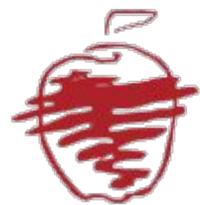


C O M P L I A N C E

by  eLuma
online therapy

A Special Educator's Guide to **Due Process & Section 504 Hearings** (presented by Gerald J. Hime)



March 16, 2018



eLuma
online therapy

Agenda

Introduction

1:00 pm EST (5 minutes)

Presentation

Background
Understanding the Laws
The Laws Applied
FAQ
Hearings
Compliance
Resources

1:05 pm EST (45 minutes)

Q&A

1:50 pm EST (10 minutes)

Who is eLuma?

eLuma Online Therapy

eLuma is one of the premier providers for related services. With a national network of high-quality therapists, a cutting-edge platform & caseload management system, and an array of game-changing blended solutions -- eLuma stands alone in providing the most cost-effective and dependable teletherapy services available.

A few facts about us:

- ▶ FOCUSED on solving COMPLIANCE issues for schools & districts.
- ▶ Founded in 2011
- ▶ Team of 100+ dedicated team members.
- ▶ Serving over 4,000 students monthly in 29 states.

The Webinar

A few facts:

- 500 attendees
- First webinar in our Compliance series
- Recording to be sent out afterwards
- Slide deck to be sent out afterwards

INTRODUCTION

Presenter

Gerald J. Hime

- ▶ Long, distinguished career spanning several decades.
- ▶ Mr. Hime has served as a special educator, administrator, consultant and more recently, as a hearing officer for due process and Section 504 hearings.
- ▶ Served as the national President of the CEC.
- ▶ Deeply passionate and committed to helping and serving individuals and communities with disabilities.



A Special Educator's Guide to
Due Process & Section 504 Hearings
(presented by Gerald J. Hime)

**"INJUSTICE ANYWHERE IS A THREAT
TO JUSTICE EVERYWHERE."**
Martin Luther King, Jr.



Civil Rights Acts for Persons with Disabilities

REHABILITATION ACT (1973)



IDEA (1975)



ADA (1990)





“The time has come when we can no longer tolerate the invisibility of the handicapped in America . . . These people have the right to live, to work to the best of their ability, to know the dignity to which every human being is entitled. But too often we keep children whom we regard as "different" or a "disturbing influence" out of school & community activities altogether, rather than help them develop their abilities . . . Every child, gifted, normal and handicapped-has a fundamental right to educational opportunity. ”

Senator Hubert Humphrey, United States Senator

Rehabilitation Act

- ▶ **Public Law 93-112**, 93rd Congress , H. R. 8070 Sept 26, 1973.
- ▶ **REPLACED** the Vocational Rehabilitation Act.
- ▶ **EXTENDED & REVISED** the authorization of grants to States or vocational rehabilitation services, with special emphasis on services to those with the most severe handicaps.
- ▶ **EXPANDED** special Federal responsibilities and research and training programs with respect to handicapped individuals.
- ▶ **ESTABLISHED** special responsibilities for the Secretary of Health, Education, and Welfare for coordination of all programs with respect to handicapped individuals within the Department of Health, Education, and Welfare.

- ▶ **Section 501** Requires federal agencies to have an affirmative action plan to hire and promote qualified individuals with disabilities.
- ▶ **Section 502** Requires all buildings constructed with federal funds to be accessible to persons with physical disabilities.
- ▶ **Section 503** Requires all government contractors to have an affirmative action plan which must include provisions for hiring, assigning jobs, promoting, training, transferring, and terminating employees with disabilities.
- ▶ **Section 504** No handicapped persons shall be excluded from participation, be denied the benefits of, or be subject to discrimination under any program activity receiving federal financial assistance.
- ▶ **Section 505** Provides that attorney's fees may be awarded in the instance that a party prevails in a complaint of discrimination under the act.
- ▶ **Section 508** Sets requirements for Federal electronic and information technology to be accessible to all people with disabilities.

The Levi Act

IDEA

- ▶ **Public Law 94-143** was originally enacted as the Education for All Handicapped Children Act in 1975.
- ▶ **SUPPORTS** states and localities in protecting the rights of, meeting the individual needs of, and improving the results for infants, toddlers, children, and youth with disabilities as well as their families.
- ▶ **AMENDED** in 1997 as the Individuals with Disabilities Education Act (IDEA).
- ▶ **ENABLES** and supports developing and implementing effective programs and services for early intervention, special education and related services.
- ▶ Before IDEA (1970), US schools educated only one fifth of all children with disabilities.

- ▶ The Americans with Disabilities Act (ADA) became **Public Law 101-336** on July 26, 1990. Tom Harkin authored the bill and was its chief sponsor.
- ▶ **PROHIBITS** discrimination based on disability. It affords similar protections against discrimination to Americans with disabilities as the Civil Rights Act of 1964
- ▶ **DEFINES** disability as "... a physical or mental impairment that substantially limits a major life activity." The determination of whether any particular condition is considered a disability is made on a case by case basis.
- ▶ The ADA was amended in 2009.

The ADA



eLuma
online therapy

Understanding the Laws

Rehabilitation Act

(The Basics)

- ▶ Largely geared to provide job opportunities and training to adults with disabilities, also addressed, though very discreetly, failure of public schools to educate students with disabilities.
- ▶ Still uses term “handicapped;” has not been amended to politically correct terminology.
- ▶ Focus is on non-discrimination; prohibits the denial of public education participation, or the enjoyment of benefits afforded to nondisabled students.
- ▶ Congress did not create federal funding but conditioned receipt of funding on compliance.
- ▶ Enforced by the Office for Civil Rights.

Disability Defined

According to Section 504, a person with disability means an individual who:

- A. has a physical or mental impairment that substantially limits one or more major life activities;
- B. has a record of such an impairment or;
- C. is regarded as having such an impairment.



Section 504 - Disability Qualification

Physical Impairment	Mental Impairment	Major Life Activities	Record of Impairment	Regarded as Impaired
<p>Physiological disorder, disease, disfigurement or anatomical loss in one or more systems:</p> <ul style="list-style-type: none"> - Neurological - Musculoskeletal - Respiratory - Cardiovascular - Reproductive - Digestive - Genitourinary - Hemic - Lymphatic - Skin - Endocrine - Substance <p>(No illegal drug abusers.)</p>	<p>Mental disorder including:</p> <ul style="list-style-type: none"> - Mental retardation - Organic brain syndrome - Emotional disturbances - Mental illness - Specific learning disabilities 	<p>Major life activities include:</p> <ul style="list-style-type: none"> - Self-care - Manual tasks - Walking - Seeing - Hearing - Speaking - Breathing - Learning - Working 	<p>The individual has:</p> <ul style="list-style-type: none"> - A history of impairment. <p>or</p> <ul style="list-style-type: none"> - A record of having been misclassified as having an impairment. 	<p>The individual has:</p> <ul style="list-style-type: none"> - An impairment not limiting a major life activity, but treated as disabled by the covered entity. <p>or</p> <ul style="list-style-type: none"> - No impairment, but treated as disabled by the covered entity.

IDEA/EHA

(The Basics)

- The federal law governing special education.
- Made clear Congress' desire to provide funding to insure that students with disabilities received "free appropriate public education" (FAPE).
- At the time of enactment, 1 million children with disabilities in the US were excluded from public education; others attended/participated but were denied "a successful educational experience" with undetected disabilities.
- Established criteria for eligibility.
- Recognized the need for adequately trained teachers and diagnostics but that lack of funding prevented success.
- Set strict procedural protections designed to empower parents to advocate for their children.
- Enforced by the U. S. Department of Education

The ADA

(The Basics)

- ▶ Picks up where the Rehabilitation Act leaves off; also a discrimination act.
- ▶ Title I: Employment; Title II: State and Local Government Activities; Title III, Public Transportation; Title IV: Public Accommodations; Title V: Telecommunications Relay Services.
- ▶ Applies the three pronged standards of the Rehabilitation Act to most private sector businesses.
- ▶ Seeks to eliminate barriers to disabled access in buildings, transportation, and communication.
- ▶ Supplants the employment provisions of §504 and reinforces the accessibility requirements; does little to change a school district's obligations to provide educational services to its disabled students.
- ▶ Title II enforced by the Office for Civil Rights; other titles by relevant federal agencies.



eLuma
online therapy

The Laws Applied



Comparison

REHABILITATION ACT/504

A civil rights law to prohibit discrimination on the basis of disability in programs and activities, public and private, that receive federal financial assistance.

IDEA

An education act to provide federal assistance to state and local education agencies to guarantee special education and related services to eligible children with disabilities.

ADA

A civil rights law to prohibit discrimination solely on the basis of disability in employment, public services, and accommodations.

Who is protected?

REHABILITATION ACT/504

Any person who (1) has a physical or mental impairment that substantially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment. Major life activities include walking, seeing, hearing, speaking, breathing, learning, working, caring for oneself, and performing manual tasks.

IDEA

Ages 3-21 who are determined by a multidisciplinary team to be eligible for special education & related services. Includes autism, sight & hearing impairments, mental retardation, multiple disabilities, orthopedic & other impairments, serious emotional disturbance, specific learning disabilities, speech/language impairments, traumatic brain injury, and visual impairments.

ADA

Any individual with a disability who: (1) has a physical or mental impairment that substantially limits one or more life activities; or (2) has a record of such impairment; or (3) is regarded as having such an impairment. Further, the person must be qualified for the program, service or job.

Provides Free & Appropriate Public Education

REHABILITATION ACT/504

Yes. An “appropriate” education means an education comparable to that provided to students without disabilities. This may be defined as regular or special education services. Students can receive related services under Section 504 even if they are not provided any special education. Section 504 does require development of a plan, although this written document is not mandated.

IDEA

Yes. A FAPE is defined to mean special education and related services. Special education means “specially designed instruction at no cost to the parents, to meet the unique needs of the child with a disability...” Related services are provided if student requires them. States are required to ensure the provision of “full educational opportunity” to all children with disabilities under an IEP.

ADA

Not directly. However, (1) ADA protections apply to nonsectarian private schools, but not to organizations or private schools, or entities controlled by religious organizations; (2) ADA provides additional protection in combination with actions brought under Section 504. Reasonable accommodations are required for eligible students with a disability to perform essential functions of the job.

Funding to Implement Services

REHABILITATION ACT/504

No. State and local jurisdictions have responsibility. IDEA funds may not be used to serve children found eligible under Section 504.

IDEA

Yes. IDEA provides federal funds under Parts B and C to assist states and local education agencies in meeting IDEA requirements to serve infants, toddlers and youth with disabilities.

ADA

No, but limited tax credits may be available for removing architectural or transportation barriers. Also, many federal agencies provide grant funds to support training and to provide technical assistance to public and private institutions

Procedural Safeguards

REHABILITATION ACT/504

Section 504 requires notice to parents regarding identification, evaluation and/or placement. Written notice is recommended. Notice must be made only before a “significant change” in placement. Following IDEA procedural safeguards is one way to comply with Section 504 mandates.

IDEA

IDEA requires written notice to parents regarding identification, evaluation, and/or placement. Further, written notice must be made prior to any change in placement. The Act delineates the required components of the written notices.

ADA

The ADA does not specify Procedural Safeguards related to special education; It does detail the administrative complaint procedures, and consequences for noncompliance related to both services and employment.

Due Process

REHABILITATION ACT/504

Requires local education agencies to provide impartial hearings for parents who disagree with the identification, evaluation, or placement of a student. Gives parents an opportunity to participate in the process and to be represented by counsel.

Beyond this, due process details are left to the discretion of the local education agency.

IDEA

IDEA delineates specific requirements for local education agencies to provide impartial hearings for parents who disagree with the identification, evaluation or placement of a child.

Preceding comparisons was prepared by the Disability Rights Education Fund (DREDF).

ADA

The ADA does not delineate specific due process procedures. People with disabilities have the same remedies that are available under the Title VII of the Civil Rights Act of 1962.

Individuals claiming discrimination may file a complaint with the relevant federal agency or sue in federal court.

Rehabilitation Act of 1973 Regulations

Part 104, Subpart D – Preschool, Elementary & Secondary Education, 104.36 Procedural Safeguards

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

Procedural Safeguards

OFFICE FOR CIVIL RIGHTS

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services.



eLuma
online therapy

Frequently Asked Questions

Parental Consent?

Must a recipient school district obtain parental consent prior to conducting an initial evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, the IDEA and Section 504 provide that districts may use due process hearing procedures to seek to override the parents' denial of consent for an initial evaluation.

Form of Consent? Withheld Consent?

If so, in what form is consent required?

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance. IDEA as well as many state laws also require written consent prior to initiating an evaluation.

What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services?

Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services

Procedural Safeguards? Providing Info?

What procedural safeguards are required under Section 504?

Recipient school districts are required to establish and implement procedural safeguards that include notice, an opportunity for parents to review relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel and a review procedure.

What is a recipient school district's responsibility under Section 504 to provide information to parents and students about its evaluation and placement process?

Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

Mediation Requirements?

Is there a mediation requirement under Section 504?

No.



eLuma
online therapy

Hearings

Due Process/Section 504 Hearing Procedures

Points for consideration:

- can be utilized to resolve differences when such differences cannot be resolved by less formal procedures.
- an opportunity to present objections and reasons for the objections to the decision and/or procedures of the committee.
- may be called at the request of the District or a parent, guardian, or surrogate parent of an affected student.
- may be initiated to resolve matter related to (1) eligibility and related procedures; (2) procedural safeguards; or (3) provision of a free and appropriate public education (FAPE).
- presided over and decided by an impartial hearing officer.

Impartial Hearing Officer

REHABILITATION ACT OF 1973

The term "impartial hearing officer" means an individual—

- (i) who is not an employee of a public agency (other than an administrative law judge, hearing examiner, or employee of an institution of higher education);
- (ii) who is not a member of the State Rehabilitation Council described in section 105;
- (iii) who has not been involved previously in the vocational rehabilitation of the applicant or eligible individual;
- (iv) who has knowledge of the delivery of vocational rehabilitation services, the State plan under section 101, and the Federal and State rules governing the provision of such services and training with respect to the performance of official duties; and
- (v) who has no personal or financial interest that would be in conflict with the objectivity of the individual.

Hearing Procedures

All parties shall have the opportunity to:

- present their evidence.
- produce outside expert testimony and be represented by legal counsel and qualified individuals.
- in cases where there are language differences, an interpreter shall be provided.

Parents involved shall have the right to:

- have the student present at the hearing.
- open the hearing to the public.
- have access to, and copies of, the student's records.

The Decision

Pertaining to the decision of the hearing officer:

- ▶ A copy of the hearing officer's decision shall be delivered to the District and the parent, guardian, or surrogate parent within 10 days following completion of the hearing, which in no event shall be later than 45 days after receipt of the request for a hearing unless all parties agree to a time extension.
- ▶ Notification will include a statement that either party may appeal the decision.
- ▶ The decision of the hearing officer will be binding on all parties concerned.

Adapted from Section 504 and the Schools by Perry A. Zirkel, Ph.D., J.D., L.L.M.

Hearing Procedure Comparison

IDEA

- ▶ Must provide impartial hearing for parents who disagree with the identification, evaluation, or placement of the student.
- ▶ Requires written consent.
- ▶ Describes specific procedures.
- ▶ Impartial appointee selects hearing officer.
- ▶ Provides “stay put” until proceedings are resolved.
- ▶ Parents must receive ten day’s notice to any change in placement.
- ▶ Enforced by US Dept of Ed, OSEP.

SECTION 504

- ▶ Must provide impartial hearings for parents who disagree with identification, evaluation or placement of the student.
- ▶ Does not require parental consent.
- ▶ Requires that parents have an opportunity to participate in and be represented by legal counsel.
- ▶ School appoints a hearing officer.
- ▶ No “stay put” provision.
- ▶ Does not require that parents are notified prior to the student’s change of placement, but the parents are to be notified.
- ▶ Enforced by the US Dept of Ed, OSEP.

STANDARDS ←

→ POLICIES

RULES ←

→ LAW

REGULATIONS ←

Compliance

→ TRANSPARENCY

COMPLIANCE



Common Issues

(Compliance)

- ▶ Development of a plan without appropriate evaluation.
- ▶ Failure to document team decision.
- ▶ Failure/refusal to consider evaluations by outside professionals.
- ▶ Fixed limitations on home/hospital limitations.
- ▶ Failure to transfer 504 documents.
- ▶ Failure to respond to evaluation request.
- ▶ Failure to access ADHA with appropriate instruments/not just SLD.

More Issues

(Compliance)

- › Failure to implement plan in regular education setting.
- › Exclusion/limitation on participation in electives, field trips, extracurricular etc.
- › Making decisions unilaterally instead of by team.
- › Making decisions that are not based on evaluation information or child's needs.
- › Not affording parents procedural safeguards.

Section 504 Issues

(Per Jacob Smiles & Gayle Sakowski at the Office of Civil Rights)

- Failure to respond to a request for an evaluation or to independently identify a student as a student with a disability who should be evaluated, including those students with mental health impairments.
- Failure to document Section 504 team decisions concerning eligibility, services and/or accommodations.
- Failure/refusal to consider evaluations conducted by outside professionals or information from parents.
- Failure to develop a plan for students with medical disabilities, such as diabetes or allergies.
- Focusing on the student's disability rather than the student's individual educational needs.
- Awareness that students may be disabled under Section 540/Title II and entitled to special services in the regular program or special education, even though they do not qualify for services under IDEA.

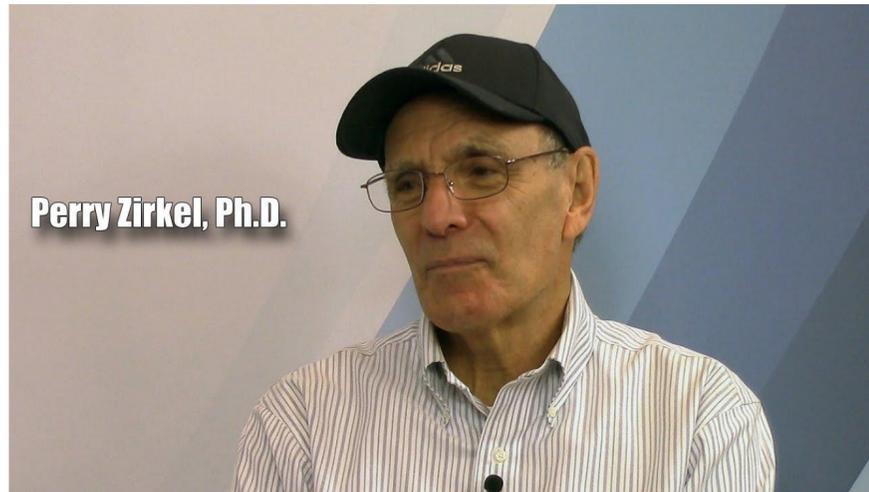
More Section 504 Issues

(Per Jacob Smiles & Gayle Sakowski at the Office of Civil Rights)

- Evaluation of students who may have ADD/ADHD using criteria and standards for learning disabilities—failure to assess ADD/ADHD using appropriate assessment instruments.
- Failure to conduct behavioral assessments and develop behavior plan for students with disability-related behavior issues, resulting in disciplinary actions that may not be appropriate.
- Failure to implement a student's IEP or Section 504 plan.
- Failure to respond to allegations of disability discrimination, including different treatment or harassment.
- Exclusion from or limitations on participation in elective classes, extracurricular activities, field trips, graduation ceremonies, or before and after school care programs.
- Evaluations which do not appropriately identify and take into account English proficiency issues as distinguished from disability.

Zirkel's Top Five

(Section 504 Errors)



1. Offering a 504 plan as a consolation prize whenever a district determines that a student is not or is no longer eligible under the IDEA.
2. Requiring parents to obtain a medical diagnosis of AD/HD, at their own expense, or accepting such a diagnosis regardless of its lack of specificity or support.
3. Using a relatively small subset of learning, such as spelling, handwriting, or math calculation, as the major life activity.
4. Measuring “substantial” limitation—of the identified impairment on the identified major life activity—without, rather than with, the effects of mitigating measure, such as medication.
5. Measuring substantial limitation in reference to the child’s potential and/or the child’s immediate classmates rather than in reference to the performance of children at the same age or grade in the general population.

Weatherly's 9 Tips

(Section 504/ADA Tips by Julie J. Weatherly, Esq.)



1. **REVIEW** your District's Section 504 forms and procedures in light of the ADA Amendments Act of 2008 (ADAAA).
2. **HAVE** Section 504 procedures in place and train school personnel on them.
3. **UNDERSTAND** that a student can be found to be "disabled" under Section 504 but not in need of a 504 Plan because his/her educational needs are met as adequately as the educational needs of nondisabled students.
4. **REMEMBER** that there are special rules of discipline applicable to students who are disabled only under Section 504.
5. **AVOID** exclusions of otherwise qualified disabled students from extracurricular and nonacademic activities, including athletics. Under Section 504, disabled students must be provided an equal opportunity to participate in extracurricular activities. 34 CFR 104.37(a)(1). However, as a general rule, such students must still comply with the behavioral, academic, and performance standards of non-disabled students.

Weatherly's 9 Tips Continued

(Section 504/ADA Tips by Julie J. Weatherly, Esq.)

6. **BE AWARE** that developing a health plan/nursing care plan may not suffice, by itself, for purposes of determining disability and providing services under Section 504.
7. **REMEMBER** that “learning” is not the only “major life activity” to consider when determining whether a student is disabled under Section 504.
8. **RECOGNIZE** that bullying of a student with a disability could constitute a form of discrimination --disability harassment—under Section 504 and schools are responsible for maintaining adequate procedures to address it.
9. **RECOGNIZE** the potential for Section 504-based lawsuits alleging retaliation.



eLuma
online therapy

HELP

TIPS

ASSISTANCE

GUIDANCE

Resources

SUPPORT

ADVICE

Message from eLuma

Here at eLuma, we are committed to helping special education programs achieve greater compliance. We hope this webinar was useful and informative, but beyond sharing this critical information, we remain focused on providing innovative solutions to help these programs better meet their students needs as well as meet the requirements of the law.

We are partnering with a rapidly growing number of schools and districts all over the country, who are discovering that there are OTHER viable and cost-effective solutions beyond the status quo. If you are in need of any assistance, we invite you to schedule a short demo so you can see all that is possible. We would love to help you explore your options and develop a solution that is tailored to your specific needs.

Sincerely,



Jeremy Glauser

President, eLuma Online Therapy

jglauser@elumatherapy.com

Recommended Resources

You may obtain a series of supporting articles at the following link: [Compliance Webinar Resources](#).

For more information contact:

Gerald J. Hime

gjhime@earthlink.net



eLuma
online therapy

Thank You