

AN UPDATED COMPREHENSIVE COMPARISON OF THE IDEA AND SECTION 504/ADA*

Perry A. Zirkel
University Professor Emeritus of Education and Law
Lehigh University

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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.

* This article appeared in *West’s Education Law Reporter*, v. 342, pp. 886–915. Additional updated information herein is highlighted in yellow.

Finally, this supplemental chart contains the following acronyms:

BIP	behavior intervention plan
<u>ED</u>	<u>emotional disturbance</u>
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 • provides approx. 15-20% of excess costs of special education ⁹	Civil rights act • tied to federal funding but provides none	Civil rights act • neither tied to federal funding nor providing it
For students aged 0-21 prior to and in elementary and secondary education ¹⁰ • peripheral re facilities ¹¹ • including extracurricular and other such activities ¹²	For students in elementary/secondary and also: • postsecondary education ¹⁶ • employees ¹⁷ • facilities ¹⁸ • extracurricular and other such activities ¹⁹	SAME AS § 504 plus also other private entities that provide public accommodations ²³
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>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 children</i> ¹⁵	<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>does not apply to home-schooled children</i> ²²	<i>Extends as well to private, nonparochial schools without such federal financial assistance²⁴</i>
Long statute (approx. 55 pages in subchapters I and II) ²⁵	Short statute (less than 2 pages for definitions and prohibition) ²⁶	Medium statute (approx. 15 pages for subchapters I-III) ²⁷
Lengthy regulations (approx. 55 pp. + comments) ²⁸	Relatively short regulations (approx. 9 pp. + comments) ³¹	Shorter regulations (e.g., approx. 7 pages for Title II) ³⁴
<u>Establishes an affirmative obligation</u> ²⁹	<u>Provides a prohibition of discrimination</u> ³²	<u>SAME</u> ³⁵
<u>Detailed annual reports to Congress</u> ³⁰	<u>Less extensive disability coverage, although still mandatory annual reports to Congress</u> ³³	<u>SAME</u>

IDEA	§ 504	ADA
ADMINISTERING AGENCY (FOR K-12 SCHOOLS):		
OSEP	OCR ³⁶ <u>and occasionally DOJ³⁷</u>	SAME AS § 504 ³⁸ <u>although increasingly DOJ³⁹</u>

INSTITUTIONAL REQUIREMENTS:

Various that are explicit:

- short nondiscrimination notice
- identified coordinator
- *grievance procedure*⁴⁰
- *self-evaluation document*⁴¹

SAME AS § 504⁴²

• *must be updated as of 1/26/93*⁴³

STATUTORY INTERPLAY:

Increasing effect of § 504 and ADA ⁴⁴	Intertwined relationship with ADA ⁴⁵ and extensive effect of IDEA ⁴⁶	Intertwined relationship with § 504 ⁴⁷
Extensive interconnection with NCLB ⁴⁸	<i>Limited, largely indirect, effect of NCLB</i> ⁴⁹	

IDEA	§ 504	ADA
STUDENT-SPECIFIC: IDENTIFICATION: ⁵⁰		
2-part definition of disability: ⁵¹ • 1 or more of 11 classifications + • need for special education	broader 3-part definition of disability: ⁵² • any recognized impairment + • major life activity (not just learning ⁵³ —expanded list within ⁵⁴ and beyond ⁵⁵ learning) + • substantial limitation	SAME
<i>Frame of reference for measuring adverse effect: unspecific</i> ⁵⁶	<i>Frame of reference for measuring substantial limitation: most students in general population</i> ⁵⁷	SAME
<i>Mitigating measures (e.g., medication): irrelevant (i.e., as is)</i> ⁵⁸	<i>Mitigating measures (e.g., medication): measurement without</i> ⁵⁹	
Child-find obligation: specific collectively ⁶⁰	Child-find obligation: more explicit individually —and less strong? ⁶¹	
<i>Evaluation</i> ⁶² : <i>medical assessment not required (unless state law provides otherwise)</i> ⁶³ • IEE: specific provisions ⁶⁵ • mis-identification: focus on “false negatives” ⁶⁷ but no coverage for “false positives” ⁶⁸	<i>SAME</i> ⁶⁴ • IEE: no provision ⁶⁶ • mis-identification: extension to “false positives” ⁶⁹	
RTI: major area of state law activity for SLD identification ⁷⁰	<i>RTI: indirect effect limited to double-covered students</i> ⁷³	
<u>Leading issues: ED⁷¹ and ADHD⁷²</u>	<u>Leading issues: students with health conditions</u> ⁷⁴	

IDEA	§ 504	ADA
STUDENT-SPECIFIC: SERVICES:		
<p>FAPE = special ed. + related services</p>	<p>FAPE = special ed. or reg. ed. + related services⁷⁵</p>	
<p>Substantive standard: reasonably calculated to enable the child to make appropriate progress in light of the child’s circumstances⁷⁶</p>	<p>Substantive standard: <i>commensurate opportunity or reasonable accommodation?</i>⁷⁷</p>	<p><i>Substantive standard: reasonable modification</i>⁸¹</p>
<ul style="list-style-type: none"> • applied to the child as s/he is 	<ul style="list-style-type: none"> • <i>local (district) frame of reference</i>⁷⁸ • <i>for private schools – “minor adjustments”</i>⁷⁹ 	<ul style="list-style-type: none"> • <u>specialized difference for hearing (and visually) impaired students?</u>⁸²
<ul style="list-style-type: none"> • with mitigating measures⁸⁰ 	<ul style="list-style-type: none"> • with mitigating measures⁸⁰ 	
<p><i>Procedural violations constitute denial of FAPE where not harmless error.</i>⁸³</p>	<p><i>Procedural violations do not alone trigger a claim.</i>⁸⁵</p>	
<ul style="list-style-type: none"> • <u>possible exception for parental opportunity for meaningful participation</u>⁸⁴ 		
<p>Implementation violations: two competing prevailing standards (though not per se approach)⁸⁶</p>	<p>Implementation violations: bad faith or gross misjudgment approach⁹⁰</p>	
<p>Specifically prescribed IEP⁸⁷</p>	<p>No formally required document (but practical use for proof)⁹¹</p>	
<ul style="list-style-type: none"> • including ITP • with at least annual review 	<ul style="list-style-type: none"> • no ITP requirement • no specified review requirement but presumably reasonableness standard 	
<ul style="list-style-type: none"> • including ESY where needed⁸⁸ • <i>implementation “as soon as possible”</i>⁸⁹ 	<ul style="list-style-type: none"> • no explicit provision • no explicit implementation deadline 	
<p>LRE⁹²:</p>	<ul style="list-style-type: none"> • SAME⁹⁵ 	
<ul style="list-style-type: none"> • residential placement: one option of LRE continuum⁹³ 		
<ul style="list-style-type: none"> • <u>case law: extensive but diminishing</u>⁹⁴ 	<ul style="list-style-type: none"> • <i>case law: extensions</i>⁹⁶ 	<ul style="list-style-type: none"> • <u>“in the most integrated setting appropriate”</u>⁹⁷
<p>Obligation to provide services to parentally placed students in private schools: limited and specific obligation of the district of location⁹⁸</p>	<p><i>Obligation to provide services to students in private schools: limited and specific obligation of the private school</i>⁹⁹</p>	
<p><i>Obligation to children home-schooled under state law: conditional (and limited)</i>¹⁰⁰</p>	<p><i>Obligation to children home-schooled under state law: none</i>¹⁰¹</p>	
<p><i>Service animals: very limited right of access</i>¹⁰²</p>		<p><i>Service animals: robust right of access</i>¹⁰³</p>

IDEA	§ 504	ADA
STUDENT-SPECIFIC: PROCEDURAL SAFEGUARDS:		
Long individual notice ¹⁰⁴	Medium individual notice ¹⁰⁵	
Detailed criteria and specific role reps, including parents, ¹⁰⁶ for evaluation, IEP, and placement teams ¹⁰⁷	3 criteria for all-purpose team (knowledgeable about child, evaluation data, and interventions), w/o specifically requiring parents ¹⁰⁸	
<i>Detailed safeguards for student records</i> ¹⁰⁹	No specific additions to brief mention in procedural safeguards provision ¹¹⁰	
Consent for initial evaluation and, with limitations, for reevaluation ¹¹¹	<i>Consent for initial evaluation but only notice for reevaluation</i> ¹¹²	
Consent for initial services ¹¹³ – with written revocation as absolute ¹¹⁴ • <i>revocation also applies to § 504</i> ¹¹⁵	<i>No consent for services?</i> ¹¹⁶	
Reevaluation at least every 3 years • <i>plus upon parent or teacher request or if specified conditions warrant</i> ¹¹⁷	Periodic reevaluation ¹¹⁸ • <i>plus upon “a significant change in placement”</i> ¹¹⁹	
<i>Impartial hearing</i> ¹²⁰ with well-settled exhaustion requirement for clear IDEA claims ¹²¹	<i>Impartial hearing</i> ¹²² with inconsistent interpretation of IDEA’s exhaustion provision ¹²³	
<i>IHO override for placement: not for initial services/placement</i> ¹²⁴ nor for revocation of consent for services/placement ¹²⁵	<i>IHO override for placement: stronger</i> ¹²⁶	
Stay-put requirement: explicit and sometimes complex ¹²⁷	<i>Stay-put requirement: inferred?</i> ¹²⁸	

IDEA	§ 504	ADA
STUDENT-SPECIFIC: DISCIPLINE: ¹²⁹		
Focus on “removals” ¹³⁰	More applications, ¹³¹ including to other forms of discipline ¹³²	
Protection for “deemed to know” students: explicit ¹³³	<i>Protection for “deemed to know” students: implicit¹³⁴</i>	
<u><i>Cumulative days beyond 10 in a school year: 4 illustrative factors</i></u> ¹³⁵	<u><i>Cumulative days beyond 10 in a school year: 3 illustrative factors</i></u> ¹³⁶	
M-Ds: detailed but recently reduced procedures and criteria ¹³⁷	M-Ds: 2 criteria for team but otherwise more relaxed ¹³⁹ • <i>but with complete reevaluation (i.e., appropriateness criterion¹⁴⁰) upon “significant change in placement”¹⁴¹</i>	
• special, subsequent treatment for drug use or possession ¹³⁸	• <i>but no M-D required for expulsion for use of alcohol or illegal drugs¹⁴²</i>	
FBA(s) and BIPs: specific triggering requirements ¹⁴³	<i>FBAs or BIPs: no requirements for 504-only students</i>	
45-day interim alternate placements: 4 specified circumstances ¹⁴⁴	<i>45-day interim alternate placements: no authority¹⁴⁵</i>	
After valid expulsion: FAPE obligation continues ¹⁴⁶	After valid expulsion: no FAPE obligation ¹⁴⁸ – <i>except in the 5th and 11th Circuits¹⁴⁹</i>	
• <i>also, albeit on streamlined basis, upon the 11th cumulative day¹⁴⁷</i>	• <i>none upon the 11th cumulative day</i>	
Interim alternate placement as expanded stay-put ¹⁵⁰	No provision for interim placements ¹⁵¹	

IDEA	§ 504	ADA
STUDENT-SPECIFIC: ENFORCEMENT: ¹⁵²		
Policy letters: OSEP ¹⁵³	Policy letters: OCR	SAME AS § 504 ¹⁵⁴
[No comparable requirement.]	<u>LEA grievance procedure</u> ¹⁵⁸	<u>ALMOST SAME AS § 504</u> ¹⁶¹
Complaints and compliance reviews: SEA ¹⁵⁵ <ul style="list-style-type: none"> • <i>primarily procedural orientation</i>¹⁵⁶ • <i>ultimate sanction: loss of IDEA funding</i> • <i>published “precedents”:</i> rarely (and probably inadvertently)¹⁵⁷ 	Complaints and compliance reviews: OCR <ul style="list-style-type: none"> • <i>almost entire procedural orientation</i>¹⁵⁹ • <i>ultimate sanction: loss of all federal funding</i> • <i>published “precedents”:</i> common¹⁶⁰ 	SAME AS § 504 ¹⁶²
Disputes: IHO is SEA responsibility ¹⁶³ <ul style="list-style-type: none"> • detailed requirements for hearings¹⁶⁴ - including district right to file and appeal¹⁶⁵ • <i>published “precedents”:</i> common¹⁶⁶ 	Disputes: IHO is LEA responsibility ¹⁶⁷ <ul style="list-style-type: none"> • skeletal requirement for hearings¹⁶⁸ - including ambiguity whether district has right to file and appeal¹⁶⁹ • <i>published “precedents”:</i> rare 	
LEA responsibility: special ed director	LEA responsibility: 504 coordinator	LEA responsibility: ADA coordinator

IDEA	§ 504	ADA
LITIGATION: ¹⁷⁰		
<i>Standing: parents - independent</i> ¹⁷¹	<i>Standing: parents – not independent (except for retaliation)</i> ¹⁷²	
<i>Exhaustion requirement: explicit and strong</i> ¹⁷³	<i>Exhaustion requirement: more extensive exceptions</i> ¹⁷⁵	
• state option of one- or two-tier system ¹⁷⁴	• one-tier suffices even in 2-tier IDEA jurisdiction ¹⁷⁶	
<i>Statute of limitations: explicit</i> ¹⁷⁷	<i>Statute of limitations: by analogy - varying but often longer</i> ¹⁷⁸	SAME AS § 504 ¹⁷⁹
<i>Unrestricted private right of action</i>	<i>Restricted private right of action</i> ¹⁸⁰	
<i>Burden of proof: on the plaintiff for FAPE and LRE</i> ¹⁸¹	<i>Burden of proof: on the plaintiff (i.e., parents)</i> ¹⁸²	SAME AS § 504 ¹⁸³
<i>“Due weight” standard of judicial review of IHO decision</i> ¹⁸⁴	<i>Unsettled standard of judicial review</i> ¹⁸⁵	
Expert witness fees: not recoverable ¹⁸⁶	<i>Expert witness fees: recoverable</i> ¹⁸⁷	
Jury trial: no ¹⁸⁸	<i>Jury trial: yes</i> ¹⁸⁹	
Protection against retaliation: limited ¹⁹⁰	<i>Protection against retaliation and harassment: stronger</i> ¹⁹¹	<i>Extends to associational protection</i> ¹⁹²
<i>Protection against bullying: need not be disability based</i> ¹⁹³ <i>but limited application and relief</i> ¹⁹⁴	<i>Protection against bullying, i.e., peer harassment, based on disability</i> ¹⁹⁵ : <i>stronger</i> ¹⁹⁶	
Attorneys’ fees: within limits ¹⁹⁷	<i>Attorneys’ fees: possibly higher</i> ¹⁹⁹	
• possibly for SEA complaints too ¹⁹⁸	• not for OCR complaints	

IDEA	§ 504	ADA
<p>Various equitable remedies: Established and emerging²⁰⁰</p> <ul style="list-style-type: none"> • tuition reimbursement: well-developed framework²⁰¹ • compensatory education: emerging crystallization²⁰² 	<p>Similar, though less well developed</p> <ul style="list-style-type: none"> • tuition reimbursement: relatively rare²⁰³ • compensatory education: more slowly developing²⁰⁴ 	
<p>Money damages: <u>generally not available</u>²⁰⁵</p>	<p>Money damages: <i>all jurisdictions but high standard</i>²⁰⁶</p>	
<ul style="list-style-type: none"> • <i>Eleventh Amendment immunity: in none of the jurisdictions to date</i>²⁰⁷ 	<ul style="list-style-type: none"> • <i>Eleventh Amendment immunity: in the minority of jurisdictions to date</i>²⁰⁸ 	<ul style="list-style-type: none"> • <i>Eleventh Amendment immunity: in declining minority of jurisdictions to date</i>²⁰⁹

Endnotes

¹ **Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed. Law Rep. 767 (2012).** For the previous versions, see Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 Ed.Law Rep. 1 (2007); Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 Ed.Law 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 Ed.Law Rep. 1 (2011).

⁷ 28 C.F.R. §§ 35.104 and 35.136 **(2016)** (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 Ed.Law 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 34.**

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 Ed.Law 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 (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 (9th Cir. 2000); 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 (5th Cir. 2012)**; *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85 (2d Cir. 2010); *D.R. v. Antelope Valley High Sch. Dist.*, 746 F. Supp. 2d 1132 (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 Ed.Law Rep. 761, 764 (2000). For more recent interscholastic athletic cases, see **Mann v. La. High Sch. Athletic Ass'n, 535 F. App'x 405 (5th Cir. 2013)**; **K.L. v. Mo. State High Sch. Athletic Ass'n, 178 F. Supp. 3d 792 (E.D. Mo. 2016)**; **Starego v. N.J. Interscholastic Athletic Ass'n, 970 F. Supp. 2d 303 (D.N.J. 2013)**; *Cruz v. Pennsylvania Interscholastic Athletic Ass'n*, 157 F. Supp. 2d 485 (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 Ed.Law 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 Ed.Law 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 (Pa. Commw. Ct. 2005).

²¹ See, e.g., Perry A. Zirkel, *Section 504, the ADA, and Parochial School Students*, 211 Ed.Law 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 (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 The threshold minimum is 15 employees. 42 U.S.C. § 12132.

²⁴ 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 (E.D. Pa. 2009); *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252 (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)**.

²⁵ 20 U.S.C. §§ 1400–1419. These sections are Part B, but the statute is even longer in its entirety, extending to *id.* § 1482.

²⁶ 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).

²⁷ 42 U.S.C. §§ 12101–12189. **Part I is specific to employment, and the remaining parts extend to *id.* § 12213.**

²⁸ 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)

²⁹ See, e.g., CG v. Commonwealth of Pennsylvania, 734 F.3d 229, 234 (3d Cir. 2013) (citing W.B. v. Matula, 67 F.3d 484, 492–93 (3d Cir. 1995)).

³⁰ 20 U.S.C. § 1464(d). For these reports, see <http://www2.ed.gov/about/reports/annual/osep/index.html>

³¹ 34 C.F.R. Part 104.

³² *Id.*

³³ 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>

³⁴ 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.

³⁵ *Id.* However, the standard for causation is different. See, e.g., CG v. Pennsylvania Dep’t of Educ., 734 F.3d at 235–36 (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)).

³⁶ 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, 69 IDELR ¶ 234 (D. Nev. 2017), *adopting* 2017 WL 136 3333 (D. Nev. Feb. 13, 2017).

³⁷ See, e.g., 28 C.F.R. § 35.171; see also Frequently Asked Questions on Effective Communication for Students with Vision, Hearing, or Speech Disabilities in Public Elementary and Secondary Schools, 64 IDELR ¶ 160 (DOJ/OSERS/OCR 2014).

³⁸ OCR enforces ADA student issues in the schools in tandem with § 504. See, e.g., OCR Senior Staff Memorandum, 19 IDELR 886 (OCR 1992).

³⁹ See, e.g., Gates-Chili Cent. Sch. Dist., 65 IDELR ¶ 152 (DOJ 2015).

⁴⁰ 34 C.F.R. § 104.7(b) (minimum of 15 employees). For examples, see ZIRKEL, *supra* note 1, at App. 4.

⁴¹ For examples, see ZIRKEL, *supra* note 1, at App. 3.

⁴² 28 C.F.R. § 35.107(a) (minimum of 50 employees).

⁴³ See, e.g., OCR Memorandum, 19 IDELR 875 (OCR 1993).

⁴⁴ See, e.g., Perry A. Zirkel, Section 504 Emerging Case Law Developments (2011) (video presentation available via www.nasdse.org); see also Perry A. Zirkel, Section 504 for Special Education Leaders: Persisting and Emerging Issues, 25 J. SPECIAL EDUC. LEADERSHIP 99 (2014).

⁴⁵ See generally ZIRKEL, *supra* note 1.

⁴⁶ See, e.g., Alexis v. Dallas Indep. Sch. Dist., 286 F. Supp. 2d 551 (N.D. Tex. 2004); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380 (D. Del. 2003); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2002).

⁴⁷ See generally ZIRKEL, *supra* note 1.

⁴⁸ 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 Ed.Law 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.

⁴⁹ See, e.g., Perry A. Zirkel, Initial Implications of the NCLB for Section 504, 191 Ed.Law Rep. 591 (2004).

⁵⁰ The replacement of “eligibility” with “identification” is based on the expanded effect of the ADAAA 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 75.

⁵¹ 34 C.F.R. § 300.8 (including addition of Tourette syndrome to OHI).

⁵² *Id.* § 104.3(j). See, e.g., *A Step-by-Step Process for §504/ADA Eligibility Determinations*, 239 Ed.Law Rep. 333 (2009). The other two prongs – “record of” and “regarded as” – are not applicable to FAPE. See **Protecting Students with Disabilities, 67 IDELR ¶ 189 (OCR 2015) – item 37**; 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 (9th Cir. 2016).** For a snapshot of school district eligibility practices prior to the ADAAA, 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 ADAAA, see Perry A. Zirkel & John M. Weathers, Section 504-Only Students: Updated National Incidence 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 (2d Cir. 2016); Mann v. La. High Sch. Athletic Ass’n, 535 F. App’x 405, 211 (5th Cir. 2013); Ellenberg v. N.M. Military Inst., 572 F.3d 815, 820–22 (10th Cir. 2009).**

⁵³ 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 Ed.Law 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 (9th Cir. 2005); *Marlon v. W. New England Coll.*, 124 F. App’x 15 (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 (Colo. Ct. App. 2006) (analogous state law). However, the ADAAA 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>.

⁵⁴ For example, the ADAAA 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.**

⁵⁵ For example, the ADAAA 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.**

⁵⁶ 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.

⁵⁷ **35 C.F.R. § 35.108(d)(1)(v); see also Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001); Zirkel 2000, supra note 19, at 761 (the “average” student).**

⁵⁸ See, e.g., **Memo 17-05, 70 IDELR ¶ 23 (OSEP 2017) (visual impairment even with correction).**

⁵⁹ 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.*

⁶⁰ 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 COMMUNIQUÉ 4 (May 2017); Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 Ed.Law Rep. 576 (2015); Perry A. Zirkel, "Child Find": *The Lore v. the Law*, 307 Ed.Law Rep. 574 (2014).**

⁶¹ 34 C.F.R. § 104.35(a) ("believed to need"). **See, e.g., Krebs v. New Kensington Arnold Sch. Dist., 69 IDELR ¶ 9 (W.D. Pa. 2016).** 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); **B.M. v. S. Callaway R-II Sch. Dist., 732 F.3d 882 (8th Cir. 2013); Reed v. Kerens Indep. Sch. Dist., 70 IDELR ¶ 40 (N.D. Tex. 2017) (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 (3d Cir. 1995); **Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012);** *O.F. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409 (E.D. Pa. 2002).

⁶² See, e.g., **Perry A. Zirkel, *The Law of Evaluations Under the IDEA: An Annotated Update*, 297 Ed.Law Rep. 637 (2013).**

⁶³ See, e.g., Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994); Letter to Parker, 18 IDELR 963 (OSEP 1991).

⁶⁴ See, e.g., *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).

⁶⁵ 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 Ed.Law Rep. 32 (2014); cf. Susan Etscheid, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).**

⁶⁶ See, e.g., *Randolph (MA) Pub. Sch.*, 21 IDELR 816 (OCR 1994).

⁶⁷ See, e.g., PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* (2006) (available via www.cec.sped.org).

⁶⁸ **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 (5th Cir. 2012).**

⁶⁹ **S.H. v. Lower Merion Sch. Dist., 729 F.3d 248 (3d Cir. 2013); see also A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194, 62 IDELR ¶ 102 (3d Cir. 2013).**

⁷⁰ 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.

⁷¹ See, e.g., **Perry A. Zirkel, *Checklist for Identifying Students Eligible Under the IDEA Classification of Emotional Disturbance: An Update*, 286 Ed.Law Rep. 7 (2013).**

⁷² **Perry A. Zirkel, *ADHD Checklist for Identifying Students Under the IDEA and Section 504/ADA*, 293 Ed.Law Rep. 13 (2013).**

⁷³ See, e.g., Harrison (CO) Sch. Dist., 57 IDELR ¶ 295 (OCR 2011); Polk Cty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).

⁷⁴ See, e.g., R.K. v. Bd. of Educ. of Scott Cty., 494 F. App'x 589 (6th Cir. 2012); **see also Perry A. Zirkel, Section 504 Eligibility and Students on Individual Health Plans, 276 Ed.Law Rep. 577 (2014).**

⁷⁵ *Id.* § 104.33(b). For the possibility, on a limited basis, of “technically eligible” students in light of the ADAAA, 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>

⁷⁶ **Andrew F. v. Douglas Cty. Sch. Dist., RE-1, 137 S. Ct. 988 (2017).**

⁷⁷ See, e.g., Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?* 106 Ed.Law Rep. 471 (1996); *see also* Mark H. v. Hamamoto, 513 F.3d 922 (9th Cir. 2008) (commensurate opportunity); **Ridley Sch. Dist. v. M.R., 680 F.3d 260 (3d Cir. 2012)**; Campbell v. Bd. of Educ., 58 F. App'x 162 (6th Cir. 2003); R.K. v Bd. of Educ. of Scott Cty., 755 F. Supp. 2d 900 (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 (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 (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, 610 F.3d 1090 (9th Cir. 2010).**

⁷⁸ 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.

⁷⁹ 34 C.F.R. § 104.39. **For possible supersedence, see *infra* note 81.**

⁸⁰ **Dear Colleague Letter, 58 IDELR ¶ 79 (OCR 2012) (items 4, 11, and 12); cf. Dear Colleague Letter, 68 IDELR ¶ 52 (OCR 2016) (“If a school district determines that a student with ADHD has a disability as defined by Section 504, it could consider whether the student uses mitigating measures and whether those mitigating measures have an impact on the student's disability. This information could help the district determine whether the student needs special education or related services.”)**

⁸¹ 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 79 and accompanying text). For the relevant interrelationship language, see 28 C.F.R. § 36.103(a).

⁸² **K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088 (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 case, closely related court decisions, and their 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 Ed.Law 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).

⁸³ 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 513(a)(2).

⁸⁴ 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).**

⁸⁵ See, e.g., *Power v. Sch. Bd.*, 276 F. Supp. 2d 515 (E.D. Va. 2003); *A.W. v. Marlborough Co.*, 25 F. Supp. 2d 27 (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).

⁸⁶ 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).*

⁸⁷ 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).**

⁸⁸ 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).

⁸⁹ 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 (2d Cir. 2006).

⁹⁰ See, e.g., *Nixon v. Greenup Cty Sch. Dist.*, 890 F. Supp. 2d 753 (E.D. Ky. 2012); *cf. CTL v. Ashland Sch. Dist.*, 743 F.3d 524 (7th Cir. 2014) (alternative of reasonable accommodation within safety context).

⁹¹ For a more specific tabular analysis, see Perry A. Zirkel, *Comparison of IDEA IEPs and Section 504 Accommodations Plans*, 191 Ed.Law Rep. 563 (2004). **For a more recent analysis in light of the ADAAA, see Zirkel, *supra* note 3.**

⁹² **34 C.F.R. § 300.114 (including education with nondisabled students “to the maximum extent appropriate”).**

⁹³ See, e.g., 34 C.F.R. §§ 300.104 and 300.115.

⁹⁴ See, e.g., Perry A. Zirkel, *The “Inclusion” Case Law: A Factor Analysis*, 127 Ed.Law Rep. 533 (1988).

⁹⁵ *Id.* § 104.33(c)(3). The case law interpreting this provision has been mixed. See, e.g., ZIRKEL, *supra* note 1, at 3:112.

⁹⁶ See, e.g., *Bess v. Kanawha Cty. Bd. of Educ.*, 53 IDELR ¶ 71 (S.D. W.Va. 2009) (constructive exclusions).

⁹⁷ See, e.g., 28 C.F.R. § 35.130(d). See, e.g., *S.S. v. City of Springfield*, 146 F. Supp. 3d 414 (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).**

⁹⁸ See *supra* note 14 and accompanying text.

⁹⁹ 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 (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 (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 (4th Cir. 2013).**

¹⁰⁰ See *supra* note 15 and accompanying text.

¹⁰¹ See *supra* note 22 and accompanying text.

¹⁰² In contrast, the limited parent's success had been under state laws. See, e.g., Perry A. Zirkel, *Service Animals in Public Schools*, 257 Ed.Law Rep. 525 (2010).

¹⁰³ 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." *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 (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 Cty. Sch. Bd.*, 87 F. Supp. 3d 319 (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.****

¹⁰⁴ 34 C.F.R. § 300.504(c) (including additions for the limitations periods).

¹⁰⁵ See, e.g., Perry A. Zirkel, *Notice of Procedural Safeguards Under Section 504 and the ADA*, 5 SECTION 504 COMPLIANCE ADVISER 3 (May 2001).

¹⁰⁶ 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).

¹⁰⁷ 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 (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).

¹⁰⁸ 34 C.F.R. § 104.35(c). Worded in terms of double-covered students, the regulations specify the third criterion as "placement options." *Id.*

¹⁰⁹ 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.

¹¹⁰ *Id.* § 104.36.

¹¹¹ *Id.* § 300.300 (including additional provisions for initial evaluations).

¹¹² 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 *Durheim* letter resolved the ambiguity regarding reevaluation that arose in *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

¹¹³ 34 C.F.R. §§ 300.300(b)(1)–(3).

¹¹⁴ *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).

¹¹⁵ 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 Cty. Sch. Dist. RE-1, 925 F. Supp. 2d 1176 (D. Colo. 2013) (ruling that district has discretion not to apply IDEA revocation to § 504). But cf. D.F. v. Leon Cty. 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 Ed.Law Rep. 623 (2015).**

¹¹⁶ 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>.

¹¹⁷ *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).

¹¹⁸ See, e.g., Garden City (NY) Union Free Sch. Dist., EHLR 353:327 (OCR 1989).

¹¹⁹ 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).

¹²⁰ 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).

¹²¹ 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

¹²² See, e.g., Perry A. Zirkel, *Impartial Hearings Under Section 504*, 334 Ed.Law Rep. 51 (2016); Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings Under Section 504*, 22 WIDENER L.J. 135 (2014).

¹²³ 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 (2017). The Court sidestepped whether exhaustion applies if their gravamen is not FAPE but the requested remedy is attorneys fees.**

¹²⁴ 20 U.S.C. § 1414(a)(1)(D)(ii); 34 C.F.R. § 300.300(b).

¹²⁵ 34 C.F.R. § 300.300(b)(4)(ii).

¹²⁶ 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).

¹²⁷ 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 Ed.Law Rep. 1 (2016).**

¹²⁸ Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87).

¹²⁹ 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 Ed.Law Rep. 1 (2008).

¹³⁰ 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 Ed.Law Rep. 445 (2007).

¹³¹ See, e.g., M.G. v. Crisfield, 547 F. Supp. 2d 399 (D.N.J. 2008) (applying § 504 "regarded as" prong to conditioning return for removal on special education evaluation).

¹³² For removals, see, e.g., Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 Ed.L. Rep. 9 (2008). For other forms of discipline, see, e.g., Perry A. Zirkel, *Discipline Under Section 504*, 226 Ed.Law Rep. 9 (2008); cf. Zirkel, *supra* note 129 (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).

¹³³ 34 C.F.R. § 300.534 (including narrowing the alternative bases and adding exceptions for refused consent).

¹³⁴ 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).

¹³⁵ 34 C.F.R. § 300.536.

¹³⁶ See, e.g., OCR Memorandum, EHLR 307:07 (OCR 1989).

¹³⁷ 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 COMMUNIQUE 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).

¹³⁸ 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).

¹³⁹ 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 ¶ 4 (N.D. Cal. 2017) (**IDEA standard suffices**); Centennial Sch. Dist. v. Phil L., 559 F. Supp. 2d 634 (E.D. Pa. 2008) (unclear requirement).

¹⁴⁰ 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).

¹⁴¹ *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 (W.D. La. 1994) with Yough Sch. Dist. v. M.S., 23 IDELR 807 (Pa. Commw. Ct. 1995).

¹⁴² 20 U.S.C. § 705(20)(C)(iv); *see also* OCR Staff Memorandum, 17 IDELR 609 (OCR 1991).

¹⁴³ 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).**

¹⁴⁴ *Id.* §§ 300.530(g) (including addition of “serious bodily injury”) and 300.532(b)(2)(ii) (requires IHO).

¹⁴⁵ 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).

¹⁴⁶ 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 (D.D.C. 2012).**

¹⁴⁷ *Id.* § 300.530(d)(4).

¹⁴⁸ 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).

¹⁴⁹ S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981). The present Eleventh Circuit is the former Unit B of the Fifth Circuit.

¹⁵⁰ 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 Ed.Law Rep. 467 (2007).

¹⁵¹ For the contrasting presence of specific IDEA provisions, see *supra* note 150 and accompanying text.

¹⁵² 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).

¹⁵³ See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.Law Rep. 391 (2002).

¹⁵⁴ See *supra* note 38 **and accompanying text.**

¹⁵⁵ See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 Ed.Law Rep. 565 (2008).

¹⁵⁶ *Id.*

¹⁵⁷ 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).

¹⁵⁸ **34 C.F.R. § 104.7(b) (if 15 or more employees).**

¹⁵⁹ 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).**

¹⁶⁰ 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 Ed.Law 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 Ed.Law Rep. 369 (1997).

¹⁶¹ **28 C.F.R. § 35.107(b) (if 50 or more employees).**

¹⁶² However, the ultimate sanction, which under § 504 is termination of federal funding, is unclear.

¹⁶³ 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 Ed.Law Rep. 1 (2014); Perry A. Zirkel, Longitudinal Trends in Impartial Hearings Under the IDEA, 302 Ed.Law Rep. 1 (2014);** Perry A. Zirkel & Karen Gischlar, *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).**

¹⁶⁴ See, e.g., 34 C.F.R. §§ 300.507–300.515 (including new provisions for prehearing process, including resolution session).

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 Ed.Law Rep. 731 (2002); see also D'Angelo, Lutz & Zirkel, *supra* note 157.

¹⁶⁷ **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 Ed.Law Rep. 1 (2014).**

¹⁶⁸ 34 C.F.R. § 104.36: “an impartial hearing with an opportunity for participation by the person’s parents ... and representation by counsel.”

¹⁶⁹ See Zirkel, *supra* note 122.

¹⁷⁰ **For a broad sampling of published case law, see *Case Law Under the IDEA: 1998 to the Present, in IDEA: A HANDY DESK REFERENCE TO THE LAW, REGULATIONS, AND INDICATORS 790 (2014)*.**

¹⁷¹ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). For an analysis, see, e.g., Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District*, 248 Ed.Law Rep. 1 (2009).

¹⁷² See, e.g., ***Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303*, 783 F.3d 634 (7th Cir. 2015)**; *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).

¹⁷³ ***Fry v. Napoleon Sch. Dist.*, 137 S. Ct. 743 (2017)**; see generally 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).

¹⁷⁴ For the current systems, see Zirkel & Scala, *supra* note 163.

¹⁷⁵ 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).

¹⁷⁶ 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 (D.R.I. 2003).

¹⁷⁷ 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 (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 Ed.Law Rep. 1 (2003). For the related issue of tolling, see, e.g., *Daggett et al.*, *supra* note 106.

¹⁷⁸ 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 (S.D.N.Y. 2011). *But see* *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (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 (6th Cir. 2010); *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999); *Hickey v. Irving Indep. Sch. Dist.*, 976 F.2d 980 (5th Cir. 1992); ***IL v. Knox Cty. Bd. of Educ.*, F. Supp. 3d (E.D. Tenn. 2017)**; ***Davis v. Blanchard*, 175 F. Supp. 3d 581 (M.D.N.C. 2016)**.

¹⁷⁹ See, e.g., *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999).

¹⁸⁰ See, e.g., *Power v. Sch. Bd.*, 276 F. Supp. 2d 515 (E.D. Va. 2003); *A.W. v. Marlborough Co.*, 25 F. Supp. 2d 27 (D. Conn. 1998); *cf.* *Mark G. v. LeMahieu*, 372 F. Supp. 2d 591 (D. Haw. 2005).

¹⁸¹ *Schaffer v. Weast*, 546 U.S. 49 (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).

¹⁸² See, e.g., *Georgia State Conference of Branches of NAACP v. Ga.*, 775 F.2d 1403 (11th Cir. 1985).

¹⁸³ See, e.g., *Dyer v. Jefferson Cty. Sch. Dist. R-1*, 905 F. Supp. 864 (D. Colo. 1995).

¹⁸⁴ See, e.g., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 205 (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 (7th Cir. 2004); *Dale M. v. Bd. of Educ.*, 273 F.3d 813 (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 CHILD. 375 (2014); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999).

¹⁸⁵ See, e.g., *Centennial Sch. Dist. v. Phil L.*, 799 F. Supp. 2d 473 (E.D. Pa. 2011).

¹⁸⁶ *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 Ed.Law Rep. 648 (2014).**

¹⁸⁷ See, e.g., **M.W. v. Sch. Dist. of Phila., 68 IDELR ¶ 36 (E.D. Pa. 2016); M.M. v. Sch. Dist. of Phila., 142 F. Supp. 3d 396 (E.D. Pa. 2015);** *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012); *L.T. v. Mansfield Sch. Dist.*, 53 IDELR ¶ 7 (D.N.J. 2009).

¹⁸⁸ 20 U.S.C. § 1415(i)(2)(C). **See, e.g., Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309 (11th Cir. 2003); Mr. & Mrs. A. v. Greenwich Bd. of Educ., 66 IDELR ¶ 97 (D. Conn. 2015).**

¹⁸⁹ See, e.g., *K.I. v. Montgomery Pub. Sch.*, 54 IDELR ¶ 12 (M.D. Pa. 2010).

¹⁹⁰ 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 Ed.Law 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 (7th Cir. 2006); *Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2002); *Hesling v. Avon Grove Sch. Dist.*, 428 F. Supp. 2d 262 (E.D. Pa. 2006).

¹⁹¹ See, e.g., **Pollack v. Reg'l Sch. Unit 75, 660 F. App'x 1 (1st Cir. 2016); A.C. v. Shelby Cty. Bd. of Educ., 711 F.3d 687 (6th Cir. 2013); D.B. v. Esposito, 675 F.3d 26 (1st Cir. 2016);** *K.R. v. Sch. Dist. of Phila.*, 373 F. App'x 204 (3d Cir. 2010); *M.M.R.-Z. v. Commonwealth of Puerto Rico*, 528 F.3d 9 (1st Cir. 2008); *Hesling v. Seidenberger*, 286 F. App'x 773 (3d Cir. 2008); *M.P. v. Indep. Sch. Dist. No. 727*, 326 F.3d 975 (8th Cir. 2003); **Lee v. Natomas 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 (S.D.N.Y. 2014);** *K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist.*, 381 F. Supp. 2d 343 (S.D.N.Y. 2005); *Vives v. Fajardo*, 399 F. Supp. 2d 250 (D.P.R. 2005); *P.N. v. Greco*, 282 F. Supp. 2d 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 Ed.Law Rep. 823 (2010); Perry A. Zirkel, *Protect Your District from Costly Claims of Disability Harassment*, 16 THE SPECIAL EDUCATOR 4 (Sept. 22, 2000).

¹⁹² 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) (not applicable to parent).**

¹⁹³ See, e.g., **Dear Colleague Letter, 61 IDELR ¶ 263 (OSEP 2013).**

¹⁹⁴ See, e.g., **T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 869 (2d Cir. 2016).**

¹⁹⁵ 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 (E.D.N.Y. 2015).

¹⁹⁶ Nevertheless, the difficulties for attaining a judicial judgement for money damages are imposing. Compare Doe v. Columbia-Brazoria Indep. Sch. Dist., 855 F.3d 681 (5th Cir. 2017); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982 (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 (E.D.N.Y. 2015); M.S. v. Marple Newtown Sch. Dist., 82 F. Supp. 3d 625 (E.D. Pa. 2015); Thomas v. Springfield Sch. Comm., 59 F. Supp. 3d 294 (D. Mass. 2014); Sutherlin v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254 (N.D. Okla. 2013); Moore v. Chilton Cty. Bd. of Educ., 936 F. Supp. 2d 1300 (M.D. Ala. 2013), further proceedings, 1 F. Supp. 3d 1281 (M.D. Ala. 2014); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729 (W.D. Ark. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235 (W.D.N.Y. 2012); K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005) (rejecting liability), with Spring v. Allegany-Limestone Sch. Dist., 655 F. App'x 25 (2d Cir. 2016); S.S. v. E. Kentucky Univ., 532 F.3d 445 (6th Cir. 2008); K.R.S. v. Bedford Cmty. Sch. Dist., 109 F. Supp. 3d 1060 (S.D. Iowa 2015); Sutherlin v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254 (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 (E.D. Wis. 2007) (preserving liability for further proceedings).

¹⁹⁷ See, e.g., 34 C.F.R. § 300.517.

¹⁹⁸ Compare Lucht v. Molalla River Sch. Dist., 225 F.3d 1023 (9th Cir. 2000); Upper Valley Ass'n for Handicapped Citizens v. Blue Mountain Union Sch. Dist., 973 F. Supp. 479 (D. Vt. 1997), with Vultaggio v. Bd. of Educ., 343 F.3d 598 (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 (D. Minn. 1999).

¹⁹⁹ 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).

²⁰⁰ 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).

²⁰¹ See, e.g., Perry A. Zirkel, *Tuition and Related Reimbursement Under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2014).

²⁰² See, e.g., Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Ed.Law Rep. 1 (2013); A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education Under the IDEA*, 257 Ed.Law 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).

²⁰³ See, e.g., Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375 (E.D. Pa. 2012) (double-covered student with differential advantage); Borough of Palmyra Bd. of Educ. v. F.C., 2 F. Supp. 2d 637 (D.N.J. 1998) (504-only student).

²⁰⁴ See, e.g., Perry A. Zirkel, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 Ed.L. Rep. 745, 748 nn.13–14 (2004).

²⁰⁵ **See, e.g., C.O. v. Portland Pub. Sch., 679 F.3d 1162 (9th Cir. 2012), cert. denied, 133 S. Ct. 859 (2013); Chambers v. Sch. Dist., 587 F.3d 176 (3d Cir. 2009); Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13 (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 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (8th Cir. 2000); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998).**

²⁰⁶ See, e.g., Zirkel 2000, *supra* note 19, at 764. For recent examples, see **Shadie v. Hazelton Sch. Dist., 580 F. App'x 67 (3d Cir. 2014); Lebron v. Commonwealth of Puerto Rico, 770 F.3d 25 (1st Cir. 2014); H. v. Montgomery Cty. Bd. of Educ., 784 F. Supp. 2d 1287 (M.D. Ala. 2011).** On the other hand, punitive damages are not recoverable under § 504. *Barnes v. Gorman*, 536 U.S. 681 (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 (D.D.C. 2008).

²⁰⁷ See, e.g., *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234 (3d Cir. 2003); *Bd. of Educ. v. Kelly E.*, 207 F.3d 931 (7th Cir. 2000); *Gadsby v. Grasmick*, 109 F.3d 940 (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 Ed.Law Rep. 657 (2003).

²⁰⁸ Compare *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234 (3d Cir. 2003); *Gean v. Hattaway*, 330 F.3d 758 (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 (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 (2d Cir. 2001); *cf. Pace v. Bogalusa City Sch. Bd.*, 325 F.3d 609 (5th Cir. 2003). See generally Zirkel, *supra* note 207.

²⁰⁹ 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 (1st Cir. 2006); *State Ass'n for Disabled Americans v. Fla. Am. Univ.*, 405 F.3d 954 (11th Cir. 2005); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005). For the prior trend, which was in the direction of immunity, see generally Zirkel, *supra* note 207.