
LIFELONG IMPACT: NON-UNIFORM INTERPRETATION OF SPECIAL EDUCATION ELIGIBILITY STANDARDS FOR STUDENTS WITH ADHD

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“Many readers write to ask if children with disabilities, including children with ADD/ADHD, are eligible for special education services. For many, the answer is a clear "Yes!" For others, the answer is a clear "No!"

-Pete & Pam Wright, *Wright’s Law*¹

I. INTRODUCTION

Unfortunately for many parents and guardians, not all school districts determine that students with a disability require special education services, despite the parents’ insistence to the contrary.² The Individuals with Disabilities Education Act (“IDEA”) addresses this potential issue by providing a system of procedural safeguards whereby a parent or guardian may choose to file an impartial administrative due process hearing with the local educational agency to challenge the eligibility team’s findings.³ If the parent or guardian disagrees with the outcome of the due process hearing or other administrative remedies, he or she may file a civil action, where the federal court (or administrative hearings office) will review the records, hear additional evidence, and determine the appropriate relief.⁴

These hearings, sometimes reaching the circuit courts of appeal, require the federal courts to utilize the IDEA eligibility guidelines to determine if the student’s local educational agency and state educational agency appropriately determined eligibility for the student.⁵ Unfortunately, while the IDEA eligibility guidelines appear to be simple and straightforward on their face, their appropriate interpretation has

¹ Pete Wright & Pam Wright, *Is a Child with ADD/ADHD Eligible for Special Education?*, WRIGHT’S LAW, <http://www.wrightslaw.com/info/elig.add.grades.htm> (last visited Sept. 25, 2013) (answering parent questions about special education eligibility).

² See generally *id.*; *My Child has LD—Isn’t He Automatically Eligible for Services?*, NAT’L CTR. FOR LEARNING DISABILITIES, <http://www.nclld.org.php53-22.ord1-1.websitetestlink.com/parents-child-disabilities/ld-rights/is-my-child-with-learning-disability-eligible-for-special-education-services> (last visited March 26, 2014).

³ 20 U.S.C.A. §§ 1412(a)(1)(A), 1415(j) (2005) (explaining the impartial due process procedures afforded to parents under the IDEA).

⁴ *Hansen ex rel. J.H. v. Republic R-III School Dist.*, 632 F.3d 1024, 1026 (2011) (citing 34 U.S.C.A. §1415(i)(2) (2005)).

⁵ 20 U.S.C.A. § 1415(i)(2)(A) (2005).

become a hotly contested topic across law and educational journal articles.⁶ In fact, many legal and educational scholars have exhibited frustrations in regard to special education eligibility determination hearings at the federal court level.⁷ Despite this, few changes have been made in the regulations themselves to provide additional guidance to the necessary decision-making authorities.⁸ The utilization of these complex standards has fostered an environment of non-uniform interpretation not only across local school districts and state educational agencies, but also across court circuit boundaries.⁹ This article will provide examples that focus specifically on the impact of non-uniform interpretation at the level of the circuit courts of appeal that effectively create a ‘last-chance’ environment where a student’s state of residence may be the ultimate determining factor in eligibility determination.¹⁰

Non-uniform interpretation may lead some students to be denied the special education services they need to be successful both in school and after graduation. An inappropriate school environment for students may lead to low self-esteem based on perceived failure and may prevent students from learning the academic, social, and emotional skills necessary to combat the negative symptoms of their disability.¹¹ Students with disabilities such as Attention Deficit Hyperactivity Disorder (“ADHD”) may be more subject to the grueling effect of non-uniformity leading to inappropriate school placement. This may be due to the skepticism surrounding the ADHD diagnosis as an “invisible” disability that presents symptoms common (albeit in lesser amounts) in many

⁶ See, e.g., Mark C. Weber, *The IDEA Eligibility Mess*, 57 BUFF. L. REV. 83, 102 (2009) (discussing how the topic of IDEA eligibility is a “mess,” in part due to cases that “oddly and indefensibly restricting children’s IDEA eligibility.”); Wendy F. Hensel, *Sharing the Short Bus: Eligibility and Identity Under the IDEA*, 58 HASTINGS L.J. 1147, 1151 (2007) (focusing on the impact on the definition and interpretation of “child with a disability”).

⁷ See *id.*

⁸ PETER W.D. WRIGHT, *THE INDIVIDUALS WITH DISABILITIES IMPROVEMENT EDUCATION ACT OF 2004: OVERVIEW, EXPLANATION, AND COMPARISON* (2004), available at <http://www.wrightslaw.com/idea/idea.2004.all.pdf> (analyzing and commenting on precise, line-by-line changes in the text of IDEA 2004 as compared to the text of IDEA 1997).

⁹ See *infra* Part IV-B-iii, proving an example of this non-uniform interpretation.

¹⁰ See *infra* Part II-C, discussing the appeals process. Likely, the Court of Appeals will be the last option for parents.

¹¹ Rashmi Goel, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, 27 LAW & INEQ. 1, 17-24 (2009); see *infra* Part IV-C-ii for a discussion of the negative effects of inappropriate environment for students with ADHD.

children.¹² Unfortunately, students with ADHD are also very susceptible to the dramatic, adverse consequences of being placed in an inappropriate schooling environment.¹³ For example, students with ADHD who do not receive the special education services they need may have a greater likelihood of expulsion,¹⁴ a great likelihood of dropping out,¹⁵ and increased academic difficulties¹⁶ in the classroom compared to non-disabled peers. There is also an increased risk for juvenile delinquency, with approximately 25%¹⁷ to 50%¹⁸ of all juvenile offenders in detention centers diagnosed with ADHD. This potential for lifelong consequences of disorder symptoms means that proper placement for students with ADHD is a high-stakes task.

To discuss the overall cause and effect of non-uniform interpretation of special education eligibility for students with ADHD, Part I of this article will provide both background about the eligibility process in general and more specific information about the process for students with ADHD. Part II of this article will briefly review the special education eligibility determination process and the procedural safeguards for families who disagree with the local educational agency's determinations. Part III will discuss the trend of non-uniform interpretation of the IDEA eligibility standards for students with ADHD across the country. Finally, Part IV will examine reasons why cases involving students with ADHD may be subject more often to the effects of non-uniform interpretation and how the effects of non-uniform interpretation may cause severe harm to students with ADHD.

II. THE PROCESS OF ELIGIBILITY DETERMINATION

Congress enacted the Education for the Handicapped Act in 1975, with the expressed intention of helping educators determine how they

¹² See *infra* note 98.

¹³ See *infra* Part IV-C.

¹⁴ See Thompson *infra* note 162 at 325-328; see, e.g., Meghan Miller, Adriana J. Nevado-Montengro, & Stephen P. Hinshaw, *Childhood Executive Function Continues to Predict Outcomes in Young Adult Females with and without Childhood-Diagnosed ADHD*, 40 J. OF ABNORMAL CHILD PSYCHOL. 657, 661 (2012) (finding that girls with ADHD were more likely than their non-disabled peers to be suspended or expelled in school).

¹⁵ See Barkley, *infra* note 152, at 346-347.

¹⁶ See Curie and Stabile, *infra* note 152, at 30.

¹⁷ Robert Eme, *Attention Deficit Hyperactivity Disorder and the Family Court*, 47 FAM. CT. REV. 650, 651 (2009).

¹⁸ Linda A. Teplin et. al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCH. GEN. PSYCHIATRY, 1133, 1140-1143 (2002) (estimating that approximately 47 percent of youth in juvenile detention have a diagnosis of ADHD).

should serve the needs of children with disabilities.¹⁹ Enacted in 1990, Public Law 94-142 amended the Education for the Handicapped Act, calling for the nation to work toward providing children with disabilities access to attend and learn in schools.²⁰ The law focused on the rights of children to receive a free and appropriate public education (FAPE) based on their individual needs, and enacted a series of changes to improve special education identification and to provide due process protections.²¹ Soon after, Public Law 101-476 renamed this call for inclusion as the Individuals with Disabilities Education Act (IDEA).²²

Congress amended the IDEA in 1997,²³ and, in accordance with President George W. Bush's No Child Left Behind, reauthorized it in 2004.²⁴ In its most recent authorization, Congress included additional provisions that attempted to produce an education uniquely structured toward each student, while encouraging enhanced academic success for all students.²⁵ The reauthorization of the IDEA did provide for some changes in the federal guidelines and regulations; however, Congress appeared to pay little attention to the vocalized frustrations of legal and education scholars, and the special education eligibility determination criteria

¹⁹ Philip T.K. Daniel, *Discipline and the IDEA Reauthorization: The Need to Resolve Inconsistencies*, 142 ED. LAW. REP. 591, 591 (2000).

²⁰ U.S. Department of Education, Office of Special Education Programs, *A 25 Year History of the IDEA* ¶ 11 (2007), available at <http://www2.ed.gov/policy/speced/leg/idea/history.pdf>; 94 P.L. 142, 89 Stat. 773.

²¹ See *id.*; 20 U.S.C.A. § 1400(d)(1)(A) (2006).

²² *Id.* at ¶12.

²³ *Id.* at ¶13 (stating that the 1997 Amendments, in large part, focused on providing students with a post-high school transition plan in the IEP).

²⁴ The 2004 Amendment of IDEA provided that schools should require short-term objectives to measure student progress and annually report the performance of students with disability. In addition, the Amendment required that schools provide alternative assessments to State or district-wide standardized assessments; these alternative assessments needed to be aligned with the State academic content standards and individual student achievement standards. Further, the Amendment provided that students should not be determined to be a child with a disability under federal regulations if the student's performance was due in part to a lack of appropriate instruction in reading or math, or a limited English proficiency. U.S. DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, ALIGNMENT WITH THE NO CHILD LEFT BEHIND ACT, 1-6 (2007), available at <http://idea.ed.gov/explore/view/p/,root,dynamic,TopicalBrief,3> (explaining how regulations of IDEA would correspond with the new objectives of the No Child Left Behind Act through an improved focus on highly qualified special education teachers, the use of scientifically-based methods of instruction, and technology).

²⁵ *Id.*

remained almost exactly the same, with little additional guidance provided for federal courts.²⁶

Under the current reauthorization of the IDEA, participating states will provide a FAPE to all children with disabilities, ages 3 to 21, residing in that state.²⁷ This education should provide “full educational opportunity to all children with disabilities,” which the local educational agency should accomplish through the creation of an Individualized Education Program (“IEP”) designed to meet the specific needs of the student.²⁸ Before any student can begin receiving special education services, however, the local educational agency must determine that he or she meets a specific set of eligibility criteria outlined in the IDEA.

A. *Initial Request and Evaluation*

The first step of the eligibility process involves a request for evaluation, made either by the student’s parent or by the local educational agency, with parent permission.²⁹ After receiving this request, the local educational agency will gather current student data and possibly conduct new assessments if necessary to ascertain a holistic understanding of the student.³⁰ In evaluating a student’s educational needs and determining if the student is a child with a disability, the IDEA regulations require that a public agency must:

- “(i) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior;
- and (ii) Ensure that information obtained from all of these sources

²⁶ See WRIGHT *supra* note 8.

²⁷ 20 U.S.C.A. § 1412 (a)(1)(A) (2005).

²⁸ 20 U.S.C.A. 1412 (a)(2) & (4) (2005); 20 U.S.C.A. § 1414(d)(1)(A)(i)(IV) (2005).

²⁹ Katherine May, *By Reason Thereof: Causation and Eligibility Under the Individuals with Disabilities Education Act*, 2009 BYU EDUC. & L. J. 173, 180 (2009) (citing 20 U.S.C.A. § 1414(a)(1)(B) (2005)).

³⁰ The process of utilizing the regulations of 34 C.F.R § 300.306(c)(1) (2007) may vary state by state. The simplest way to understand the assessment process for special education eligibility determination may be through the parent guides provided by each state’s respective Board of Education. See, e.g., CONNECTICUT STATE DEPARTMENT OF EDUCATION, BUREAU OF EDUCATION, A PARENT’S GUIDE TO SPECIAL EDUCATION 6-7 (2007), available at http://www.sde.ct.gov/sde/lib/sde/PDF/DEPS/Special/Parents_Guide_SE.pdf; MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, DIVISION OF SPECIAL EDUCATION, PARENT’S GUIDE TO SPECIAL EDUCATION IN MISSOURI 8-9 (2008), available at <http://dese.mo.gov/se/compliance/documents/ParentGuide.pdf>.

is documented and carefully considered.”³¹

After the necessary materials have been gathered, the local educational agency will assemble an eligibility determination team consisting of the student’s parents/guardians, and qualified service providers (possibly including evaluators, doctors, teachers, and school staff).³²

B. Determination of Eligibility

The eligibility determination team then analyzes the student data against the IDEA guidelines.³³ These guidelines require a student to meet two criteria in order to become eligible for special education services,³⁴ but, even at this most basic level of eligibility determination, the standards can become confusing and unclear.

First, to qualify for special education and be covered under the IDEA, a student must be a child with a disability that fits in one of thirteen specific categories.³⁵ These thirteen categories of disabling conditions, as defined in the IDEA regulations, include: (1) autism; (2) deaf-blindness; (3) deafness; (4) emotional disturbance; (5) hearing impairment; (6) mental retardation; (7) multiple disabilities; (8) orthopedic impairments; (9) other health impairment; (10) specific learning disability; (11) speech or language impairment; (12) traumatic brain injury; and (13) visual impairment.³⁶ This list of categories contained in the IDEA regulations is exhaustive, meaning that a student’s disability must fit into one of the defined categories for any further eligibility determination to take place.³⁷ To assist in this step of determination, the federal regulations provide further guidelines in each category of disabling conditions that include a list of specific impairments, which serves to provide examples that are,

³¹ 34 C.F.R. § 300.306(c)(1) (2007).

³² See May, *supra* note 30, at 180, and accompanying text.

³³ 20 U.S.C. § 1414 (b)(4) (2005); 34 C.F.R. § 300.306(a) (2007).

³⁴ 34 C.F.R. § 300.8 (a)(1) (2007).

³⁵ It is important to note that this IDEA determination of fitting into a disability category is a separate, though definitely connected, process from a medical diagnosis of a disability. While a student could be found to be “disabled” under a DSM diagnosis provided through a counselor or physician, this does not ensure that that student will be found to be a “student with a disability” under the conditions of the IDEA. The student must meet all necessary criteria within the federal regulation guidelines for each category of disability. While a medical diagnosis may be one of these criteria, it is likely not the only qualifier. See generally NAT’L CTR. FOR LEARNING DISABILITIES, *supra* note 2.

³⁶ 34 CFR § 300.8 (c) (2007).

³⁷ Letter to Fazio, 21 IDELR 572, 572-573 (OSEP 1994).

alternatively, not exhaustive.³⁸ While this may appear to be a relatively straightforward determination, some of these further guidelines include additional, vague language that is open to a varied amount of interpretation.³⁹

Furthermore, eligibility determination teams must be cautious in stating that a student is a “child with a disability,” as the IDEA regulations also note that the eligibility determination team may not qualify a student as having a disability if the child’s performance on an evaluation was due to either a “lack of appropriate instruction” in reading or math, or due to the student’s limited English proficiency.⁴⁰ The presence of either of these scenarios will quash the positive eligibility determination; thankfully, however, the federal regulations do provide some helpful direction for this determination by referring teams to the Elementary and Secondary Education Act for guidance about what constitutes appropriate reading instruction.⁴¹

The second requirement necessary to qualify for special education services is that a child with a disability must need specialized instruction “by reason [of]” that disability.⁴² The IDEA regulations afford little guidance for interpreting this requirement for special education, arguably

³⁸ *Id.*

³⁹ See *infra* Part III-B-i; see, e.g., Robert A. Garda, Jr., *Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act*, 69 MO. L. REV. 441, 460 (2004) (analyzing the phrase “adversely affects educational performance,” and stating, “Yet, IDEA does not inform decision-makers . . . This does not stop courts and hearing officers from improperly inventing federal and universal meanings for these terms . . . The result is wildly varied interpretations of these terms by decision-makers.”).

⁴⁰ 34 C.F.R. § 300.306(b)(1) (2007).

⁴¹ Though the federal regulations actually refer readers to Section 1208(3) of Elementary and Secondary Education Act of 1965 (ESEA) for guidance in determining if a student received adequate instruction, the ESEA was reauthorized under No Child Left Behind (NCLB.) As a result, those looking for guidance should consult No Child Left Behind Act, Pub. L. No. 107-110 §1208(3), 115 Stat. 1425, 1550 (2002). This section of NCLB states that the essential components of reading instruction are “explicit and systematic instruction in (A) phonemic awareness; (B) phonics; (C) vocabulary development; (D) reading fluency, including oral reading skills; and (E) reading comprehension strategies.” Other sections of NCLB expand upon these components. Again, under 34 C.F.R. 300.306(b), if a student’s performance is due to a lack of appropriate reading construction, or rather, a lack of “explicit and systematic instruction” in the five components of reading, then the student will likely be disqualified for special education services.

⁴² 34 C.F.R. § 300.8(a)(1) (2007).

even less than the first eligibility determination factor.⁴³ Despite this lack of guidance, if the eligibility team determines a student needs specialized instruction (due to his disability) to gain educational benefit, then the team of the parent and professionals will begin to create an IEP for that student that may include goals, objectives, accommodations, modifications, and other important components that ensure that the student will receive a FAPE.⁴⁴

C. *Appealing a Determination of Non-Eligibility*

The IDEA provides a specifically articulated series of procedural safeguards in the event that a family disagrees with the public agency's finding of non-eligibility.⁴⁵ The IDEA first requires that families exhaust all administrative options before filing a civil action.⁴⁶ This means that the family first request an administrative due process hearing - where a neutral hearing officer will determine if the public agency reached the proper eligibility conclusion. In many states, the family may then appeal an unfavorable decision to the state educational agency.⁴⁷ If the family is still dissatisfied with the result of the administrative proceedings and believes

⁴³ The conundrum of the language in this guideline, in particular, has inspired numerous scholars to analyze the intended meaning behind the standard and attempt to promote facial clarity. See, e.g., May, *supra* note 30, at 173-195 (focusing on the language of the second requirement, particularly the phrase "by reason thereof" and the implications on determining causation); Robert A. Garda, Jr., *Who is Eligible Under the Individuals with Disabilities Education Improvement Act?*, 35 J.L. & EDUC. 291, 293-297 (2006) (discussing the innate complexities of the language of the IDEA eligibility regulations); Weber, *supra* note 7, at 102.

⁴⁴ United States Department of Education, *Individualized Education Program*, BUILDING THE LEGACY: IDEA 2004, <http://idea.ed.gov/explore/home> (follow "Individualized Education Program (IEP)" hyperlink; then follow Individualized Education Program (IEP)" hyperlink) (last visited March 26, 2015).

⁴⁵ 20 U.S.C. 1415(b)-(g) (2004) describes in detail the process of bringing a complaint against the school district. Though this process varies slightly between states at the administrative level, the process typically begins with filing a due process complaint with the local educational agency (LEA) or state educational agency (SEA,) which may result in mediation or an Impartial Due Process Hearing. If state law required the LEA to conduct the hearing initially (and not the SEA), then the family may need to appeal the findings and decision to the SEA. After appealing to the SEA, however, the family is said to have exhausted their administrative remedies. At this point, they may appeal to the U.S. federal courts.

⁴⁶ 20 U.S.C. § 1415(l) (2004).

⁴⁷ 34 C.F.R. § 300.502(b) (2006); 20 U.S.C. § 1415(g)(1) (2004). It is important to note that this process may vary somewhat on a state-by-state basis. This framework is not the only procedure that a family must follow, but is instead one of the most common.

that the determination has been mishandled, they may file a civil action in federal court that may then be appealed to the circuit court of appeals.⁴⁸

If the case reaches the court of appeals, the court defers to the fact-finding completed by the local and state educational agencies during the administrative hearing, largely due to the deference given to administrative adjudications, but also due to the federal courts' relative lack of knowledge regarding the unique schooling needs of students with disabilities.⁴⁹ The court utilizes these facts in conjunction with the IDEA mandates and regulations to determine whether the lower court's ruling should be affirmed or reversed.⁵⁰ At this stage in the legal process, the complex eligibility standards may present a situation where a family feels that they have run out of all possible legal options to secure free, public special education for their child or children.⁵¹

III. NON-UNIFORM INTERPRETATION OF ELIGIBILITY STANDARDS

A. *The Overall Problem*

While the eligibility process has the potential to ensure that some students ultimately have their special needs met in the classroom, the complex standards may cause inappropriate denials of eligibility for some students based on interpretation.⁵² To most strongly demonstrate this

⁴⁸ 20 U.S.C. § 1415(i)(2)(A) (2004); see *W.H. v. Clovis Unified Sch. Dist.*, No. CV F 08-0374 LJO DLB, 2009 U.S. Dist. LEXIS 47736, at 62 (E.D. Cal. June 8, 2009) (showing the authority of the courts in such a case, and stating "This Court has the authority to determine whether a Student is eligible for special education . . . under the IDEA."). Some states also allow families to file in a state court of competent jurisdiction, though this article focuses on families filing in federal courts. *Id.*; see also *Bd. Of Educ. of the Hendrick Hudson Central Sch. Dist., Westchester Cnty v. Rowley*, 458 U.S. 176, 208 (1982) ("A court determines [whether] the requirements of the Act have been met, [while] questions of methodology are for resolution by the States.").

⁴⁹ This lack of specific knowledge is, of course, based on the basic facts that the courts are not mental health or educational professionals, and also did not have the opportunity to hear witnesses and testimony firsthand. See *Amanda J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 888 (9th Cir. 2011) (citing *Rowley*, 458 U.S. at 206-08 in stating "Because Congress intended states to have the primary responsibility of formulating each individual child's education, [the Court] must defer to their 'specialized knowledge and experience' by giving 'due weight' to the decisions of the state's administrative bodies.").

⁵⁰ *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1373 (8th Cir. 1996) (holding that the district court must give "due weight" to the decision of the administrative proceedings, but also has the right to make an independent determination).

⁵¹ See *Weber*, *supra* note 7, at 102-105.

⁵² See *id.*

effect, this article will focus on examples of non-uniform interpretation of ADHD eligibility standards at the level of the federal courts of appeal. While non-uniform interpretation inevitably occurs between boundary lines of local school districts, state educational agencies and even possibly within individual schools, the procedural safeguards of the IDEA attempt to atone for this by allowing families to appeal to consistently higher levels of legal authority.⁵³

While a family may, in theory, have the legal ability to be heard in the U.S. Supreme Court if its appeal in the court of appeals is unsuccessful, this is a statistical improbability. In 1982, the U.S. Supreme Court heard its first special education-related case.⁵⁴ Since that time, the U.S. Supreme Court has heard less than twenty cases that directly focus on special education. Of those cases, only two address a finding of ineligibility at any length.⁵⁵ Even so, the main issue in both of these cases focused heavily on a family's right to reimbursement for a private special education placement after an initial finding of ineligibility from the public school district, rather than a family's right for a finding of special education eligibility. Unless some major change occurs within the Supreme Court and their case-selection process, the courts of appeal are very likely to be the family's last hope of securing special education services for their its children.⁵⁶ As such, it is crucial that, at the very least,

⁵³ *See id.*

⁵⁴ *Rowley*, 458 U.S. at 179-210. In this groundbreaking opinion, the Court defined "free appropriate public education," and provided many foundational guidelines for special education rights.

⁵⁵ In addition, these two cases have been heard rather recently and focused upon very similar issues. *Bd. Of Educ. of City Sch. Dist. Of City of New York v. Tom F.*, 552 U.S. 1 (2007) brought to the court a question regarding a family's right to receive reimbursement for a private school placement if that student had never received special education services from the public school district. The Court held that they could. Likewise, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) involved a student who was diagnosed with learning disabilities by a private specialist. The school district subsequently found the student ineligible for special education services, and the family moved the student to a private school. They brought the case claiming that the school district failed to provide FAPE, and that the school district should thus have to reimburse the family for the private school tuition, as that placement was appropriate for the student in lieu of the school district's special education services. The Court agreed with the family's claims and held that IDEA authorized such reimbursement.

⁵⁶ There are many factors that appear to be urging against the Supreme Court hearing Special Education cases in general. *See, e.g.*, Mark Walsh, *U.S. Urges Supreme Court Not to Hear Special Education Case*, SCH. L. BLOG, (Dec. 1, 2011, 11:19 AM), http://blogs.edweek.org/edweek/school_law/2011/12/us_urgues_court_not_to_hear_spe.html (describing how the Obama administration encouraged the Supreme Court not to decide on a case involving compensatory tutoring); Mark Walsh, *Supreme Court Declines Special Education Appeals*, SCH. L. BLOG, (Mar. 18, 2013 5:11 PM),

interpretation of eligibility criteria should be uniform at the level of the courts of appeal.

As briefly discussed earlier in this article, the IDEA eligibility standards are constructed in a way that allow for a large amount of interpretation, particularly when determining if a student requires specialized instruction by reason of his or her disability.⁵⁷ When courts of appeal interpret these standards in drastically different ways, this creates a scenario where one interpretation of the law may become binding precedent throughout one federal circuit, while a contrasting interpretation may become relied upon in another federal circuit.⁵⁸

For example, in *D.R. ex rel. Courtney R. v. Antelope Valley Union High School District*, a Ninth Circuit case, the court held that a student with a disorder affecting mobility did not require special education services because modifications (such as extra sets of text books and mobility assistance) to her general classroom program would afford her all of the assistance she needed in school.⁵⁹ Essentially, the court determined that the student did not require “specially designed instruction to meet the unique . . . needs of individuals with exceptional needs . . .”⁶⁰ This holding was contrary to that in *Yankton School District v. Schramm*, an Eighth Circuit case, where the court held that a student with an orthopedic impairment, also requiring mobility assistance and multiple text books, needed special education because the necessary accommodations should be considered “specialized instruction.”⁶¹ In *Antelope Valley*, the court expressly acknowledged that they were aware of the conflict between their

http://blogs.edweek.org/edweek/school_law/2013/03/supreme_court_declines_special.html (stating that the Supreme Court, without any dissent or comment, declined to take up two appeals involving restraining students and allowing students with disabilities to pass to the next grade based on “social promotion” and regardless of educational performance, respectively).

⁵⁷ See *supra* Part II-B; *infra* Part III-B.

⁵⁸ See generally *Toua Hong Chang v. Minnesota*, 521 F.3d 828, 833 n.3 (8th Cir. 2008) (stating “When there is an intra-circuit split, we are free to choose which line of cases to follow.”); *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 812 (8th Cir. 2010) (Bye, J., dissenting) (explaining that there are varying standards due to intra-circuit splits on interpretation and suggesting that when this occurs, courts should choose the “better approach.”).

⁵⁹ *D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 746 F.Supp.2d 1132, 1141 (C.D. Cal. 2010). These modifications do not constitute special education service and do not provide students with an individualized education, as would an IEP. For more information about modifications, which would occur under a Rehabilitation Act Section 504 plan.

⁶⁰ *Id.* (citing Cal. Educ. Code § 56031).

⁶¹ *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1375-76 (8th Cir. 1996).

holding and that of the court in *Yankton*, stating that they declined to “follow *Yankton*’s non-binding ruling.”⁶²

Intra-circuit splits of eligibility determination standards produce a scenario that has a great potential to harm students seeking special education services. Essentially, this non-uniform interpretation of the IDEA eligibility standards creates an unfair situation where similar students could be finally denied special education services in one state while being afforded the services in another state.⁶³ It is hard to imagine that this was an intended result of the procedural safeguards set about by the IDEA.

B. Trends in Eligibility Determination for Students with ADHD

In particular, one disability that seems to entice varied analyses of the law by different courts is ADHD.⁶⁴ ADHD is a complicated disorder. In fact, at the turn of the century, physicians were struggling so much to determine the appropriate conditions in which to diagnose a child with ADHD that the American Academy of Pediatrics (“AAP”) created a series of clear, articulate guidelines to aid in creating a more reliable system for diagnosis.⁶⁵ It is no surprise that with such a difficult disorder, determining eligibility may also be a complicated process. Unfortunately for eligibility determination teams and schools, there is no series of guidelines like those created by the AAP to aid the determination process; the IDEA regulations are the only source of direction.

To determine if a student with ADHD is eligible for special education services, the court will utilize the IDEA standards of eligibility to determine that the student is a child with a disability in one of the thirteen recognized categories and that the student needs specialized schooling services “by reason of” his ADHD.⁶⁶ Many courts are careful to

⁶² *Antelope Valley*, 746 F. Supp. at 1142. The court’s opinion in *Antelope Valley* plainly demonstrates how courts are aware of the conflicting interpretations of eligibility standards.

⁶³ See, e.g., *infra* Part IV-B-iii.

⁶⁴ For a discussion of why ADHD might be highly susceptible to non-uniform interpretation, see *infra* Part IV-A.

⁶⁵ Jane E. Allen, *How do You Know if it’s Attention Deficit/ Hyperactivity Disorder?*, L.A. TIMES, May 8, 2000, <http://articles.latimes.com/2000/may/08/health/he-27719> (noting that the AAP guidelines were designed to aid in preventing under- or over-diagnosis though requiring that children display symptoms in two or more different settings and that these ADHD symptoms inhibit the student’s educational and social environment for at least half of one year).

⁶⁶ 20 U.S.C.A. § 1401(3)(A) (2005).

examine these requirements separately, likely in an attempt to produce clear reasoning behind a holding of eligibility or non-eligibility.⁶⁷

1. Requirement One: Does a Student's ADHD Qualify as a Disability?

Legal precedent from around the country demonstrates that the courts fairly uniformly recognize ADHD as falling within one of the required categories of disability as defined by federal regulations, despite the fact that IDEA does not implicitly include ADHD as a category of disability.⁶⁸ The courts typically recognize ADHD to be included under the umbrella of disabling conditions known as "Other Health Impairment" ("OHI").⁶⁹ A student with a condition falling under this label would demonstrate "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment."⁷⁰

Furthermore, to qualify under the category of OHI, the student's condition must meet two additional standards. This impairment must (i) be "due to chronic or acute health problems such as ... attention deficit disorder or attention deficit hyperactivity disorder [...]," and; (ii) must "adversely affect a child's educational performance."⁷¹ In summary, combined with the basic eligibility requirements of the IDEA,⁷² a student must, "by reason of" his ADHD, demonstrate an impairment of limited alertness in his educational environment that "adversely affects" the child in school; without all three of these components, it is unlikely that the court will find that a student meets the requirements to be a considered a "student with a disability" under the OHI category.⁷³

⁶⁷ See, e.g., C.M. ex rel. Jodi M. v. Dep't of Educ., 476 F. App'x 674, 678 (9th Cir. 2012) ("C.M. makes no argument in this regard and thus has waived the issue. Nonetheless, the hearings officer determined that although C.M. has been diagnosed with ADHD, she did not show that she has 'limited strength, vitality, or alertness,' nor did she show 'that any health impairment [she] may have adversely affects [her] educational performance.'").

⁶⁸ 20 U.S.C.A. § 1401(3)(A)(i) (2005); 34 CFR 300.8 (c) (2005); see also Paolo G. Annino, *The New IDEA Regulations: The Next Step in Improving the Quality of Special Education*, 23 MENT. & PHYS. DIS. L. REP. 439, 439 (1999).

⁶⁹ 20 U.S.C.A. § 1401(3)(A)(i) (2005); 34 C.F.R. § 300.8(c)(9) (2007). Occasionally, the court may also determine that ADHD fits into the IDEA category of "learning disability, though this seems to be much less common than a finding that ADHD fits into the category of OHI.

⁷⁰ 34 C.F.R. § 300.8 (c)(9) (2007).

⁷¹ 34 C.F.R. § 300.8(c)(9)(i-ii) (2007).

⁷² See *supra* Part II-B.

⁷³ See 4 James R. Rapp, EDUCATION LAW §§ 10C.05(7)(b)-(8) (2014).

The language of these standards is, at best, open to a wide range of speculation and confusion. Any professional attempting to utilize these eligibility criteria could potentially encounter a whole host of questions. First, under the large ‘umbrella’ standard of IDEA’s requirement that a child be a “child with a disability,” the law necessitates that a student experiences impairment “by reason of” his ADHD.⁷⁴ The standards do not provide language that explains how a court should determine if this standard is met, and further, they do not provide guidance on how exactly the court should determine the connection between ADHD symptoms and student behaviors⁷⁵ or how to weigh possible external factors against the ADHD diagnosis.⁷⁶

⁷⁴ 20 U.S.C.A. § 1401 (3)(A)(ii) (2005).

⁷⁵ ADHD is a neuropsychiatric disorder, whereby neurotransmitters in the brain may cause symptoms of impulsivity, inattention, and hyperactivity. Drew H. Barzman, M.D. et. al., *Attention-Deficit Hyperactivity Disorder Diagnosis and Treatment Separating Myth from Substance*, 25 J. LEGAL MED. 23, 29 (2004). These symptoms may result in a wide variety of manifestations of behavior, a connection that is crucial to understand for the courts to determine if a child is impaired in school due to his ADHD diagnosis or is simply impaired in school due to a series of unconnected maladaptive behaviors. Though there appears to be no formal legal standards or examples to aid in this determination, the courts may be able to look to the medical profession for guidance. In addition to providing other criteria, the DSM-IV criteria give numerous examples of these behaviors so that medical professionals can have a clinical framework in which to diagnose patients with ADHD. First, these behaviors that are a result of the symptom of inattention may include: (a) [failing] to give close attention to details or [making] careless mistakes in schoolwork, work, or other activities; (b) often [having] difficulty sustaining attention in tasks or play activities; (c) often [not seeming] to listen when spoken to directly; (d) often [not following] through on instructions and [failing] to finish schoolwork, chores, or duties in the workplace (not due to oppositional behavior or failure to understand instructions); (e) often [having] difficulty organizing tasks and activities; (f) often [avoiding, disliking, or being] reluctant to engage in tasks that require sustained mental effort (such as schoolwork or homework); (g) often [losing] things necessary for tasks or activities (e.g., toys, school assignments, pencils, books, or tools); (h) [often being] easily distracted by extraneous stimuli, or; (i) [often being] forgetful in daily activities. Gerard A. Gioia & Peter K. Isquith, *New Perspectives on Educating Children with ADHD: Contributions of the Executive Functions*, 5 J. HEALTH CARE L. & POL'Y 124, 127 (2002) (citing American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 83-85 (4th ed. 1994) [hereinafter DSM-IV]). Second, behaviors that are a result of hyperactivity symptoms may include: (a) often [fidgeting] with hands or feet or [squirming] in seat; (b) often [leaving] seat in classroom or in other situation in which remaining seated is expected; (c) often [running] about or [climbing] excessively in situations in which it is inappropriate (in adolescents or adults, may be limited to subjective feelings of restlessness); (d) often [having] difficulty playing or engaging in leisure activities quietly; (e) [often being] on the go or often [acting] if driven by a motor, or; (f) often [talking] excessively. *Id.* Finally, behaviors that are a result of impulsive symptoms may include: (a) often [blurting] out

Second, to qualify under the OHI category, the standards state that a student must demonstrate that he has “limited alertness, strength, and vitality with respect to the educational environment.”⁷⁷ Again, however, these same standards provide almost no guidance in regard to the ambiguous terms; they do not expressly clarify what it means for a student demonstrate “limited alertness, strength, or vitality”⁷⁸ and, likewise, do not explain the boundaries of the educational environment.⁷⁹

Third, the OHI standards state that a student’s ADHD must “adversely affect” his educational performance.⁸⁰ This “adversely affects” language is perhaps the most facially ambiguous standard in regards to eligibility, and leads to various interpretations by the courts.⁸¹ Whether

answers before questions have been completed; (b) often [having] difficulty awaiting turn; (c) often [interrupting] or [intruding] on others (e.g. butts into conversations or game). *Id.* Without knowing the connection between ADHD symptoms and behaviors, it is not difficult to see how one could believe that behaviors such as those listed in the DSM-IV are typical child behaviors. However, unlike a student without ADHD, these manifestations of ADHD symptoms have a serious potential to cause a student harm if they do not have access to the special education that they need. *See infra* Part IV-C.

⁷⁶ *See, e.g.,* Alvin Independent School District v. A.D. ex rel. Patricia F., 503 F.3d 378, 384 (5th Cir. 2007) (suggesting that a student’s behavior and impairment in school may have not been due to manifestations of his ADHD, but rather to events in his personal life such as a death in the family and the student’s own alcohol abuse).

⁷⁷ 34 C.F.R. § 300.8(c)(9)(2007).

⁷⁸ *Id.*

⁷⁹ As a result, this ambiguity may lead to interpretations of the standards that limit the language to limited alertness solely within the classroom, within the confines of the school building, or, most broadly, within any environment in which the student is engaged in educational activity. A review of state definitions of “educational environment” shows that most state educational agencies define the term as the location(s) where the student is receiving instruction. These locations, however, can extend far outside of the physical public schools walls to places such as (non-residential and residential) private schools, trailers outside of the school building, hospitals, correctional facilities, and even the home. To aid in data collection, some states have provided helpful guides to allow school administrators to determine a student’s “educational environment.” *See, e.g.* Pennsylvania Department of Education, Bureau of Special Education, *Appendix F: Guidelines for Calculating Educational Environment*, PENNDATA 2012-2013 RESOURCE GUIDE 120-125 (2012), available at http://penndata.hbg.psu.edu/resource-guides/2012/PennData2012_Appendix_F.pdf (providing specific guidelines and calculations for Pennsylvania school administrators to determine the educational environment of a student in a special education program.); Michigan State Board of Education, *Michigan Educational Environment Coding Instructions* (2010), http://www.michigan.gov/documents/mde/Child_Count_3thru5_instructions_2010_339271_7.doc.

⁸⁰ 34 C.F.R. § 300.8(c)(9)(ii) (2007).

⁸¹ This “adversely affect” language is also present in the criteria for other disability categories in addition to OHI and has drawn widespread conflicting interpretation, even

alone or in combination,⁸² the ambiguity of the standards in the first eligibility requirement of qualifying under an IDEA category of disability may lead to a wide variety of interpretation against students with ADHD, which may result in a situation where the student is found ineligible before the second requirement is even addressed.⁸³

between the categories of disability. For example, in *Weixel v. Bd. of Educ. of N.Y.*, 287 F.3d 138 (2d Cir. N.Y. 2002), the court determined that a student's Chronic Fatigue Syndrome had an adverse effect because it prevented her from continuously attending school. Further, in *D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist.*, 764 F.Supp.2d 1132, 1141 (C.D. Cal. 2010), the court determined that, despite the student retaining a high GPA, a student's orthopedic impairment adversely affected her educational performance because it caused her to miss chunks of her classroom time. However, despite this holding, in *C.B. v. Dep't of Educ.*, 322 Fed. Appx. 20, 21-22 (2d Cir. N.Y., 2009), the court held that a student's ADHD did not adversely impact her educational performance, because the student performed well in school. See generally *Garda*, *supra* note 40, at 460; *Ashli C. v. Hawaii*, No. 05-00429 HG-KSC, 2007 U.S. Dist. LEXIS 4927, at *22-25 (D. Haw. Jan. 23, 2007) (stating that "adversely affects" is an "ambiguous phrase," noting that IDEA does not define the phrase, and stating that each state is free to provide interpretation for the phrase).

⁸² In combination with other ambiguous terms such as "specialized instruction," the "adversely affects language may lend itself to further promotion of non-uniform interpretation of eligibility standards across regional border. For instance, the courts have provided some guidance for determining if a student's ADHD adversely affects his educational performance in a situation where the student may be currently achieving well academically due to some kind of imposed modifications within either the classroom or extracurricular environment. In *Greenland Sch. Dist. v. Amy N.*, No. 02-136-JD, 2003 U.S. Dist. LEXIS 4239, at *23 (D.N.H. Mar. 19, 2003) stated that "Courts, including this court, have interpreted the adverse effect requirement to be satisfied if the child's educational performance would have been adversely affected but for specialized instruction that the child was receiving." Utilizing this interpretation of the standard, they determined that a student's ADHD adversely affected her schooling because she only able to succeed in school with the help of a tutor and individualized instruction. *Id.* at 25. Once again, however, this standard requires some interpretation of the language "specialized instruction" as discussed in 34 CFR 300.306(b). Depending on the court's interpretation of "specialized instruction," the court's determination of adverse effect will likely differ. For example, in *Ashli C.*, 2007 U.S. Dist. LEXIS 4927 at 23, the court determined that the holding of *Greenland* did not apply to their respective facts situation, where the student received "differentiated" instruction, which they distinguished from specialized instruction. As a result, the court held that the student was not harmed by his ADHD in school because he was still able to perform at an average level in his general education classroom. *Id.* at 31-32.

⁸³ See *supra* Part II-B (stating that students must meet both requirements of being a student with a disability and requiring special education services before they may be found eligible).

2. Requirement Two: Does a Student Require Specialized Instruction because of his ADHD?

Unfortunately, while the majority of courts appear to agree on ADHD's status as an IDEA "eligible" disability, precedent suggests that the courts tend to disagree about the need for special education services for students with ADHD.⁸⁴ The first school of thought on this requirement appears to argue that students with ADHD do not need special education, but are instead simply unmotivated, something that can be corrected through general education classroom modifications.⁸⁵ Another school of thought regarding the second eligibility requirement fully rejects the conclusion of non-motivation, and instead states that the students are not unmotivated per se, but rather inattentive, impulsive, and/or hyperactive—all characteristics of their disability which can only be appropriately addressed in a special education environment.⁸⁶

For example, in one case from the Central District of California, the administrative law judge ("ALJ") held that a student was not eligible for special education services because, though the court found that the student's ADHD qualified as a disabling condition under the OHI category, the student did not also require specialized services due to his ADHD.⁸⁷ Subsequently, the state Office of Administrative Hearings

⁸⁴ In particular, there appears to be a conflict about whether the student is unmotivated because of his own accord or if his ADHD symptoms are manifesting as behaviors that make the student seem unmotivated. *See, e.g., Hawaii, Dep't of Educ. v. Zachary B. ex rel. Jennifer B.*, No. 08-00499 JMS/LEK, 2009 WL 1585816 at 7 (D. Haw. June 5, 2009) ("[T]he Hearings Officer explained that the [Department of Education's] failure to find Zachary eligible for special education stemmed (at least in part) from a fundamental misunderstanding of ADHD—that is, '[The elementary school] continued to view [Zachary's] disability as a motivation problem' rather than a symptom of his disability, but the preponderance of the evidence (including his second grade and third grade teachers' reports) showed that Zachary's 'attention was significantly challenged *due to his disability* and this adversely affected [his] ability to think, learn, write, and complete class work and homework on a regular basis.'").

⁸⁵ *Id.* at *2 (discussing how, after the student's school determined that, despite the student's diagnosed ADHD, the student did not require special education services, the teacher created a general education modification plan. These modifications included "preferential seating, modified spelling assignments, an incentive chart, and verbal redirection." The court held that this plan was not sufficient enough to provide the student with adequate assistance in school and affirmed the due process hearing officer's decision that the student required special education services).

⁸⁶ *Id.* at 7-10; *see Barzman, supra* note 76, at 29 ("The frontal lobes are believed to be central to basic functions such as motivation, self-appraisal, and self-regulation. Those functions appear to be impaired in persons diagnosed with ADHD.").

⁸⁷ *M.P. v. Santa Monica Malibu Unified Sch. Dist.*, 633 F.Supp.2d 1089, 1097-98 (C.D. Cal. 2008).

affirmed the ALJ's finding.⁸⁸ The ALJ determined that the student had the potential to succeed in school, but simply lacked the motivation necessary to reach that potential.⁸⁹ The state board reviewing the ALJ's findings stated that, with modifications in the general education classroom, the student was likely to improve his academic performance.⁹⁰ The district court reversed this holding, stating that the board failed to recognize that symptoms of ADHD can manifest as lack of motivation.⁹¹ The court reasoned that the student was capable of completing schoolwork independently, but, due to his ADHD, could not become motivated without assistance.⁹²

IV. ADHD: AT RISK FOR HARMFUL EFFECTS OF NON-UNIFORM INTERPRETATION

This section will focus upon ADHD's role as a disorder fraught with controversy and will suggest how this controversy and confusion in diagnosis may lead to varying treatment by the courts. Furthermore, this section will discuss the severe, negative, and lifelong impact that students with ADHD may face if they do not receive the special education services that they need in school.

A. *Why Might Cases Involving ADHD Be At-Risk for Non-Uniform Interpretation?*

ADHD is a disorder susceptible to incredible levels of professional scrutiny regarding, even at the most basic level, whether professionals should even consider ADHD a valid diagnosis.⁹³ Despite this scrutiny,

⁸⁸ *Id.* at 1090.

⁸⁹ *Id.* at 1096.

⁹⁰ *Id.* at 1098.

⁹¹ *Id.* at 1103.

⁹² *Id.*

⁹³ See Paul Cooper, *Like Alligators Bobbing for Poodles? A Critical Discussion of Education, ADHD, and the Biopsychosocial Perspective*, 42 J. OF PHIL. OF EDUC. 457, 463 (2008) (stating "First, it is claimed that the ADHD diagnosis is somehow bogus or 'illicit' because there is an absence of neuro-scientific evidence. This is patently untrue. As noted above, there is a wealth of evidence from many studies over many years . . ."); see, e.g., Fred A. Baughman Jr., *The ADHD Fraud—How Psychiatry Makes "Patients" of Normal Children*, ADHD FRAUD, (Oct. 30, 2011), <http://www.adhdfraud.net/the-adhd-fraud-how-psychiatry-makes-patients-of-normal-children/> (claiming quite plainly "ADHD is not a disease. Being drugged with Ritalin is."); Dathan Paterno, *Reason #327 Why ADHD is a Baloney Disorder*, DESPERATELY SEEKING HUMANS (July 7, 2009) <http://drpaterno.blogspot.com/2009/07/reason-327-why-adhd-is-baloney-disorder.html> (concluding "ADHD is simply a description for a list of behaviors that are annoying to parents and teachers and for which they currently

over the past twenty years, research has still produced relatively high estimates of the number of youth in the United States suffering from ADHD. In 2000, in the esteemed Diagnostic Service Manual of Mental Disorders (IV-TR), the American Psychiatric Association published that an estimated 3 to 5% of youth in the country suffer from the effects of ADHD.⁹⁴ More recent data, however, report much higher numbers, estimating that 7.6% of children between the ages of 5 and 11 and 12.2% of children between 12 and 17 meet the criteria for an ADHD diagnosis.⁹⁵ Despite these relatively high numbers, there is no agreed upon cause for ADHD,⁹⁶ which may further encourage the large amount of discussion and disagreement.

Two major factors contribute to this discussion. First, ADHD is a sort of “invisible diagnosis” and also presents behaviors that may be common in all children, but instead at very different levels.⁹⁷ Second,

do not know how to effect change.”); Marilyn Wedge, *ADHD: The Emperor’s New Diagnosis*, *PSYCHOLOGY TODAY* (Feb. 8, 2011)

<http://www.psychologytoday.com/blog/suffer-the-children/201102/adhd-the-emperors-new-diagnosis> (stating “Much of what is diagnosed in this country as ADHD . . . in children is much closer to normal childhood behavior than it is to a real disease or impairment of the brain.”); *See generally* Tim O’Shea, *ADD/ADHD: The “Designer Disease”*, *THE DOCTOR WITHIN*, <http://www.thedoctorwithin.com/add/add-a-designer-disease/> (last visited March 26, 2015).

⁹⁴ AMERICAN PSYCHIATRIC ASSOCIATION. *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS: DSM-IV-TR* (2000).

⁹⁵ Barbara Bloom, Robin A. Cohen, Gulnur Freeman, *Summary Health Statistics for U.S. Children: National Health Interview Survey, 2009*, 10 *VITAL HEALTH STAT.*, Dec. 2010, at 13-14, available at http://www.cdc.gov/nchs/data/series/sr_10/sr10_247.pdf.

⁹⁶ *See, e.g.*, Barzman, *supra* note 76, at 27-28 (discussing the genetic cause of ADHD and describing how it is a neuropsychiatric disorder that may be caused by dopamine reception and the frontal lobe’s malfunction); Marvin Boris & Francine S. Mandel, *Foods and Additives are Common Causes of the Attention Deficit Hyperactive Disorder in Children*, 73 *ANNALS OF ALLERGY* 462, 466 (1994) (conducting a study to determine the relationship between nutrition and ADHD, and concluding that a child’s ADHD symptoms can be greatly diminished or fully avoided through the student ingesting an elimination diet free of certain foods and additives); Catherine Mateer, Kimberly Kerns, & Karen Eso, *Management of Attention and Memory Disorders Following Traumatic Brain Injury*, 29 *J. OF LEARNING DISABILITIES* 618, 618-620 (1996) (describing how brain injury, particularly at a young age can lead to varying cognitive deficits, including resulting symptoms of inattention).

⁹⁷ “Invisible disability” is a term used to refer to any form of disability that may not be physically apparent to onlookers. These types of disabilities may include social, emotional, or behavior disabilities and even some physiological impairments that are not easily perceivable. *See generally* Linda Blum, *Not This Big, Huge, Racial-Type Thing, but...: Mothering Children of Color with Invisible Disabilities in the Age of Neuroscience*, 36 *SIGNS* 941, 941-943 (describing how the lack of physical visibility for an illness may lead to stigma and shame regarding the symptoms of that disability).

ADHD, without co-morbid diagnoses, does not produce obvious physical impairments,⁹⁸ and unlike many other disability diagnoses, there is not an exact test for determining that a student has ADHD.⁹⁹ While there are screening tools such as ADHD rating scales, these tools do not produce a precise ‘qualifying number’ that corresponds with disability definitions, making it very difficult to determine whether a student has ADHD.¹⁰⁰ In particular, this lack of bright-line test makes it particularly difficult to easily use the diagnosis to determine if a student qualifies for special education.¹⁰¹

“Such invisible disabilities may at the same time represent, as some scholars contend, a medicalization of childhood, turning a rage of unwanted, unruly traits into illness...”
Id. at 941.

⁹⁸ See Terry Matlen, *ADHD: The Invisible “Disability”*, HEALTH CENTRAL (Feb. 10, 2009), <http://www.healthcentral.com/adhd/c/57718/59001/invisible-disability/>, reflecting:

One, people with ADHD, learning disabilities, brain and psychiatric disorders typically look like most everyone else; their challenges are less apparent than the person with physical impairments. However, that doesn't mean their lives are any easier than those whose limitations are more visibly apparent. What that means, often times, is that people have higher expectations and less understanding and empathy for their difficulties. "Just try harder", or "If I can do it, so can you" are comments folks with ADHD often hear.

⁹⁹ *Attention Deficit/ Hyperactivity Disorder (ADHD): Symptoms and Diagnosis*, CENTER FOR DISEASE CONTROL AND PREVENTION (last updated July 3, 2013) <http://www.cdc.gov/ncbddd/adhd/diagnosis.html> (“There is no single test to diagnose ADHD.”).

¹⁰⁰ These rating scales may typically involve only a questionnaire completed by the student's parents or teachers. Arguably, this type of assessment may be susceptible to lead to questionable results if the rate intentionally or unintentionally ‘overrates’ the student's behavior. One example of an ADHD rating scale is the Vanderbilt ADHD Diagnostic Rating Scales, which include forms for both teachers and parents. MARK WOLRAICH, VANDERBILT ADHD DIAGNOSTIC TEACHER RATING SCALE (1998), available at [https://www.childrenshospital.vanderbilt.org/uploads/documents/med-ped_VADTRS_Quest\(2\).pdf](https://www.childrenshospital.vanderbilt.org/uploads/documents/med-ped_VADTRS_Quest(2).pdf). The rating scale given to teachers includes a list of 35 behaviors and asks the teacher to circle if each behavior occurs never, occasionally, often, or very often. Some of the listed behaviors include: “Does not seem to listen when spoken to directly”; “Talks excessively”; “Is ‘on the go’ or often acts as if ‘driven by a motor’”; “Has difficulty waiting in line” and; “Is self-conscious or easily embarrassed.” *Id.* After this, the rating scale asks the teachers to rate the academic (reading, mathematics, written expression) and classroom behavioral performance (peer relationships, following directions, disrupting class, assignment completion, organizational skills) on a scale from 1-5, with 1 meaning “problematic” and 5 meaning “above average.” *Id.*

¹⁰¹ See Scott O. Lilienfeld and Hal Arkowitz, *Are Doctors Diagnosing Too Many Kids with ADHD?* SCIENTIFIC AMERICAN MIND (May 1, 2013), <http://www.scientificamerican.com/article.cfm?id=are-doctors-diagnosing-too-many-kids-adhd> (describing the lack of bright-line test for ADHD diagnosis from the

These factors produce a wide variety of opinions in regards to ADHD's legitimacy as a diagnosis. One school of thought regarding ADHD suggests that the disorder may be a valid diagnosis, but physicians are over-diagnosing ADHD for various cultural reasons including a change in societal expectations for children and fluxing classroom environments.¹⁰² Other professionals claim that the ADHD diagnosis "has much more to do with our abilities to handle 'active' youth than the youth themselves,"¹⁰³ suggesting that the diagnosis may be more of tool for parents to use in explaining away maladaptive behavior and functioning rather than a true disorder.¹⁰⁴

perspective of rejecting the idea of overdiagnosis, stating "Many scholars have alleged that ADHD is massively overdiagnosed . . . Nevertheless, it makes little sense to refer to the overdiagnosis of ADHD unless there is an objective cutoff score for its presence. Data suggest, however, that a bright dividing line does not exist."

¹⁰² Goel *supra* note 11, at 13 (citing William B. Carey, *Is ADHD a Valid Disorder?*, ATTENTION DEFICIT HYPERACTIVITY DISORDER, ch. 3, at 2 (Peter S. Jensen & James R. Cooper eds., 2002)); *see, e.g., Interview: Fred Baughman*, PBS—FRONTLINE (May 4, 2000), <http://www.pbs.org/wgbh/pages/frontline/shows/medicating/experts/exist.html> (claiming that the ADHD is "neurobiological propaganda" by parents who have failed to attend to the development of their "normal" child); *Interview: Peter Breggin*, PBS—FRONTLINE (May 3, 2000), <http://www.pbs.org/wgbh/pages/frontline/shows/medicating/interviews/breggin.html> (commenting on the role of physicians in the over-promotion of the diagnosis, "Well, what medicine and psychiatry have done is to take essentially behavioral problems--problems of conflict between adults and children--and redefine them as medical problems."); Since the passage of the No Child Left Behind Act, Pub. L. No. 107-110 §1208(3), the American classroom environment has shifted to meet the high standards of standardized testing and meeting the standards of NCLB in regard to student achievement. Despite this change of focus to teaching more intensive, core content, many schools are not receiving the resources they need to meet their objectives. Class sizes are still large, school program are underfunded, and teachers are stretched thinner and thinner. As a result, the expectations for the students in the post-NCLB classroom have shifted as well to demanding higher levels of achievement with varying levels of support. Because of this, an ADHD diagnosis may 'explain away' a student's failure in the classroom while removing blame from teachers and parents. *See* Gail L. Sunderman, et al., *Listening to Teachers: Classroom Realities and No Child Left Behind*, THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY (September 2004), <http://civilrightsproject.ucla.edu/research/k-12-education/nclb-title-i/listening-to-teachers-classroom-realities-and-no-child-left-behind/sunderman-tracey-kim-orfield-listening-teachers.pdf>.

¹⁰³ Goel *supra* note 11, at 12 (citing President's Council on Bioethics, Human Flourishing, Performance Enhancement, and Ritalin (Dec. 2002)).

¹⁰⁴ *Id.*; *see* Kristen L. Aggelar, *Is ADHD a "Handy Excuse"?* *Remedying Judicial Bias Against ADHD*, 68 UMKC L. REV. 459, 459-460 (2000) (explaining how some media sources believe that ADHD is unnecessarily diagnosed so that parents can secure access to Ritalin to deal with their 'problem child.');

see generally Lynn R. Shoen, *Raising an ADHD Child: Well Worth the Aggravation*, 13-AUG NEVADA LAWYER 24,

Other sources, particularly those in the mainstream media, suggest that ADHD may be a label that students use as an excuse for poor performance or as a ploy to gain an advantage.¹⁰⁵ In particular, the media's focus on the propensity of some older students to feign symptoms of ADHD in order to receive a diagnosis, and subsequently receive testing accommodations and a possible prescription for ADHD medication, may further contribute to the United States' cultural bias against the ADHD diagnosis.¹⁰⁶ In the past decade, the media reports regarding ADHD have contributed to a certain stereotype of students with ADHD and have caused many members of the public to regard the disorder with skepticism.¹⁰⁷

Despite the (largely-media-based) controversy regarding ADHD's validity as a diagnosis, every prominent United States medical association and governmental health agency has asserted ADHD's legitimacy.¹⁰⁸ The

24 (2005) (describing how it is not logical to say that an ADHD diagnosis may be used to unfairly justify "difficult" behavior:

As I studied more about ADHD children, I learned that [behaviors that are a result of inattention, hyperactivity, and impulsivity] are characteristic and that such comments are typical of adults who know little about ADHD. This is not to say that a parent with an ADHD child can use the disorder as an excuse for bad behavior. In fact, ADHD children are typically not violent, abusive or mean. At worst, they can be very, very annoying. It is not that they have a deficiency of attention, rather they are attentive to so many objects and events simultaneously, they cannot filter out or prioritize the stimuli.).

¹⁰⁵ See generally Craig S. Lerner, "Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for the Elites?, 57 VAND. L. REV. 1043, 1064-1066 (2004).

¹⁰⁶ See George Leef, *Helping Hand or Unfair Advantage*, THE JOHN WILLIAM POPE CENTER FOR HIGHER EDUCATIONAL POLICY (March 30, 2010), <http://www.popecenter.org/commentaries/article.html?id=2327> (stating "Students who are diagnosed as having Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, or dyslexia can use that diagnosis to their advantage because it qualifies them for accommodation such as extra time or taking the test in a room with no other students."); Erinn L. Rigney, *Doctor's Orders: A New Prescription for ADHD Medication Abuse*, 88 NOTRE DAME L. REV. 1033, 1035, 1044 (discussing the desirable 'benefits' of ADHD medication for students without ADHD, stating that the prescription drugs may provide "increased levels of concentration and productivity, longer periods of undistracted work, and the heightened ability to focus."); see generally Heidi Mitchell, *Faking ADHD Gets You Into Harvard*, THE DAILY BEAST (Jan. 25, 2012), <http://www.thedailybeast.com/articles/2012/01/25/faking-adhd-gets-you-into-harvard.html>.

¹⁰⁷ See Aggelar, *supra* note 105, at 461-462 (explaining how the media may lead the public to believe that students use their ADHD diagnosis as an "excuse" not to take responsibility for their own actions).

¹⁰⁸ Eme, *supra* note 18, at 650 (highlighting agencies such as the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American

heated discussion on ADHD's validity is not simply due to a lack of research. In fact, over one thousand scientific and legal articles each year focus on ADHD,¹⁰⁹ producing continuously compelling data regarding the disorder's legitimacy.¹¹⁰ Much of this research has suggested that ADHD symptoms may have a neurological source, and that a shortage of the neurotransmitters norepinephrine and dopamine in the brain may be the root cause of the disorder.¹¹¹ Unfortunately, however, while physicians may be able to use this information to construct therapeutic treatment plans for affected students, this scientific research may not be enough to combat the perceptions of ADHD created by the media.¹¹²

Due to these media stereotypes and varying schools of thought, there may be a certain level of judicial bias against ADHD, which presents as a tendency to treat the issue of ADHD's validity with cynicism.¹¹³ Furthermore, judges may be hesitant to fully discuss the issue of ADHD as a valid disability due to the ambiguity in the United States' disability laws.¹¹⁴ Arguably, these factors present a possibility where the courts may be more likely to interpret the ADHD special education eligibility requirements in varying ways dependent on the personal biases or

Medical Association, the American Psychiatric Association, and the U.S. Surgeon General that have spoken on ADHD's validity as a diagnosis).

¹⁰⁹ *Id.* at 651.

¹¹⁰ Larry S. Goldman, et al., *Diagnosis and Treatment of the Attention Deficit/Hyperactivity Disorder in Children and Adolescents*, 279 J. OF THE AM. MED. ASS'NS 1100, 1105 (1998) (stating that ADHD is "one of the best-researched disorders in medicine.").

¹¹¹ Barzman, *supra* note 76, at 29-30; Joseph Bierdman & Thomas Spencer, *Attention Deficit-Hyperactivity Disorder (ADHD) as a Noradrenergic Disorder*, 46 BIOLOGICAL PSYCHIATRY 1234, 1234-25, 1240 (stating that research points to the conclusion that ADHD is a brain disorder in which genetics may play a large role, and that neurobiological and pharmacological search suggest that utilizing drugs containing certain natural-occurring chemicals in the brain such as neurotransmitters may aid in the treatment of ADHD).

¹¹² *See id.*

¹¹³ *See* Aggelar, *supra* note 105, at 473 (analyzing the opinion of *Axelrod v. Phillips Academy*, 46 F. Supp. 2d 72, 86 (D. Mass. 1999), where the judge stated that the student's poor academic performance was not excused in any way by the student's ADHD diagnosis; instead, the judge argued, the student was attempted to use his ADHD as a "handy excuse" for his academic struggles); Eme, *supra* note 18, at 650-611 (stating that this attitude is likely due to a lack of understanding about ADHD and suggesting that the court system provide for an education for personnel so that they may properly serve individuals with ADHD.)

¹¹⁴ *See supra* Part III-B (describing the ambiguous language of ADHD eligibility standards under the OHI category); Aggelar, *supra* note 105, at 470.

knowledge-bases of the judges.¹¹⁵ While, in the future, this conundrum may be solved in part through a more thorough and less vague series of regulations specifically providing guidelines for ADHD eligibility, in the present, students with ADHD are left to suffer the possibility of an inappropriate finding of ineligibility due to the non-uniform interpretation of standards.

B. Non-Uniformity in Play: Competing Circuit Interpretations in the Courts of Appeal

These societal attitudes about ADHD, combined with the current guidance for diagnosis, have the potential to create very difficult situations for families of students with ADHD. The following cases from the Fifth Circuit and Eighth Circuit Courts of Appeals demonstrate how non-uniform interpretation can present drastically different outcomes when analyzing a finding of special education eligibility for a student with ADHD. These cases present a scenario where the courts of appeals came to very different conclusions based on their interpretation of the eligibility standard requiring that the disability “adversely affects a child’s educational performance.” These cases were also selected due to the physical proximity of the circuits¹¹⁶ to demonstrate the possibility in which the student in the Fifth Circuit may have been able to figuratively walk over the border and be found eligible for services.

1. *Alvin Independent School District v. A.D. ex rel. Patricia F.*

In one Fifth Circuit Court of Appeals case, a seventh grade student with ADHD, A.D., began to have an increasingly difficult time managing his behavior in school, and, consequently, began to receive multiple forms of educational discipline, such as referrals and in-school suspensions.¹¹⁷ The school determined that the student was “at-risk,” but in a meeting to discuss A.D.’s performance in school, they found that he was passing his classes and performing well on standardized tests.¹¹⁸ As a result, no

¹¹⁵ This decision-making by judges based on bias or lack of knowledge is likely unintentional, as judges are skilled at removing personal bias from their judicial opinions and also are skilled at conducting research when they believe it is necessary to issue an opinion; *see generally* Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1264-1267 (explaining how, particularly when making decisions about the admissibility of scientific expert testimony, judges should conduct independent research to inform their decisions).

¹¹⁶ The Fifth and Eighth circuits border each other at the Arkansas and Louisiana/Texas border.

¹¹⁷ *Alvin*, 503 F.3d at 380.

¹¹⁸ *Id.*

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additional action was taken beyond continually meeting to discuss A.D.'s performance.¹¹⁹ Throughout the next school year, A.D.'s negative behavior increased dramatically.¹²⁰ He began to abuse alcohol and robbed a concession stand that was sponsored by his school.¹²¹ Despite this increase in negative behavior, the school took no action; A.D. was still passing most of his classes and standardized testing.¹²²

At this point, A.D.'s mother requested an evaluation for special education.¹²³ Due to inaction by the school, A.D.'s mother then requested a due process hearing, claiming that the school failed to properly evaluate and identify A.D. as a student with a disability who required special education.¹²⁴ The school evaluated A.D. and presented evidence to the hearing officer stating that A.D.'s ADHD "did not prevent him from making age-appropriate academic and social progress."¹²⁵ The school again pointed to A.D.'s academic achievement, with little focus on A.D.'s behavioral struggles or the impact that these behaviors could have on his potential to perform in class.¹²⁶

Despite this report from the school, the hearing officer found that A.D. was a student with a disability who required special education services.¹²⁷ The school appealed this holding to the district court, where the school obtained summary judgment. A.D. appealed the decision to the Fifth Circuit Court of Appeals.¹²⁸ The court determined that A.D. easily met the first IDEA eligibility standard, as his ADHD fell under the IDEA category of OHI.¹²⁹ Then, the court focused on the second eligibility standard - if A.D., by reason of his ADHD, needed special education services.¹³⁰ The court determined that "A.D.'s passing grades and success on the [standardized] test demonstrated academic progress,"¹³¹ and that A.D.'s teachers reported that, "despite his behavior issues, he did not need special education and was achieving social success in school."¹³² The

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Alvin*, 503 F.3d at 380.

¹²⁴ *Id.*

¹²⁵ *Id.* at 381.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ The court of appeals did not do any analysis to explain why A.D. met this requirement, but simply stating that ADHD falls under the OHI category. *Id.*

¹³⁰ *Id.* at 382.

¹³¹ *Id.* at 384.

¹³² *Id.*

court determined that the teacher's reflections on A.D.'s performance in school were the most valid representation of his educational performance.¹³³

The court held that A.D. did not require special education services because the student's "educational performance [was] adequate without them;" in other words, the court held that his ADHD did not "adversely affect" his education.¹³⁴ The court determined that the teacher's depiction of the student's passing grades and standardized test performance proved that he did not need specialized services, despite stating that the student was frequently missing the ability to partake in classroom instruction due to his behavior.¹³⁵ The court did not analyze the evidence presented by the student showing adverse impact on the student's social/behavioral skills, nor did it discuss how special education services could positively address the deficits the student was experiencing or allow the student to achieve to his full potential; instead, the court interpreted the threshold requirement need for special education services as a strict showing that the student was simply not able to pass his classes.¹³⁶ As a result, A.D. did not receive that special education services that he likely needed to learn necessary social skills and behavior modification.

2. Hansen ex rel. J.H. v. Republic R-III School District

In an Eighth Circuit Court of Appeals case, a fifth grade student with ADHD, J.H., continued to have a difficult time in school.¹³⁷ Believing that J.H. was struggling both socially and academically, J.H.'s father requested an eligibility determination from the school.¹³⁸ The school ruled that the student did not qualify for special education services, and the local educational agency quickly affirmed this holding on appeal,

¹³³ *Id.*

¹³⁴ *Id.*, at 383.

¹³⁵ *Id.* at 384; *see also* *Rowley*, 458 U.S. at 207 (stating "[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit").

¹³⁶ *Alvin*, 503 F.3d at 384; *see also* *C.B. v. Dep't of Educ.*, 322 Fed. Appx. at 322 (holding that a student's ADHD did not qualify her for special education services because the student performed well in school and tested high on standardized assessments); *see generally* *Garda*, *supra* note 40, at 504-512 (discussing whether the IDEA standards allow a student who is passing from grade to grade to be found eligible for special education services, and determining that a passing student may still be eligible under IDEA if the student's disability "adversely affects non-graded areas of educational performance or the child's educational performance is poor, but passing.")

¹³⁷ *Hansen*, 632 F.3d at 1025.

¹³⁸ *Id.*

issuing a one-paragraph opinion.¹³⁹ J.H.'s father appealed this decision to the district court, which held that J.H. qualified for special education.¹⁴⁰ The school appealed that decision, and presented evidence from the school's director of special services and teachers stating that J.H. was developing appropriate relationships with teachers and students, was one of the top students in some of his classes, and that numerous teachers had never experienced any behavior problems from J.H.¹⁴¹

Unlike *Alvin*,¹⁴² the court in *Hansen* relied on J.H.'s father's perspective of J.H.'s educational performance, who stated that J.H. had been disciplined and suspended numerous times and performed poorly in classes due to his ADHD symptoms.¹⁴³ The court agreed with J.H.'s father and essentially ignored the testimony of the school district, stating that J.H.'s behaviors resulting from his ADHD adversely affected his educational performance.¹⁴⁴ Holding that the school district did not produce evidence to show that J.H. was *not* adversely affected, the court found that J.H. was eligible for special education services under IDEA.¹⁴⁵

The court held that the presence of J.H.'s ADHD symptoms in class impacted his ability to learn, in large part due to his impulsivity and inattention.¹⁴⁶ The court determined that the best measure of educational performance was not from teachers and school staff, but instead from the perspective of the family. As result of this measure, the court concluded that J.H. needed special education services to address both behavioral and social issues and to ensure that J.H. was able to perform to his true academic level in school, not just simply passing his classes and standardized tests.¹⁴⁷

3. Comparing Holdings

While many educational scholars could undoubtedly argue against the logic of both interpretations seen in the *Alvin* and *Hansen* cases, what seems even more troubling is the extent to which the Fifth Circuit's holding contrasts with that of the Eighth Circuit.¹⁴⁸ Essentially, these

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 1029 (Gruender, concurring).

¹⁴² *Alvin*, 503 F.3d at 384

¹⁴³ *Hansen*, 632 F.3d at 1027-1028.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1028.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ These cases answered the question, "How do we determine if a student's ADHD adversely affects the student's educational performance so that he needs special

courts analyzed students in a fairly similar situation under the same eligibility requirement, but produced drastically different determinations of eligibility based on interpretation of proving that a student's disability "adversely affected" his educational performance. Are the procedural safeguards of the IDEA truly assisting parents if the outcome of their child's schooling is dependent on the circuit court in which the parent can bring their appeal?¹⁴⁹

*C. The Possible Effects of an Inappropriate Finding of Non-Eligibility:
Why Appropriate Determination Matters*

Conflicting interpretation in the courts produce an environment where students who require special education, and for whom the IDEA intended there to be specialized instruction, are left without the help they need to manage their behaviors. Students who are inappropriately found ineligible will likely continue to receive all instruction in the general education classroom, where they will likely continue to struggle and will not develop the breadth of skills necessary to control their ADHD symptoms.¹⁵⁰ When students with ADHD require special education

education services?" in two different ways. One court essentially held that a student needed special education services only when he was failing in school, while the other held that a struggle in school was likely enough to require services. *Compare Alvin*, 503 F.3d at 384 (holding that the school's testimony that a student's ability to pass classes and standardized tests demonstrated that the student did not need special education, despite numerous severe behaviors that likely required behavior modification), *with Hansen*, 632 F.3d at 1028 (holding that a parent's testimony that a student's ADHD behaviors in school demonstrated that he needed individualized instruction in social/academic skills to perform at a higher rate in school demonstrated that the student needed special education.)

¹⁴⁹ See *supra* Part III-A (explaining how a family's statistically-probable last chance to seek relief in federal courts is at the level of the court of appeals).

¹⁵⁰ Under federal law, these students will still likely receive Response to Intervention (RTI). RTI requires teachers to address the academic or behavioral needs of struggling students through a targeted system of research-based interventions. RTI may temporarily provide a "band-aid" for some student behavior, but will likely not ultimately provide the necessary amount of support to provide long-term support. RTI targets specific individual behaviors in the context of the general education experience, whereas students with ADHD who require special education services will need a wider range of instruction in behavior modification and coping skills. See generally *What is RTI? The Essential Components*, NAT'L CTR. ON RESPONSE TO INTERVENTION, <http://www.rti4success.org/webinars/video/927> (last visited Sept. 12, 2013) (providing a webinar about the process of RTI including "screening, progress monitoring, a school-wide, multi-level prevention system, and data-based decision making."); *Response to Intervention (RTI)*, NAT'L DISSEMINATION CT. FOR CHILD. WITH DISABILITIES, <http://nichcy.org/schools-administrators/rti> (last updated Aug. 2012) (stating "RTI is a process that schools can use to help children who are struggling

services to succeed in school, but are denied access to these services, there may be many short- and long-term negative consequences for those students. It is important to understand how serious these consequences may be in the life of ADHD youth to understand why some sort of reform in eligibility determination standards is so desperately needed.

1. Effects in the General Education Classroom

As a result of their intention, impulsivity, or hyperactivity, students with ADHD (who are not receiving special education services) are more likely to struggle academically than their non-disabled peers.¹⁵¹ This struggle may be due either to behaviors that interfere with academic performance¹⁵² or to an impaired working memory that prevents even motivated students from achieving in the classroom.¹⁵³ Unfortunately, this struggle may not always be recognized in the general education classroom and students may continue to suffer without any kind of assistance.

The attitude of many critics who suggest that ADHD is simply a disorder based on uncontrolled, hyperactive child behavior may also pervade the learning environment.¹⁵⁴ As a result, students with ADHD may not receive the help that they need within the general education classroom because teachers and staff may view the student's ADHD behaviors as relating to the student's personal study and work habits, and not due to any sort of inability to perform without necessary accommodations.¹⁵⁵ These educational personnel may view these students

academically or behaviorally. One of its underlying premises is the possibility that a child's struggles may be due to inadequacies in instruction or in the curriculum either in use at the moment or in the child's past.").

¹⁵¹ Janet Currie & Mark Stabile, *Child Mental Health and Human Capital Accumulation: The Case of ADHD*, NBER WORKING PAPERS 13474 at 30 (2006), available at <http://www.nber.org/papers/w13474.pdf> (stating "Children with symptoms of hyperactivity suffer large negative consequences in terms of their achievement test scores and schooling attainment."); see also Russell A. Barkley & Gwenyth Edwards, *Diagnostic Interview, Behavior Rating Scales, and Medical Examination in ATTENTION-DEFICIT HYPERACTIVITY DISORDER, A CLINICAL WORKBOOK* 346-347 (Russell A. Barkley ed., 3rd ed. 2006) (stating that these problems in school may also lead 10-35% of students with ADHD to drop out of school.).

¹⁵² See Michael P. Marshall & Brooke S.G. Molina, *Antisocial Behaviors Moderate the Deviant Peer Pathway to Substance Use in Children with ADHD*, 35 J. OF CLINICAL CHILD AND ADOLESCENT PSYCHOL. 216, 219-221 (2006).

¹⁵³ Eme, *supra* note 18, at 659.

¹⁵⁴ See, e.g., *Zachary B.*, 2009 WL 1585816 at 7.

¹⁵⁵ Students with ADHD may have an incredibly difficult time staying on-task and paying attention to details necessary to follow through with that task, especially when the task is not personally enjoyable or there is no sort of foreseen reward in the future. Unfortunately, students with ADHD may not be able to recognize this pattern of

with untreated ADHD as lazy pupils who need to simply work harder to concentrate and accomplish classroom tasks.¹⁵⁶

Unfortunately, such teacher instruction is unlikely to produce any tangible results for these students who may attempt to concentrate in class, but fall short; this may lead the students to feel particularly frustrated when they are unable to complete their work to the teacher's expectations, despite trying their best.¹⁵⁷ Alternatively, as a sort of coping mechanism, these students may try to place the blame on someone or something else for their failures. They may feel as though there is no point in trying to succeed because their performance is actually out of their hands.¹⁵⁸ Youth with untreated ADHD may not understand the connection between their ADHD symptoms, performance, and teacher criticisms, possibly leading to difficulties interacting with peers at school and low self-esteem.¹⁵⁹

2. Beyond the School Walls

While an inappropriate finding of ineligibility for special education obviously will have a strong negative impact on students while they are in school, research suggests that school performance and educational

behavior and, as a result, may not be able to regulate their behavior. Karen R. Harris, et al., *Self-Monitoring of Attention Versus Self-Monitoring of Academic Performance: Effects Amount Students with ADHD in the General Education Classroom*, 39 J. OF SPECIAL EDU. 145, 145-146 (2005) (explaining, "In classroom settings, these students often complete work at rates lower than expected, produce work of poorer quality than they are capable of, and have difficulty maintaining on-task behaviors or following through when given instructions.").

¹⁵⁶ In her article, *Delinquent or Distracted? Attention Deficit Disorder and the Construction of the Juvenile Offender*, author Rashmi Goel analogizes this phenomenon by stating "teachers often instruct ADHD students to 'try harder' and 'concentrate' without understanding how difficult it is for an ADHD student to concentrate any harder . . . Such encouragement is no different than asking a blind person to try harder when he protests he cannot read a printed page." Goel, *supra* note 11 at 21.

¹⁵⁷ See generally Bluma Litner, *Teens with ADHD: The Challenge of High School*, 32 CHILD AND YOUTH CARE FORUM 137, 148-150 (2003) (describing the specific challenges that students with ADHD may face when transitioning from elementary school into high school and how these changes may overwhelm the student, is who is likely already frustrated by their ADHD symptoms).

¹⁵⁸ Betsy Hoza, *Attention-Deficit/Hyperactivity Disorder and Control Boys' Responses to Social Success and Failure*, 71 CHILD DEV'T 432, 443 (2000).

¹⁵⁹ See Litner *supra* note 158, at 139 ("There is a socially low tolerance and acceptance of individuals with ADHD because of their difficulties with social interaction and interpersonal relationships. Thus, they often experience loneliness and peer rejection and develop negative reputations, furthering their social isolation.").

opportunity may actually be an indicator of lifelong success.¹⁶⁰ This means that it is imperative that students with ADHD, who have the potential to succeed if they receive the appropriate special education services in school, are given the necessary opportunities. Non-uniform interpretation of eligibility standards should not be the deciding factor in determining if a student will have more opportunities to succeed or fail in their future. According to research focusing on the extracurricular actions and behaviors of students with ADHD, it is apparent that the potential for negative life impact beyond the school setting due to symptoms of ADHD is staggering.¹⁶¹

One example of this, as was the case with the student in *Alvin*, youth with ADHD who have not learned the appropriate behavior modification may be more likely to engage in criminal behavior.¹⁶² Students with ADHD struggle with impulsivity and impaired behavioral inhibition, which may lead these youth to be involved in behavior that could be destructive to both themselves and others without thinking of the consequences of their actions.¹⁶³ Furthermore, a student's low self-esteem developed through perceived failure may also lead some students to turn to delinquent behavior as a sort of coping mechanism.¹⁶⁴ These delinquent actions may result in the possibility of legal consequences that may be lasting. Although ADHD may be asserted as a defense in criminal

¹⁶⁰ See generally NAT'L SECONDARY TRANSITION TECHNICAL ASSISTANCE CTR., PREDICTORS OF IN-SCHOOL AND POST-SCHOOL SUCCESS (August 16, 2011), http://www.nsttac.org/sites/default/files/Predictors_of_In-school_and_post-school_success_8-16-11.pdf (presenting a chart-based result of a literature review where the organization identified 16 evidence-based in-school predictors of post-school success in areas such as employment, further education, and independent living for individuals with and without disabilities).

¹⁶¹ *Alvin*, 503 F.3d at 380 (where, after not receiving any sort of help, A.D.'s behavior escalated dramatically from being disciplined in class to abusing alcohol and committing robbery); see ARTHUR L. ROBIN, ADHD IN ADOLESCENTS: DIAGNOSIS AND TREATMENT 151 (1998) (describing a study where, when compared to their non-disabled peers, adolescent males with ADHD displayed lower self-esteem and then later displayed lower educational developments and occupational status in adulthood).

¹⁶² See Laetita L. Thompson et al., *Contribution of ADHD Symptoms to Substance Problems and Delinquency in Conduct-Disordered Adolescents*, 24 J. ABNORMAL CHILD PSYCHOL. 325, 325-328 (1996); see generally Goel, *supra* note 11 at 12-24 (describing the overlap between ADHD and delinquent behaviors in youth).

¹⁶³ See Eme, *supra* note 18 at 653 (suggesting that this impulsivity and related behaviors are a primary reason why youth with ADHD may end up in the juvenile justice system); see generally Travis C. Pratt et al., *The Relationship of Attention Deficit Hyperactivity Disorder to Crime and Delinquency: A Meta-Analysis*, 4 INT'L J. POLICE SCI. & MGMT. 344, 345 (2002).

¹⁶⁴ See Goel, *supra* note 11, at 20, 21 (explaining the connection between for youth with ADHD between self-esteem and delinquent behavior).

proceedings,¹⁶⁵ courts may be likely to completely dismiss such a defense due to a non-receptive attitude toward the defense in general¹⁶⁶ and youth may end up facing serious penalties. The number of youth with ADHD in juvenile detention centers is staggering; some scholars estimate that roughly fifty percent of youth in juvenile detention centers have ADHD,¹⁶⁷ while others cite a more conservative estimate of 25%.¹⁶⁸

Youth with ADHD may also be more likely than peers without ADHD to develop substance abuse problems in their lives in an attempt to cope with their behaviors and low self-esteem.¹⁶⁹ An estimated 40-75% of adolescents with substance abuse disorders suffer from ADHD.¹⁷⁰ This substance use, of course, may further lead to legal consequences in addition to social, mental, and physical effects.¹⁷¹

If appropriately found eligible, youth with ADHD may receive various non-medical accommodations, modifications, and specialized educational lessons that focus on behavior modification and coping skills in school through their IEPs.¹⁷² The skills that students learn through these

¹⁶⁵ See Jeffery Wishik, *Attention Deficit Hyperactivity Disorder and Criminal Responsibility A Guide for Attorneys*, 43 MED. TRIAL TEACH. W. 83, 85 (1996) (stating that criminal defendants may try to use ADHD as a defense either by stating that it is a mitigating factor that shows mental non-responsibility or that the ADHD demonstrates that the offender has a diminished capacity); see also Bertha N. Garza, *Attention Deficit Hyperactivity Disorder (ADHD): A Childhood Diagnosis or a Criminal's Defense?*, 4 SCHOLAR 81, 99-107 (2001).

¹⁶⁶ *Id.*

¹⁶⁷ Teplin, *supra* note 19, at 1143.

¹⁶⁸ See, e.g. Eme, *supra* note 18, at 651.

¹⁶⁹ See Eme, *supra* note 18, at 659-660; see also Brooke S.G. Molina & William E. Pelham, *Childhood Predictors of Adolescent Substance Use in a Longitudinal Study of Children with ADHD*, 112 J. ABNORMAL PSYCHOL. 497, 504 (2003).

¹⁷⁰ Timothy E. Wilens, *The Need to Study Substance Use Disorders*, 15 J. CHILD ADOLESC. PSYCHOPHARMACOL. 720, 720-722 (2005).

¹⁷¹ See generally *Consequences of Youth Substance Abuse*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, www.ojjdp.gov/PUBS/drugid/ration-03.htm (last visited September 13, 2013).

¹⁷² See generally Karla Anhalt, Cheryl B. McNeil, & Alisa B. Bahl, *The ADHD Classroom Kit: A Whole-Classroom Approach for Managing Disruptive Behavior*, 35 PSYCHOL. IN THE SCHS. 67, 68-71 (1998) (providing examples of behavioral modifications in the classroom for students with ADHD such as positive feedback and positive consequences for appropriate behavior, negative consequences and warnings for inappropriate behaviors, and the use of peer leaders to guide the class in following the rules). While modifications such as these may be able to take place in the general education with some success, many students with ADHD will require a far more-individualized educational program and more one-on-one attention to be success with behavioral modification than a general education will be able to provide simply due to limited resources.

special education services are crucial, as they allow youth with ADHD to slowly learn strategies and techniques to help manage their ADHD symptoms.¹⁷³ As a result of this management, students may find that they have an increase of self-esteem and that they are better able to manage impulses;¹⁷⁴ arguably, both of these beneficial factors may lead to a reduced risk for ADHD-related consequences and, generally, a more positive future for the youth with ADHD. *This* is surely the impact that the IDEA intended for students with ADHD.

The IDEA's intention to serve, not exclude, students who need special education services is further evident under the express IDEA protections for students with disabilities. A school cannot expel children with disabilities until they have first conducted a review to determine if the student's inappropriate behavior was a manifestation of the student's disability.¹⁷⁵ If the school determines that the behavior was not a result of the disability, then the school may discipline the student as it would discipline students without disabilities;¹⁷⁶ however, if the school determines that the behavior *was* a manifestation of the disability, then the school will not expel the student, but will rather revisit the student's IEP

¹⁷³ *See id.* at 77.

¹⁷⁴ *See Cooper, supra* note 94, at 467-469 (providing examples of research studies demonstrating how behavior management, restructuring, and high levels of academic support allow students to decrease the symptoms of their ADHD and find greater success in school).

¹⁷⁵ Relevant federal regulations state:

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

20 U.S.C.A. § 1415(k)(1)(C)(i-ii) (2005).

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities . . . although it may be provided in an interim alternative educational setting.

20 U.S.C.A. § 1415(k)(1)(C) (2005).

¹⁷⁶ *Id.*

and refer to the IDEA regulations regarding student punishment.¹⁷⁷ If the court inappropriately finds that a student with ADHD is not eligible for special education services under IDEA, and does not therefore receive an IEP, then that student is not protected by IDEA regulations and may be expelled despite the likely strong connection between his disability and his behavior.¹⁷⁸ This too can lead to numerous harmful effects in the life of the youth.¹⁷⁹ The stakes are simply too high for the court to risk providing a wrongful interpretation of the IDEA eligibility standards and thus, a possible inappropriate finding of ineligibility.

D. Alternatives to Special Education

Courts may argue that a special education classroom is not the only environment in which students with ADHD may receive the services they need to manage their impairments and learn socially-appropriate behaviors

¹⁷⁷ See 20 U.S.C.A. § 1415(k)(1)(F) (2005), stating:

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--

- (i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement . . .
- (ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
- (iii) . . . return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

¹⁷⁸ See Candace Cortiella, *IDEA 2004 Close Up: Disciplining Students with Disabilities*, GREAT SCHOOLS, <http://www.greatschools.org/special-education/LD-ADHD/996-idea-2004-close-up-disciplining-students-with-disabilities.gs> (last visited Mar. 8, 2015).

¹⁷⁹ See Committee on School Health, American Academy of Pediatrics, *Policy Statement: Out-of-School Suspension and Expulsion*, 112 PEDIATRICS 1206, 1207 (2003) stating: Despite high rates of depression and numerous life stresses that are associated with school-based problem behaviors, students are not routinely referred to a medical or mental health provider on expulsion . . . Without the services of trained professionals (such as pediatricians, mental health professionals, and school counselors) and without a parent at home during the day, students with . . . expulsions are far more likely to commit crimes. Centers for Diseases Control and Prevention study found that when youth are not in school, they are more likely to become involved in a physical fight and to carry a weapon. Out-of-school adolescents are also more likely to smoke; use alcohol, marijuana, and cocaine; and engage in sexual intercourse. Suicidal ideation and behavior may be expected to occur more often at these times of isolation among susceptible youth. The lack of professional assistance at the time of exclusion from school, a time when a student most needs it, increases the risk of permanent school drop-out.

for coping. However, this ignores the fact that special education may be the only chance that *some* students with ADHD, especially those from low-income families, have to receive these crucial services.¹⁸⁰ The IDEA was constructed with the intention of ensuring that students receive a *free* appropriate public education.¹⁸¹ Without the opportunity to receive this education due to the interpretation of the court, families of children with ADHD may be required to pay a large amount of money if they wish to seek services for their children outside of the school walls.¹⁸² Unfortunately, this may make it unlikely that students from low-income families will be able to afford private treatment for their disability.¹⁸³ Again, this is a serious issue, as the consequences for youth that do not have the opportunity to learn the skills to manage their ADHD is too staggering to ignore.¹⁸⁴

Students with a medical ADHD diagnosis who do not qualify for special education services under the IDEA may qualify under Section 504 of the Rehabilitation Act, as long as those students can demonstrate that

¹⁸⁰ The most likely avenue for students with ADHD to receive the necessary services outside of school is likely through mental health counseling that can identify, target, and redirect behaviors. For individuals who are from low income families, however, there is reduced access to mental health treatment, putting youth who are inappropriately denied special education services at an even greater disadvantage. See Shannon Stagman & Janice L. Cooper, *Children's Mental Health: What Every Policymaker Should Know*, NAT'L CTR. FOR CHILD. IN POVERTY (April 2010), http://www.nccp.org/publications/pub_929.html (stating "Eighty-five percent of children and youth in need of mental health services in the child welfare system do not receive them," citing Eric M. Flake et al., *The Psychosocial Effects of Deployment on Military Children*, 30 J. OF DEVELOPMENTAL AND BEHAV. PEDIATRICS 271 (2009)).

¹⁸¹ 20 U.S.C.A. § 1412 (a)(1)(A) (2005).

¹⁸² Andrine R. Swensen, et al., *Attention-Deficit/Hyperactivity Disorder: Increased Costs for Patients and Their Families*. 42 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 1415, 1415-1423 (2003) (stating that "ADHD creates a significant financial burden regarding the cost of medical care and work loss for patients and family members. The annual average direct cost for each per ADHD patient was \$1,574, compared to \$541 among matched controls"); Barzman, *supra* note 76, at 29 ("Healthcare costs are generally high for ADHD sufferers.").

¹⁸³ While families living below the poverty line may be able to secure private or public aid that will pay for some medical costs, treatment outside of the school still requires guardians to leave work for the visits, thereby still leading to a financial loss for the family. There may also be families who do not qualify for public medical assistance, but still cannot afford the out-of-pocket costs and potential loss of pay associated with extracurricular treatment. See generally Thomas B. Edsall, *Who is Poor?*, N.Y. TIMES (March 13, 2013) available at http://opinionator.blogs.nytimes.com/2013/03/13/who-is-poor/?_r=0 (discussing the different standards of defining poverty and seeking public aid).

¹⁸⁴ See *supra* Part IV-C-ii.

their ADHD substantially limits at least one life activity¹⁸⁵ and interferes with a major life function.¹⁸⁶ While Section 504 does allow students to receive some accommodations and modifications within their school, it does not provide for individualized instruction and likely may not provide students with ADHD the depth and breadth of services required to bring about the levels of behavior modification necessary.¹⁸⁷ Many students who need intensive special education services will simply not receive the help they need through a Rehabilitation 504 plan.

V. CONCLUSION

A system of uniform interpretation would obviously not produce an environment where all students with ADHD were found eligible for special education services. Instead, a system of non-uniform interpretation encourages an environment where an increasing number of families may come to the conclusion that the courts inappropriately found their children to be ineligible for special education services due to a possibly ‘faulty’ interpretation of the IDEA eligibility regulations.

An appropriate school environment for a student with ADHD is crucial to ensure a student’s lifelong independence and success. This idea makes special education eligibility determination a high-stakes process, and a parent should be able to feel confident that the court created their determination about the student’s appropriate school environment based on a uniform interpretation of the law. Simply put, uniformity of eligibility interpretation in the courts is necessary so that all students with ADHD who have similar needs are able to have the same appropriate access to special education services regardless of their state of residency. A student’s physical location should not be the final determinant factor in the high-stakes eligibility determination.

When physicians struggled with appropriate medical diagnosis of ADHD based on the then-current method of diagnosis, the American

¹⁸⁵ 29 U.S.C.A. § 794(a) (2005).

¹⁸⁶ 42 U.S.C.A. § 12102(2)(A) (2005) (providing examples of major life functions including “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working”).

¹⁸⁷ Rehabilitation Act Section 504 plan provides very limited modifications and accommodations, which may include changes such as mobility assistance, extra time between classes, multiple sets of test books, or additional time to complete assignments. Unlike IDEA, however, Section 504 affords few rights to families of students with disabilities. 20 U.S.C.A. § 1415 (I) (2005); *see* D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist., 764 F.Supp.2d 1132, 1139-42 (C.D. Cal. 2010).

Academy of Pediatrics (AAP) created a series of clear, articulate guidelines to aid in creating a more reliable, accurate system for diagnosis.¹⁸⁸ I recommend that Congress follow this lead and release clearer, specific eligibility guidelines for ADHD (instead of grouping the disorder in the disability category of OHI).¹⁸⁹ In order to spark uniform interpretation, Congress should focus on the breadth of legal, medical, and educational research suggesting methods for IDEA eligibility standard reform. These methods should be utilized to amend the IDEA in a way that clarifies many of the very-open-to-interpretation terminology such as “by reason of” and “adversely affects.”¹⁹⁰

When Congress reauthorized the IDEA in 2004, they stated “improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.”¹⁹¹ To ensure that this end is met and that the IDEA provides the full benefits that Congress intended, the eligibility standards for special education need to be restructured. This change in standards would focus on clear guidance for educators and the courts, so that a possibility of non-uniform interpretation would be almost vanquished, even at the beginning stages of eligibility determination, and all students with ADHD would receive the services they need to be successful in school and beyond.

¹⁸⁸ See Allen, *supra* note 66.

¹⁸⁹ While, realistically, all special education eligibility criteria should likely be clarified, ADHD is a necessary starting point due to the extreme consequences that may result from students not receiving ADHD services when they actually are required. See *supra* Part IV-C-ii.

¹⁹⁰ See *supra* Part II-B; Part III-B.

¹⁹¹ 20 U.S.C.A § 1400(c)(1) (2005).