

## STATE RATES OF 504-ONLY STUDENTS IN K–12 PUBLIC SCHOOLS: AN UPDATE\*

by

Perry A. Zirkel, Ph.D., J.D., LL.M.\*\* and Tiedan Huang, Ed.D.\*\*

In contrast with the focus on K–12 students who qualify for individualized education programs (IEPs) under the Individuals with Disabilities Education Act (IDEA),<sup>1</sup> the identification of students who qualify for so-called “504 plans”<sup>2</sup> under Section 504 of the Rehabilitation Act (§ 504)<sup>3</sup> receives rather limited attention. The broader definition of “disability” under § 504<sup>4</sup> and its sister statute, the Americans with Disabilities Act (ADA),<sup>5</sup>

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\*\* Dr. Zirkel is university professor emeritus of Education and Law, Lehigh University, Bethlehem, PA. Dr. Huang is assistant professor of Education Leadership, Administration and Policy at Fordham University.

<sup>1</sup> 20 U.S.C. §§ 1400–1419 (2013).

<sup>2</sup> One of the various differences from the IDEA is that Sec. 504 does not prescribe a specifically designated and formatted document for the individualized “free appropriate public education” (FAPE) that is the qualifying child’s entitlement. Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011). For a systematic analysis of the similarities and differences, see Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 342 Ed.Law Rep. 886 (2017).

<sup>3</sup> 29 U.S.C. § 794 (2013).

<sup>4</sup> 29 U.S.C. § 705(9)(B) (2013): “a physical or mental impairment that substantially limits one or more major life activities.”

<sup>5</sup> 42 U.S.C § 12102(1)(A) (2013): “a physical or mental impairment that substantially limits one or more major life activities.” For the more than 25 examples of major life activities, including eating, sleeping, bending, breathing, and bowel functions, see *id.* § 12102(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).

includes but extends beyond the corresponding definition in the IDEA, resulting in two groups of students: (1) those who are “double covered” by the IDEA and § 504/ADA and (2) those who are “504-only.”<sup>6</sup>

More specifically, unlike the IDEA,<sup>7</sup> the § 504 definition is not limited to specified classifications,<sup>8</sup> learning,<sup>9</sup> and the need for special education.<sup>10</sup> Moreover, the ADA Amendments Act (ADAAA) of 2008, which went into effect on January 1, 2009, expanded the interpretation of the definitional criteria.<sup>11</sup> The resulting ADA regulations, which went into effect on October 11, 2016, added a few more examples of major life activities, such as interacting with others, writing, and reaching.<sup>12</sup> Unlike for the students with IEPs under the IDEA, school districts do not receive any special funding for § 504-only students under either §

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<sup>6</sup> These terms are merely functional, not legally official, designations. For example, OCR in its reporting of the CRDC data (*infra* notes 22 and 30) refers to the second category of students as “Section 504 only.”

<sup>7</sup> The IDEA definition of disability is limited to specified classifications and the resulting need for special education. 20 U.S.C. § 1401(3)(A). The focus on learning that is not only implicit in the causal link between these classifications and the need for special education but also more explicit in the IDEA regulations’ repeated emphasis on an adverse effect on educational performance. 34 C.F.R. § 300.8(c) (2015).

<sup>8</sup> The relevant § 504/ADA definition extends to any physical or mental impairment. See *supra* notes 4–5.

<sup>9</sup> Similarly, the § 504/ADA definition extends to a long, illustrative list of major life activities, extending well beyond academic areas. See *supra* note 5.

<sup>10</sup> However, the ultimate qualifying criterion, linking the impairment with the major life activity, is the requisite degree and duration of “substantially.” See *supra* note 4.

<sup>11</sup> 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). For the effective date and the incorporation of the ADAAA standards in § 504, see 29 U.S.C. § 705(20)(B).

<sup>12</sup> 28 C.F.R. § 35.108 (2016).

504 /ADA or—with the possible limited exception in Utah<sup>13</sup>—state laws.

### Previous Research

The literature specific to the incidence of § 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 addressed the incidence of IDEA enrollments nationally<sup>14</sup> and in relation to specific issues, such as autism<sup>15</sup> and specific learning disability;<sup>16</sup> racial/ethnic disproportionality;<sup>17</sup> gender;<sup>18</sup> and charter schools.<sup>19</sup> The

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<sup>13</sup> UTAH CODE ANN. § 53F-2-512 (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 did 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’s initial report of the required data provided mixed estimates based on districts having the choice to submit expenditures for the 2016–17 school year (33 districts, totaling approximately \$4.1 million) or for the eleven weeks from mid-August to October 31, 2017 (100 districts, totaling approximately \$4.6 million). UTAH STATE BOARD OF EDUCATION, APPROPRIATIONS FOR ACCOMMODATION PLANS FOR STUDENTS WITH SECTION 504 ACCOMMODATIONS (Dec. 2017), <https://schools.utah.gov/file/1c5ad51a-7dd1-4e4f-823a-f28b1863b3ed>. The Utah legislature did not allocate any funding for the 2018–19 school year. E-mail from Momi Tu’ua, Equity and Advocacy Specialist for the Utah State Board of Education, to Perry A. Zirkel (May 29, 2018, 310 EST (on file with author)).

<sup>14</sup> E.g., Christina Samuels, *Spec. Ed. Enrollments Rise*, EDUC. WK., Jan. 25, 2017, p. 6.

<sup>15</sup> E.g., Katelyn Boswell, Benjamin Zablotsky & Christopher Smith, *Predictors of Autism Enrollment in Public School Systems*, 81 EXCEPTIONAL CHILD. 96 (2014).

<sup>16</sup> E.g., Perry A. Zirkel, Zirkel, *The Trend in SLD Enrollments and the Role of RTI*, 46 J. LEARNING DISABILITIES 473 (2013).

<sup>17</sup> 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-ccrr-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).

<sup>18</sup> 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).

IDEA research has also extended to inter-state prevalence rates, although per classification more than overall.<sup>20</sup> The U.S. Department of Education’s Civil Rights Data Collection (CRDC) reported that the national average of IDEA students in 2015–16 was 12.5%, ranging from 8.6% in Texas<sup>21</sup> and 8.9% in Idaho at the low end to 17.0% in Massachusetts and 16.5% in Maine on the high end.<sup>22</sup>

For § 504, the corresponding prevalence analyses have focused on the national rate. More specifically, before the liberalizing eligibility standards of the ADA<sup>23</sup>, Holler and Zirkel found a national average rate of 1.2% for § 504-only students in 2005–06 based on a mailed survey and calculated in relation to the overall student, not resident, population.<sup>24</sup> 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 CRDC<sup>25</sup> revealed a national

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<sup>19</sup> 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).

<sup>20</sup> 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).

<sup>21</sup> For the U.S. Department of Education’s findings of IDEA violations and final plan for corrective action specific to this rate, see <https://tea.texas.gov/TexasSPED/>.

<sup>22</sup> These data are from public use file that is available in the 2015–16 zip file that is downloadable from <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-2015-16.html>. The corresponding national rate under the IDEA was 12.2% in 2013–14, with the same states at the top and bottom positions. Perry A. Zirkel, *State-by-State Rates of 504-Only Students in K–12 Schools*, 352 Ed.Law Rep. 9, 10 (2018).

<sup>23</sup> *Supra* notes 11–12 and accompanying text.

<sup>24</sup> 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).

<sup>25</sup> Being governmental surveys, the response rate was very close to 100%. In contrast, the response rate for Holler & Zirkel, *supra* note 24, at 26, was 45%.

average rate for § 504-only students of 1.02% based on the student population in 2009–10<sup>26</sup>; 1.48% in 2011–2012<sup>27</sup>; and 1.81% for 2013–2014.<sup>28</sup>

The most recent of these three successive biennial analyses extended to the percentages for each of the 50 states and the District of Columbia.<sup>29</sup> On the high side for 2013–2014, New Hampshire (5.47%), Louisiana (4.99%) and Vermont (4.41%) ranked first, second, and third in their respective prevalence rates. At the bottom end for 2013–14, the lowest rates were for New Mexico (.51%), Wisconsin (.48%), and Mississippi (.30%).

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 2015–16.<sup>30</sup>

### **2015–16 Rates**

First, the CRDC data reveal that the national average for the prevalence of § 504-only students in 2015–16 was 2.29%.<sup>31</sup>

Second, based on the same source,<sup>32</sup> the Appendix lists the prevalence rates and the rank for each state and the District of Columbia for 2015–16 in comparison to the corresponding data

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

<sup>27</sup> 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).

<sup>28</sup> Zirkel, *supra* note 22, at 11.

<sup>29</sup> *Id.*

<sup>30</sup> The source was the CRDC public-use data. See *supra* note 22. Specifically, we merged school-level data to the state level. We then calculated both the § 504-only incidence rate and rank statistics for each state using SPSS.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

for 2013–14, along with the net changes in percentage and rank. On the high side, New Hampshire (5.84%), Louisiana (5.35%) and Vermont (4.97%) retained their first-, second-, and third-place rankings in their respective prevalence rates.<sup>33</sup> At the bottom end, Wisconsin (.83%) and Mississippi (.39%) ranked 49<sup>th</sup> and 50<sup>th</sup>, each moving up one position, with Kansas (.10%) dropping from 46<sup>th</sup> to the 51<sup>st</sup> position. Conversely, New Mexico's 2015–16 rate (1.32%) resulted in a move up to 41<sup>st</sup> place from 49<sup>th</sup> position in 2013–14. The average increase for the 51 jurisdictions was .48%. Every state increased except Kansas (-.75%) and Arizona (-.05%), with the highest increases being in Texas (1.39%) and Connecticut (1.04%).<sup>34</sup>

### **Interpretation and Conclusions**

The national average of 2.29% for 2015–16<sup>35</sup> reveals a continuing gradual increase from the earlier biennial CRDC rates. Specifically, starting with 1.02% rate in the baseline year of 2009–10,<sup>36</sup> which was the first year under the liberalizing standards of the ADAAA,<sup>37</sup> the successive increases were .46% in 2011–2012,<sup>38</sup> .33% in 2013–14,<sup>39</sup> and .48% in 2015–16.<sup>40</sup> The failure of the rates to slow down or stop six years after the effective date of the ADAAA is surprising, suggesting an explanation that is a matter of culture rather than simply compliance.

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<sup>33</sup> Of these three states, the net percentage increase was higher for Vermont (.56) than for the other two states (each lower than the national average of .48).

<sup>34</sup> *Infra* Appendix.

<sup>35</sup> *Supra* text accompanying note 31.

<sup>36</sup> *Supra* note text accompanying note 26.

<sup>37</sup> *Supra* note 11 and accompanying text.

<sup>38</sup> *Supra* text accompanying note 27.

<sup>39</sup> *Supra* text accompanying note 28.

<sup>40</sup> *Supra* text accompanying note 31.

Although the process of systemic change in response to new or revised laws includes uneven dissemination of information and adjustments in policy and practice,<sup>41</sup> the intervening period since the ADA would appear to be more than ample for these factors. The likely contributing factor that is a matter of culture is the current national society's trend in education toward grade inflation, legalized entitlements, and—as most specifically illustrated in the accompanying field of higher education—increased bending of the rules to accommodate students.<sup>42</sup> The increase of .2% during the same period for the rate under the IDEA, which has not changed its eligibility standards for many years, further supports this societal explanation.

Conversely, the differences in the CRDC sampling between 2013–14 and 2015–16 are too limited to have had a notable contributing effect.<sup>43</sup> For example, the timing of the data collection was from April to January during the following school year for 2013–14 and from January to June during the following school year for 2015–16.

The state-by-state rates for § 504-only students vary rather widely from .39% in Mississippi to 5.84% in New Hampshire. The ratio between these two percentages of

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<sup>41</sup> Zirkel, *supra* note 22, at 10 (citing e.g., JOHN G. GRUMM & STEPHEN L. WASBY, *THE ANALYSIS OF POLICY IMPACT* (1981); STEPHEN L. PERCY, *DISABILITY, CIVIL RIGHTS, AND PUBLIC POLICY: THE POLITICS OF IMPLEMENTATION* (1989)).

<sup>42</sup> Douglas Belkin, *Colleges Bend the Rules for More Students, Give Them Extra Help*, WALL ST. J., May 24, 2018, <https://www.wsj.com/articles/colleges-bend-the-rules-for-more-students-give-them-extra-help-1527154200>. For example, this article reported that from 2011 to 2016, the proportion of students with special accommodations increased by an average of 71% at the public flagship universities and that 93 of the 100 of the four-year, not-for-profit colleges with the highest percentage of students with disabilities are private institutions. *Id.* The article identified wealth as a contributing factor. *Id.*

<sup>43</sup> According to the Public-Use File User's Manual, both the 2013–14 and the 2015–16 CRDC surveys collected data from the universe of all local education agencies (LEAs) and schools, including long-term secure juvenile justice facilities, charter schools, alternative schools, and schools serving students with disabilities. Through the course of the data collection, some LEAs had merged, closed, or opened, resulting in additions and removals. The initial target population consisted of 17,106 LEAs and 97,172 schools for the 2013–14 data collection and 17,422 LEAs and 99,518 schools for the 2015–16 CRDC cycle. The final population consisted of 16,893 LEAs and 95,958 schools for 2013–14 and 17,370 LEAs and 96,440 schools for 2015–16.

approximately 1:15 is far higher than the corresponding ratio of 1:2 between the lowest and highest rates under the IDEA.<sup>44</sup> 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.<sup>45</sup> Yet, exemplifying the lack of specific explanation are the relatively pronounced percentage increase in Texas and corresponding percentage decrease in Kansas during the past two years.<sup>46</sup> As noted in the previous article, 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.<sup>47</sup>

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<sup>44</sup> *Supra* text accompanying notes 21–22. Yet, due to the increased figures, the ratio decreased modestly from 1:18 for 2013–14. Zirkel, *supra* note 22, at 12.

<sup>45</sup> *Id.*

<sup>46</sup> *Supra* text accompanying note 34. In any event, the Texas situation appears to be subject to change based on the reference to § 504 in the state’s dyslexia regulations (19 TEX. ADMIN. CODE § 74.28(e)) and the aforementioned (*supra* note 21) plan that provides, *inter alia*, for “improved training regarding the interplay between the state’s dyslexia program, services provided under Section 504, and services provided by [the IDEA].” TEXAS EDUCATION AGENCY, SPECIAL EDUCATION STRATEGIC PLAN 20 (Apr. 23, 2018).

<sup>47</sup> Zirkel, *supra* note 22, at 12.

*Appendix: State-by-State Rate and Rank for Percentage of 504-Only Students in 2014–15  
As Compared with 2013–14*

| STATE                | RATE<br>(2013–14) | RANK<br>(2013–14) | RATE<br>(2015–16) | RANK<br>(2015–16) | CHANGE<br>IN RATE | CHANGE<br>IN RANK |
|----------------------|-------------------|-------------------|-------------------|-------------------|-------------------|-------------------|
| Alabama              | .86%              | 44 (tie)          | 1.16%             | 46                | .30               | -2                |
| Alaska               | .92%              | 41 (tie)          | 1.35%             | 40                | .43               | 1                 |
| Arizona              | 1.29%             | 31                | 1.24%             | 43                | -.05              | -12               |
| Arkansas             | 2.81%             | 8                 | 3.78%             | 8                 | .97               | 0                 |
| California           | .92%              | 41 (tie)          | 1.18%             | 45                | .26               | -4                |
| Colorado             | 1.09%             | 37                | 1.82%             | 23                | .73               | 14                |
| Connecticut          | 3.57%             | 5                 | 4.61%             | 5                 | 1.04              | 0                 |
| Delaware             | 2.65%             | 10                | 3.06%             | 10                | .41               | 0                 |
| District of Columbia | 1.07%             | 38                | 1.45%             | 37                | .38               | 1                 |
| Florida              | 2.23%             | 12                | 2.93%             | 12                | .70               | 0                 |
| Georgia              | 1.24%             | 32                | 1.62%             | 31                | .38               | 1                 |
| Hawaii               | 1.48%             | 23                | 1.86%             | 22                | .38               | 1                 |
| Idaho                | 1.95%             | 17                | 2.55%             | 15                | .60               | 2                 |
| Illinois             | 2.00%             | 16                | 2.56%             | 14                | .56               | 2                 |
| Indiana              | 1.54%             | 21                | 1.77%             | 27                | .23               | -6                |
| Iowa                 | 1.19%             | 33 (tie)          | 1.61%             | 32                | .42               | 1                 |
| Kansas               | 0.85%             | 46                | .10%              | 51                | -.75              | -5                |
| Kentucky             | 1.34%             | 29 (tie)          | 1.92%             | 21                | .58               | 8                 |
| Louisiana            | 4.99%             | 2                 | 5.35%             | 2                 | .36               | 0                 |
| Maine                | 3.43%             | 7                 | 3.80%             | 7                 | .37               | 0                 |
| Maryland             | 2.78%             | 9                 | 3.07%             | 9                 | .29               | 0                 |
| Massachusetts        | 3.86%             | 4                 | 4.19%             | 6                 | .33               | -2                |
| Michigan             | .92%              | 41 (tie)          | 1.31%             | 42                | .39               | -1                |
| Minnesota            | 1.19%             | 33 (tie)          | 1.57%             | 35(tie)           | .38               | -2                |
| Mississippi          | .30%              | 51                | .39%              | 50                | .09               | 1                 |
| Missouri             | 1.35%             | 26 (tie)          | 1.63%             | 30                | .28               | -4                |
| Montana              | 1.15%             | 36                | 1.64%             | 29                | .49               | 7                 |
| Nebraska             | .72%              | 48                | 1.00%             | 47                | .28               | 1                 |
| Nevada               | 1.35%             | 26 (tie)          | 1.39%             | 38                | .04               | -12               |
| New Hampshire        | 5.47%             | 1                 | 5.84%             | 1                 | .37               | 0                 |
| New Jersey           | 2.28%             | 11                | 2.52%             | 16                | .24               | -5                |
| New Mexico           | .51%              | 49                | 1.32%             | 41                | .81               | 8                 |
| New York             | 1.87%             | 18                | 2.15%             | 18                | .28               | 0                 |
| North Carolina       | 1.46%             | 24                | 1.60%             | 33                | .14               | -9                |
| North Dakota         | 2.01%             | 15                | 2.07%             | 19                | .06               | -4                |
| Ohio                 | 1.61%             | 20                | 2.19%             | 17                | .58               | 3                 |
| Oklahoma             | .86%              | 44 (tie)          | 1.19%             | 44                | .33               | 0                 |
| Oregon               | 1.35%             | 26 (tie)          | 1.81%             | 25                | .46               | 1                 |
| Pennsylvania         | 1.84%             | 19                | 2.02%             | 20                | .18               | -1                |
| Rhode Island         | 2.10%             | 13                | 2.95%             | 11                | .85               | 2                 |

|                      |              |          |              |          |            |     |
|----------------------|--------------|----------|--------------|----------|------------|-----|
| South Carolina       | 1.40%        | 25       | 1.82%        | 24       | .42        | 1   |
| South Dakota         | .95%         | 39       | 1.58%        | 34       | .63        | 5   |
| Tennessee            | .94%         | 40       | 1.38%        | 39       | .44        | 1   |
| Texas                | 3.55%        | 6        | 4.94%        | 4        | 1.39       | 2   |
| Utah                 | .73%         | 47       | .99%         | 48       | .26        | -1  |
| Vermont              | 4.41%        | 3        | 4.97%        | 3        | .56        | 0   |
| Virginia             | 1.50%        | 22       | 1.57%        | 35 (tie) | .07        | -13 |
| Washington           | 2.02%        | 14       | 2.64%        | 13       | .62        | 1   |
| West Virginia        | 1.34%        | 29 (tie) | 1.71%        | 28       | .37        | 1   |
| Wisconsin            | .48%         | 50       | .83%         | 49       | .35        | 1   |
| Wyoming              | 1.18%        | 34       | 1.78%        | 26       | .60        | 8   |
| <b>United States</b> | <b>1.81%</b> |          | <b>2.29%</b> |          | <b>.48</b> |     |