THE PUBLIC SCHOOLS' OBLIGATION FOR IMPARTIAL HEARINGS UNDER SECTION 504

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– ABSTRACT –

This article provides an in-depth examination of the legal sources and current practices specific to impartial hearings under Section 504 of the Rehabilitation Act for students in the K-12 public school context. In contrast to the Individuals with Disabilities Education Act (IDEA), this broader and overlapping statute and its regulations has received insufficient attention, particularly in terms of its impartial hearing mechanism and in light of its foreseeably increasing utilization. Part II of the article examines the Section 504 statute, regulations, and resolution avenues available under Section 504 other than the impartial hearing route. Part IV canvasses hearing officer decisions and available judicial case law, with special attention to jurisdiction. Part V provides a summary of (a) state laws and (b) state education agency policies and practices specific to the jurisdiction of IDEA impartial hearing officers for Section 504 student issues. The final part proposes a more clear and coherent framework for impartial hearings under Section 504 in relation to those under the IDEA.

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I. INTRODUCTION

Section 504 of the Rehabilitation Act (Section 504),[1] the federal disability nondiscrimination legislation that applies to "any program or activity receiving Federal financial assistance,"[2] is generally understood to have a wider coverage than the Individuals with Disabilities Education Act (IDEA)[3] for K-12 students based on its broader definition of disability.[4] The major reason[5] is

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[1] Rehabilitation Act, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2006)). The pertinent provisions that define disability and provide for attorneys' fees are at 29 U.S.C. §§ 705(20) and 794(a) (2006).

[2] 29 U.S.C. § 794(a) (2006). This phrase expressly applies, *inter alia*, to school districts. *Id*. It also applies, for their direct operations, to state education agencies. *Id*. § 794(b)(2)(B). Although the close sister statute, the Americans with Disabilities Act, extends beyond recipients of federal financial assistance, its application to local and state education agencies is merely a matter of reinforcement. *See, e.g.*, PERRY A. ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS 1:8-9 (2011).

[3] 20 U.S.C. §§ 1400–1482 (2006 & Supp. V. 2011). Although having a different name in its original passage in 1975 and different titles in the 1986 and 2004 amendments, the IDEA designation—first adopted in the 1990 amendments—is used generically herein in accordance with prevailing current usage. 20 U.S.C. § 1400(a) (Supp. II 1991) (current version at 20 U.S.C. § 1400(a) (2006)). For the IDEA provisions specific to impartial hearings, see 20 U.S.C. § 1415(f)–(j) (2006), which includes the 'stay-put' provision, requiring the child to remain in the then-current placement during the proceedings. *Id.* § 1415(j). For the corresponding IDEA regulations, see 34 C.F.R. §§ 300.507-300.518 (2012). For an overview of the implementation of the hearing provisions, see generally 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).

[4] *See, e.g.*, THOMAS F. GUERNSEY & KATHE KLARE, SPECIAL EDUCATION LAW 81 (1993); MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 1:7 (2002); ZIRKEL, *supra* note 2, at 1:3–4. As an additional, stark example, a federal court analogized Section 504 as a "bludgeon to the IDEA's stiletto." Weber v. Cranston Pub. Sch. Comm., 245 F. Supp. 2d 401, 406 (D.R.I. 2003).

[5] A second reason is that Section 504 extends to student-relevant issues, such as retaliation and facilities access, that the IDEA does not cover. 29 U.S.C. § 1404 (2006). A third—but, in this context, irrelevant—reason is that Section 504 extends to individuals, such as employees, that the IDEA does not cover. 29 U.S.C. § 1405 (2006).

because the IDEA definition of disability is limited to a discrete list of classifications that necessitate, due to their adverse effect, special education,[6] whereas the Section 504 definition of disability has an open list of impairments that substantially limit one or more major life activities, not just learning.[7] The recent Americans with Disabilities Act Amendments Act (ADAAA)[8] has broadened the scope of the wider definition of disability shared by Section 504 and its sister statute, the Americans with Disabilities Act (ADA).[9] The result—as additionally evident in the administering agency's recently issued policy interpretation of the amendments in relation to K-12 public schools[10]—is an increased potential for parent-

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[6] 20 U.S.C. § 1401(3)(A) (2006 & Supp. V. 2011); *see also* 34 C.F.R. § 300.8(a) (2012).

[7] 29 U.S.C. § 705(20)(A) (2006); *see also* 34 C.F.R. § 104.3(j)(i) (2012) ("handicapped person"). The alternative prongs, based on "record of" and "regarded as," are not relevant in this context of specialized services for K-12 students. *See, e.g.*, Office for Civil Rights, *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, U.S. DEPARTMENT OF EDUC., item 37, http://www.ed.gov/about/offices/list/ocr/504faq.html (last modified Mar. 17, 2011); OCR Senior Staff Memorandum, 19 IDELR 894 (1992).

[8] ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-54 (codified at 42 U.S.C §§ 12101-12110 (2006 & Supp. IV 2011), 29 U.S.C. § 705 (2006 & Supp. V 2011)). The ADAAA went into effect on January 1, 2009. *Id*.

[9] For the ADA, see 42 U.S.C. §§ 12101–12213 (2006 & Supp. IV 2010).

[10] Office for Civil Rights, *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEPARTMENT OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html (last modified Jan. 19, 2012). For example, for eligibility, OCR opined: "In most cases, applications of [the amendments] should quickly shift the inquiry away from the question of whether a student has a disability . . . and toward the school district's actions and obligations to ensure equal educational opportunity." *Id.* at Q4. Correspondingly for FAPE, OCR asserted: "Even though a school district does not believe that a student needs special education or related services, it still must consider whether the student is entitled to a reasonable modification of policies, practices, or procedures." *Id.* at Q10. For disagreements, OCR followed its traditional posture, pointing to the procedural safeguards requirement, including the right to an impartial hearing. *Id.* at Q14.

district disputes concerning not only eligibility,[11] but also free appropriate public education (FAPE) under Section 504.[12] These disputes fit in two primary categories, with an intermediate intersection: (1) those specific to 'double-covered' students, that is, those where both the IDEA and Section 504 apply;[13] (2) those at the margin, where Section 504 covers the student but the IDEA coverage is in question;[14] and (3) those specific to students covered by 'Section 504-only' students.[15] Regardless of the category, the principal avenue for resolving such disputes is an impartial hearing.[16]

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[11] For an overview of the implications in terms of student eligibility, see, for example, Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEADERSHIP 3, 5-7 (Mar. 2009).

[12] For the Section 504 definition of FAPE, see 34 C.F.R. § 104.33 (2012). For a discussion of the FAPE issues, see, for example, Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407, 408, 410-16 (2011).

[13] For official agency recognition of this double-coverage, see, for example, Letter to Veir, 20 IDELR 864 (OCR 1993). More specifically, the general understanding, based on the broader definition of disability under Section 504 and the expansive effect of the ADAAA, is that students eligible under the IDEA are also covered by Section 504. *See, e.g.*, Office of Civil Rights, *supra* note 7, item 13. However, there may be rare exceptions. *See, e.g.*, Ellenberg v. N.M. Military Inst., 572 F.3d 815, 820-22 (10th Cir. 2009).

[14] Usually omitted from the various published analyses attributable to the Section 504/IDEA overlap, this intermediate category is useful here to show the blurry margin attributable to changing circumstances as well as imprecise boundaries. *See infra* text accompanying notes 62-63 and 100. For an illustration of the blurry boundary, compare *Yankton School District v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996) (declaring that the district was required to comply with both the IDEA and Section 504 individually), with *D.R. ex rel. Courtney R. v. Antelope Valley High School District*, 746 F. Supp. 2d 1132, 1144-45 (C.D. Cal. 2010) (determining that the student was only covered under Section 504 and not the IDEA).

[15] For examples and OCR citations, see Peter J. 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).

[16] *See* Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100, 100, 102 (2010) (identifying and analyzing the alternate administrative and adjudicatory routes available under the IDEA and Section

Although the professional literature contains relatively recent and specific sources concerning the state systems for and results of impartial hearings under the IDEA, the published information concerning impartial hearings under Section 504 is negligible.[17] Most of the journal articles on Section 504 in relation to K-12 students focus on another issue, most frequently, eligibility.[18] The more general treatments either entirely omit[19] or merely mention

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504). In addition to this adjudicatory avenue, both Section 504 and the IDEA have a purely administrative dispute resolution avenue in the form of a complaint investigation/resolution process. *Id*. at 104, 108.

[17] *See, e.g.*, Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings*, 22 J. DISABILITY POL'Y STUD. 131, 136-37 (2011) (classifying the issues and outcomes of a national sample of IDEA impartial hearing officer (IHO) decisions); Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731, 732-33 (2002); Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22, 22, 25 (2008) (showing the overall trends in the number and outcomes of IDELR-published hearing/review officer and court decisions); Perry A. Zirkel, Zorka Karanxha, & Anastasia D'Angelo, *Creeping Judicialization in Special Education Hearings: An Exploratory Study*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 27, 44 (2007) (showing the gradual legalization of IDEA hearings in one state); Zirkel & Scala, *supra* note 3 (canvassing the nature of the IHO systems in the fifty states).

[18] *See, e.g.*, WHO'S ELIGIBLE FOR SECTION 504? A QUICK-REFERENCE GUIDE FOR PROPER PLACEMENT 1-7 (Melissa Greenwood ed., 2010); Kevin P. Brady, *Section 504 Student Eligibility for Students with Reading Disabilities: A Primer for Advocates*, 20 READING & WRITING Q. 305, 307, 315 (2004); Candace Cortiella & Laura Kaloi, *Meet the New and Improved Section 504*, 40 EXCEPTIONAL PARENT 14, 14-15 (Feb. 2010); Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning "Section 504-Only" Students*, 92 NASSP BULL. 19, 23-25 (Mar. 2008); Robert Reid & Antonis Katsiyannis, *Attention-Deficit/Hyperactivity Disorder and Section 504*, 16 REMEDIAL & SPECIAL EDUC. 44, 45 (1995); Zirkel, *supra* note 11, at 4-6; Perry A. Zirkel, *A Step by Step Process §504/ADA Eligibility Determinations: An Update*, 239 EDUC. L. REP. 333, 333 (2009).

[19] *See, e.g.*, Antonis Katsiyannis, *Individuals with Disabilities: The School Principal and Section 504*, 78 NASSP BULL. 6, 7-9 (Nov. 1994); Jodie Schraven & Jennifer L. Jolly, *Section 504 in American Public Schools*, 37 AM. EDUC. HIST. J. 419, 425-26 (2010); Tom E. C. Smith, *Section 504: What Teachers Need to Know*, 37 INTERVENTION IN SCH. & CLINIC 259, 261-63 (2002).

this right as one of the required procedural safeguards.[20] Further reflecting this lack of attention, a series of surveys on various aspects—implementation of, compliance with, and knowledge of—Section 504 in school districts in Connecticut did not include an item concerning Section 504 hearings.[21] Similarly, a survey of state education agency Section 504 policies lacked any items specific to procedural safeguards, much less impartial hearings.[22] Indeed, one of the few texts on Section 504 and the ADA similarly failed to mention, much less explain, this procedural right.[23] Coming perhaps the closest to more-than-minimal coverage is the occasional journal article or reference work that addresses Section

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[20] *See, e.g.*, Laurie U. deBettencourt, *Understanding the Differences Between IDEA and Section 504*, 34 TEACHING EXCEPTIONAL CHILD. 16, 17-18 (2002); Tom E. C. Smith, *Section 504, the ADA, and Public Schools: What Educators Need to Know,* 22 REMEDIAL & SPECIAL EDUC. 335, 336-38 (2001); *cf.* JAMES F. MCKETHAN, SECTION 504: FROM REFERRAL TO PLACEMENT 1-19 to 1-20 (2006); DAVID M. RICHARDS, THE TOP SECTION 504 ERRORS: EXPERT GUIDANCE TO AVOID COMMON COMPLIANCE MISTAKES 55 (2010); TOM E.C. SMITH & JAMES R. PATTON, SECTION 504 AND PUBLIC SCHOOLS 55 (2007).

[21] Joseph W. Madaus & Stan F. Shaw*, The Role of School Professionals in Implementing Section 504 for Students with Disabilities*, 22 EDUC. POL'Y 363, 377 (2008); Joseph W. Madaus & Stan F. Shaw*, School District Implementation of Section 504 in One State*, 24 PHYSICAL DISABILITIES: EDUC. & RELATED DISORDERS 46, 50-51 (2006); Joseph W. Madaus, Stan F. Shaw, & Jiarong Zhao, *School District Practices in the Implementation of Section 504*, 18 J. SPECIAL EDUC. LEADERSHIP 24, 27-28 (2005); 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. LEADERSHIP 3, 7-8 (2007). For an overview article that largely is a synthesis of these studies and, thus, similarly lacks any mention of this subject, see Joseph W. Madaus & Stan F. Shaw, *Preparing School Personnel to Implement Section 504*, 43 INTERVENTION IN SCH. & CLINIC 226, 227-28 (2008).

[22] Antonis Katsiyannis & Greg Conderman, *Section 504 Policies and Procedures: An Established Necessity,* 15 REMEDIAL & SPECIAL EDUC. 311, 316 (1994). In their discussion, however, the authors included a recommendation to use the IDEA impartial hearing system for Section 504 hearings. *Id*. at 317.

[23] *See generally* GLENN R. ALLEN, THE SECTION 504 GUIDE TO A SUCCESSFUL SCHOOL-LEVEL PROGRAM (2001) (same for a monograph-length handbook); CHARLES J. RUSSO & ALLAN OSBORNE, SECTION 504 AND THE ADA (2009) (discussing antidiscrimination legislation, students' rights and parents' rights, but not impartial hearings).

504 hearings as one of several issues that received more detailed but not focused treatment.[24]

The purpose of this article is to provide an in-depth examination of the legal sources and current practices specific to impartial hearings for students in the K-12 public school context. Part II examines the Section 504 statute, regulations, and pertinent policies of the administering agency. Part III, by way of contrast, outlines the dispute resolution avenues available under Section 504 other than the impartial hearing route. Part IV canvasses hearing officer decisions and available judicial case law, with special attention to jurisdiction. Part V provides a summary of (a) state laws and (b) state education agency policies and practices specific to the jurisdiction of IDEA impartial hearing officers (IHOs) for Section 504 student issues. The final part proposes a more clear and coherent framework for impartial hearings under Section 504 in relation to those under the IDEA.

II. THE LEGISLATION, REGULATIONS, AND AGENCY INTERPRETATIONS

Section 504—like its sister civil rights statutes and unlike the IDEA[25]—is relatively brief, not legislatively addressing procedural safeguards, such as impartial hearings.[26] Its closest sibling, the ADA, is much longer but does not specifically address public schools, much less impartial hearings.[27] However, the Section 504 regulations, which date back to 1977,[28] include a procedural

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[24] *See, e.g.*, ZIRKEL, *supra* note 2, at 3:230-32; Zirkel & McGuire, *supra* note 16, at 102.

[25] Ms. H. v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1258 (M.D. Ala. 2011) (characterizing IDEA as having "a detailed 'web of procedural [requirements]' ").

[26] *See, e.g.*, *id*. at 1259 (commenting that "Section 504's statutory text, unlike IDEA's, is short and straightforward").

[27] For a systematic comparison of these three statutes and their regulations pertinent to pre-K to grade 12 education, see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 EDUC. L. REP. 767 (2012).

[28] 42 Fed. Reg. 22,676–22,685 (May 4, 1977) (effective on June 3, 1977 and reissued with current numbering in 45 Fed. Reg. 30,936–30,945 (May 9, 1980)). For an overview of the controversial and belated issuance of these regulations, which required court action in *Cherry v. Mathews*, 419 F. Supp.

safeguards provision that 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."[29] In contrast to the IDEA,[30] the regulations provide no further specifications for the hearing. Similarly, in contrast to the IDEA, which expressly provides both parties with this right,[31] the

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922, 923-24 (D.D.C. 1976), see, for example, *Ass'n for Retarded Citizens v. Frazier*, 517 F. Supp. 105, 120 (D. Colo. 1981). As the Supreme Court noted in *Smith v. Robinson*, 468 U.S. 992, 1017 n.20 (1984), the proposed IDEA regulations expressed the intent of consistency with the Section 504 regulations. 41 Fed. Reg. 56,966 (Dec. 30, 1976). The final IDEA regulations were originally issued soon after the Section 504 regulations. 42 Fed. Reg. 42,473-42,504 (Aug. 23, 1977) (effective Oct. 1, 1977, except Sept. 1, 1978 for FAPE). Although the IDEA regulations have been revised several times in the wake of periodic reauthorization of this funding statute, and although both the ADA of 1990 and the ADAAA of 2008 amended the Section 504 legislation, the Section 504 regulations are still in their original form. *Compare* 34 C.F.R. § 300.506 (2012) (showing multiple amendments), *with* 34 C.F.R. § 100.7 (2012) (showing no amendments).

[29] 34 C.F.R. § 104.36 (2012). The designated jurisdiction is over "actions regarding the identification, evaluation, or educational placement of persons who, because of [disability] need or are believed to need special instruction or related services." *Id*. This provision also requires a "review procedure." *Id*. Finally, recognizing the narrower but deeper coverage of the IDEA, the final sentence in this section explains that "[c]ompliance with the procedural safeguards of [the IDEA] is one means of meeting this requirement." *Id*.

In contrast, a separate Section 504 regulation requires a grievance procedure. *Id*. § 104.7(b). This requirement is distinct from that for impartial hearings in several respects. First, it applies to recipients with more than fifteen employees, regardless of whether they operate public schools. *Id.* § 104.7(a). Second, it is for disability-related complaints more generally, such as those of employees. *Id.* § 104.7(b). Third, it is an investigatory, rather than an adjudicatory, mechanism. *Id.*

[30] In addition to the statutory provisions cited *supra* note 3, the IDEA provides rather detailed regulations specific to the impartial hearing process, including requirements for the contents of the complaint, the qualifications of the IHO, the procedures for the hearing, and the timeline for completion. 34 C.F.R. §§ 300.507–300.515 (2012).

[31] 34 C.F.R. § 300.507(a)(1) (2012) ("A parent *or a public agency* may file a due process complaint . . . relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.") (emphasis added).

Section 504 regulations do not make clear whether the school district may initiate the impartial hearing.[32]

The administering agency for Section 504 in the school context is the U.S. Department of Education's Office for Civil Rights (OCR).[33] In the commentary accompanying the original issuance of the Section 504 regulations in 1977, OCR recommended but did not require use of the IDEA model of impartial hearings.[34] In subsequent letters of findings (LOFs) as the result of complaint investigations,[35] OCR provided guidance on the impartiality requirement for impartial hearing officers (IHOs) under Section 504,[36] including the selection process.[37] In another

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[32] The accompanying rights of parental participation and legal counsel, *supra* text accompanying note 29, are not necessarily determinative. The IDEA impartial hearing provisions provide a parallel right to counsel. 34 C.F.R. § 300.512(a)(1) (2012).

[33] Office for Civil Rights, *About OCR*, U.S. DEPARTMENT OF EDUC., http://www2.ed.gov/about/offices/list/ocr/aboutocr.html (last modified May 29, 2012); *see also* Perry A. Zirkel, *The Common Lore of Section 504*, COUNCIL FOR EXCEPTIONAL CHILDREN, http://www.cec.sped.org/AM/Template.cfm?section=CEC_Today1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=19095 (last visited Oct. 21, 2012) (identifying common misconceptions among K-12 educators about the applicable Section 504 regulations).

[34] Analysis of Final Regulations, 34 C.F.R. pt. 104, app. A ¶ 25 (2012). The express rationale was that the IDEA due process procedures "are inappropriate for some recipients not subject to that Act." *Id*. In any event, the connecting regulatory provision for this part of the commentary is the final sentence of the Section 504 procedural safeguards provision. *See supra* note 29 and accompanying text.

[35] Although illustrating OCR's enforcement interpretations of Section 504, these formal dispositions in response to individual disability-related complaints do not have the same force as their policy letters. *See, e.g.*, Catoosa Cnty. (GA) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011) (including the express caveat that LOFs "are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such," and adding, by way of contrast, that "OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public").

[36] *See, e.g.*, Ill. State Bd. of Educ., EHLR 352:17 (OCR 1985); Wisconsin Dep't of Pub. Instruction, EHLR 352:357 (OCR 1986) (identifying prohibited conflicting roles).

[37] Mo. Dep't of Elementary & Secondary Educ., EHLR 257:487 (OCR 1984) (clarifying that parents are not entitled to participate in the selection of IHOs unless state law or local policy provides for it).

relatively early LOF, OCR concluded that a one-tier system (for example, per the state's IDEA model, with courts rather than a second administrative level for the "review procedure" requirement)[38] is permissible under Section 504.[39]

In a subsequent LOF, OCR clarified that the responsibility for Section 504 hearings is at the local district level, unless state law or policy provides otherwise.[40] More specifically, in an LOF arising in Connecticut, OCR commented as follows:

> If a State agrees to consider Section 504 issues under the hearing process required to address issues arising under the IDEA, the availability of the IDEA hearing process will satisfy the local school district's hearing obligation under 34 C.F.R. Section 104.36. In this instance, however, the State of Connecticut has not agreed to consider Section 504 issues in IDEA hearings. Thus, the

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[38] *See supra* note 29 and accompanying text.

[39] Miss. Dep't of Educ., EHLR 352:279 (OCR 1986). However, a recent unpublished federal district court opinion ruled that the plaintiff parent, who relied on the regulation alone without additional legal authority, failed to meet the burden to show federal courts have jurisdiction for the appeal of an impartial hearing under Section 504. J.D. v. Georgetown Indep. Sch. Dist., 57 IDELR ¶ 36 (W.D. Tex. 2011); *cf.* Bd. of Educ. of Howard Cnty. v. Smith, 43 IDELR ¶ 84 (D. Md. 2005) (ruling that district lacked standing to appeal an IHO's decision under Section 504). If courts do not have reviewing authority, one can only wonder what this review procedure is, particularly because fewer and fewer states have a second tier under the IDEA. Zirkel & Scala, *supra* note 3, at 5. At least one such state's second tier has held that it lacks jurisdiction to review Section 504 IHO rulings in the absence of specific state law authorization, commenting instead that the proper place for review is the judiciary. Bd. of Educ. of Valley Cent. Sch. Dist., 38 IDELR ¶ 276 (N.Y. SEA 2002). The New York ruling as to the jurisdiction of the second tier is at odds with its earlier decision, *infra* note 68, but a recent court decision in which second tier issued a ruling and the SEA only claimed, albeit unsuccessfully, that state law required a third applicable administrative tier. Calhoun v. Ilion Cent. Sch. Dist., 936 N.Y.S. 2d 438, 440 (App. Div. 2011). All of these New York cases arose in the context of clear or at least claimed double coverage.

[40] *See, e.g.*, N.H. Dep't of Educ., 18 IDELR 420 (OCR 1991).

> District is obligated to establish an impartial hearing process under 34 C.F.R. Section 104.36.[41]

For the overlapping issue of jurisdiction in relation to IDEA IHOs, OCR issued the following official policy guidance: "[N]othing in the Section 504 regulation . . . prevents an 'IDEA hearing officer' from adjudicating Section 504 issues."[42] The same policy letter also 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,[43] and (2) for such cases, in the absence of specific Section 504 provisions, the agency's policy is as follows:

> OCR adheres to a standard of fundamental fairness and looks to case law and other decisions under the IDEA for guidance in interpreting what is reasonable. For example, there may not be undue delays in convening hearings and rendering decisions. In deciding what is reasonable, OCR examines timelines for state hearings under the IDEA. While specific requirements of the IDEA or state law are not applied automatically, they serve to guide our determination of reasonableness.[44]

In a subsequent 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 rather informal Section 504 hearings.[45] These hearings included audiotapes rather than a court reporter,

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[41] Redding (Conn.) Pub. Sch., 33 IDELR ¶ 37 (OCR 2000).

[42] Letter to Anonymous, 18 IDELR 230 (OCR 1991). Conversely, the administering agency for the IDEA concluded: "In our view, there is nothing in [the IDEA] that would prohibit a public agency from using its Part B due process system to conduct Section 504 due process hearings." Letter to Anonymous, 26 IDELR 321 (OSEP 1997). The agency's only caveat was with regard to funding: "However, Part B funds could not be used to pay for costs associated with Section 504 due process hearings." *Id*.

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

[44] *Id*.

[45] Houston (Tex.) Indep. Sch. Dist., 25 IDELR 163 (OCR 1996).

brief written decisions that did not necessarily include factual findings and legal conclusions, and IHOs whom the district paid as independent contractors.[46] The IHO had applied this policy by allowing follow-up questions but not cross-examination.[47] In response to the parent's particular claims of unfairness, OCR ruled that Section 504 does not require IHOs "to allow cross-examination or have a court reporter present during the hearing."[48]

In a consistent line of other LOFs, OCR consistently reminded districts that the separable institutional requirement of a grievance procedure[49] does not fulfill the district's impartial hearing obligation under Section 504.[50] Similarly, OCR made clear that the grievance procedure may not be used as a prerequisite for the impartial hearing.[51]

Finally, a series of other OCR policy letters addressed the Section 504 hearings in a more peripheral way.[52] Specifically, in interpreting the Section 504 regulations as requiring consent for the initial evaluation or placement, these letters opined that school districts may—not must—initiate an impartial hearing under Section 504 to override the lack of consent.[53]

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 34 C.F.R. § 104.7(b) (2012).

[50] *See, e.g.*, Catoosa Cnty. (Ga.) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011); Leon Cnty. (Fla.) Sch. Dist., 50 IDELR ¶ 172 (OCR 2007).

[51] *See, e.g.*, Talbot Cnty. (Md.) Pub. Sch., 52 IDELR ¶ 205 (OCR 2008); Collier Cnty. (Fla.) Sch. Dist., 52 IDELR ¶ 166 (OCR 2008); Mishawaka (Ind.) Sch. Corp., 39 IDELR ¶ 10 (OCR 2002); Sycamore (Ohio) Cnty. City Sch. Dist., 36 IDELR ¶ 245 (OCR 2002); Rolla (Mo.) No. 3 Sch. Dist., 31 IDELR ¶ 189 (OCR 1999). However, in a recent LOF, OCR partly blurred the distinction between the two processes by requiring the grievance process to require "impartial investigation." Grand Blanc (Mich.) Cmty. Sch., 57 IDELR ¶ 22 (OCR 2011).

[52] *See infra* note 53.

[53] Letter to Durheim, 27 IDELR 380 (OCR 1997); Letter to Zirkel, 22 IDELR 667 (1995); OCR Senior Staff Memorandum, 19 IDELR 892 (1992); *see also* Office for Civil Rights, *Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, U.S. DEPARTMENT OF EDUC., items 27, 32, http://www.ed.gov/about/offices/list/ocr/504faq.html (last modified Mar. 17, 2011). By way of more recent contrast, the latest IDEA regulations, in the wake of the 2004 amendments to the legislation, remove IHO jurisdiction for

III. ALTERNATE ENFORCEMENT AVENUES

Where a district violates its Section 504 regulatory obligation to provide the parent with an impartial hearing, the stronger route for enforcement would appear to be via the OCR complaint resolution process. The reason is that OCR's policy for its investigation and disposition of complaints is to focus on procedural compliance.[54] Thus, in various LOFs, OCR has concluded that a district's denial or delay in providing an impartial hearing is a violation of Section 504.[55] In contrast, the courts have not been particularly receptive to claims based on the procedural requirements of the Section 504 regulations.[56] For example, in a published decision, a federal district court ruled that a school district's failure to provide an impartial hearing under Section 504 did not, in itself, establish a private right of action.[57] Distinguishing between the regulations and the legislation, the court concluded: "A procedural error, by itself, is insufficient to warrant the protections of the Rehabilitation Act."[58]

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overriding lack of parental consent for initial services. 34 C.F.R. § 300.300(b)(3) (2012).

[54] *See* 34 C.F.R. pt. 104, app. A (2012) (dating back to 42 Fed. Reg. 17,870 (Apr. 4, 1977)); U.S. Dep't of Educ., *supra* note 53, item 5. The exception is for "extraordinary circumstances." 34 C.F.R. pt. 104, app. A. In general, however, for substantive issues, OCR defers to the impartial hearing process. *Id.*; *see also* Clarkesville-Montgomery Cnty. (Tenn.) Sch. Dist., 28 IDELR 45 (OCR 1997); Fairfield (Conn.) Pub. Sch., 28 IDELR 42 (OCR 1997); Martin Cnty. (Fla.) Sch. Dist., 23 IDELR 841 (OCR 1995); Vocational-Technical (Conn.) Sch. Sys., 21 IDELR 1073 (OCR 1994).

[55] *See, e.g.*, Rochester (Ill.) Cmty. Unit Sch. Dist. 3A, 52 IDELR ¶ 80 (OCR 2009); Talbot Cnty. (Md.) Pub. Sch., 52 IDELR ¶ 205 (OCR 2008); Leon Cnty. (Fla.) Sch. Dist., 50 IDELR ¶ 172 (OCR 2007); E. Side (Cal.) Union High Sch. Dist., 44 IDELR ¶ 284 (OCR 2005); Redding (Conn.) Pub. Sch., 33 IDELR ¶ 37 (OCR 2000).

[56] *See, e.g.*, A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 31 (D. Conn. 1998).

[57] *Id.*

[58] *Id*. However, this ruling is not devoid of confusion and limitation. First, the court, apparently in response to the parent's misconception, addressed the Section 504 regulation requiring a general, institutional grievance process for disability complaints, rather than the Section 504 regulations specific to public school procedural safeguards, including impartial hearings. *Id.* (relying on the

IV. IHO DECISIONS AND RELATED CASE LAW

A. IHO Decisions

IHO decisions under Section 504 are far less numerous than those under the IDEA.[59] These decisions fit in various subcategories of the aforementioned categorization.[60] First, an IHO occasionally rules on a Section 504 claim that is intertwined with or incidental to an IDEA claim for a double-covered student.[61] Some of these cases were blurrily separable, being marginally

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fact that the court only discussed 34 C.F.R. § 104.7 and disregarded 34 C.F.R. § 104.36). Two subsequent published federal district court decisions applied *A.W.* to the procedural safeguards regulation, although these cases were not specific to the right to an impartial hearing under Section 504. Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ., 531 F. Supp. 2d 245, 278 (D. Conn. 2008); Power v. Sch. Bd. of Va. Beach, 276 F. Supp. 2d 515, 520 (E.D. Va. 2003). Second, it is not clear whether the distinction in relation to Section 504 regulations is between procedural and substantive matters. Both the *A.W.* and *Power* opinions both proceeded to address alternatively the merits, showing that the procedural lack of a hearing in many cases is intertwined with the parent's substantive, discrimination claims. *Power*, 276 F. Supp. 2d at 521; *A.W.*, 25 F. Supp. 2d at 31. To the extent that the merits are premised on FAPE, which may well be substantive, the basis, again, is a regulation. 34 C.F.R. § 104.33 (2012). The difficulty is distinguishing between the regulations tightly linked to the statutory text and those that create new obligations. Mark H. v. Lemahieu, 513 F.3d 922, 939 (9th Cir. 2008). Moreover, the excluded regulations-based violations may have an indirect effect on the merits. *See, e.g.*, Ms. H. v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 1266 (M.D. Ala. 2011) (concluding that violations of Section 504 regulations may still be relevant to show the requisite deliberate indifference for money damages).

[59] For example, the author reviewed IDELR, which is the only national reporter of hearing/review officer decisions specific to students with disabilities, finding that the frequency of the IHO decisions under the IDEA were more than fifty times as many as those under Section 504. *See, e.g.*, Wood v. Katy Indep. Sch. Dist., 53 IDELR ¶ 10 (S.D. Tex. 2009); *In re* Student with a Disability, 57 IDELR ¶ 236 (Fla. SEA 2011); N.M. Pub. Educ. Dep't, 40 IDELR ¶ 198 (N.M. SEA 2003).

[60] *See supra* text accompanying notes 13-15.

[61] *See, e.g.*, Morris Bd. of Educ., 48 IDELR ¶ 295 (N.J. SEA 2007); N.M. Pub. Educ. Dep't, 40 IDELR ¶ 198 (N.M. SEA 2003); Boston Pub. Sch., 39 IDELR ¶ 20 (Mass. SEA 2003); Washoe Cnty. Sch. Dist., 36 IDELR ¶ 80 (Nev. SEA 2002); Albuquerque Pub. Sch., 38 IDELR ¶ 235 (N.M. SEA 2002).

between the double-covered and Section 504-only categories.[62] For example, in a Vermont case, the Section 504 claim was specific to the time period after the district determined that the child was ineligible under the IDEA, but the IHO ruled that the ineligibility determination was not valid.[63] Similarly infrequent are IHO decisions for double-covered students where the Section 504 claim is clearly independent of the IDEA coverage.[64] Thus far, the IHO decisions specific to Section 504-only students are also rather rare[65] compared to those under the IDEA.[66]

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[62] *See, e.g.*, Greater Lowell Tech. High Sch., 45 IDELR ¶ 28 (Mass. SEA 2006) (ruling that after determining the student was not eligible, the district had reason to suspect eligibility under Section 504 and violated Section 504 by not completing the eligibility evaluation); Forest Grove Sch. Dist., 40 IDELR ¶ 190 (Or. SEA 2004) (successful child-find claim under Section 504 in tandem with separate child-find claim under the IDEA that eventually went to the Supreme Court); *In re* Student with a Disability, 40 IDELR ¶ 139 (Vt. SEA 2003) (challenge to Section 504 plan that student with escalating emotional problems received as, in effect, consolation prize for determination of ineligibility under the IDEA).

[63] *See, e.g.*, Randolph Union High Sch. Dist. No. 2, 20 IDELR 50 (Vt. SEA 1993) (ruling that district denied FAPE to child under IDEA and then Section 504 for successive periods that were treated as either continuous or overlapping).

[64] *See, e.g.*, *In re* Student with a Disability, 57 IDELR ¶ 236 (Fla. SEA 2011) (ruling, prior to the effective date of the new ADA regulations, that a child with autism was not entitled to a service dog at school under Section 504); Gwinnett Cnty. Sch. Dist., 50 IDELR ¶ 27 (Ga. SEA 2008) (rejecting parents' Section 504 retaliation claim on behalf of double-covered student); Fairhaven Pub. Sch., 46 IDELR ¶ 87 (Mass. SEA 2006), *aff'd*, Cordeiro v. Driscoll, 47 IDELR ¶ 189 (D. Mass. 2007) (rejecting special education student's Section 504 claim against vo-tech school and district in an admissions case); Bridgewater-Raynam Pub. Sch. & Bristol Cnty. Agric. Sch., 45 IDELR ¶ 50 (Mass. SEA 2006); Greater Lowell Technical High Sch., 45 IDELR ¶ 28 (Mass. SEA 2006); Norfolk Cnty. Agric. Sch., 45 IDELR ¶ 26 (Mass. SEA 2005) (rejecting dismissal of Section 504 claims against vo-tech schools in admissions cases concerning double-covered students).

[65] *See, e.g.*, Westport Bd. of Educ., 40 IDELR ¶ 85 (Conn. SEA 2003) (rejecting Section 504 eligibility of student with depression, anxiety disorder, and ADHD); Montgomery Cnty. Pub. Sch., 40 IDELR ¶ 24 (Md. SEA 2003) (rejecting Section 504 eligibility for student with ADHD who was receiving a B average in a high-performing district); Balt. City Pub. Sch. Sys., 45 IDELR ¶ 233 (Md. SEA 2006) (upheld district's exiting gifted student with birth defect from Section 504 coverage); Sch. Bd. of Pinellas Cnty., 58 IDELR ¶ 59 (Fla.

SEA 2011) (ruling that parents' requested accommodation for administration of insulin to child with diabetes was reasonable); Howard Cnty. Pub. Sch., 42 IDELR ¶ 161 (Md. SEA 2004) (ruling in favor of parents' Section 504 claim for tuition reimbursement based on insufficient Section 504 plan); Montgomery Cnty. Pub. Sch., 41 IDELR ¶ 23 (Md. SEA 2004) (rejecting Section 504 eligibility of student diagnosed with "learning disorder, not otherwise specified–perceptual organization"); Bos. Pub. Sch., 47 IDELR ¶ 240 (Mass. SEA 2007) (ruling that this jurisdiction does not extend to the remedy of monetary damages); Mystic Valley Reg'l Charter Sch., 40 IDELR ¶ 275 (Mass. SEA 2004) (ruling in favor of parents' claim for additional accommodations to extensive Section 504 plan for second grader with life-threatening peanut and tree nut allergy); Cardinal Spellman High Sch., 38 IDELR ¶ 112 (Mass. SEA 2002) (rejecting Section 504 claim against parochial school that refused to reduce practices for track athlete based on his migraine headaches and shin splints); Cascade Sch. Dist., 37 IDELR ¶ 300 (Or. SEA 2002) (ruling that district's multi-step Section 504 plan for student with severe peanut and tree nut allergy was appropriate); Upper Dublin Sch. Dist., 8 ECLPR ¶ 37 (Pa. SEA 2010) (ruling largely, but not entirely, for the district with regard to safety-related provisions for student with severe peanut and tree nut allergy). For indirect examples at the judicial level, see I.A. v. Seguin Indep. Sch. Dist., No. SA 10 CA, 2012 WL 3028350, at *1,3,6,7 (W.D. Tex. July 24, 2012) (dismissing claims of student with paraplegia for lack of deliberate indifference); A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 678, 683-84, 688 (E.D.N.Y. 2012) (affirming the IHO's ruling that parents' requested accommodation of heating homemade lunch of student with diabetes was not necessary); Zachary M. v. Bd. of Educ. of Evanston Twp. High Sch. Dist. No. 202, 829 F. Supp. 2d 649, 662 (N.D. Ill. 2011) (ruling that IHO's decision that the student was ineligible under Section 504 was moot); J.D. v. Georgetown Indep. Sch. Dist., 57 IDELR ¶ 36 (W.D. Tex. 2011) (ruling that federal courts lack jurisdiction for the appeal of an impartial hearing under Section 504), *further proceedings*, 58 IDELR ¶ 182 (W.D. Tex. 2012) (denying attorney's fees where the IHO's ordered relief, a reevaluation of a student with a mobility impairment, was not significant in terms of the parents' requested remedies); Sutton v. W. Chester Area Sch. Dist., 41 IDELR ¶ 61 (E.D. Pa. 2004) (ruling that district may initiate and proceed with Section 504 hearing despite the parents' objection); Power v. Sch. Bd. of Va. Beach, 276 F. Supp. 2d 515, 521 (E.D. Va. 2003) (ruling that the Section 504 procedural safeguards regulation did not establish private cause of action to challenge the sufficiency of the impartial hearing that the child received under Section 504); K.U. v. Alvin Indep. Sch. Dist., 991 F. Supp. 599, 604 (S.D. Tex. 1998) (affirming IHO's decision that district did not violate Section 504 in its provision and implementation of a Section 504 plan for a student whose parents refused an IDEA evaluation); *cf.* Sher v. Upper Moreland Sch. Dist., 481 F. App'x 762, 765 (3d Cir. 2012) (vacating ruling that exhaustion of state's former second tier applies to IHO's Section 504 ruling regarding double-covered child); Brown v.

Only a few of these cases specifically address jurisdiction.[67] In an early New York case, the review officer upheld an IDEA IHO's discretionary authority to rule on the parent's Section 504 claim that arose in the wake of a district's determination that the child was ineligible under the IDEA.[68] The bases of the review officer's ruling were the aforementioned[69] OCR policy letter, the absence of a prohibition in state law, and policy reasons.[70] Yet, in a more recent Nevada case, the review officer ruled that the IHO—on remand from the federal court for exhaustion—erred as a matter of law by ruling on the Section 504 claim that the parent presented in tandem with her IDEA claim.[71] Although the review officer's reasoning was not entirely clear,[72] her ultimate conclusion appears

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Sch. Dist. of Phila., 59 IDELR ¶ 130 (E.D. Pa. 2012) (denying dismissal of child-find claims of allegedly double-covered student). For other indirect examples, see *supra* note 39.

[66] Susan Gorn, *What's Hot, What's Not: Trends in Special Education Litigation (Special Report No. 14)*, INDIVIDUALS WITH DISABILITIES EDUC. LAW REP. (LRP), 1996, at app. 34-35 (showing that non-IDEA claims make up seven percent of all private school student services).

[67] In the aforementioned cases, jurisdiction receives only passing, if any, mention. For example, in the recent Florida case, the IHO merely cited, by way of boilerplate, two Florida statutes—one that merely prescribed procedures and the other that was repealed in 1996. *In re* Student with a Disability, 57 IDELR ¶ 236 (Fla. SEA 2011) (stating Florida statute sections give the IHO jurisdiction but includes no further discussion of jurisdiction).

[68] Bd. of Educ. of Ramapo Cent. Sch. Dist., 106 LRP 24184 (N.Y. SEA 1992). In this case, the review officer annulled the district's IDEA eligibility determination, ordering a new evaluation to rectify the violation of state special education regulations. *Id.*

[69] *See supra* note 42.

[70] The policy rationale was as follows: "A separate hearing for the Section 504 issues would have needlessly prolonged the resolution of the dispute between the parents and the [district], and would not have been in the best interests of the child." Bd. of Educ. of Ramapo Cent. Sch. Dist., 106 LRP 24184 (N.Y. SEA 1992).

[71] Clark Cnty. Sch. Dist., 37 IDELR ¶ 169 (Nev. SEA 2002).

[72] On the one hand, the review officer relied on a statement in the hearing officer manual that " 'each Nevada School District has a separate hearing system for disputes under section 504,' " without clarifying (1) whether this statement was in the nature of factual description or legal obligation, and (2) why this system was necessarily mutually exclusive with the state's IDEA system. *Id.* (internal citations omitted). On the other hand, the review officer overrode the

to be that Nevada IHOs may not address "pure" Section 504 issues, for example, those that do not fit within the overlapping jurisdiction of the IDEA.[73] Adding to the confusion, in an intervening Nevada case, which the parent did not appeal to the review stage, the IHO concluded that he had jurisdiction to address the Section 504 issues that arose in tandem with the parent's IDEA claims.[74] He relied in part on the state hearing officer manual provision about Section 504 issues raised in conjunction with IDEA issues,[75] although he ultimately decided that the district prevailed in both regards.[76]

In a New Mexico case involving an indisputably double-covered student, the review officer upheld the IHO's jurisdiction to address and remedy the parents' Section 504 claims in tandem with

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accompanying statement in the same manual that " 'the hearing officer only has jurisdiction over Section 504 issue[s] if they are raised in conjunction with issues under the IDEA' " with this confusing explanation:

> If a Section 504 issue is part of an issue raised under IDEA, it is no longer a Section 504 issue, but rather an IDEA issue. Then jurisdiction is exercised under IDEA to determine any alleged violation of IDEA's provisions and not an alleged violation of Section 504.

Id. (internal citations omitted).

[73] *Id.* Thus, the arguable distinction that could square the New York and Nevada review officer rulings is that the New York case remained within the overlapping IDEA jurisdiction whereas the Nevada case did not. *Compare id.*, *with* Bd. of Educ. of Ramapo Cent. Sch. Dist., 106 LRP 24184 (N.Y. SEA 1992). However, this potential harmonization only arose at the review officer, not the hearing officer, level. *See* Clark Cnty. Sch. Dist., 37 IDELR ¶ 169 (Nev. SEA 2002); Bd. of Educ. of Ramapo Cent. Sch. Dist., 106 LRP 24184 (N.Y. SEA 1992). Moreover, the Nevada review officer did not resolve this apparent conflict or the aforementioned confusion. *See supra* note 72.

[74] Washoe Cnty. Sch. Dist., 36 IDELR ¶ 80 (Nev. SEA 2002). This decision was six months before the *Clark County School District* review officer decision. Clark Cnty. Sch. Dist., 37 IDELR ¶ 169 (Nev. SEA 2002).

[75] Washoe Cnty. Sch. Dist., 36 IDELR ¶ 80 (Nev. SEA 2002). This language is subject to varying interpretations because it ends with another condition: "[A]nd the joinder of Section 504 Issues is appropriate." *Id.* The other basis for his conclusion was a court decision that addressed both Section 504 and IDEA claims, but it is obviously off point in terms of IHO jurisdiction. *Id.* (citing Doe v. Ala. State Dep't of Educ., 915 F.2d 651, 660 (11th Cir. 1990)).

[76] Washoe Cnty. Sch. Dist., 36 IDELR ¶ 80 (Nev. SEA 2002).

their IDEA claims.[77] However, the basis for this conclusion was the New Mexico regulation that expressly accorded the IDEA IHOs jurisdiction for "claims under Sec. 504 . . . that are brought concurrently with IDEA claims and a request for IDEA due process."[78] The relevant regulation no longer contains that language, instead being limited to requests under the IDEA and the state gifted education law.[79]

More recently, in a Connecticut case involving a double-covered student, the IDEA IHO dismissed a Section 504 case—specifically, a hearing impaired child's claim for open or closed captioning access to the televised morning announcements—based on her interpretation of the state's official policy regarding jurisdiction.[80] She focused on the policy's footnoted distinction from "what is commonly [known] as 'Section 504 only cases' "[81] rather than on whether addressing the Section 504 claim was necessary for the resolution of the IDEA issues.[82]

As a separable matter, an Oregon IHO ruled that Oregon's state regulations, which expressly provide parents with access to the state's IDEA IHOs for Section 504 claims, do not provide jurisdiction for district-initiated Section 504 claims.[83] The

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[77] Albuquerque Pub. Sch., 38 IDELR ¶ 235 (N.M. SEA 2002).

[78] *Id.*

[79] N.M. Code R. § 6.31.2.13(I)(1) (2007).

[80] Quatroche v. E. Lyme Bd. of Educ., 604 F. Supp. 2d 403, 407 (D. Conn. 2009).

[81] *Id.*

[82] *In re* Student with a Disability, 47 IDELR ¶ 313 (Conn. SEA 2007); *see also In re* Student with a Disability, 53 IDELR ¶ 67 (Conn. SEA 2009) (dismissing Section 504 retaliation claim that was based on reduction of IEP services to child with autism). It could be counter-argued that in both cases the Section 504 claim was so intertwined with the IDEA that it was necessary to determine FAPE. Further illustrating the difficulty of interpreting and applying the footnoted Connecticut policy, see, for example, *Quatroche*, 604 F. Supp. 2d at 407-08, 412 (observing the confusion in the IDEA-Section 504 interaction, here apparently attributable to the plaintiff-parents viewing the policy as excluding certain IDEA, rather than Section 504, claims).

[83] Or. City Sch. Dist., 55 IDELR ¶ 30 (Or. SEA 2010). According to its legal counsel in this case, the district did not test the possible alternative of arranging for an impartial hearing at the local level. Email from Suzy Harris, Legal Counsel (Special Education/Section 504) for Portland Public Schools, to Perry A. Zirkel (Sept. 21, 2012, 04:30 p.m. EST) (on file with the author).

particular district filing in this case was to override a parent's refusal to provide consent for a Section 504 eligibility evaluation.[84]

B. Court Decisions

Court decisions concerning Section 504 hearings are even fewer and more far between.[85] In contrast, the case law is extensive concerning the application of the following provision in the IDEA for non-exclusivity[86] and exhaustion:[87]

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], [Section 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is . . . available under [the IDEA], the procedures [for impartial hearings in this section] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA].[88]

An occasional case within the extensive and rather inconsistent case law interpreting and applying this provision addresses jurisdictional issues at the impartial hearing level.[89] In a recent Texas case where the IDEA IHO dismissed, for lack of

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[84] Or. City Sch. Dist., 55 IDELR ¶ 30 (Or. SEA 2010).

[85] Most of the court decisions concern issues peripheral, rather than specific, to the hearing. For those arising in the context of Section 504-only students, see *supra* note 65. For the double-covered context, see, for example, *Bd. of Educ. of Howard Cnty. v. Smith*, 43 IDELR ¶ 84 (D. Md. 2005) (ruling that district had no right of appeal for the Section 504 hearing, which was bifurcated from the IDEA hearing under a Maryland fee-for-services option with the state's office of administrative hearings, for a double-covered child).

[86] 'Non-exclusivity' in this context refers to the Congressional reversal of the Supreme Court's ruling in *Smith v. Robinson*, 468 U.S. 992, 1013 (1984), that IDEA is the exclusive avenue for resolving claims covered by the IDEA. *See* 20 U.S.C. § 1415(l) (2006).

[87] For a comprehensive canvassing of the case law concerning exhaustion of § 504 claims in light of this IDEA language, see Maher, *supra* note 15.

[88] 20 U.S.C. § 1415(l) (2006).

[89] *See, e.g.*, Wood v. Katy Indep. Sch. Dist., 53 IDELR ¶ 10 (S.D. Tex. 2009).

jurisdiction, the non-IDEA, including Section 504, claims that the parents proffered on behalf of their double-covered child, the federal court subsequently also refused to hear them.[90] The court's successive reasons were (1) exhaustion—the Section 504 claims initially arose and were addressable within the IHO's IDEA jurisdiction,[91] and (2) redundancy—they subsequently mirrored, that is, were not factually and legally distinct from, the parents' IDEA claims.[92] In partial contrast, the dicta in another of these recent exhaustion cases cited the IDEA's non-exclusivity and exhaustion provision in reaching this conclusion for a double-covered student in Pennsylvania:

> Plaintiff's unsupported statement that hearing officers do not have jurisdiction over Plaintiff's . . . Section 504 claims also fails. No statutory or case law supports this assertion. In fact, the language of the IDEA suggests the opposite, provided such claims are brought simultaneously with IDEA claims and seek relief available under the IDEA . . . . Thus, the court finds that [an IDEA IHO] may rule on facts falling under claims that are concurrent with IDEA claims where, as here, the relief sought is available under the IDEA.[93]

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[90] *Id.*

[91] *Id.* At the time of the parents' filing these original Section 504 claims in court, the IHO had not yet issued a decision, thus leading to the court's conclusion that "because the theory behind all of the claims in Plaintiffs' complaint may be resolved under the IDEA, . . . they must [first] exhaust their administrative remedies." *Id.*

[92] Wood v. Katy Indep. Sch. Dist., 55 IDELR ¶ 93 (S.D. Tex. 2010). The parents filed this amended Section 504 complaint after the IHO's decision. *Id.* For a contrasting, perhaps contradictory ruling in Texas, see *E.C. v. Lewisville Indep. Sch. Dist.*, 58 IDELR ¶ 219 (E.D. Tex. 2012) (granting the parent's motion to supplement the record with evidence to support their Section 504 claims, which were "primarily" not before the IHO). For an example of a ruling adding to the confusion in this jurisdiction, see *Ron J. v. McKinney Indep. Sch. Dist.*, 46 IDELR ¶ 222 (E.D. Tex 2006) (ruling that parents' filing for IDEA hearing waived their right to a Section 504 hearing).

[93] Swope v. Cent. York Sch. Dist., 796 F. Supp. 2d 592, 602 (M.D. Pa. 2011). Because the parent in this case had an IDEA hearing that did not address the Section 504 claims, it would appear the court's reference to "facts" did not

Another even more confusing Pennsylvania exhaustion case, focused on a seemingly separable procedural protection—a determination preceding a disciplinary change in placement as to whether a child's misconduct is a manifestation of the child's disability.[94] In this case, the parents challenged the impending expulsion of a student with ADHD whom the district had determined, via two successive evaluations, was not eligible under the IDEA.[95] The parents contended that the student was eligible under Section 504 and/or the IDEA.[96] The IHO, who had undisputed jurisdiction for the Section 504 as well as IDEA claims, ruled that the student was eligible under Section 504 but not under the IDEA.[97] Both sides appealed, and the federal district court concluded Section 504—unlike the IDEA—did not entitle the child to a manifestation determination.[98] However, granting partial dismissal of the parents' related claim, the court ruled that they had

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implicitly limit the IHO to IDEA's legal standards for exhaustion purposes. *Id.* However, regardless of its specific scope, this conclusion is not problematic in Pennsylvania because its IHOs have concurrent jurisdiction for IDEA and Section 504 claims. *Id.* at 601. However, in a state that does not provide IDEA IHOs to address Section 504 claims, implementing its notion of simultaneous claims is not readily practicable. Where it does clearly apply within the double-covered category, the specific meaning of "exhaustion" in this IDEA provision is not settled. *See* 20 U.S.C. § 1415(l) (2006). For example, in an unpublished federal district court decision in Georgia, the court seems to suggest that merely having the IDEA IHO address the same core facts and corresponding issues for a double-covered student, without necessarily even identifying the Section 504 claims, suffices for this purpose, although the court did not directly address the parents' seemingly inaccurate assertion that these IHOs do not have jurisdiction for Section 504 claims in Georgia. Atlanta Indep. Sch. Sys. v. S.F., 56 IDELR ¶ 66 (N.D. Ga. 2011); *cf.* Z.F. v. Ripon Unified Sch. Dist., 56 IDELR ¶ 43 (E.D. Cal. 2011) (rejecting claim preclusion where parents of double-covered student had IDEA hearing in state where the IHO lacked jurisdiction for the Section 504 claims). Whether exhaustion applies in the double-covered category is also unsettled, but that is a separate matter from the focus of this article. *See, e.g.*, Payne v. Peninsula Sch. Dist., 653 F.3d 863, 871 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1540 (2012).

[94] Centennial Sch. Dist. v. Phil L., 559 F. Supp. 2d 634, 636 (E.D. Pa. 2008).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 639-40.

[98] *Id*. at 640, 642-43.

"failed to exhaust administrative remedies as to the portion of the counterclaim seeking a declaration that [their child's] due process rights under the Rehabilitation Act were violated by the School District's failure to provide a Section 504 hearing 'similar' to a manifestation determination."[99]

Various courts have broadly applied the IDEA exhaustion provision to students in the intermediate category at the boundary between double-covered and Section 504-only students, even for cases that arguably fit in the pure Section 504-only category.[100] For

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[99] *Id.* at 647. Three years later, in further review proceedings on another issue, the court noted that the IHO decided in the interim that the district had provided the requisite IDEA "similar" process. Centennial Sch. Dist. v. Phil L. *ex rel* Matthew L., 799 F. Supp. 2d 473, 479 (E.D. Pa. 2011). The confusion between a manifestation determination and an impartial hearing is apparently attributable to a Texas case in which the magistrate referred to the district committee's scheduled meeting as a manifestation determination "hearing," citing the Section 504 impartial hearing provision. R.J. v. McKinney Indep. Sch. Dist., 45 IDELR ¶ 9 (E.D. Tex. 2005). He also referred to an IDEA manifestation determination "hearing," citing the IDEA regulation for disciplinary changes in placement. *Id*. Yet, the IDEA regulations make abundantly clear that a manifestation determination meeting is distinctly different from an impartial hearing in not only limited subject matter but, more significantly, the absence of an IHO and adjudicative procedures. *Compare* 34 C.F.R. § 300.530(e) (2012) (describing the manifestation hearing process), *with* §§ 300.511-300.512 (2012) (describing specifically the impartial due process hearing).

[100] For additions to those in this paragraph, see, for example, *S.E. v. Grant Cnty. Bd. of Educ.*, 544 F.3d 633, 641-43 (6th Cir. 2008) (applying exhaustion to student with ADHD's challenge to 504 plan without any IDEA eligibility issue); *R.N. v. Cape Girardeau 63 Sch. Dist.*, 858 F. Supp. 2d 1025, 1030-32 (E.D. Mo. 2012) (requiring exhaustion for student in wheelchair for perthes disease of the hip, which healed within 2-3 years, thus providing alternate grounds of possible ineligibility); *Palagonia v. Sachem Cent. Sch. Dist.*, 58 IDELR ¶ 130 (E.D.N.Y. 2012) (requiring exhaustion for student with anxiety in wake of district determination of non-eligibility under the IDEA); *Prins v. Indep. Sch. Dist. No. 761*, 23 IDELR 544 (D. Minn. 1995) (requiring exhaustion for student with ADD on Section 504 plan who arguably fit in the IDEA child find, or reason to suspect, margin of eligibility). *But cf*. D.P. v. Sch. Dist. of Poynette, 41 IDELR ¶ 6 (W.D. Wis. 2004) (requiring exhaustion for Section 504 eligibility and FAPE claims for student with ADD but not for other discrimination claim in which the court ruled that the child did not meet the eligibility standards under Section 504).

example, in *Babicz v. School Board*,[101] the United States Court of Appeals for the Eleventh Circuit extended this provision to two siblings who had asthma, allergies, and sinusitis, for which the district provided related services via Section 504 plans.[102] In the court's not clearly explained view, they fit within the umbrella of the IDEA.[103] Similarly, a few years later, the Court of Appeals for the Tenth Circuit required IDEA exhaustion for a student with a virus similar to mononucleosis.[104] The district had provided him with a Section 504 plan, and there was no evident need for special education, but the court reasoned that the availability of an eligibility evaluation under the IDEA sufficed to trigger the exhaustion language.[105] Most recently, in an unpublished decision in New York, a federal district court similarly applied the IDEA exhaustion requirement to a child who suffered from headaches, nausea, and vomiting.[106] His parents alleged that the district failed to provide him with a Section 504 plan and an impartial hearing, but the court—akin to alchemy—transmuted their claims under the Fourteenth Amendment's due process clause and Section 504 into the impartial hearing and individualized education program (IEP) counterparts available under the IDEA.[107]

Similarly, two successive court decisions in Connecticut further illustrate the inconsistency that is particularly problematic for a Section 504-only child. In the first case, which was collateral to an issue other than exhaustion, a federal district court in Connecticut, in a preliminary ruling in prolonged litigation involving a double-covered child, rejected the plaintiff-parent's claim that the state had violated her right to an impartial hearing under Section 504.[108] More specifically, while acknowledging that

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[101] Babicz v. Sch. Bd. of Broward Cnty., 135 F.3d 1420 (11th Cir. 1998).

[102] *Id.* at 1421 (per curiam).

[103] *Id*. at 1422 n.10.

[104] Cudjoe v. Indep. Sch. Dist., 297 F.3d 1058, 1061, 1063 (10th Cir. 2002).

[105] *Cudjoe*, 297 F.3d at 1066.

[106] Camac v. Long Beach City Sch. Dist., 57 IDELR ¶ 35 (E.D.N.Y. 2011).

[107] *Id.*

[108] Lillbask *ex rel*. Mauclaire v. Sergi, 117 F. Supp. 2d 182, 203 (D. Conn. 2000), *further proceedings*, 193 F. Supp. 2d 503, 505 (D. Conn. 2002), *aff'd in part, rev'd in part*, 397 F.3d 77 (2d Cir. 2005).

the four successive IHO decisions contained few references to Section 504 "to suggest that the issues were addressed directly," the court concluded that the state had met this Section 504 regulatory requirement via its IDEA system.[109] However, the relatively brief analysis is unclear as to whether the basis of this conclusion was the state's compliance with the IDEA or the state's policy for its IHOs to "rule upon . . . alleged procedural or systematic violations of state and federal law regarding the education of children with disabilities, including violations of [Section 504], provided that a determination is necessary."[110]

The more recent Connecticut case was specific to a pair of siblings in the Section 504-only category and the aforementioned[111] IDEA non-exclusivity/exhaustion provision.[112] The court dismissed the Section 504 claims for both children for failing to exhaust the IDEA hearing process,[113] even though the Connecticut policy does not appear to provide for jurisdiction for Section 504-only children. As a result, in his comprehensive commentary, Maher observed:

> One then 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.[114]

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[109] *Id.* at 191.

[110] *Id.* (internal quotations omitted).

[111] *See supra* note 88 and accompanying text.

[112] Avoletta v. City of Torrington, 50 IDELR ¶ 5 (D. Conn. 2008). Both children had irreversible lung disease. *Id*. The school district had evaluated the first child (Peter) as eligible under Section 504, not the IDEA, and the second child (Matthew) as not eligible under either Section 504 or the IDEA. *Id.* The parent requested an impartial hearing under Section 504 for each child. *Id*. She cancelled the hearing for the first child. *Id.* The other hearing went to completion, with the IHO deciding that the second child was not eligible under Section 504. *Id.*

[113] *Id.*

[114] Maher, *supra* note 15, at 284.

Next, a Missouri case serves, for the exhaustion issue, as another example of confusion in transitioning between the double-covered and Section 504-only categories.[115] In its initial ruling, the federal district court required exhaustion because the child had an IEP at the time of this stage of the litigation.[116] However, the parent requested and received a reconsidered ruling upon the district's finding the child was no longer eligible under the IDEA, thus exiting the child from an IEP.[117] Vacating its earlier exhaustion ruling, the court rejected the parents' Section 504 and ADA claims on the merits, thereby indirectly indicating that exhaustion did not apply to a Section 504-only child[118] and seeming to be at odds with the aforementioned[119] Missouri decision.[120]

Finally, a Rhode Island case addressed more directly the exhaustion doctrine in relation to a Section 504-only student.[121] Dissatisfied with the child's Section 504 plan in grade eleven, the parents requested an impartial hearing, which the district provided with the assistant superintendent as the IHO.[122] After objecting on

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[115] B.M. v. S. Callaway R-II Sch. Dist., 58 IDELR ¶ 253 (W.D. Mo. 2012), *vacated by* No. 11 4029 NKL, 2012 WL 3016716 (W.D. Mo. July 23, 2012).

[116] *Id.*

[117] B.M v. S. Callway R-II Sch. Dist., No. 11 4029 NKL, 2012 WL 3016716, at *4-6 (W.D. Mo. July 23, 2012).

[118] *Id*. at *2 ("[The] acts and arguments raise issues as to whether administrative exhaustion under the IDEA may not apply to the [parents] or in any event, may have been futile and thus should not be required. However, even if the Court were to rule that the [parents] do not have to exhaust their administrative remedies before bringing suit, the [parents'] Motion to Reconsider still fails as the Court finds that [the district] prevails on the merits of its summary judgment motion [based on the parents' failure to prove the requisite bad faith or gross misjudgment].").

[119] *See* cases cited *supra* note 100.

[120] *See* R.N. v. Cape Girardeau 63 Sch. Dist., 858 F. Supp. 2d 1025, 1029-30 (E.D. Mo. 2012) (requiring exhaustion of Section 504 and ADA claims of student with temporary physical impairment who did not have an IEP).

[121] Weber v. Cranston Pub. Sch. Comm., 245 F. Supp. 2d 401, 408 (D.R.I. 2003). As another reflection of the blurred boundary, however, the child reached Section 504-only status in this case as a result of the parties agreeing to declassify her under the IDEA after the parent revoked consent to her IEP. *Id*. at 403.

[122] *Id.*

various grounds, including impartiality, the parents withdrew the child and subsequently filed a complaint with the state education agency (SEA) based on a state statute that provided it with jurisdiction for hearing complaints in the K-12 context under the Rhode Island law that parallels Section 504 and the ADA.[123] The hearing officer, appointed by the SEA commissioner, ruled that the district failed to provide the required Section 504 procedural safeguards, including an impartial hearing, but ordered only prospective procedural relief, not the compensatory education that the parents sought.[124] Rather than file an appeal with the state board of education under the applicable procedures, the parents filed suit in federal court, alleging violations of Section 504 and Fourteenth Amendment procedural due process.[125] While acknowledging that a Court of Appeals for the Eleventh Circuit decision applied the IDEA's exhaustion requirement in an arguably analogous situation,[126] the court explained that "no party to this action claims that IDEA administrative procedures were ever initiated or even appropriate."[127] Although also admitting that the state's policies for Section 504 hearings were inconsistent[128] and that Section 504 does not "affirmatively require exhaustion of administrative remedies,"[129] the court ultimately dismissed the parents' suit, ruling that "[b]ecause the purpose of requiring exhaustion in the IDEA context is equally applicable to the Section

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[123] R.I. GEN. LAWS § 42-87-5(c) (2006).

[124] *Weber*, 245 F. Supp. 2d at 403-04.

[125] *Id*. at 404, 410.

[126] Babicz v. Sch. Bd., 135 F.3d 1420, 1422 (11th Cir. 1998). For the supposed similarity, *see supra* text accompanying notes 101-02.

[127] *Weber,* 245 F. Supp. 2d at 409.

[128] Specifically, the court observed:

> The state has also apparently adopted a separate policy relating to Section 504, which has been a source of contention. Plaintiffs allege that multiple and conflicting Section 504 policies were in place in 1999, and that the resulting incoherence harmed them. Before the magistrate judge, counsel for the [District] Defendants orally acknowledged that contradictory policies existed at that time.

Id. at 407-08.

[129] *Id*. at 406 (citing Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998)). For similar dicta, see *Power v. Sch. Bd.*, 276 F. Supp. 2d 512, 521 (E.D. Va. 2003).

504 FAPE context, relief for a violation of Section 504 relating to the denial of FAPE is only available in this Court upon utilization of all available state administrative procedures."[130]

V. STATE LAWS, POLICIES,[131] AND PRACTICES

A. State Laws

State laws that address jurisdiction for IDEA IHOs to address Section 504 student issues are more the exception than the rule. Among this small minority of state laws, only three state laws provide the same impartial hearing mechanism for IDEA and Section 504 claims, regardless of whether the student is in the double-covered or Section 504-only category. The New Jersey regulations expressly provide the state's administrative law judges with the authority to hear Section 504 claims filed by parents or districts in relation to not only double-covered but also Section 504-only students.[132] Similarly, but more indirectly leading to a single system, Pennsylvania's regulations, which were promulgated in the wake of the settlement of a class action suit on behalf of physically or health impaired children, regardless of whether they needed special education,[133] expressly provide parents and districts with the right to initiate a Section 504 hearing "governed by" the

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[130] *Weber*, 245 F. Supp. 2d at 410.

[131] The term "policies" is imprecise due to its varying use. In this article, policies that the state board of education has officially promulgated are included under "state laws," whereas those issued more informally, such as via memoranda or website notices, are separately summarized in the "state policies and practices" subpart. *See infra* Part V.

[132] N.J. ADMIN. CODE § 6A:14-2.7(w) (2012), *available at* http://www.lexisnexis.com/hottopics/njcode/ (select "TITLE 6A. EDUCATION;" "CHAPTER 14. SPECIAL EDUCATION;" "SUBCHAPTER 2. PROCEDURAL SAFEGUARDS"). The only procedural differences for Section 504 claims are that the IDEA provisions for sufficiency steps, resolution sessions, and expedited hearing do not apply. *Id.* On the other hand, these regulations expressly provide for district as well as parent-initiated hearings under Section 504. *Id.*

[133] Elizabeth S. v. Gilhool, EHLR 558:461 (M.D. Pa. 1987). Inasmuch as the need for special education, which is an essential element of IDEA eligibility, was not a limiting factor, this class action extended to Section 504-only students. *Id.*

state's IDEA IHO process, regardless of whether IDEA issues are also raised.[134] In line with their integrating approach for impartial hearings, these Section 504-related regulations also require stay-put[135] during these proceedings.[136] Similarly, North Dakota's regulations require the state's office of administrative law judges to conduct both IDEA and Section 504 hearings with the same hearing procedures.[137] Representing a parallel, rather than integrated, approach, Oregon's regulations separately provide for impartial hearings under the IDEA and Section 504, without any limitation to double-covered students.[138] The differences between the hearings under the IDEA and Section 504 are minimal, except that districts do not have the express right to file Section 504 claims.[139]

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[134] *See* 22 PA. CODE § 15.8(d) (2012). A federal district court partly relied on this regulation—and partly, in confusion, relied on the IDEA regulations—in upholding a district's right to initiate and proceed with an impartial hearing under Section 504, despite parental objection. Sutton v. W. Chester Area Sch. Dist., 41 IDELR ¶ 61 (E.D. Pa. 2004). The regulation is a bit awkward in relation to district-initiation by providing this jurisdictional access "after an informal conference," which is expressly subject to initiation by the parents. 22 PA. CODE § 15.5(c)-(d) (2012). Moreover, although the numbering in the cross-references to the corresponding Pennsylvania special education regulations is no longer accurate, they have led to the conclusion—reported in the survey results *infra*—that the IDEA IHO system has jurisdiction for Section 504 claims of both double-covered and Section 504-only students. *See infra* pp. 166-67.

[135] *See supra* note 3.

[136] 22 PA. CODE § 15.5(b)(8) (2012).

[137] N.D. ADMIN. CODE § 54-57-03.1 (2009), *available at* http://www.lawserver.com/law/state/north-dakota/nd-code/north_dakota_code_54_57_03-1. This regulation does not expressly differentiate double-covered from Section 504-only students. *Id.*

[138] OR. ADMIN. R. 581-015-2330 through 581-015-2385 (2012), *available at* http://arcweb.sos.state.or.us/pages/rules/oars_500/oar_581/581_015.html (delineating separate processes for IDEA and Section 504 redress); OR. ADMIN. R. 581-015-2395(1).

[139] The regulations only allow for parent filings for Section 504 hearings, but the other hearing rights are the same as those for IDEA hearings except for stay-put and a written or taped record of the hearing. OR. ADMIN. R. 581-015-2395(4) (2012), *available at* http://arcweb.sos.state.or.us/pages/rules/oars_500/oar_581/581_015.html. Query whether Section 504 has a preemptive requirement for stay-put. *See* Letter to Zirkel, 22 IDELR 667 (OCR 1995) (ambiguously answering that, although Section 504 does not contain an express

Similar to these three states, but arguably at the option of the district, Vermont's state board of education rules permit, but do not require, the use of the IDEA IHO process for Section 504 claims, whether on behalf of double-covered or Section 504-only students.[140] In such cases, the same hearing procedures apply without differentiation.[141]

In another state, the jurisdictional scope does not clearly extend to Section 504-only students.[142] Specifically, Massachusetts' regulations specify the jurisdiction for its state system of IDEA hearings as extending to "any issue involving the denial of the [FAPE] guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§ 104.31-104.39."[143] This jurisdiction is arguably limited to double-covered students because the regulation is expressly limited to hearing requests of parents of students with a disability, which these regulations define in accordance with the IDEA, rather than the broader definition under Section 504.[144]

In partial contrast, Virginia's special education regulations provide less automatic jurisdiction with regard to double-covered students and also discretionary jurisdiction with regard to Section 504-only students.[145] The discretion with regard to double-covered

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stay-put requirement, "a fair due process system would encompass the school district waiting for the results of the process before making the change").

[140] *State Board of Education Manual of Rules and Practices*, VT. DEPARMENT OF EDUC. (2012), http://education.vermont.gov/new/pdfdoc/board/rules/1100_1200.pdf (providing for Section 504 hearings under Rule 1253).

[141] *Id*.

[142] 603 MASS. CODE REGS. 28.01(2) (2009), *available at* http://www.doe.mass.edu/lawsregs/603cmr28.html?section=01.

[143] *Id*. 28.08(3)(a). The cited Section 504 regulations, which constitute the subpart specific to preschool, elementary, and secondary education, are not limited to a narrow view of FAPE, extending, for example, to child-find, evaluation, least restrictive environment, procedural safeguards, and nonacademic and extracurricular services and activities. *Id.*

[144] *Id.* 28.02(15).

[145] 8 VA. ADMIN. CODE § 20-81-210.O.5 (2009), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+8VAC20-81-210; *Id.* § 20-81-330.B.

students is for the IDEA IHO,[146] whereas that with regard to Section 504-only students is for the school district.[147] Covering both situations, Virginia's regulations are noteworthy for providing for Section 504 training for its IHOs.[148]

Finally, Georgia's regulations permit districts, in cases arising for double-covered students, to request the IDEA IHO to hear Section 504 claims, thus resulting in a consolidation of the hearing rights under both statutory frameworks.[149] If the IHO, presumably as a matter of discretion, agrees, the district bears the proportional costs of the hearing attributable to the Section 504 claims, as determined by the IHO.[150]

B. State Policies and Practices

A state-by-state survey revealed the prevailing practices for impartial hearings under Section 504, according the state education agency (SEA) representative for due process hearings under the

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[146] *Id.* § 20-81-210.O.5.b ("At the prehearing stage [the IHO shall] . . . [d]etermine when an IDEA due process notice also indicates a Section 504 dispute, whether to hear both disputes in order to promote efficiency in the hearing process and avoid confusion about the status of the Section 504 dispute.").

[147] *Id.* § 20-81-330.B (offering districts the option to use the state's IHO system to fulfill the Section 504 institutional obligation for a grievance procedure, with all costs charged to the district). This option appears to be another confusion between the more general complaint resolution procedure of 34 C.F.R. § 104.7 and the specific impartial hearing procedure of 34 C.F.R § 104.36. *See supra* text accompanying notes 49-50; *see also* A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 30-31 (D. Conn. 1998).

[148] 8 VA. ADMIN. CODE § 20-81-210.D.1, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+8VAC20-81-210 ("specialized training on . . . associated laws and regulations impacting children with disabilities"); *see also id.* § 20-81-330.B ("train[ing] . . . on 504 requirements").

[149] GA. COMP. R. & REGS. 160-1-3-.07(a) (2009), *available at* http://rules.sos.state.ga.us/docs/160/1/3/07.pdf.

[150] *Id.* 160-1-3-.07(b). Finally, the appeal is to the state board of education. *Id.* 160-1-3-.07(c). This review mechanism applies to appeals from school board decisions in Georgia. *Id.* 160-1-3-.04. However, in the specific context of Section 504, it raises an ad hoc—as contrasted with per se—issue of impartiality. *See, e.g.*, Ill. Bd. of Educ., EHLR 352:17 (OCR 1985); Ill. Bd. of Educ., EHLR 257:506 (OCR 1984); Letter to Kettler, EHLR 211:51 (OCR 1978).

IDEA.[151] The following table summarizes the survey results for the two categories of students in relation to a jurisdictional continuum, from an unconditional 'yes' to an unconditional 'no,' as to whether the state's IDEA IHOs have jurisdiction for Section 504 claims:

Table 1—Survey of State Practices for Impartial Hearings under Section 504[152]

	Double-Covered Students	**Section 504-Only Students**
Yes	HI, LA, MA*†, NJ*†, ND*†, OR*†, PA*†, VT*	HI, MA*†[153], NJ*†, OR*†, VT*
Yes with charge-back	MT	AR, LA, MD†, MT, PA**†[154]
If intertwined with IDEA	AR, ID, IL, IN, IA, KS, ME, WV	
Discretionary for IHO	GA*†, MD†, MN, VA*	

[151] Perry A. Zirkel, *Impartial Hearings under Section 504: A State-by-State Survey*, 279 EDUC. L. REP. 1, 11 (2012).

[152] *Id.*

[153] However, this response is subject to question. *See supra* note 144 and accompanying text.

[154] The respondent added the clarification about the charge-back allocation, which the regulation does not specify. *See supra* notes 133-36 and accompanying text.

No, unless separately contracted	AL, AK, CO, CT[155], DE, FL†[156], KY, MS, MO, NE, NV, NM, NY[157], OH, SC, SD, TN†[158]	AL, AK, CO, CT, DE, FL†[159], ID, IN, IA, KS, KY, ME, MS, MO, MN, NE, NV, NM, NY, OH, SC, SD, TN†, VA*, WV
No	AZ†, CA†, DC, MI†, NH, NC†, OK, RI[160], TX, UT, WA†, WI†, WY	AZ†, CA†, DC, GA†, IL, MI†, NH, NC†, ND*†[161], OK, RI[162], TX, UT, WA†, WI†, WY

*By law; †Full-time IHOs[163]

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[155] See *infra* text accompanying note 167, for the limited exception in this state's policy.

[156] The district has the option to contract with the office (Florida's Department of Administrative Hearings), not with the individual administrative law judges in that department. E-mail from Lindsey Granger, Dispute Resolution Program Dir., Fla. Dep't of Educ., to Perry A. Zirkel, Professor of Educ. & Law, Lehigh Univ. (Jan. 5, 2012, 10:40 EST) (on file with author).

[157] Yet, reflecting possible confusion or contradiction, New York's IDEA IHOs have addressed Section 504 claims in tandem with those under the IDEA. *See supra* note 39; Calhoun v. Ilion Cent. Sch. Dist., 936 N.Y.S. 438, 440-41 (App. Div. 2011).

[158] See *infra* text accompanying note 173, for the clarification that the contract would be with the office.

[159] This option is for contracting with the office, not the individual. *See* E-mail from Lindsey Granger to Perry A. Zirkel, *supra* note 156.

[160] See *infra* text accompanying notes 168-70, for the unusual alternative in this state's policy.

[161] See *supra* text accompanying note 137, for the North Dakota regulation. However, the SEA apparently interprets this regulation as implicitly intended to apply only to double-covered students. Alternatively, to the extent that this regulation does not exclude Section 504-only students, this choice for the SEA practice is "despite what the law says." E-mail from Marilyn Orgaard, Assistant Dir. of Teacher and Sch. Effectiveness, N.D. Dep't of Pub. Instruction, to Perry A. Zirkel, Professor of Educ. & Law, Lehigh Univ. (Jan. 4, 2012, 09:00 PST) (on file with author).

[162] *See* R.I. GEN. LAWS § 42-87-5(c) (2006).

[163] Zirkel & Scala, *supra* note 3, at 5.

In addition to the aforementioned state laws that largely square with these responses,[164] a few SEAs had reported policies in the form of informational guidelines that confirm or clarify the survey responses. First, the Connecticut SEA issued a policy letter to local school districts[165] that provided the following clarification:

> The Connecticut State Department of Education does not conduct [Section 504] hearings; these hearings are the responsibility of the local school district and as such, each district is required to have procedures in place to guarantee a due process hearing before an impartial hearing officer. The impartial hearing officer requirement at 34 C.F.R. 104.36 is not the same as the grievance procedure requirement found at 34 C.F.R. 100.7(b). You must have both in place at your district.[166]

However, in a footnote inferably applicable to double-covered students, this letter added that "the provisions of the Mrs. L. consent decree extend the jurisdiction of the state's IDEA [IHOs] to make determinations regarding § 504 claims only as necessary to resolve the claims made under the IDEA."[167]

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[164] *See supra* text accompanying notes 149-50 and 157, for the arguable or limited exceptions.

[165] *Reissue of CIRCULAR LETTER C-9, Series 2000-2001*, CONN. STATE DEP'T OF EDUC. (May 20, 2009), http://www.sde.ct.gov/sde/lib/sde/pdf/circ/circ08-09/c13.pdf. This circular letter started with the following recognition of confusion:

> Over the years, the overlapping requirements of the . . . IDEA . . . and Section 504 of the Rehabilitation Act of 1973 have obscured the definitive requirements for procedural safeguards found in each respective law. Specifically, we have found that some districts have confused the Section 504 hearing requirements with IDEA hearing requirements.

Id.

[166] *Id.* The letter interpreted the following as requirements for the Section 504 hearing: (1) an IHO knowledgeable about Section 504/ADA claims and the differences between Section 504/ADA and IDEA requirements, and (2) stay-put. *Id*.

[167] *Id*. (internal emphasis omitted). The referenced consent decree apparently was in settlement of earlier litigation focused on the SEA's complaint resolution process under the IDEA. *See* Mrs. W. v. Tirozzi, 706 F. Supp. 164,

Second, the website of the Rhode Island SEA provides the following policy: "Complaints regarding provision of general education accommodations under Section 504 for an eligible student may be directed to the Rhode Island Department of Education's Legal Office."[168] Thus, although Rhode Island does not provide authority for its IDEA IHOs to address these claims, it has a separate system for one specified segment of Section 504 complaints,[169] without clarifying whether the option is for the parent and/or the district.[170] Moreover, this separate system raises the issue of impartiality under Section 504.[171]

Third, Tennessee's SEA has issued a Section 504 manual that (1) requires districts to "develop a process to ensure impartial due process hearings"; (2) expressly offers districts the option of contracting with the state's office of IDEA IHOs; and (3) asserts that stay-put applies during such Section 504 hearings.[172] Thus, the second of these three provisions confirms the district option of a contractual arrangement, clarifying that it applies to the system of

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169 n.4 (D. Conn. 1989) (denying SEA's summary judgment motion and noting the secondary Section 504 claim regarding the impartial hearing process).

[168] *Questions Regarding Section 504 of the Rehabilitation Act*, R.I. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., http://www.ride.ri.gov/OSCAS/Dispute_resolution/ (last visited Oct. 20, 2012). It is unclear whether this policy is the same as the state-law procedure described in the aforementioned *Weber* case, especially given the admitted policies at the time. *See supra* text accompanying notes 121-30.

[169] This segment is a subset of FAPE complaints, presumably those from Section 504-only students (due to the restriction to "general education accommodations"), thus not extending to other issues, such as eligibility or retaliation under Section 504. *See Questions Regarding Section 504 of the Rehabilitation Act*, *supra* note 168.

[170] It may be argued that the option remains with the district, because it has the responsibility for impartial hearings. *See supra* text accompanying note 29. However, it may be counter-argued that the parent of the child with a disability has standing, thus leaving the choice of directing this specific type of complaint to the SEA. *See* J.D. v. Georgetown Indep. Sch. Dist., 57 IDELR ¶ 36 (W.D. Tex. 2011).

[171] *See* R.I. GEN. LAWS § 42-87-5(c) (2006).

[172] *Section 504 Manual*, TENN. DEPARTMENT OF EDUC. 12, 22 (Apr. 2001), http://www.tn.gov/education/speced/doc/sesection504man.pdf.

full-time IHOs rather than independently with an individual IHO.[173]

For the vast majority of states, however, the reported choice is a matter of perceived practice, rather than state law or guidelines. This situation causes questions of consistency and accuracy because the perceiver for the survey was an SEA representative with responsibility for the IDEA IHO system, whereas the Section 504 obligation for impartial hearings belongs to the "recipient" of federal financial assistance, which in the vast majority of the cases is the local school district.[174] Due to these relative responsibilities, the SEA typically maintains records and compiles data for impartial hearings under the IDEA, not under Section 504.[175] The relative paucity of Section 504 hearings similarly contributes to the limited knowledge of SEA respondents.[176] In some states, the respondents' answers evidenced confusion.[177] For example, in explaining their 'no' answers to jurisdiction for Section 504 hearings, the respondents in Arizona, Idaho, and Wyoming commented that they refer these complaints to OCR, thus confusing the administrative investigation avenue with the administrative adjudication venue of Section 504 complaints.[178]

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[173] *See id.*

[174] *See supra* note 29 and accompanying text. The SEA is clearly and directly responsible under Section 504 for programs, such as a state school for the deaf or blind, that it operates. *See, e.g.*, R.I. DEPARTMENT OF ELEMENTARY & SECONDARY EDUC., *supra* note 168 (explaining the programs that the Rhode Island SEA provides for disabled students, including the deaf and blind). However, unlike the integral part that it plays under the IDEA, the SEA does not have the primary accountability or central supervisory role for school district programs under Section 504. *See generally* ZIRKEL, *supra* note 2 at 1:3, 5 (noting that Section 504 "presents a wider but less deep obligation for school districts than the IDEA").

[175] *See, e.g.*, Zirkel & Gischlar, *supra* note 17, at 24, 28.

[176] *See* Gorn, *supra* note 66.

[177] *See* E-mail from Lindsey Granger to Perry A. Zirkel, *supra* note 156. *See generally* Zirkel & Scala, *supra* note 3, at 4-6 (discussing the fifty-state survey and its outcome).

[178] See Zirkel & McGuire, *supra* note 16, at 104, 106, for a roadmap of these distinct available avenues. *See generally* Zirkel & Scala, *supra* note 3 (explaining the findings of the fifty-state survey regarding the hearing systems under IDEA).

VI. PROPOSED SOLUTION TO THE CONFUSION

A. Prevailing Confusion

Based on the intersecting and interacting overlap between the IDEA and Section 504, confusion with regard to impartial hearings under Section 504 abounds. This confusion is not only in practice but also in law.[179] The foregoing overview of the Section 504 regulations, OCR interpretations, and case law includes the following examples:

- May a district initiate[180] and/or appeal[181] a Section 504 hearing?
- What is the appropriate mechanism for "review procedure"[182] for a Section 504 hearing?[183]
- What is the relationship between the impartial hearing and the "grievance procedure"[184] requirements of Section 504?[185]

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[179] *See, e.g.*, Zirkel & Scala, *supra* note 3, at 5; *see also* Zirkel, *supra* note 33.

[180] *See supra* note 53 and accompanying text and note 32. Given the development of the Section 504 regulations in tandem with those under the IDEA and the agency interpretations, the answer should be 'yes.' *See* Smith v. Robinson, 468 U.S. 992, 1017 n.20 (1984).

[181] *See supra* text accompanying note 39; *see also* Weber v. Cranston Pub. Sch. Comm., 245 F. Supp. 2d 401, 410 (D.R.I. 2003) (discussing the process of appealing and how it can be confusing). The answer to this part of the question should also be 'yes,' not only in light of the intended consistency with the IDEA, but also due to the general structure of civil rights laws, including but not limited to Title VI and Section 1983, that provides both parties with the right of judicial appeal. The availability of an impartial hearing under Section 504 is not a relevant distinction, especially given the exhaustion doctrine and the right of private action as applied to Section 504.

[182] *See supra* text accompanying note 29.

[183] *See supra* text accompanying note 39. The answer would seem rather obviously to be 'judicial appeal.'

[184] *See supra* text accompanying note 29.

[185] *See supra* text accompanying notes 49-51; *see also* A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 31 (D. Conn. 1998) (discussing how the grievance procedure works in real practice). Again, the answer should clearly be that they are entirely independent procedures, with the first being permissibly internal and the second being mandatorily impartial.

- Does "stay-put"[186] apply during the impartial hearing under Section 504?[187]

Contributing to, rather than resolving, the confusion is the lack of carefully clear and complete state policies, which the final section of this article addresses in terms of a proposed approach. For example, how does the aforementioned[188] IDEA exhaustion provision apply to the Section 504 claims of double-covered[189] and

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[186] *See supra* text accompanying note 3.

[187] *See supra* notes 139, 166 and text accompanying notes 135, 172. This question is a close one, with differentiation between double-covered students (yes) and Section 504-only students (no) arguably being the proper approach.

[188] *See supra* text accompanying note 88.

[189] For double-covered students, does the IHO's dismissal of their Section 504 claim for lack of jurisdiction suffice for purposes of exhaustion, even though it has not met the underlying purposes of providing specialized expertise and a trial-type record, which contribute to judicial economy by providing the opportunity for earlier dispute resolution and more efficient court decision-making? *See, e.g.*, D.C. v. Oakdale Joint Unified Sch. Dist., No. 1:11-cv-01112-AWI-DLB, 2012 WL 253224, at *7 (E.D. Cal. Jan. 26, 2012); E.S. v. Konocti Unified Sch. Dist., 55 IDELR ¶ 226 (E.D. Cal. 2010) (ruling that the IHO's dismissal of the double-covered student's Section 504 claim satisfied the exhaustion requirement); *cf.* Weber v. Cranston Sch. Comm., 212 F.3d 41, 47-54 (1st Cir. 2000) (discussing application of IDEA exhaustion requirement in relation to Section 504 retaliation claim in light of IDEA personal and subject-matter jurisdiction and alternative dispute resolution mechanisms); Cayla v. Morgan Hill Unified Sch. Dist., 58 IDELR ¶ 225 (N.D. Cal. 2012) (ruling that the IDEA IHO's lack of jurisdiction met the futility exception to exhaustion); McNeal v. Duval Cnty. Sch. Bd., 58 IDELR ¶ 7 (M.D. Fla. 2011) (ruling that district's refusal of parents' request for a Section 504 hearing either met or excused the exhaustion doctrine, although fulfilling only two of four stated purposes and partially relying on dissimilarity of retaliation from Section 504 plan issues); Thompson v. Bd. of Special Sch. Dist. No. 1, 936 F. Supp. 644, 648 (D. Minn. 1996) (ruling that parents' refused request for a hearing and unsuccessful appeal fit the futility exception to the exhaustion requirement). *But cf.* Jennifer B. v. Chilton Cnty. Bd. of Educ., No. 2:11 cv 839 MEF, 2012 WL 4165850, at *5 (M.D. Ala. Sept. 19, 2012) (ruling that "although [the parent] followed the administrative procedures set forth in the IDEA, the Court concludes that Ms. B's claims were not adequately exhausted because the state hearing officer erroneously dismissed her case before adequate development of the factual record"). For yet another interpretation, see *supra* note 91 and accompanying text.

Section 504-only students?[190] Alternatively, does Section 504 inferably have its own exhaustion requirement for Section 504-only students?[191] Separately, are the parents of a double-covered student in the various states where the IDEA hearing process does not have jurisdiction for their Section 504 claim(s) entitled to a second bite of the apple by filing for a district-level impartial hearing under Section 504 before, during, or after the IDEA hearing?[192]

B. Increased Importance

The reasons that these questions at the intersection between Section 504 and the IDEA warrant a more systematically clear and consistent approach include: (1) the increased, but unsettled, scope of eligibility and FAPE of Section 504 as a result of the ADAAA; and (2) recent case law that differentiates the standards for and scope of claims under Section 504 from those under the IDEA. The first reason significantly intensifies issues about not only eligibility, but also FAPE for Section 504-only students. For eligibility, the issues include: (1) measuring the newly listed major life activities of concentration and thinking,[193] and (2) determining whether the impairment is a substantial limitation without mitigating measures, such as medication or reasonable accommodations,[194] particularly for students who have been receiving such measures for a long period of time. Given

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[190] For Section 504-only students, as Maher observed, the same exhaustion question arises. *See supra* text accompanying note 114. Moreover, the problem is compounded by requiring consideration of jurisdiction and possibly—depending on the state policy and the IHO—the merits by an IHO who does not necessarily have any training in Section 504. Possible mitigation is available to the extent that exhaustion is distinguishable from claim preclusion. *See, e.g.,* Z.F. v. Ripon Unified Sch. Dist., 56 IDELR ¶ 43 (E.D. Cal. 2011) (ruling that lack of jurisdiction of state IDEA IHO system does not preclude court's subsequent consideration of the student's Section 504 claims).

[191] *See supra* text accompanying note 130.

[192] Such a double-bite approach not only causes significantly increased transaction costs, including time and personnel, but also potentially poses jurisdictional problems as to the extent of this second bite. *See supra* note 112 and accompanying text.

[193] 42 U.S.C. § 12102(2)(A) (Supp. IV 2010).

[194] *Id*. § 12102(4)(E).

Congress's clearly broadening intent,[195] the number of children in the Section 504-only category will expand considerably beyond the national incidence of approximately one percent of K-12 public school students prior to the ADAAA.[196] The increased incidence also expands the potential for disputes about FAPE, including, for example, impartial hearings to determine the extent of the school district's Section 504 FAPE obligation to students with severe food allergies.[197] The new, perhaps more perplexing, issues include the extent of the school district's Section 504 FAPE obligation to students determined to be eligible under the ADAAA as a result of impairments that are in remission or that are fully mitigated.[198]

The second reason intensifies the exposure to disputes for double-covered students, although it also applies to the Section 504-only category. For an example of differential standards, is the statute of limitations longer under Section 504 than under the IDEA?[199] Similarly, what is the substantive standard for FAPE under Section 504, and, at least in some cases, is it higher than that

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[195] *Id*. §§ 12101(b), 12102(4)(A).

[196] *See* Holler & Zirkel, *supra* note 18, at 30.

[197] *See, e.g.*, Mystic Valley Reg'l Charter Sch., 40 IDELR ¶ 275 (Mass. SEA 2004); Cascade Sch. Dist., 37 IDELR ¶ 300 (Or. SEA 2002); Upper Dublin Sch. Dist., 8 ECLPR ¶ 37 (Pa. SEA 2010), *further proceedings*, 57 IDELR ¶ 96 (E.D. Pa. 2011) (considering attorney's fees), 59 IDELR ¶ 94 (E.D. Pa. 2012) (additionally considering attorney's fees).

[198] Although its interpretations are not binding on IHOs and courts, OCR recently addressed this issue as follows:

> If, as a result of a properly conducted evaluation, the school district determines that the student does not need special education or related services, the district is not required to provide aids or services. Neither the Amendments Act nor Section 504 obligates a school district to provide aids or services that the student does not need. But the school district must still conduct an evaluation before making a determination. Further, the student is still a person with a disability, and so is protected by Section 504's general nondiscrimination prohibitions and [the ADA's] statutory and regulatory requirements.

Office for Civil Rights, *supra* note 10.

[199] *See, e.g.*, Bishop v. Children's Ctr. for Developmental Enrichment, 618 F.3d 533, 536 (6th Cir. 2010) (applying the state law statute of limitations); P.P. *ex rel* Michael P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 736-37 (3d Cir. 2009) (answering in the negative).

under the IDEA?[200] The differential scope in terms of additional or stronger viability under Section 504 serves as an incentive for plaintiff-parents to pursue adjudication separately or together with IDEA claims. The examples include disability-based bullying/harassment,[201] facilities accessibility,[202] misidentification,[203] service animals,[204] residential placement,[205]

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[200] *Compare* Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010) (meaningful access, including commensurate opportunity), *with* Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 428 (E.D. Pa. 2002) (reasonable accommodation combined with meaningful benefit), *and* Ridley Sch. Dist. v. M.R., 680 F.3d 260, 275 (3d Cir. 2012) (''reasonably calculated to enable [her] to receive meaningful educational benefits in light of [her] intellectual potential'') (internal quotations omitted); R.K. v. Bd. of Educ., 755 F. Supp. 2d 800, 808-09 (E.D. Ky. 2010) (reasonable accommodation alone), *vacated and remanded on other grounds*, Nos. 11–5070, 11–5700, 2012 WL 3525403 (6th Cir. Aug. 16, 2012). *See generally* Mark C. Weber, C*ommon-Law Interpretation of Appropriate Education: The Road Not Taken in* Rowley, 41 J.L. & EDUC. 95, 113-15 (2012); Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?* 106 EDUC. L. REP. 471, 473-75 (1996) (discussing the possibility of a higher standard under Section 504). In any event, the overlay of the intentional discrimination, deliberate indifference, and gross misjudgment/bad faith standards for Section 504 liability largely moots this matter to the unsettled extent that it applies to claims for money damages and to claims beyond money damages. *See, e.g.*, Baker v. S. York Cnty. Sch. Dist., 2012 WL 6561434 (E.D. Pa. Dec. 17, 2012).

[201] *See, e.g.*, K.R. v. Sch. Dist. of Phila., 373 F. App'x 204 (3d Cir. 2010); Galloway v. Chesapeake Union Exempted Vill. Sch. Bd., 60 IDELR ¶ 13 (S.D. Ohio 2012).

[202] *See, e.g.*, Celeste v. E. Meadow Union Free Sch. Dist., 373 F. App'x 85 (2d Cir. 2010); Luciano v. E. Cent. Bd. of Cooperative Educ. Serv., 59 IDELR ¶ 37 (D. Colo. 2012); D.R. v. Antelope Valley Union High Sch. Dist., 746 F. Supp. 2d 1132 (C.D. Cal. 2010).

[203] *See, e.g.*, A.G. v. Lower Merion Sch. Dist., 58 IDELR ¶ 41 (E.D. Pa. 2011), *further proceedings*, 59 IDELR ¶ 279 (E.D. Pa. 2012); Durrell v. Lower Merion Sch. Dist., 57 IDELR ¶ 10 (E.D. Pa. 2011), *further proceedings*, 59 IDELR ¶ 96 (E.D. Pa. 2012) (ultimately deciding in favor of the defendant district).

[204] *See, e.g.*, C.C. v. Cypress Sch. Dist., 56 IDELR ¶ 295 (C.D. Cal. 2011); *cf.* Jennifer S. v. Catawba Cnty. Bd. of Educ., 57 IDELR ¶ 67 (W.D.N.C. 2011) (requiring exhaustion).

[205] *See, e.g.*, Lauren G. v. W. Chester Area Sch. Dist., 60 IDELR ¶ 4 (E.D. Pa. 2012).

and retaliation.[206] Similarly, but more indirect in their effect, Section 504 provides for such substantive claims' potential litigation advantages, in comparison to the IDEA, with regard to additional evidence,[207] jury trials,[208] expert witnesses,[209] and money damages.[210]

C. Proposed Approach

The recommended approach, per the foregoing analysis, distinguishes between double-covered and Section 504-only students. Although states vary widely in their litigation cultures and competing values, in general, providing the IDEA IHOs with unrestricted jurisdiction for the Section 504 claims of double-covered students has advantages that outweigh the disadvantages. More specifically, the advantages include: (1) clearly fulfilling the letter[211] and spirit[212] of the IDEA's exhaustion provision;[213] (2)

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[206] *See, e.g.*, M.M.R.-Z. v. Puerto Rico, 528 F.3d 9 (1st Cir. 2008); K.M. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005).

[207] *See, e.g.,* E.C. v. Lewisville Indep. Sch. Dist., 58 IDELR ¶ 219 (E.D. Tex. 2012).

[208] *See, e.g.*, K.I. v. Montgomery Pub. Sch., 54 IDELR ¶ 12 (M.D. Ala. 2010).

[209] *Compare* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 300-02 (2006) (stating that the IDEA does not provide for payment of expert witness costs for prevailing parents), *with* S.M. v. Sch. Dist. of Upper Dublin, 59 IDELR ¶ 94 (E.D. Pa. 2012); L.T. v. Mansfield Sch. Dist., 53 IDELR ¶ 7 (D.N.J. 2009) (providing the plaintiff with costs for expert witness after successful Section 504 claim).

[210] *See, e.g.*, A.B. v. Adams-Arapahoe 28J Sch. Dist., 831 F. Supp. 2d 1226, 1254-55 (D. Colo. 2011); D.G. v. Somerset Hills Sch. Dist., 559 F. Supp. 2d 484, 496 (D.N.J. 2008).

[211] This approach avoids confusion as to the meaning of exhaustion of Section 504 claims of double-covered, Section 504-alone students, and the blurry intermediate category at the margin between the two. *See supra* text accompanying notes 188-90.

[212] "Spirit" here refers to the underlying purposes of exhaustion, including: (1) applying agency expertise; (2) providing a full record for judicial review; and (3) further judicial economy. *See, e.g.*, Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 (9th Cir. 1992); Ass'n for Retarded Citizens of Ala., Inc. v. Teague, 830 F.2d 158, 160 (11th Cir. 1987).

[213] 20 U.S.C. § 1415(l) (2006). This provision's specific requirement to utilize the IDEA impartial hearing process "to the same extent as would be required had the action been brought under [the IDEA]" would seem to suggest

avoiding a needless second bite of the apple along with its attendant transaction costs and procedural confusion;[214] and (3) impartially addressing both IDEA and Section 504 issues in one proceeding without the cumbersome or unpredictable criteria.[215] The primary disadvantage is the potential for longer and more complicated proceedings, but effective training of IHOs, on not only Section 504 issues but also efficient hearing management, is a relatively small and effective investment in comparison to the lengthier complications of separate IDEA and Section 504 hearings.

For the Section 504-only category, the general recommendation is less uniform, instead presenting two proposed alternatives. The threshold problem is the IDEA's exhaustion provision. As Maher cogently concluded, the proper interpretation is that Congress intended this provision to apply to double-covered students, which was the category represented by *Smith v. Robinson*,[216] the Supreme Court decision that it overturned.[217] As Maher explained, the legislative history reveals not only this narrowed intent but also that *Smith* was a preemption, or exclusive

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an obligation for the parent to raise and, thereupon, for the hearing officer to address each Section 504 claim—not to merely use the IDEA hearing process for the IDEA claims alone. *Id*. Additionally, for the decreasing minority of two-tier states under the IDEA, currently totaling ten, Zirkel & Scala, *supra* note 3, at 5, including the second tier in the exhaustion requirement would avoid problems in interpreting the "procedures" language of the IDEA exhaustion provision. *See supra* text accompanying note 88. In any event, clarifying that the Section 504 regulatory requirement of "review procedure," which obviously was part of the intended consonance with the IDEA regulations, refers to judicial proceedings which will help resolve current confusion. *See supra* text accompanying notes 182-83.

[214] *See supra* text accompanying note 192.

[215] *See supra* tbl. 1. Specifically, both of the intermediate approaches in the state survey, especially leaving the jurisdiction decision to the unfettered discretion of the IHO, lead to unpredictability, and the IDEA-intertwined criterion is so imprecise as to be an encumbrance to efficient proceedings.

[216] Smith v. Robinson, 468 U.S. 992 (1984).

[217] Maher, *supra* note 15, at 299 (stating that the IDEA overturned *Smith*). *See generally Smith*, 468 U.S. at 1021 (stating that a plaintiff could not get additional remedies by adding a Section 504 claim); Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984) (applying *Smith*, which was decided on the same day, to another double-covered student).

avenue, case specific to the double-covered context.[218] Addressing exhaustion and exclusivity together as an intertwined pair of opposites, the *Smith* majority specifically rejected what it regarded as the parents' attempt to circumvent their IDEA coverage by bringing Section 504 and other claims.[219] Instead, Congress opted for the dissent's approach, which was "to require *a plaintiff with a claim covered by the [IDEA]* to pursue relief through the administrative channels established by that Act before seeking redress in the courts under § 504."[220]

For the courts that reject this approach in the absence of Congressional clarification,[221] extending this unrestricted jurisdictional approach would seem to be prudent because it avoids the confusion as to the meaning of exhaustion[222] while fulfilling its underlying purposes.[223] It also has the advantage, by 'killing two birds with one stone,' of clearly fulfilling the OCR policy interpretations for the Section 504 hearing requirement.[224]

However, to the extent that the courts adopt the recommended, narrow interpretation[225] or Congress confirms it, states should

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[218] Maher, *supra* note 15, at 293-94. More specifically, his penetrating analysis of the courts that have applied exhaustion to the Section 504-only category was as follows:

> [I]n addressing a parent's Section 504/ADA claim when the student is eligible only under Section 504/ADA, courts mistakenly analyze whether relief would have been also available under the IDEA—if packaged as an IDEA claim—not understanding that the IDEA can only provide relief for students eligible or seeking eligibility under that statute.

Id. at 287.

[219] *Smith*, 468 U.S. at 1024. The dissent relied not only on legislative history and canons of construction, but also on the Section 504 regulations. *Id*. at 1023-27.

[220] *Id.* at 1024 (emphasis added). Conversely, the dissent criticized the majority for its approach to non-conflicting claims that "*overlap* with [the IDEA]." *Id*. at 1025 (emphasis added).

[221] The leading examples are the United States Courts of Appeals for the Tenth and Eleventh Circuits. *See supra* notes 101-05 and accompanying text.

[222] *See supra* notes 190-91 and accompanying text.

[223] *See supra* note 44 and accompanying text.

[224] *See supra* notes 41-44 and accompanying text.

[225] Some courts have arrived at the same conclusion for the Section 504-only via an alternative approach that uses the indirect and less clear-cut criterion

choose between two approaches to impartial hearings for Section 504-only students. In the increasing number of states who require IDEA IHOs to be attorneys, especially those with full-time administrative law judges,[226] extending the jurisdiction to the Section 504-only category would seem to be the preferable policy, because it extends the yield on the investment in providing them with Section 504 training and otherwise has the advantage of an efficient centralized system. Yet, some states obviously favor a much more decentralized solution, providing the direct responsibility and customized choice at the level of the "recipient" of federal financial assistance, for example, in most cases, the school district.[227] For this decentralized alternative, the major advantage is flexibility in implementing the broader and much less detailed impartial-hearing requirement under Section 504 as compared with that under the IDEA.[228] Although not integral to either alternative of the proposed approach, requiring exhaustion in the Section 504-only category would seem to be a prudent policy,[229] given the availability of an impartial hearing comparable to the structure of the IDEA.[230]

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of whether the Section 504 claim is sufficiently related to FAPE. *See, e.g.*, R.K. v. Bd. of Educ. of Scott Cnty., 755 F. Supp. 2d 800, 806-07 (E.D. Ky. 2010) (citing various decisions), *vacated and remanded on other grounds*, Nos. 11–5070, 11–5700, 2012 WL 3525403 (6th Cir. Aug. 16, 2012).

[226] Zirkel & Scala, *supra* note 3, at 5-6.

[227] *See supra* notes 29, 174 and accompanying text.

[228] *See supra* notes 45-48 and accompanying text. As a federal court observed in a recent decision, the Section 504 procedural safeguards provide "wide latitude" in compared to the regulatory requirements of the IDEA. A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 684 (E.D.N.Y. 2012).

[229] See *supra* note 130 and accompanying text for similar reasoning which is not based specifically on the specific availability of an impartial hearing under the Section 504 regulations. Conversely, for double-covered students under this proposed approach, the IDEA hearing—via integrating jurisdiction—fulfills exhaustion for both statutory structures, thus avoiding the procedural complexity and confusion. *See supra* note 189.

[230] The IDEA's express exhaustion provision does not provide a significant difference between these two statutory structures, because it is specifically limited to alternative—not IDEA—claims. *See supra* text accompanying note 88. Conversely, Section 504's provision making available the Title VI procedures, 29 U.S.C. § 794(a)(2) (2006), is not exclusive, thus preempting other procedures. Otherwise, the applicable procedural safeguards provision in

Overall, although Congressional action would facilitate the proposed approach for impartial hearings under Section 504, it is not likely or essential.[231] Without federal amendments, the successful adoption and implementation of this approach depends (1) partially on the courts' more careful distinction between double-covered and Section 504-only students in the interpretation and application of the exhaustion doctrine, and (2) more centrally on state policy makers' more concerted attention to providing an efficient and effective Section 504 hearing process that either combines with the IDEA IHO system or—for Section 504-only students—complements it with local customization.[232] In either

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the Section 504 regulations would have been invalid from its inception in 1977. Instead, as the Section 504 regulations make evident, the general provision that incorporates the Title VI procedure, 34 C.F.R. § 104.61 (2012), serves as a supplement to the various context-specific parts, including the provision for an impartial hearing in the limited context of K-12 public school students. 34 C.F.R. § 104.35 (2012). Employee or postsecondary education cases are clearly distinguishable because they do not fit within the specific context of this hearing requirement. *See, e.g.*, Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998). See *McInerney v. Rensselaer Polytechnic Inst.*, 505 F.3d 135, 138-39 (2d Cir. 2007), for an analogous example of differential exhaustion among parts of the ADA statutory structure. Thus, reliance on Section 504 cases in other contexts premised on the rationale that "the administrative procedures do not provide for direct relief to individual victims" clearly do not fit with the impartial hearing requirement for K-12 public schools. E.S. v. Konocti Unified Sch. Dist., 55 IDELR ¶ 226 (E.D. Cal. 2010) (citing BONNIE P. TUCKER & BRUCE A. GOLDSTEIN, LEGAL RIGHTS OF PERSONS WITH DISABILITIES: AN ANALYSIS OF FEDERAL LAW 3:11 (1992)).

[231] It is even less likely that the U.S. Department of Education would revise the Section 504 regulations without statutory action. The current regulations remain unchanged since their original issuance in 1977, including the outdated term "handicap," despite the passage of the ADA in 1990 and the ADAAA in 2008, which both included provisions that amended Section 504. *See, e.g.*, 34 C.F.R. § 104.3(j) (2012) (using the term "handicap"). *See also* 42 U.S.C. § 12102(2) (Supp. IV 2010) (modifying Section 504 by broadening the definition of disability).

[232] One of the major interests is that of the individual child in the Section 504-only category. For example, Maher, observed: "The failure to [resolve the confusion concerning impartial hearings] will result in many students with disabilities, covered by Section 504/ADA but not by the IDEA, continuing to face procedural obstacles and dead ends in their attempts to seek appropriate services and redress for discrimination." *See* Maher, *supra* note 15, at 300. At

event, effective IHO training is essential in not only efficient case management but also pertinent Section 504-specific features.[233]

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the same time, the institutional interests of efficiency, effectiveness, and fairness for the most part point in the same direction. *See id.* at 296.

[233] "Features" here is merely a generic term for the relevant claims and standards within the differential scope of Section 504. *See, e.g*, *supra* text accompanying notes 203-10; *see also* Perry A. Zirkel, *Section 504 for Special Education Leaders: Persisting and Emerging Issues*, 25 J. SPECIAL EDUC. LEADERSHIP 99 (Sept. 2012) (discussing these recent developments); Zirkel, *supra* note 27 (showing a more broad-based comparison with the IDEA).