

An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*

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EDUCATION LAW INTO PRACTICE

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An article in the March 2012 issue of WEST'S EDUCATION LAW REPORTER (Ed.Law Rep.) updated earlier systematic comparisons that comprehensively canvassed the student-related similarities and differences between the Individuals with Disabilities Education Act ("IDEA") and the pair of civil rights acts—Section 504 of the Rehabilitation Act of 1973 ("§ 504") and the Americans with Disabilities Act of 1990 ("ADA").¹ **Designated in underlined bold**

font, this latest version adds the procedural and substantive developments during the intervening period, including but not limited to 1) the ADA Amendments Act of 2008 (ADAAA)²; 2) related or concomitant issues under Section 504³; 3) the consent revocation amendments in the December 2008 IDEA regulations⁴; **4) the ADAAA Title II regulations issued in August 2016⁵**; and 5) relatively **new relevant issues**, such as response to intervention⁶ and service animals.⁷ It also adds various references and refinements to the endnotes for the sake of comprehensiveness.

Per the format of the original and previous updated version of the chart, the basic differences (and, although included herein to a lesser extent, similarities) are represented by regular typeface, while those that are *advanced*—in terms of being more subtle or sophisticated—are presented in italics.

Finally, this supplemental chart contains the following acronyms:

BIP	behavior intervention plan
ED	emotional disturbance
ESY	extended school year
FAPE	free appropriate public education
FBA	functional behavioral assessment
IEE	independent educational evaluation
IEP	individualized education program
IHO	impartial hearing officer
ITP	individual transition plan
LEA	local education agency
LOF	letter of finding
LRE	least restrictive environment
M-D	manifestation determination
OCR	Office for Civil Rights
OSEP	Office of Special Education Programs
RTI	response to intervention
SEA	state education agency

IDEA	§ 504	ADA ⁸
GENERAL:		
Funding statute	Civil rights act	Civil rights act
• provides approx. 15-20% of excess costs of special education ⁹	• tied to federal funding but provides none	• neither tied to federal funding nor providing it
For students aged 0-21 prior to and in elementary and secondary education ¹⁰	For students in elementary/secondary and also:	SAME AS § 504 plus also other private entities that provide public accommodations
• peripheral re facilities ¹¹	• postsecondary education ¹⁶	
• including extracurricular and other such activities ¹²	• employees ¹⁷	
	• facilities ¹⁸	
	• extracurricular and other such activities ¹⁹	
Extends, as a district obligation, to unilaterally placed students in private schools ¹³ and, to a much lesser extent, to those voluntarily placed in such schools ¹⁴	<i>Extends directly—in comparison to limited district obligation²⁰—to parochial and other private schools that receive federal hot lunch, E-rate, Title I and/or IDEA program services²¹</i>	<i>Extends as well to private, nonparochial schools without such federal financial assistance²³</i>
• <i>the voluntary placements cover home schools only in the few states where they are private schools; otherwise, the IDEA only requires child-find for home-schooled children¹⁵</i>	• <i>does not apply to home-schooled children²²</i>	
Long statute (approx. 55 pages in subchapters I and II) ²⁴	Short statute (less than 2 pages for definitions and prohibition) ²⁵	Medium statute (approx. 15 pages for subchapters I-III) ²⁶
Lengthy regulations (approx. 55 pp. + comments) ²⁷	Relatively short regulations (approx. 9 pp. + comments) ³⁰	Shorter regulations (e.g., approx. 7 pages for Title II) ³³
<u>Establishes an affirmative obligation²⁸</u>	<u>Provides a prohibition of discrimination³¹</u>	<u>SAME³⁴</u>
<u>Detailed annual reports to Congress²⁹</u>	<u>Less extensive disability coverage, although still mandatory annual reports to Congress³²</u>	<u>SAME</u>

ADMINISTERING AGENCY (FOR K-12 SCHOOLS):

OSEP

OCR³⁵
and occasionally DOJ³⁶SAME AS § 504³⁷
although increasingly DOJ³⁸**INSTITUTIONAL REQUIREMENTS:**Various that are explicit:
• short nondiscrimination notice
• identified coordinator
• *grievance procedure*³⁹
• *self-evaluation document*⁴⁰

SAME AS § 504

• *must be updated as
of 1/26/93⁴¹***STATUTORY INTERPLAY:**Increasing effect of § 504 and ADA⁴²Intertwined relationship with ADA⁴³ and
extensive effect of IDEA⁴⁴Intertwined relationship with § 504⁴⁵Extensive interconnection with NCLB⁴⁶*Limited, largely indirect, effect of NCLB⁴⁷***STUDENT-SPECIFIC: IDENTIFICATION:⁴⁸**2-part definition of disability:⁴⁹

- 1 or more of 11 classifications +
- need for special education

broader 3-part definition of disability:⁵⁰

- any recognized impairment +
- major life activity (not just learning⁵¹—
expanded list within⁵² and beyond⁵³
learning) +
- substantial limitation

*Frame of reference for measuring adverse effect:
unspecific⁵⁴**Frame of reference for measuring
substantial limitation: average student in
general population⁵⁵**Mitigating measures (e.g., medication): irrelevant**Mitigating measures (e.g., medication):
measurement without⁵⁶*Child-find obligation: specific **collectively**⁵⁷Child-find obligation: **more explicit
individually**—and less strong?⁵⁸*Evaluation⁵⁹: medical assessment not required
(unless state law provides otherwise)⁶⁰*SAME⁶¹

- IEE: specific provisions⁶²
- mis-identification: focus on “false negatives”⁶⁴
but no coverage for “false positives”⁶⁵

- IEE: no provision⁶³
- mis-identification: extension to “false
positives”⁶⁶

RTI: major area of state law activity for SLD
identification⁶⁷*RTI: indirect effect limited to double-
covered students⁷⁰***Leading issues: ED⁶⁸ and ADHD⁶⁹****Leading issues: students with health
conditions⁷¹**

STUDENT-SPECIFIC: SERVICES:

<p>Substantive standard: reasonably calculated <u>to enable the child to make appropriate progress in light of the child's circumstances</u>⁷³</p>	<p>FAPE = special ed. <u>or</u> reg. ed. + related services⁷²</p> <p>Substantive standard: <i>commensurate opportunity or reasonable accommodation</i>⁷⁴</p> <ul style="list-style-type: none"> • <i>local (district) frame of reference</i>⁷⁵ • <i>for private schools – “minor adjustments”</i>⁷⁶ 	<p>Substantive standard: <i>reasonable modification</i>⁷⁷</p> <ul style="list-style-type: none"> • <u>specialized difference for hearing impaired students</u>⁷⁸
<p><i>Procedural violations constitute denial of FAPE where not harmless error.</i>⁷⁹</p> <ul style="list-style-type: none"> • <u>possible exception for parental opportunity for meaningful participation</u>⁸⁰ 	<p><i>Procedural violations do not alone trigger a claim.</i>⁸¹</p>	
<p><u>Implementation violations: two competing prevailing standards (though not per se approach)</u>⁸²</p> <p>Specifically prescribed IEP⁸³</p> <ul style="list-style-type: none"> • including ITP • with at least annual review • including ESY where needed⁸⁴ • <i>implementation “as soon as possible”</i>⁸⁵ 	<p><u>Implementation violations: bad faith or gross misjudgment approach</u>⁸⁶</p> <p>No formally required document (but practical use for proof)⁸⁷</p> <ul style="list-style-type: none"> • no ITP requirement • no specified review requirement but presumably reasonableness standard • no explicit provision • no explicit implementation deadline 	
<p>LRE⁸⁸:</p> <ul style="list-style-type: none"> • residential placement: one option of LRE continuum⁸⁹ • <u>case law: extensive but diminishing</u>⁹⁰ 	<ul style="list-style-type: none"> • SAME⁹¹ • <i>case law: extensions</i>⁹² 	<ul style="list-style-type: none"> • <u>“in the most integrated setting appropriate”</u>⁹³
<p>Obligation to provide services to parentally placed students in private schools: limited and specific obligation of the district of location⁹⁴</p>	<p><i>Obligation to provide services to students in private schools: limited and specific obligation of the private school</i>⁹⁵</p>	
<p><i>Obligation to children home-schooled under state law: conditional (and limited)</i>⁹⁶</p>	<p><i>Obligation to children home-schooled under state law: none</i>⁹⁷</p>	
<p><i>Service animals: very limited right of access</i>⁹⁸</p>		<p><i>Service animals: robust right of access</i>⁹⁹</p>

STUDENT-SPECIFIC: PROCEDURAL SAFEGUARDS:

<p>Long individual notice¹⁰⁰</p>	<p>Medium individual notice¹⁰¹</p>
<p>Detailed criteria and specific role reps, including parents,¹⁰² for evaluation, IEP, and placement teams¹⁰³</p>	<p>3 criteria for all-purpose team (knowledgeable about child, evaluation data, and interventions), w/o specifically requiring parents¹⁰⁴</p>
<p><i>Detailed safeguards for student records</i>¹⁰⁵</p>	<p>No specific additions to brief mention in procedural safeguards provision¹⁰⁶</p>
<p>Consent for initial evaluation and, with limitations, for reevaluation¹⁰⁷</p>	<p><i>Consent for initial evaluation but only notice for reevaluation</i>¹⁰⁸</p>
<p>Consent for initial services¹⁰⁹ – with written revocation as absolute¹¹⁰</p> <ul style="list-style-type: none"> • <u>revocation also applies to § 504</u>¹¹¹ 	<p><i>No consent for services</i>¹¹²</p>
<p>Reevaluation at least every 3 years</p> <ul style="list-style-type: none"> • <i>plus upon parent or teacher request or if specified conditions warrant</i>¹¹³ 	<p>Periodic reevaluation¹¹⁴</p> <ul style="list-style-type: none"> • <i>plus upon “a significant change in placement”</i>¹¹⁵

IDEA**§ 504****ADA**

*Impartial hearing*¹¹⁶ with well-settled exhaustion requirement for clear IDEA claims¹¹⁷

*Impartial hearing*¹¹⁸ with inconsistent interpretation of IDEA's exhaustion provision¹¹⁹

*IHO override for placement: not for initial services/placement*¹²⁰ nor for revocation of consent for services/placement¹²¹

*IHO override for placement: stronger*¹²²

Stay-put requirement: explicit *and sometimes complex*¹²³

*Stay-put requirement: inferred?*¹²⁴

STUDENT-SPECIFIC: DISCIPLINE:¹²⁵

Focus on "removals"¹²⁶

More applications,¹²⁷ including to other forms of discipline¹²⁸

Protection for "deemed to know" students: explicit¹²⁹

*Protection for "deemed to know" students: implicit*¹³⁰

Cumulative days beyond 10 in a school year: 4 illustrative factors¹³¹

Cumulative days beyond 10 in a school year: 3 illustrative factors¹³²

M-Ds: detailed but recently reduced procedures and criteria¹³³

M-Ds: 2 criteria for team but otherwise more relaxed¹³⁵

- *but with complete reevaluation (i.e., appropriateness criterion*¹³⁶) upon "significant change in placement"¹³⁷

- special, subsequent treatment for drug use or possession¹³⁴

- *but no M-D required for expulsion for use of alcohol or illegal drugs*¹³⁸

FBA(s) and BIPs: specific triggering requirements¹³⁹

FBA(s) or BIPs: no requirements for 504-only students

45-day interim alternate placements: 4 specified circumstances¹⁴⁰

*45-day interim alternate placements: no authority*¹⁴¹

After valid expulsion: FAPE obligation continues¹⁴²

After valid expulsion: no FAPE obligation¹⁴⁴ – *except in the 5th and 11th Circuits*¹⁴⁵

- *also, albeit on streamlined basis, upon the 11th cumulative day*¹⁴³

- *none upon the 11th cumulative day*

Interim alternate placement as expanded stay-put¹⁴⁶

No provision for interim placements¹⁴⁷

STUDENT-SPECIFIC: ENFORCEMENT:¹⁴⁸

Policy letters: OSEP¹⁴⁹

Policy letters: OCR

SAME AS § 504¹⁵⁰

[No comparable requirement.]

LEA grievance procedure¹⁵⁴

ALMOST SAME AS § 504¹⁵⁷

Complaints and compliance reviews: SEA¹⁵¹

Complaints and compliance reviews: OCR

SAME AS § 504¹⁵⁸

- *primarily procedural orientation*¹⁵²
- *ultimate sanction: loss of IDEA funding*
- *published "precedents": rarely (and probably inadvertently)*¹⁵³

- *almost entire procedural orientation*¹⁵⁵
- *ultimate sanction: loss of all federal funding*
- *published "precedents": common*¹⁵⁶

Disputes: IHO is SEA responsibility¹⁵⁹

Disputes: IHO is LEA responsibility¹⁶³

- detailed requirements for hearings¹⁶⁰ - including district right to file and appeal¹⁶¹

- skeletal requirement for hearings¹⁶⁴ - including ambiguity whether district has right to file and appeal¹⁶⁵

- *published "precedents": common*¹⁶²

- *published "precedents": rare*

LEA responsibility: special ed director

LEA responsibility: 504 coordinator

LEA responsibility: ADA coordinator

LITIGATION:¹

Standing: parents - independent²

*Standing: parents – not independent
(except for retaliation)³*

*Exhaustion requirement: **explicit and** strong⁴*

*Exhaustion requirement: more extensive
exceptions⁶*

- state option of one- or two-tier system⁵

- one-tier suffices even in 2-tier IDEA
jurisdiction⁷

Statute of limitations: explicit⁸

*Statute of limitations: **by analogy** - varying
but often longer⁹* SAME AS § 504¹⁰

Unrestricted private right of action

Restricted private right of action¹¹

*Burden of proof: on the plaintiff for FAPE and
LRE¹²*

*Burden of proof: on the plaintiff (i.e.,
parents)¹³* SAME AS § 504¹⁴

*“Due weight” standard of judicial review of IHO
decision¹⁵*

Unsettled standard of judicial review¹⁶

Expert witness fees: not recoverable¹⁷

Expert witness fees: recoverable¹⁸

Jury trial: no¹⁹

Jury trial: yes²⁰

Protection against retaliation: limited²¹

*Protection against retaliation and
harassment: stronger²²*

Extends to associational protection²³

*Protection against bullying: **need not be disability
based²⁴** but limited application and relief²⁵*

*Protection against bullying, i.e., peer
harassment, based on disability²⁶:
stronger²⁷*

Attorneys’ fees: within limits²⁸

Attorneys’ fees: possibly higher³⁰
• not for OCR complaints

*Various equitable remedies: Established and
emerging³¹*

Similar, though less well developed

- tuition reimbursement: well-developed
framework³²
- compensatory education:
emerging crystallization³³

- tuition reimbursement: relatively rare³⁴
- compensatory education: more slowly
developing³⁵

*Money damages: **generally not available³⁶***

*Money damages: all jurisdictions but high
standard³⁷*

- Eleventh Amendment immunity: in none of the
jurisdictions to date³⁸

- Eleventh Amendment immunity: in the
minority of jurisdictions to date³⁹

- Eleventh Amendment immunity: in
declining minority of jurisdictions
to date⁴⁰

ENDNOTES

- ¹ **Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 EDUC. L. REP. 767 (2012).** For the previous versions, see Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 EDUC. L. REP. 1 (2007); Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 EDUC. L. REP. 629 (2003). For the wider coverage of Section 504 and the ADA, including employees and facilities, see, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (3d ed. 2011) (available from LRP Publications – www.lrp.com).
- ² 122 Stat. 3553, 3553-54 (codified at 42 U.S.C. §§ 12101–12110 (2013)), 29 U.S.C. § 705 (2013)).
- ³ See, e.g., Perry A. Zirkel, *Does Section 504 Require a 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).
- ⁴ 34 C.F.R. §§ 300.300(b)(4) and 300.9(c)(3) (2014).
- ⁵ **28 C.F.R. § 35.108.**
- ⁶ See, e.g., **Perry A. Zirkel, *You Be the judge #11: Response to Intervention and SLD Identification*, 45 COMMUNIQUÉ 4 (Mar. 2016);** Perry A. Zirkel, *RTI and the Law*, 286 EDUC. L. REP. 1 (2011).
- ⁷ 28 C.F.R. §§ 35.104 and 35.136 (Sept. 15, 2010 DOJ regulations under ADA Titles II and III). **For a recent analysis, see Perry A. Zirkel, *Service Animals in K–12 Schools: A Legal Update*, 327 EDUC. L. REP. 554 (2016).**
- ⁸ This column, for the ADA, has blank entries where the ADA either mirrors or is silent for the particular topic, thus adding nothing to § 504. For a comprehensive reference, see ZIRKEL, *supra* note 1. For comparisons between § 504 and the ADA, see OCR Senior Staff Memorandum, 19 IDELR 859 (1992) (reprinted in ZIRKEL, *supra* note 1, at App. 2:21); Perry A. Zirkel, *Our “Disability” with the ADA*, 8 THE SPECIAL EDUCATOR 251 (1993). **The ADA focus is Title II, which applies to public schools and other governmental entities. See *infra* note 33.**
- ⁹ Although the original 1975 version of the IDEA defined its target of “full funding” as 40% of the excess cost, Congress has never come close to this level of appropriation. The per pupil cost of special education averages twice as much as that for regular education. See, e.g., Jay G. Chambers, Thomas B. Parish & Jenifer J. Harr, *What Are We Spending on Special Education Services in the United States, 1999–2000?* (2002) (available from ERIC Document Reproduction Service – access no. ED 471888).
- ¹⁰ The focus here is Part B, which covers ages 3–21 (unless state law provides a different ceiling age). For the contrasting features of Part C, which covers ages 0–1, see, e.g., Perry A. Zirkel, *A Quick Comparison of Parts B and C of the IDEA*, 199 EDUC. L. REP. 11 (2005).
- ¹¹ 34 C.F.R. § 300.718.
- ¹² See, e.g., 34 C.F.R. §§ 300.107 and 300.117 (including new language regarding supplementary aids and services). For a recent example, see *Indep. Sch. Dist. No. 12 v. Minnesota Dep’t of Educ.*, 788 N.W.2d 907, 260 EDUC. L. REP. 409 (Minn. 2010).
- ¹³ 34 C.F.R. § 300.148.
- ¹⁴ 34 C.F.R. §§ 300.129–300.147 (including beefed up responsibilities, such as consultation, and their reallocation from the LEA of the child’s residence

- to the LEA of the private school’s location).
- ¹⁵ See, e.g., *Hooks v. Clark Cty. Sch. Dist.*, 228 F.3d 1036, 147 EDUC. L. REP. 870, 220 EDUC. L. REP. 129 (9th Cir. 2000), *cert. denied*, 121 U.S. 1002 (2001); 64 Fed. Reg. 12,601 (Mar. 12, 1999). For an overview, see Perry A. Zirkel, *Homeschoolers’ Rights to Special Education*, 82 PRINCIPAL 12 (March/April 2003). The new IDEA regulations, however, require consent for evaluation or reevaluation of home-schooled children. 34 C.F.R. § 300.300(d)(4); see also *Durkee v. Livonia Sch. Dist.*, 48 F. Supp. 2d 313 (W.D.N.Y. 2007).
- ¹⁶ See, e.g., Margaret McMenamin & Perry A. Zirkel, *OCR Rulings Under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTSECONDARY EDUC. & DISABILITY 55 (2003).
- ¹⁷ See, e.g., Perry A. Zirkel, *A Checklist for Disability Nondiscrimination in School District Employment*, 24 YOUR SCH. & THE LAW 6 (May 1994).
- ¹⁸ See, e.g., Perry A. Zirkel, *New Section 504/ADA Checklist: Expert Reviews Accessibility of Facilities, Programs*, 10 THE SPECIAL EDUCATOR 33 (Sept. 6, 1994). For recent examples of student accessibility litigation, see **Greer v. Richardson Indep. Sch. Dist.**, 472 F. App’x 287, 282 EDUC. L. REP. 101 (5th Cir. 2012); *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App’x 85, 258 EDUC. L. REP. 1005 (2d Cir. 2010); *D.R. v. Antelope Valley High Sch. Dist.*, 746 F. Supp. 2d 1132, 265 EDUC. L. REP. 215 (C.D. Cal. 2010); cf. *Miles v. Cushing Pub. Sch.*, 51 IDELR ¶ 96 (W.D. Okla. 2008) (transportation and diaper-changing table).
- ¹⁹ 34 C.F.R. § 104.34. For example, one of the most active areas of § 504 and ADA K–12 student litigation is interscholastic athletics. See, e.g., Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 EDUC. L. REP. 761, 764 (2000). For more recent interscholastic athletic cases, see **Mann v. La. High Sch. Athletic Ass’n**, 535 F. App’x 405, 299 EDUC. L. REP. 445 (5th Cir. 2013); **K.L. v. Mo. State High Sch. Athletic Ass’n**, 178 F. Supp. 3d 792, 336 EDUC. L. REP. 820 (E.D. Mo. 2016); **Starego v. N.J. Interscholastic Athletic Ass’n**, 970 F. Supp. 2d 303, 302 EDUC. L. REP. 998 (D.N.J. 2013); **Cruz v. Pennsylvania Interscholastic Athletic Ass’n**, 157 F. Supp. 2d 485, 156 EDUC. L. REP. 633 (E.D. Pa. 2001); **Blaisden v. W. Va. Secondary Sch. Activities Comm’n**, 568 S.E.2d 32 (W. Va. 2002). **For the most recent development regarding § 504 and interscholastic athletics, see Dear Colleague Letter, 60 IDELR ¶ 167 (OCR 2013); Perry A. Zirkel, *Students with Disabilities and Extracurricular Athletics in the K–12 Context: OCR’s Recent “Significant” Guidance*, 289 EDUC. L. REP. 13 (2013).** For another particular but not exclusive application, see, e.g., Perry A. Zirkel, *Section 504 and the Americans with Disabilities Act: A Legal Analysis for Career and Technical Education Students*, 265 EDUC. L. REP. 447 (2011).
- ²⁰ One limited avenue is indirect via the broad of discrimination under § 504. See, e.g., 34 C.F.R. § 104.4(b)(1)(v). The other alternative, also notably limited to date, is incorporated state law. See, e.g., *Lower Merion Sch. Dist. v. Doe*, 878 A.2d 925, 200 EDUC. L. REP. 778 (Pa. Commw. Ct. 2005).
- ²¹ See, e.g., Perry A. Zirkel, *Section 504, the ADA, and Parochial School Students*, 211 EDUC. L. REP. 15 (2006). For recent further examples, see

- Smith v. Tobinworld**, 68 IDELR ¶ 47 (N.D. Cal. 2016) (IDEA placement); *Russo v. Diocese of Greensburg*, 55 IDELR ¶ 98 (W.D. Pa. 2010) (federal E-rate program); *Spann v. Word of Faith Christian Ctr. Church*, 559 F. Supp. 2d 759, 240 EDUC. L. REP. 626 (S.D. Miss. 2008) (federal vouchers).
- ²² See, e.g., Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:74).
- ²³ 28 C.F.R. § 36.302(a). The higher standard applies to double-covered entities. *Id.* § 36.103(a); see also Zirkel 2000, *supra* note 19, at 763. For recent examples, see *United States v. Nobel Learning Communities, Inc.*, 676 F. Supp. 2d 379, 254 EDUC. L. REP. 180 (E.D. Pa. 2009); *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252, 252 ED. LAW REP. 139 (D.N.H. 2009). **For application of the religious exemption of the ADA, see, e.g., Sky R. v. Haddonfield Friends Sch.**, 67 IDELR ¶ 180 (D.N.J. 2016).
- ²⁴ 20 U.S.C. §§ 1400–1419. These sections are Part B, but the statute is even longer in its entirety, extending to *id.* § 1482.
- ²⁵ 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (20143)). The pertinent provisions that define disability and provide for attorneys’ fees are, respectively, at 29 U.S.C. §§ 705(20) and 794(a).
- ²⁶ 42 U.S.C. §§ 12101–12189. **Part I is specific to employment, and the remaining parts extend to *id.* § 12213.**
- ²⁷ 34 C.F.R. Part 300. This approximated length more than doubles upon counting the commentary and appendices accompanying the regulations. 71 Fed. Reg. 46,540 *et seq.* (Aug. 14, 2006)
- ²⁸ See, e.g., **CG v. Commonwealth of Pennsylvania**, 734 F.3d 229, 234, 298 EDUC. L. REP. 229 (3d Cir. 2013) (citing **W.B. v. Matula**, 67 F.3d 484, 492–93, 104 EDUC. L. REP. 28 (3d Cir. 1995)).
- ²⁹ **20 U.S.C. § 1464(d). For these reports, see <http://www2.ed.gov/about/reports/annual/osep/index.html>**
- ³⁰ 34 C.F.R. Part 104.
- ³¹ *Id.*
- ³² **20 U.S.C. § 3413(b)(1). For these reports, which cover Title VI and Title IX as well as § 504 and the ADA, in relation to students, see <http://www2.ed.gov/about/offices/list/ocr/congress.html>**
- ³³ 28 C.F.R. Part 35. Moreover, these regulations are not at all specific to public schools. For the regulations specific to employment and private entities that provide public accommodations (including private schools), see *id.* Parts 1630 and 36, respectively.
- ³⁴ ***Id.* However, the standard for causation is different. See, e.g., CG v. Pennsylvania Dep’t of Educ.**, 734 F.3d at 235–36, 298 EDUC. L. REP. 229 (citing 42 U.S.C. § 12132 (“by reason of such disability”) in comparison to § 504’s more strict “solely by reason of her or his disability.” 29 U.S.C. § 794(a)).
- ³⁵ For the enforcement procedures and offices, see ZIRKEL, *supra* note 1, at App. 10. **For a recent decision rejecting a parent’s suit against OCR, challenging its “opaque” decision, see McKnight v. U.S. Dep’t of Educ. Office for Civil Rights**, 2017 WL 1383449 (D. Nev. Apr. 12, 2017), *adopting* 2017 WL 136 3333 (D. Nev. Feb. 13, 2017).

- ³⁶ *See, e.g.*, 28 C.F.R. § 35.171; *see also* **Frequently Asked Questions on Effective Communication for Students with Vision, Hearing, of Speech Disabilities in Public Elementary and Secondary Schools**, 64 IDELR ¶ 160 (DOJ/OSERS/OCR 2014).
- ³⁷ OCR enforces ADA student issues in the schools in tandem with § 504. *See, e.g.*, OCR Senior Staff Memorandum, 19 IDELR 886 (OCR 1992).
- ³⁸ *See, e.g.*, **Gates-Chili Cent. Sch. Dist.**, 65 IDELR ¶ 152 (DOJ 2015).
- ³⁹ For examples, see ZIRKEL, *supra* note 1, at App. 4.
- ⁴⁰ For examples, see ZIRKEL, *supra* note 1, at App. 3.
- ⁴¹ *See, e.g.*, OCR Memorandum, 19 IDELR 875 (OCR 1993).
- ⁴² *See, e.g.*, Perry A. Zirkel, Section 504 Emerging Case Law Developments (2011) (video presentation available via www.nasde.org); *see also* Perry A. Zirkel, **Section 504 for Special Education Leaders: Persisting and Emerging Issues**, 25 J. SPECIAL EDUC. LEADERSHIP 99 (2014).
- ⁴³ *See generally* ZIRKEL, *supra* note 1.
- ⁴⁴ *See, e.g.*, Alexis v. Bd. of Educ., Baltimore Pub. Schs., 286 F. Supp. 2d 551, 182 EDUC. L. REP. 830 (D. Md. 2003); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380, 182 EDUC. L. REP. 808 (D. Del. 2003); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 164 EDUC. L. REP. 108 (E.D. Pa. 2002).
- ⁴⁵ *See generally* ZIRKEL, *supra* note 1.
- ⁴⁶ *See, e.g.*, 34 C.F.R. §§ 300.18 (highly qualified teachers), 300.35 (scientifically based research), 300.157 (AYP performance goals), and 300.306(b) (1)(i) (eligibility exclusion); *see also* Perry A. Zirkel, **NCLB: What Does It Mean for Students with Disabilities?**, 185 EDUC. L. REP. 805 (2004). **The reference here to the No Child Left Behind Act (NCLB) applies as well to its successor legislation, the Every Student Succeeds Act (ESSA). For example, the ESSA discontinued the requirement for highly qualified teachers, with a conforming amendment to the IDEA to do the same for the special education context.**
- ⁴⁷ *See, e.g.*, Perry A. Zirkel, **Initial Implications of the NCLB for Section 504**, 191 EDUC. L. REP. 591 (2004).
- ⁴⁸ The replacement of “eligibility” with “identification” is based on the expanded effect of the ADA that results in the possibility of a child identified as meeting the definition of disability under § 504 but not needing—and, thus, not eligible—for FAPE. *See infra* note 72.
- ⁴⁹ 34 C.F.R. § 300.8 (including addition of Tourette syndrome to OHI).
- ⁵⁰ *Id.* § 104.3(j). *See, e.g.*, Perry A. Zirkel, **A Step-by-Step Process for §504/ADA Eligibility Determinations**, 239 EDUC. L. REP. 333 (2009). The other two prongs – “record of” and “regarded as” – are not applicable to FAPE. *See* Senior Staff Memorandum, 19 IDELR 894 (OCR 1992). **Either of these other two prongs occasionally arise in an exclusion case. See, e.g., Chadam v. Palo Alto Unified Sch. Dist.**, 666 F. App’x 615, 340 EDUC. L. REP. 100 (9th Cir. 2016). For a snapshot of school district eligibility practices prior to the ADA, *see* Rachel Holler & Perry A. Zirkel, **Section 504 and Public Schools: A National Survey Concerning “Section 504-Only” Students**, 91 NASSP BULL. 19 (September 2008). **For the national proportion of 504-only students after**
- the ADA, see Perry A. Zirkel & John M. Waters, Section 504-Only Students: Updated National Incident Data**, 27 J. DISABILITY POL’Y STUD. 67 (2016). **Although OCR treats IDEA students as also eligible under Section 504, the courts do not view this double coverage as being automatic. See, e.g., B.C. v. Mount Vernon Sch. Dist.**, 837 F.3d 152, 336 EDUC. L. REP. 141 (2d Cir. 2016); **Mann v. La. High Sch. Athletic Ass’n**, 535 F. App’x 405, 211, 299 EDUC. L. REP. 445 (5th Cir. 2013); **Ellenberg v. N.M. Military Inst.**, 572 F.3d 815, 820–22, 246 EDUC. L. REP. 713 (10th Cir. 2009).
- ⁵¹ For the overlapping major activity of learning, however, the courts have seemed to narrow the difference in coverage considerably, such that providing a 504 plan as, in effect, a consolation prize would be clearly questionable. *See, e.g.*, N.L. v. Knox Cty. Sch., 315 F.3d 688 (6th Cir. 2003); *see also* Perry A. Zirkel, **Conducting Legally Defensible Eligibility Determinations Under Section 504 and the ADA**, 176 EDUC. L. REP. 1 (2003). For more recent judicial interpretations, which have continued this restrictive trend, *see, e.g.*, Wong v. Regents of Univ. of California, 410 F.3d 1052, 198 EDUC. L. REP. 471 (9th Cir. 2005); Marlon v. W. New England Coll., 124 F. App’x 15, 196 EDUC. L. REP. 471 (1st Cir. 2005); Soirez v. Vermilion Parish Sch. Dist., 44 IDELR ¶ 254 (W.D. La. 2005); Marshall v. Sisters of Holy Family of Nazareth, 44 IDELR ¶ 190 (E.D. Pa. 2005); *cf.* Tesmer v. Colo. High Sch. Activities Ass’n, 140 P.3d 249, 211 EDUC. L. REP. 998 (Colo. Ct. App. 2006) (analogous state law). However, the ADA directs the courts to take a more expansive and liberal view in construing the three elements of the definition of disability. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C §§ 12101-12102). For the latest OCR interpretation, *see* Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (OCR 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>.
- ⁵² For example, the ADA adds reading and concentration to the enumerated examples of major life activities. **42 U.S.C §§ 12101-12102. As further examples, the subsequent regulations add writing, speaking, and interacting with others.** 28 C.F.R. § 35.108.
- ⁵³ For example, the ADA specifies eating, sleeping, and the various major bodily functions. **42 U.S.C §§ 12101-12102. As further examples, the subsequent regulations add lifting, bending, reaching, and immune system functions.** 28 C.F.R. § 35.108.
- ⁵⁴ *See generally* Robert A. Garda, **Untangling Eligibility Requirements Under the Individuals with Disabilities Education Act**, 69 Mo. L. REV. 441 (2004); *cf.* Mark C. Weber, **The IDEA Eligibility Mess**, 57 Buff. L. Rev. 83 (2009). The eroded exception is the severe-discrepancy standard for SLD, wherein the child’s “ability” is the frame of reference. The recent regulations, following Congress’s direction, have eliminated the severe-discrepancy requirement, delegating to states whether to determine whether it is permissive or prohibited at the local level. 34 C.F.R. § 300.307(a) and 300.309.
- ⁵⁵ *See, e.g.*, Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 157 EDUC. L. REP. 520 (8th Cir. 2001); *see also* Zirkel 2000, *supra* note 19, at 761.
- ⁵⁶ In the ADA, Congress was clear in dramatically reversing the Supreme Court’s interpretation in the *Sutton* trilogy. Pub. L. No. 110-325, 122 Stat. 3553 (2008). Similarly, the ADA provides for determining substantial limitation for impairments that are episodic or in remission at the time the impairment is active. *Id.*
- ⁵⁷ *See, e.g.*, 34 C.F.R. §§ 300.111, 300.131, and 300.534. **For the case law developments of the individual obligation, see, e.g., Perry A. Zirkel, Child Find Under the IDEA: An Empirical Analysis of the Judicial Case Law**, 45 COMMUNIQUE 4 (May 2017); **Perry A. Zirkel, Child Find: The “Reasonable Period” Requirement**, 311 EDUC. L. REP. 576 (2015); **Perry A. Zirkel, “Child Find”: The Lore v. the Law**, 307 EDUC. L. REP. 574 (2014).
- ⁵⁸ 34 C.F.R. § 104.35(a) (“believed to need”). For its arguably lesser strength, *see, e.g.*, T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997); *cf.* **G.C. v. Owensboro Pub. Sch.**, 711 F.3d 623 (6th Cir. 2013) (lack of bad faith or gross misjudgment). Distinguishable from “child find” for “pure” 504 students is that for students who are also covered by the IDEA. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 104 EDUC. L. REP. 28 (3d Cir. 1995); **Lauren G. v. W. Chester Area Sch. Dist.**, 906 F. Supp. 2d 375, 292 EDUC. L. REP. 680 (E.D. Pa. 2012); *O.F. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 175 EDUC. L. REP. 145 (E.D. Pa. 2002).
- ⁵⁹ *See, e.g.*, Perry A. Zirkel, **The Law of Evaluations Under the IDEA: An Annotated Update**, 297 EDUC. L. REP. 637 (2013).
- ⁶⁰ *See, e.g.*, Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994); Letter to Parker, 18 IDELR 963 (OSEP 1991).
- ⁶¹ *See, e.g.*, Letter to Williams, 21 IDELR 73 (OCR 1994) (reprinted in ZIRKEL, *supra* note 1, at App. 2:78). However, if the district determines that a medical assessment is necessary, the assessment must be at no cost to the parents. *See, e.g.*, Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:74).
- ⁶² 34 C.F.R. § 300.502 (including limitation of entitlement for those at public expense to one per year). *See, e.g.*, Perry A. Zirkel, **Independent Educational Evaluation Reimbursement Under the IDEA: An Update**, 306 EDUC. L. REP. 32 (2014); *cf.* Susan Etscheid, **Ascertaining the Adequacy, Scope, and Utility of District Evaluations**, 69 EXCEPTIONAL CHILD. 227 (2003).
- ⁶³ *See, e.g.*, Randolph (MA) Pub. Sch., 21 IDELR 816 (OCR 1994).
- ⁶⁴ *See, e.g.*, PERRY A. ZIRKEL, **THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY** (2006) (available via www.cec.sped.org).
- ⁶⁵ **One branch is eligibility case law, but the other—child find—may also in some cases mean lack of coverage. See, e.g., D.G. v. Flour Bluff Indep. Sch. Dist.**, 481 F. App’x 887, 286 EDUC. L. REP. 131 (5th Cir. 2012) (5th Cir. 2012).
- ⁶⁶ **S.H. v. Lower Merion Sch. Dist.**, 729 F.3d 248, 297 EDUC. L. REP. 58 (3d Cir. 2013); *see also* **A.G. v. Lower Merion Sch. Dist.**, 542 F. App’x 194, 301 EDUC. L. REP. 61, 62 IDELR ¶ 102 (3d Cir. 2013).
- ⁶⁷ 34 C.F.R. § 300.309. *See, e.g.*, Perry A. Zirkel

- & Lisa Thomas, *State Laws and Guidelines for Implementing RTI*, 43 TEACHING EXCEPTIONAL CHILD. 60 (January 2010). For a comprehensive canvassing of the applicable sources, including policy letters, see Zirkel, *supra* note 6.
- ⁶⁸ See, e.g., Perry A. Zirkel, *Checklist for Identifying Students Eligible Under the IDEA Classification of Emotional Disturbance: An Update*, 286 EDUC. L. REP. 7 (2013).
- ⁶⁹ Perry A. Zirkel, *ADHD Checklist for Identifying Students Under the IDEA and Section 504/ADA*, 293 EDUC. L. REP. 13 (2013).
- ⁷⁰ See, e.g., Harrison (CO) Sch. Dist., 57 IDELR ¶ 295 (OCR 2011); Polk Cty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).
- ⁷¹ See, e.g., R.K. v. Bd. of Educ. of Scott Cty., 494 F. App'x 589, 289 EDUC. L. REP. 563 (6th Cir. 2012); see also Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 EDUC. L. REP. 577 (2014).
- ⁷² *Id.* § 104.33(b). For the possibility, on a limited basis, of “technically eligible” students in light of the ADA, i.e., those who would qualify as having a disability but not need FAPE (due to mitigation or remission), see Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (OCR 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>
- ⁷³ Andrew F. v. Douglas Cty. Sch. Dist., RE-1, 137 S. Ct. 988 (2017).
- ⁷⁴ See, e.g., Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?* 106 EDUC. L. REP. 471 (1996); see also Mark H. v. Hamamoto, 513 F.3d 922, 229 EDUC. L. REP. 53 (9th Cir. 2008) (commensurate opportunity); **Ridley Sch. Dist. v. M.R., 680 F.3d 260, 280 EDUC. L. REP. 37 (3d Cir. 2012)**; Campbell v. Bd. of Educ., 58 F. App'x 162, 174 EDUC. L. REP. 826 (6th Cir. 2003); R.K. v. Bd. of Educ. of Scott Cty., 755 F. Supp. 2d 800, 266 EDUC. L. REP. 193 (E.D. Ky. 2010) (reasonable accommodation). Another possibility is importing the IDEA’s benefit standard to § 504. Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 428, 164 EDUC. L. REP. 108 (E.D. Pa. 2002) (engrafting Third Circuit’s IDEA meaningful benefit standard on to Second Circuit’s § 504 reasonable accommodation standard, citing *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 147 EDUC. L. REP. 39 (2d Cir. 2000)). **Another decision differentiates Section 504 as focusing on the design of the IEP and whether it provided meaningful access. Mark H. v. Hamamoto, 620 F.3d 1090 (9th Cir. 2010).**
- ⁷⁵ This conclusion is based on the institution-focused definition of “recipient.” 34 C.F.R. § 104.3. For commensurate opportunity, see the § 504 definition of FAPE. *Id.* § 104.33(a). For reasonable accommodation, the basis is more a matter of case law, with the converse concept of undue fiscal hardship also having an institutional focus.
- ⁷⁶ 34 C.F.R. § 104.39. **For possible supersedence, see *infra* note 77.**
- ⁷⁷ 42 U.S.C. § 12182(b)(2)(A)(ii). It is unclear whether this higher standard supersedes the lower § 504 standard for private schools (*supra* note 77 and accompanying text). For the relevant interrelationship language, see 28 C.F.R. § 36.103(a).
- ⁷⁸ **K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088, 296 EDUC. L. REP. 800 (9th Cir. 2013), cert. denied, 134 S. Ct. 1493 (2014) (ruling that compliance with the IDEA FAPE requirement does not necessarily meet the substantive standard of the ADA’s Title II effective communication regulation). For an analysis of this court decision and its possible limitations, see Perry A. Zirkel, *Three Birds with One Stone: Does Meeting the Requirements for an IDEA-Eligible Student Also Comply with the Requirements of Section 504 and the ADA?* 300 EDUC. L. REP. 29 (2014). For agency interpretations, see Letter to Negron, 65 IDELR ¶ 304 (DOJ/OCR/OSERS 2015); Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary and Secondary Schools, 64 IDELR ¶ 180 (DOJ/OSERS/OCR 2014). According to this agency guidance, the student’s preference is entitled to primary consideration. **More specifically, the district must honor the student’s choice unless the district can show that its alternative is equally effective in terms of participation and benefit. *Id.* at 8. Yet, for an unpublished decision in which a hearing impaired student was successful in obtaining such services under the IDEA, see DeKalb Cty. Bd. of Educ. v. Manifold, 65 IDELR ¶ 268 (N.D. Ga. 2015).****
- ⁷⁹ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 513(a)(2).
- ⁸⁰ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(ii) (seemingly separable role for procedural violation where district “significantly impede[d] the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child”). **For a systematic analysis of the pertinent case law, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement Under the IDEA?* 15 CONN. PUB. INT. L.J. 1 (2016).**
- ⁸¹ See, e.g., Power v. Sch. Bd., 276 F. Supp. 2d 515, 181 EDUC. L. REP. 145 (E.D. Va. 2003); A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 130 EDUC. L. REP. 1262 (D. Conn. 1998). **However, OCR, which is the parents’ other option as a formal dispute resolution forum, focuses strictly and—with a limited exception for extraordinary circumstances—on procedural issues. See, e.g., *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, 67 IDELR ¶ 189 (OCR 2015) - item 5.** For the limited exception, see, e.g., *Gloucester Cty. (VA) Pub. Sch.*, 49 IDELR ¶ 21 (OCR 2007) (life-threatening food allergy).
- ⁸² See, e.g., Perry A. Zirkel & Eddie Bauer, *The Third Dimension of FAPE Under the IDEA: Implementation*, 36 J. NAT’L ADMIN. L. JUDICIARY 409 (2016).
- ⁸³ 34 C.F.R. § 300.324. **For double-covered students, the generally applicable requirement is an IEP, not both an IEP and a 504 plan. *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities*, 67 IDELR ¶ 189 (OCR 2015) (item 36).**
- ⁸⁴ See, e.g., Susan Etscheidt, *Extended School Year Services: A Review of Eligibility Criteria and Program Appropriateness*, 27 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 188 (2002).
- ⁸⁵ 34 C.F.R. § 300.323(c)(2). For a recent interpretation, see D.D. v. N.Y.C. Bd. of Educ., 465 F.3d 503, 213 EDUC. L. REP. 353 (2d Cir. 2006).
- ⁸⁶ See, e.g., *Nixon v. Greenup Cty. Sch. Dist.*, 890 F. Supp. 2d 753, 289 EDUC. L. REP. 703 (E.D. Ky. 2012); cf. *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 302 EDUC. L. REP. 31 (7th Cir. 2014) (alternative of reasonable accommodation within safety context).
- ⁸⁷ For a more specific tabular analysis, see Perry A. Zirkel, *Comparison of IDEA IEPs and Section 504 Accommodations Plans*, 191 EDUC. L. REP. 563 (2004). **For a more recent analysis in light of the ADA, see Zirkel, *supra* note 3.**
- ⁸⁸ **34 C.F.R. § 300.114 (including education with nondisabled students “to the maximum extent appropriate”).**
- ⁸⁹ See, e.g., 34 C.F.R. §§ 300.104 and 300.115.
- ⁹⁰ See, e.g., Perry A. Zirkel, *The “Inclusion” Case Law: A Factor Analysis*, 127 EDUC. L. REP. 533 (1988).
- ⁹¹ *Id.* § 104.33(c)(3). The case law interpreting this provision has been mixed. See, e.g., ZIRKEL, *supra* note 1, at 3:112.
- ⁹² See, e.g., Bess v. Kanawha Cty. Bd. of Educ., 53 IDELR ¶ 71 (S.D. W.Va. 2009) (constructive exclusions).
- ⁹³ See, e.g., 28 C.F.R. § 35.130(d). See, e.g., *S.S. v. City of Springfield*, 146 F. Supp. 3d 414, 331 EDUC. L. REP. 214 (D. Mass. 2015). ***But cf. Frank v. Sachem Sch. Dist.*, 633 F. App'x 14 (2d Cir. 2016) (rejecting ADA integration challenge to residential placement of student with ED).**
- ⁹⁴ See *supra* note 14 and accompanying text.
- ⁹⁵ See *supra* note 21 and accompanying text. For the limited obligation of the district of residence based on interpretation of Pennsylvania law, see *Lower Merion School District v. Doe*, 931 A.2d 640, 224 EDUC. L. REP. 312 (Pa. 2007). For applications of § 504 to students that the IEP team places in private schools, see, e.g., *C.D. v. N.Y.C. Dep’t of Educ.* 52 IDELR ¶ 8 (S.D.N.Y. 2009); *P.N. v. Greco*, 282 F. Supp. 2d 221, 182 EDUC. L. REP. 221 (D.N.J. 2003). **For the lack of a school district obligation w/o such special circumstances, see *D.L. v. Baltimore City Bd. of Sch. Comm’rs*, 706 F.3d 256, 289 EDUC. L. REP. 493 (4th Cir. 2013).**
- ⁹⁶ See *supra* note 15 and accompanying text.
- ⁹⁷ See *supra* note 22 and accompanying text.
- ⁹⁸ In contrast, the limited parent’s success had been under state laws. See, e.g., Perry A. Zirkel, *Service Animals in Public Schools*, 257 EDUC. L. REP. 525 (2010).
- ⁹⁹ 28 C.F.R. §§ 35.104 and 35.136. The primary limitations on access are based on these two permissible questions, unless this information is readily apparent: 1) “if the animal is required because of a disability,” and 2) “what work or task the animal has been trained to perform.” On the other hand, the regulations do not allow the district to “require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal.” *Id.* § 35.136(f). Examples of qualifying and disqualifying answers for question 1 respectively include “helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors” and “the provision of emotional

- support, well-being, comfort, or companionship.”⁷⁷ *Id.* § 35.104. **For illustrative decisions, see AP v. Pennsbury Sch. Dist., 68 IDELR ¶ 132 (E.D. Pa. 2016) (denying preliminary injunction that would have allowed re-access to service dog that bit another student); United States v. Gates-Chili Cent. Sch. Dist., 198 F. Supp. 3d 228, 339 EDUC. L. REP. 789 (W.D.N.Y. 2016) (preserving for further proceedings whether the student with disabilities was able to “handle” the service dog); Riley v. Sch. Admin. Unit #23, 67 IDELR ¶ 8 (D.N.H. 2015) (concluding that district is not required to provide access to service dog where the child is not able to serve as the handler and the requested staff assistance qualifies under the supervision exclusion); Alboniga v. Broward Cnty. Sch. Bd., 87 F. Supp. 3d 1319, 321 EDUC. L. REP. 331 (S.D. Fla. 2015) (enjoining district from requiring parents to maintain liability insurance, arranging for vaccinations beyond state law, and providing a handler); C.C. v. Cypress Sch. Dist., 56 IDELR ¶ 295 (C.D. Cal. 2011) (granting preliminary injunction for child with autism to have service dog in school). For a recent synthesis of the case law, Zirkel, *supra* note 7.**
- ¹⁰⁰ 34 C.F.R. § 300.504(c) (including additions for the limitations periods).
- ¹⁰¹ See, e.g., Perry A. Zirkel, *Notice of Procedural Safeguards Under Section 504 and the ADA*, 5 SECTION 504 COMPLIANCE ADVISER 3 (May 2001).
- ¹⁰² See, e.g., Lynn Daggett, Perry A. Zirkel & Leeann Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REF. 717 (2005).
- ¹⁰³ 34 C.F.R. § 300.321 (IEP team). For evaluation and reevaluation, the IDEA regulations continue to require, in addition to the IEP team members, “other qualified professionals, as appropriate.” *Id.* § 300.305(a). However, the same regulations delegate the determination of eligibility to “a group of qualified professionals and the parent.” *Id.* § 300.306(a)(1). The difference may be significant. See, e.g., Elida Local Sch. Dist. Bd. of Educ., 252 F. Supp. 2d 476, 176 EDUC. L. REP. 143 (N.D. Ohio 2003). In addition, the regulations continue, unchanged, the specified members for determining SLD eligibility. 34 C.F.R. § 300.308. Finally, the regulations also continue to require the placement team to include the parent and to meet the three criteria that match § 504. *Id.* § 300.116(a)(1).
- ¹⁰⁴ 34 C.F.R. § 104.35(c). Worded in terms of double-covered students, the regulations specify the third criterion as “placement options.” *Id.*
- ¹⁰⁵ See, e.g., *id.* §§ 300.603–300.621 (incorporating and reinforcing FERPA); see also 300.123 (migratory children), 300.132 (parentally placed private school children), 300.229 and 300.535(b) (discipline). However, the IDEA regulations require that parent disputes about misleading, inaccurate, or other privacy-violating information in student records proceed under the hearing process of FERPA. *Id.* §§ 300.619–300.621. This requirement, unless interpreted as being in the nature of exhaustion, would appear to deprive IHOs of jurisdiction of these matters.
- ¹⁰⁶ *Id.* § 104.36.
- ¹⁰⁷ *Id.* § 300.300 (including additional provisions for initial evaluations).
- ¹⁰⁸ See, e.g., **OCR, Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools 19 (2016), <https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf>**; OCR, Frequently Asked Questions about Section 504 and the Education of Students with Disabilities (2009), <http://www.ed.gov/about/offices/list/ocr/504faq.html>; Letter to Durham, 27 IDELR 380 (OCR 1997); OCR Senior Staff Memorandum, 19 IDELR 892 (1992); see also Vallivue (ID) Sch. Dist., 35 IDELR ¶ 69 (OCR 2001). The Durham letter resolved the ambiguity regarding reevaluation that arose in Letter to Zirkel, 22 IDELR 667 (OCR 1995).
- ¹⁰⁹ 34 C.F.R. §§ 300.300(b)(1)–(3).
- ¹¹⁰ *Id.* §§ 300.300(b)(4) and 300.9(c)(3). For related agency interpretations, see Letter to Ward, 56 IDELR ¶ 238 (OSEP 2010); Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009) (interpreting the regulation as requiring districts to accept either parent’s revocation of consent regardless of which parent originally consented to the services).
- ¹¹¹ See, e.g., Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR ¶ 197 (W.D. Mo. 2012); cf. Jason E. v. Dep’t of Educ., State of Haw., 64 IDELR ¶ 211 (D. Haw. 2014) (ruling that parent did not show that 504 plan that district instituted in the wake of the revocation denied FAPE under § 504); Kimble v. Douglas Cnty. Sch. Dist. RE-1, 925 F. Supp. 2d 1176, 295 EDUC. L. REP. 637 (D. Colo. 2013) (ruling that district has discretion not to apply IDEA revocation to § 504). But cf. D.F. v. Leon Cnty. Sch. Bd., 62 IDELR ¶ 167 (N.D. Fla. 2014) (ruling that child retains right to part of IEP under § 504, in this case being assistive technology). For a synthesis of the case law, see Perry A. Zirkel, *Is a 504 Plan Required (or Permitted) in the Wake of Revocation of an IEP?* 321 EDUC. L. REP. 623 (2015).
- ¹¹² Compare Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010), with Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87). The most recent OCR FAQ rather clearly implies that Section 504 requires consent for initial services. Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (OCR 2012) – item 43, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>.
- ¹¹³ *Id.* § 300.303. The previous regulations merely referred to “conditions,” but the new regulations specify them in terms of “the educational or related services needs, including improved academic achievement and functional performance, of the child.” *Id.* § 300.303(a)(1).
- ¹¹⁴ See, e.g., Garden City (NY) Union Free Sch. Dist., EHLR 353:327 (OCR 1989).
- ¹¹⁵ See, e.g., 34 C.F.R. § 104.35(a); see also OCR Staff Memorandum, EHLR 307:05 (OCR 1988). The term “significant” does not appear to add anything significant to the corresponding term under the IDEA. For example, the operational definition is the same in terms of both consecutive and cumulative days. Compare *id.*, with 34 C.F.R. § 300.536(a)(2).
- ¹¹⁶ For the impartiality requirement, see, e.g., Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N.D. L. REV. 109 (2007).
- ¹¹⁷ For the codification, which accompanies the reversal of the exclusivity doctrine of *Smith v. Robinson*, 468 U.S. 992 (1984), see 20 U.S.C. § 1415(l). The limited exceptions are relatively well established, with the only major exception being as applied to claims for money damages. Zirkel 2000, *supra* note 19, at 762 n.7
- ¹¹⁸ See, e.g., Perry A. Zirkel, *Impartial Hearings Under Section 504*, 334 EDUC. L. REP. 51 (2016); Perry A. Zirkel, *The Public Schools’ Obligation for Impartial Hearings Under Section 504*, 22 WIDENER L.J. 135 (2014).
- ¹¹⁹ See, e.g., Peter Maher, *Caution on Exhaustion: The Courts’ Misinterpretation of the IDEA’s Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but Not by the IDEA*, 44 CONN. L. REV. 259 (2011). **The Supreme Court recently ruled that IDEA’s exhaustion requirement applies to § 504 and other claims if their gravamen is FAPE. Fry v. Napoleon Sch. Dist., 137 S.Ct. 743, 340 EDUC. L. REP. 19 (2017). The Court sidestepped whether exhaustion applies if their gravamen is not FAPE but the requested remedy is attorneys fees.**
- ¹²⁰ 20 U.S.C. § 1414(a)(1)(D)(ii); 34 C.F.R. § 300.300(b).
- ¹²¹ 34 C.F.R. § 300.300(b)(4)(ii).
- ¹²² See, e.g., Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87); Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:74).
- ¹²³ 34 C.F.R. § 300.518. **For a comprehensive canvassing, see, e.g., Perry A. Zirkel, “Stay-Put” Under the IDEA: An Updated Overview**, 330 EDUC. L. REP. 1 (2016).
- ¹²⁴ Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87).
- ¹²⁵ For a broad sampling of cases across the various forms of discipline under the IDEA, § 504/ADA, and other legal bases, see Perry A. Zirkel, *Discipline of Students with Disabilities: An Update*, 235 EDUC. L. REP. 1 (2008).
- ¹²⁶ See, e.g., 34 C.F.R. § 300.530(b). For an overview, see, e.g., Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007).
- ¹²⁷ See, e.g., M.G. v. Crisfield, 547 F. Supp. 2d 399, 233 EDUC. L. REP. 109 (D.N.J. 2008) (applying § 504 “regarded as” prong to conditioning return for removal on special education evaluation).
- ¹²⁸ For removals, see, e.g., Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 EDUC. L. REP. 9 (2008). For other forms of discipline, see, e.g., Perry A. Zirkel, *Discipline Under Section 504*, 226 EDUC. L. REP. 9 (2008); cf. Zirkel, *supra* note 124 (various legal bases); see also Perry A. Zirkel & Caitlyn Lyons, *Restraining the Use of Restraints for Students with Disabilities*, 10 CONN. PUB. INTEREST L.J. 323 (2011).
- ¹²⁹ 34 C.F.R. § 300.534 (including narrowing the alternative bases and adding exceptions for refused consent).
- ¹³⁰ See, e.g., Paducah (KY) Indep. Sch. Dist., 32 IDELR ¶ 182 (OCR 1999); East Lycoming (PA) Sch. Dist., 32 IDELR ¶ 41 (OCR 1999); Aberdeen (MS) Sch. Dist., 32 IDELR ¶ 11 (OCR 1999); Terrell Cty. (GA) Sch. Dist., 29 IDELR 918 (OCR 1998). In one such case, OCR imported the IDEA

- provision as “current standards under disability law.” Washington (CA) Unified Sch. Dist., 29 IDELR 486 (OCR 1998).
- ¹³¹ 34 C.F.R. § 300.536.
- ¹³² See, e.g., OCR Memorandum, EHLR 307:07 (OCR 1989).
- ¹³³ 34 C.F.R. § 300.530(e). For detailed analyses of the new provisions and a sample form, see Perry A. Zirkel, *The New Legal Requirements for Manifestation Determinations Under the New IDEA*, 35 COMMUNIQUÉ 16 (Sept. 2006); Perry A. Zirkel, *Manifestation Determinations Under the IDEA: What the New Criteria Mean*, 19 J. SPECIAL EDUC. LEAD. 3 (2006). For recent case outcome trends, see **Perry A. Zirkel, Manifestation Determinations Under IDEA 2004: A Legal Analysis, 29 J. SPECIAL EDUC. LEAD. 32 (2016);** Perry A. Zirkel, *Manifestation Determinations Under the Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378 (2010).
- ¹³⁴ 34 C.F.R. § 300.520(a)(2). The ADA amendments to § 504 do not apply to the IDEA. See, e.g., Letter to Uhler, 18 IDELR 1238 (OSEP 1992).
- ¹³⁵ See, e.g., OCR Senior Staff Memorandum, 16 EHLR 491 (OCR 1989). In combination with the reevaluation requirement, this M-D appears to consist of two criteria—relationship and appropriateness. See, e.g., Modesto (CA) City High Sch. Dist., 38 IDELR ¶ 131 (OCR 2002). There is limited authority for the interpretation that the § 504 M-D requirement, at least in terms of prior notice (and a full reevaluation), is not as strict for 504-only, as compared to double-covered, students. See Modesto (CA) City High Sch. Dist., 38 IDELR ¶ 131 (OCR 2002); DeKalb Cty. (GA) Sch. Dist., 32 IDELR ¶ 8 (OCR 1999); cf. *J.M. v. Liberty Union H.S. Dist.*, 70 IDELR ¶ (N.D. Cal. 2017) (IDEA standard suffices); Centennial Sch. Dist. v. Phil L., 559 F. Supp. 2d 634, 235 EDUC. L. REP. 199 (E.D. Pa. 2008) (unclear requirement).
- ¹³⁶ 34 C.F.R. § 104.35(a); see also OCR, DISCIPLINE OF STUDENTS WITH HANDICAPS IN ELEMENTARY AND SECONDARY SCHOOLS (September 1992); OCR Staff Memorandum, 16 IDELR 491 (OCR 1989); OCR Memorandum, EHLR 307:05 (OCR 1988); see also Letter to Williams, 21 IDELR 73 (OCR 1994) (reprinted in ZIRKEL, *supra* note 1, at App. 2:78); *Isle of Wight Cty. (VA) Pub. Sch.*, 56 IDELR ¶ 111 (OCR 2010); *Rolla (MO) No. 31 Sch. Dist.*, 31 IDELR ¶ 189 (OCR 1999); *New Caney (TX) Indep. Sch. Dist.*, 30 IDELR 903 (OCR 1999).
- ¹³⁷ *Id.* The differences regarding lesser “removals” are subtle. First, OCR generally counts in-school suspensions and suspensions from the school bus towards these totals, whereas its IDEA counterpart, the U.S. Office of Special Education Programs (OSEP), only counts these days when, respectively, the child is not receiving FAPE as defined by the IEP or transportation is listed on the child’s IEP. Compare *Northport-E. Northport (NY) Union Free Sch. Dist.*, 27 IDELR 1150 (OCR 1997); *Response to Veir*, 20 IDELR 864 (OCR 1993), with 64 Fed. Register 12,619 (Mar. 12, 1999). Second, OCR will sometimes scrutinize suspensions from field trips, especially where the treatment is disparate from that accorded to nondisabled students and the reason for the exclusion is related to the child’s disability. See, e.g., *Grand Blanc (MI) Sch. Dist.*, 32 IDELR ¶ 153 (OCR 1999); *Hazelwood (MO) Sch. Dist.*, 28 IDELR 889 (OCR 1998). However, the limited judicial authority is not entirely consistent with OCR’s view. Compare *Jonathan G. v. Caddo Parish Sch. Bd.*, 875 F. Supp. 352, 97 EDUC. L. REP. 1052 (W.D. La. 1994) with *Yough Sch. Dist. v. M.S.*, 23 IDELR 807 (Pa. Commw. Ct. 1995).
- ¹³⁸ 20 U.S.C. § 705(20)(C)(iv); see also OCR Staff Memorandum, 17 IDELR 609 (OCR 1991).
- ¹³⁹ 34 C.F.R. § 300.530(f). **For respective analyses of the case law and state laws, see Perry A. Zirkel, An Update of Judicial Rulings Specific to FBAs or BIPs Under the IDEA and Corollary Special Education Laws, 51 J. SPECIAL EDUC. 50 (2017); Perry A. Zirkel, State Special Education Laws for Functional Behavioral Assessments and Behavior Intervention Plans: An Update, 45 COMMUNIQUÉ 4 (May 2016);** Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE L. REV. 175 (2011); Perry A. Zirkel, *State Special Education Laws for FBAs and BIPs*, 36 BEHAVIOR DISORDERS 262 (2011).
- ¹⁴⁰ *Id.* §§ 300.530(g) (including addition of “serious bodily injury”) and 300.532(b)(2)(ii) (requires IHO).
- ¹⁴¹ OCR has been silent in response to repeated letters of inquiry after the 1997 amendments to the IDEA, in contrast to its importation of such provisions prior to IDEA-97. Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87).
- ¹⁴² 34 C.F.R. §§ 300.111(a) and 300.30(d)(1). See, e.g., *Fisher v. Friendship Pub. Charter Sch.*, 857 F. Supp. 2d 64, 284 EDUC. L. REP. 120 (D.D.C. 2012).
- ¹⁴³ *Id.* § 300.530(d)(4).
- ¹⁴⁴ See, e.g., OCR Senior Staff Memorandum, EHLR 307:05 (OCR 1988); see also OSEP Memorandum, 95-16, 22 IDELR 531, 536 (OSERS 1995); *Bryan Cty. (GA) Sch. Dist.*, 20 IDELR 930 (OCR 1993).
- ¹⁴⁵ *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981). The present Eleventh Circuit is the former Unit B of the Fifth Circuit.
- ¹⁴⁶ 34 C.F.R. § 300.533. For a detailed analysis, see Perry A. Zirkel, *Stay-Put Under the IDEA Discipline Provisions: What Is New?*, 214 EDUC. L. REP. 467 (2007).
- ¹⁴⁷ For the contrasting presence of specific IDEA provisions, see *supra* note 145 and accompanying text.
- ¹⁴⁸ For the various formal alternate avenues available to double- and single-covered see, e.g., Perry A. Zirkel & Brooke L. McGuire, *A Roadmap to Legal Dispute Resolution for Parents of Students with Disabilities*, 23 J. SPECIAL EDUC. LEADERSHIP 100 (2010).
- ¹⁴⁹ See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2002).
- ¹⁵⁰ See *supra* note 37 **and accompanying text.**
- ¹⁵¹ See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008).
- ¹⁵² *Id.*
- ¹⁵³ See, e.g., Anastasia D’Angelo, Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?* 14 J. DISABILITY POL’Y STUD. 241 (2004).
- ¹⁵⁴ **34 C.F.R. § 104.7(b) (if 15 or more employees).**
- ¹⁵⁵ The limited exception is for “extraordinary circumstances.” See, e.g., **Protecting Students with Disabilities: Frequently Asked Questions** **about Section 504 and the Education of Children with Disabilities, 67 IDELR ¶ 189 (OCR 2015) (item 5).**
- ¹⁵⁶ For a broad selection of significant, published OCR LOFs, see generally ZIRKEL, *supra* note 1. For a smaller sampling, see Perry A. Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 EDUC. L. REP. 601 (1993). For an empirical analysis of the published LOFs, see Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 EDUC. L. REP. 369 (1997).
- ¹⁵⁷ **28 C.F.R. § 35.107(b) (if 50 or more employees).**
- ¹⁵⁸ However, the ultimate sanction, which under § 504 is termination of federal funding, is unclear.
- ¹⁵⁹ For a snapshot of the current state systems, see Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL’Y STUD. 3 (2010). For the frequency of adjudicated hearings, see **Perry A. Zirkel, Longitudinal Trends in Impartial Hearings Under the IDEA: A Follow-Up Analysis, 303 Educ. L. Rep. 1 (2014); Perry A. Zirkel, Longitudinal Trends in Impartial Hearings Under the IDEA, 302 Educ. L. Rep. 1 (2014);** Perry A. Zirkel & Karen Gischar, *Due Process Hearings Under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008). **For the outcomes as well as frequency of IDELR-published hearings, see, e.g., Perry A. Zirkel & Cathy A. Skidmore, National Trends in the Frequency and Outcomes of Hearing/Review Officer Decisions Under the IDEA: An Empirical Analysis, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014).**
- ¹⁶⁰ See, e.g., 34 C.F.R. §§ 300.507–300.515 (including new provisions for prehearing process, including resolution session).
- ¹⁶¹ *Id.*
- ¹⁶² See, e.g., Perry A. Zirkel & Anastasia D’Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 EDUC. L. REP. 731 (2002); see also D’Angelo, Lutz & Zirkel, *supra* note 154.
- ¹⁶³ **In a small minority of states, by law or policy, the state system for IDEA hearings is open for Section 504 claims on behalf of double-covered and/or Section 504-only students. See, e.g., Perry A. Zirkel, Impartial Hearings Under Section 504: A State-by-State Survey, 279 EDUC. L. REP. 1 (2014).**
- ¹⁶⁴ 34 C.F.R. § 104.36: “an impartial hearing with an opportunity for participation by the person’s parents ... and representation by counsel.”
- ¹⁶⁵ See Zirkel, *supra* note 118.
- ¹⁶⁶ **For a broad sampling of published case law, see Case Law Under the IDEA: 1998 to the Present, in IDEA: A HANDBOOK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS 790 (2014).**
- ¹⁶⁷ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 219 EDUC. L. REP. 39 (2007). For an analysis, see, e.g., Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District*, 248 EDUC. L. REP. 1 (2009).
- ¹⁶⁸ See, e.g., *Heffington v. Derby Unified Sch. Dist.*, 57 IDELR ¶ 256 (D. Kan. 2011); *D.A. v. Pleasantville Sch. Dist.*, 52 IDELR ¶ 135 (D.N.J. 2009).
- ¹⁶⁹ See, e.g., Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts’ Jurisdiction Under the Individuals with Disabilities Education Act,*

- 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).**
- ¹⁷⁰ For the current systems, see Zirkel & Scala, *supra* note 158.
- ¹⁷¹ See Zirkel 2000, *supra* note 19, at 762–63; *see also* R.J. v. McKinney Indep. Sch. Dist., 45 IDELR ¶ 9 (E.D. Tex. 2005).
- ¹⁷² *See, e.g.*, Bd. of Educ. of Valley Cent. Sch. Dist., 38 IDELR 276 (N.Y. SEA 2002); Mississippi State Dep't of Educ., EHLR 257:545 (OCR 1986). *But see* Weber v. Cranston Sch. Comm., 235 F. Supp. 2d 401, 174 EDUC. L. REP. 930 (D.R.I. 2003).
- ¹⁷³ 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2) and 300.516(b) (two years for hearing stage and 90 days for judicial stage unless specified in state law). **For an analysis of the latest major judicial interpretation, G.L. v. Ligonier Valley School Authority, 802 F.3d 601, 322 EDUC. L. REP. 633 (3d Cir. 2015), see Perry A. Zirkel, Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act, 35 J. NAT'L ASS'N. ADMIN. L. JUDICIARY 305 (2016).** Previous to the 2004 amendments, the IDEA was silent, and judicial interpretations varied from state to state. *See, e.g.*, Perry A. Zirkel & Peter Maher, *The Statute of Limitations Under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1 (2003). For the related issue of tolling, *see, e.g.*, Lynn Daggett, Perry A. Zirkel & LeeAnn Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REF. 717 (2005).
- ¹⁷⁴ *See, e.g.*, Zirkel 2000, *supra* note 19, at 765. For a more recent example, *see* Piazza v. Fla. Union Free Sch. Dist., 777 F. Supp. 2d 669, 270 EDUC. L. REP. 189 (S.D.N.Y. 2011). *But see* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 250 EDUC. L. REP. 517 (3d Cir. 2009). For the possibility of tolling in some states, *see, e.g.*, Bishop v. Children's Ctr. for Developmental Enrichment, 618 F.3d 533, 260 EDUC. L. REP. 580 (6th Cir. 2010); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 137 EDUC. L. REP. 150 (8th Cir. 1999); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980, 78 EDUC. L. REP. 208 (5th Cir. 1992); **Davis v. Blanchard, 175 F. Supp. 3d 581, 335 EDUC. L. REP. 1059 (M.D.N.C. 2016).**
- ¹⁷⁵ *See, e.g.*, Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 137 EDUC. L. REP. 150 (8th Cir. 1999).
- ¹⁷⁶ *See, e.g.*, Power v. Sch. Bd., 276 F. Supp. 2d 515, 181 EDUC. L. REP. 145 (E.D. Va. 2003); A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 130 EDUC. L. REP. 1262 (D. Conn. 1998); *cf.* Mark G. v. LeMahieu, 372 F. Supp. 2d 591, 199 EDUC. L. REP. 214 (D. Haw. 2005).
- ¹⁷⁷ Schaffer v. West, 546 U.S. 49, 203 Educ. L. Rep. 29 (2005); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006). **For an overview of the state law exceptions, see Perry A. Zirkel, Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act? 13 CONN. PUB. INT. L.J. 1 (2013).** Previously, the burden varied considerably among the jurisdictions. *See, e.g.*, Thomas Mayes, Perry A. Zirkel & Dixie Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Act*, 108 W.V. L. REV. 27 (2005).
- ¹⁷⁸ *See, e.g.*, Georgia State Conference of Branches of NAACP v. Ga., 775 F.2d 1403, 28 EDUC. L. REP. 339 (11th Cir. 1985).
- ¹⁷⁹ *See, e.g.*, Dyer v. Jefferson Cty. Sch. Dist. R-1, 905 F. Supp. 864, 105 EDUC. L. REP. 154 (D. Colo. 1995).
- ¹⁸⁰ *See, e.g.*, Bd. of Educ. v. Rowley, 458 U.S. 176, 205, 5 EDUC. L. REP. 34 (1982). The lower courts have arrived at varying interpretations of this judicial review standard. For example, some courts have limited it to the factual findings of the hearing officer. *See, e.g.*, L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 389 (3d Cir. 2006). The sources of variation include whether the state has a two-tier system of administrative adjudication under the IDEA and whether the court has exercised its discretion to take additional evidence. *See, e.g.*, Alex R. v. Forrestville Valley Cmty. Sch. Dist. No. 221, 375 F.3d 603, 189 EDUC. L. REP. 561 (7th Cir. 2004); Dale M. v. Bd. of Educ., 273 F.3d 813, 150 EDUC. L. REP. 372 (7th Cir. 2001). For empirical analysis of the deference standard, *see, e.g.*, Perry A. Zirkel, *Judicial Appeals for Hearing/Review Officer Decisions Under the IDEA*, 78 EXCEPTIONAL CHLD. 375 (2014); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHLD. 469 (1999).
- ¹⁸¹ *See, e.g.*, Centennial Sch. Dist. v. Phil L., 799 F. Supp. 2d 473, 274 EDUC. L. REP. 150 (E.D. Pa. 2011).
- ¹⁸² Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006). **For more general treatment, see Perry A. Zirkel, Expert Witnesses in Impartial Hearings Under the Individuals with Disabilities Education Act, 298 EDUC. L. REP. 648 (2014).**
- ¹⁸³ *See, e.g.*, **M.M. v. Sch. Dist. of Phila., 142 F. Supp. 3d 396, 330 EDUC. L. REP. 169 (E.D. Pa. 2015);** I.H. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 281 EDUC. L. REP. 1057 (M.D. Pa. 2012); L.T. v. Mansfield Sch. Dist., 53 IDELR ¶ 7 (D.N.J. 2009).
- ¹⁸⁴ 20 U.S.C. § 1415(i)(2)(C). ***See, e.g.*, Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 182 EDUC. L. REP. 770 (11th Cir. 2003); Mr. & Mrs. A. v. Greenwich Bd. of Educ., 66 IDELR ¶ 97 (D. Conn. 2015).**
- ¹⁸⁵ *See, e.g.*, K.I. v. Montgomery Pub. Sch., 54 IDELR ¶ 12 (M.D. Pa. 2010).
- ¹⁸⁶ The anti-retaliation protection in the IDEA is implicit at best, based on either a child-benefit reading of the Act or the legislative history in the 1986 Amendments. *See, e.g.*, Robert Suppa & Perry A. Zirkel, *Legal-Ethical Conflicts for Educator-Advocates of Handicapped Students*, 35 EDUC. L. REP. 9, 13–14 (1987). Nevertheless, courts have increasingly recognized this IDEA claim, subject to the exhaustion requirement. *See, e.g.*, Mosely v. Bd. of Educ., 434 F.3d 527, 218 EDUC. L. REP. 820 (7th Cir. 2006); Weber v. Cranston Sch. Comm., 212 F.3d 41, 144 EDUC. L. REP. 808 (1st Cir. 2002); Hesling v. Avon Grove Sch. Dist., 428 F. Supp. 2d 262, 209 EDUC. L. REP. 717 (E.D. Pa. 2006).
- ¹⁸⁷ *See, e.g.*, **Pollack v. Reg'l Sch. Unit 75, 660 F. App'x 1, 309 EDUC. L. REP. 921 (1st Cir. 2016); A.C. v. Shelby Cty. Bd. of Educ., 711 F.3d 687, 290 EDUC. L. REP. 542 (6th Cir. 2013);** K.R. v. Sch. Dist. of Phila., 373 F. App'x 204, 258 EDUC. L. REP. 1012 (3d Cir. 2010); M.M.R.-Z. v. Commonwealth of Puerto Rico, 528 F.3d 9, 233 EDUC. L. REP. 49 (1st Cir. 2008); Hesling v. Seidenberger, 286 F. App'x 773, 237 EDUC. L. REP. 102 (3d Cir. 2008); M.P. v. Indep. Sch. Dist. No. 727, 326 F.3d 975, 175 EDUC. L. REP. 424 (8th Cir. 2003); **Lee v. Natoms Unified Sch. Dist., 93 F. Supp. 3d 1160 (E.D. Cal. 2015); M.A. v. N.Y.C. Dep't of Educ., 1 F. Supp. 3d 125, 322 EDUC. L. REP. 301 (S.D.N.Y. 2014);** K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 201 EDUC. L. REP. 510 (S.D.N.Y. 2005); Vives v. Fajardo, 399 F. Supp. 2d 50, 205 EDUC. L. REP. 128 (D.P.R. 2005); P.N. v. Greco, 282 F. Supp. 2d 221, 182 EDUC. L. REP. 221 (D.N.J. 2003); Rick C. v. Lodi Sch. Dist., 32 IDELR ¶ 232 (W.D. Wis. 2000); Gupta v. Montgomery Cty. Pub. Sch., 25 IDELR 115 (D. Md. 1996); Prins v. Indep. Sch. Dist. No. 761, 27 IDELR 312 (D. Minn. 1995); *see also* OCR Letter to Colleague (October 26, 2010) (reprinted in Zirkel, *supra* note 1, at App. 2:101); Gina DiPietro & Perry A. Zirkel, *Employee Special Education Advocacy: Retaliation Claims Under the First Amendment, Section 504 and the ADA*, 257 EDUC. L. REP. 823 (2010); Perry A. Zirkel, *Protect Your District from Costly Claims of Disability Harassment*, 16 THE SPECIAL EDUCATOR 4 (Sept. 22, 2000).
- ¹⁸⁸ *See, e.g.*, 28 C.F.R. §§ 35.134(b) and 36.205–36.206. For a recent indirect example, *see* S.M. v. Sch. Dist. of Upper Dublin, 57 IDELR ¶ 96 (E.D. Pa. 2011) (applicable to PTA). ***But see* Todd v. Carstarphen, F. Supp. 3d (N.D. Ga. 2017).**
- ¹⁸⁹ *See, e.g.*, **Dear Colleague Letter, 61 IDELR ¶ 263 (OSEP 2013).**
- ¹⁹⁰ *See, e.g.*, **T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 869, 270 EDUC. L. REP. 593 (2d Cir. 2016).**
- ¹⁹¹ **Unlike the courts and earlier policy interpretations, OCR's latest announced policy squared with the IDEA in terms of not specifically requiring a disability connection. Dear Colleague Letter, 64 IDELR ¶ 115 (OCR 2014). However, the courts continue to require a nexus to disability. See, e.g., Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 84 F. Supp. 3d 221, 320 EDUC. L. REP. 888 (E.D.N.Y. 2015).**
- ¹⁹² **Nevertheless, the difficulties for attaining a judicial judgement for money damages are imposing. Compare Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 302 EDUC. L. REP. 492 (5th Cir. 2014); Long v. Murray Cty. Sch. Dist., 522 F. App'x 576 (11th Cir. 2013); Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 84 F. Supp. 3d 221, 320 EDUC. L. REP. 888 (E.D.N.Y. 2015); M.S. v. Marple Newtown Sch. Dist., 82 F. Supp. 3d 625, 320 EDUC. L. REP. 756 (E.D. Pa. 2015); Thomas v. Springfield Sch. Comm., 59 F. Supp. 3d 294, 316 EDUC. L. REP. 864 (D. Mass. 2014); Sutherland v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254, 301 EDUC. L. REP. 379 (N.D. Okla. 2013); Moore v. Chilton Cty. Bd. of Educ., 936 F. Supp. 2d 1300, 297 EDUC. L. REP. 282 (M.D. Ala. 2013), further proceedings, 1 F. Supp. 3d 1281, 307 EDUC. L. REP. 949 (M.D. Ala. 2014); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729, 292 EDUC. L. REP. 138 (W.D. Ark. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 287 EDUC. L. REP. 289 (W.D.N.Y. 2012); K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 201 EDUC. L. REP. 510 (S.D.N.Y. 2005) (rejecting liability), with Spring v. Allegany-Limestone Sch. Dist., 655 F. App'x 25, 337 EDUC. L. REP. 16 (2d Cir. 2016); S.S. v. E. Kentucky Univ.,**

532 F.3d 445, 234 EDUC. L. REP. 612 (6TH CIR. 2008); **K.R.S. v. BEDFORD CMTY. Sch. Dist., 109 F. Supp. 3d 1060, 325 EDUC. L. REP. 327 (S.D. Iowa 2015); Sutherland v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254, 301 EDUC. L. REP. 379 (N.D. Okla. 2013); C.L. v. Leander Indep. Sch. Dist., 61 IDELR ¶ 101 (W.D. Tex. 2013); M.J. v. Marion Indep. Sch. Dist., 61 IDELR ¶ 76 (W.D. Tex. 2013)**; Werth v. Bd. of Directors of the Pub. Sch., 472 F. Supp. 2d 1113, 217 EDUC. L. REP. 415 (E.D. Wis. 2007) (preserving liability for further proceedings).

¹⁹³ See, e.g., 34 C.F.R. § 300.177.

¹⁹⁴ Compare Lucht v. Molalla River Sch. Dist., 225 F.3d 1023, 147 EDUC. L. REP. 61 (9th Cir. 2000); Upper Valley Ass'n for Handicapped Citizens v. Blue Mountain Union Sch. Dist., 973 F. Supp. 479, 121 EDUC. L. REP. 71 (D. Vt. 1997), with Vultaggio v. Bd. of Educ., 343 F.3d 598, 180 EDUC. L. REP. 528 (2d Cir. 2003); Johnson v. Fridley Pub. Sch., 36 IDELR ¶ 129 (D. Minn. 2002); Megan C. v. Indep. Sch. Dist. No. 625, 57 F. Supp. 2d 776, 138 EDUC. L. REP. 167 (D. Minn. 1999).

¹⁹⁵ See, e.g., **Snell v. N. Thurston Sch. Dist., 66 IDELR ¶ 240 (W.D. Wash. 2015)**. Without the IDEA's specified limits, the § 504 and ADA attorneys' fees follow the more model of civil rights laws generally, including multipliers. However, the use of § 1983 potentially blurs this difference. See, e.g., Thomas Guernsey, *The Education for All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973*, 68 NEB. L. REV. 564, 578–79 (1989); Terry Seligmann, *A Diller, A Dollar: Section 1983 Damages Claims in Special Education Lawsuits*, 36 GA. L. REV. 465 (2002).

¹⁹⁶ See, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ADMIN. L. JUDICIARY 1 (2011); see also Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'L ADMIN. L. JUDICIARY 220 (2013).

¹⁹⁷ See, e.g., Perry A. Zirkel, *Tuition and Related Reimbursement Under the IDEA: A Decisional Checklist*, 282 EDUC. L. REP. 785 (2014).

¹⁹⁸ See, e.g., Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 EDUC. L. REP. 1 (2013); A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 257 EDUC. L. REP. 550 (2010); see also Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URBAN LAW. 281 (2013).

¹⁹⁹ See, e.g., **Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 292 EDUC. L. REP. 680 (E.D. Pa. 2012) (double-covered student with differential advantage)**; Borough of Palmyra Bd. of Educ. v. F.C., 2 F. Supp. 2d 637, 127 EDUC. L. REP. 113 (D.N.J. 1998) (504-only student).

²⁰⁰ See, e.g., Perry A. Zirkel, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 EDUC. L. REP. 745, 748 nn.13–14 (2004).

²⁰¹ See, e.g., C.O. v. Portland Pub. Sch., 679 F.3d 1162, 280 EDUC. L. REP. 28 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 859 (2013); Chambers v. Sch. Dist., 587 F.3d 176, 250 EDUC. L. REP. 884 (3d Cir. 2009); Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 210 EDUC. L. REP. 544 (1st Cir. 2006); Ortega v. Bibb Cty. Sch. Dist., 397 F.3d

1321 (11th Cir. 2005); Polera v. Bd. of Educ., 288 F.3d 478, 164 EDUC. L. REP. 573 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1260, 133 EDUC. L. REP. 106 (8th Cir. 2000); Sellers v. Sch. Bd., 141 F.3d 524, 125 EDUC. L. REP. 1078 (4th Cir. 1998).

²⁰² See, e.g., Zirkel 2000, *supra* note 19, at 764. For recent examples, see **Shadie v. Hazelton Sch. Dist., 580 F. App'x 67, 310 EDUC. L. REP. 668 (3d Cir. 2014); Lebron v. Commonwealth of Puerto Rico, 770 F.3d 25, 310 EDUC. L. REP. 71 (1st Cir. 2014)**; H. v. Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1247, 271 EDUC. L. REP. 315 (M.D. Ala. 2011). On the other hand, punitive damages are not recoverable under § 504. Barnes v. Gorman, 536 U.S. 181 (2002). Moreover, the majority view is that defendants are, with limited exception, not liable under § 504 in their individual capacity. Zirkel 2000, *supra* note 19, at 763. For the limited exception, see, e.g., Alston v. District of Columbia, 561 F. Supp. 2d 29, 235 EDUC. L. REP. 250 (D.D.C. 2008).

²⁰³ See, e.g., A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 180 EDUC. L. REP. 52 (3d Cir. 2003); Bd. of Educ. v. Kelly E., 207 F.3d 931, 143 EDUC. L. REP. 70 (7th Cir. 2000); Gadsby v. Grasmick, 109 F.3d 940, 117 EDUC. L. REP. 58 (4th Cir. 1997). The new regulations have added the statutory waiver. 34

C.F.R. § 300.177. For a comprehensive overview, see Perry A. Zirkel, *The Eleventh Amendment and Student Suits Under the IDEA, § 504, and the ADA*, 183 EDUC. L. REP. 657 (2003).

²⁰⁴ Compare A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 180 EDUC. L. REP. 52 (3d Cir. 2003); Gean v. Hattaway, 330 F.3d 758, 177 EDUC. L. REP. 64 (6th Cir. 2003); Miranda v. Kitzhaber, 328 F.3d 1181 (9th Cir. 2003); Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002); Jim C. v. United States, 235 F.3d 1079, 150 EDUC. L. REP. 34 (8th Cir. 2001), *cert. denied*, 533 U.S. 949 (2001); Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000), with Garcia v. SUNY Health Sci. Ctr. of Brooklyn, 280 F.3d 98, 161 EDUC. L. REP. 759 (2d Cir. 2001); cf. Pace v. Bogalusa City Sch. Bd., 325 F.3d 609, 175 EDUC. L. REP. 104 (5th Cir. 2003). See generally Zirkel, *supra* note 201.

²⁰⁵ The tide turned in the wake of *Tennessee v. Lane*, 541 U.S. 509 (2004). See, e.g., *Toledo v. Sanchez*, 454 F.3d 24, 211 EDUC. L. REP. 25 (1st Cir. 2006); State Ass'n for Disabled Americans v. Fla. Am. Univ., 405 F.3d 954, 197 EDUC. L. REP. 36 (11th Cir. 2005); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 199 EDUC. L. REP. 35 (4th Cir. 2005). For the prior trend, which was in the direction of immunity, see generally Zirkel, *supra* note 201.

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