DELAY & IRREPARABLE HARM: A STUDY OF EXHAUSTION THROUGH THE LENS OF THE IDEA*

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As the administrative state expands, and disputes involving important rights are frequently decided within the administrative process, access to efficient administrative law litigation has become increasingly critical. One procedural aspect that has taken on greater importance is the exhaustion doctrine, which requires litigants to proceed through the often-lengthy administrative process prior to seeking judicial relief. Acknowledging that the exhaustion doctrine plays an important part in preserving the appropriate role for courts in the adjudication of these disputes, courts have long grappled with requests to bypass the exhaustion requirement in various legal contexts, often navigating the tension between the benefits of exhaustion and the harm caused by the procedural delay. While courts have made exceptions to the requirement in certain cases, the law on exhaustion remains unclear and one particularly vexing issue remains: whether courts should insist that litigants exhaust any administrative remedies prior to seeking relief when adherence to the exhaustion doctrine threatens irreparable harm.

This Article examines the lack of clarity in the courts on the law of exhaustion and proposes a legal framework for interpreting the exhaustion requirement in cases where strict adherence to it causes irreparable harm through procedural delay. To highlight the ways in which compliance with the doctrine can lead to irreparable harm, and to explore a potential framework for addressing those cases, this Article focuses on the exhaustion requirement under the Individuals with Disabilities Education Act ("IDEA"), which provides children with disabilities the right to a free and appropriate education. The IDEA is the focus of this Article because it has the potential to impact millions of children enrolled in public schools who have a disability. It also illustrates the need for a path to prompt judicial relief to prevent the threat of irreparable educational harm. While the framework proposed in this Article addresses the exhaustion requirement under the IDEA, it can also serve as a model to interpret

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exhaustion requirements in other legal contexts where prompt relief is warranted based on irreparable harm caused by the administrative delay.

INTRODUCTION

With the growth of the administrative state, the procedural aspects of administrative law litigation have become critical in the adjudication of these disputes. Recently, courts have been asked to consider requests for emergency relief in highly politicized administrative law litigation, often based on claims of irreparable harm.[1] In certain cases, one procedural aspect of such litigation

1. *See, e.g.*, Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017). In particular, cases in the immigration context highlight the U.S. government's requests for emergency relief based on irreparable harm. For example, in *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017), the court contrasted the public interest of national security with the public interests of free travel, freedom from discrimination, and avoiding the separation of families after President Trump issued an executive order banning individuals from seven countries from traveling to the United States. *Id.* at 1156, 1169. In considering the government's emergency motion for a stay pending appeal after the district court

that has taken on greater importance is the exhaustion doctrine, which requires litigants to proceed through the often-lengthy administrative process prior to seeking judicial relief.[2] Acknowledging that the exhaustion doctrine plays an important role in preserving the appropriate—and, at times, deferential—role of courts in the adjudication of these disputes,[3] courts have long grappled with requests to bypass the exhaustion requirement in various legal contexts.[4] In doing so, courts must navigate the tension between the benefits of exhaustion and the harm caused by the procedural delay. While courts have made exceptions to the requirement in certain cases,[5] the law on exhaustion remains unclear.[6] Legal scholarship addressing the purposes and value of exhaustion describes the doctrine as "troublesome to the courts" and notes that "many of the decisions are confusing and poorly reasoned."[7] For these reasons, some

enjoined enforcement of this order, the court found that the government did not suffer irreparable harm from its claimed institutional injury. *Id.* at 1157–58, 1168; *see also* Wolf v. Cook County, 140 S. Ct. 681, 683 (2020) (Sotomayor, J., dissenting) (noting inconsistencies with the government's claim of irreparable harm regarding its inability to enforce a new immigration rule: "the Government has come to treat 'th[e] exceptional mechanism' of stay relief 'as a new normal'" and courts "ha[ve] been all too quick to grant the Government's 'reflexiv[e]' requests" (quoting Barr v. East Bay Sanctuary Covenant, 140 S. Ct. 3, 6 (2019) (Sotomayor, J., dissenting) (first and third alterations in original))).

2. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938).

3. McCarthy v. Madigan, 503 U.S. 140, 145 (1992) ("[T]he exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer."); McKart v. United States, 395 U.S. 185, 193–95 (1969) (noting the purposes of the exhaustion doctrine).

4. Requests to bypass exhaustion have been made in cases related to Medicare reimbursement, *see, e.g.*, Am. Hosp. Ass'n v. Azar, 348 F. Supp. 3d 62, 66–67, 75 (D.C. Cir. 2018) (noting that the court may waive the exhaustion requirements of the statute when the "issue raised is entirely collateral to a claim for payment[;] . . . plaintiffs show they would be irreparably injured were the exhaustion requirement enforced against them; [or] . . . exhaustion would be futile" (quoting Triad at Jeffersonville I, LLC v. Leavitt, 563 F. Supp. 2d 1, 16 (D.C. Cir. 2008))), claims by inmates regarding unjustifiable force and failure to protect, *see, e.g.*, Ross v. Blake, 136 S. Ct. 1850, 1855–56 (2016), and challenges to prolonged detention without a bond hearing, *see, e.g.*, Jarpa v. Mumford, 211 F. Supp. 3d 706, 710, 712, 725 (D. Md. 2016) (granting habeas relief and finding that the plaintiff was not required to exhaust administrative remedies before filing habeas petition); *see also* Lawrence v. St. Louis-S.F. Ry. Co., 274 U.S. 588, 590–92 (1927) (holding that an injunction was improper because, among other things, the railroad had neither alleged nor shown that it would suffer irreparable injury if the administrative agency were not enjoined).

5. *See* Lewis M. Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 349, 384–411 (2009) (providing examples of "cases in which courts have excused . . . exhaustion and plac[ing] them into categories" as appropriate).

6. Marcia R. Gelpe, *Exhaustion of Administrative Remedies: Lessons from Environmental Cases*, 53 GEO. WASH. L. REV. 1, 3 (1985) (noting that "the law governing exhaustion of administrative remedies is complex and confusing"); Jeffrey S. Lubbers, *Fail To Comment at Your Own Risk: Does Issue Exhaustion Have a Place in Judicial Review of Rules?*, 70 ADMIN. L. REV. 109, 124 (2018) (noting the confusion on issue exhaustion in rulemaking and the inconsistent application of exceptions to the requirement).

7. Gelpe, *supra* note 6, at 3.

scholars have called for courts to provide a "re-examination" of the doctrine, "not only to indicate how the cases should be decided, but also to clarify the issues sufficiently to guide parties' behavior so that they may avoid litigation over exhaustion's requirements."[8] One issue related to the exhaustion doctrine that has proven particularly vexing is whether courts should insist that litigants facing irreparable harm must exhaust any administrative remedies prior to seeking judicial relief when adherence to the doctrine threatens irreparable harm.[9]

This Article examines the lack of clarity in the courts on the law of exhaustion and proposes a legal framework for interpreting the exhaustion requirement in cases where procedural delay caused by strict adherence to the requirement results in irreparable harm. To highlight the ways in which compliance with the doctrine can lead to irreparable harm, and to explore a potential framework for addressing those cases, this Article focuses primarily on the exhaustion requirement under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"),[10] a federal act that provides children with disabilities the right to a free and appropriate education, because it has the potential to impact the approximately 7.1 million public school students who receive special education services.[11] This Article and its analysis

8. *Id.*; *see also* Robert C. Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 550–51.

9. *See, e.g.*, Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994); L.D. *ex rel.* A.D. v. Sumner Sch. Dist., 166 P.3d 837, 839 (Wash. Ct. App. 2007).

10. Pub. L. No. 108-446, 118 Stat. 2647 (codified as amended in scattered sections of 20 U.S.C.). Over time, Congress has amended the IDEA, and I use "the IDEA" to represent the IDEA as amended to this day.

Pub. L. No. 108-446, 118 Stat. 2647 (2004) (codified as amended in scattered sections of 20 U.S.C.).

11. *See Students with Disabilities*, NAT'L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/coe/indicator_cgg.asp#:~:text=In%202018%E2%80%9319%2C%20the%20number,of%20all%20public%20school%20students [https://perma.cc/Y4JU-54SE] (last updated May 2020). The calculation of 7.1 million students refers to the number of students who received services in the 2018 to 2019 school year. *Id.* For further data on this issue, see also Kelsey A. Manweiler, *IDEAs That Provide a Solution When the Courts Have Disabled the System*, 38 CHILD.'S LEGAL RTS. J. 47, 50, 54 (2018); SASHA PUDELSKI AM. ASS'N SCH. ADM'RS, RETHINKING SPECIAL EDUCATION DUE PROCESS 5 (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf [https://perma.cc/82RQ-URR3] (noting that "[i]n 2010, 95% of all U.S. students with disabilities were educated in public schools" compared to "only 20%" in 1970). "Under the IDEA, recognized disabilities include: intellectual impairment; learning disability; physical, cognitive, or emotional developmental delays; physical disabilities (blindness, deafness, etc.); 'serious emotional disturbance;' disabilities falling within the autism spectrum; and other health impairments." Manweiler, *supra*, at 51 (citing 20 U.S.C. § 1401(3)(a)–(b) (2012)); *see also* LINDA WILMSHURST & ALAN W. BRUE, THE COMPLETE GUIDE TO SPECIAL EDUCATION 3 (Routledge ed., 3d ed. 2018) ("The number of students with disabilities, aged 3–21, who received special education services in the United States in 1976–1977 was 3.7 million (8 percent of the school population); however, in 2005–2006 that number had increased to 6.7 million students, representing 14 percent of the school. In 2013–2014, the number of children receiving special education was 12.9 percent of the student population.").

of the IDEA's exhaustion requirement also illustrate the need for a path to immediate judicial relief to prevent the threat of irreparable educational harm. Noting the uncertainty regarding the IDEA's exhaustion requirement, the Supreme Court recently resolved a conflict regarding the scope of the requirement but left open the question of whether exhaustion is required when the plaintiff seeks relief for a denial of a free appropriate public education ("FAPE"), "but the specific remedy [they] request[] . . . is not one that an IDEA hearing officer may award."[12] While my proposed framework is presented in the context of the exhaustion requirement under the IDEA, it can serve as a model for courts in interpreting exhaustion requirements in other legal contexts where immediate or emergency relief is warranted based on the potential for irreparable harm caused by the administrative delay.

The IDEA ensures that children with disabilities are provided with a FAPE, which may include special education or related services intended to provide meaningful education to children with disabilities.[13] Yet like in many other administrative law contexts, the protections the IDEA affords students and their families are often only realized through the assertion of legal rights that must proceed through a time-consuming administrative process, which, when challenged, is often ultimately resolved in the courts.[14] While this process can be beneficial, it often comes at a significant price: children may be denied access to much-needed special education services while the administrative process works its way to completion, delaying or denying their statutory right to a FAPE and, more broadly, a right to education that some states have recognized as fundamental.[15] Circuit courts are split as to whether the exhaustion requirement is jurisdictional.[16] And courts have been unclear as to

12. Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 752 & n.4 (2017) ("In reaching these conclusions, we leave for another day a further question about the meaning of [the exhaustion requirement]: Is exhaustion required when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award?").

13. Individuals with Disabilities Education Improvement Act of 2004, §§ 611, 612(a)(1), 118 Stat. at 2670, 2676–77(e)(3)(F) (codified as amended at 20 U.S.C. § 1401(9)).

14. *Id.* § 615(*l*), 118 Stat. at 2730 (codified as amended at § 1415(*l*)).

15. *See, e.g.*, N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir.) (recognizing a "basic minimum education to be a fundamental right"), *vacated, reh'g en banc granted*, 958 F.3d 1216 (6th Cir. 2020); L.D. *ex rel.* A.D. v. Sumner Sch. Dist., 166 P.3d 837, 839 (Wash. Ct. App. 2007).

16. *Compare* Polera v. Bd. of Educ., 288 F.3d 478, 483 (2d Cir. 2002) ("A plaintiff's failure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction."), *and* DM *ex rel.* MM v. Sch. Dist., 303 F.3d 523, 536 (4th Cir. 2002) ("The failure of the [plaintiffs] to exhaust their administrative remedies . . . deprives us of subject matter jurisdiction over those claims."), *with* Mosely v. Bd. of Educ., 434 F.3d 527, 533 (7th Cir. 2006) ("[F]ailure to exhaust is normally considered to be an affirmative defense . . . and we see no reason to treat it differently here."), *and* D.G. *ex rel.* N.B. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) ("The exhaustion requirement . . . is not jurisdictional . . . .").

whether and when to make an exception to allow litigants to proceed to court immediately without exhausting administrative remedies.[17] Some courts have interpreted the requirement as a flexible rule,[18] noting that an exception may be warranted based on futility[19] and in certain "emergency" situations.

An irreparable harm exception is particularly warranted in IDEA cases involving time-sensitive determinations related to eligibility for special education services because, in those cases, the denial of services pending administrative resolution of the child's case can create a situation where the services, once denied, cannot be adequately provided at a later time. For example, if a school district determines that a child is not eligible to receive special education services during the summer months, known as extended school year ("ESY") services, it is unlikely that an administrative challenge to that determination will be resolved prior to the start of the summer ESY program.[20] In fact, in most cases, it will take at least one year—and often longer—to conclude the administrative process.[21] No interim services are provided to the child during the pendency of the administrative review process.[22] As a result, even if the agency ultimately determines that the child should have been eligible for ESY services, the child will have lost the benefit of those services *at the time they were intended to be provided*. This results in knowledge regression and irreparable educational harm to the child.[23] Indeed, in one case, a student who sought ESY services was denied those services for two years until the court ultimately reviewed the case and determined the school district had incorrectly denied eligibility.[24] While scholars have raised the

17. *See* KRISTIN E. HICKMAN & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 17.2 (6th ed. 2019) [hereinafter HICKMAN & PIERCE].

18. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002) ("The exhaustion requirement is 'not an inflexible rule.'" (quoting Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987))); Meehan v. Patchogue-Medford Sch. Dist., 29 F. Supp. 2d 129, 133 (E.D.N.Y. 1998) ("[T]he exhaustion doctrine is not an inflexible rule.").

19. *See* Honig v. Doe, 484 U.S. 305, 326–27 (1988) ("It is true that judicial review is normally not available . . . until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate.") (first citing Smith v. Robinson, 468 U.S. 992, 1014 n.17 (1984); and then citing 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams) ("[E]xhaustion . . . should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter.")).

20. *See, e.g.*, *L.D. ex rel. A.D.*, 166 P.3d at 839–41.

21. *See id.* at 837, 839–41.

22. *See generally* Blakely Evanthia Simoneau, *Stay Put and the Individuals with Disabilities Education Act: A Proposal for Clarity and Change*, 21 U. PA. J.L. & SOC. CHANGE 153 (2018) (exploring the unresolved issues related to the IDEA's "stay put" provision).

23. A recent study reported that "students with disabilities who had received ESY services regressed significantly less than their counterparts who did not receive ESY services." Lucy Barnard-Brak & Tara Stevens, *Association of Summer Extended School Years Services and Academic Regression*, 73 SCH. PSYCH., Spring 2019, at 3, 6–9.

24. *L.D. ex rel. A.D.*, 166 P.3d at 839–41.

impact exhaustion can have on time-sensitive IDEA cases,[25] they have not focused on the irreparable educational harm caused by a denial of services pending exhaustion's procedural delay.

In order to address the harm to a child's educational development during the administrative delay, this Article proposes a framework for an irreparable harm exception, which would be applied when exhaustion is likely to pose a threat to childhood well-being, cause irreparable educational harm, and lead to the loss of a statutory right. This proposal is consistent with the purpose of the statute, the legislative intent behind the exhaustion requirement, and the exceptions Congress foresaw when the IDEA was enacted. Part I analyzes the doctrine of exhaustion generally and some of the tensions that have arisen as the courts have interpreted the doctrine. Part II outlines the history of education rights for children with disabilities, the enactment of the IDEA, and the statutory right to a FAPE. Part II then focuses on the application of the IDEA's exhaustion requirement, and the exceptions, as interpreted by the courts. This analysis highlights a unique challenge presented by the exhaustion requirement in IDEA cases involving time-sensitive determinations, such as cases involving eligibility for special education services, where a child can wait one or more years[26] to receive a final determination as to whether they are entitled to services. It also underscores the need for a clearer, more consistent, and more flexible approach to addressing the potential irreparable harm caused by the procedural delay.

Part III proposes a framework for an irreparable harm exception to the exhaustion requirement, which draws from the traditional "futility" and "emergency" exceptions, while addressing the harm caused by the delay. This Article suggests a factor-based analysis, which considers: (1) whether the denial of the statutory right (for example, special education services) pending the administrative review may result in irreparable harm (for example, the child will regress, resulting in irreparable educational harm to the child); (2) whether the claimant is entitled to interim relief pending the administrative review (for example, whether the child is entitled to receive interim special education services, such as ESY services, under the IDEA's "stay put" provision[27] pending

25. *See, e.g.*, Kent Sparks, *Requiring Administrative Exhaustion While the School Shuts Down: An Insurmountable Barrier To Seeking IDEA Enforcement*, 2014 MICH. ST. L. REV. 1161, 1165.

26. Typically, an ESY determination is made in the spring of the academic year. Given the time period required to complete the administrative process, the child often does not receive a final determination until well after—sometimes more than one year after—the summer (when the services should have been provided if it is determined that the student is eligible). For a discussion on the standards applied to determine ESY eligibility, see Rosemary Queenan, *School's Out for Summer — But Should It Be?*, 44 J.L. & EDUC. 165, 176–96 (2015); *see also L.D. ex rel. A.D.*, 166 P.3d at 843–44.

27. The "stay put" provision allows a child to "remain in [their] then-current educational placement." Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615, 118 Stat. 2647, 2725–26 (codified as amended at 20 U.S.C. § 1415(j)).

the administrative review); and (3) whether subsequent relief can remedy the irreparable harm. Part IV suggests that while this framework focuses on the exhaustion requirement in the IDEA, it can also serve as a model for courts in interpreting exhaustion requirements in other legal contexts where immediate or emergency relief is warranted based on irreparable harm caused by the administrative delay.

I. THE EXHAUSTION REQUIREMENT

The doctrine of exhaustion is a "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[28] The concept is well established, and its benefits are well known.[29] This part explores the rationale, origin, and current landscape of the exhaustion doctrine and the tension between the purpose of the requirement and a litigant's need for swift access to relief. This part also presents the current state of the exceptions to the exhaustion doctrine and suggests that, in order to address the tension, courts need to clarify existing exceptions, including the irreparable harm exception, as proposed in this Article.

A. *Rationale of Exhaustion*

Exhaustion serves many purposes. Based on the idea that "agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer," the doctrine guarantees the congressional delegation of authority to agencies.[30] It also protects agency autonomy by allowing the agency the opportunity to apply its expertise and exercise its discretion.[31] Further, exhaustion aids judicial review by allowing the parties and

28. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938); Raoul Berger, *Exhaustion of Administrative Remedies*, 48 YALE L.J. 981, 995 (1939) (quoting *Myers*, 303 U.S. at 50–51). The doctrine's roots stretch back to the refusal of equitable relief in the tax context. *See* Berger, *supra*, at 981–83.

29. Administrative review "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for" children with disabilities. Polera v. Bd. of Educ., 288 F.3d 478, 487 (2d Cir. 2002) (quoting Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992)); *see also* Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 873 F.2d 933, 935 (6th Cir. 1989) ("States are given the power to place themselves in compliance with the law . . . . Federal Courts—generalists with no experience in the educational needs of handicapped students—are given the benefit of expert factfinding by a state agency devoted to this very purpose.").

30. McCarthy v. Madigan, 503 U.S. 140, 145 (1992).

31. *See* Weinberger v. Salfi, 422 U.S. 749, 765 (1975); McKart v. United States, 395 U.S. 185, 194 (1969); *Polera*, 288 F.3d at 487 ("The IDEA's exhaustion requirement was intended to channel disputes related to the education of [children with disabilities] into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances."); HICKMAN & PIERCE, *supra* note 17, § 17.2; Peter A. Devlin, *Jurisdiction*, *Exhaustion of Administrative Remedies, and*

the agency to develop the facts of the case in the administrative proceeding.[32] Finally, it promotes judicial economy by avoiding needless repetition of administrative and judicial fact finding and avoiding judicial intervention if the parties successfully resolve their claims administratively.[33]

The duty of exhaustion can be imposed by common law or by statute. The common law exhaustion requirement, which is rarely imposed and, therefore, is not a focus of this Article,[34] has been described as "flexible and pragmatic" and subject to court-imposed exceptions.[35] When exhaustion is mandated by statute, courts have interpreted the requirement strictly, and some courts have even found that failure to exhaust deprives the court of jurisdiction.[36] However, a "mere reference to the duty to exhaust administrative remedies conferred in an agency organic act is not enough to create a statutory duty to exhaust particular remedies."[37] A creature of judicial prudence, the exhaustion doctrine was developed to address the courts' reluctance to interrupt the administrative

Constitutional Claims, 93 N.Y.U. L. REV. 1234, 1242 (2018); *see also* Bills *ex rel.* Bills v. Homer Consol. Sch. Dist. No. 33–C, 959 F. Supp. 507, 511 (N.D. Ill. 1997); Sparks, *supra* note 25, at 1176 (citing Rita S. *ex rel.* Christopher S. v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1209 (9th Cir. 2004)); Wasserman, *supra* note 5, at 361 n.47 (noting that the exhaustion requirement "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcoming[s] in their educational programs for [children with disabilities]" (quoting *Polera*, 288 F.3d at 487)). Professor Lewis Wasserman's quotation of *Polera* omits the "s" in shortcomings; my first alteration reflects the quote as it appears in *Polera*.

32. *See* Sparks, *supra* note 25, at 1176 ("Courts generally justify the [exhaustion] requirement . . . by noting that the hearing process created a detailed factual record that can be subsequently used to fully inform a court proceeding.").

33. *See McKart*, 395 U.S. at 194.

34. *See* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 12:21 (3d ed. 2010) (noting that the exhaustion requirement "will be applied under the following circumstances: (1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review"); *see also* William Funk, *Exhaustion of Administrative Remedies - New Dimensions Since* Darby, 18 PACE ENV'T. L. REV. 1, 6 (2000) ("In any judicial review of agency action under the APA, the traditional, judicially-derived doctrine of exhaustion is no longer applicable.").

35. *See* HICKMAN & PIERCE, *supra* note 17, § 17.2; DANIEL R. MANDELKER, ROBERT L. GLICKSMAN, ARIANNE M. AUGHEY, DONALD MCGILLIVRAY, MEINHARD DOELLE & JASON MACLEAN, NEPA LAW AND LITIGATION § 4:36 (2d ed. 2020), Westlaw (database updated Sept. 2020) ("The lower federal courts in NEPA cases interpret *McKart* as having adopted a flexible balancing test. . . . [B]ut the balancing test sometimes leads to confusing and inconsistent results in the cases.").

36. *See* Bowles v. Russell, 551 U.S. 205, 214 (2007) ("[T]his Court has no authority to create equitable exceptions to jurisdictional requirements."). For an analysis of jurisdictional exhaustion requirements, see Beharry v. Ashcroft, 329 F.3d 51, 56–57 (2d Cir. 2003); HICKMAN & PIERCE, *supra* note 17, § 17.2; Devlin, *supra* note 31, at 1243–46.

37. HICKMAN & PIERCE, *supra* note 17, § 17.3 ("Courts interpret general references to the duty to exhaust as mere codifications of the common law duty, subject to the usual pragmatic judge-made exceptions to the duty.").

process prematurely with grants of equitable relief.[38] This was especially true where administrative agencies were granted exclusive statutory authority to award remedies.[39]

One of the earlier applications of the exhaustion doctrine arose in the habeas corpus context,[40] where detainees who claimed to be American citizens sought habeas relief from immigration detention pending return to China.[41] In interpreting an immigration statute, which delegated exclusive authority over admission of aliens to customs and immigration agents of the then Department of Commerce and Labor, the Court articulated a principle of exhaustion: "before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with."[42] Regardless of the purported invalidity and ineffectuality of the statute, "it point[ed] out a mode of procedure which must be followed before there can be a resort to the courts."[43] The exhaustion requirement[44] is also imposed in various other legal contexts, including prisoner litigation,[45] labor law,[46] environmental law,[47] and special education law.[48]

B. *Tensions Related to Exhaustion*

While the exhaustion doctrine articulated by the Supreme Court in *Myers v. Bethlehem Shipbuilding Corp*.[49] suggests a strict rule,[50] scholars have noted that

38. *See McKart*, 395 U.S. at 193; *see also* Rebecca L. Donnellan, Note, *The Exhaustion Doctrine Should Not Be a Doctrine with Exceptions*, 103 W. VA. L. REV. 361, 363 (2001).

39. *See McKart*, 395 U.S. at 193.

40. *See* United States v. Sing Tuck, 194 U.S. 161, 166 (1904).

41. *See id.*

42. *See id.* at 166–67, 170.

43. *Id.* at 167.

44. The doctrine of exhaustion is closely related to the doctrines of primary jurisdiction and ripeness. For a more complete analysis of the three doctrines, see HICKMAN & PIERCE, *supra* note 17, § 17.

45. 42 U.S.C. § 1997e(a).

46. *See* Leedom v. Kyne, 358 U.S. 184, 184–85, 190–91 (1958).

47. *See* §§ 4321–4347; *see also* Paul D. Friedland, Comment, *The Exhaustion Doctrine and NEPA Claims*, 79 COLUM. L. REV. 385, 388–89 (1979).

48. 20 U.S.C. § 1415(*l*).

49. 303 U.S. 41 (1938).

50. *Id.* at 51 ("[T]he rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage."). The Court in *Myers* relied on a long line of precedent. *See* Hegeman Farms Corp. v. Baldwin, 293 U.S. 163, 172 (1934); United States v. Ill. Cent. R.R., 291 U.S. 457, 463–64 (1934); Porter v. Invs. Syndicate, 286 U.S. 461, 468, 471 (1932); St. Louis-S.F. Ry. Co. v. Ala. Pub. Serv. Comm'n, 279 U.S. 560, 563 (1929); Chi., Milwaukee, St. Paul & Pac. R.R. v. Risty, 276 U.S. 567, 575 (1928); FTC v. Claire Furnace Co., 274 U.S. 160, 174 (1927); Lawrence v. St. Louis-S.F. Ry. Co., 274 U.S. 588, 592–93 (1927); Gorham Mfg. Co. v. State Tax Comm'n, 266 U.S. 265, 269–70 (1924); Prentis v. Atl. Coast Line Co., 211 U.S. 210, 230 (1908); *see also* Dalton Adding Mach. Co. v. State Corp. Comm'n, 236 U.S. 699, 701 (1915)

"[c]ourts have never interpreted the doctrine in this fashion . . . and instead have created a complex and opaque facade of doctrine."[51] This is, in part, due to the courts' discretion in applying the doctrine[52] and the challenge courts face in determining whether to adhere to the rule strictly as a jurisdictional requirement, which may result in "injustice, or create exceptions that avoid injustice but dilute the concept of jurisdiction."[53]

Scholars have described the doctrine as "'too rigid,' 'too complex,' 'confusing,' 'antiquated,' and 'amorphous'"[54] and have also commented that "the case law is hopelessly confused."[55] In noting that "[t]he most serious problem presented by the exhaustion doctrine concerns its very nature,"[56] Professor Robert Power identified the tension between applying the doctrine as a "rule" and applying it as a "guiding principle that administrative remedies should be exhausted unless, on balance, the policies underlying the doctrine would be better served by excusing exhaustion in the particular case."[57] As a result, decisions on exhaustion have been "unpredictable," inconsistent, and likely to result in "unnecessary litigation."[58]

An additional tension posed by the exhaustion requirement relates to the timing and delay of judicial review. While exhaustion only delays and does not prevent a party from eventually seeking judicial review,[59] Professor Power noted that the timing can have a "substantial impact" on the party seeking relief.[60] First, "[w]hile the plaintiff may ultimately succeed in court, the delay

("[I]t is not for the courts to stop [administrative] officers of this kind from performing their statutory duty for fear that they should perform it wrongly.").

51. Power, *supra* note 8, at 551–52; *see also* Funk, *supra* note 34, at 10–11.

52. KOCH, *supra* note 34, § 12:21.

53. Devlin, *supra* note 31, at 1237.

54. Power, *supra* note 8, at 547 (footnotes omitted) (first quoting LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424 (1965); then quoting 4 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 26:1 (2d ed. 1983); then quoting Gelpe, *supra* note 6, at 3; then quoting Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 627 (1983); and then quoting Comment, *Limiting Judicial Intervention in Ongoing Administrative Proceedings*, 129 U. PA. L. REV. 452, 452 (1980)).

55. Funk, *supra* note 34, at 11.

56. Power, *supra* note 8, at 547–48.

57. *Id.* at 548; *see also* McCarthy v. Madigan, 503 U.S. 140, 146 (1992) ("[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." (alteration in original) (quoting West v. Bergland, 611 F.2d 710, 715 (1979))). The Court identified circumstances where the litigant's interests may outweigh the government's interests, including where requiring exhaustion may prejudice subsequent court action and where the agency is unable to grant effective relief, making exhaustion futile. *See id.* at 146–49. The challenge courts face in making these determinations is that balancing these interests is very case specific and turns on "the nature of the claim presented and the characteristics of the particular administrative procedure provided." *Id.* at 146.

58. Power, *supra* note 8, at 548.

59. *Id.* at 553.

60. *Id.*

in resolving the dispute may work a serious hardship."[61] Additionally, "a delay in judicial review may give the agency a strategic advantage. The longer a challenged agency ruling or practice remains in effect, the more people will acquiesce in it . . . [and] the more likely is some form of extrajudicial settlement."[62] Further, as noted by Professor Maria Gelpe, the exhaustion requirement raises a practical concern of "foster[ing] needless litigation" that can burden the courts and become costly to the defendant.[63] Exhaustion litigation can also adversely affect an agency's decision-making and "wrongly influence[] courts to dispense with the exhaustion requirement."[64] Scholars have proposed various approaches to address this uncertainty related to the law of exhaustion.[65]

Scholars have also questioned whether the benefits attributed to a mandatory exhaustion requirement are realized. The benefits of "administrative autonomy" have been questioned "because almost every administrative action is subject to judicial review, and all are subject to legislative review."[66] The benefits of judicial economy and administrative efficiency raise similar questions. While resolving a matter through the administrative process is less costly than resolving the matter in court, judicial economy is diminished if the litigant incurs the cost of judicial review of the administrative decision.[67] In turn, "administrative efficiency" is diminished "if a party initiates administrative remedies and goes to court at the same time, forcing the agency to incur costs in two forums."[68] Finally, while there are benefits to giving an

61. *Id.*

62. *Id.*

63. Gelpe, *supra* note 6, at 3.

64. *Id.*

65. One proposal is a three-factor test that considers: the "extent of injury from pursuit of administrative remedy," the "degree of apparent clarity or doubt about administrative jurisdiction, and involvement of specialized administrative understanding in the question of jurisdiction." HICKMAN & PIERCE, *supra* note 17, § 17.2 (noting that the three-factor test has "been applied in many circuit courts opinions" but "is not 'the law' on exhaustion" because "the Court's opinions on exhaustion do not form a consistent and coherent pattern"). Others have proposed "abandoning the balancing approach for a straightforward law of exhaustion with clearly defined exceptions recognized only upon strong justification." Gelpe, *supra* note 6, at 31. One scholar has suggested that "[p]roperly resolving exhaustion questions demands a methodology that both serves the doctrine's purposes and recognizes the various settings in which the doctrine applies." Power, *supra* note 8, at 557 (citing McKart v. United States, 395 U.S. 185, 193 (1969)).

66. Gelpe, *supra* note 6, at 11 (footnote omitted).

67. *Id.* at 12 ("[A]dministrative resolution is less expensive . . . because administrative proceedings are less formal, administrators with greater technical backgrounds can reach factually accurate decisions more quickly, and administrative variance and review boards are less costly to maintain than courts.").

68. *Id.* at 14. Professor Gelpe notes that "[t]he administrative efficiency argument is convincing in one type of exhaustion case that arises more frequently: when the unexhausted administrative remedy is participation in an agency's hearing or rulemaking proceeding," where "[t]ypically, the agency has conducted a hearing without the plaintiff's participation; if the plaintiff had participated, the agency might have resolved the issue with little extra work." *Id.*

agency the "chance to correct its own errors" through the administrative process, it is not clear how often these benefits are realized.[69]

C. *Exceptions to Exhaustion*

Despite the rule of exhaustion, courts agree that in certain cases an exception to exhaustion may be warranted.[70] With respect to a statutory exhaustion requirement, "Congress sets the rules—and courts have a role in creating exceptions only if Congress wants them to."[71] As such, the "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved"[72] and "the extent to which applying it in a particular context will further one or more of these goals."[73] Courts have also declined to require exhaustion in certain circumstances, "even where administrative and judicial interests would counsel otherwise,"[74] based on a "balance [of] the interest[s] of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."[75]

Much of the confusion over the exhaustion doctrine relates to the courts' inability to "identify" and define "a logically consistent set of exceptions."[76] Scholars have noted that the "vague definitions of the exceptions and the trend" to "determine whether to require exhaustion by weighing various considerations as applied to a particular case" are problematic.[77]

Inconsistency in applying exhaustion exceptions may also be attributed to whether and how courts consider the merits of a case when deciding whether to make an exception.[78] While considering the merits of each case aids in understanding the potential harm of prejudice, it can also result in "inconsistent treatment of similar cases" and litigants who "cannot accurately predict whether a court would require exhaustion."[79]

A set of commonly applied exceptions have emerged, while a smaller set of less commonly applied exceptions address potential prejudice or harm. For example, the more commonly identified exceptions to exhaustion include cases

69. *Id.* at 15–16.

70. *See id.* at 25–27.

71. Ross v. Blake, 136 S. Ct. 1850, 1857 (2016).

72. McKart v. United States, 395 U.S. 185, 193 (1969).

73. KOCH, *supra* note 34, § 12:21.

74. McCarthy v. Madigan, 503 U.S. 140, 146 (1992).

75. *Id.*

76. Power, *supra* note 8, at 558; *see also* HICKMAN & PIERCE, *supra* note 17, § 17.2 ("[T]he [Supreme] Court's opinions on exhaustion do not form a consistent and coherent pattern.").

77. Gelpe, *supra* note 6, at 26.

78. HICKMAN & PIERCE, *supra* note 17, § 17.2 ("All courts, including the Supreme Court, should and do consider to some extent the merits of the issue they are being asked to resolve in the process of deciding whether to apply the exhaustion requirement.").

79. Gelpe, *supra* note 6, at 26–27.

where administrative relief is unavailable or inadequate due to the agency's lack of authority to award relief—a category identified in the IDEA's legislative history.[80] Another widely recognized exception applies when exhaustion would be "futile." However, even the commonly recognized futility exception is not clearly defined and has been described as a "shorthand reference for a variety of situations in which administrative relief is more or less unlikely."[81]

The less accepted exceptions seem to stem from a more balanced approach: "administrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further."[82] Examples of this balancing approach include instances where "resort[ing] to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action," or where "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim."[83]

This existing framework suggests support for an irreparable harm exception—the focus of this Article—which some courts have recognized may be justified where the plaintiff will suffer irreparable injury if judicial review is denied. However, the status of the irreparable harm exception is uncertain as scholars have noted "[a]s a practical matter . . . irreparable injury is an abstract standard that is almost impossible to meet."[84] However, "[c]ourts seldom apply this exception and even more rarely find that it excuses exhaustion except in cases in which other factors also militate against requiring exhaustion."[85] These tensions can be seen through a study of the application of the exhaustion requirement under the IDEA. In order to understand the context in which exhaustion applies under the IDEA, it is necessary to review the rights afforded by and the purpose of the legislation.

80. *McCarthy*, 503 U.S. at 147; Gibson v. Berryhill, 411 U.S. 564, 575 n.14 (1973) ("[S]tate administrative remedies have also been held inadequate . . . where the state administrative body was found to be biased or to have predetermined the issue before it."); H.R. REP. NO. 99-296, at 7 (1985) (stating that it would not be appropriate to exhaust administrative remedies when "the hearing officer lacks the authority to grant the relief sought").

81. Power, *supra* note 8, at 579.

82. West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979).

83. *McCarthy*, 503 U.S. at 146–47 (first citing Bowen v. New York, 476 U.S. 467, 483 (1986); and then citing Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 773 (1947)).

84. Power, *supra* note 8, at 588.

85. Power, *supra* note 8, at 588; Kenneth Culp Davis, *Administrative Law Doctrines of Exhaustion of Remedies, Ripeness for Review, and Primary Jurisdiction: 1*, 28 TEX. L. REV. 168, 179–82 (1949); *see, e.g.*, FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–52 (1938) (concluding that the expense and inconvenience of litigation are not sufficient to justify an exception to exhaustion).

II. EDUCATING CHILDREN WITH DISABILITIES

Public education is a cornerstone of democracy. It has been recognized by the Supreme Court as "the most important function of state and local governments" and a "right which must be made available to all on equal terms."[86] Since the advent of public education in the United States, however, children with disabilities have faced significant barriers to obtaining equal access to education. This part details the historical battles children with disabilities have faced to obtain a quality education, culminating in the passage of the Education for All Handicapped Children Act of 1975 ("EAHCA"),[87] the precursor to the modern-day federal statutory IDEA framework. This part then explores the procedural aspects of the IDEA, including the statutory basis for the exhaustion requirement, as well as the state administrative barriers that claimants must navigate to meet the exhaustion requirement and suggests that the commonly asserted exceptions to the IDEA exhaustion doctrine almost always fall short.

For many years, children with disabilities were denied access to proper education. Students with disabilities "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"[88] The right to education for children with disabilities began with the Supreme Court's ruling in *Brown v. Board of Education*[89] and was guaranteed by *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*[90] and *Mills v. Board of Education*,[91] where the court ordered that "no child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a [r]ule, policy, or practice of the Board of Education of the District of Columbia or its agents."[92]

In the early 1970s,[93] Congress began investigating issues related to education for children with disabilities, and the Bureau of Education for the Handicapped determined that, of the 8 million children who were in need of special education services, only 3.9 million had adequate educational services,

86. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir.) (finding "a basic minimum education to be a fundamental right"), *vacated, reh'g en banc granted*, 958 F.3d 1216, 1216 (6th Cir. 2020).

87. Pub. L. No. 94-142, 89 Stat. 773 (codified as amended in scattered sections of 20 U.S.C.).

88. Bd. of Educ. v. Rowley, 458 U.S. 176, 179 (1982) (alteration in original) (quoting H.R. REP. NO. 94-332, at 2 (1975)).

89. 347 U.S. 483 (1954). In *Brown*, the Court reasoned that, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . is a right which must be made available to all on equal terms." *Id.* at 493.

90. 334 F. Supp. 1257 (E.D. Pa. 1971).

91. 348 F. Supp. 866 (D.D.C. 1972).

92. *Id.* at 878.

93. *See Timeline of the Individuals with Disabilities Education Act (IDEA)*, UNIV. OF KAN. SCH. OF EDUC. & HUM. SCIS., https://educationonline.ku.edu/community/idea-timeline [https://perma.cc/7zDS-DUFK].

2.5 million were receiving a substandard education, and 1.75 million were not in school at all.[94] This resulted in the enactment of the EAHCA in 1975 to address concerns that children with disabilities were "excluded entirely from the public school system," "did not receive appropriate educational services," and had "undiagnosed disabilities," often as a result of a "lack of adequate resources within the public school system."[95] The EAHCA required states to "establish a goal of providing full educational opportunities to all [children with disabilities]" and "provide procedures for insuring that [children with disabilities] and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement," among other things.[96] The EAHCA was later renamed the Individuals with Disabilities Education Act ("IDEA"),[97] which was intended "to ensure that all children with disabilities have available to them a free appropriate public education"[98] that is "designed to meet their unique needs and prepare them for further education, employment, and independent living."[99]

94. *See* S. REP. NO. 94-168, at 8 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1432.

95. 20 U.S.C. § 1400(c)(2); S. REP. NO. 94-168, at 5, *as reprinted in* 1975 U.S.C.C.A.N 1425, 1429 (noting that prior to the enactment of the Elementary and Secondary Education Act in 1966, "the Federal Government had done little to assist in the education of [children with disabilities], and the effectiveness of existing programs was dissipated by the lack of a single strong administrative body. The Bureau of Education for the Handicapped was established by this law in order to provide the leadership necessary in this field"); Manweiler, *supra* note 11, at 51 (first citing Megan McGovern, *Least Restrictive Environment: Fulfilling the Promises of IDEA*, 21 WIDENER L. REV. 117, 118 (2015); and then citing OFF. OF SPECIAL EDUC. & REHAB. SERVS., U.S. DEP'T OF EDUC., THIRTY-FIVE YEARS OF PROGRESS IN EDUCATING CHILDREN WITH DISABILITIES THROUGH IDEA 3 (2010), http://www2.ed.gov/about/offices/list/osers/idea35/history/idea-35-history.pdf [https://perma.cc/HU8P-C54A]).

96. S. REP. NO. 94-168, at 8, *as reprinted in* 1975 U.S.C.C.A.N. 1425, 1432; Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612(2)(A), (5), 89 Stat. 773, 780–81 (codified as amended at 20 U.S.C. § 1412). A "child with a disability" is defined as a child "(i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A)(i)–(ii).

97. Education for All Handicapped Children Act of 1975, 89 Stat. at 773. In 1990, when Congress reauthorized the Act, it changed the name to the IDEA. Education for All Handicapped Children Act of 1990, Pub. L. No. 101-476, § 901, 104 Stat 1103, 1141–42 (codified as amended in scattered sections of 20 U.S.C.). The IDEA was again reauthorized in 2004. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2647 (codified as amended in scattered sections of 20 U.S.C.).

98. Individuals with Disabilities Education Improvement Act of 2004, § 601(d)(1)(A), 118 Stat. at 2651 (codified as amended at 20 U.S.C. § 1400(d)(1)(A)); 34 C.F.R. § 300.1(a) (2020); Bd. of Educ. v. Rowley, 458 U.S. 176, 181, 188 (1982).

99. Individuals with Disabilities Education Improvement Act of 2004, § 601(d)(1)(A), 118 Stat. at 2651 (codified as amended at 20 U.S.C. § 1400(d)(1)(A)). In 2004, the IDEA was reauthorized and the purpose section amended to specify that special education students are also preparing for "further education." *Id.*

FAPE is defined as:

The IDEA's FAPE mandate requires states to provide "specially designed instruction" and "supportive services . . . as may be required to assist a child with a disability to benefit from special education."[100] FAPE incudes special education and related services[101] that "[a]re provided at public expense, under public supervision and direction, and without charge" and "in conformity with an individualized education program [("IEP")]."[102] In order to provide a FAPE, the child's IEP must include an educational program that is "reasonably calculated to enable the child to receive educational benefits"[103] and "make progress appropriate in light of the child's circumstances."[104]

Once it is determined that a child is eligible for FAPE under the IDEA,[105] the child is evaluated by a team of individuals[106] to discuss and document

> special 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.

Id. § 1401(9). Interpreting the FAPE requirement, the Supreme Court noted that the statutory definition "tend[ed] toward the cryptic rather than the comprehensive" and applied the following two-part test: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Rowley*, 458 U.S. at 188, 206–07 (footnotes omitted). Educational benefits continue to be the subject of much discussion and debate within the area of special education law. *See, e.g.*, Queenan, *supra* note 6, at 175–76.

100. 20 U.S.C. § 1401(26)(A), (29).

101. Special education and related services can include "transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, [and] physical and occupational therapy," among other services. 34 C.F.R. § 300.34(a) (2020).

102. *Id.* § 300.17(a), (d).

103. Joseph F. *ex rel.* Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 996 (2017) (quoting *Rowley*, 458 U.S. at 207). The Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982), however, declined "to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id.* at 202. This was due to "the Act requir[ing] States to 'educate a wide spectrum' of children with disabilities and that 'the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end.'" *Joseph F. ex rel. Endrew F.*, 137 S. Ct. at 996 (quoting *Rowley*, 458 U.S. at 202).

104. *Joseph F. ex rel. Endrew F.*, 137 S. Ct. at 1001.

105. *See* 34 C.F.R. § 300.8(a) (2020) ("Child with a disability means a child evaluated in accordance with [34 C.F.R.] §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as 'emotional disturbance'), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services." (emphasis omitted)).

106. *See id.* § 300.23 ("Individualized education program team or IEP Team means a group of individuals . . . that is responsible for developing, reviewing, or revising an IEP for a child with a disability." (emphasis omitted)). Various individuals are required to participate as part of the IEP team. *Id.* § 300.321 (requiring the IEP team to include "(1) The parents of the child; (2) Not less than one

appropriate services for the child. The IEP process results in a written document, which describes the child's current academic performance, establishes objectives and goals for improvements in that performance, and "describes the specially designed instruction and services that will enable the child to meet those objectives."[107] Services can include modifications in instructional design or support services such as speech-language therapy, physical and occupational therapy, or other adaptive services.[108] Special education services can also include summer special education services—ESY services—that are provided beyond the typical 180-day school year[109] "to prevent serious regression over the summer months."[110]

Described as "the centerpiece of the [IDEA's] education delivery system for [children with disabilities],"[111] the IEP "serves as the 'vehicle' or 'means' of providing a FAPE."[112] The Supreme Court has noted that "[i]t is through the IEP that '[t]he "free appropriate public education" required by the Act is tailored to the unique needs of' a particular child."[113] Members of the IEP team must review a student's IEP annually in order to ensure that it is tailored to the unique needs of the child,[114] which is in line with the IDEA's goal of "provid[ing] each child with meaningful access to education by offering individualized instruction and related services appropriate to [their] 'unique needs.'"[115] While the first IEP meeting must be scheduled within thirty days after the school district determines the child is eligible for services,[116] subsequent annual IEP reviews are often scheduled in the spring so that the

regular education teacher of the child (if the child is, or may be, participating in the regular education environment); (3) Not less than one special education teacher of the child . . . ; (4) A representative of the public agency . . . ; (5) An individual who can interpret the instructional implications of evaluation results . . . ; (6) At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child . . . ; and (7) Whenever appropriate, the child with a disability").

107. Honig v. Doe, 484 U.S. 305, 311 (1988) (citing 20 U.S.C. § 1401(19), amended as 20 U.S.C. § 1436).

108. 20 U.S.C. § 1401(26)(A).

109. *See* L.D. *ex rel.* A.D. v. Sumner Sch. Dist., 166 P.3d 837, 843 (Wash. Ct. App. 2007) (citing Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992)).

110. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992) (citing Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1027–28 (10th Cir. 1990) (per curiam)).

111. Joseph F. *ex rel.* Endrew F. v. Douglas Cnty. Sch. Dist., 137 S. Ct. 988, 994 (2017).

112. Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 753 (2017).

113. *Joseph F. ex rel. Endrew F.*, 137 S. Ct. at 1000 (second alteration in original) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 181 (1982)).

114. *See* 20 U.S.C. § 1414(d)(1)(A)(i). The IEP team includes the student's parent(s) or guardian(s); a representative of the local education agency; at least one of the student's general education teachers; at least one of the student's special education teachers; "an individual who can interpret the instructional implications of evaluation results"; other individuals, "at the discretion of the parent or the agency, . . . who have knowledge or special expertise regarding the child"; and "whenever appropriate, the child with a disability." *Id.* § 1414(d)(1)(B).

115. *Fry*, 137 S. Ct. at 755 (first citing 20 U.S.C. § 1401(29); and then citing Bd. of Educ. v. Rowley, 458 U.S. 176, 192, 198 (1982)).

116. *See* 34 C.F.R. § 300.323(c) (2020).

IEP team can assess the child's progress over the last year and determine whether services should be adjusted for the next academic year.[117] In the event that the parent or guardian seeks to challenge the IEP, the IDEA's exhaustion provision requires the parent or guardian to proceed through an administrative review process prior to seeking relief from the court.

A. *Exhaustion Under the IDEA*

The IDEA provides a statutory exhaustion requirement, which requires claimants to pursue administrative appeal procedures prior to seeking judicial relief.[118] But courts have noted that the "exhaustion requirement is not a rigid one, and is subject to certain exceptions."[119]

The IDEA's exhaustion section provides:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . [Section 504 of the Rehabilitation Act], or other Federal laws protecting the rights of children with disabilities, *except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [state-established administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]*.[120]

The first portion of the exhaustion provision is intended to make clear that other federal statutes, such as the Americans with Disabilities Act of 1990 ("ADA")[121] and the Rehabilitation Act of 1973 ("Rehabilitation Act"),[122] provide "separate vehicles . . . for ensuring the rights of" children with disabilities.[123] The second half of the provision, beginning with "except that," includes the IDEA's exhaustion requirement. Read together, this section requires that a plaintiff who brings a claim under the ADA or the Rehabilitation Act must first exhaust the IDEA's administrative procedures *if* the plaintiff is seeking relief that is also available under the IDEA.[124]

117. *See* 20 U.S.C. § 1414(d)(4)(A)(i)–(ii).

118. *Id.* § 1415(*l*).

119. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1302–03 (9th Cir. 1992) (citing Kerr Ctr. Parents Ass'n v. Charles, 897 F.2d 1463, 1469 (9th Cir. 1990)).

120. 20 U.S.C. § 1415(*l*).

121. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 42 U.S.C. and 47 U.S.C.).

122. Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

123. Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 750 (2017) (quoting H.R. REP. NO. 99-296, at 4 (1985)). In *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), the Court noted that while exhaustion is not required under the ADA or the Rehabilitation Act, exhaustion is required when the plaintiff brings a claim under those statutes if they are also seeking relief under the IDEA. *Id.* at 754.

124. *See id.* at 754.

The IDEA's exhaustion requirement is included in the statute's "procedural safeguards" provision, which includes detailed due process procedures and requirements related to notice,[125] consent, the parents' right to participate in the development of their child's IEP, and the right to a due process hearing.[126] The procedures and requirements under the IDEA's exhaustion provision provide the child's representative with the opportunity to participate in mediation[127] or file a complaint for an impartial due process hearing.[128] While the states have some discretion in establishing their due process procedures—for example, some states have implemented a two-tier system that includes a hearing at a local level and an appeal to the state educational agency[129]—the process begins with a preliminary meeting with the school.[130] If the matter is not resolved, the complaint proceeds to a "due process hearing" before an impartial hearing officer and, in some states,[131] also includes a review by a state review officer of the state's department of education.[132] Only

125. § 1415(d)(2). The state or local education agency is required to establish "[p]rocedures that require either party . . . to provide due process complaint notice." *Id.* § 1415(b)(7)(A).

126. *See id.* § 1415(b)(1), (d)(2).

127. *Id.* § 1415(b)(5), (e)(1) (requiring the state or local educational agency to "ensure that procedures are established and implemented to allow parties . . . to resolve such disputes through a mediation process").

128. *Id.* § 1415(f) (providing the requirements for an impartial due process hearing). Specifically, the exhaustion provision requires that "before the filing of a civil action . . . the procedures under subsections (f) and (g) [of this section] shall be exhausted." *Id.* § 1415(*l*). Further, the exhaustion provision provides that

> [w]henever a complaint has been received . . . the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

Id. § 1415(f)(1)(A).

129. Elizabeth Shaver, *Every Day Counts: Proposals To Reform IDEA's Due Process Structure*, 66 CASE W. RSRV. L. REV. 143, 151 (2015); *see* 20 U.S.C. § 1415(d)(2)(J). States determine whether due process will follow a one- or two-tier structure. Shaver, *supra*, at 151. In a one-tier system, the due process hearing is held at the state level. *Id.* In a two-tier system, the hearing is conducted at the local level and an appeal of a hearing officer's decision is filed with the state educational agency before a party can file suit in state or federal court. *Id.* Most states have adopted a one-tier system. *Id.* at 151–52.

130. § 1415(f)(1)(B)(i) ("Prior to the opportunity for an impartial due process hearing . . . the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team."); 34 C.F.R. § 300.510(a) (2020).

131. For example, in New York, once a decision is issued by the impartial hearing officer, each party has a right to appeal the decision to a state review officer. N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5(k) (Westlaw with amendments included in the New York State Reg., Volume XLIII, Issue 13 dated Mar. 31, 2021). However, as noted, most states have a one-tier system. Shaver, *supra* note 129, at 152.

132. 20 U.S.C. § 1415(f)–(g). States have the option to select either a one-tier system, in which a single hearing takes place, or a two-tier system, which includes an additional review. Shaver, *supra* note 129, at 151. "If the hearing . . . is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency" and "[t]he State educational agency shall conduct an impartial review of the

if the parents are not satisfied with the administrative outcome can they seek judicial review by filing a complaint in state or federal court.[133]

In IDEA cases, exhaustion has many purposes. Exhaustion "prevent[s] premature interference with agency processes," provides the agency with an "opportunity to correct its own errors," "afford[s] the parties and the courts the benefit of [the agency's] experience and expertise," and allows the agency to "compile a record which is adequate for judicial review."[134] The Supreme Court has noted that allowing a claim without requiring exhaustion under the IDEA would "render superfluous most of the detailed procedural protections outlined in the statute" and "run counter to Congress' view that the needs of [children with disabilities] are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each [child's] education."[135]

Indeed, the majority of appellate courts have interpreted the requirement strictly, finding it to be jurisdictional.[136] This interpretation is based on the

findings and decision appealed." § 1415(g)(1)–(2). For the reviews conducted by the state educational agency, "[t]he officer conducting such review shall make an independent decision upon completion of such review." *Id.* § 1415(g)(2).

133. § 1415(i)(2)(A).

134. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); McKart v. United States, 395 U.S. 185, 194–95 (1969); Polera v. Bd. of Educ., 288 F.3d 478, 487 (2d Cir. 2002) (noting that the exhaustion requirement "was intended to channel disputes related to the education of [children with disabilities] into an administrative process that could apply administrators' expertise in the area and promptly resolve grievances"); Devlin, *supra* note 31, at 1242; *see also* Bills *ex rel.* Bills v. Homer Consol. Sch. Dist., 959 F. Supp. 507, 511 (N.D. Ill. 1997); Sparks, *supra* note 25, at 1176 (citing Rita S. *ex rel.* Christopher S. v. Stanislaus Cnty. Off. of Educ., 384 F.3d 1205, 1209 (9th Cir. 2004)). In sum, the exhaustion requirement promotes various benefits of efficiency and expertise. *See* Wasserman, *supra* note 5, at 361 n.47 (noting that the requirement "allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcoming[s] in their educational programs for [children with disabilities]" (quoting *Polera*, 288 F.3d at 487)). Professor Wasserman omits the "s" in shortcomings in their article, but the plural form of the word—"shortcomings"—is used in *Polera*; my alteration reflects the language as it appears in *Polera*.

135. Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994) (quoting Smith v. Robinson, 468 U.S. 992, 1011–12 (1984)).

136. There remains a conflict in the circuit courts as to whether the IDEA exhaustion requirement is jurisdictional. Wasserman, *supra* note 5, at 412; *see, e.g.*, *Polera*, 288 F.3d at 483 ("A plaintiff's failure to exhaust administrative remedies under the IDEA deprives a court of subject matter jurisdiction."); Fliess v. Washoe Cnty. Sch. Dist., 90 F. App'x 240, 242 (9th Cir. 2004); Babicz v. Sch. Bd., 135 F.3d 1420, 1421 (11th Cir. 1998) (per curiam); Devlin, *supra* note 31, at 1236 (stating that jurisdictional rules "govern 'a court's adjudicatory authority'" and that "[c]ourts may not create exceptions to jurisdictional defects, and parties may not waive or forfeit them" (citing J.E.F.M. v. Holder, 837 F.3d 1119, 1038 (W.D. Wash. 2015), *aff'd in part, rev'd in part sub nom.* J.E.F.M. v. Lynch, 837 F.3d 1026 (9th Cir. 2016))). *But see* Mosely v. Bd. of Educ., 434 F.3d 527, 533 (7th Cir. 2006) ("[L]ack of exhaustion usually is waivable, as lack of jurisdiction is not." (quoting Charlie F. v. Bd of Educ., 98 F.3d 989, 991 (7th Cir. 1996))); Payne v. Peninsula Sch. Dist., 653 F.3d 863, 870 (9th Cir. 2011) (holding that the IDEA's exhaustion requirement "is not jurisdictional").

IDEA's requirement that plaintiffs have access to federal or state courts only after the completion of the administrative process. However, other courts have described the requirement as a "claims-processing rule"[137] and scholars have noted that the IDEA's exhaustion requirement does not "contain[] 'sweeping and direct' statutory language" that characterizes it as jurisdictional.[138] While courts are generally reluctant to make exceptions to statutory exhaustion, even courts that find the requirement to be jurisdictional have excused exhaustion based on the Act's legislative history, which recognizes that "there are certain situations in which it is not appropriate to require the use of due process and review procedures set out in [the IDEA] before filing a law suit."[139] Courts note that "in determining whether these exceptions apply, [the] inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme."[140]

B. *Exceptions to the IDEA's Exhaustion Requirement*

Congress's intent to allow for exceptions to the IDEA exhaustion requirement is clear from a statement by its principal author, Senator Williams: "I want to underscore that exhaustion . . . should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter."[141] The legislative history provides further support for several categories of exceptions,[142] including when

> (1) it would be futile to use the due process procedures . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be

137. *Mosely*, 434 F.3d at 533 (citing Charlie F. v. Bd. of Educ. 98 F.3d 989, 991 (7th Cir. 1996)).

138. HICKMAN & PIERCE, *supra* note 17, § 17.3.

139. H.R. REP. NO. 99-296, at 7 (1985).

140. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (first citing Bowen v. City of New York, 476 U.S. 467, 484 (1986); and then citing McKart v. United States, 395 U.S. 185, 193 (1969)).

141. 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams).

142. For example, courts that have addressed whether agency policies that are contrary to the law qualify as an exception have determined that a "challenge to policies, rather than . . . a challenge to an individualized education program" is insufficient to justify a waiver of the exhaustion requirement. *Hoeft*, 967 F.2d at 1304. Rather, a claimant must also establish that "the underlying purposes of exhaustion would not be furthered by enforcing the requirement" such as cases that involve "statutory violations so serious and pervasive that the basic statutory goals are threatened." *Id.* (citing J.G. v. Bd. of Educ., 830 F.2d 444, 446 (2d Cir. 1987)) (noting that "practices amounting to wrongdoing" were "inherent in the program")); N.M. Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 851 (10th Cir. 1982) ("[T]he gravamen of the Association's lawsuit is that the entire special education service system offered by the State is infirm."). Focusing on the "contrary to the law" language, courts have determined that this exception applies when "questions of law are involved in determining the validity of a policy, as when the policy facially violates the IDEA." *Hoeft*, 967 F.2d at 1305.

> obtained by pursuing administrative remedies . . . ; and (4) an emergency situation exists . . . .[143]

Consistent with the legislative intent, courts have recognized various exceptions in IDEA cases, including futility and emergency situations.[144] But the courts "have not articulated a comprehensive standard for determining when exactly the exhaustion requirement applies."[145] While the futility exception has been recognized when the agency cannot adequately award relief, such as in cases involving systemic violations, no clear definition of futility has emerged. As to the emergency situation exception, courts have noted that it should be "sparingly invoked" and requires a heavy burden.[146] Some scholars suggest that this exception falls "within the futility exception."[147] Lastly, a few courts have recognized an irreparable harm exception, though claimants rarely succeed in securing this exception.

This Article suggests that the irreparable harm exception should be recognized by the courts uniformly and proposes a framework that would provide clarity for courts and litigants as to when the exception should be applied.[148] An irreparable harm exception is consistent with the futility and emergency situation exceptions and directly addresses the educational irreparable harm that results from exhaustion's delay. Before turning to the proposed framework for applying an irreparable harm exception, the following sections explain why both the futility exception and the emergency exception fail to adequately address the concerns involved with irreparable educational harm.

143. H.R. REP. NO. 99-296, at 7 (1985); *see also* Rose v. Yeaw, 214 F.3d 206, 210 (1st Cir. 2000) (quoting Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1094 (1st Cir. 1989)).

144. Courts have also excused exhaustion in cases seeking monetary relief on the ground that such relief is not available under the IDEA. *See, e.g.*, Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 63–64 (1st Cir. 2002). For discussion of additional exhaustion exceptions, see Wasserman, *supra* note 5, at 386 (noting other exceptions, including "the agency's failure to implement unambiguous IEP requirements . . . the agency's denial of access to the IDEA's due process procedures . . . [and] the absence of an IDEA administrative forum to adjudicate the dispute").

145. Payne v. Peninsula Sch. Dist., 653 F.3d 863, 874 (9th Cir. 2011); *see also* Devlin, *supra* note 31, at 1249 ("When it comes to the [IDEA], courts are so confused by the statute's exhaustion requirement that they ignore the issue and apply exceptions even before knowing its jurisdictionality. The result is either limbo or non-jurisdictional exhaustion with exceptions.").

146. Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 206 (2d Cir. 2007) (quoting *Rose*, 214 F.3d at 212) (rejecting a student's argument that not being able to graduate with his class, due to a setback caused by a disability, constituted an emergency situation).

147. Wasserman, *supra* note 5, at 395.

148. *See id.* at 396 (listing a variety of situations in which courts have excused exhaustion). In IDEA cases, this lack of clarity often presents challenges for the parent or guardian as the party seeking to bypass the exhaustion requirement—typically the parent—has the burden of proving an exception applies. *See* Heckler v. Ringer, 466 U.S. 602, 622 (1984).

1. The Futility Exception

The futility exception, identified by Congress, is one of the most commonly recognized exceptions to the IDEA's exhaustion requirement. Congress suggested that the exception may apply where "it would be futile to use the due process procedures (e.g., an agency has failed to provide services specified in the child's individualized educational program[])."[149] Courts have recognized the futility exception in cases involving an agency's bad faith,[150] cases involving "systemic violations," [151] and cases where "administrative procedures do not provide [an] adequate remed[y]," [152] such as where the plaintiff seeks monetary damages for physical injuries.[153] However, courts seem to be divided as to whether exhaustion is required when the claimant seeks monetary damages.[154] Some courts have excused exhaustion in cases in which

149. H.R. REP. NO. 99-296, at 7 (1985).

150. Some courts recognize the futility exception based on the bad faith of the agency, but others note that exhaustion should not be waived "because the past pattern of an agency's decisions shows that the agency will probably deny relief." Gelpe, *supra* note 6, at 40; *see also* Lauren A. Koster, Note, *Who Will Educate Me? Using the Americans with Disabilities Act To Improve Educational Access for Incarcerated Juveniles with Disabilities*, 60 B.C. L. REV. 673, 695–96 (2019).

151. N.S. *ex rel.* J.S. v. Attica Cent. Schs., 386 F.3d 107, 113 (2d Cir. 2004). Some courts have analyzed these cases under the "policy or practice of generalized applicability" exception. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1304 (9th Cir. 1992).

152. Polera v. Bd. of Educ., 288 F.3d 478, 488 (2d Cir. 2002) (citing Heldman v. Sobol, 962 F.2d 148, 158 (2d Cir. 1992)); Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 205 (2d. Cir. 2007) (quoting Mrs. G. *ex rel.* J.G. v. Bd. of Educ., 830 F.2d 444, 447 (2d Cir. 1987)); Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987); Padilla *ex rel.* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1275 (10th Cir. 2000); H.R. REP. NO. 99-296, at 7 (1985); *see also* Barron v. S.D. Bd. of Regents, 655 F.3d 787, 792 (8th Cir. 2011); Witte v. Clark Cnty. Sch. Dist., 197 F.3d 1271, 1276 (9th Cir. 1999). Courts have declined to waive the exhaustion requirements in cases where the child has graduated, cases involving allegations of psychological harm, and cases in which the child has been placed in a private school program. *See* Fraser *ex rel.* Fraser v. Tamalpais Union High Sch. Dist., 281 F. App'x 746, 748 (9th Cir. 2008).

153. The Fourth, Sixth, Seventh, Eighth, and Ninth Circuits have "found damages unavailable under the IDEA." *Polera*, 288 F.3d at 485 (citing Charlie F. v. Bd. of Educ., 98 F.3d 989 (7th Cir. 1996)); *see also* Sellers v. Sch. Bd., 141 F.3d 524, 527 (4th Cir. 1998). "The purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy—as contrasted with reimbursement of expenses—is fundamentally inconsistent with this goal." *Polera*, 288 F.3d at 486. Courts are split as to whether to waive exhaustion when the relief sought cannot be granted by the administrative hearing officer. Katherine Bruce, *Vindication for Students with Disabilities: Waiving Exhaustion for Unavailable Forms of Relief After* Fry v Napoleon Community Schools, 85 U. CHI. L. REV. 987, 1001–02 (2018) ("Once again, we do not address here (or anywhere else in this opinion) a case in which a plaintiff, although charging the denial of a FAPE, seeks a form of remedy that an IDEA officer cannot give—for example, as in the Frys' complaint, money damages for resulting emotional injury." (quoting Fry v. Napoleon Cmty. Schs., 137 S. Ct. 743, 754 n.8 (2017))).

154. *Compare* W.B. v. Matula, 67 F.3d 484, 496 (3d Cir. 1995) (concluding that "damages are available as a remedy" in a § 1983 action for IDEA violations and excusing "any exhaustion requirement" because the relief sought is "*not* available in an IDEA administrative proceeding"), *and* Covington v. Knox Cnty. Sch. Sys., 205 F.3d 912, 918 (6th Cir. 2000), *as amended on denial of reh'g and suggestion for reh'g en banc* (May 2, 2000) ("[I]n this case exhaustion would be futile because money damages, which are unavailable through the administrative process, are the only remedy capable of

the child seeks damages for severe physical or mental injuries.[155] Although rare, some courts have also made an exception where the case would not "substantially benefit by having an administrative record"[156] or where "an adverse decision [is] a certainty."[157]

While courts have been reluctant to find futility based solely on administrative delay,[158] courts have recognized that harmful delay caused by exhaustion, established by a high standard of proof, may warrant an exception.[159] In *Polera v. Board of Education*,[160] the Second Circuit denied the plaintiff's claim of futility, finding that "[w]hile the administrative process might not have delivered relief as swiftly as [the plaintiff] hoped, it certainly could have compensated for the relatively minor delay with additional remedial educational services."[161] The court cautioned against applying "[s]weeping exceptions" that "would swallow the exhaustion requirement."[162] Similarly, in *Christopher W. v. Portsmouth School Committee*,[163] the First Circuit rejected the claimant's futility argument, finding that the plaintiff "produced no evidence" to support futility.[164] Although it opened the door for an exception based on irreparable harm, the court also noted that "there are instances in which application of the exhaustion doctrine will not serve" the agency expertise or judicial economy

redressing [the student's] injuries."), *and* Witte v. Clark Cnty. Sch. Dist., 197 F.3d 1271, 1275–76 (9th Cir. 1999) (holding that the "[p]laintiff was not required to exhaust the formal administrative processes of the IDEA" because he "seeks only money damages, which is not 'relief that is available under' the IDEA"), *with* Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 69 (1st Cir. 2002) (holding that the plaintiff seeking money damages could not proceed with the claim without first exhausting the IDEA's administrative remedies), *and* Charlie F. v. Bd. of Educ., 98 F.3d 989, 989, 993 (7th Cir. 1996) (dismissing a claim for failing to first pursue the IDEA's administrative remedies), *and* D.G. *ex rel.* N.B. v. Alachua Cnty. Sch. Bd., 84 F.3d 1376, 1379 (11th Cir. 1996) ("As the plaintiff has failed to exhaust administrative remedies, the plaintiff may not proceed with her § 1983 claims for violations of the IDEA.").

155. *See* Wasserman, *supra* note 5, at 390; *see also Padilla ex rel. Padilla*, 233 F.3d at 1271, 1274 (excusing exhaustion when parents were seeking only monetary damages for a fractured skull and exacerbation of their child's seizure disorder that occurred while their child was placed unsupervised in a windowless closet); *Witte*, 197 F.3d at 1276 (excusing exhaustion when parents were seeking only monetary damages from substantial physical and verbal abuse to their child).

156. Sparks, *supra* note 25, at 1177 (citing *N.S. ex rel. J.S.*, 386 F.3d at 114); *see also* Virginia H. *ex rel.* Kristi H. v. Tri-Valley Sch. Dist., 107 F. Supp. 2d 628, 633 (M.D. Pa. 2000) ("If no factual record needs to be developed, i.e. the matter is purely legal, to proceed through the administrative proceedings is unnecessary.").

157. Nat'l Sci. & Tech. Network, Inc. v. FCC, 397 F.3d 1013, 1014 (D.C. Cir. 2005).

158. *See, e.g.*, *Polera*, 288 F.3d at 490 ("The supposed slowness of the administrative process also does not justify a finding of futility in this case.").

159. Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1095 (1st Cir. 1989).

160. 288 F.3d 478 (2d Cir. 2002).

161. *Id.* at 490. The court also noted that it was "incongruous that [the plaintiff] waited years before pursuing any remedy, yet now claims that the remedy available to her *at the time*—the administrative process—would have been too slow." *Id.*

162. *Id.* at 489.

163. 877 F.2d 1089 (1st Cir. 1989).

164. *Id.* at 1095.

interests.[165] Such instances include "when exhaustion 'will work severe harm upon a litigant,' or when '[f]urther agency proceedings may be futile, only delaying an ultimate resolution,' and that 'the legislative history of the Act reflects the understanding that exhaustion is not a rigid requirement.'"[166]

2. The Emergency Exception

The emergency exception has historically been narrowly applied and courts have cautioned that "it is to be sparingly invoked."[167] The circumstances warranting its application are unclear, beyond Congress's suggestion that it be applied when "the failure to take immediate action will adversely affect a child's mental or physical health[]."[168] In *Komninos ex rel. Komninos v. Upper Saddle River Board of Education*,[169] the parents of an eight-year-old boy sought an emergency order from the court (while the administrative proceeding was pending) for tuition expenses for their child's placement in a private residential facility.[170] The parents argued that they were unable to continue to pay for their child's tuition and that absent placement at the residential facility, their child, who was currently "suffering immediate, substantial and irreparable harm," would be "physically, permanently and irreparably educationally harmed."[171] The district court dismissed the complaint for "lack of jurisdiction" because the plaintiffs had not "yet exhausted the procedures required by the Act."[172] The Third Circuit remanded the case for further proceedings because the "district court was under the misapprehension that it lacked authority to exempt parties from exhaustion of remedies in proper circumstances in Disabilities Education Act cases."[173]

165. *Id.*

166. *Id.* (alteration in original) (emphasis omitted) (quoting Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981)). The court in *Christopher W.* misquoted *Ezratty v. Puerto Rico*, 648 F.2d 770 (1st Cir. 1981), by placing "will" before "work severe harm" without adding an ellipsis to account for omitted language from *Ezratty*. *Compare Christopher W.*, 877 F.2d at 1095 (stating application of the exhaustion doctrine would not serve the doctrine's interest "when exhaustion 'will work severe harm upon a litigant'"), *with Ezratty*, 648 F.2d at 774 ("Sometimes to require exhaustion will not only waste resources but also work severe harm upon a litigant.").

167. Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778–79 (3d Cir. 1994).

168. *Id.* at 778 (quoting H.R. REP. NO. 99-296, at 7 (1985)).

169. 13 F.3d 775 (3d Cir. 1994).

170. *Id.* at 777; *see* Sch. Comm. of Burlington v. Dep't. of Educ. of Mass., 471 U.S. 359, 369 (1985) (finding that courts can "order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement . . . is proper").

171. *Komninos*, 13 F.3d at 777–78. The parents initially sought administrative relief after the school board denied their request to place their child in a residential facility and twice moved for emergency relief before the administrative law judge. *Id.* at 777.

172. *Id.* at 778.

173. *Id.* at 781.

Although the *Komninos* court did not reach a determination as to whether an exception to exhaustion applied, the decision highlights the challenge parents face in interpreting the courts' decisions on exhaustion exceptions. In "adopt[ing]" the "emergency situation exception," the *Komninos* court cautioned that "mere allegations . . . of irreversible harm will not be enough to excuse the completion of administrative proceedings."[174] Further, the court stated that "[p]laintiffs must provide a sufficient preliminary showing that the child will suffer serious and irreversible mental or physical damage (e.g., irremediable intellectual regression) before the administrative process may be circumvented."[175]

After identifying the threshold requirement for the emergency exception, the court raised doubt as to whether "'regression' per se constitutes such irreparable harm as to justify an exception to the exhaustion requirement" because "the skills lost in regression may be recouped" even though "[students with disabilities] take longer than the non-handicapped to regain their previous achievements."[176] This observation from the court seems squarely in opposition to educational studies regarding rates of regression among students with disabilities[177] as well as the court's further suggestion that "[a] showing . . . that the regression will be irreversible would demonstrate irreparable harm and would relieve plaintiffs from the obligation to finish the administrative process before seeking judicial relief."[178]

The *Komninos* court's analysis establishes a high standard focused on "irreversible mental or physical damage" to justify the emergency exception, consistent with Congress's suggestion that the exception is warranted when "the failure to take immediate action will adversely affect a child's mental or physical health[]."[179] This language suggests that Congress was primarily concerned with cases where the child was in immediate danger of physical or mental harm, such as *Witte v. Clark County School District*,[180] where the child sought monetary damages for alleged physical and verbal abuse by a teacher and an aide,[181] or *Padilla ex rel. Padilla v. School District No. 1*,[182] where the parents sought damages for physical injuries sustained by their daughter, allegedly caused by the school placing her in an unsupervised, windowless closet.[183]

174. *Id.* at 778–79.
175. *Id.* at 779.
176. *Id.* at 779–80.
177. *See* Barnard-Brak & Stevens, *supra* note 23, at 3–8.
178. *Komninos*, 13 F.3d at 780.
179. *Id.* at 779; H.R. REP. NO. 99-296, at 7 (1985).
180. 197 F.3d 1271 (9th Cir. 1999).
181. *Id.* at 1273–74.
182. 233 F.3d 1268 (10th Cir. 2000).
183. *Id.* at 1271.

Although the emergency exception has not been extended to cases where the child suffers irreparable educational harm, some courts, including the First Circuit, have recognized that there is a need to recognize an exception when exhaustion would cause "severe harm upon a litigant."[184] The need for an irreparable harm exception is particularly warranted in cases where a child suffers educational irreparable harm as a result of the delay caused by the administrative review process. In fact, irreparable harm has already been recognized as an exception to the exhaustion requirement in other legal contexts, including in environmental, social security, and retirement cases.[185]

III. A PROPOSAL TO RECONSIDER EXHAUSTION AND ADDRESS IRREPARABLE EDUCATIONAL HARM

Many scholars and special education advocates have acknowledged the challenges presented by the exhaustion requirements and have proposed various legislative- or policy-based recommendations. While these proposals have noted the concerns related to the delay caused by the administrative review process, none have focused on the potential educational harm caused by the denial of special education services pending administrative review. After a brief review of these prior proposals for reform, this part proposes a new framework for an irreparable harm exception that would directly address the tension between the benefits of exhaustion and the need to promptly resolve disputes in order to prevent educational harm and protect the right of children with disabilities to a FAPE.

A. *Prior Proposals for Reform*

The effort to seek changes to the IDEA's procedural framework began in 2001, when President Bush created the Presidential Commission on Excellence in Special Education, which published a report that concluded that "IDEA

184. Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1095 (1st Cir. 1989) (emphasis omitted); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981).

185. *See, e.g.*, Bowen v. City of New York, 476 U.S. 467, 476 (1986) (noting that to waive the administrative exhaustion requirement for a challenge to the procedure used by the Social Security Administration in determining eligibility for disability benefits, the claimants must show that (1) "the claims were collateral to any claim for benefits" and (2) "the harm imposed by exhaustion would be irreparable"); Gulf Restoration Network, Inc. v. Salazar, 683 F.3d 158, 176 (5th Cir. 2012) (noting that although petitioners did not assert or establish a basis for the irreparable harm exception in a case by environmental organizations challenging the Department of Interior's plans for oil wells, "court[s] may . . . excuse the failure to exhaust where 'irreparable injury will result absent immediate judicial review'" (quoting Dawson Farms LLC v. Farm Serv. Agency, 504 F.3d 592, 606 (5th Cir. 2007))); Grumbine v. Teamsters Pension Tr. Fund, 638 F. Supp. 1284, 1286 (E.D. Pa. 1986) ("In general, courts will excuse a failure to exhaust 'only if the claimant is threatened with irreparable harm, if resort to administrative remedies would be futile, or if the claimant has been denied meaningful access to the plan's administrative procedures.'" (quoting Tomczyscyn v. Teamsters, Loc. 115 Health & Welfare Fund, 590 F. Supp. 211, 213 (E.D. Pa. 1984))).

dispute resolution warranted 'serious reform.'"[186] Congress acknowledged that "parents and school districts needed 'expanded opportunities to resolve their disagreements in positive and constructive ways.'"[187] Such efforts resulted in minor legislative reform in 2004 with an amendment of the IDEA to require "parties to attend a 'resolution session' that must take place within fifteen days after a due process complaint is filed unless both parties agree to waive the session or to go to mediation."[188] However, it has been noted that "[t]he 2004 Amendments were quite modest in terms of altering the structure of due process."[189]

In 2016, the American Association of School Administrators ("AASA") issued a report, *Rethinking the Special Education Due Process System*,[190] intended to address "problems with the current [IDEA] statute as well as proposed improvements."[191] The AASA report focuses on various recommendations for handling special education disputes without the use of the due process hearing. For example, the AASA recommends replacing the current due process system with a "mandated facilitated IEP meeting" and a "special education consultancy model" with the opportunity for mediation to resolve the dispute before proceeding to litigation.[192] Others have recommended an amendment to the IDEA "to authorize bringing a direct action under IDEA" in certain circumstances[193] and "creating emergency and interim hearing procedures, strengthening notice, reinstating the right to expert witness fees, shifting the burden of proof to school districts, reinstating the catalyst theory for attorneys' fees, and increasing the number of publicly funded lawyers."[194] Nonetheless,

186. Shaver, *supra* note 129, at 156–57 (citing PRESIDENT'S COMM'N. ON EXCELLENCE IN SPECIAL EDUC., A NEW ERA: REVITALIZING SPECIAL EDUCATION FOR CHILDREN AND THEIR FAMILIES 40 (2002), https://ectacenter.org/~pdfs/calls/2010/earlypartc/revitalizing_special_education.pdf [https://perma.cc/UHD4-DX5R]).

187. *Id.* at 145 (quoting 20 U.S.C. § 1400(c)(8) (2012)).

188. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 615(f)(1)(B), 118 Stat. 2647, 2720–21 (codified as amended at 20 U.S.C. § 1415(f)(1)(B)); *see also* Shaver, *supra* note 129, at 155 (citing 20 U.S.C. § 1415(f)(1)(B) (2012)).

189. Shaver, *supra* note 129, at 156.

190. PUDELSKI, *supra* note 11.

191. *Id.* at 2.

192. *Id.* at 18.

193. Wasserman, *supra* note 5, at 422.

194. Mark C. Weber, *In Defense of IDEA Due Process*, 29 OHIO ST. J. ON DISP. RESOL. 495, 507 (2014); *see also* RUTH COLKER, DISABLED EDUCATION 4–5, 153–60, 169–72 (2013); Elisa Hyman, Dean Hill Rivkin & Stephen A. Rosenbaum, *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education Lawyering*, 20 AM. U. J. GENDER SOC. POL'Y & L. 107, 156–59 (2011); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1448–49 (2011) (discussing the "previously common practice of awarding attorneys' fees in cases where the litigation was the catalyst for a change in the defendant's conduct (the so called 'catalyst rule')"); Cali Cope-Kasten, Note, *Bidding (Fair)well to Due Process: The Need for a Fairer Final Stage in Special Education Dispute Resolution*, 42 J.L. & EDUC. 501, 526, 532, 538–39 (2013)

proposals have been described as inadequate to preserve the due process hearing rights under the IDEA.[195] While these proposals address concerns related to cost, fairness, and expertise, most do not directly focus on the irreparable harm to the child caused by the administrative delay.[196]

Irreparable harm has long been raised as a basis for which to make an exception to the exhaustion requirement.[197] While some courts[198] have recognized an exception based on "severe or irreparable harm,"[199] the exception has not been universally accepted or applied.[200] Courts that have recognized this exception in IDEA cases have noted that it "draws its support" from the emergency exception.[201] But the legislative history suggests that the emergency exception is intended to apply to circumstances where the child is placed in immediate physical or mental harm as a result of actions, behavior, or circumstances that occur in a school setting.[202] Thus, an exception focused on addressing educational harm is still needed.

B. *A Proposal To Address Irreparable Educational Harm*

A universally recognized irreparable harm exception is necessary to address cases in which the delay caused by exhaustion results in a denial of services that causes the child to regress academically in a way that cannot be adequately remedied at a later time. The exception is particularly needed in the context of IDEA cases involving time-sensitive determinations as to eligibility

(arguing that, in the context of special education, due process as we know it is "unworkable . . . because the procedural elements of objective fairness conflict with subjective and outcome fairness").

195. *See* Weber, *supra* note 193, at 495–96.

196. Shaver, *supra* note 129, at 145 ("Advocacy organizations and scholars contend that, even with these dispute resolution mechanisms in place, special education dispute resolution still is too expensive and time-consuming." (citing PUDELSKI, *supra* note 11, at 7)).

197. Davis, *supra* note 85, at 168–69; Gelpe, *supra* note 6, at 48 ("Several authorities suggest that a litigant need not exhaust its administrative remedies when doing so would cause irreparable injury.").

198. The First, Second, and Third Circuits have recognized a severe and irreparable harm exception. *See* T.H. v. Cincinnati Pub. Sch. Dist. Bd. of Educ., No. 14–cv–516, 2014 WL 2931426, at *5 (S.D. Ohio June 27, 2014) (first citing Rose v. Yeaw, 214 F.3d 206, 211 (1st Cir. 2000); then citing Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 206 (2d Cir. 2007); and then citing Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ. 13 F.3d 775, 779 (3d Cir. 1994)).

199. *See* Rose v. Yeaw, 214 F.3d 206, 210 (1st Cir. 2000) (addressing the plaintiff's argument for an exception based on futility and "potential for severe harm to the litigant"); Christopher W. v. Portsmouth Sch. Comm., 877 F.2d 1089, 1097 (1st Cir. 1989); Ezratty v. Puerto Rico, 648 F.2d 770, 774 (1st Cir. 1981); Coleman v. Newburgh Enlarged City Sch. Dist., 503 F.3d 198, 206 (2d Cir. 2007); Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 778 (3d Cir. 1994).

200. *See T.H.*, 2014 WL 2931426, at *5 ("The Sixth Circuit has never expressly adopted the irreparable harm exception.").

201. *Id.*

202. H.R. REP. NO. 99-296, at 7 (1985) (providing that "there are certain situations in which it is not appropriate to require [exhaustion]," including when "an emergency situation exists (e.g., the failure to take immediate action will adversely affect a child's mental or physical health)").

for special education services.[203] Irreparable harm has been recognized as a valid basis for an exception in other legal contexts, including in cases involving criminal prosecution, where the doctrine "can be exceedingly harsh,"[204] as well as in the context of the denial of social security benefits for individuals with intellectual disabilities.[205]

An exception based on irreparable harm is consistent with the principle that the "substance of a real 'irreparable injury' claim is not that the plaintiff will fail before the agency, but that the process of seeking agency relief will cause injury."[206] With that in mind, the irreparable harm exception should apply in IDEA cases based on the following factors: (1) whether the procedural delay and denial of the services may result in regression and irreparable educational harm to the child; (2) whether the child is entitled to receive interim services pending the administrative determination; and (3) whether the harm resulting from the administrative delay can be adequately remedied at a later time.

1. Procedural Delay and Denial of Services

The IDEA includes specific time periods by which each part of the administrative review process should be completed. When a parent files a complaint, they have an opportunity for an impartial due process hearing, which is conducted by a state or local educational agency.[207] While states have some discretion in establishing their due process procedures,[208] the process typically

203. Others have advocated for an exception to exhaustion in cases involving time-sensitive claims under the IDEA, such as situations where parents are seeking to prevent a school from closing. *See* Sparks, *supra* note 25, at 1165 ("[T]he time-sensitive nature of a looming school closing should allow a parent to forego administrative exhaustion and bring an action for a preliminary injunction directly to the courts to adjudicate the underlying merits of the claim.").

204. McKart v. United States, 395 U.S. 185, 197 (1969).

205. Bowen v. City of New York, 476 U.S. 467, 469–70, 477–78 (1986); Grumbine v. Teamsters Pension Tr. Fund, 638 F. Supp. 1284, 1286 (E.D. Pa. 1986). Irreparable harm has also been recognized in the context of environmental law cases. *See, e.g.*, Gulf Restoration Network, Inc. v. Salazar, 683 F.3d 158, 181 (5th Cir. 2012).

206. Gelpe, *supra* note 6, at 48.

207. 20 U.S.C. § 1415(f)(1)(A). In order to receive federal financial assistance, states are required to comply with the substantive and procedural requirements of the IDEA. *See* Individuals with Disabilities Improvement Act of 2004, Pub. L. No. 108-446, § 615(a), 118 Stat. 2647, 2715 (codified as amended at 20 U.S.C. § 1415(a)). Specifically, the IDEA requires states to "establish and maintain procedures . . . to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a [FAPE]." *Id.* Parties are also provided with an opportunity to participate in mediation. *Id.* § 615(b)(4), 118 Stat. at 2716, 2719 (codified as amended at 20 U.S.C. § 1415(b)(5), (e)(1)) (requiring the state or local educational agency to "ensure that procedures are established and implemented to allow parties . . . to resolve such disputes through a mediation process").

208. *See, e.g.*, 20 U.S.C. § 1415(e)(2)(B), (f)(1)(A). States determine whether due process will follow a one- or two-tier structure. Shaver, *supra* note 129, at 151. In a one-tier system, the due process hearing is held at the state level. *Id.* In a two-tier system, the hearing is conducted at the local level and an appeal of a hearing officer's decision is filed with the state educational agency before a party can file

begins with a preliminary meeting with the school "within 15 days of receiving notice of the parents' complaint."[209] Once a party has provided notice of a complaint, if the matter has not been resolved "within 30 days of the receipt of the complaint, the due process hearing may occur."[210] In some states, the process includes a review by a state review officer of the state's department of education.[211] The administrator must reach a final decision within forty-five days, and if the child's representative is not satisfied with the administrative outcome, they can then seek judicial review by filing a complaint in state or federal court.[212]

The IDEA timeline requirements were established with the "ultimate goal . . . [of] resolv[ing] special education disputes quickly and efficiently so that the child's education does not suffer."[213] However, even in the most expedited cases, the determination is often delayed[214] in order to allow time for the parties to obtain relevant documentation, seek expert testimony, or seek an independent evaluation.[215] And the statutory time periods are waived once the child's representative requests additional time to gather evidence.[216] As noted

suit in state or federal court. *Id.* Most states have adopted a one-tier system. *Id.* at 152 ("Currently, forty-one states and the District of Columbia have a one-tier system.").

209. *Id.* § 1415(f)(1)(B)(i) ("Prior to the opportunity for an impartial due process hearing . . . the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team . . . .").

210. *Id.* § 1415(f)(1)(B)(ii).

211. *See id.* § 1415(f)–(g). States have the option to select either a one-tier system, in which a single hearing takes place, or a two-tier system, which includes an additional review. *See* Shaver, *supra* note 129, at 151. "If the hearing . . . is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency" and "[t]he State educational agency shall conduct an impartial review of the findings and decision appealed . . . . The officer conducting such review shall make an independent decision upon completion of such review." 20 U.S.C. § 1415(g)(1)–(2). For example, in New York, once a decision is issued by the impartial hearing officer, each party has a right to appeal the decision to a state review officer. N.Y. COMP. CODES. R. & REGS. tit. 8, § 200.5(j)(5)(v) (Westlaw with amendments included in the New York State Reg., Volume XLIII, Issue 13 dated Mar. 31, 2021). However, most states have a one-tier system. Shaver, *supra* note 129, at 152.

212. 34 C.F.R. §§ 300.515(a), 300.516(a) (2020).

213. Shaver, *supra* note 129, at 146.

214. *See* Mary A. Lynch, *Who Should Hear the Voices of Children with Disabilities: Proposed Changes in Due Process in New York's Special Education System*, 55 ALB. L. REV. 179, 184 (1991) (referring to the forty-five-day requirement for a hearing officer's decision and noting that in "discussions with attorneys for children with disabilities, as well as school district attorneys, the refrain echoes—'never saw it happen'"). Delays are often caused by "[s]cheduling conflicts," due to attorneys' schedules, school personnel vacation or limitations on working hours, witness availability, and hearing officers' workload. PUDELSKI, *supra* note 11, at 15 (citing S. James Rosenfeld, *It's Time for an Alternative Dispute Resolution Procedure*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 544–899 (2012)).

215. Lynch, *supra* note 214, at 184–85.

216. *Id.* at 185. Generally, matters of timing are left to the school board's discretion. *See* 34 C.F.R. § 300.343(a) (2006). That discretion is abused, however, when decisions are delayed for illegitimate purposes—such as to deny parents the ability to exercise their due process rights guaranteed under other sections of the regulations. Timely decision-making is critical to the integrity of the rights granted

by the Supreme Court, "[a] final judicial decision on the merits of an IEP . . . in most instances come[s] a year or more after the school term covered by [the] IEP has passed."[217] While the case is pending, the child's parent or guardian is presented with a challenging decision: "go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement."[218]

There are many examples of delayed resolutions in IDEA cases. Recently, the Eleventh Circuit decided a case in which it noted that "[o]ver two years passed before the [administrative law judge ("ALJ")] even concluded hearings in [the] case, and then another fifteen months before the ALJ rendered its decision," followed by another year before the district court issued an opinion.[219] It took over five years before a final judgment was issued in the case.[220]

In *L.D. ex rel. A.D. v. Sumner School District*,[221] it took two years for the child to receive a final determination as to whether he was eligible for ESY services.[222] A.D.'s parents challenged the school district's determination that A.D., age fifteen, was not eligible for ESY services, even though he had previously received special education services, including ESY services, since the second grade, at another school.[223] The school's determination was based on a lack of "academic data to show that A.D. would benefit from ESY services" because there was conflicting evidence "that A.D. was making good progress in improving his academic skills" but "needed ESY services for behavioral

under the IDEA. In particular, unduly late decisions infringe upon parents' rights to administrative review of IEP decisions within established timelines. 34 C.F.R. § 300.515(a)–(b) (2020) (giving parents a right to a due process hearing); *id.* § 300.515(a) (setting a forty-five-day limit on the review process).

217. Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 370 (1985).

218. Florence Cnty. Sch. Dist. Four v. Carter, 510 U.S. 7, 12 (1993) (quoting *Sch. Comm. of Burlington*, 471 U.S. at 370). Scholars and special education advocates have criticized the administrative exhaustion procedures as "expensive, time consuming, and counterproductive to a collaborative parent-school relationship." Shaver, *supra* note 129, at 159 (analyzing the various proposals offered to reform the special education due process procedures). One of the main criticisms of the current IDEA administrative process is that "it is anticollaborative and poisons the school-parent relationship, ultimately to the detriment of the child." *Id.* at 161. Unlike the parties in some other disputes, with disputes involving the IDEA the child will often continue their relationship with the school district after the case has been resolved. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 322 (1988) (noting the seven-year time period before the case reached the Supreme Court and that the Court "previously noted that administrative and judicial review under the EHA is often 'ponderous'" (quoting *Sch. Comm. of Burlington*, 471 U.S. at 370)).

219. N.N.J. *ex rel.* L.J. v. Sch. Bd., 927 F.3d 1203, 1209 n.4 (11th Cir. 2019).

220. *Id.*

221. 166 P.3d 837 (Wash. Ct. App. 2007).

222. *See id.* at 839–42 (noting that the foregoing case was filed in 2005 and a final determination was reached in 2007).

223. *Id.* at 839–41.

reasons."[224] A.D.'s mother ultimately filed an administrative due process hearing under the IDEA.[225] After prehearing conferences and a hearing, which continued from November 2005 through January 2006, the ALJ ordered the school district "to provide A.D. with 'the number of hours of instruction or counseling he would have received if he had participated in a 2005 ESY program'" and that such services were "to be delivered during mid-winter break, Spring break, Summer break, or Winter break . . . through August 2007."[226] In support of the decision, the ALJ noted the "many-year history of receipt of ESY" that supported A.D.'s request and need for ESY services, which the school district disregarded.[227] The school district appealed to the federal district court.[228] In an opinion issued September 5, 2007—two years after the initial ESY meeting—the district court affirmed the ALJ's determination, finding that by denying A.D. ESY services, the school district "failed to provide A.D. with a FAPE."[229] Though the court finally affirmed A.D.'s right to ESY services, that determination came two years too late.

Similarly, in *Reusch v. Fountain*,[230] a group of students with disabilities asserted that the school district systematically failed to provide them with an opportunity to seek ESY services in violation of the IDEA.[231] The case began with the filing of a request for a due process hearing in connection with the school's failure to consider their eligibility for ESY services.[232] The state-level hearing resulted in a decision in favor of the students and recommendations for the school district to develop interim guidelines.[233] Even after a favorable administrative ruling, the school district continued to direct its staff to steer children with disabilities away from ESY and encourage them to participate in fee-based enrichment programs, and the case proceeded to the federal district court in 1991.[234] The court found that the children with disabilities were "entitled to speedy and effective relief" and that the school district was required, "after years of avoidance of its responsibilities, [to] give [students with

224. *Id.* at 840–41.

225. *Id.* at 841.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* at 847.

230. 872 F. Supp. 1421 (D. Md. 1994).

231. *Id.* at 1421. Plaintiffs also asserted claims under section 504 of the Rehabilitation Act. *Id.* at 1424.

232. *Id.* at 1428.

233. *Id.* at 1428–29.

234. *Id.* at 1429. For insight on the school district's decision to continue steering children with disabilities away from ESY, see also Haekyoung Suh, Note, *The Need for Consistency in Interpreting the Related Services Provision Under the Individuals with Disabilities Education Act*, 48 RUTGERS L. REV. 1321, 1321 (1996) ("As funding for education diminishes, states are questioning their responsibility to provide special education to children with disabilities.").

disabilities] their full measure of rights under the IDEA, including rights regarding ESY."[235] The *Reusch* court also noted the problematic nature of the delay: it is "unacceptable for [the school district] to make decisions so late in the school year that the [child] cannot exercise rights of review and/or be given the ESY to which that child was entitled."[236]

L.D. ex rel. A.D. and *Reusch* illustrate the significant problems associated with exhaustion: strict adherence to the requirement can lead to the denial of a child's statutory right to FAPE for multiple years while awaiting administrative review, which results in irreparable educational harm. Making an exception that considers the length and impact of delay and acknowledges that breaks and disruptions in special education services can pose challenges to a child's educational progress is both consistent with the intent of the statute and is necessary to prevent educational harm. For children with disabilities, multi-year disruptions can be insurmountable. The next section explores the educational harm that can result when children with disabilities are unable to obtain interim relief in the form of special educational services during this protracted period of uncertainty.

2. Regression and Irreparable Educational Harm in ESY Cases

In certain IDEA cases, such as ESY-eligibility cases, the procedural delay caused by the exhaustion requirement can result in irreparable educational harm to the child. As Congress noted, "[D]elay in resolving matters regarding the education program of [children with disabilities] is extremely detrimental to [their] development."[237] Additionally, "[t]he developmental years of children are fleeting and critical"[238] and the "interruption or lack of the required special education and related services can result in a substantial setback to the child's development."[239] Moreover, "inappropriate classifications or programs can lead to regression or to opportunities lost forever. . . . [This] is particularly dramatic for children with disabilities."[240] These setbacks—as recognized by Congress—underscore the importance of handling these cases promptly.

Regression and educational harm are particularly evident in cases in which the child is seeking time-sensitive services, such as ESY services. ESY services are special education services that are provided beyond the typical 180-day

235. *Reusch*, 872 F. Supp. at 1424.

236. *Id.* at 1433. "Nearly 75% of all ESY decisions for the summer of 1992 were made after May 1, 1992. All denials of ESY occurred after that date and several occurred as late as June 23, 1992." *Id.* "Dr. Stanley Sirotkin, Supervisor of [the school district's] Diagnostic Support Team, testified that he would not consider a decision to be too late until mid- to late-August. The Court could not disagree more with this remark." *Id.*

237. 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams).

238. Lynch, *supra* note 214, at 186.

239. 121 CONG REC. 37,416 (1975) (statement of Sen. Williams).

240. Lynch, *supra* note 214, at 186.

school year[241] "to prevent serious regression over the summer months."[242] It has been noted that "extend[ed] school time may be particularly helpful for those students most at risk of failing."[243]

In 2019, Professors Lucy Barnard-Brak and Tara Stevens conducted a study to "examine the association of ESY services with regression and a subsequent lack of recoupment in academic achievement."[244] Part of the study focused on students who received ESY services and regressed in mathematics and reading achievement compared to students who did not receive ESY services.[245] The study used a data set of 740 kindergarten children with IEPs.[246] Parents were surveyed and, of those who responded, approximately 6% reported that their child received ESY services, while 94% did not.[247] The study determined a "twenty or more percent decline in achievement scores from the spring of Kindergarten to the fall of 1st grade."[248] The study further showed that "[a]pproximately 7% . . . had regressed with respect to mathematics achievement and did not readily recoup after the summer break" and "[a]pproximately 1% . . . had regressed with respect to reading achievement and did not readily recoup after the summer break."[249] The study results indicated that "[s]tudents who received ESY services were less likely to regress in mathematics than students who did not receive those services,"[250] and "[s]tudents who received ESY services were also less likely to regress in reading than students who did not receive those services."[251] The study concluded that "students . . . who had received ESY services regressed significantly less than their counterparts who did not receive ESY services."[252] In another study, which compared regression rates over the summer months of students with reading disabilities to students without reading disabilities, the study found statistically significant regression for the students with reading disabilities on

241. Queenan, *supra* note 26, at 166.

242. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992) (citing Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022, 1027–28 (10th Cir. 1990) (per curiam)).

243. Erika A. Patall, Harris Cooper & Ashley Batts Allen, *Extending the School Day or School Year: A Systemic Review of Research (1985-2009)*, 80 REV. EDUC. RSCH. 401, 424 (2010).

244. Barnard-Brak & Stevens, *supra* note 23, at 5.

245. *See id.*

246. *See id.* Approximately 70% identified as male, 30% as female; approximately 50% White/non-Hispanic, 13% African American, 26% Hispanic, 4% Asian, and less than 2% Native American or Hawaiian; approximately 26% resided in rural areas, 29% in urban areas and 45% in suburban areas; and average age was 69.43 months, or about six years. *Id.*

247. *Id.* ESY services are not a guarantee for children with IEPs. *See, e.g.*, L.D. *ex rel.* A.D. v. Sumner Sch. Dist., 166 P.3d 837, 839–41 (Wash. Ct. App. 2007).

248. *Id.*

249. *Id.*

250. *Id.* at 6.

251. *Id.*

252. *Id.* at 7.

three of eight tested subjects while the group of students without reading disabilities either improved or remained constant in all other tested subjects.[253]

These studies confirm the need to address and resolve eligibility determinations for time-sensitive special education services promptly to prevent further educational harm caused by a lengthy administrative review. This Article addresses that problem by recommending an exception in cases where the procedural delay may result in irreparable educational harm.

3. Whether Interim Services Are Available Pending the Administrative Determination

A related problem associated with the exhaustion requirement in certain IDEA cases is the lack of interim services provided to children pending the often-lengthy administrative review. While the IDEA contemplates this potential harm when the child is in danger of *losing* services, there is no protection for children who are seeking *additional or new* services during this time.

One of the procedural safeguards included in the IDEA is what is known as the "stay put" provision, which provides that a child "shall remain in [their] then-current educational placement"[254] pending the completion of the administrative review process unless the parties agree otherwise. This "stay put" provision serves as an "automatic preliminary injunction . . . without regard to such factors as irreparable harm, likelihood of success on the merits, and the balancing of equities."[255] "The purpose of [the] 'stay put' provision is to

253. Jessica Menard & Alexander M. Wilson, *Summer Learning Loss Among Elementary School Children with Reading Disabilities*, 23 EXCEPTIONALITY EDUC. INT'L 72, 78–79 (2013). In another study, which compared test scores of students who attended a summer program at a private school that was intended for "students with learning differences" with those who did not attend the program, the study "concluded that there was a statistical significance between the regression rates in both reading vocabulary and reading comprehension among those who attended the summer program and those who did not," and those who did not attend the summer program "regressed in skills significantly." Whitney C. Sears, The Effects of Extended School Year on Students with Mild Disabilities and Its Relationship to Regression Rate 2, 6–7 (Dec. 9, 2002) (M.S. Thesis, Longwood University) (on file with Digital Commons at Longwood University) (noting that "[s]tudents identified with special needs have a greater than average difficulty in recalling 'mastered' skills" and that "[s]tudents identified with these weaknesses and other learning difficulties have a greater than average chance of 'losing' skills acquired during the school year over the summer vacation as well as other long vacations during the school year. This loss is called regression," and "students with mild/moderate disabilities regress at a faster rate than their peers" (citation omitted)).

254. 20 U.S.C. § 1415(j). Courts have defined "then current educational placement" as "the placement set forth in the child's last implemented individualized education program." Perry A. Zirkel, *"Stay Put" Under the IDEA: An Updated Overview*, 330 WEST EDUC. L. REP. 8, 9–11 (2016) (citing Johnson v. Special Educ. Hearing Off., 287 F.3d 1176 (9th Cir. 2002)); Erickson v. Albuquerque Pub. Schs., 199 F.3d 1116, 1121 (10th Cir. 1999); J.W. *ex rel.* G.W. v. Boulder Valley Sch. Dist., No. 16-cv-00374, 2016 WL 1077544, at *2–3 (D. Colo. Mar. 18, 2016).

255. Avaras v. Clarkstown Cent. Sch. Dist., No. 18-cv-6964, 2019 WL 4600870, at *2 (S.D.N.Y. Sept. 21, 2019) (quoting N.Y. City Dep't of Educ. v. S.S., No. 09 Civ. 810, 2010 WL 983719, at *6

maintain the educational status quo while the parties' dispute is being resolved"[256] and applies "regardless of whether [the] case is meritorious or not."[257] It is also intended to "strip schools of the unilateral authority they had traditionally employed to exclude [students with disabilities]."[258] But no similar provision applies during a pending administrative review if the child is seeking *a new or additional* special education service. In the absence of a statutory amendment that extends the "stay put" provision, courts should take a more flexible approach to the exhaustion requirement and allow parents to seek a preliminary injunction as to whether they are entitled to receive such interim services. A court could grant temporary relief if the child's representative meets the standard for an injunction using the factors in the irreparable harm exception framework proposed in this Article.[259] A path for temporary injunctive relief would prevent the educational harm that will occur if the child is without services during the lengthy administrative process and subsequent judicial review.

4. Whether the Harm Can Be Remedied at a Later Time

Time-sensitive eligibility cases further warrant an irreparable harm exception because a court simply cannot make up for the loss of special education services during a one- or two-year period pending administrative review. Courts have attempted to do so by awarding compensatory education, which is intended to "place [children with disabilities] in the same position they would have occupied but for the school district's violations of the IDEA."[260] Initially, compensatory education was awarded in cases where the child sought tuition reimbursement for private education to compensate parents who chose to place their child in private school despite being denied such placement by the school district.[261] Courts subsequently extended compensatory education to

(S.D.N.Y. Mar. 17, 2010)). The court in *Avaras v. Clarkstown Central School District*, No. 18-cv-6964, 2019 WL 4600870 (S.D.N.Y. Sept. 21, 2019), incorrectly quotes the language from *N.Y. City Department of Education v. S.S.*, No. 09 Civ. 810, 2010 WL 983719 (S.D.N.Y. Mar. 17, 2019), by using "balancing of equities" instead of "balancing of hardships." *Compare Avaras*, 2019 WL 4600870, at *2 (using the phrase "balancing of equities"), *with N.Y. City Dep't of Educ.*, 2010 WL 983719, at *6 (using the phrase "balancing of hardships").

256. Avaras, 2019 WL 4600870, at *3 (quoting A.M. *ex rel.* T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 (2d Cir. 2014)).

257. Mackey v. Bd. of Educ., 386 F.3d 158, 160–61 (2d Cir. 2004) (emphasis omitted).

258. Honig v. Doe, 484 U.S. 305, 323 (1988) (emphasis omitted).

259. A process that allows for an application for injunctive relief would allow the parties to submit proof as to the child's eligibility for services as a basis for providing interim services pending administrative review. While this may be challenging for the courts, the relief would only be provided in cases such as the time-sensitive eligibility determinations, where prompt relief is necessary to prevent irreparable harm.

260. Reid *ex rel.* Reid v. District of Columbia, 401 F.3d 516, 518 (D.C. Cir. 2005).

261. Sch. Comm. of Burlington v. Dep't of Educ. of Mass., 471 U.S. 359, 362–63, 374 (1985) (holding tuition reimbursements to be appropriate relief); *see also* Perry A. Zirkel, *Compensatory*

include tutoring, summer school services, and compensatory occupational or physical therapy services.[262] Compensatory education is thus broadly understood as an after-the-fact "award of additional educational services to a student . . . for past violations to a student's right to an appropriate education."[263]

But compensatory education is not an effective form of relief in cases where the child is seeking services that are immediately necessary to provide the child with a FAPE. Awarding compensatory education as a corrective measure when the administrative body "is found to have erred in failing to provide a proper placement" is not an appropriate way to address "[t]he delay in obtaining the expected benefit."[264] This can be seen in *L.D. ex rel. A.D.*, where the court addressed the lack of ESY services provided to the child during the summers of 2005 and 2006 by ordering the school district "to provide A.D. with 'the number of hours of instruction or counseling he would have received if he had participated in a 2005 ESY program'" and that such services were "to be delivered during mid-winter break, Spring break, Summer break, or Winter break . . . through August 2007.'"[265] The court's award of compensatory education to A.D. during subsequent terms cannot adequately address the regression A.D. suffered as a result of being denied services during the summer of 2005—the time during which A.D. should have been provided with the service in order to provide him with the required FAPE. As shown by the 2019 study, students experience significant regression when services are not provided, even if the delay extends only to the subsequent school term.[266] The best way to address the irreparable harm caused by exhaustion's delay is to make an exception to the exhaustion requirement and provide the child with the opportunity for a prompt determination from the court as to whether the child is eligible for services.

Education Under the Individuals with Disabilities Education Act: The Third Circuit's Partially Mis-leading Position, 110 PA. STATE L. REV. 879, 883–84 (2006) (discussing the Third Circuit's approach to tuition reimbursement); Perry A. Zirkel, *The Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 339 WEST EDUC. L. REP. 10, 10 (2017).

262. Antonis Katsiyannis & John W. Maag, *Ensuring Appropriate Education: Emerging Remedies, Litigation, Compensation, and Other Legal Considerations*, 63 EXCEPTIONAL CHILD. 451, 454 (1997).

263. *Id.* at 452. Compensatory education is "designed to make up for past deficiencies in a child's program." Boose v. District of Columbia, 786 F.3d 1054, 1056 (D.C. Cir. 2015) (citing *Reid*, 401 F.3d at 522–23). Courts have also awarded more traditional remedies in IDEA cases, including reimbursement for the cost of residential placement and legal fees. Katsiyannis & Maag, *supra* note 262, at 453.

264. *See* Komninos *ex rel.* Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 780 (3d Cir. 1994).

265. L.D. *ex rel.* A.D. v. Sumner Sch. Dist., 166 P.3d. 837, 841 (Wash. Ct. App. 2007).

266. Barnard-Brak & Stevens, *supra* note 23, at 7.

IV. BEYOND THE IDEA: A BROADER APPLICATION OF THE IRREPARABLE HARM EXCEPTION

Courts have long struggled with how to resolve requests for emergency relief in the context of the exhaustion requirement. While exceptions have been made, none have adequately focused on cases where the procedural delay results in irreparable harm to the litigant. Some courts have expressed a willingness to recognize an irreparable harm exception, but they have been unclear as to when and whether to make an exception, which results in challenges for claimants and much unnecessary litigation. The framework proposed in this Article would provide clarity to litigants and greater procedural justice for those who need prompt relief in order to avoid irreparable harm.

The irreparable harm analysis proposed in this Article considers whether: (1) the procedural delay could result in irreparable harm; (2) the claimant is entitled to interim relief pending the administrative review; and (3) the harm can be adequately remedied at a later time. This framework is consistent with the legislative intent of the IDEA, offers uniformity, and seeks to identify and address cases where a litigant is seeking time-sensitive relief under circumstances where prompt relief outweighs the benefit of strictly adhering to the exhaustion requirement. The proposed framework also offers an approach that draws from the futility and emergency exceptions contemplated by the primary author of the IDEA.[267]

Additionally, while an analysis of the exhaustion doctrine in other legal contexts is beyond the scope of this Article, the proposed irreparable harm exception framework could be used in other legal contexts where there is a potential of irreparable harm to the claimant pending the administrative process, such as in the context of a claim under the Prison Litigation Reform Act of 1995 ("PLRA").[268] The Supreme Court recently examined the PLRA's exhaustion requirement and rejected the "special circumstances" "extra-textual exception" that had been applied by the lower court.[269] However, the Court noted that the PLRA "contains its own, textual exception" when administrative remedies are "unavailable."[270] According to the Court, "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'"[271] The Court remanded the case for consideration as to "whether the remedies [the claimant] failed to exhaust were 'available.'"[272] While the Court noted three circumstances in

267. 121 CONG. REC. 37,416 (1975) (statement of Sen. Williams).

268. Pub. L. No. 104-134, 110 Stat. 1321-66 (codified as amended at 18 U.S.C. § 3625 and 28 U.S.C. § 1932).

269. Ross v. Blake, 136 S. Ct. 1850, 1855–58 (2016).

270. *Id.* at 1858.

271. *Id.* at 1859 (quoting Booth v. Churner, 532 U.S. 731, 738 (2001)).

272. *Id.* at 1862.

which the remedy may not be "available," [273] Justice Breyer noted, in his concurring opinion, that "[t]hough [the] statutory term does not encompass 'freewheeling' exceptions for any 'special circumstanc[es],' it does include administrative law's 'well-established exceptions to exhaustion.'" [274] This suggests that the Court, or at least a contingent of the Justices, may be willing to consider other exceptions to exhaustion under the PLRA, including an exception based on futility or irreparable harm. [275] The irreparable harm exception proposed in this Article can be applied as an additional way of determining whether a remedy is "available" under the PLRA. Indeed, an irreparable harm exception has been recognized as an exception within administrative law litigation in other legal contexts.

This proposal also preserves the exhaustion requirement in cases where there is no threat of irreparable harm. In the context of the IDEA, adherence to the exhaustion requirement would continue in cases where the IDEA's "stay put" provision maintains the status quo, for example, a case in which the child is challenging the school district's determination to remove services the child is currently receiving, because there is no threat of irreparable educational harm pending the administrative review. Similarly, in other legal contexts, courts have the power to issue injunctions exercised in order "to preserve the status quo while administrative proceedings are in progress." [276]

CONCLUSION

Congress enacted the IDEA to provide children with disabilities equal and free access to a meaningful public education. A meaningful education requires special education services tailored to an individual student's needs. In many cases, a delay or denial of such services while a case makes its way through a lengthy administrative review process required by the exhaustion requirement can cause the student to regress academically, resulting in irreparable educational harm. In those situations, neither the intent of the statute nor the benefit of exhaustion is fulfilled by strict adherence to the requirement. Courts can address this by recognizing that an exception to exhaustion is warranted in cases involving time-sensitive determinations related to eligibility for special

273. *Id.* at 1853–54 (noting three circumstances in which the remedy may not be available: (1) "when it operates as a simple dead end"; (2) when "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use"; and (3) "when prison administrators thwart inmates from taking advantage of [a grievance process] through machination, misrepresentation, or intimidation"); *see also* Jacqueline Hayley Summs, Comment, *Grappling with Inmates' Access to Justice: The Narrowing of the Exhaustion Requirement in* Ross v. Blake, 69 ADMIN. L. REV. 467, 481–83 (2017).

274. *Ross*, 136 S. Ct. at 1863 (Breyer, J., concurring) (citations omitted) (quoting Woodford v. NGO, 548 U.S. 81, 103 (2006) (Breyer, J., concurring)).

275. *See* Summs, *supra* note 273, at 484 (noting that the Court's decision "suggests a softer—perhaps more sympathetic—approach to reviewing inmate claims of exhaustion").

276. FTC v. Dean Foods Co., 384 U.S. 597, 604 (1966).

education services. In such cases, exhaustion is warranted because the denial of services pending administrative resolution of the child's case can create a situation where the services, once denied, cannot be adequately provided at a later time. In order to ensure that courts apply the exception consistently and narrowly, this Article offers a framework that employs factors that directly address this potential educational harm by considering the length of delay and resulting irreparable educational harm, the potential for interim relief pending the administrative review, and whether relief issued at a later time would be adequate to remedy the educational harm.