A. § 1401(8)(B).

litigation in federal court.[254] Some courts state that the Eleventh Amendment does not bar these incorporated claims.[255]

VII. CONCLUSION

State educational agencies have various responsibilities for the education of children with disabilities. Although the current state of the law concerning their responsibilities is somewhat muddled at the edges, such as additional state law requirements and available defenses,[256] their core obligations have crystallized. First, each SEA must proactively supervise local school districts and other entities involved with providing special education.[257] Second, the SEA must take reasonable corrective action when those entities violate the rights of children with disabilities. Third, in circumscribed situations based on necessity, it must provide direct services to students with disabilities.[258] Arguably, the SEA may be required to provide direct services even when a local district is able but unwilling to educate one or more children with disabilities.[259] Finally, each agency must conform its state policies and practices to federal law.[260]

Those SEAs that fulfill these core obligations will not only better serve their children with disabilities but also will rise above the imminent incoming tide of lawsuits at the state level. Nevertheless, local educational agencies remain the primary mechanism for delivery of benefits under the IDEA, Section 504, and the ADA.

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[254] *See, e.g.*, Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 658-59 (8th Cir. 1999) (citing cases).

[255] *See, e.g.*, John T., 2000 U.S. Dist. LEXIS 6169, at * 29.

[256] *See supra* Parts V and VI.

[257] *See supra* Part II.

[258] *See supra* Part III.

[259] *See supra* Part III.A.2.

[260] *See supra* Part IV.