No. 07-1175

In The

Supreme Court of the United States

CATHERINE BURKE and MIKAEL ROLFHAMRE,
Petitioners,

v.

THE BROOKLINE SCHOOL DISTRICT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

DEAN B. EGGERT, ESQ.
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 MARKET STREET
MANCHESTER, NH 03101
(603) 669-4140

Attorneys for Respondent

May 15, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RESTATED QUESTION PRESENTED

Whether parents of children with educational disabilities who have failed to prevail in any administrative proceedings brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et. seq*. ("IDEA"), can recover monetary damages by recasting their IDEA claims as complaints for damages under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504") and the Americans with Disabilities Act, 42 U.SC. § 12132 *et seq*. ("ADA").

CORPORATE DISCLOSURE STATEMENT

The Respondent, Brookline School District, is a governmental corporate party to this appeal. No corporate disclosure statement is required by Supreme Court Rule 29.6 (2007).

TABLE OF CONTENTS

RESTATED QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF JURISDICTION 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

REASONS FOR DENYING THE PETITION 6

I. Petitioners' Question Presented is Not the Issue Presented by the Facts of this Case. . 6

II. The First Circuit's Decision is Correct and is Consistent with the Decisions of Other Circuits. 8

III. The First Circuit's Decision Conforms to the Accepted and Usual Course of Judicial Proceedings. 10

IV. This Court Need Not Reach the Question Presented Because the Petitioners' Failure to Exhaust Their Administrative Remedies and Failure to Prevail at any Administrative Proceeding Provide Independent Bases for Dismissal. 15

A. Petitioners Have Failed to Exhaust Their Administrative Remedies. . . . 15

B. Petitioners are not a Prevailing Party in Any Administrative Proceeding. . 17

CONCLUSION 20

APPENDIX

Appendix A: Excerpts from Plaintiff's Motion For Leave to Amend Complaint and Amended Complaint, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. filed May 3, 2006) 1b

Appendix B: Order of the United States District Court for the District of New Hampshire, granting in part and denying in part the Motion for Leave to File Amended Complaint, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. May 15, 2006) 7b

Appendix C: Order of the United States District Court for the District of New Hampshire, *R. v. Brookline School District*, No. 05cv292-SM (D.N.H. Aug. 22, 2007) 9b

TABLE OF AUTHORITIES

CASES

Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,
458 U.S. 176 (1982) 12

Bell Atl. Corp. v. Twombly,
127 S.Ct. 1955 (U.S. 2007) 7, 14

Blanchard v. Morton Sch. Dist.,
509 F.3d 934 (9th Cir. 2007), *cert. denied*,
128 S. Ct. 1447 (U.S. 2008) 14

Burke v. Brookline Sch. Dist., No. 06cv215-SM,
2007 WL 2669717 (D.N.H. Sept. 6, 2007) 2

Cave v. E. Meadow Union Free Sch. Dist.,
514 F.3d 240 (2d Cir. 2008) 16

Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68,
98 F.3d 989 (7th Cir. 1996) 16

Diaz-Fonseca v. Puerto Rico,
451 F.3d 13 (1st Cir. 2006) 4, 5, 8-10, 13

Ellenberg v. New Mexico Military Institute,
478 F.3d 1262 (10th Cir. 2007) 9

Frazier v. Fairhaven Sch. Comm.,
276 F.3d 52 (1st Cir. 2002) 11, 16

Indep. Sch. Dist. No. 283 v. S.D.,
88 F.3d 556 (8th Cir. 1996) 19

J.L. v. Ambridge Area School District, No. 06-1652, 2008 WL 509230 (W.D. Pa. Feb. 22, 2008) . . . 12

J.P. v. Cherokee County Bd. of Educ., 218 Fed. App'x 911 (11th Cir. 2007) 16

Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272 (3d Cir. 1996) 17

Kathleen H. v. Mass. Dep't of Educ., 154 F.3d 8 (1st Cir. 1998) 17

Lauren W. v. Deflaminis, 480 F.3d 259 (3d Cir. 2007) 18

Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18 (1st Cir. 2008) 11

M.P. v. Independent School District No 721, 439 F.3d 865 (8th Cir. 2006) 9

M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153 (11th Cir. 2006) 16

Marc V. v. N.E. Indep. Sch. Dist., 455 F. Supp. 2d 577 (W.D. Tex. 2006), *aff'd*, 242 Fed. App'x 271 (5th Cir. 2007). 19

Mark H. v. Lemahieu, 513 F.3d 922 (9th Cir. 2008) 9, 12

Monrosa v. Carbon Black Exp. Inc., 359 U.S. 180 (1959) 15

Moubry v. Indep. Sch. Dist. 696,
9 F. Supp. 2d 1086 (D. Minn. 1998) 13, 18

Pace v. Bogalusa City Sch. Bd.,
403 F.3d 272 (5th Cir. 2005) 18

Sch. Dist. of Wis. Dells v. Z.S.,
184 F. Supp. 2d 860 (W.D. Wis. 2001), *aff'd*,
295 F.3d 671 (7th Cir. 2002) 12, 18

Smith v. Fitchburg Pub. Schs.,
401 F.3d 16 (1st Cir. 2005) 17

Stanton v. Metro Corp.,
438 F.3d 119 (1st Cir. 2006) 7

STATUTES AND CODES

20 U.S.C. § 1400, *et. seq.* i

20 U.S.C. § 1415(*l*) 4, 10, 12, 14, 16

20 U.S.C. §§ 1415(i)(2), (*l*) 1, 11

20 U.S.C. § 1415(i)(3)(B)(i)(II) 17

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 i

42 U.S.C. § 1983 5

42 U.SC. § 12132, *et seq*. i

N.H. Code Admin. R. Ed 1125.05(c) (West 2001) . . 2

RULES

Sup. Ct. R. 10(a) 10

Sup. Ct. R. 29.6 (2007) ii

REGULATIONS

34 C.F.R. § 104.33(b)(2) 12, 19

34 C.F.R. § 104.36 . . . . 12, 19

STATEMENT OF JURISDICTION

Petitioners seek review of an order of the United States Court of Appeals for the First Circuit, which summarily affirmed the dismissal of their case by the United States District Court for the District of New Hampshire on December 13, 2007. Petitioners did not request rehearing.

Respondent, the Brookline School District ("School District"), maintains that the United States District Court for the District of New Hampshire ("District Court") lacks subject matter jurisdiction because the Petitioners, Catherine Burke and Mikael Rolfhamre, ("Petitioners," "Ms. Burke and Mr. Rolfhamre" or "the Parents"), failed to adequately exhaust their administrative remedies as required by the IDEA, 20 U.S.C. §§ 1415(i)(2),(*l*).

Except as indicated above, the statutory provision that confers jurisdiction on the Supreme Court is 28 U.S.C. § 1254(1).

COUNTERSTATEMENT OF THE CASE

The Brookline School District serves approximately 630 students in the rural Town of Brookline, New Hampshire. During the period of 1998 through August 2005, Ms. Burke and Mr. Rolfhamre resided in Brookline, New Hampshire. They are the parents of three children who have been identified as eligible for, and have received, special education and related services under the IDEA.

This Petition arises from the Parents' disagreement with the December 13, 2007 decision of the First Circuit Court of Appeals, which summarily affirmed the District Court's order granting the School District's motion to dismiss for failure to state a claim upon which relief may be granted.

From April 2004 through October 2005, the Parents and the District were involved in ten IDEA administrative proceedings.[1] Two of these proceedings are currently on appeal with the United States District Court for the District of New Hampshire. *Burke v. Brookline Sch. Dist.*, No. 06cv215-JL (D.N.H. filed June 8, 2006);[2] *R. v. Brookline Sch. Dist.*, No. 05cv292-JL (D.N.H. filed Aug. 23, 2005).[3] At no time has any administrative hearing officer either ruled in favor of the Parents, or in any way determined that they were a prevailing party.

---

[1] Eight of these proceedings were initiated by the Parents. Two were initiated by the School District in accord with N.H. CODE ADMIN. R. ED 1125.05(c) (West 2001), and arose from the Parents' disagreement with the School District's educational proposals. The Parents also filed complaints with the federal Office for Civil Rights and with the State of New Hampshire Department of Education.

[2] On September 6, 2007, the District Court issued an order substituting Ms. Burke and Mr. Rolfhamre as named parties in 06cv215. *Burke v. Brookline Sch. Dist.*, No. 06cv215-SM, 2007 WL 2669717 (D.N.H. Sept. 6, 2007). On January 17, 2008, this case was reassigned and given the designation 06cv215-JL.

[3] On January 17, 2008, this case was reassigned and given the designation 05cv292-JL.

In *R. v. Brookline School District*, counsel for the Petitioners moved to amend, seeking, in part, to add a claim for Section 504/ADA damages to their IDEA administrative appeal. Appendix A to Brief in Opposition ("Appendix") at 1b-6b (Excerpts from Motion for Leave to File Amended Complaint and Amended Complaint, 05cv292-JL (D.N.H. May 3, 2006)). The District Court denied the motion as to "other new issues not raised at either [administrative] hearing." Appendix B at 7b-8b (Order Granting in Part and Denying in Part the Motion for Leave to File Amended Complaint, 05cv292-JL (D.N.H. May 15, 2006)). Thereafter, counsel for the Petitioners filed two amended complaints, neither of which included claims for Section 504 or ADA damages. Motion to Amend, *R.*, 05cv292-JL (D.N.H. May 25, 2006); Amended Complaint, *R.*, 05cv292-JL (D.N.H. Nov. 28, 2006). Ultimately, Petitioners' amended complaint was stricken in its entirety. Appendix C at 9b-11b (Order of the United States District Court for the District of New Hampshire, *R.*, 05cv292-JL (D.N.H. Aug. 22, 2007)).

In August 2006, the Parents brought this suit against the Brookline School District, seeking $250,000.00 in damages. *Burke v. Brookline Sch. Dist.*, No. 06cv317-JD (D.N.H. filed Aug. 25, 2006). Petitioners' *pro se* Complaint alleged three categories of IDEA-based facts: (1) allegations that occurred outside of the statute of limitations; (2) allegations that occurred after the most recent administrative proceedings, and for which there had been no exhaustion; and (3) allegations that had been the subject of prior administrative hearings, in which there were findings in favor of the School District.

In lieu of answering, the School District moved to dismiss for failure to state a claim on which relief may be granted. The School District argued that as a matter of law Petitioners could not recover monetary damages for their claims, all of which were premised on rights created by the IDEA. *See Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 19 (1st Cir. 2006). The School District also sought dismissal based on the Petitioners' failure to exhaust their administrative remedies. *See* 20 U.S.C. § 1415(*l*).

The District Court granted the School District's Motion to Dismiss, holding that the Parents had not "allege[d] an independent claim under the ADA but instead allege[d] an IDEA-based claim in the guise of the ADA," and that they had not alleged "a separate and independent cause of action" under Section 504 of the Rehabilitation Act. Appendix to Petition for Writ of Certiorari ("Petitioners' Appendix") at 14-15 (District Court Order of January 29, 2007). The District Court also noted that it did not appear that the Parents had exhausted their administrative remedies. *Id.* at 14, n. 3.

Petitioners moved for reconsideration of the denial of their Section 504 and ADA claims. The Motion for Reconsideration was denied by the District Court on March 15, 2007. Petitioners' Appendix at 4 (District Court Order of March 15, 2007 ("Only claims for violations of rights independently provided under the other statutes are actionable outside of the restricted remedies allowed under the IDEA")). The Parents then filed an appeal with the United States Court of Appeals for the First Circuit.

On appeal, the School District argued that the District Court's decision should be affirmed based on the Petitioners' failure to exhaust their administrative remedies, or, alternatively, in accord with the First Circuit's decision in *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13 (1st Cir. 2006). On December 13, 2007, the First Circuit summarily affirmed the District Court's decision "in accord with *Diaz-Fonseca*."

SUMMARY OF THE ARGUMENT

The Petition should be denied because this case seeks to circumvent the established legal principle that money damages are unavailable under the IDEA.

Petitioners, knowing full well that monetary damages are not available under the IDEA, and that 42 U.S.C. § 1983 cannot be used to enforce IDEA claims, nevertheless seek to obtain compensatory damages by captioning their unexhausted, untimely, and/or failed IDEA claims as claims for damages under Section 504 and the ADA. Petitioners should not be permitted to circumvent the IDEA's limited remedial scheme by recasting their failed IDEA claims as violations of Section 504 and the ADA. On these facts, the First Circuit's decision affirming the dismissal of the Petitioners' complaint for failure to state a claim under Section 504 or the ADA is consistent with decisions from other courts.

Finally, granting this Petition will not influence the outcome of this case. As the District Court noted, Petitioners were required to exhaust their administrative remedies. Petitioners' Appendix at 14, n. 3. Petitioners have not exhausted their

administrative remedies on some of their claims. *Id.* As to any claims for which exhaustion has occurred, administrative hearing officers have found in favor of the School District and determined that the School District provided Petitioners' children with the free appropriate public education ("FAPE") required by the IDEA. Petitioners should not be permitted to proceed with Section 504 or ADA claims that are based on the same set of facts as their failed IDEA claims.

REASONS FOR DENYING THE PETITION

I. Petitioners' Question Presented is Not the Issue Presented by the Facts of this Case.

Petitioners ask this Court to consider and decide whether the:

> parents of a child who has been identified as disabled under the IDEA can maintain a claim for compensatory damages under the Americans with Disabilities Act (42 U.S.C. § 12132 et seq.) and/or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) for retaliatory-type conduct against them for their advocacy for their child's rights under the ADA, section 504, and the IDEA.

Petition for Writ of Certiorari ("Petition") at Question Presented. This question erroneously assumes that the Petitioners' complaint stated claims under Section 504 and the ADA. The District Court and the First Circuit both found that the Petitioners' complaint did not allege independent claims under Section 504 or the ADA. *See* Petitioners' Appendix at 1-16. These

decisions were based on a review of the factual allegations contained in Petitioners' complaint, and a determination that the Petitioners could "prove no set of facts in support of [their] claim that would entitle them to relief." Petitioners' Appendix at 6 (*quoting Stanton v. Metro Corp.*, 438 F.3d 119, 123-24 (1st Cir. 2006)).

The allegations in the complaint include the following: failure to obtain parental consent with respect to the educational placement of two of the Parents' daughters; failure to obtain parental participation in developing Individualized Education Programs ("IEP"); failure to obtain consent prior to providing special education services; failure to obtain an impartial hearing officer; improper maintenance of educational records; disagreements over evaluations; failure to provide FAPE with respect to an August 2004 administrative order; and, interference with an administrative due process hearing.[4] Petitioners' Appendix at 6-10.

Petitioners' complaint did not allege independent violations of the ADA or Section 504. Thus, the issue as stated in the Petition is not the issue presented by the facts of this case. Instead, the complaint, which prayed for relief in the form of compensatory damages, actually alleged violations of the IDEA. It was for that reason that the complaint was dismissed. *See Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (U.S. 2007)

---

[4] The alleged interference with an administrative due process hearing is pending in a separate matter before the United States District Court for the District of New Hampshire. *R.*, 05cv292-JL.

(Petitioners' "obligation to provide the 'grounds' of [their] 'entitle[ment] to relief' requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level.") (citation omitted). This case, which involves nothing more than a claim for damages for alleged violations of the IDEA, is not appropriate for further review.

II. The First Circuit's Decision is Correct and is Consistent with the Decisions of Other Circuits.

In *Diaz-Fonseca*, the First Circuit held that:

> Where the essence of the claim is one stated under the IDEA for denial of FAPE, no greater remedies than those authorized under the IDEA are made available by recasting the claim as one brought under . . . § 1983, . . . the ADA, or section 504.

451 F.3d at 19. Contrary to Petitioners' assertions, the First Circuit's decision does not "bar any claim under Section 504 or the ADA brought by a child or parent of a child identified under the IDEA." Petition at 23. Instead, the First Circuit's decision precludes parents from taking a second bite at the apple by recasting IDEA claims - for which compensatory damages are not available - as violations of Section 504 and ADA. Thus, in order to survive a motion to dismiss, parents seeking compensatory damages must allege independent causes of action under Section 504 and the ADA. *Diaz-Fonseca*, 451 F.3d at 29.

The First Circuit's application of its *Diaz-Fonseca* decision is consistent with decisions from other courts, including the Ninth Circuit's recent decision in *Mark H. v. Lemahieu*, 513 F.3d 922 (9th Cir. 2008). *Contra* Petition at 8-9. Petitioners' reference to the *Mark H.* case omits an important piece of the court's holding: the "availability of relief under the IDEA does not limit the availability of a damages remedy under § 504 for failure to provide the FAPE <u>independently required</u> by § 504 and its implementing regulations." *Mark H.,* 513 F.3d at 935 (emphasis added). The Ninth Circuit's holding is substantially similar to the First Circuit's *Diaz-Fonseca* holding, which permits parents to proceed with claims that "were already <u>independently available</u> through other sources of law." *Diaz-Fonseca*, 451 F.3d at 29 (emphasis added).

The cases that Petitioners assert to be more closely aligned with *Mark H.* than with *Diaz-Fonseca* have also involved independent claims under other federal statutes. Petition at 9-12. For example, in *M.P. v. Independent School District No 721*, the plaintiffs were permitted to proceed with a Section 504 claim because it was "wholly unrelated to the IEP process." 439 F.3d 865, 868 (8th Cir. 2006). Similarly, in *Ellenberg v. New Mexico Military Institute*, the Tenth Circuit reversed the district court's dismissal because the plaintiffs' Section 504 and ADA claims were "<u>separate and distinct</u> from the IDEA claim." 478 F.3d 1262, 1267 (10th Cir. 2007) (emphasis added). Contrary to Petitioners' assertion, these cases are consistent with the First Circuit's *Diaz-Fonseca* decision, and the First Circuit's application of *Diaz-Fonseca* does not preclude parents from bringing independent Section 504 or ADA claims. *Diaz-Fonseca*, 451 F.3d at 29. The

majority of the circuits agree with the First Circuit's conclusion that parents cannot proceed with Section 504 or ADA claims unless those claims are independent of the IDEA. Therefore, further review by this Court is not necessary. *See* SUP. CT. R. 10(a) (2007).

III. The First Circuit's Decision Conforms to the Accepted and Usual Course of Judicial Proceedings.

The Petitioners' assertion that the First Circuit's decision is contradictory to § 1415(*l*) of the IDEA belies the plain analysis of the *Diaz-Fonseca* court:

> We read the caveat set out in 20 U.S.C. § 1415(*l*) as intended to ensure that the IDEA does not restrict rights and remedies that were already independently available through other sources of law. Situations in which the caveat would be applicable surely exist, but this is not one of them. Plaintiffs' case turns entirely on the rights created by statute in the IDEA. . . . They . . . have no viable independent claim under Title II of the ADA or section 504 of the Rehabilitation Act.

Diaz-Fonseca, 451 F.3d at 29. As previously discussed, the *Diaz-Fonseca* decision is consistent with that of the other circuits. For the reasons that follow, it is also consistent with 20 U.S.C. § 1415(*l*), and it does not, as Petitioners' claim, constitute an implied repeal of the ADA or Section 504. The First Circuit has not departed from the acceptable and usual course of judicial proceedings. Therefore, there is no reason for

this Court to exercise its supervisory powers in this case.

Petitioners and the School District were involved in ten administrative proceedings over the course of sixteen months. At no time did any administrative hearing officer determine that the School District failed to provide any of Petitioners' children with FAPE. It would be illogical and a waste of valuable school district resources to permit parents to seek monetary damages under Section 504 or the ADA for IDEA-based claims when the school district has provided FAPE in accord with the IDEA. This is especially true when the Section 504 or ADA claims arise out of the same facts that have previously been adjudicated in the school district's favor.

Moreover, the requirement that a Section 504 or ADA claim be truly independent of IDEA claims is consistent with the IDEA's exhaustion requirement. 20 U.S.C. §§ 1415(i)(2),(*l*). Allowing parents to proceed with Section 504 or ADA claims that are related to, and depend on, IDEA rights would enable parents to easily circumvent the IDEA's exhaustion requirements, deluging the court with educational decision-making responsibility in situations where neither the IEP Team nor an administrative hearing officer have weighed in on the educational issues. Such a result would subvert the IDEA's exhaustion requirement, as well as the legislative intent of the IDEA itself. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 62 (1st Cir. 2002) (discussing the exhaustion requirement vis a vis a § 1983 claim). To avoid this outcome, courts give "deference to the state agency's application of its specialized knowledge." *Lessard v.*

Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 24 (1st Cir. 2008); *see also Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) (noting that "due weight" should be given to administrative proceedings and that courts should not "substitute their own notions of sound educational policy for those of the school authorities which they review").

While § 1415(*l*) preserves the "rights, procedures, and remedies available under . . . the [ADA] . . . [and Section 504 of the] Rehabilitation Act," it was not intended to allow parties to seek compensatory damages by recasting their failed, unexhausted, and/or untimely IDEA claims as claims under either of those statutes. In cases such as these, where the School District has provided FAPE under the IDEA, courts agree that parents cannot take a second bite at the apple by seeking damages under Section 504 or the ADA, unless they have alleged a claim that is independent of their previously unsuccessful IDEA claims.[5] *See Sch. Dist. of Wis. Dells v. Z.S.*, 184 F.

---

[5] To the extent that either the *Mark H.*, 513 F.3d 922, or the *J.L. v. Ambridge Area School District*, No. 06-1652, 2008 WL 509230 (W.D. Pa. Feb. 22, 2008), cases may suggest that the failure to offer FAPE under the IDEA does not preclude parents from bringing claims for denial of FAPE under Section 504, it does not follow that when a district provides FAPE under the IDEA, parents may then raise a claim under Section 504 based on the same facts. *See* 34 C.F.R. § 104.33(b)(2) ("Implementation of an Individualized Education Program developed in accordance with the [IDEA] is one means of meeting the [Section 504 FAPE] standard"); 34 C.F.R. § 104.36 ("Compliance with the procedural

Supp. 2d 860, 884 (W.D. Wis. 2001) ("Because I conclude that plaintiff provided Z.S. with a free appropriate public education during the 1999-2000 school year, defendants' claim under the Rehabilitation Act fails necessarily"), *aff'd*, 295 F.3d 671 (7th Cir. 2002); *Moubry v. Indep. Sch. Dist. 696,* 9 F. Supp. 2d 1086, 1108-09 (D. Minn. 1998) (Parent "cannot establish a viable claim under the non-IDEA causes of action, where the predicate acts, upon which he has premised those claims, have withstood judicial review under the IDEA. . . . As a consequence, no viable claim can exist under [those] other statutory provisions, in the absence of a claim which, factually and legally, is distinct from those that have already been resolved under IDEA review") (internal quotations and citations omitted).

The *Diaz-Fonseca* holding does not prevent parents from bringing suit under Section 504 or the ADA. On the contrary, those causes of action continue to be available, provided the plaintiff alleges facts establishing claims that are independent of the IDEA. *Diaz-Fonseca*, 451 F.3d at 29. In this case, Petitioners did not allege independent Section 504 or ADA claims; consequently, the District Court properly dismissed the complaint. Petitioners' Appendix at 16.

Moreover, requiring parents to plead independent claims under Section 504 and the ADA does not, as Petitioners' claim, constitute an implied repeal of either of those statutes. Section 504 and the ADA

---

safeguards of section 615 of the [IDEA] is one means of meeting [Section 504's procedural safeguards] requirement").

continue to be available, provided that a plaintiff alleges facts sufficient to state a cause of action under either of those statutes. Petitioners' complaint was dismissed because they failed to state claims under Section 504 and the ADA. Petitioners' Appendix at 4, 12-15. By enacting 20 U.S.C. § 1415(*l*), Congress did not intend to allow plaintiffs to ignore well established legal principles requiring plaintiffs to allege "more than labels and conclusions." *Bell Atl. Corp.*, 127 S.Ct. at 1965.

The District Court dismissed Petitioners' complaint because it failed to allege Section 504 and ADA claims. The District Court found that allegations in the complaint pertained to the provision of a free appropriate public education as recognized by the IDEA. As Petitioners acknowledge, the circuit courts have uniformly held that compensatory damages are not available under the IDEA. Petition at 7, n. 1. In addition, the majority of appellate courts have held that § 1983 cannot be used to enforce the IDEA. *E.g., Blanchard v. Morton Sch. Dist.*, 509 F.3d 934, 938 (9th Cir. 2007) (joining "the First, Third, Fourth, and Tenth Circuits," in holding "that the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a *§ 1983* claim for the violation of rights under the IDEA"), *cert. denied*, 128 S. Ct. 1447 (U.S. 2008). At its core, this case turns on the availability of compensatory damages for violations of the IDEA. There is no dispute that compensatory damages are not available for violations of the IDEA. Thus, the First Circuit did not depart from the accepted and usual course of judicial proceedings and there is no issue for this Honorable Court to review.

IV. This Court Need Not Reach the Question Presented Because the Petitioners' Failure to Exhaust Their Administrative Remedies and Failure to Prevail at any Administrative Proceeding Provide Independent Bases for Dismissal.

Certiorari may be denied if the resolution of the issue would be irrelevant to the ultimate outcome of the case. *Monrosa v. Carbon Black Exp. Inc.*, 359 U.S. 180, 184 (1959) (this Court decides questions "in the context of meaningful litigation"). In this case, the Petitioners' failure to exhaust administrative remedies, and their failure to prevail on any of the administrative proceedings filed during the period of April 2004 through October 2005, provide an alternate basis for dismissal of their Complaint and denial of their Petition.[6]

A. Petitioners Have Failed to Exhaust Their Administrative Remedies.

Individuals must invoke the IDEA's administrative due process hearing procedures before filing an IDEA-based suit in federal court under Section 504 of the Rehabilitation Act, § 1983, or the Americans with

---

[6] If the decision of the First Circuit was reversed, the School District would be able to assert the defense of exhaustion of administrative remedies because it has not yet answered the Complaint. The School District would also be able to assert the defenses of res judicata and collateral estoppel, because some of the Petitioners' claims have previously been the subject of their unsuccessful administrative proceedings and no administrative tribunal has ruled that Petitioners' were prevailing parties.

Disabilities Act. 20 U.S.C. § 1415(*l*). *See Frazier*, 276 F.3d at 64 (plaintiffs who bring IDEA-based claims for monetary damages must exhaust administrative remedies "as a condition precedent to entering state or federal court"); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 514 F.3d 240, 249 (2d Cir. 2008) ("IDEA's exhaustion rule applies to all of appellants' federal causes of action regardless of their statutory bases"); *J.P. v. Cherokee County Bd. of Educ.*, 218 Fed. App'x 911, 913-14 (11th Cir. 2007) (affirming dismissal of Section 504, ADA, and IDEA claims for failure to exhaust administrative remedies because the "alleged injuries *primarily* relate to the provision of . . . FAPE [pursuant to the requirements of the IDEA]") (italics in original); *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1158-59 (11th Cir. 2006) ("retaliation claims clearly relate to [student's] evaluation and education, and, therefore, are subject to the [IDEA's] exhaustion requirement); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 992 (7th Cir. 1996) ("the theory behind the grievance may activate the IDEA's [exhaustion] process, even if the plaintiff wants a form of relief that the IDEA does not supply"). As the First Circuit has noted, the "statutory exhaustion requirement means that a party must exhaust all available avenues of administrative review regardless of whether the administrative process offers the particular type of relief that is being sought." *Frazier*, 276 F.3d at 62.

As to certain of their allegations, Petitioners did not request an administrative hearing prior to filing their Complaint in the District Court. Petitioners' Appendix at 14, n.3 (District Court Order of January 29, 2007); Appendix at 7b-8b (District Court Order of

May 15, 2006, 05cv292-JL); *see also Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272, 283 (3d Cir. 1996) (affirming dismissal of claims for failure to exhaust administrative remedies because the claims were based on events that occurred after the conclusion of the state administrative proceeding). Accordingly, the Petitioners' failure to exhaust administrative remedies provides an alternate basis for this Court to deny the Petition for Certiorari.

B. Petitioners are not a Prevailing Party in Any Administrative Proceeding.

The Petition should also be denied based on the Petitioners' failure to prevail at any administrative proceeding. Under the IDEA, courts may award attorney's fees "to a prevailing party who is the parent of a child with a disability." 20 U.S.C. § 1415(i)(3)(B)(i)(II); *see also Smith v. Fitchburg Pub. Schs.*, 401 F.3d 16, 22 (1st Cir. 2005) (parents prevail when they "'receiv[e] a judgment on the merits or obtai[n] a court-ordered consent decree'") (*quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001)). A party prevails when he obtains relief that materially alters his relationship with the defendant. *Kathleen H. v. Mass. Dep't of Educ.*, 154 F.3d 8, 14 (1st Cir. 1998) (citations omitted). The relief obtained must involve a significant claim in the litigation, and there must be more than a de minimis alteration in the relationship. *Id.*

To date, no administrative tribunal has ever found that the Petitioners were the prevailing party on any IDEA claims. Instead, administrative hearing officers

have found that the School District met its obligations under the IDEA. Petitioners cannot proceed with Section 504 and ADA claims that are based on the same underlying facts as their failed IDEA claims. *See Sch. Dist. of Wis. Dells*, 184 F. Supp. 2d at 884 ("Because I conclude that [the District] provided Z.S. with a free appropriate public education during the 1999-2000 school year, defendants' claim under the Rehabilitation Act fails necessarily"), *aff'd,* 295 F.3d 671 (7th Cir. 2002); *Moubry,* 9 F. Supp. 2d at 1108-09 ("Notwithstanding a plaintiff's ability to proceed simultaneously with IDEA and other statutory claims, he cannot establish a viable claim under the non-IDEA causes of action, where the predicate acts, upon which he has premised those claims, have withstood judicial review under the IDEA") (internal quotations and citations omitted).

To the extent that Petitioners have alleged retaliation, the allegations, which have not been the subject of an administrative proceeding, "are closely related to the identification, evaluation, and educational placement of their children for purposes of achieving a free and appropriate public education." Petitioners' Appendix at 13 (District Court Order of January 29, 2007). This claim is necessarily barred by Petitioners' failure to prevail on any of the previous IDEA administrative proceedings. *See Lauren W. v. Deflaminis*, 480 F.3d 259, 274 (3d Cir. 2007) ("[I]n this case, the [District]. . . provided Lauren with a FAPE and thus satisfied the District's obligations [under Section 504]"); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 293 (5th Cir. 2005) ("the accessibility issue Pace litigated in his IDEA case and lost is the same issue he sought to litigate in his ADA/504 claim. The

district court correctly concluded that Pace was precluded from relitigating this issue"); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 562 (8th Cir. 1996) (student's non-IDEA claims . . . are precluded by the IDEA judgment in the School District's favor"); *Marc V. v. N.E. Indep. Sch. Dist.*, 455 F. Supp. 2d 577, 597-98 (W.D. Tex. 2006) ("Since Defendants complied with the IDEA during the relevant time period, Plaintiffs cannot prevail on their derivative Section 1983, Section 504 and ADA claims as a matter of law"), *aff'd*, 242 Fed. App'x 271 (5th Cir. 2007).

The above cited decisions are consistent with §§ 104.33 and 104.36 of title 34 of the Code of Federal Regulations. Under § 104.33, "implementation of an Individualized Education Program developed" in accord with the IDEA is one means of meeting the Rehabilitation Act's free, appropriate public education standard. 34 C.F.R. § 104.33(b)(2). Similarly, § 104.36 states that compliance with the procedural safeguards in section 615 of the IDEA is one means of meeting the Section 504 requirements pertaining to procedural safeguards. 34 C.F.R. § 104.36.

As to the claims that Petitioners have exhausted, administrative hearing officers have held that the School District met its duties under the IDEA. Thus, Petitioners are not a prevailing party. This provides an independent basis for dismissal of the Petitioners' Section 504 and ADA claims.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 15, 2008

Respectfully submitted,

BROOKLINE SCHOOL DISTRICT

By its attorneys,

Dean B. Eggert, Esq.,
Counsel of Record
Alison M. Minutelli, Esq.
Wadleigh, Starr & Peters, P.L.L.C.
95 Market Street
Manchester, New Hampshire 03101
(603) 669-4140