

## SPECIAL EDUCATION LEGAL ALERT

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This monthly legal alert provides, in the usual format of a two-column table, highlights (on the left) and practical implications (on the right) of major new legal developments. To sign up to automatically receive these monthly alerts, go to [perryzirkel.com](http://perryzirkel.com)

### **1. The U.S. Supreme Court issued a decision on Feb. 22, 2017 that demarcated the scope of the IDEA's exhaustion provision, which concerns whether parents must complete the impartial hearing process before proceeding in court.**

In *Fry v. Napoleon Community Schools* (2017), the Supreme Court held that when the parents file suit on behalf of their child with a disability under the Constitution, Section 504, or the ADA, exhaustion is necessary when the “gravamen,” or crux, of their claim is denial of FAPE.

This decision is another one of the Supreme Court’s modern IDEA rulings that were about the adjudicative process (e.g., who has the burden of proof and whether the parents may proceed in federal court without an attorney) rather than the special education process. Yet, it is practically significant because it tends to make it easier to file lawsuits under Section 504 and the ADA on behalf of students with disabilities. In contrast, at the immediately lower level in this case, the Sixth Circuit Court of Appeals required exhaustion based on the broader barrier requiring exhaustion where the complained-of-harms were educational in nature.

The focus is the substance of the complaint, even if it does not expressly refer to “FAPE,” “IEP,” or other such magic words. Three indicators of the exhaustion gravamen are:

1. The parents could not have brought essentially the same claim if the alleged conduct had occurred at public facility that was not a public school.
2. An adult (e.g., an employee) at the school could not have pressed the same grievance.
3. The parents started mediation or filed for a due process hearing before switching midstream to invoke the court process.

The parents in this case filed suit in federal court under the ADA, without first exhausting the impartial hearing process under the IDEA, concerning school access for the service dog of their child with severe cerebral palsy. The first two indicators contributed to their argument that the exhaustion provision did not apply, but the Supreme Court remanded the case back to the lower court to determine the answer to the third indicator, which was not clear in the record. The odds are more likely than not that the parents did not first initiate the IDEA’s dispute resolution procedures, thus exemplifying the narrower barrier from direct litigation than the one that had stopped them at the lower court.

This Court left for another day the issue of whether exhaustion is required if the gravamen of the complaint is denial of FAPE but the parents specifically requests the remedy of money damages for physical or emotional distress.

Here, the parents sought not only declaratory relief, but also money damages for their child’s emotional distress. If they avoid exhaustion, which is likely, the reserved issue will not apply to them, but it causes further exhaustion litigation for parents who seek this relief for what in substance is a denial of FAPE claim.

**2. In the absence of a second major legal development during the past four weeks, this month’s Alert provides the attached Section 504 eligibility form, which may be customized for local use with due acknowledgment per the asterisked note at the bottom of the form.**

This form includes grey and blue-green highlighting reflecting the successive relevant refinements of the ADAAA of 2008 and the subsequent ADAAA Title II regulations, which became effective in the fall of 2016. Although useful for professional development, the highlighting should be removed as one of the customizations for local use in eligibility determinations under Section 504 and its sister statute, the ADA.

The highlighting reveals a successive liberalization of the standards for eligibility, specifically with regard to the second and third essential elements—major life activities and substantial. Nevertheless, certain caveats and limitations are suggested:

- the “record of” and “regarded as” prongs provide protection from discriminatory exclusions, including procedural safeguards for disciplinary changes in placement, but that do not serve as an entitlement for a 504 plan
- the exclusion of mitigating measures for determining eligibility (specifically, the “substantial” element) but their inclusion in determining the subsequent FAPE contents of the 504 plan may mean an effective reduction or, in some cases, elimination of services and/or accommodations.

The form at the top reminds users of the need for a knowledgeable team, although not necessarily as numerous or specific as the roles of an IDEA eligibility team, for this determination. Moreover, a procedural safeguards notice, similarly more streamlined than its IDEA counterpart, that conforms to the applicable Section 504 regulation (34 C.F.R. § 104.36) should accompany this form upon its implementation. Probably the most significant ingredient of the procedural safeguards notice is that the parents have the right to an impartial hearing for identification, evaluation, and placement, which—depending on the state—is often separate from the IDEA’s impartial hearing process.

The publications list on my website included the citations and, where copyright allows, copies of various relevant articles, such as the following examples:

- Zirkel, P. (2012). Impartial hearings for public school students under Section 504: A state-by-state survey. *West’s Education Law Reporter*, 279(1), 1–17
- Zirkel, P., & Weathers, J.M. (2016). K–12 students eligible solely under Section 504: Updated national incidence data. *Journal of Disability Policy Studies*, 27(2), 67–75.
- Zirkel, P. (2016). Impartial hearings under Section 504. *West’s Education Law Reporter*, 332(3), 51–54.

## SECTION 504/ADA STUDENT ELIGIBILITY FORM\*

Child's Name: \_\_\_\_\_ Birthdate: \_\_\_\_\_

Eligibility Team Members: Fill in names and check whether knowledgeable about the:

Names: \_\_\_\_\_ ...child \_\_\_\_\_ ...meaning of  
evaluation data \_\_\_\_\_ ...accommodations/  
placement options \_\_\_\_\_

Sources of evaluation information (indicate each one used):

\_\_\_\_\_ aptitude and/or achievement tests \_\_\_\_\_ teacher recommendations  
\_\_\_\_\_ adaptive behavior \_\_\_\_\_ others(specify): \_\_\_\_\_

1. Specify the mental or physical *impairment* \_\_\_\_\_  
(as recognized in *DSM-V* or other respected source if not excluded under 504/ADA, e.g., illegal drug use)\*

2. Check the *major life activity*: \_\_\_\_\_ seeing \_\_\_\_\_ hearing \_\_\_\_\_ walking \_\_\_\_\_ breathing \_\_\_\_\_ learning  
\_\_\_\_\_ reading \_\_\_\_\_ writing \_\_\_\_\_ thinking \_\_\_\_\_ concentrating \_\_\_\_\_ communicating \_\_\_\_\_ speaking  
\_\_\_\_\_ interacting with others \_\_\_\_\_ manual tasks \_\_\_\_\_ reaching \_\_\_\_\_ lifting \_\_\_\_\_ bending  
\_\_\_\_\_ eating \_\_\_\_\_ sleeping \_\_\_\_\_ bowel functions \_\_\_\_\_ bladder functions \_\_\_\_\_ digestive functions  
\_\_\_\_\_ immune system functions \_\_\_\_\_ circulatory system functions \_\_\_\_\_ endocrine system functions  
or specify alternative of equivalent scope and central importance: \_\_\_\_\_

3. Place an "X" on the following scale to indicate the specific degree that the impairment (in #1) limits the major life activity (in #2):

- Make an educated estimate **without** the effects of mitigating measures, such as medication; low-vision devices (except eyeglasses or contact lenses); hearing aids and cochlear implants; mobility devices, prosthetics, assistive technology; learned behavioral or adaptive neurological modifications; and reasonable accommodations or auxiliary aids/services.
- Similarly, for impairments that are episodic or in remission, make the determination for the time they are active.
- Use **most** students in the general (i.e., national or state) population as the frame of reference.
- Interpret close calls in favor of broad coverage (i.e., construing Items 1-3 to the maximum extent that they permit). Thus, for an "X" at 4.0 or below, fill in specific information evaluated by the team that justifies the rating:

5	_____	Extremely	_____
4	_____	Substantially	_____
3	_____	Moderately	_____
2	_____	Mildly	_____
1	_____	Negligibly	_____

4. If the team's determination for #3 was less than "4," provide notice to the parents of their procedural rights, including an impartial hearing. If the team's determination was a "4" or above, the team should determine and list on the 504/ADA Plan the specific accommodations and/or services that are necessary for the child to have an opportunity commensurate with nondisabled students (of the same age).

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“\* Adapted with permission from Perry A. Zirkel, author of *Section 504, the ADA and the Schools*.”

[N.B. Bold font and grey highlighting based on ADAAA, effective 1/1/09. Cyan highlighting based on ADA Title II regulations, effective 8/11/16, which included the designation of impairments “easily” qualifying for eligibility: autism, bipolar disorder, diabetes, cancer, TBI, and OCD.]