

1

<b>ACRONYMS</b>	
<b>ADA</b>	Americans with Disabilities Act
<b>FAPE</b>	free appropriate public education
<b>IDEA</b>	Individuals with Disabilities Education Act
<b>IEE</b>	independent educational evaluation
<b>IHP</b>	individual health plan
<b>LC</b>	long COVID
<b>MTSS</b>	multi-tiered system of supports
<b>OHI</b>	other health impairment
<b>OCR</b>	Office for Civil Rights
<b>OSERS</b>	Office of Special Education and Rehabilitative Services
<b>RTI</b>	response to intervention
<b>§ 504</b>	Section 504 of the Rehabilitation Act

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2

## EMERGING BASELINE

- limited and heterogenous evidence based on low quality studies thus far, with primary symptoms being fatigue, headaches, and joint pain and unclear duration for either minimum or ending pt. (Pellegrino et al., 2022)
- significant problems in memory but not for concentration, social, or emotional-behavioral issues in preliminary study in Israel (Schachar-Lavie et al., 2023)
- wide disparity between advocacy perceptions and school district practices (Gewertz, 2022)

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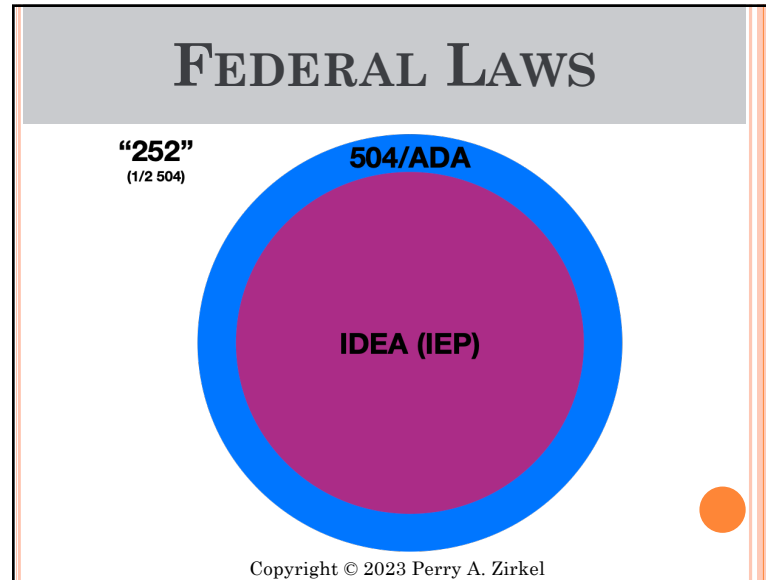
3

## LEGAL AWARENESS

- most of the legal attention to date, both in the literature and in the litigation, concerns the eligibility and accommodations under Section 504 and the ADA for **employees**, whether in companies generally or at education institutions specifically, as contrasted with K–12 students
  - different eligibility standard for “qualified” under Section 504/ADA
  - no applicability of the IDEA to employees

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4



5

## IDEA **CHILD FIND**

Ongoing obligation for initiating evaluation within reasonable period after reasonably suspecting that the child may be eligible under the IDEA.

- reasonable suspicion is most often the key in the long line of judicial rulings to date (e.g., Zirkel, 2020a)
  - multiple factors
  - 2:1 in favor of defendant districts
  - often based on need for special education

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6

## IDEA ELIGIBILITY

Two-pronged definition:

classification (e.g., OHI) → need for special ed.  
“by reason thereof”

1. OHI: limited strength, alertness or vitality that
  - (a) is due to a chronic or acute health problem
  - and -
  - (b) adversely affects educational performance
2. need for special education: blurry boundary
  - “content, methodology, or delivery of instr.”
  - v. general ed. interventions – MTSS/RTI
  - role of experts, including IEEs and school personnel

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7

## IDEA FAPE

FAPE = special education and related services

- via an individualized education program (IEP)
- 3 judicial dimensions:
  - procedural: 2-step test (violation + loss)
  - substantive: *Endrew F.* reasonably calculated std.
  - implementation: *Van Duyn* materiality std.

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8

## § 504/ADA

Child find: same as under the IDEA but tied to reasonable suspicion of § 504/ADA eligibility

### Eligibility: 3-pronged standard

- mental or physical impairment limiting
- a major life activity – e.g., thinking, concentrating, eating, sleeping
- **substantially**
  - without mitigating measures
  - in relation to the general population
  - not just degree, but also duration (~ 2–6 mos.)

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9

## § 504/ADA (CONT.)

FAPE: special education or related services

- reasonable accommodation standard
- with mitigating measures (Zirkel, 2023)

Moreover, at least for the remedy of money damages, the plaintiff-parent must show a proxy for intentional discrimination, such as deliberate indifference, bad faith, or gross misjudgment (e.g., Zirkel, 2018).

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10

## COVID-19 CASE LAW

Generally, the case law, especially at the judicial level, has been low in frequency and moderate in parental “success.” (Zirkel, in press).

- IDEA hearing/review officer decisions – lower in no. and not quite as successful than expected
- IDEA state complaint decisions – a bit more varied in frequency and more strict re procedural compliance
- OCR investigations – more affirmative but limited in no. and negligible in legal weight
- court decisions – low frequency thus far and temporary success under § 504/ADA class actions

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11

## COVID-19 “GUIDANCE”

OCR/OSERS (2021):

- reminder of possibly child find and eligibility under the IDEA or Section 504, including those with an IEP or 504 plan for other conditions
- mentions resulting Sec. 504 FAPE examples of “additional time to finish classwork and tests” and “reasonable modification to attendance policy”

OSERS (2021):

- IDEA child find: “If a child experiencing symptoms from [LC] is suspected of having a disability (e.g., [OHI]) and needs special education ..., they must be referred for an initial evaluation ....”

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12

## LC CASE LAW

*ARC of Iowa v. Reynolds*, 559 F. Supp. 3d 861 (D. Iowa 2021); see also *Stepien v. Murphy*, 574 F. Supp. 3d 274 (D.N.J. 2021)

- mentioning LC in factual background of larger plaintiff group in granting temporary restraining order against statewide ban of mandatory masking in schools (but subsequently vacated as moot, although still subject to continuing litigation)

*Norwegian Cruise Line Holdings v. State Surgeon Gen.*, 50 F.4th 1126 (11th Cir. 2022)

- mentioning LC in dissent to vacating preliminary injunction against Fla. law that bans businesses from requiring proof of vaccination

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13

## LC CASE LAW

*Abrams v. Unum Life Ins. Co.*, \_\_\_ F. Supp. 3d \_\_\_ (W.D. Wash. 2022)

- expressed doubt that lawyer had LC (despite 3 doctors' diagnoses) while ruling that he was entitled to long-term disability benefits under insurance policy applying to sickness generally

*Baum v. Dunmire Prop. Mgmt., Inc.*, 2022 WL 889097 (D. Colo. Mar. 25, 2022)

- rejected associational discrimination claim under the ADA for terminated employee because father's COVID condition lasted less than the long-term ("for months") duration in federal guidance

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14

## LC CASE LAW

*Whitebread v. Luzerne Cnty.*, 2023 WL 349939 (M.D. Pa. Jan. 20, 2023)

- dismissing § 504/ADA of employee for lack of specific evidence re diagnosis and the nature and length of symptoms

*Wood v. Bristol Va. Util. Auth.*, \_\_\_ F. Supp. 3d \_\_\_ (W.D. Va. 2023)

- dismissing ADA failure-to-accommodate claim of employee with LC (issue of eligibility not at issue) for failure to show that he could perform the essential duties of his job with reasonable accommodations

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15

## NON-LEGAL LEVEL

Beyond the foundational level of legal requirements is the higher professional/ethical level of educational practice.

- In relation to legal requirements, do not confuse prohibited (below) with permissive (above) or assume that ethical obligations are coterminous.
- For LC, as with other diverse and school-relevant individual conditions, the available and appropriate responses **above** legal requirements include:
  - IHPs (e.g., Zirkel & Brown, 2015)
  - RTI/MTSS
  - effective common sense

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16



## TENTATIVE CONCLUSIONS

IDEA: the child with LC faces an uphill slope with the likely key to child find and eligibility being the need for special education

§ 504/ADA: similar uphill slope with the likely key to child find and eligibility being whether the impairment on one or more major life activities is substantial in not only degree but also duration

For the larger residual group, the primary focus should be on the **professional/ethical obligation** to provide each one with a responsively effective environment, analogous to the return-to-school protocols for students with concussions and not limited to IHPs.

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17

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18

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19

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20

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