

# A Roadmap to Legal Dispute Resolution for Students With Disabilities

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- This article maps out the similarities and differences among the various routes to Individuals with Disabilities Education Act (IDEA) and Section 504 dispute resolution, including those not widely and well known to special education leaders.
- For IDEA-eligible students, the alternative avenues consist of not only the impartial hearing procedures and the state education agency's complaint investigation/resolution process but also the routes of legal recourse under Section 504.
- For students eligible under Section 504 alone, the alternative avenues amount to not only the complaint investigation/resolution process of the Office for Civil Rights but also the required grievance and impartial hearing procedures, which are subject to considerable confusion and—in light of the IDEA's intersecting exhaustion requirement—complexity.
- The various parts of this roadmap range from basic points for the new special education leader to more nuanced or advanced points for the experienced special education leader, with ample documentation of the specific legal sources.

Michael Garza is a third grader with severe autism, but in his special education class last year, he showed unexpected improvement in his communication skills. This year, however, with a different teacher, Michael's skill levels appear to have reached a plateau. Mr. and Mrs. Garza are dissatisfied with his new classroom environment. At the latest IEP meeting, they even hinted at recommending a private residential placement—150 miles away—that specializes in autism.

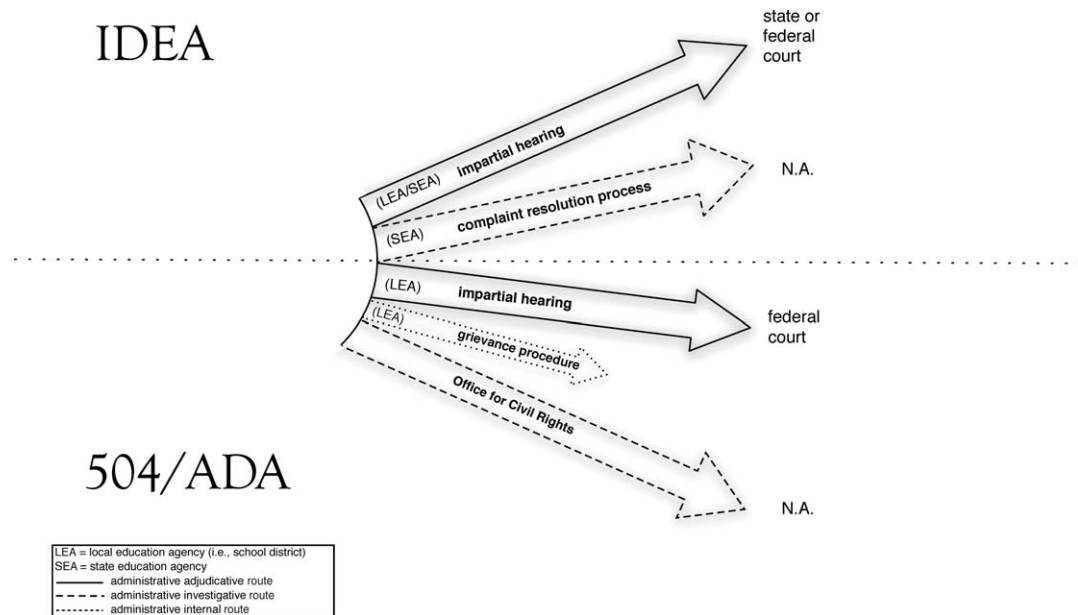
Michael's sister Jennifer, a fifth grader who excels in all her classes, has a severe food allergy to peanuts, which, according to her physician, could result in anaphylactic shock. Although she has not experienced an anaphylactic episode in her current elementary school, her parents are concerned about her safety upon the upcoming transition to the much larger middle school campus. The middle school cafeteria director has promised the Garzas to provide peanut-free meals to Jennifer but was reluctant to do so for the menu of the entire school. Based on the success of the informal arrangements during elementary school and the assurance of the cafeteria director, combined with the homeroom teacher's commitment to educate Jennifer's future classmates on their proactive responsibilities, the middle school principal opines that Jennifer does not

qualify for or need a 504 plan. In any event, the principal is unwilling to grant the Garzas' request for a complete ban of peanut products on the campus.

1. What legal avenues are available to the Garzas to obtain what they regard as an appropriate program and placement for Michael?
2. What legal avenues are available to them if they seek to challenge the school's position with regard to Jennifer's allergy?

The Individuals with Disabilities Education Act (IDEA), which Congress most recently amended in 2004, and Section 504 of the Rehabilitation Act (§ 504), which Congress most recently expanded with the Americans with Disabilities Act (ADA) Amendments, each entitle every child with a disability to a "free appropriate public education" (FAPE). This article maps out the various administrative routes of legal recourse available to parents when they have a dispute, such as a perceived denial of FAPE, about their child with a disability when this dispute has not been resolved by more informal means. The roadmap traces the available avenues under the IDEA regulations and § 504 regulations, but does not extend to either the

Figure. Alternate administrative avenues of legal recourse for parents of K-12 students with disabilities



prior informal or alternative means of dispute resolution (Mueller, 2009a), such as individualized education program (IEP) facilitation (Mueller, 2009b), or the ultimate resort to court action. Using the opening case as an illustration, the end of the article shows the Garzas' alternatives for advantageously navigating on behalf of each of their children.

The due process hearing, the most traveled of these available avenues of legal dispute resolution, is also the one that the professional literature most frequently covers. Professional journal articles typically focus on a particular aspect of IDEA hearings, such as burden of proof (Conroy, Yell, & Katsiyannis, 2008), expert witness fees (Yell, Katsiyannis, Ryan, & McDuffie, 2008), or hearing officer impartiality (Maher & Zirkel, 2007). They also include qualitative case studies (e.g., Bateman, 2007; Olivos & Ochoa, 2008) as well as quantitative studies of frequency trends (e.g., Zirkel & Gischlar, 2008) and outcome trends (e.g., Zirkel & D'Angelo, 2002).

However, these hearings are by no means the only avenue of IDEA dispute resolution worth the attention of educators and parents alike. With relatively limited exceptions (e.g., Suchey & Huefner, 1998; Zirkel, 2008b), the professional literature has not at all addressed, much less usefully mapped, these alternate routes available under not only the IDEA but also § 504 and its sister statute, the ADA. Entirely absent in the literature thus far, the

interrelationship of these avenues is subject to confusion among district and parent representatives. The aim of this article is to fill a conspicuous gap in the literature by offering a comprehensive roadmap of these various routes, as demonstrated by the *Figure* of the dispute resolution maze displayed in this article.

The respective outer limits of this roadmap are the informal alternate means of dispute resolution at one end and the full court proceedings at the other end. The boundary between the IDEA and § 504 routes is a dotted line rather than a solid one, because the availability of each path depends upon whether a child is double-covered—i.e., under both the IDEA and § 504—or protected under § 504 only.

As markers for these routes, the rest of this article cites successive primary sources of law. More specifically the IDEA and § 504 regulations, which have citations to sections starting with 300 and 104, respectively, serve as the first source of law. Second, the Office of Special Education Programs (OSEP), the federal agency that administers the IDEA and issues its regulations, provides supplementary guidance for interpreting these laws in the form of policy letters and "Questions & Answers" documents. Similarly, with regard to § 504 implementation, the Office for Civil Rights (OCR) issues policy letters, and in response to individual complaints, "letters of findings." Finally, federal court decisions and state

special education laws provide the other cited primary sources for this article. Secondary sources are included only where necessary to provide information not available in a primary source.

## The IDEA Dispute Resolution Options

### IDEA Impartial Hearing Officer: Administrative Adjudicative Route

The obvious place to start a discussion of the IDEA dispute resolution process is with the administrative adjudicative route, because it is the most well known. School officials typically call this route “due process,” because this path to dispute resolution culminates in a hearing of the same name, overseen by an Impartial Hearing Officer (IHO). As explained later under “State Structure,” the state education agency (SEA) may share responsibility for this route with the local education agency (LEA). However, the hearing is by no means the only stop worth noting along this route. What follows here is the step-by-step process from complaint to hearing, with brief mention of mediation and judicial review.

**Initiating Step.** Although an LEA may request a due process hearing, especially if a parent unilaterally changes a child’s placement (OSEP, 2009) or requests payment for an independent educational evaluation (IDEA Regulations, § 300.502(b)(2)(i)), parents account for the overwhelming majority of due process complaints. For purposes of this discussion, unless otherwise indicated, our summary presumes that a child’s parent is the filing party.

According to the IDEA regulations, except for two prescribed circumstances, a parent must file a due process hearing complaint within 2 years of the time when the parent first knew or should have known of the alleged violation (§§ 300.511(3)-(f)). This timeline, more commonly known as a statute of limitations, is not necessarily the same in all states: The IDEA permits individual states to adjust the statute of limitations in either direction via state law. Thus in Texas, for example, the statute of limitations is only 1 year (Due Process Hearings, 2009). Moreover, the IDEA regulations, tracking the IDEA 2004 legislation, add a second related time limit by specifying that the alleged violation must have occurred within 2 years prior to the date when the parent had the requisite

knowledge of it (§ 300.507(a)(2)). This provision arguably extends the limitation period for a remedy, such as compensatory education or tuition reimbursement. The courts thus far have largely limited their interpretation of this new limitations language to two exceptions (e.g., *A.B. v. Clarke County School District*, 2009; *D.G. v. Somerset Hills School District*, 2008) and have not yet clearly addressed issue of the 2- versus 4-year limit for compensatory education.

**Resolution Session.** The LEA must hold an initial resolution meeting within 15 calendar days of the filing of the complaint, and OSEP interprets the regulations as requiring a new resolution meeting every time the complaining party amends its due process complaint (OSEP, 2009). The resolution meeting starts another clock ticking; the LEA has 30 calendar days to resolve the complaint, whether through the resolution process or through mediation. However, if the LEA is the filing party, there is no resolution meeting; instead, OSEP “expects that LEAs will attempt to resolve disputes with parents *prior to filing* a due process complaint [emphasis added]” (OSEP, 2009, p. D-2). The IDEA regulations for resolution sessions discourage—without prohibiting—the participation of attorneys, in two ways. First, a prevailing parent who uses an attorney for the entire process may not recover attorney’s fees for the resolution phase (§ 300.517(c)(2)). Second, if the parent opts not to bring an attorney to resolution meetings, the LEA may not have legal representation there (§ 300.510(a)(ii)).

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... the most recent IDEA regulations require the availability of mediation before, not just after, a party has filed a due process complaint (§ 300.506).

If the resolution phase results in an agreement, the parent and the LEA representative must reduce this agreement to writing, signed by both parties. This agreement is “binding,” or in other words, enforceable in state or federal court (§ 300.510(d)), unless a party proves extenuating circumstances that would ordinarily invalidate a contract—for example, if the agreement violates public policy, or was signed under duress. However, if the resolution phase is unsuccessful in producing an agreement within 30 days, a due process hearing is the next step.

**Mediation Option.** Mediation serves an important function as another preliminary part of this route. Indeed, the most recent IDEA regulations require the availability of mediation before, not just after, a party has filed a due process complaint (§ 300.506). The reason is that early mediation may be even more effective than would the same mediation entered into after a parent has become so dissatisfied as to request a due process hearing. Nevertheless, although an SEA or LEA may establish procedures for a disinterested party to explain and encourage mediation, participation must be mutually voluntary (§§ 300.506(b)(1)–(2)); either the parent or the LEA may decline this option. Moreover, the recent version of the IDEA regulations, which were issued in 2006, expressly incorporate for mediators the impartiality requirements that have long applied to hearing officers. (§ 300.506(c)), which has caused revised institutional arrangements in some states (e.g., Chester, 2008).

**State Structures.** The IDEA regulations allow each individual state to choose between two structures for this administrative adjudicative process: 1) a one-tiered system, limited to an impartial due process hearing at the LEA or SEA level, or 2) a two-tiered system, with an initial impartial hearing at the local level and an impartial review officer (or panel) at the SEA level. The trend has been in favor of a single-tier structure. More specifically, in the decade from 1991 to 2000, nine states made the switch from a two-tiered to a one-tiered system (Ahearn, 2002). The current total for one-tiered systems is 40 states and the District of Columbia, with a gradual movement toward full-time administrative law judges as the hearing officers (Zirkel & Scala, 2010).

**Legal Boundaries.** IHOs have broad-based jurisdiction with regard to identification, evaluation, placement, and FAPE of children with disabilities under the IDEA (§ 300.507(a)(1)). The exceptions are very limited, including 1) where the parent did not provide written consent to initial services (§ 300.300(b)(2)); 2) where the parent disputes the services or lack of services, beyond child find, for a child whom they have placed in a private school where reimbursement is not the issue (§§ 300.140(a)–(b)); and 3) per the recent amendments to the regulations, where the parent provides but subsequently revokes consent (§ 300.300(b)(4)). Moreover, although the regulations only expressly grant IHOs the remedial authority for tuition

reimbursement (§ 300.148(c)), the remedies that are implicitly available to them are very broad, including declaratory and injunctive relief, such as compensatory education and even, depending on state law, disciplinary sanctions—but generally not attorneys’ fees or money damages (Zirkel, 2006a).

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IHOs differ widely from state to state in terms of institutional arrangements (e.g., part-time independent contractors vs. full-time administrative law judges) and training (Zirkel & Scala, 2010). Nevertheless, for FAPE, which is the issue in the vast majority of cases, the IDEA requires what may be considered a harmless-error approach for procedural violations, with one specified exception—where the district “[s]ignificantly impeded the parent’s opportunity to participate in the decisionmaking process regarding the provision of a FAPE to the parent’s child” (§ 300.513(b)).

**Final Steps.** The IHO’s decision must issue within 45 days after the expiration of the resolution phase or the prescribed adjusted starting point (§ 300.510(c)), and, in two-tiered states, the subsequent time limit for the review officer stage is 30 days (§§ 300.515(a)–(b)). However, it is not unusual to encounter decisions issued markedly beyond the 45-day and 30-day periods, given the express exception for extensions of the respective deadlines at the discretion of the IHO or review officer and at the request of either party (§ 300.515(c)) and the aforementioned harmless-error approach that most courts have applied to such violations (e.g., *Heather S. v. Wisconsin*, 1997).

Although the judicial process is not part of this roadmap, the connecting path from the due process hearing to court has three noteworthy features. First, the IDEA unusually provides for concurrent

jurisdiction: The party initiating review of the due process hearing may file in either state court or federal court (§ 300.516(a)). Second, the limitations period for filing is 90 days after the IHO decision unless state law provides for a different period for this specific purpose (§ 300.516(b)). Finally, the judicial review standard for an IHO decision is—as originally established (*Board of Education v. Rowley*, 1982, p. 206) and still applicable (e.g., *Ashland School District v. Parents of Student E.H.*, 2009)—“due weight,” which is flexibly intermediate between traditional deference and de novo, i.e., starting anew, which amounts to no deference (e.g., *Newcomer & Zirkel*, 1999).

Before the parents of IDEA-covered children can have their case adjudicated in state or federal court, however, they must first “exhaust” the remedies available through the IHO and, in two-tier states, review-officer procedures (§ 300.516(e)). Futility and inadequacy are the notable exceptions to this requirement, but the courts have generally interpreted these exceptions rather narrowly. For example, although they have inevitably excused class action suits from exhaustion, the majority of courts have held that this requirement applies even if the parents are seeking a remedy not available through an IDEA hearing, such as money damages (e.g., *A.W. v. Fairfax County School Board*, 2008).

### **IDEA Complaint Resolution Process (CRP): Administrative Investigative Route**

In contrast, the other IDEA route of administrative dispute resolution, which is neither well known nor well understood, is the SEA “complaint procedure” outlined in §§ 300.151–300.153 of the IDEA regulations. In accordance with the convention in some states (e.g., Connecticut State Department of Education, 2007) and for the sake of simplicity to avoid confusion with the administrative adjudicative—i.e., IHO—“complaint” procedure, we will hereafter refer to this administrative investigative procedure as “CRP” for complaint resolution procedure, or process.

**Initiating Step.** More specifically, the regulations require each SEA to implement a mechanism for parents to complain either to the state agency or, at the state’s option, to complain directly to the LEA with an SEA review of the local agency’s opinion (§ 300.151(a)(1)(ii)). Most, if not all, states have chosen the former, one-tiered approach. As with due process

complaints, the IDEA specifies a statute of limitations for CRP complaints—in this case, 1 year (§ 300.153(c)). However, in contrast to the IHO process, states may only increase—not shorten—the statute of limitations for CRP (OSEP, 2009).

**Remaining Steps.** When it receives a complaint, the SEA must investigate the allegations, allowing opportunities for the LEA to respond and the parent to amend the complaint. The SEA must also allow the LEA to make a proposal for resolution if it chooses to, and, as a new feature of the IDEA 2004 reauthorization, voluntary mediation must be available to the parties (§ 300.152(a)(3)(ii)). At the end of investigation and review, the SEA issues a written decision. Unless mediation or a like special circumstance delays it, the deadline for this decision is 60 days after the date of the initial complaint. Any state-level administrative appeal of the CRP decision is a matter of state law; for example, a New Jersey appellate court interpreted the state regulations not to allow appeal to the state board or commissioner of education (*Lenape School District v. Department of Education*, 2008).

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 For FAPE cases, the CRP often will be stricter than the IHO process about procedural violations, because there is no corresponding “harmless-error” prescription.

**Differences and Similarities.** The CRP differs from the IHO process in several other important respects as illustrated in Table 1. For FAPE cases, the CRP often will be stricter than the IHO process about procedural violations, because there is no corresponding “harmless-error” prescription. Similarly, the CRP usually has a more proximate institutional connection to the SEA compliance-review process, where procedures and guidelines are emphasized. In contrast, because the IHO process is, in terms of institutional arrangements and its individual orientation, relatively independent from compliance review, IHOs—like courts (e.g., *Holmes v. Millcreek Township School District*, 2000)—do not consider SEA guidelines at all binding. Conversely, the CRP in most states does not focus on the substantive side of FAPE, although OSEP opines that they should review and resolve these issues when the parent has not subjected them to the IHO process

**Table 1:** Introductory comparison of the IDEA's complaint resolution and impartial hearing officer processes

	CRP	IHO
<b>FAPE Orientation</b>	Procedural Emphasis	Substantive Priority
<b>SEA Relationship</b>	Integral	At least partially insulated
<b>Enforcement Activity</b>	Yes for IHO decision	No for CRP decision
<b>Attorney's Fees for Prevailing Parents</b>	Depends on jurisdiction	Uniformly yes

(IDEA Final Regulation Commentary, 2006, p. 46,601). At another at least partial difference from the IHO process, the courts are split as to whether CRP is an "action or proceeding" under the IDEA in terms of the availability of attorneys' fees for prevailing parents; for example, the answer is "yes" in the Ninth Circuit (*Lucht v. Molalla River School District*, 2000), whereas it is "no" in the Second Circuit (*Vultaggio v. Board of Education*, 2003).

Yet, similar to the IHO process, the SEA's CRP decision must provide for remedial action "such as compensatory services or monetary reimbursement" as well as future services to meet the needs of the child (§ 300.151(b)(1)). Moreover, just like due process hearing decisions and resolution-session agreements, the SEA's decision is enforceable in court (e.g., *Beth V. v. Carroll*, 1996; *Mrs. W. v. Tirozzi*, 1987); in contrast, the IHO does not have jurisdiction to review or enforce the outcome of CRP (*Millay v. Surry School Department*, 2010; *Virginia Office of Protection & Advocacy v. Virginia*, 2003). Finally, similar to appellate review of the IHO process, the IDEA regulations have no mechanism for OSEP review of CRP decisions (Anonymous, 2003), with the narrowly limited exception of private school complaints about the consultation obligations of the district of location for parentally placed private school children with disabilities (§ 300.136(b)(3)).

**Interrelationship.** The jurisdiction of CRP is broad and overlapping with that of the IHO, including, for example, IDEA provisions for student records (Anderson, 2008). Two of the three aforementioned exceptions to IHO jurisdiction also apply here, but complaints about parentally placed private school children, except child find, are exclusively reserved to CRP (§ 300.140(c)). Moreover, the jurisdiction for enforcement of an IHO decision is with CRP (§ 300.153(c)(3)), not the IHO process (e.g., *Wyner v. Manhattan Beach Unified School District*, 2000). The other alternative, which does not require exhaustion of CRP (*Porter v. Board of Trustees*, 2002), is via a

Section 1983 court action (e.g., *Jeremy H. v. Mount Lebanon School District*, 1996).

Although the IDEA regulations provide broad discretion to the SEA for CRP, they also establish "mandatory deferral," which is perhaps the most important facet of the complaint procedure for the parties to understand. Mandatory deferral is a procedural formality that prohibits the CRP from addressing any due process complaint—or part of a complaint—that has been raised and is pending in a due process action (§ 300.152(c)(1)). As a related matter, after the due process hearing is over, the IHO's decision is binding on the SEA's CRP for any future complaints on that issue (§ 300.152(c)(2)). Note that this deferral procedure and binding effect is a one-way street; the IHO need not, and typically will not, exclude an issue that the parent has concurrently subjected to CRP, and a CRP decision has no analogous exclusionary or binding effect on a subsequent IHO proceeding (e.g., *Donlan v. Wells Ogunquit Community School District*, 2002). Finally, although the IHO route remains open to parents not only during but also after CRP, there is no federally guaranteed opportunity for judicial review of the CRP decision; the regulations do not address this issue, and OSEP opines that the issue of judicial review is, thus, a matter of state law (IDEA Final Regulation Commentary, 2006, p. 46,607).

## § 504 and the ADA

To understand the dispute resolution avenues under § 504, it is useful to understand the relevant differences—and key commonalities—between § 504 and the ADA on one side and the IDEA on the other. Although the comparison extends much more comprehensively (Zirkel, 2007), Table 2 provides an illustrative example. The basic pertinent pieces are that 1) unlike the IDEA, § 504 and the ADA are civil rights laws, providing no federal funding to implement their mandates; 2) the § 504 and the ADA extend beyond the

**Table 2:** Introductory Comparison of IDEA and § 504/ADA

	IDEA	§ 504	ADA
Institutional Coverage	LEAs	LEAs + private, (including parochial) schools (and colleges) that receive federal financial assistance	LEAs + private secular (not parochial) schools (and colleges) that have ≥ 15 employees.
Federal Funding	Yes (partial)	No	Same as § 504
Disability Definition	1) recognized classification and 2) need for special education	Any physical or mental impairment that 2) limits a major life activity 3) substantially	Same as § 504
FAPE	special education + related services	Regular or special education + related services	Same as § 504
Money Damages	No	Yes	Same as § 504
Attorney Fees	Yes	Yes	Same as § 504
Enforcement Mechanisms	IHO + CRP	IHO + CRP	Same as § 504

IDEA to most, although not all private schools (e.g., Zirkel, 2006b); 3) § 504 and the ADA definition of “disability” is—particularly after the January 1, 2009 effective date of the ADA Amendments (Zirkel, 2009)—significantly wider than the definition of “disability” under the IDEA; and — perhaps most importantly here — 4) the dispute resolution avenues under § 504 and the ADA consist of the required LEA grievance procedure in addition to the external IHO and OCR mechanisms.

Conversely, the first of the two key commonalities between the IDEA and § 504/ADA is that, with rare exception (e.g., *Miller v. Board of Education*, 2009), § 504/ADA applies to all children with IEPs under the IDEA, thus making them effectively “double covered.” Second, although not widely understood at least in terms of implementation, § 504 requires an impartial due process hearing, just as the IDEA does. As a result, the administrative enforcement routes outlined later apply as additional options for parents of double-covered students and as the only options for parents whose children covered alone by § 504.

### § 504 IHO: Administrative Adjudicative Route

**Responsibility.** Unlike the IDEA, § 504 puts the sole responsibility for due process hearings on the elementary or secondary program receiving federal financial assistance (§ 104.36). Thus, in the public school context, when the parent requests an impartial hearing—with the limited exception of the relatively few students with disabilities served directly by SEAs—the LEA must arrange for the impartial

hearing. Moreover, relatively few states, such as Massachusetts, New Jersey, and Pennsylvania, have opened their IDEA IHO systems to claims under § 504 that are alternative to or instead of those under the IDEA. Connecticut illustrates another minority approach of allowing IDEA hearing officers to decide § 504 issues “only as necessary to resolve the claims made under the IDEA” (McQuillan, 2009, p. 2); this approach can rather easily result in a closed door (e.g., *Clark County School District*, 2002). However, one need not even knock at the SEA’s IDEA IHO door in the majority of the states; they entirely leave the responsibility for implementing the § 504 impartial hearing requirement to the LEA. Adding further complications, OSEP has opined that IDEA funds may not be used for § 504 hearings (Anonymous, 1997). OCR, which is a unit related to but separate from OSEP in the U.S. Department of Education has made rather clear that if any such funding restrictions or state policies bar IDEA IHOs from ruling on § 504 issues, the LEA “must establish a separate hearing procedure” (Anonymous, 1991).

**Requirements.** The only specification for the impartial hearing in the § 504 regulations, which date back to 1980, mirrored the original IDEA language requiring the opportunity for parental participation and legal representation. Additionally, the § 504 regulations clarify that compliance with the IDEA IHO process is one means of complying with this requirement (§ 104.36). In Appendix A accompanying the § 504 regulations, OCR re-emphasized that the IDEA’s IHO hearing procedures serve as only a recommended, not mandatory, model (Section 504 Regulations Commentary, 2009, ¶ 25). Because the

regulations do not provide timelines, IHO appointment procedures, or other such specific standards, OCR subsequently clarified that it uses the principles of fundamental fairness and reasonableness (Anonymous, 1991). As a result, in response to a parental complaint, OCR issued a letter of finding that ruled that a hearing procedure under § 504 that did not allow court reporters or cross-examination comported with the broad impartiality requirement of the § 504 regulations (Houston Independent School District, 1996).

The same § 504 procedural safeguards regulation requires a “review procedure” after the impartial hearing. Unlike the IDEA, this step appears to be for judicial review, not a second-tier administrative review (Board of Education of Valley Central School District, 2002; Mississippi State Education Department, 1984), and by a federal court without the concurrent option of state court. Also unlike the IDEA, this right of judicial review may not extend to school districts (*Board of Education v. Smith*, 2005).

**Judicial Factors.** Judicial review which the figure represents with references to state and/or federal courts at the right-side edge of the roadmap, presents four complicating factors for the administrative adjudicative route. First, § 504 does not specify a statute of limitations, which causes courts to infer the pertinent period by borrowing an analogous one, typically in state law. As a result, depending on the applicable analogy, the limitations period could be longer than that under the IDEA, and where the state’s personal injury law is the source, the plaintiff may have the added advantage of “tolling,” i.e., not starting the clock until the minor reaches the age of majority (e.g., *Hickey v. Irving Independent School District*, 1992; *Bishop v. Children’s Development Center*, 2010). However, the Third Circuit recently issued an unusual ruling that conformed § 504 to the IDEA statute of limitations, along with dicta that seemed to reject tolling (*P.P. v. West Chester Area School District*, 2009).

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 § 504 has the added advantages to the plaintiff-parents of not having all the IDEA limits on attorneys’ fees (e.g., *Lopez v. San Francisco Unified School District*, 2001) and of allowing for expert witness fees (*L.T. v. Mansfield Township School District*, 2009).

Second, § 504 does not contain an exhaustion requirement, which would require resorting to and completing the administrative adjudicative route before seeking judicial relief. The conundrum, however, is that there is a contingency clause embedded in the 1986 IDEA amendments that allowed parents of students with disabilities to file claims under alternate avenues, thereby reversing the Supreme Court’s interpretation they were limited exclusively to the IDEA (*Smith v. Robinson*, 1984). Specifically, “before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under subsections (f) [i.e., impartial due process hearing] and (g) [in states that opt to have a second tier, the review officer stage] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]” (IDEA, 20 U.S.C. § 1415(l)). As a result, the courts have rather consistently held that double-covered students must exhaust the IDEA’s IHO procedures even if their claim is limited to § 504 and/or the ADA (e.g., *Cave v. East Meadow Union Free School District*, 2008). However, some courts have even applied this exhaustion provision to students who are covered only by § 504 (e.g., *Babicz v. School Board*, 1998). Understandably, based on the language of this IDEA provision, the courts have focused on whether the relief sought is available via the IDEA IHO proceeding, but the aforementioned § 504 hearing jurisdictional issues pose problems for both parents and LEAs. For example, one of the open questions is whether a parent of a double-covered child who raised § 504 claims in an IDEA hearing only to have them dismissed as beyond the IHO’s jurisdiction has met the exhaustion requirement? Another is whether the parent in such circumstances or, even more problematic, when the child only is covered by § 504 is—in the courts’ view v. OCR’s view—entitled to an impartial hearing under § 504?

Third, most courts have interpreted § 504, not the IDEA, as providing for the remedy of money damages, although directly rather than via § 1983 (e.g., *A.W. v. Jersey City Schools*, 2007). However, the standard for liability is not uniform across the federal circuits, and the IHO does not share this particular area of remedial authority (Zirkel, 2006a).

Finally, § 504 has the added advantages to the plaintiff-parents of not having all the IDEA limits on attorneys’ fees (e.g., *Lopez v. San Francisco Unified School District*, 2001) and of allowing for expert



witness fees (*L.T. v. Mansfield Township School District*, 2009).

### § 504 Complaint Processes: Administrative Investigative Route

**Internal: Grievance Procedure.** The first, otherwise much less imposing, administrative complaint avenue in the § 504 regulations is not well known to parents and often subject to noncompliance by LEAs. Specifically, the § 504 regulations require each recipient of federal funds with 15 or more employees to have not only a § 504 coordinator but also a disability-discrimination grievance procedure (§ 104.7). Yet, it is not uncommon to find LEAs—especially but not exclusively smaller ones—that do not have such a procedure for disability-related, as compared with employee collective bargaining or student/employee sexual harassment, grievances.

For compliance with this requirement, the § 504 regulations contain only the broad standard that the grievance procedure be “prompt and equitable” (§ 104.7). Thus, the grievance procedure may be entirely internal to the LEA. Additionally, OCR has required reasonable specificity and an investigative component (Hayward Unified School District, 1995). The typical models have multiple levels, ranging from informal communication with the § 504 coordinator to a formal administrative appeal, with reasonable deadlines at each step (Zirkel, 2004, Appendix 4). OCR has repeatedly made clear that LEAs may not require parents to exhaust this grievance procedure before resorting to the other two avenues under § 504 (e.g., Talbot County Public Schools, 2008; Walled Lake School District, 2004). Moreover, just as clearly, an LEA may not use the grievance procedure to serve as its § 504 impartial hearing process (e.g., Leon County School District, 2007).

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The deadline for an OCR complaint is relatively short: 180 days from the time when the parent first knew of the violation or, if the parent opts to use the LEA’s grievance procedure, within 60 days of the last act under this institutional process.

Thus, when the grievance procedure is in place, parents may, at their option, use it to resolve a

dispute short of using the other formal § 504 mechanisms. On the other hand, if the district is not in compliance with this procedural requirement, the parents may use that failure as part of the basis for a complaint under the other, more imposing, § 504 administrative investigative route.

**External: OCR Complaint Procedure.** More specifically, for § 504 complaints, the much more frequently traveled nonadjudicatory administrative path is to file a complaint with OCR. The OCR website (<http://www.ed.gov/ocr>) provides a directory of the 10 regional offices throughout the nation, a complaint form, and the various options for submission. The deadline for an OCR complaint is relatively short: 180 days from the time when the parent first knew of the violation or, if the parent opts to use the LEA’s grievance procedure, within 60 days of the last act under this institutional process.

According to its latest Case Processing Manual and related materials (Zirkel, 2004, Appendix 10), upon receiving the complaint OCR then engages in various steps, starting with evaluation of the complaint and emphasizing early resolution. However, if necessary, OCR conducts an investigation, which may be administratively onerous for the LEA and time-consuming for the parent, resulting in a formal “letter of finding,” which declares whether there is “sufficient evidence to support a conclusion of noncompliance” and, if so, instructs the LEA to take corrective action. The corrective action may include, for example, a new policy, staff training, and/or compensatory education. If the LEA refuses to settle the case voluntarily or to comply with the directed corrective action, OCR has a complicated enforcement process that includes referral to the Department of Justice and possible funding termination.

Even more strongly than the SEA complaint process under the IDEA, OCR focuses on the procedural requirements of § 504 (e.g., New Milford Borough School District, 2006; Virginia Beach City Public Schools, 2006). A complicating factor for this focus is that although the § 504 procedural requirements are a streamlined version of those of the IDEA, the exception is the § 504 regulation that requires an evaluation upon any “significant change in placement” (§ 104.35(a)), thus exposing OCR enforcement LEAs that have complied with IDEA for children on IEPs (e.g., Puyallup School District, 2006).

In contrast, policy for substantive issues, such as eligibility and FAPE, is—with the limited exception of “extraordinary circumstances”—to ensure that the LEA has provided the parent with access to a grievance procedure and has arranged for an impartial hearing upon the parent’s request (OCR, 2009). As an example of its exception, in a relatively recent letter of finding OCR identified a child’s potentially life-threatening peanut allergy as an extraordinary circumstance warranting its determination on the substantive issue of FAPE, including accommodations and related services, for the child (Gloucester County Public Schools, 2007).

For such infrequent FAPE determinations, OCR (2009) has clarified that it does not consider “reasonable accommodations,” which is explicitly part of the § 504 employment regulations, as the applicable standard, relying instead on the regulatory definition of FAPE—“regular or special education and related aids and services that are ... designed to meet individual educational needs of [students with disabilities] as adequately as the needs of [nondisabled students] are met” (§ 104.33(b)(1)). Although only at the interrelated periphery of our roadmap, the courts generally have not been as hospitable to parents’ procedural claims under § 504 (e.g., *Power v. School Board*, 2003), but they have provided some—although not clearly settled—support for this substantive FAPE standard of commensurate opportunity (e.g., *Mark H. v. LeMahieu*, 2008). Finally, this avenue under § 504 differs from the impartial hearing route in three other notable respects: 1) constitutional due process, such as confrontation and cross-examination of witnesses, do not apply to this investigatory process (*Cunningham v. Riley*, 2000); 2) the only appeal is internal within the agency (OCR, 2009); and 3) use of the OCR complaint process does not meet the overlapping exhaustion requirement under the IDEA (*Avoletta v. City of Torrington*, 2009).

Returning to the opening example of the Garzas’ case, here are illustrative options of formal legal recourse short of court action. Their particular path, of course, will depend on their specific circumstances and strategies, with possible advice of local counsel.

*Michael*

*For their son, the Garzas have access to all of these avenues—both those under the IDEA and those provided*

*by § 504—in whatever combination and sequence they carefully select. The primary benefit, to be weighed against the costs, is increased odds of success due to 1) individual differences among the respective adjudicators and investigators; 2) differences between adjudication and investigation; and 3) differences in the procedural and substantive elements under the IDEA and § 504.*

*The reason that the Garzas have such a wide choice is because Michael is a classic example of the dual-covered child. As a prerequisite for his IEP, the LEA has determined via the prescribed parent-participating process, that he has met the IDEA definition of autism and that, by reason thereof, he needs special education. Similarly, the parent would presumably have no difficulty proving that this impairment substantially limits one or more major life activities, which—according to the ADA Amendments—include, for example, not only learning but also reading, thinking, and concentrating. Rather than additionally provide Michael with a 504 plan, the school district is using his IEP as a permissible means of meeting the FAPE requirement under § 504 (§ 104.33(b)(2)).*

*For their IDEA options, the savvy parent attorney or advocate would probably advise the Garzas to use the CRP route before the IHO route. This approach, just as long as they adhere to the respectively applicable limitation periods for filing, will allow them, if necessary, “two bites at the apple,” whereas filing for an IHO before or concurrently with CRP will trigger the deferral process. Moreover, in light of the orientation and implementation of CRP, the primary but not exclusive focus of their complaint should be procedural, and they should be prepared for a telephone or direct interview with an SEA investigator. If the CRP settlement or decision is partially or wholly unfavorable, the Garzas may promptly proceed along the administrative adjudicative avenue, where the CRP outcome is not binding on the IHO. For the IDEA IHO route, the Garzas should carefully consider the mediation option that is available before or after filing, with a willingness to compromise. The advice of Martín (2007), a school district attorney in Texas, applies to both sides: “Mediation is not a forum where a party simply explains why they are entitled to every bit of relief pleaded in the due process hearing request and is able to obtain that relief without litigation” (p. 16). Moreover, if mediation is unavailing, the Garzas should recognize that the IHO will likely focus on the substantive side of the program/placement, where their best but still limited chance in relation to FAPE is the IDEA’s qualified requirement that the IEP’s provision for special education be based, if practicable, on “peer-reviewed research” (e.g., Zirkel, 2008a).*

Additionally or alternatively on behalf of Michael, the Garzas can also access the § 504 safeguards. One strategy would be to request the district's policy in terms of the institutional requirements, which include but are not limited to the grievance procedure (§§ 104.6–104.8). If the district's policy complies with these requirements, the Garzas should consider using this institutional process. On the other hand, if the district is not in compliance, the Garzas can file an OCR complaint that emphasizes these deficiencies and any specified violations of the individual procedural safeguards (§§ 104.35–104.36), along with related substantive requirements (§§ 104.33–104.34). Absent extraordinary circumstances, OCR will predictably defer the substantive issues for the § 504 IHO process. Both parties can anticipate a rather time-consuming process that will emphasize resolving the matter via a mutual settlement or the district agreeing to a "voluntary" letter of finding.

Yet, if the Garzas have reason to suspect that the district is not sufficiently knowledgeable and prepared with regard to the IHO avenue under § 504, they might initiate this route before filing their OCR complaint on behalf of Michael, thus strengthening its procedural basis. In any event, if the Garzas file for an impartial hearing under § 504 before or after the OCR complaint process, either party may encounter difficulties and opportunities depending on the state. In the few states that have IDEA IHO systems that are open to § 504 claims, the district will argue, with the odds in its favor, that the Garzas must timely raise these claims within their IDEA hearing. In the other minority of states that provide jurisdiction for IDEA IHOs for intertwined § 504 claims, the odds in favor of the district's one-forum argument will depend on whether the Garzas can persuasively show that their § 504 claims are independently distinguishable from those under the IDEA. In the majority of the states, where the IDEA IHO does not have jurisdiction for § 504 claims, a knowledgeable district can make the most of the aforementioned broad boundaries of impartiality applicable to such hearings by using the selection and payment process to its advantage. Finally, both parties must be ready to persuade the IHO in relation to the broad concept of discrimination under § 504 and the ADA, which are not necessarily identical to the corresponding district obligations under the IDEA.

Perhaps the most important implication of this roadmap of formal administrative dispute resolution short of but connected to judicial

proceedings—both immediately and ultimately—is that the best avenues for parents and districts are 1) effective communication promoting trust and collaboration, and, 2) alternative, less formal and complicated means of dispute resolution.

*Jennifer*

In Jennifer's case, however, the Garzas are limited only to the administrative avenues available under § 504, unless they can show that her food allergy, as an "other health impairment," has an adverse effect that would require special education, such as adapted physical education. Her § 504 eligibility is rather clear; the ADA Amendments resolve the question as to whether her impairment (i.e., peanut allergy) limits a major life activity (i.e., eating or breathing) substantially, because they specify that for an episodic impairment substantial limitation refers to when the impairment is active (ADA Amendments Act, 2008).

The only differences with regard to the Garzas' choice of one or more of the three avenues under § 504 for Jennifer, as compared with Michael, are 1) they are much more likely to be able to persuade OCR to extend its investigation and determination to the substantive side of her claims due to the life-threatening dimension of her peanut allergy; 2) OCR is likely to use the commensurate opportunity, rather than the reasonable accommodation, standard for this FAPE claim; 3) in any event, the odds are overwhelmingly in the parents' favor that the OCR will find fatal fault with the district's noncompliance with § 504's procedural requirements in terms of evaluation and notice, in all probability also rejecting the principal's procedural position that there is no need for a § 504; and 4) if the Garzas proceed to a hearing—except in the few states that have an IHO process open, without qualification, to IDEA and/or § 504 claims—the district will have to arrange promptly and properly for the IHO, where the Garzas may rely on other IHO § 504 decisions that support a much more extensive peanut-free policy and protocol (e.g., Mystic Valley Regional Charter School, 2004).

Finally, if the Garzas file a lawsuit on behalf of either or both children before completing the IHO process, they should anticipate a district motion for dismissal for failure to exhaust administrative remedies, which the court will almost be certain to grant in Michael's case and which the court will likely grant in Jennifer's case. If the Garzas get beyond the exhaustion requirement, the open questions that the court will face include 1) whether the procedural and

substantive standards of the IDEA and § 504 make any significant difference in the outcome of Michael's case and 2) in Jennifer's case, whether, as a result of the ADA Amendments, the principal is correct in maintaining that a § 504 plan is not automatically required for all students who meet the definition of disability under § 504 but do not meet the corresponding definition under the IDEA.

Perhaps the most important implication of this roadmap of formal administrative dispute resolution short of but connected to judicial proceedings—both immediately and ultimately—is that the best avenues for parents and districts are 1) effective communication promoting trust and collaboration, and 2) alternative, less formal and complicated means of dispute resolution. If, instead, the parties proceed to the ultimately adversarial administrative process, this relatively comprehensive overview makes obvious that each side can take advantage of close familiarity with the scope and sequence of these various paths of legal recourse.

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