**EDUCATION LAW INTO PRACTICE**

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# THE LATEST COMPREHENSIVE COMPARISON OF THE IDEA AND SECTION 504/ADA*

by

Perry A. Zirkel, Ph.D., J.D., LL.M.**

An article in the March **2017** issue of WEST'S EDUCATION LAW REPORTER (EDUC. L. 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] The previous updates included the procedural and substantive developments since the original version, including but not limited to 1) the ADA Amendments Act of 2008 (ADAAA)[2]; 2) related or concomitant issues under Section 504[3]; 3) the consent revocation amendments in the December 2008 IDEA regulations[4]; 4) the ADAAA Title II regulations issued in August 2016[5]; and 5) relatively new relevant issues, such as response to intervention[6] and service animals.[7] Designated in **underlined bold font, this latest version adds new entries to the annotated outline and, more extensively, to the references and refinements in the endnotes**.

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) among the three statutory frameworks are

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** Dr. Zirkel is University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association. **For recent publications and his monthly update, visit his website *perryzirkel.com*.**

represented by regular typeface, while those that are *advanced*—in terms of being more subtle or sophisticated—are presented in italics.

Finally, this supplemental chart contains the following acronyms:

| | |
|---|---|
| BIP | behavioral intervention plan |
| **DPH** | **due process hearing** |
| ED | emotional disturbance |
| ESY | extended school year |
| FAPE | free appropriate public education |
| FBA | functional behavioral assessment |
| **IAES** | **interim alternative educational setting** |
| IEE | independent educational evaluation |
| IEP | individualized education program |
| IHO | impartial hearing officer |
| ITP | individual transition plan |
| LEA | local education agency |
| LOF | letter of finding |
| LRE | least restrictive environment |
| M-D | manifestation determination |
| OCR | Office for Civil Rights |
| OSEP | Office of Special Education Programs |
| RTI | response to intervention |
| SEA | state education agency |

| IDEA | § 504 | ADA[8] |
|---|---|---|
| **GENERAL:** | | |
| Funding statute<br>• provides approx. 15-20% of excess costs of special education[9] | Civil rights act<br>• tied to federal funding[10] but provides none | Civil rights act<br>• neither tied to federal funding nor providing it |
| For students aged 0-21 prior to and in elementary and secondary education[11]<br>• peripheral re facilities[12]<br>• including extracurricular and other such activities[13] | For students in elementary/secondary and also:<br>• postsecondary education[17]<br>• employees[18]<br>• facilities[19]<br>• extracurricular and other such activities[20] | SAME AS § 504 plus also other private entities that provide public accommodations[24] |
| Extends, as a district obligation, **directly to IEP-team private placements and potentially** to unilaterally placed students in private schools[14] and, to a much lesser extent, to those voluntarily placed in such schools[15]<br>• *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*[16] | *Extends directly—in comparison to limited district obligation*[21]*—to parochial and other private schools that receive federal hot lunch, E-rate, Title I and/or IDEA program services*[22]<br>• *does not apply to home-schooled children*[23] | *Extends as well to private, nonparochial schools without such federal financial assistance*[25] |
| Long statute (approx. 55 pages in subchapters I and II)[26] | Short statute (less than 2 pages for definitions and prohibition)[27] | Medium statute (approx. 15 pages for subchapters I-III)[28] |
| Lengthy regulations (approx. 55 pp. + comments) **– updated after each reauthorization of the statute, most recently in 2006**[29] | Relatively short regulations (approx. 9 pp. + comments)[32] **not updated since issuance in 1977, but brief recent initiation**[33] | Shorter regulations (e.g., approx. 7 pages for Title II)[36] |
| Establishes an affirmative obligation[30] | Provides a prohibition of discrimination[34] | SAME AS § 504 **(although slightly less stringent standard)**[37] |
| Detailed annual reports to Congress[31] | Less extensive disability coverage, although still mandatory annual reports to Congress[35] | SAME AS § 504[38] |

| | | |
|---|---|---|
| **ADMINISTERING AGENCY (FOR K-12 SCHOOLS):** | | |
| OSEP[39] | OCR[40]<br>and occasionally DOJ[41] | SAME AS § 504[42]<br>*although increasingly DOJ*[43] |
| **INSTITUTIONAL REQUIREMENTS:** | | |
| | Various that are explicit:<br>• short nondiscrimination notice<br>• identified coordinator[44]<br>• *grievance procedure*[45]<br>• *self-evaluation document*[46] | SAME AS § 504<br><br><br><br>• *must be updated as of 1/26/93*[47] |
| **STATUTORY INTERPLAY:** | | |
| Increasing effect of § 504 and ADA[48] | Intertwined relationship with ADA[49] and extensive effect of IDEA[50] | Intertwined relationship with § 504[51] |
| Extensive interconnection with NCLB[52] | *Limited, largely indirect, effect of NCLB*[53] | |
| **STUDENT-SPECIFIC: IDENTIFICATION:**[54] | | |
| 2-part definition of disability:[55]<br>• 1 or more of 11 classifications +<br>• need for special education | broader 3-part definition of disability:[56]<br>• any recognized impairment +<br>• major life activity (not just learning[57]—expanded list within[58] and beyond[59] learning) +<br>**• substantial limitation[60]**<br>**• exclusions for sexual disorders and current illegal drug use[61]** | **SAME AS § 504[62]** |
| *Frame of reference for measuring adverse effect: unspecific*[63] | *Frame of reference for measuring substantial* | |

| | | |
|---|---|---|
| | *limitation: average student in general population*[64] | |
| *Mitigating measures (e.g., medication): irrelevant* ***(i.e., as is)***[65] | *Mitigating measures (e.g., medication): measurement without*[66] | |
| Child-find obligation: specific collectively[67] | Child-find obligation: *more explicit individually—and less strong?*[68] | |
| *Evaluation*[69]*: medical assessment not required (unless state law provides otherwise)*[70]<br>• IEE: specific provisions[73]<br>• mis-identification: focus on "false negatives"[75] but no coverage for "false positives"[76] | ***Different, lesser standards***[71] **though SAME re *medical assessment***[72]<br>• *IEE: no provision*[74]<br>• *mis-identification: extension to "false positives"*[77] | |
| RTI: major area of state law activity for SLD identification[78] | *RTI: indirect effect limited to double-covered students*[82] | |
| Leading issues: ED[79] and ADHD[80] | Leading issue: students with **physical and, increasingly, mental** health conditions[83] | |
| **Gradually increasing national rate with wide inter-state differences**[81] | **More rapidly increasing rate, with wide inter-state differences**[84] | |
| **STUDENT-SPECIFIC: SERVICES:** | | |
| FAPE = special ed. + related services | FAPE = special ed. or reg. ed. + related services[85] | |
| Substantive standard: reasonably calculated to enable the child to make appropriate progress in light of the child's circumstances[86] | Substantive standard: *commensurate opportunity or* reasonable accommodation?[87]<br>• *local (district) frame of reference*[88]<br>• ***with mitigating measures***[89]<br>• ***bad faith/gross misjudgment or deliberate indifference std.?***[90]<br>• *for private schools – "minor adjustments"*[91] | *Substantive standard: reasonable modification*[92] *or discrimination*[93]<br>• *specialized difference for hearing impaired students?*[94] |

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| *Procedural violations constitute denial of FAPE where not harmless error.*[95]<br>• *possible exception for parental opportunity for meaningful participation*[96] | *Procedural violations do not alone trigger a claim.*[97] | |
| Implementation violations: two competing prevailing standards (though not per se approach)[98] | Implementation violations: bad faith or gross misjudgment approach[103] | |
| Specifically prescribed IEP[99]<br>• including transition services[100]<br>• with at least annual review<br>• including ESY where needed[101]<br>• *implementation "as soon as possible"*[102] | No formally required document (but practical use for proof)[104]<br>• no individual transition services requirement<br>• no specified review requirement but presumably reasonableness standard<br>• no explicit provision<br>• no explicit implementation deadline | |
| LRE[105]:<br>• residential placement: one option of LRE continuum[106]<br>• case law: extensive but diminishing[107] | • SAME AS THE IDEA[108]<br>• *case law: extensions*[109] | • *"in the most integrated setting appropriate"*[110] |
| Obligation to provide services to parentally placed students in private schools: limited and specific obligation of the district of location[111] | *Obligation to provide services to students in private schools: limited and specific obligation of the private school*[112] | |
| *Obligation to children home-schooled under state law: conditional (and limited)*[113] | *Obligation to children home-schooled under state law: none*[114] | |
| *Service animals: very limited right of access*[115] | ***Service animals: same as under the ADA***[116] | *Service animals: robust right of access*[117] |

**STUDENT-SPECIFIC: PROCEDURAL SAFEGUARDS:**

| | | |
|---|---|---|
| Long individual notice[118] | Medium individual notice[119] | |
| Detailed criteria and specific role reps, including parents, [120] for | 3 criteria for all-purpose team (knowledgeable about child, | |

| | | |
|---|---|---|
| evaluation, IEP, and placement teams[121] | evaluation data, and interventions), w/o specifically requiring parents[122] | |
| *Detailed safeguards for student records*[123] | No specific additions to brief mention in procedural safeguards provision[124] | |
| Consent for initial evaluation and, with limitations, for reevaluation[125] | *Consent for initial evaluation but only notice for reevaluation*[126] | |
| Consent for initial services[127] – with written revocation as absolute[128]<br>• *revocation also applies to § 504* ***for double-covered students***[129] | *No consent for services?*[130] | |
| Reevaluation at least every 3 years<br>• *plus upon parent or teacher request or if specified conditions warrant*[131] | Periodic reevaluation[132]<br>• *plus upon "a significant change in placement"*[133] | |
| **Transfer of rights upon reaching age of majority[134]**<br>**• extinguishing parents' standing for reimbursement remedy[135]** | **No specific transfer of rights provision**<br>**• unsettled for parents' standing[136]** | **SAME AS § 504** |
| *Impartial DPH*[137] *with well-settled exhaustion requirement for* ***explicit*** *IDEA claims*[138] | *Impartial DPH*[139] ***with newly settled interpretation of IDEA's DPH exhaustion provision[140] but residual boundary problem[141]*** | |
| *IHO override for placement: not for initial services/placement*[142] nor for revocation of consent for services/placement[143] | *IHO override for placement: stronger*[144] | |
| Stay-put requirement: explicit *and sometimes complex*[145] | *Stay-put requirement: inferred?*[146] | |
| **STUDENT-SPECIFIC: DISCIPLINE:**[147] | | |

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| Focus on "removals"[148] | More applications,[149] including to other forms of discipline[150] | |
| Protection for "deemed to know" students: explicit[151] | *Protection for "deemed to know" students: implicit*[152] | |
| *Cumulative days beyond 10 in a school year: 4 illustrative factors*[153] | *Cumulative days beyond 10 in a school year: 3 illustrative factors*[154] | |
| M-Ds: detailed but recently reduced procedures and criteria[155] | M-Ds: 2 criteria for team but otherwise more relaxed[157]<br>• *but with complete reevaluation (i.e., appropriateness criterion*[158]*) upon "significant change in placement"*[159] | |
| • special, subsequent treatment for drug use or possession[156] | • *but no M-D required for expulsion for use of alcohol or illegal drugs*[160] | |
| FBA(s) and BIPs: specific triggering requirements[161] | *FBAs or BIPs: no requirements for 504-only students* | |
| 45-day IAES: 4 specified circumstances[162] | *45-day IEASs: no authority*[163] | |
| After valid expulsion: FAPE obligation continues[164]<br>• *also, albeit on streamlined basis, upon the 11th cumulative day*[165] | After valid expulsion: no FAPE obligation[166] – *except in the 5th and 11th Circuits*[167]<br>• *none upon the 11th cumulative day* | |
| IAES as expanded stay-put[168] | No provision for IAES | |

**STUDENT-SPECIFIC: ENFORCEMENT:**[169]

| | | |
|---|---|---|
| Policy letters: OSEP[170] | Policy letters: OCR[171] | SAME AS § 504[172] |
| [No comparable requirement.] | LEA grievance procedure[176] | ALMOST SAME AS § 504[179] |
| Complaints and compliance reviews: SEA[173]<br>• *primarily procedural orientation*[174] | Complaints and compliance reviews: OCR<br>• *almost entire procedural orientation*[177] | SAME AS § 504[180] |

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| • *ultimate sanction: loss of IDEA funding*<br>• ***published: inconsistently***[175] | • *ultimate sanction: loss of all federal funding*<br>• ***published: incompletely***[178] | |
| Disputes: DPH is SEA responsibility[181]<br>• detailed requirements for hearings[182] - including district right to file and appeal[183]<br>• ***published: incompletely***[184] | Disputes: DPH is LEA responsibility[185]<br>• skeletal requirement for hearings[186] - *including ambiguity whether district has right to file and appeal*[187]<br>• *published: rarely* | |
| LEA responsibility: special ed director | LEA responsibility: 504 coordinator | LEA responsibility: ADA coordinator |

**LITIGATION:**[188]

| | | |
|---|---|---|
| *Standing: parents - independent*[189] | *Standing: parents – not independent (except for retaliation)*[190] | |
| *Exhaustion requirement: explicit and strong*[191] | *Exhaustion requirement: more extensive exceptions*[193] | |
| • state option of one- or two-tier system[192] | • *one-tier suffices even in 2-tier IDEA jurisdiction*[194] | |
| *Statute of limitations: explicit*[195] | *Statute of limitations: by analogy - varying but often longer*[196] | SAME AS § 504[197] |
| *Unrestricted private right of action* | *Restricted private right of action*[198] | |
| ***Evidence upon judicial review: limited***[199] | ***Wider possibility via discovery***[200] | |
| *Burden of proof: on the plaintiff for FAPE and LRE* ***(with limited state law exceptions)***[201] | *Burden of proof: on the plaintiff (i.e., parents)*[202] | SAME AS § 504[203] |
| *"Due weight" standard of judicial review of IHO decision*[204] | *Unsettled standard of judicial review*[205] | |
| Expert witness fees: not recoverable[206] | *Expert witness fees: recoverable*[207] | |
| Jury trial: no[208] | *Jury trial: yes*[209] | |

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|---|---|---|
| Protection against retaliation: limited[210] | *Protection against retaliation and harassment: stronger*[211] | *Extends to associational protection*[212] |
| *Protection against bullying: need not be disability based*[213] *but limited application and relief*[214] | *Protection against bullying, i.e., peer harassment, based on disability*[215]*: stronger*[216] | |
| Attorneys' fees: within limits[217]<br>• *possibly for SEA complaint decisions too*[218] | Attorneys' fees: *possibly higher*[219]<br>• *not for OCR complaints* | |
| Various equitable remedies: Established and emerging[220]<br>• tuition reimbursement: well-developed framework[221]<br>• compensatory education: emerging crystallization[222]<br>• **liability standard: primarily denial of FAPE[223]** | Similar, though less well developed<br>• tuition reimbursement: relatively rare[224]<br>• compensatory education: more slowly developing[225]<br>• **liability standard: increasingly intent variation[226]** | |
| *Money damages: generally not available*[227] | *Money damages: all jurisdictions but high standard*[228] | ***SAME AS § 504 for Title II (public schools),[229] but no money damages under Title III (private schools)[230]*** |
| • *Eleventh Amendment immunity: in none of the jurisdictions to date*[231] | • *Eleventh Amendment immunity: in the minority of jurisdictions to date*[232] | • *Eleventh Amendment immunity: in declining minority of jurisdictions to date*[233] |

## Endnotes

[1] For the previous versions, see **342 EDUC. L. REP. 886 (2017);** 282 EDUC. L. REP. 767 (2012); 216 EDUC. L. REP. 1 (2007); 178 EDUC. L. REP. 629 (2003). **The coverage is specific exclusively to students. The only institutional or facilities issues addressed herein are those addressing students. Employee issues are not included.**

[2] 122 Stat. 3553, 3553-54 (codified at 42 U.S.C §§ 12101–12110 (2017), 29 U.S.C. § 705(20)(B) (2021)).

[3] *E.g.*, Perry A. Zirkel, *Does Section 504 Require a 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011).

[4] 34 C.F.R. §§ 300.300(b)(4) and 300.9(c)(3) (2022).

[5] 28 C.F.R. §§ 35.104, 35.108, and 35.136.

[6] *E.g.*, **Perry A. Zirkel, *The Law on RTI and MTSS*, 373 EDUC. L. REP. 1 (2020);** Perry A. Zirkel, *You Be the judge #11: Response to Intervention and SLD Identification*, 45 COMMUNIQUÉ 4 (Mar. 2016).

[7] 28 C.F.R. §§ 35.136 and 36.302(c) (DOJ service animal regulations under ADA Titles II and III). *See, e.g.,* Perry A. Zirkel, *Service Animals in K–12 Schools: A Legal Update*, 327 EDUC. L. REP. 554 (2016).

[8] This column, for the ADA, has blank entries where the ADA either mirrors or is silent for the particular topic, thus adding nothing to § 504. The ADA focus is **primarily** Title II, which applies to public schools and other governmental entities.

[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 specific term is "Federal financial assistance." 29 U.S.C. § 794. **For an unusual variation, see Stephen C. v. Bureau of Indian Educ., 75 IDELR ¶ 215 (D. Ariz. 2019), *further proceedings*, 76 IDELR ¶ 182 (D. Ariz. 2020) (discussing alternative of applicability to units within the executive branch of the federal government under their implementing regulations).**

[11] 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 EDUC. L. REP. 11 (2005).

[12] 34 C.F.R. § 300.718.

[13] *See, e.g.,* 34 C.F.R. §§ 300.107 and 300.117 (including new language regarding supplementary aids and services). *See, e.g.*, Indep. Sch. Dist. No. 12 v. Minn. Dep't of Educ., 788 N.W.2d 907, 260 Educ. L. Rep. 409 (Minn. 2010).

[14] 34 C.F.R. § 300.148. ***See generally* Perry A. Zirkel, *Legal Obligations to Students in Private Schools*, 351 EDUC. L. REP. 688 (2018).**

[15] 34 C.F.R. §§ 300.129–300.147 (including enhanced responsibilities, such as consultation, and their reallocation from the LEA of the child's residence to the LEA of the private school's location). **Concurrently, the district of residence has an offer-of-FAPE obligation upon parental request. *E.g.*, A.B. v. Abington Sch. Dist., 841 F. App'x 392, 396, 388 Educ. L. Rep. 183 (3d Cir. 2021); Bellflower Unified Sch. Dist. v. Lua, 832 F. App'x 493, 495–96, 385 Educ. L. Rep. 197 (9th Cir. 2020).**

[16] *See, e.g.,* Hooks v. Clark Cnty. Sch. Dist., 228 F.3d 1036, 147 Educ. L. Rep. 870, 220 Educ. L. Rep. 129 (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).

[17] *See, e.g.,* Margaret McMenamin & Perry A. Zirkel, *OCR Rulings Under Section 504 and the Americans with Disabilities Act: Higher Education Student Cases*, 16 J. POSTECONDARY EDUC. & DISABILITY 55 (2003).

[18] *See, e.g*., Perry A. Zirkel, *A Checklist for Disability Nondiscrimination in School District Employment*, 24 YOUR SCH. & THE LAW 6 (May 1994). ***See generally* Perry A. Zirkel, *Legal Obligations to Students in Private Schools*, 351 EDUC. L. REP. 688 (2018).**

[19] *See, e.g.,* Perry A. Zirkel, *New Section 504/ADA Checklist: Expert Reviews Accessibility of Facilities, Programs*, 10 THE SPECIAL EDUCATOR 33 (Sept. 6, 1994). For examples of student accessibility litigation, see **Ashby v. Warrick Cnty. Sch. Corp., 908 F.3d 225 (7th Cir. 2018);** Greer v. Richardson Indep. Sch. Dist., 472 F. App'x 287, 282 Educ. L. Rep. 101 (5th Cir. 2012); Celeste v. E. Meadow Union Free Sch. Dist., 373 F. App'x 85, 258 Educ. L. Rep. 1005 (2d Cir. 2010); **G.P v. Claypool, 466 F. Supp. 3d 875, 383 Educ. L. Rep. 166 (N.D. Ill. 2020);** D.R. v. Antelope Valley High Sch. Dist., 746 F. Supp. 2d 1132, 265 Educ. L. Rep. 215 (C.D. Cal. 2010); *cf*. Miles v. Cushing Pub. Sch., 51 IDELR ¶ 96 (W.D. Okla. 2008) (transportation and diaper-changing table).

[20] 34 C.F.R. § 104.34. For example, one of the most active areas of § 504 and ADA K–12 student litigation is interscholastic athletics. *See, e.g.*, Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 EDUC. L. REP. 761, 764 (2000) (hereinafter referred to as "Top Ten"). For more recent interscholastic athletic cases, see **A.H. v. Ill. High Sch. Ass'n, 881 F.3d 587, 351 Educ. L. Rep. 55 (7th Cir. 2018);** Mann v. La. High Sch. Athletic Ass'n, 535 F. App'x 405, 299 Educ. L. Rep. 445 (5th Cir. 2013); **D.M. v. Or. Scholastic Activities Ass'n, 627 F. Supp. 3d 1182 (D. Or. 2022); Pritchard v. Fla. High Sch. Athletic Ass'n, 76 IDELR ¶ 285 (M.D. Fla. 2020); Marshall v. N.Y.S. Pub. High Sch. Athletic Ass'n, 374 F. Supp. 3d 276 , 366 Educ. L. Rep. 239(W.D.N.Y. 2019);** K.L. v. Mo. State High Sch. Athletic Ass'n, 178 F. Supp. 3d 792, 336 Educ. L. Rep. 820 (E.D. Mo. 2016); Starego v. N.J. Interscholastic Athletic Ass'n, 970 F. Supp. 2d 303, 302 Educ. L. Rep. 998 (D.N.J. 2013); Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485, 156 Educ. L. Rep. 633 (E.D. Pa. 2001); Blaisden v. W. Va. Secondary Sch. Activities Comm'n, 568 S.E.2d 32 (W. Va. 2002); ***cf.* Clemons v. Shelby Cnty. Bd. of Educ., 818 F. App'x 453, 380 Educ. L. Rep. 677 (6th Cir. 2020) (preserving claim that school discriminated in excluding student with Asperger syndrome from tennis team)**. For the OCR guidance regarding § 504 and interscholastic athletics, see Dear Colleague Letter, 60 IDELR ¶ 167 (OCR 2013); Perry A. Zirkel, *Students with Disabilities and Extracurricular Athletics in the K–12 Context: OCR's Recent "Significant" Guidance*, 289 EDUC. L. REP. 13 (2013). For another particular but not exclusive application, see, e.g., Perry A. Zirkel, *Section 504 and the Americans with Disabilities Act: A Legal Analysis for Career and Technical Education Students*, 265 EDUC. L. REP. 447 (2011). **For a decision concerning an after-school program, see K.N. v. Gloucester City Bd. of Educ., 379 F. Supp. 3d 334 (D.N.J. 2019).**

[21] One limited avenue is indirect via the broad of discrimination under § 504. *See, e.g.*, 34 C.F.R. § 104.4(b)(1)(v). The other alternative, also notably limited to date, is incorporated state law. *See, e.g.*, Lower Merion Sch. Dist. v. Doe, 878 A.2d 925, 200 Educ. L. Rep. 778 (Pa. Commw. Ct. 2005).

[22] *See, e.g*., Perry A. Zirkel, *Section 504, the ADA, and Parochial School Students*, 211 EDUC. L. REP. 15 (2006). For more recent further examples, see Smith v. Tobinworld, 68 IDELR ¶ 47 (N.D. Cal. 2016) (IDEA placement); Russo v. Diocese of Greensburg, 55 IDELR ¶ 98 (W.D. Pa. 2010) (federal E-rate program); Spann v. Word of Faith Christian Ctr. Church, 559 F. Supp. 2d 759, 240 Educ. L. Rep. 626 (S.D. Miss. 2008) (federal vouchers).

[23] *See, e.g*., Letter to Veir, 20 IDELR 864 (OCR 1993).

**[24] The definition of "public accommodation" in Title III of the ADA includes private schools. 42 U.S.C. § 12181(7)(J). However, religiously controlled private schools are exempt. *Id.* § 12187.**

[25] ***Id.* For the applicable standard of "reasonable modifications," see** 28 C.F.R. § 36.302(a). The higher standard applies to double-covered entities. *Id*. § 36.103. *See, e.g.*, U.S. v. Nobel Learning Cmties., Inc., 676 F. Supp. 2d 379, 254 Educ. L. Rep. 180 (E.D. Pa. 2009); Franchi v. New Hampton Sch., 656 F. Supp. 2d 252, 252 Ed. Law Rep. 139 (D.N.H. 2009). For application of the religious exemption of the ADA, see, e.g., **E.R. v. St. Martin's Episcopal Sch., 80 IDELR ¶ 154 (E.D. La. 2022);** Sky R. v. Haddonfield Friends Sch., 67 IDELR ¶ 180 (D.N.J. 2016).

[26] 20 U.S.C §§ 1400–1419. These sections are Part B, but the statute is even longer in its entirety, extending to *id*. § 1482.

[27] 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (20143)). The pertinent provisions that define disability and provide for attorneys' fees are, respectively, at 29 U.S.C. §§ 705(20) and 794(a).

[28] 42 U.S.C. §§ 12101–12189. Part I is specific to employment, and the remaining parts extend to *id*. § 12213.

[29] 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] *See, e.g.,* CG v. Pa. Dep't of Educ., 734 F.3d 229, 234, 298 Ed. Law Rep. 229 (3d Cir. 2013) (citing W.B. v. Matula, 67 F.3d 484, 492–93, 104 Educ. L. Rep. 28 (3d Cir. 1995)).

[31] 20 U.S.C. § 1464(d). For these reports, see http://www2.ed.gov/about/reports/annual/osep/index.html.

[32] 34 C.F.R. Part 104.

**[33] In May 2022, the U.S. Department of Education's OCR announced its intent to proposed new regulations (https://www.ed.gov/news/press-releases/us-department-education-announces-intent-strengthen-and-protect-rights-students-disabilities-amending-regulations-implementing-section-504), but after successive announcements of impending proposals for May 2023 and August 2023, nothing has appeared to date.**

[34] *Id*.

[35] 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

[36] 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.

[37] *Id*. However, the standard for causation is different. *See, e.g*., CG v. Pa. Dep't of Educ., 734 F.3d at 235–36, 298 Ed. Law Rep. 229 (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] *Id.***

**[39] The Office of Special Education Programs (OSEP) is part of a larger unit of the U.S. Department of Education called the Office of Special Education and Rehabilitation Services (OSERS). For an overview of the operational structure of the Department showing the position of OSERS and the separate strand in which OCR fits, see https://www2.ed.gov/about/offices/or/index.html.**

[40] For the enforcement procedures and offices, see **U.S. DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL (2022), www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html**. For a decision rejecting a parent's suit against OCR that challenged its "opaque" decision, see McKnight v. U.S. Dep't of Educ. Off. for Civ. Rts., 2017 WL 1383449 (D. Nev. Apr. 12, 2017), *adopting* 2017 WL 136 3333 (D. Nev. Feb. 13, 2017).

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

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

[43] *See, e.g.,* Gates-Chili Cent. Sch. Dist., 65 IDELR ¶ 152 (DOJ 2015).

[44] **34 C.F.R. § 104.7(b) (minimum of 15 employees).**

[45] ***Id*. For an explanation and illustrative form, see Perry A. Zirkel, *Section 504/ADA Grievance Procedure for School Districts*, 397 EDUC. L. REP. 929 (2022).**

[46] **28 C.F.R. § 35.107(b) (minimum of 50 employees).**

[47] *See, e.g.*, OCR Memorandum, 19 IDELR 875 (OCR 1993).

[48] *See, e.g.*, Perry A. Zirkel, *Section 504 for Special Education Leaders: Persisting and Emerging Issues*, 25 J. SPECIAL EDUC. LEADERSHIP 99 (2014).

[49] ***E.g.*, 42 U.S.C. § 12201(a)-(b) (no lesser standard and no limitation on equal or greater standard).**

[50] *See, e.g.*, Alexis v. Bd. of Educ., Baltimore Pub. Schs., 286 F. Supp. 2d 551, 182 Ed. Law Rep. 830 (D. Md. 2003); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380, 182 Educ. L. Rep. 808 (D. Del. 2003); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 164 Educ. L. Rep. 108 (E.D. Pa. 2002).

[51] **Although, as the column entries show, the relevant requirements are often the same under the ADA as under § 504, doubly-covered entities must comply with any additional or more stringent obligations under the ADA. 42 U.S.C. § 12201(a)-(b).**

[52] *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 EDUC. L. REP. 805 (2004). The reference here to the No Child Left Behind Act (NCLB) applies as well to its successor legislation, the 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.

[53] *See, e.g.*, Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 EDUC. L. REP. 591 (2004).

[54] 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 85.

[55] 34 C.F.R. § 300.8 (including addition of Tourette syndrome to OHI).

[56] *Id*. § 104.3(j). *See, e.g.*, Perry A. Zirkel, *A Step-by-Step Process for §504/ADA Eligibility Determinations*, 239 EDUC. L. REP. 333 (2009). The other two prongs – "record of" and "regarded as" – are not applicable to FAPE. *See* Senior Staff Memorandum, 19 IDELR 894 (OCR 1992). Either of these other two prongs occasionally arise in an exclusion case. *See, e.g.,* Chadam v. Palo Alto Unified Sch. Dist., 666 F. App'x 615, 340 Educ. L. Rep. 100 (9th Cir. 2016); **Lawton v. Success Acad. Charter Sch., 323 F. Supp. 3d 353, 354 Educ. L. Rep. 353 (E.D.N.Y. 2018)**. 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, state, district, and school rates of 504-only students after the ADAAA, see Perry A. Zirkel & Gina L. Gullo, *School-District Rates of 504-Only Students in K–12 Schools: The Next Update*, 387 EDUC. L. REP. 1 (2021); Perry A. Zirkel & Gina L. Gullo, *State Rates of 504-Only Students in K-12 Public Schools: The Next Update*, 385 EDUC. L. REP 14 (2021) (hereinafter referred to as "State Rates"); Perry A. Zirkel & Gina L. Gullo, *Public School Rates of 504-Only Students: The Next Update*, 387 EDUC. L. REP. 1 (2021).** 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, 336 Educ. L. Rep. 141 (2d Cir. 2016); Mann v. La. High Sch. Athletic Ass'n, 535 F. App'x 405, 211, 299 Educ. L. Rep. 445 (5th Cir. 2013); Ellenberg v. N.M. Military Inst., 572 F.3d 815, 820–22, 246 Educ. L. Rep. 713 (10th Cir. 2009).

[57] 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 Cnty. 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 EDUC. L. 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, 198 Educ. L. Rep. 471 (9th Cir. 2005); Marlon v. W. New England Coll., 124 F. App'x 15, 196 Ed. Law Rep. 471 (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, 211 Ed. Law Rep. 998 (Colo. Ct. App. 2006) (analogous state law). However, the ADAAA directs the courts to take a more expansive and liberal view in construing the three elements of the definition of disability. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C §§ 12101-12102). For the latest OCR interpretation, see Questions and Answers on the ADA Amendments Act of 2008 for Students with

Disabilities Attending Public Elementary and Secondary Schools (OCR 2012), http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html.

[58] 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.

[59] 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.

**[60] *See, e.g.*, Perry A. Zirkel, *Identification of 504-Only Students: An Alternate Eligibility Form*, 357 EDUC. L. REP. 39 (2018).**

**[61] 42 U.S.C. §§ 12208 and 12210; 28 C.F.R. §§ 35.104 and 35.131.**

**[62] *Id.***

[63] *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 last 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.

[64] **28 C.F.R. § 35.108(d)(1)(v). For the related judicial authority, see Zirkel, *supra* note 60, at 40–41.**

**[65] *E.g.*, Memo 17–05, 70 IDELR ¶ 23 (OSEP 2017) (visual impairment even with correction).**

[66] 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*.

[67] *See, e.g.*, 34 C.F.R. §§ 300.111, 300.131, and 300.534. For the case law developments of the individual obligation, see, e.g., **Perry A. Zirkel, *Child Find Under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 COMMUNIQUÉ 14 (May 2020);** Perry A. Zirkel, *Child Find Under the IDEA: An Empirical Analysis of the Judicial Case Law*, 45 COMMUNIQUÉ 4 (May 2017); Perry A. Zirkel, *Child Find: The "Reasonable Period" Requirement*, 311 EDUC. L. REP. 576 (2015); Perry A. Zirkel, *"Child Find": The Lore v. the Law*, 307 EDUC. L. REP. 574 (2014).

[68] 34 C.F.R § 104.35(a) ("believed to need"). ***See, e.g.*, Culley v. Cumberland Valley Sch. Dist., 758 F. App'x 301, 364 Educ. L. Rep. 84 (3d Cir. 2018); E.P. v. Twin Valley Sch. Dist., 517 F. Supp. 3d 347, 393 Educ. L. Rep. 319 (E.D. Pa. 2021); Krebs v. New Kensington Arnold Sch. Dist., 69 IDELR ¶ 9 (W.D. Pa. 2016).** For its arguably lesser strength, see, e.g., T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997); *cf*. G.C. v. Owensboro Pub. Sch., 711 F.3d 623 (6th Cir. 2013) (lack of bad faith or gross misjudgment)**; P.W. v. Leander Indep. Sch. Dist., 83 IDELR ¶ 71 (W.D. Tex. 2023) (possible bad faith or gross misjudgment).** Distinguishable from "child find" for "pure" 504 students, students who are also covered by the IDEA. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 104 Educ. L. Rep. 28 (3d Cir. 1995); Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 292 Educ. L. Rep. 680 (E.D. Pa. 2012); O.F. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409, 175 Educ. L. Rep. 145 (E.D. Pa. 2002).

[69] *See, e.g.,* **Perry A. Zirkel, *The Law of Evaluations Under the IDEA: An Annotated Update*, 368 EDUC. L. REP. 594 (2019)**.

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

**[71] *E.g.*, H.D. v. Kennett Consol. Sch. Dist., 75 IDELR ¶ 94 (E.D. Pa. 2019) (citing 34 C.F.R. § 104.35(a)-(b)).**

[72] *See, e.g.*, Letter to Williams, 21 IDELR 73 (OCR 1994). 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).

[73] 34 C.F.R. § 300.502 (including limitation of entitlement for those at public-expense to one per year). *See, e.g.*, **Perry A. Zirkel, *Independent Educational Evaluation at Public Expense Under the IDEA: The Next Update*, 402 EDUC. L. REP. 23 (2022);** *cf.* Susan Etscheid, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).

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

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

[76] 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, 286 Educ. L. Rep. 131 (5th Cir. 2012) (5th Cir. 2012).

[77] S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 297 Educ. L. Rep. 58 (3d Cir. 2013); *see also* A.G. v. Lower Merion Sch. Dist., 542 F. App'x 194, 301 Educ. L. Rep. 61, 62 IDELR ¶ 102 (3d Cir. 2013)**; *cf.* Powers v. Northside Indep. Sch. Dist., 951 F.3d 298, 374 Educ. L. Rep. 796 (5th Cir. 2020) (rejecting whistleblower challenge to their termination for 504-only over-identification). *See generally* Perry A. Zirkel, *Avoiding Under- and Over-Identification of 504-Only Students*, 359 EDUC. L. REP. 715 (2018). Conversely, for a legal lesson for parents' who push unreasonably and frivolously against a defensible decision that their child does not qualify under § 504 or the IDEA, see Lincoln-Sudbury Reg'l Sch. Dist. v. Mr. & Mrs. W., 71 IDELR ¶ 143 (D. Mass. 2018) (ordering the parents to pay for the district's reasonable attorneys' fees).**

[78] 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.

[79] *See, e.g.*, **Perry A. Zirkel, *Checklist for Identifying Students Eligible Under the IDEA Classification of Emotional Disturbance: An Update*, 373 EDUC. L. REP. 18 (2020)**.

[80] **Perry A. Zirkel, *ADHD Checklist for Identifying Students Under the IDEA and Section 504/ADA: An Update*, 366 EDUC. L. REP. 585 (2019).**

**[81] *See, e.g.*, https://www2.ed.gov/about/reports/annual/osep/index.html (annual Department of Education reports to Congress on the implementation of the IDEA).**

[82] *See, e.g.,* Harrison (CO) Sch. Dist., 57 IDELR ¶ 295 (OCR 2011); Polk Cnty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).

[83] *See, e.g.,* R.K. v. Bd. of Educ. of Scott Cnty., 494 F. App'x 589, 289 Educ. L. Rep. 563 (6th Cir. 2012); *see also* Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 EDUC. L. REP. 577 (2014). **For the persisting issue of § 504 eligibility of students with ADHD, see George J. DuPaul & Perry A. Zirkel, *Section 504 Eligibility Determinations: Concentrating on ADHD*, 47 COMMUNIQUÉ 8 (Mar.-Apr. 2019). Finally, although not yet crystallized into published case law, mental health issues are increasingly coming to the fore, including various depression- and anxiety-related disorders based on school shootings, COVID-19, and other traumatic events.**

**[84] *E.g.*, Zirkel & Gullo, *State Rates*, *supra* note 56, at 17.**

[85] *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.

[86] *Endrew F. v. Douglas Cnty. Sch. Dist., RE-1*, **580 U.S. 386** (2017). **For the judicial interpretations, see, John P. Connolly & Lewis M. Wasserman, *Has* Endrew F. *Improved the Chances of Proving a FAPE Violation under the Individuals with Disabilities Education Act?* 18 J. ARTICLES SUPPORT NULL HYPOTHESIS 1539 (2021); Perry A. Zirkel, *The Aftermath of* Endrew F.*: An Outcomes Analysis Two Years Later*, 364 EDUC. L. REP. 1 (2019); William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. LEGAL & PUB. POL'Y 495 (2020).**

[87] *See, e.g.*, **Perry A. Zirkel, *How Good Must a 504 Plan Be to Pass Legal Muster?* 36 J. SPECIAL EDUC. LEADERSHIP 43 (2023) (canvassing the relatively recent case law).**

[88] 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.

**[89] 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.").**

**[90] The liability standard for money damages (*infra* note 225 and accompanying text) is gradually expanding to FAPE cases more generally. *E.g.*, Greenhill v. Loudoun Cnty. Sch. Bd., 76 IDELR ¶ 44 (E.D. Pa. 2020) (rejecting FAPE claim on this basis in addition or alternative to lack of exhaustion).**

[91] 34 C.F.R. § 104.39. ***E.g.*, E.R. v. St. Martin's Episcopal Sch., 80 IDELR ¶ 154 (E.D. La. 2022) (requiring fact-based determination of "reasonable, minor adjustment"); Hunt v. St. Peter Sch., 963 F. Supp. 843, 118 Educ. L. Rep. 663 (W.D. Mo. 1997) (rejecting mandatory, as compared with voluntary, scent-free environment as being more than a minor adjustment under § 504).** For possible supersedence, see *infra* note 92. **For dicta-like support, see Thurmon v. Mount Carmel High Sch., 191 F. Supp. 3d 894, 898, 338 Educ. L. Rep. 910 (N.D. Ill. 2016). For application of the overriding reasonable accommodation standard without connected consideration of this § 504 regulation, see Vergara v. Wesleyan Acad., 75 IDELR ¶ 43 (D.P.R. 2019).**

[92] 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 91 and accompanying text). For the relevant interrelationship language, see 28 C.F.R. § 36.103(a).

[93] Lartigue v. Northside Indep. Sch. Dist., 86 F.4th 689 (5th Cir. 2023) (ruled that IDEA substantive FAPE ruling did not preclude ADA FAPE failure-to-accommodate claim for money damages due to different standards and relief).

[94] *See, e.g.*, K.M. v. Tustin Unified Sch. Dist., 725 F.3d 1088, 296 Educ. L. Rep. 800 (9th Cir. 2013) (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 court decision and its 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 EDUC. L. 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 Cnty. Bd. of Educ. v. Manifold, 65 IDELR ¶ 268 (N.D. Ga. 2015). **Moreover, in a subsequent decision, the First Circuit ruled that a student with multiple disabilities, including autism, was not entitled to wear an audio recording device under the ADA's effective communication regulation based on the failure to prove the threshold necessary element of effectiveness, or demonstrable benefit. Pollack v. Reg'l Sch. Unit 75, 886 F.3d 75 , 352 Educ. L. Rep. 1008 (1st Cir. 2018). In the most recent decision, a federal district court relied in part on this regulation to deny dismissal of a § 504/ADA claim based on the reduction of cortical visual impairment (CVI) services to a student with CVI. J.M. v. Wake Cnty. Bd. of Educ., 81 IDELR ¶ 230 (E.D.N.C. 2022).**

[95] 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 513(a)(2).

[96] 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2)(ii) (seemingly separable role for procedural violation where district "significantly impede[d] the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child"). For a systematic analysis of the pertinent case law, see Perry A. Zirkel, *Parental Participation: The Paramount Procedural Requirement Under the IDEA?* 15 CONN. PUB. INT. L.J. 1 (2016).

[97] *See, e.g.*, **F.B. v. Our Lady of Lourdes Parish & Sch., 2023 WL 7181656 (E.D. Mo. Nov. 1, 2023);** Power v. Sch. Bd., 276 F. Supp. 2d 515, 181 Educ. L. Rep. 145 (E.D. Va. 2003); A.W. v. Marlborough Co., 25 F. Supp. 2d 27, 130 Educ. L. Rep.

1262 (D. Conn. 1998). However, OCR, which is the parents' other option as a formal dispute resolution forum, focuses strictly and—with a limited exception for extraordinary circumstances—on procedural issues. *See, e.g.*, Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, https://www2.ed.gov/about/offices/list/ocr/504faq.html (OCR 2023), at item 5. For the limited exception, see, e.g., Gloucester Cnty. (VA) Pub. Sch., 49 IDELR ¶ 21 (OCR 2007) (life-threatening food allergy).

[98] *See, e.g.*, Perry A. Zirkel & Eddie Bauer, *The Third Dimension of FAPE Under the IDEA: Implementation*, 36 J. NAT'L ADMIN. L. JUDICIARY 409 (2016).

[99] 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, https://www2.ed.gov/about/offices/list/ocr/504faq.html (OCR 2023), at item 35.

**[100] For the case law, see Perry A. Zirkel, *Judicial Rulings for Transition Services under the IDEA: An Update*, 402 EDUC. L. REP. 570 (2022); Perry A. Zirkel, *An Analysis of Judicial Rulings for Transition Services under the IDEA*, 41 CAREER DEV. & TRANSITION FOR EXCEPTIONAL INDIVIDUALS 136 (2018).**

[101] ***See, e.g.*, Allan Osborne & Perry A. Zirkel, *Eligibility for Extended School Year Services under the IDEA: A Comprehensive Snapshot*, 395 EDUC. L. REP. 17 (2021).**

[102] 34 C.F.R. § 300.323(c)(2). *See, e.g.*, D.D. v. N.Y.C. Bd. of Educ., 465 F.3d 503, 213 Educ. L. Rep. 353 (2d Cir. 2006).

[103] *See, e.g.,* Nixon v. Greenup Cty Sch. Dist., 890 F. Supp. 2d 753, 289 Educ. L. Rep. 703 (E.D. Ky. 2012); *cf.* CTL v. Ashland Sch. Dist., 743 F.3d 524, 302 Educ. L. Rep. 31 (7th Cir. 2014) (alternative of reasonable accommodation within safety context).

[104] For a more specific tabular analysis, see Perry A. Zirkel, *Comparison of IDEA IEPs and Section 504 Accommodations Plans*, 191 EDUC. L. REP. 563 (2004). For a more recent analysis in light of the ADAAA, see Zirkel, *supra* note 3.

[105] 34 C.F.R. § 300.114 (including education with nondisabled students "to the maximum extent appropriate").

[106] *See, e.g.*, 34 C.F.R. §§ 300.104 and 300.115.

[107] *See, e.g.*, Perry A. Zirkel, *The "Inclusion" Case Law: A Factor Analysis*, 127 EDUC. L. REP. 533 (1988). **For recent decisions, which generally continue to apply the same multiple factors, see B.E.L. v. Haw. Dep't of Educ., 711 F. App'x 426, 333 Educ. L. Rep. 131 (9th Cir. 2018); S.M. v. Gwinnett Cnty. Sch. Dist., 646 F. App'x 763 (11th Cir. 2016).**

[108] *Id*. § 104.33(c)(3).

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

[110] *E.g.*, 28 C.F.R. § 35.130(d). *See, e.g.,* **U.S. v. Ga., 461 F. Supp. 3d 1315, 382 Educ. L. Rep. 315 (N.D. Ga. 2020); Ga. Advocacy Office v. Ga., 447 F. Supp. 3d 1311, 379 Educ. L. Rep. 941 (N.D. Ga. 2020);** S.S. v. City of Springfield, 146 F. Supp. 3d 414, 331 Educ. L. Rep. 214 (D. Mass. 2015)**, *further proceedings*, 934 F.3d 13, 369 Educ. L. Rep. 18 (1st Cir. 2019)**. *But cf*. Frank v. Sachem Sch. Dist., 633 F. App'x 14 (2d Cir. 2016) (rejecting ADA integration challenge to residential placement of student with ED).

[111] See *supra* note 15 and accompanying text.

[112] 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 Sch. Dist. v. Doe, 931 A.2d 640, 224 Educ. L. Rep. 312 (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, 182 Educ. L. Rep. 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, 289 Educ. L. Rep. 493 (4th Cir. 2013).

[113] See *supra* note 16 and accompanying text.

[114] See *supra* note 23 and accompanying text.

[115] In contrast, the limited parent's success had been under state laws. *See, e.g*., Perry A. Zirkel, *Service Animals in Public Schools*, 257 EDUC. L. REP. 525 (2010).

**[116] Berardelli v. Allied Serv. Inst. of Rehab. Med., 900 F.3d 104, 357 Educ. L. Rep. 547 (3d Cir. 2018). The primary significance, other than effectively excusing plaintiff-parents' sole reliance on § 504 in a service animal suit against public schools, is for (a) private schools covered by the ADA's Title III, which does not provide for money damages, and (b) religiously controlled private schools, which are exempt under the ADA, if they receive federal financial assistance. For the converse situation of a reasonable accommodation claim on behalf of a student with asthma allergies to dogs, see Doe v. U.S. Sec'y of Transp., 73 IDELR ¶ 152 (S.D.N.Y. 2018).**

[117] 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 **C.G. v. Saucon Valley Sch. Dist., 571 F. Supp. 3d 430, 404 Educ. L. Rep. 589 (E.D. Pa. 2021) (granting preliminary injunction based, for likely success criterion, on two-part test for qualifying as service animal); Pettus v. Conway Sch. Dist., 73 IDELR ¶ 176 (E.D. Ark. 2019) (denying preliminary injunction to student seeking service animal access in her 504 plan, subject to determination as to whether it was a reasonable accommodation in her circumstances);** 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); U.S. v. Gates-Chili Cent. Sch. Dist., 198 F. Supp. 3d 228, 339 Educ. L. Rep. 789 (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 Cnty. Sch. Bd., 87 F. Supp. 3d 1319, 321 Educ. L. Rep. 331 (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)**; *cf.* Neagle v. Canyons Sch. Dist., 72 IDELR ¶ 99 (D. Utah 2018) (ruling that the ADA does not require school districts to provide nondisabled students with access for training service animals)**. For a synthesis of the case law, Zirkel, *supra* note 7.

[118] 34 C.F.R. § 300.504(c) (including additions for the limitations periods).

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

[120] *See, e.g*., Lynn Daggett, Perry A. Zirkel & Leeann Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*, 38 U. MICH. J.L. REF. 717 (2005).

[121] 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, 176 Educ. L. Rep. 143 (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).

[122] 34 C.F.R. § 104.35(c). Worded in terms of double-covered students, the regulations specify the third criterion as "placement options." *Id*.

[123] *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.

[124] *Id*. § 104.36.

[125] *Id*. § 300.300 (including additional provisions for initial evaluations).

[126] *See, e.g*., OCR, Parent and Educator Resource Guide to Section 504 in Public Elementary and Secondary Schools 19 (2016), https://www2.ed.gov/about/offices/list/ocr/docs/504-resource-guide-201612.pdf; OCR, Frequently Asked Questions about Section 504 and the Education of Students with Disabilities (2009), http://www.ed.gov/about/offices/list/ocr/504faq.html; Letter to Durheim, 27 IDELR 380 (OCR 1997); OCR Senior Staff Memorandum, 19 IDELR 892 (1992); *see also Vallivue (ID) Sch. Dist*., 35 IDELR ¶ 69 (OCR 2001). The *Durheim* letter resolved the ambiguity regarding reevaluation that arose in *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

[127] 34 C.F.R. §§ 300.300(b)(1)–(3).

[128] *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).

[129] *See, e.g.,* Lamkin v. Lone Jack C-6 Sch. Dist., 58 IDELR ¶ 197 (W.D. Mo. 2012); *cf*. Jason E. v. Dep't of Educ., Haw., 64 IDELR ¶ 211 (D. Haw. 2014) (ruling that parent did not show that 504 plan that district instituted in the wake of the revocation denied FAPE under § 504); Kimble v. Douglas Cnty. Sch. Dist. RE-1, 925 F. Supp. 2d 1176, 295 Educ. L. Rep. 637 (D. Colo. 2013) (ruling that district has discretion not to apply IDEA revocation to § 504). *But cf*. D.F. v. Leon Cnty. Sch. Bd., 62 IDELR ¶ 167 (N.D. Fla. 2014) (ruling that child retains right to part of IEP under § 504, in this case being assistive technology). For a synthesis of the case law, see Perry A. Zirkel, *Is a 504 Plan Required (or Permitted) in the Wake of Revocation of an IEP?* 321 EDUC. L. REP. 623 (2015).

[130] *Compare* Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010), *with* Letter to Zirkel, 22 IDELR 667 (OCR 1995). The most recent OCR FAQ rather clearly implies that Section 504 requires consent for initial services. **Protecting Students with Disabilities, https://www2.ed.gov/about/offices/list/ocr/504faq.html (OCR 2023), at item 44; *see also*** Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools (OCR 2012) – item 43, http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html.

[131] *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).

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

[133] *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).

**[134] 34 C.F.R. §§ 300.320(c), 300.520.**

**[135] *E.g.*, Doe v. Westport Bd. of Educ., 609 F. Supp. 3d 75, 412 Educ. L. Rep. 93 (D. Conn. 2020).**

**[136] *Id.***

[137] For the impartiality requirement, see, e.g., **Perry A. Zirkel, *The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPPERDINE DISP. RESOL. L.J. 257 (2021);** Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers Under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries*, 83 N.D. L. REV. 109 (2007). **For IDEA impartial hearings more generally, see Perry A. Zirkel, *Impartial Hearings under the IDEA: Updated Legal Issues and Answers*, 43 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2022).**

[138] 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, *Top Ten*, *supra* note 20, at 762 n.7

[139] *See, e.g.*, Perry A. Zirkel, *Impartial Hearings Under Section 504*, 334 EDUC. L. REP. 51 (2016); Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings Under Section 504,* 22 WIDENER L.J. 135 (2014).

[140] **The Supreme Court more recently ruled that IDEA's exhaustion requirement applies to § 504 and other claims if their gravamen is FAPE and the requested relief is other than money damages. Perez v. Sturgis Pub. Schs., 143 S. Ct. 859 (2023); Fry v. Napoleon Cmty. Schs., 580 U.S. 154 (2017). For the appellate case law applying *Fry* before *Perez*, see Perry A. Zirkel, *Post*-Fry *Exhaustion Under the IDEA*, 381 EDUC. L. REP. 1, 11–12 (2020).**

[141] **The residual problem centers on the fuzzy boundary between "double-covered" and "504-only" students. Perry A. Zirkel, *Exhaustion of Section 504 and ADA Claims under the IDEA: Resolving the Confusion*, 74 RUTGERS L. REV. 123 (2021);** 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).

[142] 20 U.S.C. § 1414(a)(1)(D)(ii); 34 C.F.R. § 300.300(b).

[143] 34 C.F.R. § 300.300(b)(4)(ii).

[144] *See, e.g.*, Letter to Zirkel, 22 IDELR 667 (OCR 1995); Letter to Veir, 20 IDELR 864 (OCR 1993).

[145] 34 C.F.R. § 300.518. For a comprehensive canvassing, see, e.g., **Perry A. Zirkel, *"Stay-Put" Under the IDEA: The Latest Update*, 404 EDUC. L. REP. 398 (2022).**

[146] Letter to Zirkel, 22 IDELR 667 (OCR 1995).

[147] 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 EDUC. L. REP. 1 (2008).

[148] *See, e.g.*, 34 C.F.R. § 300.530(b). For an overview, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 EDUC. L. REP. 445 (2007).

[149] *See, e.g.*, *M.G. v. Crisfield*, 547 F. Supp. 2d 399, 233 Educ. L. Rep. 109 (D.N.J. 2008) (applying § 504 "regarded as" prong to conditioning return for removal on special education evaluation).

[150] For removals, see, e.g., Perry A. Zirkel, *Suspensions and Expulsions Under Section 504: A Comparative Overview*, 226 EDUC. L. REP. 9 (2008). For other forms of discipline, see, e.g., Perry A. Zirkel, *Discipline Under Section 504*, 226 EDUC. L. REP. 9 (2008); *cf*. Zirkel, *supra* note 146 (various legal bases); *see also* Perry A. Zirkel & Caitlyn Lyons, *Restraining the Use of Restraints for Students with Disabilities*, 10 CONN. PUB. INTEREST L.J. 323 (2011).

[151] 34 C.F.R. § 300.534 (including narrowing the alternative bases and adding exceptions for refused consent).

[152] *See, e.g.*, Paducah (KY) Indep. Sch. Dist., 32 IDELR ¶ 182 (OCR 1999); East Lycoming (PA) Sch. Dist., 32 IDELR ¶ 41 (OCR 1999); Aberdeen (MS) Sch. Dist., 32 IDELR ¶ 11 (OCR 1999); Terrell Cnty. (GA) Sch. Dist., 29 IDELR 918 (OCR 1998). In one such case, OCR imported the IDEA provision as "current standards under disability law." Washington (CA) Unified Sch. Dist., 29 IDELR 486 (OCR 1998).

[153] 34 C.F.R. § 300.536.

[154] *See, e.g.*, OCR Memorandum, EHLR 307:07 (OCR 1989).

[155] 34 C.F.R. § 300.530(e). For detailed analyses of the new provisions and a sample form, see Perry A. Zirkel, *The New Legal Requirements for Manifestation Determinations Under the New IDEA*, 35 COMMUNIQUÉ 16 (Sept. 2006); Perry A. Zirkel, *Manifestation Determinations Under the IDEA: What the New Criteria Mean*, 19 J. SPECIAL EDUC. LEADERSHIP 3 (2006). For more recent case outcome trends, see Perry A. Zirkel, *Manifestation Determinations Under IDEA 2004: A Legal Analysis*, 29 J. SPECIAL EDUC. LEAD. 32 (2016); Perry A. Zirkel, *Manifestation Determinations Under the Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378 (2010**). For recent case outcome trends, see Perry A.**

**Zirkel, *The Substantive "Yes" and "No "Manifestation Determinations Under the IDEA: An Updated Case Law Analysis*, 48 COMMUNIQUÉ 26 (2020).**

[156] 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).

[157] *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 Cnty. (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, 235 Educ. L. Rep. 199 (E.D. Pa. 2008) (unclear requirement). **However, an emerging line of cases blurs the difference, seeming to support the use of IDEA-type standards. Doe v. Osseo Area Sch. Dist., 296 F. Supp. 3d 1090, 354 Educ. L. Rep. 166 (D. Minn. 2017); *cf.* J.M. v. Liberty Union Sch. Dist., 70 IDELR ¶ 4 (N.D. Cal. 2017) (district policy w/o generalizability).**

[158] 34 C.F.R. §104.35(a); s*ee 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); Isle of Wight Cnty. (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). **However, another line of authority interprets reevaluation as referring to the manifestation determination. *E.g.*, Doe v. Osseo Area Sch. Dist., 296 F. Supp. 3d 1090 (D. Minn. 2017); Prince William Cnty. Pub. Sch. 68 IDELR ¶ 286 (OCR 2016); E. Detroit Pub.Sch. 116 LRP 29008 (OCR 2015).**

[159] *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, 97 Educ. L. Rep. 1052 (W.D. La. 1994) *with* Yough Sch. Dist. v. M.S., 23 IDELR 807 (Pa. Commw. Ct. 1995).

[160] 20 U.S.C. § 705(20)(C)(iv); *see also* OCR Staff Memorandum, 17 IDELR 609 (OCR 1991) **(interpreting this 1990 amendment as applying to students who meet the definition of disability for other impairments but are also currently using illegal drugs or alcohol). *See, e.g.*, W.G. v. Aristoi Classical Acad., 83 IDELR ¶ 43 (S.D. Tex. 2023) (ruling that public charter school's expulsion of student for consuming alcohol on campus did not violate § 504).**

[161] 34 C.F.R. § 300.530(f). For respective analyses of the case law and state laws, see **Perry A. Zirkel, *FBAs and BIPs under the IDEA: An Updated Analysis of the Judicial Case Law*, 49 COMMUNIQUÉ 20 (2020);** 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 BEHAV. DISORDERS 262 (2011).

[162] *Id*. §§ 300.530(g) (including addition of "serious bodily injury") and 300.532(b)(2)(ii) (requires IHO).

[163] 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).

[164] 34 C.F.R. §§ 300.111(a) and 300.30(d)(1). See, e.g., *Fisher v. Friendship Pub. Charter Sch*., 857 F. Supp. 2d 64, 284 Educ. L. Rep. 120 (D.D.C. 2012).

[165] 34 C.F.R. § 300.530(d)(4).

[166] *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 Cnty. (GA) Sch. Dist., 20 IDELR 930 (OCR 1993).

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

[168] 34 C.F.R. § 300.533. For a detailed analysis, see Perry A. Zirkel, *Stay-Put Under the IDEA Discipline Provisions: What Is New?*, 214 EDUC. L. REP. 467 (2007).

[169] 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).

[170] *See, e.g.,* **Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 EDUC. L. REP. 671 (2017).**

[171] ***See, e.g.*, Perry A. Zirkel, *The Courts' Use of OCR Policy Interpretations in Section 504/ADA K-12 Student Cases*, 349 EDUC. L. REP. 7 (2017).**

[172] ***Id.***

[173] *See, e.g.,* **Perry A. Zirkel, *State Laws and Guidance for Complaint Procedures under the Individuals with Disabilities Education Act*, 368 EDUC. L. REP. 24 (2019); Kirstin Hansen & Perry A. Zirkel, *Complaint Procedure Systems under the IDEA: A State-by-State Survey*, 31 J. SPECIAL EDUC. LEADERSHIP 108 (2018); Perry A. Zirkel, *The Complaint Procedures Avenue of the IDEA*, 30 J. SPECIAL EDUC. LEADERSHIP 88 (2017);** Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 EDUC. L. REP. 565 (2008). **For the frequency and outcomes trends of this dispute resolution avenue, see Perry A. Zirkel, Alyssa I. Fairbanks, & Natalie E. Jones, *Outcomes Trends in the State Complaint Procedures under the IDEA*, 396 EDUC. L. REP. 24 (2022); Alyssa I. Fairbanks, Natalie E. Jones, & Perry A. Zirkel, *Frequency Trends in the State Complaint Procedures under the IDEA*, 394 EDUC. L. REP. 440 (2021). For an empirical comparison of the frequency and outcomes of this administrative decisional avenue under the IDEA with the DPH alternative, see Perry A. Zirkel, *The Two Dispute Decisional Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017).**

[174] *Id*.

[175] **State complaints decisions in the LRP database were originally largely inadvertent and often mis-labeled, although they have appeared increasingly in recent years with this publisher's increased reliance on its electronic version. The IDEA regulations do not require SEAs to make the state complaint decisions public, and they vary widely as to whether they post these decisions on their website.**

[176] 34 C.F.R. § 104.7(b) (if 15 or more employees).

[177] The limited exception is for "extraordinary circumstances." See, e.g., Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities, https://www2.ed.gov/about/offices/list/ocr/504faq.html (OCR 2023), at item 5.

[178] **OCR does not generally post their LOFs, and in recent years they have increasingly been voluntary complaint resolutions. LRP includes a relatively large sampling of OCR's LOFs.** For limited analyses of these LRP-published LOFs, see Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 EDUC. L. REP. 369 (1997); Perry A. Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 EDUC. L. REP. 601 (1993).

[179] 28 C.F.R. § 35.107(b) (if 50 or more employees).

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

[181] **The limited exception is for the relatively few two-tier systems, for which the LEA is responsible for the IDEA. For successive snapshots of the state systems, see Jennifer Connolly, Thomas Mayes, & Perry A. Zirkel, *State Due Process***

***Systems Under the IDEA: An Update*, 30 J. DISABILITY POL'Y STUD. 156 (2019);** Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems Under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010). For the frequency of adjudicated hearings, see **Gina L. Gullo & Perry A. Zirkel, *Trends in Impartial Hearings Under the IDEA: A Comparative Update*, 382 EDUC. L. REP. 454 (2020); Perry A. Zirkel & Gina L. Gullo, *Trends in Impartial Hearings Under the IDEA: A Comparative Enrollments-Based Analysis*, 376 EDUC. L. REP. 870 (2020)**. ***For the outcomes of adjudicated hearings, see Perry A. Zirkel & Diane M. Holben, The Outcomes of Fully Adjudicated Impartial Hearings under the IDEA: A Nationally Representative Analysis with and without New York, J. NAT'L ASS'N ADMIN. L. JUDICIARY (in press).*** **For an earlier analysis that included** outcomes as well as frequency of IDELR-published hearings, see, e.g., Perry A. Zirkel & Cathy A. Skidmore, *National Trends in the Frequency and Outcomes of Hearing/Review Officer Decisions Under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014).

[182] *See, e.g.*, 34 C.F.R. §§ 300.507–300.515 (including the added provisions for prehearing process, including resolution session). **For a four-part series of analyses of the pertinent state laws, see, e.g., Perry A. Zirkel, *State Laws for Due Process Hearings under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N OF ADMIN. L. JUDICIARY 3 (2018).**

[183] *Id*. **For an empirical analysis of district-filed DPH decisions, see Perry A. Zirkel & Diane M. Holben, *District-Initiated Due Process Hearing Decisions under the IDEA: Frequency and Outcomes*, 398 EDUC. L. REP. 8 (2022).**

[184] **The IDEA regulations require public dissemination of DPH, but not state complaint, decisions. 34 C.F.R. §§ 300.513(d)(2) and 300.514(c)(2). The means of providing the required public availability is left to the discretion of each state just as long as it complies with confidentiality. Letter to Von Ruden, 30 IDELR 402 (OSEP 1998). While opining that compliance with a state FOIA is not sufficient to fulfill this requirement, OSEP interpreted the relevant regulations as requiring retention for at least 5.5 years. Letter to Anonymous, 69 IDELR ¶ 253 (OSEP 2017). As a result, SEAs make DPH decisions available publicly on their websites, but they vary as to the currency and period for posting. LRP Publications includes a notable selection of these decisions, although the national representativeness of this sample is clearly questionable. *See, e.g.*, *See, e.g.*, Anastasia D'Angelo, Gary Lutz & Perry A. Zirkel, *Are Published IDEA Hearing Officer Decisions Representative?* 14 J. DISABILITY POL'Y STUD. 241 (2004). For the start of a planned series of analyses of an author-assembled nationally representative extensive sampling of fully adjudicated DPH decisions, see Diane M. Holben & Perry A. Zirkel, *Due Process Hearings under the Individuals with Disabilities Education Act: Justice Delayed*, 73 ADMIN. L. REV. 833 (2021) (finding the average period from filing to decision of 200 days in comparison to the 75-day timelines in the IDEA regulations).**

[185] 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 EDUC. L. REP. 1 (2014).

[186] 34 C.F.R. § 104.36: "an impartial hearing with an opportunity for participation by the person's parents … and representation by counsel."

[187] ***See, e.g.*, Bd. of Educ. of Howard Cnty. v. Smith, 43 IDELR ¶ 84 (D. Md. 2005) (ruling that district lacked standing to appeal an IHO's decision under § 504) .**

[188] 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).

[189] Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 219 Educ. L. Rep. 39 (2007). For an analysis, see, e.g., Perry A. Zirkel, *The Problematic Progeny of* Winkelman v. Parma City School District, 248 EDUC. L. REP. 1 (2009).

[190] *See, e.g.,* Heffington v. Derby Unified Sch. Dist., 57 IDELR ¶ 256 (D. Kan. 2011); D.A. v. Pleasantville Sch. Dist., 52 IDELR ¶ 135 (D.N.J. 2009).

[191] *See, e.g.*, Lewis Wasserman, *Delineating Administrative Exhaustion Requirements and Establishing Federal Courts' Jurisdiction Under the Individuals with Disabilities Education Act*, 29 J. NAT'L ADMIN. L. JUDICIARY 349 (2009).

[192] For the current systems, see Connolly et al., *supra* note 180.

[193] *See* Zirkel, *Top Ten*, *supra* note 20, at 762–63; *see also* R.J. v. McKinney Indep. Sch. Dist., 45 IDELR ¶ 9 (E.D. Tex. 2005).

[194] *See, e.g.*, Bd. of Educ. of Valley Cent. Sch. Dist., 38 IDELR 276 (N.Y. SEA 2002); Miss. State Dep't of Educ., EHLR 257:545 (OCR 1986). *But see* Weber v. Cranston Sch. Comm., 235 F. Supp. 2d 401, 174 Educ. L. Rep. 930 (D.R.I. 2003).
[195] 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). ***See, e.g.*, Perry A. Zirkel, *The Statute of Limitations for an Impartial Hearing under the IDEA: A Guiding Checklist*, 363 EDUC. L. REP. 483 (2019).** For an analysis of the Third Circuit's influential judicial interpretation, G.L. v. Ligonier Valley School Authority, 802 F.3d 601, 322 Educ. L. Rep. 633 (3d Cir. 2015), see Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act*, 35 J. NAT'L ASS'N. ADMIN. L. JUDICIARY 305 (2016). Previous to the 2004 amendments, the IDEA was silent, and judicial interpretations varied from state to state. *See, e.g.*, Perry A. Zirkel & Peter Maher, *The Statute of Limitations Under the Individuals with Disabilities Education Act*, 175 EDUC. L. REP. 1 (2003). For the related issue of tolling, see, e.g., Lynn Daggett, Perry A. Zirkel & LeeAnn Gurysh, *For Whom the School Bell Tolls But Not the Statute of Limitations: Minors and the Individuals with Disabilities Education Act*. 38 U. MICH. J.L. REF. 717 (2005).

[196] *See, e.g.*, Zirkel, *Top Ten*, *supra* note 20, at 765. For subsequent examples, see **Vinluan v. Ardsley Union Free Sch. Dist., 78 IDELR ¶ 164 (S.D.N.Y. 2021);** Piazza v. Fla. Union Free Sch. Dist., 777 F. Supp. 2d 669, 270 Educ. L. Rep. 189 (S.D.N.Y. 2011); *but see* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 250 Educ. L. Rep. 517 (3d Cir. 2009). For the possibility of tolling in some states, see, e.g., Bishop v. Children's Ctr. for Developmental Enrichment, 618 F.3d 533, 260 Ed. Law Rep. 580 (6th Cir. 2010); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 137 Educ. L. Rep. 150 (8th Cir. 1999); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980, 78 Educ. L. Rep. 208 (5th Cir. 1992); **I.L. v. Knox Cnty. Bd. of Educ., 257 F. Supp. 3d 946, 348 Educ. L. Rep. 651 (E.D. Tenn. 2017);** Davis v. Blanchard, 175 F. Supp. 3d 581, 335 Ed. Law Rep. 1059 (M.D.N.C. 2016). ***But see* Vinluan v. Ardsley Union Free Sch. Dist., 78 IDELR ¶ 164 (S.D.N.Y. 2021); A.T. v. Dry Creek Joint Elementary Sch. Dist., 70 IDELR ¶ 69 (E.D. Cal. 2017) (not minority tolling); *cf.* De La Fuente v. Roosevelt Elementary Sch. Dist. No. 66, 812 F. App'x 537 (9th Cir. 2020) (high standard for equitable tolling). For the combination of minority tolling, student's KOSHK, and continuing violations for § 504/ADA hostile environment claims, see Duncan v. Eugene Sch. Dist. 4J, 431 F. Supp. 3d 1193, 376 Educ. L. Rep. 1174 (D. Or. 2020).**

[197] *See, e.g.*, Smith v. Special Sch. Dist. No. 1, 184 F.3d 764, 137 Educ. L. Rep. 150 (8th Cir. 1999).

[198] *See, e.g.,* Power v. Sch. Bd., 276 F. Supp. 2d 515, 181 Educ. L. Rep. 145 (E.D. Va. 2003); A.W. v, Marlborough Co., 25 F. Supp. 2d 27, 130 Educ. L. Rep. 1262 (D. Conn. 1998); *cf.* Mark G. v. LeMahieu, 372 F. Supp. 2d 591, 199 Educ. L. Rep. 214 (D. Haw. 2005).

**[199] 20 U.S.C. § 1415(i)(2)(C). The courts have interpreted this provision narrowly. *E.g.*, C.B. v. Garden Grove Sch. Dist., 575 F. App'x 796, 798, 309 Educ. L. Rep. 194 (9th Cir. 2014); R.G. v. Downingtown Area Sch. Dist., 528 F. App'x 153, 156, 298 Educ. L. Rep. 134 (3d Cir. 2013); *see also* Andriy Krahmal, Perry A. Zirkel, & Emily Kirk, *"Additional Evidence" under the Individuals with Disabilities Education Act*, 9 TEX. J. ON CIV. LIB. & CIV. RTS. 201 (2004).**

**[200] *E.g.*, L.V. v. Rye City Sch. Dist., 2023 WL 5744421 (S.D.N.Y. Sept. 6, 2023).**

[201] Schaffer v. Weast, 546 U.S. 49, 203 Educ. L. Rep. 29 (2005); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006). For an overview of the state law exceptions, see Perry A. Zirkel, *Who Has the Burden of Persuasion in Impartial Hearings Under the Individuals with Disabilities Education Act?* 13 CONN. PUB. INT. L.J. 1 (2013). Previously, the burden varied considerably among the jurisdictions. *See, e.g.*, Thomas Mayes, Perry A. Zirkel & Dixie Huefner, *Allocating the Burden of Proof in Administrative and Judicial Proceedings Under the Individuals with Disabilities Education Ac*t, 108 W.V. L. REV. 27 (2005).

[202] *See, e.g.,* Ga. State Conference of Branches of NAACP v. Ga., 775 F.2d 1403, 28 Ed. Law Rep. 339 (11th Cir. 1985).

[203] *See, e.g.,* Dyer v. Jefferson Cnty. Sch. Dist. R-1, 905 F. Supp. 864, 105 Educ. L. Rep. 154 (D. Colo. 1995).

[204] *See, e.g.,* Bd. of Educ. v. Rowley, 458 U.S. 176, 205, 5 Educ. L. Rep. 34 (1982). The lower courts have arrived at varying interpretations of this judicial review standard. For example, some courts have limited it to the factual findings of the hearing officer. *See, e.g.,* L.E. v. Ramsey Bd. of Educ., 435 F.3d 384, 389 (3d Cir. 2006). The sources of variation include whether the state has a two-tier system of administrative adjudication under the IDEA and whether the court has exercised its discretion to take additional evidence. *See, e.g.,* Alex R. v. Forrestville Valley Cmty. Sch. Dist. No. 221, 375 F.3d 603, 189 Educ. L. Rep. 561 (7th Cir. 2004); Dale M. v. Bd. of Educ., 273 F.3d 813, 150 Educ. L. Rep. 372 (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 also* Perry A. Zirkel, *Is Appealing a Hearing Officer 's Decision Likely to Result in a Major Outcome Change in the Final Court Decision*?, 393 EDUC. L. REP. 1 (2021)**.

[205] *See, e.g.,* Centennial Sch. Dist. v. Phil L., 799 F. Supp. 2d 473, 274 Educ. L. Rep. 150 (E.D. Pa. 2011).

[206] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 (2006). For more general treatment, see Perry A. Zirkel, *Expert Witnesses in Impartial Hearings Under the Individuals with Disabilities Education Act*, 298 Educ. L. Rep. 648 (2014).

[207] *See, e.g.,* **Lawton v. Success Acad. of Fort Greene, 78 IDELR ¶ 129 (E.D.N.Y. 2021); J.M. v. Montgomery Cnty. Intermediate Unit, 72 IDELR¶ 23 (E.D. Pa. 2018); M.W. v. Sch. Dist. of Phila., 68 IDELR ¶ 36 (E.D. Pa. 2016); J.L. v. Harrison Twp. Bd. of Educ., 68 IDELR ¶ 105 (D.N.J. 2016);** M.M. v. Sch. Dist. of Phila., 142 F. Supp. 3d 396, 330 Educ. L. Rep. 169 (E.D. Pa. 2015); I.H. v. Cumberland Valley Sch. Dist., 842 F. Supp. 2d 762, 281 Educ. L. Rep. 1057 (M.D. Pa. 2012); L.T. v. Mansfield Sch. Dist., 53 IDELR ¶ 7 (D.N.J. 2009).

[208] 20 U.S.C. § 1415(i)(2)(C). *See, e.g.*, Loren F. v. Atlanta Indep. Sch. Sys., 349 F.3d 1309, 182 Educ. L. Rep. 770 (11th Cir. 2003); Mr. & Mrs. A. v. Greenwich Bd. of Educ., 66 IDELR ¶ 97 (D. Conn. 2015).

[209] *See, e.g.,* K.I. v. Montgomery Pub. Sch., 54 IDELR ¶ 12 (M.D. Pa. 2010). **However, the right does a jury trial in such cases does not apply in the absence of a genuine issue of material fact. *E.g.*, K.N. v. Gloucester City Bd. of Educ., 75 IDELR ¶ 6 (D.N.J. 2019). Similarly, it does not necessarily apply to § 504 or ADA claims that were exhausted under the IDEA. *E.g.*, Stephen O. v. Sch. Dist. of Phila., 80 IDELR ¶ 75 (E.D. Pa. 2021); J.L. v. Lower Merion Sch. Dist., 78 IDELR ¶ 126 (E.D. Pa. 2021).**

[210] The anti-retaliation protection in the IDEA is implicit at best, based on either a child-benefit reading of the Act or the legislative history in the 1986 Amendments. *See, e.g.*, Robert Suppa & Perry A. Zirkel, *Legal-Ethical Conflicts for Educator-Advocates of Handicapped Students*, 35 EDUC. L. REP. 9, 13–14 (1987). Nevertheless, courts have increasingly recognized this IDEA claim, subject to the exhaustion requirement. *See, e.g.*, Mosely v. Bd. of Educ., 434 F.3d 527, 218 Educ. L. Rep. 820 (7th Cir. 2006); Weber v. Cranston Sch. Comm., 212 F.3d 41, 144 Educ. L. Rep. 808 (1st Cir. 2002); Hesling v. Avon Grove Sch. Dist., 428 F. Supp. 2d 262, 209 Ed. Law Rep. 717 (E.D. Pa. 2006).

[211] *See, e.g.,* **Camfield v. Bd. of Tr. of Redondo Beach Unified Sch. Dist., 800 F. App'x 491, 376 Educ. L. Rep. 153 (9th Cir. 2020); L.G. v. Bd. of Educ. of Fayette Cnty., 775 F. App'x 227, 369 Educ. L. Rep. 128 (6th Cir. 2019); M.L. v. Williamson Cnty. Sch. Dist., 772 F. App'x 287, 368 Educ. L. Rep. 109 (6th Cir. 2019);** Pollack v. Reg'l Sch. Unit 75, 660 F. App'x 1, 309 Educ. L. Rep. 921 (1st Cir. 2016); A.C. v. Shelby Cnty. Bd. of Educ., 711 F.3d 687, 290 Educ. L. Rep. 542 (6th Cir. 2013); K.R. v. Sch. Dist. of Phila., 373 F. App'x 204, 258 Ed. Law Rep. 1012 (3d Cir. 2010); M.M.R.-Z. v. Commonwealth of Puerto Rico, 528 F.3d 9, 233 Ed. Law Rep. 49 (1st Cir. 2008); Hesling v. Seidenberger, 286 F. App'x 773, 237 Ed. Law Rep. 102 (3d Cir. 2008); M.P. v. Indep. Sch. Dist. No. 727, 326 F.3d 975, 175 Educ. L. Rep. 424 (8th Cir. 2003); Lee v. Natomas Unified Sch. Dist., 93 F. Supp. 3d 1160 (E.D. Cal. 2015); **Wong v. Bd. of Educ., 478 F. Supp. 3d 229 128 Educ. L. Rep. 537 (D. Conn. 2020);** M.A. v. N.Y.C. Dep't of Educ., 1 F. Supp. 3d 125, 322 Educ. L. Rep. 301 (S.D.N.Y. 2014); K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 201 Ed. Law Rep. 510 (S.D.N.Y. 2005); Vives v. Fajardo, 399 F. Supp. 2d 50, 205 Educ. L. Rep. 128 (D.P.R. 2005); P.N. v. Greco, 282 F. Supp. 2d 221, 182 Educ. L. Rep. 221 (D.N.J. 2003); Rick C. v. Lodi Sch. Dist., 32 IDELR ¶ 232 (W.D. Wis. 2000); Gupta v. Montgomery Cnty. Pub. Sch., 25 IDELR 115 (D. Md. 1996); Prins v. Indep. Sch. Dist. No. 761, 27 IDELR 312 (D. Minn. 1995); *see also* OCR Letter to Colleague (October 26, 2010); Gina DiPietro & Perry A. Zirkel, *Employee Special Education Advocacy: Retaliation Claims Under the First Amendment, Section 504 and the ADA*, 257 EDUC. L. REP. 823 (2010); Perry A. Zirkel, *Protect Your District from Costly Claims of Disability Harassment*, 16 THE SPECIAL EDUCATOR 4 (Sept. 22, 2000).

[212] *E.g.*, **42 U.S.C. § 12203(b);** 28 C.F.R. §§ 35.134(b) and 36.205–36.206. **For case law applications of this associational protection, see T.C. v. Hempfield Area Sch. Dist., 72 IDELR ¶ 174 (W.D. Pa. 2018); U.S.A. v. Nobel Learning Cmties., 71 IDELR ¶ 5 (D.N.J. 2017); K.K. v. N. Allegheny Sch. Dist., 70 IDELR ¶ 65 (W.D. Pa. 2017); Eskenazi-McGibney v. Connetquot Ctr. Sch. Dist., 84 F. Supp. 3d 221, 320 Educ. L. Rep. 888 (E.D.N.Y. 2015); *cf.* S.M. v. Sch. Dist. of Upper Dublin, 57 IDELR ¶ 96 (E.D. Pa. 2011) (applicable to PTA as defendant). *But see* Souders v. Sch. Dist. of Phila., 72 IDELR ¶ 67 (E.D. Pa. 2018);** *cf.* Todd v. Carstarphen, **236** F. Supp. 3d **1311** (N.D. Ga. 2017) **(ruling that ADA associational protection was not applicable to parent in absence of direct discrimination);** S.M. v. Sch. Dist. of Upper Dublin, 57 IDELR ¶ 96 (E.D. Pa. 2011) (ruling that ADA associational protection was applicable to PTA). **For a discussion of the federal appellate court split as to the application of ADA associational standing, which extends to Section 504, see Durand v. Fairview Health Serv., 902 F.3d 836, (8th Cir. 2018).**

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

[214] *See, e.g.,* T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 869, 270 Educ. L. Rep. 593 (2d Cir. 2016).

[215] 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, 320 Educ. L. Rep. 888 (E.D.N.Y. 2015).

[216] Nevertheless, the difficulties for attaining a judicial judgement for money damages are imposing. *Compare* **Richardson v. Omaha Sch. Dist., 957 F.3d 869, 376 Educ. L. Rep. 943 (8th Cir. 2020); Doe v. Columbia-Brazoria Indep. Sch. Dist., 855 F.3d 681, 342 Educ. L. Rep. 916 (5th Cir. 2017);** Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 302 Educ. L. Rep. 492 (5th Cir. 2014); Long v. Murray Cnty. Sch. Dist., 522 F. App'x 576 (11th Cir. 2013); **D.V. v. Pennsauken Sch. Dist., 247 F. Supp. 3d 464, 347 Educ. L. Rep. 220 (D.N.J. 2017);** Eskenazi-McGibney v. Connetquot Cent. Sch. Dist., 84 F. Supp. 3d 221, 320 Educ. L. Rep. 888 (E.D.N.Y. 2015); M.S. v. Marple Newtown Sch. Dist., 82 F. Supp. 3d 625, 320 Educ. L. Rep. 756 (E.D. Pa. 2015); Thomas v. Springfield Sch. Comm., 59 F. Supp. 3d 294, 316 Educ. L. Rep. 864 (D. Mass. 2014); Sutherlin v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254, 301 Educ. L. Rep. 379 (N.D. Okla. 2013); Moore v. Chilton Cnty. Bd. of Educ., 936 F. Supp. 2d 1300, 297 Educ. L. Rep. 282 (M.D. Ala. 2013), *further proceedings*, 1 F. Supp. 3d 1281, 307 Educ. L. Rep. 949 (M.D. Ala. 2014); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729, 292 Ed. Law Rep. 138 (W.D. Ark. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 287 Ed. Law Rep. 289 (W.D.N.Y. 2012); K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343, 201 Ed. Law Rep. 510 (S.D.N.Y. 2005) (rejecting liability), *with* Spring v. Allegany-Limestone Sch. Dist., 655 F. App'x 25, 337 Educ. L. Rep. 16 (2d Cir. 2016); S.S. v. E. Kentucky Univ., 532 F.3d 445, 234 Educ. L. Rep. 612 (6th Cir. 2008); **E.M. v. San Benito Indep. Sch. Dist., 374 F. Supp. 3d 616, 366 Educ. L. Rep. 266 (S.D. Tex. 2019);** K.R.S. v. Bedford Cmty. Sch. Dist., 109 F. Supp. 3d 1060, 325 Educ. L. Rep. 327 (S.D. Iowa 2015); Sutherlin v. Indep. Sch. Dist. No. 40, 960 F. Supp. 2d 1254, 301 Educ. L. Rep. 379 (N.D. Okla. 2013); C.L. v. Leander Indep. Sch. Dist., 61 IDELR ¶ 101 (W.D. Tex. 2013); M.J. v. Marion Indep. Sch. Dist., 61 IDELR ¶ 76 (W.D. Tex. 2013); Werth v. Bd. of Directors of the Pub. Sch., 472 F. Supp. 2d 1113, 217 Educ. L. Rep. 415 (E.D. Wis. 2007) (preserving liability for further proceedings).

[217] *See, e.g.*, 34 C.F.R. § 300.517.

[218] *Compare* Lucht v. Molalla River Sch. Dist., 225 F.3d 1023, 147 Educ. L. Rep. 61 (9th Cir. 2000); Upper Valley Ass'n for Handicapped Citizens v. Blue Mountain Union Sch. Dist., 973 F. Supp. 479, 121 Educ. L. Rep. 71 (D. Vt. 1997), *with* Vultaggio v. Bd. of Educ., 343 F.3d 598, 180 Educ. L. Rep. 528 (2d Cir. 2003); Johnson v. Fridley Pub. Sch., 36 IDELR ¶ 129 (D. Minn. 2002); Megan C. v. Indep. Sch. Dist. No. 625, 57 F. Supp. 2d 776, 138 Educ. L. Rep. 167 (D. Minn. 1999).

[219] *See, e.g.,* Snell v. N. Thurston Sch. Dist., 66 IDELR ¶ 240 (W.D. Wash. 2015). Without the IDEA's specified limits, the § 504 and ADA attorneys' fees follow the more model of civil rights laws generally, including multipliers. However, the use of § 1983 potentially blurs this difference. *See, e.g.*, Thomas Guernsey*, The Education for All Handicapped Children Act, 42 U.S.C. § 1983, and Section 504 of the Rehabilitation Act of 1973*, 68 NEB. L. REV. 564, 578–79 (1989); Terry Seligmann, *A Diller, A Dollar: Section 1983 Damages Claims in Special Education Lawsuits*, 36 GA. L. REV. 465 (2002).

[220] *See, e.g.*, **Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'1 ADMIN. L. JUDICIARY 505 (2018); *see also* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 39 J. NAT'1 ADMIN. L. JUDICIARY 1 (2020);** Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE Under the IDEA*, 33 J. NAT'1 ADMIN. L. JUDICIARY 220 (2013).

[221] *See, e.g.*, **Perry A. Zirkel, *A Step-by-Step Overview of Tuition Reimbursement under the IDEA*, 34 J. SPECIAL EDUC. LEADERSHIP 94 (2021);** Perry A. Zirkel, *Tuition and Related Reimbursement Under the IDEA: A Decisional Checklist,* 282 EDUC. L. REP. 785 (2014).

[222] *See, e.g.*, **Perry A. Zirkel, *The Competing Approaches for Calculating Compensatory Education: The Next Update*, 405 EDUC. L. REP. 621 (2022); Perry A. Zirkel, *Compensatory Education: The Latest Annotated Update of the Law*, 376 EDUC. L. REP. 850 (2020);** *see also* Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 URB. LAW. 281 (2013).

[223] **Based primarily on the IDEA's "notwithstanding" provision for procedural violations (20 U.S.C. § 1415(f)(3)(E)(iii))), purely prospective remedial orders are within the equitable authority of IHOs. *See, e.g.*, Perry A. Zirkel, *Adjudication Under the Individuals with Disabilities Education Act: Explicitly Plentiful Rights but Inequitably Paltry Remedies*, CONN. L. REV. (in press).**

[224] *See, e.g.,* Lauren G. v. W. Chester Area Sch. Dist., 906 F. Supp. 2d 375, 292 Educ. L. Rep. 680 (E.D. Pa. 2012) (double-covered student with differential advantage); Borough of Palmyra Bd. of Educ. v. F.C., 2 F. Supp. 2d 637, 127 Educ. L. Rep. 113 (D.N.J. 1998) (504-only student).

[225] *See, e.g.,* Perry A. Zirkel, *Compensatory Education Services Under the IDEA: An Annotated Update*, 190 EDUC. L. REP. 745, 748 nn.13–14 (2004). **For a more recent example, which concerns compensatory education under both the IDEA and § 504, see E.P. v. Twin Valley Sch. Dist., 517 F. Supp. 3d 347, 393 Educ. L. Rep. 319 (E.D. Pa. 2021).**

[226] **The frequent variants are deliberate indifference or bad faith/gross misjudgment. *E.g.*, Perry A. Zirkel, *Do Courts Require a Heightened, Intent Standard for Students' Section 504 and ADA Claims Against School Districts?* 47 J.L. & EDUC. 109 (2018).**

[227] *See, e.g., C*.O. v. Portland Pub. Sch., 679 F.3d 1162, 280 Educ. L. Rep. 28 (9th Cir. 2012); Chambers v. Sch. Dist., 587 F.3d 176, 250 Educ. L. Rep. 884 (3d Cir. 2009); Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 210 Educ. L. Rep. 544 (1st Cir. 2006); Ortega v. Bibb Cnty. Sch. Dist., 397 F.3d 1321 (11th Cir. 2005); Polera v. Bd. of Educ., 288 F.3d 478, 164 Educ. L. Rep. 573 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1260, 133 Educ. L. Rep. 106 (8th Cir. 2000); *Sellers v. Sch. Bd*., 141 F.3d 524, 125 Educ. L. Rep. 1078 (4th Cir. 1998). ***See generally* Perry A. Zirkel, *Monetary Liability of Public School Employees under the IDEA or Section 504/ADA*, 2019 BYU J. EDUC. & LAW 1 (2019).**

[228] *See, e.g*., Zirkel, *Top Ten*, *supra* note 20, at 764. *See, e.g.,* Shadie v. Hazelton Sch. Dist., 580 F. App'x 67, 310 Educ. L. Rep. 668 (3d Cir. 2014); Lebron v. Commonwealth of Puerto Rico, 770 F.3d 25, 310 Educ. L. Rep. 71 (1st Cir. 2014); H. v. Montgomery Cnty. Bd. of Educ., 784 F. Supp. 2d 1247, 271 Educ. L. Rep. 315 (M.D. Ala. 2011). On the other hand, punitive damages are not recoverable under § 504. Barnes v. Gorman, 536 U.S. 181 (2002). **Moreover, the Supreme Court recently held, in a plurality decision, that compensatory damages recoverable under § 504 do not extend to emotional distress. Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562 (2022).** Finally, the majority view is that defendants are, with limited exception, not liable under § 504 in their individual capacity. Zirkel, *Top Ten*, *supra* note 20, at 763; ***see also* Perry A. Zirkel, *Are School Personnel Liable for Money Damages under the IDEA or Section 504 and the ADA?* 27 EXCEPTIONALITY 77 (2019). Some jurisdictions have a limited exception for retaliation claims. *Compare* Glenn v. Davis Sch. Dist., 75 IDELR ¶ 123 (D. Utah 2019); Alston v. District of Columbia, 561 F. Supp. 2d 29, 235 Educ. L. Rep. 250 (D.D.C. 2008) (yes), *with* L.B. v. Roselle Bd. of Educ., 78 IDELR ¶ 258 (D.N.J. 2021) (no).**

[229] *Id*. However, it is not yet settled whether the Supreme Court's § 504 ruling in *Cummings* applies to the ADA.

[230] ***E.g.*, Doe v. Friends Cent. Sch. Corp., 74 IDELR ¶ 201 (E.D. Pa. 2019); *cf.* G. v. Fay Sch., 931 F.3d 1 (1st Cir. 2019) (Title VI retaliation based on Title III).**

[231] *See, e.g.,* A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 180 Educ. L. Rep. 52 (3d Cir. 2003); Bd. of Educ. v. Kelly E., 207 F.3d 931, 143 Educ. L. Rep. 70 (7th Cir. 2000); Gadsby v. Grasmick, 109 F.3d 940, 117 Educ. L. Rep. 58 (4th Cir. 1997). The new regulations have added the statutory waiver. 34 C.F.R. § 300.177. For a comprehensive overview, see Perry A. Zirkel, *The Eleventh Amendment and Student Suits Under the IDEA, § 504, and the ADA*, 183 EDUC. L. REP. 657 (2003).

[232] *Compare* A.W. v. Jersey City Pub. Sch., 341 F.3d 234, 180 Educ. L. Rep. 52 (3d Cir. 2003); Gean v. Hattaway, 330 F.3d 758, 177 Educ. L. Rep. 64 (6th Cir. 2003); Miranda v. Kitzhaber, 328 F.3d 1181 (9th Cir. 2003); Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002); Jim C. v. United States, 235 F.3d 1079, 150 Educ. L. Rep. 34 (8th Cir. 2001); Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000), *with* Garcia v. SUNY Health Sci. Ctr. of Brooklyn, 280 F.3d 98, 161 Educ. L. Rep. 759 (2d Cir. 2001); *cf.* Pace v. Bogalusa City Sch. Bd., 325 F.3d 609, 175 Educ. L. Rep. 104 (5th Cir. 2003). *See generally* Zirkel, *supra* note 230.

[233] 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, 211 Educ. L. Rep. 25 (1st Cir. 2006); State Ass'n for Disabled Americans v. Fla. Am. Univ., 405 F.3d 954, 197 Ed. Law Rep. 36 (11th Cir. 2005); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 199 Educ. L. Rep. 35 (4th Cir. 2005). For the prior trend, which was in the direction of immunity, *see generally* Zirkel, *supra* note 230.