

SPECIAL EDUCATION LEGAL ALERT

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As a service to CASE members, this monthly legal alert addresses an IDEA issue and a Section 504 issue. First is the summary of a recent federal appellate court decision concerning the IDEA's LRE mandate. The second is a recently published article reporting the national and state-by-state percentages of "504-only" students. For automatic e-mailing of future legal alerts, sign up at perryzirkel.com; this website also provides free downloads of various related articles, including the two summarized in this legal alert.

In *B.E.L v. Hawaii* (2018), one of the relatively few recent court decision concerning the least restrictive environment (LRE) mandate of the IDEA, the Ninth Circuit addressed the parents' contention that their child's IEP, which provided for a special education class for reading and reading and math and a general education class for all other subjects, denied their child FAPE by being overly restrictive. The child was a second grader with SLD who, according to his first and second grade teachers, was failing to meet grade-level benchmarks in reading and math despite receiving various classroom interventions and accommodations. When the IEP team rejected the parents' request for placement in a general education class with supplementary aids and services for these two subjects, they unilaterally placed their child in a private school specializing in dyslexia and sought tuition reimbursement.

In affirming the hearing officer and the federal district court, the Ninth Circuit applied a multi-factor analysis to determine whether the parents' had proven that the child's placement was not in the LRE. The primary factors in this case were (a) comparative academic and nonacademic benefits, and (b) the extent of any disruptive effect. The court deferred to the teachers' testimony for both factors, particularly because the parents' had not presented any expert evidence and the child was effectively integrated with nondisabled peers for the rest of the school day. A private evaluation that diagnosed dyslexia and "low average" reading and math skills did not outweigh other evidence in the record.

Although the various circuits have slightly different variations of the LRE factors, they all primarily rely on these two factors, with the presumption in favor of the placement that maximizes interaction with nondisabled students with appropriate supplementary aids and services. The positions of the parties vary, with the parents favoring the more inclusive environment in some cases and favoring a more specialized, segregated environment in other cases. The judicial outcomes also vary rather widely, depending on several decisional factors, including the burden of proof, the cogency of the evidence, and the individual circumstances of the child.

LRE and its interrelationship with FAPE is not a clearly settled matter, and the levels of inclusion and the extent of supplementary aids and services vary widely from state to state and, in some states, from district to district.

Although no longer a "hot" legal issue in terms of the frequency and novelty of litigations, LRE remains a pedagogical issue that has not yet been resolved at "best practice" level of effective inclusion in many parts of the country.

A recent analysis focuses on 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 2013–2014 Civil Rights Data Collection (CRDC). For the full version of this analysis, see the most recent item under the Section 504 and the ADA subheading of the Publications list on my website—“State-by-State Rates of 504-Only Students in K–12 Schools.” A follow-up analysis based on the recently available 2015–2016 CRDC will appear on this website within the next 1–3 months.

The national average was 1.8% for 504-only students, while the corresponding average was 12.2% for IDEA IEP students.

This average represents almost a doubling of the rate before the ADA Amendments Act of 2008, which broadened the interpretive standards for Section 504 eligibility, largely by expanding the illustrative list of major life activities and the determination of substantial limitation.

The states with the highest average rates were New Hampshire (5.5%), Louisiana (5.0%), and Vermont (4.4%). The states with the lowest average rates were New Mexico and Wisconsin (.5% each) and Mississippi (.3%).

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 reasons for this variance are complex and not clearly known. 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.

These rates are not likely to have increased dramatically in more recent years, given the notable passage of time since the ADA amendments. However, the follow-up analysis of the biennial CRDC information will, in all likelihood, reveal major differences from district to district and even between elementary and high schools.

The inter-district variance further reflect the same systemic contributing factors, such as socioeconomic status. The intra-district variance is likely attributable to the subject matter orientation and SAT/ACT test pressures at the high school level.

Although not yet subject to research, it may well be that these rates include over-identification of some impairments, such as ADHD, and under-identification of various low-incidence health impairments.

These hypotheses are respectively based on (a) the over-diagnosis of ADHD and/or its interaction with IDEA identification and (b) the unwarranted importation of the educational-impact factor of IDEA eligibility and the undifferentiated use of individual health plans.

Recent unresolved issues for 504 eligibility include the recent prevalence of anxiety among adolescents and the increased emphasis on concussions.

Such determinations require careful adherence to the eligibility criteria for Section 504 eligibility. See, e.g., the 2015 article, “Are Students with Concussions Qualified for Section 504 Plans?” in the Section 504 and ADA section of the publications list.