SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this monthly legal alert addresses Section 504 and IDEA issues, respectively. First is an update of the national and state-by-state percentages of "504-only" students. Second is the summary of a recent federal appellate court decision concerning child find and eligibility IDEA. For automatic e-mailing of future legal alerts, sign up at perryzirkel.com.

The follow-up analysis of the rate of "504-only" students (i.e., those with 504 plans, not "double-covered" students with IEPs) nationally and for each state, based on the 2015–2016 Civil Rights Data Collection (CRDC) revealed notable changes since the 2013–2014 analysis. The full version of this analysis will be available next month under the Section 504 and the ADA subheading of the Publications list on perryzirkel.com—"State Rates of 504-Only Students in K–12 Schools: An Update."

The national average for 504-only students increased from 1.8% in 2013–2014 to 2.3% in 2015–2016.	This increase is surprising to the extent that the liberalized standards for Section 504 eligibility went into effect on January 1, 2009. Six years later, it would appear that not only the awareness and adherence to these standards may have been slow but also that other contributing factors are in play, including possible over-identification in some states or districts.
The states with the highest average rates are the same although the increases vary in each one: New Hampshire (5.5%→5.8%), Louisiana (5.0%→5.4%), and Vermont (4.4% →5.0%). The states with the lowest average rates changed to the extent that Kansas (.9%→.1%) moved to the bottom position and New Mexico (.5%→1.3%) moved out of the bottom three; yet, Wisconsin (.5%→.8%) and Mississippi (.3%→.4%) remained there.	This inter-state variance is higher than that for the IDEA IEP rates in terms of the ratio between the highest and lowest percentages. The likely contributing factors include litigiousness, socioeconomic status, and various interrelated situational features such as responses to high stakes time testing and the corresponding pressures with regard to IDEA identification. Their interactions and effects continue to vary as evident in not only the state averages but also the extent of the change during these two year.
My next follow-up analyses, which will be at the district and school levels, will reveal even more significant variance within each state.	The inter- and intra-district variance further reflects the same systemic contributing factors, such as socioeconomic status. The "culture" of the district and, within it, of the school, that form the prevailing practices in identifying 504-only students represent extent of accurate knowledge and available resources, the nature and weight of competing interests and values, and the interaction between past practices and current pressures. In any event, review of such data warrants consideration of possible under- or over-identification.

In *Durbrow v. Cobb County School District* (2018), the Eleventh Circuit Court of Appeals addressed the parents' child find and eligibility claims on behalf of their son, a student with ADHD in an accelerated program at a selective magnet high school. The district provided him with a 504 plan, which included extra time on tests and small class sizes, in grade 9. In grades 10 and 11, he passed all of the classes and scored As in all his final exams. In his senior year, however, he failed two subjects in the fall and three more in the spring due to late and incomplete work, despite additions to his 504 plan in October (e.g., reduced homework). At another 504 meeting in May, the parents requested an evaluation for IDEA eligibility, which the district completed by the start of the following school year. In the meanwhile, due to his Fs, the district removed him from the magnet program and determined that he had not yet qualified to graduate.	
For child find, which the parents claimed started as early the second semester of grade 10, the appellate court agreed with the hearing officer and district court that the school district (1) did not have reason to suspect possible IDEA eligibility prior to the parents' request and (2) proceeded to conduct the evaluation within a reasonable period of time. The court pointed to ample evidence in the record, including admissions from the parents and the student, that although his passing grades were less than his capability, the discrepancy was due to lack of effort. Thus, the court concluded that the missing element, in terms of the requisite reasonable suspicion, was the need for special education.	Consistent with the long line of child find jurisprudence, this case identified the two dimensions of the ongoing affirmative obligation of child find under the IDEA: (1) reasonable suspicion, as the trigger, and (2) reasonable period, as the amount of time for initiating the evaluation. Although directly connected, the time period for completing the evaluation is a fixed number—60 days from the date of consent unless state law specifies a different timeframe. In this case, the court did not find any "alarming" signs, or red flags, to indicate that the student might need special education, especially due to the overriding lack of effort and the district's "individualized attentiveness," including successive 504 plans to his difficulties. However, this outcome should not be over-generalized.
The Eleventh Circuit, which encompasses Alabama, Florida, and Georgia, also agreed with the hearing officer and lower court that for the same basic reason, the lack of evidence for the need for special education, that the student was not eligible for an IEP.	Again, this outcome is subject to caveats or questions. For example, the court concluded that the student "displayed some weaknesses not readily available to special education remediation." Are procrastination, lack of effort, and organizational skills mutually exclusive from ADHD and special education? As another example, the district's evaluation, upon completion, determined that the student was IDEA-eligible. Why was he eligible at the start of the following school year but not by the early spring of his failed grade 12?[1] Yet, this published appellate ruling illustrates the less than nuanced and district-deferential decision-making of many courts.

[1] Conversely, although the parties did not raise the issue and the court did not comment on it, one wonders whether the student's relatively early qualification for a 504 plan illustrates the over-identification in some schools. More specifically, what it the major life activity that the school identified, and how did the knowledgeable team determine that the student's ADHD substantially limit this major life activity relative to the general population independent of his lack of effort?