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DISABILITY SERVICES IN DUAL ENROLLMENT

Benjamin A. Schoenkin*

INTRODUCTION

Close to one in five people have a disability in the United States¹ and increasingly, students in secondary schools are taking dual enrollment classes.² This creates questions about legal obligations for secondary schools³ when students with disabilities take dual enrollment classes.⁴ The American Association of Community Colleges (AACCC) reported that from

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1. U.S. Census Bureau, *Nearly 1 in 5 People Have a Disability in the U.S.*, *Census Bureau Reports*, U.S. CENSUS BUREAU (July 25, 2012), <https://www.census.gov/newsroom/releases/archives/miscellaneous/cb12-134.html> [<https://perma.cc/UGA6-7CTZ>] (explaining that this finding is based on “a broad definition of disability, with more than half of” people referring to their disability as “severe”).

2. AM. ASS’N OF CMTY. COLLS., *COMMUNITY COLLEGE ENROLLMENT CRISIS? HISTORICAL TRENDS IN COMMUNITY COLLEGE ENROLLMENT* 5 (2019), <https://www.aacc.nche.edu/wp-content/uploads/2019/08/Crisis-in-Enrollment-2019.pdf> [<https://perma.cc/93BD-HF8M>]; OHIO DEP’T OF HIGHER EDUC. & OHIO DEP’T OF EDUC., *COLLEGE CREDIT PLUS ANNUAL REPORT: 2017-2018* 4 (2018), <https://www.ohiohighered.org/sites/default/files/uploads/CCP/CCP%202018%20Report%20-%20Print%20Version%28c%29.pdf> [<https://perma.cc/DJ64-SB4R>]; THE FLA. COLL. SYS., *2017–2018 ANNUAL REPORT* 9 (2018), <https://indd.adobe.com/view/30202178-8522-47fd-9e89-4d9a4f6eb786> [<https://perma.cc/9RH2-HRKW>]. This Note defines a dual enrollment class as a local community college class which a secondary school offers students the ability to take for secondary school credit at the secondary school’s expense. FLA. STAT. § 1007.271 (2019); *College Credit Plus Overview*, OHIO HIGHER ED: DEP’T OF HIGHER EDUC. (last visited Feb. 1, 2020), https://www.ohiohighered.org/content/college_credit_plus_about [<https://perma.cc/L56R-LAPU>]; Shannon Gilchrist, *Taxpayers on hook for ‘free’ college courses taken by Ohio’s middle-, high-school students*, THE COLUMBUS DISPATCH (Sept. 12, 2016, 11:27 AM), <https://www.dispatch.com/article/20160912/news/309129877> [<https://perma.cc/53KC-7TA5>]. The community college gives the student college credit as well. FLA. STAT. § 1007.271 (2019); *College Credit Plus Overview*, *supra*. The course takes place at the college or secondary school. *College Credit Plus: Frequently Asked Questions*, OHIO HIGHER ED: DEP’T OF HIGHER EDUC. (last visited Sept. 26, 2019), <https://www.ohiohighered.org/ccp/faqs#a> [<https://perma.cc/7EA5-JCJE>].

3. In this Note, “secondary schools” encompasses secondary schools, school districts, and local and state education agencies which oversee secondary education.

4. LAURA F. ROTHSTEIN & SCOTT F. JOHNSON, *SPECIAL EDUCATION LAW* 235 (6th ed. 2020) (discussing dual enrollment and students with disabilities).

2001 to 2017, there was a one hundred seventy percent increase in students below the age of eighteen taking community college classes part-time.⁵ Some states are seeing increases of over twenty-five percent in their dual enrollment programs.⁶

Different laws address the education of students with disabilities at the college and secondary levels with respective legal obligations.⁷ This can lead to different disability services⁸ provided at different levels.⁹ The Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 both require a “free appropriate public education” (which includes disability services) in secondary education.¹⁰ A free appropriate public education (FAPE) is not required at the college level.¹¹ This leads to the following question: In dual enrollment classes, are secondary schools required to provide an IDEA or Section 504 FAPE (and the accompanying disability services) to students with disabilities or can the secondary school rely on the disability services that the community college provides to college students?¹² Dual enrollment creates several issues that courts have not yet had the chance to examine.¹³ For example, in addition to determining who provides the disability services, courts must consider whether the secondary school or the community college pays the related costs and what happens when college professors believe that an Individualized Education Program (IEP) testing accommodation “is a fundamental alteration.”¹⁴ As scholars have said, because this is an area with unknowns, “greater administrative guidance” would be helpful.¹⁵

5. AM. ASS’N OF CMTY. COLLS., *supra* note 2, at 5.

6. THE FLA. COLL. SYS., *supra* note 2, at 9; *See* OHIO DEP’T OF HIGHER EDUC. & OHIO DEP’T OF EDUC., *supra* note 2, at 4.

7. KYRIE E. DRAGOO & JD S. HSIN, CONG. RSCH. SERV., R45595, LAWS AFFECTING STUDENTS WITH DISABILITIES: PRESCHOOL THROUGH POSTSECONDARY EDUCATION (2019).

8. This Note uses the term “disability services” for accommodations/modifications/services that are disability related.

9. *See infra* Part I.

10. 20 U.S.C. § 1401(9) (2018); 34 C.F.R. § 104.33 (2019).

11. DRAGOO & HSIN, *supra* note 7, at 19.

12. Some colleges maintain that only college level disability services should be provided. *See, e.g.*, COLUMBUS STATE DISABILITY SERVS., DISABILITY SERVICES STUDENT HANDBOOK: 2018–2019 (2018), <https://www.csc.edu/services/disability/pdf/Disability%20Student%20Handbook.pdf> [<https://perma.cc/7WXR-NYSJ>].

13. LAURA F. ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW 235 (6th ed. 2020). I would like to thank Professor Rothstein for taking the time to talk with me about this issue.

14. *Id.*

15. *Id.*

Part One of this Note will discuss the history of students with disabilities as well as the history of dual enrollment. Part Two will analyze the legal reasons why secondary schools must provide a FAPE to students taking dual enrollment courses. A FAPE is required under the IDEA based on its plain language,¹⁶ Congressional intent/purpose,¹⁷ and the “least restrictive environment” component of the statute.¹⁸ A FAPE is required under Section 504 based on the statutory language and implementing regulations.¹⁹ All interested parties need to understand this requirement and take the necessary steps to fulfill it.

I. HISTORY

A. Increase in Dual Enrollment

More students under the age of 18 are taking college courses than ever before.²⁰ In 2017, there were 773,000 “part-time students less than age 18,”²¹ a surge “from 287,000 in 2001.”²² For example, in Florida, “70,642 students enrolled in a dual enrollment course in 2017–18, an increase of approximately 26% since 2015–16.”²³

B. History of the Treatment of Children with Disabilities

There was a time when many students with disabilities never went to school, or if they did, they were separated from children without disabilities.²⁴ The treatment of children with disabilities began to change in the mid-1900s with “the recognition of the self-worth and dignity of the person that led to the goal of teaching self-reliance.”²⁵ Several cases in the

16. 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018).

17. 20 U.S.C. § 1400(d) (2018).

18. 20 U.S.C. § 1412(a)(5) (2018).

19. 29 U.S.C. § 794(a) (2018); 34 C.F.R. § 104.33 (2019).

20. AM. ASS’N OF CMTY. COLLS., *supra* note 2, at 5.

21. AM. ASS’N OF CMTY. COLLS., *supra* note 2, at 5.

22. AM. ASS’N OF CMTY. COLLS., *supra* note 2, at 5. The AACC says, “there is strong evidence that these students are predominantly dual enrolled students.” *Id.*

23. THE FLA. COLL. SYS., *supra* note 2, at 9.

24. *See generally* LAURA ROTHSTEIN & SCOTT F. JOHNSON, SPECIAL EDUCATION LAW 12–13 (5th ed. 2014).

25. *Id.* at 12.

mid-twentieth century played a key role in the history of the treatment of children with disabilities.²⁶ The Disability Rights Education & Defense Fund has said that the 1954 decision of *Brown v. Board of Education*²⁷ “created the foundation for students with disabilities to argue that they too had a right to an education.”²⁸ In 1972, the United States District Court for the Eastern District of Pennsylvania approved a consent agreement which said that since Pennsylvania provided education to children in the state, it had to also provide education to “mentally retarded child[ren]” and the education needed to be “appropriate to the child’s capacity.”²⁹ In 1972, the United States District Court for the District of Columbia made a very similar statement for why “‘exceptional’ children” (i.e. children with disabilities) in the District of Columbia needed to be provided an education.³⁰

In 1973, Congress enacted Section 504 of the Rehabilitation Act of 1973 which provides legal protection to people with disabilities.³¹ Two years later, Congress passed the Education for All Handicapped Children Act of 1975 (EAHCA), addressing students with disabilities at the secondary level and below.³² Through an amendment, the EAHCA became known as the IDEA in 1990.³³ That same year, Congress passed the Americans with Disabilities Act of 1990 (ADA).³⁴ United States Senator Tom Harkin of Iowa referred to the ADA as an “emancipation proclamation for people with disabilities.”³⁵ Congress amended the IDEA with the passage of the Individuals with Disabilities Education Improvement Act of 2004.³⁶ Congress was displeased that courts were not interpreting the term

26. *Id.* at 12–13.

27. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

28. Arlene Mayerson, *On the 64th Anniversary of Brown v. Board of Education of Topeka*, DISABILITY RTS. EDUC. & DEF. FUND (May 17, 2018), <https://dredf.org/2018/05/17/on-the-64th-anniversary-of-brown-v-board-of-education-of-topeka/> [<https://perma.cc/7V92-DDVB>].

29. *Pa. Ass’n for Retarded Child. v. Pennsylvania*, 343 F. Supp. 279, 302–07 (E.D. Pa. 1972).

30. *Mills v. Bd. of Educ.*, 348 F. Supp. 866, 868–71 (D.D.C. 1972).

31. DRAGOO & HSIN, *supra* note 7, at 1.

32. *See* Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended at 20 U.S.C. §§ 1400–1482 (2018)).

33. Education of the Handicapped Act Amendments of 1990, Pub. L. No. 101–476, § 901, 104 Stat. 1103, 1142 (1990).

34. Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (Supp. V Vol IV I 2013–2018)).

35. James Q. Lynch, *Harkin Celebrates Disabilities Act at 20*, QUAD-CITY TIMES (July 23, 2010), https://qctimes.com/news/state-and-regional/iowa/harkin-celebrates-disabilities-act-at-20/article_81cba68a-96c3-11df-9fea-001cc4c03286.html [<https://perma.cc/T8HR-V87M>].

36. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108–446,

“disability” in a broader sense and passed the ADA Amendments Act of 2008 in response.³⁷

C. Individuals with Disabilities Education Act

In its “Statement of Findings and Purpose” of the EAHCA, Congress explained that children with disabilities faced significant issues in education and that there were at least eight million children with disabilities.³⁸ Furthermore, more than half of that eight million did “not receive appropriate educational services which would enable them to have full equality of opportunity.”³⁹ And one million were barred from public schools and attending school with students without disabilities.⁴⁰

Congress amended the EAHCA in 1990, and the act became the IDEA.⁴¹ Congress said that educating children with disabilities was an important step toward improving the lives of people with disabilities.⁴² Congress said one of the purposes of the IDEA was to “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”⁴³ In order to receive “assistance” for educating students with disabilities, states have to make sure that “[a] free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21. . . .”⁴⁴ This federal funding is referred to as “Part B” funding.⁴⁵ Today, millions of students

118 Stat. 2647.

37. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

38. Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 3, 89 Stat. 773, 774–75 (codified as amended at 20 U.S.C. § 1401).

39. *Id.*

40. *Id.*

41. Education of the Handicapped Act Amendments of 1990, Pub. L. 101-476, § 901, 104 Stat. 1103, 1142 (1990).

42. 20 U.S.C. § 1400(c) (2018).

43. 20 U.S.C. § 1400(d) (2018). The IDEA applies to students requiring “special education and related services” who have “intellectual disabilities, hearing impairments . . . speech or language impairments, visual impairments . . . serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities.” 20 U.S.C. § 1401(3) (2018).

44. 20 U.S.C. § 1412(a) (2018).

45. KYRIE E. DRAGOO, CONG. RSCH. SERV., R41833, THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA), PART B: KEY STATUTORY AND REGULATORY PROVISIONS I (last updated

receive IDEA services.⁴⁶

Congress defined (FAPE) as follows:

[S]pecial education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.⁴⁷

Defining secondary school, Congress said that secondary school “does not include any education beyond grade 12.”⁴⁸

Schools must use the “[l]east restrictive environment” when educating children with disabilities.⁴⁹ As the statute states, “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled” and children with disabilities are educated in a segregated manner “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”⁵⁰ According to the regulations, schools need to “ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education

Aug. 29, 2019).

46. JOEL MCFARLAND ET AL., U.S. DEP’T OF EDUC.: NAT’L CTR. FOR EDUC. STATISTICS, THE CONDITION OF EDUCATION 2019 60 (2019), <https://nces.ed.gov/pubs2019/2019144.pdf> [<https://perma.cc/2MU8-JYA4>].

47. 20 U.S.C. § 1401(9) (2018).

48. 20 U.S.C. § 1401(27) (2018). Under the IDEA, “[t]he term ‘special education’ means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” 20 U.S.C. § 1401(29) (2018). Related services under the IDEA includes “transportation, and such developmental, corrective, and other supportive services.” 20 U.S.C. § 1401(26) (2018). Examples include “speech-language pathology and audiology services, interpreting services, psychological services . . . social work services . . . school nurse services . . . counseling services . . . and medical services.” *Id.*

49. 20 U.S.C. § 1412(a)(5) (2018).

50. *Id.* Supplementary aids and services are defined as, “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.” 20 U.S.C. § 1401(33) (2018).

and related services.”⁵¹ The continuum includes “provision[s] for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”⁵² States must have as their “goal” that students with disabilities be given “full educational opportunity”⁵³ The regulations explain that children with disabilities need to be provided with “the variety of education programs and services available to nondisabled children” which can include art and music and other types of programs.⁵⁴

Schools must create an IEP for each child with a disability.⁵⁵ Among other things, the IEP lists the “special education and related services and supplementary aids and services” given to the child.⁵⁶ Examples of accommodations and modifications which might be provided in an IEP include providing extra time on an exam or changing the exam depending on the disability (including potentially providing the student with their textbook).⁵⁷ By the time the student is 16 years old, the IEP starts to include “appropriate measurable postsecondary goals” for the student.⁵⁸ To meet those goals, the IEP will include “transition services (including courses of study).”⁵⁹

Two United States Supreme Court cases made an impact on what a FAPE means for children with disabilities.⁶⁰ In 1982, in *Board of Education v. Rowley*, the Court said that FAPE meant that a child had to receive “some educational benefit.”⁶¹ In 2017, in *Endrew F. v. Douglas County School District RE-1*, the Court again considered FAPE’s meaning under the IDEA and said, “[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress

51. 34 C.F.R. § 300.115 (2019).

52. *Id.*

53. 20 U.S.C. § 1412(a)(2) (2018).

54. 34 C.F.R. § 300.110 (2019).

55. 20 U.S.C. § 1414(d) (2018).

56. *Id.*

57. PACER CTR., SCHOOL ACCOMMODATION AND MODIFICATION IDEAS FOR STUDENTS WHO RECEIVE SPECIAL EDUCATION SERVICES 1–5 (2015), https://www.salishfysprt.org/uploads/1/1/3/4/11346130/school_accommodation.pdf [<https://perma.cc/RPN8-5E9R>].

58. 20 U.S.C. § 1414(d) (2018).

59. *Id.*

60. DRAGOO & HSIN, *supra* note 7, 16–19 (discussing both *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) and *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017)).

61. 458 U.S. 176, 200 (1982) (emphasis added).

appropriate in light of the child's circumstances."⁶²

D. Section 504 of the Rehabilitation Act of 1973

The "IDEA does not operate in a vacuum," Section 504 also protects children receiving education through the public schools.⁶³ Both Section 504 and the ADA can be very important for children who are not defined as children with disabilities under the IDEA, but who have a disability that makes them eligible for accommodations under Section 504 or the ADA.⁶⁴ Under both Section 504 and the ADA, a disability is "a physical or mental impairment that substantially limits one or more major life activities of such individual"⁶⁵ Section 504 states that a "qualified individual with a disability" cannot because "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."⁶⁶

Regulations for Section 504 state that "[a] recipient that operates a public elementary or secondary education program or activity shall provide a *free appropriate public education* to each" student with a disability and "appropriate education" is defined 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"⁶⁷ A debatable question is whether there is a difference between the Section 504 and IDEA FAPE requirements; "[c]ourts have at times interpreted this provision to require children who do not meet the IDEA eligibility standards but who do meet the section 504-ADA definition to be entitled to no different set of services than a child who meets the IDEA standards would be."⁶⁸ Responding to a question whether there is "a 'reasonable accommodation' standard, or other similar limitation" on the Section 504 FAPE, the United States Department of Education Office for Civil Rights said "[t]he clear and unequivocal

62. 137 S. Ct. 988, 991–99 (2017).

63. MARK C. WEBER, UNDERSTANDING DISABILITY LAW 98 (3rd ed. 2019).

64. *Id.* at 98–103.

65. 29 U.S.C. § 705(9) (2018); 29 U.S.C. § 705(20) (2018); 42 U.S.C. § 12102 (2018). Included in the definition of a major life activity is "the operation of a major bodily function. 42 U.S.C. § 12102 (2018).

66. 29 U.S.C. § 794(a) (2018).

67. 34 C.F.R. § 104.33 (2019) (emphasis added).

68. WEBER, *supra* note 63, at 104.

answer to that is no.”⁶⁹

Regarding Advanced Placement classes and International Baccalaureate programs and the IDEA and Section 504 FAPE requirement, the Department of Education has said, “[i]n general, conditioning participation in accelerated classes or programs by qualified students with disabilities on the forfeiture of necessary special education or related aids and services amounts to a denial of FAPE under both Part B of the IDEA and Section 504.”⁷⁰ When a student with a disability is in one of these types of classes, the Department of Education said they are “generally . . . considered part of the regular education or the regular classes referenced in the Section 504 and the *IDEA* regulations” meaning that a student must receive the disability services he or she is typically provided with.⁷¹

Under Section 504, students at the college level do not receive a FAPE.⁷² Section 504 prohibits colleges from discriminating against a student “on the basis of” their disability or preventing a student from participating or receiving benefits of the college “on the basis” of their disability.⁷³ At the college level, not discriminating includes “mak[ing] such modifications to its academic requirements as are necessary” for the student with a disability, but “[a]cademic requirements that the [college] can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.”⁷⁴

69. U.S. Dep’t of Educ. Off. for C.R., *Letter to Zirkel*, 20 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 134, 136 (1993). *But see* Perry A. Zirkel et al., *Section 504 and Student Health Problems: The Pivotal Position of the School Nurse*, 28 J. SCH. NURSING, 423, 427–28 (2012) (examining cases looking at the issue and writing “[t]he majority judicial view thus far appears to favor the reasonable accommodation standard” but “it is not the clearly settled standard for FAPE in the K–12 context”); Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886, n.74 (2017) (discussing different court opinions on the Section 504 standard at the secondary level).

70. Stephanie J. Monroe, *Dear Colleague Letter: Access by Students with Disabilities to Accelerated Programs*, U.S. DEP’T OF EDUC. (last updated Sept. 25, 2018), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20071226.html> [<https://perma.cc/2FT6-SCUE>].

71. *Id.*

72. *See* 34 C.F.R. § 104.43 (2019).

73. *Id.*

74. 34 C.F.R. § 104.43–44 (2019).

E. Americans with Disabilities Act

Upon signing the ADA into law, President George H.W. Bush said, “[l]et the shameful wall of exclusion finally come tumbling down.”⁷⁵ Congress explicitly discussed discrimination in education in the ADA.⁷⁶ Congress’ purpose behind the ADA was to set out a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁷⁷

Under Title II of the ADA, public colleges and universities must “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.”⁷⁸ Title III of the ADA covers private colleges and universities with similar requirements.⁷⁹

F. Case History with Accommodations at the College Level

In *Southeastern Community College v. Davis*, the United States Supreme Court said that Section 504 did not require “an educational institution to lower or to effect substantial modifications of standards” in accommodating a student with a disability, and a nursing program did not need to ignore a prospective student’s hearing ability when considering admission.⁸⁰

In *Wynne v. Tufts University School of Medicine*, the First Circuit found that Tufts University did not violate Section 504 where the university determined that changing its multiple choice exams for a medical student with a disability “would require *substantial program alterations, result in lowering academic standards, and devalue Tufts’ end product*—highly

75. Joseph Shapiro, *Remembering George H.W. Bush, A Champion for People with Disabilities*, NPR (Dec. 3, 2018, 5:08 AM), <https://www.npr.org/2018/12/03/672817727/remembering-george-h-w-bush-a-champion-for-people-with-disabilities> [<https://perma.cc/3XLM-WTLY>].

76. 42 U.S.C. § 12101(a) (2018) (emphasis added).

77. 42 U.S.C. § 12101(b) (2018).

78. 42 U.S.C. § 12132 (2018); 28 C.F.R. § 35.130(b)(7)(i) (2019).

79. 42 U.S.C. § 12182(a) (2018); 42 U.S.C. § 12181(7)(J) (2018); 42 U.S.C. § 12182(b)(2)(A)(ii) (2018).

80. 442 U.S. 397, 404–414 (1979) (partially quoting *Davis v. Southeastern Cmty. Coll.*, 574 F.2d 1158, 1160 (1978)).

trained physicians carrying the prized credential of a Tufts degree.”⁸¹ In *Maczaczj v. New York*, a case arising under the ADA, the United States District Court for the Western District of New York found telephone attendance for a student with a disability in a graduate “residency program would be a substantial modification” and an unreasonable accommodation, and that it did “not wish to substitute its judgment for that of experienced education administrators and professionals in assessing whether the program does in fact meet its pedagogical objectives.”⁸²

In 1998, the United States District Court for the District of Massachusetts found no violation of the ADA when Boston University did not allow students with learning disabilities to substitute the foreign language requirement with other courses, giving deference to a committee of Boston University professors determination that a “liberal arts degree is ‘[i]n no sense a technical or vocational degree’ like other degrees and that, in its view, the foreign language requirement ‘has a primarily intellectual, non-utilitarian purpose.’”⁸³ In 2014, the Tenth Circuit in *McCulley v. University of Kansas School of Medicine*, found no violation of the ADA or Section 504 when a medical school rescinded a student’s admission after she requested accommodations for a physical disability, writing that the accommodations would be a fundamental alteration, and that the student did “not successfully rebut the defendants’ argument that providing a staff surrogate to lift patients, administer basic life support, and perform other tasks for McCulley would render her an observer.”⁸⁴

These cases applying Section 504 and the ADA at the college level demonstrate that there have been several occasions where the fundamental alteration test has been used effectively and show that there are significant limits on the prohibition of discrimination at the college level.

81. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 794–96 (1st Cir. 1992) (emphasis added).

82. 956 F. Supp. 403, 408-09 (W.D.N.Y. 1997).

83. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 84–85 (D. Mass. 1998).

84. 591 F. App’x 648, 649–52 (10th Cir. 2014).

G. Differences Across the Laws and the Transition to College Life

While college students are covered under both the ADA and Section 504, the number of students with disabilities in college continues to be less than what one would expect considering their share of the population.⁸⁵ One “significant difference between primary/secondary education for students with disabilities under IDEA and post-secondary education for students with disabilities under Section 504 is that the former requires that all students receive a FAPE, whereas the latter only requires an education where it is reasonable to provide one.”⁸⁶ This difference contributes to the move to college being a “daunting transition for disabled students.”⁸⁷

There are many different types of disabilities. One category is students with chronic health conditions.⁸⁸ According to the United States Department of Education during the 2017–2018 school year, “14 percent [of students with IEP’s] had . . . health impairments.”⁸⁹ For some students at the secondary level with chronic health conditions, flexibility with attendance and tutoring to help with those absences is provided as part of the FAPE.⁹⁰ In a United States Department of Education Resolution Agreement with the Boston Public Schools in 2018, the agreement explained that one of the “potential accommodations” for students with sickle cell disease in a Section 504 plan or an IEP was “[s]upplemental instruction for absent students”⁹¹ because sickle cell disease can lead to school absences.⁹²

85. WEBER, *supra* note 104, at 119.

86. Christos Kelepouris, *Transitioning Students with Disabilities into Higher Education*, 2014 BYU EDUC. & L.J. 27, 32 (2014).

87. *Id.* at 27.

88. See generally MCFARLAND ET AL., *supra* note 46, at 61.

89. MCFARLAND ET AL., *supra* note 46, at 61. Health conditions include, for example “a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes.” *Id.*

90. KATHLEEN B. BOUNDY & CANDACE CORTIELLA, NAT’L CTR. ON EDUC. OUTCOMES, CHRONIC ABSENTEEISM AND STUDENTS WITH DISABILITIES: HEALTH ISSUES OF STUDENTS WITH DISABILITIES: IMPACT ON ATTENDANCE 6 (2018), <https://nceo.umn.edu/docs/OnlinePubs/ChronicAbsenteeismHealthIssuesSWD.pdf> [<https://perma.cc/YE5T-TV4B>] (citing Resolution Agreement, Boston Public Schools, OCR Complaint No. 01-15-1075 2-3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01151075-b.pdf> [<https://perma.cc/JK59-6PDP>]).

91. Resolution Agreement, Boston Public Schools, OCR Complaint No. 01-15-1075 2-3 (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/01151075-b.pdf> [<https://perma.cc/JK59-6PDP>].

92. THE VA. SICKLE CELL AWARENESS PROGRAM: VA. DEP’T OF HEALTH, UNDERSTANDING

Attendance and tutoring are handled differently at the college level.⁹³ For example at the college level, the United States Department of Education Office for Civil Rights has said that flexible attendance as an accommodation in a college course centers on whether flexibility is a fundamental alteration and whether absence changes “the fundamental experience of the course offered by the college.”⁹⁴ As previously explained, colleges are not required “to make adjustments that would fundamentally alter the nature of a service, program, or activity, or that would result in an undue financial or administrative burden.”⁹⁵ Section 504 does not mandate the provision of “services of a personal nature” in college.⁹⁶ Tutoring is not required at the college level, nor is additional time to complete assignments normally provided.⁹⁷ Other potential differences include differences in the way extended time is provided and changes to formats of exams.⁹⁸

Students with disabilities graduate from colleges at significantly lower rates compared to students without disabilities.⁹⁹ The National Center for

THE CHILD WITH SICKLE CELL DISEASE: A HANDBOOK FOR SCHOOL PERSONNEL 16, http://scinfo.org/wp-content/uploads/2015/07/SchoolHandbook_SickleCellChild_PDF1.pdf [<https://perma.cc/E6RM-JLE2>] (last updated July 2015). Cystic fibrosis and diabetes are examples of other chronic health conditions which may need flexibility with attendance and tutoring. *Individualized Education Programs (IEPs) and 504 Plans*, CYSTIC FIBROSIS FOUND., <https://www.cff.org/Life-With-CF/Caring-for-a-Child-With-CF/Working-With-Your-Childs-School/Individualized-Education-504-Plans/> [<https://perma.cc/2UAU-7EMT>] (last visited Oct. 17, 2019) (Cystic Fibrosis); AM. DIABETES ASS'N & DISABILITY RTS. EDUC. & DEF. FUND, INC., SAMPLE SECTION 504 PLAN 6 (2012), <http://main.diabetes.org/dorg/PDFs/Advocacy/Discrimination/504-plan.pdf> [<https://perma.cc/3Q9Q-VDYJ>] (Diabetes).

93. See generally U.S. Dep't of Educ. Off. for C.R., Complaint No. 09-96-2150 Letter of Findings to Cabrillo Community College 2–4 (1996) [hereinafter Cabrillo College]. The author of this Note received this document through a FOIA request.

94. *Id.*

95. U.S. Dep't of Educ. Off. for C.R., *Students with Disabilities Preparing for Postsecondary Education: Know your Rights and Responsibilities*, U.S. DEP'T OF EDUC. (revised Sept. 2011), <https://www2.ed.gov/about/offices/list/ocr/transition.html> [<https://perma.cc/ZS3X-JZWX>].

96. 34 C.F.R. § 104.44(d)(2) (2019). The ADA is similar. 28 C.F.R. § 35.135 (2019).

97. Cabrillo College, *supra* note 93, at 2–3; Elizabeth C. Hamblet & Susan Yellin, *ADHD in College: Will My Child Have an IEP in College*, ADDITUDE (last updated Nov. 20, 2019), <https://www.additudemag.com/college-accommodations-for-adhd-faq/> [<https://perma.cc/ZJ4P-ZWPE>].

98. See generally Pa. State Univ. Student Disability Res., *Preparing for a Post-Secondary Education with a Disability Checklist*, PENNSSTATE EDUC. EQUITY (last visited Dec. 27, 2019), <http://equity.psu.edu/student-disability-resources/prospective-students/checklist> [<https://perma.cc/F9X9-E99D>].

99. CHRISTOPHER SANFORD ET AL., SRI INT'L & NAT'L CTR. FOR SPECIAL EDUC. RESEARCH INST. OF EDUC. SCIS., THE POST-HIGH SCH. OUTCOMES OF YOUNG ADULTS WITH DISABILITIES UP TO 6 YEARS AFTER HIGH SCH.: KEY FINDINGS FROM THE NAT'L LONGITUDINAL TRANSITION STUDY-2 (NLT2S) NCSER 2011-3004 19–20 (2011), <https://ies.ed.gov/ncser/pubs/20113004/pdf/20113004.pdf>

College Students with Disabilities found that while everyone faces difficulty in transitioning to college, students with disabilities face extra challenges.¹⁰⁰ Some college students have “described frustration that accommodations may be limited in scope and not responsive to individual need.”¹⁰¹

H. Dual Enrollment

Dual enrollment courses start as early as the sixth or seventh grade.¹⁰² The goal of dual enrollment programs is “to enhance students’ career readiness and postsecondary success.”¹⁰³ Secondary students can take many different types of classes,¹⁰⁴ which are taught at the college, secondary school or online.¹⁰⁵

Dual enrollment changes the lives of students, enabling them to get a “jump” start.¹⁰⁶ The American Institutes for Research College and Career Readiness and Success Center says that secondary students who take “dual-enrollment classes are better prepared for postsecondary education” and that “[d]ual enrollment is a strategy that may have unique benefits for students with disabilities.”¹⁰⁷ Dual enrollment provides students with disabilities familiarity with college and can be especially helpful for students with

[<https://perma.cc/Y7AM-5JWW>].

100. SALLY SCOTT, NAT’L CTR. FOR COLL. STUDENTS WITH DISABILITIES, ACCESS AND PARTICIPATION IN HIGHER EDUC.: PERSPECTIVES OF COLL. STUDENTS WITH DISABILITIES 6–9 (2019), http://www.nccsdonline.org/uploads/7/6/7/7/7677280/na_focus_groups_research_brief_final_pdf.pdf [<https://perma.cc/B2D7-H7KB>].

101. *Id.* at 10.

102. *College Credit Plus Overview*, *supra* note 2; FLA. STAT. § 1007.271 (2019). Secondary schools pay for the courses. Gilchrist, *supra* note 2; FLA. STAT. § 1007.271 (2019).

103. *College Credit Plus Overview*, *supra* note 2.

104. *College Credit Plus: Qualifying Courses*, COLUMBUS STATE COMMUNITY COLL. (last visited Sept. 26, 2019), <https://www.csc.edu/academics/college-credit-plus/ccp-courses.shtml> [<https://perma.cc/NM6F-LKL9>] (including classes in biology, political science, automotive technology, construction management, hospitality, nursing, theatre, and many others).

105. *College Credit Plus: Frequently Asked Questions*, *supra* note 2.

106. Pam Forrester, *Dual Enrollment is a Winning Strategy for Florida Students*, TALLAHASSEE DEMOCRAT (Aug. 21, 2018, 4:02 PM), <https://www.tallahassee.com/story/life/family/2018/08/21/dual-enrollment-winning-strategy-many-high-school-students/1045685002/> [<https://perma.cc/NM6F-LKL9>].

107. BETSY BRAND, ANDREW VALENT, AM. YOUTH POL’Y F., & LOUIS DANIELSON, AM. INST. FOR RSCH., IMPROVING COLLEGE AND CAREER READINESS FOR STUDENTS WITH DISABILITIES 19–20 (2013) [hereinafter AM. INST. FOR RSCH.], <https://ccrcenter.org/sites/default/files/Improving%20College%20and%20Career%20Readiness%20for%20Students%20with%20Disabilities.pdf> [<https://perma.cc/6U2B-K2NX>].

disabilities in secondary school who are older than 18.¹⁰⁸ As they explain, “[t]hese students may benefit by taking classes on a college campus where they can interact with their peers and experience more independence and self-sufficiency than they could at a high school.”¹⁰⁹

Colleges have different views about what type of disability services should be provided to students with disabilities taking these courses. One college says that these students “are considered to be college students” and that secondary school disability services are not necessarily what the student receives in the dual enrollment classes, mainly that certain disability services “may not be permitted in a college-level class.”¹¹⁰ Explaining their rationale for not allowing certain secondary disability services, colleges will point to “institution and program accreditation requirements” as a reason.¹¹¹ At another college, whether the student receives a FAPE is based on whether the course is taught at the secondary school or college campus, and the student must communicate with the college regarding the accommodations.¹¹² At one college, the secondary school or college pays for the disability services depending on how many credits the student is enrolled in.¹¹³ At another college, the secondary schools bears the responsibility to communicate with the college and make sure the student receives a FAPE.¹¹⁴

108. *Id.* at 20.

109. *Id.*

110. COLUMBUS STATE DISABILITY SERVS., *supra* note 12. See also Stark State Coll., *Stark State College Guidelines: Students Seeking Academic Accommodations in College Credit Plus Classes*, STARK STATE C. (last updated Aug. 15, 2017), <https://www.starkstate.edu/wp-content/uploads/2016/02/CCP-Academic-Accommodations.pdf> [<https://perma.cc/5RBU-2FSF>] (discussing “fundamentally altering course requirements” will not be permitted).

111. Stark State Coll., *supra* note 110.

112. FLA. DEP’T OF EDUC., DUAL ENROLLMENT ARTICULATION AGREEMENT- SEMINOLE STATE COLLEGE OF FLORIDA & SEMINOLE COUNTY SCHOOLS 8–9 (2019) [hereinafter SEMINOLE STATE], <http://www.fldoe.org/core/fileparse.php/5421/urlt/SSC-Seminole-Pub.pdf> [<https://perma.cc/9GP9-WVB5>].

113. FLA. DEP’T OF EDUC., DUAL ENROLLMENT ARTICULATION AGREEMENT-CHIPOLA COLLEGE & HOLMES, JACKSON, LIBERTY, WASHINGTON, & CALHOUN COUNTY SCHOOLS 5 (2018) [hereinafter CHIPOLA COLLEGE], <http://www.fldoe.org/core/fileparse.php/5421/urlt/CC-Pub.pdf> [<https://perma.cc/VNL9-UPMX>] (uses the term “reasonable accommodations”).

114. FLA. DEP’T OF EDUC., DUAL ENROLLMENT ARTICULATION AGREEMENT- ST. PETERSBURG COLLEGE & PINELLAS COUNTY SCHOOLS 6 (2019) [hereinafter ST. PETERSBURG COLLEGE], <http://www.fldoe.org/core/fileparse.php/5421/urlt/SPC-Pub.pdf> [<https://perma.cc/6PWX-SYJ7>]. In a very different program from the dual enrollment program described in this Note, the Office of the Attorney General in Kentucky said in an opinion letter lacking a full explanation that a FAPE was required for Kentucky secondary school students participating in a program that is described as “a

In 2016, the United States Department of Education Office for Civil Rights (OCR) responded to a secondary student's discrimination complaint under Section 504 and Title II of the ADA regarding dual enrollment courses and said in this instance where both the school district paid for secondary students' college courses and gave secondary credit for the college course, "the District has an obligation to ensure that students with disabilities receive FAPE within their College courses."¹¹⁵ OCR said the district cannot refer "[s]tudents directly to the College for disability-related issues" and must address the classes like other classes.¹¹⁶ OCR said "that [a] Section 504 team has a duty to consider any potential absence issues in . . . [c]ollege courses as a possible FAPE issue. . . ."¹¹⁷ In 2017, OCR responded to another complaint regarding a dual enrollment class and Section 504 and Title II of the ADA.¹¹⁸ A secondary school counselor said an accommodation request "had to be approved through the College."¹¹⁹ After the student spoke with the college and approved accommodations, the college told the student to talk with her instructor, but she had difficulty doing that.¹²⁰ In this instance where the college "course takes place at the School during the regular school day" and the school administered placement exams for students, OCR said the school must make sure a FAPE was given in the class.¹²¹ OCR said "the District denied the Student a FAPE

residential program for bright, highly motivated Kentucky high school students" on a university campus. Ky. OAG 17-021 (Ky.A.G.), 2017 WL 4325410 (2017); *About the Gatton Academy*, WESTERN KENTUCKY U. (last visited Jan. 28, 2020), <https://www.wku.edu/academy/about/> [https://perma.cc/T3ET-7M62].

115. U.S. Dep't of Educ. Off. for C.R., Complaint No. 11-16-1062 Letter of Findings to Johnson County Schools 1-3 (2016) [hereinafter OCR Johnson County], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11161062-a.pdf> [https://perma.cc/DT9D-JJEA]. According to OCR, "[l]etters of Findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such." U.S. Dep't of Educ. Off. for C.R., *How the Office for Civil Rights Handles Complaints*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html> [https://perma.cc/5TEH-YXFT] (last visited Dec. 31, 2019).

116. *Id.* at 3.

117. *Id.* at 5.

118. U.S. Dep't of Educ. Off. for C.R., Complaint No. 09-17-1325 Letter of Findings to San Diego Unified School District 1 (2017) [hereinafter OCR San Diego], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09171325-a.pdf> [https://perma.cc/HR3Y-A5RK].

119. *Id.* at 3.

120. *Id.* at 3-4.

121. *Id.* at 5 ("[T]he facts establish that the course was offered, for all intents and purposes, as a high school class. OCR considered multiple factors in reaching this determination.").

by failing to provide the . . . [i]nstructor the information needed to ensure that the Student received the accommodations.”¹²²

In 2006, the Department of Education reported that they were asked to provide further guidance on dual enrollment and the IDEA and responded that they would not be changing the regulations.¹²³ They reasoned that IDEA and its corresponding regulations¹²⁴ “requires States to ensure that public agencies take steps to ensure that children with disabilities have access to the same program options that are available to nondisabled children in the area served by the agency.”¹²⁵ The Department said “a State would be responsible for ensuring that a public agency that offered dual enrollment programs in post-secondary or community-based settings to a nondisabled student would have that option available to a student with disabilities whose IEP Team determined that such a program would best meet the student’s needs.”¹²⁶ In 2019, the Department of Education said IDEA Part B funding can be used in dual enrollment scenarios “if a student’s IEP Team determines that a high school student’s needs can best be met through participation in dual enrollment programs.”¹²⁷

The obligations of secondary school regarding students with disabilities in dual enrollment courses remains uncertain.

122. *Id.* OCR explained that because of the lack of accommodations the student could not keep “a passing grade” and withdrew. *Id.* OCR said that “[w]hile implementation of required accommodations is not a guarantee that a student will pass a course, a failure to provide approved accommodations denies students with disabilities their right under Section 504 to have their needs met as adequately as those of nondisabled students are met.” *Id.*

123. Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46540, 46584 (Aug. 14, 2006) (codified at 34 C.F.R. pts. 300, 301) [hereinafter Federal Register 2006] (responding to comments).

124. See generally 20 U.S.C. § 1412(a)(2) (2018); 34 C.F.R. § 300.110 (2019).

125. Federal Register 2006, *supra* note 123.

126. *Id.*

127. U.S. DEP’T OF EDUC., INCREASING POSTSECONDARY OPPORTUNITIES AND SUCCESS FOR STUDENTS AND YOUTH WITH DISABILITIES 9–11 (2019), <https://www2.ed.gov/policy/speced/guid/increasing-postsecondary-opportunities-and-success-09-17-2019.pdf> [<https://perma.cc/R423-ZZLQ>] (internal citations omitted). “Guidance documents” are not legally binding. *U.S. Department of Education’s Guidance Homepage*, U.S. DEP’T OF EDUC. (last visited Dec. 30, 2019), <https://www2.ed.gov/policy/gen/guid/types-of-guidance-documents.html> [<https://perma.cc/R489-T8VP>].

II. ANALYSIS AND PROPOSAL

A. Introduction to Analysis

The way students with disabilities are treated today is quite different from the past.¹²⁸ 1972 was an important year as two court decisions demonstrated that schools needed to adapt to educating children with disabilities.¹²⁹ Congress made a significant impact on the lives of people with disabilities when it passed the Rehabilitation Act of 1973 which includes Section 504 for students with disabilities.¹³⁰ The start of the IDEA began in 1975¹³¹ and Congress passed the very important ADA in 1990.¹³²

There are differences among the statutes that apply to students with disabilities.¹³³ Because the IDEA at the secondary level,¹³⁴ Section 504 at the secondary level,¹³⁵ Section 504 at the college level,¹³⁶ and the ADA at the college level, impose different obligations,¹³⁷ the resulting provision of disability services to students with disabilities can be different depending on whether the student is at the secondary or college level.¹³⁸ Also, some secondary school students will qualify as having a disability under the IDEA, while others will only qualify under Section 504 and the ADA.¹³⁹ Without a FAPE requirement like at the secondary level,¹⁴⁰ colleges only need to provide students with reasonable modifications and/or accommodations which do not fundamentally alter the program or create an

128. See *supra* Part I.B.

129. Pa. Ass'n for Retarded Child. v. Pennsylvania, 343 F. Supp. 279, 302–07 (E.D. Pa. 1972); Mills v. Bd. of Educ., 348 F. Supp. 866, 868–71 (D.D.C. 1972).

130. See generally DRAGOO & HSIN, *supra* note 7, at 1.

131. Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773 (codified as amended and renamed at 20 U.S.C. §§ 1400–1482 (2018)).

132. See generally Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327; ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

133. See DRAGOO & HSIN, *supra* note 7; *supra* Part II.

134. 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018).

135. 34 C.F.R. § 104.33 (2019).

136. 34 C.F.R. § 104.43–44 (2019).

137. 42 U.S.C. § 12132 (2018); 28 C.F.R. § 35.130(b)(7)(i) (2019); 42 U.S.C. § 12182(a) (2018); 42 U.S.C. § 12182(b)(2)(A)(ii) (2018).

138. See *supra* Part II. Many of the disability services required at the secondary level are also required at the college level, but that is not the case for all disability services. See *supra* Part II.

139. 20 U.S.C. § 1401(3) (2018); 42 U.S.C. § 12102 (2018).

140. 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018); 34 C.F.R. § 104.33 (2019).

undue burden.¹⁴¹ As illustrated by court decisions, this limit on a college's obligation to accommodate can limit the lives of college students with disabilities. If a college student has a disability which requires exam format changes,¹⁴² attendance policy changes,¹⁴³ alterations to a foreign language requirement,¹⁴⁴ or assistance with physical tasks,¹⁴⁵ the college student may be out of luck under the laws applicable to college students and in essence must quit.

The differences of required disability services at the college and secondary levels, whether it be differences in attendance policies for students with chronic health conditions or tutors not being provided in college or assignment extensions or extended time being dealt with differently,¹⁴⁶ show one reason why it is so important to determine whether the FAPE requirement applies to dual enrollment courses, especially given the increasing popularity of dual enrollment classes.¹⁴⁷ Another very important reason is liability; if secondary schools are required to provide a FAPE under the IDEA or Section 504, the secondary school needs to make sure a FAPE is provided and it also has financial obligations in regard to disability services which have a cost.¹⁴⁸

Several community colleges do not believe that a FAPE (and accompanying disability services) is required in dual enrollment. This is apparent from colleges using familiar post-secondary level disability law language such as "fundamental altering,"¹⁴⁹ "reasonable accommodations,"¹⁵⁰ or simply saying "college-level expectations and responsibilities" when discussing dual enrollment.¹⁵¹ One college says course location is important to whether a FAPE is required and that the student must communicate with the college about the accommodations,¹⁵²

141 34 C.F.R. § 104.44 (2019); U.S. Dep't of Educ. Off. for C.R., *supra* note 95; 28 C.F.R. § 35.130(b)(7)(i) (2019).

142. *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791, 792–95 (1st Cir. 1992).

143. *Maczaczjy v. New York*, 956 F. Supp. 403, 404–09 (W.D.N.Y. 1997).

144. *Guckenberger v. Bos. Univ.*, 8 F. Supp. 2d 82, 85–91 (D. Mass. 1998).

145. *McCulley v. Univ. of Kan. Sch. of Med.*, 591 F. App'x 648, 648–51 (10th Cir. 2014).

146. *See supra* Part I.G.

147. *See generally* OHIO DEP'T OF HIGHER EDUC. & OHIO DEP'T OF EDUC., *supra* note 2; THE FLA. COLL. SYS., *supra* note 2.

148. 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018); 34 C.F.R. § 104.33 (2019).

149. *Stark State Coll.*, *supra* note 110.

150. *CHIPOLA COLLEGE*, *supra* note 113, at 5.

151. *COLUMBUS STATE DISABILITY SERVS.*, *supra* note 12.

152. *SEMINOLE STATE*, *supra* note 112, at 8–9.

and another college says that financial responsibility for disability services depends on the number of credits the student is enrolled in.¹⁵³ But one college does appear to believe a FAPE is required.¹⁵⁴ The current situation appears like the wild west and there needs to be more certainty to this important issue.

In 2016 and 2017, OCR looked at complaints regarding school districts not providing Section 504 FAPEs in dual enrollment courses and found that a FAPE was required.¹⁵⁵ In a 2016 complaint, OCR focused on the fact that the school district paid for the course and the student received secondary school credit.¹⁵⁶ The Letter of Findings did not make clear whether the dual enrollment course was being taught at the college or at the secondary school.¹⁵⁷ In a 2017 complaint, OCR partly focused on the dual enrollment class taking place on the secondary school campus, at regular school day times, and the district being involved in placing students in the class.¹⁵⁸ It is unclear to what extent OCR regards the location at which the course is offered—either on the secondary school campus or the college campus—as relevant to the inquiry. It is difficult to determine an answer to the question of whether FAPEs are required from these Letters of Findings.¹⁵⁹

In 2006 the Department of Education appeared to open the door to IDEA FAPE in dual enrollment courses when it said it would not change IDEA regulations to discuss dual enrollment because in its opinion (based on the statute and regulations) students with disabilities need to “have access to the same program options that are available to” students without disabilities.¹⁶⁰ But further language by the Department of Education presents a view of dual enrollment courses which regards them as a disability service in and of themselves.¹⁶¹ The Department said that where dual enrollment programs are offered to students, states would need to make sure to allow students with disabilities under the IDEA to take dual enrollment courses if the “IEP Team determined that such a program would

153. CHIPOLA COLLEGE, *supra* note 113, at 5.

154. ST. PETERSBURG COLLEGE, *supra* note 114, at 6.

155. OCR Johnson County, *supra* note 115, at 1–5; OCR San Diego, *supra* note 118, at 1–5.

156. OCR Johnson County, *supra* note 115, at 3.

157. *See generally id.* at 1–7.

158. OCR San Diego, *supra* note 118, at 5.

159. It is important to note that as explained above, “Letters of Findings are not formal statements of OCR policy. . . .” U.S. Dep’t of Educ. Off. for C.R., *supra* note 115.

160. *See* Federal Register 2006, *supra* note 123.

161. Federal Register 2006, *supra* note 123.

best meet the student's needs."¹⁶² This does not answer the question whether a secondary school is required to provide a child enrolled in a dual enrollment course a FAPE (and the accompanying disability services).

Given the lack of legal analysis, especially by courts, into whether secondary schools are required under the IDEA and Section 504 to provide a FAPE (and the accompanying disability services) to students with disabilities enrolled in dual enrollment classes, this Note will now attempt to determine what is required.

B. Analysis of the IDEA

As the United States Supreme Court explained in a previous case interpreting the IDEA, *Board of Education v. Murphy*, “we begin with the text.”¹⁶³ Furthermore the Court stated, “[w]hen the statutory ‘language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.’”¹⁶⁴

The language of the IDEA is plain. There should be no question what this language means. For a state to receive money to educate children with disabilities, it has to provide a FAPE to those children.¹⁶⁵ The definition of a FAPE “include[s] an appropriate . . . secondary school education in the State involved.”¹⁶⁶ A secondary school “does not include any education beyond grade 12.”¹⁶⁷ When a student enrolls in a dual enrollment class, they are receiving a secondary school education. The dual enrollment course counts as part of their secondary education through the twelfth grade. Whether or not the student is also receiving college credit at the same time is of no consequence as the course is still part of the secondary school education.¹⁶⁸ The secondary school has chosen to make dual enrollment part

162. Federal Register 2006, *supra* note 123. See U.S. DEP'T OF EDUC., *supra* note 127 (using very similar language in a 2019 guidance document on dual enrollment and discussing Part B funding).

163. *Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). The Court said, “[w]e have ‘stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.’” *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992)).

164. *Id.* at 296–97 (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000)).

165. 20 U.S.C. § 1412(a) (2018).

166. 20 U.S.C. § 1401(9) (2018).

167. 20 U.S.C. § 1401(27) (2018).

168. See Ky. OAG 17-021 (Ky.A.G.), *supra* note 113 and accompanying text. In an opinion letter by the Office of the Attorney General of Kentucky regarding the IDEA FAPE in a situation rather different from the dual enrollment discussed in this Note but still including students who had not yet

of the secondary school curriculum. The secondary school pays for the class. The dual enrollment class is part of the secondary education. And therefore, based on the plain language of the IDEA, the FAPE requirement applies to dual enrollment courses. The language of the statute says that a FAPE in secondary education must be provided. Dual enrollment is part of the secondary education. This is a simple case of looking at the language of the statute. Secondary schools/states choose what is part of secondary education, and the secondary schools/states that have added dual enrollment classes to their schools have chosen to make dual enrollment part of the secondary education.

One might argue that since dual enrollment is a limited program (in that it is a smaller number of students choosing to take a class), the class is not a part of the regular secondary education and the FAPE requirement does not apply. But the FAPE attaching to secondary education does not distinguish between classes like this, as demonstrated by the treatment of Advanced Placement (AP) courses and International Baccalaureate (IB) programs.¹⁶⁹ Of those students graduating secondary school nationally in 2017, 37.7 percent enrolled in an AP class.¹⁷⁰ As the Department of Education explained in 2006, AP classes and IB programs are “considered part of the regular education or the regular classes referenced in the Section 504 and the IDEA regulations” and the secondary schools must provide the FAPE and the accompanying disability services children receive in their regular education classes in the AP courses and IB programs.¹⁷¹ AP classes and IB programs do not have many students enrolled in the aggregate compared to other classes and programs,¹⁷² but they are still considered part of the regular secondary education. So too do dual enrollment courses have

graduated secondary school, the office said that where both college and secondary credit was being earned for a course, it still constituted secondary education. *Id.* Additionally, see *supra* Part I.H discussing OCR opinions on Section 504 FAPE in dual enrollment courses finding FAPE required.

169. Monroe, *supra* note 70.

170. Scott Jaschik, *Record Numbers Take Advanced Placement Courses*, INSIDE HIGHER ED (Feb. 21, 2018), <https://www.insidehighered.com/quicktakes/2018/02/21/record-numbers-take-advanced-placement-courses> [<https://perma.cc/FVY9-647V>].

171. Monroe, *supra* note 70.

172. See generally Colleen O’Dea, *Interactive Map: Highlighting the Results of New Jersey’s AP Tests*, NJ SPOTLIGHT (Feb. 23, 2018), <https://www.njspotlight.com/2018/02/18-02-23-interactive-map-highlighting-the-results-of-nj-s-advanced-placement-tests/> [<https://perma.cc/22PD-A3WJ>] (“According to the data, more than four in 10 New Jersey high school 11th and 12th graders took one or more AP or IB classes in 2016-2017.”).

a small number of secondary students enrolled.¹⁷³ Just like some secondary schools pay for the AP courses and IB programs,¹⁷⁴ so too does the secondary school pay for the dual enrollment course. Similarly, like students in AP courses and IB programs, students enrolled in dual enrollment courses can earn college credit.¹⁷⁵ Just like AP courses and IB programs, the secondary school has chosen to offer dual enrollment courses as part of the secondary education curriculum. There is no logical reason under the law to make a distinction between AP courses and IB programs and dual enrollment courses.¹⁷⁶ Dual enrollment courses are part of the regular secondary education and when students with disabilities enroll in them, just like in AP classes and IB programs, the secondary school must provide them with the FAPE and the accompanying disability services they receive in their other regular education courses. There is no legal reason to make a distinction between dual enrollment courses taught on a college campus versus on the secondary school campus. Regardless of location, the secondary school has chosen to make the dual enrollment course part of the secondary education through the twelfth grade.

Justice Breyer wrote in dissent in *Board of Education v. Murphy* that

173. AM. ASS'N OF CMTY. COLLS., *supra* note 2.

174. See generally *Advanced Placement (AP)/International Baccalaureate (IB) Test Fees*, FAIRFAX CNTY. PUB. SCHS. (last visited Jan. 28, 2020), <https://www.fcps.edu/testfees> [<https://perma.cc/3ZYP-G7LP>]. It is true that this is not always the case. L.A. Unified Sch. Dist., *AP Exam Fee Program*, L.A. UNIFIED SCH. DIST. (last visited Nov. 19, 2020), <https://achieve.lausd.net/Page/1972> [<https://perma.cc/8DSH-MKWR>] (explaining a fee waiver only for students from families at lower income levels).

175. See generally Alexandra Pannoni & Josh Moody, *IB vs. AP: Discover the Differences*, U.S. NEWS (Dec. 4, 2019, 10:25 AM), <https://www.usnews.com/education/blogs/high-school-notes/2014/09/02/discover-the-difference-between-ap-and-ib-classes> [<https://perma.cc/H7M8-TAKP>]. One difference between AP courses and dual enrollment courses is that receiving college credit from AP courses depends on the results from an exam taken after the class is complete. *Id.* But AP and dual enrollment both offer the potential for college credit. If the college credit comparison was the sole reason for comparison, the argument may be questionable, but the primary comparison between AP, IB, and dual enrollment is that they are voluntary. Merced High School, *Advanced Placement Courses*, MERCED HIGH SCH. (last visited Nov. 19, 2020), <https://mhs.muhsd.org/merced-high-school/student-services/counseling-guidance/advanced-placement-courses> [<https://perma.cc/7JUQ-JWYH>] (explaining that students must agree to a contract when taking an AP course). Voluntariness is what makes this comparison important. Requiring a FAPE in a voluntary class like an AP class shows that the requirement of a FAPE does not only apply to the bare minimum requirements to get a diploma.

176. One might make the argument that with AP and IB only high school students are taking the class while with dual enrollment there can be both college and high school students taking the class, but the presence of other students does not impact the FAPE requirement for secondary students—they are still secondary students. It is important to note again that it is the secondary school that has chosen to add dual enrollment to the secondary education curriculum.

“our ultimate judicial goal is to interpret language in light of the statute’s purpose.”¹⁷⁷ When interpreting the statute, further support is provided for interpreting the IDEA FAPE requirement to apply to dual enrollment courses by examining the purpose. Congress wrote in the IDEA that “[i]mproving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”¹⁷⁸ Congress explained that part of the purpose of the IDEA and the FAPE was to “prepare [students] for further education, employment, and independent living.”¹⁷⁹ Dual enrollment classes do just that. When a student takes a dual enrollment course, they are educated as part of their secondary education, and the dual enrollment course can be a jumping point for a career or further education.¹⁸⁰ According to the American Institutes for Research College and Career Readiness and Success Center, dual enrollment courses help secondary students prepare for college and can be beneficial to students with disabilities.¹⁸¹ Dual enrollment can provide students familiarity with college and help develop “independence and self-sufficiency.”¹⁸²

Lastly, under the IDEA, secondary schools are required to teach students with disabilities in the “least restrictive environment,” educating them as much as possible with their peers.¹⁸³ If a school has previously found that educating students with disabilities with their peers along with disability services is “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances,”¹⁸⁴ not providing those same services in the dual enrollment course would deny those students the opportunity required under the IDEA to be taught as much as possible in the least restrictive environment. Not providing the FAPE is essentially equivalent to not allowing the student to take the class.¹⁸⁵ The secondary school would be placing a baseless maximum on the extent to which all students with disabilities could be educated with their peers. That is in direct

177. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (Breyer, J., dissenting).

178. 20 U.S.C. § 1400(c) (2018).

179. 20 U.S.C. § 1400(d) (2018).

180. See generally Forrester, *supra* note 106.

181. AM. INST. FOR RSCH., *supra* note 107.

182. *Id.*

183. 20 U.S.C. § 1412(a)(5) (2018).

184. See generally Andrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 998–99 (2017).

185. See OCR San Diego, *supra* note 122 and accompanying text.

contradiction of the “least restrictive environment” which requires that students with disabilities be educated as much as possible with their peers. Of course, the least restrictive environment argument for dual enrollment courses would not be applicable to a student who the secondary school previously determined would not receive an appropriate education if educated with their peers. A student who is not enrolled in other secondary classes with their peers would not be enrolled in a dual enrollment class as the school district had already found that educating the student with their peers without disabilities was impossible.

Another potential argument is that a school could treat dual enrollment classes as “transition services”¹⁸⁶ and not provide the disability services the student typically receives in the secondary school, leaving the disability services to the college. The argument would be that the course without the usual FAPE accompanying disability services would prepare the student for the transition to college on the occasions where Section 504 and the ADA do not require the same disability services.¹⁸⁷ But not providing the student with disability services received in secondary school in the dual enrollment course, which is a part of the secondary education, would be like pulling the rug out from underneath the student.¹⁸⁸ When the rug is pulled out, the student will not receive a FAPE in secondary school. As explained previously, many college students struggle when transitioning to college¹⁸⁹ and given that secondary students taking these dual enrollment courses range from seventh to twelfth graders,¹⁹⁰ is there any doubt that students in secondary school will face even more difficulties when having to go through the same process?¹⁹¹ The end result will be the student not receiving an

186. See generally 20 U.S.C. § 1414(d) (2018).

187. See *supra* Part I.G (discussing different obligations on secondary schools versus colleges with disability services).

188. See *supra* Part I.G (discussing differences between accommodations at the secondary and college level).

189. See SANFORD ET AL., *supra* note 99, at 19–20 (discussing lower graduation rates for college students with disabilities); SCOTT, *supra* note 100, at 6–10 (discussing the negative views some students with disabilities have about college and disability services); Kelepouris, *supra* note 86, at 27 (describing the move to college a “daunting transition for disabled students.”).

190. *College Credit Plus Overview*, *supra* note 2.

191. It is true that some or many dual enrollment students may be in the year or years immediately preceding college, but that does not change the reality that they are still in secondary school. Everyone remembers growing up quite a bit between graduating high school and the beginning of college, that transition is always a stressful time. And as mentioned previously for students with disabilities the transition can be very difficult. Kelepouris, *supra* note 86, at 27. Every dual enrollment

appropriate education if they are not provided the disability services received under the IDEA FAPE. Everyone supports helping children with disabilities transition to adulthood, but setting them up for failure is not the way to do it and is a violation of the IDEA.

In a case where the United States Supreme Court engaged in statutory interpretation, the Court said, “[i]t is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”¹⁹² Furthermore, the Court explained that “[l]aws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.”¹⁹³ Of course, it is possible that when Congress enacted the IDEA, those voting may have never thought about dual enrollment or how the statutory language would apply to dual enrollment, but as demonstrated by these statements by the Court, that happens often with statutes. This is a scenario where applying the IDEA FAPE meets the purpose of the statute.¹⁹⁴ While it is true that some will not support this interpretation of the statute,¹⁹⁵ it can be difficult to state that this interpretation is absurd given the purpose of the statute provides support for the interpretation. For those concerned with this interpretation, to use the words of the Court, “the remedy lies with the lawmaking authority, and not with the courts.”¹⁹⁶

Lastly it is important to consider this issue as if legislators were on the floor right now debating amendments to the IDEA. The starting point would be to remember the benefits of dual enrollment for students with disabilities. Dual enrollment can assist in preparing a student with disabilities for college

student will face some transition issues, but to place upon the student with a disability the college type disability services, which may be different depending on the student, would place a larger burden on the student with a disability than their peers. While students with disabilities should receive help with transitioning to the after secondary school life, given the experiences of students with disabilities at the college level, forcing a change to college level disability services could risk the student’s completion of their secondary education. *See* SANFORD ET AL., *supra* note 99, at 19–20 (discussing lower graduation rates for college students with disabilities).

192. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citations omitted).

193. *Id.* (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

194. *See* 20 U.S.C. § 1400(d) (2018).

195. One only needs to look at the community colleges who would prefer to give disability services which are provided at the college level. *See supra* Part I.H.

196. *See Griffin*, 458 U.S. at 575 (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)).

and for life in general.¹⁹⁷ Given that students with disabilities experience difficulty graduating college and there can be issues with the accommodations provided,¹⁹⁸ it would seem apparent that if society wants to ensure students with disabilities are able to receive some of the benefits their peers without disabilities receive from dual enrollment, the student should not be forced to struggle in the same way college students with disabilities struggle. For those opposing an IDEA FAPE in dual enrollment, it is important to remember that secondary schools and colleges are choosing to create dual enrollment programs and it is not as if the dual enrollment program is being forced on them.¹⁹⁹ When Congress created the IDEA, it understood that a FAPE was needed to ensure students with disabilities could receive an education like their peers.²⁰⁰

C. Analysis of Section 504

This Note now turns to Section 504 FAPE and whether it applies to dual enrollment courses. Section 504's text says that a "program or activity receiving Federal financial assistance" cannot discriminate.²⁰¹ The implementing regulations of Section 504 to ban discrimination in secondary schools provided that students with disabilities must receive a FAPE in secondary school.²⁰² If secondary schools were to offer a dual enrollment program but did not offer students with disabilities a FAPE in those programs, the schools would be, in effect, discriminating against students with disabilities, directly contradicting the text of Section 504. For those students who would receive different disability services under Section 504 at the college level, it would in effect be allowing only students without disabilities an opportunity to take those classes. Therefore, a Section 504 FAPE is required in dual enrollment courses.

An argument could be made that it would not be discriminatory because

197. AM. INST. FOR RSCH., *supra* note 107, at 19–20 (discussing the benefits of dual enrollment for all students and the benefits for those with disabilities).

198. See SANFORD ET AL., *supra* note 99, at 19–20 (discussing lower graduation rates for college students with disabilities); SCOTT, *supra* note 100, at 6–10 (discussing the negative views some students with disabilities have about college and disability services).

199. *Cf. Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (explaining that when a state offers education, it "is a right which must be made available to all on equal terms").

200. 20 U.S.C. § 1400(d) (2018).

201. 29 U.S.C. § 794(a) (2018).

202. 34 C.F.R. § 104.33 (2019).

students would be offered the disability services that are offered under Section 504 at the college level. But the Department of Education has found a different level of accommodations required at the secondary level (FAPE) when comparing Section 504 at the secondary level to Section 504 and the ADA at the college level,²⁰³ and requiring students to adjust when taking these dual enrollment classes would put them at a discriminatory disadvantage. In addition to the usual transition that all students in dual enrollment classes face, students with disabilities would be burdened with having to adjust their accommodations which would have a discriminatory effect. Given that college students with disabilities already face a substantial number of problems in college,²⁰⁴ to require dual enrollment students with disabilities to face those other problems as well when their peers are not facing those challenges would be discriminatory.

D. Proposal

As secondary schools must provide IDEA and Section 504 FAPEs (with their accompanying disability services) to students with disabilities enrolled in dual enrollment courses, this Note now provides a short plan for secondary schools.

If a secondary school currently has a dual enrollment program with a local college, it needs to make sure that children with disabilities in those courses receive their usual FAPE and accompanying disability services under the IDEA or Section 504. The secondary school should act as the conduit between the student and the college regarding the disability services. The secondary school needs to make sure to follow all IDEA or Section 504 procedures.

The secondary school is responsible for paying and providing the FAPE disability services under the law,²⁰⁵ but a secondary school could attempt to negotiate with the community college for them to lend a hand. One way to attempt this would be for the secondary school to explain the benefits of the dual enrollment program to the college and state that the school would terminate the dual enrollment program for all students unless the college

203. U.S. Dep't of Educ. Off. for C.R., *supra* note 69; U.S. Dep't of Educ. Off. for C.R., *supra* note 95.

204. SCOTT, *supra* note 100, at 6–10.

205. 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018); 34 C.F.R. § 104.33 (2019).

provided support. It is important to keep in mind that if the college agrees to provide the disability services, the secondary school would need to monitor the college because if the college does not follow the law applicable to the secondary school, then the secondary school would be the one in violation regarding the FAPE. In addition to the secondary school having to provide the child with a FAPE (and the accompanying disability services) in the dual enrollment course, the college also has legal requirements. Under the applicable laws to colleges,²⁰⁶ the college must, at a minimum, provide the student with the disability services required at the college level. Therefore, it is not as if the college is without responsibility in these situations—the secondary school would be helping the college fulfill their responsibilities.

As explained above, there are disability services which are handled differently at the college level.²⁰⁷ The college level can sometimes be stricter and provide less in terms of accommodations.²⁰⁸ The secondary school must explain to the college or university that while the college typically would not allow certain disability services, under federal law the secondary school is required to make sure the child is provided them when those disability services are part of a child's IEP or 504 plan. If the college and secondary school cannot agree on this for the entire dual enrollment program due to either accreditations standards or for any other reasons, the secondary school will have to exit any existing dual enrollment agreement in order to comply with the laws. But if the college and secondary school only disagree regarding a specific course, the secondary school should leave that specific course out of the dual enrollment program so that no child (disability or not) can take the course.

206. See generally 34 C.F.R. § 104.43-.44 (2019); 42 U.S.C. § 12132 (2018).

207. See *supra* Part I.G.

208. *Id.*

CONCLUSION

This Note started with the question: In dual enrollment classes, are secondary schools required to provide an IDEA or Section 504 FAPE (and the accompanying disability services) to students with disabilities or can the secondary school rely on the disability services that the community college provides to college students? The answer is that secondary schools may not just rely on the college's disability services. The secondary school must provide under IDEA or Section 504 the FAPE and the accompanying disability services students with disabilities receive in their other secondary courses. For the IDEA, that is based on the plain language, Congress' own words in the purpose section of the statute, and the "least restrictive environment" component of the statute.²⁰⁹ For Section 504, the statute bans discrimination against people with disabilities and the implementing regulations include providing children with disabilities a FAPE.²¹⁰ It would be discriminatory to not provide the FAPE to these children under Section 504.

Making sure students with disabilities have access to dual enrollment courses as the courses become increasingly popular among secondary students²¹¹ is another step to ensuring that children with disabilities are educated like their peers without disabilities. The rights of students with disabilities to a FAPE in dual enrollment courses need to be enforced.

Some community colleges do not believe that students have a right to their FAPE and accompanying disability services when they take dual enrollment classes.²¹² The United States Department of Education should consider issuing a regulation on this matter to assist in enforcing the FAPE in dual enrollment. Non-profit legal organizations should seek out a case in which a student has been denied a FAPE and accompanying disability services in their dual enrollment class. A favorable court decision would make secondary schools consider potential legal ramifications if they do not provide a FAPE in dual enrollment courses.²¹³ Legal scholars should look

209. See generally 20 U.S.C. § 1412(a) (2018); 20 U.S.C. § 1401(9) (2018); 20 U.S.C. § 1400(d) (2018); 20 U.S.C. § 1412(a)(5) (2018).

210. See generally 29 U.S.C. § 794(a) (2018); 34 C.F.R. § 104.33 (2019).

211. See AM. ASS'N OF CMTY. COLLS., *supra* note 2, at 15.

212. See *supra* Part I.H.

213. See 20 U.S.C. § 1415 (2018); 34 C.F.R. §§ 300.507-516 (2019) (detailing the complaint process including an "[i]mpartial due process hearing" and when a party "has the right to bring a civil

at this issue further. Based on the law as well as policy, there is only one choice here, providing secondary students with disabilities enrolled in dual enrollment courses their FAPE.

action” in court).

