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An Analysis of Due Process Hearing Decisions for “§ 504-Only” Students

Perry A. Zirkel*

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The Individuals with Disabilities Education Act (IDEA), a federal special education statute, has been an active area of litigation for K–12 public school students, starting with administrative adjudication via an impartial due process hearing.¹ The resulting attention to the IDEA has largely eclipsed corresponding consideration of Section 504 of the Rehabilitation Act (§ 504), which prohibits discrimination based on disability and which has overlapping but broader coverage.² The regulations under § 504 include the right to a due process hearing,³ which in most jurisdictions differs from the procedures for the corresponding IDEA hearing.⁴

As applied to P–12 public school students, § 504 has a broader definition of “disability”

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¹ 20 U.S.C. §§ 1400 *et seq.* For the provisions specific to these due process hearings, see *id.* §§ 1415(f)–1415(i)(1); 34 C.F.R. §§ 300.511–300.515. For the notable level of adjudication under the IDEA at the hearing officer and judicial levels, respectively, see Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed ...*, 73 ADMIN. L. REV. 833, 837–38 (2021) (synthesizing previous research showing an upward trajectory culminating in uneven decline); Perry A. Zirkel & Ben Frisch, *Longitudinal Trends of Judicial Rulings in K–12 Education: The Latest Look*, 407 EDUC. L. REP. 409, 412 (2023) (showing the upward trajectory to recent plateau).

² 29 U.S.C. § 794 (applying to “any program or activity receiving Federal financial assistance”). Although not the focus here, § 504 extends to private schools that receive federal financial assistance and to employees at both these schools and their public counterparts. *Id.* For the § 504 regulations specific to public elementary and secondary school students, including the right to a due process hearing, see 34 C.F.R. §§ 104.31–104.38. Analogizing to the roles in a family, the IDEA is the overshadowing, favorite sibling, and § 504 has a fraternal twin in the Americans with Disabilities Act (ADA), which further extends to specified entities that do not receive federal financial assistance. 42 U.S.C. §§ 12101–12110. For an itemized comparison of these siblings within the public school context, see Perry A. Zirkel, *The Latest Comprehensive Comparison of the IDEA and Section 504/ADA*, 416 EDUC. L. REP. 1 (2023). In general, the requirements specific to public school students are wider but shallower for § 504 than for the IDEA. *Id.*

³ 34 C.F.R. § 104.36.

⁴ See *infra* notes 15–18, 22 and accompanying text.

than does the Individuals with Disabilities Education Act (IDEA).⁵ As a result, § 504-covered students fit into two groups: those that are “double-covered” by both statutes and those that are not covered by the IDEA and, thus, are “§ 504-only.”⁶

Many empirical analyses have tracked the trends for both the frequency and outcomes of due process hearing decisions under the IDEA.⁷ However, the literature entirely lacks any such analysis of due process hearing decisions under § 504.⁸ This gap in the literature is largely attributable to two overlapping factors: these decisions are much less numerous than those under the IDEA, and they are not publicly available.⁹

⁵ Compare 29 U.S.C. § 705(20)(B), and 34 C.F.R. § 104(j) (consisting, in relevant part, of students with a mental or physical impairment that limits one or more major life activities to a substantial extent), with 20 U.S.C. § 1401(3)(A), and 34 C.F.R. § 300.8104(j) (consisting of students who meet the criteria for one or more specified classification and who, as a result thereof, need special education). The narrower coverage of the IDEA is attributable to a restricted number of disability classifications and the resulting need for special education. See, e.g., Zirkel, *supra* note 2, at 4.

⁶ See, e.g., Perry A. Zirkel & Gina L. Gullo, *State Rates of § 504-Only Students in K–12 Schools: The Latest Update*, 417 EDUC. L. REP. 929, 929–30 (2024). Although these two terms are relatively informal, double-covered students are generally understood to be those with individualized education programs (IEPs), and § 504-only students are generally understood to be those with so-called “504 plans.” See, e.g., U.S. DEP’T OF EDUC., CRDC DATA DEFINITIONS: MASTER LIST 23 (2017–18), https://civilrightsdata.ed.gov/assets/downloads/2017-18_Master_List_of_CRDC_Definitions.pdf.

⁷ “Frequency” in this context refers to the number of hearing officer decisions within a specified geographic scope (e.g., nationally) either for a single interval or longitudinal series of intervals. See, e.g., Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO STATE J. DISP. RESOL. 525, 531–32, 533–39 (2014) (reviewing the literature on the frequency and outcome analyses of IDEA due process hearing decisions). For respective examples of more recent frequency and outcomes analyses, see Perry A. Zirkel & Elizabeth Zagata, *CADRE’s National Data on the Frequency of Due Process Hearings: Suggested Adjustments*, 422 EDUC. L. REP. 24 (2024); Perry A. Zirkel & Diane M. Holben, *The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York*, 44 J. NAT’L ASS’N ADMIN. L. JUDICIARY 126 (2023).

⁸ The very few previous sources that cite any § 504-hearing decisions cover a much more limited period and do not provide any empirical analysis of the frequency or outcomes. E.g., Perry A. Zirkel, *The Public Schools’ Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135, 149–51 (2012).

⁹ In turn, the primary reasons for the lack of public availability are twofold and overlapping: first, unlike the IDEA (20 U.S.C. § 1415(h)(4)(A)), § 504 does not require public posting of hearing officer decisions; and second, in most jurisdictions, the local education agency rather than the state education agency has the legal responsibility for conducting such hearings. 34 C.F.R. § 104.36 (requiring the recipient of federal financial assistance that operates a public elementary- or secondary-education program to provide the student’s parents with an impartial hearing).

The purpose of this article is to address this gap in the professional literature through an exploratory analysis of the frequency and outcomes of due process hearings for § 504-only students. Part I of this article provides a brief overview of the regulatory requirement for these hearings and the related legal authority concerning their jurisdiction and procedures. Part II reports the methodology and findings of this exploratory analysis. Part III discusses these findings, including their implications for practice and recommendations for further research.

I. Overview of Applicable Legal Authority

Section 504 is a brief anti-discrimination statute specific to disability, similar to the Title VI of the Civil Rights Act specifications against discrimination based on race and national origin.¹⁰ The U.S. Department of Education's § 504 regulations, which have not changed since their issuance in 1977,¹¹ include provisions explaining that the coverage includes public elementary and secondary schools that receive federal financial assistance.¹² The regulations also specify the procedural safeguards required for such educational programs.¹³ These safeguards include, without further explanation, an "impartial hearing" and a "review procedure."¹⁴

¹⁰ 29 U.S.C. § 794(a)–(b). For the analogous Title VI legislation, see 29 U.S.C. § 2000d *et seq.* For the connection in the § 504 regulations to the corresponding regulations of Title VI, see 34 C.F.R. § 104.61.

¹¹ 42 Fed. Reg. 22,676 (May 4, 1977). More than a year after its first announcement on May 6, 2022, the Department repeated its intent to issue proposed new regulations. U.S. Dep't of Educ., *U.S. Department of Education Announces Intent to Strengthen and Protect Rights for Students with Disabilities by Amending Regulations Implementing Section 504* (Nov. 7, 2023), <https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504>. However, it is currently uncertain whether and when the Department will proceed with this action. See Department of Education, Unified Agenda (Spring 2024), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202404&RIN=1870-AA18> (announcing the latest target date of November 2024 after unexplained previous postponements).

¹² 34 C.F.R. §§ 104.2, 104.36.

¹³ *Id.*

¹⁴ *Id.*

The U.S. Department of Education’s Office for Civil Rights (OCR), responsible for enforcing these regulations, has issued limited policy guidance regarding the procedural boundaries for these hearings, which generally are much more flexible than those for IDEA impartial hearings.¹⁵ For example, OCR has clarified that although the § 504 regulations permit the use of IDEA procedural requirements for impartial hearings, they are just one possible, but not necessary, alternative to meet the more minimal procedural safeguards required by § 504.¹⁶ Similarly, OCR has made clear that the responsibility for providing impartial hearings under § 504 lies with the local education agency,¹⁷ except in cases where the state education agency provides direct services, such as a state school for the deaf.¹⁸

The applicable judicial case law for § 504 hearings is *de minimis*,¹⁹ and that for the related requirement for a review procedure is unclear.²⁰ This limited case law is partly

¹⁵ For a brief synthesis of these boundaries, see Perry A. Zirkel, *Impartial Hearings under Section 504*, 334 EDUC. L. REP. 51 (2016).

¹⁶ See, e.g., 42 Fed. Reg. 22,676, 22,691 (May 4, 1977) (providing interpretative comments to accompany the § 504 regulations); see also Houston (Tex.) Indep. Sch. Dist., 25 IDELR 163 (OCR 1996) (concluding that the school district’s use of relatively informal procedures that did not include cross-examination, and that a court reporter complied with § 504). In general, OCR uses standards of fundamental fairness to determine reasonableness, referring to the requirements of the IDEA and its corollary state laws as an analogous option. See, e.g., Letter to Anonymous, 18 IDELR 230 (OCR 1991).

¹⁷ This much wider latitude than under the IDEA for the school district to select the hearing officer, in combination with the more flexible standards for both the hearing officer and the hearing, are the basis for a not uncommon perception among parents and their representatives that § 504 hearings are biased against them. E.g., E-mail from George Deabold, Parent Advocate, SchoolWatch, to Prof. Perry A. Zirkel (Nov. 28, 2024, 16:49 EDT) (on file with author).

¹⁸ See, e.g., Redding (Conn.) Pub. Sch., 33 IDELR ¶ 37 (OCR 2000); N.H. Dep’t of Educ., 18 IDELR 420 (OCR 1991). The limited other exception is for the relatively few states that provide for concurrent or optional jurisdiction for § 504 hearings. *Infra* notes 23–25 and accompanying text.

¹⁹ I do not know of and, after a relatively extensive search, did not find any court decisions that established the applicable specific contours of an impartial hearing for a § 504-only student.

²⁰ See, e.g., Bd. of Educ. of Howard Cnty. v. Smith, 43 IDELR ¶ 84 (D. Md. 2005) (ruling that the § 504 regulatory requirement for a “review procedure” does not, via analogy or otherwise, provide school districts to appeal a § 504-only hearing decision); J.D. v. Georgetown Indep. Sch. Dist., 57 IDELR ¶ 36 (W.D. Tex. 2011) (ruling that the procedural safeguards regulation does not provide either party with the right to appeal a § 504 hearing-officer

attributable to court decisions that have narrowed the jurisdiction for lawsuits specific to the § 504 regulations.²¹

In most state systems, the jurisdiction for due process hearings under the IDEA is exclusive, thereby leaving the responsibility for conducting § 504 hearings to the local education agency in which the plaintiff student is enrolled.²² The only relatively clear exceptions are Massachusetts, New Jersey, and Pennsylvania, which have state laws that appear to provide largely concurrent jurisdiction for § 504 claims on behalf of both double-covered and § 504-only students.²³ Additionally, Rhode Island provides state education agency impartial hearings for §

decision).

²¹ The split in authority appears to be the particular § 504 regulation at issue and its relationship to the statutory theory of the lawsuit. *Compare* *Thurmon v. Mount Carmel High Sch.*, 191 F. Supp. 3d 894, 899 (E.D. Ill. 2016) (collected cases), *with* *P.P. v. Compton Unified Sch. Dist.*, 135 F. Supp. 3d 1098, 1117–19 (N.D. Cal. 2015). The Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024) provides a general potential limitation on the legal force of the present and any new § 504 regulations. *See, e.g.*, Perry A. Zirkel, *Preliminary Ruminations on the Effects of the Supreme Court’s Loper Decision in the Special Education Context*, 424 EDUC. L. REP. 727 (2024).

²² *See, e.g.*, Perry A. Zirkel, *Impartial Hearings under Section 504: A State-by-State Survey*, 279 EDUC. L. REP. 1 (2012). For an overlapping examination, see Zirkel, *supra* note 8, at 162–70.

²³ 71B MASS. GEN. LAW § 2A(a) (providing the state bureau of special education appeals with jurisdiction over disputes concerning not only the IDEA, but also over those concerning a “student’s rights under Section 504 of the Rehabilitation Act ... and its regulations”); *see also* 603 MASS. CODE REGS. 28.08(3)(a) (“A parent of a student with a disability may also request a hearing on any issue involving the denial of the free appropriate public education guaranteed by Section 504 of the Rehabilitation Act of 1973, as set forth in 34 CFR §§ 104.31–104.39.”); N.J. ADMIN. CODE § 6A:14-2.7(w) (“Requests for a due process hearing with respect to issues concerning Section 504 of the Rehabilitation Act of 1973 ... shall be processed in accordance with [the provisions for IDEA due process hearings except for the requirements for a resolution period, written response to the complaint, and sufficiency procedure]”); PA. ADMIN. CODE § 15.8(d) (providing parents and districts with the right to an impartial hearing for § 504-only cases according to the same procedures that apply to IDEA students). Vermont also appears to provide jurisdiction for such cases, although its representative indicated limited knowledge of any that reached a decision on the merits. E-mail from Sarah Katz, Staff Att’y, Vt. Dep’t of Educ. to Prof. Perry A. Zirkel (Aug. 6, 2024, 6:48 EDT) (on file with author). Oregon arguably also provides jurisdiction for § 504-only cases, OR. ADMIN. R. 581-015-2395, but its representative reported that there are no decisions on file. E-mail from Mike Franklin, Special Educ. Legal Specialist, Or. Dept of Educ., to Prof. Perry A. Zirkel (Apr. 10, 2024, 14:30 EDT) (on file with author). Additionally, an unpublished federal court decision interpreted Tennessee’s special education legislation as providing the state’s IDEA hearing officers with the jurisdiction for § 504-only cases. *P.G. v. Genesis Learning Ctrs.*, 74 IDELR ¶ 223 (M.D. Tenn. 2019). However, the state’s representative reported that, to date, there have not been any such decisions reached on the merits. E-mail from Philip Hilliard, Chief Admin. Judge, Tenn. Admin. Off. of the Courts, to Prof. Perry A. Zirkel (July 2, 2024, 11:33 EDT) (on file with author). In contrast, per a state agency policy letter, Connecticut’s IDEA hearing officers, as a result of a 1991 consent decree, have jurisdiction for § 504 claims on behalf of IDEA-eligible, i.e., double-covered, students and then only if necessary for determination

504-only students through an administrative adjudication mechanism for general education students.²⁴ In a minority of other states, including Florida, the state education agency's IDEA hearing mechanism is available at the option and cost of the local education agency.²⁵ Otherwise, beyond this limited array of states, the general understanding is that IDEA hearing officers lack jurisdiction for claims on behalf of § 504-only students.²⁶ Moreover, although beyond the focus of this article, a recent pair of Supreme Court decisions have addressed the IDEA's exhaustion requirement as applicable § 504 or other alternative claims on behalf of double-covered students.²⁷

II. Method and Findings

Given the aforementioned lack of public availability of § 504-only hearing decisions,²⁸ the data collection procedure was rather ad hoc. The initial source was LRP's SpecialedConnection®, a commercial digital database that includes both administrative and

of the IDEA issues. Circular Letter C-9, (Conn. SEA Nov. 3, 2000), <https://portal.ct.gov/sde/circular-letters/agency-circular-letters>.

²⁴ 16 R.I. GEN. LAWS §§ 16-39-1, 16-39-2 (providing right to a state education agency hearing via the office of the chief state school officer for “any law relating to schools or education” and any local school board action). For this purpose, the commissioner appoints an impartial hearing officer. See R.I. Dep't of Educ., *Frequently Asked Questions: The Hearing Process* (May 17, 2023), [https://ride.ri.gov/sites/g/files/xkgbur806/files/2023-05/HEARINGS%20FAQ%20\(Final%205.17.23%20with%20attachments\).pdf](https://ride.ri.gov/sites/g/files/xkgbur806/files/2023-05/HEARINGS%20FAQ%20(Final%205.17.23%20with%20attachments).pdf)

²⁵ FLA. STAT. § 120.65(6). A few other states provide school districts with the option to use the state's system for IDEA hearings. E.g., GA. COMP. R. & REGS. 160-1-3-.07; 8 VA. ADMIN. CODE 20-81-330(B). However, their dispute resolution coordinators reported that they do not know of any such § 504-only hearing decisions. E-mail from Jessica Wang, Staff Attorney, Ga. Off. of State Admin. Hearings, to Prof. Perry A. Zirkel (Apr. 5, 2024, 17:00 EDT); e-mail from Kathryn Jones, Coordinator of Due Process Servs., Va. Dep't of Educ., to Prof. Perry A. Zirkel, Apr. 8, 2024, 8:44 EDT) (on file with author).

²⁶ See, e.g., Zirkel, *supra* note 8, at 167.

²⁷ *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142 (2023) (requiring exhaustion if the gravamen is FAPE); *Fry v. Napoleon Pub. Schs.*, 580 U.S. 154 (2017) (not requiring exhaustion if the requested relief is money damages). For commentary suggesting the implementation of the exhaustion requirement to the extent that it applies to require completion of IDEA hearings, see Perry A. Zirkel, *Exhaustion of Section 504 and ADA Claims under the IDEA: Resolving the Confusion*, 74 RUTGERS U. L. REV. 123, 141 (2021).

²⁸ *Supra* note 9 and accompanying text.

judicial decisions related to P–12 students with disabilities. However, the search was time-consuming and yielded very limited results because (a) the hearing officer decisions in this database specific to § 504-only students were largely limited to the few states with concurrent jurisdiction, and (b) the search mechanism was cumbersome.²⁹ Direct contact with the applicable representatives from states with concurrent or optional jurisdiction proved to be much more productive.³⁰ As a supplementary matter, the author conducted miscellaneous additional activities to maximize the pool of potential cases.³¹ For purposes of confidentiality, those decisions that were not posted on state education websites or published in are not cited herein,³² although their basic features, such as the issue category, outcome, and year, are included in the analysis.

The criteria for selection were that the decision was (a) specific to 504-only students and (b) addressed the merits of the plaintiff-parents’ claim(s). As a result, the many excluded cases were (a) decisions specific to double-covered students or other IDEA issues, such as child find,³³

²⁹ The primary problems were that (a) the topical index did not have a subtopic specific to § 504-only students and almost all of the contents within the subtopics that seemed pertinent (e.g., “eligibility” or “Section 504 plans”) were Office for Civil Rights (OCR) complaint investigation reports, and (b) the alternative of Boolean searches within the relevant category (“state education agency decisions”) largely yielded false positives due to the mixture with state complaint decisions and hearing officer decisions concerning “double covered” students).

³⁰ *Supra* notes 23–25. The contacted representative was the chief administrative law judge in the state with full-time hearing officers and the dispute resolution coordinator for states with part-time hearing officers.

³¹ Examples included checking the citations in Zirkel, *supra* note 8, at 149–50, e-mailing the state education agency representatives in the states with the highest percentages of § 504-only students, and contacting the various hearing officers and parent or school attorneys he knew had specialized experience in § 504 student claims.

³² For the applicable decisions found via state websites, the author used the decision dates and related identifying information to detect those available on the SpecialConnection® database. For the sake of uniformity in access, the citations herein, which contain “IDELR” or “LRP,” are to that database to the extent available there.

³³ See, e.g., *In re Student with a Disability*, 57 IDELR ¶ 236 (Fla. SEA 2011) (service animal for student with IEP); *Dep’t of Educ. of Haw.*, 123 LRP 31795 (Haw. SEA 2023) (alternatively, IDEA eligibility or 504 plan implementation); *Solanco Sch. Dist.*, 115 LRP 10056 (Pa. SEA 2015) (alternatively, child find under the IDEA or § 504); *Weehawken Twp. Bd. of Educ.*, 124 LRP (N.J. SEA 2024) (alternatively, § 504 eligibility or IDEA child find); *Fairview Sch. Dist.*, 113 LRP 3074 (Pa. SEA 2013); *Kenilworth Bd. of Educ.*, 102 LRP 11734 (N.J. 2000) (alternatively, eligibility under IDEA or § 504); *In re Student with a Disability*, 119 LRP 18512 (Va. SEA 2019)

or (b) summary dispositions based on threshold adjudicative issues, such as lack of subject matter jurisdiction or sufficiency.³⁴

The final sample consisted of 130 decisions from 16 states for the 25-year period from the start of 1999 to the end of 2023. The top five states, which accounted for 80% of the sample, were Pennsylvania (n=39), New Jersey (n=23), Florida (n=16), Massachusetts (n=13), and Rhode Island (n=13).³⁵ The remaining states were Maryland (n=5), Vermont (n=5), New York (n=4), California (n=3), Connecticut (n=2), Texas (n=2), Delaware (n=1), Michigan (n=1), Oregon (n=1), South Dakota (n=1), and Virginia (n=1).

The author coded the following features of each decision: year, issue category, outcome, and, if applicable, remedy. Within three successive overall categories, the specific issue subcategories were as follows (in italics):³⁶

- identification: *child find*, *evaluation*, and *eligibility*³⁷
- free appropriate public education (FAPE): *procedural*, *substantive*, and *failure-to-implement (FTI)*³⁸

(alternatively, IDEA eligibility or § 504 FAPE); Pa. Case No. ODR 21807-18-19 (Jan. 29, 2019) (alternatively FAPE under IDEA or § 504), <https://odr-pa.org/due-process/hearing-officer-decisions/> (last visited Nov. 17, 2024).

³⁴ See, e.g., Cardinal Spellman High Sch., 38 IDELR ¶ 112 (Mass. SEA 2002) (jurisdiction); New Bedford Pub. Schs., 114 LRP 17467 (Mass. SEA 2014); In re Student with a Disability, 124 LRP 1677 (Vt. SEA 2023) (insufficiency).

³⁵ For the jurisdictional arrangements for these five states, see *supra* notes 23–25.

³⁶ This overall and specific categorization is a customized version of an analysis of IDEA decisions and IRs. Zirkel & Skidmore, *supra* note 7, at 570–72.

³⁷ “Child find” refers to the school district’s ongoing obligation to evaluate the child upon reasonable suspicion that the child may meet the applicable eligibility standards. “Evaluation” refers to the requisite assessment for initial eligibility and for the subsequent reevaluation. “Eligibility” refers to qualifying for FAPE in accordance with the applicable standards. For the relevant § 504 regulation, see 34 C.F.R. § 104.35. For the corresponding more well-developed criteria under the IDEA, see Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TCHR. EDUC. & SPECIAL EDUC. 263 (2015).

³⁸ “FAPE” is the central obligation under § 504 and the IDEA. For the § 504 definition of FAPE, see 34 C.F.R. § 104.33(b). For the corresponding IDEA definition, see 34 C.F.R. § 300.17. For the “procedural,” “substantive,” and

- miscellaneous: e.g., *discipline, retaliation/harassment, extra services, and other*³⁹

The outcome scale, which used the issue ruling (IR) rather than the case decision as the primary unit of analysis,⁴⁰ was: (1) in favor of the parent, (2) mixed, and (3) in favor of the district.⁴¹ For those issue rulings in favor of the parent, the coded remedies were purely prospective orders (PPOs), compensatory education, or reimbursement.⁴²

The findings addressed the following three research questions (RQs):

- (1) What was the longitudinal frequency trend of the decisions?⁴³
- (2) What were the frequency and outcome trends per issue category?⁴⁴
- (3) What was the overall outcomes distribution for issue rulings and case decisions?
- (4) What were the prevalent remedies for the issue rulings in favor of the parents?
- (5) What were the primary characteristics of the decisions' legal analyses?

RQ1 (Longitudinal Frequency Trend)

Figure 1 portrays the frequency of the 130 decisions and 163 IRs for the successive 5-

“FTI” dimensions of FAPE, which are more well developed under the IDEA, see Perry A. Zirkel, *An Adjudicative Checklist of Criteria for the Four Dimensions of FAPE under the IDEA*, 346 EDUC. L. REP. 18 (2017).

³⁹ These miscellaneous subcategories cover the various issues beyond identification and FAPE that arise under the broad discrimination prohibition of § 504. 29 U.S.C. § 794; 34 C.F.R. § 104.4.

⁴⁰ “IR” refers to the hearing officer’s ruling for the applicable subcategory of issues within the above-specified framework. *Supra* notes 37–39 and accompanying text.

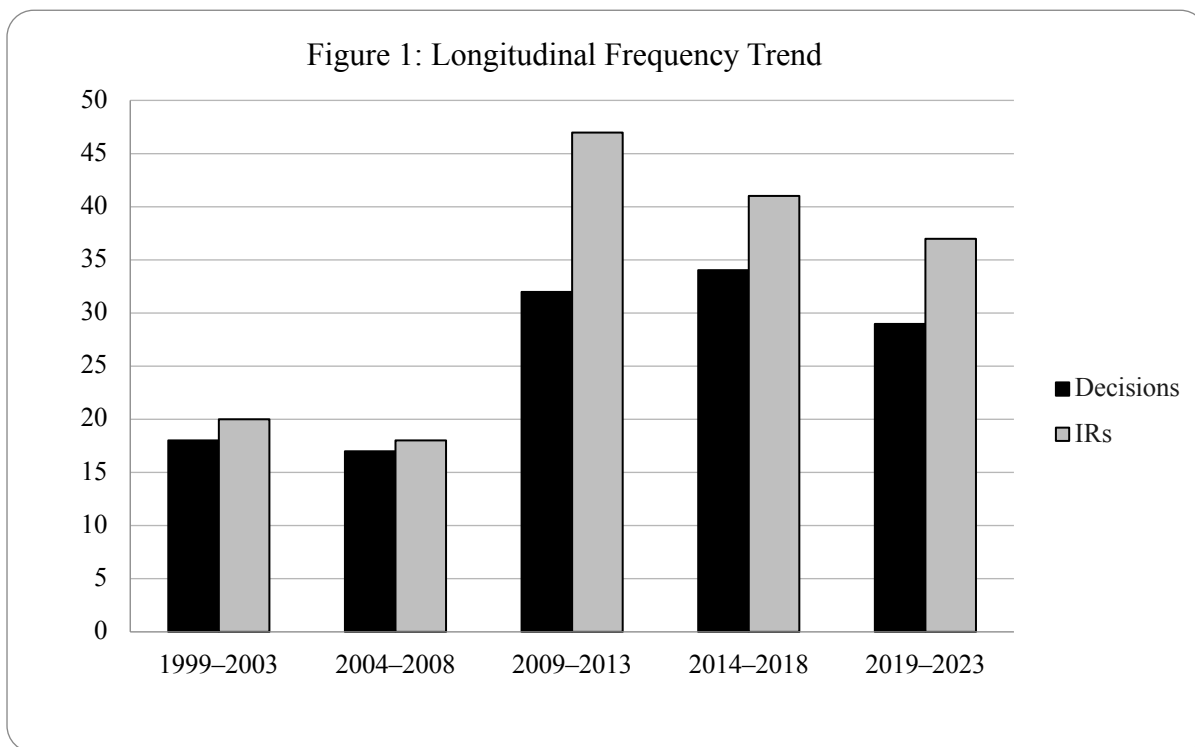
⁴¹ For a recent example of this three-category outcomes scale with the primary unit of analysis being the issue ruling, see Perry A. Zirkel, *An Analysis of Expedited Due Process Hearing Decisions under the IDEA*, 421 EDUC. L. REP. 763, 766 (2024).

⁴² For PPOs, see Perry A. Zirkel, *Adjudication under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies*, 56 CONN. L. REV. 201, 208 (2023) (hereinafter Zirkel 2023); cf. Perry A. Zirkel, *Decisional Remedies for Procedural Violations of the IDEA: Lessons from and for the State Complaint Process*, 419 EDUC. L. REP. 723, 728 (2024). For the other two remedies, see Perry A. Zirkel, *An Adjudicative Checklist of the Two Primary Remedies under the IDEA*, 354 EDUC. L. REP. 637 (2018).

⁴³ Per *supra* note 7, “longitudinal frequency trend” refers here to the number of § 504-only hearing decisions for designated intervals within the period from 1999 through 2023.

⁴⁴ For the designated issue categories (and subcategories), see *supra* notes 37–39 and accompanying text.

year intervals from 1999–2003 to 2019–2023.



Review of Figure 1 does not reveal a consistent or particularly dramatic trend. Overall, the decisions remained almost level for the first two five-year intervals, and moved to a higher uneven plateau for the next three intervals. In turn, the IRs reflected a roughly parallel pattern except for the second and higher plateau being gradually downward, with the ratio of IRs to decisions varying within a higher range after the first two five-year intervals.⁴⁵

RQ2 (Frequency and Outcomes per Issue Category)

The number of IRs for each specific issue subcategory in descending order of frequency were as follows: FAPE substantive (n=40); eligibility (n=30); FAPE FTI (n=24); miscellaneous

⁴⁵ Specifically, the ratio of IRs to decision, which averaged 1.3 for the entire twenty-five-year period, were as follows for each interval: 1999–2003 - 1.1; 2004–2008 - 1.1; 2009–2013 - 1.5; 2014–2018 - 1.2; 2019–2023 - 1.3.

other (n=19); FAPE Procedural (n=12); discipline (n=11); child find (n=9);

retaliation/harassment (including bullying) (n=9); extra services (n=6); and evaluation (n=3).⁴⁶

Because the frequencies were too small for meaningful percentage differentiation within most of the specific issue subcategories, Table 1 presents the outcomes distribution of the IRs for the three aforementioned overall issue categories.⁴⁷

Table 1: Outcome Percentages for Overall Issue Categories

Overall Issue Category	For Parent	Mixed	For District
Identification (n=42)	40%	0%	60%
FAPE (n=76)	36%	5%	59%
Miscellaneous (n=45)	29%	4%	67%

Table 1 shows a general skew in the school districts' favor, which was moderate for identification and FAPE issues and more pronounced for miscellaneous other issues.

RQ3 (Overall Outcomes Distribution)

Table 2 reports the overall outcomes distribution for the 163 IRs and, upon conflation, the 130 decisions.⁴⁸

⁴⁶ The combination of the three FAPE subcategories predominated on an overall basis, accounting for seventy-six (47%) of the 163 IRs. Next, the combination of the three identification subcategories accounted for forty-two (26%) of the IRs, with the miscellaneous IRs accounting for the remainder. However, a limited proportion of the coding entries were marginal due to the overlapping subcategories (e.g., extra services and FAPE-substantive) and the hearing officers' occasionally blurring legal analysis.

⁴⁷ *Supra* text accompanying notes 37–39. The corresponding outcomes distribution for the specific issue subcategories with sufficient numbers for this purpose were as follows:

Specific Issue Subcategory	For Parent	Mixed	For District
Eligibility (n=30)	43%	0%	57%
FAPE Substantive (n=40)	43%	5%	52%
FAPE Failure-to-Implement (n=24)	25%	8%	67%

⁴⁸ Conflation here refers to designating an outcome entry for decisions with more than one IR. If the outcomes of

Table 2: Outcome Percentages for All the IRs and Decisions

	For Parent	Mixed	For District
IRs (n=163)	35% (n=57)	4% (n=6)	62% (n=100)
Decisions (n=130)	35% (n=42)	11% (n=14)	58% (n=73)

Table 2 shows that the overall skew in favor of districts approached a 2:1 ratio for IRs but moderated to a limited extent for decisions due to the increased proportion in the intermediate outcomes category of mixed results upon conflation from IRs to decisions.

RQ4 (Prevalent Remedies)

For the sixty-three IRs completely or partially in favor of parents, thus including the six IRs within the mixed outcomes category, the frequency distribution of remedies was as follows in descending order: PPOs (n=46), compensatory education (n=11), declaratory relief (n=6), and reimbursement (n=5).⁴⁹ The PPOs consisted largely of limited actions or accommodations.⁵⁰

the two or more IRs were the same, that outcome was the entry for the decision. However, if they were different, the outcome entry for the decision was mixed, resulting in an increase in the percentage for the mixed outcomes.

⁴⁹ Five IRs resulted in more than one remedy, which accounts for the total of the frequency distribution being slightly more than the number of parent-favorable IRs.

⁵⁰ *E.g.*, Upper Perkiomen Sch. Dist., 117 LRP 44577 (Pa. SEA 2017) (IEE); Tunkhannock Area Sch. Dist., 115 LRP 36528 (Pa. SEA 2015) (diabetes injection); Sch. Dist. of Phila., 111 LRP 51028 (Pa. SEA 2011) (attendance at graduation with accommodations); Barnstable Pub. Schs., 111 LRP 48728 (Mass. SEA 2011) (re-do the manifestation determination); R.I. Case No. 0014-09 (July 15, 2009), <http://www2.ride.ri.gov/legal/LegalSearch.aspx> (last visited Nov. 17, 2024); Moorestown Twp. Bd. of Educ., 117 LRP 21585 (N.J. SEA 2017); Riverside Twp. Bd. of Educ., 103 LRP 21065 (N.J. SEA 2002); W. Chester Area Sch. Dist., 102 LRP 10354 (Pa. SEA 2001) (meeting for 504 plan); Livingston Bd. of Educ., 40 IDELR ¶ 11 (N.J. SEA 2003) (additional accommodations). Examples at the outer boundary included R.I. Case No. 0023-11 (Oct. 4, 2011), <http://www2.ride.ri.gov/legal/LegalSearch.aspx?dublin> (last visited Nov. 17, 2024) (504 plan with mediator/consultant); Upper Dublin Sch. Dist., 110 LRP 37073 (Pa. SEA 2010) (504 plan with training, nut-free classrooms, and PTO compliance); Fort Cherry Sch. Dist., 110 LRP 40282 (Pa. SEA 2008) (portable air conditioners for student's regular classes); W. Windsor-Plainsboro Reg'l Bd. of Educ., 109 LRP 21363 (N.J. 2008)

The compensatory education awards varied considerably in amount.⁵¹ Except for the unusual early case that provided reimbursement for a residential placement,⁵² the reimbursement awards were for limited items, such as tutoring or an IEE.⁵³ Finally, the purely declaratory relief was mostly for eligibility cases.⁵⁴

RQ5 (Legal Analysis)

For the most part, the legal analysis in these § 504-only hearing decisions was scant. For example, with relatively few exceptions, the legal conclusions in these § 504-only decisions lacked citations, much less analysis, of the applicable case law. Additionally, the use of IDEA case law standards without clear differentiation, including the specific extent of the analogy, was not uncommon.⁵⁵ More specifically, an examination of the legal analysis within the three

(504 plan with 25 accommodations); E. Windsor Twp. Bd. of Educ., 106 LRP 2823 (N.J. SEA 1999) (private placement on an interim basis).

⁵¹ *E.g.*, Dallastown Area Sch. Dist., 122 LRP 3312 (Pa. SEA 2021) (3 days); Twin Valley Sch. Dist., 121 LRP 13846 (Pa. 2020) (IEE-determined award); Laurel Highlands Sch. Dist., 116 LRP 8832 (Pa. SEA 2016) (one hour per attended day in one school year); Mars Area Sch. Dist., 115 LRP 56455 (Pa. SEA 2015) (one hour per day for five months); Sch. Dist. of Phila., 109 LRP 62310 (Pa. SEA 2009) (200 hours); Baltimore City Sch. Sys., 45 IDELR ¶ 233 (Md SEA 2006) (7.5 hours).

⁵² Howard Cnty. Pub. Schs., 41 IDELR ¶ 161 (Md. SEA 2004); *cf.* Pocono Mountain Sch. Dist., 65 IDELR ¶ 120 (Pa. SEA 2015) (two years of tuition reimbursement).

⁵³ *E.g.*, Twin Valley Sch. Dist., 121 LRP 13846 (Pa. SEA 2020) (three private evaluations); Sch. Bd. of Pinellas Cnty., 58 IDELR ¶ 59 (Fla. SEA 2011) (diabetes services); W. Chester Area Sch. Dist., 102 LRP 10354 (Pa. SEA 2001) (IEE).

⁵⁴ *E.g.*, Sch. Dist. of Phila., 111 LRP 51028 (Pa. SEA 2011); R.I. Case No. 0040-10 (Dec. 23, 2010), <http://www2.ride.ri.gov/legal/LegalSearch.aspx> (last visited Nov. 17, 2024); Hopkinton Pub. Schs., 105 LRP 34753 (Mass. SEA 2005).

⁵⁵ For examples, see *infra* notes 70, 78 and accompanying text. Instead, the requirements of § 504 are generally wider but shallower than those of the IDEA. *See, e.g.*, Miller v. Albuquerque Pub. Schs., 565 F.3d 1232, 1246 (10th Cir. 2009); Mark H. v. LeMahieu, 513 F.3d 922, 936–37 (9th Cir. 2008). As one court put it, “[§ 504] is a bludgeon to the IDEA’s stiletto, protecting a broader swath of the population without describing a precise manner of compliance.” Weber v. Cranston Pub. Schs., 245 F. Supp. 2d 401, 406 (D.R.I. 2003). Just as the applicable definitional criteria for eligibility under § 504 are broader than and generally encompass those under the IDEA, meeting the FAPE and other standards under the IDEA often meet the less specific standards of § 504; however, interpreting the IDEA standards as requirements for § 504-only students is fatal error. To whatever extent that the § 504 regulations have applicable legal force in adjudication (*supra* note 21), their mention of the optional use of an IDEA IEP to meet the § 504 FAPE requirement (34 C.F.R. § 104.33(b)) and the similar use of IDEA procedural compliance as “one means” of meeting the obviously less detailed § 504 procedural safeguards requirement (*id.* §

predominant issue subcategories—eligibility, FAPE substantive, and FAPE FTI—as well as a residual “other” subcategory follows.⁵⁶

Eligibility. The § 504 definition of eligibility may be arranged as three successive criteria: (1) physical or mental impairment that limit (2) one or more major life activities (3) substantially.⁵⁷ The major legal development for eligibility was the 2008 amendments of the Americans with Disabilities Act, which also applied to § 504.⁵⁸ These amendments effectively broadened the scope of eligibility in two ways: (a) expanding the identified examples of major life activities and (b) liberalizing the interpretation of the ultimate “substantially” criterion.⁵⁹ The case law before and after these amendments specific to student eligibility have tended to focus on this ultimate criterion.⁶⁰

104.36) clearly do not equate the applicable standards for § 504-only students. *See, e.g., Zirkel, supra* note 2. In contrast, the courts’ limited references to largely coextensive requirements under the IDEA and § 504 are limited to the specific context of double-covered, not § 504-only, students. *See, e.g., Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238, 253 (3d Cir. 1999) (observing that failure to provide FAPE under the IDEA “could violate § 504” based on the “few differences, if any” from § 504 for to a student with an IEP).

⁵⁶ For the residual “other” category, see *supra* note 39 and accompanying text.

⁵⁷ 29 U.S.C. § 705(20)(B); 34 C.F.R. § 300.8. *See, e.g., Perry A. Zirkel, Identification of 504-Only Students: An Alternate Eligibility Form*, 357 EDUC. L. REP. 39 (2018); Perry A. Zirkel, *A Step-by-Step Process for § 504/ADA Eligibility Determinations*, 239 EDUC. L. REP. 333 (2009).

⁵⁸ Pub. L. 110-325, 122 STAT. 3553, § 7 (Conforming Amendments).

⁵⁹ *See, e.g., Perry A. Zirkel, The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEADERSHIP 3 (2009). The 2016 Department of Justice regulations added a few more identified examples of major life activities and reinforced the case law interpretation that the frame of reference for “substantially” is the general population. 81 Fed. Reg. 53,204, 53,223–24 (Aug. 12, 2016).

⁶⁰ *E.g., S.T. v. L.A. Unified Sch. Dist.*, 545 F. Supp. 3d 840 (C.D. Cal. 2021); *Pritchard v. High Sch. Athletic Ass’n*, 2020 WL 3542652 (M.D. Fla. June 30, 2020); *Lincoln-Sudbury Reg’l Sch. Dist. v. Mr. and Mrs. W.*, 2018 WL 563147 (D. Mass. Jan. 25, 2018); *H.P. v. Naperville Cmty. Unit Sch. Dist. #203*, 2017 WL 5585627 (N.D. Ill. 2017); *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp. 3d 1281 (M.D. Ala. 2014); *Rademaker v. Blair*, 2010 WL 5376263 (C.D. Ill. Dec. 22, 2010). For pre-2008 examples, see *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916 (8th Cir. 2001); *Bercovitch v. Baldwin Sch., Inc.*, 133 F.3d 141 (1st Cir. 1998); *Marshall v. Sisters of Holy Family of Nazareth*, 44 IDELR ¶ 190 (E.D. Pa. 2005); *D.P. v. Sch. Dist. of Poynette*, 41 IDELR ¶ 6 (W.D. Wis. 2004); *T.J.W. v. Dothan City Bd. of Educ.*, 26 IDELR 999 (M.D. Ala. 1997). The courts have continued the same trend for students at the postsecondary level. *E.g., Ramsay v. Nat’l Bd. of Med. Exam’rs*, 968 F.3d 251 (3d Cir. 2020); *Doherty v. Nat’l Bd. of Med. Exam’rs*, 791 F. App’x 462 (5th Cir. 2019); *Wong v. Regents of Univ. of Cal.*, 410 F.3d 1052 (9th Cir. 2005); *Betts v. Rector*, 191 F.3d 447 (4th Cir. 1999); *Munday v. Lees McRae Coll.*, 2022 WL 17252598 (W.D.N.C. Nov. 28, 2022); *Colas v. City Univ. of N.Y.*, 2019 WL 2028701 (E.D.N.Y. May 7, 2019);

In contrast, the majority of the § 504-only hearing decisions with an IR specific to eligibility did not address this key criterion, including the applicable statutory standards and case law.⁶¹ This discrepancy was particularly pronounced in the decisions since the ADA amendments.⁶²

FAPE-Substantive. Unlike the IDEA,⁶³ the Supreme Court has not addressed the substantive standard for FAPE under § 504. However, in a long line of case law in the wake of the 1979 Supreme Court decision in *Southeastern Community College v. Davis*,⁶⁴ the lower courts established “reasonable accommodation” as the substantive standard for FAPE specific to public school students.⁶⁵ More recently, based on the Court’s 1985 decision in *Alexander v. Choate*,⁶⁶ some of the lower courts added a “meaningful access” or similar gloss to this

Turner v. Vincennes Univ., 2019 WL 8266875 (S.D. Ind. Mar. 29, 2019); Grabin v. Marymount Manhattan Coll., 2015 WL 4040823 (S.D.N.Y. July 15, 2015).

⁶¹ *E.g.*, Parkland Sch. Dist., 115 LRP 49930 (Pa. SEA 2015); Pocono Mountain Sch. Dist., 65 IDELR ¶ 120 (Pa. SEA 2015); Princeton Reg’l Bd. of Educ., 114 LRP 17121 (N.J. SEA 2013); Neshaminy Sch. Dist., 113 LRP 48258 (Pa. SEA 2013); Fox Chapel Area Sch. Dist., 113 LRP 39222 (Pa. SEA 2013); Sch. Dist. of Phila., 111 LRP 51028 (Pa. SEA 2011); R.I. Case No. 0040-10 (Dec. 23, 2010), <http://www2.ride.ri.gov/legal/LegalSearch.aspx>; Baltimore City Pub. Sch. Sys., 45 IDELR ¶ 233 (Md. SEA 2006); Windham Cent. Supervisory Union, 104 LRP 56177 (Vt. SEA 2004); Chester Area Sch. Dist., 102 LRP 10354 (Pa. SEA 2001); *cf.* Chester Upland Sch. Dist., 112 LRP 2667 (Pa. SEA 2011); W. Windsor-Plainsboro Reg’l Bd. of Educ., 109 LRP 21363 (N.J. SEA 2008) (analyzing “substantially” without any legal citations). *But see* Cranston Sch. Dep’t, 117 LRP 43011 (R.I. SEA 2017); *cf.* Duval Cnty Sch. Bd., 109 LRP 17215 (Fla. SEA 2006); Needham Pub. Schs., 106 LRP 32299 (Mass. SEA 2006); Hopkinton Pub. Schs., 105 LRP 34753 (Mass. SEA 2005); Westport Bd. of Educ., 40 IDELR ¶ 85 (Conn. SEA 2003); Montgomery Cnty. Pub. Schs., 40 IDELR ¶ 24 (Md. SEA 2003) (prior to ADAAA).

⁶² *Id.*

⁶³ In its recent refinement of the substantive standard for FAPE under the IDEA, the Court held that the IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399 (2017).

⁶⁴ 442 U.S. 397 (1979). Although this decision was in the postsecondary education context and the § 504 regulations expressly adopt it in the employment context, the courts have extended it to the K–12 student context.

⁶⁵ *See, e.g.*, David Dagley & Charles Evans, *The Reasonable Accommodation Standard for Section 504-Eligible Students*, 97 EDUC. L. REP. 1 (1995); Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?*, 106 EDUC. L. REP. 471, 471 n.4 (1993) (collected cases). *But cf.* *Lyons v. Smith*, 829 F. Supp. 414, 85 F. Supp. 803 (D.D.C. 1993) (relying on the commensurate opportunity standard in the § 504 regulations).

⁶⁶ 469 U.S. 287 (1985).

standard.⁶⁷ Finally, when the requested remedy is money damages and, in some circuits just injunctive relief, the courts have required “deliberate indifference” or another proxy for intentional discrimination.⁶⁸

In contrast, most of the § 504-only hearing decisions with an IR for FAPE-substantive notably lacked recognition of the courts’ relatively settled substantive standard for 504 plans, citing at most the standard in the § 504 FAPE regulation.⁶⁹ Moreover, some § 504-only hearing decisions confusingly imported the IDEA substantive standard without differentiation.⁷⁰ Finally, very few decisions addressed whether an intent proxy was additionally applicable in their jurisdiction.⁷¹

⁶⁷ *E.g.*, *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 282 (3d Cir. 2012) (meaningful participation); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097–99 (9th Cir. 2010) (meaningful access). Similarly citing *Alexander v. Choate*, the Sixth Circuit “reasonable” does not necessitate the “preferred” accommodation. *E.g.*, *Knox Cnty. v. M.Q.*, 62 F.4th 478, 1001 (6th Cir. 2023). For a more extensive canvassing of the recent case law, see Perry A. Zirkel, *How Good Must a 504 Plan Be to Pass Legal Muster?*, 36 J. SPECIAL EDUC. LEADERSHIP 43 (2023).

⁶⁸ *E.g.*, *Mark H. v. Hamamoto*, 620 F.3d at 1099. For a comprehensive canvassing of the case law, including claims for solely injunctive relief, see Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students’ Section 504 and ADA Claims against School Districts?*, 47 J.L. & EDUC. 109 (2018).

⁶⁹ *E.g.*, *Reading Sch. Dist.*, 109 LRP 21055 (Pa. SEA 2007); *Manalapan-Englishtown Reg’l Bd. of Educ.*, 107 LRP 27925 (N.J. SEA 2007); *In re Student with a Disability*, 40 IDELR ¶ 139 (Vt. SEA 2003); *Riverside Twp. Bd. of Educ.*, 103 LRP 21065 (N.J. SEA 2002); *In re Student with a Disability*, 103 LRP 9458 (Vt. SEA 2002); *cf.* *Dennis-Yarmouth Reg’l Sch. Dist.*, 69 IDELR ¶ 141 (Mass. SEA 2016); *Lakeland Sch. Dist.*, 115 LRP 39148 (Pa. SEA 2015); *Tunkhannock Area Sch. Dist.*, 115 LRP 36528 (Pa. SEA 2015); *Neshaminy Sch. Dist.*, 113 LRP 48258 (Pa. SEA 2013); *R.I. Case No. 0023-11* (Oct. 4, 2011), <http://www2.ride.ri.gov/legal/LegalSearch.aspx>; *Upper Dublin Sch. Dist.*, 110 LRP 37073 (Pa. SEA 2010); *Bedford Pub. Schs.*, 109 LRP 59132 (Mass. SEA 2009); *Fort Cherry Sch. Dist.*, 110 LRP 40282 (Pa. SEA 2009); *Hampden-Wilbraham Reg’l Sch. Dist.*, 108 LRP 29931 (Mass. SEA 2008); *Gettysburg Area Sch. Dist.*, 103 LRP 9599 (Pa. SEA 2003); *E. Windsor Twp. Bd. of Educ.*, 106 LRP 2823 (N.J. SEA 1999) (regulatory standard only). *But see* *Dracut Pub. Schs.*, 123 LRP 30469 (Mass. SEA 2023); *Upper Perkiomen Sch. Dist.*, 117 LRP 44577 (Pa. SEA 2017); *Mystic Valley Reg’l Charter Sch.*, 40 IDELR ¶ 275 (Mass. SEA 2004); *Phila. Sch. Dist.*, 103 LRP 20331 (Pa. SEA 2003); *Cascade Sch. Dist.*, 37 IDELR ¶ 300 (Or. SEA 2002).

⁷⁰ *E.g.*, *Dover Area Sch. Dist.*, 116 LRP 29498 (Pa. SEA 2016); *Shenango Area Sch. Dist.*, 115 LRP 40887 (Pa. SEA 2014); *Pa. Case No. ODR 1855-1011KE* (Oct. 28, 2011), <https://odr-pa.org/due-process/hearing-officer-decisions/>; *Livingston Twp. Bd. of Educ.*, 40 IDELR ¶ 111 (N.J. SEA 2003); *In re Student with a Disability*, 103 LRP 9458 (Vt. SEA 2002).

⁷¹ *E.g.*, *compare* *Anne Arundel Cnty. Pub. Schs.*, 102 LRP 10953 (Md. SEA 2002) (citing the applicable Fourth Circuit bad faith/gross misjudgment standard), *with* *Pa. Case No. ODR 2803-1112AS* (Aug. 14, 2012), <https://odr-pa.org/due-process/hearing-officer-decisions/> (misciting Third Circuit decisions for requiring deliberate indifference

FAPE-FTI. Unlike the IDEA, for which the cumulative case law amounts to a relatively well-established material discrepancy approach,⁷² only one court has clearly addressed the standard for FAPE-FTI claims under § 504,⁷³ with the rest of case law to date resolving this issue on other grounds.⁷⁴

However, instead of distinguishing FAPE-FTI from FAPE-substantive and citing the differences in the foregoing case law, most of the various IRs specific to FAPE-FTI either failed

in the absence of money damages).

⁷² The two successive and overlapping variations of this approach are the Fifth Circuit’s more qualitative version and the Ninth Circuit’s more quantitative version. *Hous. Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (ruling that materiality meant failure to implement “substantial or significant provisions of the IEP”); *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811, 826 (9th Cir. 2007) (ruling that materiality means a failure that is “more than a minor discrepancy”). For a discussion of these approaches, including the role of actual progress, see Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IDEA Implementation*, 36 J. NAT’L ASS’N ADMIN. L. JUDICIARY 409 (2016).

⁷³ *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 529–31 (7th Cir. 2014) (concluding that § 504 has a less exacting standard for FTI claims than applies under the IDEA, requiring instead a discrepancy that is “significant enough to *effectively* deny a disabled child the benefit of a public education”).

⁷⁴ *E.g.*, *R.D. v. Lake Washington Sch. Dist.*, 843 F. App’x 80, 83–84 (9th Cir. 2021); *K.U. v. Alvin Indep. Sch. Dist.*, 166 F.3d 341, at *4 (5th Cir. 1998); *McDavid v. Hous. Indep. Sch. Dist.*, 79 IDELR ¶ 214 (S.D. Tex. 2021) (resolving FTI claim based on overriding bad faith/gross misjudgment standard); *Baker v. Bentonville Sch. Dist.*, 75 F.4th 810, 816–17 (8th Cir. 2023); *K.D. v. Starr*, 55 F. Supp. 3d 782, 790–92 (D. Md. 2014) (mixing FAPE-FTI with FAPE-substantive and relying on overriding bad faith/gross misjudgment standard); *Beam v. W. Wayne Sch. Dist.*, 165 F. Supp. 3d 200, 210–12 (M.D. Pa. 2016) (mixing FAPE-FTI with FAPE-substantive and relying on causal nexus and deliberate indifference requirements); *cf.* *A.C. v. Owen J. Roberts Sch. Dist.*, 554 F. Supp. 3d 620, 626–28 (E.D. Pa. 2021) (procedural violation for removal of 504 plan, with possible substantial implementation standard but dispositive factor was the lack of a resulting loss of progress); *Bryant v. Dayton Indep. Sch. Dist.*, 79 IDELR ¶ 99 (S.D. Tex. 2021) (part of larger harassment/hostile environment claim and resolved based on insufficient factual foundation, including deliberate indifference standard); *B.D. v. Fairfax Cnty. Sch. Bd.*, 73 IDELR ¶ 261 (E.D. Va. 2019) (distinguishable as being in the double-covered context and having bad faith/gross misjudgment as the decisional factor).

to identify and support their applicable approach⁷⁵ or misconstrued the applicable standard.⁷⁶

Other. The same pattern appeared for the various IRs in the “other” specific issue subcategory and the broad overall miscellaneous issues category. The legal analysis in most cases was cursory, either without any supporting citations⁷⁷ or with citations of questionable legal authority, such as undifferentiated importation of IDEA case law,⁷⁸ misapplication of § 504

⁷⁵ *E.g.*, Pompton Lakes Bd. of Educ., 122 LRP 28875 (N.J. SEA 2022) (approximate harmless-error approach without cited support); Laurel Highlands Sch. Dist., 116 LRP 8832 (Pa. SEA 2016) (concluding that the failure was “frequent and significant” and “constituted a substantive denial of FAPE” without supporting legal citation); R.I. Case No. 0040-10 (Dec. 23, 2010), <http://www2.ride.ri.gov/legal/LegalSearch.aspx> (concluding that the district did not “consistently” follow part of the 504 plan without specific legal standard); W. Essex Reg’l Bd. of Educ., 109 LRP 69606 (N.J. SEA 2006) (rejecting FTI claim based on “assuming arguendo” discrepancy but lack of resulting loss that would warrant compensatory relief); Bethlehem Area Sch. Dist., 109 LRP 66018 (Pa. SEA 2006) (concluding that the district “appropriately” implemented the 504 plan with no legal citation and finding that the only discrepancy was de minimis); Leominster Pub. Schs., 106 LRP 32319 (Mass. SEA 2005) (concluding that the district “followed” the provisions of the IEP without any legal citations, specific percentage, or other standard for said following); Broward Cnty. Sch. Bd., 109 LRP 35144 (Fla. SEA 2005) (summarily ruling that the district “reasonably implemented” the 504 plan without specifying the extent of any discrepancy); Livingston Twp. Bd. of Educ., 106 LRP 2040 (N.J. SEA 2004) (finding the relevant evidence to be insufficient for a ruling in favor of the parents for their requested grade change, although ordering one of the disputed accommodations “to clarify matters a bit and remove any doubts”); *cf.* R.I. Case No. 20-017 (Oct. 26, 2020), <http://www2.ride.ri.gov/legal/LegalSearch.aspx> (failing to make substitute teacher aware of 504 plan, citing OCR complaint decision); Baltimore City Pub. Sch. Sys., 45 IDELR ¶ 233 (Md. SEA 2006) (district did not dispute the alleged FTI violation and offered corresponding compensatory education despite evidence of no resulting loss of educational benefit). *But see* Duval Cnty. Sch. Bd., 122 LRP 43205 (Fla. SEA 2022) (CTL approach, per *supra* note 73); Dallastown Area Sch. Dist., 122 LRP 3312 (Pa. SEA 2021) (materiality approach via express analogy to cited IDEA case law); *cf.* Boward Cnty Sch. Bd., 109 LRP 35144 (Fla. SEA 2005) (“reasonably implemented” without any legal citation).

⁷⁶ *E.g.*, Pittsburgh Pub. Schs., 112 LRP 41951 (Pa. SEA 2012) (mischaracterizing Third Circuit decisions as requiring deliberate indifference for FTI claim for injunctive relief); Chartiers Valley Sch. Dist., 111 LRP 56974 (Pa. SEA 2011); Edison Twp. Bd. of Educ., 106 LRP 2074 (N.J. SEA 2003) (mischaracterizing the FAPE-FTI claim as FAPE-substantive and applying the IDEA substantive standard without any differentiation); Upper Dublin Sch. Dist., 110 LRP 37073 (Pa. SEA 2010) (fusing IDEA substantive FAPE standard and § 504 regulatory standard for substantive FAPE to resolve FAPE-FTI claim).

⁷⁷ *E.g.*, *In re Student with a Disability*, 122 LRP 47690 (Vt. SEA 2022) (IEE); Alloway Twp. Bd. of Educ., 120 LRP 28385 (N.J. SEA 2020) (extra services); Blackstone Valley Reg’l Vocational Tech. Sch., 122 LRP 3419 (Mass. SEA 2022); W. Haven Bd. of Educ., 114 LRP 36191 (Ct. SEA 2014); Sch. Dist. of Phila., 109 LRP 62310 (Pa. SEA 2009) (discipline).

⁷⁸ *E.g.*, Propel Charter Schs., 116 LRP 50268 (Pa. SEA 2016) (child find and remedies); Parkland Sch. Dist., 115 LRP 49930 (Pa. SEA 2015) (evaluation); Suwanee Cnty. Sch. Bd., 121 LRP 28620 (Fla. SEA 2020); Barnstable Pub. Schs., 111 LRP 48728 (Mass. SEA 2011); Montgomery Cnty. Pub. Schs., 104 LRP 36726 (Md. SEA 2003) (discipline–manifestation determination); R.I. Case No. 023-16 (Nov. 3, 2016), <http://www2.ride.ri.gov/legal/LegalSearch.aspx>; Bayonne Bd. of Educ., 37 IDELR ¶ 118 (N.J. SEA 2002) (stay-put).

case law,⁷⁹ or sole reliance on OCR guidance and complaint decisions.⁸⁰

III. Discussion

In interpreting the findings of this exploratory study, the primary limitation is the inevitably uncertain representativeness of the sample of 130 decisions. For example, the predominance of five states may not be representative of the unknown total population of § 504-only hearing decisions.⁸¹ Other limitations included the author's exclusive role in the selection, categorization, and coding of the decisions.

Taking these limitations into consideration, the following subsections provide initial interpretations of the findings for each of the successive research questions, followed by some general recommendations for researchers and practitioners.

RQ 1 (Longitudinal Frequency Trends)

The finding of an initial plateau followed by a higher, uneven plateau appears to roughly parallel the longitudinal frequency pattern of impartial hearing decisions under the IDEA.⁸² Moreover, the dramatically lower yearly totals for the § 504-only decisions, as compared to the

⁷⁹ *E.g.*, Norwin Sch. Dist., 123 LRP 37559 (Pa. SEA 2023) (deliberate indifference beyond money damages); Harrisburg Sch. Dist., 124 LRP 10500 (S.D. SEA 2023) (employee regulations).

⁸⁰ *E.g.*, Bedford Pub. Schs., 109 LRP 59132 (Mass. SEA 2009) (FAPE and other issues).

⁸¹ *Supra* text note 35. For corresponding litigiousness, New Jersey and Pennsylvania were in the top five states for impartial hearings under the IDEA, while Florida and Massachusetts were in the next five. Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update*, 376 EDUC. L. REP. 870, 878 (2020) (hereinafter Zirkel & Gullo 2020). For corresponding § 504-only student rates, Florida, Massachusetts, and Rhode Island were in the second highest five-state subgroups for the percentage of § 504-only students. Perry A. Zirkel & Gina L. Gullo, *State Rates of § 504-Only Students in K–12 Public Schools: The Latest Update*, 417 EDUC. L. REP. 929, 934 (2024).

⁸² The time intervals and the databases for the successive studies were not uniform, thus constituting an imprecise piecemeal pattern. *See, e.g.*, Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 21, 28 (2008) (finding gradual increase culminating in uneven plateau from 1991 to 2005); Zirkel & Gullo 2020, *supra* note 81, at 872 (finding uneven plateau from 2006–2007 to 2017–2018); Zirkel & Zagata, *supra* note 7, at 30 (finding gradual decline, without the outlier of New York, between 2012–2013 and 2021–2022).

IDEA decisions,⁸³ is not surprising in light of the general lower awareness of and priority on administrative adjudicative activity under § 504.⁸⁴

RQ2 (Frequency and Outcomes per Issue Category)

The relatively high frequencies for the FAPE-substantive, eligibility, and FAPE-FTI subcategories is also not surprising considering the practical importance of qualifying for and receiving 504-plan services for students who are not eligible under the IDEA.⁸⁵ More notable is the wide scattering of IRs in the overall miscellaneous category that did not lend themselves to categorization beyond the limited clusters for retaliation/harassment, discipline, extra services, and evaluation.⁸⁶

The outcomes for the overall identification and FAPE categories and for the eligibility and FAPE-substantive subcategories were comparable to the corresponding results of IDEA decisions in that they reflected a moderate skew in favor of school districts.⁸⁷ However, the

⁸³ As an example, the total population of IDEA hearing decisions during the 2014–2018 interval was approximately 9,700. Zirkel & Zagata, *supra* note 7, at 32. In comparison, the number of § 504 decisions found in the present analysis for the same period was 34. *Supra* Figure 1.

⁸⁴ Parents tend to focus instead on the complaint process of the U.S. Department of Education’s Office for Civil Rights (OCR). *See, e.g.,* Margaret McMenamin & Perry A. Zirkel, *OCR Rulings under Section 504 and the Americans with Disabilities Act*, 16 J. POSTSECONDARY EDUC. 5 (2003). Yet, OCR’s longstanding policy is to address procedural issues only for extraordinary circumstances, thus leaving issues like eligibility, FAPE-substantive, and FAPE-FTI to the impartial hearing process. *See, e.g., Does OCR Examine Individual Placement of Other Education Decisions for Students with Disabilities?*, U.S. DEPT. OF EDUC. (Aug. 12, 2024), <http://www2.ed.gov/about/offices/list/ocr/504faq.html>. Other contributing factors for the relatively low number of § 504-only hearing decisions include: (1) the exhaustion requirement does not apply to § 504-only, *e.g.,* *Power v. Sch. Bd. of Va. Beach*, 276 F. Supp. 2d 515, 521 (E.D. Va. 2003); (2) the stakes, as reflected in the findings here for the prevailing hearing officer remedies, are often not as high as in IDEA cases; and (3) in most states, the § 504-only hearing is the responsibility of the school district, not the state education agency, with the much wider latitude than under the IDEA for the district to select the hearing officer having a potential chilling effect on parental filings (*supra* note 17).

⁸⁵ The corresponding frequency distribution for IDEA impartial hearing decisions tends to have a similarly high proportion of FAPE-substantive IRs but lower frequencies and more diverse specific subcategories. *See, e.g.,* Zirkel & Skidmore, *supra* note 7, at 552 (based on LRP-published IDEA impartial hearing decisions from 1978 to 2012).

⁸⁶ *Supra* note 39 and accompanying text. Moreover, these tentative subcategories were imprecise, especially “extra services.” *Supra* note 46.

⁸⁷ For an analysis of the outcomes of the overall identification and FAPE categories and for the eligibility and

outcomes distribution for the overall miscellaneous category and the specific FAPE-FTI subcategory was much more pronounced in the direction of the school districts. While the reasons for this differential are unclear, the result is an overall notable skew in the districts' favor.

RQ3 (Overall Outcomes Distribution)

The overall distribution for IRs was almost 2:1 in favor of district, though this result was moderated somewhat upon conflation into the secondary unit analysis of decisions.⁸⁸ Conflation from IRs to decisions resulted in expansion of the mixed category from 4% to 11%.⁸⁹ Due to the varying number and nature of IRs per decision in this broad intermediate category, including the scope and significance of each one and the resulting remedy in the perception of the parties, it is difficult to more precisely track the specific outcome valence of the mixed decisions.⁹⁰ In any event, the overall outcomes distribution of § 504-only hearing decisions moderately skewed in favor of the district, results which were not dramatically dissimilar to those of IDEA-hearing decisions.⁹¹ Although the mixed category had a higher proportion of the representation, the ratio

FAPE-substantive subcategories, see *supra* Table 1 and note 47. For comparable IDEA decisions and an overlap of time period, outcomes scale, and database, see, e.g., Zirkel & Skidmore, *supra* note 7, at 552.

⁸⁸ *Supra* Table 2.

⁸⁹ The average ratio of IRs to decisions was 1.3. *Supra* note 45. The corresponding ratio of IRs to decisions for IDEA cases was approximately twice as high. See, e.g., Zirkel & Skidmore, *supra* note 7, at 550 n.150 (again, overlapping time period, outcomes scale, and database).

⁹⁰ The use of a five-category outcomes scale has been partially successful in differentiating mixed IRs. See, e.g., Zirkel & Skidmore, *supra* note 7, at 552. However, it is of more limited utility for mixed decisions. *Id.* at 547–49, 555. Overall, the three-category scale appears to be generally preferable for the outcomes distribution of decisions rather than either a simplistic conception of two outcome categories or an inevitably imprecise conception of five or more outcome categories. See, e.g., Zirkel & Holben, *supra* note 7, at 130–33.

⁹¹ The latest available national data representing the outcomes distribution for IDEA impartial hearing decisions for the six-year period of 2013–2018 (without an outlier jurisdiction) was as follows: 26% for parents, 26% mixed, and 48% for districts. Zirkel & Holben, *supra* note 7, at 136. New York City was the sole outlier jurisdiction in the IDEA analysis due to its overwhelming proportion of decisions. However, New York City was not an exclusion in the sample for this analysis because it accounted for only 2% of the decisions.

between the two polar categories did not directly support the perception that the district's heavier role in the hearing-officer process for § 504-only cases had an effect on the outcome.⁹²

However, the lack of such an effect may be attributable to the sourcing for the decisions in this analysis. More specifically, for the five jurisdictions that accounted for approximately four-fifths of the § 504-only hearing decisions, the state agency, rather than the local district, was responsible for the hearing.⁹³

RQ4 (Prevalent Remedies)

For remedies upon parent-favorable IRs in the § 504-only hearing decisions, the findings that PPOs were prevalent and reimbursement was limited in both frequency and amount⁹⁴ are generally different from and lighter than the corresponding relief pattern under the IDEA.⁹⁵ One of the reasons may be the generally more limited extent and general education context of § 504 plans as compared to IDEA IEPs.⁹⁶ Yet, the difference from the IDEA is less pronounced for the frequency and nature of compensatory education, perhaps attributable to its rather ready importation from the IDEA due to the solely case law basis and highly malleable nature of this remedy.⁹⁷ The potentially advantageous availability of money damages under § 504 as

⁹² *Supra* note 17. However, to whatever extent that this perception reduced the number of cases (*supra* note 84), it may have had a skewing effect by sifting out the cases that had lower odds of parent-favorable outcomes, thus indirectly aligning with this hypothesis.

⁹³ *Supra* note 35 and accompanying text. In one of the five states, Florida, the use of the state system is optional for the district, but all the Florida decisions in this analysis were from the records of that central panel system. *Supra* notes 25 and 23.

⁹⁴ *Supra* text accompanying notes 49–50.

⁹⁵ See, e.g., Zirkel 2023, *supra* note 42, at 281–19 (explaining that IDEA hearing officers are often parsimonious for PPOs); Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (finding that tuition reimbursement is one of the two most frequent remedies in both hearing-officer and court decisions under the IDEA).

⁹⁶ See, e.g., Perry A. Zirkel, *Comparison of IDEA IEPs and Sec. 504 Accommodation Plans*, 191 EDUC. L. REP. 623 (2004).

⁹⁷ See, e.g., Terry Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of*

compared to under the IDEA may well contribute to bypassing the hearing step and proceeding directly to court to pursue this remedy, thus contributing to the relative low frequency of § 504-only hearing decisions.⁹⁸

RQ 5 (Legal Analysis)

Perhaps the most remarkable finding is the scant legal analysis in most of these § 504-only hearing decisions without notable change across the entire twenty-five-year time period, the various jurisdictions, and the major issue categories.⁹⁹ Overall, in comparison to IDEA hearing decisions, the § 504-only decisions were well-within the norm for factual findings but not for legal conclusions.¹⁰⁰ The decisions notably lacked citations to and application of the legal standards that emerged in the case law in the late 1990s or early 2000s and has been increasingly well-established in the years since.¹⁰¹ Conversely, the decisions that did cite case law tended to rely on (a) IDEA court decisions without carefully considering the extent to which the analogy is justified, or (b) § 504 court decisions without carefully considering their specific scope and applicability.¹⁰²

The general lack of attention to § 504 in the K–12 student context as compared to the overshadowing primacy of the IDEA may be a significant contribution factor for the adjudicative disparity between the factual findings and the legal conclusions in these decisions. This

Remedies?, 405 URBAN L. 281 (2013).

⁹⁸ *Supra* notes 27 and 68. The exhaustion doctrine is a separate matter. *Id.* The doctrine, along with its exceptions, applies to double-covered students. *Id.*

⁹⁹ *Supra* notes 55–79 and accompanying text.

¹⁰⁰ The basis for this comparative conclusion is my own experience in reading and analyzing thousands of IDEA hearing officer decisions for various empirical analyses, including those cited herein.

¹⁰¹ *Supra* notes 57–62, 64–71, 73–80, and accompanying text. More specifically, see the marked contrast between the applicable judicial standards and the typical § 504-only hearing decisions in each category. *Id.*

¹⁰² *Supra* note 55 and accompanying text.

difference in attention applies to not only the parties and their attorneys, but also the impartial hearing systems. Even in the handful of state IDEA hearing systems that provide concurrent jurisdiction for § 504, these issues are usually secondary claims on behalf of double-covered students; the proportion of the case load specific to § 504-only students is very low.

In any event, the § 504-only hearing decisions generally reflected a reasonable person seat-of-the pants perspective without the legal standards and refinements from prevailing IDEA adjudication. The rather cursory legal analysis fits with relatively skeletal nature of the § 504 regulations and the noticeably lower level of IRs per decision, number of hearing sessions, and other measures of adjudicative ponderousness that is characteristic of the IDEA.¹⁰³ Nevertheless, hearing officers can and should receive and apply improved knowledge of the emerging judicial standards specific to § 504 students.

Recommendations

Due to its federal funding, student coverage, and detailed requirements, the IDEA will understandably retain its preeminent legal status in the K-12 student context. However, increased attention to the § 504-only hearing process is warranted based on the more rapidly identification rate of § 504-only students¹⁰⁴ and the lack of extra state or federal funding for

¹⁰³ See, e.g., *Honig v. Doe*, 484 U.S. 305, 322 (1988) (citing *Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359, 370 (1985)) (characterizing the overall adjudicative process under the IDEA as “ponderous”); 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).

¹⁰⁴ Compare Zirkel & Gullo, *supra* note 6, at 931 (reporting that the proportion of § 504-only students more than doubled from 1.5% in 2011–2012 to 3.3% in 2021–2022), with U.S. DEPT. OF EDUC., 44TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 41 (2022) and U.S. DEPT. OF EDUC., 45TH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT 50 (2023) (reporting that the proportion of IDEA students increased from 8.4% in 2011 to 9.6% in 2021).

complying with the § 504 procedural and substantive requirements that apply to them. Section 504-only hearing decisions that are more precisely legally informed are in the mutual interest of parents and school districts in allocating limited district resources in accurate accordance with applicable standards. The means of achieving more informed legal analysis in these decisions include more specific training for the attorneys who represent parents and districts as well as for the impartial hearing officers who render these decisions. This exploratory analysis is intended to serve as a springboard for more intensive and extensive research on the perceptions of and practices in the § 504-only hearing process as well as improved training for the participants in this process.¹⁰⁵ Moreover, the U.S. Department of Education's OCR should provide leadership in stimulating and supporting more attention to and standards for this dispute resolution mechanism in cooperation with other organizations.¹⁰⁶

¹⁰⁵ A few examples of the questions that warrant specific research are as follows: What is the level of awareness of the impartial hearing process among parents of § 504-only students? What are the prevailing practices of school districts for the selection of hearing officers and the procedures for the § 504-only hearings? What are the best practices for not only the selection and procedures but also the training for these hearing officers?

¹⁰⁶ Potential examples of such organizations include the Center for Appropriate Dispute Resolution in Special Education (<https://www.cadreworks.org/>), the Council of Parent Attorneys and Advocates (<https://www.copaa.org/>), the National School Attorneys Association (<https://www.nationalschoolattorneysassociation.org/home>), the Council for Exceptional Children (<https://exceptionalchildren.org/>), and the National Association of the Administrative Law Judiciary (<https://naalj.org>). The standards may take the form of an inter-organizational white paper or specific OCR guidance if not new regulations.