A COMPREHENSIVE COMPARISON OF THE IDEA AND SECTION 504/ADA

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An article in the March 2007 issue of WEST'S EDUCATION LAW REPORTER (Ed.Law Rep.) updated a 2003 systematic comparison comprehensively canvassing 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"). This latest version covers the procedural and substantive developments during the intervening period, including but not limited to 1) the ADA Amendments Act of 2008 (ADAAA)ⁱⁱ; 2) related or concomitant issues under Section 504ⁱⁱⁱ; 3) the consent revocation amendments in the December 2008 IDEA regulations; and relatively new relevant issues, such as response to intervention and service animals. It also adds various references and refinements to the endnotes for the sake of comprehensiveness.

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) are represented by regular typeface, while those that are *advanced*—in terms of being more subtle or sophisticated—are presented in italics. The added material is signaled by grey highlighting.

Finally, this supplemental chart contains the following acronyms:

BIP behavior intervention plan

ESY extended school year

FAPE free appropriate public education



FBA functional behavioral assessment

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

$\mathbf{ADA}^{\mathrm{v}}$ **§504 IDEA** General Funding statute Civil rights act Civil rights act • provides approx. 15-20% of excess • tied to federal funding but • neither tied to federal costs of special education^{vi} provides none funding nor providing it For students aged 0-21 prior to and in For students in SAME AS § 504 plus also other private entities that elementary and secondary education vii elementary/secondary and also: • postsecondary education provide public • employees^{xiii} accommodations • peripheral re facilities viii • facilities xiv • including extracurricular and other • extracurricular and other such such activities ix activitiesxv Extends, as a district obligation, to Extends directly—in Extends as well to private, comparison to limited district unilaterally placed students in private nonparochial schools obligation^{xvi}—to parochial and schools^x and, to a much lesser extent, without such federal <mark>financial assistance^{xix}</mark> to those voluntarily placed in such other private schools that schoolsxi receive federal hot lunch, Title I and/or IDEA program services xvii • the voluntary placements cover • does not apply to homeschooled children^{xviii} home schools only in the few states where they are private schools; otherwise the IDEA only requires child-find for home-schooled *children*^{xii} Long statute (approx. 55 pages in Short statute (less than 2 pages Medium statute (approx. 15 subchapters I and II)xx for definitions and pages for subchapters I-III)^{xxii} prohibition)xxi Lengthy regulations (approx. 55 pp. + Relatively short regulations Shorter regulations (e.g.,



comments)xxiii

(approx. 9 pp. + comments)^{xxiv}

approx. 7 pages for Title

 $\prod_{i=1}^{n}$

IDEA §504 ADA

Administering Agency (for K-12 Schools)

OCR xxvi SAME AS § 504^{xxvii} **OSEP**

Institutional Requirements

Various that are explicit:

- short nondiscrimination notice
- identified coordinator
- grievance procedure xxviii
- self-evaluation document^{xxix}

• must be updated as of 1/26/93^{xxx}

Statutory Interplay

Increasing effect of § 504 and Intertwined relationship with ADA^{xxxii} and extensive effect of IDEA^{xxxiii}

Extensive interconnection with

NCLB^{xxxv}

Limited, largely indirect, effect

of NCLB^{xxxvi}

Intertwined relationship

with § 504^{xxxiv}



IDEA §504 ADA

Student-Specific: Identification xxxviii

2-part definition of disability: xxxviii

• 1 or more of 11 classifications +

• need for special education

broader 3-part definition of disability: xxxix

- any recognized impairment +
- major life activity (not just learning^{xl}—expanded list within^{xli} and beyond^{xlii} learning) +
- substantial limitation

Frame of reference for measuring adverse effect: unspecific^{xliii}

Frame of reference for measuring substantial limitation: average student in general population xliv

Mitigating measures (e.g., medication): irrelevant

Mitigating measures (e.g., medication): measurement without xlv

Child-find obligation: specific^{xlvi}

Child-find obligation: less specific—and less strong too? xlvii

Evaluation: medical assessment not required (unless state law provides otherwise)^{xlviii}

SAME^{xlix}

• IEE: specific provisions¹

RTI: major area of state law activity for SLD identification lii

• IEE: no provision^{li}

RTI: indirect effect limited to double-covered students liii

§ 504 **IDEA ADA Student-Specific: Services** $FAPE = special ed. + rel. services^{liv}$ FAPE = special ed. or reg. ed.+ related services lv Substantive standard: reasonably Substantive standard: Substantive standard: calculated to provide benefit reasonable modification commensurate opportunity or reasonable accommodation?^{lvi} • local (district) frame of $reference^{\,lvii}$ • for private schools – "minor adjustments" lviii Procedural violations may be denial Procedural violations do not of FAPE where not harmless error. lix alone trigger a claim.lx Specifically prescribed IEP^{lxi} No formally required document (but practical use for proof) lxiv • no ITP requirement including ITP • with at least annual review • no specified review requirement but presumably reasonableness standard • including extended school year • no explicit provision ("ESY") where needed lxii • implementation "as soon as • no explicit implementation possible "lxiii deadline SAME^{lxvi} Residential placement: one option of LRE continuum lxv Obligation to provide services to Obligation to provide services students in private schools: limited to students in private schools: and specific obligation of the district limited and specific obligation of location lxvii of the private school^{lxviii}



limited)^{lxix}

access^{lxxi}

Obligation to children home-schooled

Service animals: very limited right of

under state law: conditional (and

Obligation to children home-

Service animals: robust right of

schooled under state law:

 $none^{lxx}$

access. lxxii

IDEA § 504 ADA

Student-Specific: Procedural Safeguards

Long individual notice lxxiii

Medium individual notice lxxiv

Detailed criteria and specific role reps, including parents, lxxv for evaluation, IEP, and placement teams lxxvi

Detailed safeguards for student

records^{lxxviii}

Consent for initial evaluation and, with limitations, for reevaluation laxx

Consent for initial services lxxxii – with written revocation as absolute xxxiii

Reevaluation at least every 3 years

 plus upon parent or teacher request or if specified conditions warrant^{lxxxv}

Impartial hearing lxxxviii with wellsettled exhaustion requirement lxxxix

IHO override for placement: not for initial services/placement^{xci} nor for revocation of consent for services/placement^{xcii}

Stay-put requirement: explicit xciv

3 criteria for all-purpose team (knowledgeable about child, evaluation data, and interventions), w/o specifically requiring parents lxxvii

No specific additions to brief mention in procedural safeguards provision lxxix

Consent for initial evaluation but only notice for reevaluation lxxxi

No consent for services<mark>?</mark>lxxxiv

Periodic reevaluation lxxxvi

• plus upon "a significant change in placement" lxxxvii

Impartial hearing with inconsistent interpretation of IDEA's exhaustion provision^{xc}

IHO override for placement: stronger^{xciii}

Stay-put requirement: inferred?^{xcv}



IDEA § 504 ADA

Student-Specific: Discipline xcvi

Focus on "removals" More application to other forms

of discipline as well xcviii

Protection for "deemed to know" students: implicit

Protection for "deemed to know" students: explicit xcix

M-Ds: detailed but recently reduced procedures and criteria^{ci}

M-Ds: 2 criteria for team but otherwise more relaxed^{ciii}

 but with complete reevaluation (i.e., appropriateness criterion^{civ}) upon "significant change in placement"^{cv}

• special, subsequent treatment for drug use or possession^{cii}

 but no M-D required for expulsion for use of alcohol or illegal drugs^{cvi}

FBA(s) and BIPs: specific triggering requirements^{cvii}

FBAs or BIPs: no requirements for 504-only students

45-day interim alternate placements: 4 specified circumstances cviii

45-day interim alternate placements: no authority^{cix}

After valid expulsion: FAPE obligation continues^{cx}

After valid expulsion: no FAPE obligation^{exii} – *except in the 5th and 11th Circuits*^{exiii}

• also, albeit on streamlined basis, upon the 11th cumulative day^{cxi} Interim alternate placement as expanded stay-put^{cxiv} • none upon the 11th cumulative day

No provision for interim placements^{cxv}

IDEA	§ 50 4	ADA
Student-Specific: Enforcement		
Policy letters: OSEP ^{cxvi}	Policy letters: OCR	SAME AS § 504 ^{cxvii}
Complaints and compliance reviews: SEA ^{exviii} • ultimate sanction: loss of IDEA funding • published "precedents": rarely (and probably inadvertently) ^{exix}	Complaints and compliance reviews: OCR • ultimate sanction: loss of all federal funding • published "precedents": common ^{cxx}	SAME AS § 504 ^{cxxi}
Disputes: IHO is SEA responsibility exxii • detailed requirements for hearings exxiii	Disputes: IHO is LEA responsibility • skeletal requirement for hearings ^{cxxv} • published "precedents": rare	
• published "precedents": common ^{cxxiv}		
LEA responsibility: special ed director	LEA responsibility: 504 coordinator	LEA responsibility: ADA coordinator

§504 IDEA ADA

Litigation

Exhaustion requirement: strong Exhaustion requirement: more extensive exceptions cxxvii

• one-tier suffices even in 2-tier • state option of one- or two-tier IDEA jurisdiction exxviii system^{cxxvi}

SAME AS § 504^{cxxxi} Statute of limitations: explicit cxxix Statute of limitations: varying but often longer^{cxxx}

Unrestricted private right of action Restricted private right of action

Burden of proof: on the plaintiff SAME AS § 504^{cxxxv} Burden of proof: on the plaintiff for FAPE and LRE cxxxiii (i.e., parents)^{cxxxiv}

"Due weight" standard of judicial Unsettled standard of judicial review^{cxxxvii} review of IHO decision^{cxxxvi}

Protection against retaliation: Protection against retaliation limitedcxxxviii and harassment: stronger exxxix

Extends to associational protection^{cxl}

Protection against bullying, i.e., peer Protection against bullying, i.e., harassment based on disability: limited^{cxli}

peer harassment, based on disability: stronger^{cxlii}

Attorneys' fees: within limits cxliii Attorneys' fees: possibly • possibly for SEA complaints too^{cxliv} higher^{cxlv} • not for OCR complaints

Similar, though less well Various equitable remedies^{cxlv1}

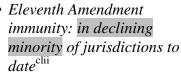
developed, remedies exlvii

Money damages: all Money damages: minority of jurisdictions only exlviii jurisdictions but higher standard in most^{exlix}

• Eleventh Amendment immunity: in • Eleventh Amendment immunity: in the minority of jurisdictions to date^{cli}

• Eleventh Amendment immunity: in declining minority of jurisdictions to

none of the jurisdictions to date^{cl}





Endnotes

¹ Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 Ed.Law Rep. [1] (2007). For the previous version, see Perry A. Zirkel, *A Comparison of the IDEA and Section 504/ADA*, 178 Ed.Law Rep. [629] (2003). For the wider coverage of Section 504 and the ADA, including employees and facilities, see, e.g., PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (3d ed. 2011) (available from LRP Publications – www.lrp.com).

ii Pub. L. No. 110-325, 122 Stat. 3553 (2008).

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

iv 34 C.F.R. §§ 300.300(b)(4) and 300.9(c)(3) (2009).

^v 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. For a comprehensive reference, see ZIRKEL, *supra* note 1. For comparisons between § 504 and the ADA, see OCR Senior Staff Memorandum, 19 IDELR 859 (1992) (reprinted in ZIRKEL, *supra* note 1, at App. 2:21); Perry A. Zirkel, *Our "Disability" with the ADA*, 8 THE SPECIAL EDUCATOR 251 (1993).

vi 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 average 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).

vii The focus here is Part B, which covers ages 3-21. 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 Ed.Law Rep. [11] (2005).

viii 34 C.F.R. § 300.718 (2006).

 $^{\rm ix}$ See, e.g., 34 C.F.R. §§ 300.107 and 300.117 (2006) (including new language regarding supplementary aids and services).

^x 34 C.F.R. § 300.148 (2006).

xi 34 C.F.R. §§ 300.129-300.147 (2006) (including beefed up responsibilities, such as consultation, and their reallocation from the LEA of the child's residence to the LEA of the private school's location).

xii See, e.g., Hooks v. Clark Cnty. Sch. Dist., 228 F.3d 1036 (9th Cir. 2000), cert. denied, 121 U.S. 1002 (2001); 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).

See, e.g., Perry A. Zirkel, *A Checklist for Disability Nondiscrimination in School District Employment*, 24 YOUR SCH. & THE L. 6 (May 1994).

Facilities, Programs, 10 THE SPECIAL EDUCATOR 33 (Sept. 6, 1994). For recent examples of student accessibility litigation, see Celeste v. E. Meadow Union Free Sch. Dist., 373 F. App'x 85 (2d Cir. 2010); D.R. v. Antelope Valley High Sch. Dist., 746 F. Supp. 2d 1132 (C.D. Cal. 2010).



- xv 34 C.F.R. § 104.34 (2006). 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 Ed.Law Rep. [761, 764] (2000). For more recent cases, see Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 (E.D. Pa. 2001); Blaisden v. West Virginia Secondary Sch. Activities Comm'n, 568 S.E.2d 32 (W. Va. 2002). For another particular but no 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 Ed.Law Rep. [447] (2011).
- 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 (Pa. Commw. Ct. 2005).
- Rep. [15] (2006). For recent further examples, see 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 (S.D. Miss. 2008) (federal vouchers).
- xviii See, e.g., Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, supra note 1, at App. 2:74).
- xix 28 C.F.R. § 36.302(a). The higher standard applies to double-covered entities. *Id.* § 36.103(a). For further information, see, e.g., Zirkel, *supra* note 15. For recent examples, see United States v. Nobel Learning Communities, Inc., 676 F. Supp. 2d 379 (E.D. Pa. 2009); Franchi v. New Hampton Sch., 656 F. Supp. 2d 252 (D.N.H. 2009).
 - xx 20 U.S.C §§ 1400-1419 (2006).
 - xxi Id. §§ 705(20) and 794. For remedies and attorneys' fees, see id. § 794a.
 - ^{xxii} 42 U.S.C. §§ 12101-12189.
- xxiii 34 C.F.R. Part 300 (2007). This length is only an estimate because at this time the regulations are only available at 71 Fed. Reg. 46,540 (Aug. 14, 2006) and include the appendices. xxiv 34 C.F.R. Part 104 (2006).
- xxv 28 C.F.R. Part 35 (2006). 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.
 - For the enforcement procedures and offices, see ZIRKEL, *supra* note 1, at App. 10.
- xxvii OCR enforces ADA student issues in the schools in tandem with §504. See, e.g., OCR Senior Staff Memorandum, 19 IDELR 886 (OCR 1992).Un
 - xxviii For examples, see ZIRKEL, *supra* note 1, at App. 4.
 - xxix For examples, see ZIRKEL, *supra* note 1, at App. 3.
 - xxx See, e.g., OCR Memorandum, 19 IDELR 875 (OCR 1993).
- xxxi See, e.g., Perry A. Zirkel, Section 504 Emerging Case Law Developments (2011) (video presentation available via www.nasdse.org).
 - xxxii See generally ZIRKEL, supra note 1.
- v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 551 (N.D. Tex. 2004); Corey H. v. Cape Henlopen Sch. Dist., 286 F. Supp. 2d 380 (D. Del. 2003); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2002).
 - xxxiv See generally ZIRKEL, supra note 1.



xxxv 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 Ed.Law Rep. [805] (2004).

xxxvi See, e.g., Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 Ed.Law Rep. [591] (2004).

xxxvii 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* notes 40-42.

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

record of and regarded as — are not applicable to FAPE. See Senior Staff Memorandum, 19 IDELR 894 (OCR 1992). For a snapshot of school district eligibility practices prior to the ADAA, 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).

xl 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 Ed.Law 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 (9th Cir. 2005); Marlon v. W. New England College, 124 F. App'x 15 (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. Colorado High Sch. Activities Ass'n, 140 P.3d 249 (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).

xli For example, the ADAAA adds reading and concentration to the enumerated examples of major life activities. *Id*.

xlii For example, the ADAAA specifies eating, sleeping, and the various major bodily functions.

xliii See generally Robert A. Garda, Untangling Eligibility Requirements under the Individuals with Disabilities Education Act, 69 Mo. L. REV. 441 (2004). The eroded exception is the severe-discrepancy standard for SLD, wherein the child's "ability" is the frame of reference. The recent 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 (2006).

xliv See, e.g., Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001); *see also* Zirkel, *supra* note 15, at 761.

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*.

xlvi See, e.g., 34 C.F.R. §§ 300.111, 300.131, and 300.534 (2006).



Id.

xlvii See, e.g., T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997). Distinguishable for "child find" for "pure" 504 students is that for students who are also covered by the IDEA. See, e.g., W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); O.F. v. Chester Upland Sch. Dist., 246 F. Supp. 2d 409 (E.D. Pa. 2002).

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

xlix See, e.g., See, e.g., Letter to Williams, 21 IDELR 73 (OCR 1994) (reprinted in ZIRKEL, supra note 1, at App. 2:78). 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) (reprinted in ZIRKEL, supra note 1, at App. 2:74).

¹ 34 C.F.R. § 300.502 (2006) (including limitation of entitlement for those at public-expense to one per year). *See*, *e.g.*, Susan Etscheid, *Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).

li See, e.g., Randolph (MA) Pub. Sch., 21 IDELR 816 (OCR 1994).

lii 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 OSEP policy letters, see Perry A. Zirkel, *RTI and the Law*, 268 Ed.Law Rep. [1] (2011).

liii See, e.g., Polk Cnty. (FL) Pub. Sch., 56 IDELR ¶ 179 (OCR 2010).

liv 34 C.F.R. § 300.17.

lv *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 Letter to Zirkel, __ IDELR ¶ __ (OCR 2011).

lvi See, e.g., Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less Than the IDEA?* 106 Ed.Law Rep. [471] (1996); *see also* Mark H. v. Hamamoto, 513 F.3d 922 (9th Cir. 2010) (commensurate opportunity); Campbell v. Bd. of Educ., 58 F. App'x 162 (6th Cir. 2003); R.K. v Bd. of Educ. of Scott Cnty., 755 F. Supp. 2d 900 (E.D. Ky. 2010) (reasonable accommodation). Another possibility is importing the IDEA's benefit standard to § 504. Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422, 428 (E.D. Pa. 2002) (engrafting Third Circuit's IDEA meaningful benefit standard on to Second Circuit's § 504 reasonable accommodation standard, citing J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000)).

lvii 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.

^{lviii} 34 C.F.R. § 104.39.

lix 20 U.S.C. § 1415(f)(3)(E)(ii) (2005); 34 C.F.R. § 513(a)(2) (2006). The only per se procedural denial of FAPE appears to be significantly impeding the parents' opportunity for participation in the IEP process. *Id*.

lx See, e.g., Power v. Sch. Bd., 276 F. Supp. 2d 515 (E.D. Va. 2003); A.W. v. Marlborough Co., 25 F. Supp. 2d 27 (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., Office for Civil Rights, Frequently Asked Questions about Section 504 and the Education of Students with Disabilities (2009) (available at



http://www.ed.gov/about/offices/list/ocr/504faq.html). For the limited exception, see, e.g., Gloucester Cnty. (VA) Pub. Sch., 49 IDELR ¶ 21 (OCR 2007) (life-threatening food allergy).

lxi 34 C.F.R. § 300.324 (2006).

lxii See, e.g., Susan Etscheidt, Extended School Year Services: A Review of Eligibility Criteria and Program Appropriateness, 27 RES. & PRAC. FOR PERSONS WITH SEVERE DISABILITIES 188 (2002).

lxiii 34 C.F.R. § 300.323(c)(2). For a recent interpretation, see D.D. v. New York City Bd. of Educ., 465 F.3d 503 (2d Cir. 2006).

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

lxv See, e.g., 34 C.F.R. §§ 300.104 and 300.115 (2006).

 lxvi Id. § 104.33(c)(3). The case law interpreting this provision has been mixed. See, e.g., ZIRKEL, supra note 1, at 3:112.

lxvii See *supra* note 11 and accompanying text.

lxviii See *supra* note 17 and accompanying text. For the limited obligation of the district of residence based on interpretation of Pennsylvania law, see *Lower Merion School District v. Doe*, 931 A.2d 640 (Pa. 2007).

lxix See *supra* note 12 and accompanying text.

lxx See *supra* note 18 and accompanying text.

lxxi In contrast, the limited parent's success had been under state laws. See, e.g., Perry A. Zirkel, *Service Animals in Public Schools*, 257 Ed.Law Rep. [525] 2010).

lxxii 75 Fed. Reg. 56,163 *et seq.* (Sept. 15, 2010)(new DOJ regulations under ADA Titles II and III). For a recent example of the application of this regulation, see C.C. v. Cypress Sch. Dist., 56 IDELR ¶ 295 (C.D. Cal. 2011).

lxxiii 34 C.F.R. § 300.504(c) (2006) (including additions for the limitations periods).

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

lxxv 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).

lxxvi 34 C.F.R. § 300.321 (2006) (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) (2005). However, the same regulations delegate the determination of eligibility to "a group of qualified professionals and the parent." *Id.* § 300.306(a)(1) (2006). The difference may be significant. *See, e.g.*, Elida Local Sch. Dist. Bd. of Educ., 252 F. Supp. 2d 476 (N.D. Ohio 2003). In addition, the regulations continue, unchanged, the specified members for determining SLD eligibility. 34 C.F.R. § 300.308 (2006). Finally, the regulations also continue to require the placement team to include the parent and to meet the three criteria that match § 504. 34 C.F.R. § 300.116(a)(1).

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

lxxviii 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.

lixix *Id.* § 104.36.

lxxx *Id.* § 300.300 (2006) (including additional provisions for initial evaluations).

^{1xxxi} See, e.g., Letter to Durheim, 27 IDELR 380 (OCR 1997); OCR Senior Staff Memorandum, 19 IDELR 892 (1992).

lxxxii 34 C.F.R. §§ 300.300(b)(1)-(3) (2009).

lxxxiii *Id*, §§ 300.300(b)(4) and 300.9(c)(3) (2009). 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).

lxxxiv Tyler (TX) Indep. Sch. Dist., 56 IDELR ¶ 24 (OCR 2010).

^{1xxxv} *Id.* § 300.303 (2006). 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).

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

lxxxvii See, e.g., 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. § 300.519.

IXXXVIII For the impartiality requirement, see, e.g., 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).

lxxxix 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, *supra* note 15, at 762 n.7

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. ___ (forthcoming).

^{xci} 20 U.S.C. § 1414(a)(1)(D)(ii); 34 C.F.R. § 300.300(b).

^{xcii} 34 C.F.R. § 300.300(b)(4)(ii) (2009).

App. 2:87); Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87); Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:74). xciv 34 C.F.R. § 300.518 (2006).

xcv Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, supra note 1, at App. 2:87).

xcvi 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 Ed.Law Rep. [1] (2008). For a recent systematic review of the revisions under IDEA 2004 and its 2006 regulations, see Perry A. Zirkel, *Suspensions and Expulsions of Students with Disabilities: The Latest Requirements*, 214 Ed.Law Rep. [445] (2007).



xcvii See, e.g., 34 C.F.R. § 300.530(b) (2006). For an overview, see, e.g., Perry A. Zirkel, Suspensions and Expulsions of Students with Disabilities: The Latest Requirements, 214 Ed.Law Rep. 445 (2007).

Comparative Overview, 226 Ed.L. Rep. [9] (2008). For other forms of discipline, see, e.g., Perry A. Zirkel, Discipline under Section 504, 226 Ed.Law Rep. [9] (2008); cf. Perry A. Zirkel, Discipline under Section 504, 226 Ed.Law Rep. [9] (2008); cf. Perry A. Zirkel, Discipline of Students with Disabilities: A Judicial Update, 235 Ed.Law Rep. [1] (2008) (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).

xcix 34 C.F.R. § 300.534 (2006) (including narrowing the alternative bases and adding exceptions for refused consent).

^c 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).

ci 34 C.F.R. § 300.530(e) (2006). For detailed analyses of the new provisions and a sample form, 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. LEAD. 3 (2006). For recent case outcome trends, see Perry A. Zirkel, *Manifestation Determinations under the Individuals with Disabilities Education Act: An Update*, 31 REMEDIAL & SPECIAL EDUC. 378 (2010).

cii 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 1239 (OSEP 1992).

See, e.g., OCR Senior Staff Memorandum, 16 EHLR 491 (OCR 1989). In combination with the reevaluation requirement, this MDR 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 MDR 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.* Centennial Sch. Dist. v. Phil L., 559 F. Supp. 2d 634 (E.D. Pa. 2008).

Civ 34 C.F.R. §104.35(a); see also OCR, DISCIPLINE OF STUDENTS WITH HANDICAPS IN ELEMENTARY AND SECONDARY SCHOOLS (September 1992); OCR Memorandum re Discipline of Students with Disabilities (November 13, 1989) (reprinted in ZIRKEL, *supra* note 1, at App. 2:1); see also Letter to Williams, 21 IDELR 73 (OCR 1994) (reprinted in ZIRKEL, *supra* note 1, at App. 2:78); 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).

cv See supra note 87 and accompanying text. 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 (W.D. La. 1994) *with* Yough Sch. Dist. v. M.S., 23 IDELR 807 (Pa. Commw. Ct. 1995).

cvi 20 U.S.C. § 705(20)(C)(iv); see also OCR Staff Memorandum, 17 IDELR 609 (OCR 1991).

cvii 34 C.F.R. § 300.530(f) (2006). For respective analyses of the case law and state laws, see 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 BEHAVIOR DISORDERS 262 (2011).

cviii *Id.* §§ 300.530(g) (including addition of "serious bodily injury") and 300.532(b)(2)(ii) (requires IHO) (2006).

cix 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) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87).

^{cx} 34 C.F.R. §§ 300.111(a) and 300.30(d)(1) (2006).

^{cxi} *Id.* § 300.530(d)(4) (2006)

cxii 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).

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

cxiv 34 C.F.R. § 300.533 (2006). For a detailed analysis, see Perry A. Zirkel, *Stay-Put under the IDEA Discipline Provisions: What Is New?*, 214 Ed.Law Rep. [467] (2007).

^{cxv} See *supra* note 109 and accompanying text.

cxvi See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.Law Rep. [391] (2002).

cxvii See supra note 26.

cxviii See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 Ed.Law Rep. 565 (2008).

cxix 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).

cxx For a broad selection of significant, published OCR LOFs, see generally ZIRKEL, *supra* note 1. For a smaller sampling, see Perry A. Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 Ed.Law Rep. [601] (1993). For an empirical analysis of the published LOFs, see Perry A. Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 Ed.Law Rep. [369] (1997).

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

cxxii For a snapshot of the current state systems, see 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 Perry A. Zirkel, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. SPECIAL EDUC. LEADERSHIP 22 (2008).



cxxiii See, e.g., 34 C.F.R. §§ 300.507-300.515 (2006) (including new provisions for prehearing process, including resolution session).

cxxiv See, e.g., Perry A. Zirkel & Anastasia D'Angelo, *Special Education Case Law: An Empirical Trends Analysis*, 161 Ed.Law Rep. [731] (2002); *see also* D'Angelo, Lutz & Zirkel, *supra* note 119.

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

cxxvi For the current systems, see Zirkel & Scala, *supra* note 122.

cxxvii See Zirkel, *supra* note 15, at 762-63; *see also* R.J. v. McKinney Indep. Sch. Dist., 45 IDELR ¶ 9 (E.D. Tex. 2005).

cxxviii See, e.g., Bd. of Educ. of Valley Cent. Sch. Dist., 38 IDELR 276 (N.Y. SEA 2002); Mississippi State Dep't of Educ., EHLR 257:545 (OCR 1986). *But see* Weber v. Cranston Sch. Comm., 235 F. Supp. 2d 401 (D.R.I. 2003).

cxxix 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2) and 300.516(b) (2006) (two years for hearing stage and 90 days for judicial stage unless specified in state law). 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 Ed.Law 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).

cxxx See, e.g., Zirkel, *supra* note 15, at 765. *But see* P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727 (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 (6th Cir. 2010); Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 (8th Cir. 1999); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992).

cxxxi See, e.g., Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 (8th Cir. 1999);

^{cxxxii} See, e.g., Power v. Sch. Bd., 276 F. Supp. 2d 515 (E.D. Va. 2003); A.W. v, Marlborough Co., 25 F. Supp. 2d 27 (D. Conn. 1998); *cf.* Mark G. v. LeMahieu, 372 F. Supp. 2d 591 (D. Hawaii 2005).

cxxxiii Schaffer v. Weast, 546 U.S. 49 (2005); L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006). 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 Act*, 108 W.V. L. REV. 27 (2005).

cxxxiv See, e.g., Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403

See, e.g., Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403 (11th Cir. 1985).

cxxxvi See, e.g., Dyer v. Jefferson Cnty. Sch. Dist. R-1, 905 F. Supp. 864 (D. Colo. 1995).

cxxxvi See, e.g., Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (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 (7th Cir. 2004); Dale M. v. Bd. of Educ., 273 F.3d 813 (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*, __ EXCEPTIONAL CHILD. __ (forthcoming); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999).



cxxxvii See, e.g., Centennial Sch. Dist. v. Phil L., __ F. Supp. 2d __ (E.D. Pa. 2011).

cxxxviii 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 Ed.Law 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 (7th Cir. 2006); Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2002); Hesling v. Avon Grove Sch. Dist., 428 F. Supp. 2d 262 (E.D. Pa. 2006).

v. Seidenberger, 286 F. App'x 773 (3d Cir. 2008); M.P. v. Indep. Sch. Dist. No. 727, , 326 F.3d 975 (8th Cir. 2003); K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005); Vives v. Fajardo, 399 F. Supp. 2d 250 (D.P.R. 2005); P.N. v. Greco, 282 F. Supp. 2d 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)(reprinted in Zirkel, supra note 1, at App. 2:101); Gina DiPietro & Perry A. Zirkel, Employee Special Education Advocacy: Retaliation Claims under the First Amendment, Section 504 and the ADA, 257 Ed.Law Rep. [823] (2010); Perry A. Zirkel, Protect Your District from Costly Claims of Disability Harassment, 16 The Special Educator 4 (Sept. 22, 2000).

cxlii See, e.g., T.K. v. New York City Dep't of Educ₂, __ F. Supp. 2d __ (S.D.N.Y. 2011).

cxlii Compare K.M. ex rel. D.G. v. Hyde Park Cent. Sch. Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005), with S.S. v. E. Kentucky Univ., 532 F.3d 445 (6th Cir. 2008); Werth v. Bd. of Directors of the Pub. Sch., 472 F. Supp. 2d 1113 (E.D. Wis. 2007).

cxliii See, e.g., 34 C.F.R. § 300.517 (2006).

cxliv *Compare* Lucht v. Molalla River Sch. Dist., 225 F.3d 1023 (9th Cir. 2000); Upper Valley Ass'n for Handicapped Citizens v. Blue Mountain Union Sch. Dist., 973 F. Supp. 479 (D. Vt. 1997), with Vultaggio v. Bd. of Educ., 343 F.3d 598 (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 (D. Minn. 1999).

cxlv 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).

^{cxlvi} See, e.g., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'1 ADMIN. L. JUDICIARY 1 (2011).

^{cxlvii} See, e.g., Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, Ed.L. Rep. 745, 748 nn.13-14 (2004).

cxlviii *Compare* Polera v. Bd. of Educ., 288 F.3d 478 (2d Cir. 2002); Padilla v. Sch. Dist. No. 1, 233 F.3d 1268 (8th Cir. 2000); Thompson v. Bd. of Educ. 144 F.3d 574 (8th Cir. 1998); Sellers v. Sch. Bd., 141 F.3d 524 (4th Cir. 1998), *with* W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); Goleta Union Elementary Sch. Dist. v. Ordway, 38 IDELR ¶ 64 (C.D. Cal. 2002); L.C. v. Utah State Bd. of Educ., 57 F. Supp. 2d 1214 (D. Utah 1999). The case law is limited and similarly split with regard to punitive damages. *Compare* Woods *ex rel*. T.W. v New Jersey Dep't of Educ., 796 F. Supp. 767 (D.N.J. 1992), *with* Appleton Area Sch. Dist. v. Benson, 32 IDELR ¶ 91 (E.D. Wis. 2000).

cxlix See, e.g., Zirkel, *supra* note 15, at 764. On the other hand, punitive damages are not recoverable under § 504. Barnes v. Gorman, 536 U.S. 681 (2002). Moreover, the majority view is that defendants are, with limited exception, not liable under § 504 in their individual capacity. Zirkel, *supra* note 15, at 763. For the limited exception, see, e.g., Alston v. Dist. of Columbia, 561 F. Supp. 2d 29 (D.D.C. 2008).

cl See, e.g., A.W. v. Jersey City Pub. Sch., 341 F.3d 234 (3d Cir. 2003); Bd. of Educ. v. Kelly E., 207 F.3d 931 (7th Cir. 2000); Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997). The new regulations have added the statutory waiver. 34 C.F.R. § 300.177 (2006). For a comprehensive overview, see Perry A. Zirkel, *The Eleventh Amendment and Student Suits under the IDEA*, § 504, and the ADA. 183 Ed.Law Rep. [657] (2003).

cli *Compare* A.W. v. Jersey City Pub. Sch., 341 F.3d 234 (3d Cir. 2003); Gean v. Hattaway, 330 F.3d 758 (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 (8th Cir. 2001), *cert. denied*, 533 U.S. 949 (2001); Stanley v. Litscher, 213 F.3d 340 (7th Cir. 2000), *with* Garcia v. SUNY Health Sci. Ctr. of Brooklyn, 280 F.3d 98 (2d Cir. 2001); *cf.* Pace v. Bogalusa City Sch. Bd., 325 F.3d 609 (5th Cir. 2003). *See generally* Zirkel, *supra* note 150.

clii 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 (1st Cir. 2006); State Ass'n for Disabled Americans v. Florida Am. Univ., 405 F.3d 954 (11th Cir. 2005); Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474 (4th Cir. 2005). For the prior trend, which was in the direction of immunity, *see generally Zirkel*, *supra* note 147.