

# EDUCATION LAW INTO PRACTICE

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

by

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In contrast with the focus on K–12 students who have individualized education programs (IEPs) under the Individuals with Disabilities Education Act (IDEA),<sup>1</sup> students who have so-called “504 plans”<sup>2</sup> under Section 504 of the Rehabilitation Act (§ 504)<sup>3</sup> receive rather limited attention. The broader definition of “disability” under both § 504<sup>4</sup> and its sister statute, the Americans with Disabilities Act (ADA),<sup>5</sup> for services<sup>6</sup> extends beyond the corresponding definition in the IDEA, resulting in two groups of students: (1) those with IEPs, who are “double covered” by the IDEA and § 504/ADA, and (2) those with 504 plans, who are designated as “§ 504-only.”<sup>7</sup>

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*The Latest Comprehensive Comparison of the IDEA and Section 504/ADA*, 416 EDUC. L. REP. 1 (2023).

- 20 U.S.C. §§ 1400–1419.
- One of the differences from the IDEA is that § 504 does not prescribe a specifically designated and formatted document for the individualized “free appropriate public education” (FAPE) that is the entitlement of qualifying students. Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* 40 J.L. & EDUC. 407 (2011); see also Perry A. Zirkel, *Comparison of IDEA IEPs and Section 504 Accommodation Plans*, 191 EDUC. L. REP. 563 (2004) (observing additionally the broader definition of FAPE under § 504). For a systematic analysis of the similarities and differences, see Perry A. Zirkel,
- 29 U.S.C. § 794.
- Id.* § 705(9)(B) (cross referring to the definition of disability under the ADA – *infra* note 5).
- 42 U.S.C. § 12102(1)(A): “a physical or mental impairment that substantially limits one or more major life activities.” For the more than 25 examples of major life activities, including eating, sleeping, bending, breathing, and bowel functions, see *id.* § 12102(2).
- The administering agency, the U.S. Department of Education’s Office for Civil Rights (OCR), has made clear that for purposes of a 504 plan, the other two alternative prongs of the definition of disability, which are based on “regarded as” or a “record of” the same other definitional elements, are not applicable. See, e.g., *Protecting Students with Disabilities* at item 36 (OCR 2023), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>.
- These terms are merely functional, not legally official, designations. For example, OCR in its reporting of the CRDC data (*infra* note 17) refers to the second category of students as “Section 504 only.”

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More specifically, unlike the IDEA,<sup>8</sup> the § 504 definition is not limited to specified classifications,<sup>9</sup> learning,<sup>10</sup> or the need for special education.<sup>11</sup> Moreover, the ADA Amendments Act (ADAAA) of 2008, which went into effect on January 1, 2009, expanded the interpretation of the definitional criteria.<sup>12</sup> The resulting ADA regulations, which went into effect on October 11, 2016, added a few more examples of major life activities, such as interacting with others, writing, and reaching.<sup>13</sup> Unlike for students with IEPs under the IDEA, school districts do not receive any special funding for § 504-only students under either § 504/ADA or state laws.<sup>14</sup>

### Previous Research

The literature specific to the incidence of § 504-only students in the K–12 student population has until recently been markedly limited in comparison to that concerning the corresponding IDEA enrollments. For the IDEA, for example, empirical reports have regularly addressed the incidence of IDEA enrollments nationally and per state.<sup>15</sup> Specific to the 2020–21 school year special education students comprised 13.9% of the nation’s total public school enrollment, ranging on a state-by-state basis from 11.0% in Hawaii to 18.7% in Maine.<sup>16</sup>

For § 504, the corresponding prevalence analyses effectively started with the 2009–10 version of the U.S. Department of Education’s Civil Rights Data Collection (CRDC), an extensive national survey generally conducted every two years that includes the number of § 504-only students per school and per school district.<sup>17</sup> Previously and also pre-dating the liberalizing eligibility standards of the ADAAA,<sup>18</sup> Holler and Zirkel estimated a national prevalence rate of 1.2% for § 504-only students in 2005–06 based on a mailed survey and a limited response rate of 45%.<sup>19</sup>

8. The IDEA definition of disability is limited to a set of specified classifications and the resulting need for special education. 20 U.S.C. § 1401(3)(A). The focus on learning is not only implicit in the causal link between these classifications and the need for special education but also more explicit in the IDEA regulations’ repeated emphasis on an adverse effect on educational performance. 34 C.F.R. § 300.8(c). *See, e.g.,* Perry A. Zirkel, *An Adjudicative Checklist of Child Find and Eligibility under the IDEA*, 357 EDUC. L. REP. 30 (2018).
9. The relevant § 504/ADA definition extends to any physical or mental impairment. *See supra* notes 4–5.
10. Similarly, the § 504/ADA definition extends to a long, illustrative list of major life activities, extending well beyond academic areas. *Id.*
11. Instead, as an ultimate limiting factor, the third qualifying criterion, linking the impairment with the major life activity, is the requisite degree and duration of “substantially.” *Id.*
12. More specifically, the ADAAA added more examples to the list of major life activities, including subsets of learning, such as reading, and liberalized the determination of the “substantially” prong. *E.g.,* Perry A. Zirkel, *The ADAA and Its Effect on Section 504 Students*, 22 J. SPECIAL EDUC. LEADERSHIP 3 (2009).
13. 28 C.F.R. § 35.108.
14. Utah had been a potential exception, but in 2021 the state repealed both UTAH CODE ANN. § 53F-2-512, which had authorized possible appropriations, and UTAH ADMIN. CODE R. 277-753-3, which had required reporting information for § 504-only students.
15. *E.g.,* Eesha Pendharkar, *The Number of Students in Special Education Has Doubled in the Past 45 Years*, EDUC. WK., July 31, 2023; Paige E. Pullen, Kristen E. Ashworth, & Jy Hoon Ryoo, *Prevalence Rates for Students Identified for Special Education and Their Interstate Variability: A Longitudinal Approach*, 43 LEARNING DISABILITY Q. 88 (2020). For the annual reports to Congress on the implementation of the IDEA, which include various enrollments national and state analyses, *see* <https://www2.ed.gov/about/reports/annual/osep/index.html>.
16. For comparison purposes, these percentages are based on the CRDC data, *infra* note 27.
17. U.S. Department of Education. Office for Civil Rights, Civil Rights Data Collection, <https://civilrights.data.ed.gov/about/crdc>.
18. *Supra* note 12 and accompanying text.
19. Rachel A. Holler & Perry A. Zirkel, *Section 504 and*

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The successive analyses of the CRDC biennial survey results, which had a response rate close to 100%, revealed the following national rates of § 504-only students in relation to the total public-school population: 1.02% in 2009–10,<sup>20</sup> 1.48% in 2011–2012,<sup>21</sup> 1.81% for 2013–2014,<sup>22</sup> 2.29% for 2015–16,<sup>23</sup> and 2.71% in 2017–18.<sup>24</sup>

The most recent three of these five successive biennial analyses extended to the percentages for each of the 50 states and the District of Columbia. The top state for all three surveys was New Hampshire – 5.47% in 2013–14, 5.84% in 2015–16, and 6.32% in 2017–18. However, during the last two of these successive surveys, Texas moved up from fourth place (4.94%) in 2015–16 to second place in 2017–18 (6.00%), while Louisiana dropped from second to third place and Vermont dropped from third to fourth place. At the opposite end, Mississippi had the lowest rate among the 50 states and the District of Columbia – .30% in 2013–14, .39% in 2015–16, and .65% in 2017–18.<sup>25</sup>

### Method

The purpose of this article was to update the most recent previous state rates article.<sup>26</sup> Specifically, the purpose was to determine the prevalence rate of § 504-only students nationally and, more specifically, among the states for the most recent CRDC biennial survey, which was for the school year 2020–21.<sup>27</sup> Despite the CRDC's complete response rate<sup>28</sup> and data quality checks,<sup>29</sup> the results are not devoid of errors in light of the extensive length of the survey instrument and variance among the submitting school representatives.

### 2020–21 Rates

First, the CRDC data reveal that the national prevalence of § 504-only students in 2020–21 was 3.26%, reflecting an increase of .55% in comparison to the 2017–18 data.

*Public Schools: A National Survey Concerning "Section 504-Only" Students*, 92 NASSP BULL. 19, 26 (Mar. 2008).

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

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

22. Perry A. Zirkel, *State-by-State Rates of 504-Only Students in K-12 Schools*, 352 EDUC. L. REP. 9 (2018).

23. Perry A. Zirkel & Tiedan Huang, *State Rates of 504-Only Students in K-12 Public Schools: An Update*, 354 EDUC. L. REP. 621 (2018).

24. 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).

25. Zirkel & Gullo, *supra* note 24, at 22–23; Zirkel & Huang, *supra* note 23, at 626–27; Zirkel, *supra* note 22, at 13–14. The published analysis for 2015–16 contained a typo for Kansas, which should have had a rate of .94% rather than .094%. Zirkel & Huang, *supra* note 23, at 626.

26. Zirkel & Gullo, *supra* note 24. Thus, much of the

language is repeated from that article, with the differentiating focus being on the new data.

27. Due to the COVID-19 pandemic, OCR postponed the data collection in 2019–20 to 2020–21. *Supra* note 17. CRDC released the 2020–21 public use data in late 2023. First, we accessed the “downloadable data files” for 2020–21 at <https://civilrightsdata.ed.gov/> data. Second, we extracted the total enrollment, number of § 504-only students, and number of IDEA students for each school. Third, we deleted the relatively few entries that had negative numbers, based on the “data file user’s manual” description for reserve codes, or questionable data. Finally, we calculated both the § 504-only incidence rate and rank for each state using Microsoft Excel. The national § 504-only incidence rate is based on summing, not averaging, the respective total enrollments and § 504-only enrollments for all of the states and D.C.

28. U.S. Department of Education Office for Civil Rights, 2020–21 Civil Rights Data Collection User’s Manual: Release 1, at 7–8 (2023), <https://civilrightsdata.ed.gov/data> (reporting that “OCR achieved 100% reporting and certification from required data submitters for the 2020–21 CRDC, which included 17,821 LEAs and 97,575 schools.”).

29. *Id.* at 10–14 (reporting the limited but notable extent of suppressed data due to submission errors).

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Second, based on the same source, the Appendix lists the prevalence rates and the rank for each state and the District of Columbia for 2020–21 in comparison to the corresponding data for 2017–18, along with the net changes in percentage and rank. On the high end, Texas (6.88%) continued its upward trajectory moving into first place, with New Hampshire (6.69%) dropping down to second place. Louisiana (6.22%) retained third place but Connecticut (6.09%) moved up from fifth to fourth place. At the bottom end, New Mexico (1.12%) exchanged 50th and 51st places with Mississippi (1.20%). The average change for the 51 jurisdictions was .55%, with the largest increase being for Delaware (1.77%) and Arkansas (1.61%) and the smallest being for Hawaii (.09%) and with Wyoming (-.01%) being the only decrease for the three-year period. The ranks of most states remained moderately stable, with only a handful, led by South Dakota, moving up more than four positions and a similar number, led by Wyoming, moving down more than four positions.

### Interpretation and Conclusions

The national prevalence rate of 3.26% for 2020–21 reveals a continuing gradual increase from the earlier biennial CRDC rates. Specifically, starting with 1.20% rate in the baseline year of 2009–10,<sup>30</sup> which was the first year under the liberalizing standards of the ADAAA,<sup>31</sup> the increases for the successive two-year analyses were .46%, .33%, .48%, .42%, and, here after three years, .55%.<sup>32</sup>

The failure of the inflationary trend to slow or stop more than a decade after the effective date of the ADAAA is surprising, suggesting an explanation that is a more a matter of culture than compliance. Although the process of systemic change in response to new or revised laws includes uneven dissemination of information and adjustments in policy and practice,<sup>33</sup> the intervening period since the ADAAA would appear to be more than ample for resolving these factors. Instead, the likely contributing factor that is a matter of culture is the continuing national society's trend of inflation in various aspects of life, including fiscal matters, college football bowl games, or grade point averages. For legalized entitlements, as the corresponding longitudinal trend in the percentage of students with IDEA IEPs,<sup>34</sup> the gravitational pull continues to be in the inflationary direction. For 2020–21, as the “change in rate” column of the Appendix shows, only one state was an exception to this trend and then only to a negligible extent.

The state-by-state rates for § 504-only students vary rather widely from close to 1% in New Mexico and Mississippi to more than 6% in four states led by Texas. The 6:1 ratio between these polar percentages far exceeds the corresponding less than 2:1 ratio of CRDC rates under the IDEA.<sup>35</sup> Yet, within the ample variation, the relationship between the § 504-only and the IDEA rates at the state level is far from consistent. For example, Texas and Louisiana are respectively #1 and #3 for § 504-only % and #50 and #45 for IDEA %; yet, Massachusetts, New Hampshire, and Vermont are in the top ten for both § 504-only % and

30. *Supra* text accompanying note 20.

31. *Supra* note 12 and accompanying text.

32. *Supra* text accompanying notes 20–24 and *supra* note 27.

33. Zirkel, *supra* note 22, at 10 (citing e.g., John G. Grumm & Stephen L. Wasby, *The Analysis of Policy Impact* (1981); Stephen L. Percy, *Disability, Civil Rights, and Public Policy: The Politics of Implementation* (1989)).

34. According to the National Center for Education Statistics (NCES), the proportion of students with IEPs aged 3 to 21 increased steadily from 12.9% in 2013–14 to 14.7% in 2021–22, after a few years of relative stability. NCES, *Digest of Education Statistics*, Table 204.30 (2022), [https://nces.ed.gov/ipeds/data/digest/d22/tables/dt22\\_204.30.asp](https://nces.ed.gov/ipeds/data/digest/d22/tables/dt22_204.30.asp)

35. *Supra* text accompanying note 16.

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IDEA %. The likely intervening and contributing factors are complex, including litigiousness, socioeconomic status, and various interrelated situational features such as parent and district responses to high-stakes tests. Moreover, the relatively high § 504-only rates for Texas, Louisiana, and Arkansas suggest that strong state laws for identification of and interventions for students with dyslexia may play a particular role depending on prevailing implementation practices in relation to 504 plans or IEPs.<sup>36</sup>

The effect of the COVID-19 pandemic on § 504-only rates is at this point speculative. It is likely that the pandemic slowed the identification process during the varying periods among and within the states in which in-person instruction was no longer generally available. Yet, it is just as likely that the increased mental health and behavioral issues that arose in the immediate wake of the pandemic will have accelerated these rates. The specific net effect will not be seen until the release of the 2021–22 and the 2023–24 data, which are not imminent.<sup>37</sup> Moreover, whether the possible incidence of “long COVID” affects the rate of IDEA or § 504-only students is another open question at this point.<sup>38</sup>

In any event, the wide variance among the states suggests likely under- and over-identification, which respectively raise issues of “civil rights violations for which school districts are ethically responsible and legally vulnerable, and . . . questions of resource equity and efficiency.”<sup>39</sup> The relatively flexible eligibility criteria under § 504, the lack of federal (and state) funding, the relatively limited public awareness, and the difficulties in litigation all contribute to potential problems for under-resourced and under-informed families.<sup>40</sup>

The other and wider levels of variance are intra- rather than inter-state. Per the sequence for the predecessor articles based on the 2017–18 CRDC data,<sup>41</sup> the successive sequels for the 2020–21 CRDC data will be examinations of the § 504-only prevalence rates at the district and school levels, respectively. These more fine-grained follow-up analyses pinpoint more closely the locations most likely associated with such under- and over-identification.

36. See, e.g., Perry A. Zirkel, *Identification and Intervention of Students with Dyslexia: The Latest Update*, 411 EDUC. L. REP. 903 (2023); Perry A. Zirkel, *Legal Developments for Students with Dyslexia*, 43 LEARNING DISABILITY Q. 127 (2020). Additionally, for the leading state of Texas, the U.S. Department of Education’s ongoing compliance monitoring of the IDEA that started with a finding of under-identification related to the funding system may have played an indirect contributing role to the increase in § 504-only students. See, e.g., *Seven Years and Millions of Children Later*, U.S. Department of Education Announces Continued Monitoring of Texas (2023), <https://special.educationaction.com/seven-years-and-millions-of-children-later-u-s-dept-of-education-announces-continued-monitoring-of-texas/> (reporting of the continuing controversy in Texas from a Virginia-based advocacy organization). Finally, recent changes in Texas’ dyslexia law, which goes into effect during the 2023–24 school year, may well shift some of § 504-only students based on dyslexia to the IDEA category, thus decreasing the 504-only percentage and increasing the IDEA percentage. See, e.g., Texas Education Agency, *FAQs: Dyslexia Evaluation, Identification, & Instruction—House Bill (HB) 3928* (Nov. 15, 2023), <https://tea.texas.gov/academics/special-student-populations/dyslexia-and-related-disorders>

37. For information about the collection of these data, see <https://crdc.communities.ed.gov/#program>.

38. E.g., U.S. Department of Education, *Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, Schools, Service Providers, and Families* (OSERS/OCR, July 26, 2021), <https://sites.ed.gov/idea/files/oct-factsheet-504-20210726.pdf> (positing possible IDEA or § 504 eligibility for P–12 students with long COVID).

39. E.g., Perry A. Zirkel, *Avoiding Under- and Over-Identification of 504-Only Students: Pitfalls and Handholds*, 359 EDUC. L. REP. 715, 716 (2018).

40. See generally MARIA M. LEWIS & RAQUEL MUÑOZ, *SECTION 504 PLANS: EXAMINING INEQUITABLE ACCESS AND MISUSE* (June 2023), <https://nepc.colorado.edu/publication/504-plan>. For the difficulties in litigation, see Claire Raj, *The Lost Promise of Disability Rights*, 119 MICH. L. REV. 933 (2021).

41. Perry A. Zirkel & Gina L. Gullo, *Public School Rates of § 504 Only Students: The Next Update*, 387 EDUC. L. REP. 1 (2021); Perry A. Zirkel & Gina L. Gullo, *School District Rates of 504-Only Students: The Next Update*, 385 EDUC. L. REP. 24 (2021).



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Appendix: State-by-State Rate and Rank for Percentage of § 504-Only  
Students in 2020–2021 as Compared with 2017–2018

STATE	2017–18		2020–2021		CHANGE IN RATE	CHANGE IN RANK (+ = up)
	RATE	RANK	RATE	RANK		
Alabama	1.48%	44	1.77%	43 (tie)	+ .29%	+1
Alaska	1.49%	43	1.59%	46 (tie)	+ .10%	-3
Arizona	1.51%	42	1.86%	42	+ .35%	0
Arkansas	4.02%	8	5.63%	6	+1.61%	+2
California	1.37%	47	1.71%	45	+ .34%	+2
Colorado	2.32%	23	3.18%	18	+ .86%	+5
Connecticut	5.30%	5	6.09%	4	+ .79%	+1
Delaware	3.06%	14	4.83%	9	+1.77%	+5
District of Columbia	2.04%	31	2.54%	28	+ .50%	+3
Florida	3.40%	10	4.34%	10	+ .94%	0
Georgia	2.51%	19	3.49%	15	+ .98%	+4
Hawaii	2.26%	26	2.35%	32 (tie)	+ .09%	-6
Idaho	3.13%	12	3.86%	13	+ .73%	-1
Illinois	3.12%	13	3.65%	14	+ .53%	-1
Indiana	2.23%	27	2.59%	27	+ .36%	0
Iowa	1.89%	34	1.96%	41	+ .07%	-7
Kansas	1.40%	46	1.77%	43 (tie)	+ .37%	+3
Kentucky	2.11%	29	2.41%	29 (tie)	+ .30%	0
Louisiana	5.64%	3	6.22%	3	+ .58%	0
Maine	4.88%	6	5.17%	7	+ .29%	-1
Maryland	3.20%	11	3.87%	12	+ .67%	-1
Massachusetts	4.53%	7	4.89%	8	+ .36%	-1
Michigan	1.64%	39	2.27%	34	+ .63%	+5
Minnesota	1.88%	35	2.20%	35	+ .32%	0
Mississippi	0.65%	51	1.20%	50	+ .55%	+1
Missouri	1.99%	32	2.37%	31	+ .38%	+1
Montana	2.35%	22	2.85%	22	+ .50%	0
Nebraska	1.18%	48	1.51%	48	+ .33%	0
Nevada	1.56%	41	1.59%	46 (tie)	+ .03%	-5
New Hampshire	6.32%	1	6.69%	2	+ .37%	-1
New Jersey	2.82%	16	3.07%	20	+ .25%	-4
New Mexico	1.00%	50	1.12%	51	+ .12%	-1
New York	2.36%	21	2.63%	25	+ .27%	-4
North Carolina	1.68%	38	2.12%	37 (tie)	+ .44%	+1
North Dakota	2.30%	24	2.70%	24	+ .40%	0
Ohio	2.77%	17	3.42%	16	+ .65%	+1
Oklahoma	1.46%	45	1.97%	40	+ .51%	+5
Oregon	2.52%	18	3.16%	19	+ .64%	-1
Pennsylvania	2.40%	20	2.82%	23	+ .42%	-3
Rhode Island	3.69%	9	4.13%	11	+ .44%	-2
South Carolina	2.28%	25	2.93%	21	+ .65%	+4
South Dakota	1.84%	36	2.41%	29 (tie)	+ .57%	+7
Tennessee	1.68%	37	2.12%	37 (tie)	+ .44%	0
Texas	6.00%	2	6.88%	1	+ .88%	+1

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Utah	1.56%	40	2.09%	39	+53%	+1
Vermont	5.48%	4	5.85%	5	+37%	-1
Virginia	2.07%	30	2.60%	26	+53%	+4
Washington	2.92%	15	3.30%	17	+38%	-2
West Virginia	1.92%	33	2.35%	32 (tie)	+43%	-1
Wisconsin	1.08%	49	1.43%	49	+37%	0
Wyoming	2.19%	28	2.18%	36	-.01%	-8
<b>United States</b>	<b>2.71%</b>		<b>3.26%</b>		<b>+55%</b>	