

## EDUCATION LAW INTO PRACTICE

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### SECTION 504/ADA GRIEVANCE PROCEDURE FOR SCHOOL DISTRICTS\*

by

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Section 504 of the Rehabilitation Act (§ 504) and its sister statute, the Americans with Disabilities Act (ADA) provide over-arching coverage that includes but extends beyond that of the Individuals with Disabilities Education Act (IDEA).<sup>1</sup> The regulations for § 504 and the ADA require school districts to have a grievance procedure for perceived disability-discrimination violations.<sup>2</sup> The applicable parts of § 504 and the ADA for school districts include students,

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<sup>1</sup> § 504: 29 U.S.C. § 794 (2018); ADA: 42 U.S.C. §§ 12101 *et seq.* (2018); IDEA: 20 U.S.C. §§ 1401 *et seq.* (2018). For the school district focus of this article, the more extensive coverage is attributable to the broader definition of disability under § 504/ADA, although the direct applicability beyond public schools would otherwise account for this wider effect. For a systematic analysis of these three frameworks in relation to P–12 schools that includes these coverage differences, see Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 EDUC. L. REP. 886 (2017).

<sup>2</sup> § 504: 34 C.F.R. § 104.7(b) (“A recipient [of federal financial assistance] that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part.”); 28 C.F.R. § 35.107(b) (“Complaint procedure. A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part.”). Although § 504 refers to “grievance procedures” plural and the ADA refers synonymously to “complaint procedure,” this article uses, for the sake of simplicity, the generic singular form of “grievance procedure” for this required mechanism.

employees, and facilities.<sup>3</sup> Thus, the potential complainants inferably extend to any individual or organization. Similarly, the inferable and worthwhile purpose is to provide an internal institutional mechanism for identifying and resolving noncompliance with the intertwined regulatory requirements of this pair of civil rights acts prohibiting disability discrimination.<sup>4</sup>

The U.S. Department of Education’s Office for Civil Rights (OCR) is the administering agency for § 504 and the ADA in relation to school districts.<sup>5</sup> The letters of findings from its complaint investigations reveal that one of the most vulnerable areas of § 504/ADA compliance for school districts is the grievance procedure requirement.<sup>6</sup> The reasons include the lack of general awareness of this requirement,<sup>7</sup> its rather cryptic standards,<sup>8</sup> and school district confusion with the separable § 504/ADA requirement for impartial hearings.<sup>9</sup>

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<sup>3</sup> § 504: 34 C.F.R. §§ 104.1–104.38 (2019); ADA: 28 C.F.R. ch. 35 and 36 (2019). The regulatory requirements for students specifically extend to nonacademic and extracurricular programs, including athletics. 34 C.F.R. § 104.37 (2019).

<sup>4</sup> Cf. U.S. Department of Education Office for Civil Rights, *Developing Effective Grievance Procedures* (2020), <https://www2.ed.gov/about/offices/list/ocr/grievance.html> (“Developing, publicizing and effectively implementing the procedures gives students and parents an avenue to address concerns at the local level. . . . OCR will generally defer to the results reached, where the process provided for fair consideration of the grievance.”).

<sup>5</sup> Occasionally, the Department of Justice (DOJ) will issue policy interpretations or engage in litigation enforcement as part of its broad remit. *E.g.*, *Gates-Chili Cent. Sch. Dist.*, 65 IDELR ¶ 152 (DOJ 2015); *U.S. v. Gates-Chili Cent. Sch. Dist.*, 198 F. Supp. 3d 228 (W.D.N.Y. 2016) (concerning service animal for student with disabilities).

<sup>6</sup> *See, e.g.*, Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 EDUC. L. REP. 369, 378 (1997) (finding a 75% success rate for complaints specific to grievance procedures as compared to overall success rate of approximately 50%).

<sup>7</sup> Reflecting and contributing to this insufficient awareness, the school literature concerning § 504/ADA and the public school largely lacks specific coverage of the grievance procedure requirement. *See, e.g.*, Laurie U. deBettencourt, *Understanding the Differences Between IDEA and Section 504*, 34 TEACHING EXCEPTIONAL CHILD. 16 (2002); Dora D. Rodriguez, Velma D. Menchaca, & George Padilla, *Social Justice: School Administrative Staff Perceptions of Strengths, Challenges, and Training Needs in Section 504-Only Services*, 18 J. LEADERSHIP, ACCOUNTABILITY & ETHICS 89 (2021); Jodie Schraven & Jennifer L. Jolly, *Section 504 in American Public Schools*, AM. EDUC. HIST. J. 419 (2010); Stan F. Shaw & Joseph W. Madaus, *Preparing School Personnel to Implement Section 504*, 43 INTERVENTION SCH. & CLINIC 226 (2008).

<sup>8</sup> *Supra* note 2 (“appropriate due process standards” and “prompt and equitable resolution”).

<sup>9</sup> 34 C.F.R. § 104.36. The differences include that this separable mechanism is intrinsically adjudicative rather than investigative and necessarily impartial. *See generally* Perry A. Zirkel, *The Public Schools’ Obligation for Impartial*

In light of these considerations, this brief article provides practical recommendations for and an illustrative template of a § 504/ADA grievance procedure for school districts. Each of these two successive parts are subject to elaboration and customization at the local level.

### Practical Recommendations

The following recommendations are in the form of a checklist of yes-no questions. It is a non-exhaustive list of considerations.<sup>10</sup>

1. Has your district both adopted and made this procedure generally available (e.g., on your website and in the student/parent handbook) with due notice to parents, students, and employees?
2. Does the procedure expressly cover not only § 504 but also the ADA?
3. Does it extend to not only student education issues, but also any complaint relating to the other applicable aspects of § 504 and the ADA – nonacademic services, preschool and adult education programs, employment, and facilities (including communications)?
4. Is it separate from, and not confused with, other complaint resolution mechanisms, such as a student’s right to an impartial due process hearing and any individual’s right to file an OCR complaint?
5. Does it have a minimum of two, preferably three, levels, typically starting with a relatively informal step and ending with a formal central office (or, in small districts, school board) appellate decision?
6. Does it include expeditious and adequately reliable investigation by the designated § 504/ADA coordinator, including the opportunity to provide testimonial and documental evidence?

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*Hearings under Section 504*, 22 WIDENER L.J. 135 (2012). The confusion is usually either using the grievance procedure for the parent’s right to an impartial hearing, vice versa, or requiring resort to the grievance procedure as a prerequisite for the impartial hearing. *E.g., id.* at 146; Blue Valley (KS) Unified Sch. Dist., 71 IDELR ¶ 201 (OCR 2017).

<sup>10</sup> For varying additional features that have arisen in the voluntary resolutions of OCR complaints, see, e.g., Glendale (AZ) Elementary Sch. Dist., 78 IDELR ¶ 202 (OCR 2020) (including “easily understood, easily located, and distributed”); Adams Cnty. (CO) Sch. Dist., 78 IDELR ¶ 263 (OCR 2020) (including an explanation of what constitutes disability-based discrimination and notice of the procedure, including where to file complaints); Barbour Cnty. (WV) Sch. Dist., 74 IDELR ¶ 296 (OCR 2018) (including all disability-related harassment with notification of the outcome to all parties, including the accused, with the possible exception of coverage under a separate bullying complaint procedure).

7. Does it specify timelines for reasonably prompt processing of complaints, with a written reply to the grievant, at each level?
8. Do the communications to all parties conform to the confidentiality requirements of applicable federal and state privacy and records laws, including the Family Educational Rights and Privacy Act?

### **Illustrative Template**

The following sample is purposively skeletal and flexible to not only permit but also promote customization to the size and nature of the school district. The footnotes provide explanations and variations for the district to consider in this process of adding to and fine-tuning the contents.<sup>11</sup>

#### *Section 504/ADA Grievance Procedure*

*As part of its commitment to nondiscrimination, including the disability discrimination prohibitions of Section 504 of the Rehabilitation Act and the Americans with Disabilities Act (ADA),<sup>[12]</sup> the Okay School District provides the following process to address complaints relating to disability discrimination.<sup>[13]</sup>*

*Step 1: The complainant, who may be a student, parent or guardian, employee, or third*

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<sup>11</sup> The footnotes are bracketed to show that they are not to be part of the recommended grievance procedure, being solely for consideration in determining the final form and contents of the district's grievance procedure. Who should be designated for this determination is left entirely to local discretion, although consultation with interested stakeholders is a useful consideration.

<sup>12</sup> The school district may opt to fulfill the notice requirement of § 504 (34 C.F.R. § 104.8) and the ADA (42 U.S.C. § 35.106) exclusively on a separate basis rather than this overlapping acknowledgment. Moreover, the school district may find it appropriate to provide information about and/or citation to Section 504 and the ADA.

<sup>13</sup> The school district may opt for a generic nondiscrimination notice and/or grievance process that addresses discrimination based on not only disability but also other protected categories, such as gender (under Title IX), race and national origin (under Title VI), overlapping and other employee categories (under Title VII), and any additional groups under state law or local policy. Alternatively, for a procedure limited to disability discrimination, examples that are not particularly obvious, such as retaliation, harassment, and service animals may be useful to show the overall scope of coverage.

*party, notifies the 504/ADA coordinator of the school or the district of the complaint.<sup>[14]</sup> This notification may be oral, by telephone or in person, so as to facilitate informal and rapid resolution. The applicable 504/ADA coordinator will respond to the complainant within five working days<sup>[15]</sup>*

*Step 2: If not satisfied with the response at Step 1, the complainant shall fill out the 504/ADA complaint form and submit it to the district 504/ADA coordinator within ten working days, whereupon the district 504/ADA coordinator will provide the complainant with a written response within ten working days.<sup>[16]</sup>*

*Step 3: If not satisfied with the Step 2 response, the complainant may appeal to the superintendent of schools within ten working days, who will arrange for a prompt and reliable investigation, including the reasonable opportunity for testimonial and documentary evidence from the complainant and from the accused and directly affected parties. The superintendent or the superintendent's designee for coordinating this investigation will inform the complainant of the district's final response within twenty working days unless a specific extension is requested and warranted.*

*This procedure is separate and independent from the complaint process of the U.S. Department of Education's Office for Civil Rights and, for student issues, the impartial hearing*

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<sup>14</sup> Similarly, depending on its size and nature, the school district may opt for a totally centralized approach for the required purpose of at least one employee as a designated coordinator, per 34 C.F.R. § 104.7(a) (§ 504); 28 C.F.R. § 35.107(a) (ADA).

<sup>15</sup> The school district may choose to include an accompanying section defining "working days" and any other not clearly obvious terms.

<sup>16</sup> The school district should develop an efficient and user-friendly complaint form that provides contact information of the complainant; reasonable specification of the category and nature of the complaint; optional identification of any known, responsible parties; the opportunity for supplementary or supporting documentation; and suggested alternatives for resolving or rectifying the perceived violation.

*processes under the Individuals with Disabilities Act and Section 504/ADA.*<sup>[17]</sup>

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<sup>17</sup> In collective bargaining jurisdictions, it may be useful to also distinguish the grievance procedure under any staff or faculty collective bargaining agreements.