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Education Law Into Practice

IMPARTIAL HEARINGS UNDERSECTION 504 [a1]

Perry A. Zirkel, Ph.D., J.D., LL.M. [aa1]

An impartial hearing is a well–known and well–established procedure under the Individuals with Disabilities Education Act (IDEA). [1] However, the corresponding procedural safeguard under Section 504 of the Rehabilitation Act (§ 504), although a clearly established right, [2] is not well known. [3] Moreover, its institutional implementation is subject to question. [4]

The purpose of this article is to synthesize, as a set of practice pointers, the limited legal sources specific to impartial hearings under § 504, [5] such as ***52** letters of findings from the U.S. Department of Education's Office for Civil Rights (OCR). [6] The primary thrust of the practice pointers is for school districts in relation to so–called "§ 504–only" students, as contrasted with those also covered under the IDEA definition of disability, [7] although other individuals and organizations may also find this information beneficial.

- The district, as the recipient of federal funds, has this legal obligation. [8]
- In fulfilling this obligation, check carefully the availability of the state's IDEA impartial hearing system. [9]
- This right, along with the other § 504 procedural safeguards, extends to child find, i.e., students reasonably suspected of meeting the § 504 eligibility standards. [10]
- Make sure that you provide the requisite procedural safeguards notice, which includes the parents' right for an impartial hearing under § 504, upon each action regarding identification, evaluation, or educational placement. [11]
- Do not confuse the regulatory requirement for a grievance procedure [12] with that for an impartial hearing under § 504. [13] More over, do not ***53** require use of the grievance procedure as a prerequisite for obtaining a § 504 hearing. [14]
- Provide a reasonable period for filing for the hearing. [15]
- Do not unilaterally determine that the issues have been resolved, thus denying the parent's request and right to a hearing. [16]
- Make sure that the hearing officer meets the applicable standards for impartiality:

– not an employee of the school district
– not an employee of another district that shares a contract for special education services
– not an individual that otherwise has a personal or professional conflict of interest
– not an individual who has participated in the formulation of state policy concerning students with disabilities. [17]

• Although the IDEA procedural requirements for the hearing is one means of complying with § 504, [18] they serve as an optimum model rather than a required minimum. [19] For example, the hearing may, not must, meet the IDEA requirements, such as the rights of cross-examination (as ***54** compared with follow-up questions) and a transcript (as compared with a tape recording). [20]

• Make sure that the hearing is scheduled and completed within a reasonable period of time. [21]

• Make sure to include an outside [22] "review procedure" for the hearing decision. [23]

• Be very careful, consulting with local legal counsel, about the relationship with the exhaustion requirement for IDEA hearings. [24]

Footnotes

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aa1 Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

1 For the relevant IDEA regulations, see 34 C.F.R. §§ 300.507–300.518 (2015). For an overview of the various state systems for IDEA hearings, see 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).

2 34 C.F.R. § 104.36 (requiring 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").

3 For various surveys, showing generally low knowledge levels of § 504 procedures and lack of specific recognition of the hearing right, see Antonis Katsiyannis & Greg Conderman, *Section 504 Policies and Procedures: An Established Necessity,* 15 REMEDIAL & SPECIAL EDUC. 311 (1994); Joseph W. Madaus & Stan F. Shaw, *The Role of School Professionals in Implementing Section 504 for Students with Disabilities*, 22 EDUC. POL'Y 363 (2008); Joseph W. Madaus & Stan F. Shaw, *School District Implementation of Section 504 in One State*, 24 PHYSICAL DISABILITIES: EDUC. & RELATED DISORDERS 46 (2006); Joseph W. Madaus, Stan F. Shaw, & Jiarong Zhao, *School District Practices in the Implementation of Section 504*, 18 J. SPECIAL EDUC. LEADERSHIP 24 (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 (2007).

4 *See, e.g.*, Perry A. Zirkel, *Impartial Hearings under Section 504: A State–by–State Survey*, 279 Ed. Law Rep. 1 (2012). For § 504–only students, only 10 states' IDEA hearing systems provide jurisdiction, half with a charge back to the local district. *Id.* at 11. Some of the others allow for district use of this system on an optional, contractual basis. *Id.*

5 One of the reasons that the case law is limited is because some courts have held the § 504 does not provide a private right of action to enforce its procedural safeguards. *See, e.g.*, *Brennan v. Reg'l Sch. Dist. No. 1*, 531 F.Supp.2d 245, 229 Ed.Law Rep. 513 (D. Conn. 2008); *Power v. Sch. Bd. of City of Va. Beach*, 276 F.Supp.2d 515, 181 Ed.Law Rep. 145 (E.D. Va. 2003); *cf. Manecke v. Sch. Bd. of Pinellas Cnty.*, 762 F.2d 1192, 25 Ed.Law Rep. 119 (11th Cir. 1985) (upholding challenge to time period for hearing based on lack of statutory requisites). *But cf. P.P. v. Compton Unified Sch. Dist.*, 135 F.Supp.3d 1098, 329 Ed.Law Rep. 272 (C.D. Cal. 2015) (ruling in favor of implied right of action if underlying FAPE claim). Another reason is the increasing judicial use of a high liability standard, such as deliberate indifference, gross misjudgment, or bad faith, for § 504 violations in the school context. *See, e.g., C.C. v. Hurst–Euless–Bedford Indep. Sch. Dist.*, __ Fed.Appx. __ (5th Cir. 2016); *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 302 Ed.Law Rep. 5 (2d Cir. 2014); *S.H. v. Lower Merion Sch. Dist.*, 729 F.3d 248, 297 Ed.Law Rep. 58 (3d Cir. 2013). For an example of a case where the plaintiff–parents survived the first barrier

only to fail at the second one, see *H. v. Montgomery Cnty. Bd. of Educ.*, 784 F.Supp.2d 1247, 1267, 271 Ed.Law Rep. 315 (M.D. Ala. 2011) ("the Board's failure to provide a hearing exhibited, at worst, confusion, not deliberate indifference").

6 Although OCR provides its selected recent LOFs on its website (http://www2.ed.gov/about/offices/list/ocr/docs/investigations/index.html?exp=2#section504res), the citations herein are to the more complete sampling in LRP's Individuals with Disabilities Law Report (IDELR).

7 *See, e.g.,* Perry A. Zirkel & John M. Weathers, *Section 504–Only Students: National Incidence Data*, 26 J. DISABILITY POL'Y STUD. 184 (2015). Moreover, for "double–covered" students, i.e., those who are eligible under the IDEA and, due to its broader coverage, Section 504, the school district must arrange for an impartial hearing to comply with Section 504 where the state's IDEA hearing process does not address Section 504 claims. *See, e.g.*, Letter to Anonymous, 18 IDELR 230 (OCR 1991).

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

9 *See* Zirkel, *supra* note 4. For a more comprehensive and thorough discussion, see Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012).

10 34 C.F.R. § 104.36 ("[students] who, because of [disability], need *or are believed to need* special instruction or related services") (emphasis added).

11 *Id.* For the application of the notice requirement, see, e.g., *Oceanside Unified (Cal.) Sch. Dist.*, 115 LRP 55347 (OCR 2015); *Hanover Cnty. (Va.) Pub. Sch.*, 115 LRP 37657 (OCR 2015); In re Student with a Disability (Ill.), 115 LRP 17591 (OCR 2015); *Norwich City (N.Y.) Sch. Dist.*, 114 35076 (OCR 2014); *Roselle Park (N.J.) Sch. Dist.*, 59 IDELR ¶ 17 (OCR 2012); Las Virgenes (Cal.) Unified Sch. Dist., 55 IDELR ¶ 83 (OCR 2010); *Lake Oswego (Or.) Sch. Dist.* 7J, 33 IDELR ¶ 130 (OCR 1999); *St. Tammany Parish* (La.) Sch. Bd., 31 IDELR ¶ 144 (OCR 1999).

12 34 C.F.R. § 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, INCLUDING BUT EXTENDING BEYOND STUDENTS AND THEIR PARENTS TO OTHERS, SUCH AS EMPLOYEES. *ID.* § 104.7(B). THIRD, IT IS AN INVESTIGATORY, RATHER THAN AN ADJUDICATORY, MECHANISM. *ID.*

13 *See, e.g.*, Greendale (Wis.) Sch. Dist., 65 IDELR ¶ 155 (OCR 2014); Catoosa Cnty. (Ga.) Sch. Dist., 57 IDELR ¶ 141 (OCR 2011); Leon Cnty. (Fla.) Sch. Dist., 50 IDELR ¶ 172 (OCR 2007).

14 *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).

15 *See, e.g., Wentzville (Mo.) R–IV Sch. Dist.*, 115 LRP 50553 (OCR 2014); *Smithtown (Mo.) R–IV Sch. Dist.*, 115 LRP 37681 (OCR 2015) (using the IDEA filing period by way of analogy).

16 *See, e.g., Rochester (Ill.) Cmty. Unit Sch. Dist.*, 52 IDELR ¶ 80 (OCR 2009).

17 *See, e.g., Greendale (Wis.) Sch. Dist.*, 65 IDELR ¶ 155 (OCR 2014); *Matthews Cnty. (Va.) Pub. Sch.*, 114 LRP 42768 (OCR 2014); *Bossier Parish (La.) Sch. Sys.*, 53 IDELR ¶ 102 (OCR 2009); *Wis. Dep't of Educ.*, 353 IDELR ¶ 57 (OCR 1986); *Ill. State Bd. of Educ.*, 352 IDELR 17 (1985). On the other hand, parents do not have a right to participate in the selection process unless provided in state law or local policy. *See, e.g., Wis. Dep't of Pub. Instruction*, 17 IDELR 432 (OCR 1990); *Mo. State Dep't of Elementary & Secondary Educ.*, 257 IDELR 487 (1984). As a final consideration or criterion, OCR has only incidentally indicated that the hearing officer should be knowledgeable about Section 504. *See, e.g., Sandusky City (Ohio) Sch. Dist.*, 15 LRP 55829 (OCR 2015).

18 34 C.F.R. § 104.36 ("Compliance with the procedural safeguards of [the IDEA] is one means of meeting [the § 504 procedural safeguards] requirement").

19 *See, e.g.,* the commentary accompanying the § 504 regulations. 42 Fed. Reg. 22,676, 22,691 (May 4, 1977); *see also* 45 Fed. Reg. 30,946, 30,953 (May 9, 1980). For the use of the IDEA by way of analogy, see, e.g., Letter to Anonymous, 18 IDELR 230 (OCR 1991):
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.

20 *See, e.g., Houston (Tex.) Indep. Sch. Dist*., 25 IDELR 163 (OCR 1996). However, where a district opts for the IDEA procedures for the hearing, it must comply with them. *See, e.g., Miami–Dade Cnty. (FL) Sch. Dist*., 52 IDELR ¶ 53 (OCR 2008).

21 See *supra* notes 18–19 and accompanying text. For applications of this general reasonableness standard, see, e.g., *Griffith (Ind.) Pub. Sch*., 41 IDELR ¶ 157 (OCR 2003); *Middleton–Cross Plains (Wis.) Sch. Dist*., 17 IDELR 1497 (OCR 1990); *Ga. Dep't of Educ*., 17 IDELR 472 (OCR 1990).

22 The district may not have a role in the final outcome of the hearing other than deciding whether to appeal it according to the review procedure. *See, e.g.*, *Helms v. McDaniel*, 657 F.2d 800 (5th Cir. 1981).

23 34 C.F.R. § 104.36. The second tier (i.e., review officer level) in states that have a two–tier IDEA system is not necessary. *See, e.g., Miss. State Dep't of Educ*., 352 IDELR 279 (OCR 1986); *In re Student with a Disability*, 116 LRP 2576 (N.Y. SEA 2015). However, its use for this purpose is permissible. *See, e.g., Pa. Dep't of Educ*., 19 IDELR 1105 (OCR 1993). However, the specific contours of the review procedure, when it is not the second tier, are subject to question, at least for districts. *See, e.g.*, *J.D. v. Georgetown Indep. Sch. Dist*., 57 IDELR ¶ 36 (W.D. Tex. 2011) (commenting that "a vague reference to 'a review procedure' in an implementing regulation cannot by itself create federal jurisdiction"); *Bd. of Educ. of Howard Cnty. v. Smith*, 43 IDELR ¶ 84 (D. Md. 2005) (observing that "this review procedure is not necessarily mandated in federal court").

24 *See, e.g.,* 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 (2011).