

C

West's Education Law Reporter

June 21, 2012

Commentary

***1 IMPARTIAL HEARINGS FOR PUBLIC SCHOOL STUDENTS UNDER SECTION 504: A STATE-BY-STATE SURVEY [FN1]**

Perry A. Zirkel, Ph.D., J.D., LL.M. [FNaa1]

Copyright 2012 by Thomson Reuters/West – No Claim to Original U.S. Government Works

The parents of Brett Doe have become increasingly frustrated with their local school district officials. When Brett experienced various difficulties in school that seemed to be associated with his diagnoses of attention deficit hyperactivity disorder (ADHD) and anaphylactic food allergies, they asked for various, increasing forms of assistance and intervention without success. When they demanded an evaluation for special education services, the district personnel complied but determined that Brett did not qualify for an individualized education program (IEP) under the Individuals with Disabilities Education Act (IDEA). However, when the parents vented their dissatisfaction, the district provided Brett with a “Section 504 plan” as a consolation prize. When Mr. and Mrs. Doe consulted with a legal specialist, the attorney informed them that in light of recent developments in Congress and the courts, Section 504 of the Rehabilitation Act is more complicated and nuanced than the district personnel may realize, thus providing them with a prize that potentially could end up meaning the opposite of consolation for the district. Specifically, to prove the point, the attorney suggested that they formally request an impartial hearing under Section 504.

How will the school district respond to this request for an impartial hearing under Section 504? In contrast, as the request for and implementation of a special education evaluation illustrate here, school officials and parents are generally aware of the basic requirements and procedures under the IDEA. [FN1] One of the basic procedures is the primary dispute resolution mechanism, which is commonly known as a “due process hearing.” [FN2] The IDEA regulations have rather detailed specifications, [FN3] and the states have well-established systems [FN4] for these impartial hearings. Moreover, the *2 professional literature provides systematic information about the frequency, [FN5] issues, [FN6] outcomes, [FN7] “judicialization,” [FN8] burden of proof, [FN9] impartiality, [FN10] and various other aspects [FN11] of IDEA impartial hearings. Thus, if Brett's parents subsequently request an impartial hearing under the IDEA, it is likely that the school district will respond appropriately.

However, school personnel [FN12] and parents [FN13] have much less familiarity with the pertinent requirements and procedures under Section 504 of the Rehabilitation Act. [FN14] More specifically, although they may recognize that Section 504 has a broader definition of disability than does the IDEA [FN15] and *3 that the Section 504 complaint investigation process of the U.S. Department of Education's Office for Civil

Rights (OCR) is one avenue parents may resort to for enforcement, [FN16] school personnel are often unfamiliar with, or confused about, the corresponding impartial hearing procedure for resolving Section 504 disputes of K–12 public school students. [FN17]

The purposes of this article are (a) to canvass the Section 504 legislation, regulations, and OCR interpretations specific to impartial hearings; and (b) to determine, via a national survey, the current practices of the state education agencies (SEAs) for the 50 states and the District of Columbia (D.C.) in terms of meeting the Section 504 requirement for an impartial hearing for the two identified categories of Section 504–eligible students. Part I of this article provides an introductory overview of the major sources of confusion—one based on the overlap with the IDEA and the other based on the limited coverage in the literature—concerning impartial hearings under Section 504. As a focused legal framework, Part II summarizes the Section 504 legislation, regulations, and OCR interpretations specific to impartial hearings. As the central section, Part III presents the methodology and findings of a survey of the current practices, including state laws and policies, of the 51 SEAs (including D.C.) for Section 504 hearings. Finally, Part IV provides a concluding discussion recommending that states review and revise these practices in light of the OCR interpretations, relevant case law, and other pertinent considerations.

I. INTRODUCTORY OVERVIEW

Two major sources contribute to the confusion about impartial hearings under Section 504. First, the respective coverage of the IDEA and Section 504, akin to one small circle within a larger circle, results in two categories of students—(a) “double–covered,” referring to students with IDEA IEPs who are also entitled to the protection of Section 504, and (b) “Section 504–only,” referring to students not eligible under the IDEA but who nevertheless fit in the broader Section 504 definition of disability. [FN18]

Thus, with very rare exceptions, [FN19] students in the first category not only have IEPs as a result of an IDEA evaluation that determined that they met the two–pronged standard of eligibility under the IDEA [FN20] but also fit within the broader coverage of the three–pronged standard of eligibility under *4 Section 504, which is not limited to impairments that require special education. [FN21] For example, a student with attention deficit hyperactivity disorder (ADHD) who, as a result, needs special education has an IEP under the IDEA is also covered by the broader definition of Section 504. [FN22]

Because Section 504 extends to major life activities beyond learning, such as breathing, students with various health impairments fit in the second category if they do not require special education. The Americans with Disabilities Act Amendments Act (ADAAA), which went into effect on January 1, 2009, significantly expanded the scope of this Section 504–only category. [FN23] For example, a child who has ADHD that substantially impairs the ADAAA–recognized major life activity of concentration but who may only need classroom accommodations, such as extended testing time and preferential seating but not special education, qualifies as Section 504–only. [FN24] Similarly, a student with diabetes or life–threatening food allergies, despite the mitigation of medication, qualifies in this same category unless also needing special education. [FN25] Additionally, as explained in more detail in the final part of this article, recent court decisions have also expanded the potential for more Section 504 hearings concerning not only eligibility [FN26] but also free appropriate public education (FAPE). [FN27] The impartial hearing right under Section 504 for double–covered and Section 504–only students under the Section 504, in comparison to that under the IDEA, and the differential standards of eligibility and FAPE between Section 504 and the IDEA are complicated, thus subject to potential

confusion.

The second contributing factor is the paucity in the professional literature of specific information about impartial hearings under Section 504. Most of the publications on Section 504 in relation to K–12 students focus on another issue—eligibility. [FN28] The more general treatments either entirely omit [FN29] or merely mention the right to an impartial hearing as one of the required *5 procedural safeguards. [FN30] Further reflecting this lack of attention, a series of surveys on school district personnel's implementation and knowledge of Section 504 in Connecticut did not include any questionnaire items concerning Section 504 hearings. [FN31] Similarly, the only national survey of state education agency Section 504 policies did not cover impartial hearings at all, lacking any items specific to procedural safeguards. [FN32] Thus, the national–study researchers' recommendation to use the IDEA's impartial hearing process for Section 504 claims was without any specific support in or correlation to the survey results. Moreover, their sole justification for the recommendation was that “a separate system is likely to overburden localities and result in practice discrepancies as hearings often are brought under both IDEA and Section 504.” [FN33] Being only incidental to the state–level focus of the survey, this brief explanation did not consider other policy concerns and lacked a systematic differentiation between double–covered and Section 504–only students.

The few sources that provide specific information on Section 504 hearings only have done so on a scattered or secondary basis. For example, a two–volume reference work on Section 504 contains citations and blurbs for the regulations and rulings concerning impartial hearings interspersed with and incidental to comprehensive coverage of the K–12 school context. [FN34] Additionally, a roadmap of the various avenues of legal dispute resolution under the IDEA and Section 504 put in broader perspective the role of Section 504 impartial hearings with differentiation between double–covered and Section 504–only students. [FN35] Finally, comprehensive analysis of the non–exclusivity provision in the IDEA highlighted the inconsistency and confusion among judicial rulings and state policies with regard to impartial hearings under Section 504. [FN36] This IDEA provision allows parents of children with disabilities to advance alternative claims in court, including those under Section 504, but only after exhausting available relief in IDEA hearings. [FN37]

*6 This Article will contribute to filling this small but significant gap in the literature. Specifically, it will provide systematic information as to the applicable provisions of Section 504, the related OCR policy interpretations, and the current policies and practices of state education agencies.

II. THE LEGISLATION, REGULATIONS, AND OCR INTERPRETATIONS [FN38]

A. Statute

Dating back to 1973, Section 504 of the Rehabilitation Act—unlike the IDEA—is relatively brief and does not legislatively address procedural safeguards, such as impartial hearings. [FN39] After providing its broad definition of disability, [FN40] this legislation prohibits disability discrimination in “any program or activity receiving Federal financial assistance.” [FN41] The sister statute, the Americans with Disabilities Act, [FN42] is much longer and extends to private organizations that accommodate the public, [FN43] but it does not specifically address public schools or impartial hearings.

B. Regulations

The Section 504 regulations, which were originally issued in 1977 and have not been revised, provide a rather brief procedural safeguards provision. This provision requires recipients of federal financial assistance that operate a public elementary or secondary education program to provide “an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel.” [FN44] This regulation only provides one other specification for the hearing itself: the designated subject matter jurisdiction is “identification, evaluation, or educational placement of persons who, because of [disability] need or are believed to need special instruction or related services.” [FN45] Its only other related requirement is that the recipient, i.e., school district, must have, as the subsequent step, a “review procedure.” [FN46] Finally, recognizing the narrower but deeper coverage of the IDEA, the final sentence explains that “[c]ompliance with the procedural safeguards of [the IDEA] is one means of meeting this requirement.” [FN47]

A separate Section 504 regulation requires a grievance procedure. [FN48] However, this requirement is distinct from that for impartial hearings in several respects. First, it applies to recipients with more than 15 employees, *7 regardless of whether they operate public schools. [FN49] Second, it is for disability-related complaints more generally, such as those of employees. [FN50] Third, it is an investigatory, rather than an adjudicatory, mechanism. [FN51]

C. Agency Interpretations

In the commentary accompanying the original issuance of the Section 504 regulations, OCR recommended but did not require use of the IDEA model of impartial hearings. [FN52] In a subsequent policy letter, OCR issued the following guidance: “Nothing in the Section 504 regulation...prevents an ‘IDEA hearing officer’ from adjudicating Section 504 issues.” [FN53] In recognition of its overlapping enforcement role, OCR in the same policy letter explained that (1) “if the school district failed to provide the parent with an impartial hearing, OCR's complaint mechanism is an appropriate avenue for remedying this violation, and (2) for such cases, in the absence of specific Section 504 provisions, the agency's policy is to adhere to standards of reasonableness and fundamental fairness, with the IDEA serving for guidance by way of analogy rather than automatically.” [FN54]

In letters of findings (LOFs) resulting from its complaint investigations, OCR clarified that the responsibility for Section 504 hearings is at the local district level, unless state law or policy provides otherwise. [FN55] In another LOF, showing that its standards of fairness and reasonableness for Section 504 hearings are not necessarily limited by IDEA standards where state law or local policy do not provide otherwise, OCR found no violation for a school district policy that provided for Section 504 hearings that were relatively informal. [FN56] The features of these hearings included audiotapes rather than a court reporter; brief written decisions that did not necessarily include factual findings and legal conclusions; and hearing officers whom the district paid as independent contractors. [FN57] The hearing officer in this particular case had applied this policy by allowing follow-up questions but not cross-examination. In response to the parent's claims of unfairness, OCR ruled that Section 504 does not require hearing officers “to allow cross-examination or have a court reporter present during the hearing.” [FN58]

Additionally, in a consistent line of LOFs, OCR consistently reminded districts that the separable institutional requirement of a grievance procedure does not fulfill, and may not be used as a prerequisite for, the district's impartial hearing obligation under Section 504. [FN59] Other LOFs have made clear that impartiality of hearing officers under Section 504 is, in the absence *8 of specific standards in the Section 504 regulations, a rather ad hoc determination. [FN60]

Finally, a series of other OCR policy letters addressed the Section 504 hearings in a more peripheral way. Specifically, in interpreting the Section 504 regulations as requiring consent for the initial evaluation or placement, these letters opined that school districts may—in contrast with “must”—initiate an impartial hearing under Section 504 to override the lack of consent. [FN61]

Within this broad and rather fluid framework, the ADAAs have expanded the potential for litigation on behalf of 504-only students, and parent attorneys are increasingly finding advantages in proffering Section 504 claims on behalf of both double-covered and 504-only students. Thus, the increase of impartial hearings under Section 504 is foreseeable. Do states, comparable to their systems for impartial hearings under the IDEA, [FN62] have carefully considered and generally workable policies and practices for Section 504 hearings?

III. STATE-BY-STATE SURVEY

A. Method

As shown in the Appendix, the survey instrument was a brief two-item questionnaire that the author developed and—after field-testing with the state education agency (SEA) representatives for IDEA hearings in Connecticut, Massachusetts, and Rhode Island—refined for national, state-by-state data. One item was specific to students with IEPs under the IDEA, i.e., the aforementioned “double-covered” category. [FN63] The second item focused instead on students with 504 plans, i.e., the “Section 504-only” category. [FN64] In parallel with each other, both items had five designated choices and a final option of filling in a blank “Other” option. The five choices ranged from “YES, our hearing officers can hear 504 claims just like IDEA claims” to “NO, our hearing officers *cannot* hear any 504 claims.” The instructions at the top of the survey form directed the respondent to select one answer for each of the two questions, and the instructions at the bottom requested the citation, URL, or copy of any applicable official policy or regulation.

*9 The SEA director of special education received via e-mail the final version of the survey questionnaire, with a request to have the staff member responsible for IDEA hearings to fill out and return the form via e-mail, fax, or a designated Google Docs site. Repeated reminders, including follow-up telephone calls, yielded a 100% response rate, thus providing results for all 51 jurisdictions.

The author followed up with an e-mail exchange with each of the approximately ten respondents whose answers warranted clarification. Some of these answers were ambiguous in their wording, reflecting the respondent's apparent confusion. For example, one respondent's initial answer for the first item was: “No, our hearing officers identify the matter as not related to the IDEA and exhaust the matter for the record. If the 504 claim could also be an IDEA related issue, then they would hear it.” Others were ambiguous in their context, reflecting an inadvertent contradiction in the questionnaire's wording, which was resolved in the follow-up communications. [FN65]

B. Results

Table 1 provides the overall distribution of the 50 states' and D.C.'s survey responses for the two separate categories—“double-covered” and “Section 504-only” students—according to a continuum ranging from an unconditional YES (i.e., inclusively the same as for IDEA claims) to an unconditional NO (i.e., exclusively for IDEA claims) as to whether the IDEA hearing officers have jurisdictions for Section 504 claims. The two

intermediate levels of the continuum are for relatively integral “it depends” conditions, whereas the first of the two levels for NO is for a more limited and relatively separate exception.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***10** Examination of Table 1 reveals that for double-covered students, the majority (59%) of the 51 SEAs do not directly allow access to their IDEA hearing system for Section 504 claims. Yet, substantial minorities provide jurisdiction for these claims on an “it depends” basis (24%)—more typically based on whether the Section 504 and IDEA claims are intertwined—or without any restrictions except for the possible charge back of the costs. In contrast, for Section 504-only students, the distribution amounts to the polar pairs of the continuum. More specifically, most (80%) of the SEAs not directly allowing access to Section 504 claims and with the remainder (20%) being a similar proportion to that for double-covered students but with more of these SEAs specifying that they charge the cost back to the LEA. Additionally, clarifying comments on the survey forms and during the aforementioned follow up inquiries revealed that allocating the costs for hearing Section 504 claims to LEAs was actually more frequent than the “charge back” response entries. The reason is that some states hold the district responsible for the costs of either impartial hearings generally, even those solely under the IDEA, or for the costs of the 504 claims regardless of the three differential categories in this table. Table 2 provides a more detailed view of the overall distribution, identifying (a) which states account for each cell; (b) which of these practices have a supporting law or policy; and (c) which states—according to Zirkel and Scala’s survey [FN66]—have full-time IDEA hearing officers.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

***11** Table 2 elaborates the pattern of Table 1 in two major respects—(a) whether the response was a matter of law, policy, or purely practice; and (b) whether the state’s IDEA hearing officers are full-time or part-time. First, Table 2 shows that eight states have relevant laws and three more have pertinent policies. Of those with relevant laws, the SEA representatives for only four (Georgia, New Jersey, North Dakota, and Virginia) provided this information in response to the “soft” request at the end of the survey form. [FN67] A systematic Boolean search on Westlaw for “Section 504” and “hearing” for the legislation and regulations for each of the 50 states and the District of Columbia revealed the relevant laws of the other four jurisdictions. Inspection of the respective laws and policies confirmed the respondents’ answers except for the following contradictions or clarifications: (a) the Massachusetts’ regulation appears to limit this dual jurisdiction to double-covered students; [FN68] (b) the Connecticut policy provided a limited exception ***12** for addressing Section 504 claims when “necessary to resolve the claims made under the IDEA”; [FN69] (c) Tennessee’s policy allows for a contractual arrangement between the district and the system, not an individual one, of the IDEA hearing officers; [fn70] (D) RHODE ISLAND’s policY provides an unusual option for a subset of Section 504 complaints—submission of those specific to “general education accommodations under Section 504” to the SEA’s legal office; [FN71] and (e) North Dakota only allows Section 504 claims for double-covered, not Section 504-only, students in its IDEA hearing process although its regulation does not expressly provide for this differentiation. [FN72]

Second, Table 2 shows that the distribution of the minority of SEAs (n=15) that have full-time hearing officers for IDEA cases tend to be similar to the pattern for those with part-time hearing officer systems, except for a more pronounced skew to the two extremes of the continuum, i.e., either addressing Section 504 claims on a par with IDEA claims or not at all.

IV. DISCUSSION

The predominant theme that emerged from the SEA survey was the lack of clear familiarity and careful attention to impartial hearings under Section 504. Several findings contributed to this conclusion concerning state policies and practices.

First, some of the respondents showed obvious confusion in their answers to the questionnaire. For example, approximately a fifth of the respondents warranted follow-up communications for clarification, which in some cases resulted in reversed answers. Others were clear in their answers, but their comments evidenced obvious confusion. For example, in explaining their “No” answers to jurisdiction for Section 504 hearings, the respondents in three states commented that they refer these claims to OCR, thus confusing the administrative investigation avenue with the administrative adjudication venue for Section 504 complaints. [FN73] Finally, in the eleven states with pertinent laws or policies, the responses seemed to suggest incomplete, if any, knowledge of their existence or at least their specific contents. More specifically, respondents in half of the eight SEAs with relevant laws failed to acknowledge that their state had a law despite the survey request for this information, and the answers of the respondents in at least three of the eleven jurisdictions did not square with the pertinent policy or law.

Second, most states lacked either specific laws or—distinguishable because they are not produced via the formal process of legislation or regulations and, thus, lack the binding force of law [FN74]—official policies concerning *13 impartial hearings under Section 504. Consequently, in the 40 SEAs without a pertinent law or policy, the reported practice is ripe for inconsistency in two ways: (a) at the time of the survey, the various relevant SEA representatives may have perceived and, thus, may have implemented the agency practice differently; and, even more likely, (b) over time the practice may easily change from the administration of one state special education director—a position subject to rather rapid attrition—to that of another.

The third contributing finding merits special consideration. Specifically, for double-covered students, the notable minority practice of not allowing Section 504 claims to be heard in IDEA hearings, [FN75] leaves parents with the option of having a “second bite of the apple” at an impartial hearing at the local level. For this hearing, the facts will usually be identical, given that it is the same child with an IEP, with the likely outcome-determinative differences being the legal standards—e.g., eligibility or FAPE—and the individual hearing officer. Thus, these states may not have carefully considered the matter. Instead, they have taken the knee-jerk position for complying with the Section 504 regulation for impartial hearings, which fastens the obligation on the recipient that operates a public elementary or secondary education program and only applies to the SEA in the limited instances of direct programs, such as state schools for the deaf or blind. Would it not be more prudent public policy to provide the limited additional training to IDEA hearing officers for the circumscribed differences for Section 504 claims and allocate the proportional costs for the hearing to the local school district? Although the cost-allocation feature is not unusual among the SEAs that, in practice, provide jurisdiction for Section 504 claims, Georgia's law illustrates codifying this feature. [FN76] More noteworthy, Virginia's regulations are exemplary in explicitly providing for impartial hearing officer (IHO) training on Section 504. [FN77] Finally, for states that opt, by law or policy, to have IDEA hearing officers address Section 504 claims of double-covered students, it would appear prudent for the provision to require the parties to do so in one proceeding, thus precluding the possibility of separate, or “second bite,” hearings.

Reinforcing an integrating answer for this policy choice is the aforementioned [FN78] problematic non-exclusivity provision of the IDEA that traces back to the 1986 amendments. [FN79] This provision allows parents to file alternative claims in court under other federal laws protecting the rights of children with disabilities, such as Section 504, but requires exhausting the impartial hearing procedures of the IDEA. [FN80]

In states that do not allow addressing the Section 504 claims in IDEA hearings, does the hearing officer's dismissal of these claims (but decision on the IDEA claims) amount to exhaustion? The courts *14 have not clearly settled this issue. [FN81] Even if the IDEA hearing officer's dismissal or, instead, simply completing the IDEA hearing without any mention of Section 504 fulfills the exhaustion requirement, the parent would still appear to have the option of filing for a local impartial hearing under Section 504, thus invoking the "second bite" problem in terms of resources and, possibly, result.

The IDEA exhaustion provision is even more problematic for the even more predominant proportion of jurisdictions that say "No" to state-level impartial hearings for Section 504-only students. In a comprehensive analysis, Maher found that various courts have applied the IDEA exhaustion provision to Section 504-only students, thus leaving the parents of these students in a Catch-22 if the case arises in one of these "No" jurisdictions. [FN82] For example, Maher posed the following conundrum for Connecticut, which by policy does not allow IDEA hearing officers jurisdiction for most Section 504 claims: "One—wonders how, in Connecticut, the parents of a student eligible under Section 504/ADA, but ineligible under the IDEA, can exhaust their administrative remedies through the IDEA's procedures if Connecticut hearing officers do not have jurisdiction over Section 504 claims unrelated to IDEA claims." [FN83] Must the parents file an IDEA claim for the child who is undisputedly ineligible under the IDEA, thus in all likelihood leading to dismissal? This route is a waste of not only the parents' but also the district's and SEA's energy, time, and other resources. It is also contrary to the underlying purposes of exhaustion, which are specialized expertise and judicial efficiency. [FN84] Alternatively, in accordance with the interpretation of one court, [FN85] must parents of Section 504-only students exhaust whatever the district or state offers by way of an impartial hearing under Section 504 as a prerequisite to filing suit? These issues are unsettled and unsettling. Unclear, confusing, or ill-informed state practices contribute to compounding rather than resolving them.

For jurisdictions where courts, per Maher's recommendation, [FN86] interpret the IDEA exhaustion provision to apply only to double-covered students, leaving Section 504 hearings to the local level has the advantage of maintaining the aforementioned flexibility that the Section 504 regulations and OCR interpretations allow in clear contrast with the increasingly costly and complex procedures under the IDEA. Having such hearings readily available on an impartial basis within the streamlined standards of Section 504 would appear to be beneficial to the system, the parents, and the child regardless of whether exhaustion applies under Section 504.

Recent reasons for a likely increase in the frequency of parent requests for both categories of students reinforce the need for more careful state policymaking consideration to the impartial hearing requirement of Section *15 504. First, recent court decisions illustrate the following Section 504 claims that parents may pursue via impartial hearings that are differentiated from IDEA claims and, thus, are available to both double-covered and Section 504-only students:

a different and possibly higher substantive standard for FAPE [FN87]

disability-based bullying/harassment, [FN88] retaliation, [FN89] facilities accessibility issues, [FN90] associational discrimination, i.e., via related organizations, [FN91] misidentification, [FN92] constructive exclusions, [FN93] statute of limitations, [FN94] service animals, [FN95]

Second, other recent court decisions illustrate Section 504 claims that provide differential advantages specifically at the judicial stage in comparison to sole reliance on the IDEA. Thus, the following claims provide an additional, albeit more limited and indirect, incentive for increased Section 504 activity at the impartial hearing stage:

money damages, [FN96] jury trial, [FN97] expert witness fees, [FN98]

Finally, the ADA, which went into effect on January 1, 2009, expanded the scope of the Section 504-only student category, thus multiplying not only impartial hearing cases concerning eligibility [FN99] but also FAPE. [FN100] For eligibility, the thorny issues include (a) measurement of newly listed major life activities, such as concentration and thinking; (b) determining which other major life activities are now inferable as a result of the lengthened list; [FN101] and ascertaining substantial limitation without mitigating measures [FN102] and—for impairments that are in remission episodic or in remission—at the active time. For FAPE, the thorny issues include the standards for the scope *16 and sufficiency of 504 plans for these same students—e.g., a student with ADHD who takes medication before and after school that fully mitigates the limitation on concentration or a student with severe food allergy [FN103] whose parent seeks a peanut—and tree nut—free school. [FN104]

In sum, impartial hearings under Section 504 merit much more attention in both the professional literature and in state policymaking. Although no single solution is necessarily applicable to all states, careful consideration is clearly warranted. In general, adopting a state law or at least official policy would appear to be in the public interest. The process of such adoption should include concerted and systematic attention to (a) the differences between double-covered and Section 504-only students, (b) the courts' interpretation of the IDEA exhaustion provision for the particular jurisdiction, and (c) the competing interests, including available resources and applicable values, for the jurisdiction. Finally, SEAs need to include local stakeholders in terms of both parents and district personnel in both the development and dissemination of the policies for impartial hearings under Section 504 so that disputes about eligibility, FAPE, and other such claims are subject to effective resolution rather than costly compounding.

Returning to the request of Brett's parents for an impartial hearing under Section 504, if the district provides one, the parents can still subsequently request an impartial hearing under the IDEA, where they can advance claims of inappropriate evaluation and perhaps, depending on the specific facts, child find. If the district either declines to provide or drags its feet in implementing a Section 504 hearing, the parents have added ammunition for filing a complaint with OCR, perhaps adding—depending on the timing and manner of the district's action—a retaliation claim. The district will have difficulty basing its refusal on the IDEA's exhaustion requirement, because (1) the parents' claim may artfully avoid the IDEA by acquiescing to the evaluation, and, in any event, (2) they may effectively argue that exhaustion does not preclude their right to a Section 504 hearing because they have not filed, at least yet, a complaint in court. If, however, the state has an impartial hearing system that adjudicates both Section 504 and IDEA claims, the district will at least be able to avoid adding fuel to the fire in terms of two hearings and/or the OCR complaint—and exhaustion will not be an issue except that it may successfully resolve the matter short of litigation.

[FN1] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 279 Ed. Law Rep. [1] (June 21, 2012).

[FN2] Perry A. Zirkel is University Professor of Education and Law at Lehigh University in Bethlehem, PA.

[FN3]. 20 U.S.C. §§ 1400 *et seq.* (2009).

[FN2]. *Id.* § 1415(b)(7)(B). The regulations refer alternatively to “due process hearing,” “impartial due process hearing,” and “impartial hearing.” See, e.g., 34 C.F.R. §§ 300.507(a), 300.507(b), and 300.507(e). In this article, we use “impartial hearing” because it is the most generic and concise of these various alternatives.

[FN3]. 34 C.F.R. §§ 300.507–300.515.

[FN4]. E.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010).

[FN5]. E.g., Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEAD. 22 (2008).

[FN6]. E.g., Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131 (2011); Kristin Rickey, *Special Education Due Process Hearings*, 14 J. DISABILITY POL'Y STUD. 46 (2003).

[FN7]. E.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, [161 Ed.Law Rep. [731]] (2002).

[FN8]. E.g., Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization of Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27 (2007).

[FN9]. E.g., Charles J. Russo & Allan Osborne, *The Supreme Court Clarifies the Burden of Proof in Special Education Cases: Schaffer ex rel. Schaffer v. Weast*, [208 Ed.Law Rep. [705]] (2006); Mitchell L. Yell & Antonis Katsiyannis, *Schaffer v. Weast: The Supreme Court on the Burden of Proof in Special Education Due Process Hearings*, 44 J. DISABILITY POL'Y STUD. 241 (2009).

[FN10]. E.g., Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N. DAKOTA L. REV. 109 (2007); Geoffrey F. Schultz & Joseph R. McKinney, *Hearing Officer Background and Case Variable Effect on Decision Outcomes*, 2000 BYU EDUC. & L.J. 17.

[FN11]. E.g., David Bateman, *Due Process Hearing Case Study*, 41 TEACHING EXCEPTIONAL CHILD. 69 (July–Aug. 2009); Paul Beare & Colleen Torgerson, *Where to Place Wally: A Special Education Due Process Hearing Case Study*, 6 TEACHING EXCEPTIONAL CHILD. PLUS 2 (Dec. 2009), <http://journals.cec.sped.org/tecplus/vol6/iss2/art3>; Geoffrey F. Schultz & Joseph R. McKinney, *Hearing Officers, Case Characteristics and Due Process Hearings*, [111 Ed.Law Rep. [1069]] (1996); Mitchell L. Yell, Antonis Katsiyannis, Joseph B. Ryan, & Kimberly A. McDuffie, *Recovery of Expert Fees in Due Process Hearings*, 44 INTERVENTION SCH. & CLINIC 112 (2008).

[FN12]. For example, a national sampling of Section 504 building coordinators revealed notable misconceptions about the then applicable interpretive standards for determining whether an impairment amounted to a substantial limitation on one or major life activities. Rachel Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning “Section 504–Only” Students*, 92 NASSP BULL. 19 (2008). Similarly, based on their previous survey studies (*infra* note 31), Madaus and Shaw concluded that both central office and building–level personnel have not received adequate information about Section 504 implementation for students. Stan F. Shaw & Joseph W. Madaus, *Preparing School Personnel to Implement Section 504*, 43

INTERVENTION SCH. & CLINIC 226 (2008).

[FN13]. For example, a comprehensive literature search found only one article concerning Section 504 addressed to parents, and it was limited to new eligibility standards. Candace Cortiella & Laura Kaloi, *The New and Improved Section 504*, 40 EXCEPTONAL PARENT 14 (Feb. 2010).

[FN14]. 29 U.S.C. § 794 (2009).

[FN15]. Even for this broader scope of eligibility, school districts often confuse Section 504 with the IDEA by restricting evaluation to only one of the major life activities under Section 504—learning. See, e.g., Oxnard (CA) Union High Sch. Dist., 55 IDELR ¶ 21 (OCR 2009); N. Royalton (OH) City Sch. Dist., 52 IDELR ¶ 203 (OCR 2009); Virginia Beach (VA) City Pub. Sch., 54 IDELR ¶ 202 (OCR 2009).

[FN16]. E.g., PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS App. 10 (2011).

[FN17]. E.g., Catoosa Cnty. (GA) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011); Leon Cnty. (FL) Sch. Dist., 50 IDELR ¶ 172 (OCR 2007).

[FN18]. For the prevailing visual image, based on concentric circles, see, e.g., ZIRKEL, *supra* note 16, at One:3.

[FN19]. E.g., *Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1016 (2009) (ruling that child covered under the IDEA was not automatically covered by Section 504). Although the court did not provide specific information as to the student in question, it is at least conceivable that a child eligible as having a specific learning disability (SLD) under the IDEA might not qualify under Section 504, because the IDEA provides for SLD eligibility based on eight enumerated areas, such as reading fluency and math calculation, whereas Section 504 premises eligibility on broader, or more general, “major life activities,” such as “reading.”

[FN20]. This standard, based on the IDEA regulations, consists of (1) meeting the criteria of one or more of the recognized classifications under the IDEA and, by reason thereof, (2) needing special education. 34 C.F.R. § 300.8(a) (2009).

[FN21]. This standard consists of (1) a physical or mental impairment that (2) substantially limits (3) one or more major life activities. 20 U.S.C. § 705(20)(B)(1) (2009); 34 C.F.R. § 104.3(j)(1) (2009).

[FN22]. For a detailed treatment of the eligibility of students with ADHD, see Stacy Martin & Perry A. Zirkel, *Identification Disputes for Students with Attention Deficit Hyperactivity Disorder: An Analysis of the Case Law*, 40 SCH. PSYCH. REV. 405 (2011).

[FN23]. Pub. L. No. 110–325, 122 Stat. 3553, § 2 (2008) (codified at 42 U.S.C §§ 12101–12102 (2009)). For an overview of its expansive effect on Section 504 eligibility, see, e.g., Perry A. Zirkel, *A Step-by-Step process for § 504/ADA Eligibility Determinations*, [239 Ed.Law Rep. [333]] (2009).

[FN24]. See, e.g., Martin & Zirkel, *supra* note 22.

[FN25]. E.g., Perry A. Zirkel, *Section 504 and Students with Individual Health Plans*, [__ Ed.Law Rep. [__]] (in press).

[FN26]. E.g., Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEAD. 3 (2009).

[FN27]. E.g., Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).

[FN28]. E.g., WHO'S ELIGIBLE FOR SECTION 504?: A QUICK-REFERENCE GUIDE (Melissa Greenwood ed., 2010); Kevin P. Brady, *Section 504 Student Eligibility for Students with Reading Disabilities*, 20 READING & WRITING Q. 305 (2004); Cortiella & Kaloi, *supra* note 13; Holler & Zirkel, *supra* note 12; Perry A. Zirkel, *Section 504: Student Eligibility Update*, 82 CLEARING HOUSE (2009).

[FN29]. E.g., CHARLES J. RUSSO & ALLAN OSBORNE, SECTION 504 AND THE ADA (200999); THOMAS E.C. SMITH, THE SECTION 504 TRAINER'S MANUAL (2002); Jodie Schraven & Jennifer Jolley, *Section 504 in American Public Schools*, 37 AM. EDUC. HIST. J. 419 (2010).

[FN30]. E.g., GLENN R. ALLEN, THE SECTION 504 GUIDE TO A SUCCESSFUL SCHOOL-LEVEL PROGRAMMM (2001); Patricia Guthrie, SECTION 504 AND ADA: PROMOTING STUDENT ACCESS—A RESOURCE GUIDE FOR EDUCATORS (2011); JAMES MCKETHAN, SECTION 504: FROM REFERRAL TO PLACEMENT (2007); DAVID M. RICHARDS, THE TOP SECTION 504 ERRORS (2010); THOMAS E.C. SMITH & JAMES R. PATTON, SECTION 504 AND PUBLIC SCHOOLS (2007); Laurie U. deBettencourt, *Understanding the Differences Between IDEA and Section 504*, 34 TEACHING EXCEPTIONAL CHILD. 16 (Jan./Feb. 2002).

[FN31]. Joseph W. Madaus & Stan F. Shaw, *The Role of School Professionals in Implementing Section 504 for Students with Disabilities*, 22 EDUC. POL'Y 363 (2008); Joseph W. Madaus & Stan F. Shaw, *School District Implementation of Section 504 in One State*, 24 PHYSICAL DISABILITIES: EDUC. & RELATED DISORDERS 46 (2006); Laura M. Seese, Joseph W. Madaus, Melissa A. Bray, & Thomas J. Kehle, *A State-Specific Survey of District Compliance with Section 504 Policies and Procedures*, 20 J. SPECIAL EDUC. LEAD. 3 (2007).

[FN32]. Antonis Katsiyannis & Greg Conderman, *Section 504 Policies and Procedures: An Established Necessity*, 15 REMEDIAL & SPECIAL EDUC. 311 (1994).

[FN33]. *Id.* at 317.

[FN34]. ZIRKEL, *supra* note 16.

[FN35]. Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).

[FN36]. Peter Maher, *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, 276-77 (2011).

[FN37]. 20 U.S.C. § 1415(l) (2009). For further discussion of this provision and the Maher analysis, see *infra* notes 82-86 and accompanying text.

[FN38]. The case law, which is more a limited and unsettled application than a fundamental building block of

this framework, is selectively includes in Part IV (Discussion). For a comprehensive treatment of the case law, see Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504: Resolution of the Confusion* (2012) (manuscript under review).

[FN39]. The much more detailed IDEA is primarily funding legislation, whereas Section 504—like Title VI—is a civil rights law that does not provide any funding. For a detailed comparison of the legislation and regulations under Section 504 with the legislation and regulations under the IDEA, see, e.g., Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, [__ Ed.Law Rep. [__]] (in press).

[FN40]. 29 U.S.C. § 705(20) (2009).

[FN41]. *Id.* § 794 (2009).

[FN42]. 42 U.S.C. §§ 12101 *et seq.* (2009).

[FN43]. *Id.* § 12182(a).

[FN44]. 34 C.F.R. § 104.36 (2009).

[FN45]. *Id.*

[FN46]. *Id.*

[FN47]. *Id.*

[FN48]. *Id.* § 104.7(b).

[FN49]. *Id.*

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. Analysis of Final Regulations, 34 C.F.R. Ch. 104 App. A ¶ 25 (2009).

[FN53]. Letter to Anonymous, 18 IDELR 230 (OCR 1991).

[FN54]. *Id.*

[FN55]. E.g., Redding (CT) Pub. Sch., 33 IDELR ¶ 37 (OCR 2000); New Hampshire Dep't of Educ., 18 IDELR 420 (OCR 1991).

[FN56]. Houston (TX) Indep. Sch. Dist., 25 IDELR 163 (OCR 1996).

[FN57]. *Id.*

[FN58]. *Id.* at 164.

[FN59]. E.g., Catoosa Cnty. (GA) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011); Talbot Cnty. (MD) Sch. Dist., 52 IDELR ¶ 205 (OCR 2008).

[FN60]. For example, in a case where the parent's impartiality challenge was based on the hearing officer being a faculty member at a state university, OCR pieced together, by analogy, broad criteria from the IDEA, state law, and the state plan for the IDEA. The agency concluded: “[T]he hearing officer met the Federal and State impartiality standards and we find no merit to the claim that the hearing officer was not impartial solely by virtue of the fact that he is employed by a State University.” Wisconsin Dep't of Pub. Instruction, EHLR 352:57 (OCR 1986).

[FN61]. E.g., Frequently Asked Questions about Section 504 and the Education of Children with Disabilities (OCR 2009), <http://www2.ed.gov/about/offices/list/ocr/504faq.html>.

[FN62]. See *supra* note 4 and accompanying text.

[FN63]. Specifically, as the Appendix shows, the item was as follows: “IEP QUESTION:ÉFor a child *on an IEP*, if a parent files for an impartial hearing and raises one or more claims under Section 504, can your IDEA hearing officersÉhear those claims?”É

[FN64]. Similarly, as the Appendix shows, the wording of the second item was as follows: “SECTION 504 QUESTION:ÉFor a child *on a 504 plan*, if a parent files for an impartial hearing and raises one or more claims under Section 504, can your IDEA hearing officersÉhear those claims?”É

[FN65]. Specifically, the inadvertent ambiguity was that one of the designated choices provided for an answer of “No” but with a parenthetical express exception for the local education agency (LEA) doing so via a separate contract. Due to the difference between states with full-time and those with part-time hearing officers, the author followed up for clarification in the full-time jurisdictions as to whether the state applied this parenthetical condition for the individual full-time hearing officer, the office that employs them, or not at all.

[FN66]. Zirkel & Scala, *supra* note 4.

[FN67]. Given the high volume of paperwork of the SEAs, including many such surveys, the note at the bottom of the form may have been missed or not considered essential.

[FN68]. 603 MASS. CODE REGS. 28.08(3)(a) (2009).

[FN69]. Connecticut Department of Education, Reissue of Circular Letter C-9, Series 2000-2001 (May 20, 2009), www.sde.ct.gov/sde/lib/sde/pdf/circ/circ08-09/c13.pdf-2009-06-05.

[FN70]. Tennessee Department of Education, Section 504 Manual (2001), <http://www.tn.gov/education/speced/doc/sesection504man.pdf>.

[FN71]. Rhode Island Department of Elementary and Secondary Education, Questions Regarding Section 504 of the Rehabilitation Act (no date), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>

[FN72]. N.D. ADMIN. CODE 54-57-03.1 (2009).

[FN73]. For a carefully documented roadmap that shows these distinct avenues, see Zirkel & McGuire, *supra* note 35.

[FN74]. E.g., *Holmes v. Millcreek Twp. Sch. Dist.*, 205 F.3d 583 [142 Ed.Law Rep. [667]] (3d Cir. 2000);

Bethlehem Area Sch. Dist. v. Zhou, 976 A.2d 1284 [247 Ed.Law Rep. [740]] (Pa. Commw. Ct. 2009).

[FN75]. More specifically, this practice applied completely in 18% and partially—i.e., via the two intermediate subcategories—in an additional 24% of the 51 SEAs.

[FN76]. GA. COMP. R. & REGS. 160–1–3–.07(b) (2009).

[FN77]. 8 VA. ADMIN. CODE ?? 20–81–210.D.1 and 20–81–330.B (2009).

[FN78]. See *supra* note 37 and accompanying text.

[FN79]. These amendments effectively reversed the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984).

[FN80]. 20 U.S.C. ? 1415(l) (2009).

[FN81]. E.g., *Wood v. Katy Indep. Sch. Dist.*, 53 IDELR 10 (S.D. Tex. 2009).

[FN82]. Maher, *supra* note 36.

[FN83]. *Id.* at 284.

[FN84]. E.g., *Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298 [76 Ed.Law Rep. [47]] (9th Cir. 1992).

[FN85]. *Weber v. Cranston Pub. Sch. Comm.*, 245 F.Supp.2d 401 [174 Ed.Law Rep. [930]] (D.R.I. 2003).

[FN86]. Maher, *supra* note 36, at 296. Although Maher advocated this judicial interpretation, the primary target for his recommendation was Congress or the U.S. Department of Education. *Id.* at 297.

[FN87]. E.g., *Mark H. v. Hamamoto*, 620 F.3d 1090 [261 Ed.Law Rep. [48]] (9th Cir. 2010).

[FN88]. E.g., *K.R. v. Sch. Dist. of Philadelphia*, 373 Fed.Appx. 204 [258 Ed.Law Rep. [1012]] (3d Cir. 2010).

[FN89]. E.g., *M.M.R.–Z. v. Commonwealth of Puerto Rico*, 528 F.3d 9 [233 Ed.Law Rep. [49]] (1st Cir. 2008).

[FN90]. E.g., *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 Fed.Appx. 85 [258 Ed.Law Rep. [1005]] (2d Cir. 2010).

[FN91]. .g., *S.M. v. Sch. Dist. of Upper Dublin*, 57 IDELR 96 (E.D. Pa. 2011).

[FN92]. E.g., *Durrell v. Lower Merion Sch. Dist.*, 57 IDELR 10 (E.D. Pa. 2011).

[FN93]. *Bess v. Kanawha Cnty. Bd. of Educ.*, 53 IDELR 71 (S.D. W.Va. 2009).

[FN94]. E.g., *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533 [260 Ed.Law Rep. [580]] (6th Cir. 2010).

[FN95]. E.g., *C.C. v. Cypress Sch. Dist.*, 56 IDELR 295 (C.D. Cal. 2011).

[FN96]. E.g., *H. v. Montgomery Cnty. Bd. of Educ.*, 784 F.Supp.2d 1247 [271 Ed.Law Rep. [315]] (M.D. Ala.

2011); *Taylor v. Altoona Area Sch. Dist.*, 737 F.Supp.2d 474 [263 Ed.Law Rep. [664]] (W.D. Pa. 2010); *D.G. v. Somerset Hills Sch. Dist.*, 559 F.Supp.2d 484 [235 Ed.Law Rep. [112]] (D.N.J. 2008).

[FN97]. E.g., *K.I. v. Montgomery Pub. Sch.*, 54 IDELR 12 (M.D. Ala. 2010).

[FN98]. E.g., *Neena S. v. Sch. Dist. of Philadelphia*, 53 IDELR 20 (E.D. Pa. 2009); *L.T. v. Mansfield Sch. Dist.*, 53 IDELR 7 (D.N.J. 2009).

[FN99]. See *supra* note 26.

[FN100]. See *supra* note 27.

[FN101]. For example, as a result of listing “reading” and “concentrating” in addition to “learning,” which appears to include both of these areas within its scope, did Congress intend social interaction, written expression, or math performance to be major life activities?

[FN102]. The list of mitigating measures extends beyond medication to include, for example, reasonable accommodations, thus raising seemingly circular issues for districts that have provided students with general education interventions or accommodations short of Section 504 or IDEA as a matter of informal individual health plans.

[FN103]. For OCR's latest guidance, see Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (OCR 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>.

[FN104]. For various examples concerning student health conditions, see, e.g., Perry A. Zirkel, Margarita F. Granthom, & Leanna Lovato, *Section 504 and Student Health Problems: The Pivotal Position of the School Nurse*, __ J. SCH. NURSING __ (in press).
279 Ed. Law Rep. 1

END OF DOCUMENT