School districts are increasingly relying upon closing school buildings as a result of the current national education-funding crisis. With a significant portion of students in the American public education system falling under the protection of the Individuals with Disabilities Education Act (IDEA), districts must give proper attention to the IDEA’s strict requirements when closing school buildings. Yet, parents currently have no adequate remedy to ensure IDEA enforcement during the short timeframe before a school closes. Parents face the insurmountable obstacle of having to first exhaust the IDEA administrative remedies prior to bringing a court action to temporarily delay a district from closing a school. Without first engaging the administrative remedies process, courts summarily dismiss parents’ IDEA claims for lack of jurisdiction based on a want of administrative exhaustion.

By finding that the justifications for mandatory administrative exhaustion are lacking in the context of an imminent school closing and examining other situations in which courts waive the exhaustion requirement, it becomes evident that the time-sensitive nature of a looming school closing makes compulsory administrative exhaustion inapplicable. Congress is expected to reauthorize the IDEA, which presents an ideal opportunity for it to remedy the current administrative exhaustion barrier. This can be achieved by providing courts with the jurisdiction to hear disputes from either party after an IDEA administrative hearing and by waiving mandatory administrative exhaustion for civil cases seeking a preliminary injunction to temporarily prevent an imminent school closing due to an alleged IDEA violation.

These changes will allow parents to timely argue the merits of their IDEA-related preliminary injunction claim, rather than spending the limited time before a school closes first litigating
whether a court has jurisdiction to enforce a hearing officer’s order or whether administrative exhaustion is appropriate. The time is now to take these steps to ensure that every student covered by the IDEA gets the required protection if—and, for many students in the United States, when—their school is slated to close.

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INTRODUCTION

Chicago Public Schools, the nation’s third largest school district,1 made national headlines when it announced that it was closing forty-nine school buildings prior to the start of the 2013–2014 academic year.2 Resulting in a $1 billion budget deficit,3 the district faces a period of decreasing revenues, declining student enrollment, and rising operating costs.4 Parents of students with disabilities filed a lawsuit against the district alleging that the expedited timeline to close the schools did not permit a proper evaluation of the students’ individualized education plans or the district to properly accommodate the students’ needs in their new school building.5 The parents sought to temporarily enjoin the district from closing the schools until the district put adequate attention into the students’ educational accommodations as required under the Individuals with Disabilities Education Act (IDEA).6

Over a mere three-month period, the parents and the district engaged in a rapid, and very public, hearing in the Northern District of Illinois where the court ultimately rejected the motion for a

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3. See Yaccino, supra note 1.
5. Complaint ¶ 1, Swan, 2013 WL 4401439 (No. 13-cv-03623) (stating that the parents claimed that the district’s school-closing timeline would significantly disrupt the more than 5,000 students in the district’s special education program).
6. Id. at 16.
preliminary injunction.\textsuperscript{7} Despite the arguments about the underlying merits of the parents’ claim, Chicago Public Schools (CPS) skillfully prevailed in part because of the parents’ procedural overstep.\textsuperscript{8} The parents failed to first exhaust the administrative remedies under the IDEA prior to bringing the civil action, resulting in the court’s unequivocal rejection of their claim.\textsuperscript{9}

The financial crisis facing CPS is not unique among public schools across the United States.\textsuperscript{10} The cause of this financial deterioration is complex, yet has undisputable causal factors ranging from the ways in which districts are funded to districts facing declining student enrollment.\textsuperscript{11} Regardless of the roots of the financial turmoil, many districts across the nation are turning to closing school buildings as a result of these economic strains in order to maintain a balanced budget or to alleviate budget deficits.\textsuperscript{12} The challenge that this situation creates is that the requirements of the IDEA do not fade due to budget woes.\textsuperscript{13} With a significant portion of students in the American public education system falling under the protection of the IDEA,\textsuperscript{14} districts must give proper attention to the IDEA’s requirements when closing school buildings.\textsuperscript{15} The combination of the widespread school closings and strict federal protections for students with disabilities brings to light a seemingly minor, yet inexplicitly significant, requirement: Parents currently must take the time to exhaust the IDEA’s administrative remedies prior to bringing a court action to temporarily stop a district from closing a school.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{7} Swan, 2013 WL 4401439, at *29.
\item \textsuperscript{8} See id. at *27-28. The court noted, however, that the parents were unlikely to prevail on the underlying merits of the claim. See infra note 280 and accompanying text.
\item \textsuperscript{9} See infra note 280 and accompanying text; Swan, 2013 WL 4401439, at *19.
\item \textsuperscript{10} See infra note 56 (providing examples of education-funding crises throughout the United States).
\item \textsuperscript{11} See infra Section I.A.
\item \textsuperscript{12} See infra Section I.A.
\item \textsuperscript{13} See Swan, 2013 WL 4401439, at *1-2, *28 (requiring the district to comply with the IDEA requirements despite a $1 billion deficit).
\item \textsuperscript{14} See infra Section I.B.
\item \textsuperscript{15} See Swan, 2013 WL 4401439, at *1, *28 (requiring the district to comply with the IDEA requirements despite closing forty-nine schools within a single academic year).
\item \textsuperscript{16} See id. at *19 (holding that the plaintiffs cannot prevail on their claim because they did not first exhaust the administrative remedies).
\end{itemize}
This Note discusses how parents seeking to temporarily prevent a school from closing due to an alleged IDEA violation face an insurmountable obstacle by being required to first exhaust the administrative remedies. The flaw in this approach is that it is based on the presupposition that such an administrative remedy exists and that a district will adequately comply with an administrative hearing officer’s order. The hearing officer does not, however, have the power to grant a preliminary injunction to prevent a school from closing. Moreover, a parent is prevented from bringing a civil action to ensure district compliance with an administrative order due to the court’s lack of jurisdiction as dictated by the IDEA. While much has been written on the IDEA exhaustion requirement in general, there is currently a void in legal scholarship addressing the exhaustion requirement as it relates specifically to imminent school closings and the IDEA. This Note does not argue that parents assumedly have a valid claim for a preliminary injunction; rather, it argues that the time-sensitive nature of a looming school closing should allow a parent to forego administrative exhaustion and bring an action for a preliminary injunction directly to the courts to adjudicate the underlying merits of the claim.

Part I examines the status of education funding in the United States as the driving force behind districts closing schools and provides an overview of the IDEA and its requirements relating to

18. See infra Part III.
19. See infra Subsection I.B.1 (providing an overview of the powers of an administrative hearing officer).
20. See infra Section I.B (discussing how courts strictly read the IDEA’s jurisdictional-giving language).
21. See, e.g., Susan G. Clark, Administrative Remedy Under IDEA: Must It Be Exhausting?, 163 EDUC. L. REP. 1 (2002) (examining the established conditions for requiring the exhaustion of administrative remedies and instances in which the requirement is waived); Lewis M. Wasserman, Delineating Administrative Exhaustion Requirements and Establishing Federal Courts’ Jurisdiction Under the Individuals with Disabilities Education Act: Lessons from the Case Law and Proposals for Congressional Action, 29 J. NAT’L ASS’N ADMIN. L. JUDICIARY 349 (2009) (examining the implications of failing to exhaust administrative remedies, when exhaustion is required and when it is waived, and the diverging approaches to applying the IDEA’s jurisdictional-giving language); Peter J. Maher, Note, Caution on Exhaustion: The Courts’ Misinterpretation of the IDEA’s Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA, 44 CONN. L. REV. 259 (2011) (providing an overview of the IDEA’s exhaustion requirement and its application to Section 504 of the Rehabilitation Act and the Americans with Disabilities Act).
administrative exhaustion. Part II discusses how courts approach the
exhaustion requirement, both in the context of school closings and in
general. Part III analyzes the challenges that imposing the
administrative-exhaustion requirement presents to families in the
context of school closings and proposes two changes to the IDEA
that attempt to resolve these complications.

I. COMBINING CONSTRAINTS ON DISTRICTS: FINANCES AND THE
IDEA

Public school districts across the United States face a myriad of
challenges in providing adequate educational services. Two of
these challenges are school district funding and the statutory
requirements of the IDEA. The educational funding system based on
state tax revenue places district finances at the mercy of the overall
health of the economy. Despite many districts making drastic
budget cuts in the face of limited financial resources, they still must
comply with the IDEA mandates. The IDEA provides a
comprehensive framework for districts to follow to ensure that
adequate educational services are provided to qualifying students and
for an administrative hearing process for addressing disputes
regarding IDEA compliance. While the current underfunded K-12
education system can lead districts to close one or more schools, the
strict requirements of the IDEA leave parents with limited options to

22. See Layshock ex rel. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 222 (3d Cir. 2011) (Jordan, J., concurring) (“I hope and believe that we are all mindful of the challenges school administrators face in providing a safe environment, conducive to learning and civic development, for children and young adults. Those challenges have never been greater than they are today.”); Sypniewski v. Warren Hills Reg’l Bd. of Educ., 307 F.3d 243, 268 (3d Cir. 2002) (“We recognize the challenges faced by school officials when attempting to adopt disciplinary policies directed at racial harassment.”); Newsome v. Batavia Local Sch. Dist., 842 F.2d 920, 924-25 (6th Cir. 1988) (“Today’s public schools face severe challenges in maintaining the order and discipline necessary for the impartation of knowledge.”); AFT Mich. v. State, 825 N.W.2d 595, 609 (Mich. Ct. App. 2012) (“We are not unmindful of the budgetary challenges facing local school districts . . . .”).

23. See infra Section I.A (discussing how district funding is largely tied to state tax revenue).

24. See infra Section I.B (providing an overview of the strict requirements of the IDEA).

25. See infra Section I.B.
ensure that the district complies with a student’s educational rights during the school-closing process.26

A. Insufficient Educational Funding and Its Dire Consequences for School Districts

Public schools are the anchors of their respective communities.27 But, as a result of the funding crisis facing many school districts across the nation,28 districts29 are increasingly forced to make painful budget cuts year after year.30 School boards have little choice but to take drastic measures—from laying off teachers, administrators, and staff to closing entire school buildings31—to ensure that the district’s doors remain open. The federal government has stepped in on multiple occasions to provide districts with billions of dollars in emergency funding to ward off looming budget cuts.32

26. See infra Part II (discussing the limited avenues through which a parent can seek to enforce the IDEA protections).


28. See Kristi L. Bowman, Before School Districts Go Broke: A Proposal for Federal Reform, 79 U. Cin. L. Rev. 895, 895 (2011) (“As school districts across the country continue to face falling revenues, they are scrambling to cut their budgets and adjust to leaner times. But districts have never had to make such drastic adjustments—and some of them are nearing a point of fiscal crisis.”).

29. Throughout this Note, the term “district” is used to indicate an entire K-12 public school district, whereas the term “school” represents a single school building within a district.

30. See Bowman, supra note 28, at 898-99 (discussing the various ways in which districts cut expenses from their budgets).

31. See id.

Those emergency funds have long since been depleted, and districts are largely left to independently brave the financial storm.

While there is an array of causes that contributed to and continue to sustain the funding crisis in districts throughout the United States, leaders in educational academia generally point toward a certain direction when determining the overarching cause—the state and local tax system. School districts, on average among all fifty states, rely on state and local government for 87.5% of their overall funding, which amounts to roughly $528.8 billion nationally from state and local taxes. While there is not a uniform national formula for funding schools, there is a general structure: The state portion of funding, which is estimated to be 44.1% of a district’s total revenue, is primarily drawn from income and sales taxes, and the local portion of funding, which is estimated to be 43.4% of a district’s total revenue, is primarily drawn from property taxes, from both residential and commercial properties. With public education funding being almost exclusively at the mercy of income, sales, and property taxes, districts face severe budget restrictions when the overall economy plummets as the nation faced in the recent Great Recession.

Despite the official end of the recession, the national and state economies have hardly recovered—slow economic growth and high

33. See Bowman, supra note 28, at 895 (stating in a 2011 article that the additional federal education funds are soon to run out).
34. See id. at 899 (“Congress intended the stimulus money to stretch over two years, but most states used the vast majority of those funds during Fiscal Year (FY) 2010.”).
35. See, e.g., id. at 903; Susan Pace Hamill, The Vast Injustice Perpetuated by State and Local Tax Policy, 37 HOFSTRA L. REV. 117, 120, 146 (2008).
37. Id. at 8.
39. CORNMAN, supra note 36, at 8.
40. See Federal, State, and Local K-12 School Finance Overview, supra note 38.
41. See Bowman, supra note 28, at 908.
unemployment still taint the American economy.\textsuperscript{43} Job loss and continued unemployment contribute to decreased and stagnated state income tax revenue.\textsuperscript{44} The combination of decreased home values and the prevalence of foreclosures lead to low property tax revenue,\textsuperscript{45} and low consumer spending results in low sales tax revenue.\textsuperscript{46} This combination led to the perfect storm for the fiscal crisis currently facing many districts across the nation.\textsuperscript{47} While some state budgets appear to be increasing revenues from their recession-era levels,\textsuperscript{48} this fact does not inevitably equate to an improved outlook for districts.\textsuperscript{49} Even while the American economy starts to turn around, it may be more than a decade before tax revenues return to their pre-


\textsuperscript{44} See Bowman, supra note 28, at 903 (“These reductions have many causes, but the most immediate causes are that states’ income tax revenue has been hit hard by job losses; local and state property tax revenue has fallen sharply because home values have been dropping as the real estate bubble burst and tax delinquencies and home foreclosures rose; and state sales tax revenues have decreased because of substantial drops in consumer spending.”).

\textsuperscript{45} See id.

\textsuperscript{46} See id.

\textsuperscript{47} See id. at 908 (stating that “[t]he general economic crisis clearly is the dominant, immediate trigger of most school districts’ current fiscal crises”).

\textsuperscript{48} There are indications that state tax revenues are starting to turn a corner in some states. In Michigan, for example, lawmakers are grappling with how to appropriate a $1.3 billion surplus; while some advocate using the funds to increase K-12 school district funding, others argue that the increase may not be sustainable long term. See Niraj Chokshi, \textit{Michigan Session Preview: What to Do with $1.3 Billion Surplus?}, \textit{WASH. POST} (Jan. 14, 2014), http://www.washingtonpost.com/blogs/govbeat/wp/2014/01/14/michigan-session-preview-what-to-do-with-a-1-3-billion-surplus/; Zoe Clark & Rick Pluta, \textit{Michigan’s Budget Surplus: More Money, More Problems? Sure, but It Beats the Alternative}, \textit{MICH. RADIO} (Jan. 3, 2014, 1:35 PM), http://michiganradio.org/post/michigan-s-budget-surplus-more-money-more-problems-sure-it-beats-alternative. Michigan Governor Rick Snyder announced on February 3, 2014 that his proposed 2014–2015 budget will increase K-12 school district funding by $322 million, though $270 million of that amount is designated to offset the increase in school retirement costs. See Paul Egan, \textit{Snyder to Propose $322-Million Funding Boost for K-12 Education}, \textit{DETROIT FREE PRESS} (Feb. 3, 2014, 10:16 AM), http://www.freep.com/article/20140203/NEWS06/302030053/Snyder-education-funding-increase-Michigan.

recession levels.\textsuperscript{50} School districts continue, and will likely continue in the foreseeable future, to face a grim financial outlook.\textsuperscript{51}

The restricting budgets facing districts across the nation are leading many schools to close their doors.\textsuperscript{52} Michigan’s educational landscape, for example, is in a bleak position with a historic fifty-six school districts with budget deficits.\textsuperscript{53} In Illinois, forty-five districts are classified as “highest risk” by its State Board of Education because of their severe financial status.\textsuperscript{54} These are just two examples of the many districts facing financial turmoil across the nation.\textsuperscript{55} Many districts are resorting to closing school buildings to help alleviate the financial strains—closing a school results in cost savings by eliminating redundant administrative, custodial, and food-service staff, and reducing costs associated with utilities,

\begin{itemize}
  \item[50.] Bowman, supra note 28, at 900 (stating that “‘it could take 15 years or more for tax revenue to rebound to pre-recession levels’” (quoting Nick Bunkley, Debt Rising, A City Seeks Donations in Michigan, N.Y. Times, Nov. 20, 2010, at A10)).
  \item[51.] See id.
  \item[52.] See supra notes 30-34; see also Edward McMilin, Nat’l Clearinghouse for Educ. Facilities, Closing a School Building: A Systematic Approach 1-2 (2010), available at http://www.ncef.org/pubs/closing.pdf (“[S]chool districts around the nation have announced major school closings. . . . Decreased revenues from taxes, fees, and reduced federal funding, less return on investments, and increased cost to continue services, have resulted in significant budget deficits. As a result, government units at all levels are being forced to reduce funding for education.”).
  \item[53.] See Brian Smith, See the 56 Michigan School Districts with Budget Deficits, MLive (Sept. 13, 2013, 9:19 AM), http://www.mlive.com/education/index.ssf/2013/09/see_the_56_school_districts_wi.html.
  \item[56.] See Bowman, supra note 28, at 898; see also Kayla Webley, Are School Closings Discriminatory?, TIME (May 23, 2013), http://nation.time.com/2013/05/23/are-school-closings-discriminatory (stating that New York City is slated to close seventeen of its schools, Philadelphia district officials announced that twenty-three schools are closings, and Washington D.C. is closing fifteen schools).  
\end{itemize}
Requiring Administrative Exhaustion

A total of 1,929 schools closed in the United States during the 2010–2011 school year, up from 1,515 school closings in 2008–2009. While scholars continue to debate the influence that educational funding has on student achievement, the fact remains that schools cannot keep the proverbial schoolhouse gates open without adequate funding. Always looming in the background for districts is the fact that shrinking budgets result in fewer available financial resources to ensure compliance with the demanding IDEA.

B. The IDEA’s Strict Requirements

The IDEA is the cornerstone to ensuring that students with disabilities receive the necessary services to allow them to benefit from educational instruction provided by districts. In the latest national data collected by the National Center for Education Statistics, 13.1% of students in the United States school system,

57. See MCMILIN, supra note 52, at 3 (“Most of the savings result from non-classroom personnel costs which would no longer be required. Generally these positions include principals, assistant principals, clerical staff, food service, and custodial personnel. Teaching staff is usually not included because the impact district-wide is based on collective bargaining agreements, retirements, and personnel who annually leave the district. In addition to any personnel savings, budget reductions will result from reduced utility cost (60% factor), infrastructure maintenance cost (90% factor), budgeted capital maintenance projects, reduced rubbish and shredding costs, and all supplies.”).

58. THOMAS D. SNYDER & SALLY A. DILLOW, NAT’L CTR. FOR EDUC. STATISTICS, NCES 2014-015, DIGEST OF EDUCATION STATISTICS 2012, at 176 (2013), available at http://nces.ed.gov/pubs2014/2014015.pdf. Out of the 1,929 schools that closed during the 2010–2011 school year, 1,486 were traditional schools, 72 were special education schools, 7 were vocational schools, and 364 were alternative schools. Id.


which equates to roughly 6,480,540 students, fall under the protection of the IDEA. Students who are eligible to receive the benefits of the IDEA are entitled to a free and appropriate public education, which the Supreme Court defines as consisting of specially created educational instruction to meet the unique needs of students with disabilities. The provision of a free and appropriate public education is generally met when individualized instruction is provided along with supportive services, which can include, for example, extended time on tests or specialized equipment, such as a therapeutic chair, that allow a student to benefit from instruction. In order for students to receive these specialized services, the district, along with the parents, is charged with creating an Individualized Education Plan (IEP) for the child. The IEP establishes the student’s educational goals, the necessary special education services that the child will receive, and the ways in which the goals and services will be evaluated. There are a number of procedural safeguards that the IDEA provides parents to help ensure that districts continuously comply with both the IEP and its obligation to provide the eligible student with a free and appropriate public education.


65. See Rowley, 458 U.S. at 188-89 (defining a free and appropriate public education as “educational instruction specially designed to meet the unique needs of the handicapped child”).

66. See id. at 189 (“[I]f personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a ‘free appropriate public education’ as defined by the [IDEA].”).

67. See Garda, supra note 64, at 444-45.

68. See id. at 445 (citing 20 U.S.C. § 1414(d); 34 C.F.R. § 300.347).

69. See 20 U.S.C. § 1415(b)(1) (enumerating the procedural safeguards to include an opportunity for the parents “to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child”).
1. The Administrative Hearing Process

The essential device for resolving IDEA disputes between districts and parents is an impartial administrative hearing. These hearing proceedings, which are conducted by a hearing officer, can come in one of two forms depending on the selection of the individual state. A state can select either a one-tiered system in which a single hearing takes place to adjudicate the dispute, or a two-tiered system that includes the initial hearing, but that also provides an additional level of review. The scope of the hearing officer’s authority is generally limited to determining the sufficiency of a student’s disability classification and the implementation of the IDEA, and to ordering districts to take corrective action to come into compliance with the Act. If an administrative hearing is successful, then it promotes judicial efficiency by preventing unnecessary judicial intervention. The hearing avoids immediate court action based on the speculative premise that district officials will correct any problems identified through the hearing.

The hearing process generally mirrors the procedural and adversarial nature of an action in civil court, resulting in an elongated trial-like process. The IDEA enumerates strict procedural requirements, including the mandatory content within a parent’s initial complaint and within the district’s response to the parent.
standards through which the complaint can be amended, and an initial determination by the hearing officer of whether these procedural requirements have been met. After a mandatory initial meeting between the parents and the district, the administrative hearing itself will commence, during which both parties have the right to, among other things, be represented by counsel, present evidence, compel the attendance of witnesses, and cross-examine witnesses. These intricate requirements can, however, “be time-consuming and elaborate,” resulting in parties attempting to sidestep the requirements by taking action in civil court. Nevertheless, before parents or district officials can bring a dispute to civil court for resolution, compliance with these administrative procedures is largely required under the IDEA; a court is likely to dismiss a related civil claim if the administrative remedy process is not first exhausted.

2. Seeking a Review of the Hearing Officer’s Decision

Once an order is issued by an administrative hearing officer, there are strict statutory limitations on how to proceed with a subsequent dispute regarding compliance. The IDEA provides that “any party aggrieved by the findings and decision rendered in such a hearing may appeal” its findings. In two-tiered systems, the party

agency to develop a model form to assist parents in filing a complaint and due process complaint notice.” Id. § 1415(b)(8).

79. Id. § 1415(c)(2)(B)(i)(I)(aa)-(dd) (stating that the district’s response must be provided within ten days of receiving the complaint and it must include (1) “an explanation of why the agency proposed or refused to take . . . action raised in the complaint”; (2) “a description of other options that the IEP Team considered and the reasons why those options were rejected”; (3) “a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action”; and (4) “a description of the factors that are relevant to the agency’s proposal or refusal”).

80. Id. § 1415(c)(2)(E)(i)(I)-(II).

81. Id. § 1415(c)(2)(D) (noting that the hearing officer has five days to make such a determination).

82. Id. § 1415(f)(1)(B)(i).

83. Id. § 1415(h)(1)-(2).

84. See Clark, supra note 21, at 2.

85. Id. at 1-2 (citing Drinker v. Colonial Sch. Dist., 888 F. Supp. 674 (E.D. Pa. 1995)). There are established exceptions for the required exhaustion of administrative exhaustion. See infra Section II.D.


87. Id. § 1415(g)(1).
aggrieved can appeal to the second level of administrative review.88
In a one-tiered system, and those cases decided at the second level in
a two-tiered system, the party aggrieved may appeal the officer’s
determination by bringing an action in federal or state court, but
successfully getting into court requires stringent adherence to the
IDEA’s statutory language.89

An integral aspect of the IDEA’s language is that only the
“party aggrieved” by a hearing officer’s decision can have that
determination reviewed by a separate adjudicatory body.90 A parent
may prevail at the hearing by receiving an order for the district to
take remedial measures; yet, if the district refuses to comply or
complies inadequately with that order, then the parent is unable to
seek enforcement through the courts—the parent is not the “party
aggrieved” as required under the IDEA’s jurisdictional-giving
language.91 As a result, courts may require that a parent who
obtained a favorable outcome in an administrative hearing return to
the administrative forum to reinitiate the exhaustion process relating
to the issue of district compliance.92 If a district fails to conform to a
hearing officer’s order, then Norris v. Board of Education opined
that an adequate remedy is “plainly available” to parents in the form
of additional administrative proceedings,93 resulting in that court
dismissing the civil action for lack of jurisdiction.94 Thus, parents
who technically prevail in the initial hearing process have no other

88. See Wasserman, supra note 21, at 359 (citing 20 U.S.C.
§ 1415(i)(2)(A)).
89. See id.
90. See id. at 388-89.
91. See id. at 359, 389 (“When parents or the applicable agency are
aggrieved by the decision at Tier I in a one-tier state, or the Tier II decision in a two-
tier state, they may appeal the decision by filing a civil action in federal or state
court[s].”). To be a party aggrieved, the hearing officer largely must issue an order
that is adverse to the parent’s desired outcome. See id. at 389.
(S.D. Ind. 1992); see also Wasserman, supra note 21, at 390 (“[A] plaintiff who
obtains a favorable result at due process may be required to return to the
administrative forum, where the nature of the due process decision contemplated
further proceedings of the IEP team.”).
93. See Norris, 797 F. Supp. at 1468 (stating that when a district failed to
comply with a hearing officer’s order, “an adequate remedy was plainly available”
for the parent.) The court went on to note that “[w]hen a school district ignores a
valid final order, the proper remedy is enforcement of that order . . . through the
administrative process.” Id.
94. See id. at 1469.
source for seeking district compliance but to further engage in the IDEA administrative remedy process.95

3. The Reasons for the Adamant Exhaustion Requirement

When faced with a question of whether to dismiss a case for want of administrative exhaustion, courts frequently rely upon the applicability of the underlying rationales for requiring exhaustion.96 Courts generally justify the requirement—even when the administrative hearing officer is hypothetically unable to correct the violation—by noting that the hearing process creates a detailed factual record that can be subsequently used to fully inform a court proceeding.97 Such a requirement also allows the state educational agency to use its expertise to explore the technical educational issues presented by the dispute.98 Promoting judicial efficiency is another oft-cited justification for requiring exhaustion because it gives the educational agencies the first opportunity to correct shortcomings in their programs for students with disabilities.99 These justifications are the underpinnings on which courts rely in strictly enforcing the exhaustion requirement.100

Courts do not always require exhaustion when these justifications are not applicable to the case at bar.101 The Second Circuit, for example, relied on this reasoning when it waived the

95. See, e.g., id. at 1468-69.
97. See Douglass v. District of Columbia, 750 F. Supp. 2d 54, 63 (D.D.C. 2010) (“[E]ven if a hearing officer would hypothetically be unable to correct Plaintiff’s alleged systemic violations, Plaintiff’s Section 504 claim raises questions of educational policy ‘upon which the state experts should first have their say’ and which ‘the record created by the application of their expertise to those problems will certainly help the federal court resolve the issue in a more informed manner.’” (quoting Riley v. Ambach, 668 F.2d 635, 640 (2d Cir. 1981))).
98. See Christopher S., 384 F.3d at 1209.
99. See id.; see also Bills, 959 F. Supp. at 511 (stating that “[t]here are numerous reasons for requiring exhaustion . . . including: (1) to permit an agency to exercise its discretion and expertise; (2) to develop technical issues and a factual record prior to judicial review; (3) to prevent circumvention of agency procedures; and (4) to avoid unnecessary judicial review by allowing agencies to correct errors”); Douglass, 750 F. Supp. 2d at 60 (outlining the “two sound policies” that the exhaustion requirement advances).
100. See supra notes 97-99.
exhaustion requirement in *J.S. v. Attica Central Schools*. 102 This case involved six students who claimed that the district’s programming as a whole violated the students’ rights to a free and appropriate education under the IDEA. 103 While the court did not deny the importance of exhaustion in “textbook” cases concerning the IDEA, it held that *J.S.* was not a “textbook” case. 104 The issue in *J.S.* concerned the district’s total failure to prepare and implement students’ IEPs, 105 rather than a simplified dispute regarding the mere contents of an individual student’s IEP. 106 As such, the court held that the plaintiffs’ claims were not the standardized type from which a court would substantially benefit by having an administrative record. 107 When it comes time for courts to determine whether to dismiss a case for lack of exhaustion or to proceed to adjudicate the merits of the claim, its “inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purpose of exhaustion.” 108 In the absence of the foundational reasons for mandatory exhaustion, then, waiving the exhaustion requirement is supported. 109

102. See id. at 115.

103. See id. at 110-12 (stating that the students alleged twenty-seven ways that the district failed to comply with the IDEA in a systematic manner).

104. See id. at 114-15 (“We acknowledge Hope’s recognition of the importance of exhaustion in ‘textbook’ cases presenting issues involving individual children where the remedy is best left to educational experts operating within the framework of the local and state review procedures. However, the complaint in this case does not allow us to conclude that this is such a ‘textbook’ case—at least not at this stage of the proceedings. The district court made clear that the complaint does not challenge the content of Individualized Education Programs, but rather the School District’s total failure to prepare and implement Individualized Education Programs.” (referencing *Hope v. Cortines*, 872 F. Supp. 14 (E.D.N.Y.), aff’d, 69 F.3d 687 (2d Cir. 1995))).

105. See id. at 115.

106. See id.

107. See id. at 114; see also Virginia H. ex rel. Kristi H. v. Tri-Valley Sch. Dist., 107 F. Supp. 2d 628, 633 (M.D. Pa. 2000) (“If no factual record needs to be developed, i.e. the matter is purely legal, to proceed through the administrative proceedings is unnecessary.”).

108. See Hoeft v. Tuscon Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992) (citing Bowen v. City of New York, 476 U.S. 467, 484 (1986); McKart v. United States, 395 U.S. 185, 193 (1969)); see also Bailey ex rel. J.B. v. Avilla R-XIII Sch. Dist., 721 F.3d 588, 596 (8th Cir. 2013) (stating that a plaintiff must show that the alleged violation “in the proceedings is such that it would not further the underlying purposes of exhaustion” to be granted a waiver).

109. See supra note 107.
Districts face the stringent requirements of the IDEA\(^\text{110}\) with increasingly less money.\(^\text{111}\) Fewer financial resources have caused many districts to plunge into economic distress, resulting in the consolidation of schools as a cost-saving measure.\(^\text{112}\) When parents attempt to require a district to comply with the IDEA during a school-closing process, however, they are faced with numerous limitations due to the IDEA’s strict statutory requirements.\(^\text{113}\) These obstacles taken together create a demanding exhaustion barrier for parents to overcome when seeking to ensure IDEA enforcement during a school closing.\(^\text{114}\)

II. SCHOOL CLOSINGS AND PARENTS FIGHTING TO STOP THEM

With an increase in school closings due to financial constraints, parents have resorted to court action in an attempt to safeguard a student’s rights under the IDEA during a closure.\(^\text{115}\) Reliance on a preliminary injunction to temporarily stop a school closing is an increasingly used method among parents for seeking IDEA enforcement in the face of a school closing.\(^\text{116}\) The CPS case, *Swan v. Board of Education of Chicago*, illustrates how courts approach parents’ attempts to get a preliminary injunction for this very reason.\(^\text{117}\) Looking at how courts generally approach civil actions brought without first exhausting the IDEA administrative remedies\(^\text{118}\) helps to expose the limitations of the administrative-exhaustion

\(^\text{110}\) See *supra* Section I.B (providing an overview of the IDEA’s statutory requirements).

\(^\text{111}\) See *supra* Section I.A (discussing how declining state tax revenue has led to decreasing finances for districts).

\(^\text{112}\) See *supra* Section I.A (discussing the cost-saving measures implemented by districts, which include closing schools).

\(^\text{113}\) See *infra* Section II.B (explaining the specific procedures that a parent must take when seeking IDEA enforcement).

\(^\text{114}\) See *infra* Part III.


\(^\text{116}\) See *infra* Section II.A (discussing the legal implications of a preliminary injunction).

\(^\text{117}\) See *infra* Section II.B (describing the claims in the CPS case and how the court approached them).

\(^\text{118}\) See *infra* Section II.C (explaining the instances in which courts will dismiss an action for failure to exhaust administrative remedies).
Requiring Administrative Exhaustion

Understanding the determinative role that administrative exhaustion plays is essential for grappling with the serious challenges that parents face when seeking to protect a student’s access to a free and appropriate education under the IDEA during school closings.\textsuperscript{120}

A. Relying on a Preliminary Injunction for IDEA Compliance

Seeking a preliminary injunction is a tactic that parents rely upon in an attempt to temporarily prevent their child’s school from closing due to an alleged IDEA violation.\textsuperscript{121} The increased prevalence of school closings due to financial strains\textsuperscript{122} and the resulting student placement in new schools have caused parental concerns that their district—in its haste to close the schools and reassign the students—is violating their students’ rights under the IDEA.\textsuperscript{123} A preliminary injunction, or a temporary restraining order (TRO) in some instances,\textsuperscript{124} is an avenue through which the parents can lessen that haste to ensure that their students’ rights are not overlooked.\textsuperscript{125}

The allure of seeking a preliminary injunction is a result of its unique, short-term legal consequence of preserving the status quo.\textsuperscript{126} While preliminary injunctions were once used only in extraordinary circumstances, courts issue them with much more frequency in modern American jurisprudence.\textsuperscript{127} A party may in some instances

\textsuperscript{119} See infra Section II.D (illustrating the scenarios in which courts will waive the exhaustion requirement).
\textsuperscript{120} See infra Part III.
\textsuperscript{122} See supra Section I.A.
\textsuperscript{123} See infra Section III.B.
\textsuperscript{124} For a brief overview of the difference between a preliminary injunction and a TRO, see infra notes 128-30 and accompanying text.
\textsuperscript{125} See Swan, 2013 WL 4401430, at *1; see also Garcia v. Yonkers Sch. Dist., 561 F.3d 97, 106-07 (2d Cir. 2009).
\textsuperscript{126} See, e.g., Garcia, 561 F.3d at 107; Weintraub v. Hanrahan, 435 F.2d 461, 463 (7th Cir. 1970); Crue v. Aiken, 137 F. Supp. 2d 1076, 1082 (C.D. Ill. 2001).
\textsuperscript{127} See KRISTIN STOLL-DEBELL, NANCY L. DEMPSEY & BRADFORD E. DEMPSEY, INJUNCTIVE RELIEF: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 3 (2009) (stating that “in this rapidly developing era of social change, technological development, and government legislation and regulation, the once-
first seek a TRO prior to a preliminary injunction, as a TRO preserves the status quo until a court can hear the merits on the action for the more permanent-in-nature preliminary injunction. The benefit of the issuance of a preliminary injunction for the harmed party is clear—the preliminary injunction provides a legally enforceable mechanism to minimize a hardship while the underlying issue can be properly resolved. In instances of a school closing and an IDEA violation, for example, a preliminary injunction can require the district to temporarily halt the school closing so that the district can remedy an IDEA violation related to the closure prior to its continuation.

The elements required to issue a preliminary injunction play a determinative role in a parent’s pursuit of seeking IDEA enforcement. While there are jurisdictional differences regarding the requirements to obtain a preliminary injunction, the five-part test generally encompasses the considerations of the other two widely used tests. Courts applying the five-part test require that the extraordinary remedy of preliminary injunctive relief now appears to be quite ordinary”).

128. See, e.g., Crue, 137 F. Supp. 2d at 1078, 1082-83. A TRO can, in certain instances, be issued without initial notice to the opposing party, but will typically last no more than ten days. See THOMAS E. PATTERSON, HANDLING THE BUSINESS EMERGENCY: TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS 17 (2009). Once a preliminary injunction is issued, it is generally not dissolved until deemed appropriate by a court. See id.

129. See Garcia, 561 F.3d at 107 (quoting Pan Am. World Airways, Inc. v. Flight Eng’rs’ Int’l Ass’n, 306 F.2d 840, 842-43 (2d Cir. 1962)).

130. See Crue, 137 F. Supp. 2d at 1082 (stating that the motivation for seeking a TRO is to “minimize the hardship to the parties pending the ultimate resolution of the suit”).

131. See, e.g., Swan v. Bd. of Educ., Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (“According to Plaintiffs, the schedule for the closures will not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented, nor will there be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act].”).

132. See infra Section II.B.

133. Courts typically apply the same standard for evaluating a TRO, unless a court issues it ex parte, in which case a higher standard applies. See STOLL-DEBELL, DEMPSEY & DEMPSEY, supra note 127, at 30-31 (citing Fed. R. Civ. P. 65(b)).

134. The “traditional test” involves a four-part inquiry into: (1) “the movant’s likelihood of success on the merits”; (2) “the likelihood of irreparable harm absent preliminary injunctive relief”; (3) “the balance of harms between the movant and the nonmovant”; and (4) “the public interest.” Id. at 20. The three-part test requires that the movant establish “that it is subject to irreparable harm”; and either (a) “that it will likely succeed on the merits”; or (b) “that there are sufficiently
movant “establish (1) a reasonable likelihood of success on the merits of the underlying claim; (2) no adequate remedy at law; and (3) irreparable harm if the injunction is not granted.”135 Once the first three elements are met, a court will then consider (4) whether the alleged harm to the movant absent the preliminary injunction outweighs the potential harm that the preliminary injunction will inflict on the defendant; and (5) whether the issuance of the preliminary injunction will disserve the public interest.136 This five-part test is notably used by the Seventh Circuit and played a central role in the parents’ failed attempt to obtain a preliminary injunction in the CPS case, Swan v. Board of Education of Chicago.137

B. Swan v. Board of Education of Chicago

The CPS case138 illustrates how a court will approach an action for a preliminary injunction due to an alleged IDEA violation absent administrative exhaustion.139 As a result of CPS announcing plans to close forty-nine schools over a single summer,140 parents of students with disabilities141 brought two separate actions for preliminary injunctions against CPS to temporarily prevent the schools from closing.142 The first suit alleged that the school-closing schedule would disproportionately harm children in special education
programs, compared to their peers in general education, by not providing adequate time at the new schools for the implementation of the IEPs of students classified as disabled under the IDEA. The second suit alleged that the school closings would destroy the students’ relationships with teachers and peers, prevent the students from having their IEPs revised, and place their children in new schools with unfamiliar and dangerous commutes. Due to the looming school start date, the parties agreed to consolidate the claims, and the court granted an expedited discovery motion to be followed by a four-day preliminary injunction hearing, all over a mere month before the start of school.

For the more than 2,000 students with disabilities within CPS that would be impacted by the school closings, the district took a number of steps—exposed through discovery and witness testimony—in an attempt to ensure IDEA compliance. The district held an outreach campaign for families with students with disabilities, where it hosted meetings at each closing school to explain the transition process and reached out to each family to answer questions related specifically to each family’s child. The special education department reviewed the IEP of each student affected by the closures to ensure that proper supports were in place, and the faculty in the schools receiving new students with disabilities was required to complete training programs over the summer that included customized disability awareness training. The district went so far as to take photographs of the closing school

143. See id. at *2 (stating that the closing schedule would “not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented” and that there would not “be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act]”).

144. See id.

145. See id.

146. See id. at *9 (stating that the district took steps to ensure that “(a) students with disabilities know their new school and feel welcome; (b) the staff understands the needs of students; (c) instructional supports and equipment are in place and teachers know how to use them; (d) schools have provided activities to support the transitions; (e) the students are scheduled in accordance with their IEPs; and (f) any necessary IEP revisions have been completed” (citing Hr’g Tr. at 788-89; Hr’g Exs. 24, 29)).

147. See id. (citing Hr’g Tr. at 807-08, 814).

148. See id. (citing Hr’g Tr. at 814-15).

149. See id. at *10 (citing Hr’g Tr. at 828-29, 835).

150. See id. (citing Hr’g Tr. at 794-95).
classrooms in an attempt to replicate them in the new schools,\textsuperscript{151} down to matching the color of the computer cords for certain students’ classrooms.\textsuperscript{152} Despite the unveiling of these comprehensive steps during discovery and the hearing, the parents continued through the trial-like hearing process, proclaiming that the district was neither taking the time nor putting the resources into ensuring full IDEA compliance during the school closings.\textsuperscript{153}

Though the entire case was completed within just three months, it resulted in a comprehensive factual record supplemented by numerous expert witnesses on which the court relied.\textsuperscript{154} The court provided a nearly thirty-page opinion discussing how the facts in the case corresponded to the required elements for the issuance of a preliminary injunction.\textsuperscript{155} Despite this detailed attention to the merits of the claims, the court relied in part on the parents’ failure to first exhaust the administrative remedies in rejecting their motion for a preliminary injunction.\textsuperscript{156} Without first exhausting the IDEA administrative remedies, the parents could not demonstrate the absence of an adequate remedy for the alleged harms, an essential element for a preliminary injunction.\textsuperscript{157} The court nonetheless evaluated the remaining elements and held that the parents were not likely to succeed on the merits based on the presented evidence\textsuperscript{158}—even though the single fact that the parents failed to exhaust the administrative remedies was alone dispositive to defeat the preliminary injunction claim.\textsuperscript{159}

\textsuperscript{151} See id. (citing Hr’g Tr. at 439, 800-01).
\textsuperscript{152} See id. at *15 (citing Hr’g Tr. at 800-01).
\textsuperscript{153} See id. at *1-2.
\textsuperscript{154} See id. at *2, *29.
\textsuperscript{155} See id. at *1-29.
\textsuperscript{156} See id. at *19, *28.
\textsuperscript{157} See id. at *28 (“Thus, Plaintiffs’ have failed to demonstrate that the administrative review process cannot provide a remedy for the harms they allege. Plaintiffs have failed, therefore, to show that there is not an adequate remedy at law for their ADA claims.”). While this aspect of the opinion discussed the plaintiffs’ claim under the Americans with Disabilities Act (ADA), the court noted that the parents were nonetheless making a claim of an IDEA violation. See id. at *27.
\textsuperscript{158} See id. at *27-28 (stating that the parents failed to present “persuasive evidence that the harm they will suffer without an injunction is greater than the harm [that] others will suffer, including other students, if an injunction was granted”).
\textsuperscript{159} See id. at *27.
C. Without Exhausting, an IDEA Action “Must Fail”

As the CPS case illustrates, courts adamantly require that IDEA disputes proceed through the exhaustion process prior to the claim having merit in civil court.\(^{160}\) The administrative hearing process allows education professionals to have “the first crack” at resolving a parent’s complaint.\(^{161}\) Without allowing for this administrative first crack, the claims under the IDEA “must fail.”\(^{162}\) Even when it is unclear whether the administrative process is able to provide an adequate remedy for the underlying IDEA violation, exhaustion is typically still required.\(^{163}\)

Courts reason that requiring exhaustion when relief is uncertain is appropriate because parents cannot be certain that no administrative relief exists without first going through the administrative remedy process.\(^{164}\) When the alleged IDEA violations have their roots in educational services, relief is hypothetically available under the IDEA because the statute provides remedies to educational issues by way of the hearing process.\(^{165}\) Litigating whether administrative exhaustion is required can be an elongated process and consumes scarce judicial resources.\(^{166}\) As the Ninth Circuit noted, parties in an IDEA case litigated whether exhaustion should be required over a four-year period.\(^{167}\) The court’s dissent pointed out that a resolution on the underlying IDEA question would have been reached far more quickly without the preliminary exhaustion dispute.\(^{168}\) Courts often strictly enforce the

\(^{160}\) See id.


\(^{162}\) See Comb v. Benji’s Special Educ. Acad., No. H-10-3498, 2012 WL 1067395, at *8 (S.D. Tex. Mar. 28, 2012) (“There is no evidence to support an exemption from the administrative exhaustion requirement. Thus, the Parent–Plaintiffs’ claims under both the IDEA and Section 1983 must fail.”).

\(^{163}\) See Ellenberg ex rel. S.E. v. N.M. Military Inst., 478 F.3d 1262, 1276 (10th Cir. 2007).

\(^{164}\) See Charlie F., 98 F.3d at 993.

\(^{165}\) See id. (“[W]hen the genesis and the manifestations of the problem are education[,] the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA.”).

\(^{166}\) See generally Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting).

\(^{167}\) See id.

\(^{168}\) See id. (“I cannot help but note that this lawsuit concerns a schedule announced at the beginning of the 2000–01 school year, more than four years ago. By inviting appeal of district court determinations that plaintiffs should be required...
administering-exhaustion requirement regardless of the time consumed litigating its applicability and despite that enforcement will result in the claim’s summary dismissal based not on its underlying merits.169

D. Recognizing the Limits of Administrative Remedies

Despite the strict IDEA procedural mandates,170 there are instances in which courts recognize the limits of the administrative-exhaustion requirement. The Eighth Circuit in Barron ex rel. D.B. v. South Dakota Board of Regents held that parents challenging the closure of a school were not required to exhaust the administrative remedies before bringing a motion for a preliminary injunction due to an alleged IDEA violation.171 The parents in Barron sought to prevent the state from moving programs for their deaf or hard-of-hearing children to a different district.172 After acknowledging that the IDEA typically requires administrative exhaustion prior to bringing a civil action,173 the court held that such a requirement in this case was not appropriate.174 In waiving administrative exhaustion, the court reasoned that if the parents’ underlying IDEA claim had merit, then the administrative hearing process was unlikely to provide adequate relief.175 When, assuming that the IDEA claim is meritorious, the hearing officer would be unable to issue the necessary relief for the violation, Congress specified that exhaustion should not be required.176 Thus, as a practical matter, it was improbable that an administrative hearing officer could require the

to exhaust administrative remedies before proceeding in court, our decision here will likely encourage more court activity rather than less. That is not what Congress intended.”).

169. See, e.g., id.; Charlie F., 98 F.3d at 992-93.
170. See supra Section I.B.
171. See 655 F.3d 787, 791-92 (8th Cir. 2011).
172. See id. at 791.
173. See id. at 792 (citing 20 U.S.C. § 1415(i) (2006)).
174. See id. at 793.
175. See id. at 792 (citing Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199 (2d Cir. 2002)).
176. See id. (“‘Congress specified that exhaustion is not necessary if . . . “it is improbable that adequate relief can be obtained by pursuing administrative remedies.”’” (quoting Murphy, 297 F.3d at 199)). The court went on to state that the administrative remedies process is appropriate for questions related to “‘any matter[] relating to the identification, evaluation or educational placement of a child with a disability, or the provision of [a free and appropriate education] to the child.’” See id. at 792-93 (quoting S.D. ADMIN. R. 24:05:30:07:01 (2007)).
district to reverse its decision to change the location of the students’ program—the hearing officer is generally limited to rectifying issues only relating to the contents of a student’s IEP. After waiving the exhaustion requirement, the court proceeded without delay to adjudicate the merits of the claimed IDEA violation.

The Second Circuit came to a similar conclusion when it recognized that case law carved out a futility exception for requiring administrative exhaustion. In waiving the exhaustion requirement, the court in Heldman v. Sobol relied on an exception used in circumstances in which exhaustion would be futile—when the administrative procedures cannot provide an adequate remedy. In Heldman, the court waived mandatory administrative exhaustion because the hearing officer did not have the power to alter the state statutory procedure allegedly violating the IDEA. When the administrative hearing officer lacks the authority to alter the alleged harm, both Barron and Heldman indicate that requiring exhaustion is a mere exercise in futility and should, therefore, be waived.

An additional explicit method of waiving the exhaustion requirement under the IDEA is through the Act’s “stay-put” provision. While this provision is not applicable to questions of a

177. See id. at 793 (“We agree with the district court that [i]n consideration of the administrative scheme, and as a practical matter, it may be more than improbable that a hearing officer could ultimately enforce an order to the Board of Regents to reverse its policy of cutting programs at the school’s physical location and out-sourcing services to home school districts.” (citation omitted) (internal quotation marks omitted)).

178. See id. at 792-93.


180. See id.

181. See id. at 159 (“Resort to the New York state administrative process in this case would be futile. Heldman claims that the NYSED regulation specifying the hearing officer selection procedure violates the mandate of IDEA. Because the regulation implements a New York statute, neither the Commissioner nor the assigned hearing officer has the authority to alter the procedure; therefore, it would be an exercise in futility to require Heldman to exhaust the state administrative remedies.” (citing Monahan v. Nebraska, 491 F. Supp. 1074, 1086 (D. Neb. 1980))).

182. See id.; Barron, 655 F.3d at 793.

183. See Guardians Ad Litem ex rel. N.D. v. Haw. Dep’t of Educ., 600 F.3d 1104, 1111 (9th Cir. 2010) (“Exhausting the administrative process would be inadequate because the stay-put provision (and therefore the preliminary injunction) is designed precisely to prevent harm while the proceeding is ongoing.” (citing Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 (2d Cir. 2002))).
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preliminary injunction related to a school closing, its underlying justifications for waiving exhaustion are insightful. The stay-put provision is a procedural safeguard requiring that during the pendency of any proceeding relating to a change in a student’s educational placement, the student shall remain in his or her “then-current educational placement.” The Ninth Circuit held that the exhaustion requirement need not be met when seeking to enforce the stay-put provision of the IDEA. The stay-put provision’s purpose, similar to a preliminary injunction, is to prevent the alleged harm while the underlying issue is resolved. A hearing officer lacks the power to order a district to retain a student in his or her “then-current educational placement,” so requiring administrative exhaustion would be insufficient. The stay-put provision protects students when the time-sensitive nature of an action should control, as the potential harm will have already occurred if the student is forced to change his or her educational placement during the dispute regarding the appropriateness of that change. The critical question

184. The stay-put provision is very limited in its application. See infra notes 186, 190, and accompanying text.
185. See infra Section III.D.
186. See 20 U.S.C. § 1415(j) (2012). A student’s “educational placement” means the student’s general educational programming, and a change in such a placement “relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction.” N.D., 600 F.3d at 1116. “A change in the educational placement can also” occur “when there is a significant change in the student’s program even if the student remains in the same setting.” Id.

Educational placement does not, however, refer to “the ‘bricks and mortar’ of the specific school.” T.Y. ex rel. T.Y. v. N.Y.C. Dep’t of Educ., 584 F.3d 412, 419 (2d Cir. 2009). For a detailed overview and critique of the stay-put provision, see Valerie Boland, Note, Courts Misinterpret “Stay Put” Provision of Individuals with Disabilities Education Act: Did Congress Really Intend to Take Services Away from Children with Disabilities?, 57 DRAKE L. REV. 1007 (2009).
187. N.D., 600 F.3d at 1110-11 (adopting the framework of Murphy, 297 F.3d at 199-200).
188. See id. (“Exhausting the administrative process would be inadequate because the stay-put provision (and therefore the preliminary injunction) is designed precisely to prevent harm while the proceeding is ongoing.” (citing Murphy, 297 F.3d at 199-200)).
189. See id. (citing Murphy, 297 F.3d at 199-200); see also 20 U.S.C. § 1415(i) (2006).
190. See N.D., 600 F.3d at 1110-11 (“The stay-put provision recognizes the need for the child to keep her current educational placement as the administrative process tries to sort out alternatives. If the child is moved from the current placement during the process, then the deprivation of the right has occurred. The completion of the administrative process cannot remedy the harm. Access to the
concerning waiving the exhaustion requirement in the stay-put context is whether the delay caused by the administrative-exhaustion process should be subjugated by the immediacy of the alleged harm.\footnote{191}{See Komninos ex rel. Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 780 (3d Cir. 1994) (“[T]he critical question is whether there is such immediacy of harm as to preclude delay until the administrative process is completed. . . . A showing at the time the suit is filed in the district court, however, that the [harm to the student] will be irreversible would demonstrate irreparable harm and would relieve plaintiffs from the obligation to finish the administrative process before seeking judicial relief.”).}

A preliminary injunction is a powerful tool, but without first exhausting the IDEA administrative remedies a court is unlikely to issue such an order.\footnote{192}{See supra Section II.C.} The CPS case, \textit{Swan}, illustrates the determinative role that administrative exhaustion can play in bringing a civil action,\footnote{193}{See supra Section II.B.} though requiring administrative exhaustion is not appropriate in all circumstances.\footnote{194}{See supra Section II.D.} Much stands in the way between a parent and his or her ability to require a district to comply with the IDEA.\footnote{195}{See infra Part III.} These demanding IDEA requirements work together to create an administrative-exhaustion barrier that is difficult to overcome in a timely manner.\footnote{196}{See infra Part III.}

\section*{III. The Exhaustion Barrier}

When parents bring an action based on an alleged IDEA violation for a preliminary injunction to temporarily prevent a school from closing, time is of the essence.\footnote{197}{See Swan v. Bd. of Educ., Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (“On May 23, 2013, the [c]ourt granted the parties leave to proceed with expedited discovery and scheduled a four-day preliminary injunction hearing for July 16, 2013.”).} The current mandatory IDEA administrative-exhaustion framework is unsuitable in instances of an imminent school closing. The limitations of the existing IDEA structure, ranging from the narrow powers of an administrative officer\footnote{198}{See infra Section III.A.} to the restrictive nature of the statute’s jurisdictional-giving preliminary injunction is essential to vindicate this particular IDEA right.” (citation omitted) (citing \textit{Murphy}, 297 F.3d at 199-200)).
language, leave parents with limited options for seeking IDEA enforcement. Further buttressing the limitations of mandatory administrative exhaustion in this context is the void of the underlying rationales in support for the exhaustion process. Courts have shown their willingness to recognize the boundaries of mandatory exhaustion by carving out narrow exceptions in instances of the IDEA’s stay-put provision and imminent school closings. Against this backdrop, it becomes clear that a modification to the IDEA is needed to alleviate the current exhaustion barrier. Without addressing these obstacles to IDEA enforcement, there is a serious risk that an otherwise meritorious IDEA claim will go unaddressed by the courts due to a parent’s inability to directly bring a civil action.

A. Limited Powers of an Administrative Hearing Officer

Administrative hearing officers’ powers are far from unlimited. The officers’ ability to issue orders is generally limited to determining the sufficiency of a student’s disability classification and the implementation of the IDEA’s requirements and to ordering districts to take corrective action to come into compliance with the Act. When an administrative hearing officer lacks the power to order an appropriate remedy, requiring administrative exhaustion is not proper. In Barron ex rel. D.B. v. South Dakota Board of Regents, the Eighth Circuit waived the exhaustion requirement for this very reason—the inability of the hearing officer to issue the necessary remedy made exhaustion, as a practical matter, unsuitable. If the underlying IDEA violation claimed by the

199. See infra Section III.B.
200. See infra Section III.C.
201. See infra Section III.D.
202. See infra Subsection III.E.1.
203. See supra Section II.C.
204. See Zirkel, supra note 70, at 9.
205. See id. While the hearing officer has the power to take these actions, this power is largely restricted to ordering the district to take steps relating specifically to the student’s educational services—it does not, however, extend to ordering the district to take wider action, such as unilaterally stopping a district from closing a school. See id.
206. See Barron ex rel. D.B. v. S.D. Bd. of Regents, 655 F.3d 787, 792 (8th Cir. 2011) (“We conclude that the parents were not required to exhaust because, if their position was well founded and the Board’s actions violated the IDEA, adequate relief likely could not have been obtained through the administrative process.”).
207. See id. at 793.
plaintiffs was occurring, then the court held that the hearing officer would not have within his or her power the ability to prevent a district’s school board from cutting school programs.208

The Eighth Circuit’s reasoning in waiving exhaustion in Barron is telling because it indicates that exhaustion should not be required when, in the event that the underlying claim is accurate, the hearing officer’s authority to order the necessary remedy is improbable.209 In reviewing an administrative officer’s powers, absent from the list is the ability to issue a preliminary injunction to temporarily stop a district from closing a school or to reverse an initiated school closing.210 Using the Barron reasoning, then, if a parent seeks a preliminary injunction due to an alleged IDEA violation during the school-closing procedures, then exhaustion should be waived because it is improbable that the administrative officer can issue such an order.211

Courts should apply the Barron reasoning and waive exhaustion at the outset of an action seeking a preliminary injunction for an alleged IDEA violation for school closings.212 If exhaustion is not waived and the hearing officer concludes that the district must reevaluate its closing procedures to comply with the IDEA, thereby requiring a temporary hold on the district’s school-closure plans, then the officer simply has no authority to take this necessary action.214 Adopting this approach is one step to avoid the unnecessary and damaging time delay of requiring exhaustion in the context of an imminent school closing.215

208. See id. at 792; see also supra note 74 and accompanying text.
209. See Barron, 655 F.3d at 792.
210. See Zirkel, supra note 70, at 9; see also Barron, 655 F.3d at 792.
211. See Barron, 655 F.3d at 793.
212. See id.
213. The plaintiffs in Swan sought, among other things, for CPS to reevaluate its school closing procedures. See Swan v. Bd. of Educ., Nos. 13 C 3623-24, 2013 WL 4401439, at *2 (N.D. Ill. Aug. 15, 2013) (“According to Plaintiffs, the schedule for the closures will not allow enough time for administrators in the new schools to ensure that the IEPs of disabled students are properly revised and implemented, nor will there be sufficient time for students with disabilities to adequately acclimate to their new schools in violation of the [IDEA and Americans with Disabilities Act].”).
214. See supra note 210 and accompanying text.
B. The IDEA’s Jurisdictional Dilemma: The “Party Aggrieved” Requirement

If an administrative hearing officer does order a form of relief, 216 there are great restrictions on a parent’s ability to ensure that the district complies with the order. 217 The proper remedy for a district failing to follow an administrative order is for the parent to seek enforcement of that order. 218 The only available avenue for enforcement under the IDEA, however, is for the parent to reengage the administrative hearing process, as the parent is not the party aggrieved—depriving a court of jurisdiction to hear the claim. 219 Failing to restart the administrative-exhaustion process will likely result in a court dismissing the claim for lack of jurisdiction based on the IDEA’s explicit statutory language. 220

The IDEA’s jurisdictional-giving language provides that only the “party aggrieved” can bring an enforcement action to the courts. 221 Norris v. Board of Education illustrates how the party aggrieved requirement works in practice. 222 The parent of a student with disabilities in Norris initially exhausted the administrative remedies as required by the IDEA and received a favorable hearing outcome. 223 Yet, due to the district’s noncompliance with the administrative order, the parent brought an action in court to require

216. The IDEA allows an administrative hearing officer to issue a form of remedy that neither party requested but that the officer believes would be appropriate under the IDEA. See, e.g., Neil F. ex rel. Charlie F. v. Bd. of Educ., 98 F.3d 989, 991 (7th Cir. 1996) (“The [IDEA] speaks of available relief, and what relief is ‘available’ does not necessarily depend on what the aggrieved party wants.”).

217. See infra notes 218-20 and accompanying text.

218. See Norris ex rel. Norris v. Bd. of Educ., 797 F. Supp. 1452, 1468 (S.D. Ind. 1992) (“When a school district ignores a valid final order, the proper remedy is enforcement of that order.”).

219. See id.

220. See id. at 1469.

221. See Wasserman, supra note 21, at 388-89; see also Hunter ex rel. Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 278 n.10 (3d Cir. 1996) (“The argument against the applicability of [20 U.S.C.] § 1415(e)(2) would be that the Hunters, in seeking judicial assistance to enforce portions of the IDEA administrative decision, were not persons ‘aggrieved by the findings and decision’ within the meaning of § 1415(e)(2), but rather persons aggrieved by the failure of the local school officials to implement the decision. The counter-argument would be that the Hunters were ‘aggrieved’ by the fact that the administrative orders favorable to the Hunters contained no enforcement mechanisms.”).

222. See Norris, 797 F. Supp. at 1467-68.

223. See id. at 1457-58.
the district to conform to the hearing officer’s determination.\textsuperscript{224} Although the parent faced an uncooperative district, the court dismissed the case for lack of jurisdiction because the parent was not the party aggrieved under the IDEA’s strict jurisdictional-giving language.\textsuperscript{225}

Requiring a parent to be the party aggrieved by an administrative hearing’s outcome places a soaring hurdle in the path of a parent seeking IDEA enforcement in the process of a school closing.\textsuperscript{226} While some on the bench argue that this requirement “does not mean that their claims will be unfairly or improperly denied” because court review is eventually available,\textsuperscript{227} this continuous exhaustion requirement “make[s] no sense” in application.\textsuperscript{228} When a parent complies with the IDEA by initially completing the exhaustion process, but cannot get the district to comply with the hearing officer’s order, the only available avenue to seek enforcement is through additional administrative exhaustion—meanwhile, the underlying IDEA violation continues unresolved.\textsuperscript{229}

When a district is in the midst of planning or implementing a school closing, there is no time to engage in the cycle of exhaustion as required by the IDEA. Restarting the exhaustion process and litigating whether more exhaustion is required before a court has jurisdiction is very time consuming.\textsuperscript{230} Yet, courts continue enforcing the strict exhaustion requirement by reading the IDEA’s jurisdictional language narrowly.\textsuperscript{231} When faced head-on with this circular exhaustion requirement, the \textit{Norris} court rejected the

\begin{itemize}
\item \textsuperscript{224} See id.
\item \textsuperscript{225} See id. at 1468-69 (“Plainly, a complaint that a school ignored a hearing officer’s order may be remedied through the administrative process. Plaintiffs failed to seek this type of required remedy.”).
\item \textsuperscript{226} See id. (dismissing an IDEA claim for lack of jurisdiction because the parent received a favorable decision through the administrative hearing process, though the district subsequently failed to comply with the order).
\item \textsuperscript{227} See \textit{Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ.}, 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting).
\item \textsuperscript{228} See \textit{Wasserman, supra} note 21, at 389.
\item \textsuperscript{229} See id.
\item \textsuperscript{230} See \textit{Christopher S.}, 384 F.3d at 1220 (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).
\item \textsuperscript{231} See \textit{Norris}, 797 F. Supp. at 1468-69 (requiring that a party seeking to enforce a district to comply with an administrative hearing officer’s order must re-exhaust the administrative process because the plaintiff was not the party aggrieved); see also \textit{Hunter ex rel. Jeremy H. v. Mount Lebanon Sch. Dist.}, 95 F.3d 272, 278 n.10 (3d Cir. 1996).
\end{itemize}
parent’s argument that the party aggrieved requirement was a “catch-22”\textsuperscript{232} situation.\textsuperscript{233} The parent argued that she could not have her case heard in front of an adjudicative body that had the power to enforce compliance with the IDEA, as her only option was more ineffective administrative hearings.\textsuperscript{234}

When the date of a school closing grows closer, this exhaustion cycle is the epitome of a catch-22. On the one hand, a parent complies with the IDEA by exhausting the administrative remedies in which a favorable ruling is provided; but, on the other hand, that parent cannot have the favorable order enforced by an adjudicative body that possesses the power to require the district to comply.\textsuperscript{235} Consequently, a parent is forced to return to the proven ineffective administrative process.\textsuperscript{236} All the while, the student’s access to a free and appropriate education, which the IDEA is designed to ensure,\textsuperscript{237} is left in the questionable state that motivated the initial lawsuit while the school-closing schedule forges ahead. This procedural exhaustion requirement allows a district to exhaust the parent into giving up the fight for the student’s IDEA rights during the school-closing process.\textsuperscript{238} There is simply not sufficient time to engage in multiple rounds of administrative exhaustion when a school is slated to close.

\begin{itemize}
\item \textsuperscript{232} A catch-22 is “[a] dilemma or difficult circumstance from which there is no escape because of mutually conflicting or dependent conditions.” OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/catch-22 (last visited Oct. 22, 2014).
\item \textsuperscript{233} See Norris, 797 F. Supp. at 1468 (“Plaintiffs incorrectly argue that they were in a ‘catch-22’ situation because they were not ‘aggrieved’ by any order but rather faced a school district unwilling to abide by a valid order.”).
\item \textsuperscript{234} See id.
\item \textsuperscript{235} The parent is not the party aggrieved, as required by the IDEA, so a court does not have jurisdiction to hear the case. See, e.g., id.
\item \textsuperscript{236} See, e.g., Neil F. ex rel. Charlie F. v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996) (“The case is remanded with instructions to dismiss for failure to use the IDEA’s administrative remedies.”); Swan v. Bd. of Educ., Nos. 13 C 3623-24, 2013 WL 4401439, at *27-28 (N.D. Ill. Aug. 15, 2013) (“[Plaintiffs] must exhaust the IDEA’s administrative process before coming to federal court, unless exhaustion would have been futile. . . . Thus, Plaintiffs’ [sic] have failed to demonstrate that the administrative review process cannot provide a remedy for the harms they allege. Plaintiffs have failed, therefore, to show that there is not an adequate remedy at law for their [IDEA] claims.” (citation omitted)).
\item \textsuperscript{237} See supra notes 65-66 and accompanying text.
\item \textsuperscript{238} See Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).
\end{itemize}
within mere months of an initiated action for a preliminary injunction due to an alleged IDEA violation.  

C. Absent Justifications for Mandatory Exhaustion

When the underlying justifications for mandatory administrative exhaustion do not substantially benefit a civil proceeding, courts will waive the exhaustion requirement. As *J.S. v. Attica Central Schools* noted, in non-textbook IDEA cases—those that go beyond mere questions of the contents of a student’s IEP—the exhaustion requirement is not necessarily applicable, particularly when the purposes behind exhaustion are not furthered. Seeking a claim for a preliminary injunction for an alleged IDEA violation in the face of a looming school closing is a non-textbook case, making the applicability of the underlying rationales for mandatory exhaustion less than certain.

As the CPS case, *Swan v. Board of Education of Chicago*, illustrates, courts have the capacity to properly adjudicate the underlying merits of a preliminary injunction claim without the assistance of the administrative agency’s educational experts. In *Swan*, the parties provided the court with the necessary technical educational information by employing an array of educational experts—including experts in the areas of general education, special education, school-building utilization, and school transition plans for

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239. *See id.; see also Swan*, 2013 WL 4401439, at *2 (allowing an expedited preliminary injunction hearing due to the looming start of the academic school year).

240. *See supra Section II.D; see also Christopher S.*, 384 F.3d at 1209 (majority opinion) (“The requirement that aggrieved parties exhaust their administrative remedies before filing a lawsuit . . . ‘affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.’” (quoting *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992))).

241. *See Bailey ex rel. J.B. v. Avilla R-XIII Sch. Dist.*, 721 F.3d 588, 596 (8th Cir. 2013); *N.S. ex rel. J.S. v. Attica Cent. Schs.*, 386 F.3d 107, 114 (2d Cir. 2004); *Hoeft*, 967 F.2d at 1303.

242. *See supra* note 104 and accompanying text.


244. *See id.* at 114-15. When the claim is regarding the timeline, procedures, and student placement related to a school closing, the questions go beyond a textbook case consisting solely of issues regarding the contents of an IEP. *See supra* note 104 and accompanying text.

245. *See infra* notes 246-50 and accompanying text.
students. In all, seventeen experts and witnesses testified during the four-day hearing. Moreover, the hearing created an 877-page factual record for the court to rely upon in making its ruling. In rendering its twenty-nine page opinion, the court made no mention of a want of a better understanding of the technical educational issues or a more comprehensive factual record. It is clear from Swan that courts are capable of gleaning a sufficient understanding of the technical educational issues presented and developing a detailed factual record of the pertinent educational issues in order to issue an informed ruling. Thus, when it comes to an alleged IDEA violation due to a looming school closing, the case for requiring administrative exhaustion prior to bringing a civil case severely weakens without the support of its underlying rationales.

246. The experts and witnesses that testified are (1) Pauline Lipman, professor of educational policy studies at the University of Illinois in Chicago; (2) Kristine Mayle, former special education teacher at CPS; (3) Mandi Swan, parent of a student with a learning disability; (4) Lucy Witte, who provided an opinion concerning the impact of the closing of forty-nine elementary schools on students with disabilities; (5) Sarah Judith Hains, member of the Chicago Education Facilities Task Force; (6) Laurie Hines Siegel, who testified on the impact of the school closings on the special education population at CPS; (7) John Martin Hagedorn, expert on gang activity in Chicago; (8) Woods Bowman, who analyzed the Board of Education’s financial justifications for closing the schools; (9) Sherise Renee McDaniel, parent of an allegedly impacted student; (10) Pavlyn Jankov, Chicago Teachers Union research facilitator; (11) Markay Winston, chief officer for the CPS office of diverse learner supports and services; (12) Adam Lee Anderson, officer of portfolio planning and strategy for the Chicago Board of Education; (13) Ginger Ostro, budget and grants officer for the Chicago Board of Education; (14) Annette Gurley, chief officer for teaching and learning for the Chicago Board of Education; (15) Jadine Chou, chief safety and security officer for the Chicago Board of Education; (16) Tom Tyrrell, Deputy Chief Administrative Officer for the Chicago Board of Education; and (17) Rebecca Clark, director of student supports in the office of diverse learners, supports, and services for CPS. See Transcript of Proceedings - Preliminary Injunction Hearing Before the Honorable John Z. Lee, Swan v. Bd. of Educ., Nos. 13 C 3623-24 (N.D. Ill. Aug. 15, 2013), ECF Nos. 138-141.

247. See id.
248. See id.
250. See supra note 246 and accompanying text.
D. Applying the “Stay-Put” Rationales to Imminent School Closings

With the inapplicability of the traditional supportive justifications for mandatory administrative exhaustion,252 the case for waiving such exhaustion is further supported by considering the rationales for waiving exhaustion in the IDEA’s stay-put provision. The stay-put provision253 is only applicable when the student’s education placement is in question.254 Yet, the concept underlying the stay-put provision is informative when approaching the IDEA administrative-exhaustion requirement relating to imminent school closings. The stay-put provision’s design is to ensure that a student is not harmed during an adjudicative proceeding concerning the merits of an IDEA claim.255 As the Ninth Circuit recently noted when presented with a stay-put provision question, because of the “time-sensitive nature” of determining a student’s proper educational placement, exhaustion of administrative remedies is not required.256 In light of the time sensitivity, the Ninth Circuit reasoned that the defendant’s argument in favor of requiring exhaustion, which presupposed that the administrative-exhaustion process might be effective in resolving the dispute, was not persuasive.257 It is essential, the court noted, that the plaintiff in this time-sensitive situation be given the ability to directly bring a court action concerning the merits of the IDEA claim.258

The reasoning employed by the Ninth Circuit to waive administrative exhaustion in instances of the stay-put provision is extendable to cases concerning the administrative-exhaustion requirement in circumstances of imminent school closings. The claim’s time sensitivity and mere presupposition of the hearing officer’s ability to remedy the harm was sufficiently persuasive for the Ninth Circuit to waive the administrative-exhaustion process.259

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252. See supra Sections III.A-C.
253. See supra note 186 and accompanying text.
255. The harm in question concerns the harm to the student via a violation of his IDEA right to a free and appropriate education. See supra note 188 and accompanying text.
256. See Guardians Ad Litem ex rel. N.D. v. Haw. Dep’t of Educ., 600 F.3d 1104, 1110 (9th Cir. 2010) (citing Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 199-200 (2d Cir. 2002)).
257. See id. (stating that “[t]his argument is a non-sequitur”).
258. See id. at 1111 (“Access to the preliminary injunction is essential to vindicate this particular IDEA right.” (citing Murphy, 297 F.3d at 200)).
259. See id. at 1110 (citing Murphy, 297 F.3d at 199-200).
The dangers adverted by waiving exhaustion in stay-put cases similarly exist in cases of alleged IDEA violations in contexts of impending school closings. When a school is slated to shut down in mere months, time is of the essence to resolve an IDEA-violation question concerning the transition. Yet, in the face of an elongated exhaustion process, courts still adhere to the exhaustion requirement in order to allow the administrative process to have the “first crack” at resolving the problem, even when a hearing officer’s ability to order a solution is far from certain or merely hypothetical. When the risk exists that the school will close prior to the completion of the administrative process, the uncertain nature of the administrative process’s ability to issue an enforceable solution is a similarly unpersuasive rationale for requiring exhaustion. Courts should follow the rationale employed in questions concerning the stay-put provision in order to evade the time-sensitive harm to students that is similarly in question when a student has an IDEA challenge due to a soon-to-close school.

When a broad view is taken toward questions of the administrative-exhaustion requirement for IDEA claims, it becomes clear that exhaustion is not appropriate in many IDEA contexts. It may be the case that the presence of a single rationale for waiving IDEA exhaustion when a school is slated to close is an insufficient justification for extending a waiver. There are, however, at least four


261. See supra Section I.B (discussing the procedural requirements of the administrative hearing process); see also Christopher S., 384 F.3d at 1220 (noting that the case at bar disputed the exhaustion process for more than four years).

262. See Neil F. ex rel. Charlie F. v. Bd. of Educ., 98 F.3d 989, 992 (7th Cir. 1996) (“[U]nder the IDEA, educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.”).

263. See id. at 993 (noting that the parents–plaintiffs cannot know that no remedy exists without first going through the administrative process and “that at least in principle relief is available under the IDEA”).


265. See Guardians Ad Litem ex rel. N.D. v. Haw. Dep’t of Educ., 600 F.3d 1104, 1110 (9th Cir. 2010).

266. See supra note 190 and accompanying text.

267. See supra Sections III.A-D.
applicable factors—the limited powers of the administrative hearing officer, the court’s absent jurisdiction for enforcement, the void of the traditional administrative-exhaustion justifications, and the similarities to the stay-put provision’s rationales—that courts have relied upon to waive mandatory exhaustion in IDEA cases. Taken together, these rationales present a strong case for similarly waiving mandatory IDEA administrative exhaustion when presented with a time-sensitive situation of a slated school closure.

E. 6,480,540 Reasons to Act and No Time to Wait

It took a national education funding crisis to uncover a procedural barrier to relief for families seeking injunctive action for an alleged IDEA violation in the face of a looming school closing. CPS’s historic decision to close forty-nine schools over a single summer posed serious challenges for ensuring compliance with the demanding IDEA. In the face of this pressure, however, CPS rose to the challenge—in doing so, it established the gold standard for dealing with mass school closings while simultaneously safeguarding students’ rights under the IDEA. The district went to great lengths to ensure that every student classified with a learning disability received personalized attention during the school transition, from reaching out to each family to discuss the transition and hosting meet-and-greets with new teachers to replicating students’ prior classrooms in the new schools. No step was too minor to ensure the smoothest possible transition for the students.
While the Swan court found that CPS’s comprehensive actions to comply with the IDEA made the motion for a preliminary injunction unlikely to prevail on the merits, the standard for school transitions set by CPS may be unreachable for many districts. Factors such as the number of students with disabilities affected by the move or the amount of resources dedicated specifically to IDEA compliance may impact a district’s ability to ensure complete compliance. While the parents would likely not have won on the merits of the claim in the CPS case, the presence of a future meritorious IDEA claim in the context of another school closing would currently be single-handedly rejected for want of administrative exhaustion.

The CPS case exposes the determinative role that administrative exhaustion plays in a child’s right to have his or her IDEA claim heard by a body with the authority to take remedial measures in a time-conscious manner. The time to take corrective action is now—before a meritorious IDEA claim is summarily themselves to be shared with their new teachers at their receiving schools. Over the summer, receiving schools are scheduling a variety of events to introduce parents of diverse learners to the school, administrators and staff, such as tours, ‘meet-and-greets,’ and information sessions with case managers. For students in cluster programs, CPS has taken photos of the closing school classrooms and is trying to replicate them as much as possible in the receiving school to aid in the transition. Additionally, schools receiving students in cluster programs are preparing social stories with pictures of the school and classrooms in a story book format to provide to transitioning students.” (internal citations omitted)).

279. See supra note 152 and accompanying text (noting that the district went so far as to match the color of the computer cords in the new classrooms with those in the closing schools).

280. See Swan, 2013 WL 4401439, at *1 (“Finally, when the low likelihood of success on the merits is considered in conjunction with the potential harm that injunctive relief would cause by prolonging the period of uncertainty for the impacted students and their parents, causing additional instability for the administration and staff at the schools, and preventing those students who may want the opportunity to attend higher performing schools from doing so, the balancing of equities weighs against preliminary injunctive relief. For these and the other reasons[,] . . . Plaintiffs’ motions for preliminary injunction are denied.”).

281. See id. at *2 (stating that the parents–plaintiffs claimed that the expedited timeline to close the schools did not provide the district with adequate time for the district to allocate requisite resources to ensuring IDEA compliance for the thousands of impacted students classified as disabled).


283. See supra Section II.B (describing how the court rejected the parents’ claim for a preliminary injunction due in part to their failure to first exhaust the administrative remedies).
dismissed amidst a school closing. By addressing the jurisdictional-giving language in the IDEA and the administrative-exhaustion requirement in the context of an imminent school closing, the current barrier to IDEA relief can be lifted.

1. **Eliminating Two Obstacles for IDEA Enforcement for Students with Disabilities**

The first aspect of the IDEA that merits modification is the jurisdictional-giving language. Only the “party aggrieved” can currently bring a civil action after the issuance of an administrative order, resulting in parents being unable to seek judicial enforcement of the hearing officer’s order. To remedy this disparity, jurisdiction should be provided to courts to hear claims brought by parents seeking IDEA enforcement when a district fails to comply with an administrative order. This remedy ensures that the merit of a hearing officer’s order has the backing of the courts and can be timely enforced. In the absence of this jurisdiction, the only remedy currently available for parents is to reengage the proven ineffective administrative process, all while the school closing and IDEA violation persist.

The second necessary IDEA change addresses the mandatory administrative-exhaustion provision. When a school is slated to close in mere months, there is neither adequate time nor the underlying rationales to exhaust the IDEA administrative remedies prior to a school closing. The IDEA ought to be modified to expressly waive mandatory administrative exhaustion when a claim is brought for a temporary or preliminary injunction to prevent a school from closing. To help ensure that this waiver is not applied to contexts not intended, it should be limited to claims brought to rectify alleged

284. See infra Subsection III.E.1 (proposing a remedy to the “party aggrieved” language of the IDEA).
285. See infra Subsection III.E.1 (proposing a modification to the administrative-exhaustion requirement in a school-closing context).
287. See supra Section III.A.
288. See supra Section III.A.
289. See supra Section III.A.
290. See supra Section III.A.
291. See supra note 239 and accompanying text.
292. See supra Section III.C.
293. See supra Section II.C.
IDEA violations that result from a proposed or an initiated school closing.

Both of these changes are needed to ensure full IDEA compliance, particularly in the fast-paced environment of a looming school closing.294 These proposed changes would allow the parents to argue the merits of their IDEA-related preliminary injunction claim, rather than spending their and the court’s time and resources first litigating whether a court has jurisdiction to enforce a hearing officer’s order or whether exhaustion is appropriate.295 To be clear, neither of these modifications presumes that a parent will have a meritorious injunction claim, but only that his or her claim should not be predestined to fail. A uniform federal change that explicitly provides clear guidance for this narrow circumstance gives more certainty and protection to families seeking to ensure that a district complies with their students’ IDEA protections during a school closing. To further buttress the appeal of making this change, it is important to briefly address the arguments against this proposal.

2. Three Critiques Addressed

The first critique of the proposal relates to its practical and potentially harmful effect on a district. Under these proposed modifications, a single student has the ability to bring a civil action for an alleged IDEA violation that may result in stopping an entire school from closing. This consequence may cost a district a substantial amount of money due to continuing building operations and maintenance,296 continuing transport of a shifting student

294. CPS, for example, initially announced in March 2013 that it would close fifty-four schools by August 2013. See James B. Kelleher & Mary Wisniewski, Chicago Announces Mass Closing of Elementary Schools, REUTERS (Mar. 21, 2013, 8:28 PM), http://www.reuters.com/article/2013/03/22/us-usa-education-chicago-idUSBRE92K1C120130322.

295. See Rita S. ex rel. Christopher S. v. Stanislaus Cnty. Office of Educ., 384 F.3d 1205, 1220 (9th Cir. 2004) (Clifton, J., dissenting) (noting that litigation concerning the alleged IDEA violation and its exhaustion requirement lasted for more than four years).

296. See CHI. PUB. SCHS., DRAFT EDUCATIONAL FACILITIES MASTER PLAN 9 (2013), available at http://cps.edu/About_CPS/Policies_and_guidelines/Documents/CPSDraftEducationalFacilitiesMasterPlan.pdf (stating that “[t]he average age of [Chicago Public School] buildings is 75 years old (i.e. built in 1938)” and that “[k]eeping up with the basic repair and maintenance of the current facilities footprint has been estimated at $350 [m]illion per year”).
population,297 and providing redundant educational programming and
the cost of litigation.298 The cost savings for CPS’s proposed school
closings, for example, equated to $43 million annually,299 though this
number would not be representative of a single school closing or a
small- to medium-sized district.300 No matter the district’s size,
requiring a school to remain open will harm the district financially
and administratively.301

There is no doubting the serious burdens that may result from
the issuance of an injunction, but such factors are taken into
consideration by the court when making its ruling.302 To grant a
preliminary injunction, the court must consider two factors aimed
toward weighing these potential consequences: (1) whether the
alleged harm to the movant without the injunction outweighs the
potential harm that the preliminary injunction will inflict on the non-
movant; and (2) whether the issuance of the preliminary injunction
will disserve the public interest.303 It is true that a single student
could temporarily halt a school closing; yet, this would only be done
if the court first determines that the IDEA violation is so pervasive or
severe that the financial and administrative harms should be
temporarily subjugated.304 This safeguard is already in place to

297. See id. ("One challenge [that the Chicago Public Schools] face in
attempting to fund improvements to bring our facilities up to the level we all wish
for our students is a shift in the city’s population. . . . This creates resource
challenges for these schools and for our system as a whole.").

298. See id. at 37 ("Given limited financial resources, [Chicago Public
Schools] cannot provide new programs in every school impacted by a closure.").

299. See id. at 36 (noting that the school closings and other cost-saving
measures would result in an “operating cost savings of $43 million annually”).

300. See id. at 8 (“Chicago Public Schools ranks as the third largest school
district in the nation with 403,461 students and 681 schools operating in 743
buildings. The District is made up of 515 Elementary Schools, 13 Middle Schools,
and 153 High Schools.”).

301. The main driving force behind school closings is typically financial
strains. See supra Section I.A.

302. See supra note 136 and accompanying text.

303. See supra note 136 and accompanying text.

*28-29 (N.D. Ill. Aug. 15, 2013) ("In the balancing phase, Plaintiffs must
demonstrate that the harm they will suffer without an injunction outweighs any harm
that may be suffered by Defendants or third-parties (the ‘public interest’) if the
injunction is granted. The [c]ourt employs a sliding scale approach: ‘[t]he more
likely the plaintiff is to win, the less heavily need the balance of harms weigh in his
favor, the less likely he is to win, the more need it weigh in his favor.’ Here, because
Plaintiffs are not likely to succeed on the merits based on the evidence they have
presented at this stage in the two cases, they must demonstrate great harm in the
ensure that only the most extreme cases result in an injunction.305 Not permitting a single student to bring an action to require IDEA compliance undermines the importance of the IDEA and presupposes that financial concerns will always trump the educational rights of students with disabilities.

A second criticism of creating this exception to mandatory administrative exhaustion is the frequently proffered slippery-slope argument.306 Enumerating an additional exception to mandatory IDEA exhaustion will lead courts to open the floodgates to finding further exceptions, leaving the process ultimately without the practical force intended. This type of slippery-slope argument is frequently made as a reason to resist extending a legal principle.307 Yet, its underlying logic is not applicable to making this narrowly created change to the IDEA.308 Providing courts with jurisdiction to hear a dispute related to the administrative hearing from either party, rather than just the party aggrieved, is simply unsusceptible to further extension. Moreover, the proposed change to the administrative-exhaustion requirement only applies in the specific circumstance of a claim seeking a preliminary injunction due to an alleged IDEA violation to temporarily prevent a school closing. This exception is

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305. See supra note 136 and accompanying text.
306. A slippery-slope argument “is the claim that we ought not make a sound decision today, for fear of having to draw a sound distinction tomorrow.” Eugene Volokh, The Mechanisms of the Slippery Slope, 116 HARV. L. REV. 1026, 1029-30 (2003) (internal quotation marks omitted).
308. See generally Volokh, supra note 306, at 1029 (noting that legal “thinkers such as Lincoln, Holmes, and Frankfurter have recognized [that] slippery slope objections can’t always be dispositive” because a legal change is “often a risk that we need to take”).
exceedingly narrowed to a unique circumstance, resulting in its underlying justifications being not easily transferable to diverging situations.

A third critique of the proposed two-part solution is that making both changes simply goes too far. Solely giving courts the power to enforce an administrative hearing officer’s order is arguably sufficient to ensure IDEA compliance—alleviating the need to also modify the administrative-exhaustion requirement. The established administrative remedy process provides the opportunity for the hearing officer to efficiently remedy the dispute. Further, if the district fails to adhere to an order, then a parent can compel compliance by directly seeking court enforcement. This solution permits the use of the more streamlined administrative process while also providing the direct backing of the court. Consequently, there is no need to also grant an automatic waiver of the IDEA administrative-exhaustion process.

While providing this enforcement power would address the “party aggrieved” jurisdiction-giving language, this step alone falls short of fully resolving the problem. There is generally an extremely limited time between when a district announces a school closing and when the school physically closes. This narrow time frame does not provide parents with sufficient time to first engage in the administrative-exhaustion process and then, once it becomes apparent that the district is not fully complying, seek court enforcement. The alleged IDEA harm can continue unchecked without the ability to seek a preliminary injunction. A preliminary injunction first determines whether the alleged harm is so severe and likely to be meritorious that the closing procedures should be

309. See Clark, supra note 21, at 4 (“If successful, administrative review helps to avoid unnecessary judicial intervention by giving school officials the first opportunity to correct any procedural or substantive errors in its proposal to the parent . . . .”); see also Neil F. ex rel. Charlie F. v. Bd. of Educ., 98 F.3d 989, 992 (7th Cir. 1996) (stating that the administrative hearing process should be given the “first crack” to resolve the dispute).

310. See supra Section III.B.


312. This process can be even more elongated in states that chose the two-tiered administrative review system. See supra note 73 and accompanying text.

313. See supra note 130 and accompanying text.
temporarily halted to address the IDEA violation. Without a parent’s ability to initially seek this preliminary court review in extreme cases, the time will have likely passed after exhausting the administrative remedies for a preliminary injunction review to be worthwhile; once the school has closed and the students and programs have been reassigned, they cannot easily be reversed. Parents must have timely access to this essential form of relief before seeking a preliminary injunction becomes simply impracticable.

CONCLUSION

Just as there is no time to waste for parents attempting to halt an imminent school closing because of an IDEA violation, there is similarly no time to spare to make these needed changes to the IDEA. With the rising prevalence of school closings across the United States, there is an increasing threat that students with disabilities will be denied the protections and services provided to them under the IDEA. Parents seeking to ensure IDEA compliance currently cannot timely seek a preliminary injunction to delay a school closing or get a court to force a district to fulfill a hearing officer’s order. The existing IDEA relies on a dangerous assumption that a hearing officer has the power to issue an adequate remedy and that such an order will be enforced in a timely manner.

Much can be gleaned from collectively considering the aspects used by courts to apply or not apply mandatory IDEA administrative exhaustion. Requiring exhaustion of administrative remedies is not

315. See Barron ex rel. D.B. v. S.D. Bd. of Regents, 655 F.3d 787, 793 (8th Cir. 2011) (“[A]s a practical matter, it may be more than improbable that a hearing officer could ultimately enforce an order to the [district] to reverse its policy of cutting programs at the school’s physical location and out-sourcing services to home school districts.” (internal quotation marks omitted)).
316. See id. (stating that once a school program is eliminated, the administrative officer is unlikely to have the ability to reverse the district’s action despite an IDEA violation).
317. See generally Kelleher & Wisniewski, supra note 294 (noting that CPS initially announced in March 2013 that it would close fifty-four schools by August 2013).
318. See supra Section I.A.
319. See supra note 65 and accompanying text.
320. See supra Section II.C.
321. See supra Section III.B.
322. See supra Sections III.A-B.
323. See supra Sections II.C-D.
appropriate when this collective view is applied to instances of seeking a preliminary injunction to temporarily halt an imminent school closing due to an alleged IDEA violation. The case may be that no claim will ever be strong enough to obtain a preliminary injunction in this context, but courts are artificially making this presupposition a reality. Congress is expected to reauthorize the IDEA, which presents an ideal opportunity for it to remedy the current administrative-exhaustion barrier by making two changes: (1) provide courts with the jurisdiction to hear disputes from either party stemming from an IDEA administrative hearing; and (2) waive mandatory administrative exhaustion for civil cases seeking a preliminary injunction to temporarily prevent an imminent school closing due to a related IDEA violation. These two changes will help ensure that future actions for a preliminary injunction are not summarily dismissed for want of administrative exhaustion, but, rather, are adjudicated on the underlying merits of the claim. The time is now to take these steps to ensure that every student covered by the IDEA gets the required protection if—and, for many students in the United States, when—their school is slated to close.

324. See supra Sections III.A-D.
325. See supra Section II.D.
327. See supra Subsection III.E.1.
328. See supra Subsection III.E.1.