SPEAKER: I'd like to introduce Perry Zirkel to you. He is a university professor of education and law at Lehigh University, where he was formerly the dean of the College of Education and more recently held the Iacocca Chair in Education for a five-year term. He has written more than 3,350 publications -- 1,350. Either way, 1,350, 3,000. Publications on various aspects of school law with an emphasis on legal issues and special education. He writes a regular column in Phi Delta Kappa, another for Principal magazine, and a third for -- more recently for Teaching Exceptional Children.

He's the past president of the Education of Law Association and the co-chair for the Pennsylvania special education appeals panel from 1990 to 2006. He is the author of the two-volume reference book, Section 504: the ADA and Schools from LRP Publication. So you're in for a treat. Perry is welcoming questions as he is going through, so please feel free to ask him questions. And I will tell you our session is being recorded, so I'm going to ask you to please make sure your phones are on vibrate or shut off. Give yourself a break from them. That's always a good thing. And also please limit the sidebar conversations as the taping will pick up sounds and conversations. Please help me welcome Perry.

PERRY ZIRKEL: Welcome, everyone. We're going to get the handouts to you very quickly. There are two of them. One of them has to do with 504, which will be our opening session. The second one will be on RtI, or what some of you call RtII or MTSS. Let me reinforce what has just been said with regard to questions. As I move through this material, if a question occurs to you relating to the particular slide, just simply get your hand up or yell out so that I could see you, and I'll repeat the question so that we can cover the material with some informal interaction.

Can the folks in the back row hear me okay? Great. And you can see well? That's good too. One little sort of non-commercial commercial. Some folks had asked me about our Lehigh programs in special ed law. We have our one-day conference, which is now in its something like 41st repetition. It's not quite annually, but for 41 times we've done it. And that will be I think it's May 10th. If you just simply google Lehigh special ed law conference.

Then there's a one-page sheet. The young lady in the blue dress, if you see her hand, right in front of her there are copies of a one-page sheet describing our one-week long for credit or for non-credit or for Act 48 credit, the special ed law symposium the last week in June at Lehigh, which should be excellent. This -- we're very excited about the presenters that we have.

Now with that, let's go now to this first topic. Many of you know something about section 504 and use it or Pennsylvania's regulations version, which is Chapter 15, Chapter 15 and 504 being the same thing. Many of you use it as sort of a consolation prize if a child doesn't make it under IDEA. And we'll examine that sort of practice and some other prevailing concepts.

And what we'll find is that some of the things that you do in practice are really not legally justifiable in an objective sense. Nevertheless, you may choose in terms of risk management to continue them on the concept that, if a clock is not broken, don't fix it. That will be up to you, but my job is to try to compare what some common concepts or practices are for 504, compare those to what the regulations, what the cases, and what OCR says.

Now OCR, the Office for Civil Rights, is an office that's part of the Department of Ed. Where OSEP, the Office of Special Ed programs, administers IDEA, Pennsylvania's Chapter 14, with obvious help from PaTTAN and PDE, 504 is administered by the Office for Civil Rights, OCR, headquarters in Washington but a regional office in Philadelphia. What they have to say in terms of their formal, written policy letters and memoranda is not law as far as being binding on hearing officers or courts, but it's close enough in terms of being the official interpretation of the administering agency to be worth attention with due limitations because, although not binding, courts often find such interpretations persuasive. Plus, if a parent goes to OCR and files a complaint, or if OCR is doing a compliance review of your district, their view is they follow the law as they've interpreted it. So to them, that is law.

Now with that sort of hopeful clarification, let's go to the first one. And I don't have them in any particular priority or chronological fashion. They're just simply -- often I pick it up in conversation with people. And I often find that there's a prevailing perception that let's just think of it as a hypothetical. Many of you are in school districts working in a school district. Let's say you have a parent who is a resident of your district, but who chooses to place their child in a parochial school, whether the parochial school is in your district or in a neighboring district. You often ask folks like me the question, do you have any responsibility to this child under 504? And that's not this concept, but let's cover it while we're at it.

And it gets tricky because we have the difference of national requirements and states that can add on. Nationally, meaning in other states that do not have what I'm going to describe as a peculiarity to Pennsylvania. Nationally, the answer is if you've put your child in a parochial school and are seeking services including evaluation or a 504 plan from the local district, the answer legally is not our job. You voluntarily placed your child.

Now, if under IDEA, there's a different answer having to do with the district where the private school, parochial or not, is located having certain responsibilities. But under 504, the national answer is not our job. Now again, that doesn't mean you can't do it. Some of you voluntarily feel that it's good practice to help parents and help kids in parochial schools. Nothing prohibits you, but 504 does not require any duty upon you elsewhere.

But in Pennsylvania, we have a strange case that went to Pennsylvania Supreme Court. Lower Marion

School District case, which followed a previous case under Chapter 14. And under Chapter 14, a previous case had said that district do have a responsibility to provide related services presumably, not necessarily, at the location of the parochial school, maybe at your district. But you have a certain responsibility.

And I read that case as largely due to Pennsylvania's strange dual enrollment law, which allowed a parent to dually enroll their child in your school district and a parochial school. And if they had done so, then you would have had some responsibility under IDEA Chapter 14, regardless of what the national law was.

Well, by analogy then, the Lower Marion case said same deal for 504 kids. You have some responsibility. And I don't want to get into the details except to forewarn you if you get this kind of request, check with your legal counsel, say look at Lower Marion and determine what is the scope of our responsibility.

But this is a different question. This is, if it's not our job, whose job is it for this child? Especially in states beyond Pennsylvania, or in Pennsylvania if dual enrollment doesn't apply. Does the parochial school have a responsibility legally under 504? Now let me first clarify this if I haven't already. What I've got up here on the screen are the misconceptions. So don't copy these down and run down and say, this is legally true. These are the misconceptions. Some of them are false, some of them are partially false, and what we're going to examine now is to what extent they are correct or not.

Now in doing so, and I'm sorry to keep postponing the answer, but in doing so, the person who introduced me gave due attention to two organizations. One was -- excuse me, one was CASE. And now I'm looking for the -- and see, after that big introduction and all those publications, you'd think I can find the particular document that we had put in the dock here. So you'll just have to -- because I put it in the dock, but somehow it disappear but I know where it is in my list here of items.

So we go to lore versus law. And by the way, last year I did lore versus law generally. This is the same concept, lore being the sort of common concepts, and law being the sort of objective interpretation of the law. And what I'm trying to get to is a newsletter article. And for some reason, again, is not opening. But it's a case newsletter article, and it covers each one of these items as to what the misconception is, and then explains what the accurate conception is.

Now wouldn't you know that this would happen? Could one of my folks in the back who's much better at this than me from PaTTAN come up and see if you can help me open this document? Do we have one of our PaTTAN -- yeah, yeah, good, good. Now I'll give you the answer while he's coming up to straighten me out. Get ready here. And the answer often is, under 504, much like what the answer is legally under the IDEA. And some of you like this kind of answer. The answer is it depends.

But what does it depend upon? It depends upon one simple factor. Does the parochial school receive

federal financial assistance? If the answer is yes, then the parochial school is the one that would have the legal obligation. Now do you see what we're trying to open? Not this PowerPoint, but this document here that when I click on it doesn't seem to open.

Now what does federal financial assistance mean? For a parochial school, don't expect to look in the budget and find money coming in from the federal government. The establishment clause under the constitution should prevent that. What you'd be looking at in a practical sense, let's start with where most of you have your head anyway. IDEA. If there are IDEA kids at that parochial school receiving services from the district of location, that would trigger 504 for these remaining students. Thanks very much. Wait, wait, come back, come back. You're not done. We need the larger format so that we can see it. Do you know what I mean? Just the standard format. Meaning start opening it up -- well, I guess it's down here. Just opening up so I can adjust the size. You know, we don't have those -- yeah, yeah, thank you very much.

Now what this is is the case newsletter from November/December 2/12, which is cited on the last slide. And if I go to this page, page four, you'll see that it looks like this. Go to that first item. Section 504 does not apply to public schools. And when I look at the answer, one of the things we'll see is a Pennsylvania case mentioned here to exemplify it for you. Now a moment ago, I said -- now I'm talking about this case.

Before I quite get there, so my first question is, you're the monsignor that runs this particular parochial school, St. Luke's, do you have any IDEA kids? Nope, we don't have any. Second, Title I services coming from a district or the IU. If so, since those Title I services are federally funded, that triggers 504. Besides Title I and IDEA, the third most likely alternative is school hot lunch program, Department of Agriculture. That would trigger it.

In this case, near out in the western part of the state, near Pittsburgh, Greensburg, this particular parochial school did not have any of those things, so they thought 504 doesn't apply. And I might have agreed with them, not knowing as much as some of you'd know about federal funding. That school participated in the federal E-Rate program, which gives discounts on certain equipment. Thus when the parochial school moved for dismissal, the court said, I deny dismissal. The E-Rate program triggers 504. Now the rest of the -- we never got to the rest of the case as to whether the parochial school violated or not, just the threshold issue.

Now if you're following me so far, it's a little more complicated because it looks at 504, that is this item looks at 504, in tandem with the twin sister of 504. The twin sister is the Americans with Disabilities Act. Has the same definition of disability, the same prohibition of discrimination. I call them twin sister, but my analogy or metaphor doesn't exactly work because 504 was born earlier than some of you, 1973, two years before the IDEA, but the ADA didn't come along until 1990. So I don't know of any twins that are, you know, that far apart, but in any event.

Except for that, we run into a different distinction, which is why was the ADA passed if 504 already established nondiscrimination based on disability? And the primary reason for the ADA was to level the proverbial playing field beyond federally funded agencies. Now federally funded agencies include public schools, some parochial schools, some secular private schools, some colleges, whether you're Penn State or Lehigh, but if you're -- now what's that small school out by Pittsburgh that is well funded by the Pew Foundation? What? Grove City College, thank you. If you're Grove City College, you didn't have to because you didn't do 504.

The ADA says, hey, if you've got more than a minimum number of employees set by the statute, then you may not discriminate regardless of whether you get federal funds. So for most of you, because most of you work in school districts, all the ADA does is reinforce 504. But how about -- because there's some little glitches, how about parochial schools? And the answer is that if the parochial school does not receive federal financial assistance and is truly a parochial school that is controlled by the clergy, by the church, the ADA does not fill in the gap because the clergy got smart enough politically in our system after 1973 when they heard, hey, it applies to us. They got politically argued for. The majority of us said yes. They got an exemption, an exclusion for parochial schools, religiously-controlled schools, in the ADA.

So it gets fairly complicated because the basic answer to a parent who contacts me, I had a lady who contacted me years ago from California who was very dissatisfied with the parochial school. She went to the district. They said not our job. I said, they're right. It isn't their job. Hopefully you can establish some rapport and do things cooperatively, but if not, go after the parochial school. And it turns out they didn't -- they only had de minimis, meaning so trifling, like one kid on a hot lunch program, court said no. She said, can I use ADA? I said, no, you can't. She says, what do I do? I said, pray. Or I suppose reenroll your kid in the school district. Or you know, appeal to their moral sense. Any question or comment? Now this is overly complex, but it just sort of shows you your knee jerk reaction on 504 and ADA sometimes requires a little extra help.

Next, you get this kind of issue. Now I mentioned earlier this concept of using 504 as a consolation prize. And some districts say, what's wrong with that? If the parent isn't -- if the parent is unhappy that they didn't get an IEP, shouldn't we give them something like a 504 plan? And I say, well, if it works for you, great. But don't be expecting, since I'm doing religious metaphors today, manna from heaven, if you will. That is, 504 -- now he's back on the political landscape, Newt Gingrich had coined the phrase years ago with regard to 504, the ADA, and other civil rights acts like Title IX for gender and Title VI for race, unfunded mandates.

Now he meant it as a way get rid of them. And I'll leave it to your political persuasion, but if you follow that logic, why don't you get rid of the constitution as well? That is the counterargument is that a civil rights law is so intrinsic to the value system of our country in terms of not discriminating based upon gender,

disability, or race that we don't need to dangle extra money. You shouldn't be using your own money.

But the practical reality for you -- for school districts is don't be expecting any money from the federal government to fund each one of your 504 plans or accommodations or services. It comes out of your fixed budget. And although PDE, as this conference shows, is a leadership kind of SEA, or state education agency, compared to many and does provide technical assistance, they're doing so just to be good people and for -- and going out beyond legal minimum. In most states, the SEA says, we have a responsibility under IDEA, no responsibility under 504, and certainly no funding. So any help you get from the SEA will be limited at most to technical support.

AUDIENCE MEMBER: So there's no regulatory authority?

PERRY ZIRKEL: So there's no regulatory -- if by regulatory authority you mean -- normally at least, you'd mean going out and doing compliance reviews or receiving complaints and investigating. Nothing like that. On the other hand, there's a limited exception here. Chapter 15 are regulations and they were -- they went through the department's process and were duly adopted.

But interestingly enough, if you track back Chapter 15, what happened was there was a class action lawsuit filed in the early 80s against some of you who violated a concept we'll come back to because some of you are still violating it. The notion being, hey, if you've got a food allergy or asthma or diabetes, but you're a bright kid who likes to learn and you're doing well, we have no responsibility under 504. Well, that is wrong. The class action suit was to erase that concept. And the class action suit was filed against PDE and the districts. PDE settled it by saying, we'll remind districts of their responsibility by adopting Chapter 15.

But if you look there, it's essentially an empty vehicle because it's just simply a cross-reference saying, hey, these kids are -- and they even invented a term, which is sort of silly and politically incorrect, protected handicapped child entitled to a service agreement, which makes me think of my GE, you know, refrigerator thing. But essentially what they're saying is you have a responsibility to do 504.

So my -- her question again was, does PDE have any regulatory authority? Not any duty, but if they wanted to enter into the equation like they did under Chapter 15, they could. And by the way, they're the only state I know of that has any state regs relating to 504.

Next, as you read through this thing, the key phrase is this: grievance procedure. What would you do, for example, if you had a parent who came to you or, you know, I'm thinking of doing this in my retirement now as I'm getting older, maybe I'll become the 504 pain in the neck for you. Travel around the country and improve compliance. Well, it turns out, whether you realize it or not, that although if I wanted to file a hearing or go to court, I need something called standing, it's got to be my kid, to file a complaint with OCR, anyone can

file a complaint.

So I could go around the country. And at one point about 15 years ago, there was someone that did this. They filed something like 340 complaints in like 18 states, just traveling around. And what they were looking for was essentially procedural compliance. And when they didn't find it, they filed a complaint and then that triggered OCR having to investigate.

So picture this person, me, you know, pull off my shirt and I've got a blue thing with a big S, but it's not Superman, it's Section 504 person. And I say, would you please show me your grievance procedure? And it might be the principal's secretary I go to and she sort of doesn't know what I'm talking about. I finally get to the principal, the superintendent.

Think about it in your own district. What would likely that person receive? In some districts, the person will receive a grievance procedure that does not fulfill the requirement I'm about to tell you about. They'll give you the collective bargaining agreement grievance procedure for employees because employees can file grievances and typically go to arbitration. We use the same term and concept, but what I'm talking about, and this is not at all new, this was in the 504 regs which date back to 1978. And it says any institution that receives federal financial assistance, thus having to do with 504, has certain general institutional requirements. And one is must have a grievance procedure.

What they're talking about a disability-related grievance procedure so that if I drive up to the school and the parking for people with disabilities, the sign or the paint has been removed or, you know, an accessibility issue, or I'm an employee and I don't feel I'm getting the accommodations, or more likely what most of you are thinking, I'm a parent and I didn't get -- or the teacher is not implementing the plan. You're supposed to have a procedure where the person typically -- now that's -- it's a little bit like RtI. It's multi-tiered, but it doesn't have specific requirements except that it should be fair, whatever that might mean to OCR.

Well, in the American system, fairness like inventing baseball, which I find very slow, but somehow Abner got away with this and most people still watch baseball, you get three strikes. So three seems to be a magic number. So most grievance procedures I've seen, although the law doesn't require it, typically have three levels. First is an informal level. By the way, someone knocked the sign down and the first level is typically the 504 coordinator, which is another requirement for a district that could be a slide, except I thought most of you'd know that. That every district, and most districts have one, and in addition typically delegate it at the school level, but the district at least is -- because that's the agency that receives federal funds, must have a coordinator.

So if you're the coordinator -- and who is the coordinator? In some districts, it's the special ed director,

which I've always advised against, but people -- the superintendent picks regardless of what I say. The law doesn't say. And why shouldn't it be the special ed director? Well, number one because she's a terribly busy person. And although you'd think you're rewarding her for mastery of law and everything else, this is just, you know, one more job. But number two, if you don't think about her and you just think about your staff, it gives them the misconception that 504 is a special ed responsibility. 504 is primarily, although not exclusively, a general ed responsibility.

So the first step of a grievance procedure is typically the coordinator informally. Someone knocked the sign down. And nine out of ten times, that's the end of it. She says, I'll take care of it. What if so-and-so doesn't? Then what? Then I typically have a formal step where I have to fill out some kind of form, give it to her, she's got to give me an answer within ten days, which is go pound sand. I'm not doing it because I'm busy doing special ed PDE review or whatever it may be.

And what's next? The next level is some higher level, which might be the superintendent, it might be the board, it might be the assistant superintendent. Or it might be, but does not have to be, an impartial hearing officer. Now again, do not confuse this process with the impartial which I'm going to get to in a minute. But you could have an impartial person like an arbitrator. All OCR cares, as a procedural compliance matter, is do you have one in place that the secretary and the principal and a parent would be able to find out and understand, that's got a couple of levels and seems to be reasonable in terms of, you know, it doesn't say we'll get back to you in three years? You know, we'll give you our answer in five days. You've got to file the appeal within eight days, whatever it is.

And by the way, OCR doesn't get into the details of how many days. They just look at it overall to see if it's reasonably available and seems to fit just general standards of fairness. Now know what we're talking about. So it's a section 504 does not require the only grievance procedures, so this is what I'm saying is wrong.

Now what some of you do, especially in smaller districts, is you fold your grievance procedure for 504 not into collective bargaining, but into an equity grievance procedure, which would handle sexual harassment, racial harassment and discrimination, and any other sort of civil rights issues because we're a small district and we want to be responsive. Just as long as it's clear that disability-related complaints, whether it's employee, visitor, accessibility, or student issues, can go through this process, that would suffice. Question?

Now we get to the one I was mentioning a moment ago. There's a common conception. Now I just had -- in general, by the way, I do not answer email for legal advice because I just get -- you know, I get -- I probably get 20 a week. But in this case, it was a colleague of mine who I've sort of mentored, a former -- oddly enough, and this just happened this past week, a former superintendent in Tennessee who then went to law school and is now a professor of school law at a university in Tennessee.

But she's also, like me, a grandparent. And her grandchild now has -- who is age four has now evidenced enough symptoms that people are confident that her grandchild has autism. And she's gone to the school district and asked for services, and they've told her the inn is full right now. And until we have a slot, we'll let you know. Now some of you obviously realize that that's just, again, lore. Maybe it'll work, but it's not going to work law, especially an ex-superintendent who went to law school.

But just to double check, she emails me, says, did I miss something about slots and stuff? I said, no, you're quite correct. She said, well, hopefully when I go to the meeting this week, they're going to understand and move along. But if not, what remedies might I have? Now this is an autism case in special ed. But if it had been, let's say, a food allergy under sort of pure 504, we get similar answers.

So let's start with special ed. She could file a complaint with the Tennessee Department of Ed. She could ask for a due process hearing under the IDEA. And because children under IDEA are generally also covered by 504, she can additionally or alternatively do what the food allergy child who might not need special ed could do purely under 504, which is, well, first, grievance procedure, which is just an -- not informal, but an institutional process.

But when I -- that one I'm not really mentioning here because if this district is -- what's the adjective here? Ignorant enough to tell her that she's got to wait for a slot, then likely their grievance process won't help her. So she has two alternatives. Like IDEA, instead of filing a complaint with PDE, the state education agent, she could file a complaint with OCR, the regional office for her being in Atlanta. Here, Philadelphia. Or now we're finally at this point, or either the special ed child or the non-special ed pure 504 child does have a right to an impartial hearing under 504. And we are fortunate in Pennsylvania that we're one of the few states that the IDEA impartial hearing process has jurisdiction for both 504 and IDEA, either one alone or both combined.

So for a parent, if they file under 504 for a food allergy kid where there's no adverse effect, it would require special ed and they're only talking about let's say a peanut-free school, they have a right to a hearing just like an IDEA kid and it's the same process. But in Tennessee, interestingly enough, and most other states, she'll really confuse folks because in Tennessee, the state ed department says, we have a hearing process for IDEA alone. But 504, since it's the district responsibility, they have to file a hearing.

And I emailed her back and said, and if they're really nasty and you really want to get action, you just request a 504 hearing, you wait because you can tell they're either ignorant or confused. They're not going to get it ready in a reasonable amount of time. Then you file your complaint with OCR because OCR loves procedures. And the failure to provide a hearing, regardless of what the merits are, will be enough trigger OCR getting on the back of this district and having them resolve the matter. So my point is parents under 504 for a child that is a 504 child or is reasonably suspected of being a 504 child have the same right to an impartial

hearing as does an IDEA kid. Questions?

Here's another concept. Child Find. Most of you are very literate about Child Find under IDEA. I often get the question, how about 504? And I say if you actually look, because I teach special ed law and I give my students a -- the graduate students a question of the week. They go out and do some research. And the one I always save is a real tricky one if they really cover everything.

I'll say, go find Child Find under IDEA. You could find a million Child Find cases, including several recently in the Third Circuit Pennsylvania under the IDEA, but show me the language in the IDEA statute or regulations for Child Find. Now there is a section, but that Child Find is not what we're talking about. That's the collective Child Find saying every district must in its various, you know, like newsletters and everything else, make it aware to parents, hey, if you're in this community and you have a child that has a disability or might have a disability, let us know. We will serve. That's collective.

But when I mean Child Find here is not Child Find collective Child Find. It's individual. The legal obligation to evaluate a student upon -- now here's some tricky language. It's like an it depends. Reasonably suspecting eligibility. Now you know under the IDEA that you have this responsibility. But oddly enough, there's no place in the IDEA regulations that it explicitly says it. It just makes a lot of sense. But the 504 regulations dating back again to '78 that were actually issued to be compatible with IDEA are even more obvious with regard to Child Find because what they say is you have a legal duty to evaluate a child when you have reason to believe. That reason to believe language is right in the 504 regs.

And so my basic answer is there is clearly an obligation for you to go through the process for evaluation to determine if the child is eligible under 504 when you have reason to believe or suspect. And some of you say, well, what does that mean? You know, it's another it depends. There are all sorts of factors as to, you know, the kid is not doing well in school is what you think of for special ed. But again, like I was a kid, I had asthma. I did real well in school, but there were times where I'd get into an asthmatic attack and I was not ready to do anything except try to get enough air.

And you might have reason to suspect that this not just me horsing around, especially when if my parents came in and provided some medical documentation, or the nurse or et cetera. And it will just depend because some people, you know, have trouble breathing for all sorts of reasons, like a little bit of cold. And we'll come back to what eligibility means, but my main point now is you do have the responsibility under 504 clearly, and I can show you not just the regs, but court cases that have enforced it.

AUDIENCE MEMBER: So what if the student will require a medical evaluation?

PERRY ZIRKEL: And what?

AUDIENCE MEMBER: What if you think a student requires a medical evaluation?

PERRY ZIRKEL: Good, thank you. Hold on. She asked me one that ties in with this. And the most common example is ADHD. So I've got a kid in my school who's getting into some behavioral issues. As a matter of fact, I'm now thinking of my -- one of my four grandchildren, Max. And Max is ten years old, and he just gets into a whole bunch of hassles all the time. And I've noticed that one of my Max's problems is, you know, like his little -- I say, Max, don't do it! Boom. It's just the impulsivity. He just can't resist. He just -- I can't control him. He doesn't seem to understand the consequence and off he goes.

Of course, Max a very bright kid. He wants me to do a manifestation determination. But in any event, my point is that once again it's an it depend issue. And certainly lots of adolescents and younger kids have impulsivity problems and behavioral issues that might overlap with ADHD, but not be ADHD. But if it turns out that this set of circumstances is such that you really have reason to suspect that Max might have ADHD and you want to get medical confirmation, the prevailing practice in many school districts is to say to the parent, we suspect, so please you pick out the doctor that you want, go get us an evaluation or a diagnosis, bring it back. And if a parent -- if a district is really sharp, by sharp meaning sort of not wanting to give things away very easily, say, and we'll not necessarily follow the diagnosis. We'll give it due wait, meaning, gee, you went to an obstetrician and your kid -- and he or she didn't even see your kid. They just want -- you know, so we'd want to see did they sort of follow DSM IV criteria or not.

But that's the -- now it turns out that lots of districts do it and they get away with it. But if a parent actually went to OCR, file a complaint, or the hearing or court, OCR has issued more than one letter, policy letter, like a letter to Williams, which I've cited in the actual article that is cited here, and a recent case I just read called MJC. I don't remember who the district was. Wasn't Pennsylvania, but it was the same concept. And what both OCR and the courts have said is nothing in the 504 regulations requires a medical diagnosis for ADHD. But if you decide I want it to be medical, then just like under IDEA, under IDEA if a child needs a medical diagnosis, that's your job, not the parent's job. And if the parent -- and so if this parent is sharp, what I'd do is if I were the parent, and again if we're playing this unfortunate game, I'd go out and I'd get the best one -- you know, I'd go to Columbia University pediatrics, Dr. Chambers, internationally famous. I've seen him in various court cases, an expert.

I'll go there because you haven't given me any cost limitations or anything. I'll get it. Bring you this full report that will probably have 30 pages of recommendations as well. And I'll say, here's the invoice. You pay. And if you don't, we'll go to OCR court because the legal responsibility for a medical diagnosis is yours.

Now I'll give you the converse side that some of you won't like again. And you don't have to agree with everything I've said. I'm just giving you objectively what the law says. And sometimes, as Dickens said, the law

is an ass. But in any event, what the law says is, especially those of you who are school psychologists may not like this, not only that if you require medical is it your responsibility, but other qualified professionals may diagnose ADHD not for medication, but for 504 eligibility. And at Lehigh, one of the skills that we give our wonderful school psychologist graduates is, through George DuPaul and his expertise, training in how to identify children with ADHD. And they often do a better job that is more credible in court proceedings than physicians in identifying ADHD. Does that answer your question? Okay.

Now she asked me a good question, but we were back at number five, so now I'm at six. Now in general, the general concept for 504 is 504 is like IDEA-light. So if you look at the regs, the IDEA regs, there are, you know, I don't know, 150 pages. And they're changed every about eight, ten years. 504 regs have not changed since 1978. And there are just a few pages as it relates to pre-K to grade 12, elementary and secondary education.

And the regs do not address this question. But several folks over the years have written to OCR and said, do you interpret 504 regs as requiring consent for an initial evaluation for 504? And they have said yes. And so my advice is don't be -- I don't think it's worth challenging them on this. It otherwise sort of makes sense both in terms of a parent feeling as a participant and trust as well as, you know, safeguarding abuses here. I think it is -- but I can't show you a court case, I can't show you a statute of regulation. I can only show you consistent -- and if you ask them, if a parent filed a complaint with them, they will enforce their own interpretation as law.

Now what that leads to is the next item. I'm the parent and I'm asking you for an evaluation of your child. In some cases, and if -- in some cases, an evaluation under 504 is what you call a records review under IDEA in some cases. For example, let's say your kid does have a food allergy, and let's say you've voluntarily gone to physicians, as many parents will to help their child, and have gotten a bona fide diagnosis of this child's food allergy or diabetes or, you know, whatever other. And I have in mind now health conditions. If this parent has done all of that for you and if you have, either at the table as the eligibility team, the child's teacher as well as other knowledgeable people and the records of this child, you don't have to go out and give the kid an IQ test for asthma or diabetes. That isn't the question.

Eligibility is three criteria. You need all three. Now before I go into the three, because again, many of you, you're special ed thinking people, I have to get you onto the 504. You think two criteria in general. One, do you meet the criteria of one of the classifications? ADHD is not a classification, but OHI is. Dyslexia is not, but SLD is, specific learning disability. So do you meet the criteria of a classification? If yes, this is IDEA. Second question is, does it adversely affect educational performance? Now you might regard that as a second criterion, but I just see that as the bridge leading to the second criterion, which is how much of an effect? So

much that you need special ed. So it's classification plus special ed need. That's IDEA.

504 is different. It overlaps. Some of these kids are both, some are not. First, instead of classification, a mental or physical impairment. The difference is no defined list. Any mental or physical impairment. And without a list, I keep seeing new ones all the time. We had a Pennsylvania case of a kid, I think I've told you about this one before for those who've heard me before, but I love this one because I have it myself. Delayed phase syndrome. He was not a morning person. And the court accepted that as a mental impairment because, although it's not listed in, you know, like Wikipedia -- not Wikipedia, but Merck's Manual or something, there are Harvard professors that have written articles on circadian rhythms in adolescents and have defined with criteria what this delayed phase syndrome is.

Undifferentiated somatoform disorder. One that you're much more familiar with, nonverbal learning disability, which may or may not qualify under SLD. And a whole host of health conditions because, under the new 504, what I call new, the regs haven't changed, but in 2008, the ADA was amended, effective January 1, 2009, now in our rearview mirror. And Congress, not the department, Congress by legislation amended the ADA and its sister, 504, to broaden eligibility. Now it didn't change impairment. It's still wide open. What it changed is the second criterion, which will affect the first.

So let me move to this. So first is mental or physical impairment, which to me is almost wide open. I'll find something for -- there's several that would apply to me, including, you know, organizational chaos and limited technology capability. But moving on, the second item is major life activity. And many of you have the problem that you think that the only major life activity, because that's what your mission in life is, is learning. But remember, asthma, breathing, and which was always there and for somebody like, oh, who's in the news now? Pistorius, the Olympic guy, walking.

Okay, those major life activities were always there, but Congress has now broadened the list. And at one end, what it broadened it and pardon the pun about end, but while I'm doing end, I'm thinking about major bodily functions including bladder functions. So bladder function's a major life activity. Now why does that interact with impairment? Because then you start talking about irritable bowels, oh, and bowel functions. So irritable bowel syndrome, colitis, Crohn's disease, and other things that you see commercials about all the time. Those kinds of -- they're major life activities that expands potential physical or mental impairments.

If that doesn't drive you crazy enough, while we're at it, let's go to something I love to do and we just did during the break. Eating is a major life activity, which triggers, going back to impairment, food allergies, food -- what we call, you know, like a person who doesn't eat enough, what do we call that? Anorexia, bulimia are food-related. Diabetes is food, eating. And it's also, by the way, major bodily functions, endocrine functions. So now we've expanded the list of major life activities.

And the one that'll give you the biggest headache of all, if I jump for a moment to where we were, ADHD. And during lunch, somebody gave me this case from their district. They say, we got this kid, he's got a 126 IQ. He's got great grades, et cetera. But he has ADHD. And the parent wants extra time on tests and other accommodations. Is the kid eligible? Oh, and we evaluated him for special ed and we found no need for special ed, but Mom at least wants 504 and says that in a former district she was in, you automatically got 504 as a consolation prize.

And I said, well, it depends. Again, and one is what district you're in, but what it depends on more typically, frankly, is what this parent knows or what you legally and ethically will share because the big major life activity that was added for ADHD that the CHADD Organization has put out there correctly, but as an advocacy organization, something that you people seem to be very good at, concentration. This kid, despite his high intelligence and good grades, et cetera, if you just restricted it down to how well does he concentrate in relationship to the average child in the general population, how well does he concentrate however you can measure that. And if his ADHD is the cause of him being substantially below, then he qualifies. And I've just mentioned the third criterion, which is the key criterion. Impairment, major life activity, but the key and most difficult, many -- I had asthma, but I was not 504 because my asthma was moderate. It would have to be substantially limiting on breathing.

So back to the -- and I'm going to revisit this concept we're now talking about, but we were at this one. To make it easy, eligibility requires an adverse -- this is no. This is IDEA. This is not 504. So this is clearly false. What's true, however, is hard to figure out. And wait, and let me just -- because in relationship I may be answering.

Now watch this one because it relates to the one I just described. The kid who had a 126 IQ and good grades, et cetera, was on medication. And the question is, do we measure substantial with or without medication? Because this particular kid with meds, and that's not true for all kids, but this kid with meds still has a problem with concentration, but it's a mild problem, not a -- but without his meds, it's substantial. Now the true, that is legally correct answer, was, past tense, was without.

But in those amendments that I talked about that Congress passed, the ADA amendments, Congress reversed what the Supreme Court had interpreted a silent 504. Congress now says, we're making it clear so you know our intent. We intended to be -- wait, wait, wait, we -- excuse me, if I just said -- I think I just said it in reverse. Did I just say it in reverse? It used to be with. That's what's wrong with this. It's now without. In other words, if the kid with meds had a limited problem, before January 1, 2009, he was not eligible.

Today, I'm not saying he is, I'm saying he might be. I need some data on what his performance would be with regard to concentration relating to ADA without meds, which is a problem because if I'm the parent,

I'm not going to let you do a controlled experiment with my kid. So you're going to have to get historical data, which may be 20 years ago when we -- not 20, but five years ago. You're going to have to rely on the parent and the physician who are going to obviously give you perhaps a skewed interpretation. But unless you can come up with something else that would seem to be ethnically and legally appropriate, you're just going to make guesstimate. And in many cases, you'll probably guess in favor of eligibility. And Congress will say, did say in the ADA amendments, in close cases, we want the benefit of the doubt to go to the individual.

And by the way, why did Congress do this? To keep me in business so I can keep coming back and confusing you. No, Congress did this because it was thinking not of kids and not of schools. It was thinking at the time of the returning veteran from Iraq or Afghanistan or other conflicts who came back with Desert Storm syndrome and post-traumatic stress disorder, et cetera, and was having trouble getting government benefits. But once we do it for them, we do it for everyone, including that kid with ADHD.

Now if you're not confused yet, you will when we go a couple slides more. Now just let me stop here. I'm saying when you do the evaluation -- now by the way, when would I do the eval? I only have to do it if I have reason to suspect. If Johnny's taking his meds and he's doing fine, I got no reason to suspect. But if the parent says, I request an evaluation because he's on meds because of his severe problems, then I do have reason to suspect because what I have reason to suspect is, if he's on meds, that without the meds he might be eligible.

Then I have to convene a meeting that has -- now we'll get into the who's in the meeting. In the meeting, you've got flexibility again, and some of you are using special ed thinking and are doing more than you have to, but that, nothing wrong with that just as long as you're making a conscious decision to do more than you have to. Three criteria for the eligibility team, which is the same criteria for whoever would write the 504 plan.

One, you need someone on the team knowledgeable about the child. Now that could be the parent, but there are other people that are reasonably knowledgeable about this child, depending upon what grade they're in and how long we've interacted. Second, knowledgeable about the -- knowledgeable about evaluation. I don't need a school psychologist. I need someone who could read the report and understand it. Or more likely with these health conditions, the school nurse becomes critical because she can read these medical reports. And finally, someone on the team who's knowledgeable about accommodations because the parent wants a copy of the notes and 200% time and amanuenses. I had to look that one up, but it's a scribe that the pharaoh used to have because the kid's handwriting is poor or whatever.

So this team might just look at records. Now if you need new data, like medical data, you got to go get it. However, if I say to the parent, you don't have to and I'm willing to. But if you want to pick the doctor and

you want to go out and get some more, you're certainly -- and there's HIPAA and all those other things to protect you. But if you voluntarily give it to us, we'll do with it what my wife does with my opinion. She gives it due weight, which is usually very little because that's what I've earned. Question?

AUDIENCE MEMBER: A question. So with regard to -- you're at the meeting. I'm not there yet, but if you're at the meeting, how do you argue and how do the feds argue the substantial limits or the substantial limitations? Like what were the parameters? And if I'm in that meeting and I would argue against it, what leg do I stand on?

PERRY ZIRKEL: First of all, the feds, again, if you mean OCR, they've taken the policy we don't do eligibility. So if a parent complains, they're going to look for things like do you have a grievance procedure? Did you get consent? Do you have a knowledgeable team meeting those criteria? Did you look at multiple sources of data? And if you say, but is the kid eligible or give me the parameters, they're going to say, we don't do that. Parent has a right to file for a hearing. And we've had very few hearings or cases on that. Frankly, what I give you is the same kind of sort of parameters you'd get under IDEA, which is you look at multiple source of data, use professional judgment, you're be ready to be second-guessed by a hearing officer if necessary.

The one parameter that I find useful here is the one I just mentioned briefly before. When you're doing something substantial, although there is no sort of pure operational definition, the key reference point is the kid in the general population. So if this is a tenth grader who's got problems with asthma or colitis or ADHD, what is the performance of the average tenth grader in the -- now what's general population? It's not the advanced placement class. It's not the school. It's not the school district, even Philadelphia, as big as that. It's either state or national.

So you look, among other things, at norms, percentiles, and medical data as well of this sort. And if he or she is not substantially below, even though they could do -- be doing much, much better, you have a defensible frame of reference for your discussion. Otherwise, you need a 504 plan for allergy to ambiguity because this stuff is not as crystal clear as you might like.

Moving on. Did I skip any? No. Well, since I just opened up things like mentioning things like diabetes and colitis and all these other low incidence, but serious kinds of conditions, many districts already cover these kids under health plans. Does that mean I've got to take every health plan and covert it to a 504 plan? You could if you want, but you'd be doing more than you have to. But if you like it that way and if it works for you and it's not causing undue problems in terms of legalities, the only problem, by the way, I find with over-identification -- well, two problems. One, resources. But the other is the transaction cost of legalization. Now you've got forms, you've got procedures, you've got this what my friend Jenna calls the game, you know, with OCR and all the rest, that takes away from trust and cooperation and informality at the local level.

So you could convert them all, but if you asked OCR, they would just again say, it depends. And to me, the best legal advice is sit down, if you're the 504 coordinator, with the nurse and review the IHPs and determine which ones give you reason to suspect that the child might be 504. Then for those parents, offer an evaluation, seek consent, and give procedural safeguards.

Now why did I emphasize that? Let me go over to that document that we were looking at a minute ago if I can hopefully open it. Yeah. And we're at item ten I think it was. There was a case that I wanted to give you the quote from. I'm over here. Now here's item ten. And by the way, I'm not trying to hide this from you. It's a copyright issue. I had to get permission to share the blue items, but the publisher said no, no, we're not giving you the whole thing, so that's why I'm just showing it. But recently, a parent filed a complaint about a -- against a school district. I don't know, where's Roselle Park for trivial pursuit? Long Island or Chicago probably.

AUDIENCE MEMBER: New Jersey.

PERRY ZIRKEL: New Jersey. Thank you. I should have known that. New Jersey is the 504 capital of the universe. They have more 504s than anything. But they had a parent of a kid on a health plan who insisted on a 504 plan. Now I go here. Now what I'm doing here is I'm quoting. And actually, when I gave them the -- when I gave them this language right here, it was in a block quote, you know, APA style, but somehow it got indented so it doesn't look -- but it's a quote.

So this is OCR talking. The regulation implementing 504 does not require that the district name the plan a 504 plan or any other name. Thus, an individual health plan or whatever you call it may meet the requirements for 504. And now look at their if. If the district followed the procedural requirements implementing 504, which include, one, the thing about a knowledgeable team, and the big one to me, 104.36, that you provided notice to the parent.

And what does that notice say? It says, among other things, you have a right to an evaluation, which we did. But the big thing it says is, and you have a right to an impartial hearing if you disagree. OCR likes it because, frankly, it points it to a different agency to enforce this thing. But what I'm saying is you don't have to make every kid a health plan a 504 plan, but what I think is advisable is to do a Child Find screening and then follow through on procedural safeguards for the remaining.

But be prepared if you get a parent like my friend who's the Tennessee superintendent lawyer professor, she's going to get you on an issue we're going to in a minute, which is she's going to want a hell of a lot more in that health plan than you had originally, like extra time on tests, copy of the teacher's notes, maybe some special ed, which will introduce a different issue, which is what is the level of entitlement. But right now, we're focusing on eligibility.

Moving on because of time again. And of course, I haven't managed my time well, so I'm going to have to pick up the speed here. Now so I'm meeting with that hypothetical person I'm talking about. I'm now playing the district's role. And she already beat me that her child is now going to get -- and I'm going to tell her, hey, if you want any services, that's special ed. We don't do services. We only do accommodations. You want to sit in the first row, we always have room in the first row. And maybe I'll give you some -- but we don't do any tutoring, any of the stuff that they do in special ed. We're not going to give you a Orton-Gillingham or any of that sort of stuff.

Well, it turns out if you get away with it, fine. But if you look at the law, it has always said since 1978 because it was written to conform to IDEA, IDEA you get FAPE. 504 you get FAPE. This FAPE is special ed plus related services. And you only get the related services if you need them for special ed. This one, you won't like it some of you based upon your understanding and practice, this one is special ed or regular ed and related services.

The first thing you don't like about this is if a kid needs a related service alone, physical therapy, because you gave him a 504 plan for handwriting, now you made a mistake as far as I'm concerned. Handwriting's not a major life activity. But if you said it was and this kid writs well below the line, you can't read it, and you said he needs FAPE, if physical or occupational therapy is what's required for this kid to pass your courses and perform along with other kids to give him a commensurate opportunity, he's entitled to physical or occupational therapy at your expense without dipping in special ed funding because the auditors say no.

And second, now watch out for this one. Theoretically, a kid could get special ed through 504. Theoretically. Now practically and defensibly, what most districts do is they say, if you really do need special ed, let's redo or do it for the first time a special ed evaluation because you meet the second criterion. And what I'm going to do is take the breadth of OHI, which if it covered ADHD and Tourette's syndrome, certainly it'll cover almost anything else you can think of, especially it's health related. That is health related. Then I can provide special ed through an IEP.

Then a parent says, but wait a minute. It said special ed related service under 504. And I say back again, repeating what OCR said, kids under IDEA are also covered under 504. Thus I give special ed, under 504 through IDEA. And unless you don't fit in IDEA and needed special ed outside, which I think would be very hard for you to establish, I, by some quick footwork, I'm able to defensibly -- because I don't want to set that precedent. Ma'am?

AUDIENCE MEMBER: I have a question then. I have a [inaudible]. He was in a regular setting up until seventh grade, where he is now. And they did the reverse. They basically said he's in regular classes all these years --

PERRY ZIRKEL: We'll do 504 first. And if he doesn't do -- yeah.

AUDIENCE MEMBER: They put him in special ed, 45 minutes to complete work. His problem is he needed longer time, but now if we did an IEP, should we do 504?

PERRY ZIRKEL: Now I've succeeded in confusing many of you who are reasonable, sensible people. And to try to straighten that out within limited time, let me just turn to a visual organizer that helps both you and me that I often use in my -- you know, some people say Zirkel is Zirkel Zirkel circles. So if I go to 504 for a second to a PowerPoint here, because I just want to grab those circles because they're useful to most of us. Yeah, talk.

AUDIENCE MEMBER: [Inaudible]

PERRY ZIRKEL: Yes, thank you. The question -- well, the basic question, I'm going to change it slightly. The basic question is, how does 504 relate to IDEA? Which one do you do first? Do you have to do both? She described a child who had autism or at least autistic-like behaviors and the district treated the child in general ed under 504, and then added in some special ed.

So I'm suggesting that when we're looking at 504, think of these circles because they help most of us. And this symbolic concept, the red circle is IDEA, accounting for about 10% of our population, probably about 12% now. And then I overlay on top of it the broader definition of disability, that three-prong definition under 504. And this is in my book and various articles. But here's the concept.

First, the red turned purple. Thus, think this way. If the child, that child you described, has been evaluated and determined to be eligible under the IDEA, they get an IEP. Not an IEP and a 504 plan. They get an IEP because it's generally understood that two birds kill one -- excuse me, yeah, it's one stone, thank you. One stone kills two birds. So the IEP takes care of both. So if your kid needs special ed and needs whatever else, we do it under the IEP.

The blue is what I sometimes call 504 only or 504 alone. Those kids who do not need special, don't have that adverse effect that requires special ed, don't fit in one of the ten classifications, but nevertheless meet the three criteria, those are the ones that we typically give a 504 plan. So my first point is this. If you just looked at it institutionally and systematically, about 10 to 12% of the kids fit here.

Somewhere between I would guess nationally, and we've had some data come through, somewhere between one and three percent is the national average for pure 504. Leaving over 85% of the kids not to drown, but for you to do wonderful things, whether it's RtI, PBS, differentiated instruction, or what I call 252, half of 504, okay, because that makes sense just to, you know, take some of your special ed and infect the rest of us. And you won't need some of this.

But my point is do good things for kids. If the kid you have reason to suspect 504, do this evaluation and provide FAPE for the kid if he needs it. If it's more severe, do this. Then I get this question. Should we start here, like RtI? Then go here? Then go here? Not necessarily. If you get a kid and he's got severe autism, he's totally nonverbal, et cetera, and you got to try him out in general education and then try 504, if he's got a good attorney, you're going to owe compensatory education. So sometimes it pays -- but to me it's like LRE. Sometimes we try inclusion and then a little less inclusion, but sometimes it's very obvious that this kid might need a residential placement. So it depends. We know we have three sort of islands. This one, that one, and that one. Each one, although there's some overlap, discrete unto themselves.

Now we can go in further to your particular child we get there, but to go back to this then, we were at the point of just simply establishing the belief that 504 only provides accommodations is not legally defensible. Now here's the one I promised you I was going to come back to. And you're going to say, wait, you had a slide that did this already. And we said with, underlined. What's the difference between this slide and the one we looked at? Because there's a significant difference.

Remember we had the ADHD kid and he was performing, let's say, pretty well on meds, but the parents said, I want an evaluation because he can't concentrate without meds. The difference is that slide was eligibility. This slide is what I'll call entitlement or FAPE. And watch this because it gets very tricky and confusing.

I do eligibility without the meds or other mitigating measures. Remember, I talked to you about Pistorius, the guy that's now accused of murder? He has this prosthetic thing where he can run faster than the average person with his prosthesis. You would measure him -- not measure, you would do an assessment of eligibility without -- and it's pretty obvious that if he didn't have this prosthesis he's not going to be able to walk anywhere near what the average person, much less run or ambulate, if you will.

But if he's got his prosthesis on and he's racing around and now he wants a head start, sorry, but we do FAPE, the entitlement. Well, remember, this is in the wrong. The right is with because I've got them opposite here. The lore is without. The law is with. Now if I were a parent, I would think if you do the eligibility without, you'd do FAPE without. Be consistent. But OCR, who's the one who's come up with this interpretation in their latest FAQs, frequently asked questions, did this because of our economy and the reality of resources, the thought being, just like ObamaCare, if we don't have enough to go around for our total population.

If you got to prosthesis and you can run fast, get out of line because there are people behind you who can't do it with or without the prosthesis. So put on your prosthesis. And if you need accommodations or services, including related services, to be able to have a commensurate opportunity, we will give that to you. But in his case, he already runs faster than the average person without it. So theoretically, what could happen

for some parents, unwittingly through Congress, is you might qualify for a blank 504 plan. What some of you call a monitoring IEP. You know, I've seen kids on monitoring IEPs. You don't need anything, but we'll keep our eye out on you. So we'll keep our eye out on you running and stuff, but just long as you don't need anything to compete with the other kids, so it gets very tricky under this new lenses.

Here's another tricky point. What's the substantive standard? Under IDEA, it's reasonably calculated for educational benefit. That's Rowley. Under 504, there are two competing standards and it is unsettled. If a parent goes to OCR or asks OCR, they say, read the reg. The reg says -- remember the one I started you with, I didn't give you the end. Special ed or general ed and related services, now watch this, that meet the needs of the child with a disability as adequately as you, being the federally funded agency, the district, are meeting the needs of non-disabled kids. We call this, to give it a short name, commensurate opportunity. You get that.

Now I measure eligibility for the general population, but I measure FAPE in relationship to district kids. If you're in Lake Wobegon, you know Garrison Keillor, Lake Wobegon? Everybody above average and you're not? I'm going to owe you a lot. If you're in a district that is underperforming and through NCLB, you're going to get very little. Maybe owe us something. That's semi-humorous, but my point is this weird standard is in the regs and OCR says that's the standard.

But they don't do FAPE. They'll send you to a hearing. And most hearing officers, the few hearing officers that have had cases, follow the courts. And there's one recent case in the Ninth Circuit out of Hawaii that used commensurate opportunity, but most courts use the standard that applies to employees in the regs by analogy. Reasonable accommodation, which again will depend upon the district, but it depends upon other factors such as is it an undue fiscal hardship or an undue -- or a fundamental alteration? Again, I'm just hitting the highlights.

Section 504 regs require a 504 plan. No place is there a requirement for a 504 plan except going back to her question. Chapter 15 says a service agreement. But in every other state, there's no requirement. I have to do an IEP. And it makes sense to do a 504 plan, but you don't have to. If you did FAPE without the form, that's what counts. So if I have a health plan or I have some other plan or I have no plan written down, but I did it, that's what counts. It's just that most of us do a plan just because human beings need some document to look at and double check and all the rest. But it's not quite the same as IDEA.

And I'm going to just hit the last ones fairly quickly. You can read the article to get the rest. 504 provides less protection for discipline. Sometimes that's true. For example, you're caught on campus using or possessing alcohol or drugs. If so, the ADA amendments of 1990, law, legislation applied to 504 kids say use or possession of alcohol or drugs, you lose protection for a change in placement. You're going to be expelled like any other kid. You get no more, no less protection. So that fits light.

And there's a Pennsylvania case that I think is confused and confusing out of Centennial School District that seems to say, it's sort of an ambiguous opinion, that there's no manifestation determination requirement under 504, which I think is bad advice, but you can look at it. But so there are -- is some evidence that it's -- but there is also counter-evidence where 504 provides greater protection. For example, the biggest example is many of you, for kids who are either dangerous or involved with weapons, you put them in a 45-day interim -- that's IDEA. No such allowance under 504. The ten-day rule applies to a 504 kid with no 45-day safety valve unless you've got parental consent. And another example, every time you change placement, like expel a kid under 504, you must reevaluate the kid. Never seen that under IDEA. It's a requirement under 504 as interpreted by OCR.

Here's another common one. Oh my god, I can lose the car and the house. They're suing me because I didn't know everything Zirkel. I failed his test. Everything he said was true -- was false I thought was true. The courts have consistently said you can get money damages, a parent can, not under IDEA, under 504. That double-covered kid, you have him under an IEP, but if you didn't implement it, I may sue you for money damages under 504 because he's double-covered.

I can use 504 as the -- but one, I've got to show bad faith. If they just sort of blithered around but in good faith, I can't win. It's hard to win. But number two, it's the district that receives federal funds that is liable, not the principal, the superintendent, the teacher or 504 coordinator because they don't receive federal funds. They're not the entity. Case is thrown out against the individual. It's the district.

This is legally wrong, but ethically correct. Parents do not have a -- the same right to participate as they do under IDEA because you need a knowledgeable person. But why would you -- why would you close a parent out? You're just going to make an enemy of me. It doesn't make sense culturally. And some districts say, well, in our district, the 504 coordinator, she writes the plan. No, she -- maybe she does, but that's lore. You get away with it, great, but that's not law. A knowledgeable team.

I get this one from New Jersey. Parents, the kid's about to come to Lehigh or some other college, they say, 504 follows the kid to college. They do. It follows the kid. IDEA doesn't. But then they say, thus the kid has an IEP. Put him on a 504 plan so he gets ready for college. Since the stone you told me about kills two birds, that stone is stronger for a college than a 504 plan. If you come to Lehigh and say, I had an IEP, we'll give you 504 accommodations at Lehigh based on your IEP. Why would you change it to a 504 plan? It makes no sense. There's no such legal requirement.

504 doesn't apply to field trips or extracurricular activity because that's just a privilege, not a right. So you're impulsive and you're ADHD, you can't go to Hershey Park. Or you can, but your parent has to come. If you haven't required the other parents to come, then you can't require this parent to come. And anything you

offer, extracurricular, nonacademic, it's not a -- it is a right. The same right of opportunity applies.

Now what some districts do, meanly, is they cut out field trips and nobody's got the right. But once you offer, you got to offer -- the only way to provide a student. I have some districts, they say, look, we'd like to give this kid tutoring or this or that, but we have to give him a 504 plan, right? And I say, no. If you want to do good things for kids, do good things for kids. You don't need a law, especially under 504 because it's not giving you money anyway. Do 252 widely and creatively because that's a better use of resources than spending it on lawyers and people like me.

And finally, most recently, January, not in your materials because it came out after I had to send my handouts in, the most recent thing is a dear colleague letter from OCR on 504 having to do with interscholastic athletics. And it reminds us of our obligations not to discriminate.

But the tricky part that caused confusion, it's a three-part letter, and the last part has some language about like wheelchair basketball teams. And some people misinterpret it, say, OCR says that the law says we got to set up wheelchair basketball. And if we don't have enough kids in wheelchairs, then we got to do it in the league and with other districts and other agencies.

What you don't read carefully is that part says two things. One, there's no -- not only no need, you can get in trouble doing this if you just did it immediately. Oh, you want to play basketball and you're in a wheelchair or whatever else? You're Pistorius, we got a separate Olympics for you, you can't be in the regular -- you got to exhaust the integrated alternatives first with reasonable accommodations. It would only be in the case that you exhausted all this and the kid still has no opportunity to participate. And secondly, they purposely wrote the language saying should, not shall. It's recommended. It's not required. It's just being good and ethical and proactive, et cetera. So read the letter, but it does not require, as a general matter, separate teams. It just says consider it and hopefully do it where it's workable. All right, any questions on 504 that I've left over?

AUDIENCE MEMBER: [Inaudible]. What happens if the township is offering like summer programs?

PERRY ZIRKEL: Same deal. Anything you offer, summer programs or anything else, you know, experience at Lehigh to get credit or whatever, once you open it up to anyone, then folks with disabilities should have an equal opportunity. But equal opportunity doesn't mean, oh, you're blind? Take my test and fill out the answer sheet. It's with reasonable accommodations or commensurate opportunity.

AUDIENCE MEMBER: In this case, it's a young child with severe diabetes who needs a nurse. And so does the township pay for that nurse?

PERRY ZIRKEL: Damn right. Unless you have some creative other way. I was out in California and I asked this one lady, how do you do it? And she says, I talk to the animals. And I say, you talk to the animals? Maybe you

need 504. And she says, no, I talk to the Lions, the -- you know, these clubs, these -- the Elks. And I creatively get moneys that way. But you can't put it on the parent.

Okay. Now we're going to RtI. Oh, and so I -- the last slide just give you that article. Now in my stupid way, I've spent most of the time on this and I apologize for that, but hopefully I can do this one rather quickly. The lore about RtI. Again, misconceptions that is common. By the way, this is a pun on the, you know, the notion of common law. But in any event, there's a lot of misconceptions. But here, frankly, it's not as bad because I can give it to you in short, and then we can just look at examples.

The main point is simply this. If you're interested in RtII or MTSS or RtI, go to George Batsche's session. Bo to, you know -- listen to the educators. Not the -- the law has very little to say or require about RtI. It is largely a pedagogical, philosophical, practical matter. And all this hullabaloo that it's going to cause a bunch of Child Find cases, I'm like, who was it? Carol Burnett in the -- the time when she's with -- it wasn't Carol Burnett. It's Lucy. I'm dating myself now. Lucy, who is Lucy's sidekick?

AUDIENCE MEMBERS: Ethel.

PERRY ZIRKEL: Ethel and Lucy are in a candy factory where they've gotten a job. And I don't mean the humorous part where they're sticking chocolates all the way in to cover it, but before anything's coming down. I keep waiting at the end of the conveyor belt for court cases on 504. None. It is a legal anti-climactic matter.

Now to just give you some examples. Here's the first point. Find a lot of misconceptions here. If and when you really went to a hearing or court, if you say, we did RtI and your kid is not SLD, because that's the way the case comes up, the case comes up because it's an eligibility under IDEA for SLD. That's the legal framework for IDEA. If you say, no, your kid's not eligible and you say you did RtI, if I'm the attorney for the parent, I'm going to cross-examine you and show that what you did is you took your -- what did we call it back in the days of -- I keep dating myself now. Jim. He brought us ISTs. What is it?

AUDIENCE MEMBER: [inaudible].

PERRY ZIRKEL: What is it? No, not Joe. Jim. He was a state director.

AUDIENCE MEMBER: Tucker.

PERRY ZIRKEL: Jim Tucker brought us instructional support teams. Many districts have repackaged their instructional support team by calling it RtI. What I'm saying is many districts use what I call GEI, school-based, that may or may not qualify as RtI because, although there are many models, the criteria include -- and on cross-examination, could you show me that your what you call the RtI process is based upon scientifically-based instruction? Show me the evidence. That's criteria number one, universally for all.

Two, could you show me what is MT, multiple tiers? I don't know. We've got this team and we tried something out. Then what? You know, is there another tier? No, that's it. Third, could you show me the continuous progress monitoring? I don't know. We asked the teacher, after 60 days, was it working. That ain't continuous progress monitoring.

I'm saying be able to -- if you're talking about law, examine what you call RtI and make sure it meets the criteria that have been established by OSEP, not in the law, but OSEP, like OCR, has listed these criteria. And I have articles that describe it, but I'm just -- second point.

All right. The reverse then is, all right, we're going to take our instructional support and make sure it's RtI. How many tiers should we have? How long should it be? How often to continue it? What intent? The law, meaning IDEA, answers none of those questions. OSEP said, we purposely left it open for states to develop. And in Pennsylvania, although we have guidance that gives you some suggestions, we have no binding legal requirements, which I think is good. But some of you, you want that, you want a cookbook. Well, then you know, lobby for Chapter 14 to have it.

Somebody told me that George Batsche said MTSS is not restricted to RtI. Do it because it's good for kids. Do it for behavior. Do it for all sorts of things. I reinforce him. I agree with him philosophically, but legally speaking, the IDEA, under law, limits, at this point, RtI to one specific purpose: identifying which children are SLD and which children are not. Any other uses are permissible but have nothing to do with the law unless a state law expands it to other classifications.

And there are a few states, like Delaware for intellectual disabilities and Louisiana for three or four other classifications, but for most states, including Pennsylvania, this is legally incorrect, although pedagogically certainly might be good practice.

The IDEA requires the use of RtI. It does not. It requires that RTI be permitted. And Pennsylvania, along with four -- excuse, 36 or so other states, have left it up to school districts to either use RtI or use the traditional severe discrepancy approach. Now Delaware requires it. New York requires it for certain areas. Connecticut requires it. West Virginia requires it. About a dozen. But IDEA doesn't. And most states don't at this point. Now that's not to say it's bad. That's not to say it shouldn't -- you shouldn't do it. Just trying to keep law where it belongs, which is in a limited role here.

RtI replaces evaluation. That's clearly wrong. RtI is in general ed. You do -- if you're doing RtI, you do RtI. Then you do the evaluation. Then you do the special ed. So it doesn't replace it. You still have to do an evaluation. Now there are a few models which do evaluation at the third tier, so in a way it's sort of, but it's still leading to it.

And what you do with the evaluation varies across the country. Some states or localities just do a default approach. They say, you didn't respond to intervention. We've got the data here. Third tier didn't work for you. You obviously need special ed and you obviously -- you likely meet SLD, but we're going to exclude other possibilities. Maybe it's autism. Maybe it's emotional disturbance. Maybe it's English language learner. So we eliminate rival hypotheses. Otherwise you're it, which will increase identification for those that have not responded to intervention.

Other districts in some parts of the country, some states, by law I think do the most bizarre thing of all, but it's meanly clever. They do RtI, require it. And at evaluation, they do severe discrepancy. That keeps their numbers way down because you have two hurdles that are the opposite to get through. And we'll see an item that talks about combined approaches. But my main point is don't think it's the evaluation.

Well, for RtI, I mean, for 504 I needed consent. I better get consent. If you think culturally and practically and politically you should get consent, go ahead. But there's nothing in the IDEA that requires it. And there's a letter to Torres where Torres wrote in to OSEP and says does -- and they said, if you're doing RtI, like most districts, which is sort of a screening function before evaluation, then the regs say no consent is required for screening.

Here's another confusing part. The language of the law talks about pattern of strengths and weaknesses. And I've even see articles about PSW, they made it into an acronym already. And they say that's RtI. Now it's very ambiguous and I could see where people would say it because it's really weird language. But folks have asked OSEP already. I think I wrote a letter to them and said, what is this thing? And they said, this is not RtI. This is severe discrepancy or the third approach. I said, how do you know that? Because if you look at the structure of the language, it says you must do RtI or, for a state, or this PSW. So it's got to be the alternative. The alternative is severe discrepancy, and it mentions intellectual development. That's where your IQ is. But some states permit the third alternative, which is other research-based approach.

Then you get into this big debate that has been in the professional literature. Must you have IQ testing? Or the opposite. Must you not? Well, there's language that OSEP has already used in the guidance documents that accompany the regulations that clarify it's another one of those it depends. If you need to measure IQ, for example severe discrepancy, using severe discrepancy, continue to measure IQ. If you're using a strict RtI approach where you don't need cognitive assessment, then you don't need IQ. So the IQ developers are making this big, you know, fuss about this to try to hang onto their royalties, et cetera, but it's not clearly one way or the other.

This is the one about it does not permit a combination of approaches, although philosophically and pedagogically, how could you do these? To me, it's like saying, you know, there are tall thin people that are

good at basketball and there are, I don't know, heavy people that are good as sort of linemen. Well, to me, that's just sort of saying you got to do both. We're doing the combine for the NFL, you got to weigh at least 350 pounds and you got to run the 50 in, you know, five seconds or something like that.

To me, they're two different approaches. One is emphasizing response to intervention. So if I'm a slow learner, I have a good chance of being eligible. The other one, severe discrepancy, if I'm a slow learner, I've got such a low ceiling, it's hard for me to show a severe discrepancy. If you're requiring both, it's going to be very few people and you're going to get very few false negatives -- false positives, meaning very few people you say are SLD that aren't, but you're going to exclude a lot of people who are SLD. But nevertheless, the law says, OSEP says you may combine approaches. It depends upon state law. Some states require both. Some states required RtI alone and not severe discrepancy. And some states, like Pennsylvania, don't address it. And we'll need to have a test case, so I invite you to be the test case, of course.

Here's the one I gave you earlier. Oh, we're going to a spate of losing litigation under Child Find. Now if you're the test case who makes the mistake, you're going to be the first case. And the way you make the first case is you say to the parent, hey, you know, the kids comes to you and the kid can’t hide -- has, I don't know, an IQ test of -- we use, let's say -- now we're doing an RtI, that's right. The kid can't read. And he's quite bright and he does everything else, but he's just having a tremendous problem reading. He's got reversal of letters and all. And it's just so severe that it's just it's like the asthma case, where the person could hardly breathe at all without a nebulizer.

And you say, no, no, we've got to go through tier one and that's 60 days and tier two, another 30 day, tier three. And the parent has requested an evaluation. Say, nope, we're not doing it unless you go all the way through RtI. You're going to have a Child Find case and you're going to lose it. You had reason to suspect at the outset and the parent gave you consent. You had 60 days and you didn't do anything. But I find that most districts are smart enough to say, for those severe cases, we'll skip the hurdle. But otherwise, if the parent hasn't requested it and we -- or even if they had requested it, we have no reason to suspect, we are going to go through the whole RtI process. And you're going to win the case because the only time you have to do evaluation is when you have reason to suspect, with or without a request for referral. And there's been none so far.

The cases so far on Child Find give you guidance. I could write you a whole article. If you go to the -- because we're running out of time. If you go to, on your last slide, one of the various sources you may want to look at is the RtI Action Network. And I've written this particular document that I'm talking about with the answers is there along with three others that I've written that cover the cases, the statute, the regulations. So if you're really into it, just go there.

And what you'll find in general is the few cases that have been a little bit RtI, like there's a case in Downingtown, Daniel P, federal court case out of Pennsylvania. People say that's an RtI case. It's classified as RtI in the Special Ed Connection. When you read the case, they use severe discrepancy. They won on severe discrepancy. The parents' expert said, if you'd done RtI, you would have had a different result. The court said, listen, expert, you know, you don't know what you're talking about because they don't have to do RtI. Plus, your judgment is suspect anyway. It's just pure dicted. It doesn't give you any guidance whatsoever.

So I would not look to court cases at this point for guidance. I'd like in the mirror and at my colleagues. Are we going to do this? If we're going to do it, let's do it right. Let's get special ed and general ed to work it out together. Let's use it beyond SLD identification, but let's not officially use it for SLD identification until we've got it all set and legally defensible. Otherwise, we're just giving Zirkel his cases.

And finally, and most strangely of all, coming back full circle to where we were. When I did an exhaustive search to see if there were any legal developments on RtI where parents won, I found three cases where parents nail districts, Child Find RtI. And oddly enough, they were not court decisions. They are not hearing officer decisions. They were OCR complaint investigations under 504, where OCR said, you had reason to suspect. And these would be like Florida, where Florida mandates RtI. And you made the kid go through all the stages when you had reason to suspect at the beginning and you didn't provide procedural safeguards, thus you violated 504. So although it is in this law because 504 overlaps with IDEA, so far at least, parents have done better with the procedural orientation of OCR through 504. Have I succeeded in completely confusing you? If so, I've accomplished my purpose.

SPEAKER: Well, first please join me in thanking Dr. Zirkel.