

# SPECIAL EDUCATION LEGAL ALERT

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This monthly legal alert, as a wider view to start the new year, provides two over-arching legal developments: (a) a six-month look at the lower court progeny of the Supreme Court’s *Andrew F.* decision, and (b) the latest data on the incidence of students on 504 plans. The layout follows the usual format of a two-column table, with key rulings on the left and practical implications on the right. For automatic e-mailing of future legal alerts, sign up at [perryzirkel.com](http://perryzirkel.com); this website also provides free downloads of various related articles, including those specific to the complaint procedures avenue under the IDEA.

**In an article published last month entitled “*Andrew F.* After Six Months: A Game Changer?,” and available on my website, I have provided a systematic outcomes analysis of lower court decisions with a substantive FAPE issue between the date of the Supreme Court’s decision in *Andrew F. v. Douglas County School District RE-I*, and September 22, 2017, which marked its six-month anniversary. More specifically, the analysis was limited to the 33 cases in which an IDEA hearing officer applied *Rowley*’s substantive standard for FAPE and the court applied the corresponding substantive standard under *Andrew F.* Because one of the cases had two relevant rulings, representing two successive IEPs, the analysis was based on 34 rulings.**

In only 2 (6%) of these 34 rulings was the outcome different between the pre-*Andrew F.* hearing officer and the post-*Andrew F.* court. Moreover, the difference was limited to a remand of a ruling previously in the district’s favor for further consideration and—oddly enough—a reversal of a ruling previously in the parent’s favor. Partially moderating this lack of the overall outcomes difference, in 5 rulings the court upheld the hearing officer’s determination in favor of the parent.

Overall, the characterization of *Andrew F.* as a game-changer,” at least with regard to the rulings for the notable number of lower court decisions in the first six months after the decision, is hyperbole. However, a more definitive conclusion awaits more extensive research extending to not only a longer period but also hearing officer decisions. Moreover, beyond such empirical litigation analysis, the question of the effect of the decisions of IEP teams is the ultimate consideration.

Second, whether the hearing officer was in a “some” benefit or “meaningful” benefit jurisdiction did not seem to make a significant difference in the outcome. However, in 3 of the cases, the court expressly concluded that the *Andrew F.* standard was not substantively distinguishable from the previous standard of “meaningful” benefit. In any event, the lower courts’ analysis of *Andrew F.* was rather cursory.

It will take more time for hearing officers and party attorneys to flesh out a more careful analysis and application of the holding of *Andrew F.* in light of its varying dicta, which will in turn stimulate a more definitive shaping of judicial precedents. The key will be the identification and weighting of the relevant factors within the key phrase of “appropriate under the circumstances” in its holding, although the individualized nature of the IDEA inevitable counters high outcomes predictability.

**Although the U.S. Department of Education’s data has for many years reported the incidence of students with IEPs under the IDEA, the Department only started collecting and reporting the incidence for students with 504 plans under Section 504 (herein referred to as “504-only” students) as part of OCR’s biennial Civil Rights Data Collection (CRDC) for 2009–2010. The most recent reported data are for 2013–2014. The results stimulate the need for wider awareness, thoughtful consideration, and more extensive and intensive analysis.**

On average across of the school districts in the nation, the proportion of 504-only students was 1.8% for 2013–2014. The corresponding percentages for 2009–2010 and 2011–2013 were 1.0% and 1.5%, respectively (per the Zirkel & Weathers’ articles cited on my website).

The growth is largely attributable to the gradual awareness and implementation of the more liberalized eligibility standards in the ADAAA of 2008 and the resulting Department of Justice regulations in 2016.

As with the incidence of students with IEPs under the IDEA, the percentages of 504-only students varies rather widely among states. The leading states in terms of their respective averages were: New Hampshire – 5.5%, Louisiana – 5.0%, and Vermont – 4.4%. At the other extreme were New Mexico – .5% and, tied for next lowest, Nebraska and Utah, each at .7%.

The explanations for these differences are not simple but the likely contributing factors include (1) the extent of litigiousness in the cultures of each state; (2) the interaction with the over- and under-identification of students under the IDEA; and (3) the interrelationship with demographic factors, such as race and wealth.

The differences are also notable for race/ethnicity (in favor of Whites), gender (in favor of males), and poverty-related school status (in favor of non-Title I as compared with Title I schools).

These factors are not unexpected, given their significance and interaction for various other distributional results in our society, such as average annual incomes.

A systematic comparison among school districts is not available in the literature, but one may well hypothesize a wide discrepancy between the wealthy suburbs in litigious metropolitan areas, such as New York, Chicago, and Los Angeles, and their corresponding inner-city schools.

These intra-state differences may be at least as statistically and practically significant as the inter-state differences, although the matter merits empirical as well as policy attention. The data are available via OCR’s CRDC.