

EDUCATION LAW INTO PRACTICE

STATE-BY-STATE RATES OF 504-ONLY STUDENTS IN K-12 SCHOOLS*

by

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In schools, as in the courts, the legal spotlight for “disability” in the K–12 student population is on the Individuals with Disabilities Education Act (IDEA).¹ Starting with the identification process, the primary and central focus for education and litigation is on students with individual education programs (IEPs) under the IDEA. However, the broader definition of “disability” under Section 504² and its sister statute, the Americans with Disabilities Act (ADA),³ includes but extends beyond students eligible for IEPs under the IDEA. More specifically, unlike the IDEA,⁴ the Section 504 definition is not limited to specified classifications,⁵ learning,⁶ and the need for special education.⁷ Moreover, the ADA Amendments Act (ADAAA) of 2008 expanded the interpretation of the definitional criteria.⁸ The expanding group of covered students beyond those under the encompassed area of the

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1. 20 U.S.C. §§ 1400–1419 (2013).

2. 29 U.S.C. § 705(9)(B) (2013).

3. 42 U.S.C. § 12102(1)(A) (2013): “a physical or mental impairment that substantially limits one or more major life activities.” For the several examples of major life activities, see *id.* § 12012(2). The responsible agency, the U.S. Department of Education’s Office for Civil Rights (OCR), has made clear that for purposes of a 504 plan, which is the analog to an IDEA, the other two alternative prongs of the definition of disability are not applicable. See, e.g., Protecting Students with Disabilities at item 37 (OCR 2015), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>; Senior Staff Memorandum, 19 IDELR 894 (OCR 1992). Although Section 504 does not specifically require such a

written plan, this document is typically the way that school districts identify the 504-only group. E.g., Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).

4. The IDEA definition of disability is limited to specified classifications and the resulting need for special education. *Id.* § 1401(3)(A).

5. The relevant § 504/ADA definition extends to any physical or mental impairment. See *supra* note 3.

6. Similarly, the § 504/ADA definition extends to a long, illustrative list of major life activities, extending well beyond academic areas. See *supra* note 3.

7. Finally, tied the major life activity, the requisite qualifier is “substantially.” See *supra* note 3.

8. More specifically, the ADAAA added more examples to the list of major life activities, including subsets of learning, such as reading, and liberalized the determination of the “substantially” prong. E.g., Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEADERSHIP 3 (2009).

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IDEA, are commonly referred to as “504-only” or a variant thereof.⁹ Unlike for the students with IEPs under the IDEA, school districts do not receive any special funding for 504-only students under either Section 504/ADA or—with the limited exception in Utah¹⁰—state laws.

Previous Research

The literature specific to the incidence of Section 504-only students in the K–12 student population is markedly limited in comparison to that concerning the corresponding IDEA enrollments. For the IDEA, for example, empirical analyses have focused on the incidence of IDEA enrollments nationally¹¹ and in relation to specific issues, such as autism¹² and specific learning disability;¹³ racial/ethnic disproportionality;¹⁴ gender;¹⁵ and charter schools.¹⁶ The IDEA research has extended to inter-state prevalence rates, although per classification more than overall.¹⁷ The U.S. Department of Education’s Civil Rights Data Collection (CRDC) reported that the national average of IDEA students in 2013–14 was 12.2%, ranging from 8.6% in Texas¹⁸ and 8.7% in Idaho at the low end to 16.3% in Massachusetts and 16.2% in Maine on the high end.¹⁹

9. For example, the OCR data (*infra* note 19) refer to this category of students as “Section 504 only.”
10. UTAH CODE ANN. § 53A–17a–112.2 (West 2017); UTAH ADMIN. CODE R. 277–753–3 (2017). The extent of any state funding under this new legislation and its implementing regulation is unclear at this time because (a) the legislation does not commit any particular appropriation for this purpose, (b) any reimbursement under this legislation is limited to the costs of a 504 plan that exceed 150% of the per pupil expenditures for general education students and then only on a pro-rated basis, and (c) the state education agency is in the transitional process of compiling and reporting the requisite reporting data.
11. E.g., Christina Samuels, *Spec. Ed. Enrollments Rise*, EDUC. WK., Jan. 25, 2017, p. 6.
12. E.g., Katelyn Boswell, Benjamin Zablotsky & Christopher Smith, *Predictors of Autism Enrollment in Public School Systems*, 81 EXCEPTIONAL CHILD. 96 (2014).
13. E.g., Perry A. Zirkel, Zirkel, *The Trend in SLD Enrollments and the Role of RTI*, 46 J. LEARNING DISABILITIES 473 (2013).
14. E.g., DANIEL J. LOSEN & JONATHAN GILLESPIE, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL, <https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/federal-reports/upcoming-crrr-research>; Paul L. Morgan, George Farkas, Marianne M. Hillemeier & Steve Maczuga, *Replicated Evidence of Racial and Ethnic Disparities in Disability Identification in U.S. Schools*, 46 EDUC. RESEARCHER 305 (2017); Amanda L. Sullivan & Aydin Bal, *Disproportionality in Special Education: Effects of Individual and School Variables in Disability Risk*, 79 EXCEPTIONAL CHILD. 475 (2013).
15. E.g., Donald P. Oswald, Al M. Best, Martha J. Coutinho & Heather A. Nagle, *Trends in Special Education Rates of Boys and Girls: A Call for Research and Change*, 11 EXCEPTIONALITY 223 (2003).
16. E.g., William H. Blackwell, *An Era of Charter School Expansion: An Examination of Special Education in Massachusetts Charter Schools*, 24 J. DISABILITY POL’Y STUD. 75 (2012); Marcus A. Winters, *Understanding the Gap in Special Education Enrollments between Charter and Traditional Schools: Evidence from Denver, Colorado*, 44 EDUC. RESEARCHER 224 (2015).
17. E.g., Daniel P. Hallahan, Clayton E. Keller, Elizabeth A. Martinez, E. Stephen Byrd, Jennifer A. Gelman & Xitao Fan, *Prevalence Rates of Learning Disabilities and Other Special Education Categories: A Longitudinal Comparison*, 73 EXCEPTIONAL CHILD. 136 (2007).
18. For the U.S. Department of Education’s findings of IDEA violations and Texas’ initial plans for corrective action specific to this rate, see <https://tea.texas.gov/TexasSPED/>

STATE-BY-STATE RATES OF 504-ONLY STUDENTS

For Section 504, the corresponding prevalence analyses have focused on the national rate, although two of the studies also extended to the variables of race/ethnicity, gender, and charter schools. More specifically, before the liberalizing eligibility standards of the ADA, Holler and Zirkel found a national average rate of 1.2% for 504-only students in 2005–2006 based on a mailed survey and calculated in relation to the overall student, not resident, population.²¹ Subsequent to these amendments, which went into effect on January 1, 2009, successive analyses of the more complete data from the U.S. Department of Education's CRDC²² revealed a national average rate for 504-only students of 1.02% based on the student population in 2009–2010²³ and 1.48% in 2011–2012.²⁴ Moreover, both analyses found significant differences for race/ethnicity, gender, and school Title I status.²⁵

However, this limited research has not extended to the more recent data and the particular issue of the variation in interstate prevalence rates. The purpose of this article is to analyze the prevalence rate of 504-only students nationally and, more specifically, among the states for the most recent CRDC biennial survey, which was for the school year 2013–14.²⁶

2013–2014 Rates

First, the CRDC data reveal that the national average for the prevalence of 504-only students in 2013–2014 was 1.8%.²⁷

Second, based on the same source,²⁸ the Appendix lists the prevalence rates and the rank for each state and the District of Columbia.²⁹ On the high side, New Hampshire (5.5%), Louisiana (5.0%) and Vermont (4.4%) rank

19. These data are from the following table that is available in the 2013–14 zip file that is downloadable from <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2013-14.html>: “Public School Students Overall and by Race/Ethnicity, Students with Disabilities Served under IDEA and Those Served Solely under Section 504, and Students Who Are English Language Learners, by State: School Year 2013–14.” CRDC conducts its surveys every two years, but the 2015–16 data will not be available until later in 2018. E.g., <https://www2.ed.gov/about/offices/list/ocr/data.html>

20. See *supra* note 8.

21. Rachel A. Holler & Perry A. Zirkel, *Section 504 and Public Schools: A National Survey Concerning “Section 504-Only” Students*, 92 NASSP BULL. 19 (Mar. 2008).

22. Being governmental surveys, the response rate was very close to 100%. In contrast, the response rate for Holler & Zirkel, *supra* note 21, at 26, was 45%.

23. Perry A. Zirkel & John M. Weathers, *Section 504-Only Students: National Incidence Data*, 26 J. DISABILITY POL'Y STUD. 184 (2015).

24. Perry A. Zirkel & John M. Weathers, *K–12 Students Eligible Solely under Section 504: Updated National Incidence Data*, 27 J. DISABILITY POL'Y STUD. 67 (2016).

25. For the other selected variable, charter school status, the results were mixed, with the first analysis finding a significant difference but the more recent analysis not finding the difference significant between charter and non-charter schools.

26. See *supra* note 19.

27. For the specific table that includes this information, see *supra* note 19. For rounding to the nearest hundredth, the more specific figure is 1.81% (based on 1.80543).

28. *Id.*

29. For the Appendix, the rounding is to the nearest hundredth of a percent to provide more accurate rankings among the 51 jurisdictions.

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first, second, and third in their respective prevalence rates.³⁰ At the bottom end, the lowest rates are for New Mexico (.5%), Wisconsin (.5%), and Mississippi (.3%).

Interpretation and Conclusions

The national average of 1.81% for 2013–2014³¹ reveals a continuing gradual increase from the earlier CRDC figures of 1.02% for 2009–2010 and 1.48% for 2011–2012.³² This gradual growth is likely attributable to the process of systems change in response to the ADAAA, which includes uneven dissemination of information and adjustments in policy and practice.³³

The state-by-state rates for 504–only students vary rather widely from .3% in Mississippi to 5.5% in New Hampshire. The ratio between these two percentages of approximately 1:18 is far higher than the corresponding ratio of 1:2 between the lowest and highest rates under the IDEA.³⁴ The reasons for this variance are complex and not clearly known. The likely contributing factors include litigiousness, socioeconomic status, and various interrelated situational features such as responses to high stakes time testing and the corresponding pressures with regard to IDEA identification.³⁵ Pending research that examines this complex set of interrelationships at the state level and, by way of extension on a selected basis, at the local levels, these national and state averages serve as initial guides, or early warnings, as to the under- and over-identification of 504–only students.

30. Here, the rounding is to the nearest tenth of a percent for the sake of brevity consistent with the reported (*supra* text accompanying note 27) national average of 1.8%.

31. For the corresponding national comparisons, the percentage here is to the nearest hundredth. See *supra* note 27.

32. See *supra* notes 23–24 and accompanying text.

33. For the complexity of the implementation of laws, see, e.g., JOHN G. GRUMM & STEPHEN L. WASBY, *THE ANALYSIS OF POLICY IMPACT* (1981); Thad E. Hall & Laurence J. O'Toole, *Structure for Policy Implementation: An Analysis of National Legislation 1965–1966 and 1993–1994*, 31 *ADMIN. & SOC'Y* 667 (2000). For analyses specific to disability laws, see, e.g., STEPHEN L. PERCY,

DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION (1989); Katherine Kovac Burns & Gary L. Gordon, *Analyzing the Impact of Disability Legislation in Canada and the United States*, 20 *J. DISABILITY POL'Y STUD.* 205 (2010).

34. See *supra* text accompanying notes 18–19. However, the overall range is much larger for the IDEA group, due at least in part to the much higher overall average of 12.2%, as compared with 1.8%.

35. Sorting through this complex pattern will require rather sophisticated statistical analysis, because no single factor serves as the explanation, much less causation. For example, for the first- and second-place states for 504 rates, New Hampshire and Louisiana, the respective ranks for IDEA rates are fourth place and forty-sixth place.

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Appendix: State-by-State Rate and Rank for Prevalence of 504-Only Students in 2013–2014

State	Rate	Rank
Alabama	0.86%	44 (tie)
Alaska	0.92%	41 (tie)
Arizona	1.29%	31
Arkansas	2.81%	8
California	0.92%	41 (tie)
Colorado	1.09%	37
Connecticut	3.57%	5
Delaware	2.65%	10
District of Columbia	1.07%	38
Florida	2.23%	12
Georgia	1.24%	32
Hawaii	1.48%	23
Idaho	1.95%	17
Illinois	2.00%	16
Indiana	1.54%	21
Iowa	1.19%	33 (tie)
Kansas	0.85%	46
Kentucky	1.34%	29 (tie)
Louisiana	4.99%	2
Maine	3.43%	7
Maryland	2.78%	9
Massachusetts	3.86%	4
Michigan	0.92%	41 (tie)
Minnesota	1.19%	33 (tie)
Mississippi	0.30%	51
Missouri	1.35%	26 (tie)
Montana	1.15%	36
Nebraska	0.72%	48
Nevada	1.35%	26 (tie)
New Hampshire	5.47%	1
New Jersey	2.28%	11
New Mexico	0.51%	49
New York	1.87%	18
North Carolina	1.46%	24

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North Dakota	2.01%	15
Ohio	1.61%	20
Oklahoma	0.86%	44 (tie)
Oregon	1.35%	26 (tie)
Pennsylvania	1.84%	19
Rhode Island	2.10%	13
South Carolina	1.40%	25
South Dakota	0.95%	39
Tennessee	0.94%	40
Texas	3.55%	6
Utah	0.73%	47
Vermont	4.41%	3
Virginia	1.50%	22
Washington	2.02%	14
West Virginia	1.34%	29 (tie)
Wisconsin	0.48%	50
Wyoming	1.18%	34