

Section 504 Due Process Policies and Procedures

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A. Due Process Policies and Procedures

34 C.F.R. § 104.36 requires public school districts to provide students and their parents with due process procedures in the event of a dispute concerning an evaluation, 504 Plan, implementation of a Plan, or a change in placement, among other possibilities. These procedures must include the right to an impartial hearing and, if necessary, an appeal. It is now well established that a parent's failure to exhaust IDEA's administrative remedies will preclude a claim under Section 504 – seeking relief that ostensibly could have been obtained through an impartial hearing under IDEA.¹ However, at least one court has held that parents will not be required to exhaust such remedies if district officials never advised the parents that such a due process mechanism existed. *Sandlin*, 2009 U.S. Dist. LEXIS 72689, *supra*. As the court in *Sandlin* noted, a district that wants to rely on the procedures of IDEA has an obligation to tell a child's parents of their rights under that law:

If a school expects students and their parents to exhaust their administrative remedies under [IDEA], it needs to take the simple step of notifying parents and students of their procedural rights, as [IDEA] itself requires. Because of this lack of notice, *Sandlin* is excused from the requirement that he exhaust any administrative remedies under [IDEA].²

Practice Tip: School districts should consider adding a notice to their Section 504 due process notices, advising parents that they may be required to exhaust IDEA's administrative remedies as a condition to commencing a judicial action asserting claims based on Section 504. Doing so avoids any potential the district will lose this valuable affirmative defense.

B. Section 504 and Claims for Money Damages

Section 504 provides parents with a potential cause of action for money damages when a school district discriminates against students with disabilities. Some federal courts have held that this claim includes causes of action arising out of a school district's systemic

1. 20 U.S.C. § 1415(l); *see, e.g., Weidow v. Scranton School Dist.*, Case No. 3:08-cv-1978, 2009 U.S. Dist. LEXIS 73622 (M.D. Pa. Aug. 19, 2009); *Vicky M. v. Northeastern Educ. Intermediate Unit*, Case No. 3:06-cv-01898, 2009 U.S. Dist. LEXIS 85026 (M.D. Pa. Sept. 16, 2009); *Sandlin v. Switzerland County School Corp.*, Case No. 4:08-cv-0047, 2009 U.S. Dist. LEXIS 72689 (S.D. Ind. Aug. 17, 2009) (citing *Charlie F. v. Board of Educ. Of Skokie School Dist. No. 68*, 98 F.3d 989, 991-992 (7th Cir. 1996); *Moore v. Hamilton Southeastern School Dist.*, Case No. 1:11-cv-01548-SEB-DM, 2013 U.S. Dist. LEXIS 123507 (S.D. Ind. Aug. 29, 2013)).

2. *Sandlin*, 2009 U.S. Dist. LEXIS 72689, * 15-16.

non-compliance with Section 504 or IDEA. For example, the U.S. District Court in the Eastern District of Pennsylvania ruled that parents were entitled to recover their expert witness fees relative to an impartial hearing commenced under IDEA where the hearing officer ruled that the school district had violated both IDEA and Section 504.³ The Court held that this ruling established a violation of Section 504 and the ADA, as well as IDEA, and, while IDEA does not allow the parents to recover expert witness fees, Section 504 and the ADA contain no such limitation.

In February of this year, the U.S. Supreme Court ruled that parents of a child classified under IDEA lacks standing to pursue a claim for money damages under Section 504 if the parent has not first exhausted the administrative remedies provided by IDEA when the “gravamen” of the claim concerns the denial of FAPE or seeks relief that could be obtained under IDEA.⁴ By contrast, if the claim pursued under Section 504 seeks relief for simple discrimination, irrespective of IDEA’s FAPE obligation, exhaustion of IDEA’s administrative process is not required as a condition to filing a lawsuit under Section 504.⁵

The Court suggested that whether exhaustion of IDEA’s administrative process is required can be ascertained through two considerations. First, whether the plaintiff could have “brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school” or “an adult at the school . . . [could] have pressed essentially the same grievance.” If those conditions exist, then the claim would appear not to concern the denial of FAPE and the parent can pursue the claim under Section 504 without first exhausting IDEA’s

3. *M.M. v. School Dist. of Phila.*, 142 F. Supp. 3d 396, 413 (E.D. Pa. 2015).

4. *Fry*, 137 S. Ct. at 754.

5. *Id.*

administrative remedies.⁶ Secondly, the history of a case may reveal whether the gravamen of the parent's claim concerns a denial of FAPE, thereby requiring exhaustion of IDEA's administrative process before bringing a claim. If the parent had first commenced IDEA's procedures to handle the particular dispute, but switched "to a lawsuit under Section 504 midstream," it is likely that the claim concerns an alleged denial of FAPE, requiring exhaustion of the administrative process as a condition to bringing a lawsuit.⁷ Such circumstances require a court to discern whether the parent "moved to a courtroom" because of "late-acquired awareness that the school had fulfilled its FAPE obligation and the grievance involves something else entirely."⁸

Clearly, the objective is to keep claims concerning matters addressed by IDEA out of the courts, thereby upholding the scheme Congress crafted when it enacted IDEA. A parent (or student) cannot short-circuit that process by pursuing a claim under Section 504 if the process provided by IDEA could have resolved the dispute.⁹

Section 504 also provides a private cause of action for money damages to students with disabilities who are subjected to a hostile educational environment based on their disability. In other words, they are subjected to harassment based on their disability that is sufficiently severe or pervasive to alter the condition of the student's education and create an abusive environment, provided an appropriate official of the school had actual knowledge of the harassment and was deliberately indifferent to it.¹⁰ An appropriate official is one who has authority to address the alleged discrimination and implement corrective measures – generally, a principal and, most likely, an assistant principal. It is unclear what other school officials might also be considered to

6. *Id.* at 756.

7. *Id.* at 757.

8. *Id.*

9. *Harrington v. Jamesville Dewitt Cent. School Dist.*, Case No. 5:17-CV-53 (TJM/DEP), 2017 U.S. Dist. LEXIS 54930, at *28-29 (N.D.N.Y. Apr. 11, 2017) (quoting *Fry*, 137 S. Ct. at 754) ("If [a] lawsuit charges [a denial of FAPE], the plaintiff cannot escape 'the statutory exhaustion requirement 'merely by bringing [his] suit under a statute other than the IDEA' such as [Section 504] or the [ADA].")

10. *E.g.*, *TK v. New York City Dep't of Educ.*, 779 F. Supp. 2d 289, 314-315 (E.D.N.Y. 2011).

fall within this category. Presumably, teachers, guidance counselors, and other similar school employees will not qualify, but courts are not in complete agreement on this issue.

Deliberate indifference has been defined as having actual knowledge of the harassment and failing to respond adequately. Relative to the cause of action provided by Title IX of the Education Amendments of 1972, which is identical in its requirements to the cause of action provided by Section 504, courts have held that the response must be “clearly unreasonable in light of known circumstances.”¹¹ Even when a school’s response is ostensibly reasonable on its face, but proves to be ineffective, a school may be found to have been deliberately indifferent if it fails to change its response in order to obtain efficacy.

The potential for liability under Section 504 is greatest with regard to a hostile educational environment arising out of the student’s disability. Such harassment is reasonably foreseeable in any school, and it is imperative that schools manage this risk by ensuring faculty and staff promptly report such incidents after becoming aware of them, and ensuring that immediate and credible response of action is taken to stop the harassment.

C. Application of Section 504 to Private Schools

Section 504 applies to private schools that receive federal assistance, including religious schools, and students attending private schools are entitled to services from their districts of residence.

1. Application of Section 504 to Private Schools

Whether the statute applies to all of a private school’s programs or just those funded with federal money or assistance has been an area of some debate. A few courts have held private schools are only subject to Section 504 relative to the specific programs that receive federal

11. *Id.* (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999)).

funding – not all of their programs.¹² However, the majority rule holds that the receipt of any federal assistance – even if provided indirectly – is sufficient to subject all of a private school’s programs to Section 504.¹³ Therefore, private schools receiving any form of federal assistance should assume they are subject to Section 504’s provisions and govern accordingly.

Even if Section 504 applies to a private school, however, the Section 504 regulations limit that school’s obligations. It prohibits such a school from excluding a disabled student from elementary or secondary school programs, but only if the school can provide the student with an appropriate educational placement “with minor adjustments” to its programs.¹⁴ Section 504 also prohibits private schools from charging more for the provision of an appropriate education for disabled students than they would charge nondisabled students, except to the extent any charge is justified by a substantial increase in cost to the private school.

2. *Private School Students’ Entitlement to Services from Districts of Residence*

The predominant view is that once a school district offers a child a FAPE, it has no duty to provide “educational services to students not enrolled in the public school program based on the personal choice of the parent or guardian.” (Letter to Veir, 20 IDELR 864 (OCR 1993)).¹⁵ However, the Pennsylvania Supreme Court recently rejected that notion, ruling that the implementing regulations of Section 504 require public school districts to provide services to disabled students residing in the district and dually enrolled in the public school district and a private school – even if the disabled student does not attend classes in the public school district.¹⁶

12. See, e.g., *Marshall v. Sisters of the Holy Family of Nazareth*, 399 F. Supp. 2d 597, 602 (E.D. Pa. 2005).

13. See, e.g., *Dupree v. Roman Catholic Church*, No. 97-3716 Section “C,” 1999 U.S. Dist. LEXIS 13799, *15 (E.D. La. Sept. 2, 1999) (provision of Title I assistance, even though indirectly received through the public school district, was sufficient to subject the private school to Section 504’s mandates); *Hunt v. St. Peter’s School*, 963 F. Supp. 843, 849 (W.D. Mo. 1997) (provision of federal assistance from the U.S. Department of Agriculture’s National School Lunch and Breakfast Programs and from the U.S. Department of Education’s Title I program are sufficient to subject the private school to Section 504).

14. 34 C.F.R. §§ 104.39(a), 104.33(b); *St. Johnsbury Academy v. D.H.*, 240 F.3d 163, 173 (2d Cir. 2001).

15. See also *Hinds Co. School Bd.*, 20 IDELR 1174 (OCR 1993).

16. *Lower Merion School Dist. v. Doe*, 593 Pa. 437, 446-447, 48 IDELR 255 (Pa. 2007) (a student’s dual enrollment in the public district and private school required the public district to provide the student with Section 504 services because, under the statute’s implementing regulations, a public district must still provide FAPE, including special services and accommodations); see also *Vicky M.*, 2009 U.S. Dist., LEXIS 108666, *18.

As for completion of the child-find obligation and evaluating students referred as possibly disabled students, it is the child's district of residence that bears the obligation to evaluate – not the district in which the child's private school is located.¹⁷

¹⁷. *West Seneca (NY) School Dist.*, 53 IDELR 237, 109 LRP 76695 (OCR 2009).

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