SECTION 504/ADA AND K-12 STUDENTS: SUPPLEMENTAL MATERIALS

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THESE MATERIALS ARE A SUPPLEMENT TO THE ZIRKEL POWER POINT ON STUDENT ELIGIBILITY IN THE WAKE OF THE ADAAA.
FOR THE FULL REFERENCE SOURCE OF THESE MATERIALS, SEE PERRY A. ZIRKEL, *SECTION 504, THE ADA AND THE SCHOOLS* (2004) (AVAILABLE FROM WWW.LRP.COM AND UPDATED ANNUALLY).

CHECKLIST FOR SECTION 504/ADA GRIEVANCE PROCEDURE

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Does your school district have a grievance procedure Section 504 and the ADA and, if so, is it legally defensible? There are several reasons that your answer should be "Yes." First, both the Sec. 504 and the ADA regulations require such a procedure, at least if your district has at least 15 employees or 50 employees, respectively. 34 C.F.R. § 104.7(b); 28 C.F.R. 35.107(b). Second, parents or other individuals have had a high rate (75%) of success in OCR complaints concerning this requirement. *See* Perry Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 WEST'S EDUC. L. REP. 369, 377 (1997). Third, and not at all least, such a procedure serves as an internal mechanism for resolving Sec. 504 and ADA complaints short of the costly involvement of OCR, due process hearings, and courts.

The pertinent Sec. 504 and ADA regulations only provide that the grievance procedure incorporate "appropriate due process standards" and be "prompt and equitable." The LRP two-volume set – PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS (2011) – contains sample forms and related rulings for this requirement. As a supplement, this checklist provides operational criteria for a legally defensible Sec. 504/ADA grievance procedure.

1. Can you show that your district has both adopted and made this procedure generally available (e.g., in a parent handbook)?

2. Does the procedure expressly cover not only Sec. 504 but also the ADA?

3. Does it extend to not only student education issues, but also any individual's complaint relating to the other applicable aspects of Sec. 504 and the ADA – nonacademic services, preschool and adult education programs, employment, and facilities (including communications)?

4. Is it separate from, and not confused with, other complaint resolution mechanisms, such as a student's right to an impartial due process hearing and any individual's right to file an OCR complaint?

5. Does it have a minimum of two, preferably three, levels, typically starting with a relatively informal step and ending with a formal central office (or, in small districts, school board) appellate decision?

6. Does it include expeditious and adequate investigation by the designated Sec. 504/ADA coordinator?

7. Does it specify time lines (e.g., 5 working days) for prompt processing of complaints, with a written reply to the grievant, at each level?

SECTION 504/ADA STUDENT ELIGIBILITY FORM*

Child's Name: _____ Birthdate: _____

Eligibility Team Members: Fill in names and check whether knowledgeable about the:

Names:	…child	…meaning of evaluation data	…accommodations/ placement options

Sources of evaluation information (indicate each one used):

_____ aptitude and/or achievement tests _____ teacher recommendations
_____ adaptive behavior _____ others(specify):_____

1. Specify the mental or physical *impairment* _____
(as recognized in *DSM-IV* or other respected source if not excluded under 504/ADA, e.g., illegal drug use)

2. Check the *major life activity*: ___seeing ___hearing ___walking ___breathing ___manual tasks
___learning ___reading ___thinking ___concentrating ___communicating
___ eating ___sleeping ___bowel functions ___bladder functions ___digestive functions
or specify alternative of equivalent scope and importance: _____

3. Place an "X' on the following scale to indicate the specific degree that the impairment (in #1) limits the major life activity (in #2):

   - Make an educated estimate **without** the effects of mitigating measures, such as medication; low-vision devices (except eyeglasses or contact lenses); hearing aids and cochlear implants; mobility devices, prosthetics, assistive technology; learned behavioral or adaptive neurological modifications; and reasonable accommodations or auxiliary aids/services.
   - Similarly, for impairments that are episodic or in remission, make the determination for the time they are active.
   - Use the average student in the general (i.e., national or state) population as the frame of reference.
   - Interpret close calls in favor of broad coverage (i.e., construing Items 1-3 to the maximum extent that they permit). Thus, for an "X" at 4.0 or below, fill in specific information evaluated by the team that justifies the rating:

5	Extremely	_____
4	Substantially	_____
3	Moderately	_____
2	Mildly	_____
1	Negligibly	_____

4. If the team's determination for #3 was less than "4," provide notice to the parents of their procedural rights, including an impartial hearing. If the team's determination was a "4" or above, the team should determine and list on the 504/ADA Plan the specific accommodations that are necessary for the child to have an opportunity commensurate with nondisabled students (of the same age).

§ 504ADA PROCEDURAL SAFEGUARDS NOTICE*

For students eligible or suspected to be eligible solely under § 504 and the ADA, but not under the IDEA, questions commonly arise as to compliance procedures with regard to parental notice. Not to be confused with the procedural safeguards requirements of the IDEA (34 C.F.R. §§ 300.503-300.504), the shaded contents below constitute the essential, or minimum, ingredients for such a form (per 34 C.F.R. § 104.36). In addition, districts may wish to consider adding other, discretionary features, such as the following:

1) an introductory section, citing and describing the nondiscrimination obligation of § 504 and the ADA

2) more details about the listed procedural rights, such as an explanation of the term "educational placement" and "significant change in placement" in this pure (rather than overlapping IDEA) § 504/ADA context and about the regulatory requirements for evaluation and placement

3) a list of the eligible child's substantive rights, such as the § 504 definition of "free and appropriate education" and § 504 "least restrictive environment" requirements for academic and nonacademic settings

4) a reference to the more general requirements, such as your grievance procedure and 504/ADA coordinator

5) perhaps most importantly, a final section and related procedure to document parents' receipt of this notice form

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In accordance with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990, the _____ School District provides you, as the parent or guardian, with the following procedural safeguards in relation to your child.

1. **You have a right to receive a copy of this notice upon the district's identification, evaluation, refusal to provide an evaluation, educational placement, denial of educational placement and any significant change in said placement of your child.**

2. **You have the right to an evaluation of your child if the district has reason to believe that your child has a mental or physical impairment that substantially limits learning or some other major life activity …**

    a) **before the initial placement.**
    b) **before any subsequent significant change in placement.**

3. **You have the right to an opportunity to examine all relevant records for your child.**

4. **You have the right to an impartial hearing, with participation by you and representation by counsel, concerning the identification, evaluation or educational placement of your child.**

5. **You have the right to appeal the final decision of the impartial hearing officer to a court of competent jurisdiction.**

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* Source: PERRY ZIRKEL, SECTION 504, THE ADA AND THE SCHOOLS App. 5:9 (2004).

RECOMMENDATIONS FOR § 504/ADA PLANS

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Interestingly, the relevant regulations do not mention "accommodations" or a 504 Plan, much less a required designation, or name, for such a document; rather, they only require that the district provide each eligible student "free appropriate public education" (FAPE), defined as "regular or special education and related aids and services."[1]

→ *For "504-alone" students, meaning those that are not also covered by the IDEA, it is advisable to have, for purposes of planning and proof, a § 504/ADA accommodations form – titled however your district chooses but showing that it covers both § 504 and the ADA.*

→ *The plan should be limited to those accommodations that are necessitated by the identified impairment, not just any accommodations that would benefit the student.*

→ *The prevailing judicial standard is "reasonable accommodation," which is the opposite of undue hardship or fundamental alteration.*[2]

→ *Although neglected by many districts, the eligible child is also entitled to any necessary related services as part of FAPE.*

→ *In addition to identifying the child and specifying the necessary accommodations and related services, the template, or form, for this purpose may contain other accountability features, depending on district discretion, such as the following:*

- *identifying, by name, the person(s) responsible for implementing each accommodation or service*
- *also identifying, in this case by role, the individual responsible for ensuring proper implementation*
- *listing an approximate time for review of the plan (typically at the end or start of the school year, but the standard for periodic review is reasonableness, which is more flexible than the IDEA standard for IEP reviews*

[1] 34 C.F.R. § 104.33(a).

[2] However, based on the rest of the FAPE regulation, OCR opines that the applicable standard is commensurate opportunity.

- *providing a space at the bottom for the parent(s) to acknowledge receipt of or agreement with the plan*[3]

→ *Be wary about including a checklist menu of accommodations directly in your form. On the one hand, such a checklist invites over-identification of what is necessary in terms of the student's disability (as compared with beneficial strategies that should be part of the child's regular education program and subject to local, not federal, accountability). On the other hand, such a checklist often does not provide the specificity that OCR or a hearing officer might well expect if the parents choose to challenge the plan on the grounds of formulation or implementation.*

→ *Although high-stakes testing and the NCLB are undeniably a potent motivation, district should be careful about agreeing to overdoing testing accommodations as either the basis for eligibility or as a short-range substitute for more effective long-range interventions for the child.*

[3] In a recent case, for example, OCR found a district's consent requirement to violate § 504, reasoning as follows: "Moreover, the Section 504 regulations do not require a signature on a Section 504 plan for the plan to be valid. The committee's determination that the student needs certain related aids and services to ensure an appropriate public education establishes the district's obligation to implement the related aids and services." *Tyler (TX) Indep. Sch. Dist.*, 56 IDELR ¶ 24 (OCR 2010).

SAMPLE SEC. 504/ADA PLAN

Student's Name _____ School _____

Team (knowledgeable about the student, the evaluation, and the accommodations):

_____
_____
_____
_____

Identified Impairment/ Major Life Activity	Necessary Accommodations and/or Related Services	Individual(s) Responsible for: Implementation Monitoring

Describe location of accommodations/services if other than the regular classroom setting and justifying reason(s):

_____
_____

Beginning date: _____ Ending (i.e., review) date _____

I have received the Sec. 504/ADA Procedural Safeguards along with a copy of this Plan.

_____ _____
Parent/Guardian Signature Date

A SAMPLING OF OTHER CONCERNS

Perry A. Zirkel

Private Schools. Contrary to a common misconception, the § 504 obligations for students with disabilities voluntarily enrolled in parochial school are, with the rare exception of a judicially connected state law,[4] do not belong to the school district, whether of residence or location. Instead, they belong to the parochial school if it receives more than *de minimis* financial federal assistance (e.g., IDEA, Title I/NCLB, hot lunch program services, or E-rate grant).[5] For secular private schools, not only does § 504 apply on the same basis, but also the ADA—which has an exemption for religiously controlled schools—fills the gap for those that do not received such assistance.[6] Interestingly, the first published court decision that applied the ADAA's liberalizing interpretive standards arose in a private school.[7]

OCR Enforcement. Parents of double-covered and 504-alone students may file a complaint with the regional OCR office, which triggers an investigation and resolution process that typically ends in either an informally mediated settlement or a formal "letter of findings." Although parents often fail to substantiate the alleged violations of § 504, the process can be costly to districts in terms of staff time and legal resources. The long-standing OCR policy is to focus on procedural violations with the limited exception of extraordinary circumstances.[8] Districts are advised to put in place procedures and practices that are proactive and preventive; nevertheless, the parents' right to file a complaint may not be restricted in any way, including by the district's grievance process, and districts should respond to OCR with cooperation and empathy while remaining firm – not fearful or intimidated – in terms of the specific requirements of § 504 and the ADA. Interestingly, the current administration recently announced a priority on OCR enforcement of race and sex issues.

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[4] *Lower Merion Sch. Dist. v. Doe*, 931 A.2d 640 (Pa. 2007) (state dual enrollment law).

[5] See, e.g., Perry A. Zirkel, *Section 504, the ADA, and Parochial School Students*, 211 EDUC. L. REP. 15 (2006). For the latest example, see *Russo v. Diocese of Greensburg*, 55 IDELR ¶ 98 (W.D. Pa. 2010).

[6] See, e.g., *Doe v. Haverford Sch.*, 39 IDELR ¶ 266 (E.D. Pa. 2003).

[7] *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252 (D.N.H. 2009)(rejected dismissing student's ADA suit against private school that allegedly expelled student for an eating disorder, preserving for trial whether her disorder substantially limited the major life activity of eating).

[8] For the unusual example of a procedure that is more rigorous under § 504 than under the IDEA, see the regulatory requirement for a reevaluation upon any significant change in educational placement. 34 C.F.R. § 104.35(b). For a recent example of extraordinary circumstances, see *Gloucester County (VA) Pub. Sch.*, 49 IDELR ¶ 21 (OCR 2007) (life-threatening food allergy).

Impartial Hearings. The most important procedural safeguard under § 504/ADA is the right to an impartial hearing; yet, parents have only infrequently exercised this right thus far. Such requests often cause confusion, because the responsibility for such hearings – unlike those under the IDEA -- is the district's, not the state's. Beyond the basics of impartiality and the parents' rights to counsel, the requirements for such hearing are more flexible than for those under the IDEA.[9] Moreover, unlike the IDEA, the district is ultimately responsible to arrange for such impartial hearings if the state does not, and there is not second tier of administrative review unless state law provides for it.

Extracurricular Activities. The most active area of recent student litigation under § 504/ADA is interscholastic athletic eligibility.[10] The lessons in the case law for extracurricular activities more generally, including field trips, are 1) the courts are still divided about this issue, but the Supreme Court's decision concerning the professional golfer, Casey Martin, seems to have shifted the balance in favor of plaintiffs except where the requested accommodation would consist of a fundamental alteration; and 2) consideration should be given to individualized waivers, which bend but do not break rules in light of the relationship to the disability and the reason for the rule.

Retaliation/Harassment. Another active area of disputes, more often via OCR complaints than court suits, is alleged retaliation, typically as a result of parent advocacy of their child's § 504/ADA rights, or harassment, predominantly in terms of hostile treatment of the child by personnel or peers. OCR and the courts use a multi-step process to evaluate such claims, including whether there was a causal connection between the parents' advocacy (in retaliation cases) or student's disability (in harassment cases) and the adverse action. Although districts have prevailed in the clear majority of the cases to date, having proactive procedures – including periodic staff training and prompt corrective action – is in the mutual interest of the district and the child with disabilities.[11]

Service Animals. The case law concerning whether students with autism or other such disabilities are entitled to bring their service dogs to school was subject to mixed judicial outcomes, with parent victories largely limited to state law.[12] However, the new Department of Justice regulations for Titles II and III of the ADA settle the matter in favor of access, with related specifics, such as safety and maintenance issues.[13]

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[9] See, e.g., "Basic Elements of Grievance Procedures and Impartial Hearings," in ZIRKEL *supra* note 1, at App. 4:30-4:31 (2000).

[10] For an overview of the pertinent case law, see Perry A. Zirkel, *Section 504 and the ADA: The Top Ten Recent Concepts/Cases*, 147 EDUC. L. REP. 764 (2000).

[11] For an example of one of the relatively few successful claims, see *Hayward (CA) Unified Sch. Dist.*, 54 IDELR ¶ 63 (OCR 2009) (ruling that district transferred child with ED to another teacher's classroom due to his parent's advocacy).

[12] See, e.g., Perry A. Zirkel, *Service Animals in Public Schools*, 257 EDUC. L. REP. 525 (2010).

[13] 35 C.F.R. §§ 35.104 and 35.136. The primary limitations on access are based on these two permissible questions, unless this information is readily apparent: 1) "if the animal is required because of a disability," and 2) "what work or task the animal has been trained to perform." On the other hand, the regulations do not allow the district to " require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal." *Id.*§ 35.136(f). Examples of qualifying and disqualifying answers for question 1 respectively include "helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors" and "the provision of emotional support, well-being, comfort, or companionship." *Id*. § 35.104.

Discipline Policies. § 504 and the ADA overlap with the IDEA such that they provide an alternate theory for double-covered students and particular confusion with regard to 504-alone students. Whereas the focus of IDEA discipline cases has been suspensions/expulsions, parents have used § 504/ADA in relation to a variety of forms of discipline. For disciplinary procedures other than suspensions/expulsions, the keys are avoiding differential adverse treatment of students with disabilities and following the pertinent provisions of the child's IEP or 504 Plan.[14]

For suspensions/expulsions, the primary question is whether the removals constitute a "significant change in placement." The standard is the same as under the IDEA: 11 consecutive days of removal or a cumulative pattern of days in the school year that is the functional equivalent to 11 consecutive days, which depends on 1) the total number of days, 2) the length of each of these removals, and 3) their proximity. For those removals that meet this standard, Appendices I and II show the differences between the IDEA, which controls for double-covered students, and § 504/ADA, which controls for 504-alone students. The main differences are

- whereas both require a manifestation determination (also known under § 504 as a relationship test), upon a removal of more than 10 consecutive days or an equivalent pattern of cumulative days in a school year,[15] the team and criteria are much more detailed under the IDEA

- if the misconduct is a manifestation of the disability, § 504/ADA provides a stronger bar because – unlike the IDEA – it has no 45-day interim placement authorized for weapons or other such danger-based violations

- the use or possession of alcohol or illegal drugs is an exception to any such procedural protection under § 504/ADA

- if the misconduct is not a manifestation of the disability, the 504-alone child is only entitled to the same notice, hearing, and – if any -- alternative education that nondisabled students receive.

- the only requirements for the manifestation determination are that a knowledgeable team conduct it based on a variety of sources of relevant information

- the manifestation determination must be accompanied by re-evaluation of the student and consideration as to whether the placement (i.e., 504 Plan) is appropriate

- with the exception of the six states of the Fifth and Eleventh Circuits—Alabama, Florida, Georgia. Louisiana, Mississippi, and Texas—the FAPE obligation does not continue in the wake of an expulsion for misconduct unrelated to the child's disability.

Additionally more stringent than the IDEA, § 504 regulations expressly contain a prerequisite for a significant, including disciplinary, change in placement not specified in the IDEA—a re-evaluation (34 C.F.R.104.35(a)). For an illustrative recent case where the lack of such an evaluation was fatal to the interim placement of a child on a 504 plan, see *Murray County (GA) Sch. Dist.*, 55 IDELR 233 (OCR 2010).

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[14] See, e.g., Perry A. Zirkel, *Suspensions and Expulsions under Section 504: A Comparative Overview*, 226 EDUC. L. REP. 9 (2008).

[15] *But cf. Centennial Sch. Dist. v. Phil L.*, 599 F. Supp. 2d 634 (E.D. Pa. 2008).

RECENT COURT DECISIONS UNDER §504/ADA

S *Doe v. Haverford Sch.*, 39 IDELR ¶ 266 (E.D. Pa. 2003)
- private school's various extensions and other accommodations to student with obstructive sleep apnea and phase-delayed syndrome were reasonable; requested further extensions or waiver of the course required for promotion would have been fundamental alterations

(***P***) *P.N. v. Greco*, 282 F. Supp. 2d 221 (D.N.J. 2003)
- possible liability of public, not private, school official for discrimination and, separately, for retaliation under § 504 and the ADA

S *Sutton v. West Chester Area Sch. Dist.*, 41 IDELR ¶ 61 (E.D. Pa. 2004)
- rejected parents' claim that district's taking the issue of the appropriateness of its proposed 504 plan was abuse of § 504 process – child had multiple chemical sensitivity; the plan included provision for nurse-administered epi-pen (despite parent' refusal of consent); and the hearing officer determined that it was appropriate, but the parents withdrew the child from the district when it implemented the plan

P *Bd. of Educ. v. Smith*, 43 IDELR ¶ 84 (D. Md. 2005)
- held that federal court lacks jurisdiction to hear school district appeal of § 504 hearing decision in favor of parent

(P) *Scruggs v. Meriden Bd. of Educ.*, 44 IDELR ¶ 59 (D. Conn. 2005); *see also M.Y. v. Grand River Acad.*, 54 IDELR ¶ 255 (N.D. Ohio 2010); *cf. K.R. v. Sch. Dist. of Philadelphia*, 38 IDELR ¶ 216 (E.D. Pa. 2007)(no bad faith requirement in 3d Circuit)
- allowed to proceed to trial parents' money damages claim against the district based on peer harassment on account of disability

S *Soirez v. Vermilion Parish Sch. Dist.*, 44 IDELR ¶ 254 (W.D. La. 2005)
- rejected § 504 eligibility of student with spinal condition (spondylolisthesis) and thus her discrimination complaint about being excluded from graduation ceremony, where she failed to show that her impairment substantially limited her normal activities of daily living

S *Alex G. v. Bd. of Trs.*, 387 F. Supp. 2d 1119 (E.D. Cal. 2005); *cf. Ariel v. Fort Bend Indep. Sch. Dist.*, 45 IDELR ¶ 211 (S.D. Tex. 2006)
- held that district officials' restraint, transfer, and filing for *Honig* injunction of escalating disruptive 3rd grader with autism did not violate § 504 in terms of discrimination against student or retaliation against parents

S *Janet G. v. State of Hawaii Dep't of Educ.*, 410 F. Supp. 2d 958 (D. Hawaii 2005)
- rejected tuition reimbursement (under IDEA regulation) for student with dyslexia that the district found ineligible for special education

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* The outcome of each case is coded as illustrated here:

(***P***) = Parent won inconclusively (i.e., subject to further proceedings)

S = School district won conclusively.

(P) *Indiana Area Sch. Dist. v. H.H.*, 428 F. Supp. 2d 361 (W.D. Pa. 2006)
- allowed suit to proceed to trial for possible compensatory damages for pain and suffering where district had denied FAPE to an IDEA student but parents were not entitled to compensatory education due to the equities

S *Garcia v. Northside Indep. Sch. Dist.*, 47 IDELR ¶ 6 (W.D. Tex. 2007)
- rejected eligibility and, thus, liability for student with asthma who died in physical education class before school officials retrieved his inhaler from his locker

S *Vives v. Fajardo*, 472 F.3d 19 (1st Cir. 2007); *cf. Lauren W. v. DeFlaminis*, 480 F.3d 259 (3d Cir. 2007)(IDEA hearings and waiver form)
- rejected retaliation claim of parent of child with autism, finding lack of requisite connection between her OCR complaints (as compared with concerns with child's health) and the district's filing of child neglect charges

S *Kropp v. Maine Sch. Admin. Union #44*, 47 IDELR ¶ 131 (D. Me. 2007); *see also Smith v. Tangipahoa Parish Sch. Dist*., 46 IDELR ¶ 282 (E.D. La. 2006)
- rejected accommodations claim of parents of seventh-grader with asthma because the student, who was on a 504 plan, did not qualify as having a disability – due to nebulizer

S *Benedict v. Cent. Catholic High Sch*., 511 F. Supp. 2d 854 (D. Ohio 2007)[16]
- parents failed to show that parochial school's refusal to re-enroll student with SLD who had voluntarily withdrawn upon facing expulsion for possession of marijuana on campus was a discriminatory pretext

P *Lower Merion Sch. Dist. v. Doe*, 931 A.2d 925 (Pa. 2007)
- held that § 504 student in private school was entitled to OT from the district, corresponding to IDEA precedent in *Veschi*, premised on dual enrollment

S *M.Y. v. Special Sch*. Dist. No. 1, 519 F. Supp. 2d 995 (D. Minn. 2007)
- removal of transportation from IEP and school bus driver's subsequent sexual assault of the student lacked the requisite bad faith or gross misjudgment for district liability under § 504

(P) *L.M.P. v. Sch. Bd. of Broward County*, 516 F. Supp.2d 1294, 49 IDELR ¶ 14 (S.D. Fla. 2007)
- preserved for trial whether district's alleged policy predetermining segregated placement of triplets with autism violated § 504, including requisite proof of intentional discrimination

(***P)/S*** *K.F. v. Francis Howell Sch. Dist.*, 49 IDELR ¶ 244 (E.D. Mo. 2008)
- dismissed parents' § 504 and breach of contract claim for district's alleged failure to implement OCR resolution agreement but ruled that their claims for compensatory education and money damages (including their lost wages) for shortened school days were not subject to exhaustion requirement and were viable for further proceedings

[16] For an earlier article on the obligations of parochial schools under § 504, see Perry A. Zirkel, " Section 504, the ADA, and Parochial School Students," *West's Education Law Reporter*, 2006, v. 211, pp. 15-18. Reprinted in *ELA Notes*, 2008, v. 43, pp. 10-11.

(***P)/S*** *A.P. v. Anoka-Hennepin Indep. Sch. Dist. No. 1.*, 538 F. Supp. 2d 1125 (D. Minn. 2008)
- dismissed parents claim that district's refusal to train staff members to administer a diabetic child's glucagons injections violated § 504/ADA but preserved for trial whether its refusal to assist the child with his blood testing and insulin pump operation violated § 504/ADA – reasonable accommodation and deliberate indifference issues

(P) *S.L.-M. v. Dieringer School District No. 343*, 50 IDELR ¶ 97 (W.D. Wash. 2008)
- preserved for trial whether district sufficiently implemented the § 504 plan of a student with multiple physical impairments (while expressing doubt as to whether they substantially limited a major life activity), whether the district retaliated against the student for requesting accommodations, and whether the district engaged in deliberate indifferences of his rights under § 504/ADA

(P) *M.G. v. Crisfield*, 547 F. Supp. 2d 399, 49 IDELR ¶ 217 (D.N.J. 2008)
- denied dismissal of claim that conditioning return of student with disability from suspension on the parents' consent for special education services violated § 504 "regarded as" prong

S *Robinson v. Dist. of Columbia*, 535 F. Supp. 2d 38, 49 IDELR ¶ 252 (D.D.C. 2008)
- alleged failure to comply with FAPE settlement did not rise to § 504 violation in the absence of bad faith or gross misjudgment

(***P***) *M.M.R.-Z. v. Commonwealth of Puerto Rico*, 528 F.3d 9, 50 IDELR ¶ 61 (1st Cir. 2008)
- preserved for trial retaliation claim of parents of a child with cerebral palsy

(***P***) *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 50 IDELR ¶ 64 (D. Hawaii)
- ruled that parents sufficiently pleaded a discrimination claim w/o identifying violations of § 504 regulations for an IEP non-implementation, as compared to formulation, case

(***P***) *Alston v. Dist. of Columbia*, 561 F. Supp. 2d 29, 50 IDELR ¶ 152 (D.D.C. 2008)
- ruled contrary to some jurisdictions (e.g., 4th Circuit) that individual school officials could be personally liable for retaliation under § 504/ADA

(P)/D *Centennial Sch. Dist., v. Phil L.*, 559 F. Supp. 2d 634, 50 IDELR ¶ 153 (E.D. Pa. 2008)
- seemed to rule that § 504 requires procedural safeguards, including an impartial hearing, but not a manifestation determination

(***P***) *D.G. v. Somerset Hills Sch. Dist.*, 559 F. Supp. 2d 484, 50 IDELR ¶ 156 (D.N.J. 2008)
- ruled, in child-find case, that parents' stated claim for money damages under § 504, although not under IDEA

S *M.Y. v. Special Sch. Dist. No. 1*, 544 F.3d 885, 51 IDELR ¶ 1 (8th Cir. 2008)
- although IDEA exhaustion requirement did not apply to parent's liability claim, district's refusal to provide transportation to and from summer school did not deny FAPE to child with a disability where the IEP showed child was not entitled to ESY

(P)/S *Derrick F. v. Red Lion Area Sch. Dist.*, 568 F. Supp. 2d 282, 51 IDELR ¶ 120 (M.D. Pa. 2008)
- rejected § 504 retaliation claim but postponed judgment on intertwined IDEA (FAPE) and § 504 (discrimination) lack of implementation claims

(P) *Spann v. Word of Faith Christian Ctr. Church*, 559 F. Supp. 2d 759, 51 IDELR ¶ 186 (S.D. Miss. 2008)
- church preschool program was subject to § 504 based on parents' use of federally funded daycare vouchers for her son's tuition

S *Miller v. Bd. of Educ.*, 565 F.3d 1232, 52 IDELR ¶ 61 (10th Cir. 2009); *see also Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815, 52 IDELR ¶ 181 (10th Cir. 2009)
- ruled that violation of IDEA is not necessarily § 504 violation – needs additional proof of discrimination

(P)/S *S.L.-M. v. Dieringer Sch. Dist. No. 343*, 614 F. Supp. 2d 1152 (W.D. Wash. 2008)
- preserved for trial 1) whether student with hypospadias was eligible under § 504 and, if so, 2) which accommodations were warranted (via interactive process); 3) only one of three retaliation claims; 4) whether the asserted § 504 regulations were valid basis for damages claim and, if so, whether the district officials had been deliberately indifferent

S *Miller v. Bd. of Educ.*, 565 F.3d 1232 (10th Cir. 2009); *see also Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 1016 (2009)
- ruled that violation of IDEA is not necessarily § 504 violation – needs additional proof of eligibility and discrimination

S *P.P. v. W. Chester Area Sch. Dist.*, 585 F.3d 727 (3d Cir. 2009)
- ruled that statute of limitations under § 504 is the same as under IDEA, i.e., two years

S *Torrence v. Dist. of Columbia*, 669 F. Supp. 2d 68 (D.D.C. 2009)
- rejected claim under § 504 that district did not conduct timely evaluation of IDEA-covered child due to failure to programmatic failure or discrimination beyond denial of FAPE

(P) *Franchi v. New Hampton Sch.*, 656 F. Supp. 2d 252 (D.N.H. 2009)
- rejected dismissing student's ADA suit against private school that allegedly expelled student for an eating disorder, applying the ADAAA's liberalizing rules of construction and preserving for trial whether her disorder "substantially limited" the major life activity of eating

(P)/S *United States v. Nobel Learning Communities, Inc.*, 676 F. Supp. 2d 379 (E.D. Pa. 2009)
- dismissed ADA pattern or practice claims against private charter school operator with regard to its daycare, elementary, and secondary programs but not with regard to its preschool programs because 11 of the 12 plaintiff children with disabilities had been disenrolled or denied admission at the preschool level but only 1 at the other levels—also dismissed parents' associational discrimination claim because it was only indirect

S *Doe v. Wells-Ogunquit Cmty. Sch. Dist.*, 698 F. Supp. 2d 219 (D. Me. 2010)
- dismissed § 504 retaliation claim that mirrored the parents' IDEA FAPE claim

(***P***) *Mark H. v. Hamamoto*, 513 F.3d 922, 55 IDELR ¶ 31 (9th Cir. 2010)
- preserved for jury whether parents of child with autism (who settled the IDEA claim separately for the child) prove 1) failure to provide reasonable accommodation (statute) or commensurate opportunity (regulations),[17] and 2) deliberate indifference on the part of the school authorities

[17] The most recent decision couches both alternative in terms of meaningful access and directs their application in this case in terms of autism-specific services.

(*P*) *Celeste v. E. Meadow Union Free Sch. Dist.*, 373 F. App'x 85 (2d Cir. 2010)
- upheld jury verdict under the ADA for district's denial of meaningful facilities access to student with cerebral palsy, but vacated its damages award for retrial due to excessiveness

S *K.R. v. Sch. Dist. of Philadelphia*, 373 F. App'x 204 (3d Cir. 2010)
- upheld jury verdict in favor of district under §504/ADA when student with autism challenged the behavioral and social support services and peer harassment

(***P***) *Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533 (6th Cir. 2010)
- borrowed Ohio's minority tolling statute to apply § 504 limitations period for child with autism

S *J.D.P. v. Cherokee County Sch. Dist.*, 735 F. Supp. 2d 1348, 55 IDELR ¶ 44 (N.D. Ill. 2010)
- rejected § 504 failure-to-train money damages claim on behalf of child with autism and other disabilities (who had IEP plus, for after-school program, 504 plan)—deliberate indifference standard

(***P***) *Russo v. Diocese of Greensburg*, 55 IDELR ¶ 98 (W.D. Pa. 2010)
- ruled that § 504 applied to parochial school based on its participation in national school hot lunch program and federal E-rate program

(***P***) *Taylor v. Altoona Area Sch. Dist.*, 737 F. Supp. 2d 474 (W.D. Pa. 2010)
- while rejecting liability under IDEA child-find and § 1983 constitutional claims, preserved for trial § 504/ADA claims on behalf of 504-plan child with asthma who died in school allegedly due to refusal to provide him with reasonable accommodation

(***P***) *D.R. v. Antelope Valley High Sch. Dist.*, 746 F. Supp. 2d 1132 (C.D. Cal. 2010)
- granted preliminary injunction to student with physical disability, concluding that she did not need special education, thus not qualifying under the IDEA, but that she was entitled to elevator key as a reasonable accommodation under § 504

S *R.K. v Bd. of Educ. of Scott County*, 755 F. Supp. 2d 900 (E.D. Ky. 2010)
- rejected parent's claim that neighborhood school must provide nursing services to their kgn. child with Type I diabetes, where district offered to provide insulin pump monitoring in another district school (reasonable accommodation standard)

S *Brown v. Dist. 299-Chicago Pub. Sch.*, 762 F. Supp. 2d 1056 (N.D. Ill. 2010)
- ruled that even if the failing grades of a h.s. student with SLD showed denial of access to education, the parent failed to provide evidence that they were attributable to the alleged denial of FAPE (via non-implementation)

(***P***) *C.C. v. Cypress Sch. Dist.*, 56 IDELR __ (C.D. Cal. 2011)
- upheld preliminary injunction for child with autism to be accompanied by trained service dog based on ADA—not a fundamental alteration

A TENTATIVE VIEW OF WHO IS ENTITLED TO A 504 PLAN

Perry A. Zirkel

"Who is entitled to a 504 plan in the wake of the ADAA?" is an open question according to some school district advocates, although OCR would presumably regard this entitlement as automatic for every child who meets the ADAA's expansive interpretive standards for the criteria under Prong 1.[18] The view counter to OCR's is based on 1) he lack of an explicit requirement for a 504 plan in the Section 504 regulations, as compared with the detailed requirements for an IEP under the IDEA, and 2) the lack of the need for FAPE, analogous to Prongs 2 and 3 under the Section 504 definition of individual with a disability.

Here is a preliminary view of this emerging restrictive view of the answer to this arguably procedural question:

Definitely Entitled	**Individual Health Plan[19]**	**Not Entitled ("Technically Eligible")**
i.e., limited automatic approach	i.e., functional approach	negative-only protection approach
students who met the pre-ADAA interpretive standards for the Prong 1 criteria plus those who additionally need FAPE beyond merely health accommodations under the post-ADAA standards	students newly eligible under the Prong 1 criteria as a result of the ADAA but who only need nurse-specific accommodations	students newly eligible but who obviously do not need FAPE

The ultimate defensibility of this approach will depend on whether districts manage to have the courts address the issue. A related issue is whether the students in the second and third categories are entitled to notice of procedural safeguards, but the courts have already seemed to take a much less strict approach than OCR consistently has exhibited.[20]

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[18] See, e.g., *Unchartered Territory: Education Leaders Reflect on Impact of the ADAAA*, 40 NAT'L DISABILITY L. REP. 1 (Jan. 14, 2011).

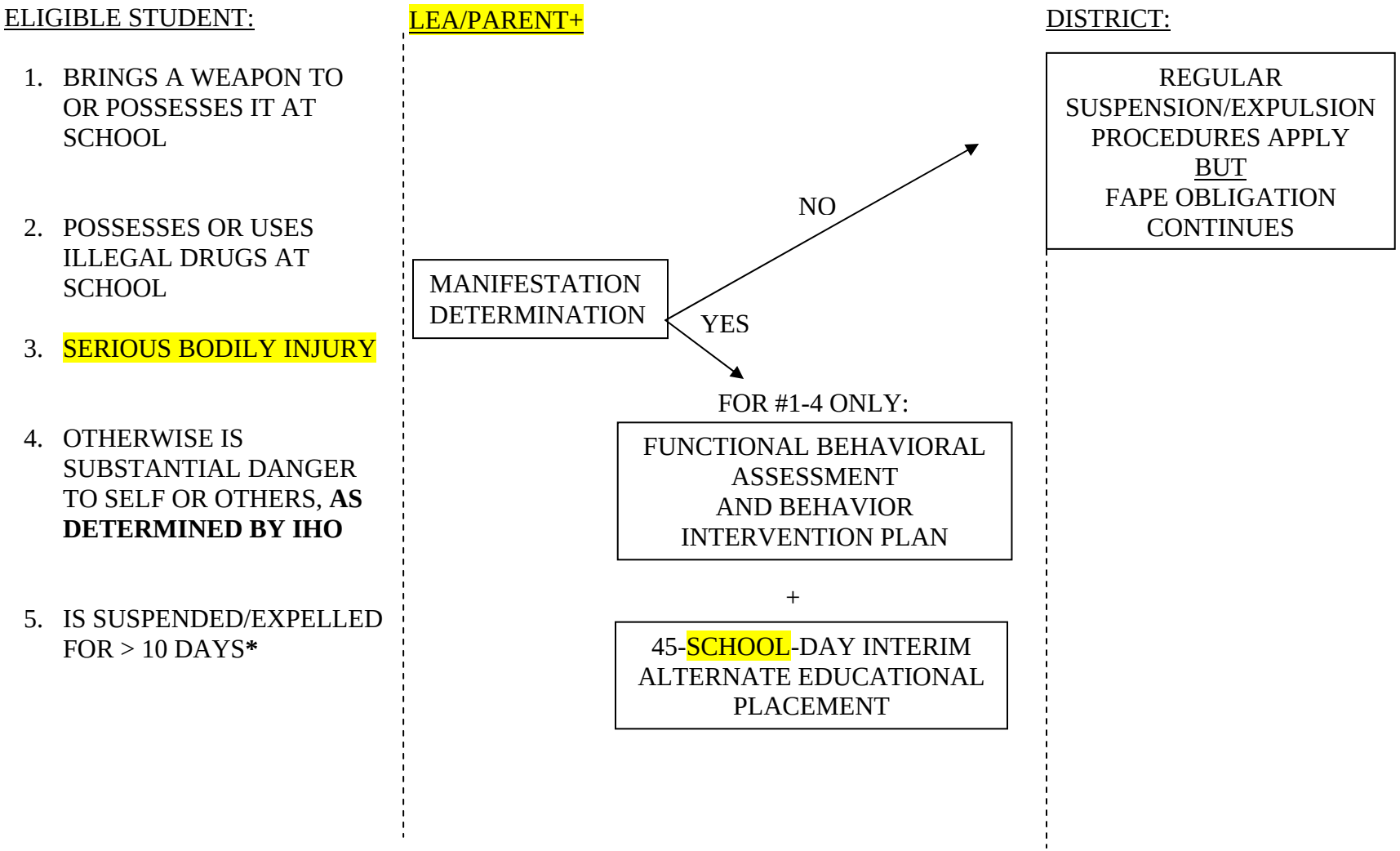
[19] In a recent case OCR upheld an individual health plan (IHP), such as an Emergency Allergy Plan (EAP), but 1) the district had referred to it in communications with the parents as "becom[ing] your son's Section 504 plan" and had provided the parents with a procedural safeguards notice, and 2) OCR found the district otherwise in violation because it limited eligibility to the major life activity of learning. *N. Royalton (OH) Sch. Dist.*, 52 IDELR ¶ 203 (OCR 2009). Yet, in another case, OCR applied the § 504 anti-exclusion protection of the "regarded as" prong to a child on an EAP. *Bethlehem (NY) Cent. Sch. Dist.*, 52 IDELR ¶ 169 (OCR 2009).

[20] See, e.g., *Power v. Sch. Bd.*, 276 F. Supp. 2d 515, 39 IDELR ¶ 214 (E.D. Va. 2003); *A.W. v. Marlboro Co.*, 25 F. Supp. 2d 27 (D. Conn. 1998).

In the rare states that have specific designations for 504 plans (e.g., "service agreement" in Pennsylvania), the second category would seem to be less defensible. In any event, this entire three-part conception is speculative at this point.[21]

[21] Perry A. Zirkel, *Does Section 504 Require a Section 504 Plan for Each Eligible Non-IDEA Student?* __ J. L. & EDUC. __ (forthcoming). For OCR's arguably implicit recognition of the possiblility of "technically eligible" students, see *Memphis (MI) Cmty. Sch.*, 54 IDELR ¶ 61 (OCR 2009).

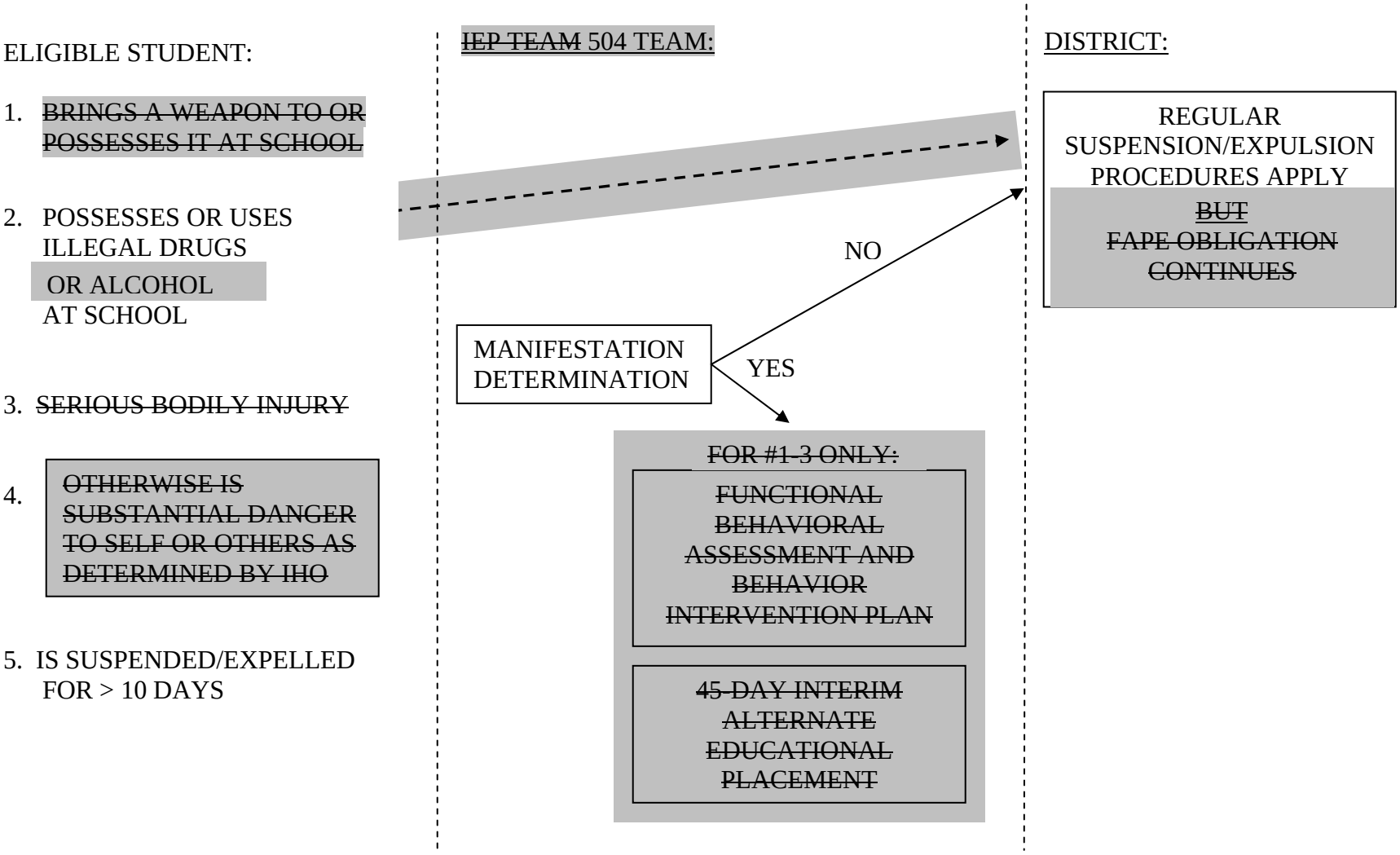
APPENDIX I: OVERVIEW OF SUSPENSIONS/EXPULSIONS UNDER THE IDEA: 2004 REVISIONS HIGHLIGHTED*



*** "10-days" refers to 10 consecutive school days or the cumulative equivalent in one school year based on the multi-factored test in the federal regulations (except in Pennsylvania – 15 cumulative days).**

Source: Perry A. Zirkel, "Suspensions and Expulsions under Section 504: A Comparative Overview," West's Education Law Reporter, 2008, v. 226, p. 9-13. Revisions according to 2004 IDEA amendments and 2006 IDEA Regulations are highlighted.

APPENDIX II: SUSPENSIONS/EXPULSIONS UNDER § 504/ADA: COMPARISON TO IDEA



Source: Perry A. Zirkel, "Suspensions and Expulsions under Section 504: A Comparative Overview," West's Education Law Reporter, 2008, v. 226, p. 9-13. The differences from the IDEA are noted via grey shading and cross-outs.

Section 504, the ADA and the Schools—Third Edition, is available from LRP Publications at: www.shoplrp.com (1-800-341-7874)