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The Death of Section 504

Ruth Colker
Ohio State University College of Law

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Ruth Colker*

I. INTRODUCTION

The passage of the Americans with Disabilities Act¹ (ADA) was a significant and positive development for the law of disability discrimination. The ADA strengthened the rights that already existed under Section 504 of the Rehabilitation Act of 1973² by extending those rights to the private sector.³ Because Section 504 and the Individuals with Disabilities Education Act⁴ (IDEA) already provided protection for students with disabilities,⁵ the ADA's primary impact has been on the law of employment and accessibility.⁶

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* Heck-Faust Memorial Chair in Constitutional Law, The Ohio State University College of Law. A.B. 1978, Harvard University (Radcliffe College); J.D. 1981, Harvard Law School. I would like to thank my team of research assistants who coded the Section 504 outcomes: James Boland, Michelle Evans, and Paul Wilkins. Catherine Cetrangolo assisted me with my analysis of Supreme Court cases decided under Section 504. I would also like to thank the *University of Michigan Journal of Law Reform* for providing me with an opportunity to present this work at its ADA symposium and the USX Foundation for its generous support of my empirical research. Finally, I would like to thank Nancy Darling who assisted in the preparation of the charts and tables.

1. 42 U.S.C. §§ 12101–12213 (1994).

2. 29 U.S.C. § 794 (1994).

3. See, e.g., Ronald D. Wenkart, *The Americans with Disabilities Act and Its Impact on Public Education*, 82 EDUC. LAW. REP. 291, 291 (1993) (“It is expected that the Act will have its greatest impact in the private sector, since the provisions of the ADA are patterned after the provisions of section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against the handicapped by agencies receiving federal financial assistance.”).

4. 20 U.S.C. §§ 1400–1485 (1994 & Supp. IV 1998) (formerly known as the Education of All Handicapped Children Act).

5. The IDEA requires states, which accept federal funding for their educational programs (as virtually all do), to ensure that all children with disabilities receive a “free appropriate public education” in the least restrictive environment possible. 20 U.S.C. § 1412. The IDEA targets all children with disabilities who require special education services, and are therefore classified as educationally disabled. 20 U.S.C. § 1400. A child may have a disability within the meaning of Section 504 yet not be covered by the IDEA because the child is not in need of special education services. For example, a child who uses a wheelchair may have no difficulties in learning associated with her disability but cannot gain access to the building without improvements in accessibility. The accessibility requirements would be governed by Section 504 rather than the ADA.

6. In a previously constructed data base, the author found that seventy-six percent of all ADA appellate cases were based upon claims of employment discrimination. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 n.7 (1999) [hereinafter Colker, *Windfall*]. Although the author has not been able to document much litigation under ADA Title III (which involves accessibility matters),

In theory, the ADA should have had little impact on institutions already covered by Section 504 other than to increase publicity about the existence of the rights of individuals with disabilities. Section 504 was the model for drafting the ADA;⁷ the similarities are particularly striking with regard to coverage of the public sector.⁸ The Section 504 regulations often became the text of the ADA, itself. Codifying these pre-existing rights might have had the effect of improving voluntary compliance with these rights. The nature of the rights, themselves, however, should have been largely unchanged. In fact, Congress expressly dictated that the pre-existing rights under Section 504 should be the “floor” in determining the meaning of the ADA.⁹

This Article argues that the passage of the ADA had an unexpected consequence, namely the narrowing of the rights that were understood to exist under Section 504.¹⁰ Section 504 covered two broad areas of the law: the law of employment for individuals employed by entities receiving federal financial assistance and the law of education for students attending primary, secondary or higher education. The effect on the law of employment, which I will discuss in Part II, has been immediate and dramatic. The effect on the law of education, discussed in Part III, cannot yet be fully documented. Recent decisions, however, suggest that those rights

it is clear that many private and public institutions have been modified to increase their accessibility. For a discussion of ADA Title III, see generally Ruth Colker, *ADA Title III: A Fragile Compromise*, 21 BERKELEY J. EMP. & LAB. L. 377 (2000).

7. See Colker, *Windfall*, *supra* note 6, at 134–35.

8. Whereas the ADA states, “[s]ubject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,” 42 U.S.C. § 12132, the Rehabilitation Act states, “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” 29 U.S.C. § 794(a) (1994). The only important difference in language is that Section 504 has the “solely” requirement which is absent from the ADA. Omission of the word “solely” should make the ADA broader than Section 504 with respect to determinations that discrimination has taken place.

9. See 42 U.S.C. § 12201(a) (“Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.”).

10. This Article will not discuss the effect that the Eleventh Amendment decisions may have on the ADA and Section 504. One could argue, however, that passage of the ADA heightened people’s sensitivities to the regulation of state and local government causing courts for the first time to question the constitutionality of Section 504 under the spending power. See, e.g., *Jim C. v. Ark. Dep’t of Educ.*, 197 F.3d 958 (8th Cir. 1999) (granting rehearing en banc on spending clause issue in Section 504 case); *Amos v. Md. Dep’t of Pub. Safety & Corr. Servs.*, 178 F.3d 212 (4th Cir. 1999), *reh’g en banc granted, judgment vacated* (Dec. 28, 1999).

may also soon be limited. Thus, this Article argues that passage of the ADA resulted in the demise, if not the death, of Section 504.

Section 504 litigation could take on even further importance if the United States Supreme Court were to conclude that principles of sovereign immunity precluded private damages actions under ADA Title II.¹¹ It would indeed be ironic if the passage of the ADA resulted in the dilution of the pre-existing rights under Section 504 while the ADA is also found not to provide a private damages remedy for individuals against state government.

II. THE LAW OF EMPLOYMENT

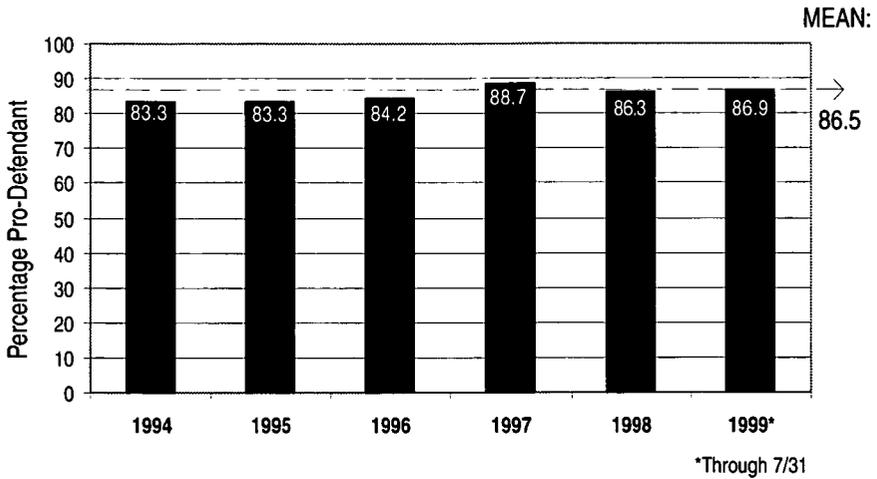
In two previous articles, I reported appellate outcome statistics for ADA employment discrimination cases.¹² Table I reports ADA data from January 1994 through July 30, 1999:¹³

11. In *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Supreme Court held that Congress did not properly abrogate the states' sovereign immunity under ADA Title I for employment discrimination cases brought against the state, but did not resolve whether that principle applied generally to ADA Title II for nonemployment cases involving discrimination in the provision of programs and services at the state level. The Supreme Court will ultimately resolve that issue; at this time, it has not granted certiorari in a case addressing that issue. A further complication, however, is that Section 504 may become a less viable source of a private right of action. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (implying that private right of action does not exist to enforce Section 504 regulations that go beyond the "authoritative interpretation of the statute"); see also *Garrett v. Univ. of Ala.*, 261 F.3d 1242 (11th Cir. 2001), *reh'g granted*, 276 F.3d 1227 (11th Cir. 2001) (holding that suit in federal court by state employees to recover money damages by reason of the state's failure to comply with the ADA or Section 504 are barred by the Eleventh Amendment).

12. See Colker, *Windfall*, *supra* note 6; Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) [hereinafter Colker, *Winning and Losing*]. This data reflects appellate cases decided during the applicable time period which are available on Westlaw. It does *not* reflect trial court decisions and does not reflect appellate court decisions which are not made available to the public. This data reflects selection bias problems which were discussed in other articles. See, e.g., Colker, *Winning and Losing*, *supra*, at 244–47.

13. The ADA became effective two years after passage; the first appellate cases were decided in 1994. The database only reflects decisions through July 30, 1999.

TABLE 1: ADA EMPLOYMENT CASES



YEAR	# OF PRO-DEFENDANT APPELLATE CASES/ TOTAL # OF APPELLATE CASES	PERCENTAGE
1994	5 out of 6	83.3
1995	35 out of 42	83.3
1996	96 out of 114	84.2
1997	158 out of 178	88.7
1998	189 out of 219	86.3
1999	140 out of 161	86.9
Mean	623 out of 720	86.5

Table 1 reflects a strong pro-defendant trend in appellate outcomes in employment cases that are available on Westlaw. Since the appellate courts began to hear employment discrimination cases under the ADA, defendants have had successful outcomes in 86.5% of the cases.¹⁴ This figure, however, does not mean that de-

14. A successful outcome for a defendant is defined as the affirmance of a pro-defendant outcome at trial or the reversal of a pro-plaintiff outcome at trial. The affirmance of a pro-defendant outcome at trial results in a clear victory for the defendant unless the case is appealed to the Supreme Court. It is, of course, possible that a reversal of a pro-plaintiff trial court outcome on appeal will ultimately result in the plaintiff winning (again) on remand. Nonetheless, the overwhelming majority of pro-defendant appellate outcomes involve affirmances of pro-defendant trial court outcomes. For example, of the 623 cases defined as a pro-defendant appellate outcome, 594, or 95.3%, were affirmances of pro-defendant trial court outcomes (data available from author). If anything, this definition of pro-defendant outcome understates defendant's success rate because the definition of pro-plaintiff outcome included affirmances of pro-plaintiff trial court outcomes as well as reversals of pro-defendant trial court outcomes. Of the ninety-seven pro-plaintiff appellate outcomes, only sixteen, or sixteen percent, of those cases were affirmances of pro-plaintiff

fendants are winning 86.5% of all ADA employment discrimination cases. It merely means that defendants have prevailed in 86.5% of ADA appellate, employment discrimination cases that are available on Westlaw for the time period under investigation. Because these statistics are overwhelmingly pro-defendant, they suggest that plaintiffs' lawyers are over-predicting their chance of success on appeal. They are acting seemingly irrationally in expending financial resources to appeal cases which, in hindsight, faced little chance of success.

Why would plaintiff lawyers make such large miscalculations in deciding which cases to appeal?¹⁵ One way to understand this problem is to say that plaintiff lawyers have acted irrationally—that they have made decisions to appeal cases out of a false sense of potential success. Because most lawyers take ADA cases on a contingency fee basis, it makes little sense for a lawyer to pursue meritless litigation on appeal. One would expect that economic forces would cause plaintiffs' lawyers to make conservative judgments on appeal, so that the plaintiff success rate would come close to the fifty percent figure which is postulated by the proponents of the "judicial expectations" model for litigation outcomes.¹⁶

One factor causing plaintiff lawyers to overpredict their chance of success on appeal may be their relatively successful experience under another, similar statute.¹⁷ Their success rate on appeal in employment discrimination cases¹⁸ brought under Section 504¹⁹ was approximately thirty-five percent on the eve of the effective date of ADA Title I. Yet, when plaintiffs' lawyers applied their experience from Section 504 to ADA litigation, they experienced a much lower success rate. In other words, the judicial response to their ADA cases was worse than they would have expected given their Section 504 experience. Thus, higher success rates under Section 504 may have caused plaintiffs' lawyers to overpredict their

trial court outcomes. The remaining cases were reversals of pro-defendant trial court outcomes. It is quite possible that the plaintiff will ultimately lose on remand in the 81 cases in which the appellate court reversed a dismissal or summary judgment decision at the trial court level.

15. See Colker, *Windfall*, *supra* note 6, at 109–10.

16. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (discussing litigation selection process).

17. See Colker, *Winning and Losing*, *supra* note 12, at 264.

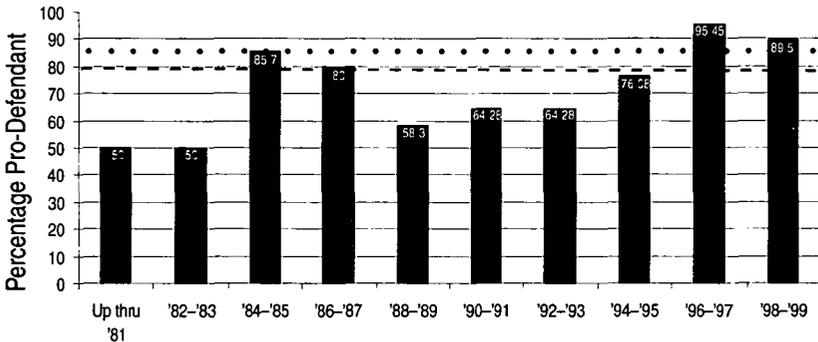
18. Section 504 cases can be brought against any entity receiving federal financial assistance. They are not limited to issues of employment discrimination. In fact, it appears that most Section 504 cases brought before 1994 involved issues of educational discrimination.

19. The database also includes Section 501 and 503 employment discrimination cases although the overwhelming majority of the cases are brought under Section 504.

success rate in ADA litigation in the early years of the interpretation of that statute.²⁰

This Article explores how the passage of the ADA may have affected judicial outcomes under Section 504. As Table 2 illustrates, the ADA failure rate seeped into Section 504 litigation beginning in 1994.

TABLE 2
§ 504 EMPLOYMENT CASES



• • • • • ADA Employment: 86.5%
 - - - - - § 504 Employment: 79.5%

DATE	PRO-DEFENDANT OUTCOMES/ ALL OUTCOMES	PERCENTAGE OF PRO-DEFENDANT OUTCOMES
Before 1982	2 out of 4	50
1982-1983	4 out of 8	50
1984-1985	6 out of 7	85.7
1986-1987	8 out of 10	80
1988-1989	7 out of 12	58.3
1990-1991	18 out of 28	64.3
1992-1993	18 out of 28	64.3
1994-1995	35 out of 46	76.1

20. Many other explanations are also possible to explain this pattern over time. The defense bar may have become increasingly sophisticated in handling disability discrimination claims (thereby mounting a stronger defense on appeal), the judiciary may have grown increasingly conservative or hostile to ADA claims, plaintiffs may have been overly emboldened by the passage of the ADA and pursued frivolous claims, and pro se plaintiffs may not be responding to the economic forces that affect private litigation. This Article's focus on one explanation is not intended to discount these other explanations. Their cumulative effect may explain the results that have been discovered.

DATE	PRO-DEFENDANT OUTCOMES/ ALL OUTCOMES	PERCENTAGE OF PRO-DEFENDANT OUTCOMES
1996–1997	42 out of 44	95.5
1998–1999	77 out of 86	89.5
§ 504 Employment Mean (All)	217 out of 273	79.5
ADA Employment Mean (All)	623 out of 720	86.5

Although the overall figure is a seventy-nine percent pro-defendant outcome, the statistics change significantly before and after 1994 as illustrated in Table 3 below.

TABLE 3
§ 504 EMPLOYMENT CASES: 1994 SPLIT



CATEGORY OF CASE	PRO-DEFENDANT OUTCOME/ ALL OUTCOMES	PERCENTAGE OF PRO-DEFENDANT OUTCOMES
§ 504 Employment Before 1994	63 out of 97	64.94
§ 504 Employment 1994–1999	154 out of 176	87.5
ADA Employment 1994–7/31/1999	623 out of 720	86.5

After 1994, the Section 504 employment decisions have virtually had the same outcome as ADA employment decisions. The defendant success rate under Section 504 rose twenty-three percent after the appellate courts began deciding ADA employment discrimination cases. These results were statistically significant at the 0.001 level of statistical significance in a Pearson Chi-Square test.²¹ In other words, a significant factor in predicting appellate outcome under Section 504 is whether the appeal was decided before or after 1994.

These statistics also reveal that the volume of Section 504 appellate litigation increased substantially when the ADA was enacted. There are more Section 504 decisions decided by the appellate courts and made available on Westlaw from 1994 to 1998 than there were from 1988 to 1994.²² That increase is due, in part, to the publicity about disability discrimination matters preceding and following the passage of the ADA. Although the number of Section 504 cases increased beginning in 1990, the change in judicial outcome did not occur until 1994, when the courts were also first faced with ADA lawsuits.

There are four ways to explain the drop-off in the plaintiff success rate following 1994. First, the defense bar may have become more organized and thoughtful in its litigation strategy, now that it had a larger volume of cases to defend under Section 504 and the ADA. Second, while the appellate courts were initially relatively sympathetic to Section 504 claims when they typically involved issues of educational discrimination, they may have become less sympathetic as the volume increased and the type of claim increasingly involved employment matters. Third, new plaintiffs' lawyers may have done a poor job in litigating these cases.²³ Finally, the circuit courts may have adjusted Section 504 case law to comport with the pro-defendant interpretations of the statute by the Supreme Court.²⁴

21. The statistics were analyzed under SPSS version 9.0.

22. No Section 504 cases in the appellate courts were located on Westlaw prior to 1988 which involved issues of employment discrimination. Failure to locate such cases does not mean that such cases do not exist; it may simply mean that such cases were not made available to Westlaw or that Westlaw did not choose to include such cases in their data base prior to 1988.

23. See Jeffrey A. Van Datta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Why Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 517 (2000) ("Many ADA cases founder because counsel for plaintiffs have not prepared the minimum factual record necessary to provide the jury with a basis to conclude that the ADA protects their clients.")

24. Although there has been much publicity about the pro-defendant decisions rendered by the Supreme Court under the ADA, comparatively little attention has been

Regardless of why this pattern emerged, an important transition took place. While Section 504 cases may have stood a reasonable chance of success on appeal for plaintiffs until 1994, those chances of success on appeal diminished significantly after 1994. Passage of the ADA may have had a causal effect on that change. The ADA may have helped transform Section 504 from a relatively successful statute for plaintiffs to a relatively unsuccessful statute. This effect may have not been limited to employment discrimination claims; it may have occurred for all Section 504 claims, including claims of educational discrimination which have historically predominated Section 504 claims. The passage of the ADA therefore may have been the death knell to Section 504.

focused on the fact that the Supreme Court has also consistently interpreted Section 504 in a pro-defendant manner. Of the seventeen Section 504 cases heard by the Supreme Court between 1979 and 1996, only two of them resulted in a pro-plaintiff holding. *See* Sch. Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) (holding that contagious diseases can be covered under Section 504 as a disability); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624 (1984) (holding that an action for employment discrimination against an individual with a disability may be maintained even if the federal aid the defendant receives is not for employment purposes). Although four of the seventeen cases cannot be readily classified as pro-plaintiff or pro-defendant, eleven of the decisions rendered during this time period were clearly pro-defendant. *See* *Lane v. Pena*, 518 U.S. 187 (1996) (holding that Congress had not waived the federal government's sovereign immunity under Section 504 with respect to awards of monetary damages); *Traynor v. Turnage*, 485 U.S. 535 (1988) (permitting the Veteran's Administration to distinguish between veterans who are and are not alcoholics in rendering treatment decisions); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (holding that commercial airlines are not the recipients of federal funding due to airport operators or government control of the air traffic control system); *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610 (1986) (invalidating rules promulgated under Section 504 to protect infants with disabilities); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (finding that Congress failed to use the necessary unequivocal language necessary to abrogate the Eleventh Amendment so that plaintiff could not obtain requested relief); *Alexander v. Choate*, 469 U.S. 287 (1985) (finding that Tennessee did not violate Section 504 in its treatment of Medicaid patients); *Irving Indep. Sch. Dist. v. Texas*, 468 U.S. 883 (1984) (finding that Section 504 could not be used as a basis to attain attorney's fees in case involving discrimination in violation of the Education of the Handicapped Act); *Smith v. Robinson*, 468 U.S. 992 (1984) (same holding as *Tatro*); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (finding no Section 504 violation in treatment of patients at state hospital); *Cnty. Television of S. Cal. v. Gottfried*, 459 U.S. 498 (1982) (finding that Section 504 does not impose new enforcement obligations on the FCC to consider disability accessibility issues in license renewal applications); *S.E. Cmty. Coll. v. Davis*, 442 U.S. 397 (1979) (holding that nursing program could lawfully fail to admit plaintiff into its program due to her hearing impairment). Many of these decisions did not directly relate to issues of employment discrimination. Hence, they may not have had a major impact on lower courts rendering employment discrimination decisions under Section 504. Moreover, one of the pro-plaintiff cases, namely *Arline*, did have a significant impact on Section 504 employment discrimination cases. Hence, it is possible that this record had only a minimal impact on the lower courts until the appellate courts and the Supreme Court followed these decisions with strong, pro-defendant decisions under the ADA.

Ironically, this result is exactly the opposite of Congress' intent. Congress stated clearly in the ADA that the prior Section 504 rules of law were supposed to be the floor and not the ceiling for the rules of law under the ADA.²⁵ Instead, the ADA has pulled the rug out from under Section 504.

III. EDUCATION CASES

While the ADA is primarily known for its impact on the law of employment, Section 504 is best known for its impact on the law of education, particularly the law of higher education. Although the IDEA is the primary regulator of the law of primary education, Section 504 is the primary regulator of higher education law. Part II documented how the ADA has had a plausible effect on the law of employment under Section 504.²⁶ This section addresses the effect it has arguably had on the law of education.

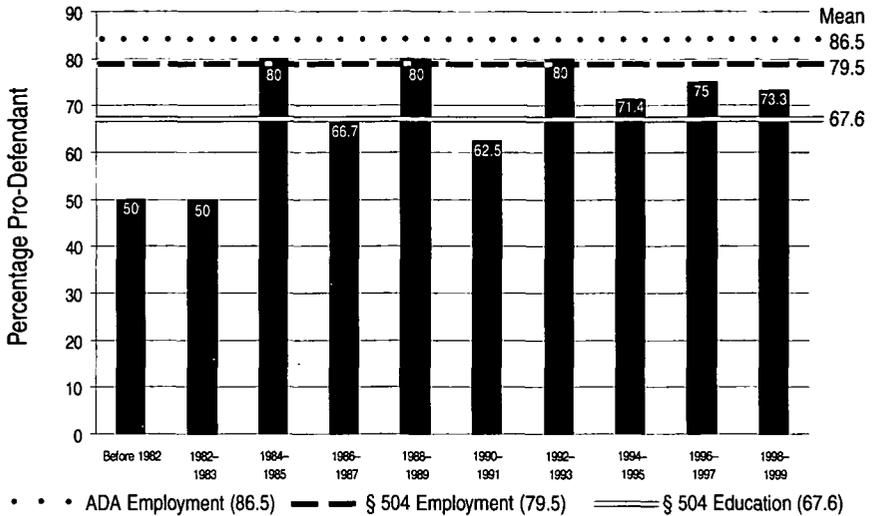
Education discrimination claims at the appellate level have been somewhat more successful than employment discrimination claims. The ADA's effect on these cases is not as clear as its effect on the employment cases. Nonetheless, the following data suggests that the ADA may soon have an adverse effect on Section 504 education cases.

The following two tables document the Section 504 education cases.

25. See 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this Chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 (20 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.").

26. See *supra* Tables 1–3.

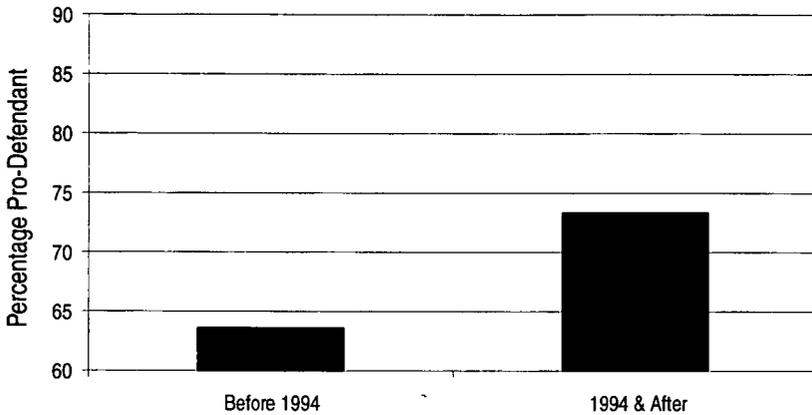
TABLE 4
§ 504 EDUCATION CASES



DATE	PRO-DEFENDANT OUTCOME/ ALL CASES	PERCENTAGE OF PRO-DEFENDANT OUTCOME
Before 1982	4 out of 8	50
1982-1983	5 out of 10	50
1984-1985	4 out of 5	80
1986-1987	2 out of 3	66.7
1988-1989	4 out of 5	80
1990-1991	5 out of 8	62.5
1992-1993	4 out of 5	80
1994-1995	5 out of 7	71.4
1996-1997	6 out of 8	75
1998-1999	11 out of 15	73.3
§ 504 Education Mean (All)	50 out of 74	67.6
§ 504 Employment Mean (All)	217 out of 273	79.5
ADA Employment Mean (All)	623 out of 720	86.5

Defendants' success rate in Section 504 education cases was somewhat lower than it was under Section 504 employment cases (sixty-eight percent in education area as compared with eighty percent in employment area). However, the figures after 1994 show a higher defendant success rate than the figures for the period before 1994. Table 5 reflects those statistics.

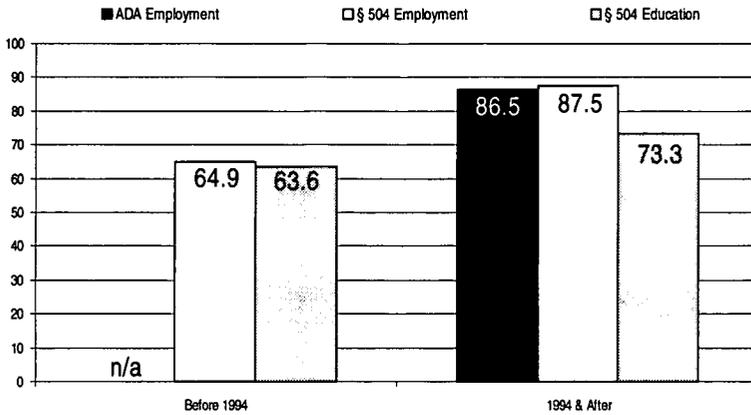
TABLE 5
 § 504 EDUCATION CASES: 1994 SPLIT



Unlike the employment cases, this difference based on time is not statistically significant. Nonetheless, a statistically significant difference might appear in the future if the existing trend continues over the next several years.

The final table compares all the statistics.

TABLE 6
COMPARISON OF ADA AND § 504 CASES



DATE	PRO-DEFENDANT OUTCOME/ ALL CASES	PERCENTAGE OF PRO-DEFENDANT OUTCOME
Before 1994 ADA	n/a	n/a
Before 1994 § 504 Employ.	63 out of 97	64.9
Before 1994 § 504 Educ.	28 out of 44	63.6
1994–7/31/1999 ADA Employ.	623 out of 720	86.5
1994–1999 § 504 Employ.	154 out of 176	87.5
1994–1999 § 504 Educ.	22 out of 30	73.3

Table 6 reflects that ADA and Section 504 employment cases are currently obtaining the same rate of pro-defendant appellate outcomes. This result is not surprising because most section 504 cases are filed under both ADA and Section 504. Hence, whether a defendant was public or private was not a significant factor in predicting ADA appellate outcomes.²⁷ Education cases have become less successful since the passage of the ADA, but those cases are still more successful than employment cases.

27. See Colker, *Winning and Losing*, *supra* note 12, at 270 (reporting that defendant's status as a public or private defendant was not a significant factor in a regression analysis of appellate judicial outcomes under the ADA).

Although Section 504 cases involving education issues are not significantly more pro-defendant since the passage of the ADA, such a trend may be on the horizon, because a significant number of those cases involved individuals with a particularly contentious disability, namely a learning disability.²⁸ Of the seventy-eight cases in the database, thirteen involved individuals with learning disabilities.²⁹ Of those thirteen cases, eight were decided before the ADA became effective. Of those eight cases, three were successful. In none of these thirteen cases did the court question whether the plaintiff was disabled. Of the remaining five cases, which were decided after the ADA became effective, one was successful. These are obviously small numbers but an examination of the case law suggests that cases involving learning disabilities have a much more limited chance of success today than they did in 1992.

In *Sutton v. United Air Lines, Inc.*,³⁰ the Supreme Court concluded that a court must consider corrective devices and mitigating measures when determining whether an individual is disabled under the ADA. In light of that holding, it vacated and remanded a Second Circuit case in which the court had concluded that an individual with a learning disability was disabled for the purposes of the ADA.³¹ Although the lower court in the Second Circuit determined on remand that plaintiff is disabled and entitled to relief, other courts have denied relief to such plaintiffs.³²

If individuals with learning disabilities are found not to be entitled to relief under the ADA, then a student with a learning disability who has attained accommodations under the IDEA (which does not contain this set of requirements) may stop receiving accommodations upon admission to college and graduate

28. The media has often ridiculed cases involving students with learning disabilities. See, e.g., Ruth Shalit, *Defining Disability Down*, *New Republic*, Aug. 25, 1997, at 16.

29. See *Weber v. Cranston Sch. Comm.*, 212 F.3d 41 (1st Cir. 2000) (pro-defendant); *Wong v. Regents of the Univ. of Cal.*, 192 F.3d 807 (9th Cir. 1999) (pro-plaintiff); *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999) (pro-defendant); *Ridgewood Bd. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999) (pro-plaintiff); *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041 (9th Cir. 1999) (pro-defendant); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524 (4th Cir. 1998) (pro-defendant); *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751 (3rd Cir. 1995) (pro-plaintiff); *Mallett v. Marquette Univ.*, 65 F.3d 170 (7th Cir. 1995) (pro-defendant); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995) (pro-defendant); *Pottgen v. Mo. State High Sch. Athletic Ass'n*, 40 F.3d 926 (8th Cir. 1994) (pro-defendant); *Wynne v. Tufts Univ. Sch. of Med.*, 976 F.2d 791 (1st Cir. 1992) (pro-defendant); *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983) (pro-defendant); *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1982) (pro-plaintiff).

30. 527 U.S. 471 (1999).

31. See *N.Y. State Bd. of Law Exam'rs v. Bartlett*, 527 U.S. 1031 (1999).

32. Compare *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93CIV.4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001) (granting relief) with *Biank v. Nat'l Bd. of Med. Exam'rs*, 130 F. Supp. 2d 986 (N.D. Ill. 2000) (denying relief).

school if his or her IDEA-sponsored education was reasonably successful. The successful intervention under the IDEA will disqualify the student under the ADA because corrective measures have helped alleviate some of the consequences of the underlying disability. The student, however, still has the underlying disability and needs continued assistance to succeed academically.

When the ADA was enacted, commentators predicted that it would be of particular benefit to students with learning disabilities who were pursuing higher education. One commentator argued:

Students may have more opportunity for successful academic accommodation claims as a result of recent cases and laws. However, perhaps the most important aspect of the Rehabilitation Act and the ADA related to academic accommodations is that both laws provide students with important tools—tools that will be useful to them in dialogue with their respective colleges and universities [S]tudents with disabilities should enter colleges and universities knowing that the law provides protection against discrimination. The law may not allow students to receive every accommodation they believe that they deserve, but it provides them with a place to begin the dialogue.³³

In fact, passage of the ADA may hinder discussion about accommodations, because the discussion will now focus on the whether the individual is even disabled.

CONCLUSION

One must wonder how the following conversation may have taken place on the eve of passage of the ADA:

Member of Congress: I am willing to vote for the passage of the ADA but I must warn you that passage of the ADA will

33. Claire E. McCusker, *The Americans with Disabilities Act: Its Potential for Expanding the Scope of Reasonable Academic Accommodations*, 21 J.C. & U.L. 619, 641 (1995).

significantly harm litigation outcomes under Section 504. The chances of a plaintiff prevailing on appeal will plummet by a factor of two.

Member of Disability Rights Community #1: No thank you. I'm not interested in a statute that will raise false hopes while eroding the rights we have worked so hard to obtain.

Member of Disability Rights Community #2: I refuse to proceed from such a pessimistic outlook. Maybe we will see such consequences in the early years following passage of the ADA. But with educational efforts on the importance of these rights, we can overcome those problems over time. In the long run, we will have a strong Section 504 and ADA.

Member of Congress: So what should I do? Should I wait for a better political and judicial climate or seize the opportunity at hand despite the short term consequences? Can we be certain those short term consequences will ever be reversed or, instead, will ADA's lasting legacy be the death, not just the wounding, of Section 504?

The positive news for the disability civil rights community is that the ADA has not yet killed the law of education under Section 504 although it has had an arguably negative impact on the law of employment under Section 504. There is reason to believe, however, that the narrowing of the law of higher education for students with learning disabilities may be around the corner. There may soon be a generation of students educated with the assistance of the IDEA who are left to sink or swim in post-secondary education.