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) related or concomitant issues under Section 504; 3) the consent revocation amendments in the December 2008 IDEA regulations; 4) the ADAAA Title II regulations issued in August 2016; and 5) relatively new relevant issues, such as response to intervention and service animals. 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:

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>BIP</td>
<td>behavior intervention plan</td>
</tr>
<tr>
<td><strong>ED</strong></td>
<td>emotional disturbance</td>
</tr>
<tr>
<td>ESY</td>
<td>extended school year</td>
</tr>
<tr>
<td>FAPE</td>
<td>free appropriate public education</td>
</tr>
<tr>
<td>FBA</td>
<td>functional behavioral assessment</td>
</tr>
<tr>
<td>IEE</td>
<td>independent educational evaluation</td>
</tr>
<tr>
<td>IEP</td>
<td>individualized education program</td>
</tr>
<tr>
<td>IHO</td>
<td>impartial hearing officer</td>
</tr>
<tr>
<td>ITP</td>
<td>individual transition plan</td>
</tr>
<tr>
<td>LEA</td>
<td>local education agency</td>
</tr>
<tr>
<td>LOF</td>
<td>letter of finding</td>
</tr>
<tr>
<td>LRE</td>
<td>least restrictive environment</td>
</tr>
<tr>
<td>M-D</td>
<td>manifestation determination</td>
</tr>
<tr>
<td>OCR</td>
<td>Office for Civil Rights</td>
</tr>
<tr>
<td>OSEP</td>
<td>Office of Special Education Programs</td>
</tr>
<tr>
<td>RTI</td>
<td>response to intervention</td>
</tr>
<tr>
<td>SEA</td>
<td>state education agency</td>
</tr>
<tr>
<td>IDEAA</td>
<td>§ 504</td>
</tr>
<tr>
<td>-------</td>
<td>-------</td>
</tr>
<tr>
<td><strong>GENERAL:</strong></td>
<td></td>
</tr>
<tr>
<td>Funding statute</td>
<td>Civil rights act</td>
</tr>
<tr>
<td>• provides approx. 15-20% of excess costs of special education$^9$</td>
<td>• tied to federal funding but provides none</td>
</tr>
<tr>
<td>For students aged 0-21 prior to and in elementary and secondary education$^{10}$</td>
<td>For students in elementary/secondary and also:</td>
</tr>
<tr>
<td>• peripheral re facilities$^{11}$</td>
<td>• postsecondary education$^{16}$</td>
</tr>
<tr>
<td>• including extracurricular and other such activities$^{12}$</td>
<td>• employees$^{17}$</td>
</tr>
<tr>
<td>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$^{14}$</td>
<td>Extends directly—in comparison to limited district obligation$^{20}$—to parochial and other private schools that receive federal hot lunch, <strong>E-rate</strong>, Title I and/or IDEA program services$^{21}$</td>
</tr>
<tr>
<td>• 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$^{15}$</td>
<td>• does not apply to home-schooled children$^{22}$</td>
</tr>
<tr>
<td>Long statute (approx. 55 pages in subchapters I and II)$^{25}$</td>
<td>Short statute (less than 2 pages for definitions and prohibition)$^{26}$</td>
</tr>
<tr>
<td>Lengthy regulations (approx. 55 pp. + comments)$^{28}$</td>
<td>Relatively short regulations (approx. 9 pp. + comments)$^{31}$</td>
</tr>
<tr>
<td><strong>Establishes an affirmative obligation</strong>$^{29}$</td>
<td><strong>Provides a prohibition of discrimination</strong>$^{32}$</td>
</tr>
<tr>
<td><strong>Detailed annual reports to Congress</strong>$^{30}$</td>
<td><strong>Less extensive disability coverage, although still mandatory annual reports to Congress</strong>$^{33}$</td>
</tr>
</tbody>
</table>
### Administering Agency (for K-12 Schools):

<table>
<thead>
<tr>
<th>IDEA</th>
<th>§ 504</th>
<th>ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td>OSEP</td>
<td>OCR\textsuperscript{36} and occasionally DOJ\textsuperscript{37}</td>
<td>SAME AS § 504\textsuperscript{38} although increasingly DOJ\textsuperscript{39}</td>
</tr>
</tbody>
</table>

### Institutional Requirements:

Various that are explicit:
- short nondiscrimination notice
- identified coordinator
- grievance procedure\textsuperscript{40}
- self-evaluation document\textsuperscript{41}

SAME AS § 504\textsuperscript{42}

- must be updated as of 1/26/93\textsuperscript{43}

### Statutory Interplay:

Increasing effect of § 504 and ADA\textsuperscript{44} Intertwined relationship with ADA\textsuperscript{45} and extensive effect of IDEA\textsuperscript{46} Intertwined relationship with § 504\textsuperscript{47}

Extensive interconnection with NCLB\textsuperscript{48} Limited, largely indirect, effect of NCLB\textsuperscript{49}
<table>
<thead>
<tr>
<th>IDEA</th>
<th>§ 504</th>
<th>ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>STUDENT-SPECIFIC: IDENTIFICATION:</strong>&lt;sup&gt;58&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| 2-part definition of disability:<sup>51</sup>  
- 1 or more of 11 classifications +  
- need for special education | broader 3-part definition of disability:<sup>52</sup>  
- any recognized impairment +  
- major life activity (not just learning)—expanded list within and beyond learning) +  
- substantial limitation | SAME |
| Frame of reference for measuring adverse effect: unspecific<sup>56</sup> | Frame of reference for measuring substantial limitation: *most students in general population*<sup>57</sup> | SAME |
| Mitigating measures (e.g., medication): irrelevant *(i.e., as is)*<sup>58</sup> | Mitigating measures (e.g., medication): measurement without<sup>59</sup> | |
| Child-find obligation: specific collectively<sup>60</sup> | Child-find obligation: *more explicit individually*—and less strong<sup>61</sup> | |
| Evaluation: medical assessment not required *(unless state law provides otherwise)*<sup>62</sup>  
- IEE: specific provisions<sup>65</sup>  
- mis-identification: focus on “false negatives” but no coverage for “false positives”<sup>68</sup> | SAME<sup>64</sup>  
- IEE: no provision<sup>66</sup>  
- mis-identification: extension to “false positives”<sup>69</sup> | |
| RTI: major area of state law activity for SLD identification<sup>70</sup> | RTI: indirect effect limited to double-covered students<sup>73</sup> | |
| **Leading issues:** ED<sup>71</sup> and ADHD<sup>72</sup> | **Leading issues:** students with health conditions<sup>74</sup> | |
### IDEA 

**STUDENT-SPECIFIC: SERVICES:**

<table>
<thead>
<tr>
<th>IDEA</th>
<th>§ 504</th>
<th>ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>FAPE = special ed. + related services</strong></td>
<td>FAPE = special ed. or reg. ed. + related services</td>
<td>Substantive standard: reasonable modification</td>
</tr>
<tr>
<td>Substantive standard: reasonably calculated to enable the child to make appropriate progress in light of the child’s circumstances</td>
<td>Substantive standard: commensurate opportunity or reasonable accommodation?</td>
<td>• specialized difference for hearing (and visually) impaired students</td>
</tr>
<tr>
<td>• applied to the child as s/he is</td>
<td></td>
<td>• with mitigating measures</td>
</tr>
<tr>
<td>Procedural violations constitute denial of FAPE where not harmless error.</td>
<td></td>
<td>Procedural violations do not alone trigger a claim.</td>
</tr>
<tr>
<td>• possible exception for parental opportunity for meaningful participation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Implementation violations: two competing prevailing standards (though not per se approach)</td>
<td>Implementation violations: bad faith or gross misjudgment approach</td>
<td></td>
</tr>
<tr>
<td>Specifically prescribed IEP</td>
<td>No formally required document (but practical use for proof)</td>
<td></td>
</tr>
<tr>
<td>• including ITP</td>
<td>• no ITP requirement</td>
<td></td>
</tr>
<tr>
<td>• with at least annual review</td>
<td>• no specified review requirement but presumably reasonableness standard</td>
<td></td>
</tr>
<tr>
<td>• including ESY where needed</td>
<td>• no explicit provision</td>
<td></td>
</tr>
<tr>
<td>• implementation “as soon as possible”</td>
<td>• no explicit implementation deadline</td>
<td></td>
</tr>
<tr>
<td>LRE:</td>
<td>• SAME</td>
<td>• “in the most integrated setting appropriate”</td>
</tr>
<tr>
<td>• residential placement: one option of LRE continuum</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• case law: extensive but diminishing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Obligation to provide services to parentally placed students in private schools: limited and specific obligation of the district of location</td>
<td>Obligation to provide services to students in private schools: limited and specific obligation of the private school</td>
<td></td>
</tr>
<tr>
<td>Obligation to children home-schooled under state law: conditional (and limited)</td>
<td>Obligation to children home-schooled under state law: none</td>
<td></td>
</tr>
<tr>
<td>Service animals: very limited right of access</td>
<td>Service animals: robust right of access</td>
<td></td>
</tr>
</tbody>
</table>

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75 ADA, 34 C.F.R. § 300.143(a).
77 28 C.F.R. § 35.145(a).
78 ADA, 28 C.F.R. § 35.145(a).
79 ADA, 28 C.F.R. § 35.145(b)(1).
80 ADA, 28 C.F.R. § 35.145(c).
<table>
<thead>
<tr>
<th><strong>STUDENT-SPECIFIC: PROCEDURAL SAFEGUARDS:</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>IDEA</strong></td>
</tr>
<tr>
<td>Long individual notice&lt;sup&gt;104&lt;/sup&gt;</td>
</tr>
<tr>
<td>Detailed criteria and specific role reps, including parents,&lt;sup&gt;106&lt;/sup&gt; for evaluation, IEP, and placement teams&lt;sup&gt;107&lt;/sup&gt;</td>
</tr>
<tr>
<td><strong>Detailed safeguards for student records</strong>&lt;sup&gt;109&lt;/sup&gt;</td>
</tr>
<tr>
<td>Consent for initial evaluation and, with limitations, for reevaluation&lt;sup&gt;111&lt;/sup&gt;</td>
</tr>
<tr>
<td>Consent for initial services&lt;sup&gt;113&lt;/sup&gt; – with written revocation as absolute&lt;sup&gt;114&lt;/sup&gt;</td>
</tr>
<tr>
<td>• revocation also applies to § 504&lt;sup&gt;115&lt;/sup&gt;</td>
</tr>
</tbody>
</table>
| Reevaluation at least every 3 years  
• plus upon parent or teacher request or if specified conditions warrant<sup>117</sup> | Periodic reevaluation<sup>118</sup>  
• plus upon “a significant change in placement”<sup>119</sup> |  |
| Impartial hearing<sup>120</sup> with well-settled exhaustion requirement for clear IDEA claims<sup>121</sup> | Impartial hearing<sup>122</sup> with inconsistent interpretation of IDEA’s exhaustion provision<sup>123</sup> |  |
| IHO override for placement: not for initial services/placement<sup>124</sup> nor for revocation of consent for services/placement<sup>125</sup> | IHO override for placement: stronger<sup>126</sup> |  |
| Stay-put requirement: explicit and sometimes complex<sup>127</sup> | Stay-put requirement: inferred?<sup>128</sup> |  |
### IDEA vs § 504 vs ADA

<table>
<thead>
<tr>
<th>Student-Specific: Discipline:</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Focus on “removals”</strong></td>
</tr>
<tr>
<td>More applications, including to other forms of discipline</td>
</tr>
<tr>
<td>Protection for “deemed to know” students: explicit</td>
</tr>
<tr>
<td>Protection for “deemed to know” students: implicit</td>
</tr>
<tr>
<td><strong>Cumulative days beyond 10 in a school year: 4 illustrative factors</strong></td>
</tr>
<tr>
<td><strong>Cumulative days beyond 10 in a school year: 3 illustrative factors</strong></td>
</tr>
<tr>
<td>M-Ds: detailed but recently reduced procedures and criteria</td>
</tr>
<tr>
<td>M-Ds: 2 criteria for team but otherwise more relaxed</td>
</tr>
<tr>
<td>• special, subsequent treatment for drug use or possession</td>
</tr>
<tr>
<td>• but with complete reevaluation (i.e., appropriateness criterion) upon “significant change in placement”</td>
</tr>
<tr>
<td>FBA(s) and BIPs: specific triggering requirements</td>
</tr>
<tr>
<td>FBAs or BIPs: no requirements for 504-only students</td>
</tr>
<tr>
<td>45-day interim alternate placements: 4 specified circumstances</td>
</tr>
<tr>
<td>45-day interim alternate placements: no authority</td>
</tr>
<tr>
<td>After valid expulsion: FAPE obligation continues</td>
</tr>
<tr>
<td>After valid expulsion: no FAPE obligation – except in the 5th and 11th Circuits</td>
</tr>
<tr>
<td>• also, albeit on streamlined basis, upon the 11th cumulative day</td>
</tr>
<tr>
<td>• none upon the 11th cumulative day</td>
</tr>
<tr>
<td>Interim alternate placement as expanded stay-put</td>
</tr>
<tr>
<td>No provision for interim placements</td>
</tr>
<tr>
<td>IDEA</td>
</tr>
<tr>
<td>------</td>
</tr>
<tr>
<td><strong>STUDENT-SPECIFIC: ENFORCEMENT:</strong>&lt;sup&gt;152&lt;/sup&gt;</td>
</tr>
<tr>
<td>Policy letters: OSEP&lt;sup&gt;153&lt;/sup&gt;</td>
</tr>
<tr>
<td>[No comparable requirement.]</td>
</tr>
<tr>
<td>Complaints and compliance reviews: SEA&lt;sup&gt;155&lt;/sup&gt;</td>
</tr>
<tr>
<td>• primarily procedural orientation&lt;sup&gt;156&lt;/sup&gt;</td>
</tr>
<tr>
<td>• ultimate sanction: loss of IDEA funding</td>
</tr>
<tr>
<td>• published “precedents”: rarely (and probably inadvertently)&lt;sup&gt;157&lt;/sup&gt;</td>
</tr>
<tr>
<td>Disputes: IHO is SEA responsibility&lt;sup&gt;163&lt;/sup&gt;</td>
</tr>
<tr>
<td>• detailed requirements for hearings&lt;sup&gt;164&lt;/sup&gt; - including district right to file and appeal&lt;sup&gt;165&lt;/sup&gt;</td>
</tr>
<tr>
<td>• published “precedents”: common&lt;sup&gt;166&lt;/sup&gt;</td>
</tr>
<tr>
<td>LEA responsibility: special ed director</td>
</tr>
<tr>
<td><strong>LITIGATION:</strong></td>
</tr>
<tr>
<td>-----------------</td>
</tr>
<tr>
<td><strong>Standing:</strong> parents - independent</td>
</tr>
<tr>
<td><strong>Exhaustion requirement:</strong> explicit and strong</td>
</tr>
<tr>
<td>• state option of one- or two-tier system</td>
</tr>
<tr>
<td><strong>Statute of limitations:</strong> explicit</td>
</tr>
<tr>
<td><strong>Unrestricted private right of action</strong></td>
</tr>
<tr>
<td><strong>Burden of proof:</strong> on the plaintiff for FAPE and LRE</td>
</tr>
<tr>
<td>“Due weight” standard of judicial review of IHO decision</td>
</tr>
<tr>
<td><strong>Expert witness fees:</strong> not recoverable</td>
</tr>
<tr>
<td><strong>Jury trial:</strong> no</td>
</tr>
<tr>
<td><strong>Protection against retaliation:</strong> limited</td>
</tr>
<tr>
<td><strong>Protection against bullying:</strong> need not be disability based but limited application and relief</td>
</tr>
<tr>
<td><strong>Attorneys’ fees:</strong> within limits</td>
</tr>
<tr>
<td>• possibly for SEA complaints too</td>
</tr>
</tbody>
</table>

170 A, 204, 206
171 A, 204, 206
172 A, 204, 206
173 A, 204, 206
174 A, 204, 206
175 A, 204, 206
176 A, 204, 206
177 A, 204, 206
178 A, 204, 206
179 A, 204, 206
180 A, 204, 206
181 A, 204, 206
182 A, 204, 206
183 A, 204, 206
184 A, 204, 206
185 A, 204, 206
186 A, 204, 206
187 A, 204, 206
188 A, 204, 206
189 A, 204, 206
190 A, 204, 206
191 A, 204, 206
192 A, 204, 206
193 A, 204, 206
194 A, 204, 206
195 A, 204, 206
196 A, 204, 206
197 A, 204, 206
198 A, 204, 206
199 A, 204, 206
<table>
<thead>
<tr>
<th>IDEA</th>
<th>§ 504</th>
<th>ADA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Various equitable remedies:</td>
<td>Similar, though less well developed</td>
<td></td>
</tr>
<tr>
<td>Established and emerging</td>
<td></td>
<td>Money damages: all jurisdictions but high</td>
</tr>
<tr>
<td></td>
<td></td>
<td>standard</td>
</tr>
<tr>
<td>• tuition reimbursement: well-developed</td>
<td>• tuition reimbursement: relatively rare</td>
<td></td>
</tr>
<tr>
<td>framework</td>
<td>• compensatory education: more slowly</td>
<td></td>
</tr>
<tr>
<td></td>
<td>developing</td>
<td></td>
</tr>
<tr>
<td>• compensatory education:</td>
<td></td>
<td>• Eleventh Amendment immunity: in the</td>
</tr>
<tr>
<td>emerging crystallization</td>
<td></td>
<td>minority of jurisdictions to date</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Eleventh Amendment immunity: in</td>
</tr>
<tr>
<td></td>
<td></td>
<td>declining minority of jurisdictions to</td>
</tr>
<tr>
<td></td>
<td></td>
<td>date</td>
</tr>
</tbody>
</table>

Money damages: *generally not available*[^205]

• Eleventh Amendment immunity: in none of the jurisdictions to date[^207]

[^200]: Emerging and crystallizing
[^201]: Well-developed
[^202]: Emerging
[^203]: Relatively rare
[^204]: More slowly developing
[^205]: Generally not available
[^206]: All jurisdictions but high standard
[^207]: None
[^208]: Minority
[^209]: Declining minority
Endnotes


4 34 C.F.R. §§ 300.300(b)(4) and 300.9(c)(3) (2014).

5 28 C.F.R. § 35.108.


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).


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, 898 A.2d 925 (Pa. Commw. Ct. 2005).


The threshold minimum is 15 employees. 42 U.S.C. § 12132.


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 (2014)). The pertinent provisions that define disability and provide for attorneys’ fees are, respectively, at 29 U.S.C. §§ 705(20) and 794(a).

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

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)

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)).


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).


45 See generally ZIRKEL, supra note 1.


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.

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.

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


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).

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).


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.

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.

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.

35 C.F.R. § 35.108(d)(1)(v); see also Costello v. Mitchell Pub. Sch. Dist. 79, 366 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 ADAAA, 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 ADAAA provides for determining substantial limitation for impairments that are episodic or in remission at the time the impairment is active. Id.
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).
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).
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.
See, e.g., Harrison (CO) Sch. Dist., 57 IDELR ¶ 295 (OCR 2011); Polk Cty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).


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


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.

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

For possible supersedence, see infra note 81.

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.”)

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).

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).


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).


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).


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.


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.


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).
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). Warded 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).


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).


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).


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).


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.

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.


125 34 C.F.R. § 300.300(b)(4)(ii).


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).


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


135 34 C.F.R. § 300.536.

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


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).
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).

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).

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).


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).

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

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).


Id. § 300.530(d)(4).

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.
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).
154 See *supra* note 38 and accompanying text.
156 *Id.*
158 *34 C.F.R. § 104.7(b) (if 15 or more employees).*
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.
164 See, e.g., 34 C.F.R. §§ 300.507–300.515 (including new provisions for prehearing process, including resolution session).
165 *Id.*
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.”*
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).

See Zirkel, supra note 122.


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


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 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.


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


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

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 Cnty. 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).


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

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


See, e.g., 34 C.F.R. § 300.517.


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.