

## A COMPREHENSIVE COMPARISON OF THE IDEA AND SECTION 504/ADA

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This analysis provides the latest in a series of successively updated 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”).<sup>1</sup> This latest version adds various procedural and substantive developments, including but not limited to 1) the ADA Amendments Act of 2008 (ADAAA)<sup>2</sup>; 2) related or concomitant issues under Section 504<sup>3</sup>; 3) the consent revocation amendments in the December 2008 IDEA regulations<sup>4</sup>; and 4) relatively new relevant issues, such as response to intervention<sup>5</sup> and service animals.<sup>6</sup> 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 relatively more subtle or sophisticated—are presented in italics.

Finally, this supplemental chart contains the following acronyms:

BIP	behavior intervention plan
ED	emotional disturbance
ESY	extended school year
FAPE	free appropriate public education
FBA	functional behavioral assessment
IEE	independent educational evaluation

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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

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IDEA	§ 504	ADA <sup>7</sup>
<b><u>General</u></b>		
Funding statute <sup>8</sup> • provides approx. 15-20% of excess costs of special education <sup>9</sup>	Civil rights act <sup>10</sup> • tied to federal funding but provides none	Civil rights act <sup>11</sup> • neither tied to federal funding nor providing it
For students aged 0-21 prior to and in elementary and secondary education <sup>12</sup>  • peripheral re facilities <sup>13</sup> • including extracurricular and other such activities <sup>14</sup>  Extends, as a district obligation, to unilaterally placed students in private schools <sup>15</sup> and, to a much lesser extent, to those voluntarily placed in such schools <sup>16</sup>  • <i>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</i> <sup>17</sup>	For students in elementary/secondary and also: • postsecondary education <sup>18</sup> • employees <sup>19</sup> • facilities <sup>20</sup> • extracurricular and other such activities <sup>21</sup>  <i>Extends directly—in comparison to limited district obligation<sup>22</sup>—to parochial and other private schools that receive federal hot lunch, E-rate, Title I and/or IDEA program services</i> <sup>23</sup> • <i>does not apply to home-schooled children</i> <sup>24</sup>	SAME AS § 504 plus also other private entities that provide public accommodations  <i>Extends as well to private, nonparochial schools without such federal financial assistance</i> <sup>25</sup>
Long statute (approx. 55 pages in subchapters I and II) <sup>26</sup>	Short statute (less than 2 pages for definitions and prohibition) <sup>27</sup>	Medium statute (approx. 15 pages for subchapters I-III) <sup>28</sup>
Lengthy regulations (approx. 55 pp. + comments) <sup>29</sup>	Relatively short regulations (approx. 9 pp. + comments) <sup>30</sup>	Shorter regulations (e.g., approx. 7 pages for Title II) <sup>31</sup>

IDEA	§ 504	ADA
<b><u>Administering Agency (for K-12 Schools)</u></b>		
OSEP	OCR <sup>32</sup>	SAME AS § 504 <sup>33</sup>
<b><u>Institutional Requirements</u></b>		
	Various that are explicit: <ul style="list-style-type: none"> <li>• short nondiscrimination notice</li> <li>• identified coordinator</li> <li>• <b>grievance procedure</b><sup>34</sup></li> <li>• <i>self-evaluation document</i><sup>35</sup></li> </ul>	<ul style="list-style-type: none"> <li>• <i>must be updated as of 1/26/93</i><sup>36</sup></li> </ul>
<b><u>Statutory Interplay</u></b>		
Increasing effect of § 504 and ADA <sup>37</sup>	Intertwined relationship with ADA <sup>38</sup> and extensive effect of IDEA <sup>39</sup>	Intertwined relationship with § 504 <sup>40</sup>
Extensive interconnection with <b>NCLB</b> <sup>41</sup>	<i>Limited, largely indirect, effect of NCLB</i> <sup>42</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Identification</u></b> <sup>43</sup>		
2-part definition of disability: <sup>44</sup> <ul style="list-style-type: none"> <li>• 1 or more of 11 classifications +</li> <li>• need for special education</li> </ul>	broader 3-part definition of disability: <sup>45</sup> <ul style="list-style-type: none"> <li>• any recognized impairment +</li> <li>• major life activity (not just learning<sup>46</sup>—expanded list within<sup>47</sup> and beyond<sup>48</sup> learning) +</li> <li>• substantial limitation</li> </ul>	
<i>Frame of reference for measuring adverse effect: unspecific</i> <sup>49</sup>	<i>Frame of reference for measuring substantial limitation: average student in general population</i> <sup>50</sup>	
<i>Mitigating measures (e.g., medication): irrelevant</i>	<i>Mitigating measures (e.g., medication): measurement without</i> <sup>51</sup>	
Child-find obligation: specific <sup>52</sup>	Child-find obligation: less specific—and less strong too? <sup>53</sup>	
<i>Evaluation: medical assessment not required (unless state law provides otherwise)</i> <sup>54</sup>	SAME <sup>55</sup>	
<ul style="list-style-type: none"> <li>• IEE: specific provisions<sup>56</sup></li> </ul>	<ul style="list-style-type: none"> <li>• IEE: no provision<sup>57</sup></li> </ul>	
<ul style="list-style-type: none"> <li>• mis-identification: focus on “false negatives”<sup>58</sup> but no coverage for “false positives”<sup>59</sup></li> </ul>	<ul style="list-style-type: none"> <li>• mis-identification: deliberate indifference hurdle for “false positives”<sup>60</sup></li> </ul>	
RTI: major area of state law activity for SLD identification <sup>61</sup>	RTI: indirect effect limited to double-covered students <sup>62</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Identification (Continued)</u></b>		
Leading issues: ED <sup>63</sup> and ADHD <sup>64</sup>	Leading issues: students with health conditions <sup>65</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Services</u></b>		
FAPE = special ed. + rel. services <sup>66</sup>	FAPE = special ed. <u>or</u> reg. ed. + related services <sup>67</sup>	
Substantive standard: reasonably calculated to provide benefit	Substantive standard: <u>commensurate opportunity</u> or reasonable accommodation? <sup>68</sup> <ul style="list-style-type: none"> <li>• local (district) frame of reference<sup>69</sup></li> <li>• for private schools – “minor adjustments”<sup>70</sup></li> </ul>	Substantive standard: reasonable modification <sup>71</sup> <ul style="list-style-type: none"> <li>• specialized difference for hearing impaired students?<sup>72</sup></li> </ul>
<i>Procedural violations constitute denial of FAPE where not harmless error.</i> <sup>73</sup> <ul style="list-style-type: none"> <li>• possible exception for <u>parental opportunity for meaningful participation</u><sup>74</sup></li> </ul>	<i>Procedural violations do not alone trigger a claim.</i> <sup>75</sup>	
Incomplete-implementation violations: substantial, material standard <sup>76</sup> <p>Specifically prescribed IEP<sup>77</sup></p> <ul style="list-style-type: none"> <li>• including ITP</li> <li>• with at least annual review</li> <li>• including ESY where needed<sup>78</sup></li> <li>• implementation “as soon as possible”<sup>79</sup></li> </ul>	Incomplete-implementation violations: bad faith or gross misjudgment approach <sup>80</sup> <p>No formally required document (but practical use for proof)<sup>81</sup></p> <ul style="list-style-type: none"> <li>• no ITP requirement</li> <li>• no specified review requirement but presumably reasonableness standard</li> <li>• no explicit provision</li> <li>• no explicit implementation deadline</li> </ul>	
LRE: <ul style="list-style-type: none"> <li>• residential placement: one option of LRE continuum<sup>82</sup></li> <li>• case law: extensive but diminishing<sup>83</sup></li> </ul>	<ul style="list-style-type: none"> <li>• SAME<sup>84</sup></li> <li>• case law: extensions<sup>85</sup></li> </ul>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Services (Continued)</u></b>		
<p>Obligation to provide services to parentally placed students in private schools: limited and specific obligation of the district of location<sup>86</sup></p>	<p><i>Obligation to provide services to students in private schools: limited and specific obligation of the private school<sup>87</sup></i></p>	
<p><i>Obligation to children home-schooled under state law: conditional (and limited)<sup>88</sup></i></p>	<p><i>Obligation to children home-schooled under state law: none<sup>89</sup></i></p>	
<p><i>Service animals: very limited right of access<sup>90</sup></i></p>	<p><i>Service animals: robust right of access.<sup>91</sup></i></p>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Procedural Safeguards</u></b>		
Long individual notice <sup>92</sup>	Medium individual notice <sup>93</sup>	
Detailed criteria and specific role reps, including parents, <sup>94</sup> for evaluation, IEP, and placement teams <sup>95</sup>	3 criteria for all-purpose team (knowledgeable about child, evaluation data, and interventions), w/o specifically requiring parents <sup>96</sup>	
<i>Detailed safeguards for student records</i> <sup>97</sup>	No specific additions to brief mention in procedural safeguards provision <sup>98</sup>	
Consent for initial evaluation and, with limitations, for reevaluation <sup>99</sup>	<i>Consent for initial evaluation but only notice for reevaluation</i> <sup>100</sup>	
Consent for initial services <sup>101</sup> – with written revocation as absolute <sup>102</sup> • <b>revocation</b> also applies to § 504 <sup>103</sup>	<i>No consent for services?</i> <sup>104</sup>	
Reevaluation at least every 3 years • <i>plus upon parent or teacher request or if specified conditions warrant</i> <sup>105</sup>	Periodic reevaluation <sup>106</sup> • <i>plus upon “a significant change in placement”</i> <sup>107</sup>	
<i>Impartial hearing</i> <sup>108</sup> with well-settled exhaustion requirement <sup>109</sup>	<i>Impartial hearing with inconsistent interpretation of IDEA’s exhaustion provision</i> <sup>110</sup>	
<i>IHO override for placement: not for initial services/placement</i> <sup>111</sup> nor for <b>revocation</b> of consent for services/placement <sup>112</sup>	<i>IHO override for placement: stronger</i> <sup>113</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Procedural Safeguards (Continued)</u></b>		
<b>Stay-put</b> requirement: explicit and sometimes complex <sup>114</sup>	<i>Stay-put requirement: inferred?</i> <sup>115</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Discipline</u></b> <sup>116</sup>		
Focus on “removals” <sup>117</sup>	More applications, <sup>118</sup> including to other forms of discipline <sup>119</sup>	
Protection for “deemed to know” students: explicit <sup>120</sup>	<i>Protection for “deemed to know” students: implicit<sup>121</sup></i>	
<b>Cumulative days</b> beyond 10 in a school year: 4 illustrative factors <sup>122</sup>	<i>Cumulative days beyond 10 in a school year: 3 illustrative factors<sup>123</sup></i>	
<b>M-Ds:</b> detailed but recently reduced procedures and criteria <sup>124</sup> <ul style="list-style-type: none"> <li>• special, subsequent treatment for drug use or possession<sup>125</sup></li> </ul>	M-Ds: 2 criteria for team but otherwise more relaxed <sup>126</sup> <ul style="list-style-type: none"> <li>• <i>but with complete reevaluation (i.e., appropriateness criterion<sup>127</sup>) upon “significant change in placement”<sup>128</sup></i></li> <li>• <i>but no M-D required for expulsion for use of alcohol or illegal drugs<sup>129</sup></i></li> </ul>	
<b>FBA(s) and BIPs:</b> specific triggering requirements <sup>130</sup>	<i>FBA(s) or BIPs: no requirements for 504-only students</i>	
45-day interim alternate placements: 4 specified circumstances <sup>131</sup>	<i>45-day interim alternate placements: no authority<sup>132</sup></i>	
After valid expulsion: <b>FAPE obligation continues</b> <sup>133</sup> <ul style="list-style-type: none"> <li>• <i>also, albeit on streamlined basis, upon the 11<sup>th</sup> cumulative day<sup>134</sup></i></li> </ul>	After valid expulsion: no FAPE obligation <sup>135</sup> – <i>except in the 5<sup>th</sup> and 11<sup>th</sup> Circuits<sup>136</sup></i> <ul style="list-style-type: none"> <li>• <i>none upon the 11<sup>th</sup> cumulative day</i></li> </ul>	
Interim alternate placement as expanded stay-put <sup>137</sup>	<b>No provision for interim placements</b> <sup>138</sup>	

IDEA	§ 504	ADA
<b><u>Student-Specific: Enforcement</u></b> <sup>139</sup>		
Policy letters: OSEP <sup>140</sup>	Policy letters: OCR	SAME AS § 504 <sup>141</sup>
Complaints and compliance reviews: SEA <sup>142</sup> <ul style="list-style-type: none"> <li>• <i>primarily procedural orientation</i><sup>143</sup></li> <li>• <i>ultimate sanction: loss of IDEA funding</i></li> <li>• <i>published “precedents”: rarely (and probably inadvertently)</i><sup>144</sup></li> </ul>	Complaints and compliance reviews: OCR <ul style="list-style-type: none"> <li>• <i>almost entire procedural orientation</i><sup>145</sup></li> <li>• <i>ultimate sanction: loss of all federal funding</i></li> <li>• <i>published “precedents”: common</i><sup>146</sup></li> </ul>	SAME AS § 504 <sup>147</sup>
Disputes: IHO is SEA responsibility <sup>148</sup> <ul style="list-style-type: none"> <li>• detailed requirements for hearings<sup>149</sup> - including district right to file and appeal<sup>150</sup></li> <li>• <i>published “precedents”: common</i><sup>151</sup></li> </ul>	Disputes: IHO is LEA responsibility <sup>152</sup> <ul style="list-style-type: none"> <li>• skeletal requirement for hearings<sup>153</sup> - including ambiguity whether district has right to file and appeal<sup>154</sup></li> <li>• <i>published “precedents”: rare</i></li> </ul>	
LEA responsibility: special ed director	LEA responsibility: 504 coordinator	LEA responsibility: ADA coordinator

IDEA	§ 504	ADA
<b><u>Litigation</u></b> <sup>155</sup>		
<i>Standing: parents - independent</i> <sup>156</sup>	<i>Standing: parents – not independent (except for retaliation)</i> <sup>157</sup>	
<b>Exhaustion requirement:</b> strong • state option of one- or two-tier system <sup>158</sup>	<i>Exhaustion requirement: more extensive exceptions</i> <sup>159</sup> • one-tier suffices even in 2-tier IDEA jurisdiction <sup>160</sup>	
<b>Statute of limitations:</b> explicit <sup>161</sup>	<i>Statute of limitations: varying but often longer</i> <sup>162</sup>	SAME AS § 504 <sup>163</sup>
<i>Unrestricted private right of action</i>	<i>Restricted private right of action</i> <sup>164</sup>	
<b>Burden of proof:</b> on the plaintiff for FAPE and LRE <sup>165</sup>	<i>Burden of proof: on the plaintiff (i.e., parents)</i> <sup>166</sup>	SAME AS § 504 <sup>167</sup>
<i>“Due weight” standard of judicial review of IHO decision</i> <sup>168</sup>	<i>Unsettled standard of judicial review</i> <sup>169</sup>	
Expert witness fees: not recoverable <sup>170</sup>	<b>Expert witness fees:</b> recoverable <sup>171</sup>	
Jury trial: no <sup>172</sup>	Jury trial: yes <sup>173</sup>	
Protection against retaliation: limited <sup>174</sup>	Protection against <b>retaliation and harassment:</b> stronger <sup>175</sup>	Extends to associational protection <sup>176</sup>
<i>Protection against bullying: need not be disability-based</i> <sup>177</sup> but limited application and relief <sup>178</sup>	Protection against <b>bullying</b> , i.e., peer harassment, based on disability: stronger <sup>179</sup>	

IDEA	§ 504	ADA
<b><u>Litigation (Continued)</u></b>		
<p>Attorneys' fees: within limits<sup>180</sup></p> <ul style="list-style-type: none"> <li>• possibly for SEA complaints too<sup>181</sup></li> </ul>	<p>Attorneys' fees: possibly higher<sup>182</sup></p> <ul style="list-style-type: none"> <li>• not for OCR complaints</li> </ul>	
<p>Various equitable remedies: Established and emerging<sup>183</sup></p> <ul style="list-style-type: none"> <li>• tuition reimbursement: well-developed framework<sup>184</sup></li> <li>• compensatory education: emerging crystallization<sup>185</sup></li> </ul>	<p>Similar, though less well developed</p> <ul style="list-style-type: none"> <li>• tuition reimbursement: relatively rare<sup>186</sup></li> <li>• compensatory education: more slowly developing<sup>187</sup></li> </ul>	
<p>Money damages: minority of jurisdictions only<sup>188</sup></p>	<p>Money damages: all jurisdictions but higher standard in most<sup>189</sup></p>	
<ul style="list-style-type: none"> <li>• Eleventh Amendment immunity: in none of the jurisdictions to date<sup>190</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Eleventh Amendment immunity: in the minority of jurisdictions to date<sup>191</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Eleventh Amendment immunity: in declining minority of jurisdictions to date<sup>192</sup></li> </ul>

## Endnotes

<sup>1</sup> Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 286 Ed.Law Rep. 767 (2012); Perry A. Zirkel, *An Updated Comparison of the IDEA and Section 504/ADA*, 216 Ed.Law Rep. 1 (2007); 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).

<sup>2</sup> 122 Stat. 3553, 3553-54 (codified at 42 U.S.C §§ 12101-12110 (2006 & Supp. IV 2011), 29 U.S.C. § 705 (2006 & Supp. V 2011)).

<sup>3</sup> 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).

<sup>4</sup> 34 C.F.R. §§ 300.300(b)(4) and 300.9(c)(3) (2012).

<sup>5</sup> 35 C.F.R. §§ 35.104 and 35.136 (2012) (Sept. 15, 2010 DOJ regulations under ADA Titles II and III).

<sup>6</sup> See, e.g., Perry A. Zirkel, *RTI and the Law*, 286 Ed.Law Rep. 1 (2011).

<sup>7</sup> 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).

<sup>8</sup> 20 U.S.C. §§ 1400–1482 (2006 & Supp. V 2011).

<sup>9</sup> 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).

<sup>10</sup> 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2006)). The pertinent provisions that define disability and provide for attorneys' fees are, respectively, at 29 U.S.C. §§ 705(20) and 794(a) (2006).

<sup>11</sup> 42 U.S.C. §§ 12101–12213 (2006 & Supp. IV 2010).

<sup>12</sup> 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 Ed.Law Rep. 11 (2005).

<sup>13</sup> 34 C.F.R. § 300.718 (2012).

<sup>14</sup> See, e.g., 34 C.F.R. §§ 300.107 and 300.117 (2012) (including new language regarding supplementary aids and services). For a recent example, see *Indep. Sch. Dist. No. 12 v. Minnesota Dep't of Educ.*, 788 N.W.2d 907(Minn. 2010), *cert. denied*, 131 S. Ct. 1566 (2011).

<sup>15</sup> 34 C.F.R. § 300.148 (2012).

<sup>16</sup> 34 C.F.R. §§ 300.129-300.147 (2012) (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).

<sup>17</sup> 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) (2012); *see also* *Durkee v. Livonia Sch. Dist.*, 48 F. Supp. 2d 313 (W.D.N.Y. 2007).

<sup>18</sup> 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. POSTSECONDARY EDUC. & DISABILITY 55 (2003).

<sup>19</sup> See, e.g., Perry A. Zirkel, *A Checklist for Disability Nondiscrimination in School District Employment*, 24 YOUR SCH. & THE LAW 6 (May 1994).

<sup>20</sup> 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 recent examples of student accessibility litigation, see *Greer v. Richardson Indep. Sch. Dist.*, 472 F. App'x 287 (5th Cir. 2012); *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); *cf.* *Miles v. Cushing Pub. Sch.*, 51 IDELR ¶ 96 (W.D. Okla. 2008) (transportation and diaper-changing table).

<sup>21</sup> 34 C.F.R. § 104.34 (2012). 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 interscholastic athletic cases, see *Mann v. Louisiana High Sch. Athletic Ass'n*, \_\_\_ F. App'x \_\_\_ (5th Cir. 2013); *Starego v. New Jersey State Interscholastic Ass'n*, 61 IDELR ¶ \_\_\_ (D.N.J. 2013); *Lyon v. Illinois High Sch. Ass'n*, 60 IDELR ¶ 191 (N.D. Ill. 2012); *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); *cf.* *S.S. v. Cent. Whitesboro Sch. Dist.*, 58 IDELR ¶ 99 (N.D.N.Y. 2012). For the most recent development 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 Ed.Law Rep. 447 (2011).

<sup>22</sup> One limited avenue is indirect via the broad of discrimination under § 504. See, e.g., 34 C.F.R. § 104.4(b)(1)(v) (2012). 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).

<sup>23</sup> See, e.g., Perry A. Zirkel, *Section 504, the ADA, and Parochial School Students*, 211 Ed.Law 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).

<sup>24</sup> See, e.g., Letter to Veir, 20 IDELR 864 (OCR 1993) (reprinted in ZIRKEL, *supra* note 1, at App. 2:74).

<sup>25</sup> 28 C.F.R. § 36.302(a) (2012). The higher standard applies to double-covered entities. *Id.* § 36.103(a); see also Zirkel 2000, *supra* note 21, at 763. 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).

<sup>26</sup> 20 U.S.C §§ 1400-1419 (2006 & Supp. V 2011). These sections are Part B, but the statute is even longer in its entirety, extending to *id.* § 1482.

<sup>27</sup> 87 Stat. 355, 394 (1973) (codified as amended at 29 U.S.C. § 794 (2006)). The pertinent provisions that define disability and provide for attorneys' fees are, respectively, at 29 U.S.C. §§ 705(20) and 794(a) (2006).

<sup>28</sup> 42 U.S.C. §§ 12101-12189 (2006 & Supp. IV 2010). Part I is specific to employment, and the remaining parts extend to *id.* § 12213.

<sup>29</sup> 34 C.F.R. Part 300 (2012). 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)

<sup>30</sup> 34 C.F.R. Part 104 (2012).

<sup>31</sup> 28 C.F.R. Part 35 (2012). 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.

<sup>32</sup> For the enforcement procedures and offices, see ZIRKEL, *supra* note 1, at App. 10.

<sup>33</sup> OCR enforces ADA student issues in the schools in tandem with §504. See, e.g., OCR Senior Staff Memorandum, 19 IDELR 886 (OCR 1992).

<sup>34</sup> For examples, see ZIRKEL, *supra* note 1, at App. 4.

<sup>35</sup> For examples, see ZIRKEL, *supra* note 1, at App. 3.

<sup>36</sup> See, e.g., OCR Memorandum, 19 IDELR 875 (OCR 1993).

<sup>37</sup> See, e.g., Perry A. Zirkel, Section 504 Emerging Case Law Developments (2011) (video presentation available via [www.nasdse.org](http://www.nasdse.org)).

<sup>38</sup> See generally ZIRKEL, *supra* note 1.

<sup>39</sup> See, e.g., Alexis v. Dallas Indep. 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).

<sup>40</sup> See generally ZIRKEL, *supra* note 1.

<sup>41</sup> 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) (2012) (eligibility exclusion); see also Perry A. Zirkel, *NCLB: What Does It Mean for Students with Disabilities?*, 185 Ed.Law Rep. 805 (2004).

<sup>42</sup> See, e.g., Perry A. Zirkel, *Initial Implications of the NCLB for Section 504*, 191 Ed.Law Rep. 591 (2004).

<sup>43</sup> 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.

<sup>44</sup> 34 C.F.R. § 300.8 (2012) (including addition of Tourette syndrome to OHI).

<sup>45</sup> *Id.* § 104.3(j). (2009). See, e.g., *A Step-by-Step Process for §504/ADA Eligibility Determinations*, 239 Ed.Law 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). 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).

<sup>46</sup> 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) (codified at 42 U.S.C §§ 12101-12102 (2009)). 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>.

<sup>47</sup> For example, the ADAAA adds reading and concentration to the enumerated examples of major life activities. *Id.*

<sup>48</sup> For example, the ADAAA specifies eating, sleeping, and the various major bodily functions. *Id.*

<sup>49</sup> 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 (2012).

<sup>50</sup> See, e.g., *Costello v. Mitchell Pub. Sch. Dist.*, 79, 266 F.3d 916 (8th Cir. 2001); see also Zirkel 2000, *supra* note 21, at 761.

<sup>51</sup> 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.*

<sup>52</sup> See, e.g., 34 C.F.R. §§ 300.111, 300.131, and 300.534 (2012).

<sup>53</sup> 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). Distinguishable from "child find" for "pure" 504 students is that for students who are also covered by the IDEA. See, e.g., *Lauren G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375 (E.D. Pa. 2012); *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).

<sup>54</sup> See, e.g., Letter to Williams, 21 IDELR 73 (OSEP/OCR 1994); Letter to Parker, 18 IDELR 963 (OSEP 1991).

<sup>55</sup> 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).

<sup>56</sup> 34 C.F.R. § 300.502 (2012) (including limitation of entitlement for those at public-expense to one per year). See, e.g., Perry A. Zirkel, *Independent Educational Evaluation Reimbursement: A Checklist*, 231 Ed.Law Rep. 21 (2008); *cf. Susan Etscheidt, Ascertaining the Adequacy, Scope, and Utility of District Evaluations*, 69 EXCEPTIONAL CHILD. 227 (2003).

<sup>57</sup> See, e.g., *Randolph (MA) Pub. Sch.*, 21 IDELR 816 (OCR 1994).

<sup>58</sup> See, e.g., PERRY A. ZIRKEL, *THE LEGAL MEANING OF SPECIFIC LEARNING DISABILITY FOR SPECIAL EDUCATION ELIGIBILITY* (2006) (available via [www.cec.sped.org](http://www.cec.sped.org)).

<sup>59</sup> *S.H. v. Lower Merion Sch. Dist.*, \_\_\_ F.3d \_\_\_ (3d Cir. 2013).

<sup>60</sup> *Id.*

<sup>61</sup> 34 C.F.R. § 300.309 (2012). 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.

<sup>62</sup> See, e.g., *Harrison (CO) Sch. Dist.*, 57 IDELR ¶ 295 (OCR 2011); *Polk Cnty. (FL) Pub. Sch.*, 56 IDELR ¶ 179 (OCR 2010).

<sup>63</sup> See, e.g., Perry A. Zirkel, *Checklist for Identifying Students Eligible under the IDEA Classification of Emotional Disturbance: An Update*, 286 Ed.Law Rep. 7 (2013).

<sup>64</sup> Perry A. Zirkel, *ADHD Checklist for Identifying Students under the IDEA and Section 504/ADA*, 293 Ed.Law Rep. 13 (2013).

<sup>65</sup> See, e.g., *R.N. v. Cape Girardeau 63 Sch. Dist.*, 858 F. Supp. 2d 1025 (E.D. Mo. 2012); see also Perry A. Zirkel, *Section 504 Eligibility and Students on Individual Health Plans*, 276 Ed.Law Rep. 577 (2012). These issues continue beyond eligibility. See, e.g., *A.C. v. Shelby Cnty. Bd. of Educ.*, 711 F.3d 687 (6th Cir. 2013); *R.K. v. Bd. of Educ. of Scott Cnty.*, 494 F. App'x 589 (6th Cir. 2012).

<sup>66</sup> 34 C.F.R. § 300.17 (2012).

<sup>67</sup> *Id.* § 104.33(b). For the possibility, on a limited basis, of “technically eligible” students in light of the ADA, 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>

<sup>68</sup> 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)).

<sup>69</sup> This conclusion is based on the institution-focused definition of “recipient.” 34 C.F.R. § 104.3 (2012). 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.

<sup>70</sup> 34 C.F.R. § 104.39 (2012). For possible supersedence, see *infra* note 71.

<sup>71</sup> 42 U.S.C. § 12182(b)(2)(A)(ii) (2006 & Supp. IV 2010). It is unclear whether this higher standard supersedes the lower § 504 standard for private schools (*supra* note 70). For the relevant interrelationship language, see 28 C.F.R. § 36.103(a) (2012).

<sup>72</sup> *K.M. v. Tustin Unified Sch. Dist.*, \_\_\_ F.3d \_\_\_ (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).

<sup>73</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2006 & Supp. V 2011); 34 C.F.R. § 513(a)(2) (2012). The only per se procedural denial of FAPE appears to be significantly impeding the parents’ opportunity for participation in the IEP process. *Id.*

<sup>74</sup> 20 U.S.C. § 1415(f)(3)(E)(ii) (2006); 34 C.F.R. § 300.513(a)(2)(ii) (2012) (seemingly separable role for procedural violation where district “significantly impede[] the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents’ child”).

<sup>75</sup> 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), <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).

<sup>76</sup> See, e.g., *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007); *Melissa S. v. Sch. Dist.*, 183 F. App'x 184 (3d Cir. 2006); *Catalan v. Dist. of Columbia*, 478 F. Supp. 2d 73 (D.D.C. 2007).

<sup>77</sup> 34 C.F.R. § 300.324 (2012).

<sup>78</sup> 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).

<sup>79</sup> 34 C.F.R. § 300.323(c)(2) (2012). For a recent interpretation, see *D.D. v. New York City Bd. of Educ.*, 465 F.3d 503 (2d Cir. 2006).

<sup>80</sup> See, e.g., *Nixon v. Greenup Cnty Sch. Dist.*, 890 F. Supp. 2d 753 (E.D. Ky. 2012).

<sup>81</sup> 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.

<sup>82</sup> See, e.g., 34 C.F.R. §§ 300.104 and 300.115 (2012).

<sup>83</sup> See, e.g., Perry A. Zirkel, *The "Inclusion" Case Law: A Factor Analysis*, 127 Ed.Law Rep. 533 (1988).

<sup>84</sup> *Id.* § 104.33(c)(3). The case law interpreting this provision has been mixed. See, e.g., ZIRKEL, *supra* note 1, at 3:112.

<sup>85</sup> See, e.g., *Bess v. Kanawha Cnty. Bd. of Educ.*, 53 IDELR ¶ 71 (S.D. W.Va. 2009) (constructive exclusions).

<sup>86</sup> See *supra* note 16 and accompanying text.

<sup>87</sup> See *supra* note 23 and accompanying text. The district has no obligation to provide FAPE for parentally placed students in private schools. *D.L. v. Baltimore City Pub. Sch.*, 706 F.3d 256 (4th Cir. 2013). For the limited exception based on a state dual enrollment law, see *Lower Merion School District v. Doe*, 931 A.2d 640 (Pa. 2007). For applications of § 504 to students that the IEP team places in private schools, see, e.g., *C.D. v. New York City Dep't of Educ.* 52 IDELR ¶ 8 (S.D.N.Y. 2009); *P.N. v. Greco*, 282 F. Supp. 2d 221 (D.N.J. 2003).

<sup>88</sup> See *supra* note 17 and accompanying text.

<sup>89</sup> See *supra* note 24 and accompanying text.

<sup>90</sup> 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).

<sup>91</sup> 35 C.F.R. §§ 35.104 and 35.136 (2012). 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 an early illustrative decision, see *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).

<sup>92</sup> 34 C.F.R. § 300.504(c) (2012) (including additions for the limitations periods).

<sup>93</sup> See, e.g., Perry A. Zirkel, *Notice of Procedural Safeguards under Section 504 and the ADA*, 5 SECTION 504 COMPLIANCE ADVISER 3 (May 2001).

<sup>94</sup> 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).

<sup>95</sup> 34 C.F.R. § 300.321 (2012) (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 (N.D. Ohio 2003). In addition, the regulations continue, unchanged, the specified members for determining SLD eligibility. 34 C.F.R. § 300.308 (2012). 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).

<sup>96</sup> 34 C.F.R. § 104.35(c) (2012). Worded in terms of double-covered students, the regulations specify the third criterion as “placement options.” *Id.*

<sup>97</sup> *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.

<sup>98</sup> *Id.* § 104.36.

<sup>99</sup> *Id.* § 300.300 (including additional provisions for initial evaluations).

<sup>100</sup> *See, e.g.,* 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 Durham*, 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 *Durham* letter resolved the ambiguity regarding reevaluation that arose in *Letter to Zirkel*, 22 IDELR 667 (OCR 1995).

<sup>101</sup> 34 C.F.R. §§ 300.300(b)(1)-(3) (2012).

<sup>102</sup> *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).

<sup>103</sup> *See, e.g.,* *Kimble v. Douglas Cnty. Sch. Dist. RE-1*, 925 F. Supp. 2d 1176 (D. Colo. 2013).

<sup>104</sup> *Compare* *Tyler (TX) Indep. Sch. Dist.*, 56 IDELR ¶ 24 (OCR 2010), with *Letter to Zirkel*, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87). The most recent OCR FAQ rather clearly implies that Section 504 requires consent for initial services. *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>.

<sup>105</sup> *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).

<sup>106</sup> *See, e.g.,* *Garden City (NY) Union Free Sch. Dist.*, EHLR 353:327 (OCR 1989).

<sup>107</sup> *See, e.g.,* 34 C.F.R. § 104.35(a) (2012); *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).

<sup>108</sup> 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).

<sup>109</sup> 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) (2006 & Supp. V 2011). The limited

exceptions are relatively well established, with the only major exception being as applied to claims for money damages. Zirkel, *supra* note 21, at 762 n.7

<sup>110</sup> See, e.g., 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).

<sup>111</sup> 20 U.S.C. § 1414(a)(1)(D)(ii) (2006 & Supp. V 2011); 34 C.F.R. § 300.300(b) (2012).

<sup>112</sup> 34 C.F.R. § 300.300(b)(4)(ii) (2012).

<sup>113</sup> See, e.g., Letter to Zirkel, 22 IDELR 667 (OCR 1995) (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).

<sup>114</sup> 34 C.F.R. § 300.518 (2012). For a comprehensive canvassing, see, e.g., Perry A. Zirkel, *"Stay-Put" under the IDEA: An Annotated Overview*, 286 Ed.Law Rep. 12 (2013).

<sup>115</sup> Letter to Zirkel, 22 IDELR 667 (OCR 1995) (reprinted in ZIRKEL, *supra* note 1, at App. 2:87).

<sup>116</sup> 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).

<sup>117</sup> See, e.g., 34 C.F.R. § 300.530(b) (2012). 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).

<sup>118</sup> See, e.g., *M.G. v. Crisfield*, 547 F. Supp. 2d 399 (D.N.J. 2008) (applying § 504 "regarded as" prong to conditioning return for removal on special education evaluation).

<sup>119</sup> For removals, see, e.g., Perry A. Zirkel, *Suspensions and Expulsions under Section 504: A Comparative Overview*, 226 Ed.Law 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.* Zirkel, *supra* note 116 (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).

<sup>120</sup> 34 C.F.R. § 300.534 (2012) (including narrowing the alternative bases and adding exceptions for refused consent).

<sup>121</sup> 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).

<sup>122</sup> 34 C.F.R. § 300.536 (2012).

<sup>123</sup> See, e.g., OCR Memorandum, EHLR 307:07 (OCR 1989).

<sup>124</sup> 34 C.F.R. § 300.530(e) (2012). 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).

<sup>125</sup> 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).

<sup>126</sup> 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) (not required at all).

<sup>127</sup> 34 C.F.R. §104.35(a); *see 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) (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).

<sup>128</sup> *See supra* note 117 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).

<sup>129</sup> 20 U.S.C. § 705(20)(C)(iv) (2006); *see also* OCR Staff Memorandum, 17 IDELR 609 (OCR 1991).

<sup>130</sup> 34 C.F.R. § 300.530(f) (2012). 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).

<sup>131</sup> *Id.* §§ 300.530(g) (including addition of “serious bodily injury”) and 300.532(b)(2)(ii) (requires IHO) (2006).

<sup>132</sup> 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).

<sup>133</sup> 34 C.F.R. §§ 300.111(a) and 300.30(d)(1) (2012). *See, e.g.,* Fisher v. Friendship Pub. Charter Sch., 857 F. Supp. 2d 64 (D.D.C. 2012).

<sup>134</sup> *Id.* § 300.530(d)(4).

<sup>135</sup> *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).

<sup>136</sup> S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981). The present Eleventh Circuit is the former Unit B of the Fifth Circuit.

<sup>137</sup> 34 C.F.R. § 300.533 (2012). For a detailed analysis, see Perry A. Zirkel, *Stay-Put under the IDEA Discipline Provisions: What Is New?*, 214 Ed.Law Rep. 467 (2007).

<sup>138</sup> *See supra* note 134 and accompanying text.

<sup>139</sup> 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).

<sup>140</sup> See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 Ed.Law Rep. 391 (2002).

<sup>141</sup> See *supra* note 33.

<sup>142</sup> See, e.g., Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process*, 237 Ed.Law Rep. 565 (2008).

<sup>143</sup> *Id.*

<sup>144</sup> 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).

<sup>145</sup> The limited exception is for "extraordinary circumstances." See, e.g., 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>.

<sup>146</sup> 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).

<sup>147</sup> However, the ultimate sanction, which under § 504 is termination of federal funding, is unclear.

<sup>148</sup> 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).

<sup>149</sup> See, e.g., 34 C.F.R. §§ 300.507-300.515 (2012) (including new provisions for prehearing process, including resolution session).

<sup>150</sup> *Id.*

<sup>151</sup> 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 144.

<sup>152</sup> 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 Ed.Law Rep. 1 (2012).

<sup>153</sup> 34 C.F.R. § 104.36 (2012): "an impartial hearing with an opportunity for participation by the person's parents ... and representation by counsel."

<sup>154</sup> See, e.g., Perry A. Zirkel, *The Public Schools' Obligation for Impartial Hearings under Section 504*, 22 WIDENER L.J. 135 (2012).

<sup>155</sup> 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* 669 (2012).

<sup>156</sup> *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). For an analysis, see, e.g., Perry A. Zirkel, *The Problematic Progeny of Winkelman v. Parma City School District*, 248 Ed.Law Rep. 1 (2009).

<sup>157</sup> 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).

<sup>158</sup> For the current systems, see Zirkel & Scala, *supra* note 148.

<sup>159</sup> See Zirkel, *supra* note 21, at 762-63; see also *R.J. v. McKinney Indep. Sch. Dist.*, 45 IDELR ¶ 9 (E.D. Tex. 2005).

<sup>160</sup> 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).

<sup>161</sup> 20 U.S.C. § 1415(f)(3)(C) (2006 & Supp. V 2011); 34 C.F.R. §§ 300.507(a)(2) and 300.516(b) (2012) (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).

<sup>162</sup> See, e.g., Zirkel, *supra* note 21, at 765. For a more recent example, see *Piazza v. Florida Union Free Sch. Dist.*, 777 F. Supp. 2d 669 (S.D.N.Y. 2011). 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).

<sup>163</sup> See, e.g., *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999);

<sup>164</sup> 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).

<sup>165</sup> *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). The untested exception continues to be state law. See, e.g., Perry A. Zirkel, *Who Has the Burden of Proof in Impartial Hearings Under the Individuals with Disabilities Education Act?*, \_\_\_ CONN. PUB. INT. L.J. \_\_\_ (forthcoming 2013).

<sup>166</sup> See, e.g., *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403 (11th Cir. 1985).

<sup>167</sup> See, e.g., *Dyer v. Jefferson Cnty. Sch. Dist. R-1*, 905 F. Supp. 864 (D. Colo. 1995).

<sup>168</sup> 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. Unit 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*, 78 EXCEPTIONAL CHILD. 375 (2012); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999).

<sup>169</sup> See, e.g., *Centennial Sch. Dist. v. Phil L.*, 799 F. Supp. 2d 473 (E.D. Pa. 2011).

<sup>170</sup> *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

<sup>171</sup> See, e.g., *I.H. v. Cumberland Valley Sch. Dist.*, 842 F. Supp. 2d 762 (M.D. Pa. 2012); *L.T. v. Mansfield Sch. Dist.*, 53 IDELR ¶ 7 (D.N.J. 2009).

<sup>172</sup> 20 U.S.C. § 1415(i)(2)(c) (2006 & Supp. V 2011).

<sup>173</sup> See, e.g., *K.I. v. Montgomery Pub. Sch.*, 54 IDELR ¶ 12 (M.D. Pa. 2010).

<sup>174</sup> 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).

<sup>175</sup> See, e.g., A.C. v. Shelby Cnty. Bd. of Educ., 711 F.3d 687 (6th Cir. 2013); K.R. v. Sch. Dist. of Philadelphia, 373 F. App'x 204 (3d Cir. 2010); M.M.R.-Z. v. Commonwealth of Puerto Rico, 528 F.3d 9 (1st Cir. 2008); Hesling 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).

<sup>176</sup> See, e.g., 28 C.F.R. §§ 35.134(b) and 36.205-36.206 (2012). For a recent indirect example, see S.M. v. Sch. Dist. of Upper Dublin, 57 IDELR ¶ 96 (E.D. Pa. 2011) (applicable to PTA).

<sup>177</sup> See, e.g., Dear Colleague Letter, 61 IDELR ¶ 263 (OSEP 2013).

<sup>178</sup> See, e.g., T.K. v. New York City Dep't of Educ., 779 F. Supp. 2d 289 (S.D.N.Y. 2011).

<sup>179</sup> Compare Sutherland v. Indep. Sch. Dist. No. 40, \_\_\_ F. Supp. 2d \_\_\_ (N.D. Okla. 2013); Moore v. Chilton Cnty. Bd. of Educ., \_\_\_ F. Supp. 2d \_\_\_ (M.D. Ala. 2013); Braden v. Mountain Home Sch. Dist., 903 F. Supp. 2d 729 (W.D. Ark. 2012); Preston v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235 (W.D.N.Y. 2012); 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); Doe v. Big Walnut Sch. Dist. Bd. of Educ., 837 F. Supp. 2d 742 (S.D. Ohio 2011); Werth v. Bd. of Directors of the Pub. Sch., 472 F. Supp. 2d 1113 (E.D. Wis. 2007). For the broader view for OCR enforcement, see Dear Colleague Letter, 55 IDELR ¶ 174 (OCR 2010).

<sup>180</sup> See, e.g., 34 C.F.R. § 300.517 (2012).

<sup>181</sup> 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).

<sup>182</sup> 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).

<sup>183</sup> 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'L ADMIN. L. JUDICIARY 1 (2011).

<sup>184</sup> See, e.g., Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed.Law Rep. 785 (2012).

<sup>185</sup> See, e.g., Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Ed.Law Rep. 1 (2013); A. Zirkel, *Two Competing Approaches for Calculating Compensatory Education under the IDEA*, 257 Ed.Law Rep. 550 (2010); see also Terry J. Seligmann & Perry A. Zirkel, *Compensatory Education for IDEA Violations: The Silly Putty of Remedies?* 45 Urban Law. 281 (2013).

<sup>186</sup> See, e.g., *Lauren G. v. W. Chester Area Sch. Dist.*, 906 F. Supp. 2d 375 (E.D. Pa. 2012) (double-covered student with differential advantage); *Borough of Palmyra Bd. of Educ. v. F.C.*, 2 F. Supp. 2d 637 (D.N.J. 1998) (504-only student).

<sup>187</sup> See, e.g., Perry A. Zirkel, *Compensatory Education Services under the IDEA: An Annotated Update*, Ed.Law Rep. 745, 748 nn.13-14 (2004).

<sup>188</sup> 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).

<sup>189</sup> See, e.g., Zirkel, note 21, at 764. For recent examples, see *Chambers v. Sch. Dist.*, 827 F. Supp. 2d 409 (E.D. Pa. 2011); *H. v. Montgomery Cnty. Bd. of Educ.*, 784 F. Supp. 2d 1287 (M.D. Ala. 2011). 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 21, at 763. For the limited exception, see, e.g., *Alston v. Dist. of Columbia*, 561 F. Supp. 2d 29 (D.D.C. 2008).

<sup>190</sup> 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 (2012). 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).

<sup>191</sup> Compare *A.W. v. Jersey City Pub. Sch.*, 341 F.3d 234 (3d Cir. 2003); *Geau 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 190.

<sup>192</sup> 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 190.