August 19, 2015

VIA UPS NEXT DAY AIR
Tracking #: 1Z F76 33F 22 1000 397 5

Office for Civil Rights, Region IX
U.S. Department of Education
50 Beale Street, Room 7200
San Francisco, CA 94105

RE: Disability Discrimination Civil Rights Complaint against the Berkeley Unified School District

To Whom It May Concern:

This is a disability civil rights complaint pursuant to the U.S. Department of Education's ("Department") Office for Civil Rights' (OCR) discrimination complaint resolution procedures.[1] Disability Rights Education and Defense Fund (DREDF) brings this complaint against the Berkeley Unified School District ("BUSD" or "District") for its continuing failure to ensure the provision of a free appropriate public education (FAPE) to qualified students with disabilities in violation of Title II of the Americans with Disabilities Act ("Title II" or "ADA"), 42 U.S.C. § 12131 *et seq.,* and its implementing regulations at 28 C.F.R. Part 35; and Section 504 of the Rehabilitation Act, as amended, 29 U.S.C. § 794, and its implementing regulations at 34 C.F.R. Part 104.

DREDF makes this complaint as an interested third-party organization on behalf of qualified students with disabilities in the District.[2] The complaint identifies myriad ways in which the District's Section 504 policies, practices, and procedures run afoul of the aforementioned disability discrimination statutes and their respective implementing regulations, and deny a FAPE to many of the District's most vulnerable and underserved students. Attached to this complaint is supporting evidence in the form of parent declarations that illustrate the devastating impact of the District's discriminatory practices. *See* Exhibits A-F. We ask that OCR promptly investigate the allegations in this complaint, act swiftly to remedy unlawful policies and practices, and order further systemic relief including compensatory education as appropriate.

[1] 34 C.F.R. § 104.61 (Section 504, incorporating Title VI procedures, 34 C.F.R. § 100.7); 28 C.F.R. § 35.170 (Title II).

[2] Attached as Exhibit G is a consent form signed by DREDF attorney Robert Borrelle on behalf of the class. *See* OCR Case Processing Manual ("CPM") § 103. Please contact Mr. Borrelle with any requests for signed consent forms from the parent witnesses.

I. Introduction and Background

Students with disabilities eligible for services under Section 504 and Title II ("504/ADA" or "Section 504") are a vulnerable and too often neglected group. Studies show that 504-only students make up only one percent of all public school students, a number which surely does not reflect the actual level of need.[3] Students with disabilities from disadvantaged groups are particularly underrepresented.[4] For example, in California, Latino students make up 52% of the total enrollment, yet only 29% of students with 504 plans.[5] Prompt identification at the first signs of students' suspected disabilities and the subsequent infusion of appropriate, individualized Section 504 services are critical to ensuring they succeed in school and in the future. When a school district does not have a system in place that ensures timely and effective implementation of the Section 504 requirements, these already vulnerable students fall through the wide cracks.

The District currently lacks a functioning system for implementing various Section 504 mandates, including providing adequate notice of rights, implementing child find obligations, offering to conduct and conducting appropriate evaluations, planning meetings, and providing a FAPE to these students. On a routine and systemic basis, families seeking these services for their children are unlawfully rebuffed, fed misinformation regarding Section 504 eligibility, and improperly steered toward Student Study Teams (SSTs) and other informal procedures that are patently inconsistent with required 504 procedures. These district-wide practices show a lack of training and a chronic, fundamental misunderstanding of the law at the staff and administrative levels. In many instances, these practices are the result of the continued implementation of facially unlawful Section 504 policies. *See infra* Section III(a).

Years of these illegal practices have led to increased frustration among BUSD families. In 2013, a group of Berkeley High School (BHS) parents/guardians, all of whom had struggled to secure special education services for their children, started a support group called Berkeley Students Owning Learning Differences (BOLD). BOLD is dedicated to "finding ways to support, empower and educate students with learning disabilities and

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[3] Zirkel, Perry A., and John M. Weathers. "Section 504-Only Students National Incidence Data" at 9. *Journal of Disability Policy Studies* (2014) (Attached as Ex. H).
[4] *Id.* at 5.
[5] ADVOCACY INSTITUTE, *Analysis Finds Students with Disabilities Served under Section 504 Overwhelmingly White, Disproportionately Male* (Aug. 2015), http://www.advocacyinstitute.org/resources/504analysisCRDC2012.shtml (last visited August 19, 2015).

their families by fostering understanding and advocating for effective intervention."[6] BOLD has an active listserv and holds monthly meetings on advocacy topics such as requesting evaluations, applying to college with a disability, and securing outside tutors with expertise in special education interventions.

Before the District's May 20, 2015 school board meeting, a group of parents and students, including many BOLD members, held a rally to urge board members to provide for more inclusive schools for students with disabilities.[7] Their concerns were aptly summed up by a BHS student during the meeting's public comment period:

> I'm a student at Berkeley High, and the process that a student has to go through to get representation for their mental health and to get support from the school is long, it's arduous—it's really hard. You have to stand up for yourself; your parents have to stand up for you constantly, over and over again. It's really, really frustrating. Both my brother and I have gone through this process. My brother is still trying to get support from the school. I have a 504 plan but it took me a year to get it and it was really frustrating….I come from a place where I am able to speak up for myself and I do, and my parents are willing to do that for me and have gone to the counselors and to the school administration and have really pushed it. But not everyone has this….I think it's really important that the school board recognizes that the process for people with physical but also mental health problems and getting support from the school is really hard and we need to change that because students need to be able to succeed. And students can't succeed if they aren't recognized by the school with all their disabilities and all their abilities.[8]

It is against this backdrop that DREDF now brings this complaint on behalf of District students with disabilities and suspected disabilities. We believe OCR is uniquely situated to investigate our complaint and facilitate an appropriate remedy for all parties

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[6] Posting of BOLD, bhsboldcontact@gmail.com, to BHS E-Tree, bhs@lists.lmi.net (Mar. 8, 2015), available at: http://lists.lmi.net/pipermail/bhs/20150308/011419.html (last visited August 19, 2015).

[7] Seung Y. Lee, *Parents, Students rally for more inclusive schools*, BERKELEYSIDE, May 22, 2015, http://www.berkeleyside.com/2015/05/22/parents-students-rally-for-more-inclusive-berkeley-schools/ (last visited August 19, 2015).

[8] *BUSD Board Meeting Public Comments* (May 20, 2015), VIMEO.COM, https://vimeo.com/128644627 (last visited August 19, 2015) (cited quote begins at 0:00:56).

regarding the District's provision of a FAPE to all qualifying students with disabilities.[9] We ask that OCR issue a comprehensive corrective plan that requires the District to reform its noncompliant Section 504 policies, practices, and procedures, and provides aggrieved students with compensatory education as appropriate to their individual needs.[10]

II. Jurisdiction and Timeliness

OCR has jurisdictional authority to investigate this complaint under Section 504 and Title II. OCR has jurisdiction under Section 504 because the District is a public agency that receives federal financial assistance from the Department.[11] OCR has jurisdiction under Title II because the District is a public entity.[12] Further, the Title II implementing regulations expressly permit OCR to accept disability discrimination complaints against public entities that receive federal financial assistance from the Department.[13]

This Complaint is timely because the District's outdated Section 504 policies are unlawful, and the discriminatory impact of its illegal Section 504 policies and practices with regard to the location, identification, and evaluation of students with disabilities is ongoing. OCR's CPM explicitly states that "[t]imely allegations may include those where the complainant alleges a continuing discriminatory policy or practice."[14] An analysis of the policies themselves and supporting parent and guardian declarations demonstrates the existence of continuing discriminatory policies and practices.

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[9] A "qualified student with a disability" is a student with a disability who is "of an age during which [disabled] persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to [disabled] persons, or (iii) to whom a state is required to provide a [FAPE] under [the IDEA]." 34 C.F.R. § 104.3(l).

[10] On May 29, 2015, DREDF as an organizational complainant filed a compliance complaint with the California Department of Education against the District regarding its restrictive eligibility criteria for specific learning disabilities (Case #S-0952-14/15). The IDEA and state law allegations in that complaint were narrowly tailored and wholly separate from the Section 504/Title II allegations described here. Thus, there is no legitimate reason for an administrative closure of this complaint under OCR CPM § 110.

[11] 34 C.F.R. § 104.2; 34 C.F.R. § 104.3(f) (defining a recipient of federal funds as "any public or private agency…to which Federal financial assistance is extended directly or through another recipient[.]").

[12] 42 U.S.C. § 12131(1)(B) (defining "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or States or local government").

[13] 28 C.F.R. § 35.170(c); 28 C.F.R. § 35.190(b)(2).

[14] OCR CPM § 106(a).

III. Claims

The Department's Section 504 regulations require school districts to provide a FAPE to each qualified student with a disability within its jurisdiction.[15] The regulations define a FAPE as "the provision of regular or special education and related aids and services that (1) are designed to meet individual educational needs of disabled students as adequately as the needs of nondisabled students; and (2) adhere to the requirements of the Section 504 regulations."[16] OCR interprets the Title II regulations to require districts to provide a FAPE at least to the same extent required under Section 504.[17]

As described below, the District's current system of providing Section 504 services is not equipped to ensure it meets the individual educational needs of disabled students as adequately as the needs of nondisabled students. Moreover, the District's Section 504 policies, practices, and procedures—particularly in regard to how the District locates, identifies, and evaluates students for Section 504 eligibility—fall woefully short of compliance with the requirements of the Department's Section 504 regulations.

a. The District's Section 504 Policies and Guidance are Inconsistent with the Requirements of Section 504 and Title II

The District's Section 504 board policy (BP 6164.6),[18] administrative regulation (AR 6164.6),[19] and other Section 504 procedural safeguard notices fail to fully and accurately educate families regarding their rights, and the District's responsibilities. The policies are outdated, omit critical parent/guardian and student rights and District obligations, and in some instances, particularly regarding Section 504 eligibility criteria, contain incorrect information.

i. BUSD Policies Omit Key Section 504 Rights and Responsibilities

BP 6164.6 and AR 6164.6 omit critical information regarding families' rights, and the District's obligations, under Section 504. A comparison of the California School Board

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[15] 34 C.F.R. § 104.33(a).
[16] 34 C.F.R. § 104.33(b).
[17] *See* 28 C.F.R. §§ 35.103(a) and 35.130(b)(1)(ii)-(iii).
[18] Berkeley USD, BP 6164.6 (2004). Available at: http://www.gamutonline.net/displayPolicy/335955/6 [User Name: BUSD; Password: Policy] (last visited August 19, 2015).
[19] Berkeley USD, AR 6164.6 (2004). Available at: http://www.gamutonline.net/displayPolicy/335956/6 [User Name: BUSD; Password: Policy] (last visited August 19, 2015).

Association's (CSBA) Model Section 504 Board Policy and Administrative Regulation (2013)[20] and BUSD's corresponding policies demonstrates the latter's deficiencies. The following Section 504 requirements are not reflected in BUSD BP 6164.6 or AR 6164.6:

BP 6164.6: Identification and Education Under Section 504

- The District's obligation to provide a FAPE to qualified students with disabilities, as well as a full definition of a FAPE, 34 C.F.R. § 104.33;
- The District's obligation to ensure students and their parents/guardians are provided applicable procedural safeguards with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services, 34 C.F.R. § 104.36; and
- The District's obligation to ensure qualified students with disabilities are provided an equal opportunity to participate in programs and activities that are integral components of the district's basic education program, including, but limited to, extracurricular athletics, interscholastic sports, and/or other nonacademic activities, 34 C.F.R. § 104.37.

AR 6164.6: Identification and Education Under Section 504

- The District's obligation to designate a 504 Coordinator, 34 C.F.R.§ 104.7;
- The restored definition of disability in accordance with ADA Amendments Act of 2008, 42 U.S.C. § 12102, 34 C.F.R. § 104.3 (*see also infra* Section III(a)(ii);
- The 504 team shall consist of a group of persons knowledgeable about the student, the meaning of the evaluation data, and the placement options, 34 C.F.R. § 104.35;
- The District's evaluation procedures shall ensure that evaluation materials: (a) Have been validated and are administered by trained personnel in conformance with the instruction provided by the test publishers; (b) are tailored to assess specific areas of educational need and are not based solely on a single IQ score; and (c) reflect aptitude or achievement or whatever else the tests purport to measure and do not reflect the student's impaired sensory, manual, or speaking skills unless the test is designed to measure these particular deficits, 34 C.F.R. § 104.35; and
- The District shall ensure that it has taken appropriate steps to notify students and parents/guardians of the district's duties under Section 504, 34 C.F.R. § 104.32.

OCR should order the District to revise BP 6164.6 and AR 6164.6 to include all Section 504 rights and responsibilities, with adoption of the CSBA model Section 504 policy and regulation as an acceptable method of compliance with this corrective action.

[20] Available at: http://natomasunified.org/wp-content/uploads/2013/10/6164.6-Oct-13.pdf (last visited August 19, 2015).

ii. BUSD Policies Contain Incorrect Section 504 Eligibility Criteria

Various District policies, regulations, and procedural safeguard notices contain Section 504 eligibility criteria that are inconsistent with the Title II and Section 504 definitions of disability. It is no coincidence then that District staff and administrators convey similar misinformation to parents/guardians regarding their children's eligibility for a 504 plan.

1. Definition of Disability in BP 6164.6 and AR 6164.6

BUSD BP 6164.6[21] and AR 6164.6[22] contain restrictive special education eligibility criteria that are inconsistent with the ADA and Section 504 definitions of disability. The District adopted BP 6164.6 and AR 6164.6 in May 2004, well before Congress enacted the ADA Amendments Act of 2008 (ADAAA).[23] The ADAAA restored the definition of "disability" under both the ADA and Section 504, which had been inappropriately narrowed by judicial interpretations.

Neither BP 6164.6 nor AR 6164.6 have been updated to convey Congress' intention for the Acts to provide broad coverage to students with disabilities: "With passage of the Amendments Act, Congress intended to ensure a broad scope of protection under the ADA and to convey that the question of whether an individual's impairment is a disability under the ADA and Section 504 should not demand extensive analysis."[24] The policies also fail to explain that the inquiry into whether an impairment substantially limits a major life activity must be determined without reference to the ameliorative effects of mitigating measures such as medications, prosthetic devices, assistive devices, learned behavioral, or adaptive neurological modifications which an individual may use to eliminate or reduce the effects of an impairment.[25]

The definition of disability in AR 6164.6 also contains information that is potentially misleading to families. The regulation identifies "[p]oor or failing grades over a lengthy period of time" as an indication that a possible disability interferes with learning.[26] While this statement is not unlawful on its face, the supporting parent declarations strongly

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[21] *Supra* note 18.
[22] *Supra* note 19.
[23] P.L. 110-355, § 4(a), codified at 42 U.S.C. § 12102(2)(A) (effective January 1, 2009).
[24] U.S. Department of Education, OCR. "Dear Colleague Letter: Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools." January 19, 2012. Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html (last visited August 19, 2015).
[25] *Id.*
[26] *Supra* note 19.

suggest that District staff and administrators believe academic struggles are a prerequisite for Section 504 eligibility. The District's child find practices also reflect this belief. *See infra* Section III(b)(i). Many families have told DREDF that the District inappropriately denied their children 504 plans because their "grades were too high" or that their child's struggles were not academic. *See* Ex. A at 2; Ex. E at 2. Moreover, District students with disabilities often achieve excellent grades through extra work, outside tutoring, and other mitigating measures—the ameliorative effects of which the District cannot consider when determining 504 eligibility. *See, e.g.,* Ex. A and Ex. D.

2. Office of Student Services' "Menu of Student Services"

The District's Office of Student Services website provides similar misinformation regarding Section 504 Eligibility. The webpage prominently features a "Menu of Student Services"[27] that provides parents/guardians with an overview of all available student services. Under the heading "Section 504 Eligibility," the Menu states: "Students with disabilities (temporary or permanent) that ***substantially limit their ability to succeed in school*** may be eligible for accommodations under Section 504."[28] (emphasis added.) "Substantially limit their ability to succeed in school" is not the proper standard under Section 504 and Title II, and in fact many students with eligible disabilities (e.g., diabetes, asthma, and other chronic conditions) can and do thrive academically and socially. This definition again incorrectly relays to families that Section 504 eligibility is predicated on academic struggles and suggests a District-wide misunderstanding of the law.

The "Menu of Student Services" also reflects the District's emphasis on regular attendance, noting that in 2010-2011, the District lost over $2,000,000 in unearned income due to absences.[29] While regular attendance is absolutely critical to a student's success, the District fails to recognize that a student's frequent absences are often related to their disabilities. *See, e.g.,* Student M.T., Ex. A at 1-2. In fact, DREDF has assisted numerous students with disabilities who are threatened with referrals to the District's School Attendance Review Board (SARB). Instead of punishing children for their absences, the District should consider whether they are disability-related and initiate Section 504 referrals when appropriate. *See* Child Find Discussion, *infra* Section III(b).

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[27] *Menu of Student* Services,BERKELEYSCHOOLS.NET, http://www.berkeleyschools.net/wp-content/uploads/2011/09/StudentSvcsTopContentFinal.pdf (last visited August 19, 2015).
[28] *Id.*
[29] *Id.*

b. The District's Child Find Practices Violate Section 504 and Title II

The Section 504 regulations' "child find" provision requires school districts to "identify and locate" students with disabilities within their jurisdiction in need of special instruction or related services and to take appropriate steps to notify parents/guardians of this duty.[30] The regulations further require school districts to conduct an evaluation of any student who, because of a disability, needs or is believed to need special education or related services.[31] Although the regulations do not impose a specific timeline for completion of an evaluation, OCR has suggested that "as little time as possible should pass between the time when the student's possible eligibility is recognized and the district's conducting the evaluation."[32] An unreasonable delay constitutes discrimination against students with disabilities because "it has the effect of denying them meaningful access to educational services provided to students without disabilities."[33]

The District's child find system is not designed to ensure timely compliance with Section 504. As described in Section III(a), *supra*, the incorrect eligibility criteria listed in the District's 504 policies fail to provide families with adequate notice of the District's child find duties. District staff and administrators also fail to proactively identify and locate students with suspected disabilities and unlawfully deny evaluations by "counseling out" through written and verbal misinformation regarding families' Section 504 rights. Finally, the District unlawfully delays evaluations by compelling parents to attend SST meetings and comply with other procedures that are not required by Section 504.

i. The District Responds to Section 504 Evaluation Requests by "Counseling Out"

The District violates its child find duties by failing to respond to written and verbal parental requests for special education evaluations. As illustrated in the parent declarations, the District's most common response to parent referrals is to "counsel out"—i.e., tell families that their children do not qualify under Section 504 because their grades are too high or that 504 plans are only for students with academic struggles.

BUSD denied M.T.'s parents' request for an evaluation, telling them that evaluations are not for students who have performed well historically, and that if the District approved every request for an evaluation, it would be performing evaluations constantly. *See* Ex. A at 2. The District will even "counsel out" despite the existence of independent evaluations and other evidence that clearly indicate the presence of a disability.

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[30] 34 C.F.R. § 104.32.
[31] 34 C.F.R. § 104.35(a).
[32] *Clover (SC) Sch. Dist.*, 114 LRP 29307 (OCR 2014).
[33] *Id.*

Although E.G. had been tested and received accommodations for a learning disability in private school, BHS's Program Specialist claimed she did not need accommodations because she had a superior IQ and was getting A's and B's. *See* Ex. E at 2.

ii. The District Often Fails to Respond to Section 504 Evaluation Requests Altogether

Other times, the District will ignore parent referrals altogether. On February 11, 2015, S.P.'s mother emailed the Program Administrator of the BUSD Independent Study Program and requested a 504 meeting for her daughter who had already been privately evaluated and diagnosed with ADHD and an anxiety disorder. In email exchanges with that administrator over the following weeks, S.P.'s mother asked to meet and discuss the "next steps" four different times. To date, BUSD has not scheduled a meeting to discuss a 504 plan her. *See* Ex. D at 2-3. After I.N.'s mother sent an email on June 1, 2015 to BHS's Program Specialist requesting an assessment for her son (who had a history of emotional struggles and had a 504 plan in middle school), she was told that someone would contact her within fifteen days. As of August 19, 2015, she is still waiting for the district to respond to her assessment request. *See* Ex. C at 3.

Silence from school-site personnel is a dead end for families because there is no straightforward flow chart to assist them in identifying the appropriate District-level staff. When DREDF receives call from parents like I.N.'s mother who have been rebuffed at the school-site level, we refer them directly to the District's 504 Coordinator, Susan Craig, or BHS Program Manager Diane Colburn. We however have consistently heard back from these parents that they rarely receive a response. *See, e.g.,* Student I.N., Ex. C at 3.

iii. The District Unreasonably Delays Evaluations by Ignoring Outside Diagnoses and Requiring SST Meetings

The District also regularly allows an unreasonable amount of time to pass between when it first has notice of a student's suspected disability and when it conducts an evaluation. The delays are often because the District either ignores the legitimate concerns of parents or disregards outside diagnoses, especially with specific learning disabilities such as dyslexia. For example, when M.T., who had an outside diagnosis of dyslexia, requested an evaluation in May 2015, the District dismissed her diagnosis as well as her plummeting grades and frequent absences. *See* Ex. A at 1-2. In March 2015, a BHS counselor told the mother of student I.N., who was concerned with her son's poor grades and health (he began having nosebleeds and migraines), that there was a "wait list" for special education. *See* Ex. C at 1-2.

A key reason for this pattern of unreasonable delay is the District's practice of unlawfully steering families toward SST meetings in lieu of conducting evaluations or holding 504 meetings. Families willingly go through months or even years of SST meetings because the District leads them to believe it is a required step in the path to a 504 plan. For example, BHS staff told the parents of student O.B., an incoming freshman with documented diagnoses of dyslexia, dysgraphia, and ADHD, that it could not even consider a 504 plan until it held an SST meeting. *See* Ex. B at 2.

iv. BUSD Fails to Provide Procedural Safeguards When Denying Requests for Section 504 Plans

When a school district denies a request for a special education evaluation, it must inform the student's parent or guardian of its decision and provide a notice of procedural safeguards.[34] The District however regularly verbally rebuffs families seeking 504 plans without providing accurate written notice of their rights, denying these students a FAPE.[35] *See supra* Section III(b)(i). In March 2015, a BHS counselor told the mother of student I.N., who was concerned with her son's poor grades and health (he began having nosebleeds and migraines), that there was a "wait list" for special education. *See* Ex. C at 1-2. I.N.'s mother was unaware of her rights and did not submit a formal request until June 1, 2015. *Id.* The District however had an obligation under state law to assist I.N.'s mother in putting her request in writing.[36] This requirement is especially important for families who lack access to computers or who have disabilities themselves.

The District also improperly steers families towards SST meetings without notifying them that it is not a Section 504 requirement, *supra* Section III(b)(iii), and makes unilateral decisions without providing families with procedural safeguard notices, *infra* Section III(b)(iv). Moreover, as discussed above, the District's Section 504 policies and guidance that are publicly available to families contain potentially misleading and in some cases patently incorrect information regarding their Section 504 rights and the District's Section 504 obligations. *See* Discussion of BUSD Section 504 Policies, *supra* Section III(a). Thus the District would fail to meet the Section 504 procedural safeguards requirement even if it did provide families with these documents because of the inaccuracies.

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[34] 34 C.F.R. § 104.36; *see also* "Amendments Act FAQ" *supra* note 24.

[35] Compliance with the Section 504 procedural safeguards provision is necessary to satisfy the law's FAPE requirements. 34 C.F.R. § 104.36.

[36] 5 CCR § 3021 ("When a verbal referral is made, staff of the school district…shall offer assistance to the individual in making a request in writing[.]"); *see also Farmington (MI) Public School District*, 110 LRP 57410 (OCR 2010) (looking to state law evaluation requirements for guidance where the Section 504 regulations are silent).

c. The District Makes Unlawful Unilateral Placement Decisions

When making placement decisions, school districts must: (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, and (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.[37]

A district violates this provision when it makes placement decisions solely on the basis of a student's grades.[38] Thus the District's practice of verbally denying parent/guardian requests for 504 plans because their children's "grades were too high" violates § 104.35(c). *See supra* Sections III(a)(ii) and III(b)(i). The District further violates § 104.35(c) by failing to consider other relevant information besides grades, such as medical documentation (Ex. A and Ex. D) and prior 504 plans (Ex. C and Ex. F).

In the fall of 2014, the District told the mother of student K.F. that her 504 plan, which provided for extra time on tests, "lapsed" when she transitioned from Willard Middle School to BHS. *See* Ex. F at 2-3. BUSD Counselor Teri Goodwin further stated that that K.F. was otherwise ineligible for a 504 plan because of her high grades. *Id.* Until then, both K.F. and her mother thought she still had a 504 plan, and K.F. had informed her BHS teachers about the plan and its accommodations. *Id.* The District has yet to reinstate K.F.'s 504 plan despite the continued advocacy efforts of K.F. and her mother.

This practice of unilaterally terminating students' 504 plans upon transition to high school violates the "group" placement requirement in § 104.35(c). Furthermore, the District was required to conduct a reevaluation of K.F. before it terminated her 504 plan. Section 504 requires school districts to reevaluate students receiving Section 504 services when it "contemplates a significant change in placement, and OCR considers "***terminating or significantly reducing a related service a significant change in placement.***"[39] (emphasis added.)

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[37] 34 C.F.R. § 104.35(c).
[38] *Cf. Ferguson-Florissant (MO) R-II Sch. Dist.*, 111 LRP 1946 (OCR 2010).
[39] U.S. Department of Education. "Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities." December 19, 2013, http://www2.ed.gov/about/offices/list/ocr/504faq.html (last visited August 19, 2015).

d. The District Denies Qualified Students From Participating in its BHS Independent Studies Program On The Basis Of Their Disabilities

In addition to requiring the provision of a FAPE, the Section 504 and Title II regulations have general nondiscrimination provisions that prohibit school districts from discriminating on the basis of disability either by excluding qualified students with disabilities from participating in or denying them the benefits of the district's services, programs, or activities.[40] OCR has further stated that "a school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular."[41] The District must also show a legitimate, non-discriminatory reason for excluding students with disabilities from a program or activity on the basis of funding or resource limitations.[42]

The District offers a number of different educational programs ("Small Schools") at the high school level in order to meet the diverse needs of its students.[43] However, the District, based on unfounded stereotypes about the independence of students with disabilities and without a legitimate, non-discriminatory reason, dissuaded S.P. from continuing in the Berkeley Independent Studies (BIS) Program because of her attempts to secure a 504 plan.

S.P. enrolled in BIS at the start of her junior year (FY 2014-2015) after struggling the previous year at a large high school in Oakland. *See* Ex. D at 1. She chose BIS because of its small size and personalized instruction model. When S.P. began to struggle, she sought out independent tutoring and asked her parents for a private assessment. *Id.* Her assessor, Dr. Carina Grandison, diagnosed S.P. with ADHD and recommended a number of accommodations, including extra time on tests and a quiet space for testing. *Id.*

On February 11, 2015, S.P.'s mother contacted BIS administrator Edith Smiley about implementing a 504 plan. *Id.* Over the next month, in a series of emails, Ms. Smiley repeatedly rejected S.P.'s mother's request to meet to discuss implementing a 504 plan. *See* E-mail thread attached to Ex. D. Ms. Smiley stated BIS did not have the ability to

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[40] 34 C.F.R. § 104.4(a) (Section 504) and 28 C.F.R. § 35.130(a) (Title II).
[41] U.S. Department of Education, Office for Civil Rights. "Dear Colleague: Students with Disabilities in Extracurricular Athletics" 2. January 25, 2013. Available at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf (last visited August 19, 2015).
[42] *See, e.g., Metropolitan Nashville (TN) Sch. Dist.*, 105 LRP 1634 (2004).
[43] The Small Schools at BHS are Academic Choice, Arts and Humanities Academy, the Academy of Medicine and Public Service, Berkeley International High School, Communication Arts and Sciences, Green Academy, and Berkeley Independent Study.

serve 504 plans and suggested that S.P. transfer to the main BHS campus. At one point she told S.P.'s mother that if S.P. had made these "demands" when she applied, S.P. "would not have been accepted to BIS." *Id.*

S.P. and her mother were devastated by Ms. Smiley's responses, and S.P. felt punished for asking for help. *See* Ex. D at 3-4. Because of the District's refusal for provide accommodations, S.P. made the difficult decision to leave her BUSD peers and activities and enroll in the California Virtual Academy, an online charter school, for the 2015-2106 academic year. *See* Ex. D at 4.

e. The District Administers its Standardized Testing Accommodation Policies and Practices in a Discriminatory Manner

The College Board and ACT accommodation application forms mandate that an official school representative complete and sign certain sections of the form and send the form directly from the school to the applicable testing body.[44] As described below, the District's restrictive policy for processing these applications constitutes discrimination on the basis of disability in violation of Section 504 and Title II. The District's broken child find policies further prevent qualified students from accessing accommodations. OCR must order the District to reform its testing accommodation policies to ensure all qualified students with disabilities have access to the necessary accommodations.

i. The District's Policy for Processing Testing Accommodation Application Forms Violates Section 504 and Title II

The District has in some cases refused to cosign students' standardized test accommodation applications unless the student has an IEP. This has created a scenario where many qualifying high school students with 504 plans cannot secure necessary accommodations on these important tests. For example, O.B., who has a 504 plan, had to file a complaint against his counselor in order to get him to sign the form. *See* Ex. B at 2-3. DREDF attorney Robert Borrelle also advised a BHS student, who had received informal testing accommodations but did not have a 504 plan, to file an OCR complaint in early 2015 when the District refused to cosign his application form.

OCR resolved nearly identical allegations against the North Rockland (NY) Central School District in 2008. In that case, the district categorically prohibited a group of students from applying for accommodations on the PSAT and refused to assist others seeking help filling out the applications. OCR determined that North Rockland Central's

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[44] *See, e.g.,* THE ACT, *Policies for Extended Time National Testing 2015-2016* (Jun. 2015), *http://www.act.org/aap/pdf/ExtendedTimeNational.pdf* (last visited August 19, 2015).

practices violated Section 504 and Title II and ordered it to issue a regulation that ensured "all District students with disabilities are permitted to apply to receive testing modifications for the PSAT, and that District staff complete all College Board forms necessary for students with disabilities to obtain testing modifications."[45] Because of the similarities between these two policies, we ask that OCR order the District to pass a similar board-approved policy that ensures all qualified students are given an opportunity to apply for testing accommodations, and are provided assistance to do so.

ii. The District's Unlawful Child Find Policies Further Prevent Qualified Students from Accessing Testing Accommodations

The District's broken child find system and unlawful Section 504 eligibility criteria have exacerbated the problem, as the District's delay in granting 504 plans has in some instances prejudiced students' applications. Student E.G. attended private school from K-8th grade where she had received testing accommodations for a diagnosed reading disability. *See* Ex. E at 1. When E.G. entered BHS in the Fall of 2013, BHS denied her request for a 504 plan because her grades were too high. *Id.* When she applied for accommodations on the PSAT during her sophomore year, the College Board determined that the documentation submitted did not "support a need for extended time." *Id.* at 3. She finally secured a 504 plan in January 2015 and applied for extended time on her upcoming SAT exam. The College Board however again denied her request, explaining that E.G.'s lack of accommodations for her freshman year played a crucial role in their decision not to give her accommodations for the SAT. *Id*.

Related is the fact that some District students who are unable to secure a 504 plan or IEP are still granted informal accommodations by sympathetic teachers who see their struggles firsthand. *See, e.g.,* Student O.B., Ex. B at 2. This practice penalizes students in the long-term because the College Board and other testing bodies require students to show a documented history of receiving support. Colleges and universities similarly require documentary proof before providing accommodations. Moreover, should a student relocate, the new district will have no record of this informal support.

iii. The District Administers Tests to Students with Disabilities in Substandard Facilities

Finally, the District must reform its method for administering standardized tests. Section 504 requires districts to ensure that facilities, services, and activities provided to students with disabilities are comparable to the other facilities, services, and activities of the District.[46] For its May 2015 AP exams, the District placed students with disabilities

[45] *North Rockland (NY) Cent. Sch. Dist.*, 109 LRP 27208 (OCR 2008).
[46] 34 C.F.R. § 104.34(c).

receiving accommodations in gymnasium locker rooms and in the women's and men's lounges at the Berkeley Community Theater. *See* Ex. B at 3. All of these spaces were cramped, cold, and had poor lighting. The restrooms in the locker room and adjacent to the lounges were in use throughout the period of the exam, which was distracting to the exam takers. *Id.* Subjecting students with disabilities to these unequal conditions is unacceptable and constitutes discrimination in violation of Title II and Section 504.

IV. Prior OCR Resolution Agreements and Guidance

When presented with similar facts and allegations, OCR has consistently found districts in violation of Section 504 and Title II and ordered necessary corrective actions such as systemic reforms and compensatory education for the individual aggrieved students. OCR has also produced "Dear Colleague" letters and other guidance documents that articulate interpretations of Section 504 and Title II that are clearly disregarded in the District's policies, practices, and procedures. Below is a brief list of OCR resolutions and guidance documents that directly address the allegations in this complaint.

Eligibility Criteria - ADAAA

- ***Elm Creek (NE) Pub. Schs.*, 64 IDELR 22 (OCR 2013).** The District agreed to revise its policies to include language noting the ADAAA's updated standard for determining whether a student's impairment substantially limits a major life activity.

- ***Highlands County (FL) Sch. Dist.*, 114 LRP 2114 (OCR 2013).** The District agreed to conduct staff training on several topics, including: 1) the factors that make a student eligible for services under Section 504; and 2) the ADAAA's expanded definitions of physical and mental impairments and major life activities.

- **U.S. Department of Education, Office for Civil Rights. "Dear Colleague Letter: Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools." January 19, 2012.** Affirming that the question of whether an individual's impairment is a disability under the ADA and Section 504 does not demand extensive analysis.

Identification and Evaluation (Child Find)

- ***Yadkin County (NC) Pub. Schs.*, 65 IDELR 22 (OCR 2014).** OCR determined the District violated Section 504 when it disregarded signs that the student's learning disability hindered her ability to succeed in class and ordered it to provide any necessary compensatory education.

- ***Fort Atkinson (WI) Sch. Dist.*, 46 IDELR 142 (OCR 2006).** The District violated the regulations implementing Section 504 when it agreed to accommodate a student's SLD without first evaluating the student's need for special education services.

- ***Clover (SC) Sch. Dist.*, 114 LRP 29307 (OCR 2014).** The District's four-month wait to conduct an evaluation constituted an unreasonable delay. OCR determined that the teachers assumed the student's difficulties were due to lack of effort, rather than the ADHD diagnosis and learning disabilities reported by his mother.

- ***Craven County (NC) Schools*, 114 LRP 36292 (OCR 2014).** Because the District knew about the student's Colonic Dysmotility, the chronic nature of the symptoms associated with it, the student's frequent absences related to the condition, and the student's poor grades, the district had sufficient information to warrant an evaluation.

- ***New Hanover County (NC) Schs.*, 114 LRP 14971 (OCR 2013).** The District violated Section 504 when it postponed an evaluation until March 2013. OCR reasoned that the district had ample reason to believe that the student may need services since September 2012 based on the student's ADHD diagnosis, the parent's requests for services, and teacher reports of the student's difficulties.

- ***Oakland (CA) Unified Sch. Dist.*, 113 LRP 27902 (OCR 2013).** District had reason to suspect a student might be 504-eligible as early as October 2009 based on his ADD diagnosis and academic and behavioral challenges, but failed to evaluate until compliant filed in June 2011. OCR noted his teachers erred by continuing with unsuccessful ad hoc accommodations instead of referring him for an evaluation.

- ***Farmington (MI) Public School District*, 110 LRP 57410 (OCR 2010)**: OCR looked to Michigan state law for guidance on the District's evaluation obligations where the Section 504 regulations were silent.

<u>Placement Decisions</u>

- ***Ferguson-Florissant (MO) R-II Sch. Dist.*, 111 LRP 1946 (OCR 2010).** 34 C.F.R. § 104.35(c) requires school districts to consider more than a student's grades when making placement decisions.

- ***Pitt County (NC) Schools*, 114 LRP 41316 (OCR 2014).** OCR determined that the reevaluation procedures in § 104.35(d) are triggered whenever a District proposes a "significant change in placement." OCR considers terminating or significantly reducing a related service a significant change in placement.

- **U.S. Department of Education. "Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities." December 19, 2013.** Stating that OCR considers "terminating or significantly reducing a related service" a significant change in placement.

Equal Participation

- ***Metropolitan Nashville (TN) Sch. Dist.*, 105 LRP 1634 (2004).** The District prohibited students with IEPs from participating in a summer program. OCR determined that the District's explanation—funding limitations—was not a legitimate, non-discriminatory reason.

- **U.S. Department of Education, Office for Civil Rights. "Dear Colleague: Students with Disabilities in Extracurricular Athletics." January 25, 2013.** Stating that a school district may not operate its program or activity on the basis of generalizations, assumptions, prejudices, or stereotypes about disability generally, or specific disabilities in particular.

Standardized Testing

- ***North Rockland (NY) Cent. Sch. Dist.*, 109 LRP 27208 (OCR 2008).** The District violated Section 504 when it: (1) prohibited qualified 9th and 10th grade students with disabilities from applying for accommodations on the PSAT; and (2) failed to assist students in completing the eligibility forms students are required to submit to the College Board.

Compensatory Education

- ***Birdville (TX) Independent Sch. Dist.*, 115 LRP 17601 (OCR 2015).** OCR ordered a group of a group of knowledgeable persons, including the complainant, to meet and determine whether the student needs compensatory and/or remedial services as a result of the District's failure to provide appropriate special education or related services. The District then had to report the outcomes of the meeting to OCR so it could to ensure the meetings met the procedural requirements of Section 504 regulations 34 C.F.R. §§ 104.34, 104.35 and 104.36.

V. Request for Relief

OCR should conduct a proper investigation into all of the foregoing allegations of noncompliance with Section 504 and Title II, and issue comprehensive corrective

actions regarding all relevant policies and practices of the District, including but not limited to the following:

1. Revise its Section 504 and Title II policies, regulations, procedures, manuals, forms, and any other relevant materials to ensure they comply with the ADAAA and Section 504 and Title II regulations, including the Section 504 regulations at 34 C.F.R. § 104.31 through 104.35 regarding the identification, evaluation, and educational placement of students who, because of a disability, need or are believed to need special education or related services. With regard to the ADAAA, the revised materials must comport with the following requirements:
   - Congress enacted the ADAAA with the intention of ensuring a broad scope of protection and to convey that identifying a qualifying disability should not demand extensive analysis;
   - The terms "substantially" and "major" are not to be interpreted strictly; and
   - The inquiry into whether an impairment substantially limits a major life activity is to be determined without reference to the ameliorative effects mitigating measures such as medications, prosthetic devices, assistive devices, learned behavioral, or adaptive neurological modifications which an individual may use to eliminate or reduce the effects of an impairment.

2. Issue comprehensive corrective actions regarding all relevant policies, practices, and procedures of the District, including but not limited to the following:

   - Revise Section 504 Identification, Evaluation, and Placement policies to come into full compliance with Section 504, with adoption of the CSBA Model Section 504 policies[47] as an acceptable method of compliance with this corrective action;

   - Immediately develop a "practical method" to carry out child find duties, especially in the general education setting, timely identify all students with suspected disabilities eligible for Section 504 services, and offer complete evaluations in compliance with Section 504 and Title II;

   - Through a fully compliant and timely Section 504 process, offer and provide FAPE in the LRE, including appropriate, research-based services, compensatory education services and monetary reimbursement as appropriate to all students found eligible in accordance with laws cited above;

   - Require the District to ensure compliance with all applicable laws governing procedural safeguards when initiating, changing or refusing identification,

[47] *See supra* note 20.

evaluation, educational placement or provision of FAPE in the LRE, including documented training of all staff responsible to prepare procedural safeguard notices; and

- Provide for immediate and continuing education and evaluation of progress toward compliance by a mutually agreed upon third-party expert. The expert should provide training to all staff outlining all of the above legal requirements: child find, evaluation/identification, appropriate intervention services for the variety of Section 504 eligible disabilities, and program evaluation following implementation of reforms.

3. For each aggrieved student, hold a meeting to determine whether that student needs compensatory and/or remedial services as a result of the District's failure to provide appropriate regular and/or special education or related services. The District should then report the outcomes of these meetings to OCR so that OCR can to ensure that the District met the procedural requirements of the Section 504 regulations, 34 C.F.R. §§ 104.34, 104.35 and 104.36, in making these determinations.

4. Hire an outside specialist to conduct a District-wide training for all relevant personnel, including all teachers, nurses, administrators, and any other personnel responsible for facilitating students' Section 504 evaluations and identifying students who are eligible for special education services and related aids and services. The training should address the procedural requirements of Section 504 in identification, evaluation, and placement and the District's process for meeting these requirements. The District must provide for OCR's review and approval a copy of the training materials prepared, including the name(s) and title(s) of the trainer(s) and any handouts or presentations developed. After the training is conducted, the District should submit to OCR the date of the training, the materials used, and the sign-in sheet indicating the names and titles of participants.

5. Revise the general nondiscrimination policies of all BUSD educational programs, including the BHS Small Schools, to ensure the District does not discriminate on the basis of disability either by excluding qualified students with disabilities from enrolling in a particular educational program or denying students with disabilities the benefits of any of the District's services, programs, or activities;

6. Issue a Board Policy and Administrative Regulation that ensure all District students with disabilities are permitted to apply to receive testing accommodations for the PSAT, SAT, ACT, and any other relevant standardized tests, and that District staff complete all forms necessary for students with disabilities to obtain these testing accommodations. The policies should also include information that notifies students

that they may be eligible for accommodations, connects them to the proper staff to request the accommodations, and explains the value of making such requests.

Finally, following a thorough investigation and comprehensive corrective actions consistent with the proposed resolution requested above, DREDF requests OCR to require the District to provide timely follow up compliance reports to OCR and DREDF addressing each of the areas listed in the proposed resolution and corresponding corrective actions, and OCR to provide timely evidence of its follow up enforcement actions to DREDF, all of which are necessary to ensure that the District is brought into compliance with applicable laws cited in this complaint.

Thank you for your prompt assistance with this request for investigation and resolution. Please contact me for further information, and in advance of any plans to contact the parents who have submitted confidential witness statements.

Sincerely,

Robert J. Borrelle, Jr.
Equal Justice Works Fellow
rborrelle@dredf.org

Bridget Claycomb
Law Clerk

Enc. Exhibits A – H

Cc via email (without enclosures):

Members of the Berkeley Unified School District School Board
Donald Evans, Superintendent of the Berkeley Unified School District
BOLD Parent Advocacy Group

Exhibit G

CONSENT FORM - FOR REVEALING NAME AND PERSONAL INFORMATION TO OTHERS

(Please print or type except for signature line)

Your Name: Robert J. Borrelle, Jr.

Name of School or Other Institution That You Have Filed This Complaint Against:

Berkeley Unified School District (CA)

- This form asks whether the Office for Civil Rights (OCR) may share your name and other personal information when OCR decides that doing so will assist in investigating and resolving your complaint.
- For example, to decide whether a school discriminated against a person, OCR often needs to reveal that person's name and other personal information to employees at that school to verify facts or get additional information. When OCR does that, OCR informs the employees that all forms of retaliation against that person and other individuals associated with the person are prohibited. OCR may also reveal the person's name and personal information during interviews with witnesses and consultations with experts.
- If OCR is not allowed to reveal your name or personal information as described above, OCR may decide to close your complaint if OCR determines it is necessary to disclose your name or personal information in order to resolve whether the school discriminated against you.

  NOTE: If you file a complaint with OCR, OCR can release certain information about your complaint to the press or general public, including the name of the school or institution; the date your complaint was filed; the type of discrimination included in your complaint; the date your complaint was resolved, dismissed or closed; the basic reasons for OCR's decision; or other related information. Any information OCR releases to the press or general public will not include your name or the name of the person on whose behalf you filed the complaint.

  NOTE: OCR requires you to respond to its requests for information. Failure to cooperate with OCR's investigation and resolution activities could result in the closure of your complaint.

Please sign section A or section B (but not both) and return to OCR:

- If you filed the complaint on behalf of yourself, you should sign this form.
- If you filed the complaint on behalf of another specific person, that other person should sign this form.

  EXCEPTION: If the complaint was filed on behalf of a specific person who is younger than 18 years old or a legally incompetent adult, this form must be signed by the parent or legal guardian of that person.
- If you filed the complaint on behalf of a class of people, rather than any specific person, you should sign the form.

A. **I <u>give</u> OCR my consent to reveal my identity (and that of my minor child/ward on whose behalf the complaint is filed) to others to further OCR's investigation and enforcement activities.**

Signature _____ Date 8/19/15

<u>OR</u>

B. **I <u>do not</u> give OCR my consent to reveal my identity (and that of my minor child/ward on whose behalf the complaint is filed) to others.** I understand that OCR may have to close my complaint.

Signature _____ Date _____

I declare under penalty of perjury that it is true and correct that I am the person named above; and, if the complaint is filed on behalf of a minor child/ward, that I am that person's parent or legal guardian. This declaration only applies to the identity of the persons and does not extend to any of the claims filed in the complaint.

Exhibit H

Article

Hammill Institute on Disabilities

Journal of Disability Policy Studies
1–10

DOI: 10.1177/1044207314543560
jdps.sagepub.com
SAGE

Section 504-Only Students: National Incidence Data

Perry A. Zirkel, PhD, JD, LLM[1] and John M. Weathers, PhD[1]

Abstract

Students with disabilities fit into two groups: (a) those with individualized education plans (IEPs), who are eligible under both the Individuals With Disabilities Education Act and Section 504, and (b) those with 504 plans, who are eligible under Section 504 only. Updating the only previous data about the incidence of 504-only students, which was a non-governmental survey prior to the 2008 ADA amendments to the Americans With Disabilities Act, this study analyzed the data from the federal government's 2009–2010 Civil Rights Data Collection (CRDC). The first finding was that the average proportion of 504-only students in the nation's public schools is approximately 1%. Second, the percentage of this group is significantly higher for (a) Black and Hispanic than for White students and (b) for males than for females. Third, the percentage of 504-only students is significantly higher for (a) high IEP than for low IEP schools, (b) non-charter than for charter schools, and (c) non-Title I than Title I schools. These results suggest the need for more diligent and consistent identification of 504-only students and for more current and comprehensive research.

Keywords

ADA, civil rights, eligibility, law/legal issues

Unlike the Individuals With Disabilities Education Improvement Act (IDEA; 2012) but like various federal civil rights laws, Section 504 of the Rehabilitation Act (2012) is a so-called *unfunded mandate* to the extent that it "does not have a specific funding stream attached to it" (Weber, 2010, p. 16). Students in K–12 public schools who are not eligible for an individualized education plan (IEP) may qualify for individual accommodations and services under Section 504 under what is commonly called a "504 plan" and with attendant procedural safeguards that represent other legalized transaction costs, such as formalized notice, reevaluation, and hearings or investigations (e.g., Zirkel & McGuire, 2010). Evaluating the costs and benefits of Section 504 in relation to K–12 students, including the social justice in distributing its coverage, requires national frequency figures—akin to the data for students with IEPs—of students with 504 plans.

Comparative Categories

Eligibility under Section 504 requires having a mental or physical impairment that substantially limits one or more major life activities. It is generally understood that this scope of eligibility is broader than the definition of disability under the IDEA. Eligibility under the IDEA requires meeting the criteria of one or more specified classifications and, by reason thereof, needing special education (e.g., Hensel, 2009; Weber, 2012; Zirkel, 2011b, 2012b). As a result of the broader Section 504 definition of disability, K–12 students who are eligible under Section 504 fit into one of two subcategories. First, students with IEPs generally are "double covered," that is, they meet both eligibility definitions. Second, students who do not qualify under the IDEA definition of disability but who meet the Section 504 eligibility definition are "504-only," with their individually appropriate accommodations and services typically specified in a 504 plan. Thus, with a limited nuanced exception in the "Discussion" section, this article uses interchangeably the terms *504-only* and *students with a 504 plan*.

Comparable Data

The data concerning students with IEPs under the IDEA are extensive, including the annual reports to Congress by the U.S. Department of Education's Office of Special Education Programs (OSEP). For example, based on the annual data that the Department collected from school districts, via state education agencies, Zirkel (2013) reported that the

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proportion of K–12 student enrollments with IEPs increased steadily from 11.3% in 1995–1996 to 12.5% in 2003–2004 and thereafter gradually dropped to 11.7% in 2011–2012. Yet, the national data concerning 504-only students are scant. Without these data, policy makers and practitioners can only guess at the magnitude of this group and the assignment patterns in terms of student and school characteristics. Of particular concern has been the disproportionate representation for the corresponding group of IEP (i.e., double-covered) students in terms of race and gender; however, this issue remains limited to speculation in the absence of high-quality national data and analysis.

This article represents a springboard step to address this gap in the research literature by using the most recent set of national data from the agency that administers Section 504 for K–12 students, the U.S. Department of Education's Office for Civil Rights (OCR). This source represents the first governmental basis for examining the national prevalence of 504-only students. The purpose of this study is to analyze these data to determine not only this national percentage but also its relationship to identified student characteristics, such as race/ethnicity, and school characteristics, such as Title I status.

Background Framework

The scarcity and meaning of the national Section 504 student data are best understood in a three-stage framework. The relatively short intermediate and dividing stage was the 2008 amendments to the Americans With Disabilities Act (ADA; 2012), which applied—based on its sister-statute status—to Section 504. President Bush signed these amendments into law on September 25, 2008, and they went into effect on January 1, 2009. As explained below, these amendments broadened the interpretation of the eligibility standards for Section 504-only students. Thus, the first stage was the period before these amendments, and the third stage was the current, post-amendments period.

The Early Stage

The literature concerning Section 504 is relatively plentiful, as illustrated in Zirkel's (2012c) summary sampling, but quantitative research studies on the national level have been in short supply. Numerous experts have long emphasized the need for national estimates of the number of Section 504-only students for various purposes, including as a frame of reference in helping to determine over- and under-identification (Katsiyannis & Conderman, 1994; Russo & Morse, 1999). Moreover, early news accounts claimed that Section 504 plans, particularly those providing extra time on high stakes tests, such as the College Board's SAT, were disproportionately overrepresented in wealthy suburbs and disproportionately underrepresented in the inner city (Gross, 2002; Weiss, 2000). Such disproportionality may well signal abuses in terms of social justice, but objective data on the national level have been limited to the period prior to ADA amendments.

Specifically, in the only national study during this first stage in relation to the ADA amendments, Holler and Zirkel (2008) analyzed data based on a mailed survey of a random sample, finding that the proportion of 504-only students in K–12 public schools was 1.2% of the entire public school population. Moreover, they found that the percentage was significantly higher in secondary schools than in elementary schools. In contrast, differences among school settings (i.e., rural, suburban, urban) and in school wealth (based on the percentage of free and reduced-price lunches) were not statistically significant. However, the measures of these respective variables were not sufficiently precise in terms of reliably differentiated settings and direct measures of student socioeconomic status. Moreover, their results applied to the time of data collection, which was fall 2005, and the response rate of 45.2% limited their estimated findings.

For the relatively low overall percentage of 504-only students, Holler and Zirkel (2008) explained that the courts' consistently narrow interpretation of the Section 504 eligibility criteria had been a major contributing factor. For example, prior to the ADA amendments, the U.S. Supreme Court had interpreted Congressional intent as being "demanding" with regard to eligibility (*Toyota Motor Manufacturing v. Williams*, 2002, p. 197), including whether the affected function qualified as a major life activity. Similarly, the Court ruled that the measurement of whether the impairment's limitation of a major life activity was substantial must be with—not without—mitigating measures, such as medication (e.g., *Albertson's, Inc. v. Kirkingburg*, 1999). Although these decisions were in the employment sector, the lower courts followed their stringent application in the student sector as well.

2008 ADA Amendments

Making clear that the Court had misinterpreted the statutory intent of the ADA and its sister statute, Section 504, Congress enacted the ADA amendments of 2008. More specifically, Congress targeted the courts' interpretation of the second and third definitional criteria—major life activity and substantial limitation. Among the major interpretive standards for the definition of disability, which is identical under both Section 504 and the ADA, the amendments (a) expanded the illustrative list of major life activities and (b) directed that *substantial* be determined without mitigating measures and, for impairments that are episodic or in remission, be estimated liberally for the active time (e.g., Zirkel, 2009a).

Post-ADA Amendments

As a result of the amendments, Hardcastle and Zirkel (2012) predicted a "new" Section 504 (p. 32), and Hensel (2009)

similarly concluded that it "undoubtedly expand[ed] eligibility for students with disabilities in elementary and secondary school seeking accommodations pursuant to § 504" (p. 684). However, the specific extent of the expanding effect on the proportion of 504-only students has remained speculative in the absence of national data subsequent to the amendments. Although OCR has previously compiled survey data, it was not until the 2009–2010 Civil Rights Data Collection (CRDC) that its survey form included differential information for students with IEPs and students who are 504-only.

The published use of this national database has been limited to date and not specific to 504-only students. For example, Losen and Gillespie (2012) found that the suspension rates were disproportionately high for Black students and students with disabilities in K–12 schools. However, they did not analyze such rates for 504-only students "because their data are not disaggregated by race" (Losen & Gillespie, 2012, p. 52). On the contrary, a short news article in the *Chicago Tribune* compared the 504-only results for its metropolitan area, reporting that the affluent, predominantly White suburban districts had much higher proportions of students with 504 plans than Chicago's inner-city schools (Rado, 2012).

Method

As part of its enforcement and monitoring efforts, and as a service to other government agencies and interested parties, OCR has collected data in the nation's public schools since 1968. The CRDC, formerly the Elementary and Secondary School Survey, is a mandatory data collection process for a national sample of U.S. schools, authorized under the various statutes and regulations that OCR administers in the context of K–12 education, including Section 504 of the Rehabilitation Act of 1973. At the time of our analysis, only the data from the 2000, 2004, 2006, and 2009–2010 administrations were publicly available from U.S. OCR (n.d.-a).

Data Source

The data source for this study is the 2009–2010 CRDC. Part 1 reported beginning-of-year enrollment data, and Part 2 contained end-of-year results data. The Part 1 data included school characteristics, such as the type of school (e.g., charter school), and student characteristics, such as whether the student was 504 only. Although the *CRDC Data Notes* (U.S. OCR, n.d.-b) show that the web-based data collection for Part 1 occurred during the period from March 29 to June 4, 2010, the instructions were to "use a count on a single day between September 27 and December 3, [2009]" (p. 3). The national sample from these data consisted of approximately 7,000 school districts encompassing approximately 70,000 schools. Unlike the stratified random sample that the National Center for Educational Statistics uses for such data collection projects as the Schools and Staffing Survey, the CRDC sample is limited to districts with more than 3,000 students. Although amounting to nearly half of the nation's districts, the sample represents approximately 85% of all public school students. As a result, per Losen and Gillespie's (2012) conclusion, it provides for reasonable, although not completely representative, national estimates.

Data Limitations

These CRDC data have several limitations, in addition to the less than ideal sampling, that may affect the validity of the results. Specifically, the limitations include the following: (a) The data are district self-reports, thus being subject to inadvertent or even deliberate inaccuracies; (b) OCR's data collection policy allowed sampled districts to choose between two racial category reporting schemes, thus causing imprecision in calculating racial data across schools; and (c) the CRDC reported school-level student counts rounded to the nearest 5, thus causing inaccuracy to the limited extent that the rounding did not balance out across 70,000 schools. These limitations merit additional details.

Self-reports. Self-reporting survey data are open to biased inaccuracies or incompletions. Such consequences are particularly likely when survey form is technically complex and/or particularly time-consuming. The CRDC surveys are complex to the extent that they require the retrieval and reporting of student information that poor rural and urban schools may have less technological means of capturing and accurately reporting. On an overlapping basis, completion of the survey forms is time-consuming. According to U.S. OCR's (n.d.-c) *2009–10 CRDC Table Layouts With Definitions*,

> The time required to complete this information collection is estimated to average 12.8 hours per school survey response and 2.8 hours per local education agency (LEA) survey response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. (p. 1)

In light of these two overlapping factors, OCR attempted to ensure accuracy and completeness via technology-based checks and district-superintendent accountability. More specifically, U.S. OCR (n.d.-b) reported in its *CRDC Data Notes*:

> The submission system includes a series of embedded edit checks to ensure data errors are corrected before the district submits its data. Additionally, each district is required to certify the accuracy of its submission. Only a district superintendent, or the superintendent's designee, may certify the CRDC submission. Ultimately, the quality of the CRDC data depends on accurate collection and reporting by the participating districts. (p. 1)

Nevertheless, OCR has both acknowledged and responded to the inaccuracy for some districts (Shah, 2013; Shah & McNeil, 2013).

Racial/ethnic categorization. For the 2009–2010 CRDC, OCR offered the sampled school districts the choice between two schemes for racial/ethnic identification of students: (a) five categories, each with official criteria—Black/African American, Hispanic/Latino, White, Asian/Pacific Islander, and American Indian/Alaska Native, or (b) seven categories—the same first three plus Asian, Native Hawaiian/Other Pacific Islander, American Indian/Alaska Native, and two or more races. Approximately 25% of the districts opted for the seven-category system, which included a multiracial category in line with recent revisions of the U.S. Census. However, the categories beyond the first three—summarily referred to here as Black, Hispanic, and White—accounted for less than 1% of the total student sample. Consequently, we limited our analysis to three largest ethnic groups, Whites, Blacks, and Hispanics, thus allowing for combining the two alternative schemes for these in-common categories. A more complete analysis of disproportionate representation, which extended to the other categories, would warrant a different approach that would be skewed to the extent that schools choosing the seven-category option are more likely to be high-minority and high-poverty districts.

Rounding. In the data that the OCR has made available to the public for research and other uses, the student counts at the school level have been rounded to the nearest five. For example, if a school reported four students as 504-only, the corresponding count in the public data file is "5." Clearly, such a decision limits the precision of any estimates derived from these data, especially when it comes to distinguishing true zero counts from those that have been rounded down to zero. However, given the very large sample of schools and the resulting balancing effect in calculating averages, it is likely the net imprecision is relatively small.

Research Questions

Based on OCR's CRDC data for 2009–2010, these are the questions that our analysis addresses:

Research Question 1: What is the percentage of 504-only students?
Research Question 2: Is the distribution of 504-only students significantly different from the general K–12 school population with regard to (a) race/ethnicity and (b) gender?
Research Question 3: Is there a significant difference in the proportion of 504-only students by these school characteristics: (a) charter versus non-charter, (b) Title I versus non-Title I, and (c) low versus high IEP percentage schools?

Although we had originally planned to examine additional questions based on other CRDC survey variables, such as school setting and discipline (e.g., harassment/bullying and restraints), these data were not available on a disaggregated basis for 504-only students.

Data Analysis

To answer these various research questions, we applied two primary methods: simple calculation of percentages and a *z* test for the difference between two proportions to determine whether differences were statistically significant. The primary variable of interest in these analyses is the number or proportion of 504-only students per school. This category is non-overlapping with the IDEA category because U.S. OCR (n.d.-c) instructed sampled districts and schools to count separately "students under IDEA and those served under Section 504 only" (*2009–10 CRDC Table Layouts With Definitions*, p. 5). The other selected student variables (race/ethnicity and gender) and school variables (low percentage IEP and high percentage IEP, charter vs. non-charter, Title I vs. non-Title I status) were the variables for which information was available for 504-only students.

Results

The findings are reported sequentially in relation to the three research questions. For clarity, these research questions are repeated below as headings for the respective findings.

Research Question 1: What is the percentage of 504-only students?

In response to the primary question of this study, 433,980 of the CRDC sample of 42,330,315 students were 504-only. Thus, the overall proportion was 1.02%.

Research Question 2: Is the distribution of 504-only students significantly different from the general K–12 school population with regard to (a) race/ethnicity and (b) gender?

Table 1 provides the analysis for 504-only students by race/ethnicity. This table shows racial/ethnic disproportionality. More specifically, the percentage of White students who are 504-only is significantly higher than the percentages for their Black or Hispanic counterparts. Although statistical significance is not difficult in light of the size of the

Table 1. Relative Likelihood of Receiving a 504 Plan in K–12 Public Schools by Race/Ethnicity.

Race/ethnicity	504-only students[a]: School-level proportion	Difference from White percentage	Full sample overall proportion
Hispanic	0.50%	0.76%***	20.93%
Black	0.57%	0.69%***	18.92%
White	1.26%	—	52.88%

[a]Calculated based on the following: Ethnic group 504-only total/total ethnic group enrollment.
***Statistically significant at the $p < .001$ level.

Table 2. Relative Likelihood of Receiving a 504 Plan in K–12 Public Schools by Gender.

Race/ethnicity	504-only students[a]: School-level proportion	Difference	Full sample overall proportion
Female	0.76%	−0.51%***	48.61%
Male	1.27%	—	51.39%

[a]Calculated based on the following: Gender group 504-only total/total gender group enrollment.
***Statistically significant at the $p < .001$ level.

Table 3. Relative Likelihood of Receiving a 504 Plan by K–12 School Percentage of IEP Students.

IEP	504-only students[a]: School-level proportion	Difference	Full sample overall proportion[b]
Low IEP school	0.97%	−0.12%*	3.97%
High IEP school	1.09%	—	7.36%

Note. IEP = individualized education plan.
[a]Calculated based on the following: Total 504-only school type/total general education students school type. [b]Percentage of students with IEPs in the full sample for the low and high IEP schools (with those schools higher than the median thus accounting for a larger percentage of IEP students).
*Statistically significant at the $p < .05$ level.

sample, the size of the difference is practically significant. More specifically, across the whole sample, the White students are more than twice as likely (1.26%) to have a 504 plan than their Black (0.57%) or Hispanic (0.50%) classmates.

The corresponding analysis for 504-only students by gender is presented in Table 2. Review of this table reveals a similarly statistically significant although moderately less disproportionality by gender. More specifically, the percentage of male students who are 504-only is significantly higher than the percentage of female students who are 504-only. Thus, male students are more likely to receive a 504 plan than are their female classmates.

Research Question 3: Is there a significant difference in the proportion of 504-only students by these school characteristics: (a) charter versus non-charter, (b) Title I versus non-Title I, and (c) low versus high IEP percentage schools?

The next three tables reexamine the 504-only group with regard to selected school characteristics. Table 3 provides calculations for the difference in the proportion of 504-only students between the schools with a relatively high percentage and those with a relatively low percentage of students with IEPs. The dividing line between the high and low IEP subsamples was the median for the proportion of IEP students per school, which was 11.36%.

Table 3 reveals that the difference between relatively high percentage and relatively low percentage IEP schools (−.12%) is statistically significant at the less stringent but conventional .05 level. Thus, to a modest but generalizable extent, schools with a higher percentage of IEP students also tend to have a higher proportion of Section 504 students. The limited extent of this connection is evident in the overall correlation of .376 between the school proportion of 504-only and IEP (double covered).

Table 4 provides the analysis of 504-only student by a more clearly distinguished school type, specifically whether the charter school designation applies. This table shows that the small segment of students in the total sample in charter schools are significantly less likely to have a 504 plan than their counterparts in general education (non-charter) public schools. The difference of .22% is less pronounced than that for race/ethnicity and gender, respectively.

Finally, Table 5 presents the corresponding analysis for Title I versus non-Title I schools. Review of this table reveals that students in Title I (high poverty) schools are

Table 4. Relative Likelihood of Receiving a 504 Plan by K–12 Public School Type.

School type	504-only students[a]: School-level proportion	Difference	Full sample overall proportion
Charter	0.81%	−0.22%***	1.56%
Non-charter	1.03%	—	98.54%

[a]Calculated based on the following: Total 504-only school type/total general education students school type.
***Statistically significant at the $p < .001$ level.

Table 5. Relative Likelihood of Receiving a 504 Plan by K–12 Public School Title I Status.

Title I status	504-only students[a]: School-level proportion	Difference	Full sample overall proportion
Title I	0.84%	−0.39%***	52.90%
Non-Title I	1.23%	—	47.10%

[a]Calculated based on the following: Total 504-only school type/total general education students school type.
***Statistically significant at the $p < .001$ level.

significantly less likely to receive a 504 plan than those in non-Title I schools. The difference of .39% is larger than the difference (.22%) for charter versus non-charter schools.

Discussion

Overall Percentage

In response to the first research question, based on the fall 2009 CRDC survey, 504-only students accounted for approximately 1% of public student enrollments nationally, thus remaining basically at the same level as Holler and Zirkel (2008) estimated in their fall 2005 survey. The specific percentage is slightly lower, but the differences in methodology in all likelihood account for that limited difference. For example, their survey was a private mailing to a random sample of approximately 1,200 schools, yielding a response rate of 45%, whereas the CRDC was a web-based governmental survey to 70,000 schools in districts with enrollments above 3,000 students, yielding a response rate of 100% (U.S. OCR, 2012a). The lack of "dramatic" expansion (Weber, 2012, p. 618) as a result of the 2008 ADA amendments is most likely attributable to a combination of two factors.

First, the awareness and implementation of these amendments, which went into effect on January 1, 2009, was probably too slow in many school districts to make a significant difference 10 to 12 months later, which—depending on the sampled district's choice of the count day—was the basis for the reported 504-only data. Contributing to this delay was that the legislative changes were under the general ADA rubric, and thus not directly and prominently associated with Section 504 in the school context. Also contributing to the belated effect was the multistep process for implementation, including (a) the dissemination of the information concerning the effect of the ADA on 504-only student eligibility, which did not first appear from U.S. OCR (2009) or in the professional literature (e.g., Zirkel, 2009b) until fall 2009; (b) the transmission of the information from colleagues, which is the principal source of legal information for many administrators (e.g., Militello, Schimmel, & Eberwein, 2009); (c) the revision in policies and procedures at the district level, which can be particularly cumbersome in the larger districts that formed the CRDC survey sample; and (d) the actual implementation of the revised standards to identify the newly eligible students. The generally low level of district in-service training with regard to Section 504 requirements (e.g., Madaus & Shaw, 2008) is also a contributing factor to the belated or imprecise implementation of these standards.

Second, it may well be that, as Holler and Zirkel (2008) concluded, their survey results may, on balance, have represented a more expansive implementation of the eligibility standards than those applicable prior to the ADA amendments. One reason is that districts in litigious areas tended to provide a 504 plan as a "consolation prize" (Holler & Zirkel, 2008, p. 31), as a preventive or defensive mechanism to avoid parental resort to legal action, which could be an OCR complaint, a due process hearing, or a lawsuit (e.g., Zirkel & McGuire, 2010). Another reason is that, as their additional survey items reflected, the responsible school representatives often had an expansive interpretation of the eligibility criteria, particularly the definitional elements of major life activity and substantial limitation, that seemed to reflect professional norms rather than legal requirements. This normative tendency is not unusual with regard to students with disabilities (e.g., Zirkel, 2011a). Although some districts instead appeared to under-identify 504-only students, Holler and Zirkel concluded that the expansive skew of the other districts tended to be the predominant and thus net effect.

In contrast, a third possible explanation is unlikely to have contributed to the lack of expansion. More specifically,

based on the ADA amendment's new interpretive standards for the effects of mitigating measures and episodic impairments, U.S. OCR (2012b, Q9–Q11) has concluded that a student may fit within a district's *child find* obligation under Section 504 but, after the requisite evaluation, may not need any accommodations or services. Thus, Richards (2012) referred to such students as "technically eligible" (p. 7), meaning that the district must provide procedural safeguards and nondiscrimination protection but not a 504 plan. Although theoretically dampening the post-amendment's percentages of 504-only students, such nuances are unlikely to have affected the 2009–2010 CRDC results due to districts' generally slow and imprecise compliance and the survey form's request for the number of "Section 504 only" students rather than students with Section 504 plans.

Race/Ethnicity and Gender

In response to the second research question, the disproportionate percentages in terms of race and gender are not surprising in light of the persisting differentials, and underlying reasons, with respect to IDEA enrollments. For example, in an analysis of the data for 18,000 students in a large, urban district, Sullivan and Bal (2013) found that students' race and gender were significant predictors of identification under the IDEA. Similarly, national data for fourth and eighth graders revealed higher percentages of students with IEPs for Black and—except for Grade 4—Hispanic children than for White children and more markedly higher percentages for males than females at both grades (Ruiz-Quintanilla, Featherston, & Houtenville, 2009). This issue, particularly for race, is a complex one that includes a variety of societal and institutional factors (e.g., Artiles, Kozleski, Trent, Osher, & Ortiz, 2010; DiCosmo, Hayman, & Mickman, 2013), and the pattern varies within the IDEA classifications (e.g., emotional disturbance and intellectual disabilities vs. specific learning disabilities; see, for example, Hosp & Reschley, 2004; Kauffman & Landrum, 2010; Skiba et al., 2008). However, the reverse trend for the 504-only group, which suggests under-, rather than over-, identification for Black and Hispanic students, is even more complicated because the interaction with the identification pattern for the double-covered category becomes more prominent.

The reverse racial disproportionality for students with 504 plans may be attributable to the interaction between pressures against over-identification of students with IEPs in general (i.e., regardless of race) and (a) the litigiousness of parents in upper-income suburbs of major metropolitan centers, (b) their reported competitive gamesmanship for SAT/ACT accommodations, and (c) districts' purported "consolation prize" use of 504 plans. Additional factors also implicate interactions with parental poverty and school characteristics. These factors may include (a) significant and subtle differences from the IDEA, ranging from the lack of any federal or state funds for Section 504 to the oft-neglected or oft-confused requirements for a grievance procedure and impartial hearing under Section 504 (e.g., Zirkel, 2012b, 2012c); (b) a parallel pattern for the use of prescription medication for children's behavioral or emotional difficulties, which suggests the interplay among various factors, including the effects of economic pressures and cultural values on parental choices (Howie, Pastor, & Lukacs, 2014); and (c) the difference between the "lore," that is, prevailing perceptions/practices, and "law," that is, specific legal requirements of Section 504 (Zirkel, 2012a).

Unfortunately, empirical evidence regarding and scholarly attention to this multifaceted issue are lacking. These initial findings should be a stimulus for not only further research and scholarship but also OCR attention and action. Thus far, OCR—like OSEP (e.g., Letter to Woolsey, 2012) and the courts (e.g., *Lee v. Macon County Board of Education*, 1967)—has focused on racial disproportionality issues for double-covered students (e.g., *Schenectady City School District*, 2013; *Sun Prairie Area School District*, 2013). The most recent federal administrative guidance, which OCR issued jointly with the Department of Justice and which cited CRDC data, focused on racial/ethnic disproportionality of discipline with only passing mention of double-covered students and without any consideration of the interconnection with 504-only students (Dear Colleague Letter, 2014).

Low Versus High IEP Schools

In response to the third research question, the significantly although only modestly higher proportion of 504-only students in the so-called "high IEP" schools seems to suggest that a propensity for legal labeling that extends beyond the IDEA to Section 504 identification processes may be one contributing factor to the relatively higher levels of Section 504 students in these schools. If so, this formal identification tendency may be associated in part with the aforementioned litigious culture anecdotally reported for affluent suburbs. However, the limited difference and the only medium correlation more strongly suggest an explanation that requires more complete and precise empirical examination, which is beyond the scope of this study and the 2009–2010 CRDC data. For example, it may be that the same districts that are under pressure from competitive parents for advantageous accommodations but also have to contend with state authorities and/or local taxpayers to keep IDEA numbers down tend to engage more heavily in the "consolation prize" mentality for shifting to 504 plans. However, these two pressures are not coterminous in their application. Moreover, the race- and poverty-related results in this study show that the pattern is a complex one, meriting a multifactored approach, including, for example, a path or logistic regression analysis.

For this third question, the incidental finding of a median school proportion of 11.36% for the IEP, or double-covered, students generally squares with the aforementioned OSEP enrollment surveys (Zircon, 2013). For a more direct comparison, the mean for the students—as contrasted with the median for the students—was 10.98%, which is modestly lower than the OSEP mean for IEP students in 2009–2010.

Charter Versus Non-Charter and Title I Versus Non-Title I Schools

For the other parts of the third research question, the disproportionality for the remaining identified school characteristics—charter and Title I status—is also a new, but not unexpected finding. For charter schools, the significantly lower percentage of 504-only students, as compared with the non-charter schools, is in line with the corresponding pattern for IDEA students. More specifically, for the same school year of 2009–2010, the U.S. Government Accountability Office (2012) reported that approximately 11% of students in traditional schools had IEPs under the IDEA compared with about 8% of students enrolled in charter schools. The reasons are likely similar, including the lack of institutionalized procedures for specialized legal compliance, but there may well be nuanced differences. Interestingly, the legal scholarship concerning charter schools in relation to students with disabilities has focused entirely on the double coverage of students with IEPs (e.g., Garda, 2012; Wieselthier, 2013). These first-time data on 504-only students in charter schools serve as a catalyst for a second stage of research and scholarship.

For Title I schools, the statistically significantly lower percentage of 504-only students, in comparison with non-Title I schools, tends to support the aforementioned news media reports of under-identification in high-poverty areas. The results do not square with Holler and Zirkel's (2008) finding of no significant difference for the correlative school-wealth variable of percentage of free and reduced-price lunches. However, their procedure was to analyze differences among multiple categories (e.g., 0%–9%, 10%–20%, 21%–30%, and 31%–40%) rather than the dichotomous analysis of Title I versus non-Title I. Thus, their results may be attributable to the smaller cell sizes and, thus, lower degrees of freedom for statistical significance in their analytical approach. Alternatively, their survey approach may have resulted in less accurate data because their respondents were 504 coordinators who may not have known the specific percentage of free/reduced-price lunch students for their respective schools. Other reasons for the seeming conflict in findings may be (a) the lower response rate and sample size in Holler-Zirkel, (b) a possible change from fall 2005 to fall 2009, and (c) differences between the two indicators of school wealth. In any event, such conclusions about wealth, which fit with a capitalist system, merit much more precise indicators of the child's socioeconomic status than this school-based partial proxy and the interaction of other variables, including the child's racial/ethnic status, the parents' assertiveness (e.g., threats of legal action), and the particular school/community culture.

Leadership Implications

Overall, these initial results suggest that the costs of the eligibility-extending ADA amendments on K–12 schools with regard to students have not changed notably, but the identification process has yielded inequitable results in terms of race/ethnicity, gender, and poverty. These findings are rather clear-cut, pending further application of the ADA amendments. These Section 504 student eligibility issues warrant awakened consideration—in comparison to and interaction with parallel issues for IEPs under the IDEA—by both practitioners and policy makers.

The thus far unchanged overall incidence of students on 504 plans and their significantly different distribution in relation to students' race and gender and in relation to selected school characteristics, such as IEP-prevalence and Title I status, seems to suggest a less than diligent and consistent adherence to the eligibility criteria under Section 504. Compared with the identification of students under the IDEA, the attention to identification of students under Section 504 has been clearly neglected and potentially abused. Even the analyses and other activities of OCR, the enforcing agency for Section 504 in relation to K–12 schools, have largely missed these lessons in the CRDC data, focusing instead on discipline and double-covered students. Rather than being based on the particular culture of the school and its intersection with the presence or absence of parental pressure, district personnel need to base identification on careful and close adherence to the child find and eligibility requirements under Section 504, which are similar to but distinct from those under the IDEA.

Research Recommendations

Nevertheless, this initial post-ADA amendments' examination of 504-only data invites further analyses of the 2009–2010 CRDC database, such as the extent and nature of differences among the states and among local school districts. Equally or more importantly, this exploratory examination not only provides an analytical template for but also extends the value of the next rounds of CRDC data collection. First, according to U.S. OCR's (n.d.-c) CRDC website, the data from the subsequent biennial survey for the 2011–2012 school year, which included every school rather than only those with 3,000 or more students, are newly available. Obtaining the full data set can resolve the rounding limitation of our 2009–2010 data (for entries of less than 5) and can ascertain whether the expected expansion has ripened, but it

will require considerable time and resources. Second, OCR is currently using the regulatory process to determine the scope of an expanded survey (see http://www.regulations.gov/#!documentDetail;D=ED-2013-ICCD-0079-0304). Finally, more current and comprehensive empirical research concerning school officials' knowledge and implementation of the student requirements of Section 504, including eligibility criteria, is warranted. Thus, this exploratory analysis serves as a stimulus and starting model, not the culminating step or final formulation, for more systematic and current attention to the second and too often neglected group of students with disabilities—those who are 504-only.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

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